STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

Rendition No._____

FCCI INSURANCE GROUP,

Petitioner,

vs.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

And

CAPE CANAVERAL HOSPITAL, INC., HOLMES REGIONAL MEDICAL CENTER, INC., and INDIAN RIVER MEMORIAL HOSPITAL, INC.,

Intervenors.

_____/

DOAH CASE NOS. 05-2018F
05-2161F
05-2204F
05-2205F
05-2206F
05-2207F
05-2256F
05-2257F

AHCA CASE NOS. 2005003723
2005004002
2005004521
2005004523
2005004524
2005004972
2005004973
2005005027

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), Daniel Manry, conducted a formal administrative hearing[1]. At issue in this case is whether Intervenors are entitled to reasonable attorney fees and costs pursuant to Section 120.595, Florida Statutes (2003). The Recommended Order of April 27,

[1] The "hearing" in this matter was not a hearing on the underlying merits of these cases, since the Petitioner voluntarily dismissed its petitions for hearing prior to any evidentiary hearing taking place. Rather, the "hearing" mentioned above refers to the hearing that was held on the issue of whether the Intervenors were entitled to attorney's fees and costs pursuant to Section 120.595, Florida Statutes (2003). Additionally, the Agency considers the findings of fact in, but not limited to, Paragraphs 19, 24, 25 and 26 of the Recommended Order, and the conclusions of law in, but not limited to, Paragraphs 51, 52, 53, 55, 56, 59, 60, 61 and 62 of Recommended Order to be dicta, and thus not binding in regards to any of the underlying policy issues. However, the Agency is constrained from reversing or modifying any of these paragraphs due to the limitations imposed by Section 120.57(1)(*l*), Florida Statutes (2006).

2006, is attached to this Final Order and incorporated herein by reference, except where noted infra.

RULING ON EXCEPTIONS

The Respondent filed exceptions to which the Petitioner filed a response. The Petitioner did not file any exceptions.

In Exception No. 1, the Respondent took exception to Endnote #3 of Paragraph 1 of the Recommended Order, arguing that the ALJ's conclusion of law in Endnote #3 was imprecise and unclear as written. Section 120.57(1)(*l*), Florida Statutes, limits the Agency's ability to reject a conclusion of law. It states that

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

The Agency finds that, while it has substantive jurisdiction over the conclusion of law in Endnote #3 of the Recommended Order, it could not substitute a conclusion of law as or more reasonable than that of the ALJ, since the ALJ's conclusion was based on sound legal precedent. Therefore, Respondent's Exception No. 1 is denied.

In Exception No. 2, Respondent took exception to the findings of fact in Paragraph 2 of the Recommended Order, arguing that the findings were inaccurate and incomplete. However, the findings of fact in Paragraph 2 of the Recommended Order were based on competent substantial evidence. See Section 440.02(3), Florida Statutes (2005), and Rule 69L-7.602(1)(b), Florida Administrative Code (both of which were officially recognized by the ALJ); and

Transcript, Volume II, Pages 316-317, 319-323 and 354. See § 120.57(1)(*l*), Fla. Stat.; Heifetz v. Department of Bus. Regulation, 475 So.2d 1277, 1281 (Fla. 1985) (holding that an agency "may not reject the hearing officer's finding [of fact] unless there is no competent, substantial evidence from which the finding could reasonably be inferred"). Therefore, the Respondent's Exception No. 2 is denied.

In Exception No. 3, Respondent took exception to the findings of fact in Paragraph 11 of the Recommended Order, arguing that the findings of fact were inaccurate and incomplete. However, the findings of fact in Paragraph 11 were based on competent substantial evidence. See Section 440.12(3), Florida Statutes; Transcript, Volume I, page 188; Transcript, Volume II, Pages 238-239, 334, 342-345. Thus, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Respondent's Exception No. 3 is denied.

In Exception No. 4, Respondent took exception to the finding of fact in the first sentence of Paragraph 12 of the Recommended Order, arguing that the finding of fact was not supported by competent substantial evidence because the ALJ confused the term "schedule", referring to it in the sense of a table or listing of reimbursement rates, when, in actuality, the term was referring to whether an event had been planned and set on a calendar. A review of the record revealed that the ALJ's use of the term "schedule" in Paragraph 12 was not supported by competent substantial evidence. See, e.g., Transcript, Volume II, Pages 341-346. Therefore, Respondent's Exception No. 4 is granted and the first sentence of Paragraph 12 of the Recommended Order is stricken in its entirety.

In Exception No. 5, Respondent took exception to the findings of fact in Paragraph 13 of the Recommended Order, arguing that it does not interpret the statute, but rather applies the Hospital Reimbursement Manual methodology. Respondent further argued that the ALJ

incorrectly found that it reimburses services, when, in reality, it resolves reimbursement disputes. A review of the record indicates that the ALJ's findings are not based on competent substantial evidence, and that there is competent substantial evidence to support Respondent's arguments. See, e.g., Transcript, Volume II, Pages 219 and 323. Therefore, Respondent's Exception No. 5 is granted to the extent that Paragraph 13 of the Recommended Order is changed to state

> 13. Respondent uses the methodology set forth in the Hospital Reimbursement Manual, which is incorporated by reference in Rule 69L-7.501, Florida Administrative Code, to determine the proper reimbursement for both unscheduled inpatient and outpatient hospital services. Respondent determines that the proper reimbursement for both unscheduled inpatient and outpatient hospital services is 75 percent of the "usual and customary" charge.

In Exception No. 6, Respondent took exception to the findings of fact in Paragraph 14 of the Recommended Order, arguing that the findings were inaccurate because there was more than one issue in dispute in this matter. Respondent is correct in its assertion that there was more than one issue in dispute in this matter. See, e.g., Petitioner's Pre-Hearing Statement filed on October 18, 2005. Therefore, Respondent's Exception No. 6 is granted to the extent that Paragraph 14 of the Recommended Order is changed to state

> 14. The main 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.

In Exception No. 7, Respondent took exception to the finding of fact in the second sentence of Paragraph 16 of the Recommended Order, arguing that the finding was not supported by record evidence. However, contrary to Respondent's argument, the ALJ's finding of fact in the second sentence of Paragraph 16 of the Recommended Order was based on competent substantial evidence. See Transcript, Volume IV, Page 607. Thus, the Agency cannot reject or

modify the finding of fact. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Respondent's Exception No. 7 is denied.

