STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE BISCAYNE INSTITUTE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 03-1837
	)	03-1838
AGENCY FOR HEALTH CARE ADMINISTRATION,	)	03-3890
	)	
Respondent,	)	
	)	
and	)	
	)	
CITY OF HOLLYWOOD and FLORIDA LEAGUE OF CITIES,	)	
	)	
Intervenors.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on March 15 through 18, 2004, at Miami, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Steven E. Stark, Esquire
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For Respondent: Donna Riselli, Esquire
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For Intervenors: Mark S. Spangler, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner is entitled under Florida's workers' compensation laws to payment for professional services to an injured worker for the billings identified by the three notices of disallowance at issue in this consolidated proceeding.

PRELIMINARY STATEMENT

J.B. (the claimant) suffered a traumatic brain injury on February 17, 1995, while in the course of his employment as a traffic meter enforcement officer with the City of Hollywood, Florida. The claimant, who is not a party to this proceeding, is entitled to and receiving benefits pursuant to the Florida workers' compensation laws.

Petitioner, a rehabilitation facility, first provided services to the claimant on August 1, 1996. Despite having received the notices of disallowance at issue in this proceeding, Petitioner continued to provide services to the claimant as of the date of the final hearing (and presumably the date of this Recommended Order).

The Division of Workers' Compensation was formerly housed within the now defunct Department of Labor and Employment

Security. The Division of Workers' Compensation is now housed within the Agency for Health Care Administration.

The Intervenors are the employer and the workers' compensation carrier for the employer. For ease of reference, the City of Hollywood and the Florida League of Cities will be referred to as Intervenors when reference is to both. When reference is to one, the City of Hollywood will be referred to as the employer and the Florida League of Cities will be referred to as the carrier.

In October 2000 counsel for the carrier mailed to Petitioner a Notice of Disallowance which reflected that the carrier had conducted a utilization review of the rehabilitation services provided the claimant and had concluded that certain specified services rendered by Petitioner constituted overutilization and/or misutilization since the treatment was excessive and not medically necessary. The carrier advised Petitioner that it had disallowed payment for the identified services. Thereafter, a series of nearly identical Notices of Disallowance were separately mailed by the carrier to Petitioner covering subsequent time periods. For each Notice of Disallowance, Petitioner contested the disallowance and timely petitioned the Division of Workers' Compensation to resolve the dispute pursuant to Section 440.13(7), Florida Statutes (2000).

By letter dated December 3, 2002, Merle Barnett, on behalf of Respondent, notified Petitioner that it had determined that the medical services at issue between the dates September 25, 2000, and July 5, 2002, were not appropriate for the claimant and that the carrier's disallowance of those billings was sustained. Petitioner thereafter challenged Respondent's determination that the subject payments should be disallowed and the matter was referred to the Division of Administrative Hearings, where it was assigned DOAH Case No. 03-1837.

By letter dated January 28, 2003, Ms. Barnett, on behalf of Respondent, notified Petitioner that it had determined that the medical services at issue between the dates July 8, 2002, through December 5, 2002, were not appropriate for the claimant and that the carrier's disallowance of those billings was sustained. Petitioner thereafter challenged Respondent's determination that the subject payments should be disallowed and the matter was referred to the Division of Administrative Hearings, where it was assigned DOAH Case No. 03-1838.

By letter dated August 15, 2003, Ms. Barnett, on behalf of Respondent, notified Petitioner that it had determined that the medical services at issue between the dates December 9, 2002, and June 27, 2003, were not appropriate for the claimant and that the carrier's disallowance of those billings was sustained. Petitioner thereafter challenged Respondent's determination that

the subject payments should be disallowed and the matter was referred to the Division of Administrative Hearings, where it was assigned DOAH Case No. 03-3890.

