STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD W. MERRITT, D.C.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-1149RX
	)	
DEPARTMENT OF HEALTH,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
THE FLORIDA INSURANCE COUNCIL, INC.; THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA; THE AMERICAN INSURANCE ASSOCIATION; THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES; ET AL.,	)	
	)	
Intervenors.	)	
	)	

FINAL ORDER

Pursuant to notice, a formal administrative hearing was held in this case before Diane Cleavinger, Administrative Law Judge of the Division of Administrative Hearings, on July 19 and 20, 2004, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issue in this case is whether Florida Administrative Code Rule 64B-3.004(2) constitutes an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On April 2, 2004, Petitioner filed a Petition to Determine Invalidity of Existing Rule. The Petition alleged that Florida Administrative Code Rule 64B-4.003, which declared certain tests to not be medically necessary for people who have been injured in an automobile accident, was an invalid exercise of delegated legislative authority, and therefore, an invalid rule.

On April 29, 2004, a Petition to Intervene was filed by the Florida Insurance Council, Inc., the Property Casualty Insurers Association of America, the American Insurance Association, the

National Association of Mutual Insurance Companies, the Florida Automobile Joint Underwriting Association, State Farm Mutual Automobile Insurance Company, Allstate Insurance Company, Government Employees Insurance Company, the Florida Farm Bureau Insurance Companies, Liberty Mutual Insurance Group, First Floridian Auto and Home Insurance Company, and United Services Automobile Association, alleging that their interests would be substantially affected if the rule were stricken, in that they would incur significantly greater expenses. On May 5, 2004, the Petition to Intervene was granted.

On June 6, 2004, Petitioner filed a motion to amend his Petition. The proposed amendment limited the scope of his rule challenge to the portion of the rule involving surface electromyography (SEMG). On June 9, 2004, an Order Granting the Motion to Amend was entered.

At the hearing, Petitioner presented the testimony of two witnesses and offered 19 exhibits into evidence. Respondent presented the testimony of three witnesses and offered 10 exhibits into evidence, of which Exhibits 1, and 3 through 10 were accepted. Intervenors presented the testimony of one witness and offered 4 exhibits into evidence.

After the hearing, Petitioner, Respondent and Intervenors filed Proposed Final Orders on October 4, 2004.

FINDINGS OF FACT

1. In 1971, Personal Injury Protection (PIP) coverage was required to be included in automobile insurance policies and was required to be obtained by anyone operating a motor vehicle in Florida. In general, PIP coverage provides payment for medically necessary treatment, lost wages and funeral expenses incurred by persons involved in motor vehicle accidents. The reasons PIP insurance coverage was made mandatory were to provide for the speedy payment of medical expenses, lost wages and burial expenses that an individual might incur as a result of being injured in a motor vehicle accident and to reduce the amount of litigation involved in recovering such expenses. Responsibility for such speedy payment rested with the various insurance companies involved in writing motor vehicle insurance.

2. Until 1980, the PIP system operated in a reasonably cost-efficient manner. However, fraud and paying for medically unnecessary medical tests or treatment were problems under the PIP system. In the past, at the option of a given insurance company, such unnecessary testing or treatment resulted in payment, denial of the claim, and perhaps litigation for the denied claim.

3. By the mid-1980s, for a variety of reasons, the PIP system became less cost efficient. The average Florida PIP claim rose by 33 percent and the amount of premium per insured vehicle

needed to cover PIP claims rose by 35 percent. Such increases led to higher premiums for the driving public, as well as larger numbers of motorists not carrying PIP coverage, estimated to be around 22 percent of Florida drivers. Indeed since 1999, State Farm Insurance Company, one of the largest insurers of motor vehicles, has experienced an average $100,000,000.00 loss per year.

4. In 2001, the Legislature enacted a fee schedule for certain medical services and tests, including a fee for SEMG. The legislature did not limit the number of times a particular service or test could be used. The 2001 legislation did not solve the problems of continued claims and payment for tests or services that were not medically necessary or overutilized. The 2001 legislation also did not solve the problem of the cost ineffectiveness of companies litigating the issue of whether a particular test was medically necessary or overused.

5. Consequently, during the 2003 legislative session, the Florida Legislature enacted Section 627.736(5)(b)6., Florida Statutes, which provides:

> The Department of Health, in consultation with the appropriate professional licensing boards, shall adopt, by rule, a list of diagnostic tests deemed not to be medically necessary for use in the treatment of persons sustaining bodily injury covered by personal injury protection benefits under this section. The initial list shall be adopted by January 1, 2004, and shall be revised from

> time to time as determined by the Department of Health, in consultation with the respective professional licensing boards. Inclusion of a test on the list of invalid diagnostic tests shall be based on lack of demonstrated medical value and a level of general acceptance by the relevant provider community and shall not be dependent for results entirely upon subjective patient response. Notwithstanding its inclusion on a fee schedule in this subsection, an insurer or insured is not required to pay any charges or reimburse claims for any invalid diagnostic test as determined by the Department of Health.

6. The statute was intended to relieve an insurance company of the burden of paying for or litigating the medical necessity of diagnostic tests that the Department listed in a to-be-developed rule. There was no evidence suggesting that the Legislature intended the words used in the statute to have any meaning other than their ordinary meanings.

7. In order to implement the statute, the Department commenced rulemaking pursuant to the legislative directive in Section 727.736(5)(b)6. Florida Statutes. As a starting point, the Department asked the insurance industry to provide a list of diagnostic tests that the insurance industry believed should be in the rule. The list contained four tests--Spinal Ultrasound, Nerve Conduction Velocity (NCV) Studies, Somatosensory Evoked Potential, and Dermatomal Evoked Potential. SEMG was not included on the insurance industry’s list.

8. SEMG is a method of measuring the electrical output of muscles through the placement of electrical sensors on the skin. In general, a muscle at rest has a lower amount of electrical activity than a muscle that is being worked or contracted. Similarly, muscle spasms have more electrical activity associated with them than a muscle at rest. On the other hand, muscle contracture, which is the condition of a muscle at rest that has been permanently shortened and generally hardened through some process, has a different level of electrical activity associated with it than with muscle spasms.

