STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HUBERTO E. MERAYO, Petitioner, vs. AGENCY FOR HEALTH CARE ADMINISTRATION, Respondent, and WARREN TECHNOLOGIES AND UNITED SELF INSURED SERVICES, Intervenors.	)	Case No. 05-0926

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on June 3, 2005, by video teleconference between Miami and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH). Counsel for Intervenors participated by telephone.

APPEARANCES

For Petitioner: L. Barry Keyfetz, Esquire
44 West Flagler Street, Suite 2400
Miami, Florida 33139

For Respondent: Joanna Daniels, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Station 3
Tallahassee, Florida 32308

For Intervenors: Mark S. Spangler, Esquire
Mark S. Spangler, P.A.
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STATEMENT OF THE ISSUE

Whether Petitioner, a health care provider, filed a timely, valid petition with Respondent to challenge Intervenors' disallowance of payment for certain dates of service to a workers' compensation claimant.

PRELIMINARY STATEMENT

Intervenor Warren Technologies is the employer and Intervenor United Self Insured Service is the workers' compensation insurance carrier (the carrier) for a workers' compensation claimant (claimant). Petitioner is a health care provider. On September 30, 2004, the carrier's attorney (Mr. Spangler) mailed to Petitioner a Notice of Disallowance (Notice) and Explanation of Benefits (Explanation), which notified Petitioner that the carrier was disallowing payment to Petitioner for billings for three dates of service to the claimant. The Notice and Explanation were received by Petitioner on October 4, 2004.

By letter dated October 25, 2004, (the October 25 correspondence) Petitioner corresponded with Respondent as to

the disallowance. The import of the October 25 correspondence and the enclosures with the correspondence are in dispute. Petitioner asserts in this proceeding that the October 25 correspondence constitutes a petition to challenge the disallowances set forth in the Notice and Explanation. Petitioner further asserts that all requisite enclosures were enclosed with the correspondence. Respondent and Intervenors dispute that the October 25 correspondence constitutes a valid petition. They further dispute that the correspondence included requisite enclosures. They also argue that the October 25 correspondence cannot be a valid petition because Petitioner served it by regular mail, not certified mail. As will be discussed in detail below, the applicable statute is Section 440.13(7), Florida Statutes (2004), and the applicable rule is Florida Administrative Code Rule 59A-31.002.[1]

It should be noted that the issue before the undersigned is whether Petitioner filed a valid petition with Respondent. The merits of the underlying dispute pertaining to the utilization review is not at issue and will not be discussed. Also not at issue and not discussed is whether Petitioner should have an opportunity to amend the October 25 correspondence should it be determined that the correspondence was an invalid petition.

The claimant is not a party to this proceeding because the provider cannot bill the claimant for the disallowed services.

See Furtick v. William Shults Contractor, 664 So. 2d 288 (Fla. 1st DCA 1995).

At the final hearing, Petitioner presented the testimony of Vinnette Febus and Donna Reynolds. Ms. Febus is Petitioner's records custodian. Ms. Reynolds, a Registered Nurse, is employed by Respondent and was responsible for responding to both the October 25 correspondence and the dispute that ensued between Petitioner and Intervenors. Petitioner offered one composite exhibit, which was admitted into evidence. Respondent recalled Ms. Reynolds during its case in chief and presented three exhibits, two of which were composite exhibits and each of which was admitted into evidence. Intervenors presented no testimony and no exhibits.[2]

A Transcript of the proceedings was filed on August 8, 2005. Petitioner filed a Proposed Recommended Order and Respondent and Intervenors filed a Joint Proposed Recommended Order. The parties' Proposed Recommended Orders have been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At the times relevant to this proceeding, Intervenors had accepted that the claimant had suffered a compensable injury under the Florida workers' compensation laws and had paid

benefits to and on behalf of claimant. The date of the compensable injury was July 8, 1994.

