STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAKELAND REGIONAL HEALTH SYSTEMS, INC.,

Petitioner,

vs. Case No. 18-3845

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,

Respondent.
_____/

LAKELAND REGIONAL MEDICAL CENTER, INC.,

Petitioner,

vs. Case No. 18-3846

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,

Respondent.
_____/

RECOMMENDED ORDER

On October 2, 2018, a disputed-fact evidentiary hearing was held in these consolidated cases by video teleconference in Tallahassee and Lakeland, Florida, before Elizabeth W. McArthur, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in these cases are whether two Petitions for Resolution of Reimbursement Dispute (Petitions), filed pursuant to section 440.13(7), Florida Statutes (2018),[1/] were untimely; and, if so, whether the untimeliness should be excused under the equitable tolling defense asserted by Petitioners.

PRELIMINARY STATEMENT

Petitioners, Lakeland Regional Health Systems, Inc. (LRHS), and Lakeland Regional Medical Center, Inc. (LRMC) (collectively, Petitioners), through counsel, filed separate Petitions with the Department of Financial Services, Division of Workers' Compensation (Respondent or Department), on May 4, 2018. In separate notices, the Department informed Petitioners that it was dismissing the Petitions because they were untimely. The notices

advised Petitioners of their right to request an administrative hearing to contest the proposed dismissals. Timely hearing requests were filed, by LRHS on May 29, 2018, and by LRMC on June 15, 2018. For reasons not evident in the record, the cases were not transferred to the Division of Administrative Hearings until July 20, 2018. The cases were assigned to the undersigned, consolidated on Respondent's agreed motion, and set for hearing.

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation in which they agreed to several facts that would not require proof at hearing. The agreed facts are incorporated into the findings below to the extent relevant.

At hearing, Petitioners presented the testimony of one witness, Gina Cobb. Petitioners' Exhibits 1 through 4 were admitted in evidence, with limitations on the use of Exhibit 1 because of imbedded hearsay within the business record, as discussed at hearing. See § 120.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 28-106.213(3); and see, e.g., Reichenberg v. Davis, 846 So. 2d 1233, 1234 (Fla. 5th DCA 2003) (witness statements contained within an agency's business records do not fall within the business records exception because they were not based upon the personal knowledge of an agent of the "business").

Respondent presented the testimony of Arlene Cotton. Respondent's Exhibits 1 through 4 were admitted.

The exhibits offered at hearing contained unredacted confidential information. After the hearing, the exhibits were given to counsel for Respondent, with instructions to determine necessary redaction with counsel for Petitioners, redact the exhibits as agreed, and return them. This task was accomplished. On October 5, 2018, Respondent filed a Notice of Filing Redaction Log, and submitted a redacted set of the exhibits along with the unredacted exhibits. The unredacted exhibits are in a sealed envelope labelled as confidential, with access restricted to parties and tribunals for this proceeding and any appeal.

Since the redaction task did not include adding any exhibits not admitted at hearing, the evidentiary record was closed at the end of the hearing on October 2, 2018. See Tr. at 118. Despite the closure of the record, the next day Petitioners filed a "Notice of Proffer," proffering one fax and two letters, which had been offered into evidence at hearing, but not admitted. Petitioners should have proffered the exhibits at the time they were not admitted, but did not. Petitioners only requested to make a proffer of testimony at hearing, which was permitted, but which did not include any proffer of documents. See Tr. at 55-57. Nonetheless, Respondent did not file an objection to the Notice of Proffer. Petitioners' late-proffered Exhibits A and B are accepted as proffers in the record pursuant to section

120.57(1)(f), Florida Statutes. They are not made part of the evidentiary record for the reasons stated at hearing.[2/]

The one-volume Transcript of the final hearing (which includes the proffer that is not part of the hearing testimony, Tr. at 55-57), was filed October 26, 2018. The parties timely filed Proposed Recommended Orders (PROs), which have been considered in preparing this Recommended Order.

FINDINGS OF FACT

1. LRMC is a large hospital in Lakeland that regularly provides hospital care and services to injured workers covered by workers' compensation insurance. In conformity with the workers' compensation statutes and rules, LRMC bills workers' compensation insurance carriers (carriers) for the hospital charges.

2. LRHS is a health system, presumably affiliated with LRMC (though there is no record evidence of the relationship between the two entities). Based on an unspecified relationship with physicians who provide services to injured workers at LRMC, LRHS takes care of billing carriers for those physician charges.

3. The parties stipulated that Petitioners are considered "health care providers" within the meaning of the Workers' Compensation Law, chapter 440, Florida Statutes.