9. There are two types of SEMG, used for different purposes. Neither type of SEMG relies on subjective patient input. Static EMG uses a hand-held device with probes as an assessment (or muscle scanning) procedure to take a quick measure of muscle tension. Although in most cases hand palpation of a muscle gives a practitioner all the necessary information needed to diagnose a patient, SEMG can augment hand palpation when palpation is not determinative and help differentiate contraction from contracture. SEMG, also can assist in determining the need for the more comprehensive application of dynamic SEMG and generates a graphic, recorded reading of muscle tension.

10. Dynamic SEMG is used to document and verify injury, to determine if the patient is injured, and, in concert with other diagnostic procedures, establish the level or the extent of

injury. Once a treatment plan is developed and implemented, SEMG testing is used to monitor a patient's response to treatment. Dynamic SEMG provides an objective tool to evaluate the function of paraspinal muscles of injured persons, including those involved in motor vehicle accidents.

11. On July 25, 2003, the Department published a notice for a workshop for proposed Rule 64B-3.004 in volume 29, no. 30 of the Florida Administrative Weekly. On August 29, 2003, the Department re-noticed the workshop in Volume 9, no. 35 of the Florida Administrative Weekly. The workshop was held on September 9, 2003.

12. The draft rule presented at the workshop listed the four tests submitted by the insurance industry. The draft rule did not include SEMG. However, based on comments made during the workshop, some of which came from a chiropractic representative of the Florida Chiropractic Association, SEMG was included in the next iteration of the draft Rule.

13. The next public iteration of the rule appeared in a Notice of Proposed Rule published on Friday, November 14, 2003, in Volume 29, No. 46 of the Florida Administrative Weekly. SEMG appeared for the first time in the November 14, 2003 notice. The proposed rule was, according to the Notice, based “[u]pon review of the testimony provided at the workshop, input received from the Boards, written opinions by members of the health care and

insurance communities, and literature in support thereof." The Notice also announced a public hearing for 9:00 a.m. on Tuesday, November 18, 2003.

14. Additionally, the record for submitting information regarding the proposed rule was held open for 21 days after the November 14, 2003, publication date to give interested persons an opportunity to submit information. During the time the record was held open, the Department received some evidence and studies indicating that SEMG was not useful, or at a minimum, unnecessarily redundant in the diagnosis of the type of injuries often incurred in an automobile accident. However, the Department also received some evidence and studies that SEMG was useful in the treatment of such injuries, particularly when bio-feedback is being employed in treatment.

15. Oddly, on December 2, 2003, prior to the official closure of the record, the final rule was transmitted to the Secretary of the Department for signature and approval for filing with the Secretary of State. In due course, the rule was filed with the Secretary of State and became effective on January 7, 2004.

16. Rule 64B-3.004, as adopted by the Department states, in relevant part, as follows:

> 64B-3.004 Diagnostic Testing.
> For the purposes of Section 627.736(5)(b)6., F.S. (2003), the Department of Health, in

> consultation with the appropriate licensing boards, hereby adopts the following list of diagnostic tests based on their demonstrated medical value and level of general acceptance by the provider community:
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> * * *
>
> (2) Surface EMG is deemed not to be medically necessary for use in the diagnosis of persons sustaining bodily injury covered by personal injury protection benefits.
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> * * *
>
> Specific Authority 627.736(5) FS. Law Implemented 627.736(5) FS. History - New 1-7-04.

The rule only applies to SEMG when used for diagnostic purposes. The rule does not apply to SEMG when used in the treatment of PIP-covered automobile accident victims.

17. Petitioner, Richard Merritt, is a Doctor of Chiropractic, licensed in Florida, Texas, and Alabama. Prior to the adoption of Rule 64B-3.004, Dr. Merritt billed $130,000 to $160,000 per year for SEMG tests.

18. Dr. Merritt has used SEMG in his practice since the 1980s. Thirty-five percent of Dr. Merritt's patients have been involved in motor-vehicle accidents. Curiously, Dr. Merritt performs SEMG on all of those patients for which PIP insurance generally pays. Again, curiously, only ten percent of his remaining patients have SEMG that may or may not be covered by other insurance. However, the evidence was not clear as to the

differences between patients sustaining injuries in motor-vehicle accidents and other non-accident patients. Dr. Merritt suggested that motor-vehicle accident patients generally have more complicated or layered medical histories than patients who have not been involved in motor-vehicle accidents. No evidence was presented on this alleged difference which seems to be a very dubious distinction between patients.

19. The Florida Insurance Council, Inc.; the Property Casualty Insurers Association of America; The American Insurance Association; The National Association of Mutual Insurance Companies; The Florida Automobile Joint Underwriting Association; State Farm Mutual Automobile Insurance Company; Allstate Insurance Company; Government Employees Insurance Company; The Florida Farm Bureau Insurance Companies; Liberty Mutual Insurance Group; First Floridian Auto and Home Insurance Company; and United Service Automobile Association have standing to intervene in this proceeding.

20. Florida Insurance Council, Property and Casualty Insurance Association of America, and the American Insurance Association, all have a substantial number of members affected by the rule. These associations exist, in part, to protect their member's interests in legislative and regulatory matters involving insurance. The subject matter of this rule is within

the associations' scope of interest and activity and they are often involved in these types of rule challenges.

21. Intervenor, Florida Automobile Joint Underwriters Association (JUA), is the automobile residual market in Florida. The JUA makes PIP available to high-risk customers and operates as a standard insurance company under its governing statutes and rules.

22. All the individual companies that sought to intervene in this proceeding pay claims under PIP provisions.

23. Both the JUA and the individual companies are directly affected by the rule. The rule affects rates and premiums which are calculated based in part on loss experience. Loss costs are affected by the rule because the rule regulates what must be paid under PIP coverage. Additionally, the rule affects the profits and losses of individual companies.

24. The issue in this case is limited to a consideration of whether the inclusion of SEMG on the “list of diagnostic tests deemed not to be medically necessary for use in the treatment of persons sustaining bodily injury covered by personal injury protection benefits” is an invalid exercise of delegated legislative authority. Accordingly, the place to start is with the language of the statute being implemented. § 627.736(5)(b)6., Fla. Stat.

25. As indicated earlier, there was no evidence that the Legislature intended the words used in the statute to have any meanings other than their ordinary meanings. Thus, by reading the statute, it is clear that the tests to be included in any proposed rule must be "diagnostic tests."

26. It is undisputed that "diagnosis" and "treatment" in the medical area are different procedures and refer to different aspects of providing medical care to a patient. When used in a medical context, the term "diagnosis" means the art of distinguishing one disease from another or the determination of the nature of or cause of disease or injury, whereas the term "treatment" means the management and care of a patient for the purpose of combating disease or disorder. See Dortland's Illustrated Medical Dictionary, 27th Ed. (1988) and Stedman's Medical Dictionary, 26th Ed. (1995). In short, there is a diagnosis phase of medical care wherein a practitioner uses various tests, procedures and historical information to determine the nature, i.e. what the patient's condition is and/or how severe the condition is, and the cause, i.e. automobile accident or fall, of a given disease or condition. Distinct from the diagnostic phase there is a treatment phase of medical care wherein a practitioner, through tests, therapies, procedures and medicines manages or cares for a patient's condition. However, in their ordinary usage, the terms "diagnosis" and "treatment"

can overlap. In ordinary usage, the term “diagnosis” does not differ significantly from the medical term and means the art or act of identifying a disease from its signs and symptoms. Webster’s New Collegiate Dictionary (1984). The term “treatment” means “the act or manner or an instance of treating someone or something: HANDLING, USAGE.” Id. The term “treat” means to “deal with.” Id. In its ordinary sense, “treatment” has a broader meaning than it does in its medical sense and can include diagnosis. Thus, in this case, the tests referred to in the statute are diagnostic tests used in handling or dealing with a person who has been physically hurt in a motor vehicle accident. Also, by giving the term “treatment” its ordinary meaning the Department has the authority to differentiate between the appropriateness of a diagnostic test used in the medical diagnostic phase and the same test used in the medical treatment phase.

27. In this case, SEMG, especially static SEMG, is used as a test in both the medical diagnosis and treatment phases in dealing with persons injured in a motor vehicle accident. Therefore, it is a diagnostic test that may be considered under the other criteria of the statute.

28. For a test to be included in the rule it must be medically unnecessary, based on a lack of demonstrated medical value and a lack of general acceptance by the relevant provider

community and not be dependant for results entirely from subjective patient response. As can be seen, the statute does not deal with the overuse of a given test, but only defines medical necessity by the three criteria listed above. In reality, some types of test overuse may only be determined on a case-by-case basis, since whether a generally or occasionally, medically beneficial test is useful or redundant at a particular time in treatment or diagnosis depends greatly on the reasons the test is being employed. Thus, if a test has a degree of medical value, it cannot be on the list; if a test has a level of general acceptance by the relevant provider community which includes the Doctors of Chiropractic, it cannot be on the list; and if a test is not dependent for results entirely on subjective patient response, it cannot be on the list.

29. The medical value of any test is not related in any way to the manner in which payment for that procedure is made. In that regard, the medical validity of a procedure does not vary as to whether the patient is covered by Workers' Compensation, Medicare, private insurance, or PIP.

30. PIP patients typically have injuries to the connecting soft tissues of their spine as well as injuries to organs and broken bones. Muscles, ligaments, and tendons can be stretched or injured, which can lead to a breakdown in spinal-joint motion or a spinal-joint misalignment. Spinal-joint misalignment may

cause interference in the patient's nervous system. Soft tissue and misalignment injuries are routinely the subject of chiropractic care. SEMG is effective in recording changes in the electrical activity of muscles associated with spinal injuries known as vertebral subluxations. Vertebral subluxations are commonly associated with automobile accidents, and are diagnosed and treated by chiropractic physicians.

31. In spinal injuries, there is a depolarization that occurs at the cellular level. Electrical activity is generated at the cellular level and runs down the muscle fiber. SEMG measures the surface manifestation of the amount of electrical activity generated and the depolarizations in the area. The purpose is to measure muscle tension. SEMG is objective and quantitative. It eliminates subjective impressions or input and provides an objective and unbiased assessment of the electrical activity of the patient's paraspinal muscles. It allows a medical professional to distinguish objectively between observed muscle tension that is electrically active, which is associated with spasm, from observed muscle tension that is not electrically active, which is associated with contracture. It is debatable whether SEMG provides no more useful information to a practitioner than information gleaned by hand palpation of the injured area. The problem is that hand palpation can sometimes be inconclusive, especially in regard to determining if a muscle

is hard from spasm or contracture. The question is one of over or redundant use of a test. Again that question is not part of the criteria for inclusion of a test in the rule. The criteria only include whether a test can be used by the practitioner to make a valid diagnosis or conclusion. In regard to SEMG, published documentary evidence demonstrates that spasm and contracture share a similar physical manifestation, i.e. the muscle is hard to the touch, and may not be distinguished through palpation and that, in the occasional instances where had palpation is inconclusive, SEMG can differentiate the conditions, and "provide[] an important element of diagnostic information." Specific to automobile-related injuries, when hand palpation is inconclusive, SEMG has medical value to chiropractic physicians in that it allows the treating chiropractic physician to determine if a patient has an injury or does not have an injury, to quantify the extent of the injury, to monitor the patient's response to treatment, and to assess the point of maximum clinical improvement or maximum therapeutic benefit. While its diagnostic usefulness may be limited to certain situations when hand palpation is inconclusive, the evidence demonstrated that SEMG had some utility in the diagnostic phase of medical care. Therefore, SEMG should not be included in the proposed rule.

32. Dynamic SEMG is also utilized on motor vehicle accident victims. Its primary use is to provide the level of

documentation for services rendered a person involved in a motor-vehicle accident required to demonstrate injury, permanency of injury, the need for treatment, and the response to treatment before payment will be made under a PIP plan.

