STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re:	)	Docket No. 01-2006-A-1234
	)	
[APPELLANT'S NAME]	)	**REVIEW DECISION AND FINAL AGENCY ORDER**
	)	
	)	
Appellant	)	Medical/Dental/Transportation Services/Equipment
	)	Client ID No. [NUMBER]

I. NATURE OF ACTION

1. On January 19, 2006, [APPELLANT'S NAME] (the Appellant) telephoned the Office of Administrative Hearings (OAH) and made an oral request for a hearing. OAH staff recorded the Appellant has having identified the program at issue as "medical for dental work." OAH staff also recorded the following description of the problem identified by the Appellant as, "Had dental work done. Cancer radiation caused problem and basic health would not pay for dental work. Borrowed the money to get his done even though his treatment for the cancer caused the medical problem so basic health should have covered bill.

2. The Department of Social and Health Services, Health and Recovery Services Administration, (the Department) moved to dismiss the Appellant's hearing request. Administrative Law Judge (ALJ) Jane L. Habegger conducted an administrative hearing for the limited purpose of hearing the Department's motion and issued an Order Denying Motion to Dismiss on May 22, 2006. In this order, the ALJ concluded that the Department had not timely filed its motion to dismiss under the terms of an April 11, 2006, prehearing conference order. The ALJ concluded in the alternative, that the motion should be denied because the arguments the Department had made went to the merits of the case, not to whether the Appellant should be afforded a hearing to challenge the Department's decision.

3. On June 1, 2006, the Department filed a Petition for Review of Interlocutory Order and Request for Stay of Proceedings with the Board of Appeals. On June 9, 2006, Review Judge (RJ) Ed Pesik issued a Review Decision and Order Denying Department's

Appeal of the ALJ's Interlocutory Order. The RJ concluded that the ALJ erred in concluding that the Department's motion was untimely filed, as the law allows a party to raise the issue of subject matter at any time. The RJ also concluded that the ALJ was correct in her alternate conclusion that the Department's motion should be denied because the arguments the Department had made went to the merits of the case, not to whether the ALJ had subject matter jurisdiction.

4. Another pre-hearing conference was conducted on June 15, 2006. At this hearing, the Department renewed its motion to dismiss the Appellant's hearing request. On June 30, 2006, the ALJ issued an Order on Motion to Dismiss. In this order, the ALJ concluded that the Department's motion was untimely filed under the terms of the April 11, 2006, prehearing conference order. The ALJ also concluded in the alternative that the Department's motion should be denied because the arguments the Department had made went to the merits of the case, not to whether the Appellant should be afforded a hearing right.

5. On July 17, 2006, the Department filed a petition for review of the Order on Motion to Dismiss with the Board of Appeals. The Department argued in its petition for review as follows:

The Department of Social and Health Services (DSHS) – Health and Recovery Services Administration (HRSA), by and through it's representative, Gregory Sandoz, respectfully submits this petition for review of the Interlocutory Order Denying Motion to Dismiss for Lack of Subject Matter Jurisdiction in the above-captioned case, pursuant to WAC 388-02-0530, and requests a stay in the proceedings until review of this motion is completed.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On or about June 8, 2005, the Appellant's doctor requested an appeal of denial of coverage for dental procedures through [BUSINESS NAME 1] (See Exhibit 1: Letter from [DR 1], MD). Subsequently [BUSINESS NAME 1] reviewed its denial of the requested dental coverage and the denial was upheld by [BUSINESS NAME 1] (See Exhibit 2: Letter dated June 29, 2005; Exhibit 3: Letter dated July 6, 2005; Exhibit 4: Letter dated July 29, 2005; and Exhibit 5: Letter from [DR 1] to [NAME 1] – undated).

On or about December 27, 2005, the Appellant took a copy of multiple dental bills to the [AREA] CSO requesting that DSHS reimburse him for his dental bills (See Exhibit 6: Billing statements regarding dental procedures from multiple providers).

On or about January 19, 2006, the Appellant requested a hearing regarding the denial of coverage of his dental work by [BUSINESS NAME 2]. (See Exhibit 8: request for hearing).

Sometime in late January or early February 2006, Karen Wilson, R.N., from Medicaid's Exception Case Management program, was contacted by Representative Steve Kirby's Office regarding the Appellant's case. On or about February 6, 2006, Karen Wilson followed up by contacting the Appellant regarding his dental bills. During this communication Karen Wilson was able to determine the bills were all from non-Medicaid contracted providers and therefore not covered by the Department. Karen Wilson informed the Appellant that because he went to non-contracted providers, the Department would not cover these bills. He then became threatening and the call was terminated. (See Exhibit 7: CMIS notes and testimony of Karen Wilson at June 15, 2006, hearing).