In Exception No. 8, Respondent took exception to the findings of fact in Paragraphs 17 and 18 and Endnote 8 of the Recommended Order, arguing that the findings were conclusions of law that were not supported by the factual evidence that was presented at hearing. Regardless of whether Paragraphs 17 and 18 and Endnote 8 of the Recommended Order are findings of fact or conclusions of law, they were supported by competent substantial evidence. See, e.g., Proposed Florida Workers' Compensation Reimbursement Manual for Hospitals 2006 Edition at Pages 14-15; Transcript, Volume IV, Pages 633-634. If they are findings of fact, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. If they are conclusions of law, while the Agency may have substantive jurisdiction over them, it could not substitute conclusions of law as or more reasonable than those of the ALJ. Therefore, Respondent's Exception No. 8 is denied.

In Exception No. 9, Respondent took exception to the finding of fact in the second sentence of Paragraph 19 of the Recommended Order, arguing that the proposed changes to the Reimbursement Manual are irrelevant to the underlying reimbursement dispute, and that Intervenor's motion to strike should have been granted by the ALJ. However, the Agency does not have substantive jurisdiction to rule on an evidentiary issue. See Barfield v. Department of Health, 805 So.2d 1008 (Fla. 1st DCA 2001). Furthermore, the finding of fact in the second sentence of Paragraph 19 of the Recommended Order was based on competent substantial evidence. See Proposed Florida Workers' Compensation Reimbursement Manual for Hospitals 2006 Edition at Pages 14-15. Thus, the Agency cannot reject or modify the finding of fact. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Respondent's Exception No. 9 is denied.

In Exception No. 10, Respondent took exception to findings of fact in Paragraph 20 of the Recommended Order, arguing that the findings were misleading and unclear. However, the ALJ's findings in Paragraph 20 were based on competent substantial evidence. Compare Transcript, Volume II, Pages 334-347 with Proposed Florida Workers' Compensation Reimbursement Manual for Hospitals 2006 Edition at Pages 14-15. See also Respondent and Intervenor's Proposed Recommended Order filed on March 27, 2006 at Exhibit A. Thus, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Respondent's Exception No. 10 is denied.

In Exception No. 11, Respondent took exception to the findings of fact in Paragraph 21 of the Recommended Order, arguing that it is also misleading and unclear. For the reasons set forth in the ruling on Respondent's Exception No. 10 supra, Respondent's Exception No. 11 is also denied.

In Exception No. 12, Respondent took exception to the finding of fact in the second sentence of Paragraph 22 of the Recommended Order, arguing that it was misleading as to the use and function of explanation of bill review (EOBR) codes. However, the finding of fact in the second sentence of Paragraph 22 of the Recommended Order was based on competent substantial evidence. See Transcript, Volume I, Pages 180-181; Transcript, Volume II, Pages 299 and 354-355. Thus, the Agency cannot reject or modify it. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Respondent's Exception No. 12 is denied.

In Exception No. 13, Respondent took exception to the findings of fact in the second and last sentences of Paragraph 23. However, Respondent did not include appropriate and specific citations to the record. Section 120.57(1)(k), Florida Statutes (2005), states that "[a]n agency need not rule on an exception that does not clearly identify the disputed portion of the

recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Therefore, the Agency declines to rule on Respondent's Exception No. 13. Alternatively, to the extent that Respondent's Exception No. 13 is based on Respondent's Exception No. 3, Respondent's Exception No. 13 is denied based upon the reasoning set forth in the ruling on Respondent's Exception No. 3 supra. Additionally, the ALJ's finding was based on competent substantial evidence. See Petitioner's Petitions for Administrative Hearing filed in the above-referenced cases; and Transcript, Volume IV, Page 634. Thus, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Respondent's Exception No. 13 is denied.

In Exception No. 14, Respondent took exception to the findings of fact in Paragraph 26, arguing that the findings were unnecessary and imprecise. However, Paragraph 26 was a summary finding of fact based upon the findings of fact in Paragraphs 24 and 25 of the Recommended Order, which, in turn, were based on competent substantial evidence. See Transcript, Volume IV, Pages 619-620. Therefore, Respondent's Exception No. 14 is denied.

In Exception No. 15, Respondent took exception to the finding of fact in the second sentence of Paragraph 29 of the Recommended Order, arguing that the finding was inappropriate and imprecise, and would be better characterized as a conclusion of law. However, the ALJ's findings were based on competent substantial evidence, namely Section 120.595, Florida Statutes (2003), and the final orders in the cases of One Beacon Insurance v. AHCA, Rendition No. AHCA-05-0575-FOI-OLC (November 2, 2005); and Hortica Insurance and West Michigan Floral Supply v. AHCA, Rendition No. AHCA-05-0084-FOI-OLC (February 11, 2005), which were officially recognized by the ALJ. Thus, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Respondent's Exception No. 15 is denied.

In Exception No. 16, Respondent took exception to the conclusions of law in Paragraph 45 of the Recommended Order, arguing that it was not supported by the evidence presented at hearing. However, the conclusions of law in Paragraph 45 of the Recommended Order were based on the findings of fact in Paragraphs 14-18, which, in turn, were based on competent substantial evidence. See, e.g., Transcript, Volume IV, Pages 607 and 633-634; Proposed Florida Workers' Compensation Reimbursement Manual for Hospitals 2006 Edition at Pages 14-15. Respondent, is, in essence, asking the Agency to re-weigh the evidence in order to reach a different conclusion than that of the ALJ, which it cannot do. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Respondent's Exception No. 16 is denied.

In Exception No. 17, Respondent took exception to the conclusions of law in Paragraphs 46 and 47 and Endnote 13 of the Recommended Order, arguing that the caselaw citations contained within the conclusions of law were unnecessary and inappropriate. Based upon the reasoning set forth in the ruling on Respondent's Exception No. 16 supra, Respondent's Exception No. 17 is also denied.

In Exception No. 18, Respondent took exception to the conclusions of law in Paragraphs 48-50 of the Recommended Order, arguing that the proposed changes to the Reimbursement Manual for Hospitals do not constitute a new "interpretation" of the phrase "usual and customary". Respondent's argument is an attempt to have the Agency reverse the ALJ's ruling on Intervenor's Motion to Strike, which is outside of its substantive jurisdiction. See Barfield. Therefore, Respondent's Exception No. 18 is denied

In Exception No. 19, Respondent took exception to the conclusions of law in Paragraph 51 of the Recommended Order. However, Respondent's Exception No. 19 was based on its Exception Nos. 1, 3, 9 and 10, which were denied. Therefore, based upon the reasoning set forth

in the rulings on Respondent's Exception Nos. 1, 3, 9 and 10, Respondent's Exception No. 19 is also denied.

