

**APPEALS DIVISION
TEXAS HEALTH AND HUMAN SERVICES COMMISSION
AUSTIN, TX**

**HARLINGEN FAMILY
DENTISTRY,
Petitioner**

v.

**TEXAS HEALTH AND HUMAN
SERVICES COMMISSION OFFICE
OF INSPECTOR GENERAL,
Respondent**

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SOAH DOCKET NO. 529-12-3180

RESPONDENT'S MOTION FOR REHEARING

TO THE HON. SUSAN NASH FEKETY:

Pursuant to 1 TEX. ADMIN. CODE § 357.498 (2007), Respondent respectfully files this Motion for Rehearing.

I. Purpose of the Proceeding

State Office of Administrative Hearings (SOAH) Docket No. 529-12-3130 was convened to determine whether Respondent acted within its authority in imposing a suspension on payments to the Petitioner while credible allegations of fraud were pending. Applicable law requires the agency to review all allegations, facts, and evidence carefully, and act judiciously in verifying the allegations underlying the payment hold. Thus, the factual issue before the court was whether or not Respondent confirmed the reliability of a credible allegation of fraud prior to placing a hold on payments to Petitioner. As the SOAH Administrative Law Judge implicitly acknowledged, she lacks the authority to reduce the hold by characterizing the reduction as a recommendation rather than an order.¹

¹ PFD: pg 36

II. Procedural History

SOAH Docket No. 529-12-3180 was heard by Administrative Law Judge Shannon Kilgore on April 24, 2012 and April 25, 2012. After submission of written closing arguments and replies, ALJ Kilgore issued her Proposal for Decision on August 15, 2012. Respondent and Petitioner both filed timely exceptions to the Proposal for Decision. ALJ Kilgore reaffirmed her original findings on September 27, 2012, and transferred the case to the Health and Human Services Commission (HHSC) for issuance of a Final Order on the Proposal for Decision. Executive Commissioner Suehs delegated authority to issue Final Orders to HHSC Administrative Law Judge Susan Nash Fekety, who sustained in part and reversed in part.

III. Grounds for Rehearing

Respondent adopts by reference its Exceptions and incorporates the Exceptions into this Motion. Respondent specifically asks that ALJ Fekety grant this motion for rehearing and set aside the ordered percentage of the payment hold for two reasons.

A. Proposal for Decision Exceeded Scope of Authority.

The Final Order was based upon and adopted the findings of the SOAH Proposal for Decision. Because the Proposal for Decision exceeded SOAH's established authority, it should not serve as a basis for the Final Order.

In the Proposal for Decision, ALJ Kilgore concluded Respondent had provided prima facie evidence Petitioner had committed program violations.² ALJ Kilgore further concluded Petitioner billed for services that were not reimbursable and failed to follow Medicaid Policy as outlined by the Texas Medicaid Provider Procedures Manual.³ The Proposal for Decision ultimately stated ALJ Kilgore's determination that, because program violations had occurred,

² PFD: pg 30

³ Id. at pg 30-31

Respondent had authority to maintain the payment hold against Petitioner.⁴ ALJ Kilgore's analysis should have ended at this point.

When there is a choice as to the sanction or penalty an agency may select, that choice is vested with the agency, not with the courts. *See Brown v. Tex. State Board of Dental Exam'rs*, 281 S.W.3d 692, 697 (Tex. App. – Corpus Christi 2009, pet. denied) (citing *Sears v. Tex. State Bd. of Dental Exam'rs*, 759 S.W.2d 748, 751 (Tex. App.-Austin 1988, no pet.)). Respondent chose to place Petitioner on payment hold because there was reliable evidence indicating Petitioner was committing program violations.⁵ ALJ Kilgore concluded Petitioner did in fact commit program violations as alleged.⁶ By recommending a reduction of the percentage of the payment hold sanction, ALJ Kilgore exceeded the proper scope of the payment hold hearing.

In adopting ALJ Kilgore's proposed percentage of the payment hold, ALJ Fekety implies that ALJ Kilgore was vested with authority to reduce the percentage of the payment hold. As discussed, ALJ Kilgore has no such authority. There is no statute that enables SOAH to recommend an appropriate sanction. *See* TEX. GOV'T CODE ANN. §2003.042. Neither does the ALJ's recommendation to reduce the payment hold to four percent of total billings fall within the statutory definitions of a finding of fact or a conclusion of law. *See* TEX. GOV'T CODE ANN. §2001.058(e). The order should be corrected to reflect the proper scope of inquiry within SOAH's authority.

Moreover, the question at issue in a payment hold hearing is only whether or not the Respondent acted within its authority in imposing the payment hold. The amount of the hold remains within the discretion of the agency's Office of Inspector General. *See* 1 TEX. ADMIN. CODE §371.1703(b). Thus, the proceeding is not one in which the appropriate amount or

⁴ Id. at pg 36

⁵ PFD: pg 33

⁶ Id. at pg 36

percentage of the payment hold is to be determined. The order should be changed to reflect the purpose of the proceeding and to delete any reference to the percentage of the hold.