At the final hearing, Petitioner presented the testimony of Marie A. DiCowden, Ph.D. (a psychologist and director of the Biscayne Institute); Paul Wand, M.D. (a treating neurologist); William Benda, M.D. (a physician with a special interest in both conventional and alternative theories to rehabilitation); Donald Joseph Lollar, Ph.D. (a psychologist employed by the Center for Disease Control); Raymond Seltser, M.D. (a retired professor who has a special interest in disability determinations); Richard Kishner, M.D. (a neurologist); and Antonio Puente, Ph.D. (a psychology professor). Petitioner offered 37 exhibits, 36 of which were admitted into evidence. (Only a portion of Petitioner's Exhibit 37 was admitted into evidence.) Among Petitioner's exhibits were the depositions of Daniel A. Picard, M.D. (the medical director of the rehabilitation department of Whitehall Nursing Home); Lauren L. Lerner, M.D.[1] (a physiatrist); Venerando Batas, M.D. (a physiatrist); Merle Barnett (a registered nurse specialist employed by Respondent); and Debra Bartlett (a claims adjuster employed by the carrier).

Intervenors presented the testimony of Kenneth Fischer, M.D. (a neurologist); Karen Williams, M.D. (a physiatrist); Charles J. Golden, Ph.D. (a neuropsychologist); Mollie Frawley,

R.N. (a former employee of Respondent); Allen Raphael, Ph.D. (a specialist in assessment psychology); and Victor Robert, M.D. (a neurologist). Intervenors offered 24 exhibits, 22 of which were admitted into evidence.[2] Among Intervenors' exhibits were the depositions of Gerard Garcia, Psy.D. (a neuropsychologist); Fernando G. Miranda, M.D. (a neurologist); David P. McCraney, M.D. (a neurologist); Jorge Villalba, M.D.(a psychiatrist); Richard S. Bailyn, M.D.[3] (a neurologist); Thomas G. Hoffman, M.D. (a neurologist); and Kevin Lapinski, Ph.D. (a neuropsychologist).

Respondent did not present any additional witnesses or exhibits.

A Transcript of the proceedings, consisting of seven volumes, was filed on April 20, 2004. Each party filed a Proposed Recommended Order, which has been duly-considered by the undersigned in the preparation of this Recommended Order.

Unless otherwise noted, all statutory references are to the Florida Statutes (2004).

FINDINGS OF FACT

1. The claimant, a male, was born July 21, 1961. On February 17, 1995, the claimant sustained a severe traumatic brain injury (TBI) and other injuries during the course of his employment with the City of Hollywood, Florida. At all times

relevant to these proceedings, the claimant has been receiving benefits pursuant to the Florida workers' compensation laws.

2. At all times relevant to this proceeding, the carrier has been the workers' compensation carrier for the employer.

3. At all times relevant to this proceeding, the claimant has lived in a home purchased for him by the carrier. The claimant has a life estate in the home and the carrier has the remainder interest. The claimant lives in the home with his mother and has 24-hour attendant services paid for by the carrier. The carrier has purchased a van for the claimant, which his attendant uses to transport the claimant to therapy and other appointments.

4. The claimant has a history of mental illness dating to his teenage years, when he was diagnosed with schizophrenia. As a result of his injury and his illness, the claimant acts out periodically and becomes physically resistive to those trying to care for him.

5. At all times relevant to this proceeding, Petitioner has been a provider of rehabilitation services to various patients, including those with TBI. Dr. Marie DiCowden, a psychologist, is the founder and director of Petitioner. Dr. DiCowden described Petitioner as being a health care community that provides an integrated administration for a long continuum of care post acute rehabilitation through community

reintegration using health promotion, prevention, and integrated primary care. Petitioner is accredited by two national accrediting organizations referred to by the acronyms CARF (Commission on Accreditation of Rehabilitation Facilities) and CORF (Commission on Outpatient Rehabilitation Facilities). Petitioner is also certified by the Florida Division of Vocational Rehabilitation (formerly housed in the Department of Labor and now housed in the Department of Education), the Florida Division of Workers' Compensation, and by the Florida Brain and Spinal Cord Injury Program.[4]

6. As a result of his accident, the claimant was in a coma for several weeks. He was hospitalized (first in an acute care facility and subsequently in two different rehabilitation hospitals) until December 28, 1995, when he was placed in Whitehall Nursing Home. Whitehall was not an appropriate placement for the claimant because of his behavior and his need for rehabilitation services.