33. Overall, SEMG has advanced as a clinical tool from its earliest, more experimental uses in which no computer support was available, through the time in which the best technology available was the Commodore 64 (or earlier) computer, to today, when advances in technology and understanding have resulted in the elimination of problems of electrical interference, bandwidth filtering and electrode placement, and have resulted in a higher threshold of sensitivity.

34. The evidence in this case demonstrates that SEMG has medical value for use in the treatment of persons sustaining bodily injury covered by personal injury protection benefits. The Department admitted and the evidence showed that some surface EMG techniques may be useful in the treatment of persons sustaining bodily injury in motor vehicle accidents in appropriate circumstances. Based on the admissions of the Department, it is clear that SEMG has a degree of demonstrated medical value. Therefore, its inclusion on the list of medically unnecessary tests is arbitrary and capricious; has exceeded the Department’s grant of rulemaking authority; and has enlarged,

modified, or contravened the specific provisions of law implemented.

35. The Department also admitted and the evidence showed that SEMG is not dependent for results entirely upon subjective patient response. Therefore, under the terms of the statute, the inclusion of SEMG on the list of medically unnecessary tests has exceeded the Department's grant of rulemaking authority and has enlarged, modified, or contravened the specific provisions of law implemented.

36. The evidence also demonstrated that SEMG is generally accepted in the relevant provider community. In 1996, the two primary organizations that represent chiropractic physicians in Florida, the Florida Chiropractic Association and the Florida Chiropractic Society, were asked to develop a set of guidelines to apply to the chiropractic profession. Their work resulted in a report and the publication of the Chiropractic Practice Guidelines and Parameters for the State of Florida (CPG). The CPG was unanimously accepted and endorsed by the Florida Board of Chiropractic on August 22, 1996. The CPG was copyrighted and published by the Florida Chiropractic Association, Inc. and the Florida Chiropractic Society, Inc. in 1997.

37. The CPG is a set of rules or guidelines that a practicing chiropractic physician can follow regarding the treatment of chiropractic problems. The CPG constitutes the

consensus agreement of the chiropractic profession on many of the procedures that a chiropractor might provide.

38. The CPG references SEMG both in comparison with needle EMG and as to its own merits. As a comparative matter, the CPG provides that "needle techniques are appropriate for the evaluation of specific muscles, while surface electrodes are appropriate for kinesiological studies of the "global" function of groups of muscles." In terms of test-retest reliability and longitudinal muscle studies, SEMG was found to be superior to needle EMG. The CPG also states that SEMG provides an objective and quantifiable measure of muscular activity in areas of vertebral subluxation. Although the section discussing SEMG concludes with language indicating a degree of qualification, the CMG rates SEMG as "established." An "established" rating means that SEMG is accepted as appropriate by the practicing chiropractic community for the given indication in the specified patient population. The rating of "established" was made with a Consensus Level of 1, which is the highest level of consensus available. In addition, the rating was supported by various categories of evidence used to analyze a given test, including expert opinion, clinical experience or effectiveness studies (Evidence E), refereed literature or published monographs, legal decisions and/or authority (Evidence L) and available controlled studies (Evidence C). The rating of "established" also requires

one or more controlled trials. Therefore, read as a whole, the CMG demonstrates the medical value of SEMG as a clinical and diagnostic tool for evaluating paraspinal muscle activity, quantifying palpation findings, performing longitudinal studies, and detecting muscle spasm.

39. Dr. Jenkins' testimony regarding the lack of reliability of the CPG and attempt to disown the CPG as an authoritative statement by the Board of Chiropractors cannot be given weight since he was on neither the Florida Committee for Adoption of Guidelines nor the Board of Chiropractic when the CPG was accepted and endorsed. Additionally, during his tenure on the Board stretching back to 1997, the Board has not rescinded or amended the CPG.

40. Finally, the evidence did not demonstrate that the CPG was superceded by the 1999 Universe of Florida Patients with Neck Pain or Injury Medical Practice Guidelines. These Universe Guidelines appear to relate only to medial doctors and not to Chiropractic Physicians. The Guidelines state they are not applicable to Chiropractic Physicians licensed under Chapter 460, Florida Statutes.

41. The fact that the CPG describes SEMG as "[a]ccepted as appropriate by the practicing chiropractic community" provides a strong demonstration of the medical value of the test, and strong

evidence of the high level of general acceptance of the test by the relevant provider community.

42. Additionally, the American Medical Association Current Procedural Terminology (CPT) 2004 Manual is a proprietary system of the AMA for reporting medical services and procedures. CPT Codes are the uniform, established system for reporting medical services for reimbursement under government and private insurance programs. CPT coding is mandatory to describe the services a physician renders when submitting that service for payment to an automobile insurance carrier.

43. In order to be assigned a five-digit CPT Code, the procedure must be "consistent with contemporary medical practice and be . . . performed by many practitioners in clinical practice in multiple locations.

44. Code assignment is performed by a CPT Editorial Panel, consisting of 17 physician members, and a larger CPT Advisory Committee of medical and allied health professionals. Among the objectives of the CPT Advisory Committee is to "provide documentation to staff and the CPT Editorial Board regarding the medical appropriateness of various medical and surgical procedures. . . ." (emphasis supplied)

45. Among the considerations for Code assignment are the requirements "that the service/procedure is a distinct service performed by many physicians/practitioners across the United

States," and "that the clinical efficacy of the service/procedure is well established and documented in peer review literature."

46. Dynamic SEMG has been assigned a five-digit CPT Code 96002. Similarly, The review and interpretation of dynamic SEMG has been assigned a five-digit CPT Code 96004.

47. The fact that SEMG has been found to meet the requirements of the AMA for assignment of five-digit CPT Codes provides evidence of the medical value of the test, and strong evidence of the high level of general acceptance of the test by the relevant provider community.

48. Finally, the rulemaking record for Rule 64B-3.004 contains information regarding SEMG. The literature submitted as part of the rulemaking record reveals, by a preponderance of competent, substantial evidence, that SEMG does not lack demonstrated medical value, and that it has a level of general acceptance by the relevant provider community.

