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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0685-21**

**MARC S. MENKOWITZ, MD
LLC and ORTHOPAEDIC SPINE
SPECIALISTS OF NJ, LLC,**

Plaintiffs-Appellants,

v.

**HORIZON BLUE CROSS BLUE
SHIELD OF NEW JERSEY,**

Defendant-Respondent.

Submitted November 10, 2022 – Decided August 24, 2023

Before Judges Gooden Brown and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2059-21.

Maggs McDermott & DiCicco, LLC, attorneys for appellants (Michael M. DiCicco, of counsel and on the briefs; Kyle R. Tognan, on the briefs).

Stradley Ronon Stevens & Young, LLP, attorneys for respondent (Adam J. Petitt, of counsel and on the brief).

PER CURIAM

Plaintiffs Marc S. Menkowitz, MD LLC (Menkowitz) and Orthopaedic Spine Specialists of NJ, LLC (OSS) appeal from the September 24, 2021 order of the Law Division granting defendant Horizon Blue Cross Blue Shield of New Jersey's (Horizon) motion to dismiss their complaint for failure to state a claim upon which relief can be granted pursuant to Rule 4:6-2(e). We affirm.

I.

The following facts are alleged in the complaint. In 2014, S.B.¹ suffered a spinal injury while shoveling snow during his employment at Long Beach Board of Education (BOE). S.B. was enrolled in the State Health Benefits Program (SHBP), a self-funded health benefits program established by the New Jersey State Health Benefits Program Act, N.J.S.A. 52:14-17.24 to -45. Pursuant to a contract with the State, Horizon is the administrator of SHBP. Its responsibilities include the processing of benefit claims. At the time of his injury, S.B. had health coverage under SHBP's NJ Direct Plan, which is administered by Horizon. Although Horizon administers SHBP and the NJ Direct Plan, the State Health Benefits Commission (Commission) has the sole statutory authority to establish the terms and conditions for coverage, make payments on claims, and limit or exclude benefits. N.J.S.A. 52:14-17.25.

¹ The complaint identifies the injured worker only by his initials.

Payments on SHBP claims are not made from Horizon's funds, but come from the State Treasury.

On February 24, 2014, Menkowitz and OSS performed a cervical fusion on S.B. Menkowitz billed \$152,243 and OSS billed \$151,930 for the surgery (collectively, the claim). S.B. sought coverage for the claim through the BOE's workers' compensation insurance carrier. On June 20, 2019, the Division of Workers' Compensation (Division), having found that S.B. was not entitled to benefits because his injuries were not caused by actions taken in the course of his employment, dismissed his claim with prejudice.

On May 14, 2014, while S.B.'s workers' compensation claim was pending, Menkowitz and OSS submitted a claim to Horizon for the cost of S.B.'s surgery. Horizon initially denied the claim on the ground that S.B. would receive workers' compensation benefits. However, nearly seven years later, in April 2021, after the Division denied S.B.'s claim, Horizon approved the payment of \$150,609.74 to Menkowitz and \$36,800 to OSS on the claim. The payments did not include interest.

Menkowitz and OSS subsequently filed a complaint in the Law Division alleging they were owed interest on the payments. Plaintiffs alleged that: (1) pursuant to N.J.A.C. 11:22-1.5(a), Horizon, as an authorized agent of SHBP,

had forty days to remit payment on the claims; and (2) because Horizon remitted payment beyond the forty-day deadline, plaintiffs were entitled, pursuant to N.J.A.C. 11:22-1.5(e), to simple interest of twelve percent per annum on the payments.² The regulations on which plaintiffs relied, commonly known as the prompt payment regulations, were promulgated by the Department of Banking and Insurance (DOBI) pursuant to the Health Information Electronic Data Interchange Technology Act (HINT Act), and the Health Claims Authorization, Processing and Payment Act (HCAPPA), both of which are codified as various provisions of Titles 17, 17B and 26 of the New Jersey Statutes Annotated.

Horizon moved to dismiss the complaint for failure to state a claim upon which relief could be granted pursuant to Rule 4:6-2(e). It argued that the prompt payment regulations do not apply to it because: (1) it was not acting as an insurer of S.B., but as an administrator of SHBP, which issued a health benefits program to S.B., when it remitted payment to plaintiffs; and (2) SHBP, on whose behalf it was an authorized agent, was not engaged in the business of

² In their complaint, plaintiffs alleged they are owed ten percent interest pursuant to N.J.A.C. 11:22-1.6(c). However, as the trial court correctly observed, "[t]he language regarding interest to be added to claims not timely paid is within N.J.A.C. 11:22-1.5(e)." Additionally, although plaintiffs alleged that they were entitled to ten percent interest, the regulation refers to twelve percent interest. N.J.A.C. 11:22-1.5(e). Plaintiffs refer to the correct regulation and interest rate in their merits brief.

insurance and is not, therefore, a "carrier" within the meaning of the prompt payment regulations. In addition, Horizon argued that even if the regulations were applicable to it, the HINT Act and HCAPPA do not create a private right of action to recover interest on late payments. According to Horizon, the authority to enforce the prompt payment regulations rests solely with the DOBI Commissioner. Finally, Horizon argued that if plaintiffs do have a private right of action to recover interest, the proper defendant would be SHBP, NJ Direct, or the State, but not Horizon, which has no financial responsibility to pay SHBP's claims. Plaintiffs opposed the motion.

