

**DOCKET NO. 453-04-2766.M4  
M4-03-6979-01**

—,	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>ABERDEEN INSURANCE CO.,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

This case involves a dispute over whether Respondent Aberdeen Insurance Company (the Carrier) should be required to reimburse Petitioner \_\_\_ \$7,100 for sums he paid to David Soto for home health care services. The services at issue required preauthorization, but the Petitioner did not obtain preauthorization. Petitioner argued that the services Mr. Soto provided fell within an exception to the preauthorization rule for emergencies. In this Decision and Order, the Administrative Law Judge (ALJ) finds that Petitioner failed to establish that the emergency exception to the preauthorization requirement applies. Thus, the Carrier is not required to reimburse Petitioner.

**I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION**

No one contested jurisdiction, notice, or venue. Therefore, those issues are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

A hearing in this matter was convened on March 23, 2004, at 9:00 a.m., at the hearings facility of the State Office of Administrative Hearings, William P. Clements Building, 300 West 15<sup>th</sup> Street, Austin, Texas, with ALJ Renee M. Rusch presiding. Petitioner appeared through his wife (Mrs. K.), who holds a power of attorney authorizing her to act on her husband's behalf. Mrs. K. was assisted by Luz Losa, an ombudsman with the Texas Workers' Compensation Commission (Commission, the Commission). Attorney Beverly Vaughn represented the Carrier. After the taking of argument and evidence, the hearing was adjourned and the record closed the same day.

**II. REASONS FOR DECISION**

1. Applicable Law

Workers' compensation insurance covers all medically necessary health care, which includes all reasonable medical aid, examinations, treatments, diagnoses, evaluations, and services reasonably required by the nature of the compensable injury and reasonably intended to cure or relieve the effects naturally resulting from a compensable injury. Medically necessary health care includes procedures designed to promote recovery or to enhance the injured worker's ability to get or keep

employment.<sup>1</sup> However, certain services require preauthorization by the insurance carrier before they may be provided. Home health care is one of the services for which preauthorization is required.<sup>2</sup> Once preauthorization is granted, the insurance carrier is generally liable to reimburse the procedure according to the Act and the Commission's rules.<sup>3</sup> Preauthorization is not required "where there is a documented life-threatening degree of a medical emergency necessitating" one of the treatments or services requiring preauthorization.<sup>4</sup> If preauthorization is not obtained from the Carrier or ordered by the Commission, and no emergency existed, the Carrier is not liable to reimburse the services in issue.<sup>5</sup>

The Commission's rules define "emergency" thus:

Emergency-Either a medical or mental health emergency as described below:

(A) a medical emergency consists of the *sudden onset of a medical condition manifesting itself by acute symptoms of sufficient severity*, including severe pain, that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health and/or bodily functions in serious jeopardy, and/or serious dysfunction of any body organ or part.

(B) a mental health emergency is a condition that could reasonably be expected to present danger to self or others. 28 TEX. ADMIN. CODE § 133.1(A)(7). [Emphasis added.]

TEX. LABOR CODE § 401.011 contains the following relevant definitions:

(19) "Health care" includes all reasonable and necessary medical aid, medical examinations, medical treatments, medical diagnoses, medical evaluations, and medical services. The term does not include vocational rehabilitation. The term includes:

(A) medical, surgical, chiropractic, podiatric, optometric, dental, nursing, and physical therapy services provided by or at the direction of a doctor;

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<sup>1</sup> TEX. LAB. CODE ANN. § 401.011(19) and (31). The Texas Workers' Compensation Act is found at TEX. LAB. CODE ANN. § 401.001 *et seq.* and is hereafter referred to as "the Act."

<sup>2</sup> 28 TEX. ADMIN. CODE § 134.600(h)(12).

<sup>3</sup> 28 TEX. ADMIN. CODE § 134.600(b).

<sup>4</sup> TEX. LABOR CODE § 413.014(a); 28 TEX. ADMIN. CODE § 134.600(a)(1).

<sup>5</sup> 28 TEX. ADMIN. CODE § 134.600(b)(1).

- (B) physical rehabilitation services performed by a licensed occupational therapist provided by or at the direction of a doctor;
- (C) psychological services prescribed by a doctor;
- (D) the services of a hospital or other health care facility;
- (E) a prescription drug, medicine, or other remedy;
- (F) a medical or surgical supply, appliance, brace, artificial member, or prosthesis, including training in the use of the appliance, brace, member, or prosthesis. . . .

(21) "Health care practitioner" means:

- (A) an individual who is licensed to provide or render and provides or renders health care; or
- (B) a nonlicensed individual who provides or renders health care under the direction or supervision of a doctor.

## 2. Factual Background

On \_\_\_\_, Petitioner suffered a severe closed head injury in a fall. Petitioner required an immediate right craniotomy to evacuate subdural and intercerebral hemorrhage. He was discharged from the hospital on January 11, 2002. Though doctors recommended Petitioner enter a rehabilitation facility for evaluation and rehabilitation following his release from the hospital, Petitioner declined to do so, electing instead to recover at home with his family. (Resp. Ex. 1, p. 69.)

When Petitioner was released from the hospital, his treating physician, Robert Gordon, M.D., a neurologist, ordered physical therapy, occupational therapy, and 24-hour sitters.<sup>6</sup> These individuals were placed immediately, and thus, for the first ten days after Petitioner's release from the hospital, the Carrier provided nurse aide care 24 hours per day six days per week.<sup>7</sup>

During this time period, Petitioner showed poor judgment and was irascible, unsteady, and prone to falling. (Resp. Ex. 1, p. 57.) In office notes dated January 21, 2002, Dr. Gordon wrote,

I do not feel comfortable yet in leaving him alone in the house while his wife is working because he is still a little impulsive and is certainly unsteady. I would not want him to fall and reinjure himself. I am going to request sitters from 6 a.m. to 6 p.m. for the next week and if he continues to improve, he may get to the point where he does not need any sitters at all. (*Id.*)

For the next ten days, the Carrier provided nurse aide care 13 hours per day six days per week.

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<sup>6</sup> In documents, testimony, and argument, the parties used the terms "sitter", "nurse aide," and "home health care" interchangeably. The ALJ has also used those terms interchangeably in this Decision and Order.

<sup>7</sup> Petitioner dismissed the physical therapist and occupational therapist within 48 hours. (Resp. Ex. 1, p. 69.)

As of February 12, 2002, Dr. Gordon was “hopeful and optimistic that we can discontinue his need for nurse’s aids [sic] over the next several weeks.” (Resp. Ex. 1, p. 59.) On February 20, 2002, Dr. Gordon wrote,

The patient continues to improve. His wife still feels uncomfortable leaving him at home during the day. He still is somewhat unsteady in his walking. . . .*He will still need some observation for a short period of time, but he has improved where he is very close to being able to take care of himself at home.* (Resp. Ex. 1, p. 60.) [Emphasis added.]

Office notes and correspondence generated by Dr. Gordon reflect that Petitioner’s condition improved steadily, and as Petitioner’s condition improved, his nurse aide care was reduced to the following levels: five hours per day six days per week for four weeks, then five hours per day six days per week for two weeks, and finally, two hours per day five days per week for an two additional weeks.

A recurrent theme in Dr. Gordon’s office notes between February and April 2002 was the observation that Petitioner’s wife was concerned about leaving Petitioner hat home without a sitter while she was at work.<sup>8</sup> In correspondence dated April 5, 2002, Dr. Gordon wrote that Petitioner’s judgment was poor and Dr. Gordon felt “extremely uncomfortable about the health and safety of [Petitioner] if he does not have supervision while his wife is not there.” (Pet. Ex. A, pp. 31-32.) Though Dr. Gordon had previously reported that Petitioner’s condition was improving steadily and he would not need sitters much longer, Dr. Gordon did not explain this seeming reversal of Petitioner’s progress.

According to Petitioner’s wife, Petitioner had suffered a serious head injury in another fall in \_\_\_\_\_. Following that injury, Petitioner developed a seizure disorder for which he took various medications, including Dialantin, Mysoline, and Tegretol, on a strict timetable and on a regular basis.