At the June 15, 2006, hearing Karen Wilson also testified to the following factual information regarding the dental offices from whom the dental bills in question came from:

> [DR 2]'s Office: [NAME 2] informed that the client was aware that if he is seen in their office he would have to pay privately. Department was also informed that client did not indicate he was a Medicaid client. [DR 2]'s office had seen him many times and he always represented himself as a self-pay client. Additionally, their office had performed many services for him for free since he is a difficult case and he has indicated he is low income. Their office is not a Medicaid-contracted provider.
>
> [DR 3]'s Office: Client never said he had Medicaid and on the forms for insurance information at this first office visit the client indicated "nothing – Visa." Their office is not a Medicaid-contracted provider.
>
> [DR 4]'s Office: Client did not indicate he was Medicaid and on the forms under insurance he wrote "n/a." Their office is not a Medicaid-contracted provider.

[Testimony of Karen Wilson from June 15, 2006, hearing].

A pre-hearing conference was held in this matter on March 29, 2006. Subsequently, the ALJ issued a Pre-Hearing Conference Order which included a briefing schedule. This order included a deadline of Friday, April 21, 2006, for the Department to file any briefing on the matter. The Department subsequently filed its motion to dismiss for lack of subject matter jurisdiction as to the State Medicaid program on Monday, April 24, 2006.

At the hearing held on May 4, 2006, the Appellant objected to the Department's Motion to Dismiss being considered because it was not filed by the April 21, 2006, deadline. The Department responded that the law allowed subject matter jurisdiction to be raised at any time and that the Department had not even received a valid request for service from an enrolled Medicaid provider. Therefore, there was no formal denial giving rise to a hearing right as to the Medicaid program, and the actual issued identified in the Appellant's own request for hearing is the denial of coverage of his dental work by [BUSINESS NAME 2]. Of note is the fact that the ALJ failed to address or even identify in her order that the Appellant had failed to submit any response to OAH in accordance with the Pre-Hearing Conference Order. Additionally, and further of note, is the fact that there has not been a request for hearing regarding a denial by the Medicaid program which logically follows, since there has never been a valid request for services nor a formal denial giving rise to a hearing right.
Subsequently, ALJ Habegger issued a written order dismissing the Department's motion to dismiss for lack of subject matter jurisdiction as not being filed timely, and also ruling that the

issues raised by the Department's motion were actually not jurisdictional. Rather, she wrote that the issues went to the merits of the case and she would have therefore denied the motion to dismiss on its own merits even if timely filed. Her ruling stated that the Department should be prepared to go forward on the "merits of this case" at the haring set for June 15th (See ALJ's Order Denying Motion to Dismiss). Specifically the ALJ stated, in part, as follows:

> FINDINGS OF FACT
>
> 5. Mr. Sandoz explained that he did not file the Memorandum and Motion on time due to "workload issues" and that he filed it on the next work day, Monday, April 24, 2006. He also argues that his Motion raises a question of subject matter jurisdiction and therefore may be raised at any time. He cites the case of INLAND FOUNDRY COMPANY V. SPOKANE COUNTY AIR POLLUTION CONTROL AUTHORITY, 98 Wn. App. 121, 989 P.2d 102 (1999) in support of this position.
>
> 10. In their Motion, the department argues that there is no jurisdiction to hear this appeal because there is "no aggrieved client as there has not been any valid request for authorization of services submitted to the Medicaid program and the appellant would not be eligible for reimbursement of dental services provided by non-Medicaid contracted providers."
>
> CONCLUSIONS OF LAW
>
> 3. I have reviewed Inland Foundry v. Spokane Air Pollution Control Authority and do not see any ruling pertaining to challenges to subject matter jurisdiction in that opinion.
>
> 4. Had I not denied th[e] department's Motion to Dismiss on the above grounds, I would have denied it on the merits. The arguments which the department makes go to the merits of the case, not to whether or not [APPELLANT'S NAME] should be afforded a hearing to challenge the department's decision. Thus the department should be prepared to go forward with the merits of this case.
>
> ORDER
>
> The department's Motion to Dismiss was not timely filed and is therefore dismissed.

See Order Denying Motion to Dismiss.

On June 1, 2006, the Department petitioned for review of the interlocutory order denying the motion to dismiss from the ALJ on May 22, 2006. [Procedural History since June 9, 2006, Review Decision] On June 9, 2006, the Review Judge issued a Review Decision in response to the Department's motion. In Conclusions of Law the Review Judge specifically ruled:

> 9. … The Department is correct in its assertion that they may raise the issue of subject matter jurisdiction at any time in the proceedings. …the issue may be raised simply by making the motion and asking the ALJ to rule upon it.
> …
> 11. … In other words, <u>while the undersigned cannot support the dismissal on the basis of its *untimeliness*</u>, the motion should in fact have been denied. <u>Until the</u>

> circumstances of the Appellant's program status, as well as the relationship (or lack thereof) between the various providers and the Department, have been established, there are genuine issues of fact regarding the jurisdiction of the administrative process. Among other things, the Department would have to show that there hasn't been any "valid request for authorization of services submitted to the Medicaid program" and that "the Appellant would not be eligible for reimbursement of dental services provided by non-Medicaid contracted providers. There is also the question of what law is applicable in the circumstances of this case, i.e., which "Medicaid program rules" should be applied to this case and how those rules relate to the circumstances of the Appellant" is a proper subject of an administrative hearing. …

See Review Decision issued June 9, 2006 [emphasis added].

Another administrative hearing was then held on June 15, 2006. At this hearing, the Department Representative informed it intended to present testimony and offer evidence to address the issues identified by the Review Judge in CC #11 of the Review Order and establish the facts necessary to prove there had not been a valid request for services based on program rules, there had not been a formal denial giving rise to a hearing right, and the ALJ did not have subject matter jurisdiction in this case and the Department would be renewing its motion in accordance with the Review Judge's Decision. Initially, the ALJ indicated she would not allow further argument on the motion to dismiss as it was her belief the Review Decision had upheld her order denying the Department's motion in its entirety. However, the ALJ acknowledged she had not read the Department's Petition for Review of Interlocutory Order and was obviously unaware of the substance of the Review Decision. In fact, the Department Representative had to quote the actual language of the Review Decision to be allowed to offer additional testimony and evidence to address the issues identified by the Review Judge in CCL #11 so a motion to dismiss for lack of subject matter jurisdiction could be properly ruled upon. After the Department Representative quote the language from CCL #11, the Department presented testimony of Karen Wilson, R.N. and the Department's Exhibits 1-8 were admitted into evidence.

The testimony and evidence presented by the Department at the June 15, 2006, hearing addressed the issues identified in the Review Decision and also provided the necessary authority supporting its motion to dismiss for lack of subject matter jurisdiction. At the conclusion of the hearing, the ALJ indicated she would issue a written decision which would address the Managed Care Organization's motion to dismiss and may or may not address the Department's Motion to Dismiss.

Then on June 30, 2006, the ALJ issued a written ruling in which she: 1) failed to follow the ruling of the Review Judge in CCL# 11 or even mention the substance of that ruling; 2) failed to make the findings from the evidence presented by the Department in support of its motion to dismiss; 3) failed to address in any meaningful manner the arguments of the Department in support of its motion to dismiss for lack of subject matter jurisdiction; 4) denied the Department's motion to dismiss again as being untimely; and 5) also denied the Department's motion in the alternative because the arguments went to the "merits" of the case and in her opinion did not support a conclusion that the tribunal lacked subject matter jurisdiction. The Department now appeals this ruling denying its motion to dismiss.

Review Judge's Authority to Review Interlocutory Order

See prior Petition for Review and Ruling of the Board of Appeals from first Petition for Review of Interlocutory Order.

Review Authority of the Board of Appeals

The authority of the Review Judge in this case is contained in WAC 388-02-0600(2), which provides the following rules:

> (2) … a review judge may only change the hearing decision if:
>
> (a) There are irregularities, including misconduct of a party or misconduct of the ALJ or abuse of discretion by the ALJ, that affected the fairness of the hearing;
> (b) The findings of fact are not supported by substantial evidence based on the entire record;
> (c) The decision includes errors of law;
> (d) The decision needs to be clarified before the parties can implement it; or
> (e) Findings of fact must be added because the ALJ failed to make an essential factual finding. The additional findings must be supported by substantial evidence in view of the entire record and must be consistent with the ALJ's findings that are supported by substantial evidence based on the entire record.

SUMMARY OF ISSUES FOR INTERLOCUTORY APPEAL

The Department appeals the ruling of the ALJ denying its Motion to Dismiss for lack of subject matter of jurisdiction since the ALJ: 1) failed to abide by the Review Decision; 2) failed to make necessary findings of fact from the testimony and evidence; 3) made erroneous rulings of law; and 4) engaged in misconduct affecting the fairness of the proceeding.

The evidence presented by the Department has established the necessary facts to address the issues identified in the Review Decision and provided the supporting authority mandating the granting of its motion to dismiss for lack of subject matter jurisdiction. In this regard the evidence has clearly established: 1) all of the bills in question were for dental services the client obtained knowingly and voluntarily from non-Medicaid contracted providers; 2) the Medicaid program has not received a valid request for authorization of dental services from an enrolled provider; 3) has not issued a denial which would give rise to a hearing right; and 4) there is no subject matter jurisdiction for the ALJ regarding the request by Appellant for the Medicaid program to pay him money for dental services he knowingly and voluntarily obtained from non-Medicaid contracted providers.

ARGUMENT

1st Issue: Error of Law and Misconduct of the ALJ: The ALJ erred by <u>again</u> ruling that the State could not proceed on a motion to dismiss for lack of subject matter jurisdiction because it was <u>untimely</u>.

