

**CAUSE NO. 2007-538,383**

CITY OF LUBBOCK, TEXAS	§	IN THE 72nd DISTRICT COURT
	§	
Movant	§	
	§	
v.	§	OF
	§	
ICON BENEFIT ADMINISTRATORS II, L.P.; and AMERICAN ADMINISTRATIVE GROUP, INC.	§	
	§	
Respondents.	§	LUBBOCK COUNTY, TEXAS

**MOTION TO APPOINT INDEPENDENT AUDITOR**

TO THE HONORABLE JUDGE OF THIS COURT:

Respondents’ ICON Benefit Administrators II. L.P., and American Administrative Group, Inc. (collectively referred to as “AAG” ) hereby move this Court for an order appointing an independent auditor pursuant to TEXAS RULE OF CIVIL PROCEDURE 172 and in support of this motion show as follows:

**Introduction**

AAG was awarded contracts with the City of Lubbock (“Lubbock”) for the years 2004-2006 (“collectively referred to as “Contract”) to act as Lubbock’s third party administrator for Lubbock’s health care plans. AAG diligently performed under the Contract.

Lubbock city staff had a, yet to be disclosed, hidden agenda to appoint another healthcare administrator without strict adherence to public bid laws during the renewal or re-bid phase for the third party administration contract. Lubbock notified AAG that an audit of AAG would be conducted. Lubbock chose Benefit Plan Audit Services (“BPA”) as its auditor. BPA’s advertising clearly shows its biased for hire perspective. BPA expressly states:



**Targeted Claims Evaluations — This is where we can "show you the money" your administrator is throwing away. We select a targeted sample of paid claims, focusing on high dollar claims and claims for services which are most likely to include overpayments. Since our sample is skewed to save you money, the results will not give you a statistical rate to measure your administrator's overall performance. But, you will get the "biggest bang for the buck" if you want to find out where your "lost dollars are buried."**<sup>1</sup>



**We evaluate your medical, dental, vision, pharmacy, and/or flexible spending account claims by tailoring our standard random claims evaluation to fit your concerns.**<sup>2</sup>

(emphasis added). BPA asserts that it will “skew” samples in order to give its’ clients “the biggest bang for the buck”. As promised, BPA “skewed” its audit of AAG by:

1. engaging in biased reporting,
2. using inaccurate statistical extrapolation calculations,
3. using inaccurate and misleading percentage calculations, and
4. failing to identify “industry standards” or extrapolation methodology.<sup>3</sup>

For these reasons, and those enumerated below, this Court should appoint an independent auditor to state the accounts between the parties so that justice and right may be done.

---

<sup>1</sup> BPA website 3/21/07

<sup>2</sup> BPA website 3/21/07

<sup>3</sup> Defenbaugh & Associates, Inc. Report, attached as Exhibit A1, page 1; curriculum vitas attached as Exhibit A2 & A3.

## **Argument and Authorities**

Texas Rule of Civil Procedure 172 provides that “When an investigation of account or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible. The auditor shall verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come within his knowledge.” In this case an independent auditor is essential in order to obtain an accurate and “un-skewed” picture of AAG’s claims’ handling.

### **A. Biased Reporting**

BPA, and Robert Freck, have made it clear that they are Lubbock’s paid experts acting on Lubbock’s marching orders. Advertising aside, Frcek provided an affidavit to Lubbock on March 2<sup>nd</sup> of opinions and conclusions, but no substantiating evidence, before his company’s audit of AAG was even completed.<sup>4</sup> Frcek’s affidavit, for example, in ¶9 and ¶10 uses identical language to BPA’s audit report issued March 23<sup>rd</sup> at ¶2 page 17, opining about re-pricing information which is outside of the scope of Lubbock’s contract and, thus, BPA’s audit.<sup>5</sup> The affidavit was provided 22 days before the audit report, at the time that BPA was still auditing on site at AAG’s premises. A truly independent auditor has no business giving an affidavit to his client before the audit has been completed and its finding reported upon. An affidavit which Lubbock used in telling the Court that it should order AAG to submit to an audit which was already happening.