7. On March 27, 1996, Yvonne Beckman, a rehabilitation nurse consultant employed by the carrier, referred the claimant to Petitioner for an evaluation. Shortly before that referral, the claimant had been evaluated by two neuropsychologists (Dr. Jorge A. Herra and Dr. Lee. H. Bukstel), who had opined that the claimant would benefit from rehabilitation services.

8. Ms. Beckman asked Dr. DiCowden to recommend a neurologist who practiced in South Florida. In response, Dr. DiCowden gave Ms. Beckman the names of three neurologists, one of whom was Dr. Paul Wand. Ms. Beckman authorized Dr. Wand to provide services to the claimant. Dr. Wand prescribed continued rehabilitation services for the claimant at Petitioner's facility. The services at issue in this proceeding were provided by Petitioner pursuant to prescriptions from Dr. Wand.[5]

9. Prior to accepting the claimant, Dr. DiCowden informed a representative of the carrier that Petitioner would accept the claimant as a patient in its brain injury program and estimated the annual costs to be $200,000.00. The claimant began receiving rehabilitation services from Petitioner five days a week beginning August 1, 1996. The claimant received from Petitioner's staff physical therapy, occupational therapy, cognitive retraining, speech training, language training, psychological services, art therapy, music therapy, and yoga therapy. The claimant continued to receive those rehabilitation services from Petitioner (five days a week) from August 1996 to the date of the hearing (and presumably to date). The authorization for the provision of rehabilitation services to the claimant was periodically reviewed by the carrier.

10. In November 1998, the carrier had the claimant examined by Dr. Richard Bailyn (a neurologist) and by Dr. Kevin Lapinski (a neuropsychologist). Those doctors opined that the claimant was not benefiting from cognitive retraining, occupational therapy, speech therapy, or language therapy at Petitioner's facility. They further opined that the claimant required an activity program to satisfy his recreational and stimulation needs, but that such a program did not require Petitioner's facility since the claimant's aide could be trained to provide those services. Dr. Bailyn was of the opinion that as of November 1998 the various therapies provided by Petitioner's facility to the claimant were not reasonable and were not medically necessary.

11. Section 440.13(6), Florida Statutes, requires a carrier to review bills by providers of medical services as follows:

> (6) UTILIZATION REVIEW.--Carriers shall review all bills, invoices, and other claims for payment submitted by health care providers in order to identify overutilization and billing errors, including compliance with practice parameters and protocols of treatment established in accordance with this chapter, and may hire peer review consultants or conduct independent medical evaluations. Such consultants, including peer review organizations, are immune from liability in the execution of their functions under this subsection to the extent provided in s. 766.101. If a carrier finds that

> overutilization of medical services or a billing error has occurred, or there is a violation of the practice parameters and protocols of treatment established in accordance with this chapter, it must disallow or adjust payment for such services or error without order of a judge of compensation claims or the agency, if the carrier, in making its determination, has complied with this section and rules adopted by the agency.

12. As required by Section 440.13(6), Florida Statutes, the carrier conducted a utilization review of the services provided by Petitioner to the claimant beginning in late 1999.

13. The carrier retained Dr. Thomas G. Hoffman to review the claimant's medical records and to express opinions pertaining to the services provided to him by Petitioner. On April 10, 2000, Dr. Hoffman submitted a report that included several conclusions, including those that follow. The claimant has severe, residual deficits as a result of his accident. He requires 24-hour attendant care. There is no reasonable expectation for further improvement. The therapy he was receiving at that time (and still receives) was not reasonable or medically necessary. The therapy was excessive in frequency and duration. Dr. Hoffman's deposition testimony was consistent with his written report.

