

THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re Petition of Margaret McCarthy

Docket No. INS 13-038-AP

**MOTION TO DISMISS PETITION WITHOUT ADJUDICATIVE HEARING
BY INTERVENING PARTY ANTHEM BLUE CROSS AND BLUE SHIELD**

The undersigned intervening party, Anthem Blue Cross and Blue Shield (“Anthem”),¹ hereby moves the Hearing Officer to dismiss Petitioner Margaret McCarthy’s Petition For Hearing Pursuant To RSA 400-A:17 dated November 6, 2013 (“Petition”) without proceeding with an adjudicative hearing for two reasons: (1) Ms. McCarthy’s Petition was filed untimely under RSA 400-A:17, III and IV; and (2) Ms. McCarthy does not fulfill the requirements of grievement under RSA 400-A:17 II(b).

I. Petitioner McCarthy’s November 6, 2013 Petition Was Untimely And Should Not Be Given Further Consideration.

The Petition should be dismissed because it was not filed within the applicable thirty (30) day limitation set forth in Section III of RSA 400-A:17. In support of this basis for dismissal, Anthem incorporates here and makes all of the arguments demonstrating untimeliness set forth in its April 3, 2014 Motion For Rehearing (Exhibit B hereto), which was filed in response to the Department’s March 28, 2014 Order And Notice Of Hearing (Exhibit A hereto); its April 14, 2014 Reply Brief Upon Rehearing (Exhibit C hereto); and its

¹ Anthem’s April 4, 2014 Motion To Intervene was granted by the Commissioner without limitation by Order of April 11, 2014.

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April 15, 2014 Sur Reply Upon Rehearing (Exhibit E hereto),² which responded to Petitioner McCarthy's belated April 15, 2014 Affidavit (Exhibit D hereto).

In addition, Anthem further submits that the Petition should be dismissed as statutorily untimely because the Hearing Officer's most recent April 30, 2014 Ruling On Timeliness Of Petitioner McCarthy's Petition For Hearing Pursuant To RSA 400-A:17 ("Ruling On Timeliness") (Exhibit F hereto) was contrary to New Hampshire law because it improperly interpreted the timeliness requirements set forth in RSA 400-A:17, and improperly applied those statutory requirements to find that Ms. McCarthy's Petition was timely. Anthem asserts that the Hearing Officer erroneously concluded that the thirty day timeframe for filing an application for an adjudicative hearing challenging the Department's Decision³ only began to run when Petitioner first knew or should have known that she was allegedly aggrieved. In fact, the Ruling On Timeliness (Exhibit F) inappropriately tangles the statutory requirement of aggrievement with the separate and distinct statutory requirement of timeliness of an application by an aggrieved applicant. Specifically, per Section IV of RSA 400-A:17, upon receiving an application seeking an adjudicative hearing, the Commissioner's first order of business is to determine whether the application is timely (RSA 400-A:17, IV states in pertinent part: "If the Commissioner finds that the application

² Exhibits B, C and E are hereby referred to as "Anthem's April, 2014 Rehearing Submissions".

³ As is clearly stated in Paragraph 15 of the Petition and as correctly stated by the Hearing Officer in the Ruling On Timeliness, the act or order being challenged by Ms. McCarthy's Petition is the Department's July 31, 2013 Decision recommending Anthem's Exchange Plans for certification as qualified health plans by the Center For Consumer Information And Insurance Oversight ("CCIIO"), a division of the Centers For Medicare And Medicaid Services ("CMS") of the federal government.

is timely, made in good faith, and that the applicant would be so aggrieved ... he shall hold a hearing ...”). Clearly, the timeliness of the application is the threshold determination that must be made before time and attention is given to whether the applicant has demonstrated aggrievement.

The terms of RSA 400-A:17, III clearly mandate that, to be considered, an application must be filed within thirty (30) days after the applicant knew or should have known only of the act or order being challenged. Here, then, the threshold determination of whether Ms. McCarthy’s Petition was timely is limited to a determination of when she knew or should have known about the Department’s Decision. On this issue, even if, for argument sake, one were to set aside the considerable evidence of untimeliness provided by Anthem’s April, 2014 Rehearing Submissions, Ms. McCarthy’s own Affidavit (Exhibit D) is dispositive that she had actual knowledge of the Department’s Decision in mid-September, 2013. Consequently, it is indisputable that Ms. McCarthy’s Petition, which was filed on November 6, 2013,⁴ was filed at least thirty seven (37) days and as many as forty nine (49) days after Ms. McCarthy admits she knew of the Department’s Decision.

To be sure, RSA 400-A:17, III speaks only to the applicant’s knowledge or reasonable discovery of the act or order being challenged – in this matter, the Department’s Decision is the trigger for the thirty day clock to start ticking; the statute does not by its terms delay the start of the clock to the time the applicant becomes aware or reasonably should have become aware of his or her injury alleged to have been caused by the challenged act or

⁴ The Hearing Officer is requested to take official notice of the Petition’s filing on November 6, 2013.

order. The statutory thirty (30) day limitation for filing an application simply is not tied to aggrievement. Finally, as this limitation provision is set forth in a statute, not in an insurance department regulation, the Department must give the provision its ordinary meaning and apply it accordingly.