---

4 Lubbock’s Application for Order Pursuant to Chapter 171, Exhibit H dated March 2, 2007.

5 “Independent Consultant’s Report on the City of Lubbock Claims Operational and Compliance Review of



The Government Accountability Office notes that it is an auditor's responsibility to maintain "the highest degree of integrity, objectivity, and independence"<sup>6</sup> An auditor's independence is, in fact, so critical that:

"Auditors and audit organizations have a responsibility to maintain independence so that opinions, conclusions, judgments, and recommendations will be impartial and will be viewed as impartial by knowledgeable third parties. Auditors should avoid situations which could lead reasonable third parties with knowledge of the relevant facts and circumstances to conclude that the auditors are not able to maintain independence and, thus, are not capable of exercising objective and impartial judgment on all issues associated with conducting and reporting on the work."<sup>7</sup>

BPA violates this most basic of auditing standards. Further, Frcek readily revised its audit report at Lubbock's request,

**From:** Robert J. Frcek [mailto:rfrcek@beneplanaudit.com]  
**Sent:** Thursday, March 29, 2007 11:04 PM  
**To:** Anita Burgess; Marcos Rolon  
**Cc:** Ruth Pence @ BPA; Sue Trammel, BPA; Bill Paulk; LINDE WINTON; Kim Lozano; Leisa Hutcheson; Lee Ann Dumbauld; Mitch Satterwhite  
**Subject:** REVISED Preliminary Report for the City of Lubbock (COL) Claims Operational and Compliance Review of American Administrative Group (AAG)  
**Importance:** High

Marcos Rolon and Anita Burgess,

Attached is a revised copy of the preliminary draft report we prepared on the Claims Operational and Compliance Review we recently performed on behalf of the COL at the AAG office in Lubbock, TX.

I would appreciate it if you would reply to this e-mail to acknowledge that you have received it.

The only change to this version of the report is the language added from the bottom of page 21 through the top of page 24, which we added based on the COL's request that we expand our discussion to ...

BPA's obvious pandering to Lubbock's desires obviates any appearance of independence.

Additionally, bias is shown by this example from the attached report by former Special Agent in Charge, Federal Bureau of Investigation ("FBI"), Northern Regional Office, retired April 2002, Danny Defenbaugh:

"BPA auditors skewed the favorable percentage of 97.6% payment accuracy, which was in AAG's favor, down to 94.20% by calculating seven (7) claims amount "strata" accuracy percentages. By taking the averages of each strata and weighing the average, BPA distorted the calculated average down to a percentage favorable to the COL,

---

American Administrative Group" dated March 23, 2007, attached as Exhibit C4.

6 Government Auditing Standards, Chapter 1, 1.19 - Auditor's Responsibility, cited in Exhibit A.

7 Government Auditing Standards, Chapter 3, 3.03 and 3.04 - Independence.

thereby being able to declare the performance of AAG as Unsatisfactory.”<sup>8</sup>

Such manipulation shows how easily statistical data can be twisted to say what you want it to say.

In addition, BPA’s strata and sample sizes are completely arbitrary. University of Texas at Arlington Professor Dr. Dyer states that,

“The monetary intervals that were used to determine the strata appear to have been arbitrarily chosen. What is the basis for the chosen intervals? This alone leads to arbitrary sample sizes, and statistical inferences made from the resulting data are compromised. Strata #1 is particularly bothersome. To make statistical inferences about information from 40 reviewed claims is unsound and without statistical merit.”<sup>9</sup>

Northshore International Insurance Services, Inc. has the same observation,

“For example, Strata #1 has 116,678 records, but only 40 claims were selected for audit, while Strata #5 has only 675 records, but 29 were selected for audit. We find that there is an inconsistency in the sample selections across the stratum that we believe makes the audit findings for each strata suspect.”<sup>10</sup>

Auditing standards recognize that,

“One inaccuracy in a report can cast doubt on the reliability of the entire report. Also, use of inaccurate evidence can damage the credibility of the issuing audit organization and reduce the effectiveness of its reports.”<sup>11</sup>

BPA’s audit report is replete with inaccuracies and bias. The report should be totally disregarded and an independent auditor appointed.

