Cause No. D-1-GN-14-002229

ANTOINE DENTAL CENTER,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
	§	
v.	§	
	§	
TEXAS HEALTH AND HUMAN SERVICES COMMISSION AND OFFICE OF INSPECTOR GENERAL,	§	**OF TRAVIS COUNTY, TEXAS**
	§	
	§	
Defendant.	§	
	§	**200th JUDICIAL DISTRICT**

PLAINTIFF'S BRIEF ON THE MERITS
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	§	**200th JUDICIAL DISTRICT**

PLAINTIFF'S BRIEF ON THE MERITS

NOW COMES Plaintiff Antoine Dental Center (ADC) and through this Brief on the Merits would show the Court as follows:

I. SUMMARY OF THE ARGUMENT

The HHSC-OIG placed ADC on a 100% payment hold, claiming that it had credible evidence of fraud against ADC. ADC requested a hearing on the State's claim. ADC won that hearing; the SOAH judges found no evidence that is credible, reliable, or verifiable, or that has indicia of reliability, that ADC had engaged in fraud. The SOAH judges found no factual basis to continue the payment hold.

Following a series of unusual procedural errors, Commissioner Janek reversed the SOAH judges' decision and kept the 100% payment hold in place. Determined to justify this reversal, Commissioner Janek's decision broke the rules for what an agency is allowed to do after a SOAH hearing. This case—specifically the issues surrounding the Commissioner's abandonment of the facts supporting SOAH's proposal for decision—presents numerous, considerable errors of law that require this court to overturn Commissioner Janek's reversal of the SOAH decision.

Commissioner Janek's Final Order may appear justified at first blush as he attempts to carefully, albeit wrongly, recast factual changes as legitimate policy decisions. But examining

the Order with scrutiny reveals the many reversible errors of law. In his decision to reverse the SOAH judges' ruling, Commissioner Janek had to disregard the ALJs' most critical points - 17 factual findings and 5 legal conclusions. Where SOAH deemed witnesses credible, the Commissioner reversed the decision and deemed them non-credible. SOAH found no credible evidence on many factual questions, but the Commissioner chose to reweigh the evidence and found "overwhelmingly" credible evidence on those same points. Where the ALJs found TMHP's prior authorization/approval of ADC's orthodontic work relevant, the Commissioner claimed TMPH approval was irrelevant. The ALJs ruled the OIG's experts acted improperly, but the Commissioner reversed that finding and held that the OIG's experts did their job correctly. Most importantly, the ALJs found no evidence that ADC intentionally did anything improper, but the Commissioner determined ADC willfully misrepresented its patients' dental conditions to the HHSC. Each of these examples is reversible error, and collectively these improprieties require reversal of Commissioner Janek's Amended Final Order."

II. RELEVANT FACTS AND PROCEDURAL HISTORY

ADC was a Texas Medicaid dental provider. In April 2012, the HHSC-OIG[1] placed ADC on a Medicaid "payment hold."[2] A payment hold temporarily freezes future Medicaid payments to a provider, despite the provider's ongoing participation in the Medicaid program. The payment hold against ADC was issued pursuant to what the HHSC-OIG called a "credible allegation of fraud" regarding ADC's past Medicaid billings. The HHSC-OIG placed a 100%

[1] The HHSC-OIG is the Texas Health and Human Services Commission, Office of Inspector General. The HHSC-OIG is an agency of the State of Texas that exercises authority over the Texas Medicaid program. Although the HHSC-OIG is "part of" the HHSC, it is a distinct entity, one required by federal law, exercising power independent of HHSC control. The HHSC-OIG is the prosecutorial arm of the State, responsible for preventing waste, fraud and abuse in the Medicaid system.

[2] AR 1756 (Amended Final Order, FOF 32), Attached as Appendix Exhibit 2.

payment hold on ADC, which meant that ADC continued to serve Medicaid patients but ADC would not be paid for the services rendered.

ADC requested a hearing to contest the payment hold, and a hearing was held at the State Office of Administrative Hearings in May 2013. The hearing was limited to determining whether the HHSC-OIG possessed a credible allegation of fraud against ADC. At that time, Texas Human Resources Code § 32.0291(c) directed HHSC's actions following a payment hold hearing:

> The department shall discontinue the hold unless the department makes a prima facie showing at the hearing that the evidence relied on by the department in imposing the hold is relevant, credible, and material to the issue of fraud or wilful misrepresentation.

Texas Human Resources Code § 32.0291(c).[3] The SOAH judges made several relevant Findings of Fact and Conclusions of Law in their proposal for decision (hereinafter "PFD"). The ultimate Findings of Fact and Conclusions of Law related to three dental experts in the case: Dr. Tadlock for the HHSC-OIG,[4] and Drs. Nazari and Kanaan for ADC. Those findings and conclusions were:

[3] That section was later amended on September 1, 2013, and the language changed. A copy of the statute as it existed at the time of ADC's hearing is attached at Appendix Exhibit 3 to this brief.

