

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

IN THE MATTER OF THE REQUEST OF)
THE UNITED ACUPUNCTURE SOCIETY)
OF NEW JERSEY FOR A STAY OF THE)
ADOPTION OF AMENDMENTS TO)
N.J.A.C. 11:3-29APPENDIX, EXHIBIT 6)

This matter arises out of a request by the United Acupuncture Society of New Jersey (hereafter referred to as "the UASNJ"), dated December 18, 2012, for a stay of the adoption of amendments to N.J.A.C. 11:3-29 Appendix, Exhibit 6 concerning Personal Injury Protection ("PIP") Benefits, and the PIP Fee Schedule – "Codes Subject to the Daily Maximum" as adopted at 44 N.J.R. 2652(c) on November 5, 2012 (hereinafter generally as "the rules").

The Notice of Adoption of the rules was published in the New Jersey Register on November 5, 2012 and will become operative on January 4, 2013.¹ Prior to publishing the Notice of Proposal of the rules, the Department engaged in a lengthy advance notice of rulemaking process pursuant to Executive Order 2 which included the exchange of information and comments with interested parties, including medical providers and insurers. The proposal was published in the New Jersey Register at 43 N.J.R. 1640(a) on August 1, 2011, and over 18,000 written comments were received. Subsequently, on February 21, 2012, a Notice of Proposed Substantial Changes Upon Adoption was published in the New Jersey Register at 44 N.J.R. 383(a) pursuant to N.J.S.A. 52:14B-4.10, and over 300 comments were received on that Notice.

¹ Other new rules and amendments not included in the instant request were also adopted on November 5, 2012. Certain of those other amendments and new rules will not become operative until November 5, 2013.

In support of its motion, the UASNJ states that the rules are unlawful and invalid as a matter of law because by subjecting to the daily maximum reimbursement prescribed in N.J.A.C. 11:3-29.4(m) and Appendix Exhibit 6 four acupuncture current procedural terminology (“CPT”) codes (97810, 97811, 97813 and 07814) through the adoption of the rules, the Department has acted in an arbitrary and capricious manner. Specifically, UASNJ avers that by including acupuncture, which is an invasive procedure meant to treat the nervous system, with unrelated diagnostic procedures and treatment modalities performed by chiropractors and/or physical therapists intended to address spinal and muscular conditions, the rules lack a rational basis. The UASNJ asserts that for this reason it has a strong probability of success on its challenge to the legality of the rules. It also contends that a stay pending appeal would be appropriate to avoid the inefficiency and wasteful repetition of claim processing that would result from implementing the rules, having acupuncture practitioners change their procedures and submit claims under the new rules, and then, assuming they are successful, having these practitioners again change procedures and resubmit claims while also requiring insurers to reprocess all claims. USANJ also asserts that a failure to stay the rules will increase the cost of providing care for acupuncture procedures and thereby diminish access to care, as patients may opt to decline treatment.

Finally, the UASNJ avers that a balancing of the equities favors a grant of the stay.

STANDARD OF REVIEW

It is well settled that the USANJ has the burden of establishing that a stay should be granted in this matter by clear and convincing evidence. American Employers’ Insurance Co. v. Elf Atochem N.A., Inc., 280 N.J. Super. 601, 611, fn8 (App. Div. 1995); Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 639 (App. Div. 1999) (citing American

Employers' Ins. Co., *supra*). In this application, the USANJ has failed to recite facts in the moving papers which meet the legal requirements entitling them 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. See 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, GTE Corp. v. Williams, 731 F. 2d 676, 678 (10th Cir. 1984), the party seeking such relief must clearly carry the burden of persuasion as to all the prerequisites. United States v. Lambert, 695 F. 2d 536, 539 (11th Cir. 1983). 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.

Such relief is appropriate only in instances where the party seeking this extraordinary measure demonstrates that each of the following conditions has been satisfied: (1) a reasonable probability of success on the merits of the underlying appeal; (2) the public interest favors such relief; (3) on balance, the benefit of the relief to the movant will outweigh the harm such relief will cause other interested parties, including the general public; and (4) irreparable injury will result if a stay is denied. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982). UASNJ' request for a stay fails to meet their burden of demonstrating facts that satisfy any of the required four Crowe elements.

LIKELIHOOD OF SUCCESS ON THE MERITS

The USANJ has failed to establish that there is a reasonable probability that they will prevail on the merits of their 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 head] may be given great weight." N.J. Coalition of Health Care Professionals, 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 Env'tl. Protection, 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 full below, Movants have failed to demonstrate any likelihood that they would be able to sustain this burden and prevail in their appeal of the rule adoption.