In her ruling, the ALJ is <u>again</u> incorrectly interpreting the law and denying the Department's Motion to Dismiss for being filed after the deadline established in the pre-hearing conference order. This ruling is in complete contravention of the law and the Review Decision, which has been directly read to her. In fact, the law is absolutely clear and unambiguous on this point.
Specifically the ALJ has again ruled:

> I have reviewed the Inland Foundry v. Spokane Air Pollution Control Authority [sic] and do not see any ruling pertaining to challenges to subject matter jurisdiction.[1]

The ALJ's ruling is not only an incorrect interpretation of the law regarding subject matter jurisdiction, but also just a plain failure to conduct a clear and competent reading of the case. In this regard, the court in Inland specifically ruled:

> *HN1* - We review jurisdiction de novo. *Crosby v. Spokane County,* 137 Wn.2d 296, 301, 971 P.2d 32 (1999).
>
> *HN2* - A tribunal's lack of subject matter jurisdiction may be raised by a party or the court at any time in a legal proceeding. RAP 2.5(a)(1); *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn. 2d 769, 788, 947 P.2d (1997).
>
> *HN3* – Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal. *Crosby*, 137 Wn.2d at 301.

See *Inland Foundry Co., Inc. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App.121, 989 P.2d 102 (1999): See Washington Rules of Appellate Procedure (RAP) 2.5(a)(1).

Also, as previously noted by the Department, the Washington Supreme Court has provided some basic legal principles regarding subject matter jurisdiction which are relevant in this case. In *Dougherty v. Department of Labor & Indust.,* 150 Wn.2d 310, 76 P.3rd 1183 (2003), the Washington Supreme Court articulated the following basic rules regarding subject matter jurisdiction:

> [1] *HN1* – Whether a court has subject matter jurisdiction is a question of law reviewed de novo. *Crosby v. Spokane County,* 137 Wn.2d 296, 301, 971 P.2d 32 (1999). …
>
> [2] *HN2* - … Jurisdiction "is the power and authority of the court to act." 77 Am.Jur. 2D, *Venue* § 1, at 608 (1997). Jurisdiction does not depend on procedural rules. 14 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: TRIAL PRACTICE CIVIL § 41, at 118 (5th ed. 1996).
>
> …
>
> *HN18* – Jurisdiction exists because of a constitutional or statutory provision. A party cannot confer jurisdiction; all that a party does is invoke it. *See, e.g., Fay,* 115 Wn.2d at 197 ("statutory requirements must be met before jurisdiction is properly invoked." (quoting *Spokane County v. Utilities & Transp. Comm'n,* 47 Wn. App. 827, 830, 737 P.2d 1022 (1987)); *Hernandez v. Dept of Labor & Indus.,* 107 Wn. App. 190, 195, 26 P.3d 977 (2001).

See *Dougherty* at pages 314-319.

This ruling by the ALJ is in complete contravention to the Review Decision in which the Review Judge acknowledged that "[t]he Department is correct in its assertion that they may raise the issue of subject matter jurisdiction at any time in the proceedings. …the issue may be raised simply by making the motion and asking the ALJ to rule upon it." (See Review Decision CCL#9.) In this regard, the ruling of the ALJ is again ignoring, failing to follow, or demonstrating an inability to understand the law regarding subject matter jurisdiction. The ruling by the ALJ is either

[1] See Order Denying Motion to Dismiss at CCL#3.

misconduct or just a plain and egregious error of law which the Review Judge is required to correct.

2nd Issue: Misconduct of the ALJ, failure to make findings of fact, and errors of law: The ALJ failed to comply with the Review Decision, make necessary findings of fact, substantively address the arguments of the Department, and has incorrectly denied the Department's Motion to Dismiss regarding lack of subject matter jurisdiction.

At the hearing on June 15, 2006, the Department actually quoted the language from CCL #11 of the Review Decision and then presented testimony and evidence which addressed the issues and established the facts the Review Judge indicated needed to be established prior to a proper ruling on the motion to dismiss for lack of subject matter jurisdiction. Despite the fact that the Department quoted the language from CCL #11 and presented evidence, testimony, and the authority which clearly established there had not been a valid request for services, or any denial which would give rise to a hearing right, the ALJ failed to make the necessary findings from the evidence or to meaningfully engage in any analysis of the arguments presented by the Department which clearly establish there is no subject matter jurisdiction in this case.

As note above, in her ruling the ALJ fails to ever even address the substance of CCL #11 of the Review Decision and only makes a vague reference to it by stating "[t]he department cited to some language on page 17 in Conclusion of Law 11 of the order which they believe opened the door to the department renewing their motion to dismiss." (See Order on Motion to Dismiss FF #18).

As also noted the ALJ also failed to substantively address the arguments or the authority presented by the Department in support of its motion. Instead she only identifies that the Department presented testimony that the Appellant obtained dental services without prior authorization from non-Medicaid providers, and then mentions WAC provisions cited by the Department in support of its motion to dismiss without even discussing the substance of those provisions. In this regard, the ALJ ruled as follows:

> Conclusions of Law
>
> 4. … The question of whether or not the rules support denial of [APPELLANT'S NAME]'s request for coverage of treatment he received from [DR 3], [DR 4], and [DR 2] goes to the merits of this hearing and in no way implies that there is no subject matter jurisdiction to hear [APPELLANT'S NAME]'s request. The department's renewed motion to dismiss this hearing is again denied. Thus the department should be prepared to go forward with the merits of this case.
>
> Order
>
> 2. … Alternatively, it is denied because the arguments raised in the motion go to the merits of that case and do not support a conclusion that this tribunal is lacking subject matter jurisdiction.