14. The carrier retained Dr. Victor B. Robert to review the claimant's medical records and to express opinions pertaining to the services provided to him by Petitioner. On

June 19, 2000, Dr. Robert submitted a report that included several conclusions, including those that follow. The treatment rendered by Petitioner was excessive in frequency and duration. The claimant reached an improvement plateau in early 1997 and therapy was thereafter needed only for maintenance reasons. Dr. Robert's testimony was consistent with his written report.

15. The carrier retained International Assessment Systems, Inc. (IAS), a professional association of various medical practitioners, to conduct an independent neurological, neuropsychological, and psychological examination of the claimant. On September 22, 2000, IAS submitted a report (Intervenors' Exhibit 8) based on the examinations of claimant and the review of his medical records by Dr. Kenneth C. Fischer, Dr. Alan J. Raphael, and Dr. Charles J. Golden. The report included several observations and conclusions, including those that follow. The testimony of Drs. Fischer, Raphael, and Golden was consistent with the written report they prepared for IAS.

16. Pages 12-13 of the IAS report contain the following:

> [The claimant] was oriented to person, but not to place or time. He did not know the current day, date, month, or year. His sensorium was significantly impaired. His mood was volatile, ranging from normal to agitated. His affect was similarly labile, at times he was placid, laughing, and able to converse at a basic level, however he was also quite violent. Attention and concentration were significantly impaired. His receptive, expressive and fluency

> language capabilities were similarly impaired, although, as noted, he was capable of basic/functional [sic] communication. There were no direct indications of hallucinatory or delusional phenomena, however, based on his behavior, it is likely that some hallucinatory or delusional phenomena were present. His reality testing and insight were significantly impaired. During his repeated fits of anger, he often uttered suicidal and homicidal threats, however there was no evidence of actual intent or plan. He showed no ability to monitor his own safety.

17. Page 15 of the IAS report contains the following:

> From a neuropsychological and psychological perspective, there were gross impairments noted in his cognitive abilities and emotional functioning. . . . He has been afforded considerable time to maximize his cognitive recovery at this point. It is clear that he has plateaued with regard to cognitive improvement. He will not benefit from continued rehabilitation efforts, although he will require continued stimulation to avoid further cognitive decline. His mood and labile affect may also be benefited by continued stimulation in terms of recreational activities to provide appropriate quality of life.[6]

18. Page 17 of the IAS report contains the following under the heading “Neurologic Impression”:

> . . . I [Dr. Fischer] would recommend that he be placed in a supervised residential setting which will give better protection for him and his caregivers than his present home setting. As the patient is four and a half years status post-injury, specific rehabilitative and therapeutic endeavors will have no benefit and are unwarranted. This would relate to hyperbaric oxygen and cognitive rehabilitation was well as any

> form of physical, occupational, or speech therapies.

19. Page 19 of the IAS report contains the following:

> [The claimant] was certainly aided by initial removal from the nursing home and receiving cognitive and physical therapies at Biscayne. However, he has long since reached a plateau in his improvement and no further improvement can be expected at this time. Maximum medical improvement should have been reached within 18 to 24 months post-injury. Any treatment after that time would be palliative or maintenance-oriented (sic). Therefore, the treatment prescribed by Dr. Wand became unreasonable and medically unnecessary several years ago.

20. Page 20 of the IAS report reflects the opinion that while the treatments at Petitioner's facility were excessive in all respects, the claimant does require maintenance rehabilitation services. It is opined that cognitive retraining is no longer appropriate, but that cognitive tasks and games are appropriate in a recreational setting.

21. By letter dated October 27, 2000, the carrier, through its counsel, advised Petitioner that based on its Utilization Review investigation, it had concluded that as to the identified dates of service ". . . there has been overutilization and/or misutilization since the treatment has been excessive and not medically necessary." This Letter of Disallowance was the first of a series of letters sent by counsel for the carrier to

Petitioner, and frames the issues for all of the disallowances at issue in this proceeding.

22. Thereafter, Petitioner timely disputed the carrier's basis for disallowing its services to the claimant and petitioned the Respondent to resolve the dispute. The total amount disallowed and at issue in this consolidated proceeding is $615,587.00.

23. Respondent employed four Expert Medical Advisors (EMAs) to perform peer review and assist it in resolving the dispute involving the rehabilitation services provided the claimant by Petitioner. Respondent employed Dr. Fernando G. Miranda, Dr. Jorge Villalba, Dr. Gerard P. Garcia, and Dr. David McCraney to serve as EMAs.[7] Each of these doctors prepared a report following his review and each sat for deposition.

24. Dr. Miranda's report, dated September 17, 2001, is attached to his deposition (Intervenors' Exhibit 17). The report included several conclusions, including those that follow. The referral for intensive multi-disciplinary treatment at Petitioner's facility is no longer medically necessary. The services provided by Petitioner are excessive in frequency and duration and he will not further improve with speech therapy, cognitive retraining, occupational therapy, or individual psychotherapy. Maintenance physical therapy is recommended. Dr. Miranda testified in his deposition that the recommended

physical therapy could be performed by the claimant's attendant. Dr. Miranda's deposition testimony was consistent with his written report.

25. Dr. Villalba's report dated October 15, 2001, is attached to his deposition (Intervenors' Exhibit 19). The report included several conclusions, including those that follow. The claimant reached maximum medical improvement between February 1996 and October 1997. Dr. Villalba described the services provided by Petitioner to claimant "clearly not medically necessary" after October 1997. He also opined that the claimant will require maintenance physical therapy, occupational therapy, and speech and language therapy on a continuing basis. Dr. Villalba's deposition testimony was consistent with his written report.

26. Dr. Garcia's undated report was prepared during the second week of October, 2001, and is attached to his deposition (Intervenors' Exhibit 16). The report included several conclusions, including those that follow. The claimant should be on a maintenance program and Petitioner's treatment was excessive. The claimant is unlikely to make further neuropsychological improvement, but he should be treated by a psychiatrist for his schizophrenia. Dr. Garcia's deposition testimony was consistent with his written report.

27. Dr. McCraney's report dated November 18, 2001, is attached to his deposition (Intervenors' Exhibit 18). The report included several conclusions, including those that follow. While the care provided Petitioner appears to be excellent, the claimant is far beyond the point where Petitioner's therapies would be reasonable or medically necessary. Dr. McCraney's deposition testimony was consistent with his written report.

28. Dr. DiCowden testified at length about the various services her facility provides the claimant and the records her staff generates as a result of those services. Dr. DiCowden testified that her staff is well-trained in assessing the functional status of rehabilitation patients using nationally recognized assessment methodologies. FIN-FAM, acronyms for "Functional Independence Measures" and "Functional Assessment Measures" is one assessment measure used by Petitioner's staff. The FIN-FAM measure purports to quantify a patient's progress or lack thereof and can be used by staff as a tool in developing treatment strategies. Dr. DiCowden presented a chart of the FIN-FAM scores for the claimant for the periods at issue in this proceeding. The chart, prepared for this litigation, reflects steady functional improvement of the claimant.

29. Dr. DiCowden further testified that Petitioner's staff uses a scale of cognitive functioning developed by a

rehabilitation facility known as Rancho Los Amigos Hospital, which measures a patient's response to stimuli on a scale of Ranch Level I (no response) to Ranch Level VII (appropriate response). She asserts that the measurement of the claimant's status using the Rancho methodology reflect that the claimant has improved over the years.

30. In support of its position that the claimant steadily progressed while undergoing therapy at its facility, Petitioner presented the testimony of Drs. Antonio Puente, Vernando Batas, and Richard Kishner who observed the claimant at Petitioner's facility on June 23, 2003, September 13, 2003, and February 24, 2004, respectively. Each of these witnesses had the subjective impression that the claimant was benefiting from therapy at Petitioner's facility.

