

NEW JERSEY
INDIVIDUAL HEALTH COVERAGE PROGRAM

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OAL Dkt No. IHC 08083-
02S

IN THE MATTER OF THE NEW
JERSEY INDIVIDUAL HEALTH
COVERAGE PROGRAM BOARD'S
ADJUSTMENT OF BLUE CROSS
AND BLUE SHIELD OF NEW
JERSEY'S REQUEST FOR
REIMBURSEMENT OF LOSSES
FOR CALENDAR YEARS 1993
AND 1994

Final Decision 05-IHC-01

We have reviewed the Motion to Settle the Record filed by Horizon Blue Cross Blue Shield of New Jersey ("Horizon") in this case on January 26, 2005, as well as the response thereto filed by respondent, New Jersey Individual Health Coverage Program Board of Directors ("IHC Board") on February 7, 2005. For the reasons that follow, we conclude that Horizon's Motion to Settle the Record should be denied. This matter arises out of an appeal by Horizon to the Superior Court of New Jersey, Appellate Division, from

New Jersey Individual Health Coverage Program Board (hereinafter "IHC Board") Orders No. 96-21, 96-23 and 99-02. These decisions

1) confirmed the decision and recommendation of Administrative Law Judge Bruce Campbell that the methodology used by the auditors hired by the IHC Board, in an independent audit of Horizon's reported losses on individual health insurance for 1993 and 1994 was valid and within the bounds of generally accepted auditing standards; and

2) denied Horizon's request for an OAL hearing on the issue of whether Horizon waived its right to reimbursement for certain expenses and found as a matter of law that Horizon had waived that right because it had made unambiguous statements in certifications filed with the Board stating that it was not seeking reimbursement of those expenses for 1993 and 1994.

On April 16, 2002, the Appellate Division affirmed the Board's decision on the independent audit methodology and reversed the Board's decision to deny Horizon a hearing on the issue of waiver. It remanded the matter, however, for fact-finding to determine whether Horizon's conduct

satisfied the elements of waiver, specifically the element of intent. In re Individual Health Coverage Program Board's Adjustment of Blue Cross and Blue Shield of N.J.'s Requests for Reimbursement of Losses for Calendar Years 1993 and 1994 ("In re Horizon"), No. A-4020-98T1 (App. Div. Apr. 16, 2002)(per curiam).

Accordingly, the IHC Board transmitted the following issue to the Office of Administrative Law ("OAL"):

Did Horizon, by virtue of providing certifications in 1993 and 1994 to the IHC Board which stated that it was not seeking reimbursement of employee incentive expenses and amortization of deferred system development costs (hereinafter, the "MICP expenses and CARS costs"), intend to waive its right to reimbursement of those expenses and costs?

The OAL received the IHC Board transmittal on November 6, 2002. Hearings were held on October 20, 2003 and January 7, 2004. The record closed on July 6, 2004 with the filing of post-hearing briefs.

In the Initial Decision, ALJ Douglas Hurd accepted and adopted paragraphs 1-35 of a Joint Stipulation of Facts that the parties had submitted, and supplemented the Joint Stipulation with six additional findings of fact. Initial

Decision at 2-3. ALJ Hurd thoroughly considered all of the facts and evidence in the record and decided that the IHC Board satisfied its burden of proving that Horizon did waive its right to seek reimbursement for the MICP and CARS expenses in connection with its 1993 and 1994 Exhibit K filings. Initial Decision at 6.

Among other things, ALJ Hurd found that evidence of other carriers' ability to amend their Exhibit K filings, as well as specific evidence regarding another carrier's amendment to an Exhibit K, discussed and approved by the IHC Board in May 1999, was irrelevant to this case. Initial Decision at 3. The ALJ also ordered that testimony regarding excluded exhibits P-16 and P-17, as well as excerpts quoted from those exhibits that appeared in Horizon's post hearing briefs, be held under seal because they contained privileged material. Initial Decision at 6.

Horizon submitted exceptions to the Initial Decision on August 25, 2004, and IHC Board submitted a brief in reply on September 10, 2004, pursuant to an extension granted on September 13, 2004.

On November 4, 2004, the IHC Board issued a Final Decision which adopted ALJ Hurd's Initial Decision in its

entirety, including ALJ Hurd's conclusion that Exhibits P-16 and P-17 were irrelevant to the question of whether Horizon waived its right to reimbursement for its 1993 and 1994 MICP expenses and CARS costs and, moreover, contained privileged material and therefore, the exhibits as well as excerpts therefrom should be excluded from the record.

By letter dated December 10, 2004, Horizon filed a timely Notice of Appeal in the Appellate Division of the Superior Court of New Jersey.

On January 12, 2005, pursuant to R. 2:5-4(b), the IHC Board filed its Statement of Items Comprising the Record. The IHC Board's Statement of Items did not include the two documents submitted by Horizon at the January 7, 2004, OAL Hearing, Exhibits P-16 and P-17.

On January 26, 2005, Horizon filed a Motion to Settle the Record, requesting the Statement of Items be amended to include Exhibits P-16 and P-17. On February 7, 2005, the IHC Board filed a brief in response to Horizon's motion.