4. In these cases, Petitioners want the Department to resolve their reimbursement disputes with a carrier. The disputes arose from the carrier's disallowance or adjustment of

payment on bills for hospital and physician services rendered to an injured worker during a single "encounter" (patient stay at LRMC) from October 31, 2017, to November 8, 2017.

5. The Department is the state agency responsible for administering and enforcing the Workers' Compensation Law. One of its responsibilities is resolving reimbursement disputes between providers and carriers, upon a provider's timely petition after receiving notice from a carrier that payment of a bill has been disallowed or adjusted. See § 440.13(7), Fla. Stat.

Regulatory Context

6. The process by which health care providers bill carriers and carriers review and make determinations on provider bills is highly regulated, with requirements, deadlines, and procedures in the Workers' Compensation Law and implementing rules.[3/]

7. Bill review by carriers under section 440.13(6) and implementing rules culminates in a reimbursement decision by the carrier to either pay the bill or to disallow, adjust, or deny payment. An "Explanation of Bill Review" (EOBR) is "the document used to provide notice of payment or notice of adjustment, disallowance or denial by a claim administrator or any entity acting on behalf of an insurer to a health care provider[.]" Fla. Admin. Code R. 69L-7.710(1)(y).

8. Pursuant to rule 69L-7.740(14), the carrier (or its claim administrator) must use an EOBR detailing the adjudication

of the submitted bill by each line item; it is the only authorized means for giving notice to the health care provider of the reimbursement decision. The adjudication (reimbursement decision) must be explained using EOBR reason codes and code descriptors listed in rule 69L-7.740(13)(b) (listing 98 EOBR codes with code descriptors). The carrier must select at least one EOBR code reason, and no more than three EOBR code reasons, for each line item. When more than one EOBR code reason is used for one line item, the codes must be shown in descending order of importance. Fla. Admin. Code R. 69L-7.740(13)(a). EOBR codes must be used, but the carrier may also add internal code reasons for additional explanation. Fla. Admin. Code R. 69L-7.740(14).

9. The EOBR notice is what triggers a health care provider's option to petition the Department to resolve a reimbursement dispute with the carrier pursuant to section 440.13(7). The EOBR itself must make that clear by including the following statements required by rule 69L-7.740(14):

> An EOBR shall specifically state that the EOBR constitutes notice of disallowance or adjustment of payment within the meaning of subsection 440.13(7), F.S. An EOBR shall specifically identify the name and mailing address of the entity the carrier designates to receive service on behalf of the "carrier and all affected parties" for the purpose of receiving the petitioner's service of a copy of a petition for reimbursement dispute resolution by certified mail, pursuant to paragraph 440.13(7)(a), F.S.

10. By statute, a provider has a limited 45-day window after receiving a carrier's notice of disallowance or adjustment of a bill to petition the Department to resolve a reimbursement dispute with the carrier. § 440.13(7)(a), Fla. Stat. ("Any health care provider who elects to contest the disallowance or adjustment of payment by a carrier under subsection (6) must, within 45 days after receipt of notice of disallowance or adjustment of payment, petition the department to resolve the dispute."). Since the notice can only be given by means of an EOBR, the 45-day window starts upon receipt of the EOBR.

Three EOBRs Adjudicating Two LRHS Bills (Case No. 18-3845)

11. The parties stipulated that in Case No. 18-3845, LRHS received notice of disallowance or adjustment of payment from the carrier on December 5, 2017, and December 11, 2017. As required by rule, notice was given by EOBRs: two EOBRs were received on the first date; a third EOBR was received on the second date.[4/]

12. One EOBR received on December 5, 2017, addressed a "treating physician" bill with three line items for physician services rendered on or about November 6 and 8, 2017 (as best the dates can be discerned). The EOBR authorized partial payment of $407.25 for two of the three line items, and identified a check issued in that amount on December 1, 2017. The second EOBR received on December 5, 2017, addressed a different treating physician bill, with line items for three hospital visits, on

November 3, 4, and either 5 or 6, 2017 (the date is stated on the EOBR, but is not clear on the reduced copy in evidence). The EOBR authorized partial payment in the amount of $180.00, and identified a check issued in that amount on December 1, 2017.

13. The EOBR received on December 11, 2017, appears to be a reconsideration of the first EOBR described in the preceding paragraph, because it addressed the same three line items. The EOBR authorized additional reimbursement of $2,172.00, and identified a check issued in that amount on December 7, 2017.

14. EOBR codes were assigned in all three EOBRs to explain the reasons for adjusting or disallowing payment for each line item. Additional internal codes were also provided with additional explanation. According to the codes, payment was reduced from the amounts billed based on reimbursement manual provisions and/or a contractual arrangement, and payment on one line item on each bill was disallowed as a billing error.