31. Petitioner asserts that the FIN-FAM scores, the Rancho Levels, and the testimony of its experts establish that the claimant is benefiting from therapy. That assertion is rejected as being contrary to the greater weight of the credible evidence. The FIN-FAM scoring and the Rancho scale depend on the subjective impressions of the various therapists who treat the claimant at Petitioner's facility and the record reflects that the scoring was done on an irregular basis.[8]

32. Dr. DiCowden adamantly disagreed with the contention that the rehabilitation services provided by her facility is not

reasonable or medically necessary. All evidence presented by Petitioner, including Dr. DiCowden's testimony, has been carefully considered by the undersigned in resolving the conflicts in the evidence. At best, Petitioner established that the claimant made some unquantified amount of progress in the highly structured therapeutic setting at Petitioner's facility. Intervenors' experts clearly established that any progress made by the claimant in therapy did not transcend that therapeutic setting to the real world.

33. Petitioner failed to establish by a preponderance of the evidence that the rehabilitation services it provided the claimant were appropriate and medically necessary. To the contrary, the greater weight of the credible evidence established that at all times relevant to this proceeding the rehabilitation services provided by Petitioner to the claimant have been excessive and that those excessive services have been neither reasonable nor medically necessary.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), 440.13(11)(c), and 440.44(8), Florida Statutes.

35. This is a de novo proceeding. See § 120.57(1)(k), Fla. Stat. As the party asserting entitlement to reimbursement

for its services, Petitioner has the burden of proof in this proceeding. See Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 785-87 (Fla. 1st DCA 1981). The standard of proof is a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.

36. Section 440.13(7), Florida Statutes, sets forth the policies and procedures for resolution of billing disputes between a provider and a carrier as follows:

> (7) UTILIZATION AND REIMBURSEMENT DISPUTES.
>
> (a) Any health care provider, carrier, or employer who elects to contest the disallowance or adjustment of payment by a carrier under subsection (6) must, within 30 days after receipt of notice of disallowance or adjustment of payment, petition the agency to resolve the dispute. The petitioner must serve a copy of the petition on the carrier and on all affected parties by certified mail. The petition must be accompanied by all documents and records that support the allegations contained in the petition. Failure of a petitioner to submit such documentation to the agency results in dismissal of the petition.
>
> (b) The carrier must submit to the agency within 10 days after receipt of the petition all documentation substantiating the carrier's disallowance or adjustment. Failure of the carrier to submit the requested documentation to the agency within 10 days constitutes a waiver of all objections to the petition.
>
> (c) Within 60 days after receipt of all documentation, the agency must provide to the petitioner, the carrier, and the affected parties a written determination of whether the carrier properly adjusted or

> disallowed payment. The agency must be guided by standards and policies set forth in this chapter, including all applicable reimbursement schedules, in rendering its determination.
>
> (d) If the agency finds an improper disallowance or improper adjustment of payment by an insurer, the insurer shall reimburse the health care provider, facility, insurer, or employer within 30 days, subject to the penalties provided in this subsection.
>
> (e) The agency shall adopt rules to carry out this subsection. The rules may include provisions for consolidating petitions filed by a petitioner and expanding the timetable for rendering a determination upon a consolidated petition.
>
> (f) Any carrier that engages in a pattern or practice of arbitrarily or unreasonably disallowing or reducing payments to health care providers may be subject to one or more of the following penalties imposed by the agency:
>
> 1. Repayment of the appropriate amount to the health care provider.
>
> 2. An administrative fine assessed by the agency in an amount not to exceed $5,000 per instance of improperly disallowing or reducing payments.
>
> 3. Award of the health care provider's costs, including a reasonable attorney's fee, for prosecuting the petition.