As of April 2002, Mrs. K. did not believe Petitioner was mentally or physically able to take his medications by himself. Moreover, in May 2002, as Petitioner was recovering from his \_\_\_\_\_ injury, Petitioner’s seizures (resulting from his \_\_\_\_\_ injury) began recurring, a development that made it all the more important that he take his anti-seizure medications on schedule.

In early April, Dr. Gordon requested preauthorization for sitters, without specifying any frequency.

On June 28, 2002, Petitioner underwent an independent medical examination. Prior to that examination, Petitioner had not yet had any neuro psychological testing, nor had he been evaluated by any rehabilitation professionals specializing in traumatic brain injury rehabilitation. (Pet. Ex. A, pp. 35-39.)

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<sup>8</sup> Mrs. K. testified that she could not stay home with Petitioner, as she works as an office manager/receptionist/back-up dental assistant in a dentist’s office approximately 20 miles from her home. Her work hours are 7 a.m. to 4:45 p.m., Monday through Thursday, and her commute takes approximately 40 minutes each way.

### 3. The Carrier's Denial of Preauthorization

On April 15, 2002, the physician advisor who initially evaluated the preauthorization request recommended denial on the basis that Dr. Gordon had not established medical necessity:

While it may seem that a sitter is necessary, there are no objective notes supporting any intervention by the sitter in past to support their efficacy. The injured worker was noted to have Seizure disorder even prior to the date of injury. There are not documentation by Dr. Gordon of what parameters he uses for assessing judgment and improvements necessary. A neuro psychological evaluation may be necessary . . . . If in fact judgement is lacking then perhaps neuro and cognitive rehabilitation may be more cost effective and efficacious. (Verbatim, Pet. Ex. A, p. 27.)

In reviewing the appeal of that denial, another physician advisor, on April 17, 2002, concurred and noted: "Patient may benefit from a higher level of care for cognitive rehabilitation. Would need an evaluation, neuro psych and as well functional." (Verbatim, Pet. Ex. A, p. 28.) Both physician advisors tried to reach Dr. Gordon by telephone to confer with him, but Dr. Gordon was not available when they called and did not return their phone calls. (Pet. Ex. A, pp. 27 and 28.)

Notwithstanding the Carrier's denial of preauthorization, Mrs. K. hired David Soto to stay with Petitioner while she was at work. Mr. Soto is a building contractor who was just completing repair work on the K.s' house at about this time. Mr. Soto was not licensed to provide health care practitioner. However, because Mr. Soto had experience caring for a son with a disability and because Petitioner had "bonded with" Mr. Soto, Mrs. K. believed Mr. Soto had the requisite skills to provide home health care services to Petitioner. The K.s compensated Mr. Soto at the rate of \$10 per hour for 40 hours per week.

Mr. Soto provided the following services to Petitioner: Mr. Soto got Petitioner up out of bed; helped Petitioner dress; administered Petitioner's medications; cooked for Petitioner; motivated Petitioner to exercise; took Petitioner to doctor, dentist and eye doctor appointments; helped Petitioner learn to walk again; talked to Petitioner to keep his mind occupied; took Petitioner to Home Depot and let him push the shopping cart for exercise; and prepared Thermos bottles full of coffee to take along on their outings together. Though Mr. Soto drove Petitioner to medical appointments and sometimes accompanied Petitioner into the examining room, he was not working under the direction or supervision of a doctor.

When Petitioner submitted statements for Mr. Soto's services to the Carrier, the Carrier declined payment on the basis that the services had not been preauthorized.<sup>9</sup>

### 4. Review by the Commission's Medical Review Division (MRD)

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<sup>9</sup> At the hearing, the Carrier advanced additional, intertwined reasons why reimbursement should be denied: the services were not medically necessary; the services did not constitute home health care; and Mr. Soto, a building contractor, was not appropriately certified, licensed, or supervised to provide home health services.