15. As required by Department rule, each EOBR stated: "This EOBR constitutes notice of disallowance or adjustment of payment within the meaning of Section 440.13(7), Florida Statutes (F.S.). This carrier designates Optum, 2500 Monroe Blvd., Suite 100, Norristown, PA 19430 to receive service of a copy of a petition for reimbursement dispute resolution by certified mail, pursuant to Section 440.13(7)(a), F.S. on behalf of the carrier and all affected parties."

16. Arlene Cotton, testifying for the Department, said that carriers occasionally issue multiple EOBRs. Usually that is done to address different components of a bill or series of bills. If a carrier issues multiple EOBRs for the same bill, the 45-day deadline to file a reimbursement dispute resolution petition would run from the last EOBR receipt date only if the last EOBR is substantively different from a prior EOBR adjudicating the same line items, i.e., if the last EOBR makes changes to the line-by-line adjudication of the bill.

17. For LRHS, a single EOBR was issued to adjudicate the bill for three physician hospital visits, received on December 5, 2017. The 45-day deadline to file a petition disputing the reimbursement decisions in that EOBR was January 19, 2018.

18. The other LRMC bill, with three line items charging for three types of physician services, was the subject of two EOBRs. The second EOBR, received December 11, 2017, changed the line-by-line adjudication of the submitted bill, changing both the amount of payment authorized and some of the coded reasons assigned to the three line items. The deadline to file a petition to dispute the revised adjudication of that bill was January 25, 2018.

19. On May 4, 2018, counsel for LRHS filed a single Petition to dispute the EOBRs received on December 5 and 11, 2017. The LRHS Petition was, without question, very untimely.

One EOBR Adjudicating One LRMC Bill (Case No. 18-3846)

20. The parties stipulated that in Case No. 18-3846, LRMC received notices of disallowance or adjustment of payment on January 12, 2018, and February 16, 2018. As provided by rule, notice was by means of an EOBR. A single EOBR, issued to adjudicate a single LRMC bill with 27 line items, was sent twice, with different fax transmittal pages, first on January 12, 2018, and again on February 16, 2018.

21. The twice-transmitted EOBR, as required by Department rule, stated: "This EOBR constitutes notice of disallowance or adjustment of payment within the meaning of Section 440.13(7), Florida Statutes (F.S.). This carrier designates Optum, 2500 Monroe Blvd., Suite 100, Norristown, PA 19430 to receive service of a copy of a petition for reimbursement dispute resolution by certified mail, pursuant to Section 440.13(7)(a), F.S. on behalf of the carrier and all affected parties."

22. The Department takes the position that when the same EOBR is transmitted on two different days, transmittal of a second identical EOBR does not start a second 45-day window to file a petition for reimbursement dispute resolution. Under that view, which is found to be the more reasonable position under the circumstances here (where nothing was changed in the EOBR, not even a date, much less an authorized payment or reason code), LRMC was required to file a petition by February 26, 2018.

No evidence was offered that would suggest LRMC was operating under a different assumption; Ms. Cobb did not testify that she believed LRMC would have the right to file a petition within 45 days of receiving the same EOBR a second time. It is noted that even if the later receipt date were used to restart the 45-day clock, the petition would have been due April 2, 2018.

23. Counsel for LRMC filed the Petition on May 4, 2018, more than two months late according to the more reasonable position, and more than one month late under the most generous (and unreasonable) interpretation. Under any interpretation, the Petition was untimely; there is no legitimate dispute about that.

Equitable Tolling Defense

24. Petitioners raise equitable tolling as a defense, contending the untimeliness of their Petitions should be excused.

25. Gina Cobb was Petitioners' only witness. She works for LRMC in the denials and appeals department. During the time pertinent to this case, she worked exclusively on workers' compensation claims for four years at LRMC, billing carriers for LRMC's hospital charges and following up when payment was denied, disallowed, or adjusted. Before that, she did the same kind of work in the workers' compensation claims arena at Winter Haven Hospital for an additional four years.

26. Ms. Cobb does not handle billing for LRHS. LRHS takes care of billing carriers for separate physician charges for

services to injured workers while at LRMC. When both hospital services and physician services are provided to the same injured worker during a single "encounter" (i.e., a patient stay at LRMC), Ms. Cobb's only involvement in the LRHC billing process is to provide LRHS with the claim number issued by the carrier or claim administrator, as well as the address to use for billing purposes. Ms. Cobb did not work on the LRHS bill submissions at issue in this case, other than to provide the claim number and address for LRHS to use to submit its bills.