This ruling by the ALJ is completely illogical and demonstrates either a complete lack of understanding of the law regarding subject matter jurisdiction or just a plain disregard of it and also a disregard of the ruling of the Review Judge in CCL #11. The evidence and arguments presented by the Department were directly on point to the issues of whether there had been a valid request for services based on program rules, and whether there had been a denial which

would have given rise to a hearing right and subject matter jurisdiction for the ALJ. In other words, the evidence presented by the Department has addressed the necessary "merits" of the case and also established there has not been a valid request for services based on program rules. Furthermore, there has not been a formal denial giving rise to a hearing right. Subject matter jurisdiction simply does not exist in this case.

The ALJ seems to be saying in her ruling that since the evidence, authority and arguments presented by the Department address substantive issues which go to the "merits" of the case, it in no implies or supports a conclusion there is no subject matter jurisdiction. This ruling is completely illogical, ignores the substance of the Review Decision, and demonstrates either a lack of understanding of the law regarding subject matter jurisdiction, or just a complete disregard of it in an attempt to create subject matter jurisdiction where it clearly does not exist.

In this regard, the Medicaid program rules indicate it only reimburses enrolled providers for services listed as covered in the Medicaid WAC when the services are properly authorized and the provider bills according to department rules and billing instructions. Program rules provide the limits on scope of medical program services in WAC 388-501-0300, which states in pertinent part as follows:

> WAC 388-501-0300, Limits on scope of medical program services.
>
> (1) The medical assistance administration (MAA) pays only for equipment, supplies, and services that are listed as covered in MAA Washington Administrative Code (WAC), when the items or services are:
>
> (a) Within the scope of an eligible client's medical care program;
> (b) Medically necessary as defined in WAC 388-500-0005;
> (c) Billed according to the requirements in WAC 388-502-0100, 388-502-0110, and 388-502-0150; and
> (d) Within accepted medical, dental, or psychiatric practice standards and are:
> (i) Consistent with a diagnosis; and
> (ii) Reasonable in amount and duration of care, treatment, or service.

See WAC 388-501-0300(1). (Emphasis added).

Review of WAC 388-502-0100 further illustrates there has not been a valid request for services in this case as this WAC provides as follows:

> WAC 388-502-0100, General conditions of payment.
>
> (1) The department reimburses for medical services furnished to an eligible client when all of the following apply:
>
> (a) The service is within the scope of care of the client's medical assistance program;
> (b) The service is medically or dentally necessary;
> (c) The service is properly authorized;
> (d) The provider bills within the time frame set in WAC 388-502-0150;
> (e) The provider bills according to department rules and billing instructions; and
> (f) The provider follows third-party payment procedures.

Provider is a defined term in WAC 388-500-0005 as follows:

> "Provider" or "provider of service" means an institution, agency, or person:
>
> > Who has a signed agreement with the department to furnish medical care, goods, and/or services to clients; and is eligible to receive payment from the department.

The Medicaid program rules further state that only enrolled providers are eligible to receive payment for services from the Medicaid program in WAC 388-502-0010, which provides as follows:

> The department reimburses enrolled providers for covered medical services, equipment and supplies they provide to eligible clients.
>
> (1) To be eligible for enrollment, a provider must:
>
> (a) Be licensed, certified, accredited, or registered according to Washington state laws and rules; and
> (b) Meet the conditions in this chapter and chapters regulating the specific type of provider, program, and/or service.
>
> (2) To enroll, an eligible provider must sign a core provider agreement or a contract with the department and receive a unique provider number. ….

The Medicaid Dental program rules further require a dental provider who is requesting prior authorization to submit objective clinical information to establish medical necessity and the request must be submitted on an American Dental Association claim form and contain some required information as follows:

> WAC 388-535-1280, Obtaining prior authorization for dental-related services-Adults
>
> When the medical assistance administration (MAA) authorizes dental-related services for adults, that authorization indicates only that the specific service is medically necessary; it is not a guarantee of payment. The client must be eligible for covered services at the time those services are provided.
>
> (1) MAA requires a dental provider who is requesting prior authorization to submit sufficient objective clinical information to establish medical necessity. The request must be submitted in writing on an American Dental Association (ADA) claim form, which may be obtained by writing to the American Dental Association, 211 East Chicago Avenue, Chicago, Illinois 60611. The request must include at least all of the following:
>
> (a) The client's patient identification code (PIC);
> (b) The client's name and address;
> (c) The provider's name and address;
> (d) The provider's telephone and fax number (including area code);
> (e) The provider's MAA-assigned seven-digit provider number;
> (f) The physiological description of the disease, injury, impairment, or other ailment;

(g) The most recent and relevant radiographs that are identified with client name, provider name, and date the radiograph was taken;
(h) The treatment plan;
(i) Periodontal when radiographs do not sufficiently support the medical necessity for extractions;
(j) Study model, if requested; and
(k) Photographs, if requested.

