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In re the Arbitration between:

BMS File No. 11-PA-0691

The City of Duluth, Minnesota,

Employer,

and

**GRIEVANCE ARBITRATION  
OPINION AND AWARD**

International Association of Firefighters,  
Local 101,

Union.

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Pursuant to **Article 36** of the collective bargaining agreement effective January 1, 2010 through December 31, 2010, “and after that date the agreement survives until the parties agree to a new contract, as provided by law,<sup>1</sup>” the parties have brought the above captioned matter to arbitration.

James A. Lundberg was appointed by the parties as the neutral arbitrator to hear the above matter and issue a final and binding decision.

The parties stipulated that the matter is arbitrable and properly before the arbitrator for a final and binding determination.

A grievance was filed on December 27, 2010.

A hearing was conducted on June 28, 2011.

Post Hearing Briefs were submitted on July 15, 2011 and the hearing was closed upon receipt of briefs.

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<sup>1</sup> **Article 46, Duration of Agreement, Section 46.1**, page. 37 of Collective Bargaining Agreement.

**APPEARANCES:**

**FOR THE EMPLOYER**

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**FOR THE UNION**

Erik Simonson  
President IAFF Local 101  
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**ISSUE:**

**As stated by the Union:**

*Did the Employer violate Article 18.8 of the collective bargaining agreement between Local 101 and the City of Duluth when it refused to agree that said Article requires the current claims administrator (Health Partners) to utilize PHCS or the successor to PHCS when calculating the Usual Customary Reasonable fee (UCR) for any covered services by an out of network provider?*

**As stated by the Employer:**

- 1. Whether the City shall be forced to use the Ingenix Prevailing Healthcare Charges System (PHCS) Benchmarking Database to calculate usual customary reasonable (UCR) fees for Fire Union members if they use out-of-network providers?*
- 2. Whether the City may use HealthPartners Administrators, Inc., effective January 1, 2011, to process and calculate usual customary reasonable (UCR) fees for Fire Union members if they use out-of-network providers?*

**RELEVANT CONTRACT LANGUAGE:**

**ARTICLE 18 – HOSPITAL – MEDICAL INSURANCE**

*18.8 If the Employer contracts with a claims administrator or purchases a fully-insured plan from a provider other than Blue Cross Blue Shield of Minnesota, the allowed amount for any covered service provided by out-of-network providers shall be the usual customary reasonable (UCR) fee as calculated by PHCS or its successor.*

**FACTUAL BACKGROUND:**

The City of Duluth, Minnesota self insures the health insurance plan with the IAFF Local 101. The collective bargaining agreement between the parties provides for claims administration using a third party. Historically, the City has contracted with Blue Cross Blue Shield of Minnesota for administrative services. However, HealthPartners became the plan administrator on January 1, 2011.

A “Frequently Asked Questions” statement was provided to IFFA Local 101 by the City and HealthPartners as part of the transition from administration by Blue Cross Blue Shield to HealthPartners. The statement said:

*Out of network providers are not required to accept HealthPartners’ contractual discounted payment. Therefore, you may be responsible for the difference between the billed amount and the eligible amount payable under medical plan.*

Upon further inquiry the Union determined that the answer given to the frequently asked question does not reflect the term negotiated at **Section 18.8** of the collective bargaining agreement. Attempts to resolve the dispute over contract language were unsuccessful and the issue was grieved on December 27, 2010. The grievance process did

not result in issue resolution and the matter was brought to arbitration for a final and binding determination.

**SUMMARY OF UNION'S POSITION:**

**Section 18.8** originally appeared in the 2004-2006 collective bargaining agreement. In contemplation of the possibility of a claims administrator other than Blue Cross Blue Shield, the parties agreed that a new plan administrator would use a data base maintained by a company called PHCS, when calculating the amount the insurer would be responsible to pay for an insured, who obtained out of network medical treatment.

The PHCS was administered by Ingenix, a Subsidiary of United Health Group.

The New York Attorney General's office challenged the fairness of data<sup>2</sup> maintained by PHCS and United Health Group entered into an agreement to shut down PHCS. A new non profit corporation called FAIR Health was created to replace PHCS. The Union contends that FAIR Health is the successor to PHCS. Consequently, **Section 18.8** of the collective bargaining agreement requires HealthPartners to use the FAIR Health data base to calculate out of network reimbursements.

The Union acknowledges that FAIR Health is phasing out various data modules previously used by PHCS and is phasing in new data modules. However, FAIR Health is operating and is the successor to PHCS. The collective bargaining agreement does not allow HealthPartners to arbitrarily select a different method for calculating usual customary reasonable (**UCR**) fees. The plain meaning of the language agreed upon in the collective bargaining agreement should be followed.

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<sup>2</sup> The data was found to benefit the insurer to the detriment of consumers. Specifically, the data base was skewed and resulted in payment obligations for insurers that were low and unfair to insured parties.

The Union clarifies its position by pointing out that it is not demanding HealthPartners rely upon PHCS for in network claims. The only situations covered by the contract language are those circumstances, where a covered employee uses an out of network provider and seeks reimbursement. The reimbursement level according to the contract should be determined by using PHCS or the successor to PHCS, which is FAIR Health. HealthPartners may not substitute reimbursement data it normally utilizes, since **Section 18.8** of the contract specifically provides for a different method of calculating **UCR** fees.

The Union concedes that PHCS no longer exists but there is a successor. The PHCS data base was taken over by FAIR Health and new data modules are being created. While the new data modules are being created, the existing PHCS data base is being used. To the extent that PHCS data is still being used, PHCS still exists and FAIR Health is clearly the successor of PHCS. Hence, the Employer's argument that the Union asks that a non existent entity be relied upon is misplaced.