[4] Dr. Tadlock only looked at ADC's scoring for ectopic eruption. Dr. Tadlock did not evaluate the other scoring components of an HLD score sheet. (AR 1205) Dr. Tadlock did not use the Medicaid Manual's definition of ectopic eruption, and he did not render an opinion regarding the accuracy of ADC's scoring based upon the Medicaid Manual's definition of ectopic eruption. AR 1219 (PDF discussion of Dr. Tadlock's testimony); The SOAH ALJ's found Dr. Tadlock's testimony unhelpful because he did not follow the Manual's definition of ectopic eruption. (AR1223).

VIII. FINDINGS OF FACT

45. Dr. Tadlock did not apply the Manuals' definition of ectopic eruption in scoring the HLD Index for the 63 ADC patients.

46. Dr. Nazari was a credible witness and properly utilized the Manuals' definition of ectopic eruption in scoring the HLD Index.

47. Wael Kanaan, D.D.S., an orthodontist who worked with ADC, was a credible witness and properly utilized the Manuals' definition of ectopic eruption in scoring the HLD Index.

Fraud and Willful Misrepresentations

48. There is no evidence that is credible, reliable, or verifiable, or that has indicia of reliability, that ADC incorrectly scored the HLD Index to obtain Texas Medicaid benefits for patients or to obtain Texas Medicaid payments.

49. There is no evidence that is credible, reliable, or verifiable, or that has indicia of reliability, that ADC committed fraud or engaged in willful misrepresentation with respect to the 63 ADC patients in this case.

50. There is no evidence that is credible, reliable, or verifying, or that has indicia of reliability, that ADC committed fraud or misrepresentation in filing requests for prior authorization with TMHP for the 63 patients at issue in this case.[5]

IX. CONCLUSIONS OF LAW

13. HHSC-OIG lacks authority to maintain the payment hold against ADC for alleged fraud or misrepresentation. Tex. Gov't Code § 531.102(g)(2) (2011); 42 C.F.R. § 455.23 (2011); Tex. Hum. Res. Code § 32.091(c) (2003); 1 Tex. Admin. Code §§ 371.1703(b)(3), 371.1617(a)(1)(A)-(C) (2005).[6]

[5] AR 1234-35 (PFD FOF 48-50), attached as Appendix Exhibit 1.

[6] AR 1236 (PFD COL 13); the legal authority stated in COL 13 are attached to this brief as Appendix Exhibit 3. Parts of the HHSC Rules referenced in COL 13 were struck by the Third Court of Appeals in *Harlingen Family Dentistry, P.C. v. Texas Health & Human Servs. Comm'n*, 452 S.W.3d 479, 488 (Tex.App.—Austin 2014, pet. filed).

X. RECOMMENDATION

The ALJs recommend that the payment hold against Antoine Dental Center be discontinued.

SIGNED November 4, 2013.

CATHERINE C. EGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

HOWARD S. SEITZMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS[7]

The Texas Attorney General's Office, who had represented the HHSC-OIG in the hearing and prosecuted the case alongside HHSC-OIG attorneys at SOAH,[8] filed exceptions to the SOAH ALJs decision; the SOAH judges denied the Attorney General's exceptions, finding them duplicative of the HHSC-OIG's "legal arguments raised during the hearing and in written arguments."[9]

The Administrative Record does not reflect that the HHSC-OIG filed a Motion for Rehearing to the HHSC at that time. Apparently, the Attorney General's exceptions were reviewed by in-house HHSC administrative law judge Rick Gilpin, who had not received the SOAH judges' rejection of the HHSC-OIG's exceptions. HHSC Judge Gilpin was well known to the parties because he had worked at the Texas Attorney General's Office for decades, including the time that the Attorney General's Office and the HHSC-OIG were investigating ADC and preparing to prosecute the administrative case. HHSC Judge Gilpin misread the HHSC-OIG's

[7] AR 1237 (signature block of the SOAH judges' PFD).
[8] AR 1196 (stating "HHSC~OIG was represented by outside counsel Dan Hargrove, Caitlyn Silhan, James R. Moriarty, and Ketan Kharod; by Assistant Attorneys General Raymond C. Winter and Margaret M. Moore, from the Office of Attorney General of Texas; and by Enrique Varela and John R. Medlock, from HHSC-OIG.").
[9] AR 1375-1376 (ALJs' letter overruling the HHSC-OIG exceptions on 1/16/2014).

exceptions to be a Motion for Rehearing, and he *sua sponte* issued a Final Order reversing the SOAH judges' decision.[10] This fact immediately raises a serious question of disqualification, because Rick Gilpin acted as a judge in this matter. To clarify, Rick Gilpin issued his Final Order reversing the SOAH judges' decision *sua sponte*, without the HHSC-OIG's filing any Motion for Rehearing.