49. The primary documents submitted in the course of rulemaking included the 1993 Guidelines for Chiropractic Quality Assurance and Practice Parameters (Mercy Conference), the National Guideline Clearinghouse summary of the 1998 Council on Chiropractic Practice Guideline entitled Vertebral subluxation in chiropractic practice, a pair of AAEM Literature Reviews, entitled The Use of Surface EMG in the Diagnosis and Treatment of Nerve and Muscle Disorders and Dynamic Electromyography in Gait

and Motion Analysis; the American Academy of Neurology study on Clinical utility of surface EMG; a report from Connie Coleman; two submissions from Dr. Jerome True, and a 2003 literature review, Surface EMG in Chronic Paraspinal Pain.

50. Neither the Mercy Conference Guidelines nor the AAEM Surface EMG Literature Reviews contained any information or analysis more recent than 1993. Those documents did not reflect the current state of technology or understanding of SEMG, and could not form the sole bases for a rule based on SEMG's demonstrated medical value and level of general acceptance in 2003.

51. The National Guideline Clearinghouse summary of the 1998 Council on Chiropractic Practice Guidelines, and the American Academy of Neurology study on Clinical Utility of Surface EMG both provide support of the medical value for SEMG. As indicated, the 1998 Council on Chiropractic Practice Guidelines, which was subject to external peer review, and which even critics of SEMG recognize as being authoritative, determined that SEMG earned a rating of "established" "for recording changes in the electrical activity of muscles associated with vertebral subluxations" based on expert opinion, literature support, and controlled studies. The American Academy of Neurology study drew three conclusions, one of which was that Surface EMG "is an acceptable tool for kinesiologic (movement) analysis of movement

disorders because it is a method for recording and quantifying clinically important muscle-related activity with the least interference on the clinical picture," and confirmed its usefulness for several maladies, some of which result from automobile accidents.

52. A report from Connie Coleman concluded that SEMG should not be in the rule, based on the American Academy of Neurology study, the AAEM Surface EMG Technology Literature Review, and a position paper authored by Aetna Insurance. Ms. Coleman's report cannot be given any weight since she cited only the negative recommendations of the American Academy of Neurology study regarding SEMG, but omitted the third, positive recommendation from the study referenced above. Furthermore, as support for her recommendation to include spinal ultrasound in the rule, Ms. Coleman relied on the National Guidelines Clearinghouse document referenced above, which she stated was:

> a comprehensive database of evidence-based clinical practice guidelines and related documents produced by the Agency for Healthcare Research and Quality (AHRQ), U.S. Department of Health and Human Services, in partnership with the American Medical Association (AMA) and the American Association of Health Plans (AAHP).

However, Ms. Coleman failed to note that the same National Guidelines Clearinghouse document gave SEMG a rating of

established “for recording changes in the electrical activity of muscles associated with vertebral subluxations.”

53. Of the two reports submitted by Dr. True, only one recommended that SEMG should have been on the list, with that recommendation based on a single journal article. Dr. True’s other submission mentioned SEMG, but made no specific recommendation regarding the test. However, Dr. True’s second submission did note that allegations of over utilization and abuse have “nothing to do with determining whether a test is medically valid.” Dr. True also relied on the Chiropractic Practice Guidelines and Parameters for the State of Florida, which recognize the medical validity of SEMG.

54. Finally, David Marcarian, the developer and manufacturer of SEMG equipment, submitted several documents, including a literature review of journal articles ranging in dates from 1982 to 2002. The review discussed each of the journal articles, and concluded that “SEMG is a useful diagnostic tool in the evaluation of spine pain patients, and suggests that it be done routinely in cases where there is a need for disability and impairment determination.” The evidence did not demonstrate that Mr. Marcarian’s materials should be given less weight than older material containing dated information.

55. The evidence submitted in this proceeding demonstrates a definite trend in both the understanding of the medical

validity of SEMG and its acceptance by the chiropractic and medical community.

56. Each of the 21 journal articles comprising Petitioner's Exhibit 8, ranging in dates from 1988 to 2004, used SEMG as a tool to provide an objective measurement of muscle activity. Although many of the articles were focused on the muscular conditions leading to such conditions as low back pain, fibromyalgia, and whiplash disorders, rather than the clinical efficacy of SEMG itself, the fact that SEMG was so widely used as a measure of muscle activity is evidence of its medical value. Additionally, several of the articles focused on SEMG as a diagnostic tool in and of itself.

57. Going back as far as 1988, researchers reported that "clear and consistent surface paraspinal EMG patterns can be discerned between differing groups of lower back pain patients and non-pain controls if the methodological limitations inherent in previous studies are corrected," and concluded that "[t]he findings of the present study clearly point to the utility of differential diagnosis in lower back pain surface EMG studies," and that "[r]esults strongly indicate that when careful attention is given to both diagnosis and position, surface EMG recordings can differentiate among the various types of lower back pain, as well as between those with and without lower back pain." Electromyographic recordings of 5 types of low back pain subjects

and non-pain controls in different positions, Arena, et al., "Pain", 37 (1989) pp. 63, 64.

58. Through the early 1990s, researchers began noting the effect that technological advances were having on the medical efficacy of Surface EMG. Researchers during that period were recognizing that advances in surface electromyography (EMG) have prompted a renewed interest in examining the fatigue properties of back muscles. See Fatigue, recovery and low back pain in varsity rowers, Roy, et al., Medicine and Science in Sports and Exercise, vol. 22, no. 4, p. 463. As a result of those advances, those researchers concluded that "the EMG technique is able to correctly identify persons with LBP from two very different populations" [Id. at p. 467] and that "the results of this study have verified the usefulness of a surface EMG measurement technique to identify changes in back muscles that are characteristic of LBP in rowers . . . The technique may be useful to athletic trainers and other health professionals for evaluating the muscular component of LBP in their patients." (Id. at 468). During that same period, researchers were beginning to conclude that, though not without limitations, "[e]lectromyo-graphic spectral analysis was shown again to be a highly sensitive and highly specific diagnostic test." Comparison of Spinal Mobility and Isometric Trunk Extensor Forces with Electromyographic Spectral Analysis in Identifying Low Back Pain,

Klein, et al., Physical Therapy, vol. 71, no. 6, p. 41 (1991). Other groups noted that contemporaneous research studies "have also shown the reliability of dynamic EMG measurements of paraspinal low back muscles," and concluded that "[w]e believe that [EMG] is an invaluable aid in detecting and objectifying disturbed function in paraspinal muscles in back pain patients and in general disability. This agrees with recent research which indicates that kinetic EMG patterns (in contrast to static levels) may best show the complex biomechanical events in the lumbar region." Electric Behavior of Low Back Muscles During Lumbar Pelvic Rhythm in Low Back Pain Patients and Healthy Controls, Sihvonen, et al., Arch. Phys. Med. Rehabil., vol. 72, pp. 1080, 1086 (1991).