On September 4, 2021, Judge Henry P. Butehorn issued a written opinion granting Horizon's motion. Judge Butehorn explained that N.J.A.C. 11:22-1.5(e) requires the payment of interest where "a health carrier or its agent" fails to pay a "claim" within a specified period. A "claim," the judge found, is

a request by a covered person or a provider for payment of benefits under a policy or contract issued by a carrier for which the financial obligation for the payment of a claim under the policy or contract rests in whole or in part with the carrier.

[N.J.A.C. 11:22-1.2(a).]

The court found that plaintiffs failed to allege a crucial element to establish an entitlement to interest on the late payment of a claim: that Horizon

was a carrier that issued a health benefits plan to S.B. pursuant to which it was financially responsible for paying their claim. Nor, the court found, did plaintiffs allege that SHBP, on whose behalf Horizon was authorized to act, is a carrier who issued a health benefits plan to S.B. The court concluded that SHBP is not a "carrier" because it is not "an insurance company, health service corporation, hospital service corporation, medical service corporation, or health maintenance organization authorized to issue health benefits plans in this State" N.J.A.C. 11:22-1.2. As a result, the judge concluded, Horizon was not acting as an agent of a carrier when it issued payment on plaintiffs' claim.

Because plaintiffs could not amend the complaint to allege that Horizon was a carrier or an authorized agent of a carrier under the regulations, and thus required to pay interest on their claim, Judge Butehorn dismissed the complaint with prejudice. A September 24, 2021 order memorializes the court's decision.³

This appeal followed.

II.

We apply a de novo standard of review to a trial court's order dismissing a complaint under Rule 4:6-2(e). See Stop & Shop Supermarket Co., LLC v.

³ In light of his conclusions, Judge Butehorn elected not to decide whether the HINT Act or the HCAPPA created a private right of action for recovery of interest on late payments by carriers or authorized agents of carriers.

Cnty. of Bergen, 450 N.J. Super. 286, 290 (App. Div. 2017) (quoting Teamsters Loc. 97 v. State, 434 N.J. Super. 393, 413 (App. Div. 2014)). Under the rule, we owe no deference to the motion judge's conclusions. Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011). Our "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (citing Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987)). "A pleading should be dismissed if it states no basis for relief and discovery would not provide one." Rezem Family Assocs., LP, 423 N.J. Super. at 113 (citing Camden Cnty. Energy Recovery Assoc., LP v. N.J. Dep't of Env'l. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd, 170 N.J. 246 (2001)).

We have carefully reviewed plaintiffs' arguments in light of the record and applicable legal principles and affirm the September 24, 2021 order for the reasons stated by Judge Butehorn in his thorough and well-reasoned written opinion. We add the following.

SHBP "provides health benefits coverage to employees of the State and other public employees whose employers participate in the program." Grillo v. State, 469 N.J. Super. 267, 271 (App. Div. 2021). As noted above, the

Commission is SHBP's governing body and has "final authority and financial responsibility for the" program. Murray v. State Health Benefits Comm'n, 337 N.J. Super. 435, 439 (App. Div. 2001).

"Although the State contracts with health insurers to administer various benefit plans for program participants, the [Commission] alone has the authority and responsibility to make payments on claims" Beaver v. Magellan Health Servs, Inc., 433 N.J. Super. 430, 433 (App. Div. 2013). "The [SHBP] is, in effect, the State of New Jersey acting as a self-insurer." Ibid. (quoting Burley v. Prudential Ins. Co. of Am., 251 N.J. Super. 493, 495 (App. Div. 1991)). "In essence, the State pays the benefits and Horizon administers the claims." Ibid. "A plan is ordinarily defined as self-funded when 'it does not purchase an insurance policy from any insurance company in order to satisfy its obligations to its participants.'" White Consol. Indus., Inc. v. Lin, 372 N.J. Super. 480, 486 (App. Div. 2004) (quoting FMC Corp. v. Holliday, 498 U.S. 52, 54 (1990)). "Provided that the administrator does not assume any financial risk relating to benefit claims, a plan remains self-funded even if it contracts with an insurance company to provide administrative services." Ibid.

Pursuant to N.J.A.C. 11:22-1.5(a), carriers are "required to make prompt payment of claims." Palisades Ins. Co. v. Horizon Blue Cross Blue Shield of

N.J., 469 N.J. Super. 30 40, (App. Div. 2021). As Judge Butehorn succinctly concluded, plaintiffs did not, and could not, allege that Horizon was a carrier that issued a health benefits plan to S.B. and was financially responsible to pay his claims or that it acted as an authorized agent of such a carrier. Horizon administers SHBP pursuant to a contract, but did not issue a health benefits plan to S.B. and is not financially responsible to pay plaintiff's claims. SHBP, which issued the health benefits plan at issue, is a State-created entity that carries out New Jersey's self-insurance of employee health benefits through the State Treasury. It is none of the entities that comprise the regulatory definition of a carrier. Dismissal of the complaint with prejudice was warranted.

In light of these conclusions, we agree with Judge Butehorn's decision not to decide whether the HINT Act or HCAPPA create a private right of action for recovery of interest on late payments of claims.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION