STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SERVICE INSURANCE COMPANY, Petitioner, vs. OFFICE OF INSURANCE REGULATION and FINANCIAL SERVICES COMMISSION, Respondents.	)	Case No. 09-3042RX

FINAL ORDER

Pursuant to notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on July 31, 2009, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Richard J. Santurri
Mang Law Firm, P.A.
660 East Jefferson Street
Tallahassee, Florida 32302

For Respondents: Elenita Gomez, Esquire
Office of Insurance Regulation
200 East Gaines Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue presented is whether Florida Administrative Code Rule 69O-170.105(1)(d), is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On June 5, 2009, Petitioner Service Insurance Company filed a Petition for Rule Challenge against Respondent Office of Insurance Regulation, alleging that Florida Administrative Code Rule 69O-170.105(1)(d) is an invalid exercise of delegated legislative authority. Petitioner's subsequent motion to amend its Petition to add the Financial Services Commission as a Respondent was granted by Order entered June 24, 2009, and Petitioner's Petition for Rule Challenge was, therefore, replaced by Petitioner's First Amended Petition for Rule Challenge filed June 16, 2009.

No witnesses were offered by any party at the final hearing. However, Joint Exhibits numbered 1-5; Petitioner's Exhibits numbered 1, 3, and 5-7; and Respondents' Exhibits numbered 1 and 2 were admitted in evidence. The post-hearing Joint Motion to Submit Additional Joint Exhibits 6 and 7 was granted by Order entered August 3, 2009, and Joint Exhibits 6 and 7 were also admitted in evidence in this cause.

The Transcript of the final hearing was filed on August 14, 2009. Respondents' Motion for Extension of Time Within Which to File Proposed Final Orders was granted up to and including September 28, 2009. Petitioner and Respondents timely filed their proposed final orders.

FINDINGS OF FACT

1. Respondent Office of Insurance Regulation (formerly the Florida Department of Insurance) regulates the insurance industry in Florida. Petitioner Service Insurance Company is an insurance company duly licensed and regulated by Respondent Office.

2. During its regular session, the 1996 Florida Legislature added Subsection (6) to Section 627.062, Florida Statutes, effective January 1, 1997. That Subsection provided as follows:

> (6)(a) After any action with respect to a rate filing that constitutes agency action for purposes of the Administrative Procedure Act, an insurer may, in lieu of demanding a hearing under s. 120.57, require arbitration of the rate filing. . . . Costs of arbitration shall be paid by the insurer.
>
> (b) Arbitration under this subsection shall be conducted pursuant to the procedures specified in ss. 682.06-682.10. Either party may apply to the circuit court to vacate or modify the decision pursuant to s. 682.13 or s. 682.14. The department shall adopt rules for arbitration under this subsection, which rules may not be inconsistent with the arbitration rules of the American Arbitration Association as of January 1, 1996. [Emphasis added.]

3. Assumedly in anticipation of the effective date of the new arbitration option, on November 8, 1996, the Department of Insurance published in the *Florida Administrative Weekly* its

notice of development of proposed rules for rate filing arbitration pursuant to Section 627.062(6), Florida Statutes. On February 28, 1997, the Department published its proposed rules. Proposed Rule 4-170.105 was entitled "Costs, Expenses and Fees of the Arbitration" and read as follows:

> Notwithstanding anything to the contrary in the Florida Arbitration Code or in the AAA Rules, all costs, expenses and fees of a rate filing arbitration shall be paid by the initiating party. For purposes of these rules, costs, expenses and fees of a rate filing arbitration include, but are not limited to, the following items:
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> (1) Filing fees payable to the American Arbitration Association pursuant to the AAA Rules incidental to the rate filing arbitration.
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> (2) Service, processing, hearing, postponement/cancellation, travel, hearing room rental and/or any other administrative fee, charge or expense referred to in the Florida Arbitration Code, in the AAA Rules, or elsewhere.
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> (3) Court reporter costs, expenses and fees for an expedited transcript of all arbitration hearings, and all costs associated with the taking by any party of a deposition of any expert or non-expert witnesses.
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> (4) Expert witness fees, costs and expenses, for any expert or experts retained by any party or by the arbitration panel, including all costs, expenses and fees related to the taking by any party of a deposition of any such expert witness(es), and all costs, expenses and fees related to the appearance and testimony of such expert or experts during the arbitration hearing.

