



**BEFORE THE DIRECTOR OF
INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION
STATE OF MISSOURI**

IN THE MATTER OF:)	
)	
BLUE CROSS AND BLUE SHIELD)	Case No. 070815337C
GROUP ENROLLMENT FORMS,)	
)	
and)	
)	
BLUE CROSS AND BLUE SHIELD)	Case No. 070815338C
INDIVIDUAL ENROLLMENT FORMS.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

NOW on this 10th day of October, 2007, the Director of the Department of Insurance, Financial Institutions and Professional Registration ("Director"), has taken up the matter for summary determination on the merits without the need for an evidentiary hearing. The Director, having considered the submissions of the Insurance Market Regulation Division ("Division") and Blue Cross and Blue Shield of Kansas City ("BCBSKC"), the full record before the Director, and being fully informed in the premises, does hereby issue the following findings of facts, conclusions of law and order in this matter:

FINDINGS OF FACT

1. On March 8, 2007, BCBSKC submitted the following group enrollment amendments to the Division for review and approval:
 - Blue Cross and Blue Shield of Kansas City, MO # 0703120013, Form # BCBSKC-214-07-M
 - Good Health HMO, Inc. d/b/a Blue-Care, MO # 0703120012, Form # BC-310-07-M

- Blue Cross and Blue Shield of Kansas City, d/b/a Blue-Advantage, MO # 070312001, Form # BA-407-07-M

2. On March 8, 2007, BCBSKC submitted the following individual enrollment amendments to the Division for review and approval:

- Blue Cross and Blue Shield of Kansas City, MO # 0703120010, Form # PPOI-201-07-M
- Good Health HMO, Inc. d/b/a Blue-Care, MO # 0703120009, Form # BCI-301-07-M

3. The group enrollment amendments contain the following Special Enrollment Periods provision, which includes the newborn coverage language:

New Dependents: If a new Dependent is acquired by an Employee due to marriage, birth of a child, adoption of a child, or placement for adoption of a child, the new Dependent, the spouse of an Employee and/or Employee who previously declined coverage may enroll during this Special Enrollment Period, even if coverage was previously declined. To enroll during this Special Enrollment Period, an Employee must submit to Us a completed Employee application and any additional Premium due within 31 days after the date of marriage, birth, adoption, or placement for adoption. Documentation verifying the event must be provided, if requested.

Notwithstanding the above paragraph, if the Employee previously has elected Dependent coverage and such coverage is in effect on the date of the newborn child's birth, then the Employee's newborn child will be covered automatically for 31 days from the moment of birth. No additional Premium will be assessed for coverage for these 31 days. If additional Premium is due, the Employee must submit to Us a completed Employee application requesting coverage for such newborn to be added within 31 days of the child's birth on order to continue such child's coverage beyond the initial 31 days. Coverage for such a newborn will be subject to all of the terms and conditions of the Contract . . .

4. The individual enrollment amendments contain the following Enrollment provision, which includes the newborn coverage language:

If a new Dependent child is acquired by the Contractholder due to birth of a child, adoption of a child, or placement for adoption of a child, the new Dependent child may be enrolled for coverage under the Contract. To enroll, the Contractholder must submit to Us a completed Contractholder application and any additional Premium due within 31 days after the date of birth, adoption, or placement for adoption. Documentation verifying the event must be provided, if requested.

Notwithstanding the above paragraph, if the Contractholder has previously elected Dependent coverage and such coverage is in effect on the date of the newborn child's birth, then the Contractholder's newborn child will be covered automatically for 31 days from the moment of birth. No additional Premium will be assessed for coverage for these 31 days. If additional Premium is due, the Contractholder must submit to Us a completed Contractholder application requesting coverage for such newborn to be added within 31 days of the child's birth in order to continue such child's coverage beyond the initial 31 days. Coverage for such a newborn will be subject to all of the terms and conditions of the Contract . . .