The Medicaid Dental program rules also indicate that dental related service providers must bill using CPT codes and/or CPT codes as appropriate as follows:

WAC 388-535-1070, Dental-related service provider information.

(3) For the dental specialty of oral and maxillofacial surgery:

(a) MAA requires a dentist to:
(i) Be currently entitled to such specialty designation (to perform oral and maxillofacial surgery) under WAC 246-817-420; and
(ii) Meet the following requirements in order to be reimbursed for oral and maxillofacial surgery:
(A) The dentist must have participated at least three years in a maxillofacial residency program; and
(B) The dentist must be board certified or designated as "board eligible" by the American Board of Oral and Maxillofacial Surgery.
(b) A dental provider who meets the requirements in (3)(a) of this section must bill claims using appropriate current dental terminology (CDT) codes or current procedural terminology (CPT) codes for services that are identified as covered in WAC and MAA's published billing instructions or numbered memoranda.

(4) See WAC 388-502-0020 for provider documentation and record retention requirements. MAA requires additional dental documentation under specific sections in this chapter and as required by chapter 246-817 WAC.

(5) See WAC 388-502-0100 and 388-502-0150 for provider billing and payment requirements. Enrolled dental providers who do not meet the conditions in (3)(a) of this section must bill all claims using only the CDT codes for services that are identified in WAC and MAA's published billing instructions or numbered memoranda. MAA does not reimburse for billed CPT codes when the dental provider does not meet the requirements in subsection (3)(a) of this section.

The Washington Supreme Court has also identified rules regarding subject matter jurisdiction in terms of courts of special, limited, or inferior jurisdiction as follows:

HN3 – "A court of special, limited, or inferior jurisdiction must by its record show all essential or vital jurisdictional facts of its authority to act in the particular case, and in what respect it has jurisdiction. This rule also applies to jurisdiction over special statutory proceedings exercised in derogation of, or not according to, the course of the common law. So the necessary jurisdictional facts must affirmatively appear by averment and proof to bring the case within the jurisdiction of such court."

See *Smith v. Dep't of Labor & Indus.,* 1 Wn.2d 305, 1939 Wash. LEXIS 365 (Wash., November 14, 1939).

The ALJ's ruling denying the Department's motion to dismiss for lack of subject matter jurisdiction and her ruling that it must be prepared to go forward on the "merits" of the case are incorrect and invalid, as the ALJ fails to establish necessary jurisdictional authority as the evidence presented has clearly established:

1. All of the bills in question are from non-Medicaid contracted providers;
2. That a request by a Medicaid enrollee to be paid money for dental services he knowingly and voluntarily received from non-Medicaid providers is not a valid request for services;
3. There has not been any formal denial giving rise to a hearing right;
4. There would be no subject matter jurisdiction for the ALJ in this case.

In fact, the evidence and authority clearly established that the only authority the ALJ has in this matter is to dismiss the hearing.

CONCLUSION

This case boils down to a request from a Medicaid enrollee that the State Medicaid program pay him money for dental services he knowingly and voluntarily received from non-Medicaid contracted providers. This is not a valid request for services based on Medicaid program rules and does not create a hearing right. There is no subject matter jurisdiction for the ALJ who has no authority in this case other than to dismiss the matter as to the State Medicaid program for lack of subject matter jurisdiction.

In fact, the ALJ's order that the State Medicaid program be prepared to "proceed on the merits" of the Appellant's case regarding the dental services is not possible in any practical sense. As noted above, the Department requires a provider to submit requests for authorization and/or payment for dental services with diagnosis and procedure codes, including sufficient medical evidence to identify and evaluate a request for coverage and medical necessity. In her order the ALJ is again mandating, in contravention of her authority, that the Medicaid program evaluate the dental services obtained by the Appellant for coverage and medical necessity without a proper request for services from an enrolled provider, which is in contravention to Department rules and billing instructions.

REQUEST FOR RELIEF

For the reasons stated herein, the Department requests the Review Judge overrule the ALJ's order denying the Department's motion to dismiss for lack of subject matter jurisdiction and grant its motion.

6. On July 31, 2006, the Appellant filed a response and argued as follows:

I do not agree for dept Steve Sanzody to dismiss nor the judge to take this motion to dismiss.

II. FINDINGS OF FACT

The findings of fact of the Order Denying Motion to Dismiss are adopted as this decision's

findings of fact.