> (5) Payments to, for, or on behalf of each of the members of the arbitration panel in compensation for their services and in reimbursement of all reasonable and necessary expenses incurred by each in connection with the arbitration proceeding.
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> (6) Any other cost or expense incurred by any party to the arbitration and deemed by such incurring party to be necessary for an effective and proper presentation of such party's case to the arbitration panel, except that each party shall bear its own attorneys' fees. [Emphasis added.]

4. Following a rule development workshop conducted by the Department of Insurance on December 4, 1996, Attorney David A. Yon sent a letter dated December 10 to the Bureau Chief of the Department's Bureau of P & C Forms and Rates regarding his concerns with several provisions of the proposed rules. As relevant to this proceeding, Yon advised the Department that:

> Section 627.062(6)(a) states that the "[c]ost of arbitration shall be paid by the insurer." Presumably, this provision would require the insurer to pay arbitration fees and perhaps the costs of the hearing room. However, rule 4-150.05 [sic], as drafted, provides that the insurer shall pay "all costs, expenses and fees of a rate filing arbitration" and describe [sic] in detail the type of costs that insurers will have to bear. These costs include the Department's expert witness fees and any other expenses deemed by the Department to be reasonably necessary in preparing its case. We strongly object to this provision and believe it exceeds the Department's statutory authority.

5. As a result of Attorney Yon's concerns, a Department attorney directed a Memorandum dated January 22, 1997, to the Director of Insurer Services regarding the Department's authority to interpret the word "costs" to mean "all costs." While acknowledging that the Department's expansion of the word "costs" to include "costs, expenses, and fees" conflicted specifically with AAA Rule 49, which required that the expenses of any witnesses shall be paid by the party producing the witness, he concluded that the AAA Rule was "eclipsed" by the rate filing arbitration enabling statute. No citation is provided for that conclusion, nor is the concept of "eclipsed" explained. The Memorandum further acknowledges that the section in the Florida Arbitration Code relating to the payment of costs was specifically made inapplicable to rate filing arbitration by the Legislature.

6. After concluding that AAA Rule 49 was "eclipsed" and that the costs rule in the Florida Arbitration Code did not apply, the attorney concluded that the enabling statute must mean "all costs." The attorney explained that the Department's interpretation would be reasonable because if the rate filing arbitration were a civil action instead, the trial judge would have discretion to consider the reasonableness of the amount and the necessity of the expense in determining the taxation of costs. The attorney concluded that the Department's

interpretation of costs to mean "all costs" and to mean "costs, expenses, and fees" was reasonable. Since the Department's interpretation was reasonable, the proposed rule on costs, expenses, and fees, therefore, did not exceed powers delegated to the Department by the Legislature, in the opinion of the author of the Memorandum.

7. Following a public hearing on the proposed rules conducted by the Department on March 28, 1997, Attorney Yon, on behalf of the American Insurance Association and the Florida Insurance Council, sent a letter to the Bureau Chief of the Department's Bureau of P & C Forms and Rates on April 8, 1997. As relevant to this proceeding, Yon advised the Department that:

> As addressed at the workshop, all interested parties are concerned with proposed rule 4-170.105, which requires insurers to bear all costs, other than attorneys' fees, associated with arbitrations. The breadth of the proposed rule contravenes the intent of section 627.062, Florida Statutes, and is not consistent with general arbitration practices, including the American Arbitration Association Rules. The statute provides at paragraph (6)(a) that, "Costs of arbitration shall be paid by the insurer." The "cost [sic] of arbitration" refers to those costs associated with conducting arbitration proceedings, not the costs of the parties in presenting their case at such proceedings. The first draft of the statute provided that the department and the insurer would each appoint an employee to the arbitration panel. There was concern that this would not make for the most effective arbitration and the language was modified to provide for nonemployees [sic]. As a