59. By the mid to late 1990s, the continuing research, though still recognizing that there were things left to learn, was becoming more conclusive as to the value of SEMG. In 1997, researchers funded by the Department of Veterans' Affairs stated that "[w]e predict that in the future the concept of surface EMG-based imbalance or load sharing parameters may provide the clinician with important person-specific information already in the acute stage of the injury, to help prevent the development of a chronic disability. Surface EMG provides us with a powerful, noninvasive tool to investigate the status and function of muscles." Development of new protocols and analysis procedures

for the assessment of LBP by surface EMG techniques, Oddsson, et al., Journal of Rehabilitation Research and Development, vol. 34, no. 4, p. 425 (1997). During that same year, researchers in California studying muscular electrical signals, noted the technological advances that were serving to make SEMG more effective. In their study, they found that "[s]uccessful myoelectric recording with surface electrodes during dynamic exercise of the low back is relatively recent. This is largely due to the recent development of small high-competence preamplifiers located close to the muscle which reduces the electronic artifact during dynamic activity to allow analysis of the myoelectric signal." Relationships Between Myoelectric Activity, Strength, and MRI of Lumbar Extensor Muscles in Back Pain Patients and Normal Subjects, Mooney, et al., Journal of Spinal Disorders, vol. 10, no. 4, p. 354 (1997).

60. By the early 2000s, SEMG was becoming established as a reliable and valuable tool in the assessment and diagnosis of automobile related injury. In a peer-reviewed study regarding whiplash-associated disorders (WAD), the authors concluded that:

> Patients with whiplash associated disorder Grade II can be distinguished from healthy control subjects according to the presence of cervical muscle dysfunction, as assessed by surface electromyography of the upper trapezius muscles. Particulary the decreased ability to relax the trapezius muscles seems to be a promising feature to identify patients with whiplash associated disorder

> Grade II. Assessment of the muscle (dys)function by surface electromyography offers a refinement of the whiplash associated disorder classification and provides an indication to a suitable therapeutic approach.

Cervical Muscle Dysfunction in the chronic Whiplash Associated Disorder Grade II (WAD II), Nederhand, et al., Spine, vol. 25 (15), p. 8 of 10 (2000). The authors noted that "the use of palpation to assess either muscle point tenderness or muscle spasm is questionable because manually tested musculoskeletal signs have shown poor interexaminer reliability, and very little is known about its diagnostic validity." Id. The authors found that "SEMG as a measure of the inability to relax the upper trapezius muscles may be useful in diagnostic testing. In the literature this feature was shown to be related to cervical pain and muscle fatigue and therefore supports the clinical importance of this study's findings." Id. at p. 8 of 10. Also in 2000, researchers, while still recognizing the lack of absolute precision with all manner of electro-diagnostic testing (including X-rays, MRIs, CT scans, myelograms), stated that "surface electromyography (SEMG) is a non-invasive method of analysis of the degree of muscular activity and function." Chronic Low Back Pain Assessment Using Surface Electromyography, Ambroz et al., JOEM, vol. 42, no. 6, p. 661 (2000). In recognition of the advances in technology, the authors noted that

"[r]ecent technological advancement has overcome the previous limitations of data acquisition and processing." Id. at 661. That study, while noting the need for accounting for physical conditions including body fat, and recognizing the advantages of further testing and study, made the following findings:

> More recent investigations have found a significant relationship between pain and SEMG-measured muscle activity in the upper and lower back and have suggested that SEMG can be a valid tool for objectively assessing LBP. Also, although Biederman questioned the reliability of SEMG reading in biofeedback research, two subsequent studies addressing the validity of this technique reported good reliability for the static and dynamic SEMG activities in the assessment of CLBP.
>
> By using a rigorous matching protocol that included BMI [body mass index], our study demonstrated a statistically significant difference between CLBP patients and pain free controls. Thus, the results of this study support the previous investigations suggesting that SEMG is a useful diagnostic tool in the assessment of CLBP. Furthermore, in this study the use of one of the latest and more technologically advanced semi devices available has contributed to a more reliable collection and processing of this data, giving more strength to this analysis.

61. Finally, in 2004, the evidence regarding the medical value of SEMG demonstrates that it has achieved a full level of general acceptance. In a study released in June 2004, the authors concluded that "[s]urface electromyography has been shown to be useful in the evaluation of spine pain in much the same way

that EKGs have become indispensable for chest pain evaluation. SEMG testing is easy to do, inexpensive, has no morbidity, and provides important information for the pain practitioner." Objective Documentation of Spine Pain, Ambroz, et al., Practical Pain Management, May/June 2004, p. 36

62. Thus, it is clear that the evidence in this case demonstrates that there was no "lack" of demonstrated medical value to SEMG, but, that SEMG has a level of general acceptance for use in the treatment of patients by the relevant provider community. The real dispute in this case is how often SEMG is used in the relevant provider community. Therefore, the inclusion of SEMG in Florida Administrative Code Rule 64B-3.004 exceeds the Department's grant of rulemaking authority, enlarges, modifies, or contravenes the specific provisions of Section 627.736(5)(b)6., Florida Statutes, and is arbitrary and capricious.

CONCLUSIONS OF LAW

63. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.54, Fla. Stat. (2003).

64. Petitioner has the burden of proving by a preponderance of the evidence that the challenged rule is an invalid exercise of delegated legislative authority. § 120.56(1)(e), Fla. Stat. (2003).