III. CONCLUSIONS OF LAW

Jurisdiction

1. ALJs and Review Judges must first apply the Department's rules adopted in the Washington Administrative Code (WAC). If no Department rule applies, the ALJ or Review Judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington State constitutions, statutes, regulations, and court decisions.[2]

2. A Review Judge may change an order in a case such as this only if a party shows one of the following: (1) irregularity affecting the fairness of the hearing; (2) findings of fact that are unsupported by substantial evidence in the record; (3) a need for additional consistent findings of fact based upon substantial evidence in the record; (4) an error of law; or (5) a need for clarification in order to implement the decision.[3]

3. An Administrative Law Judge is authorized to enter an order to address limited issues before closing the record and mailing a hearing decision resolving all issues.[4] The procedural rules for Department administrative hearings provide that review at the Board of Appeals is available when a party disagrees with a hearing decision.[5] A Board of Appeals Review Judge reviews decisions made by an Administrative Law Judge.[6] Neither the term "hearing decision" nor "decision" is defined in chapter 388-02 WAC, although WAC 388-02-0010 provides that "Initial order" is a hearing decision made by an ALJ that may be reviewed by a Review Judge pursuant to WAC 388-02-0215(4). Absent clear regulatory guidance, the undersigned turns to the enabling statute for guidance.[7] The question is, therefore, whether the Administrative Law Judge's Order on Motion to Dismiss entered on June 30, 2006, falls within the

---

[2] WAC 388-02-0220.
[3] WAC 388-02-0600(2).
[4] WAC 10-08-210(5) and 388-02-0500(2).
[5] WAC 388-02 sections 0530(2), 0560(1), and 0570.
[6] WAC 388-02-0010, at "Review Judge."
[7] WAC 388-02-0220(2).

Administrative Procedure Act definition of initial order and, thus, is subject to administrative review under RCW 34.05.464 and Department's regulations.

4. The Administrative Procedure Act defines "order" as follows:

> "Order," without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties privileges, immunities, or other legal interests of a specific person or persons.[8]

In this case the Order on Motion to Dismiss meets the definition of "order" because it is, in fact, a written statement of particular applicability that determines a legal right, i.e. jurisdiction for an administrative hearing (adjudicative proceeding) to hear and decide the merits of a Department decision which aggrieved the Appellant.

5. Under the Administrative Procedure Act, an initial order must include "a statement of findings and conclusions, and the reasons and basis therefore, on all material issues of fact, law, or discretion presented on the record."[9] Under the procedural regulations published by the Office of Administrative Hearings, an initial order is required to contain appropriate numbered findings of fact and conclusions of law, and to contain an order disposing of all contested issues.[10] Under current Department procedural rules for hearings in Chapter 388-02 WAC, the ALJ's "decision" must, *inter alia*, "find the facts used to resolve the dispute based on the hearing record;" "state the law that applies to the dispute;" "apply the law to the facts of the case in the conclusions of law;" and "discuss the reasons for the decision based on the facts and the law."[11] The Administrative Law Judge's order in this case does meet the requirements as to form under any of these definitions of initial order or decision. The form or caption the Administrative Law Judge applies to the document is not controlling in determining the nature of the order. The order does meet the most important criteria for an initial order in that it disposes of a contested issue before the Administrative Law Judge: jurisdiction to proceed to a hearing on the merits based on the

---

[8] RCW 34.05.010(11)(a).
[9] RCW 34.05.461(3).
[10] WAC 10-08-210.
[11] WAC 388-02-0520.

appeal filed by the Appellant. Thus, since the Order on Motion to Dismiss meets all of the elements of the Administrative Procedure Act definition of an "order," it is concluded that the decision is an order as defined by RCW 34.05.010(11)(a).[12]

6. While the Order on Motion to Dismiss is not *the* order resolving all of the disputed issues in the Appellant's appeal, it is clearly *an* initial order that makes a final determination as to the issue of jurisdiction.[13] The order is a *final* determination as to the single issue of subject matter jurisdiction, since the issue of subject matter jurisdiction, once decided, may deny the moving party the benefit of avoiding the time and resource loss involved in a full hearing on the merits of the Appellant's appeal. The order issued by the ALJ concluded that the Department had filed a Motion for Dismissal in an untimely fashion. Department and OAH regulations specifically allow an ALJ to grant a preliminary motion based on summary judgment without limiting the right of the Board of Appeals to review such decisions if entered in a program otherwise subject to review under WAC 388-02-0215(4).[14] Because the Order on Motion to Dismiss is an initial order, also known as a "hearing decision or order", it is subject to review by the Board of Appeals.[15]

7. It is noted that not every "order" entered by an Administrative Law Judge prior to the decision on the merits in a case is subject to review at the Board of Appeals under the foregoing analysis. The Board of Appeals review of Administrative Law Judges' orders entered prior to a decision on the merits is limited to orders that make a final disposition as to a legal right.[16] Chapter 388-02 WAC itself makes a clear distinction between procedural orders that cannot be appealed and hearing decisions that can be appealed. Orders concerning strictly procedural matters, such as those procedural matters that are specifically permitted to be addressed in prehearing conference orders, are not subject to review at the Board of Appeals

---

[12] The undersigned notes that the Department's Petition states that "WAC 388-02-0015 provides that 'hearing decision or order' means 'Initial Order' as that term is used in the Administrative Procedure Act, chapter 34.05 RCW." This rule was changed in November 2002 and no longer contains such a comparison/definition.