> result, it was agreed that the insurer would bear the costs of arbitration, with the clear implication being that cost referred to the cost of using nonemployed [sic] arbitrators. This language never contemplated that the insurer would have to pay for the department's costs of putting on its own case, including hiring expert witnesses. Finally, this provision of the rule is clearly contrary to Rule 49 of AAA's Commercial Arbitration Rules. That provisions [sic] states:
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> The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.
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> We therefore request that the department revise the rule to eliminate the requirement that insurers pay all costs related to arbitrations and clarify that the rules do not require insurers to fund preparation of the department's arbitration cases.

8. On April 9, 1997, the Regional Manager for the Southern Region of the Alliance of American Insurers sent a letter to an attorney for the Department noting certain concerns with the Department's proposed rate filing arbitration rules. Among the concerns raised was the following:

> Our reading of Chapter 627.062(6)(a), FS[,] shows that an insurer pay only arbitration costs rather than all costs. We note that a

> requirement to pay all costs without consent by either party is inconsistent with commercial arbitration rules (see AAA Rule 49, specifically page 18 and 21 relative to administrative fees and hearing fees and page 22 relative to postponement/cancellation and processing fees).

9. By letter dated April 16, 1997, a Staff Attorney for the Joint Administrative Procedures Committee (JAPC) requested the Department's Division of Legal Service to explain a number of concerns the Committee had with the proposed rules. As to the rule under challenge in this proceeding, JAPC questioned the Department's statutory authority to include the American Arbitration Association in the arbitration process contemplated by Section 627.062(6), Florida Statutes. The May 16, 1997, reply states that: "Since the statute mandates conformity to the AAA rules, we wrote the rule to be consistent with the AAA rules."

10. The Department filed for adoption its proposed rate filing arbitration rules on August 11, 1997, and the rules became effective August 31, 1997. No changes were made to Rule 4-170.105 in its substance or language from the version published in February except for internal changes to the subsection numbers within the Rule. Under that re-numbering, Subsection (4) of the proposed Rule became Subsection (1)(d).

11. The 2008 Legislature amended Section 627.062(6), Florida Statutes, by deleting the rate filing arbitration option and requiring that any administrative proceeding arising from the denial of a rate filing be expedited. § 10, ch. 2008-66, Laws of Fla. The amendment, effective July 1, 2008, was approved by the Governor on May 28, 2008.

12. Admitted as joint exhibits in this proceeding were the awards from two rate filing arbitrations involving Petitioner and the Office of Insurance Regulation. In American Arbitration Association Case No. 33 195 Y 00356 07, Petitioner's demand for arbitration was filed August 20, 2007, but the arbitration hearing did not take place until February 4-6, 2009. Prior to the arbitration hearing, on November 5, 2008, Petitioner filed with the arbitrators a motion relating to the allocation of costs of the Office's proposed outside expert witness.

13. The motion challenged the validity of the same rule at issue in this proceeding requiring that Petitioner pay all costs, including those of the Office's experts. The arbitrators ruled that AAA Rule 49, which provides that the expenses of witnesses be paid by the party producing the witness, controlled. The Office filed a motion a few days prior to the arbitration hearing seeking to have Petitioner pay the Office's expert witness costs incurred prior to the time Petitioner challenged in the arbitration the applicability of Rule 69O-

170.105 [formerly Rule 4-170.105 under the Department of Insurance]. In the Award entered April 24, 2009, the Chief Arbitrator ordered Petitioner to pay the fees, costs, and expenses of the Office's outside expert witness incurred prior to September [sic] 5, 2008. One arbitrator dissented from that requirement, and one arbitrator dissented from the entire Decision and Award.