On May 12, 2003, Petitioner appealed the Carrier's denial of payment to Commission's MRD. Petitioner sought reimbursement for services Mr. Soto provided from April 1, 2002, through July 12, 2002. The MRD determined that, pursuant to the one-year rule set forth in Commission Rule 133.307(d)(1), Petitioner did not timely request medical dispute resolution for dates of service April 1, 2002 through May 10, 2002, and thus, the only dates of service eligible for review were May 13, 2002, through July 12, 2002.<sup>10</sup>

The MRD found Petitioner was not entitled to reimbursement for the costs of Mr. Soto's services between May 13, 2002 and July 12, 2002, either, because Commission Rule 134.600(h)(12) provides that home health services require preauthorization. Because Petitioner did not obtain preauthorization for the services Mr. Soto provided between May 13, 2002, and July 12, 2002, the MRD concluded the Carrier was not required to reimburse Petitioner for Mr. Soto's services. That determination was the subject of this proceeding.

Petitioner did not dispute that home health services required preauthorization. Petitioner argued, however, that the services Mr. Soto provided fell within an exception to the preauthorization rule for emergencies.

## 5. Analysis

Petitioner's predicament is unfortunate. Under the Commission's rules, when Dr. Gordon's request for preauthorization for sitters was denied on April 17, 2002, Petitioner's remedy was to request dispute resolution at the Commission's MRD. 28 TEX. ADMIN. CODE § 133.308. Under that scenario, Petitioner's need for the requested services would have passed by the time Petitioner's appeal of the denial of preauthorization would have been resolved. In the interim, Mrs. K. would either have had to leave Petitioner home alone or else hire a sitter, as she did, but be foreclosed from receiving reimbursement because she did not first obtain preauthorization. Neither the Act nor the Commission's rules provide for retrospective preauthorization. Thus, the statutory scheme seems to create a "no win" situation for a claimant such as Petitioner *unless* the emergency exception or some other exception to the preauthorization rule applies. Petitioner argues, essentially, that the emergency exception to the preauthorization rule should apply because Petitioner needed home health care *at that time*, and Mrs. K. could not simply call a "time out" on Petitioner's need and leave him home alone while she pursued the Commission's appeal procedures.

Although it could be argued that the statutory scheme leads to a harsh result, the ALJ has no authority to disregard the law or impose a different process than the one created by the Legislature. Petitioner had the burden of proof in this matter, but Petitioner failed to establish that the

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<sup>10</sup> Petitioner did not challenge that determination. Rule 133.307(d)(1), which applies to requests for medical fee dispute resolution filed on or after January 1, 2003, provides in relevant part:

A person or entity who fails to timely file a request waives the right to medical dispute resolution. . . . A request for medical fee dispute resolution on a carrier denial or reduction of a medical bill or any employee reimbursement shall be considered timely if it is filed no later than one (1) year after the date(s) of service in dispute.

circumstances giving rise to Mrs. K.'s hiring Mr. Soto constituted a medical emergency, as that term is defined in the Commission's rules. Though Petitioner, his wife, and his treating doctor may have believed Petitioner needed in-house assistance while Mrs. K. was at work, Petitioner did not provide evidence of a "sudden onset of a medical condition manifesting itself by acute symptoms." Instead, the evidence suggests that Dr. Gordon sought preauthorization for the continuation of sitters because Mrs. K. was concerned about leaving Petitioner home alone while she was at work.

Before the preauthorization request at issue here, the Carrier had been reducing the number of hours of nurse aide care Petitioner received per day. Yet Dr. Gordon's April 2002 preauthorization request for a sitter was open-ended, and Mrs. K. hired Mr. Soto to work 40 hours per week. The Carrier sought objective evidence of Petitioner's condition, and presumably, such evidence could have been obtained through neuro psychological testing, but Petitioner and/or Dr. Gordon chose not to have Petitioner undergo such testing.