In this regard, the New Hampshire Legislature has clearly demonstrated that, when it intends to condition a limitation period on knowledge of both the third party's act at issue and the causation of injury, it knows how to do so. For example, in Correia v. Town of Alton, 157 N.H. 716 (2008), the court addressed the issue of whether the procedures set forth in RSA chapter 43 apply to the termination of police officers. The court determined that, "had the legislature intended RSA chapter 43 to apply, it would have explicitly stated such ..." Id. at 719. In reaching this conclusion, the Correia court reasoned:

Of the seven categories of public officers covered by RSA chapter 41 (selectmen, town clerk, town treasurer, town auditor, collector of taxes, overseers of public welfare, and permanent constables and police officers), the legislature prescribed RSA chapter 43 removal procedures for only three categories. Reading this in the context of the overall statutory scheme and not in isolation ... requires that we interpret this as intentional. Had the legislature intended for police officers to be afforded RSA chapter 43 procedures, it knew what language to use.

(Citation omitted; internal quotation marks omitted.) Also, in Town of Hudson v. Baker, 133 N.H. 751, 584 A.2d 177 (1990), the court addressed whether the Superior Court properly reviewed, *de novo*, a demolition order of the Nashua District Court. The court held: "[T]he superior court erred in holding a trial *de novo* when no such trial was authorized by the

statute. The legislature could have explicitly required a *de novo* trial on appeal to the superior court under RSA chapter 155-B, as it has done on appeals under other statutes. See, e.g., RSA 169-B:29; RSA 169-D:20. If the legislature desires a full *de novo* hearing on appeal, it knows how to require it by using those words.” (Internal quotation marks omitted.) Id. at 752. See also John A. Cookson Co. v. N.H. Ball Bearings, 147 N.H. 352, 357, 787 A.2d 858 (2001) (“It is proper to presume that the legislature was aware of the difference between ... words and chose to use them advisedly”); Appeal of Baldoumas Enters., 149 N.H. 736, 739, 829 A.2d 1056 (2003) (stating that language elsewhere in statutory scheme “demonstrates that when the legislature intends to create liability for negligence instead of strict liability, it knows how to do so”).

In fact, on point with the timeliness issue in this matter, the Legislature clearly demonstrated its ability to utilize the discovery rule judiciously in connection with the limitation of actions in RSA 508:4 Personal Actions, which states in its entirety as follows:

“I. Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

II. Personal actions for slander or libel, unless otherwise provided by law, may be brought only within 3 years of the time the cause of action accrued.”

Instructively, in Section II of RSA 508:4 above, the Legislature enacted a three (3) year statute of limitations for slander and libel without providing that the limitation period begins to run only when the injury from the slander or libel is discovered. Premium Management, Inc. v. Walker, 648 F.2d 778, 1981 U.S. App. LEXIS 13297 (1st Cir. NH 1981) (the general rule dates the accrual of the cause of action from the time the damages occurred and, ordinarily, ignorance of the cause of action on the part of the plaintiff does not toll the statute of limitations). However, in Section I of RSA 508:4, the Legislature enacted the same three year limitation period for all personal actions (other than actions for slander and libel), but added that, when the causal relationship between the challenged act or omission is not discovered and could not reasonably have been discovered at the time of the act or the omission, **“the action shall commence within three (3) years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.”** (Emphasis added) Consequently, in Section I, but not in Section II of RSA 508:4, and most importantly here, not in Section III of RSA 400-A:17, the Legislature incorporated the discovery rule to have the limitation period run only from the point in time when both the act and injury are known or should have been known.

Clearly, the New Hampshire Legislature has deemed it appropriate to prevent the extinguishing of a right of action before its holder knows or should have known of its existence in certain circumstances (e.g., for personal actions other than for slander or libel under RSA 508:4, I) and it has deemed it appropriate to use a more definitive limitation

period to prevent stale claims in other circumstances (e.g., for personal actions for slander or libel under RSA 508:4, II, and for applications for adjudicative hearings challenging the acts and orders of the Insurance Commissioner under RSA 400-A:17, III). When viewed against this Legislative intent, RSA 400-A:17, III by its terms provides that Ms. McCarthy's Petition was required to be filed within thirty (30) days after her knowledge of the Department's Decision at issue, not within thirty (30) days of her knowledge that she was aggrieved by that Decision. By her admission in her own Affidavit (Exhibit D), Ms. McCarthy was aware of the Department's Decision in mid-September, 2013 and consequently, her Petition is untimely.

WHEREFORE, for all the foregoing reasons, the Petition should be dismissed without further adjudication.

II. Petitioner McCarthy Cannot Establish Aggrievement And Therefore She Does Not Have Standing To Seek An Adjudicative Hearing Challenging The Department's Decision.

The Petition also should be dismissed because Ms. McCarthy does not have standing to seek an adjudicative hearing challenging the Department's Decision. Specifically, neither her Petition nor any of her subsequent filings with the Department demonstrate that she has suffered any injury in fact as a direct result of the Department's Decision. In support of this basis for dismissal, Anthem hereby incorporates here and makes its arguments demonstrating Petitioner McCarthy does not have standing set forth in its December 2, 2013 Brief (Exhibit F hereto); its December 11, 2013 Supplemental Brief Re: Aggrievement (Exhibit G hereto);

its March 11, 2014 Second Supplemental Brief (Exhibit H hereto); and its April 3, 2014 Motion For Rehearing (Exhibit B).

WHEREFORE, for all the foregoing reasons, the Petition should be dismissed without further adjudication.

Dated: May 7, 2014

By 
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CERTIFICATION

This is to certify that a copy of the foregoing was emailed, sent via facsimile and/or mailed, postage prepaid, on the above-written date, to:

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