14. The Award required Petitioner to pay the costs allocated to it within 30 days of receipt of invoices. No evidence was offered as to when Petitioner received an invoice from or for the Office's outside expert witness.

15. In American Arbitration Association Case No. 33 195 Y 00357 07, the arbitration hearing occurred on February 6-8, 2008. The Award was signed by two arbitrators, one of whom dissented, on June 2, 2008, and by the third arbitrator on June 4, 2008. The Award does not specifically address the payment of the costs, fees, and expenses of expert witnesses. The Award addressed in the arbitration described in Paragraphs numbered 12-14 of this Final Order, however, refers to the Award described in this Paragraph and notes that Petitioner by letter dated July 23, 2008, advised the Office that it was refusing to pay the fees and costs of the Office's expert in that related arbitration. The letter itself refers to the arbitration described in this Paragraph.

16. On August 5, 2008, Respondent Office filed with the Division of Administrative Hearings an Order to Show Cause against Petitioner, seeking to suspend or revoke Petitioner's Certificate of Authority to transact insurance for violating Rule 69O-170.105. Service requested an administrative hearing, and the matter is currently pending before DOAH in Case No. 08-005961. That case has been placed in abeyance pending the outcome of this rule challenge.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.56, 120.569, and 120.57(1), Florida Statutes. Although the challenged Rule was adopted by the Department of Insurance on August 31, 1997, the Legislature transferred the Department's arbitration rules to the Financial Services Commission, effective January 7, 2003, when it abolished the Department of Insurance and created the Commission and the Office of Insurance Regulation within the Commission. § 20.121(3) and (5), Fla. Stat. Accordingly, the proper parties are present in this proceeding.

18. The First Amended Petition for Rule Challenge filed by Petitioner in this cause alleges that Florida Administrative Code Rule 69O-170.105(1)(d) is an invalid exercise of delegated authority in that it enlarges, modifies, or contravenes the

specific provisions of law implemented. Section 120.56(3), Florida Statutes, provides that any substantially affected person may seek a determination of the invalidity of a rule as an invalid exercise of delegated authority. Subsection 120.56(3) authorizes seeking such a determination of the invalidity of an existing rule at any time during the existence of the rule and provides that the Petitioner has the burden to prove by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised. Petitioner has met its burden of proof.

19. The challenged rule enlarges, modifies, or contravenes the specific provisions of law implemented. During the time period when arbitration was an option, Section 627.062(6), Florida Statutes, provided in Subsection (a) that the costs of arbitration shall be paid by the insurer and in Subsection (b) that Respondent Commission shall adopt rules for arbitration, which rules may not be inconsistent with the arbitration rules of the American Arbitration Association (AAA) as of January 1, 1996.

20. The statute did not define costs. The AAA Rules as of January 1, 1996, did not contain a definition of costs. Rather, the Rules dealt separately with different items carrying a monetary burden for the parties, such as administrative fees, filing fees, hearing fees, hearing room rental, and cancellation

fees. Rule 49 is entitled "Expenses" and provides that the expenses of witnesses for either side are to be paid by the party producing the witness. The Department expanded the statutory term "costs" and promulgated the challenged rule which is entitled "Costs, Expenses and Fees of the Arbitration" and required one party, the insurance company, to pay the expert witnesses fees and expenses of the other party, now the Respondent Office. Simply stated, the Department took one category of monetary obligation (costs) and expanded it to three (costs, expenses, and fees). Accordingly, the challenged Rule directly contravenes the statute implemented because it is inconsistent with the AAA Rules. See Dept. of Ins. v. First Floridian Auto and Home Ins. Co., 803 So. 2d 771 (Fla. 1st DCA 2001), wherein the Court resolved conflicts between the Department's arbitration rules and the AAA Rules in favor of the AAA Rules.