Mr. Soto was not a health care practitioner, as that term is defined in TEX. LABOR CODE § 401.011(21); nor was he working under the direction or supervision of a doctor.<sup>11</sup> Though certain of the services he provided Petitioner might arguably constitute health care, *e.g.*, administering Petitioner's anti-seizure medications, many of the services appear to have been more domestic in nature, *e.g.*, cooking for Petitioner, talking to Petitioner to keep his mind occupied, taking Petitioner to Home Depot and letting him push a shopping cart for exercise. The ALJ does not doubt that Mr. Soto's attention and care aided Petitioner; however, she does not believe his services constituted immediate emergency medical attention as contemplated in the preauthorization rule.

In reaching this conclusion, the ALJ has taken into account a note from Dr. Gordon dated March 15, 2004, in which Dr. Gordon asserted that Petitioner needed a sitter eight hours per day five days per week between April 1, 2002, and July 14, 2002, while his wife worked. The ALJ attached little weight to this note, as it was prepared approximately one week before the hearing, was conclusory, happened to mirror precisely the work arrangement the K.s had with Mr. Soto, and provides no objective evidence of medical necessity. Moreover, Dr. Gordon did not testify at the hearing, and thus, was not available for cross-examination.

## **F. Conclusion**

For the reasons discussed above, the ALJ concludes that the emergency exception to the preauthorization rule does not apply. Because Petitioner did not obtain preauthorization for Mr. Soto's services, reimbursement is not required. Moreover, because this factor alone is dispositive, the ALJ will not separately address the other arguments raised by the Carrier.

## **IV. FINDINGS OF FACT**

1. On \_\_\_\_, Petitioner \_\_\_\_ sustained work-related, compensable, closed-head injury while employed by an employer carrying workers' compensation insurance underwritten by Aberdeen Insurance Company (Carrier).

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<sup>11</sup> *Also see* 28 TEX. ADMIN. CODE § 133.1(a)(9).

2. Petitioner required an immediate right craniotomy to evacuate subdural and intercerebral hemorrhage.
3. Petitioner was discharged from the hospital on January 11, 2002.
4. Though doctors recommended Petitioner enter a rehabilitation facility for evaluation and rehabilitation following his release from the hospital, Petitioner declined to do so, electing instead to recover at home with his family.
5. When Petitioner was released from the hospital, his treating physician, Robert Gordon, M.D., a neurologist, ordered physical therapy, occupational therapy, and 24-hour sitters.
6. For the first ten days after Petitioner's release from the hospital, the Carrier provided nurse aide care 24 hours per day six days per week.
7. Following his release from the hospital, Petitioner showed poor judgment and was irascible, unsteady, and prone to falling.
8. As of February 12, 2002, Petitioner's condition had improved to the point where he was very close to being able to take care of himself at home.
9. Petitioner's condition improved steadily, and as his condition improved, his nurse aide care was reduced to the following levels: 13 hours per day six days per week for ten days, five hours per day six days per week for four weeks, then five hours per day six days per week for two weeks, and finally, two hours per day five days per week for an two additional weeks.
10. Throughout this time period, Petitioner's wife was concerned about leaving Petitioner home without a sitter while she was at work.
11. Petitioner had suffered a serious head injury in another fall in \_\_\_\_\_. Following that injury, Petitioner developed a seizure disorder for which he took various medications, including Dialantin, Mysoline, and Tegretol, on a strict timetable and on a regular basis.
12. As of April 2002, Mrs. K. did not believe Petitioner was mentally or physically able to take his seizure medications by himself.
13. In early April 2002, Dr. Gordon requested preauthorization for sitters, without specifying frequency.
14. The Carrier denied preauthorization on the basis that Dr. Gordon has not provided any objective evidence, such as a neuro psychological evaluation, establishing medical necessity.



