STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FOUNDATION HEALTH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-5007
	)	
DEPARTMENT OF INSURANCE,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on January 17, 2001, via video teleconference, with the Petitioner and the Respondent appearing in Fort Lauderdale, Florida, before Patricia Hart Malono, the duly-designated Administrative Law Judge of the Division of Administrative Hearings, who was present in Tallahassee, Florida.

APPEARANCES

For Petitioner: Mark C. Burton, Esquire
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For Respondent: William Fred Whitson, Esquire
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STATEMENT OF THE ISSUE

Whether the Petitioner should be required to provide authorization and coverage for surgery and radiation treatment for J.C.M., a person covered under the Certificate of HMO Coverage ("HMO Certificate") between the Petitioner and the Broward County School Board.

PRELIMINARY STATEMENT

This case arose out of proceedings initiated pursuant to Section 408.7056, Florida Statutes (2000), which establishes the Statewide Provider and Subscriber Assistance Program to provide a procedure for resolving grievances between a subscriber and a managed care entity. A dispute arose between J.A.M., a subscriber, and the Foundation Health Plan ("Foundation Health"), a managed care entity, regarding authorization for the surgical removal and radiation treatment of keloids on the earlobes of J.C.M., an eligible dependent of J.A.M. under the HMO Certificate. Foundation Health denied the requested authorization, and this decision was appealed to the Statewide Provider and Subscriber Assistance Panel ("Panel"). In a document dated August 30, 2000, and entitled "Findings of Fact and Recommendation," the Panel recommended to the Department of Insurance ("Department") that Foundation Health be ordered to authorize the requested surgery and treatment. In a letter dated November 9, 2000, the Department notified Foundation

Health that it adopted the Panel's Findings of Fact and Recommendation, which would become the Department's final determination unless Foundation Health requested review of the decision.

In accordance with Section 408.7056(14), Florida Statutes (2000), Foundation Health timely requested a summary hearing with the Division of Administrative Hearings pursuant to Section 120.574, Florida Statutes (2000). The Department transmitted the matter to the Division of Administrative Hearings for assignment of an administrative law judge. The case was received by the Division of Administrative Hearings on December 13, 2000, and, in a telephone conference held on December 15, 2000, the parties agreed that the final hearing in this matter should be conducted on January 17, 2001.

At the hearing, Foundation Health presented the testimony of Andrew Halpern, M.D., and J.A.M., the father of J.C.M. The Department presented the testimony of J.C.M., Dennis Cookro, M.D., and J.A.M. Joint Exhibits 1 through 8 were offered and received into evidence.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on February 2, 2001, and the parties timely submitted proposed findings of fact and conclusions of law, which have been considered in the preparation of this Final Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. At all times material to this dispute, J.A.M. was insured under a group health maintenance organization contract between Foundation Health and the Broward County School Board for the benefit of its employees and their eligible dependents.

2. At all times material to this dispute, J.C.M., J.A.M.'s son, was a dependent eligible for coverage under the contract. J.C.M. is currently a 22-year-old college student.

3. When J.C.M. was approximately 13 years old, he suffered a cut on his arm, and a keloid developed that was surgically removed.

4. A keloid is a raised, irregular, and enlarging scar created by an excessive build-up of collagen. When the body suffers a wound such as a cut, a burn, or a surgical incision, the body heals the wound by building up tissue over the wound to close it. A keloid forms when the body does not stop the development of tissue, so that the tissue continues to accumulate and eventually forms large, unsightly scars or growths.

5. Some people are prone to develop keloids, although keloids do not always develop in these individuals as a result

of every cut or abrasion. It appears that J.C.M. is a person prone to develop keloids.

6. When he was 16 years old, J.C.M. elected to pierce his ears so that he could wear earrings, a practice that was, according to J.C.M., "in style." Ear piercing is not a medical procedure, although a physician can perform the procedure.

7. After his ears were pierced, J.C.M. wore earrings continually for a period of time. At some point, J.C.M. noticed that the back of both of his earlobes itched. As time passed, it became apparent that keloids were forming on the back of each earlobe at the point at which his ears were pierced.

8. When J.C.M. first noticed them, the keloids were the size of pimples, and they formed around the hole made by the incision piercing his earlobes. The keloids have grown slowly, and they are now quite large. They cause J.C.M. considerable discomfort: They turn a dark purplish color when exposed to the sun, they itch, and they become tender if J.C.M. rubs them or sleeps on his side.

