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2008 NOV -5 P 1: 30

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

RENDITION NO. AHCA-08-1007-FOF-MDR

AVANTE AT JACKSONVILLE,

Petitioner,

vs.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.

DOAH CASE NOS. 07-3626
07-5158

FILED
2008 NOV -6 A 11: 32
DIVISION OF ADMINISTRATIVE HEARINGS

AVANTE AT ST. CLOUD,

Petitioner,

vs.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.

DOAH CASE NO. 08-0220

AMENDED FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), Errol H. Powell, conducted a formal administrative hearing. At issue in this proceeding is whether Petitioners' Interim Rate Request ("IRR") for an increase should be granted. The Recommended Order dated September 18, 2008 is attached to this final order and incorporated herein by reference, except where noted infra.

RULINGS ON EXCEPTIONS

Both Petitioners and Respondent filed exceptions to the recommended order, and Respondent filed a response to Petitioners' exceptions.

Petitioners' Exceptions

In its First Exception, Petitioners took exception to the findings of fact in Paragraph 39 of the Recommended Order, arguing that the findings were not supported by competent, substantial evidence and conflicted with other findings of fact in the Recommended Order. The Agency can only reject or modify findings of fact in a recommended order if those findings are not based on competent, substantial evidence. 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"). Contrary to Petitioners' assertion, the findings of fact in Paragraph 39 of the Recommended Order were based on competent, substantial evidence. See Transcript, Pages 25-26, 30, 40-41, 42, 48, 52, 54 and 90-91. Thus, the Agency cannot reject or modify them. Therefore Petitioners' First Exception is denied.

In its Second Exception, Petitioners took exception to the conclusions of law in Paragraph 59 of the Recommended Order, arguing that the ALJ's interpretation of section 2160A of the CMS Publication 15-1 was erroneous. The Agency finds that it could not substitute conclusions of law as or more reasonable than those of the ALJ. Therefore, Petitioners' Second Exception is denied.

In its Third Exception, Petitioners took exception to the ALJ's Recommendation, arguing that the Petitioners were entitled to at least the portion of the losses that were not covered by insurance. An ALJ's Recommendation is not a finding of fact or conclusion of law to which a party can take exception. To the extent that the ALJ's Recommendation could be deemed a conclusion of law, the Agency finds that it could not substitute a conclusion of law as or more reasonable than that of the ALJ. Therefore, Petitioners' Third Exception is denied.

Respondent's Exceptions

In its First Exception, Respondent took exception to the finding of fact in the last sentence of Paragraph 42 of the Recommended Order, wherein the ALJ found "that general and professional liability insurance costs include premiums, settlements, losses, co-insurance, deductibles, and defense costs." The Agency argued that the ALJ's finding was a conclusion of law regarding an interpretation of an Agency rule. As such, the Agency should reject the ALJ's conclusion of law and substitute a conclusion of law stating that the costs of general and professional liability insurance do not include settlements, losses, co-insurance, deductibles, and defense costs. Just because the ALJ labeled the last sentence of Paragraph 42 of the Recommended Order as a finding of fact does not make it so.

> [W]e give no great weight to the labeling of the conflicting findings as "conclusions of law" rather than "findings of fact." Though the hearing officer's labeling informs us that he properly sensed the presence of policy and legal considerations in the task of weighing the evidence . . . we nevertheless give the hearing officer's finding effect to the extent the issue was "simply the weight or credibility of testimony by witnesses," or was determinable "by ordinary methods of proof," "or was in a factual realm concerning which 'the agency may not rightfully claim special insight." Mc-Donald v. Dept. of Banking and Finance, 346 So.2d 569, 579 (Fla. 1st DCA 1977). On the other hand, to the extent that "the ultimate facts are increasingly matters of opinion and opinions are increasingly infused by policy considerations for which the agency has special responsibility," we shall honor the [agency's] substituted findings.

Sch. Bd. of Leon County v. Hargis, 400 So.2d 103 (Fla. 1st DCA 1981). While the ALJ's finding is based on witness testimony (See Transcript, Pages 75-77), the finding itself is not simply the result of weighing evidence, but instead involves a policy consideration for which the Agency has special responsibility, namely the interpretation of the State Plan that the Agency is required to administer. As such, "policy considerations left to the discretion of the Agency may

take precedence over findings of fact by an administrative law judge." Gross v. Department of Health, 819 So.2d 997, 1002 (Fla. 5th DCA 2002). Thus, the Agency finds that the last sentence of Paragraph 42 of the Recommended Order is a conclusion of law over which the Agency has substantive jurisdiction, and that the Agency could substitute a conclusion of law as or more reasonable than that of the ALJ. Therefore, the Respondent's first exception is granted, and the last sentence of Paragraph 42 of the Recommended Order is changed to state "Based on the record evidence presented, general and professional liability insurance costs include premiums, but do not include settlements, losses, co-insurance, deductibles, and defense costs."