27. Ms. Cobb is not a lawyer. Instead, in keeping with her job duties, she is certified in medical billing and coding. With eight years' experience handling workers' compensation billing for two different Florida hospitals, she would have to be very familiar with the regulatory requirements for the billing and payment process under the Workers' Compensation Law. Indeed, she is quite proud of her track record, saying more than once that she is "usually successful" in getting bills paid.

28. Whether a badge of accomplishment or not, in her eight years of experience, Ms. Cobb has never filed a petition for reimbursement dispute resolution or been involved in a Department proceeding to resolve a reimbursement dispute. Indeed, she did not file a petition this time, either. Instead, at some unknown point, Petitioners retained an attorney who prepared and filed

the untimely Petitions; his name, not Ms. Cobb's, appears on LRMC's Petition as the LRMC representative.

29. Ms. Cobb's initial involvement in the October 31 through November 8, 2017, injured worker "encounter" at issue was on November 2, 2017. That is when Ms. Cobb was informed by a hospital social worker that a patient was being reclassified from self-pay to workers' compensation. The next day, Ms. Cobb called the patient's employer and learned that the carrier was Lion Insurance Company (Lion or carrier), and that the claim administrator was Packard Claims Administration (Packard or administrator). She called Packard and received a claim number and address to use in submitting bills for the encounter.

30. Ms. Cobb worked on preparing and submitting the LRMC bill to Packard for the hospital charges. She also gave the Packard claim number and address to LRHS so that LRHS could file bills with Packard for physician charges for the encounter.

31. Ms. Cobb's testimony was limited to addressing the LRMC billing process before and after receiving the EOBR. She was unable to address the LRHS bills because she did not submit them, nor could she address the EOBRs on those bills, because she did not receive them. Ms. Cobb had no communications with Packard or the carrier regarding the LRHS bills or the EOBRs on those bills.

32. With regard to the LRMC bill, Ms. Cobb testified that she prepared the claim (bill with supporting records), which was

printed out and mailed to Packard on or about November 29, 2017. She called Packard to check on the claim status and spoke with a representative on January 12, 2018. The EOBR was transmitted to her later that same day. It appears from the EOBR, corroborated by what Ms. Cobb said she was told by the Packard representative, that as of January 12, 2018, the bill had already been reviewed and payment disallowed (on or about December 21, 2017). The EOBR giving notice of that reimbursement decision was not received by LRMC until Ms. Cobb's inquiry prompted the fax transmittal.

33. Ms. Cobb testified that she reviewed the EOBR, and believed from her review that the reason payment of the entire hospital bill was disallowed was that no medical records were received. That belief is contradicted by the EOBR itself, which is the only non-hearsay record evidence.[5/] The impression given from Ms. Cobb's testimony is that she did not carefully study the EOBR she received on January 12, 2018.

34. The EOBR addressed 27 separate line items on the LRMC bill. All 27 billed line items were disallowed, with code 34 given as the first EOBR code reason for each line item. The reason descriptor for code 34 set forth in the EOBR (consistent with the EOBR coding rule) was: "Payment disallowed: no modification to the information provided on the medical bill.[6/] No payment made pursuant to contractual arrangement." (all caps in original converted to lower case).

35. A second EOBR code reason related to insufficient documentation was given for only one of the 27 line items, which was a line item charging for an implant. For this single line item, after code 34, EOBR code 47 was added as the second reason for disallowing payment. The reason descriptor for code 47 set forth in the EOBR (consistent with the EOBR coding rule), was: "Payment disallowed: insufficient documentation; invoice or certification not submitted for implant." (all caps in original converted to lower case). For the same implant line item, two internal code reasons (M127 and MA27) were added: "Missing patient medical record for this service" and "Missing/incomplete/ invalid entitlement number or name shown on this claim."

36. Following her review of the EOBR received January 12, 2018, Ms. Cobb said that she immediately printed all of the medical records and submitted them to Packard with a request for reconsideration. A reasonably prudent employee with responsibility over a hospital's workers' compensation claim denials and appeals department would have, instead, addressed the actual EOBR code reasons given for disallowing payment.[7/]

37. Petitioners did not point to any statute or rule that regulates a provider's request for "reconsideration," or a carrier's obligations with respect to such a request, after the carrier disallows or adjusts payment of a bill for reasons set forth in an EOBR sent to the provider. The only official avenue

in statute and rule available to a provider who wants to contest a carrier's disallowance or adjustment of payment, as set forth in an EOBR, is to file a petition with the Department to resolve the reimbursement dispute.

38. It appears that the process of requesting a carrier reconsider its adjudication of a bill as set forth in an EOBR is an informal, unofficial process, akin to other settlement efforts to resolve disputes. As evident by the LRHS December 11, 2017, EOBR, sometimes a carrier will reconsider its adjudication of a bill, revise an EOBR, and authorize additional payment. But within the official statutory and rule framework, there is only the 45-day period for carriers to review and adjudicate a bill by means of an EOBR, followed by a 45-day period after a provider's receipt of an EOBR for the provider to file a petition with the Department for reimbursement dispute resolution.

