STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FCCI INSURANCE GROUP, Petitioner, vs. AGENCY FOR HEALTH CARE ADMINISTRATION, Respondent, and CAPE CANAVERAL HOSPITAL, INC., HOLMES REGIONAL MEDICAL CENTER, INC., AND INDIAN RIVER MEMORIAL HOSPITAL, Intervenors.	)	Case Nos. 05-2018 05-2161 05-2204 05-2205 05-2206 05-2207 05-2256 05-2257

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the formal hearing in this proceeding on January 18 and 19, 2006, in Orlando, Florida, and on January 31, 2006, in Tallahassee, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Daniel R. Goodman, Esquire
Cindy R. Galen, Esquire
Eraclides, Johns, Hall, Gelman, Eikner & Johannssen, LLP
Post Office Box 49137
Sarasota, Florida 34230-9137

For Respondent: Joanna Daniels, Esquire
Agency for Health Care Administration
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Intervenors: Karen Walker, Esquire
Matthew H. Mears, Esquire
Holland & Knight LLP
Post Office Drawer 810
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue for determination is whether Intervenors are entitled to reasonable attorney fees and costs pursuant to Section 120.595, Florida Statutes (2003).[1]

PRELIMINARY STATEMENT

On December 9, 2005, Intervenors filed Hospitals' Motion for Attorneys' Fees. The motion seeks attorney fees and costs pursuant to Section 120.595, Florida Statutes (2003).

At the formal hearing, Intervenors presented the testimony of eight witnesses and submitted 43 exhibits for admission into evidence. Petitioner called one witness and submitted no exhibits for admission into evidence.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the four-volume Transcript filed with DOAH on March 6 and 7, 2006. On March 14, 2006, the ALJ granted Petitioner's request to extend the time in which to file proposed recommended orders (PROs) until March 27, 2006.

Intervenors and Respondent timely filed their single PRO on March 27, 2006. Petitioner filed its PRO on March 28, 2006.

FINDINGS OF FACT

1. Petitioner is an insurer and carrier within the meaning of Subsections 440.02(4) and 440.02(38), Florida Statutes (2005), and Florida Administrative Code Rule 69L-7.602(1)(w).[2] Petitioner is licensed in the state as a workers' compensation insurance carrier (carrier).[3]

2. Respondent is a state agency within the meaning of Subsection 440.02(3), Florida Statutes (2005), and Florida Administrative Code Rule 69L-7.602(1)(b). In relevant part, Respondent is responsible for resolving reimbursement disputes between a carrier and a health care provider.

3. Intervenors are health care providers within the meaning of Subsection 440.13(1)(h), Florida Statutes (2005), and Florida Administrative Code Rule 69L-7.602(1)(u). Each Intervenor is a health care facility within the meaning of Subsection 440.13(1)(g), Florida Statutes (2005).

4. Intervenors seek an award of attorney fees and costs against Petitioner pursuant to Sections 57.105 and 120.595, Florida Statutes (2003). The proceeding involving Section 57.105, Florida Statutes (2003), is the subject of a separate Final Order entered on the same date as this

Recommended Order. The scope of this Recommended Order is limited to Section 120.595, Florida Statutes (2003).

5. Intervenors allege that Petitioner is the "non-prevailing adverse party" in an underlying proceeding and participated in the underlying proceeding for an "improper purpose" as the quoted terms are defined, respectively, in Subsections 120.595(1)(e)3. and 120.595(1)(e)1., Florida Statutes (2003). The underlying proceeding involves eight consolidated Petitions for Administrative Hearing.

6. Petitioner filed each Petition for Administrative Hearing after Respondent determined Petitioner had improperly discounted the amount of reimbursement Petitioner paid for hospital services that Intervenors provided to eight patients from March 13, 2004, through February 11, 2005. From April 13 through May 23, 2005, Respondent issued separate orders directing Petitioner to pay the disputed amounts pursuant to Subsection 440.13(7), Florida Statutes (2005). From June 1 through June 21, 2005, Petitioner filed eight separate Petitions for Administrative Hearing. The eight petitions were subsequently consolidated into one underlying proceeding.

7. Petitioner is the non-prevailing adverse party in the underlying proceeding. On December 8, 2005, Petitioner filed a Notice of Voluntary Dismissal in the underlying proceeding.

8. On December 9, 2005, Intervenors filed their motion for attorney fees based on Section 120.595, Florida Statutes (2003). The formal hearing in the underlying proceeding was set for January 18, 2006. The ALJ amended the issue for the formal hearing to exclude the original reimbursement dispute and to limit the scope of the formal hearing to the fee dispute. The ALJ did so to avoid delay in the resolution of the proceeding.