ADC immediately filed a Motion for Rehearing[11] and a Verified Motion to Disqualify HHSC Judge Gilpin.[12] ADC's motions were denied. Meanwhile, the HHSC-OIG filed its own Motion for Rehearing expressly requesting that Commissioner Janek,[13] instead of HHSC Judge Gilpin, revise and shore up Judge Gilpin's Final Order by making additional explanations and by rejecting the earlier *Harlingen Family Dentistry* HHSC decision.[14] No rehearing was held, and ADC was not notified that any reconsideration would be forthcoming. Without providing ADC any opportunity to respond to the HHSC-OIG's Motion for Rehearing, Commissioner Janek issued an Amended Final Order reversing the SOAH PFD and rejecting certain findings in *Harlingen Family Dentistry*. That Amended Final Order changed seventeen (17) Findings of Fact ("FoF") and five (5) Conclusions of Law ("CoL") in the SOAH PFD. [15]

ADC filed a Motion for Rehearing pointing out the same legal errors set out in this brief, and when that Motion was denied by operation of law, ADC filed this appeal.

III. STANDARD OF REVIEW

Technically speaking, this is a substantial evidence review under Texas Government Code § 2001.174, but as a practical matter this Court must: 1) determine whether Commissioner

[10] AR 1387 (HHSC Judge Gilpin's 2/27/2014 Final Order reversing the SOAH judges' decision).
[11] AR 1427 (ADC's Motion for Rehearing on HHSC Judge Gilpin's Final Order, filed 3/17/2014).
[12] AR 1470 (ADC's Verified Motion to Disqualify HHSC Judge Gilpin, filed 3/21/2014).
[13] While most Texas agencies consist of multiple Board members who are charged with reviewing SOAH PFDs and issuing a final decision, the HHSC does not have a Board. Executive Commissioner Janek.
[14] AR 1553 (HHSC-OIG's Motion for Rehearing, filed 4/2/2015).
[15] Commissioner Janek's Amended Final Order changed Findings of Fact 10, 21, 26, 29, 39-42, 44-50, 54-55, and 57; Commissioner Janek's Amended Final Order also changed Conclusions of Law 4, 10, 13, 14 and 16.

Janek had the power to reverse parts of the SOAH PFD, and if the court finds Commissioner Janek did have such power the Court must then 2) review the record to determine if the factual findings provide *prima facie* evidence of willful misconduct by ADC. The inquiry by the court is not whether there is substantial evidence in the record to support the agency's decision (ADC is not challenging the agency's simple adoption of a SOAH proposal for decision), but rather the court must inquire into the law governing an agency's ability to reverse a proposal for decision.

The HHSC-OIG had the burden of proof in ADC's contested case. The evidentiary burden at the hearing is stated in Texas Human Resources Code § 32.0291(c):

> The department shall discontinue the hold unless the department makes a prima facie showing at the hearing that the evidence relied on by the department in imposing the hold is relevant, credible, and material to the issue of fraud or wilful misrepresentation.

Texas Human Resources Code § 32.0291(c). The legal standard for demonstrating a "*prima facie*" standard of proof is not common in administrative proceedings. Under this standard, even if a party can make a *prima facie* showing, the inquiry does not end; it simply gives rise to a presumption. A *prima facie* presumption is rebuttable; it can be challenged. If challenged, the presumption disappears. The Texas Supreme Court has explained the procedure for handling *prima facie* evidence, and any presumptions that are created from that evidence, in this way:

> The presumption is subject to the same rules governing presumptions generally. Its effect is to shift the burden of producing evidence to the party against whom it operates. *Combined Am. Ins. Co. v. Blanton,* 163 Tex. 225, 353 S.W.2d 847, 849 (1962); *Empire Gas & Fuel Co. v. Muegge,* 135 Tex. 520, 143 S.W.2d 763, 767–768 (1940); Roy R. Ray, Texas Law of Evidence § 53, at 76–77 (3d ed. 1980); 9 Wigmore, Evidence § 2491 (Chadbourne rev. 1981). Once that burden is discharged and evidence contradicting the presumption has been offered, the presumption disappears and "is not to be weighed or treated as evidence." *Blanton,* 353 S.W.2d at 849.

Gen. Motors Corp. v. Saenz on Behalf of Saenz, 873 S.W.2d 353, 359 (Tex. 1993).

IV. ARGUMENTS AND AUTHORITIES

A. The relevant changes that Commissioner Janek made were FoF 45-50, as well as CoL 13.

ADC contends that 20 of Commissioner Janek's 22 changes to the SOAH PFD are barred by statute and precedent, but ADC believes only 7 of those 20 changes are truly significant to the ultimate aim of ADC's appeal.[16] The overriding issue in ADC's case is whether the HHSC-OIG demonstrated that it possesses relevant, credible and material evidence of fraud or willful misrepresentation. The relevant findings of fact that Commissioner Janek changed to find fraud or willful misrepresentation were FoF 45-50, as well as Conclusion of Law 13.