39. Ms. Cobb offered testimony about the steps she took beginning on January 12, 2018, to try to get the carrier to reconsider its reimbursement decision that was set forth in the EOBR. Because the total hospital charge on the bill was over $135,000, and the expected reimbursement was just over $100,000, Ms. Cobb said that the claim was considered "high dollar," and she was expected to "touch" the account more often, which she described as checking on the status. She called Packard

periodically and spoke with different persons about the status of the reconsideration request.

40. Ms. Cobb said that when she spoke with someone on February 13, 2018, that person said that no claim was found for that amount. This was a red flag to Ms. Cobb. As she put it:

> It's usually a stalling tactic that we deal with -- with carriers, so I felt like it was, but to cover myself I sent everything all over again. Tr. at 42 (emphasis added).

41. As of February 13, 2018, 32 days had elapsed since the EOBR was received on January 12, 2018. Ms. Cobb was experienced enough to understand the possibility that her reconsideration request was not getting attention, but rather, that the carrier was employing stalling tactics while the days counted down. Having "felt like it was" a stalling tactic, Ms. Cobb should have, at that time (instead of months later, well after the 45-day deadline had passed), enlisted the help of the LRMC attorney to prepare and file the Petition. Since that is the only formal avenue in statute and rule available to a provider wanting to contest a carrier's EOBR adjudication of a bill, it is inconceivable that Ms. Cobb would not have done so.

42. Instead, despite her belief that the carrier was using stalling tactics, Ms. Cobb's only action was to reprint the bill and supporting documentation, and send the reconsideration request a second time.

43. Although Ms. Cobb testified about several conversations with Packard, she never said that she was misled or lulled into believing that she did not have to file a petition for reimbursement dispute resolution within 45 days after receiving the EOBR on January 12, 2018. She repeatedly acknowledged that nothing prevented her from filing a petition for reimbursement dispute resolution. Instead, it was her choice to pursue informal resolution of the dispute by filing (and refiling) reconsideration requests. That choice was not mutually exclusive with protecting LRMC's rights by means of a timely filed petition. Given Ms. Cobb's belief as of February 12, 2018, that the carrier was employing stalling tactics with regard to her reconsideration requests, it was unreasonable for her to pursue only this avenue for this high dollar unpaid bill. In light of her concerns, she failed to act with reasonably prudent regard for LRMC's rights, when she did not file a petition then (with 13 days remaining) or enlist counsel (as was later done) to file a petition for reimbursement dispute resolution.

44. Three days later, on February 16, 2018, Ms. Cobb received a fax transmittal from Packard, transmitting the same EOBR that had previously been transmitted on January 12, 2018. Ms. Cobb's concerns should have been heightened by this second red flag. The failure to act with reasonably prudent regard for LRMC's rights was compounded by letting this second red flag go.

Although there were still ten days left to file a petition for reimbursement dispute resolution based on the first EOBR transmittal, Ms. Cobb still took no action to contact the LRMC attorney or seek authorization to retain an attorney to prepare a petition (as was done much later, after any conceivable 45-day window had long passed). A reasonably prudent employee in her position would have been spurred to action by filing a petition or enlisting counsel then, with 10 days remaining to timely dispute the EOBR.

45. Instead, Ms. Cobb said that she did two things when she received the identical EOBR a second time. She said at that point, she gave the EOBR to the "cash apps department" to post zero as the money received on the bill. In addition, she said that upon receiving the EOBR a second time (five weeks after she first received the EOBR notifying LRMC that payment on the entire bill was disallowed), she "did a more thorough check," for the purpose of "looking for the denial reasons to -- I was looking for the denial reasons that I could've rectified." Tr. at 47. She admitted that when she looked more closely at the EOBR, "I did see that I missed [the] implant invoices." Id. Reasonable regard for her employer's rights would have compelled this careful attention immediately upon first receipt of the EOBR. That was her job.

46. Ms. Cobb said she assumed that since payment was disallowed for the whole bill, the EOBR's reference to missing implant invoices on one line item must have meant that the carrier was missing everything. This explanation does not square with the actual EOBR code reasons given for disallowing payment on the other 26 line items. But Ms. Cobb said that "just to be thorough this time," she sent everything one more time. In addition, this time she included the implant invoices that she had never previously submitted.

