

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AIG,)
)
Petitioner,)
)
vs.) Case No. 11-3341
)
SOUTHERN BAPTIST HOSPITAL OF)
FLORIDA, INC., d/b/a BAPTIST)
MEDICAL CENTER; AND DEPARTMENT)
OF FINANCIAL SERVICES, DIVISION)
OF WORKERS' COMPENSATION,)
OFFICE OF MEDICAL SERVICES,)
)
Respondents.)
_____)

RECOMMENDED ORDER OF DISMISSAL

This cause is before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings, on the Motion to Dismiss and Motion for Summary Final Order filed by Southern Baptist Hospital of Florida, d/b/a Baptist Medical Center on July 11, 2011, and August 12, 2011, respectively. The Motion to Dismiss and Motion for Summary Final Order are considered motions for a recommended order of dismissal.

APPEARANCES

For Petitioner: Daniel J. Simpson, Esquire
Conroy, Simberg, Ganon, Krevans, Abel,
Lurvey, Morrow, and Schefer, P. A.
3440 Hollywood Boulevard, Second Floor
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For Respondent:¹ Alan M. Fisher, Esquire
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For Respondent:² Cynthia L. Jakeman, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
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STATEMENT OF THE ISSUE

The issue for determination is whether Southern Baptist Hospital of Florida, Inc., d/b/a Baptist Medical Center should be reimbursed by AIG for medical services rendered in accordance with the proposed agency action by the Department of Financial Services, Division of Workers' Compensation, Office of Medical Services issued on April 22, 2011.

PRELIMINARY STATEMENT

On April 22, 2011, the Department of Financial Services, Division of Workers' Compensation, Office of Medical Services (Department) issued a determination on a dispute between Southern Baptist Hospital of Florida, Inc., d/b/a Baptist Medical Center (Baptist Medical Center), and AIG regarding reimbursement for medical services rendered. The Department's determination was favorable to Baptist Medical Center. AIG disputed the Department's determination and requested a hearing. On July 6, 2011, this matter was referred by the Department to the Division of Administrative Hearings.

Pursuant to notice, this matter was scheduled for final hearing by webcast and telephone conference call between locations in Miami, Jacksonville, and Tallahassee, Florida, on September 21, 2011.

On July 11, 2011, Baptist Medical Center filed a Motion to Dismiss AIG's Late Petition for Administrative Relief requesting dismissal of AIG's Petition for Administrative Hearing (Petition) as untimely. Among other things, AIG filed a response asserting that the Petition was timely, to which Baptist Medical Center filed a reply. The Department did not file a response.

Pertinent hereto, on August 11, 2011, the undersigned issued an Order Regarding Motion to Dismiss. The undersigned determined that, based upon Baptist Medical Center's suggesting that it become an additional respondent and not objecting to AIG being a party to the instant case as the Petitioner, Baptist Medical Center was withdrawing its Motion to Dismiss. However, subsequently, Baptist Medical Center indicated that it was not withdrawing its Motion to Dismiss and desired the dismissal of the Petition. As a result, on September 1, 2011, the undersigned issued an Order Vacating Order Regarding Motion to Dismiss.

On August 12, 2011, Baptist Medical Center filed, among other motions, a Motion for Summary Final Order, which is

considered a motion for recommended order of dismissal,³ and which also incorporates arguments presented by Baptist Medical Center in its Motion to Dismiss. In essence, Baptist Medical Center's position is that AIG's Petition, challenging the Department's determination, is untimely and should be dismissed. On August 19, 2011, AIG filed a response in opposition to the Motion for Summary Final Order. On August 25, 2011, Baptist Medical Center filed a reply to AIG's response. On August 26, 2011, the Department filed a response to AIG's response.

Further, Baptist Medical Center's Motion to Dismiss is considered a motion for a recommended order of dismissal.⁴ The Motion to Dismiss is also considered in this Recommended Order in that, essentially, the same arguments for dismissal are being presented in both the Motion to Dismiss and the Motion for Summary Final Order.

A basic tenant of law is that, in addressing motions to dismiss, allegations of a petition or complaint must be accepted as true in the light most favorable to the Petitioner or complainant. City of Gainesville v. State of Fla., Dep't of Transp., 778 So. 2d 519, 522 (Fla. 1st DCA 2001); Fox v. Prof'l Wrecker Operators of Fla., Inc., 801 So. 2d 175, 178 (Fla. 5th DCA 2001). Consequently, the allegations in the Petition must be taken as true and in the light most favorable to AIG.

FINDINGS OF FACT

Based on the Petition and assertions by the parties to which no disagreement exists, the following Findings of Fact are made:

1. Baptist Medical Center filed a Petition for Resolution of Reimbursement Dispute (Petition for Resolution) with the Department. Baptist Medical Center was the Petitioner, and AIG was the respondent.

2. On April 22, 2011, the Department issued its decision in favor of Baptist Medical Center. Contained in its decision, among other things, the Department notified all affected persons, including AIG and AIG's servicing agent, Specialty Risk Services, Inc. (SRS), that any petition for hearing was required to be filed within 21 days from their receipt of the decision and that failure to do so would constitute a waiver of the right to a hearing regarding the Department's decision.

