ORDER NO. A17-01

NEW JERSEY SMALL EMPLOYER HEALTH BENEFITS PROGRAM BOARD

IN THE MATTER OF THE REQUEST OF THE NEW JERSEY SPINE SOCIETY FOR A STAY OF THE REPEAL of N.J.A.C. 11:21-7.13	)))	ORDER DENYING STAY

This matter arises out of a request by the New Jersey Spine Society (hereafter referred to as "the Movant"), dated December 29, 2016, for a stay of the effective date of the Readoption with amendments of N.J.A.C. 11:21-1.1 adopted September 21, 2016 by the New Jersey Small Employer Health Coverage Program Board (hereafter referred to as the "SEH Board") and published in 48 N.J.R. 2360 on November 7, 2016,[1] pending the Movant's appeal of the repeal of N.J.A.C. 11:21-7.13 to the Appellate Division of the Superior Court.

The Notice of Adoption of the Readoption with amendments of N.J.A.C. 11:21-1 through 3, 4 through 7, 10, 17, 18, and 23 and 11:21 Appendix Exhibits D, F, G, K, T, W, Y, BB, CC, DD, HH and II and repeal of N.J.A.C. 11:21-2.13, 2.17, 7.13, 8, 10.2, and 17.4 and 11:21 Appendix Exhibits BB Part 6 and KK was published in the *New Jersey Register* on November 7, 2016 and became operative on January 1, 2017. The SEH Board proposed readoption of its subchapters and Appendix exhibits of N.J.A.C. 11:21 (with amendments and repeals) at a Board meeting held on May 25, 2016. The proposal followed earlier discussions of the proposal by the Board consistent with the requirements of the Open Public Meetings Act, as well as Executive

[1] Factually, the SEH Board adopted a readoption with amendments and repeals. In addition, the Movant has misidentified the party that took the action from which it requests a stay. Consequently, this order is being issued by the SEH Board, rather than the Department of Banking and Insurance.

Order 2 (Christie, 2010).[2] Discussions were held at the SEH Board meetings of April 20, 2016, May 18, 2016, and May 25, 2016.[3]

The SEH Board proposed and adopted its rulemaking action in accordance with the expedited procedure established at N.J.S.A. 17B:27A-51, as an alternative to the rulemaking process under the Administrative Procedures Act, L. 1968, c. 410, as amended (N.J.S.A. 52:14B-1 et seq.). The proposal was published in the *New Jersey Register* at 48 N.J.R. 8(2) on August 15, 2016, and a public hearing was held on August 18, 2016. In accordance with N.J.S.A. 17B:27A-51, the SEH Board may adopt its proposed action immediately upon the close of the comment period or the public hearing (whichever occurs later) by submitting the adopted action to the Office of Administrative Law (OAL) for publication. The adopted action is effective upon the date of its submission to the OAL, or such later date as the Board may designate. The Board adopted the Readoption with amendments and repeals at its September 21, 2016 meeting, and submitted the notice of adoption to OAL on October 12, 2016. The notice of adoption was published November 7, 2016 in the *New Jersey Register*. 48 N.J.R. 2360(a) (Nov. 7, 2016).

In support of its motion, the Movant contends that the repeal of N.J.A.C. 11:21-7.13 is invalid as a matter of law for the following reasons: (1) the SEH Board failed to provide the requisite notice of the rulemaking; (2) the proposed rulemaking violates public policy; and (3) the Repeal ignores the intent of the enabling statute. The Movant asserts that a stay pending appeal is necessary to avoid irreparable harm to patients who may be subject to "overwhelming" balance bills due to the insurance carriers' artificially low reimbursement for out-of-network providers. The Movant contends that a stay is further appropriate to avoid the chaos, extreme

[2] Indeed, at least one member of the public in attendance at the May 18th meeting chose to provide comments to the Board, albeit about issues not relevant to the Movant's concern.
[3] Minutes of SEH Board meetings are at http://www.nj.gov/dobi/division_insurance/ihcseh/sehminutes.html.

inefficiency and wasteful repetition of claim processing that it asserts would result from implementing the repeal, having thousands of claims processed under the new system, and then requiring insurers to reprocess all claims in the event the Repeal is declared invalid.

Finally, the Movant asserts that a balancing of the equities favors a grant of the stay.