In its Second Exception, Respondent took exception to the conclusions of law in the third and fourth sentences of Paragraph 57 of the Recommended Order, arguing that the conclusions of law were erroneous because Section IV.J. of the Plan is used only to determine interim rate requests and does not address allowable costs. The Agency finds that it has substantive jurisdiction over the conclusions of law in the third and fourth sentences of Paragraph 57 of the Recommended Order, and that it could substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, Respondent's Second Exception is granted, and Paragraph 57 of the Recommended Order is changed to state:

> 57. The Plan Section IV.J. does not specifically address settlement dollars. However, the evidence demonstrates that AHCA correctly examined only the Plan Section IV.J. and determined that the IRRs should be denied because settlement dollars are not general and professional liability insurance costs.

In its Third Exception, Respondent took exception to the conclusions of law in the second, third and fourth sentences of Paragraph 58 of the Recommended Order, arguing that there was no record evidence to infer that "the policy coverage for each facility represented prudent management." Additionally, Respondent argued that the ALJ misstated the law because

CMS Publication 15-1 specifically states that "any settlement negotiated by the provider ... of damages paid by the provider in excess of the limits of the provider's policy, ... are includable in allowable costs, provided the provider submits evidence to the satisfaction of the intermediary that the insurance coverage carried by the provider at the time of the loss reflected the decision of prudent management." Respondent noted that the ALJ correctly identified the Agency as the intermediary in Paragraph 47 of the Recommended Order, but stated that there was no record evidence stating or inferring that the Agency made a determination that Petitioners' insurance coverage carried at the time of the losses reflected the decision of prudent management. The ALJ's conclusions of law in the second, third and fourth sentences of Paragraph 58 of the Recommended Order were based on record testimony (See Transcript, Pages 78-80). However, they involve policy considerations for which the Agency has special responsibility. Thus, the Agency finds that it has substantive jurisdiction over the conclusions of law in the second, third and fourth sentences of Paragraph 58 of the Recommended Order, and that it could substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, Respondent's Third Exception is granted and Paragraph 58 of the Recommended Order is changed to state

> 58. CMS-PUB.15-1, Section 2160.2 provides that settlements in excess of the policy limits of insurance are allowable costs and that the provider must satisfy the intermediary that the policy coverage at the time of the loss represented prudent management. There is no evidence demonstrating that the intermediary, AHCA, determined that the policy coverage for each facility represented prudent management. Hence, the liability losses for each facility were not allowable costs.

In its Fourth Exception, Respondent took exception to the conclusions of law in Paragraph 59 of the Recommended Order based on the reasoning set forth in its First Exception. The Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraph 59

of the Recommended Order, and that it could substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, Respondent's Fourth Exception is granted and Paragraph 59 of the Recommended Order is changed to state:

> 59. The evidence demonstrates that settlements are not general and professional liability costs under Section IV.J. of the Plan. The evidence also demonstrates that the intermediary, AHCA, never determined that the policy coverage for each facility represented prudent management. Additionally, the evidence demonstrates that Avante at Jacksonville and Avante at St. Cloud chose not to file a claim with their respective insurance carrier for the losses covered by their insurance policies from the settlements, which exceeded the policy limits. The general provision in CMS-PUB.15-1 provides that, if a provider chooses not to file a loss claim with its insurance carrier for the losses covered, costs incurred as a result of such losses are not allowable. CMS-PUB.15-1, § 2160A. Consequently, the losses incurred by Avante at Jacksonville and Avante at St. Cloud were also not allowable costs under CMS-PUB.15-1, § 2160A.

FINDINGS OF FACT

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

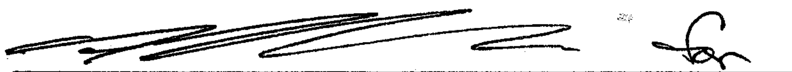
CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing, Petitioners' IRRs are hereby denied.

DONE and **ORDERED** this 4th day of November, 2008, in Tallahassee, Florida.



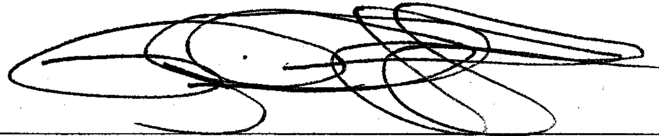
HOLLY BENSON, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO A JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A SECOND COPY ALONG WITH THE FILING FEE AS 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 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. Mail, or by the method indicated, to the persons named below on this 5th day of November, 2008.



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