

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2010-0770

Premium Research Services

v.

State of New Hampshire
Departments of Labor and Treasury

**MEMORANDUM OF LAW FOR THE STATE OF NEW
HAMPSHIRE DEPARTMENTS OF LABOR AND TREASURY**

NOW COMES the State of New Hampshire Departments of Labor and Treasury (the “State”), by and through counsel, the Office of the Attorney General, and files this Memorandum of Law pursuant to Supreme Court Rule 16(4)(b).

I. INTRODUCTION AND BACKGROUND FACTS

Premium Research Services (“Premium Research”) brought a Petition against the New Hampshire Departments of Labor and Treasury pursuant RSA 91-A:7 seeking the disclosure of documents related to workers compensation payment coverage, and more specifically the Second Injury Fund.¹ See Petitioner’s Addendum (“PA”) 15-22. Premium Research, prior to the petition, had first requested information from the Department of Labor concerning specific claims under the Workers Compensation, Second Injury Fund, dealing with reimbursement. PA. 23-24.

The Department of Labor (“Department”) denied the request given the statutory exception in the workers compensation law that exempts from disclosure under RSA 91-A “proceedings and records of the department of labor with respect to workers’ compensation

¹ The Second Injury Fund provides employers an opportunity to limit their workers’ compensation costs where an injury would leave an employee more disabled than the same injury would leave a non-impaired worker. See, e.g., RSA 281-A:54, :55.

claims under RSA 281-A...” . RSA 281-A:21-b; PA. 25. Premium Research, undeterred by the Department’s response subsequently requested specific forms from the Department, stating “[a] copy of [WCSIF-2a] for each Second Injury Fund claim...” and “form 9WCA-2 with the employee’s name redacted [would] meet [their] requirements.” PA. 26. The Department, again, denied the request stating that the provisions of RSA 281-A:21-b could not be “ignored or avoided” simply by redacting the name of the injured worker. PA. 27.

The Department moved to dismiss the RSA 91-A:7 petition on grounds of the unambiguous statutory exception provided under the workers compensation law for “records of the department of labor with respect to workers’ compensation claims under RSA 281-A.” The court scheduled a hearing on the petition for May 3, 2010.

At the hearing Premium Research argued that it’s purpose in seeking the material was to ensure that the rules of the National Council on Compensation Insurance were followed and that the State was construing the statutory exemption in an overbroad manner. TrI. (May, 2010) 17. The State argued that the express and unambiguous provisions of the statute exempt Department of Labor “records” related to workers compensation claims.

The State asserted that the words in RSA 281-A:21-b are not narrowly construed or limited to certain types of “workers compensation records” and there is no reason to look beyond the language of the statute at legislative history or at the motives of a petitioner who is requesting documents. TrI. 21-22. The court agreed that the “language of the statute seems straightforward....” TrI. 24. The State also argued that the primary purpose of RSA 91-A is to inform the citizenry about the activities of government and the requested information does not inform the public of what the government is up to, but rather shows what insurance carriers are doing. TrI. 22, 29-30.

The court, at the close of the hearing, requested additional information regarding the purpose of the recent amendments to the statute. TrI. 33. Both the Petitioner and the State were provided an opportunity to respond to that issue. PA. 34-48. The court then held a second hearing on September 9, 2010, which primarily focused on the legislative history of the statute. TrII. (September, 2010). At that hearing the State showed the court the forms that the Petitioner sought for every claim under the second injury fund. TRII. 5-6; App.² 1-2. Premium Research then indicated that it was interested in obtaining information related to the employer name, insurance company name, and date of injury. TrII. 12-13.

On September 14, 2011 the Merrimack County Superior Court, (McNamara, J.) issued an order finding that the words in the statute are clear and that the information sought by the Petitioner “is plainly a record of the Department of the Labor with respect to workers’ compensation claims under RSA 281-A.” PA. 102.

The Petitioner moved for reconsideration claiming that the State could articulate no policy justification for its “slavish adherence” to a statutory construct (PA. 86) and that construing the statute to deny the request fails to effectuate the overall purpose of the statute and allows an absurd and unjust result. PA. 85. The Petitioner never argued that the result violated Part 1, Article 8 of the New Hampshire Constitution.³

II. ARGUMENT

A. Standard of Review

The interpretation of statute, whether it is New Hampshire’s right to know law, or New Hampshire’s workers compensation law is ultimately a question to be resolved by the supreme

² App refers to the Appendix to the State’s Memorandum of Law

³ Where an issue is not properly raised in the superior court it cannot be properly brought before the supreme court on appeal. *See, e.g., State v. Dilboy*, 160 N.H. 135, 145 (2010). Moreover, this argument was not raised in the Notice of Appeal and is thus waived on appeal. *See Forsberg v. Kearsarge Reg’l School District*, 160 N.H. 264, 269 (2010). Sup. Ct. R. 16(3)(b).

court. See e.g. *N.H. Challenge v. Commissioner, N.H. Dep't of Educ.*, 142 N.H. 246, 249 (1997).