5. On April 20, 2007, the Division sent letters to BCBSKC informing it that the forms would not be approved as submitted. The Division asked whether a newborn would be automatically covered for 31 days from the moment of birth even if the employee does not have dependent coverage established. The Division requested BCBSKC to resubmit the filing "incorporating the required changes."

6. BCBSKC responded via letters dated April 30, 2007, explaining the language in the proposed amendments – that the first paragraph provides for newborn coverage upon submission of an application by the employee or contractholder and payment of a premium, and that the second paragraph provides 31 days of coverage for a newborn, without additional premium, if family coverage is already in force at the time of the newborn's birth.

7. On May 15, 2007, the Division again rejected the forms, stating that newborns are covered from birth for 31 days regardless of whether the employee or contractholder has dependent coverage (at the time of birth) and additional premiums and applications would be necessary only to continue coverage beyond the 31 day period.

8. In letters dated May 31, 2007, BCBSKC expressed its disagreement with the Division's interpretation of the statutes and its intention to request that the Department revisit its position and request an administrative hearing.

9. In letters dated July 11, 2007, the Division disapproved all of the forms, stating, "The Division of Insurance Market Regulation will continue to enforce Sections 376.406 and 376.816 and apply the *Kelly v. Pan-American Life Insurance Company, et al.*, as precedent in Missouri."

10. On August 3, 2007, BCBSKC, by and through counsel, requested a hearing on the disapproval of the form amendments, pursuant to Section 376.405.

CONCLUSIONS OF LAW

11. The Director has authority to hold a hearing and approve policy forms pursuant to Section 376.405.

12. Section 376.405.3, states:

The director of insurance shall approve only those policy forms which are in compliance with the insurance laws of this state and which contain such words, phraseology, conditions and provisions which are specific, certain and unambiguous and reasonably adequate to meet needed requirements for the protection of those insured. The disapproval of any policy form shall be based upon the requirements of the laws of this state or of any regulation lawfully promulgated thereunder.

13. The relevant portions of Section 376.406 state:

1. All health benefit plans which provide coverage for a family member of an enrollee shall, as to such family member's coverage, also provide that the health benefits applicable for children shall be payable with respect to a newly born child of the enrollee from the moment of birth.

* * *

3. If payment of a specific premium or subscription fee is required to provide coverage for a child, the health benefit plan may require that notification of birth of a newly born child and payment of the required premium or fees must be furnished to the health carrier within thirty-one days after the date of birth in order to have the coverage continue beyond such thirty-one-day period.

* * *

14. Two federal district courts have rendered decisions interpreting the requirement of Section 376.406 with regards to automatic coverage of newborns for 31 days from birth. No agency of the State of Missouri or the State itself was a party to either of these actions.

15. The cases are: *Shaw v. Republic Nat'l Life Ins. Co.*, 622 F.Supp. 93, decided in the United States District Court, Eastern District, in 1985; and *Kelly v. Pan-American Life Ins. Co.*, 765 F.Supp. 1406, decided in the United States District Court, Western District.

16. *Shaw* was a case between two insurance companies over responsibility for medical expenses for a baby boy in the first 31 days after birth. The parents of a baby boy were each insured by a different company through their respective employers. Mr. Shaw had not made a written election of dependent coverage. Mrs. Shaw had made a valid election of dependent coverage. Mr. Shaw's insurer, Travelers, denied coverage on the basis that he had not elected dependent coverage at or before the time his son was born. Mrs. Shaw's insurer claimed that Section 376.406 required Mr. Shaw's insurer to automatically cover the newborn for the first 31 days of his life, and that under the respective coordination of benefits clauses, his insurer was responsible for 80% of the costs and Mrs. Shaw's insurer, as the secondary insurer, was responsible for only 20%.

17. The Court found the language of the statute to be plain and unambiguous and found "The statute can be construed to operate only to cause an insured's family or dependent coverage to apply automatically to a newborn child at birth." *Id.* at 96-97. Since Mr. Shaw did not have dependent coverage when the child was born, Travelers did not have to automatically cover any of the expenses of the child's first 31 days. *Id.* at 97.

18. *Kelly* was a case between the insured and the insurer. Mrs. Kelly was covered by group health coverage through Pan-American. A baby born to Mr. and Mrs. Kelly had a congenital heart defect and the medical bills for her first 31 days were \$32,000. Mrs. Kelly's insurer denied it was responsible for the costs.

19. Initially, consistent with the holding in *Shaw*, the Court stated that the sole factual issue was whether Mrs. Kelly was carrying dependent health insurance through the Pan-American plan at the time the baby was born. The Court went on to state that if she was not carrying such coverage, Pan-American was not responsible for the medical expenses of the baby. But when the Court actually issued its decision on the issue, "upon further review" it found that Section 376.406 did mandate insurance coverage of Mrs. Kelly's baby.

20. The Court explained that its earlier pronouncement that whether Mrs. Kelly had dependent or family coverage when the baby was born was based upon the Judge's reading of *Shaw*. The Judge, in subsequently deciding that the Kelly baby was covered, announced that the result in *Shaw* was correct, but that different facts in the case in front of him led to a different result.

21. The Court stated that *Shaw* was correctly decided because the insured, Mr. Shaw, did not carry coverage for his wife under the policy at issue. The Court stated that *Kelly* was critically different than *Shaw* in that Mrs. Kelly "the family member who bore [the baby] was covered by the insurance policy." The Court's rationale:

Section 376.406 appears to have been drafted primarily to extend health insurance to a newborn of an insured's spouse where the insured's spouse is also covered. The language of § 376.406, however, is sufficiently broad to require mandatory health insurance coverage of a newborn child borne by the insured

herself. The insured, after all, is a family member of her own family and is the person for which insurance is provided.

In conclusion, this Court finds that Mo. Rev. Stat. § 376.406 mandates that a health insurance policy covering an insured provide health insurance on a child borne by the insured from the moment of birth.

22. Despite the stated affirmation of *Shaw* in *Kelly*, the decisions are in conflict with each other.

23. *Kelly* uses a flawed analysis depending upon the gender of the insured, and the result of truly following *Kelly* would require disparate treatment based upon the gender of the insured.

24. The Division reasoned that it was following *Kelly* in its denial of BCBSKC's policy forms. The Division has actually followed neither case, but instead applied a portion of the ruling in *Kelly*.

25. "The primary rule of statutory construction is to give effect to legislative intent as reflected in the plain language of the statute." *State v. Blocker*, 133 S.W.3d 502, 504 (Mo. banc 2004)(citing *State v. Grubb*, 120 S.W.3d 737, 739 (Mo. banc 2003)). Each word and phrase used in a statute must be given meaning. *Blocker*, 133 S.W.3d at 504; accord *State v. Harris*, 156 S.W.3d 817, 822 (Mo.App. W.D. 2005). "When a term is undefined, the Court looks to its plain and ordinary meaning as found in the dictionary." *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 902 (Mo. banc 2006) (citing *Tendai v. Missouri Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 369 (Mo. banc 2005)).

26. The Division's and *Kelly*'s interpretation of the term "family" as including oneself, without requiring any other person, ignores the rule of construction that undefined terms are given their common dictionary definition. *StopAquila.org*, 208 S.W.3d at 902. There is no

definition of “family” in Section 376.1350 or elsewhere that is applicable to Section 376.406.

According to the dictionary, “family” means:

- 1 : a group of individuals living under one roof and usually under one head, [or]
- 5 a : the basic unit in society traditionally consisting of two parents rearing their children; *also*: any of various social units differing from but regarded as equivalent to the traditional family <a single-parent *family*>
- b : spouse and children <want to spend more time with my *family*>

MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 452 (11th Ed. 2003)(emphasis added).

If enrollee coverage is the equivalent of family coverage, then the word “family” is being given a meaning contrary to the plain dictionary definition. If a person could be the sole member of his or her family, it would render other statutes meaningless or confusing. See, e.g., § 376.424 (“a group health insurance policy may be extended to insure the employees and members with respect to their family members or dependents, or any class or classes thereof”); § 376.531 (“Family policies may be issued insuring any two or more members of a family”).

27. The plain language of the statute supports the holding in *Shaw*. It does not support the holding in *Kelly*, nor does it support the interpretation by the Division.

28. In light of the definition of “family,” for the Director to conclude that any enrollee is entitled to automatic newborn coverage without regard to whether the enrollee has elected family, spousal or dependent coverage would require that the statute read as follows:

- 1. All health benefit plans ~~which provide coverage for a family member of an enrollee shall, as to such family member's coverage, also provide that the health benefits applicable for children shall be payable with respect to a newly born child of the enrollee from the moment of birth.~~

29. The Director cannot ignore language or rewrite the statute as he sees fit. *Blocker*, 133 S.W.3d at 504; *State v. Swoboda*, 658 S.W.2d 24, 26 (Mo. banc 1983). The Director must apply the language used by the legislature. *Id.*

30. Additionally, by expressing that the health plans which "provide coverage for a family member" must cover newborns, the Legislature was also saying that plans which do not provide such coverage do not have to cover newborns. *See Ming v. General Motors Corp.*, 130 S.W.3d 665, 669 (Mo.App. 2004)("when a statute enumerates the subjects or things on which it operates, it is generally to be construed as excluding from its effect all those not expressly mentioned.")

31. The rules of statutory construction are consistent with the reasoning and result in *Shaw*.

32. The Division's disapproval of the BCBSKC plan amendments was based upon an unsupported interpretation of the newborn coverage statute.

33. The Director concludes that *Shaw* articulates the correct standard to be applied.

34. Section 376.406 may have been enacted based upon social presumptions that are no longer current. The state of Missouri through legislation could enact a mandate that an enrollee is entitled to automatic newborn coverage without regard to whether the enrollee has previously elected family, spousal or dependent coverage, but no such mandate exists under the current statutes of Missouri.

35. Although the issue was neither raised by the Division in its disapproval, nor briefed in this matter, Section 376.406 does appear to mandate automatic newborn coverage for any child born to the spouse of an enrollee, who elected spousal coverage, but not dependent coverage.

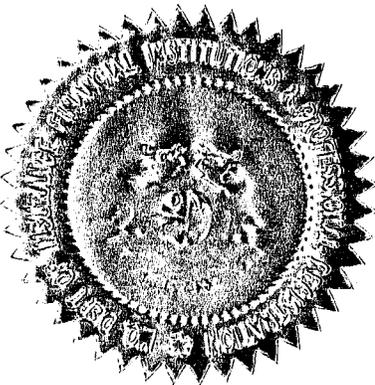
36. The director's responsibility to review policy forms under Section 376.405.3 includes a determination that the provisions are "specific, certain and unambiguous." Although it did so without statutory authority, this department has contributed to an expectation in the

market that thirty-one days of automatic newborn coverage is also mandated under an enrollee only plan. Because of the significant change in the market, which is likely to follow the release of this order, BCBSKC would be well advised to bring conspicuous attention to this change in coverage at the time of enrollment, so that the notion of automatic newborn coverage under an enrollee only plan is clearly dispelled.

ORDER

Pursuant to the authority in Section 376.405, RSMo, the Director directs the Division to review the policy forms submitted to the Division on March 8, 2007 by BCBSKC and make within ten days of this order a determination consistent with the findings of fact and conclusions of law herein.

SO ORDERED on October 10, 2007.



A handwritten signature in black ink, appearing to read "Douglas M. Ommen", written over a horizontal line.

Douglas M. Ommen
Director
Department of Insurance, Financial Institutions
and Professional Registration

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2007, a copy of the foregoing order and notice was mailed by U.S. Mail, postage prepaid, to:

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A handwritten signature in black ink, appearing to read "James R. Morris", written over a horizontal line.