## **B. Inaccurate calculations and extrapolations**

Of the numerous errors in BPA’s audit report, which are more fully discussed in the Defenbaugh Report, the Northshore Int’l Ins. Services Report and the Dyer Report a few are summarized below:

1. Amendment No. 4 to Lubbock’s Plan Document.

BPA’s audit report states that Amendment No. 4<sup>12</sup> which was effective July 1, 2005,

---

<sup>8</sup> Defenbaugh & Associates, Inc. Report, attached as Exhibit A1, page 4.

<sup>9</sup> Dyer Report, attached as Exhibit B1; curriculum vitae attached as Exhibit B2.

<sup>10</sup> Northshore Int’l Ins. Services, Inc. Report, attached as Exhibit C1, page 2; curriculum vitae attached as

even though it was executed August 17, 2005 and would not have been in effect until executed and employees notified, was a directive for “AAG to reduce the allowable for non-par providers to Medicare Allowable, based on Medicare’s Resource Based Relative Value Scale (RBRVS). However, BPA does not give this consideration during extrapolation calculations, rather, BPA considers the calculates percentages overall as though Amendment No. 4 was in effect during the entire audit period of January 1, 2004 through October 31, 2006. **This procedure skews the percentages of the statistical detail for extrapolation calculations of payments more than \$20,000.00, again to the detriment of AAG.**”<sup>13</sup> (emphasis added).

2. Inaccurate stating of “Underpaid” amounts.

“As annotated on Page 1 of the report, BPA identifies an “\$Underpaid” amount of \$7,764.71 yet on Page 5, 25, and 33, BPA stated the amount as \$7,674.71. **Although this appears to be a transposition error, it is an inaccuracy which, dependent upon the figure will effect any other calculation used.** This error appears to have bearing on the percentage of 94.20%. This being the case, this error also has bearing on the “extrapolated population file” numbers as well.”<sup>14</sup> (emphasis added).

3. Inaccurate percentages

“As annotated on Page 17, Analysis of Reported PPO Savings, **BPAS auditors stated % of Charges were 52.3% for two different amounts namely, \$51,688,705.16 and \$51,367,214.56. One of these percentages is incorrect;** but they cannot be the same percent. Variance is shown as 0.6%.”<sup>15</sup> (emphasis added).

and, even though the following example was to AAG’s detriment independent examiner Defenbaugh included it as yet another example of BPA’s inaccurate percentages,

“On Page 5 Paragraph (Par) 3, BPA audit report states “For the 195 payments reviewed, we (BPA) noted 18 valued errors (or 96.89% paid correctly), which is unsatisfactory.” **Consultants note the correct percentage is 90.80% not 96.89%. On the basis of these percentages being questionable and inaccurate, we would question the validity of the extrapolated amounts both underpaid and overpaid within the population file,** as identified on Page 5 Par 3 and 4.”<sup>16</sup> (emphasis added).

To test BPA’s use of its own invalid methodology, AAG used BPA’s methodology and

---

Exhibit C2.

<sup>11</sup> Government Auditing Standards, Chapter 8, 8.43 - Accurate.

<sup>12</sup> Lubbock’s Application to Court for Order, Exhibit G.

<sup>13</sup> Defenbaugh & Associates, Inc. Report, attached as Exhibit A1, page 4.

<sup>14</sup> Defenbaugh & Associates, Inc. Report, attached as Exhibit A1, page 3.

<sup>15</sup> Defenbaugh & Associates, Inc. Report, attached as Exhibit A1, page 3.