2. On September 30, 2004, Mr. Spangler, as counsel for the carrier, prepared the Notice that was received by Petitioner on October 4, 2004. The Notice provided, in part, as follows:

> The purpose of this letter is to inform you of the findings from the Carrier's utilization review investigation. Based upon the opinions of Carrier Medical Consultants, the Carrier has concluded that there has been overutilization and/or misutilization since the treatment has been excessive and not medically necessary. Additionally, it appears that some bills may not have been timely submitted to the Carrier. . . .
>
> Accordingly, the Carrier has decided that specific dates of service will be disallowed and they are as follows:
>
> 04/26/04, 06/01/04, 07/12/04
>
> Based upon its utilization review investigation, the Carrier also believes that the treatment rendered on the following dates [sic] was also excessive, and neither reasonable nor medically necessary. Nevertheless, the Carrier has agreed to reimburse for these specific dates [sic] of service which are as follows:
>
> 08/17/04
>
> As the health care provider, you have certain rights and responsibilities under Florida Statutes and Florida Administrative Code. This office sent you a very detailed letter that explained the requirements and procedures under the utilization review provisions of Section 440.13(7), Florida Statutes.
>
> Please note the under Section 440.13(7)(a), Florida Statutes, "Any health care provider . . . who elects to contest the disallowance . . . of payment by a carrier under 440.13 subsection (6) must,

> within 30 days after receipt of notice of disallowance petition the agency to resolve the dispute." The 30 days begin to run from the date this letter is received. Additionally, please find enclosed the Explanation of Benefits regarding these dates of service.
>
> Please reference our previous correspondence forwarded to you or contact the undersigned if you have any questions concerning this matter.

3. Enclosed with the carrier's letter of September 30, 2004, was the Explanation, which consisted of two pages.

4. The carrier's Notice was a "disallowance of payment" within the meaning of Section 440.13(7), Florida Statutes, and a "reimbursement decision" within the meaning of Florida Administrative Code Rule 59A-31.002.

5. Petitioner mailed a letter to Respondent dated October 25, 2004, that was received by Respondent's mailroom and delivered to Ms. Reynolds on November 1, 2004. Ms. Reynolds testified that the envelope for the letter reflected that it was mailed on October 29, 2004, in Miami. The two-page letter, which has been redacted to protect the privacy of the claimant, stated the following:

> I am a Board Certified physician in the field of psychiatry. I have been the treating physician, under the worker's compensation law, for the above noted patient for many years. I undertook [her/his] treatment on September 19, 2000, at the request of the carrier, following retirement of [her/his] original treating physician. At the that time [she/he] was

already adjudicated permanent total disability and it [sic] was already determined to be suffering from severe depression, on various medications and needing continued follow-up care.

I was advised by the patient's attorney that the carrier was trying to close the case including closing the medical. The patient however is in need of continued medical care and has no viable alternative source therefore.

I then received various communications from the insurance carrier's attorney pointing out their rational [sic] for disallowance of medically necessary services. In my field the doctor-patient relationship is of course particularly important and it would be most detrimental to the patient and, at least at this point, I declined to follow a course of curtailing needed services.

I then received the enclosed communication disallowing payment for 4 [sic] recent visits per the enclosure. The letter advises to challenge the same it is necessary to "petition" the agency within 30 days of notification. My office was unable to determine to whom I was supposed to respond and in what form. I accordingly incredibly was required to seek the assistance of an attorney to simply try to top [sic] track down whom I was supposed to contact and in what manner. The attorney advises me that after his personal efforts for in excess of two hours, multiple calls including office of employee assistance, AHCA itself several times, Division of Worker's Compensation and several faxed letters that he was provided the above address. I am further advised that there is no form for this petition, but a responding letter will serve as the petition.

Before my addressing the 4 [sic] bills I would suggest it imperative that you need to address a requirement that the carrier in any disallowing communication be required to advise as to whom is to be contacted if

> objection is made and that a letter will suffice.
>
> Given the diagnosis of the patient, Major Depressive Disorder, Recurrent, Severe, With Psychotic Features, it is the accepted guidelines of treatment based on research and practice to combine the use of individual psychotherapy and psychotropic medication for maximum results.
>
> This patient's care has been minimized to 6 visits a year and I don't see how she can be treated with less frequency and time than that. The minimum time that can be given with this frequency of visits is at least 45-60 minutes to obtain results. An alternative would be twice a month visits of 25 minutes, which will be more costly.
>
> If any additional information is needed to expedite my petition please advise.