In Exception No. 20, Respondent took exception to the conclusions of law in Paragraphs 52 through 61 of the Recommended Order, arguing that the conclusions of law were erroneous or superfluous to the issue of attorney's fees, and thus should be deleted in their entirety. Respondent's Exception No. 20 was based on its arguments in Exception Nos. 8, 9, 10 and 11, which were denied supra. Therefore, Respondent's Exception No. 20 is also denied.

FINDINGS OF FACT

The Agency adopts the findings of fact set forth in the Recommended Order, except where noted supra.

CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the Recommended Order.

IT IS THEREFORE ADJUDGED THAT:

The Intervenor's motion of attorney's fees and costs is hereby DENIED.

DONE and ORDERED this 13th day of July, 2006, in Tallahassee, Florida.

Christa Calamas

CHRISTA CALAMAS, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY, ALONG WITH THE FILING FEE PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by U.S. or interoffice mail to the persons named below on this 18th day of July, 2006.

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DOAH Case Nos.: 05-2018
05-2161
05-2204
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05-2206
05-2207
05-2256
05-2257

RESPONDENT'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent, Agency for Health Care Administration ("Agency"), through undersigned counsel and pursuant to section 120.57(1)(k), Florida Statutes (2005), and rule 28-106.217, Florida Administrative Code, submits exceptions to Findings of Fact and Conclusions of Law entered by the presiding officer of the Division of Administrative Hearings in his Recommended Order, dated April 27, 2006, following hearing in the above consolidated cases. Respondent's exceptions and legal bases therefore are as follows:

Standard of Review

Section § 120.57(1)(l), Florida Statutes (2005), establishes the standard of review regarding findings of fact:

> The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Section § 120.57(1)(l), Florida Statutes (2005), also establishes the standard of review regarding conclusions of law:

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

While mindful that "'an agency cannot circumvent the requirements of [section 120.57(1)(l), Florida Statutes,] by characterizing findings of fact as legal conclusions.'" Verleni v. Dep't of Health, 853 So. 2d 481, 484 (Fla. 1st DCA 2003) (citation omitted), the Respondent respectfully suggests that likewise, a conclusion of law, regardless of whether it is mislabeled as a finding of fact, is subject to the same Agency authority as if it were labeled as a conclusion of law.

Exceptions to Findings of Fact

1. Respondent takes exception to footnote #3 to the Findings of Fact in Paragraph 1, which states:

> 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).

Respondent respectfully suggests that the presiding officer's conclusion of law, as set forth in this footnote, is imprecise and unclear, as written. However, because the statutory provisions cited by the presiding officer have not been substantially amended since 2003, and the substantive rights and duties of both Petitioner and Intervenors regarding all of the underlying disputed reimbursements arose since that time, the presiding officer's conclusion that the cited statutes are procedural rather than substantive is irrelevant to the issue(s) for determination in the instant case.

Respondent respectfully suggests Footnote #3 to Finding of Fact in Paragraph 1 be deleted in its entirety. If not deleted, Respondent respectfully suggests Footnote #3 to the Findings of Fact in Paragraph 1 be amended in order to avoid the inference that amendment of the statutes, or the administrative rules adopted there under, would never create substantive rights, as explained here.

The holding in the cited case related to a statutory amendment enacted by the legislature in 1990, which transferred certain duties of the Judges of Compensation Claims to the Division of Workers' Compensation. The appellate panel determined that the amended statute applied retroactively, because the amendment merely changed the forum for obtaining a determination and had no substantive effect as to the outcome or calculation of disputed reimbursement determinations, citing Sullivan v. Mayo, 121 So. 2d 424 (Fla. 1960) (forum in which review may be had is a procedural matter, not a substantive right). The court did not determine that the statute was merely procedural not substantive.

On the contrary, sections 440.13(7) and 440.13(12), Florida Statutes, and the administrative rules adopted there under, substantially affect the amounts that health care providers are entitled to be reimbursed under the workers' compensation law, and consequently substantially affect the amounts that workers' compensation insurance carriers are required to pay. Amendment of section 440.13(12), Florida Statute, in particular, or the administrative rules adopted by the Division of Workers' Compensation, if it affects the maximum reimbursement allowances established by the three-member panel, may be applied prospectively only. See e.g.: State Dep't of Transportation v. Houlihan, 402 So. 2d 490 (Fla. 1st DCA 1981).

If necessary to provide the full and relevant explanation of substantive versus procedural rights at issue in the underlying reimbursement proceedings, the Footnote should be deleted and replaced as follows:

> *The underlying Petitions for Administrative Review involved disputes regarding reimbursement for medical services provided by the Intervenor hospitals to injured workers for whom Petitioner is the workers' compensation insurance carrier. The services were rendered between March 13, 2004, and February 11, 2005. The Intervenors' right(s) to be reimbursed and the carrier's duty to pay for the services arose at the time services were rendered. Since the applicable provisions of the workers' compensation statute have not been amended since 2003, the 2005 statute is cited here.*

2. Respondent takes exception to the Findings of Fact set forth in Paragraph 2. which states:

> 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.

Respondent respectfully suggests that this Finding of Fact is inaccurate and incomplete, and should be deleted in its entirety and replaced as follows:

Respondent is a state agency within the meaning of Subsection 20.03(11), Florida Statutes (2005). In relevant part, Respondent is responsible for resolving reimbursement disputes between health care providers and workers' compensation insurance carriers, when requested pursuant to Subsection 440.13(7), Florida Statutes.

3. Respondent takes exception to the Findings of Fact set forth in Paragraph 11 of the Recommended Order, which states:

> 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.

Respondent respectfully suggests that this finding of fact is inaccurate and incomplete. The "exceptions" aforementioned in the statute are, in fact, relevant to this proceeding. In concluding otherwise, the presiding officer ignores the legislative and administrative history of the statute and implementing rules that are adopted by the Division of Workers' Compensation and contain the maximum reimbursement allowances determined by the three-member panel. While this finding may be considered non-binding dicta, the inference that the statutory exception providing for the three-member panel to adopt maximum reimbursement allowances for outpatient services is not relevant to the underlying proceeding should be corrected.