9. The keloids on the posterior of his earlobes developed as a result of the incisions created when his earlobes were pierced.

10. Zoila Alen, M.D., J.C.M.'s primary physician, referred him to Nestor F. De La Cruz-Munoz, M.D., a surgeon, for evaluation of the keloids for surgical removal. Dr. De La Cruz,

in turn, referred J.C.M. to Jaime Zusman, M.D., for a preoperative evaluation of the need for radiation treatment to prevent new keloids from developing as a result of the surgical incisions to remove the existing keloids. The physicians concluded that J.C.M. required surgery and radiation treatment.

11. On March 3, 2000, Dr. Alen submitted a Primary Care Physician Referral Authorization and Consultation Form to Foundation Health requesting authorization to refer J.C.M. to Abelardo Arango, M.D., for surgery to remove the keloids on his earlobes and for radiation therapy.

12. In a letter dated March 15, 2000, Foundation Health notified J.A.M. that it was unable to authorize the requested referral. The basis for Foundation Health's decision was that the keloids were complications of a non-covered benefit and that the treatment to remove the keloids was, therefore, not covered.

13. J.A.M. requested a re-evaluation of the request in a letter dated March 21, 2000.

14. In a letter dated March 23, 2000, Foundation Health notified J.A.M. that it would adhere to its original decision and deny the requested authorization. Foundation Health reiterated as the basis for its decision the determination that the keloids were "complication[s] of a non-covered benefit (ear piercing)" and that the requested services were not covered by the HMO Certificate. Foundation Health enclosed with this

letter a copy of page 26 of the Member Handbook explaining J.A.M.'s coverage under the HMO Certificate, which provides in pertinent part:

> 35. Miscellaneous. The following services and supplies are excluded from coverage:
>
> * * *
>
> • Complications of non-covered services including the diagnosis and treatment of any condition which arises as a complication of a non-covered service (e.g. services or supplies to treat a complication of cosmetic surgery, etc.)

15. The HMO Certificate provides in pertinent part:

> SECTION IX
> EXCLUSIONS AND LIMITATIONS
>
> A. Exclusions. The following services and/or supplies are specifically excluded from Coverage and are not Covered Services under this Agreement:
>
> * * *
>
> 8. cosmetic, surgical or non-surgical procedures which are undertaken primarily to improve or otherwise modify the Member's external appearance except reconstructive surgery necessary to correct or repair a functional disorder as a result of a disease, injury or congenital defect or initial implanted prosthesis and reconstructive surgery incident to a mastectomy for cancer of the breast. Also excluded are surgical excision or reformation of any sagging skin of any part of the body, including, but not limited to the eyelids, face, neck, abdomen, arms, legs or buttocks; any services performed in connection with the enlargement, reduction, implantation or change in appearance of a

> portion of the body, including, but not limited to, the face, lips, jaw, chin, nose, ears, breast, or genitals; hair transplantation; chemical face peels or abrasion of the skin,; electrolysis depilation; removal of tattooing; or any other surgical or non-surgical procedures which are primarily for cosmetic purposes or to create body symmetry. Additionally, all medical complications as a result of cosmetic, surgical or non-surgical procedures are excluded;
>
> * * *
>
> 39. Complications or conditions resulting from a non-Covered Service.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Section 408.7056(14) and Section 120.574, Florida Statutes (2000).

17. The extent of coverage for medical services provided to employees of the Broward County School Board pursuant to the HMO Certificate is determined by reference to the terms of the HMO Certificate, which constitutes the insurance contract between the parties. The issue presented for resolution in this case is whether the proposed surgical removal of the keloids on J.C.M.'s earlobes and the radiation treatment to prevent their recurrence are services that are excluded from coverage under the HMO Certificate.

18. The rules relating to construction of insurance contracts in Florida were summarized by the court in Epstein v. Hartford Casualty Insurance Co., 566 So. 2d 331 (Fla. 1st DCA 1990), as follows:

> When material facts surrounding a controversy are not in dispute, it is uniquely within the province of the court to give a contract its proper construction. If a contract is ambiguously worded, it is the responsibility of the court to resolve the ambiguity as a matter of law. On the other hand, if the language of a contract is unambiguous and not subject to conflicting inferences, it is the court's responsibility to give the contract its clearly intended construction. Ellenwood v. Southern Life Ins. Co., 373 So. 2d 392 (Fla. 1st DCA 1979).
>
> The dispositive issue presented in this case is whether the policy exclusion is ambiguous to the extent that it is susceptible of two different meanings, with one allowing coverage and the other excluding coverage. In addressing a similar issue under an insurance policy, we recently said:
>
> > Where a term in an insurance contract is ambiguous, the courts will construe the policy language in favor of the insured and against the insurer. Triano v. State Farm Mutual Automobile Insurance Co., 565 So. 2d 748 (Fla. 3d DCA 1990); Herring v. First Southern Insurance Co., 522 So. 2d 1066 (Fla. 1st DCA 1988); Davis v. Nationwide Life Insurance Co., 450 So. 2d 549 (Fla. 5th DCA 1984); Rowland v. National States Insurance Co., 295 So. 2d 335 (Fla. 1st DCA 1974). Where the

> language is susceptible of two different interpretations, the interpretation sustaining coverage will be adopted.
>
> Herring at 1068. In keeping with this principle, terms of exclusion are to be narrowly construed. Triano; Hartford Accident and Indemnity Co., 294 So. 2d 363 (Fla. 1st DCA 1974). Where the provision is not ambiguous, however, there is no occasion for employing the rule of construction against the insurer, and the court simply applies the plain meaning of the provision. Home Indemnity Co. v. Alday, 213 So. 2d 13 (Fla. 1st DCA 1968); Quality Imports, Inc. v. St. Paul Fire & Marine Insurance Co., 566 So. 2d 293 (Fla. 1st DCA 1990).

See also Auto-Owners Insurance Co. v. Anderson, 756 So. 2d 29 (Fla. 2000); Weldon v. All American Life Insurance Co., 605 So. 2d 911 (Fla. 2d DCA 1992); and Blue Shield v. Woodlief, 359 So. 2d 883 (Fla. 1st DCA 1978).

HMO Certificate, Section IX, Paragraph 8.

19. Paragraph 8 of Section IX of the HMO Certificate provides that "cosmetic, surgical or non-surgical procedures which are undertaken primarily to improve or otherwise modify the Member's external appearance" are "excluded from Coverage and are not Covered Services under this Agreement" and that "all medical complications as a result of cosmetic, surgical or non-surgical procedures are excluded." Beyond the description in paragraph 8, "cosmetic" is not defined in the HMO Certificate. Therefore, a "cosmetic" procedure is one undertaken to improve

or modify a person's external appearance, the various procedures identified in paragraph 8 as specifically excluded from coverage are consistent with this definition in that they all describe the alteration of a portion of the body by surgical or non-surgical means in order to improve the appearance of the body.

20. These provisions of paragraph 8 in Section IX of the HMO Certificate appear to be susceptible of only one interpretation and, therefore, are not ambiguous. It is, therefore, necessary only to apply the terms of the HMO Certificate to the facts in this case to determine if the requested service is covered or excluded from coverage.

21. Certainly, ear piercing is a procedure whose ultimate purpose is cosmetic; the procedure creates an incision in the earlobes through which an earring can be placed, and the earring is intended to enhance appearance through the adornment of the body. However, the procedure of making an incision in the earlobe is not, of itself, intended to improve or modify the appearance of the body, and ear piercing is not, therefore, a "cosmetic" procedure as that term is used in paragraph 8 of the HMO Certificate. It follows, then, that the development of keloids as a result of ear piercing is not a "medical complication" of a cosmetic procedure, and coverage for the surgical removal of the keloids and for radiation treatment is

not excluded by the terms of paragraph 8 of the HMO Certificate. HMO Certificate, Section IX, Paragraph 39.

22. Paragraph 39 of Section IX of the HMO Certificate provides that "[c]omplications or conditions resulting from a non-Covered Service" are "excluded from Coverage and are not Covered Services under this Agreement." There is no definition in the HMO Certificate of "non-Covered Service," and the term is subject to two different interpretations. 1/ On the one hand, the term "non-Covered Service" could refer to a service that is not covered under the HMO Certificate because it is "specifically excluded from Coverage" in Section IX. Under this interpretation, ear piercing would not, for the reasons discussed above, be excluded from coverage under paragraph 8 as a "cosmetic" procedure, nor does there appear to be any other specific exclusion for ear piercing in Section IX of the HMO Certificate. Accordingly, under this interpretation, authorization and coverage for treatment of J.C.M.'s keloids could not be denied pursuant to paragraph 39 of Section IX as a complication or condition arising from a service that is "non-Covered" because it is not specifically excluded from coverage under the HMO Certificate.