21. Prior to the adoption of the challenged Rule, the Department of Insurance was repeatedly advised that the challenged Rule was inconsistent with the AAA Rules and, therefore, contrary to the statute the Rule is alleged to be implementing. The only record evidence that the Department considered the infirmity of the then-proposed Rule is the internal memorandum dated January 22, 1997, wherein the author declared the controlling AAA Rule to be "eclipsed," whatever

that means; relied upon a provision in the Florida Arbitration Code that the Legislature had specifically provided did not apply; and relied upon the discretion given to a trial judge in a different branch of government to determine reasonable and necessary costs and then assess them.

22. The memorandum, therefore, successfully avoided considering directly the issue before the Department and, now, this forum. There is no evidence that the Legislature intended the arbitration process to constitute a blank check for the Department to expend any amounts it desired if the insurance company chose arbitration rather than a Section 120.57, Florida Statutes, proceeding. There is no evidence that the Legislature anticipated that the Department would hire outside expert witnesses if the insurance company chose arbitration rather than using its own employees whose opinions resulted in the Department's preliminary determination to deny the rate filing.

23. Respondents argue that the challenged Rule has been legislatively protected from being challenged in a Section 120.56 proceeding and/or that the Legislature actually adopted the Department's rules. Respondents rely on Section 20.121(5), Florida Statutes, which provides as follows:

> Effective January 7, 2003, the rules of the Department of Banking and Finance and of the Department of Insurance that were in effect on January 6, 2003, shall become rules of the Department of Financial Services or the

> Financial Services Commission as is appropriate to the corresponding regulatory or constitutional function and shall remain in effect until specifically amended or repealed in the manner provided by law.

24. The Legislature did not ratify the rules being transferred when it created Section 20.121(5), Florida Statutes, and transferred the Department of Insurance's rules to, in this instance, Respondent Financial Services Commission. The Legislature has provided the process transfers must follow in Section 20.06, Florida Statutes, which states:

> Method of reorganization.--The executive branch of state government shall be reorganized by transferring the specified agencies, programs, and functions to other specified departments, commissions, or offices. Such a transfer does not affect the validity of any judicial or administrative proceeding pending on the day of the transfer, and any agency or department to which are transferred the powers, duties, and functions relating to the pending proceeding must be substituted as a party in interest for the proceeding. The transfers provided herein are intended to supplement but not supplant the requirements of s. 6, Art. III of the State Constitution. The definitions provided in s. 20.03 apply to this section, and the types of transfers are defined as follows:
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> * * *
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> (2) TYPE TWO TRANSFER.-- A type two transfer is the merging into another agency or department of an existing agency or department or program, activity, or function thereof or, if certain identifiable units or subunits, programs, activities, or functions are removed from the existing agency or

> department, or are abolished, it is the merging into an agency or department of the existing agency or department with the certain identifiable units or subunits, programs, activities, or functions removed therefrom or abolished.
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> * * *
>
> (c) Unless otherwise provided by law, the administrative rules of any agency or department involved in the transfer which are in effect immediately before the transfer remain in effect until specifically changed in the manner provided by law.

The transfer applicable to the creation of the Department of Financial Services was a type two transfer as defined in Section 20.06(2), Florida Statutes. See § 3, Ch. 2002-404, Laws of Fla.

25. Section 20.121(5) is not the first time that the Legislature has transferred rules from one agency to another. For example, in 1996, the Legislature transferred powers from the Department of Health and Rehabilitative Services to the Department of Health in Section 8, Chapter 96-403, Laws of Florida, by means of a type two transfer. Likewise, in 1993, the Legislature created both the Department of Business and Professional Regulation (DBPR) and the Department of Environmental Protection (DEP). DBPR was created by merging and transferring the Department of Business Regulation and the Department of Professional Regulation in Sections 2 and 3 of Chapter 93-220, Laws of Florida, by means of type one transfers and type three transfers. (Type 3 transfers authorized at the

time are the equivalent of a type 2 transfer currently. See Section 12, Chapter 94-235, Laws of Fla.) DEP was created by transferring the Department of Natural Resources and the Department of Environmental Regulation in Section 8 of Chapter 93-213, Laws of Florida, by means of a type 3 transfer.