B. Commissioner Janek's changes required him to reweigh the evidence and modify dispositive factual findings, which is forbidden.

Agencies have the power to amend PFDs under three specific circumstances:

> (e) A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:
>
> (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;
>
> (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
>
> (3) that a technical error in a finding of fact should be changed.
>
> The agency shall state in writing the specific reason and legal basis for a change made under this subsection.

[16] While ADC still affirmatively asserts that SOAH Findings of Fact 10, 21, 26, and 29, and Conclusion of Law 4 were improperly changed by Commissioner Janek, those findings and conclusions are tangential and supportive of the SOAH judges' ultimate decision that the HHSC-OIG did not provide credible evidence of fraud. In short, those SOAH proposed findings can be changed without necessarily reversing the SOAH judges' ultimate finding that no credible evidence of fraud exists. Therefore, ADC's argument will not address the error in changing those findings and conclusions.

Likewise, Findings of Fact 54, 55, 57 and Conclusion of Law 16 are aimed at the HHSC-OIG's claims at the hearing that ADC committed numerous program violations that would permit the imposition of a payment hold. Commissioner Janek engaged in unlawful changes with regard to those findings and conclusions, but this Court need not address those changes in this case because after Commissioner Janek issued his Amended Final Order the Third Court of Appeals specifically struck the HHSC rules that permitted HHSC to impose a payment hold for mere program violations. *See Harlingen Family Dentistry, P.C. v. Texas Health & Human Servs. Comm'n*, 452 S.W.3d 479 (Tex.App.—Austin 2014, pet. filed). Both the SOAH PFD and the Amended Final Order's discussion of missing models and other program violations cannot be the basis for any payment hold. Therefore, ADC's argument will not address the error in changing those findings and conclusions.

Texas Goverment Code § 2001.058(e). Here, Commissioner Janek asserted that he made changes under (e)(1) and (e)(2). However, neither of those sections permit him to make the changes that he made in this case. Commissioner Janek's changes to the PFD were all couched in the same way: he claimed that the ALJs proposed findings were "legislative findings," as opposed to "adjudicative findings." Having decided the ALJs findings were legislative instead of adjudicative, Commissioner Janek proclaimed that he had "complete discretion" to modify findings of fact 39-42 and 45-50.[17]

In the seminal case *Flores v. Employees Ret. Sys. of Texas*, 74 S.W.3d 532, 539 (Tex.App.—Austin 2002, review denied), the Third Court of Appeals explained the difference between adjudicative and legislative facts by quoting from an administrative law treatise:

> Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are the general facts that help the tribunal decide questions of law and policy and discretion.

While agencies have no power to change adjudicative facts, "agencies are 'relatively' free to review and correct an ALJ's 'legislative facts,' which 'provide a foundation for developing law, rules, or policies and, consequently, affect the outcome of many cases.' " *Texas State Bd. of Med. Examiners v. Dunn*, No. 03-03-00180-CV, 2003 WL 22721659, at *3 (Tex.App.—Austin 2003, no pet.)

With the limitations on an agency's power well-defined by the "adjudicative vs. legislative" distinction, agencies commonly attempt to reclassify disagreeable findings as "legislative" and therefore subject to change at the agency's discretion. In *Dunn*, the Court of

[17] All of those factual findings begin with the boilerplate statement that the ALJs finding is "a mixed question of fact and law, and is a 'legislative finding.' "

Appeals confronted, then rejected, the same sort of argument from the Texas Medical Board that Commissioner Janek is using in this case:

> The Board attempts to characterize the rejected findings as legislative facts, arguing that the determination of clinical competence impacts future cases. However, we believe the specific questions here-whether Dunn was competent before his drug abuse began and whether he is currently competent to practice medicine-are instead adjudicative facts, tied to and affecting only the parties to this particular contested case. The overall definition of competence is a matter of policy; whether a particular doctor under particular facts has carried his burden of establishing his competence is not.

Dunn at *4. Here, the SOAH judges determined that the HHSC-OIG's expert Dr. Tadlock ***did not*** apply the Medicaid Manual's definitions,[18] and further decided that ADC's dentists Dr. Nazari and Dr. Kanaan ***did*** properly apply the Medicaid Manual's definition.[19] The SOAH findings regarding whether these three experts followed proper Medicaid definitions is important in this case. But even if this Court finds that Commissioner Janek had a legal a basis for reversing the SOAH judges' decision regarding the credibility of those witnesses, such a change cannot manufacture the facts and findings necessary to find *prima facie* evidence of willful misrepresentations.