9. The fee dispute at issue in this proceeding includes only six of the original eight reimbursement disputes because Intervenors were not the medical providers in two of the original eight disputes.[4] In the six reimbursement disputes involving Intervenors, Respondent ordered Petitioner to pay additional reimbursements in the aggregate amount of $54,178.52.

10. Approximately $51,489.27 of the $54,178.52 in additional reimbursement involved inpatient hospital services provided to one patient.[5] The remaining $2,689.25 in additional reimbursement involved outpatient hospital services in the emergency room.[6]

11. Subsection 440.13(12), Florida Statutes (2005), mandates that a three-member panel must determine statewide schedules for reimbursement allowances for inpatient hospital care. The statute requires hospital outpatient care to be reimbursed at 75 percent of "usual and customary" charges with certain exceptions not relevant to this proceeding.

12. Notwithstanding the statutory mandate to schedule reimbursement rates for hospital inpatient services, the inpatient services at issue in the underlying proceeding were apparently unscheduled inpatient services. By letter dated April 13, 2005, Respondent ordered Petitioner to pay Intervenor, Holmes Regional Medical Center, Inc. (Holmes), an additional reimbursement in the amount of $51,489.27. The total reimbursement to Holmes was 75 percent of the charges that Holmes submitted to Petitioner for reimbursement.[7]

13. Respondent interprets Subsection 440.13(12), Florida Statutes (2005), to authorize reimbursement of both unscheduled inpatient hospital services and outpatient hospital services at the same rate. There is no dispute that Respondent reimburses unscheduled inpatient hospital services and outpatient hospital services at 75 percent of the "usual and customary" charges.

14. The dispute in the underlying proceeding was over the meaning of the phrase "usual and customary" charges. Petitioner challenged the interpretation asserted by Respondent and Intervenors.

15. Respondent and Intervenors contended that the quoted statutory phrase means Intervenors' usual and customary charges evidenced in a proprietary document identified in the record as the "charge master." Each Intervenor maintains its own charge

master, and the information in each charge master is proprietary and confidential to each Intervenor.

16. Petitioner asserted that the statutory phrase "usual and customary" charges means the usual and customary charges imposed by other hospitals in the community in which Intervenors are located. Petitioner maintains a data base that contains information sufficient to determine the usual and customary charges in each community.

17. Petitioner did not participate in the underlying proceeding for an improper purpose within the meaning of Subsection 120.595(1)(e)1., Florida Statutes (2003). Rather, Petitioner presented a good faith claim or defense to modify or reverse the then-existing interpretation of Subsection 440.13(12), Florida Statutes (2005).

18. Petitioner had a reasonable expectation of success. The statutory phrase "usual and customary" charges is not defined by statute. Nor has the phrase been judicially defined. Respondent bases its interpretation of the disputed phrase on two agency final orders and relevant language in the Florida Workers' Compensation Reimbursement Manual for Hospitals (2004 Second Edition) (the Manual). The Manual is developed by the Florida Department of Financial Services (DFS).[8]

19. The Manual interprets the quoted statutory phrase to mean the "hospital's charges." However, after the effective

date of the Manual in 2004, DFS developed a proposed change to the Manual that, in relevant part, interprets "usual and customary" charges to mean the lesser of the charges billed by the hospital or the median charge of hospitals located within the same Medicare geographic locality.[9]

20. The trier of fact does not consider the new interpretation of the disputed statutory phrase as evidence relevant to a disputed issue of fact. As Respondent determined in an Order to Show Cause issued on February 16, 2006, and attached to Intervenors' PRO, "what constitutes 'usual and customary' charges is a question of law, not fact."

21. The ALJ considers the new interpretation proposed by DFS for the purpose of determining the reasonableness of the interpretation asserted by Petitioner in the underlying proceeding. The ALJ also considers the new DFS interpretation to determine whether the interpretation asserted by Petitioner presented a justiciable issue of law.

22. Intervenors assert that Petitioner's improper purpose in the underlying proceeding is evidenced, in relevant part, by Petitioner's failure to initially explain its reduced reimbursement to Intervenors with one of the codes authorized in Florida Administrative Code Rule 69L-7.602(5)(n) as an explanation of bill review (EOBR). None of the EOBR codes,

however, contemplates a new interpretation of the statutory phrase "usual and customary" charges.

23. Intervenors further assert that Petitioner's improper purpose in the underlying proceeding is evidenced, in relevant part, by Petitioner's failure to respond to discovery. However, responses to discovery would not have further elucidated Petitioner's rule-challenge. Petitioner stated eight times in each Petition for Administrative Hearing that Florida Administrative Code Rule 69L-7.501, the DFS rule incorporating the Manual by reference:

> [S]hould be read to allow recovery of 75% of the usual and customary fee prevailing in the community, and not 75% of whatever fee an individual provider elects to charge.