47. On March 27, 2018, Ms. Cobb called Packard to check on the status of the reconsideration request. Following the conversation, she received a fax from Packard. With regard to that communication, the parties stipulated that on March 27, 2018, Ms. Cobb "received correspondence from Packard stating that the bill was being audited by an attorney, and that 'it is still processing.'" Ms. Cobb acknowledged that the March 27, 2018, fax was not an EOBR.[8/]

48. Ms. Cobb testified that it was her expectation that another EOBR would be sent after the carrier or administrator completed review of the reconsideration request. Her expectation was based on hearsay, and was not proven to be a reasonable expectation. Petitioners did not offer any statutory or rule authority that would have required the carrier to proceed in a certain fashion on the reconsideration request, or to give notice

in any particular form of the culmination of that process. Moreover, having already been sent the same EOBR twice, Ms. Cobb had no basis for assuming or expecting that any subsequent EOBR transmittal would not have been of the same EOBR, a third time, to signify denial of the request for reconsideration.

49. Ms. Cobb testified that she followed up on April 13, 2018, by calling the attorney who had been auditing the reconsideration request. There was no non-hearsay evidence as to what she was told. She indicated that she perceived what she was told to be a red flag. This was not the first red flag, though, as Ms. Cobb believed two months earlier that the carrier was employing stalling tactics.

50. Petitioners apparently contend that as of March 27, 2018, it was reasonable for Ms. Cobb to believe not only that the carrier would review the multiple reconsideration requests she had sent by then, but also, that the carrier would revise the EOBR to change its prior adjudication of the bill. Petitioners essentially concede that that expectation was rendered unreasonable as of April 13, 2018, when it became clear to Ms. Cobb that the carrier was not going to reconsider its decision to disallow payment of the LRMC bill.

51. Ms. Cobb did not say that she ever informed the carrier or administrator that LRMC was planning to file a petition with the Department to resolve the dispute over the carrier's

disallowance of payment. Ms. Cobb did not testify that she was ever led to believe by the carrier or administrator that the time for LRMC to file a petition for reimbursement dispute resolution would be extended by her reconsideration request. Ms. Cobb did not say that the subject of a dispute resolution petition was ever raised in any of her communications with the carrier and administrator.

52. Petitioners admit that they had no communications with the Department regarding whether or when to file a petition for resolution of the reimbursement dispute. There is no evidence that a Department employee said or did anything to mislead or lull Petitioners into inaction that prevented the timely filing of the Petitions.

53. At the point that even Petitioners acknowledge it was no longer reasonable to expect reconsideration by the carrier of its reimbursement decision, the Petitions were not immediately filed. No explanation was given for waiting three more weeks before filing the Petitions on May 4, 2018.

CONCLUSIONS OF LAW

54. The Division of Administrative Hearings has jurisdiction over the parties and subject matter, pursuant to sections 120.569 and 120.57(1), Florida Statutes.

55. At issue in both consolidated cases is whether the Petitions filed pursuant to section 440.13(7) were untimely, as

initially determined by the Department. If untimely filed, Petitioners raise the defense of equitable tolling to excuse the untimeliness.

56. As the parties asserting the affirmative of the issue, Petitioners have the burden of proving by a preponderance of the evidence that they are entitled to the relief they seek. See generally Balino v. Dep't of Health & Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977); § 120.57(1)(j), Fla. Stat.

57. The parties stipulated to the dates on which Petitioners received notices, by means of EOBRs, of the carrier's disallowance or adjustment of payment on their bills, within the meaning of section 440.13(7)(a).

58. As found above, the Petitions were not timely filed by counsel for Petitioners within 45 days of Petitioners' receipt of the EOBRs. The Petitions were untimely--and not by just a little bit--under any counting scenario.

59. As recognized in the cases cited by Petitioners, a party's failure to meet an administrative deadline, such as the 45-day requirement for filing petitions for resolution of reimbursement disputes pursuant to section 440.13(7)(a), can sometimes be excused, by application of the equitable tolling doctrine as a defense. See Aleong v. Dep't of Bus. & Prof'l Reg., 963 So. 2d 799, 801 (Fla. 4th DCA 2007) (considering the defense, but finding it inapplicable); Florists Mut. Ins. Co. v.

Dep't of Fin. Servs., Div. of Workers' Comp., Case No. 13-2940, 2013 WL 550890 (Fla. DOAH Sept. 30, 2013) (rejecting equitable tolling based on petitioner's lack of due diligence).[9/]

60. The doctrine of equitable tolling was first applied in administrative proceedings by the Florida Supreme Court in Machules v. Dep't of Admin., 523 So. 2d 1132, 1134 (Fla. 1988), in which the doctrine was described as follows:

> The tolling doctrine is used in the interests of justice to accommodate both a defendant's right not to be called upon to defend a stale claim and a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing. Equitable tolling is a type of equitable modification which focuses on the plaintiff's excusable ignorance of the limitations period and the lack of prejudice to the defendant. (emphasis added; cites and quotes omitted).