26. The Legislature did not include a ratification of any agency rules in the above transfers in the session laws or Florida Statutes. All appear to be subject to the condition expressed in Section 20.06(2)(c), that rules "remain in effect until specifically changed in the manner provided by law." This language is very similar to that contained in Section 20.121(5), which states rules "shall remain in effect until specifically amended or repealed in the manner provided by law." One method by which rules are repealed or amended is in response to the rule challenge process.

27. Another indication that the Legislature did not intend the language in Section 20.121(5), Florida Statutes, to operate as a ratification of the agency rules is Section 163.3177(10)(k), Florida Statutes. Section 163.3177(10)(k) discusses Florida Administrative Code Chapter 9J-5, which had to be submitted to the Legislature for approval before it could become effective. Section 163.3177(10)(k) states, in its relevant part:

> . . . Therefore, the Legislature declares that changes made to chapter 9J-5, Florida Administrative Code, prior to October 1, 1986, shall not be subject to rule challenges under s. 120.56(2), or to drawout proceedings under s. 120.54(3)(c)2. The entire chapter 9J-5, Florida Administrative Code, as amended, shall be subject to rule challenges under s. 120.56(3), as nothing herein shall be construed to indicate approval or disapproval of any portion of chapter 9J-5, Florida Administrative Code, not specifically addressed herein. No challenge pursuant to s. 120.56(3) may be filed from July 1, 1987, through April 1, 1993. Any amendments to chapter 9J-5, Florida Administrative Code, exclusive of the amendments adopted prior to October 1, 1986, pursuant to this act, shall be subject to the full chapter 120 process.

28. In Section 163.3177(10)(k), Florida Statutes, the Legislature expressly stated when changes to Chapter 9J-5, Florida Administrative Code, were and were not subject to rule challenges. There is no such language within Section 20.121(5), Florida Statutes. If the Legislature had intended Section 20.121(5), Florida Statutes, to grant an immunity from rule challenges, it would have included language such as the language contained in Section 163.3177(10)(k).

29. Accordingly, Respondents' novel argument is without merit because (1) the Legislature did not use any language that would suggest that the Department's rules were exempt from Chapter 120, Florida Statutes; (2) the language used is the usual "housekeeping" language used when the Legislature moves

functions from one agency to another; and (3) if the Legislature had not used the language it used in transferring the rules, the Commission would have had no rules for the functions it received from the Department of Insurance unless and until it adopted rules through the Chapter 120, Florida Statutes, rulemaking process.

30. Respondents argue that Petitioner lacks standing to maintain this proceeding because (1) the rule has been repealed by operation of law and cannot be challenged, and (2) a rule can only be declared invalid prospectively but Petitioner seeks a retroactive application. Neither argument has merit in this proceeding.

31. As to Respondents' first argument, the general proposition is that the repeal of a statute which is implemented by a rule results in an automatic expiration of the rule. See Christo v. Dept. of Banking and Fin., 649 So. 2d 318, 321 (Fla. 1st DCA 1995). Thus, the effective "repeal" of a rule by operation of law would prevent the Division of Administrative Hearings (DOAH) from accepting jurisdiction in a challenge to that rule after the authorizing statute was repealed. See Dept. of Rev. v. Sheraton Bal Harbour Ass'n., Ltd., 864 So. 2d 454 (Fla. 1st DCA 2003), appealing the final order in DOAH Case No. 03-2441RX, wherein the taxes had already been paid and the challenged rule had been formally repealed.