B. *Proposal for Decision Incorrectly Interpreted Policy.*

The Final Order was based upon and adopted the findings of the SOAH Proposal for Decision. Because the Proposal for Decision incorrectly interpreted Medicaid policy, it should not serve as a basis for the Final Order.

Medicaid policy defined the term “ectopic eruption” as “an unusual pattern of eruption, such as high labial cuspids or teeth that are grossly out of the long axis of the alveolar ridge.”⁷ ALJ Kilgore improperly disregarded all but the first five words of the definition of “ectopic eruption,” ignoring the exemplary language, “such as high labial cuspids or teeth that are grossly out of the long axis of the alveolar ridge.”⁸ This interpretation violated the Supreme Court’s doctrine of *ejusdem generis*.

The principle of *ejusdem generis* directs that the term “ectopic eruption” should have been interpreted to include only cases of the same kind of severity as the examples listed in the policy – high labial cuspids or grossly misaligned teeth. *See, generally, Farmers Texas County Mutual Insurance v. Romo*, 250 S.W.3d 527, 537-38 (Tex. App. – Austin 2008, no pet.); *Johnson v. Texas Dep’t of Transp.*, 905 S.W.2d 394, 399 (Tex. App. - Austin 1995, no writ) (courts interpret a statute containing an illustrative list to include only items of the same kind or class as those expressly mentioned). When general language is used in connection with an illustrative list of examples, the meaning of the general words must be construed as narrowly as the class of designated persons or things. *See Marks v. St. Luke’s Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010); *State v. Fidelity & Deposit Co. of Md.*, 223 S.W.3d 309, 312 (Tex. 2007); *Hilco*

⁷ PFD: 13

⁸ PFD: 18

Elec. Coop. v. Midlothian Butane Gas Co., 111 S.W.3d 75, 81 (Tex. 2003) (the meaning of the general words will be restricted to the particular designation).

The record evidence demonstrates that the State Medicaid Director and an agency staff orthodontist both interpreted the policy correctly. The staff orthodontist testified that only those types of orthodontic patients whose conditions were as severe as those with high labial cuspids or grossly misaligned teeth would be approved for orthodontic treatment.⁹ The agency's expert consultant also interpreted the policy in this manner.¹⁰ The State Medicaid Director confirmed that this interpretation was in effect at the time Petitioner filed its claims for payment.¹¹

ALJ Kilgore concluded that the agency's expert witness was not credible or reliable because he had "regarded the language about high labial cuspids and teeth grossly off the alveolar ridge as examples only."¹² But under the doctrine of *ejusdem generis*, that is precisely how the expert was supposed to interpret and apply the policy.

In fact, it was ALJ Kilgore who incorrectly interpreted the policy. Instead of narrowing the scope of inquiry to cases that were analogous to the illustrative examples, she *expanded* the scope to include *all* unusual patterns of eruption. *See Marks*, 319 S.W.3d at 663 (warning against expansive interpretations of broad language in immediate proximity to narrow and specific terms). Because ALJ Kilgore's approach was diametrically opposed to the rules of statutory construction, her rationale and conclusion must also fail, and the Proposal for Decision cannot adequately support a Final Order.

⁹ Exhibit P-11: 14 (lines 15-20); Exhibit P-11:19 (lines 15-25), 20 (lines 1-5, 10-14);

¹⁰ PFD: 15

¹¹ Exhibit P-10: 81 (lines 9-11).

¹² PFD: 27


IV. Prayer

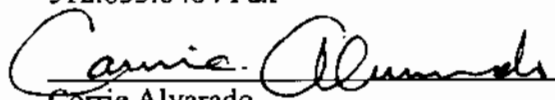
Respondent prays that ALJ Fekety grant Respondent's Motion for Rehearing, sustain the Respondent's payment hold, and modify the Final Order to omit any references to the amount of the hold.

Respectfully submitted,

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Inspector General
HHSC/Office of Inspector General

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CERTIFICATE OF SERVICE


By my signature, I certify that I have on this 30th day of October, 2012, served copies of this Respondent's Motion for Rehearing upon the HHSC Hearing Appeals and upon Petitioner, as follows:

Via Facsimile: (512)231-5779


HHSC Appeals Division
8407 Wall Street, 3rd Floor
Hearing Room S-329
Austin, Texas 78754

Via Facsimile: (361) 884-7023

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C/o J.A. Tony Canales
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**PLEASE DELIVER IMMEDIATELY TO THE FOLLOWING
INDIVIDUAL(S) LISTED BELOW:**

TO: J.A. "TONY" CANALES CANALES & SIMONSON, P.C. PHONE: (800) 527-7381 FAX: (361) 884-7023	FROM: JOHN MEDLOCK, ASSOCIATE COUNSEL, OFFICE OF INSPECTOR GENERAL PHONE: (512) 491-2052 FAX: (512) 833-6484
DATE: OCTOBER 30, 2012	NUMBER OF PAGES, INCLUDING COVER SHEET: 8

Re: Cause No. 529-12-3180; Harlingen Family Dentistry v. Texas Health & Human Services Commission

Please find the following 7 pages relating HHSC-OIG's Motion for Rehearing.
This represents fax 1 of 1.

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