The fact that HealthPartners was selected by the Health Insurance Labor Management Committee does not mean that HealthPartners may calculate **UCR** fees in a manner that is contrary to the method of calculations prescribed by **Section 18.8** of the collective bargaining agreement. **Section 18.8** applies only when Blue Cross Blue Shield is no longer the claims administrator and applies only when an insured uses an out of network provider. How Blue Cross Blue Shield calculated **UCR** is not relevant, even if HealthPartners uses the same system of calculation that Blue Cross Blue Shield used.

The Employer also inaccurately argued that the recent Commerce Commission Order prohibits the City from following the terms of the collective bargaining agreement.

The Union points out that the Order has nothing to do with how claims are calculated and is irrelevant to this dispute.

**SUMMARY OF EMPLOYER'S POSITION:**

The Employer argues that FAIR Health is not the legal successor to Ingenix PHCS, which is a wholly owned division of UnitedHealth Group, Inc. UnitedHealth still owns Ingenix but Ingenix no longer operates PHCS. There are hundreds of data bases used in the United States to calculate UCS fees of which the most common is Medicare. In fact, Blue Cross Blue Shield did not use PHCS. The Employer alleges that Blue Cross Blue Shield does not recognize FAIR Health, Inc. as the successor to PHCS.

Using FAIR Health to calculate UCS fees is not a remedy available in this grievance. The City has determined that FAIR Health data bases are not available until August 2011 at the earliest. Hence, the argument made by the Union is only prospective.

When the City Health Insurance Labor-Management Committee City contracted with HealthPartners to be the plan administrator, it also agreed that the HealthPartners method for calculating UCS fees to be paid for out of network services would be used. The agreement was a package deal. When asked during the bid process how it would calculate UCR fees HealthPartners did not represent that it would use PHCS or FAIR Health and the Union did not object at the time the method of calculation was disclosed. Furthermore, the method of calculating UCR fees “in many cases would actually be higher.” The Union did not grieve the selection of HealthPartners and can not now grieve the method of calculation of UCR fees that HealthPartners disclosed they would use.

The Union has failed to demonstrate past, present or future harm to its membership by the practice that is being challenged. Furthermore, the City contends that

the Union is trying to use grievance arbitration to obtain what it did not obtain in collective bargaining. Hence, the grievance should be denied.

**OPINION:**

**ARTICLE 18, Section 18.8** very clearly provides that PHCS or its successor shall be used by any claims administrator other than Blue Cross Blue Shield, when calculating **UCR** fees for out of network services. The collective bargaining agreement does not allow the new administrator to make a unilateral and arbitrary determination of the method it will use to calculate **UCR** fees for employees covered by the collective bargaining agreement entered into between the City of Duluth and International Association of Fire Fighters Local 101. HealthPartners, administrator of the self insured plan, must follow the direction found at **Section 18.8**.

The problem faced by the Employer and HealthPartners is not simply determining the successor to PHCS but also making a calculation of **UCR** fees that does not skew the payment in favor of the insurer, which would in essence work a fraud upon bargaining unit members.

A preponderance of the evidence submitted at hearing supports the position that FAIR Health is the successor to PHCS. FAIR Health was created by agreement between the owners of PHCS and the New York Attorney General's Office to be a substitute for PHCS, which cures the negative impact that PHCS calculations had upon consumers. However, it is not clear whether FAIR Health can provide new data modules in all instances. It is also unclear whether the current PHCS modules being used are untainted by former practice.

**Section 18.8** gives directions as to the method of calculating **UCR** fees for out of network providers but the underlying purpose of the section is to be certain that IAFF Local 101 bargaining unit members are treated fairly when out of network **UCR** fees are calculated. The remedy in this situation must follow both the instructions given in **Section 18.8** and accomplish the purpose of the contractual language. If a tainted data base is used, which treats IAFF Local 101 employees unfairly, the purpose of **Section 18.8** will not be served.

Since PHCS data is “suspect” and FAIR Health is using some data from PHCS, the health plan administrator, HealthPartners must be directed to perform two **UCR** fee calculations for any IAFF Local 101 bargaining unit member, who submits an out of network claim. HealthPartners is required to calculate **UCR** fees using PHCS or the successor to PHCS, which is FAIR Health. The required calculation can be made by obtaining data from FAIR Health. However, if a tainted data base module is used, the calculation may result in payment that is less than a fair calculation of **UCR**. To guard against use of a skewed data base, HealthPartners must also calculate **UCR** using the method it normally applies to **UCR** fee calculations paid for out of network services. The amount to be paid as the **UCR** fee for out of network services shall be the greater amount of the two calculations, which should mitigate against tainted data.

**AWARD:**

1. *The grievance is hereby upheld.*
2. *The Employer is directed to require HealthPartners to comply with Section 18.8 of the collective bargaining agreement by determining the allowed amount for any covered service provided by out-of-network providers by using the usual customary reasonable (UCR) fee as calculated by PHCS or its successor, which is FAIR Health.*
3. *In order to prevent harm to IAFF Local 101 bargaining unit members, a second calculation of usual customary reasonable (UCR) fees shall be made using the method of calculation that is normally utilized by HealthPartners.*
4. *The usual customary reasonable (UCR) fee payable by the City shall be the greater of the two calculations.*
5. *If FAIR Health has no applicable data module, HealthPartners shall pay the usual customary reasonable fee arrived at using the method of calculation it normally utilizes.<sup>3</sup>*

**Dated: July 27, 2011.**

**/s/James A. Lundberg\_\_\_\_\_**  
**James A. Lundberg, Arbitrator**

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<sup>3</sup> At hearing direct evidence regarding the “normal method of calculation” was not submitted but witnesses did indicate that they believed the Medicare calculation is used by HealthPartners in its normal operations.