In order to provide the full and relevant portions of the statute and implementing rules upon which the underlying reimbursement disputes in the consolidated cases were determined, the Findings of Fact in this paragraph should be deleted in and replaced as follows:

> *Section 440.13(12), Florida Statutes, directs a legislatively appointed "three-member panel" to establish maximum reimbursement allowances for medically necessary treatment . . . , to be used in conjunction with a pre-certification manual as determined by the Department of Financial Services, Division of Workers' Compensation ("Division"). The reimbursement allowances and manual(s) in effect at the time the Intervenor hospitals provided medical services to Petitioner's insureds is the Florida Workers' Compensation Reimbursement Manual for Hospitals*

("Reimbursement Manual" or "HRM"), 2004 Edition, and the 2004 Second Edition.[1] *The HRM is incorporated by reference into the Division's rule 69L-7.501, Florida Administrative Code.*

Inpatient Services

As to the disputed reimbursement of $51,489.27 for inpatient services that were provided by the Intervenor, Holmes Regional Medical Center, Inc. ("Holmes Regional"), subsection 440.13(12)(a), Fla. Stat. specifies that the maximum reimbursement allowances for inpatient hospital care "shall be based on a schedule of per diem rates . . . ." The per diem schedule established by the three-member panel for hospital inpatient services are set forth in Section 11 B 1. of the HRM, which sets forth the applicable per diem reimbursement for inpatient care when provided by an acute care hospital or by a trauma center, and when involving a surgical stay or when non-surgical. Section 11 B 2. of the HRM provides for a "stop-loss" to the per diem schedule that the three-member panel established for "when charges for inpatient services at either an acute care hospital or a trauma center exceed $50,000." The reimbursement allowance established by three-member panel for inpatient hospital care where the hospitals' charges exceed $50,000.00 is "75 percent of charges for medically necessary services." The HRM provides that charges for medically necessary services can be determined from an on-site audit of the hospital's medical records as well as the hospital's charge master, when requested in order "to verify accurate payment of hospital charges." §§ 11 B 3. and 12 HRM

Following receipt of the Agency's determination letter regarding reimbursement for inpatient hospital care provided by Holmes Regional Medical Center, the Petitioner timely submitted its Petition for Administrative Hearing and alleged:

- *the Agency's decision letter is without legal effect because the hospital did not first request reconsideration of the carrier's disallowance/adjustment of payment within 60 days after receipt of the carrier's EOBR before requesting Agency intervention as required by Rule 59A-31.001(5), Florida Administrative Code;*

- *the Agency contends that the hospital is entitled to receive 75 percent of its "individual usual and customary charges," and that the agency decision was made without benefit of the hospital's records verifying its usual and customary charges;*

- *the Agency misapplied and misinterpreted the administrative rule 69L-7.501, F.A.C., contrary to the provisions of section 440.13(12), Florida Statutes; and that*

[1] *The amendments adopted in the 2004 Second Edition have no substantive effect as to the underlying reimbursement disputes.*

- *rule 69L-7.501, F.A.C., should be read to allow recovery of 75 percent of "the usual and customary fee prevailing in the community."*

Further, Respondent's determination letter regarding the reimbursement dispute for inpatient services made no reference to "usual and customary" at all, but specifically identified section 11 B 3. of the Hospital Reimbursement Manual, 2004 Second Edition, as the bases for its determination. Section 11 B 3. of HRM does not contain the term "usual and customary." It states "reimbursement shall be at 75 percent of charges . . ." The HRM is clear on its face that "usual and customary" is not an issue as to the inpatient services provided by Holmes Regional.

On these bases alone, Petitioner could be held to have participated in the proceeding against Holmes Regional for an improper purpose. However, in Petitioner's Response to Intervenors' Motion to Relinquish Jurisdiction, Petitioner raised a number of issues of disputed material fact(s) as to whether the charges were billed (coded) properly, whether the charges were consistent with the hospital's charge master, and whether certain procedures were followed, etc.

Petitioner's Response to Intervenors' Motion to Relinquish Jurisdiction also questioned the validity of the rule 69L-7.501, F.A.C., alleging that the rule adopted by the Division of Workers' Compensation is in derogation of the implemented statute, 440.13(12), Fla. Stat. While the validity of a rule may be determined in conjunction with a 120.57 hearing, State ex rel. Department of General Services v. Willis, 344 So. 2d 580 , 592 (Fla. 1st DCA 1977), the agency whose rule is being challenged must be provided notice and opportunity to defend its rules pursuant to 120.56 or 120.57, Fla. Stat. The Division was not made a party to this proceeding, thus Petitioner's "rule challenge" argument must be limited to whether the Agency's determinations were issued in accordance with the requirements of the statute and the Division rules. Moreover, a proceeding against the Agency, without the Division, could not provide the ultimate relief that the Petitioner sough: the Agency is explicitly without authority to establish the schedules or rates of reimbursement. Instead, section 440.13(7(c) is clear that the Agency's authority is limited to only the application of such matters:

> *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. (emphasis added)*

Outpatient Reimbursement

Petitioner's challenge(s) of the Agency's determinations regarding reimbursement for outpatient services provided by the Intervenor hospitals were also based on its assertion that the HRM should be read to mean "usual and customary in the community." Because the statute implementing reimbursement does, in fact, refer to

"usual and customary." Petitioners' basis for challenging the Agency's determinations for outpatient reimbursement was of more merit possibly t. Petitioner sought to change the Agency's interpretation of both the statute and the Division's administrative rule.

The statute states that outpatient care provided in a hospital setting "shall be reimbursed at 75 percent of usual and customary charges, except as provided by this subsection." The statute does not define what "usual and customary" means, and the term is used only in this one reference to outpatient services. The HRM implementing the statute states that reimbursement for hospital outpatient care shall be "at 75 percent of the hospital's charges," with some exceptions not applicable here. The three-member panel has consistently interpreted "usual and customary" to mean what is "usual and customary" for the individual hospital, and this interpretation is consistent with the legislature's prior statutory directives, see e.g.: §§ 11 A – C, HRM 1999 Edition; and § 440.13(4)(a) - (d), Fla. Stat. (1991).