Respondent and Intervenors were fully aware of the absence of statutory and judicial authority to resolve the issue.

24. Petitioner did raise at least one factual issue in each Petition for Administrative Hearing. Petitioner alleged that Respondent's decision letters ordering Petitioner to pay additional reimbursement amounts had no legal effect because Respondent acted before each provider requested and received the carrier's reconsidered reimbursement decision.

25. The absence of a formal hearing in the underlying proceeding foreclosed an evidential basis for a determination of whether each provider in fact requested and received a

reconsidered reimbursement decision before the date Respondent ordered Petitioner to pay additional reimbursements. In this fee dispute, Petitioner presented some evidence to support the factual allegation and thereby established the presence of a justiciable issue of fact. It is not necessary for Petitioner to present enough evidence to show that Petitioner would have prevailed on that factual issue in the underlying proceeding.

26. If the letters of determination issued by Respondent were without legal effect, Petitioner would not have waived its objections to further reimbursement within the meaning of Subsection 440.13(7)(b), Florida Statutes (2005). A determination that Petitioner did, or did not, submit the required information is unnecessary in this proceeding.

27. During the formal hearing in this proceeding, Petitioner called an expert employed by a company identified in the record as Qmedtrix. The testimony showed a factual basis for the initial reimbursement paid by Petitioner. It is not necessary for Petitioner to show that this evidence was sufficient to prevail on the merits in the underlying case. The evidence is sufficient to establish justiciable issues of fact in the underlying case.

28. In this proceeding, Petitioner submitted some evidence of justiciable issues of fact in the underlying proceeding. Petitioner need not submit enough evidence in this fee dispute

to show Petitioner would have prevailed on these factual issues in the underlying proceeding.

29. Intervenors are not entitled to a presumption that Petitioner participated in this proceeding for an improper purpose in accordance with Subsection 120.595(1)(c), Florida Statutes (2003). Although Petitioner was the non-prevailing party in two previous administrative hearings involving the same legal issue, the two proceedings were not against the same prevailing hospital provider and did not involve the same "project" as required in the relevant statute.

30. Intervenors seek attorney fees in the amount of $36,960 and costs in the amount of $2,335.37 through the date that Petitioner voluntarily dismissed the underlying proceeding. Absent a finding that Petitioner participated in the underlying proceeding for an improper purpose, it is unnecessary to address the amount and reasonableness of the attorney fees and costs sought by Intervenors.

31. If it were determined that Petitioner participated in the underlying proceeding for an improper purpose, the trier of fact cannot make a finding that the proposed attorney fees and costs are reasonable. Such a finding is not supported by competent and substantial evidence.

32. The total attorney fees and costs billed in the underlying proceeding were charged by six or seven attorneys or

paralegals employed by the billing law firm. However, the fees and costs at issue in this proceeding exclude any time and costs charged by paralegals and include only a portion of the total fees and costs charged by the attorneys.

33. The total amount of time billed and costs incurred in the underlying proceeding is evidenced in business records identified in the record as Intervenors' Exhibits 20-23. However, those exhibits do not evidence the reasonableness of the fees and costs billed by the attorneys.[10]

34. Either the testimony of the billing attorneys or the actual time slips may have been sufficient to support a finding that the attorney fees and costs are reasonable. However, Intervenors pretermitted both means of proof.

35. Intervenors asserted that the time slips contain information protected by the attorney-client privilege. However, Intervenors neither submitted redacted time slips nor offered the actual time slips for in-camera review. Nor did Intervenors allow the attorneys to testify concerning unprivileged matters.

36. The absence of both the testimony of the attorneys and the time slips is fatal. The fact-finder has insufficient evidence to assess the reasonableness of the fees and costs, based on the novelty and difficulty of the questions involved.

37. Intervenors' expert opined that the attorney fees and costs are reasonable. The expert based her opinion, in relevant part, on her review of the actual time slips maintained by each attorney. However, Petitioner was unable to review the time slips before cross-examining the expert.

38. In lieu of the actual time slips, Intervenors submitted a summary of the nature of the time spent by each attorney. The summary is identified in the record as Intervenors' Exhibit 2.

39. Petitioner objected to Intervenors' Exhibit 2, in relevant part, on the ground that it is hearsay. The ALJ reserved ruling on the objection and invited each side to brief the issue in its respective PRO. The paucity of relevant citations in the PROs demonstrates that neither side vigorously embraced the ALJ's invitation.

40. Intervenors' Exhibit 2 is hearsay within the meaning of Subsection 90.801(1)(c), Florida Statutes (2005).[11] The author of Intervenors' Exhibit 2 summarized the unsworn statements of attorneys from their time slips and submitted those statements to prove the truth of the assertion that the time billed was reasonable. Intervenors made neither the attorneys nor their time slips available for cross examination.[12]

41. Even if the summary were admissible, the summary and the testimony of its author are insufficient to show the

attorney fees and costs were reasonable. The insufficiency of the summary emerged during cross-examination of its author. The author is the lone attorney from the billing law firm who testified at the hearing.