15. At the time the Carrier denied preauthorization, Petitioner had not had any neuro psychological testing, nor had he been evaluated by any rehabilitation professionals specializing in traumatic brain injury rehabilitation.
16. The physician advisors who reviewed Dr. Gordon's preauthorization request tried to reach Dr. Gordon by telephone to confer with him, but Dr. Gordon was not available when they called and did not return their phone calls.
17. Because Mrs. K. was unable to stay home with Petitioner and felt uncomfortable leaving him home alone, she hired David Soto to assist Petitioner while she was at work.
18. Mr. Soto is a building contractor who was completing repair work on the K.s' house at about this time.
19. Mr. Soto was not licensed to provide or render health care.
20. Mr. Soto did not render care to Petitioner under the direction or supervision of a doctor.
21. Mr. Soto provided the following services to Petitioner: got Petitioner up out of bed; helped Petitioner dress; administered Petitioner's medications; cooked meals for Petitioner; motivated Petitioner to exercise; took Petitioner to doctor, dentist and eye doctor appointments; helped Petitioner learn to walk again; talked to Petitioner to keep his mind occupied; took Petitioner to Home Depot and let him push the shopping cart for exercise; and prepared Thermos bottles full of coffee to take along on their outings together.
22. Petitioner's wife compensated Mr. Soto at the rate of \$10 per hour for 40 hours per week.
23. When Petitioner submitted statements for Mr. Soto's services to the Carrier for the period April 1, 2002, to July 12, 2002, the Carrier declined payment on the basis that the services had not been preauthorized.
24. On May 12, 2003, Petitioner submitted a request for dispute resolution to the Texas Workers' Compensation Commission (Commission).
25. The Medical Review Division (MRD) of the Commission issued its Findings and Decision on March 21, 2003, denying reimbursement.
26. Petitioner requested a hearing on March 27, 2003, and the Commission issued its original Notice of Hearing on April 29, 2003.
27. The hearing in this docket was held on March 23, 2004, at the hearings facility of the State Office of Administrative Hearings in Austin, Texas, before ALJ Renee M. Rusch. Petitioner appeared through his wife, who holds a power of attorney authorizing her to act on Petitioner's behalf. Attorney Beverly Vaughn represented the Carrier. The hearing concluded and the record closed that same day.

## V. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction over this matter pursuant to the Texas Workers' Compensation Act (the Act). TEX. LAB. CODE ANN. § 413.031.
2. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031 and TEX. GOV'T CODE ANN. ch. 2003.
3. The request for a hearing was timely made pursuant to 28 TEX. ADMIN. CODE § 148.3.
4. Adequate and timely notice of the hearing was provided according to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. Petitioner had the burden of proving by a preponderance of the evidence that the Carrier is liable for reimbursing the services in issue. 28 TEX. ADMIN. CODE § 148.21(h).
6. Pursuant to 28 TEX. ADMIN. CODE § 133.307, which required that a request for medical dispute resolution at the Commission be filed within one year after the date of service in dispute, Petitioner waived the right to medical dispute resolution and reimbursement for services Mr. Soto provided between April 1, 2002 and May 10, 2002.
7. Pursuant to TEX. LABOR CODE ANN. 413.014, an insurance carrier is not liable for specified treatments and services unless preauthorization for the treatments or services has been obtained from the insurance carrier or the Commission, or the services were provided for a medical emergency.
8. The Commission's rules in effect at all times relevant to this case require preauthorization for home health care services. 28 TEX. ADMIN. CODE § 134.600(h)(12).
9. "Preauthorized" means that the service or treatment must be authorized before it is provided.
10. The circumstances in which Mr. Soto provided the services at issue did not constitute a medical emergency under Commission Rule 133.1(a)(7).
12. Petitioner failed to carry his burden of proving that the Carrier is liable to reimburse the services provided by David Soto between May 13, 2002, and July 12, 2002, as the evidence establishes that no preauthorization was obtained, and Petitioner failed to show by a preponderance of the evidence that the services were provided for a medical emergency. TEX. LABOR CODE ANN. 413.014; 28 TEX. ADMIN. CODE § 134.600(b)(1).
13. Petitioner's request for reimbursement for the services Mr. Soto provided between April 1, 2002, and July 12, 2002, should be denied.

**ORDER**

**IT IS ORDERED** that Petitioner's request for reimbursement for payment for services provided by David Soto to Petitioner between April 1, 2002, and July 12, 2002, be, and the same is hereby, denied.

**SIGNED May 19, 2004.**

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**RENEE M. RUSCH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**