To demonstrate that it is likely to succeed on the merits of its appeal, the UASNJ asserts that inclusion of the four acupuncture CPT codes in the amended Appendix Exhibit 6 is an arbitrary and capricious action. I disagree because the inclusion of the acupuncture codes in amended Exhibit 6 was a reasonable and necessary action that was consistent with the Department's statutory obligation imposed by N.J.S.A. 39:6A-4 to approve a PIP medical benefit plan for "reasonable, necessary and appropriate treatment and provision of services." Pursuant to N.J.S.A. 39:6A-4.6b., "The fee schedule may ... establish the use of a single fee rather than an unbundled fee for a group of services if those services are commonly provided together." As the Department stated in the Notice of Adoption, the codes in issue were included in Exhibit 6 because information received from insurers demonstrated that "an increasing number of acupuncture providers are associated with chiropractic clinics and physical therapists and insureds get both treatments on the same dates." 44 N.J.R. 2706. The Appellate Division of the Superior Court of New Jersey affirmed this approach for adding CPT codes to the Schedule of Codes Subject to the Daily Maximum in the last appellate challenge without discussion. See In re: Adoption of N.J.A.C. 11:3-29, 410 NJ Super. 6 (App. Div.) 2009. In addition, although the reimbursements for acupuncture have decreased in this adoption, the Department set the reimbursements for stand-alone acupuncture at rates that more than satisfy the statutory standard of the reasonable and prevailing fees at the 75th percentile of providers on a regional basis. See N.J.S.A. 39:6A-4.6(a). The fees were set at the 95th percentile of the Fair Health allowed fee database to satisfy the Department's obligation to set fees at the most current reasonable and prevailing rates. 44 N.J.R. 2706-07.

In its submission, the USANJ avers that acupuncturists offer a treatment modality "to address parts of a patient's body that are separate and distinct from those parts treated by

chiropractors and physical therapists, i.e., the patient's nervous system as opposed to muscle groups and bone alignment." (USANJ letter, page 4.) As amended by the November 5, 2012 adoption, N.J.A.C. 11:3-29.4(m), the rule that establishes the daily maximum reimbursement amount for the codes listed in Appendix Exhibit 6, provides, in pertinent part:

The daily maximum allowable fee shall be \$105.00 for the Physical Medicine and Rehabilitation CPT codes listed in subchapter Appendix, Exhibit 6, incorporated herein by reference, that are commonly provided together. The daily maximum applies when such services are performed for the same patient on the same date. ... The daily maximum applies to all providers, including dentists. However, when the provider can demonstrate that the severity or extent of the injury is such that extraordinary time and effort is needed for effective treatment, the insurer shall reimburse in excess of the daily maximum. Such injuries could include, but are not limited to, severe brain injury and non-soft-tissue injuries to more than one part of the body.

Thus the rule that prescribes how the daily maximum is to be implemented provides for reimbursements in excess of the daily maximum for non-soft-tissue injuries to distinct parts of the body. Accordingly if, as the USANJ characterizes it, the acupuncture treatment is administered to treat an injury to the nervous system, as opposed to as a palliative for a soft-tissue injury to a muscle group or for a bone misalignment, and the acupuncturist can demonstrate that was the case as set forth in the rule, reimbursement in excess of the daily maximum shall be provided. However, if the acupuncture treatment is administered on the same day to address the same soft tissue injuries for which chiropractic treatment or physical therapy

is administered, it would be subject to the daily maximum fee due to the related nature of the treatments, their intended cumulative effect, and their being commonly provided together.

Furthermore, by subjecting such combined treatments to the daily maximum, the insured's PIP benefit is extended, as opposed to being more quickly depleted by separate charges for the related treatments directed to the same injuries.

In sum, Appellants have failed to put forth any evidence to demonstrate a reasonable probability of success in their challenge to the newly adopted Appendix Exhibit 6. The Appellate Division has recognized that non-specific and unsupported complaints about reimbursement levels are inadequate to sustain a challenge to a PIP fee schedules adoption. In re Adoption of N.J.A.C. 11:3-29, supra, 410 N.J. Super. at 23-26.

For all of the above reasons, it is clear that USANJ has failed to demonstrate a reasonable probability of success on the merits of the appeal, and therefore is not entitled to a stay. However, in order to provide a complete analysis, the following will address the other three criteria set forth in Crowe.

PUBLIC INTEREST

The public interest does not favor a stay of these rules pending appeal. PIP patients will continue to receive the same standard of care and providers will provide the same standard of care regardless of whether the fees they receive are based upon the former or the amended Appendix Exhibit 6. Permitting amended Appendix Exhibit 6 to become effective on January 4, 2013, will benefit the interests of New Jersey auto insurance consumers and PIP patients.