This court, on questions of statutory interpretation, is the “final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole...[interpreting] legislative intent from the statute as written and ...not [considering] what the legislature might have said or [adding] language that the legislature did not see fit to include.” *Appeal of the Hartford Insurance Company*, ___ N.H. __ (decided May 26, 2011).

B. The Superior Court’s Decision Finding That the Plain Meaning of RSA 281-A:21-b Precludes Disclosure of Records was Appropriate Where the Requested Records Were Determined to be A Record of the Department of Labor with Respect to Workers Compensation Claims.

This case is governed by the language of RSA 281-A:21-b, which reads,

Confidentiality of Workers’ Compensation Claims. Proceedings and records of the department of labor with respect to workers’ compensation claims under RSA 281-A shall be exempt from RSA 91-A. Nothing in this section shall prohibit the department of labor from releasing information on a person’s claim or claims to the person, the person’s legal representative, attorney...

Specifically, at issue is the first sentence of the statute and whether that phrase refers to all records of the department with respect to workers compensation claims or simply “injury reports containing personal employee information” as Premium Research contends. PB⁴ 10. Premium Research’s interpretation is contrary to the plain language of the statute and fails as a matter of law.

Premium Research makes no claim that the information sought is not a record of the Department of Labor with respect to workers compensation claims under RSA 281-A. Nowhere in its pleadings or during the hearings did Premium Research argue that the language of the statute was vague or unclear. Instead, Premium Research contends that the legislature did not intend to bar statistical information on Second Injury Fund disbursements from disclosure but

⁴ PB refers to the Premium Research brief.

sought only to protect privacy interests of workers' compensation claimants, as gleaned from the legislative history of the statute. PB 10.

Premium Research's characterization of the information contained in Department of Labor Forms 9WCA-2 and WCSIF-2a as statistical data is not supported. The forms contain data relating to disability payments on specific workers compensation claims. See App. 11-12. Moreover, review of the legislative history is unnecessary. When a statute is clear on its face there is no need to make inquiry into what the legislature meant to say. See *Appeal of Parkland Medical Ctr.*, 158 N.H. 75, 78 (2005). This court first, where possible, ascribes the plain and ordinary meanings to the words used. *State v. Villeneuve*, 160 N.H. 352, 347 (2010). "Courts can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include." *Appeal of Astro Spectacular*, 138 N.H. 298, 300 (1994) (quotation omitted). A statute's meaning will not be modified when the language is clear. See *Dalton Hydro v. Town of Dalton*, 153 N.H. 74,78 (2005). It is only when the statute's language is ambiguous that the court will consider legislative history and examine the statute's overall objective. *Favazza v. Braley*, 160 N.H. 349, 351 (2010).

The legislature in this instance did not limit the language of the first part of RSA 281-A:21-b to particularized records of an employee's claim. Instead it said "records of the department of labor" regarding "workers compensation claims under RSA 281-A" are exempt from RSA 91-A. This action is presumed to be valid. See *Wright v. Clark Equipment Co.*, 125 N.H. 299, 303 (1984) (stating it is well settled law of this jurisdiction that legislative acts are presumed valid). This is especially true in light of the remainder of the statutory scheme and the most recent legislative changes to Department of Labor statutes in September 2005.

First, the general enabling statutes of Department of Labor require the “records of the department... be public records open to the inspection of any person interested.” RSA 273:5.

This statute was amended at the same time as the provision in RSA 281-A:21-b was added. Prior to the 2005 amendment, RSA 273:5, II read,

Notwithstanding paragraph I or any other provision of law to the contrary, the department of labor shall maintain the confidentiality of the names, addresses, and medical records of workers’ compensation claimants and the worker’s “first Report of Injury” filed with the department.

This provision was removed from RSA 273:5 effective September 2005, at the same time RSA 281-A:21-b was enacted. *See* Laws 2005, 278:1, 278:4. The Legislature, thus, knew how to keep only certain records (*i.e.* an individual claimant’s medical records) from being disclosed. It subsequently abandoned that narrow language opting for a broader recognition of the non-disclosure of records relating to workers’ compensation claims. Additionally, comparing the language that was deleted from RSA 273:5 to the newly enacted RSA 281-A:21-b it is evident the legislature understood the distinction it was making in passing RSA 281-A:21-b.