> Q. What other information did you look at to decide what time to actually bill . . .?
>
> A. The information I used was the information from the actual bill.
>
> Q. If we look at the first entry . . . were you the person that conducted that telephone conference?
>
> A. No, I wasn't.

Transcript (TR) at 510-511.

> Q. In other words, [the entries] go with the date as opposed to the event [such as a motion to relinquish]?
>
> A. That's correct.
>
> Q. So if I wanted to know how much time it took you to actually work on the motion to relinquish, I would have to look at each entry and add up all the hours to find out how long it took you to do one motion. Is that how I would do that?
>
> A. It would be difficult to isolate that information from this record, we bill and explain in the narrative what work is performed each day, and unless that was the single thing worked on for several days, there would be no way to isolate the time, because we don't bill sort of by motion or topic. . . .
>
> Q. Well, if I'm trying to decide whether the time billed is reasonable, wouldn't I

need to know how much time was spent on each task?

A. I'm not sure how you would want to approach that. . . . Looking at this document, it does not give you that detail. It doesn't provide that breakout of information.

Q. Is there a way for us to know who you spoke with on those entries?

A. The entry . . . doesn't specify who participated in the conference. . . . I don't recall what the conference entailed . . . . And many of these entries are from months ago, and I can't specifically recall on that date if I was involved in a conference and who else might have been there. . . . And so my guess is . . . where the conference is listed on a day when lots of activity was performed on behalf of the client, most of it in this case was research.

TR at 516-521.

CONCLUSIONS OF LAW

42. DOAH has jurisdiction over the parties and subject matter in this proceeding. §§ 120.569 and 120.595, Fla. Stat. (2003). DOAH provided the parties with adequate notice of the formal hearing.

43. The burden of proof is on Intervenors to show entitlement to reasonable attorney fees and costs. Lee Engineering & Construction Co. v. Fellows, 209 So. 2d 454, 457 (Fla. 1968); Mason v. Reiter, 564 So. 2d 142, 146 (Fla. 3d DCA 1990). In relevant part, Intervenors must show by a

preponderance of the evidence that Petitioner is the non-prevailing adverse party in the underlying proceeding, that Petitioner participated in the underlying proceeding for an improper purpose, and that the amount of attorney fees and costs is reasonable. § 120.595(1), Fla. Stat. (2003).

44. Intervenors showed by a preponderance of the evidence that Petitioner is the non-prevailing adverse party in the underlying proceeding. Petitioner failed to substantially change the outcome of the proposed agency action. § 120.595(1)(e)3, Fla. Stat. (2003).

45. The preponderance of evidence does not support a finding that Petitioner participated in the underlying proceeding for an improper purpose. Rather, the evidence shows Petitioner made a good faith attempt to modify the agency's interpretation of "usual and customary" charges in Subsection 440.13(12), Florida Statutes (2005).

46. Subsection 57.105(2), Florida Statutes (2003), prohibits an award of attorney fees and costs when a party asserts a claim or defense in a good faith attempt to modify existing law and demonstrates a reasonable expectation of success. Legislative provisions in Subsection 57.105(2), Florida Statutes (2003), provide an appropriate basis for ascertaining legislative intent for Subsection 120.595, Florida Statutes (2003). See G.E.L. Corporation v. Department of

Environmental Protection, 875 So. 2d 1257, 1262 (Fla. 5th DCA 2004) reh. denied July 1, 2004 (amendment to § 57.105(5) providing that voluntary dismissal by a non-prevailing party does not divest ALJ of jurisdiction to award attorney fees is properly construed as legislative intent for jurisdiction in § 120.595, Fla. Stat. (2003)).[13]

47. A party that asserts a good faith and soundly based attempt to change an existing rule of law is not subject to attorney fees. Compare Jones v. Charles, 518 So. 2d 445 (Fla. 4th DCA 1988)(applying the stated proposition in a negligence action). Petitioner had a reasonable basis to seek to modify Respondent's interpretation of a rule promulgated by DFS.

48. DFS has recently developed proposed changes to the relevant rule. Relevant portions of the proposed changes are substantially similar to the statutory interpretation that Petitioner asserted in the underlying proceeding.

49. Petitioner submitted the proposed rule after the conclusion of the evidentiary hearing. Intervenors moved to strike it from the record. The ALJ denies the motion to strike.

50. As Respondent determined in an order attached to Intervenors' PRO, the correct interpretation of the phrase "usual and customary" charges presents an issue of law, not fact. Intervenors presented their legal arguments in the motion to strike. The ALJ is unpersuaded.