Commissioner Janek reclassified FOF 45-50 as "legislative facts" by fabricating two meritless justifications; he then bootstrapped those justifications into supposed evidence of wrongdoing, and then double-bootstrapped that supposed evidence of wrongdoing into willful acts by ADC's dentists Dr. Nazari and Dr. Kanaan in order to meet the knowing and intentional scienter element of willful conduct. Reviewing his logic demonstrates that his justification and conclusions fail at each point. The first meritless justification Commissioner Janek used was that

[18] AR 1234 (Finding of Fact 45), Dr. Tadlock applied the new 2012 definition, not the definition in effect from 2007-2011. Testimony of Dr. Tadlock, Tr. Vol. 1 Page 188 Line 24 – Page 189 line 6. (Q You -- in forming your opinion, you rely upon definitions regarding ectopic eruption that are found outside of the provider manual, correct? A As a doctor, we are responsible for those. We learn those, we were taught those. JUDGE SEITZMAN: You just need to answer the question. A Yes, I did absolutely.).

[19] AR 1234 (Finding of Fact 46-47).

the Medicaid Manual's discussion of ectopic eruption was not a definition (as determined by the ALJs), it was an instruction. Setting aside the fact that every single expert witness at the hearing—***including the HHSC-OIG's witnesses***[20]—referenced the Manual's discussion of ectopic eruption as a definition, the Commissioner's "it was an instruction, not a definition" argument is a distinction without a difference.

At the end of the day, whether the Manual's discussion of ectopic eruption is an instruction or a definition cannot be a justification for changing SOAHs proposed findings 46-50 to find willful misrepresentation. Clearly, the ALJs believed that Drs. Nazari and Kanaan properly scored their patients, because proposed SOAH findings 46 and 47 say so. And implicit in those SOAH findings is the conclusion that Drs. Nazari and Kanaan ***believed*** they were scoring their patients correctly regarding ectopic eruption. Because Drs. Nazari and Kanaan ***believed*** they were doing it correctly, there could not be any intent to willfully misrepresent HLD scores. Stated differently, it is impossible for ADC to willfully misrepresent anything to Texas Medicaid when the SOAH ALJs found that ADC's dentists were not only acting properly, those same dentists actually believed they were acting properly.

Thus, it is the last part of Commissioner Janek's changes to SOAH findings 46 and 47 that are the real problem, because Commissioner Janek creates *mens rea* in Drs. Nazari and

[20] Dr. Altenhoff testified on behalf of the HHSC, and she stated that definition in the manual had been the same from 2007 to 2012. Tr. Vol. 1 at 102. (Now, this is a policy, by the way, that has been on the books ever since you can recall, correct? A Ever since the orthodontic -- I'm sorry. As far as this-- Q The definition. A Which definition are you referencing? Q Right here. The definition of ectopic eruption [in the Medicaid manual]. A Which part of it? Q Whatever reads right here. 45.6 states that ectopic eruption is an unusual pattern of eruption such as high labial cuspids or teeth that are grossly out of the long axis of the alveolar ridge. My question to you is: Is this definition the same definition that applied -- we saw awhile ago in 19.1 in 2007, 2008, 2009, 2010, is it the same definition that was there? A Yes, sir.); *See also* Tr. Vol 1 at 89, Lines 5-19 (Q Will you agree with me that the definition of ectopic eruption, at least for the years 2008 through 2011, did not change? A I would agree with that. Q If I show you -- let's look at P-65. There's a-- what I want to know is whether or not this definition he had awhile ago of ectopic eruption -- Can you go to this particular definition? Can you tell us whether or not this definition here was a constant and consistent definition of ectopic eruption from at least ending in the year 2011? A Beginning when, sir? Q Well, how about 2007. A I would -- yes, I believe that is a consistent definition within the Medicaid manual.); Dr. Tadlock referred to the Manual's definition at Tr. Vol. 1 at 180

Kanaan. He created an adjudicative fact—*scienter*—to support his final decision in Findings 48-50 and Conclusion of Law 13. ADC disputes that there is evidence to support the Commissioner's claim that Drs. Nazari and Kanaan mis-scored their patients HLD score sheets (and, in any event that is an adjudicative fact the ALJs determined and which cannot be changed), but ADC recognizes that Commissioner Janek's position is a clever attempt to convert adjudicative fact findings about the credibility of witnesses and *mens reas* into a legislative fact/policy question that will permit the Commissioner to rewrite the ultimate decision. The SOAH proposed finding 46 stated:[21]

> Dr. Nazari was a credible witness and properly utilized the Manuals' definition in scoring the HLD index.

Commissioner Janek changed that proposed finding, and added to it, to create a different conclusion:[22]

> Despite the SOAH ALJs finding Dr. Nazari's testimony to be credible, Dr. Nazari did not properly follow Medicaid policy in his identification of ectopic eruptions; the overwhelming evidence of *the consistent pattern of inflated HLD scores* submitted by ADC establishes prima facie evidence that is reliable, relevant and material that ADC's misrepresentations of medical necessity *constitute willful misrepresentations*.