65. Consideration of the validity of a rule must necessarily commence with an analysis of Respondent's rulemaking authority in accordance with the legislative mandate set forth in Section 120.52(8), Florida Statutes, which states:

> (8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious;
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may

> adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

66. The standard of review in this proceeding has been established in Section 120.56(1)(e), Florida Statutes (2003), which provides, in pertinent part, that "[h]earings held under this section shall be *de novo* in nature, which effectively superceded the earlier standard of review set forth in Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243 (Fla. 1st DCA 2002). In that case, the First District Court of Appeal, construing the now-repealed "competent substantial evidence" rule challenge basis, opined that the standard of review was, essentially, an appellate standard of review, meant "to limit the scope of review by ALJ's in rule challenge proceedings to whether legally sufficient evidence exists supporting the agency's proposal." Florida Academy of Cosmetic Surgery at 257.

67. The language of the 2003 amendment is clear on its face that the Florida Academy of Cosmetic Surgery standard has been superceded due both to the repeal of the statutory section upon which the opinion was based, Section 120.52(8)(f), Florida Statutes (2002), and to the amendment of Section 120.56(1)(e), Florida Statutes, which now specifies the de novo standard. In addition, legislative history of the bill provides that:

> The effect of these amendments, in combination with the bill's removal of the "competent substantial evidence" language from ss. 120.52(8)(f) and 120.57(1)(e)1., F.S., will arguably overturn the court's decision in *Florida Academy of Cosmetic Surgery, Inc*. . . . Under the bill, however, it is made clear that an ALJ's rule challenge hearing is de novo . . . .

Senate Staff Analysis, CS/CS/SB 1584, Judiciary Committee, April 15, 2003 at p. 10.

68. It is well established through a long-standing line of judicial opinions that "[o]nly when a statute is of doubtful meaning should matters extrinsic to the statute be considered in construing the language employed by the legislature." Capers v. State, 678 So. 2d 330, 332 (Fla. 1996), citing Florida State Racing Commission v. McLaughlin, 102 So. 2d 574, 576 (Fla. 1958); see also Closet Maid v. Sykes, 763 So. 2d 377, 381 (Fla. 1st DCA 2000) (holding that the phrase "major contributing cause" as applied to injuries covered by Workers' Compensation was amenable

to construction without resort to extrinsic aides); Rhodes v. State, 704 So. 2d 1080, 1083 (Fla. 1st DCA 1998).

69. Consideration of the legislative history of an act as an extrinsic aid to construction has been expressly found to be improper in construing an unambiguous statute. Coleman v. Coleman, 629 So. 2d 103, 104 (Fla. 1994)(holding the term "alimony obligation" to be unambiguous, thus allowing no consideration of legislative history); Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000)(holding that terms used in the 1999 amendments to Section 120.52(8), Florida Statutes, were clear and capable of construction using the dictionary, thus providing "no reason to add our own view of the legislative intent."); Mayo Clinic Jacksonville v. Department of Professional Regulation, Board of Medicine, 625 So. 2d 918, 919 (Fla. 1st DCA 1993) (finding no ambiguity in a facility based physician licensure statute, and thus no need to resort to legislative history or other rules of construction). Also, in a case on point to this case, the Florida Supreme Court has held that the terms "diagnosis" and "treatment" are not ambiguous, and should be accorded their plain meaning, without resort to legislative history. Silva v. Southwest Florida Blood Bank, Inc., 601 So. 2d 1184, 1186-1187, 1188 (Fla. 1992). Furthermore, the restriction

on using legislative history as an aid to construction is so strong that the Florida Supreme Court has held that:

> Where, as here, the language of a statute is clear and unambiguous the language should be given effect without resort to extrinsic guides to construction. As we have repeatedly noted, "[e]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." (citations omitted)

Lamont v. State, 610 So. 2d 435, 437 (Fla. 1992). Accord Florida Department of Children and Family Services v. McKim, 869 So. 2d 760 (Fla. 1st DCA 2004).

70. Extrinsic evidence that is improper as an aid in construing an unambiguous statute also includes the administrative construction of the statute by the implementing agency. In a recent case from the Third District Court of Appeal construing the application of a statute affecting medical “clinics” to portable diagnostic testing equipment, the court held that:

> State Farm points out that the Department of Health has interpreted the statute to require registration by entities such as Diagnostic. . . . That makes no difference here, because the statutory language is clear on its face. "[A] court need not defer to an agency's construction if the language of the statute is clear and therefore not subject to construction." *Doyle v. Department of Business Regulation,* 794 So.2d 686, 690 (Fla. 1st DCA 2001). "[W]here the administrative

> ruling or policy is contrary to the plain and unequivocal language being interpreted, the ruling or policy is clearly erroneous." *Eager v. Florida Keys Aqueduct Authority,* 580 So.2d 771, 772 (Fla. 3d DCA 1991).
>
> State Farm argues that it would [sic] a good idea as a matter of policy to require companies like Diagnostic to register. That policy determination is for the Legislature, not for us.

Diagnostic Services of South Florida v. State Farm Mutual Automobile Insurance Co., 877 So. 2d 1, 3 (Fla. 3d DCA 2004); see also Mayo Clinic Jacksonville, supra at 919 ("[c]ourts may resort to legislative history, administrative construction of a statute, and rules of statutory construction only to determine the legislative intent of an ambiguous statute.").

71. The testimony of a witness, even expert testimony, is equally unavailing in the face of the plain meaning of a statute. As stated by the First District:

> Expert testimony as to the meaning of an ordinance is not appropriate when the disputed language consists of "ordinary words susceptible to being given plain effect consistent with their ordinary meaning." *T.J.R. Holding Co., Inc. v. Alachua County,* 617 So.2d 798, 800 (Fla. 1st DCA 1993). . . . While expert testimony may be relevant and helpful to the court where a statute or ordinance contains words of art or scientific and technical terms, even then such testimony cannot dictate the court's construction of the enactment. *T.J.R. Holding Co.,* 617 So.2d at 799-800.