51. The proposed changes to the existing definition of "usual and customary" charges may indicate the intent of DFS to clarify its interpretation of the quoted statutory phrase rather than change its interpretation. See G.E.L. Corporation, 875 So. 2d at 1262-1263 (subsequently enacted legislation may indicate legislative intent to clarify the law rather than change it). Even if the proposed rule were intended to change the agency's interpretation of the quoted statutory phrase, Subsection 440.13(12), Florida Statutes (2005), is procedural, and an interpretation of a procedural law may be applied retroactively. Compare Terners of Miami Corporation v. Freshwater, 599 So. 2d 674 (Fla. 1st DCA 1992)(former § 440.13(2)(i) is procedural and may be applied retroactively).

52. If the proposed rule were to emerge as a correct interpretation of the statutory phrase "usual and customary" charges, the proposed and original interpretations would be mutually exclusive. Under such circumstances, the original interpretation adopted in the rule in effect in 2004 would have been an invalid exercise of delegated legislative authority within the meaning of Subsection 120.52(8), Florida Statutes (2003). The original interpretation would have enlarged, modified, or contravened the specific provisions of Subsection 440.13(12), Florida Statutes (2003).

53. In order to preserve the validity of the rule in effect in 2004, it would be necessary to interpret the rule in accordance with the proposed change, nunc pro tunc. An agency is authorized to adopt only those rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. § 120.52(8), Fla. Stat. (2003).

54. The competing agency interpretations of the statutory phrase "usual and customary" charges illustrate the reasonableness and justiciability of the interpretation asserted by Petitioner in the underlying case. Petitioner need not show in this proceeding that its asserted interpretation would have prevailed in the underlying proceeding or that DFS will adopt the proposed rule changes.

55. Petitioner was legally entitled to challenge the existing rule in a proceeding conducted pursuant to Subsection 120.57(1), Florida Statutes (2003). If the challenged rule were invalid, the agency could not have enforced the rule merely because Petitioner did not initiate a separate rule challenge pursuant to Section 120.56, Florida Statutes (2003).

56. Sections 120.56 and 120.57, Florida Statutes (2003), authorize joint and several procedures for challenging proposed agency action. Petitioner elected to challenge an existing rule

in a proceeding conducted pursuant to Subsection 120.57(1), Florida Statutes (2003).

57. Duplicative proceedings under Sections 120.56 and 120.57, Florida Statutes (2003), are not required if a party's rule challenge is presented with other grievances in a proceeding conducted pursuant to Subsection 120.57(1), Florida Statutes. State ex rel. Department of General Services v. Willis, 344 So. 2d 580, 592 (Fla. 1st DCA 1977); accord St. Joe Paper Company v. Florida Department of Natural Resources, 536 So. 2d 1119, 1122 (Fla. 1st DCA 1989); McDonald v. Department of Banking and Finance, 346 So. 2d 569, 580 (Fla. 1st DCA 1977). The legislature has adopted judicial construction of the relevant statutes through longstanding re-enactment. State ex rel. Szabo Food Services, Inc. v. Dickinson, 286 So. 2d 295 (Fla. 1973).

58. If the rule challenged by Petitioner in the underlying proceeding were invalid, the agency could not enforce an invalid rule merely because Petitioner elected one statutory procedure over another. See § 120.52(8), Florida Statutes (2003) (agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute). An agency has no authority to interpret a statute in a manner that expands the statute. Great American Banks, Inc.

v. Division of Administrative Hearings, Department of Administration, 412 So. 2d 373, 375 (Fla. 1st DCA 1982).

59. If the rule that Petitioner challenged in the underlying proceeding were to enlarge, modify, or contravene the law implemented, agency enforcement of the rule would risk violation of the separation of powers clause. In relevant part, the separation of powers clause prohibits the executive branch and its administrative agencies from performing any legislative function; including the modification, amendment, or enlargement of a statute implemented by the agency. Fla. Const., Art. 2, § 3; Ch. 20, Fla. Stat. (2005).

60. The non-delegation doctrine is a corollary of the separation of powers clause. The non-delegation doctrine requires the legislature to provide standards and guidelines in an enactment that are ascertainable by reference to the terms of the enactment. Bush v. Shiavo, 885 So. 2d 321 (Fla. 2004); B.H. v. State, 645 So. 2d 987, 992-994 (Fla. 1994); Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978).

61. The legislature may not delegate to the executive branch power to enact a law or the right to exercise unrestricted discretion in applying the law. Statutes granting power to the executive branch must clearly define the power delegated, preclude unbridled discretion, preclude the enlargement or modification of the law implemented, and ensure

the availability of meaningful judicial review. Shiavo, 885 So. 2d at 332.