STANDARD OF REVIEW

It is well settled that the Movant has the burden of establishing that a stay should be granted in this matter by clear and convincing evidence. Garden State Equality v. Dow, 216 N.J. 314, 320 (2013); Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012); Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638-39 (App. Div. 1997). The Movant's motion fails to meet its burden because it does not support its contentions with facts that satisfy the legal standards entitling the Movant to the relief requested.

A stay pending appeal of a final administrative decision, including the adoption of administrative rules, is an extraordinary equitable remedy involving the most sensitive exercise of judicial discretion. Crowe v. DeGioia, 90 N.J. 126, 132 (1982); Zoning Board of Adjustment of Sparta v. Service Electric Cable Television of N.J. Inc., 198 N.J. Super. 370, 379 (App. Div. 1985). It is not a matter of right, even though irreparable injury may otherwise result. Yakus v. United States, 321 U.S. 414, 440, 64 S. Ct. 660, 674, 88 L. Ed. 834 (1944). Because it is the exception rather than the rule, Kershner v. Mazurkiewicz, 670 F. 2d 440, 443 (3d Cir. 1982), the party seeking such relief must clearly carry the burden of persuasion as to all the prerequisites. Campbell Soup Co. v. ConAgra, Inc., 977 F. 2d 86, 90 (3d Cir. 1992). Granting a stay pending appeal is the exercise of an extremely far-reaching power, one not to be indulged in except in a case clearly warranting it.

The standard for review of a request for a stay set forth in Crowe , supra., requires a demonstration that each of the following conditions has been satisfied: 1) relief is needed to prevent irreparable harm; 2) the party seeking relief has a reasonable probability of succeeding on the merits of the underlying appeal; 3) balancing the relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were; and, 4) the public interest favors such relief. Garden State Equality, supra.,216 N.J. 320-321 (citing Crowe, supra,. 90 N.J. 126, 132-134). The Movant's request for a stay fails to meet its burden of demonstrating facts that satisfy any of the required four Crowe elements.

I. LIKELIHOOD OF SUCCESS ON THE MERITS

The Movant has failed to establish that there is a reasonable probability that it will prevail on the merits of its appeal. It is "well-established" that administrative regulations enjoy a presumption of validity. N.J. State League of Municipalities v. Department of Community Affairs, 158 N.J. 211, 222 (1999). A party challenging a regulation's validity has the burden of overcoming that presumption and demonstrating that the regulation is arbitrary, capricious, or unreasonable. Bergen Pines County Hosp. v. N.J. Dep't of Human Servs., 96 N.J. 456, 477 (1984). "A finding that an agency acted in an ultra vires fashion in adopting regulations is generally disfavored. Particularly, in the field of insurance, the expertise and judgment of the [agency] may be given great weight." N.J. Coalition of Health Care Prof., Inc., v. N.J. Dep't of Banking and Ins., Div. of Ins., 323 N.J. Super. 207, 229 (App. Div.), certif. denied, 162 N.J. 485 (1999) (citations omitted).

In the context of actions by an administrative agency, "arbitrary and capricious" means "willful and unreasoning action, without consideration and in disregard of circumstances." Bayshore Sewerage Co. v. Department of Envtl. Protect., 122 N.J. Super. 184, 199 (Ch. Div.

1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974), quoted in Worthington v. Fauver, 88 N.J. 183, 204-05 (1982). Action that is "exercised honestly and upon due consideration," is not arbitrary and capricious, even if there is room for another option and "even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewerage Co., supra., 122 N.J. Super. at 199. As discussed in greater detail below, the Movant has failed to demonstrate any likelihood that it would be able to sustain this burden and prevail in its appeal of the rule Readoption which included the repeal of N.J.A.C. 11:21-7.13.

A. Appropriate Notice and Comment Period was Provided

The Movant contends that the Department failed to provide appropriate notice of the hearing and comment period. The Movant appears not to recognize that the SEH Board is in, but not of, the Department, with rulemaking authority separate and apart from the Department. Consequently, the Movant words its request as if the Department and the SEH Board are interchangeable, which is not the case. The SEH Board, not the Department or the Commissioner, is the party in interest in this matter because it was the SEH Board that adopted the rules at issue. Furthermore, the Movant takes issue with the use of the rulemaking procedure set forth at N.J.S.A. 17B:27A-51, which authorizes the SEH Board (but not the Department) to follow an expedited rulemaking procedure. Moreover, the Movant questions whether the notice requirements of N.J.S.A. 17B:27A-51 were met.