23. On the other hand, the term "non-Covered Service" could be interpreted to mean a service that is not listed as a

"Covered Service" under the HMO Certificate. "Covered Services" are listed in Section VIII of the HMO Certificate, and they are generally described as services that are "medically necessary" or that are "preventative health services . . . essential to the health of a Member," and it is clear that the services and supplies that are covered by the HMO Certificate are medical and health-related services. Ear piercing is not identified in the HMO Certificate as a "Covered Service," most likely because it is not a medical or health-related service. Accordingly, under this second interpretation of "non-Covered Service," the removal and treatment of J.C.M.'s keloids could be denied because the keloids would be a condition arising from ear piercing, a procedure that is not identified as a "Covered Service." 2/

24. Because the exclusion set forth in paragraph 39 of Section IX is subject to two interpretations, it is ambiguous, and the rules of construction of an insurance contract recited above must be applied to determine if the surgical removal and radiation treatment of J.C.M.'s keloids are excluded from coverage under the HMO Certificate. In Deni Associates of Florida, Inc. v. State Farm Fire & Casualty Insurance Company, 711 So. 2d 1135 (Fla. 1998), the Florida Supreme Court stated:

> In State Farm Mutual Automobile Insurance Co. v. Pridgen, 498 So. 2d 1245 (Fla. 1986), this Court announced the rule to be followed in the interpretation of exclusionary clauses in insurance policies:

> [E]xclusionary provisions which are ambiguous or otherwise susceptible to more than one meaning must be construed in favor of the insured, since it is the insurer who usually drafts the policy. See Excelsior Insurance Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 942 (Fla. 1979).

25. In accordance with this rule, it is concluded that the exclusion from coverage set forth in paragraph 39 of Section IX does not apply to exclude coverage for the surgical removal and radiation treatment of J.C.M.'s keloids.

26. Because the requested treatment for J.C.M.'s keloids is not excluded by either paragraph 8 or paragraph 39 of Section IX of the HMO Certificate covering the employees of the Broward County School Board and their eligible dependents, Foundation Health must authorize and provide coverage for this treatment.

27. Section 408.7056(14), Florida Statutes (2000), concludes with the following provision: "If the managed care entity does not prevail at the hearing, the managed care entity must pay reasonable costs and attorney's fees of the agency or the department incurred in that proceeding." Inasmuch as Foundation Health has not prevailed, it must pay such costs and fees.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED:

1. The Foundation Health Plan shall immediately provide authorization for and coverage of the services requested by Zoila Alen, M.D., for the surgical removal and radiation treatment of the keloids on the posterior of J.C.M.'s earlobes;

2. No later than 30 days from the date of this order, the Foundation Health Plan shall promptly pay the reasonable costs and attorney's fees incurred by the Department of Insurance in this proceeding. If the parties are unable to agree on the amount of such costs and fees, no later than 30 days from the date of this order, the Department of Insurance shall file an affidavit itemizing all costs and fees to which it claims entitlement. Ten days after service of such an affidavit, the Foundation Health Plan shall file a written statement identifying with particularity each item in the affidavit of the Department of Insurance to which it has any objection and stating the basis for each objection. If necessary, a further hearing will be convened for the purpose of hearing argument or evidence on any disputed issues regarding the amount of the costs and attorney's fees.

DONE AND ORDERED this 28th day of February, 2001, in Tallahassee, Leon County, Florida.

PATRICIA HART MALONO
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 2001.

ENDNOTES

[1]/ In determining that there are two possible interpretations of paragraph 39 of Section IX, it is noted that it would be inappropriate to put a strained or unnatural construction on a policy to create an uncertainty or ambiguity. See Federated Mutual Insurance Co. v. Germany, 712 So. 2d 1245, 1248 (Fla. 5th DCA 1998).

[1]/ It should also be kept in mind that, in interpreting the meaning of "non-Covered Service," it is necessary to construe the meaning of the term in light of all of the terms and conditions in the HMO Certificate. Section 627.419(1), Florida Statutes (2000); Ellenwood v. Southern United Life Insurance Co., 373 So. 2d 392, 395 (Fla. 1st DCA 1979). Were this approach to be taken under the facts herein, it could be said that the scope of the HMO Certificate is limited to medical and health-related services and that the parties intended the HMO Certificate to deal only with medical and health-related service, regardless of whether they are identified as "Covered Services" or "non-Covered Services." Under such an alternative interpretation, ear piercing would not be a "non-Covered Service" because it is not a medical procedure.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The notice of appeal must be filed within thirty (30) days of rendition of the order to be reviewed.