The legislature's intent that reimbursement be based on individual hospitals' charges, rather than "usual and customary" in any given community, is further evidenced elsewhere within section 440.13(12), Florida Statutes (2005). For example, subsection 440.13(12)(d), Florida Statutes, provides that each health care facility, ambulatory surgical center, et al., "shall maintain records verifying their usual charges." This statutory requirement would be meaningless if reimbursement was to be based on anything other than the hospitals' individual "usual" charges." A statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all its parts. State ex rel City of Casselberry v. Mager, 356 So. 2d 267 (Fla. 1978).

More recently, in Senate Bill 50A enacted in 2003, the legislature clearly acquiesced with the three-member panel's use of "usual and customary" to mean the individual hospital's "usual" charges. Since 2003, section 440.13(12)(b)3, Florida Statutes, reduces reimbursement for scheduled outpatient surgeries "from 75 percent of charges to 60 percent of charges." The legislature is presumed to know the provisions of law in effect at the time that it acts. Woodgate Development Corporation v. Hamilton Investment Trust, 351 So. 2d 14 (Fla. 1977). This includes presumed knowledge of the construction of a statute by the agency charged with its administration. See Cole Vision Corporation v. Department of Business and Professional Regulation, Board of Optometry, 688 So. 2d 404 (Fla. 1st DCA 1997).

Given the legislative history and acquiescence to the apparent definition adopted by the three-member panel), there is no doubt that the Agency's interpretation and application of the HRM in issuing its determination letters in the underlying disputes was proper and correct. Petitioner's assertion that disallowance or adjustment of charges should be allowed based on industry standards or guidelines, or what is usual, customary, or reasonable must be presented for legislative review, as the agency is bound to follow the applicable reimbursement manual.

4. Respondent takes exception to the Finding of Fact in the first sentence of Paragraph 12, which states:

> 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.

This finding of fact is not supported by competent and substantial evidence because the hearing officer has confused the term schedule, in the sense of a table or listing of reimbursement, and the definition of schedule referring to whether an event has been planned and set on a calendar. Whether or not the services at issue were planned or instead unplanned (emergency treatment), all the services were covered by the "reimbursement schedules" contained in the HRM. § 440.13(7(c), Fla. Stat.

5. Respondent takes exception to the Findings of Fact in Paragraph 13, which states:

> Respondent interprets Subsection 440.13(12), Florida Statutes 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 hospitals services at 75 percent of the "usual and customary" charges.

The Respondent does not interpret the statute, but rather applies the HRM methodology. (Tr. 219 lines 12 to 15). The HRM methodology happens to dictate the same percentage level of reimbursement for the different types of services in dispute. Furthermore, the Respondent does not reimburse hospital services. The Respondent resolves reimbursement disputes when requested, pursuant to section 440.13(7), Florida Statutes, and when doing so, Respondent's authority is limited to application of the administrative rules adopted by the Division of Workers' Compensation which contain the maximum reimbursement allowances adopted by the three-member panel, pursuant to Section 440.13(12), Florida Statutes. (Tr. 323 lines 1 to 12).

The Finding of Fact in Paragraph 13 might be considered non-binding dicta, yet the inferences that scheduling of inpatient services has any effect on reimbursement issues and that Respondent reimburses health care providers should be corrected. The Paragraph 13 should be deleted in its entirety.

6. Respondent takes exception to the Findings of Fact in Paragraph 14 which states:

> 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.

Petitioner's challenge regarding "usual and customary" was the main issue required for determination in the underlying reimbursement dispute, but was not the only fact issue raised by Petitioner in its challenges to the agency's determination letters. Respondent requests amendment of the first sentence in Paragraph 14 to read as follows:

> *One of the disputed issues for determination in six of the underlying proceeding(s) involved determination of the meaning and application of the term "usual and customary charges," as used in section 440.13(12), Florida Statutes.*

7. Respondent takes exception to the Finding of Fact in the second sentence of Paragraph 16 which states:

> Petitioner maintains a data base [sic] that contains information sufficient to determine the usual and customary charges in each community.

Respondent respectfully suggests that this Finding of Fact is not support by the evidence.

The only evidence regarding the Petitioner's database was presented via testimony of an "expert witness." No data was offered into evidence (if it exists) from which the Petitioner determined or from which the "expert" could determine "usual and customary" charges in any community. Therefore, the accuracy or "sufficiency" of Petitioner's database could not be determined – much less the accuracy of Petitioner's analysis of the actual data it used to arrive at its determinations of "usual and customary" charges in the communities

where the Intervenor hospitals were located. Because the hearing before the administrative law judge was limited to determination of the Intervenors entitlement to attorney fees, the full evidentiary analysis of the sufficiency of Petitioner's data base was not necessary. The inference that a database can be determined "sufficient" based on oral testimony alone is of concern.

Respondent respectfully requests this sentence be deleted.

8. Respondent takes exception to the Findings of Fact in Paragraphs 17 and 18, and the Footnote # 8 at Paragraph 18 which state:

> 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).
>
> Petitioner had a reasonable expectation of success. The statutory phrase "usual and customary" charge 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]
>
> [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 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.

Respondent respectfully suggests that these Findings of Fact are Conclusions of Law, and are not supported by the fact evidence that was presented at hearing.

The statutory phrase "usual and customary" charge has been defined to mean the "usual and customary" charges of the separate facilities. The definition is made clear in the maximum reimbursement allowances determined by the three-member panel, published in the Reimbursement Manuals, and adopted by the Division of Workers' Compensation via administrative rulemaking; and both of the agency final orders were based on the Findings of

Fact and Conclusions of Law determined by the Division of Administrative Hearings administrative law judge following full evidentiary hearing, pursuant to section 120.57(1), Fla. Stat.

Respondent may not and does not "interpret" section 440.13(12), Florida Statutes. That statute is "interpreted" by the three-member and the Division of Workers' Compensation. In resolving reimbursement disputes, Respondent must apply the provisions of Reimbursement Manuals that are adopted by the Division in order to determine what is the health care provider's proper reimbursement. See § 440.13(7)(c), Fla. Stat. (2005)..