As the Movant concedes, N.J.S.A. 17B:27A-51 authorizes the SEH Board to follow an expedited rulemaking procedure as long as it publishes notice of its proposed actions in three newspapers and provides notice of the proposed action to affected trade and professional associations. The statute allows for a 20-day comment period regarding the proposed action, with

the 20 days running from the date of the notice. Consistent with the requirements of N.J.S.A. 17B:27A-51, notice of the proposal was sent on July 7, 2016 to three newspapers of general circulation: the New Jersey Star Ledger, the Trenton Times and the Courier Post. The notice was published in each of those newspapers in accordance with their respective publication schedules. As also required by N.J.S.A. 17B:27A-51, notice was provided via email to the various trade and professional organizations that have requested to be included in the SEH Board's interested parties list. Like all rulemaking entities, the SEH Board maintains an interested parties list for the purpose of disseminating notice of its rulemaking activities, consistent with the requirements of N.J.S.A. 52:14B-1 et seq.[4] For example, a representative from the Medical Society of New Jersey is on the SEH Board's interested parties list. She received notice of the Board's intended rulemaking action and submitted timely comments to the Board's proposed readoption with amendments and repeals, including comments regarding the repeal of N.J.A.C. 11:21-7.13. The notice was also forwarded for publication to the OAL on July 7, 2016, as required by N.J.S.A. 17B:27A-51.

With respect to the duration of the comment period, the SEH Board allowed a 45-day comment period, starting from July 7, 2016, and concluding at the end of August 22, 2016. The 45-day comment period exceeded the statutorily required minimum 20-day period. Thus, the SEH Board not only complied with the requirements of N.J.S.A. 17B:27A-51, it provided substantially more time for interested parties to submit their comments in writing than the expedited procedure requires. In addition, because the proposal included action on health benefits plans, the SEH Board was required to hold a public hearing (on August 18, 2016) prior to taking final action on the health benefits plans. Notice of the public hearing was included

[4] The interested parties list maintained by the SEH Board is not the same interested parties list(s) maintained by the Department of Banking and Insurance. Although there may be duplication in the interested parties, there are also differences because of the differences in the scope of regulatory authority.

within the notice of Readoption with amendments sent to OAL, and published in the *New Jersey Register*, as well as the notices published in the newspapers and distributed to interested parties.

For those reasons, the Movant's contention that the only proof of notice available was in the *New Jersey Register* published August 15, 2016, is inaccurate. Further, above and beyond the requirements of N.J.S.A. 17B:27A-51, notice was posted online on the SEH Board's website,[5] and was also provided to the Secretary of State for posting and to the State House Press Corps.

The Movant asserts that a notice that is effective upon the notice being sent to the *New Jersey Register* is untenable and that the expedited procedure must still follow the procedures set forth in the Administrative Procedures Act. That assertion is incorrect. In fact, the expedited rulemaking process has been judicially challenged, relying on a similar assertion, and upheld. As explained in the response to comment 8 in the Board's notice of adoption, the special rulemaking process specified in N.J.S.A. 17B:27A-51 is identical to the special rulemaking process specified in N.J.S.A. 17B:27A-16.1 with respect to the Individual Health Coverage Board, the SEH Board's sister regulatory board. N.J.S.A. 17B:27A-16.1 was upheld by the Superior Court, Appellate Division, in In re N.J. IHC Program's Readoption of N.J.A.C. 11:20-1 et seq., 353 N.J. Super. 494 (App. Div. 2002), aff'd in part and rev'd in part on other grounds, 179 N.J. 570 (2004). Further, while the Movant may contend that the notice was inadequate for its purposes, other interested parties were able to provide both verbal and written comments to the Board in a timely manner. Two interested parties provided comments during the hearing. These same parties also provided written comments before the August 22, 2016 close of the comment period on the proposal, along with four additional parties. The list of commenters,

[5] At http://www.state.nj.us/dobi/division_insurance/ihcseh/sehrulesadoptions.htm.

their comments, and the SEH Board's responses, are recorded in the *New Jersey Register* at 48 N.J.R. 1564(a) (Nov. 7, 2016).