62. The determination of whether Petitioner asserted factual issues in the underlying proceeding for an improper purpose involves an issue of fact.[14] The issue must be resolved based on all of the evidence submitted during a proceeding conducted pursuant to Subsection 120.57(1), Florida Statutes (2003). § 120.595(1)(c), Fla. Stat. (2003) (authorizing an award of attorney fees in a recommended order issued in proceedings [conducted] "pursuant to s. 120.57(1)"); Compare Burke v. Harbor Estates Associates, Inc., 591 So. 2d 1034, 1037 (Fla. 1st DCA 1991)(construing the statutory predecessor to § 120.595, Fla. Stat. (2003), for the stated proposition) and Glover v. School Board of Hillsborough County, 462 So. 2d 116 (Fla. 2d DCA 1985)(to properly award attorney fees pursuant to former § 57.105, Fla. Stat. (1983), it is necessary to find that entire action, not just a portion of it, is devoid of merit both as to law and fact) with G.E.L. Corporation, 875 So. 2d at 1262-1263 (legislative provisions in § 57.105, Fla. Stat. (2003), evince legislative intent for § 120.595, Fla. Stat. (2003)).

63. The voluntary dismissal of the underlying proceeding deprived the trier of fact of an adjudicatory hearing in which evidence would have been submitted in a proceeding conducted pursuant to Subsection 120.57(1), Florida Statutes (2003).

However, the voluntary dismissal did not deprive DOAH of jurisdiction over the fee dispute authorized in Subsection 120.595(1), Florida Statutes (2003). G.E.L. Corporation, 875 So. 2d at 1263. In G.E.L. Corporation, the court held:

> [T]he ALJ clearly erred when he ruled that dismissal of the petition prior to an adjudicatory hearing deprived him of jurisdiction to award fees under section 120.595(1). (emphasis not supplied)

64. After Petitioner voluntarily dismissed the underlying proceeding, the parties were entitled to an evidentiary hearing in the fee dispute authorized in Subsection 120.595, Florida Statutes (2003). During the evidentiary hearing, each party had an opportunity to show, in relevant part, that if an adjudicatory hearing had been conducted in the underlying proceeding all of the evidence would have established that Petitioner did, or did not, participate in the underlying proceeding for an improper purpose. § 120.595(1)(e)1., Florida Statutes (2003); G.E.L. Corporation, 875 So. 2d at 1261-1262 (the terms "proceeding" and "hearing" are not synonymous, and a "proceeding" may exist "pursuant to" § 120.57(1), Fla. Stat. (2003), even though the ALJ does not conduct a "hearing" pursuant to the same statute).

65. During the evidentiary hearing, the parties needed to submit enough evidence to supply an evidential basis for the trier of fact to make findings concerning the statutory

prerequisites in Subsection 120.595(1), Florida Statutes (2003). See, e.g., Burke, 591 So. 2d at 1037. In Burke, the court construed the statutory predecessor to Subsection 120.595, Florida Statutes (2003), and explained:

> Whether a party intended to participate in a Section 120.57(1) proceeding for an improper purpose is an issue of fact. (citations omitted) . . . In determining a party's intent, the finder of fact is entitled to rely upon permissible inferences from all of the facts and circumstances of the case and the proceeding before him.

Id.

66. Petitioner is not required to submit sufficient evidence in this proceeding to show that Petitioner would have prevailed on the factual issues if an adjudicatory hearing had been conducted in the underlying proceeding. Petitioner need only submit sufficient evidence to show that the factual issues raised in the underlying proceeding were justiciable. See Hartford Insurance Company of the Midwest v. Miller, 681 So. 2d 301 (Fla. 3d DCA 1996)(absence of substantial factual or legal support does not show a complete absence of a justiciable issue of either law or fact); City of Largo v. LaGrande, 650 So. 2d 178 (Fla. 2d DCA 1995)(summary judgment based on absence of a genuine issue of a material fact is not equivalent to frivolousness). Petitioner submitted the requisite evidence.

67. If it were found that Petitioner participated in the underlying proceeding for an improper purpose, Subsection 120.595(1)(d), Florida Statutes (2003), requires the recommended order to award reasonable attorney fees and costs. The reasonableness of attorney fees must be supported by competent substantial evidence. Sierra v. Sierra, 505 So. 2d 432, 434 (Fla. 1987).

68. Competent and substantial evidence requires expert testimony and either the actual time slips from the billing attorney or the testimony of the billing attorney. Expert testimony alone does not satisfy the requirement for competent and substantial evidence. Nants v. Geraldine Griffin and State Farm Insurance, 783 So. 2d 363, 366 (Fla. 5th DCA 2001); Wiley v. Wiley, 485 So. 2d 2 (Fla. 5th DCA 1986).