We have reviewed Horizon's motion and supporting documentation as well as the brief and materials filed by the IHC Board in response. We conclude that Exhibits P-16

and P-17 were properly excluded from the IHC Board's Statement of Items Comprising the Record.

In its Letter Brief in Support of its Motion to Settle the Record, Horizon asserts that Exhibits P-16 and P-17 show that Travelers Insurance Company received preferential treatment inasmuch as Travelers was permitted to amend its Exhibit K to receive reimbursement for losses that were not previously reported on its Exhibit K, while Horizon was denied reimbursement for losses it did not include on its Exhibit K. *Horizon Letter Brief in Support of Motion to Settle the Record at 4 (January 26, 2005)*. However, the issue on remand was framed thusly:

We conclude that Horizon is entitled to a hearing on the issue of whether the 1993 and 1994 certification constituted waivers of Horizon's right to reimbursement of the employee incentive expenses and amortization of deferred system development costs. We, therefore, remand the matter for a hearing solely on the waiver issue. [In Re Individual Health Coverage Program

Board's Adjustment of Blue Cross and
Blue Shield of N.J.'s Requests for
Reimbursement of Losses for Calendar
Years 1993 and 1994, No. A-4020-98T1
(App. Div. Apr. 16, 2002)(per curiam),
slip op. at 15.

The documents which Horizon seeks to have admitted to the record are minutes of the May 5, 1999 IHC Legal Committee Meeting (Exhibit P-16) and minutes of the May 11, 1999 Executive Session of the IHC Board meeting (Exhibit P-17). These documents memorialize meetings that took place more than four years after Horizon's actions, which are the subject of this appeal. As such, Exhibits P-16 and P-17 shed no light on the issue of whether Horizon waived its right to reimbursement for its 1993 and 1994 MICP expenses and CARS costs.

Moreover, the documents themselves show that the facts underlying Travelers' permitted amendment of its Exhibit K are materially different from the facts underlying the issue at hand. As noted in this Board's Final Decision of November 4, 2004, ALJ Hurd clearly considered the proffered evidence contained in Exhibits P-16 and P-17 and noted that

it differed in material respects from the evidence pertaining to Horizon's 1993 and 1994 Exhibit Ks. In particular, ALJ Hurd noted that the Traveler's Exhibit K was not accompanied by certifications intentionally excluding certain net paid losses, as was Horizon's. Moreover, whether or not Traveler's was permitted to amend its Exhibit K in 1999 has no bearing on the question of whether Horizon intended to exclude its MICP expenses and CARS costs from its net paid losses in its 1993 and 1994 Exhibit Ks. As found by ALJ Hurd and adopted by this Board in its Final Decision, the certifications constituted a knowing waiver by Horizon of its right to reimbursement for these expenses. Horizon's request for reimbursement is, therefore, substantially dissimilar from Travelers' request to amend its Exhibit K. Exhibits P-16 and P-17 are, therefore, irrelevant to the question of whether Horizon waived its right to reimbursement for its 1993 and 1994 MICP expenses and CARS costs.

It is an administrative agency's responsibility to submit a Statement of Items Comprising the Record setting forth "what the record consists of to facilitate appellant's preparation of the appendix as well as the

appellate court's understanding of what proofs, exhibits, stipulations, and the like the agency considered in reaching its determination." Sylvia B. Pressler, Rules Governing the Courts of the State of New Jersey, R. 2:5-4, comment 2 at 609 (2005 edition).

Exhibits P-16 and P-17 were properly excluded from the record by ALJ Hurd on relevancy grounds. Neither of these documents help to resolve the issue of whether Horizon waived its right to reimbursement for its 1993 and 1994 MICP expenses and CARS costs. These documents, therefore, were not part of the record considered by the IHC Board in resolving that issue. The mere discussion of the relevancy of Exhibits P-16 and P-17 by the IHC Board in its Final Decision, especially in connection with its consideration of Horizon's exceptions, does not render these documents necessary to the final determination of Horizon's waiver, nor does such a discussion facilitate the Appellate Division's understanding of the ultimate determination of the IHC Board that Horizon waived its right to reimbursement of these expenses and costs. Because the record on appeal consists of those items that "the agency considered in reaching its determination," the IHC Board

properly excluded Exhibits P-16 and P-17 from the Statement of Items Comprising the Record. Sylvia B. Pressler, Rules Governing the Courts of the State of New Jersey, R. 2:5-4, comment 2 at 609 (2005 edition). See In Re Gastman, 147 N.J. Super. 101, 114 (App. Div. 1977)(declining to supplement the record with evidence that would not have affected the final outcome).

Because we find that Exhibits P-16 and P-17 were properly excluded from the IHC Board's Statement of Items Comprising the Record because they are irrelevant to the question of Horizon's waiver of its right to reimbursement for its 1993 and 1994 MICP expenses and CARS costs and were not items considered by the IHC Board in reaching its final decision, we decline to decide whether Horizon should have submitted redacted versions of the documents at the OAL hearing.

For all of the reasons set forth above, and because Exhibits P-16 and P-17 were properly excluded from the IHC Board's Statement of Items Comprising the Record, Horizon's Motion to Settle the Record is hereby denied.

Mary McClure, Chairwoman
Individual Health Coverage Program