61. The Court described the type of equitable circumstances that might justify equitable tolling when they prevent a timely filing in the proper forum:

> Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum.

Id.

62. Petitioners here seek to invoke the first type identified in Machules, contending that they were misled or

lulled into inaction, not by the Department, but by the carrier or its administrator.

63. As a threshold matter, although the equitable tolling defense is claimed for both Petitioners, the record is devoid of evidence to support an equitable tolling defense to excuse LRHS's late filing of its Petition in Case No. 18-3845. No evidence was presented to show that LRHS was misled or lulled into inaction by anyone associated with the carrier, the administrator, or the Department, that in any way prevented the timely filing of a petition by the due dates of January 19 and 25, 2018. Instead, the only evidence offered to support equitable tolling was the testimony of Ms. Cobb regarding her pursuit of reconsideration of the disallowance of payment on the LRMC bill. Therefore, consideration of the equitable tolling defense must be limited to LRMC only.

64. As noted by the Court in Machules, although it is not necessary to prove that LRMC was misled or lulled into inaction by active deception or misconduct, the focal point for equitable tolling is whether LRMC acted "with a reasonably prudent regard for" its rights. Application of the doctrine to allow a party to proceed on an untimely petition is dependent, in part, upon a showing that the litigant has not "slept on his rights." Machules, 523 So. 2d at 135; accord Jancyn Mfg. Corp. v. Dep't of Health, 742 So. 2d 473, 476 (Fla. 1st DCA 1999).

65. While there is much to distinguish Machules factually, consideration of this focal point is particularly compelling under the facts of this case. As found above, LRMC did not prove that it acted with a reasonably prudent regard for its rights. Instead, the evidence shows that LRMC slept on its rights.

66. In addition, unlike in Machules, there is no claim that the statutes or rules are confusing or unclear regarding whether or when to petition the Department for reimbursement dispute resolution. Cf. Madison Highlands, LLC v. Fla. Hous. Fin. Corp., 220 SO. 3d 457 (Fla. 5th DCA 2017) (applying equitable tolling where agency's rule contradicted the applicable uniform rules, and the party relied on the agency's rule to file a seconded amended petition slightly late).

67. Also unlike in Machules, Ms. Cobb was not acting as a layperson seeking to protect her own personal interests. It was her job to protect the interests of her employer in having its bills paid for hospital services rendered to injured workers. It was her job to understand and follow the regulatory requirements governing workers' compensation claims. Indeed, during the time that she worked on the claim at issue in this case, workers' compensation claims were her exclusive focus and only responsibility for her big hospital employer.

68. What the evidence does show is that after receiving notice by means of the EOBR faxed to Ms. Cobb on January 12,

2018, LRMC, by its employee Ms. Cobb, was attempting to get the carrier/administrator to reconsider the decision to disallow payment. No authority was presented to show that reconsideration is a regulatory option that must be addressed in a certain fashion by the carrier or that a reconsideration request acts to extend or toll the deadline in section 440.13(7). Instead, as found above, the only evidence in this record is that reconsideration is a permissive informal process akin to other types of settlement efforts.

69. While there is nothing wrong with providers and carriers attempting to resolve disputes informally, that effort does not constitute an equitable circumstance that prevented the timely filing of a formal petition for reimbursement dispute resolution. There is no reason why LRMC could not go down parallel tracks, by enlisting counsel to timely file a petition with the Department, while also having Ms. Cobb pursue reconsideration with the carrier. And under the facts found above, there were many reasons why LRMC should have taken those parallel tracks, in order to act with reasonably prudent regard for its rights.

70. Indeed, this dual path is recognized by one of the Department's reimbursement dispute resolution rules, Florida Administrative Code Rule 69L-31.012, authorizing the following after a timely petition is filed and a carrier response is filed:

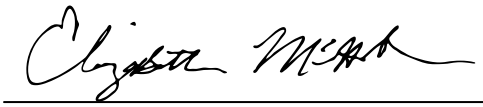
> Within fourteen (14) calendar days subsequent to service upon the Department of the carrier response, the petitioner and carrier may serve upon the Department a joint stipulation of the parties, mutually stipulating in writing that the reimbursement dispute be held in abeyance for a specified time period, not to exceed sixty (60) calendar days, for the parties to seek a resolution of the reimbursement dispute without the need for a determination by the Department.

71. Application of the equitable tolling doctrine is not warranted to excuse the untimely filing of the Petitions.

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, issue a final order dismissing the untimely Petitions filed by Petitioners LRHS and LRMC.