Just because Commissioner Janek thinks Drs. Nazari and Kanaan did not properly follow Medicaid policy, it does not follow that their HLD score sheets were "inflated," and it certainly does not follow that any alleged "inflated" scores were willfully misrepresented. What Commissioner Janek has done in substituting his judgment for the decision of the SOAH ALJs is strictly forbidden in administrative law because it changes, and creates, adjudicative facts to support his final decision.

---

[21] AR 1234 (Proposed Finding of Fact 46)
[22] AR 1767 (Revised and Final Finding of Fact 46) (emphasis added); Finding of Fact 47 has the same issue, but involves Dr. Kanaan.

"An agency must respect the due process rights of parties that appear before it in contested cases." *Jordon Paving Corp. v. Texas Dep't of Transp.*, No. 03-04-00782-CV, 2009 WL 1607916, at *8 (Tex.App.—Austin 2009, no pet.) This specifically includes deferring to the legislatively delegated fact-finder—the SOAH ALJs. "Having chosen to delegate the factfinding role to the hearing examiner, a board cannot then ignore those findings with which it disagrees and substitute its own additional findings." *Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 564 (Tex. 2000). This concept of empowering the administrative fact finder for the purpose of removing the discretionary power of the agency is well-settled. *Id.* An agency only has the power to decide whether the facts, as determined by the ALJ, show a violation of the law or agency rules. *Id.*

Commissioner Janek's second fabricated justification for changing FOF 45-50 involves the idea that there was not, and could never be, a definition of ectopic eruption in the Medicaid Manual that differed from the definition in the general dental profession. The Commissioner claims that doing so would create a different standard for treating Medicaid patients, and that doing so would violate federal law. This argument is a straw man. It attempts to create a problem where there is none to justify the result the Commissioner seeks. Texas, like every other state, enjoys the ability to determine what services are and are not covered under the State's Medicaid plan. Texas enjoys tremendous discretion to determine what conditions will qualify for treatment. Commissioner Janek's argument mixes the question of which dental conditions are covered, with the standard of care for delivering those covered benefits. It is true that all covered benefits must be delivered with the same standard of care that non-Medicaid services are delivered. But if the State wants to decide that only teeth "off of the alveolar ridge" should be considered "ectopic enough" to warrant treatment, it can do so; in fact, the State could decide

that ectopic eruption shouldn't be considered at all in determining whether orthodontic services are warranted, and conclude that correction of ectopic teeth is not a covered benefit. In short, ADC believes it is undisputed that the State retains the ability to define any medical condition for the purpose of determining whether such condition will be covered under Texas' Medicaid plan. Commissioner Janek's claim that the State cannot define ectopic eruption in a specific manner for the Texas Medicaid system is a false alarm.

At the end of the day, Commissioner Janek simply goes too far in his activism. To use a straightforward car-crash metaphor, Commissioner Janek cannot "change a green light to a red light." The SOAH judges determined that ADC and its dentists drove through an intersection under a green light; Commissioner Janek claimed that neither the SOAH judges nor ADC properly understood what a green light looks like, and he reversed the ALJs decision so that ADC drove through the intersection under a red light. Then Commissioner Janek added the finding that ADC willfully ran the red light. That sort of creative "fact fabrication" cannot stand. When Commissioner Janek changed the SOAH judges' proposed Findings of Fact 46-50, his actions prejudiced ADC's substantial rights because his actions were in excess of his authority, and not reasonably supported by substantial evidence, and arbitrary and capricious, and an abuse of his discretion.

C. Commissioner Janek's attempt to overturn Findings of Fact from *Harlingen* to create evidence in this case is improper.

The Amended Final Order asserts that: 1) the SOAH ALJs erred by relying on the *Harlingen Family Dentistry* decision, and 2) Commissioner Janek expressly rejected three findings of fact from *Harlingen*. However, the SOAH ALJs did not rely on Harlingen for

anything dispositive in ADC's case, and the Commissioner cannot reject Findings of Fact 29, 31, and 33[23] from the *Harlingen* decision because those are adjudicative facts from that case.