69. Intervenors satisfied the evidential requirement for expert testimony. The testimony of the billing attorneys would not have been necessary if their time slips were in evidence. Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985)(trial court should determine hours reasonably expended based, in relevant part, upon a review of attorney's time records). Compare Nants, 783 So. 2d at 366 (requirement for competent and substantial evidence is satisfied by attorney affidavit with attached time sheets detailing work performed) and Mason, 564 So. 2d at 146 (attorney should present accurate

contemporaneous records detailing work performed); with Cohen v. Cohen, 400 So. 2d 463 (Fla. 4th DCA 1981)(testimony of billing attorney is necessary for award of attorney fees) and Nivens v. Nivens, 312 So. 2d 201 (Fla. 2d DCA 1975)(reversing award of attorney fees without testimony of billing attorney). See also Morton v. Heathcock, 913 So. 2d 662, 670 (Fla. 3d DCA 2005).

70. The requirement for either time slips or the testimony of the billing attorney is intended to facilitate an adequate cross-examination by the opposing party. Sierra, 505 So. 2d at 434; Morgan v. South Atlantic Production Credit Association, 528 So. 2d 491, 492 (Fla. 1st DCA 1988). The omission from the record of both the time slips and the testimony of the billing attorneys impeded cross-examination of: Intervenors' Exhibit 2; and the expert witness because the expert witness based her testimony, in part, on her review of the actual time slips.

71. Intervenors' Exhibit 2 is a summary by one billing attorney of the time slips of other billing attorneys that does not attach the underlying data upon which the summary is based.[15] The summary includes unsworn statements by the attorneys who did not testify at the hearing. Unsworn statements of attorneys do not constitute competent substantial evidence of the reasonableness of their fees. Faircloth v. Bliss, 917 So. 2d 1005, 1006-1007 (Fla. 4th DCA 2006); Brown v School Board of Palm Beach County, 855 So. 2d 1267 (Fla. 4th DCA 2003).

72. The reasonableness of attorney fees is not subject to judicial notice. Nor should it be left to local custom, conjecture, or guesswork. Lyle v. Lyle, 167 So. 2d 256, 257 (Fla. 2d DCA 1964). As the decision in Lyle, explained:

> To those lawyers whose practice brings them more than an occasional suit in which the fee is set by the court, . . . testimony detailing the services . . . may seem tedious. . . . However . . . the . . . rules of evidence [cannot] be ignored. [L]awyers who treat such evidence lightly defeat their own purpose; and such evidence . . . must be adduced else the court is without authority to make any award since the award must be based on competent evidence.

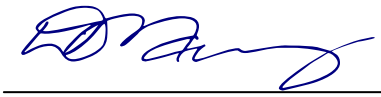
Lyle, 167 So. 2d at 257.

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order denying the motion for attorney fees and costs.

DONE AND ENTERED this 27th day of April, 2006, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of April, 2006.

ENDNOTES

1/ Statutes authorizing attorney fees create substantive, rather than procedural, rights and must be applied prospectively. Whitten v. Progressive Casualty Insurance Company, 410 So. 2d 501 (Fla. 1982); Mullins v. Kennelly, 847 So. 2d 1151 (Fla. 5th DCA 2003); Love v. Jacobson, 390 So. 2d 782 (Fla. 3d DCA 1980). Since the first hospital services were provided in March 2004, prior to the effective date of the 2004 statute, the statute in effect in 2003 is cited in this proceeding.

2/ References to Florida Administrative Code Rule 69L-7.602 are to the rule amended on "7-4-04." That is the version of the rule provided by Intervenors in Tab 7 of the "Materials Supporting Billing Hospitals' Motion Requesting Official Recognition."

3/ The statute enacted on or after July 2005, is cited even though the relevant facts occurred prior to July 2005, as further explained in Finding 6. The provisions in Subsections 440.13(7) and 440.13(12), Florida Statutes (2005), are procedural rather than substantive. While the substantive rights of parties in reimbursement disputes are determined by the law in effect at the time the relevant facts occurred, the

rule does not apply to procedural enactments. The statutory provisions of Subsections 440.13(7) and 440.13(12), Florida Statutes (2005), are procedural because they do not create substantive rights to reimbursement but, in relevant part, merely prescribe procedures for calculating the amount of reimbursement and for resolving reimbursement disputes. Procedural enactments are properly applied retroactively to relevant facts that preceded the effective date of the statute. Compare Terners of Miami Corporation v. Freshwater, 599 So. 2d 674 (Fla. 1st DCA 1992)(applying former sec. 440.13(2)(i) retroactively).

4/ The DOAH case numbers for the cases involving the six reimbursement disputes for which Intervenors seek attorney fees and costs in this proceeding are 05-2018, 05-2161, and 05-2204 through 05-2207. Halifax Medical Center was the billing hospital in DOAH Case Nos. 05-2256 and 05-2257 and did not participate in either this or the underlying proceeding.