6. It is undisputed that three forms completed and signed by Petitioner were enclosed with the letter of October 25, 2004. Each form was captioned "Workmen [sic] Compensation Report" (the Report forms) and were, respectively, for the dates of service April 26, 2004; June 1, 2004; and July 12, 2004, that are at issue in this proceeding (the dates of service).[3] The three Report forms were the only enclosures with the letter of October 25 received by Ms. Reynolds on November 1, 2004.

7. Ms. Febus typed and mailed the letter of October 25. Ms. Febus testified that in addition to the three Report forms, she also included with the October 25 letter a "Health Insurance Claim Form" for each date of service, the Notice, and the two-page Explanation.

8. The original of each of the Health Insurance Claim Forms was mailed to the carrier and constituted a billing for the services rendered to the claimant by Petitioner on each respective date of service. Petitioner introduced as part of its composite exhibit a copy of his file copy of each Health Insurance Claim Form. Each of the Health Insurance Claim Forms introduced by Petitioner (the three forms Ms. Febus testified she enclosed with the October 25 correspondence) reflects that Petitioner signed the form on December 22, 2004 (block 31 of each form), and that the claimant signed a release of medical information on December 22, 2004 (block 12 on each form). These three Health Insurance Claim Forms were the only billings that Petitioner alleged was enclosed with the October 25 correspondence.

9. Ms. Febus' testimony was based on her memory. She did not note on the letter the list of enclosures (other than a reference to the Notice) and she did not keep a file copy of her complete submission package.

10. The mailing of the October 25 correspondence was by regular mail, not certified mail. A notation on the bottom of Petitioner's letter reflects that a copy was mailed to the carrier's adjuster, to Mr. Spangler, and to Mr. Keyfetz. Each of these mailings was by regular mail. There was no evidence as to what enclosures were included with any of these mailings and

there was no indication on the letter whether the copies included the enclosures.

11. On November 1, 2004, after her review of the October 25 correspondence, Ms. Reynolds telephoned Petitioner's office and talked to Ms. Febus. Ms. Reynolds believed the correspondence constituted an inquiry, not a petition to resolve a disputed disallowance. Ms. Reynolds and Ms. Febus discussed the applicable statute and rule and they discussed the required contents of a petition to resolve a disputed disallowance. Ms. Reynolds and Ms. Febus did not discuss the enclosure that had been received with the October 25 correspondence.

12. On November 1, 2004, Ms. Reynolds followed up her conversation with Ms. Febus by sending her an e-mail. Ms. Reynolds' e-mail provided, in part, the following:

> This is a continuation of our telephone conversation of today regarding the 10-25-04 letter from Dr. Merayo. Attached are 2 documents which may assist to orient you to 2 sections of the Florida WC Law which may impact the issues which are spoken to in the letter. Please feel free to call me for further discussion regarding Florida's WC Law and the medical issues that you may have questions [sic].
>
> The 2 sections of the law that I immediately wish to draw your attention to are: ss. 440.13 and subsection 7(a) and ss. 440.192 F.S.
>
> The second section deals with the CLAIMANT'S benefits under Fla. WC Law ... these issues, when impacted, are decided by a Judge of Compensation Claims, following

> the submission of a proper request by the CLAIMANT.
>
> THE FIRST SECTION, ss. 440.13(7), F.S., addresses the way a dispute is submitted to this Agency (using the address below).
>
> Should you have further questions, do not hesitate to contact me.

13. Ms. Reynolds attached to her e-mail copies of Sections 440.192 and 440.13(7), Florida Statutes, and Florida Administrative Code Rule 59A-31.002.

14. Section 440.192, Florida Statutes, pertains to disputes between a claimant and a carrier that are resolved by a Judge of Compensation Claims. Those provisions are not relevant to the issues in this proceeding.

15. Section 440.13(7), Florida Statutes, pertains to reimbursement disputes between a provider and a carrier and provides in relevant part, 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 timely 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, practice parameters, and protocols of treatment, 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. ...