The SOAH ALJs in ADC's case expressly rejected that they were relying on the decision in *Harlingen* to dispose of legal questions in ADC's hearing. The proposal for decision states:

> Prior to the commencement of the hearing on the merits, ADC requested that HSSC-OIG be bound by certain of the Commission's findings in *Harlingen Family Dentistry v. Texas Health and Human Services Commission, Office of Inspector General*, SOAH Docket No. 529-12-3180 *(Harlingen)* based upon the doctrines of res judicata and collateral estoppel. The ALJs denied ADC's motion. Having developed the evidentiary record, the ALJs find no basis for applying either doctrine in this case.[24]

The *Harlingen* decision is only mentioned a handful of times in ADC's proposal for decision, and when *Harlingen* is cited in any legitimately applicable context, it is cited only to discuss the HHSC-OIG expert witness, Dr. Evans', testimony and credibility in *Harlingen.* In *Harlingen*, the SOAH ALJ found Dr. Evans was not credible and the ALJ in that case did not give his testimony weight. In *Harlingen,* the Commissioner ultimately adopted the *Harlingen* ALJ's PFD in full, which included these Findings of Fact 29, 31, and 33:

SOAH DOCKET NO. 529-12-3180

HARLINGEN FAMILY DENTISTRY,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
V.	§	
	§	**OF**
TEXAS HEALTH AND HUMAN	§	
SERVICES COMMISSION,	§	
OFFICE OF INSPECTOR GENERAL,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

29. Dr. Evans has treated no Medicaid patients and had no familiarity with the HLD score sheet prior to his work in this case.

[23] See the excerpt from the *Harlingen Family Dentistry* decision, at Appendix Exhibit 4.
[24] AR 1196 (SOAH Proposal for Decision).

31.	For decades in Texas Medicaid practice, prior authorization was granted and benefits paid based on an interpretation of the definition of ectopic eruption that was more expansive than the one employed by Dr. Evans in his review of the HFD cases.
33.	Dr. Evans' view of ectopic eruption and his scoring of the patients at issue lack credibility, reliability, and indicia of reliability, and do not verify the allegations of fraud against HFD.

In ADC's contested case hearing, the HHSC-OIG chose to not have Dr. Evans testify,[25] and instead the HHSC-OIG simply admitted his expert report regarding ADC into evidence. ADC responded by arguing that Dr. Evans' expert report should be excluded. The SOAH judges admitted Dr. Evans' report, but the judges were "unable to assess the credibility and reliability of Dr. Evans' opinions because he did not testify in" the contested case hearing.[26] The ADC judges ultimately held:

> Because Dr. Evans failed to testify in this case, his qualifications to render an opinion upon the scoring of ectopic eruption using the Texas Medicaid HLD score sheet remain unproven. Therefore, his expert report and conclusions are accorded no weight by the ALJs.[27]

The SOAH ALJs reasons for giving Dr. Evans' report no weight in this case are important. Commissioner Janek's Amended Final Order in this case claims that the judges relied on *Harlingen* to find that Dr. Evans was not qualified. But a reading of the ADC PFD demonstrates that the SOAH judges looked to the *Harlingen* Final Order in an attempt to ***qualify*** Dr. Evans, ***not to disqualify him***. Because Commissioner Janek decided Dr. Evans was not credible or reliable in *Harlingen*, the SOAH judges were not able to find that Dr. Evans was instantly qualified in ADC's case. And because the HHSC-OIG did not allow Dr. Evans to testify in ADC's contested case hearing, the SOAH judges' could not find any new basis to qualify Dr. Evans or to give weight to his expert report. In sum, the Commissioner's claim that the ALJ's

[25] AR 1218 (SOAH Proposal for Decision).
[26] AR 1217.
[27] AR 1218.

relied on the *Harlingen* decision to disqualify the HHSC-OIG's expert in this case is simply incorrect.

When Commissioner Janek issued his Amended Final Order in this case, he sought to generate evidence of ADC's wrongdoing by giving Dr. Evans' report some weight. Commissioner Janek's Final Order only disclaims three findings of fact from *Harlingen*: FoF 29, 31, and 33, which were the Commissioner's three findings concerning Dr. Evans. Thus, it should be clear that Commissioner Janek's attempt to overrule *Harlingen* FoF 29, 31 and 33 were a transparent attempt to make Dr. Evans a credible witness in this case.

As stated above, the credibility of a witness is not a legislative fact, it is strictly an adjudicative fact. Whether Dr. Evans' testimony in *Harlingen* should have been given any weight in that case was the decision of the fact finder in that case. Commissioner Janek was not the fact finder in *Harlingen*, but he agreed that Dr. Evans was not credible or reliable in that case and the *Harlingen* decision was issued by the Commission with those findings in 2012. Likewise, Commissioner Janek is not the fact finder in this case. He has no more ability today to change those adjudicative facts in *Harlingen* than he did when that case was considered and finalized in 2012. And his attempt to undo his earlier determination in *Harlingen* regarding the credibility of Dr. Evans is improper; it is an obvious effort to manufacture evidence that is detrimental to ADC so that the Commissioner can claim that the HHSC-OIG met its evidentiary burden. This court should reject the Commissioner's arguments that the SOAH ALJs in this case relied on *Harlingen's* FoF 29, 31, and 33 to discount the testimony of HHSC-OIG's expert witness Dr. Evans.