Therefore, the Movant's efforts to demonstrate a reasonable probability of success on the merits of the appeal by challenging the procedure that the SEH Board followed are without merit. The SEH Board fully complied with the requirements of a judicially approved rulemaking procedure. The Movant has not shown a likelihood of success on the merits regarding that issue.

B. The Impact of the Repeal does not violate the Public Interest, nor does it ignore the Intent of the Enabling Statute

The public interest does not favor a stay of these rules pending appeal. Employees and their dependents that are covered under small-employer plans that feature out-of-network benefits continue to enjoy the right to elect to receive care from either network providers or from out-of-network providers.

1. The Repeal is consistent with the Intent of the Enabling Statute

The Movant contends the lack of notice and the actions of commercial carriers violate public policy and the intent of the Legislature in creating the SEH Board, the primary mission of which, according to the Movant's broad, nonspecific formulation, is to protect consumers in the small employer market.[6] However, although protecting consumers is one part of the SEH Board's mission, protecting consumers means many things, and includes increasing consumers' access to coverage, educating key stakeholders in the marketplace, and promoting carrier participation in the small employer market in an effort to assure that consumers have choices of carriers, choices of plans, meaningful products, and a competitive market. The SEH Board, in an appropriate exercise of its technical expertise, determined that the Repeal is one way of

[6] Among other things, the Movant takes issue with the composition of the Board, alleging that the Board is driven by the interests of its carrier representatives. However, the Movant's characterization of the composition and interests of the Board is inaccurate. For example, only five of the currently sitting 12 Board members represent carriers.

protecting consumers. The repeal of N.J.A.C. 11:21-7.13 is entirely consistent with the SEH Board's stated mission. The availability of plans with out-of-network benefits has decreased through the years. The percentage of persons covered under plans with out-of-network benefits saw a corresponding decrease. As of the fourth quarter of 2015, only 28 percent of small employer plans featured out-of-network benefits. The SEH Board expects the repeal of N.J.A.C. 11:21-7.13 will increase access to health benefits plans with out-of-network coverage because carriers will be able to offer more such plans at more competitive rates. The SEH Board requires carriers to fully disclose the standard selected for allowable charges, enhancing the ability of consumers to make informed decisions. This requirement promotes transparency in the health care coverage contract, and provides a valuable and necessary consumer protection.

2. The Repeal does not deny any Rights or Legal Protections, or otherwise violate Public Policy

The Movant asserts that actions of the Board and the commercial carriers deprive insureds of their bargained for benefits – specifically, out-of-network coverage and the calculation of a covered person's maximum out-of-pocket expense per year (MOOP). The repeal of N.J.A.C. 11:21-7.13 does not deprive insureds of out-of-network benefits, nor does it have any direct impact on the MOOP. Out-of-network benefits continue to exist in plans available in the small employer market. The SEH Board has found that the Repeal will increase the availability of such plans and expects the plans to be more competitively priced than they have been in recent years. As regards the MOOP, the MOOP is unchanged by the repeal of N.J.A.C. 11:21-7.13. The purpose of the MOOP is to limit the cost sharing paid by a covered person in the form of copayments, deductibles and coinsurance in a calendar year (see for instance, the definition in N.J.A.C. 11:21 Appendix Exhibit F). The definition was not amended as a result of the repeal of N.J.A.C. 11:21-7.13.

The Movant expresses concerns with balance bills a patient may receive. However, the term "balance bill" refers to the difference between the amount a provider bills for a service and the sum of the covered persons' cost sharing plus the benefit paid by the insurance company. Persons who voluntarily choose to use the voluntary services of out-of-network providers have always been at risk for balance bills. In repealing N.J.A.C. 11:21-7.13, the SEH Board anticipates that the potential amount of the balance bill will become more transparent for consumers, enabling the person to make an informed decision as to whether to proceed with the use of an out-of-network provider.