Lindsey v. Bill Arflin Bonding Agency Inc., 645 So. 2d 565 (Fla. 1st DCA 1994)

72. Section 627.736(5)(b)6., Florida Statutes, is not so unclear or ambiguous as to require or justify the consideration of extrinsic means of construction to decipher its meaning. Thus, recognition by the Legislature that testing can be abused does not affect whether evidence supports the medical value of any specific test. As stated by Dr. True, over-utilization and abuse have little or nothing to do with the medical validity of a test.

73. Section 627.736(5)(b)6., Florida Statutes, is the only statute that authorizes the Department to promulgate a rule, and establishes the criteria upon which the rule must be based. It limits the Department's authority to the development of "a list of diagnostic tests deemed not to be medically necessary for use in the treatment of persons sustaining bodily injury covered by personal injury protection benefits."

74. SEMG was included in the rule because it was "deemed not to be medically necessary for use in the treatment of persons sustaining bodily injury covered by personal injury protection benefits." There is no question that "diagnosis" and "treatment," mean different things. However, in common usage the term "treatment" can include diagnosis.

75. Based on a review of the entire record, Petitioner has shown, by a preponderance of the evidence, that SEMG has demonstrated medical value. The findings reflected in the Chiropractic Guidelines and Parameters for the State of Florida and the CPT Codes, combined with the advances in technology and understanding of the process reflected in the trend of the literature, demonstrate that SEMG has achieved a level of medical acceptance as a valuable diagnostic tool for injuries of the spine and upper and lower back. Therefore, Florida Administrative Code Rule 64B-3.004(2) exceeds the Department's grant of rulemaking authority conferred by Section 627.736(5)(b)6., Florida Statutes, and enlarges, modifies, or contravenes the specific provisions of Section 627.736(5)(b)6., Florida Statutes.

76. Additionally, based on a review of the entire record, the Petitioner has demonstrated, by a preponderance of the evidence, that SEMG has a level of general acceptance by the relevant provider community. SEMG is regularly used by chiropractic physicians who are a part of the relevant provider community. The Florida Chiropractic Association and the Florida Chiropractic Society, the leading chiropractic professional groups in Florida, agree that SEMG is generally accepted by the practicing chiropractic community. The basis for the rating of "established" in the CPG, has been accepted and endorsed by the

Florida Board of Chiropractic, the chiropractic physician regulatory and licensing arm of the Department of Health. The American Medical Association had determined that SEMG is a distinct service performed by many physicians and practitioners across the United States. In addition, the clinical efficacy of SEMG has become established and documented as reflected in peer reviewed literature. Therefore, by including SEMG in Florida Administrative Code Rule 64B-3.004(2) the Department has exceeded its grant of rulemaking authority conferred by Section 627.736(5)(b)6., Florida Statutes, and has enlarged, modified, or contravened the specific provisions of Section 627.736(5)(b)6., Florida Statutes. As such, Florida Administrative Code Rule 64B-3.004(2) is an invalid exercise of delegated legislative authority.

77. Finally, Petitioner has demonstrated, by a preponderance of the evidence, that Surface EMG is not dependent for results entirely upon subjective patient response. The Department's admission of that fact is conclusive. Therefore, Florida Administrative Code Rule 64B-3.004(2) exceeds the Department's grant of rulemaking authority conferred by Section 627.736(5)(b)6., Florida Statutes, and enlarges, modifies, or contravenes the specific provisions of Section 627.736(5)(b)6., Florida Statutes. As such, Florida Administrative Code Rule 64B-

3.004(2) is an invalid exercise of delegated legislative authority.

78. In State, Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001), the court held that:

> [A]dministrative agencies are creatures of statute and have only such powers as the statutes confer . . . . If reasonable doubt exists as to the "lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." (supra at 700-701)

79. In Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000), the court noted:

> The ordinary meaning of the term "specific" is "limiting or limited; specifying or specified; precise, definite, [or] explicit." See Webster's New World College Dictionary 1287 (3rd Ed. 1996). "Specific" is used as an adjective in the 1999 version of section 120.52(8) to modify the phrase "powers and duties."

It is clear that the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute. Otherwise, the rule is not a valid exercise of delegated legislative authority.

80. The Legislature has not granted to the Department the specific power or duty that the rule seeks to implement. The only statute which provides the specific power or duty for the

Department to promulgate Florida Administrative Code Rule 64B-3.004(2) is Section 627.735(5)(b)6., Florida Statutes. That statute allows the Department to place a diagnostic test on the list only if the test is not “medically necessary for use in the treatment of persons sustaining bodily injury covered by personal injury protection benefits.” The statute does not allow the Department to place a diagnostic test on the list due to its overuse in the treatment of persons sustaining bodily injury. The Department’s authority is limited to those tests that meet the criteria of a) lack of demonstrated medical value and b) a level of general acceptance by the relevant provider community and c) are not dependent for results entirely upon subjective patient response. None of those criteria apply to SEMG. Thus, the rule constitutes an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(b) and (c), Florida Statutes.

81. While the Department has asserted that allowing tests to be included on the list when they are used for the diagnosis of injured persons would more fully comport with its view of the purpose of the statute, the "necessity for, or the desirability of, an administrative rule does not, of itself, bring into existence authority to promulgate such rule." 4245 Corporation v. Division of Beverage, 371 So. 2d 1032, 1033 (Fla. 1st DCA 1978). Such a rationale does not validate an otherwise invalid

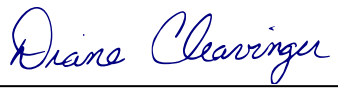
rule. Therefore, the inclusion of SEMG in Florida Administrative Code Rule 64B-3.004 exceeds the Department's grant of rulemaking authority, enlarges, modifies, or contravenes the specific provisions of Section 627.736(5)(b)6., Florida Statutes, and is arbitrary and capricious.

ORDER

Based on the foregoing Findings of Facts and Conclusions of Law, it is

ORDERED that the Amended Petition to Determine Invalidity of Existing Rule challenging Florida Administrative Code Rule 64B-3.004(2) is granted, and the rule is declared invalid.

DONE AND ORDERED this 25th day of January, 2005, in Tallahassee, Leon County, Florida.



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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 the original notice of appeal with the Clerk of the Division of Administrative Hearings and a 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 30 days of rendition of the order to be reviewed.