16. Florida Administrative Code Rule 59A-31.002, provides as follows:

> In those instances when a provider does not agree with a carrier's reconsidered reimbursement decision, the Agency will, upon request, provide for a settlement of such reimbursement dispute through a review process conducted by the Agency's Bureau of Managed Care.
>
> (1) The provider, the carrier or the employer may request a resolution to a reimbursement dispute from the Agency. A valid Request for Resolution of Disputed Reimbursement must:

(a) Be in writing and specify the specific service(s) and policy being disputed.

(b) Include copies of the following:

1. All bills submitted or resubmitted that are related to the services in question and their attachments.

2. All applicable Explanations of Medical Benefits.

3. All correspondence between the carrier and provider which is relevant to the disputed reimbursement.

4. Any notation of phone calls regarding authorization.

5. Any pertinent or required health care records or reports or carrier medical opinions.

(2) The Agency's response to a valid disputed reimbursement request will:

(a) Be within 60 days of receipt.

(b) Establish the proper reimbursement amount, including over and under payments.

(c) Identify the basis for the decision.

(d) Be sent to the provider, carrier and employer.

(e) Be in writing.

(f) Provide for reconsiderations through physicians and peer review before an appeal [sic] pursuant to Section 120.57, Florida Statutes.

(3) Requests for Resolution of Disputed Reimbursement will be returned as not valid when:

(a) The required documentation is not included with the request.

(b) The date of the request for a reconsideration exceeds the time requirements as specified in this section.

. . .

17. The next communication between Petitioner and Respondent was in the form of a letter dated December 22, 2004, from Mr. Keyfetz on behalf of Petitioner to Respondent. After

referencing the reimbursement dispute, the letter provided as follows:

> I am in receipt of copy of responsive petition by Dr. Merayo dated October 25, 2004, in connection with the above matter. Dr. Merayo advises he has received no response thereto let alone the required response within 10 days receipt by the carrier. It is provided:
>
> Failure of the carrier to timely submit the requested documentation to the agency within 10 days constitutes a waiver of all objections to the petition.
>
> We await your written determination, which is now due regarding the carrier disallowance of these amounts.

18. The letter from Mr. Keyfetz dated December 22, 2004, prompted a letter from Mr. Spangler on behalf of the carrier dated December 30, 2004. After receiving a copy of Mr. Spangler's letter, Mr. Keyfetz wrote a second letter to Respondent on January 5, 2005, that attempts to refute Mr. Spangler's letter and again demands a written determination of the disputed reimbursements.

19. On January 26, 2005, Ms. Reynolds responded to Petitioner with copies to Mr. Keyfetz and Mr. Spangler.

> This is to acknowledge not only your letter of October 25, 2004, but also the correspondence recently received from [Mr. Keyfetz and Mr. Spangler].
>
> At issue is the acknowledgment of correspondence sent by you to this office dated October 25, 2004, received by this office on November 1, 2004. This correspondence was a two-page letter with reference to a disallowance of payment for

treatment rendered to the claimant: [name redacted]. Attachments to this letter were 3 progress reports dated: 08-12-04, 06-01-04, and 04-26-04, from the Merayo Medical Arts Group and signed with your apparent signature. The progress reports show [claimant's] Date of Accident (D/A) as 07-08-1984.

On November 1, 2004, in response to this correspondence, I telephoned your office and spoke with Vinette, who identified herself as a representative of your office staff. It was during this telephone conversation, I clarified the definition of a disallowance, denial and a payment made at a different amount from that which was billed. Each of these circumstances has specific procedures, which must be met in order to address a disagreement concerning the carrier's action.

I followed this conversation with an e-mail sent, at Vinette's direction to ... I have attached a copy of this e-mail and the attachments contained in this e-mail to this letter.

I have had no follow-up communication from your office following this action. No file was established in this office. This correspondence was handled as an inquiry.

However, subsequent to this action, on December 27 [, 2004] and on January 10, 2005, letters were received from [Mr. Keyfetz] regarding your original October 25, 2004, correspondence. [Mr. Spangler], the carrier's representative, sent a letter dated December 30, 2004.