[13] RCW 34.05.010(11)(a).

[14] WAC 388-02-0215(2)(c), (m), and 10-08-135.

[15] RCW 34.05.464; WAC 10-08-210; WAC 388-02 section 0215(4) and 0560(1), (2).

on an interlocutory basis, but must be challenged by filing an objection with the Administrative Law Judge.[17] However, chapter 388-02 WAC contains no similar restriction on Board of Appeals review of orders that go beyond the limited scope of procedural orders that may be entered after a prehearing conference.

8. The Department timely filed a petition for review of the Order on Motion to Dismiss and it is otherwise proper.[18] Jurisdiction exists to review the Order on Motion to Dismiss and to enter the final agency order on the limited issue addressed in this order.[19]

The Department's Motion to Dismiss

9. On June 9, 2006, a Review Judge (RJ) issued a Review Decision and Order Denying Department's Appeal of the ALJ's Interlocutory Order that addressed the ALJ's earlier-issued Order Denying Motion to Dismiss. In this Review Decision, the RJ concluded that the ALJ erred in deciding that the Department's motion was untimely filed, as the law allows a party to raise the issue of subject matter at any time. The issue of whether the Department's motion to dismiss was timely filed is issue is now res judicata—that is, it has already been decided by the RJ at the administrative appeals level and cannot be decided again by the ALJ.

10. The ALJ apparently just copy-pasted her conclusions of law from her Order Denying Motion to Dismiss into her Order on Motion to Dismiss, making no adjustments to reflect that the Review Decision had already ruled that her conclusions were wrong as a matter of law. The undersigned has no explanation for this. It could have been a simple oversight by the ALJ; it could have been a refusal by the ALJ to acknowledge the authority of the Board of Appeals to correct errors made by ALJs and to issue final agency decisions; it could have been a misunderstanding by the ALJ as to her role in the administrative hearing process; or it could have been the result of some unknown thinking process by the ALJ. In any event, it is grossly

---

[16] RCW 34.05.010(11)(a) and 34.05.464.
[17] WAC 388-02 sections 0200 and 0205(2).
[18] WAC 388-02-0580.
[19] WAC 388-02-0560 to -0600.

erroneous. The Department's Motion to Dismiss can be made at any time. It was not untimely filed.

11. In the second half of his Review Decision and Order Denying Department's Appeal of the ALJ's Interlocutory Order, the RJ concluded that the ALJ was correct in her alternate conclusion that the Department's motion should be denied because the arguments the Department made went to the merits of the case, not to the issue of whether the ALJ has subject matter jurisdiction. This conclusion remains true, correct as a matter of law, and applicable to the Department's renewed motion to dismiss.

12. "Subject matter jurisdiction" means the authority of the adjudicator to decide a specific issue. In this case, the Department has alleged that the ALJ has no authority to hear and decide the specific issue of whether the Department should pay the Appellant's dental bills. The Department is wrong; the ALJ has the authority to decide questions concerning an applicant's eligibility for medical services. RCW 74.08.080(1)(a) provides that , "A public assistance applicant or recipient who is aggrieved by a decision of the department or an authorized agency of the department has the right to an adjudicative proceeding…." Medicaid services are a form of needs-based public assistance. This statute grants the Appellant a hearing right and the ALJ jurisdiction authority to adjudicate the "subject" of medical eligibility.

13. The Department has apparently misunderstood what the RJ said in the Review Decision and Order Denying Department's Appeal of the ALJ's Interlocutory Order. The RJ said, in essence, that a motion to dismiss is not the proper way to proceed in this case because there were genuine issues of fact in dispute. The Department appears to have taken this as a directive to put more factual information into evidence in support of its motion. The Department is wrong in its interpretation of the Review Decision. A merits hearing is required. The Department may or may not have already put on its case in chief and all of its evidence and argument may already be of record It is unclear from the Order on Motion to Dismiss what else the ALJ is expecting to happen at the next scheduled hearing, but be that as it may, the ALJ is

within her authority to reconvene the hearing and/or ask for additional evidence and argument.

14. The procedures and time limits for seeking reconsideration of this decision with the Board of Appeals or judicial review with the superior court are in the attached statement.

IV. DECISION AND ORDER

The Order on Motion to Dismiss is affirmed.

Mailed on August 4, 2006.

CHRISTINE STALNAKER
Review Judge

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: [APPELLANT'S NAME], Appellant
Greg Sandoz, Department Representative, MS: 45504
Tony Mauhar, Program Administrator, MS: 45504
James F. Novello, MCO Representative
Jane Habegger, ALJ, [CITY] OAH