Respondent suggests these findings and conclusions be clarified by deleting Paragraphs 17 and 18 and Footnote #8, and replace as follows:

> *The dispute in all but one of the underlying proceedings was over the meaning of the phrase "usual and customary" charges as used in subsection 440.13(12)(a), Fla. Stat. These seven Petitions sought review of AHCA's determination letters wherein AHCA determined the hospitals were entitled to reimbursement of 75 percent of their total charges for the services administered to injured employees via the hospitals' emergency departments. None of the injured workers upon which these seven Petitions were based were admitted to the hospitals, and hence constitute unscheduled outpatient services. Pursuant to section 440.13(12)(a), Fla. Stat., unscheduled outpatient services provided in a hospital setting "shall be reimbursed at 75 percent of usual and customary charges, except as provided by this subsection."*
>
> *At the hearing on the Intervenors' motion(s) for attorney fees, Petitioner's witness testified regarding a database that Petitioner maintains and from which Petitioner determines what it deems to be "usual and customary charges" in a given community. (Transcript page 607, lines 17, et cet).. Having withdrawn its petitions prior to hearing on the underlying reimbursement dispute, analysis of the actual "community" charge data Petitioner used when adjusting the Intervenor hospitals' charges was not presented.*
>
> *As previously noted, the Reimbursement Manual adopted by the three-member panel implementing its authority and duty to establish schedules of maximum reimbursement allowances for unscheduled outpatient services provided in a hospital setting maximum interprets "usual and customary," as that phrase is used in the statute, to mean the hospitals' individual usual and customary charges. Prior versions of the Reimbursement Manual specified that hospitals would be reimbursed "75 percent of its usual and customary charges" or "75 percent of the hospital's usual and customary charge." HRM, 1999 Edition.*

The legislature acquiesced and approved the three-member panel's interpretation of "usual and customary," in enacting the 2003 legislation that reduced reimbursement for scheduled outpatient surgeries from 75 percent of "charges" to 60 percent of "charges." § 440.13(12)(b)3, Fla. Stat. (2005). Section 440.13(12)(a) still contains the term "usual and customary," but only in reference to outpatient services, and subject to exceptions (including the three-member panel's authority to establish maximum reimbursement allowance for outpatient services). The legislature is presumed to know the provisions of law in effect at the time that it acts. Woodgate Development Corporation v. Hamilton Investment Trust, 351 So. 2d 14 (Fla. 1977). This includes presumed knowledge of the construction of a statute by the agency charged with its administration. See Cole Vision Corporation v. Department of Business and Professional Regulation, Board of Optometry, 688 So. 2d 404 (Fla. 1st DCA 1997).

Petitioner asserted that the disputed reimbursement for inpatient services provided by the Intervenor, Holmes Regional Medical Center, should be determined using Petitioner's definition of "usual and customary," as well. This claim is wholly unsupportable by the facts and the existing law, and could arguably subject Petitioner to attorney fee sanctions pursuant to either section 57.105 or 120.595, Florida Statutes. However, Petitioner raised additional fact issues in its Petition regarding Holmes Regional to preclude a finding that there was a complete absence of a justiciable issue of either law or fact.

9. Respondent takes exception to the second sentence in the Findings of Fact at Paragraph 19, which states:

> 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.

Respondent respectfully suggests that proposed changes to the Reimbursement Manual are irrelevant to the underlying reimbursement dispute, and that Intervenor's motion to strike should have been granted by the administrative law judge.

The Reimbursement Manual(s) are promulgated by DFS to adopt by administrative rule the maximum reimbursement allowances that are adopted by the three-member panel. The Manuals and maximum reimbursement allowances are subject to change at least annually, as deemed necessary and appropriate by the three-member panel. §440.13(12), Fla. Stat. The Manual that is

in effect at the time medical services are rendered contains the applicable reimbursement allowances for the services.

Further the proposed changes to the Reimbursement Manual considered by the administrative law judge in this Finding of Fact do not "interpret" what is usual and customary. The proposed changes, if adopted, would establish a new methodology for determination of maximum reimbursement allowances based on a formula of "usual and customary" charges. The proposed changes would establish minimum data base requirements and data analysis instructions that carriers must follow when electing to adjust reimbursement based on a maximum reimbursement allowance for "usual and customary" charges. In order to utilize the proposed methodology, however, the carrier must produce its data when requested, in order to verify that the validity of its disallowance or adjustment. (The Petitioner in the instant case refused to produce its database when requested pursuant to discovery).

Finally, at the time Petitioner presented the proposed changes for consideration by the presiding officer, the proposed changes were in fact merely proposed. (Based on comments submitted to the three-member panel at its meeting in February, whether the proposed changes will be formally adopted by rule is questionable - and even more objection to the proposed changes were recently submitted at a rule development workshop held by the Division of Workers' Compensation on May 16, 2006.

Respondent respectfully requests the second sentence in this Finding of Fact be deleted, or deleted and replaced as follows:

> *Pursuant to direction received from the three-member panel at its meeting on April 12, 2006, DFS has initiated rulemaking that would replace the existing HRM with a 2006 HRM which contains a provision whereby carriers may, if they maintain a database that meets the requirements set forth in the rule, determine the maximum reimbursement allowance for outpatient services based on a formula whereby the usual and customary charges of hospitals located within the same Medicare geographic locality is obtained. When adjusting*

reimbursement based on this method, the carrier would be required to produce the sample data from which it determined the usual and customary charge, if requested.

10. Respondent takes exception to the Finding of Fact in Paragraph 20, which states:

> 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."

Respondent respectfully suggests that this finding of fact is misleading and unclear. As explained in paragraph 9, above, the 2006 HRM does not contain a new "interpretation." The proposed manual contains a new methodology for determining the maximum reimbursement allowance established by the three-member panel at its meeting on April 11, 2006. Also, while under the current Manual, determination of what constitutes "usual and customary" is a question of law, the proposed Manual if adopted by administrative rule will substantially change the amount and method for determining maximum reimbursement allowance such that factual determinations regarding data collected and used by the carrier.

Given the substantive nature of the changes in reimbursement set forth in the proposed Manual, the Manual if adopted by rule, will apply only to medical services that were provided following the effective date of the proposed rule. The Reimbursement Manuals create substantive rights and duties and thus may not be applied retroactively to determine reimbursement for services provided when the maximum reimbursement allowances established by the three-member panel were different – whether higher or lower.

Respondent respectfully requests Finding of Fact in Paragraph 20 be deleted in its entirety.

11. Respondent takes exception to the Findings of Fact in Paragraph 21, which states:

> 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.

Respondent respectfully suggests that this Finding of Fact is misleading and unclear, for the same reasons as provided in paragraphs 9 and 10, above. The proposed manual does not "interpret" "usual and customary" and consideration of any maximum reimbursement allowance that is not in effect at the time medical services are rendered does not present a justiciable issue of law. Finally, even if Petitioner's assertion of what is "usual and customary" presented a justiciable issue of law, the issue would be limited to the seven reimbursement disputes regarding outpatient services, as explained in paragraphs 3 and 8, above.