This is to inform you that this office cannot address the issues brought forward except to clarify to you sections of Chapter 440, which may be of import to your quest for assistance.[4]

* * *

You failed to comply with these requirements as a contested disallowance or adjustment of payment by the carrier. I

> have dismissed this correspondence as an invalid submission of a reimbursement dispute.[5]

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

21. Petitioner has the burden of proving that he timely filed a valid petition with Respondent. That burden is by a preponderance of the evidence. See Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981), and Section 120.57(1)(j), Florida Statutes.

22. A “preponderance” of the evidence means the greater weight of the evidence. See Fireman's Fund Indemnity Co. v. Perry, 5 So. 2d 862 (Fla. 1942).

23. “Competent” evidence must be relevant, material and otherwise fit for the purpose for which it is offered. See Gainesville Bonded Warehouse v. Carter, 123 So. 2d 336 (Fla. 1960), and Duval Utility Co. v. FPSC, 380 So. 2d 1028 (Fla. 1980).

24. "Substantial" evidence must be sufficient to allow a reasonable mind to accept the evidence as adequate to support a conclusion. See Degroot v. Sheffield, 95 So. 2d 912 (Fla.

1957), and Agrico Chemical Co. v. Fla. Dept. of Environmental Regulation, 365 So. 2d 759 (Fla. 1st DCA 1978).

25. The testimony by Ms. Febus that she enclosed in the letter dated October 25, 2004, a copy of the three Health Insurance Claim Forms is not credible since each form reflects signatures dated December 22, 2004. It is concluded that Petitioner failed to meet his burden of proof in this proceeding because he failed to prove by credible evidence that he enclosed with his October 25 correspondence all enclosures required by Section 440.13(7), Florida Statutes, and Florida Administrative Code Rule 59A-31.002(1). Petitioner's argument that the correspondence was in substantial compliance with the applicable statute and rule is rejected as being contrary to the greater weight of the competent evidence.

26. On November 1, 2004, Ms. Reynolds reviewed the correspondence of October 25, 2005, and reasonably concluded that the correspondence was an inquiry. She appropriately responded to that inquiry by telephoning Petitioner's records custodian and e-mailing her copies of the applicable statute and rule. The letter from Mr. Keyfetz dated December 22, 2004, specifically advised, for the first time, that Petitioner considered the October 25 correspondence to be a petition, not an inquiry. Once Ms. Reynolds knew that Petitioner considered the October 25 correspondence to be a petition to resolve a

disputed disallowance, she was required to review the correspondence and determine whether the petition satisfied appropriate statutory and rule criteria. Ms. Reynolds correctly determined that the petition did not meet that criteria. She further correctly determined that the petition should be dismissed pursuant to Section 440.13(7)(a) Florida Statutes.

27. Because of the foregoing conclusions, Petitioner's contention that Intervenors have waived all objections to the petition pursuant to Section 440.13(7)(b), Florida Statutes, because the carrier did not respond to the correspondence within 10 days of its receipt by the adjuster for the carrier is moot.

28. Also moot is the contention by Respondent and Intervenors that the correspondence of October 25 is invalid because it was served by regular mail, not by certified mail.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent enter a final order dismissing the October 25 correspondence as an invalid petition.

DONE AND ENTERED this 29th day of September, 2005, 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 29th day of September, 2005.

ENDNOTES

1/ Unless otherwise noted, all statutory references are to Florida Statutes (2004) and all rule references are to the version of the rule in the Florida Administrative Code as of the date of this Recommended Order.

2/ Prior to the hearing, counsel for Intervenor filed a copy of the deposition of the carrier's adjuster (Arnie Blake) with DOAH. This deposition was not admitted into evidence. See transcript, page 102, lines 16-19. The joint Proposed Recommended Order filed by Respondent and Intervenors erroneously reflects that Intervenors moved the deposition into evidence.

3/ The amount in controversy for each date of service is $180.00 and the total amount in controversy is $540.00.

4/ The letter sets forth the relevant portions of Section 440.13(7)(a), Florida Statutes, and Florida Administrative Code Rule 59A-31.002, which have been set forth above and need not be repeated.

5/ The letter then advised Petitioner of his rights pursuant to Chapter 120, Florida Statutes, which need not be repeated.

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.