5/ Respondent ordered the additional reimbursement for hospital inpatient services in DOAH Case No. 05-2161.

6/ Respondent ordered the remaining reimbursement for hospital outpatient services in DOAH Case Nos. 05-2018 and 05-2204 through 05-2207.

7/ Holmes provided services in the amount of $125,062.35. Petitioner paid Holmes $42,307.49. Respondent ordered Petitioner to reimburse Holmes an additional $51,489.27. The total reimbursement was $93,796.76 or approximately 75 percent of $125,062.35.

8/ DFS promulgates the rule that incorporates the Manual by reference. Thus, Respondent relies on and purports to enforce a rule and Manual promulgated by DFS as a basis for Respondent's interpretation of the statutory phrase "usual and customary" charges. Respondent does not base its statutory interpretation on a rule promulgated by Respondent. Respondent is not entitled to great deference for its interpretation and enforcement of another agency's rule.

9/ The proposed rule change is a draft submitted by the three-member panel on April 7, 2006. DFS developed the proposed changes for incorporation by reference "into" Florida Administrative Code Rule 69L-7.501. The proposed changes are in addition to the requirements established in Florida Administrative Code Rule 69L-7.602. See Florida Workers'

Compensation Reimbursement Manual for Hospitals (2006 ed.), § 1, page 2, second para.

10/ Co-counsel for Intervenors represented during the hearing that Intervenors' Exhibits 22 and 23, pertaining to fees rather than costs, were submitted for the sole purpose of evidencing the total amount of time billed in the underlying proceeding rather than the reasonableness of the time billed.

11/ Intervenors' Exhibit 2 is also a summary within the meaning of Section 90.956, Florida Statutes (2005), for which Intervenors failed to satisfy the statutory prerequisites to admissibility. Intervenors provided neither timely notice nor the underlying data, including the actual time slips. However, Petitioner did not object to the admissibility of the exhibit on the ground that it is a summary.

12/ Intervenors' Exhibit 2 does not explain or supplement competent and substantial evidence admitted in Intervenors' Exhibits 20-23 within the meaning of Subsection 120.57(1)(c), Florida Statutes (2005). Co-counsel for Intervenors represented during the hearing that the latter exhibits are submitted solely to prove the total amount of fees and costs and not to prove the truth of reasonableness of the fees. Intervenors' Exhibit 2 is submitted to prove the reasonableness of the fees.

13/ In G.E.L. Corporation, 875 So. 2d at 1262-1263, the court stated:

> Our consideration of the newly enacted provisions of section 57.105 is fitting because the courts have consistently held that subsequently enacted legislation may indicate the Legislature's intent to clarify the law rather than change it [citation omitted] . . . . Accordingly, the legislative response to the interpretation given section 120.595 in the administrative decisions just referred to clearly indicates that the Legislature did not agree with those interpretations and sought to clarify the meaning of the statute through the newly enacted provision to section 57.105.

14/ The factual issues Petitioner presented in the underlying proceeding include allegations that Intervenors petitioned Respondent for an order requiring additional reimbursement from

Petitioner without first giving Petitioner an opportunity to issue a reconsidered reimbursement decision.

15/ Of the relevant judicial decisions uncovered by the ALJ, only one involved a summary. However, the summary was supported by the actual time slips as well as the testimony of the attorney as to his own work in the case. Saussy v. Saussy, 560 So. 2d 1385, 1386 (Fla. 2d DCA 1990).

COPIES FURNISHED:

Joanna Daniels, Esquire
Agency for Health Care Administration
200 East Gaines Street
Tallahassee, Florida 32399-4229

Daniel R. Goodman, Esquire
Eraclides, Johns, Hall, Gelman,
Eikner & Johannessen, LLP
Post Office Box 49137
Sarasota, Florida 34230-9137

Matthew H. Mears, Esquire
Holland & Knight LLP
Post Office Drawer 810
Tallahassee, Florida 32302

Jerome W. Hoffman, Esquire
Holland & Knight, LLP
Post Office Drawer 810
Tallahassee, Florida 32302

Cindy R. Galen, Esquire
Eraclides, Johns, Hall, Gelman,
Eikner and Johannessen, L.L.P.
Post Office Box 49137
Sarasota, Florida 34230

Karen Walker, Esquire
Holland & Knight LLP
Post Office Drawer 810
Tallahassee, Florida 32302

Richard Shoop, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, Mail Station 3
Tallahassee, Florida 32308

Christa Calamas, General Counsel
Agency for Health Care Administration
Fort Knox Building, Suite 3431
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

Alan Levine, Secretary
Agency for Health Care Administration
Fort Knox Building, Suite 3116
2727 Mahan Drive
Tallahassee, Florida 32308

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.