D. The Commissioner failed to give the parties an actual Motion for Rehearing, he just reversed the SOAH decision.

Twice in this case, the Commissioner (or someone acting on his behalf) have granted the HHSC-OIG's Motion for Rehearing. On February 27, 2014, HHSC Appeals Judge Gilpin signed a Final Order granting the HHSC-OIG's Motion for Rehearing in this case and rendering a final decision, even though the HHSC-OIG had not filed a Motion for Rehearing at that time. On May 2, 2014, Commissioner Janek signed an Amended Final Order indicating that the Amended Order was being issued in response to the HHSC-OIG's April 2, 2014 Motion for Rehearing. However, no rehearing was ever held on either of the alleged Motions for Rehearing. Neither Judge Gilpin or Commissioner Janek engaged in a rehearing on the issues. No argument was taken, no evidence was offered, no law or precedent was discussed. ADC was not permitted to offer any response to the HHSC-OIG's arguments in its Motion for Rehearing, and it was never clear which of the HHSC-OIG's arguments the Commissioner or Judge Gilpin found to be a basis for granting the rehearing. Commissioner Janek simply amended the Final Order without notice to or comment from the parties. This constitutes a violation of law and a denial of due process. It amounts to an arbitrary and capricious act and an abuse of discretion. This is a significant reversible error that requires a rehearing. HHSC should require the parties to brief the specific issues upon which the original rehearing was granted, and ADC must be allowed to respond to the OIG's arguments. This is a per se violation of due process, as ADC was denied not only notice that an Amended Final Order would be issued, but also an opportunity to be heard at a rehearing before issuance of such Order.

V. CONCLUSION

Most administrative contested cases are essentially strict liability cases. The State regularly brings administrative claims against regulated businesses for breaking administrative

rules or violating the standard of care. In those cases, the businesses' intent to break the law is irrelevant, the only thing that matters is whether the law was, in fact, broken. That framework is not applicable to this case. Here, the HHSC-OIG was required to provide evidence that ADC not only did something wrong, but that it intended to defraud or willfully misrepresent that wrong to the State. Following a SOAH hearing, the fact-finding ALJs determined that the HHSC-OIG had failed to prove either point; ADC neither acted improperly, nor did it intend to act improperly.

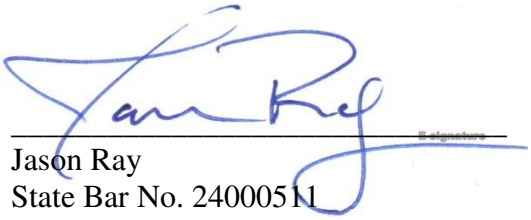
Reversing a SOAH decision that finds no evidence of wrongdoing and no evidence of intent to engage in wrongdoing is difficult for an agency to do, and it should be. It should be impossible to do so in a situation that requires *scienter*, such as this case. The Commissioner cannot redefine policy after the fact and then use that redefined policy to reweigh evidence in ADCs case to find that ADC did something wrong. But even if this Court finds that Commissioner Janek's reweighing of evidence was not reversible error, and his conclusion that ADC's dentists incorrectly scored patients' orthodontic conditions can be substituted for the SOAH ALJs decision, that is not enough to permit the State to maintain a payment hold against ADC. The Commissioner also had to find evidence of intent, of scienter. That cannot be fabricated through any reconstruction of HHSC policy.

It is improper for Commissioner Janek to manufacture evidence of wrongdoing, **but it is impossible** for Commissioner Janek to manufacture evidence of ADC's intent to engage in wrongdoing in this case. It simply cannot be done given the limitation on an agency's ability to change a PFD. The SOAH ALJs did not find evidence of intent to willfully misrepresent anything in the Medicaid system, and that finding is dispositive. Commissioner Janek's reversal of the SOAH PFD, and his Amended Final Order's requirement that the 100% payment hold remain in place, cannot stand.

VI. PRAYER

FOR THESE REASONS, Plaintiff, Antoine Dental Center, prays that this Court reverse the Texas Health and Human Services Commission's Amended Final Order.

Respectfully submitted,



Jason Ray
State Bar No. 24000511
RIGGS & RAY, P.C.
700 Lavaca, Suite 920
Austin, Texas 78701
512.457.9806 (Telephone)
512.457.9866 (Facsimile)
Email: jray@r-alaw.com
ATTORNEY FOR PLAINTIFF
ANTOINE DENTAL CENTER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ***Antoine Dental Center's Brief on the Merits*** was served via email and eservice on this 24th day of April, 2015 to the following:

Via Email: Raymond.Winter@texasattorneygeneral.gov
Via Email: Jennifer.Hopgood@texasattorneygeneral.gov
Raymond Winter
Chief, Civil Medicaid Fraud Division
Jennifer L. Hopgood
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
ATTORNEYS FOR DEFENDANTS

Jason Ray