DONE AND ENTERED this 26th day of November, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of November, 2018.

ENDNOTES

[1/] For ease of reference, citations to Florida Statutes are to the 2018 version, and citations to rules are to the current versions. It is noted that the relevant statutory and rule provisions discussed herein have not changed during the time period involved in these cases (i.e., since October 31, 2017).

[2/] Petitioners' Notice of Proffer reiterates the argument made and rejected at hearing that the fax and letters from persons who did not testify at hearing were admissible, not for the truth of the matters asserted, but "to show Ms. Cobb's reaction and thought process following her receipt of the communications." Notice of Proffer at 3. For the reasons given at hearing, this re-argument is rejected. See, e.g., Tr. at 49-53, 59-61. The Notice of Proffer also belatedly raises a new argument that the documents should be admitted for the truth of the matters asserted, notwithstanding their hearsay nature, because objections to hearsay were waived when not raised in the Joint Pre-hearing Stipulation. However, as the parties were reminded at the outset of this hearing (Tr. at 12-13), under the statutes and rules governing this proceeding, the limitations on using hearsay evidence cannot be waived by the absence of an objection. See § 120.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 28-106.213(3) (hearsay evidence, whether objected to or not, cannot be the sole basis for a finding of fact unless it would be admissible in a civil action over objection).

[3/] Section 440.13(6) requires carriers to review health care providers' bills for services rendered to injured workers. Section 440.20(2)(b) provides the following deadline: "The carrier must pay, disallow, or deny all medical, dental, pharmacy, and hospital bills submitted to the carrier in accordance with department rule no later than 45 calendar days after the carrier's receipt of the bill." A provider's requirement to submit bills "in accordance with department rule" means that the provider must use medical billing forms and corresponding instructions adopted by the Department and incorporated by reference in Florida Administrative Code Rule 69L-7.720. Provider bills must also comply with Department rules 69L-7.020, 69L-7.100, and 69L-7.501, which adopt and incorporate by reference three voluminous reimbursement manuals. In addition, rule 69L-7.730 details provider billing and reporting responsibilities. For carriers, rule 69L-7.740 details medical bill review responsibilities, including requirements for carriers to document and keep records of the "Date Insurer Received Bill," which starts the 45-day period in section 440.20(2)(b).

[4/] Copies of the three LRHS EOBRs in evidence (Pet. Ex. 4) are very difficult to read, as they are reduced images to make room on the page for additional information documenting the date and manner in which the EOBRs were received by LRHS. The redacted copies are even more difficult to read; the unredacted sealed copies are a little clearer.

[5/] Ms. Cobb testified that her belief that payment of the entire bill was disallowed because there were no medical records was based not only on her review of the EOBR, but also, on what she was told by a Packard employee to whom she spoke by telephone. No Packard witness testified, and no Packard records were offered at hearing to show what was received and when, although such records, required to be maintained by Department rule, were presumably available and could have been sought. The Packard employee statement is hearsay that does not explain or supplement non-hearsay evidence; it contradicts the non-hearsay evidence.

[6/] Ms. Cotton explained that the phrase "no modification to the information provided on the medical bill" simply means that the carrier did not change a code on the medical bill, as might be done if the carrier believes an item is improperly billed.

[7/] A careful review of the EOBR, disallowing payment of an entire hospital bill that charged over $100,000, might have found that the code reasons were erroneous, or that there was some other problem with the claim or adjudication of the claim. It is unclear what the EOBR means by disallowing payment due to a contractual arrangement, but that is the first (and thus, the most important) code reason given for all 27 line items, and is the only code reason given for most of the line items. As such, it certainly deserved scrutiny by Ms. Cobb or by someone at LRMC who could address the legitimacy of payment disallowance based on a contractual arrangement. Consideration of the actual EOBR code reasons might have led to authorization to have an attorney look at the matter then (as ultimately was done much later).

[8/] In the Petition, counsel for LRMC mischaracterized the March 27, 2018, fax as an EOBR, by listing the dates on which the provider received the EOBR at issue from the carrier as January 12, 2018; February 16, 2018; and March 27, 2018. That caused the Department to issue an omissions notice, since the Petition failed to attach an EOBR received March 27, 2018. Counsel for LRMC repeated that mistake in Petitioners' PRO, erroneously referring to the March 27, 2018, fax as an EOBR. See Pet. PRO at 6, ¶ 26.

[9/] As pointed out by Administrative Law Judge F. Scott Boyd, while refusing to apply equitable tolling may seem contrary to the important goal of ameliorating harsh results, there is an equally important competing value: routinely enforcing filing deadlines so they do not become blurred and unreliable. Florists Mutual, Case No. 13-2940, FO at 13.

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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.