Respondent respectfully suggests that this Finding of Fact be deleted in its entirety.

12. Respondent takes exception to the second sentence in Findings of Fact Paragraph 22, which states:

> None of the EOBR codes, however, contemplates a new interpretation of the statutory phrase "usual and customary" charges.

Respondent respectfully suggests this Finding of Fact is misleading as to the use and function of EOBR codes. There is no EOBR code for adjustment of charges based on "usual and customary," because "usual and customary" is not, at present, a valid bases for adjusting under the applicable Reimbursement Manual, 2004 Second Edition. The proposed manual instructs carriers to identify adjustment based on the "usual and customary" determination of maximum reimbursement allowance(s) by using the EOBR code "20," for "other," and to specifically state that adjustment was based on its determination of "usual and customary." Sections 11C and 12 of the proposed HRM, 2006 Edition.

Respondent requests that the sentence be deleted and replaced as follows:

This fact allegation brought by Respondent, together with Petitioner's allegation regarding proper billing and coding by the hospitals are evidence of a bona fide factual dispute and justification for Petitioner's requesting the formal administrative hearing(s) as to all eight of the agency's determination letters.

13. Respondent takes exception to the Findings of Fact in the second and last sentences of Paragraph 23 which read:

> However, responses to discovery would not have further elucidated Petitioner's rule challenge.
>
> Respondent and Intervenors were fully aware of the absence of statutory authority to resolve the issue.

As explained in paragraph 3, above, the administrative rule that Petitioner "challenged" was adopted by the Division of Workers' Compensation, not AHCA, and the Petitioner was or should have been "fully aware" of the absence of statutory authority for AHCA to apply any "interpretation" or reimbursement determination other than as set forth in the Reimbursement Manual adopted by DFS administrative rule. While the validity of the existing rule (and the hospital reimbursement manual incorporated therein) may be determined in conjunction with a 120.57 hearing, State ex rel. Department of General Services v. Willis, 344 So. 2d 580, 592 (Fla. 1st DCA 1977), no rule challenge may be brought without providing notice to the affected agency and opportunity to defend its rules pursuant to 120.56 or 120.57, Fla. Stat. The DFS was not made a party to this proceeding, thus Petitioner's "rule challenge" argument must be limited to whether the Agency's determination letters were issued in accordance with the requirements of the statute and the existing Division rules.

Respondent respectfully requests that this sentence be deleted; that "however," be added to begin the next sentence, and that the last sentence be deleted and replaced, as follows:

> *Such allegation would present a proper purpose if intended to request determination of the validity of DFS's administrative rules. However, any rule challenge proceeding must be made against DFS. But Petitioner's requesting AHCA to "interpret" DFS' rules in the manner as Petitioner requested, can be seen as a sufficiently valid basis for filing the Petitions as to the outpatient disputes .*

14. Respondent takes exception to the Findings of Fact set forth in Paragraph 26, which states:

> 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.

Respondent respectfully suggests that this Finding of Fact is unnecessary and imprecise. The statement would be better identified as a Conclusion of Law.

Respondent requests this Finding of Fact be deleted and replaced as follows:

The absence of formal hearing in the underlying proceeding also foreclosed evidential basis for determination of whether the Petitioner timely submitted documentation supporting its adjustment disallowance of the disputed bills. The Petitioner's assertion that the reimbursement disputes were not yet "ripe" for determination by AHCA makes a determination that Petitioner did or did not submit the required information is also unnecessary in this proceeding.

15. Respondent takes exception to the second sentence in the Finding of Fact at Paragraph 29, which states:

> 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.

Respondent respectfully suggests that this finding is inappropriate and imprecise, and would be better categorized as a Conclusion of Law. Subsection 120.595(1)(c), Florida Statutes, creates a rebuttable presumption if all of the factors set forth in that subsection are present. However, the inquiry does not end if such factors are not present. Further Respondent disputes any inference that determination of improper purpose would require the underlying proceedings to have involved the same hospital provider or "project" where the Petitions are filed against AHCA – not the hospital providers. Regardless of whether the requirements for creating a presumption of

improper purpose were met, section 120.595(1)(e), Florida Statutes, defines "improper purpose" to mean participation primarily to harass or cause unnecessary delay or for frivolous purpose or needlessly increase the cost of litigation, licensing, or securing the approval of an activity. And a party may be subject to fees if a claim is not dropped or dismissed when it becomes evident it is no longer justiciable, even though it may not have been frivolous when filed.

Respondent respectfully requests this Finding of Fact be deleted.

Exceptions to Conclusions of Law

16. Respondent takes exception to the Conclusion of Law in Paragraph 45, which states:

> 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).

Respondent respectfully suggests that the ALJ's conclusion regarding "preponderance of evidence" is not supported by the fact evidence presented at hearing. As explained in paragraphs 3 and 8, Petitioner's assertion that the Agency should apply Petitioner's version of "usual and customary" instead of the Division's is only arguably supportive to the reimbursement disputes involving outpatient services. "Usual and customary" cannot even be arguably considered to support an evidentiary basis for a finding of fact regarding inpatient services provided by Holmes Regional Medical Center in DOAH Case No.: 05-2161.

Respondent suggest this Conclusion of Law be deleted and replaced as follows:

> *The preponderance of evidence does not support a finding that Petitioner participated in the underlying proceeding for an improper purpose. As to the $2,689.25 disputed reimbursement involving outpatient hospital services that were provided in the emergency room, the evidence shows Petitioner intended to persuade the agency to apply Petitioner's interpretation of the statute's reference to "usual and customary charges" and to affirm*

the Petitioner's analysis of hospital charge data to adjust reimbursement of the hospitals' charges.

Petitioner's attempt to have the agency apply a "usual and customary" standard as to the inpatient services provided by Holmes Regional, however, has no basis in law. Nevertheless, Petitioner raised a number of other fact issues regarding the hospitals' billing practices and the "ripeness" of AHCA review of the disputes when filed by the Intervenor hospitals, such that no finding of improper purpose shall be issued.

17. Respondent takes exception to the Conclusions of Law in Paragraphs 46 and 47, and footnote 13, which state:

> 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, 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 of § 57.205(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. (2203)).
>
> A party that asserts a good faith and soundly based attempt to change an exiting 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 reasonable basis to seek to modify Respondent's interpretation of a rule promulgated by DFS.
>
> [footnote 13 is not restated here].