3. Both AIG and SRS received their respective copy of the Department's decision on April 25, 2011. A petition for hearing was required to be filed with the Department on or before May 16, 2011.

4. SRS forwarded a petition for administrative hearing to the Department's Clerk by Federal Express on May 10, 2011. An inference is drawn and a finding of fact is made that SRS' petition for administrative hearing was received by the

Department on May 11, 2011. SRS' petition for administrative hearing reflects, among other things, in the style and the allegations, SRS as the Petitioner and SRS as requesting the hearing. Also, in an allegation identifying the Petitioner and the Petitioner's address, SRS includes AIG and Liberty Asset Recovery as Petitioners.

5. Subsequently, AIG was contacted by the Department's counsel on June 16, 2011. The Department's counsel advised AIG that SRS did not have standing to file the petition for administrative hearing; that AIG, instead of SRS, must be named as the Petitioner; and that the 21-day deadline would be extended to allow AIG to file an amended petition for administrative hearing to correct the defect of SRS as the Petitioner.

6. AIG forwarded its Petition to the Department's Clerk by Federal Express on June 20, 2011. An inference is drawn and a finding of fact is made that AIG's Petition was received by the Department's Clerk on June 21, 2011.

7. The Department's Clerk received AIG's Petition more than 21 days from the date that AIG received the Department's decision on the Petition for Resolution. AIG's Petition is untimely.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has

jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2011).

9. Section 120.569, provides in pertinent part:

(2) (a) Except for any proceeding conducted as prescribed in s. 120.56, a petition or request for a hearing under this section shall be filed with the agency. . . . A request for a hearing shall be granted or denied within 15 days after receipt.

* * *

(c) Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b). Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to Petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. The agency shall promptly give written notice to all parties of the action taken on the petition, shall state with particularity its reasons if the petition is not granted, and shall state the deadline for filing an amended petition if applicable. This paragraph does not eliminate the availability of equitable tolling as a defense to the untimely filing of a petition.

(d) The agency may refer a petition to the division for the assignment of an administrative law judge only if the

petition is in substantial compliance with the requirements of paragraph (c).

10. Pertinent to the instant case, the Department provided in its decision that any petition for hearing was required to be received by the Department within 21 days from receipt of its decision.

11. AIG received the Department's decision on April 25, 2011. As a result, AIG's Petition should have been received by the Department's Clerk on or before Monday, May 16, 2011. However, AIG's Petition was not received until June 21, 2011, more than one month after the date that AIG received the Department's decision and more than one month after the date that the Department should have received AIG's Petition.

12. AIG argues that its Petition is not untimely because the action by the Department's counsel, after the filing deadline, extended and waived the 21-day requirement. The undersigned is not persuaded that the action by the Department's counsel extended and waived the 21-day requirement. See Riverwood Nursing Ctr., LLC. v. Ag. for Health Care Admin., 58 So. 3d 907, 911 (Fla. 1st DCA 2011). Furthermore, even though not argued, equitable tolling does not apply to the circumstances presented in the instant case. Id.

13. Additionally, AIG argues that its Petition is not untimely because its Petition amends or relates back to the

earlier petition for hearing filed by SRS with the Department's Clerk on May 11, 2011. The undersigned is not persuaded that the relation back rule applies in this particular situation. Id. See also Trosso v. Fla. Ins. Guar., 538 So. 2d 103 (Fla. 4th DCA 1989).

14. Consequently, AIG's Petition is untimely.

15. The agency with whom a petition for hearing is filed determines whether the petition should be dismissed as untimely. § 120.569(2)(c), Fla. Stat. SRS' petition for hearing was filed with the Department, as SRS being the Petitioner. AIG's Petition was filed with the Department, as AIG being the Petitioner. Therefore, the Department determines whether AIG's Petition should be dismissed as untimely.

16. The Department shall dismiss a petition for hearing, at least once, without prejudice and allow the Petitioner to file an amended petition curing the defect, unless it appears conclusively from the face of a petition that the defect in the petition cannot be cured. § 120.569(2)(c), Fla. Stat.

17. The Department determined that SRS did not have standing to file a petition for hearing as a Petitioner, but did not dismiss SRS' petition for hearing.

18. AIG did not file a petition for hearing before the expiration of the 21-day requirement.

19. Subsequent to the 21-day requirement, the Department's

counsel contacted AIG and advised AIG of SRS' standing defect and that AIG was required to file the petition for hearing. AIG then filed its Petition.

20. Unless the Department determines that the defect in SRS' petition for hearing, as SRS being the Petitioner, could be cured by AIG's filing a petition for hearing, as AIG being the Petitioner, AIG's Petition should be dismissed.

21. AIG's Petition is untimely and should be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, Office of Medical Services enter a final order dismissing AIG's Petition for Administrative Hearing.

DONE AND ENTERED this 6th day of September, 2011, in Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of September, 2011.

ENDNOTES

^{1/} The Respondent is Southern Baptist Hospital of Florida, d/b/a Baptist Medical Center.

^{2/} The Respondent is Department of Financial Services, Division of Workers' Compensation, Office of Medical Services.

^{3/} This Administrative Law Judge does not have final order authority in the instant case.

^{4/} Id.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.