<sup>16</sup> Defenbaugh & Associates, Inc. Report, attached as Exhibit A1, page 4.

when the 195 payments were calculated only “12 errors (or 99.41% claims paid correctly), which is satisfactory”.<sup>17</sup>

4. Inaccurate extrapolations

“When selecting audit sample parameters, it is necessary to make certain assumptions about the results of the audit, Specifically, for Rate of Occurrence, an assumption must be made regarding the probability that an error will occur in a stated population. In this case, BPA selected its sample on the basis of a 2 percent Rate of Occurrence. Unfortunately, the results of the audit as calculated by BPA show a 5.8 percent Rate of Occurrence. Thus, **BPA’s initial assumption is flawed, making the results, and certainly any extrapolation of those results, invalid.**”<sup>18</sup> (emphasis added).

Dr. Dyer points out that there is a “serious statistical issue” with the small sample sizes used by BPA. To obtain a high degree of confidence and precision more data, i.e. larger samples than BPA used, are required. Otherwise the results are skewed.<sup>19</sup> Strata #2 treats an imprecise sample estimate of 13 correct over 1 incorrect, 13/14, as a precise estimate without regard for variation and the unsatisfactory sample size.

<sup>17</sup> Claims Supervisor’s Rebuttal to the City of Lubbock’s Independent Consultant Report Issued by Benefit Plan Audit Services dated April 4, 2007, attached as Exhibit C3, page 5, III, ¶1.

<sup>18</sup> Northshore Int’l Ins. Services, Inc. Report, attached as Exhibit C1, page 1.

<sup>19</sup> Dr. Dyer Report, attached as Exhibit B1, page 1, #3, “Aside from the problems with the data, **there is a more serious statistical issue with the calculations for Payment Accuracy %, Procedure Accuracy %, and Combined Payment Accuracy %.** To illustrate, a Payment Accuracy of 96.89% is reported which, according to standards (97%), is unsatisfactory. This figure is based on the sample results extended to the strata.

STRATA	# OF RECORDS	# OF CLAIMS REVIEWED	# OF CORRECT-VALUED CLAIMS	ESTIMATED # OF CORRECT-VALUED CLAIMS IN STRATA
Strata #1	116,678	40	39	(39/40)116,678 = 113,761
Strata #2	4,884	14	13	(13/14)4,884 = 4,535
Strata #3	2,780	20	19	(19/20)2,780 = 2,641
Strata #4	1,767	28	21	(21/28)1,767 = 1,325
Strata #5	675	29	25	(25/29)675 = 582
Strata #6	66	48	46	(46/48)66 = 63
Strata #7	17	16	14	(14/16)17 = 15
Totals	126,867	195	177	122,922

Consequently, the estimated Payment Accuracy = 122,922/126,867 = 0.9689 (96.89%). The problem with this calculation is that, for each strata, the true proportion of correct-valued claims within the strata is estimated by the observed proportion of correct-valued claims in the sample taken from the strata. For example, for Strata #2 the estimate of the true proportion of correct-valued claims is 13/14 = 92.9% ( there were 13 correct-valued claims in the sample of size 14) which leads to an estimate of (13/14)4,884 = 4,535 correct-valued claims in the strata. In the calculations, 13/14 is treated as being a precise estimate. In actuality, this figure is a rather imprecise point estimate of the true proportion. This is like estimating the probability that a coin will turn up heads as 0.8 after observing 8 heads in 10 tosses of the coin. A more useful approach would be to say the probability of heads is 0.8 plus or minus K, where the value of K takes into account the sampling variation associated with tossing the coin only 10 times. Taking this sampling variation into account leads to a confidence interval estimate (based on exact statistical formulae) of the true strata proportion. For Strata #2, 13 of 14 correct-valued claims leads to the 95% confidence interval of (66.13%, 99.82%) for the true Strata #2 percentage of correct-valued claims. This interval, while correct, is not particularly useful because of its unsatisfactory length. This is due to the small sample size used for Strata #2 but illustrates how imprecise the estimate that was used (92.9%) really is.”

The BPA audit report<sup>20</sup> is skewed, imprecise and distorted. For these reasons and others stated in the attached Defenbaugh, Northshore Int'l Ins. Services, and Dyer reports, it is necessary that the Court appoint an independent auditor.