Respondent respectfully suggests that citation to the G.E.L. and Jones cases are unnecessary and inappropriate for this conclusion of law. G.E.L. involved determination of the legislative intent regarding changes to the attorney fee statutes and jurisdiction of DOAH to rule on a pending motion following dismissal of a 120 proceeding. DOAH's jurisdiction to review the Intervenor hospitals' motion(s) for attorney fees is not disputed here. Further Jones involved attorney fee sanctions under section 57.105, Florida Statutes – not 120.595, Florida Statutes.

The legislative intent for determination of whether sanctions may be imposed under the Administrative Procedure Act is clearly outlined in the statute and is obviously broader than

intended for sanctions under the section 57.105, Florida Statutes. As explained in paragraph 15, above. Section 120.595 not only provides for a rebuttable presumption of "improper purpose" under limited circumstances, but it also allows sanctions when it is determined that a party participated in the proceeding primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation . . . .

Further, if it could be held that Petitioner initiated the proceedings with a good faith attempt to modify existing law with reasonable expectation of success, the Petitioner would have had to bring its "rule challenge" against DFS and not AHCA.

Respondent respectfully suggests that the Conclusions of Law in Paragraphs 46 and 47 be deleted.

18. Respondent takes exception to the Conclusions of Law in Paragraphs 48 through 50, which state:

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

As explained in paragraphs 9 and 10, above, the proposed changes to the Reimbursement Manual for Hospitals, 2006 Edition, does not contain a new "interpretation." The proposed manual contains a new methodology for determining the maximum reimbursement allowance established by the three-member panel at its meeting on April 11, 2006, and at the time Petitioner presented the proposed changes for consideration by the presiding officer, the proposed changes

were in fact merely proposed, and Intervenors' Motion to Strike should have been granted, as explained. [2]

Given the substantive nature of the changes in reimbursement set forth in the proposed Manual, the Manual (if adopted by rule) will apply only to medical services that were provided following the effective date of the proposed rule. No consideration of the proposed manual may be afforded to Petitioner in the underlying reimbursement dispute, because the Reimbursement Manuals create substantive rights and duties and thus may not be applied retroactively to determine reimbursement for services provided when the maximum reimbursement allowances established by the three-member panel were different – whether higher or lower.

Respondent respectfully requests that the second sentence of Finding of Fact Paragraph 48, and the Findings of Fact in Paragraphs 49 and 50 be deleted replaced as follows:

> *Pursuant to direction received from the three-member panel at its meeting on April 12, 2006, DFS has initiated rulemaking that would replace the existing HRM with a 2006 HRM which contains a provision whereby carriers may, if they maintain a database that meets the requirements set forth in the rule, determine the maximum reimbursement allowance for outpatient services based on a formula whereby the usual and customary charges of hospitals located within the same Medicare geographic locality is obtained.*
>
> *That the new, proposed Reimbursement Manuals were not in existence at the time(s) of AHCA's determinations in the underlying reimbursement disputes, they bear no significance to AHCA's having issued determinations based on the Manual in effect at the time the services were rendered – the 2004, Second Edition, and the Intervenor's Motion to Dismiss is granted, because AHCA's determination was, as required, limited to application of the rule existing at the time the hospital services were rendered.*

19. Respondent takes exception to the Conclusions of Law in Paragraph 51, which states.

> 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

[2] Based on comments submitted to the three-member panel at its meeting in February, whether the proposed changes will be formally adopted by rule is questionable - and even more objection to the proposed changes were recently submitted at a rule development workshop held by the Division of Workers' Compensation on May 16, 2006.

(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).

The proposed changes to the Reimbursement Manual do not "interpret" what is usual and customary, and thus cannot indicate any intent by DFS to "clarify it interpretation." The proposed changes, if adopted, would establish a wholly new methodology for determination of maximum reimbursement allowances based on a formula of "usual and customary" charges, and this methodology was established by the three-member panel, pursuant to its statutory authority to adopt maximum reimbursement allowances. And as explained in paragraphs 1, 3, 9 and 10, reference to GEL and Terners is incorrect. The Reimbursement Manuals create substantive rights and may not be applied retroactively, and any issue regarding "usual and customary" is limited to the disputed reimbursements for outpatient services.

Respondent respectfully suggests Conclusion of Law be deleted in its entirety and replaced as follows:

If the proposed Manual bears any significance to the determination of whether the Intervenors are entitled to an award of attorney fees pursuant to section 57.101, Fla. Stat., the proposed definitions of "usual and customary" support the reasonableness of Petitioner's proposed application of the statute – but only as to the disputed reimbursement for outpatient services. Reimbursement for the inpatient services provided by Holmes Regional under the proposed RMH would be the same as under the existing RMH. Hortica Insurance and West Michigan Floral Supply v. AHCA, Case No. 03-422PH, AHCA No. 2003005535. The agency is bound to apply the existing rule – and any rule challenge proceedings by Petitioner must be filed as against the Division of Workers' Compensation in the Department of Financial Services – not AHCA. See also: One Beacon Insurance v. AHCA, Case No. 04-356PH, FRAES No. 2004003025. [A copy of the Final Order issued by AHCA in Hortica is attached marked "Exhibit 2, "and incorporated by reference.]

20. Respondent takes exception to the Conclusions of Law in Paragraphs 52 through 61, which are set forth below. The proceeding below was not a proper rule challenge, because the

Division of Workers' Compensation was not a party. All of these Conclusions of Law are erroneous or superfluous to the issue of attorney fees, and should be deleted in their entirety:

> 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 section 440.13(12), Florida Statutes (2003).
>
> 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).
>
> 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.
>
> 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).
>
> 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).
>
> 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).
>
> 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).

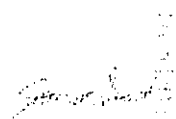
If the rule that Petitioner challenged in the underlying proceeding were to enlarge, modify, or contravene the law implemented, agency enforcement of the rule would risk violation of the separation of powers clause. In relevant part, the separation of powers clause prohibits the executive branch and 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).

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).

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.

Respondent respectfully suggests that these Conclusions of Law are unnecessary and inappropriate because DFS was not a party to any of the litigation.

Respectfully submitted on **Monday, May 22, 2006.**



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **Monday, May 22, 2006**, a true and correct copy of the foregoing was furnished via to the persons listed below:

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