37. "Utilization review" is the process used to determine whether overutilization exists. Pursuant to Section 440.13(1)(u), Florida Statutes, the utilization review process involves:

> . . . the evaluation of the appropriateness of both the level and the quality of health care and health services provided to a patient, including, but not limited to, evaluation of the

> appropriateness of treatment, hospitalization, or office visits based on medically accepted standards. Such evaluation must be accomplished by means of a system that identifies the utilization of medical services based on medically accepted standards as established by medical consultants with qualifications similar to those providing the care under review, and that refers patterns and practices of overutilization to the agency.

38. Section 440.13(1)(l), Florida Statutes, defines an "instance of overutilization" to mean "a specific inappropriate service or level of service provided to an injured employee."

39. Section 440.13(1)(m), Florida Statutes, defines "medically necessary" as follows:

> any medical service or medical supply which is used to identify or treat an illness or injury, is appropriate to the patient's diagnosis and status of recovery, and is consistent with the location of service, the level of care provided, and applicable practice parameters. The service should be widely accepted among practicing health care providers, based on scientific criteria, and determined to be reasonably safe. The service must not be of an experimental, investigative, or research nature, except in those instances in which prior approval of the Agency for Health Care Administration has been obtained.

40. To satisfy its burden, Petitioner would have to prove by a preponderance of the evidence that the services it provided the injured worker were medically necessary and appropriate and, consequently, did not constitute overutilization. It is necessary to consider the claimant's entire treatment history to

understand the patient's status of recovery and to determine whether the treatment rendered by Petitioner on the dates at issue was appropriate for the patient. After considering all evidence presented by the parties, it is concluded that Petitioner failed to justify its extensive treatment of the claimant in light of his deficits and his inability to benefit from therapy outside of the therapy room. Petitioner failed to meet its burden of proof in this proceeding.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Agency for Health Care Administration issue a final order that sustains the disallowances at issue in this consolidated proceeding.

DONE AND ENTERED this 15th day of June, 2004, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of June, 2004.

ENDNOTES

1/ Petitioner's Exhibit 15 is a composite exhibit of Dr. Lerner's two depositions, one taken September 19, 1995, and the other taken December 7, 1995.

2/ Intervenors' Exhibit 4, a magazine article entitled "Winning one with Medicaid," was rejected based on Petitioner's hearsay objection. That article is in evidence as part of Petitioner's Composite Exhibit 9. Intervenors' Exhibit 15 (the curriculum vitae of Ms. Frawley) was withdrawn by Intervenors.

3/ Intervenors' Exhibit 20 is Dr. Bailyn's deposition taken December 4, 2003. Intervenors' Exhibit 21 is Dr. Bailyn's deposition taken March 1, 2004.

4/ Intervenors attempted to create an inference that Petitioner was intentionally gouging the carrier by providing unnecessary and excessive services to the claimant. The undersigned rejects that inference. This case involves a genuine dispute between a reputable provider (and its supporting experts) and other highly qualified professionals as to whether the rehabilitation services at issue were reasonable and medically necessary.

5/ Respondent has upheld Intervenors' disallowance of certain services provided by Dr. Wand to the claimant. Dr. Wand has not challenged Respondent's determination that certain of his services were "excessive" and "not reasonable or medically necessary".

6/ Although not relevant to the issues, it should be noted that the report includes an observation that "His overall psychiatric status is associated with his premorbid difficulties [schizophrenia], but made worse by the cognitive damage he sustained. His current placement at home appears inappropriate and unsafe for all concerned." The record is clear that the claimant would benefit from appropriate psychiatric services.

7/ The undersigned finds each of these EMAs to be highly qualified and unbiased. Their testimony and reports are found to be credible and have been accorded considerable weight.

Their opinions are consistent with the IAS report and with the other evidence presented by the Intervenors.

8/ Moreover, the reliability of the FIN-FAM data and the chart itself were called into question because the data was not part of the medical records produced pursuant to discovery and as required by Section 440.13(4)(c), Florida Statutes. The chart, prepared for this litigation, was based on data that had not been properly disclosed to the Intervenors and Respondent.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.