**C. Unidentified arbitrary methodology**

While BPA refers to “industry standards” in its audit report, it seldom identifies such standards. This “trust me” attitude is inappropriate for a credible audit report. Standards which are cited are inaccurate. For example, BPA inaccurately applies Centers for Medicare and Medicaid Services standards when AAG is “governed by the American Medical Association (AMA) and comply with their standards”.<sup>21</sup>

Further, as stated by Northshore Int'l Ins. Service, other BPA methodology is not standard in this industry,

“...we also question BPA’s methodology for calculating the actual payment accuracy percentage. BPA’s calculations are based on a per-claim average, applying the assumption that (as averaged across stratum), if a total of \$81,049.51 in errors occurred in 195 claims, then an average error of \$15.00 occurred in each of the 126,867 claims in the total audit population, **producing an extrapolated error total of \$1,903,307.84 across the population. Such methodology to calculate payment accuracy is not standard in our industry...**”<sup>22</sup> (emphasis added).

An extrapolated error of this magnitude emphasizes that BPA’s audit is “skewed”. AAG has the right to an “un-skewed” audit that conforms to parties’ contract.

---

<sup>20</sup> See also, “Independent Consultant’s Report on the City of Lubbock Claims Operational and Compliance Review of American Administrative Group” revised March 29, 2007, attached as Exhibit C5.

<sup>21</sup> Claims Supervisor’s Rebuttal to the City of Lubbock’s Independent Consultant Report Issued by Benefit Plan Audit Services dated April 4, 2007, attached as Exhibit C3, page 13, ¶1.

<sup>22</sup> Northshore Int'l Ins. Services, Inc. letter, attached as Exhibit C1, page 1.

### **Conclusion**

Due to the "skewed" audit performed at Lubbock's request, AAG requests that this Court appoint an auditor which is independent of the parties to perform an independent audit and tax the costs to both parties. Such an auditor shall make a verified report as to the results of the audit, notwithstanding the contested legal issues between the parties.

The accounts between the parties are of such complexity, volume, and contain confidential information, that the appointment of an independent auditor is necessary in order to affect justice between the parties and to avoid delay in prosecution of the action.

### **Prayer**

WHEREFORE, Respondents' ICON Benefit Administrators II, L.P. and American Administration Group, Inc. hereby requests that the Court appoint an independent auditor to investigate and examine the accounts, specifically the "refund" fees paid by vendors to AAG by reviewing the accounts of the parties.

Respectfully submitted,

**BURT BARR & ASSOCIATES, LLP**

By: 

JOHN HOLMAN BARR

SBN: 01798700

L. DARLENE MITCHELL

S.B.N. 24009225

P.O. Box 223667

Dallas, Texas 75222-3667

Telephone: (214) 943-0012

Facsimile: (214) 943-0048

**Attorneys for ICON Benefit Administrators II, L.P.  
and American Administrative Group, Inc.**

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing instrument has been forwarded to counsel of record of this 5th day of April, 2007 pursuant to the Texas Rules of Civil Procedures.



\_\_\_\_\_  
L. Darlene Mitchell

**CAUSE NO. 2007-538,383**

CITY OF LUBBOCK, TEXAS	§	IN THE 72nd DISTRICT COURT
	§	
Movant	§	
	§	
v.	§	OF
	§	
ICON BENEFIT ADMINISTRATORS II, L.P.; and AMERICAN ADMINISTRATIVE GROUP, INC.	§	
	§	
Respondents.	§	LUBBOCK COUNTY, TEXAS

**FIAT**

ICON Benefit Administrators II, L.P. and American Administrative Group, Inc.'s  
**MOTION TO APPOINT INDEPENDENT AUDITOR** is set to be heard on the \_\_\_\_day of  
\_\_\_\_\_, 2007, at \_\_\_ o'clock a.m./p.m., in the 72<sup>nd</sup> District Court County, Texas.

SIGNED THIS \_\_\_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_  
PRESIDING JUDGE