The Movant incorrectly characterizes the repealed requirements of N.J.A.C. 11:21-7.13 as establishing a usual, customary and reasonable ("UCR") system. In fact, N.J.A.C. 11:21-7.13(a) defined the allowed charge. The allowed charge relied on a standard which the SEH Board previously dictated, but the Repeal is leaving the allowed charge to the determination of each carrier for the many reasons explained in the proposal. Carriers must disclose the standard that they are using, which is why the SEH Board believes it will become a more transparent process.

It has always been the case that if a person chooses to use the services of a provider whose billed charges exceed the standard for allowed charges that the person will be subject to balance billing. If the provider's charges far exceed the carrier's chosen standard for allowed charges, the patient's liability will be greater. With the standard entirely transparent, both providers and patients will have information to enable informed provider-patient discussions and ultimately informed patient decisions.

The Movant contends that the repeal of N.J.A.C. 11:21-7.13 will diminish New Jersey's legal protections of consumers from out-of-network charges (i.e., New Jersey's hold harmless

requirements). Those protections, however, apply only in situations in which the patient cannot choose whether to use an in- or out-of-network provider, such as emergency situations. The out-of-network provisions addressed in the SEH Board's actions apply solely to voluntary use of out-of-network providers. None of the requirements associated with the unknowing use of out-of-network providers in emergencies or under circumstances defined in N.J.A.C. 11:22-5.8(b) apply to the voluntary use of an out-of-network provider. The repeal of N.J.A.C. 11:21-7.13 will have no impact on the protections afforded to consumers through New Jersey's hold harmless requirements.

For the reasons set forth above, the Movant has not identified even one basis to establish that the SEH Board's actions are not in the public interest or that they are inconsistent with the SEH Act. Therefore, it has not met its burden of showing a likelihood of success on the merits.

II. BENEFITS VS. HARM OF GRANTING THE APPLICATION

On balance, any benefit of granting the stay will not outweigh the harm such relief will cause other interested parties. The Movant has provided no facts or proofs on which it may be concluded that the balance of the equities favors a stay. The Movant states that physicians will be paid less, and thus patients will have a greater risk of large balance bills. However, small employers will benefit from greater access to plans with out-of-network benefits at more competitive rates. The use of an out-of-network provider is a choice, not a requirement. After weighing the options, a patient may freely elect whether to proceed with the use of an out-of-network provider.

The benefits of the repeal of N.J.A.C. 11:21-7.13 outweigh the unsubstantiated claims of economic loss the Movant argues may result if the application for a stay is denied. Thus, the balance of equities does not support granting the requested relief.

III. IRREPARABLE HARM

Irreparable harm will not result to the Movant or its patients if the stay is denied. Notably, the projected harm cited by the Movant is essentially monetary in nature. The courts have consistently held that irreparable injury is not demonstrated when dealing with the potential loss of money. "[I]njuries, however substantial, in terms of money, time and energy" are not enough to constitute irreparable harm. Zoning Board, supra., 198 N.J. Super. at 381-82; Bd. of Educ. v. N.J. Educ. Ass'n, 96 N.J. Super. 371, 391 (Ch. Div. 1967), aff'd 53 N.J. 29 (1968). The most pervasive harm cited in support of the motion is that providers could be paid less and patients would have greater risk of balance billing. If the Movant succeeds in its challenge to the repeal of N.J.A.C. 11:21-7.13, a return to the prior rule is simply not appropriate for the reasons stated in the proposal.[7]

Moreover, not only has the Movant failed to demonstrate by clear and convincing evidence its allegation that the Repeal will cause harm to the public, but as set forth in detail above, the benefits of the repeal of N.J.A.C. 11:21-7.13 are significant and were deemed by the SEH Board to outweigh any potential disadvantages.

Based upon the foregoing, Movant has failed to carry its burden and establish that irreparable harm will befall any parties if the repeal of N.J.A.C. 11:21-7.13 is operative on January 1, 2017.

[7] The standard required by N.J.A.C. 11:21-7.13 to be used for allowed charges is no longer available-that is, the Prevailing Charges System, operated by Ingenix, no longer exists.

CONCLUSION

In sum, the Movant failed to demonstrate by clear and convincing evidence any of the four prerequisites it was its burden to establish in order for a stay to be granted. Consequently, for all the foregoing reasons, the application for a stay must be, and is hereby, DENIED.

IT IS SO ORDERED this 18th day of January, 2017.

Ellen F. DeRosa
Executive Director