

**BEFORE THE COMMISSIONER OF INSURANCE  
OF THE STATE OF KANSAS**

In the Matter of	)	
<b>Preferred Health Systems</b>	)	Docket No. 3908-SO
<b>NAIC #60110</b>	)	

**JOURNAL ENTRY AND FINAL ORDER**

This matter comes on for hearing on the 25th day of November, 2008, at 1:30 A.M., before Presiding Officer Robert M. Tomlinson, Assistant Commissioner of Insurance, acting as agency head on behalf of Insurance Commissioner Sandy Praeger, pursuant to K.S.A. 77-547, for all matters pertinent to the above-captioned case.

Preferred Health Systems (“Respondent”) appears by and through counsel, Michelle M. Carter-Gouge. The Kansas Insurance Department (“KID”) appears, by and through counsel, Susan Ellmaker.

The Hearing Officer having previously heard evidence, statements of counsel, and being fully informed in the premises issues the following findings of fact, conclusions of law, and orders:

1. The ruling of Judge Brown in *MMA Insurance Company v. Blue Cross and Blue Shield of Kansas, Inc.*, 552 F. Supp. 2d 1250 (D. Kan. 2004) (“MMA”), that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) requires the replacement carrier be primarily liable for immediately upon coverage for coverage of the claims of a hospitalized insured is persuasive in this case.
2. The provision of K.S.A. 40-2254 that the original carrier must extend coverage for 31 days for an inpatient insured does not control permit the replacement carrier to avoid enrolling or having the primary liability for an inpatient insured.

3. PHS has primary liability for paying the claims of the insured at issue in this case.
4. K.S.A. 40-2404(9)(f) requires a showing of bad faith on the part of the Respondent.  
  
In this case, PHS made the initial inquiry to the KID regarding the matters at issue. While such an inquiry does not automatically prevent a finding of bad faith on the part of the insurer, it should be considered. As a matter of policy, the KID should work with insurers when they raise a question. There has been no showing of bad faith and for that reason PHS has not violated K.S.A. 40-2404(9)(f).
5. Having found that there was no violation of K.S.A. 40-2404, there can be no penalty assessed under K.S.A. 40-2407 (a)(1) and there can be no order issued under K.S.A. 40-2407 (a)(3) for payment of the insured's claims.
6. While no order for payment of the insured's claims should issue at this time, it is nonetheless noted that failure of PHS to pay the claims after the entry of the finding of primary responsibility could lead to a further administrative procedure and a finding of violation of K.S.A. 40-2404 (9)(f).
7. On the issue of whether a Bulletin should have been published, the Hearing Officer declines to issue any order.
8. This Order shall be posted on the Kansas Insurance Department website in its totality.

#### **NOTICE OF RIGHTS**

Pursuant to K.S.A. 77-601 *et seq.*, Preferred Health Systems is entitled to judicial review of this Final Order. The petition for judicial review must be filed within thirty (30) days of service of this Final Order (plus three [3] days for service by mail pursuant to K.S.A. 77-531). In the event Preferred Health Systems files a petition for judicial review pursuant to K.S.A. 77-

613(e), the Agency Officer to be served on behalf of the Kansas Insurance Department is:

John W. Campbell, General Counsel  
Kansas Insurance Department  
420 SW 9<sup>th</sup> Street  
Topeka, KS 66612

**IT IS SO ORDERED.**



      /s/ Robert M. Tomlinson \_\_\_\_\_  
Robert M. Tomlinson  
Assistant Commissioner of  
Insurance/Presiding Officer

Dated this \_\_\_27th\_\_\_ day of February, 2009.

Prepared by:

      /s/ Susan Ellmaker \_\_\_\_\_  
Susan Ellmaker  
Staff Attorney  
Kansas Insurance Department

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she served the above and foregoing Journal Entry and Order on this 27th day of February, 2009, via facsimile, to the following:

Michelle M. Carter-Gouge  
General Counsel  
Preferred Health Systems  
8535 E. 21<sup>st</sup> Street N.  
Wichita, Kansas 67206  
Facsimile (785) 291-3673  
General Counsel for Respondent

/s/ Susan Ellmaker \_\_\_\_\_  
Susan Ellmaker  
Staff Attorney