32. Those general propositions are not, however, the end of the inquiry as to whether such a rule can be challenged at DOAH after the repeal of the statute implemented by the rule. The application of the rule and the effect of the rule on the challenger must also be considered. See Witmer v. Dept. of Bus. & Prof. Reg., Div. of Pari-Mutuel Wagering, 662 So. 2d 1299 (Fla. 4th DCA 1995).

33. The circumstances in the case at bar are more similar to those in Witmer than to those in Sheraton Bal Harbour. In this proceeding, the Rule is being challenged by a licensed insurance company which is regulated by Respondent Office. The Rule still appears as an existing Rule in the *Florida Administrative Code.*

34. More importantly, however, are the facts that (1) one of the arbitrations described in the Findings of Fact portion of this Final Order occurred after the repeal of the statute authorizing the rate filing arbitration option and the expiration of the challenged Rule, and (2) Respondent Office's Order to Show Cause pending in DOAH Case No. 08-005961 seeking to suspend or revoke Petitioner's license was initiated after the repeal of the statute and the expiration of the challenged Rule. As in Witmer, Respondent Office seeks to discipline Petitioner's license based upon an expired rule. As Witmer had

standing to maintain his challenge, Petitioner has standing to maintain its challenge in this proceeding.

35. Respondents' second argument that Petitioner lacks standing because it seeks a retroactive, rather than a prospective, application of the Rule fails for the same reasons Respondents' first argument fails. In addition, Respondent Office's Order to Show Cause filed after the Statute's repeal and the Rule's expiration is in and of itself a prospective application of the Rule. The fact that Respondent Office is still operating under the Rule confirms Petitioner's standing to challenge it.

36. It is concluded that the portion of the agency rule that requires the insurer to pay the agency's expert witness fees contravenes the express language of Section 627.062(6)(b), Florida Statutes, prohibiting the agency from adopting a rule inconsistent with the AAA rules. Accordingly, Rule 69O-170.105(1)(d), which is contrary to AAA Rule 49, is an invalid exercise of delegated legislative authority. Further, Petitioner has standing to initiate and maintain this rule challenge.

37. In its First Amended Petition for Rule Challenge, Petitioner asserts that it is entitled to an award of attorney's fees pursuant to Section 120.595, Florida Statutes. During the final hearing in this cause no mention of attorney's fees, the

amount thereof, or the reasonableness of the amount was made by Petitioner or Respondents. Petitioner's Proposed Final Order reiterates its request for attorney's fees and adds a request for costs, with no further specificity as to what might be reasonable.

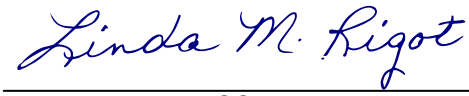
It is, therefore,

ORDERED that:

1. Florida Administrative Code Rule 69O-170.105(1)(d) is an invalid exercise of delegated legislative authority.

2. Petitioner has sufficiently pled its entitlement to reasonable costs and reasonable attorney's fees. Jurisdiction is reserved as to all issues involving the amount of reasonable attorney's fees and costs to be awarded to Petitioner.

DONE AND ORDERED this 22nd day of October, 2009, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of October, 2009.

COPIES FURNISHED:

Douglas A. Mang, Esquire
Richard J. Santurri
Mang Law Firm, P.A.
660 East Jefferson Street
Tallahassee, Florida 32302

Elenita Gomez, Esquire
Office of Insurance Regulation
200 East Gaines Street
Tallahassee, Florida 32399-0305

Kevin M. McCarty, Commissioner
Office of Insurance Regulation
200 East Gaines Street
Tallahassee, Florida 32399-0305

Steve Parton, General Counsel
Office of Insurance Regulation
200 East Gaines Street
Tallahassee, Florida 32399-0305

Liz Cloud, Program Administration
Administrative Code
Department of State
R.A. Gray Building, Suite 101
Tallahassee, Florida 32399

F. Scott Boyd, Executive Director and
General Counsel
Joint Administrative Procedure Committee
120 Holland Building
Tallahassee, Florida 32399-1300

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.