By limiting the reimbursements that can be provided for bundled services delivered on the same day to PIP patients, their PIP benefit will be extended and the impact of excessive PIP reimbursements on automobile insurance rates will be reduced.

For these reasons, the public interest favors permitting the amended Appendix Exhibit 6 to take effect.

BENEFITS VS. HARM OF GRANTING THE APPLICATION

On balance, the benefit of granting the stay will not outweigh the harm such relief will cause other interested parties. The UASNJ has provided no facts on which it may be concluded that the balance of the equities favors them. Further delaying the date on which this change will become operative will adversely affect New Jersey automobile insureds.

In addition, the challenged adoption is the culmination of the Department's most recent efforts to fulfill the statutory mandate to establish comprehensive fee schedules that contain costs while providing a fair level of reimbursement for services. The rules implement the beneficial public policies that the application of current and comprehensive PIP fee schedules were intended to serve, including the dampening effect such schedules have on the administrative costs of providing PIP coverage and medical care to auto accident victims. The adoption of the amendments to Appendix Exhibit 6 that address the fees that may be charged by acupuncturists whose services are provided to accident victims as part of a bundle of services on the same day will reduce the upward pressure on rates currently caused by the separate billing of such procedures.

An objective evaluation of the foregoing compels me to conclude that the benefits of amended Appendix Exhibit 6 going into effect on January 4, 2013, outweigh the conjectural

inefficiencies and unsubstantiated claims of economic loss the UASNJ claim may result if their application is denied. Thus, the balance of equities does not support granting the requested relief.

IRREPARABLE HARM

Irreparable harm will not result to the members of the UASNJ or their patients if the stay is denied. UASNJ argues that if the rules go into effect providers will be required to create new claims submission systems, which will result in inefficiency and wasteful repetition of claim processing. These assertions are at best speculative. The UASNJ avers that providers would be required to modify their claim submission systems a second time if, after having initially done so in response to the adoption, UASNJ succeeds in its challenge to the rules, resulting in a reversion to the fee schedules that existed prior to the January 4, 2013 operative date of the new and amended rules. In reality, providers will merely need to change the amounts of their currently billed fees to the maximum amounts established in the amended schedules for services rendered on or after January 4, 2013. In addition, the process of providers generating and submitting bills to insurers for reimbursement takes time. The lag between rendering the service and billing for that service will allow providers adequate time to adjust to the new fee amounts. Moreover, if bills are submitted by providers at rates other than the amounts specified in the schedules, the impact of such over or underbilling will be null because insurers themselves will adjust payment amounts to comply with the fee levels prescribed in the schedules. Moreover, it is inevitable that both providers and insurers will be processing bills under both fee structures until the bills for all services rendered prior to the operative date of the rules have been submitted and paid. Such a period of operating under dual claims systems will be required regardless of the amounts included in the amended fee schedules. Finally, while complying with such a reversion to the

former rules might be frustrating and inefficient, the UASNJ's position inherently recognizes the ability of providers to realign and readjust their systems to restore the status quo ante. This argument alone demonstrates that the prospective harm on which UASNJ cites in their stay request is not "irreparable."

Notably, much of the projected harm cited by UASNJ is essentially monetary in nature. The courts have consistently held that the loss of income or pecuniary harm does not constitute irreparable harm for purposes of obtaining an interlocutory injunction. Bd. of Ed. of Union Beach v. N.J. Ed. Ass'n, et al, 96 N.J. Super. 371, 391 (Ch. Div. 1967), aff'd 53 N.J. 29 (1968).

UASNJ also asserts that a failure to stay the rules will create a risk that patients who require both immediate acupuncture and chiropractic treatment or physical therapy will delay or forego treatment out of concerns related to coverage or cost, which will compromise the quality of and access to care. Like their argument with respect to the inefficiencies that would result from duplicative system modifications by providers, these arguments are also purely speculative. The UASNJ has supplied no facts in support of their conclusions, and has merely listed a speculative parade of horrors that will result from the rules becoming operative. Indeed, during each adoption of PIP rule amendments, one or more parties have made similar arguments; however, each PIP adoption and the new fee schedules associated therewith have eventually become operative with little to no revision after appellate review, and yet, no treatment crisis has ever occurred.

Based upon the foregoing, UASNJ has failed to carry their burden and establish that irreparable harm will befall any parties should the rules go into effect on January 4, 2013.

CONCLUSION

In sum, UASNJ has failed to demonstrate by clear and convincing evidence any of the four prerequisites it was their 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 21st day of December, 2012.

A handwritten signature in black ink, appearing to read 'K. Kobylowski', written over a horizontal line.

Kenneth E. Kobylowski
Acting Commissioner

PIP Stay Order United Acupuncture Society of NJ/inoord