Second, a well-accepted rule of statutory construction holds that where a later statute deals with a subject in a specific way, it controls over the more general. *See, e.g., In re Dufston*, 158 N.H. 784 (2009). Here, the provision of the workers’ compensation statute exempting Department of Labor records relating to workers compensation claims was later in time than RSA 91-A and therefore trumps its more general exemption provisions.

Premium Research lastly argues that the premise of RSA 91-A of not unreasonably restricting public records is being undermined because workers compensation insurance carriers

are effectually allowed to break the law⁵ if the material is not disclosed; thus any interpretation of RSA 281-A:21-b that leads to nondisclosure is an absurd and unjust result. While the purpose of RSA 91-A is to "ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people," the public is not guaranteed unfettered access to every document in the government's possession. There are well-recognized legislatively created exceptions and exemptions. *See Orford Teachers Assoc. v. Watson*, 121 N.H. 118, 120 (1981). "[T]he Right-to-Know Law guarantees every citizen the right to inspect all public records except as otherwise prohibited by statute or RSA 91-A:5." (quotation omitted); *Goode v. N.H. Office of Legislative Budget Ass't.*, 148 N.H. 551, 553 (2002). RSA 281-A:21-b is one such statutory exception. The State has no burden to articulate the legislature's rationale for exempting the material. It is presumed to be valid. *See Wright*, 125 N.H. at 303. It is unlike the exemption under RSA 91-A regarding confidential material where the party seeking non-disclosure bears the burden on non-disclosure. *Cf. New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H. 437 (2003); *Goode*, 148 at 554.

Likewise, under RSA 91-A there is no need to ascertain why the requesting party wants the material. Accordingly, the rhetorical and anecdotal references made by Premium Research concerning the desire to ensure workers' compensation carriers are complying with National Council on Compensation Insurance rules is both unpersuasive and factually not part of the record as there was no sworn testimony related to the role of NCCI in New Hampshire. *See also supra*, footnote 5.

⁵ There is simply no evidence of any New Hampshire laws being violated. Premium Research, in fact, cites to no provision of New Hampshire law that has been violated by a workers compensation insurance provider. Instead, Premium Research cites to a National Council on Compensation Insurance (NCCI), URE Workers Compensation Statistical Plan without giving any context to the NCCI plan. Premium Research first addressed the NCCI Plan on rehearing, PA 85- 96, to which the State objected and moved to strike, App. 13. These NCCI documents and South Carolina draft testimony are again not given any context by Premium Research, have not been subject to the State's critique and are an improper reference given the actual regulatory scheme in New Hampshire.

One purpose of the Right-to-Know law is “to serve concerns informing citizenry about the activities of their government.” *Lamy v. N.H. Pub. Util. Commission*, 152 N.H. 106, 111 (2005). Informing the public about what their government is up to is key, but “if disclosing the information does not serve this purpose, disclosure will not be warranted . . .” *Id.* (citations omitted). Here, Premium Research is not seeking information about what the government, in this case the Department of Labor or Treasury, is up to. There were no findings or even sworn testimony regarding the regulatory process that Premium Research now laments. Moreover, there was no testimony or specific findings on whether the information requested would shed light on an agency’s performance of its statutory duties. There was, however, some discussion that the Department of Labor had no duty to ensure workers compensation carriers were properly refunding premiums to employers after being reimbursed under second injury fund. TrI. 11, 24 – 25.

This is not a case where the State is arguing an exemption based on the ground that disclosure would constitute an invasion of privacy. As such, the court need not apply the balancing test. *Cf. N.H. Civil Liberties Union*, 149 N.H. 440. This is a case, however, where the plain language of the statute exempts disclosure of records of the Department of Labor regarding workers compensation claims – to which there is no dispute. The trial court therefore correctly denied the petition.

III. CONCLUSION

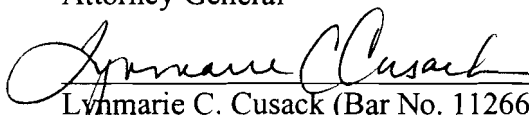
For the foregoing reasons, the State of New Hampshire Departments of Labor and Treasury respectfully request that this Honorable Court affirm the trial court's decision. In filing this Memorandum of Law pursuant to Supreme Court Rule 16(4)(b), it is the State's position that due to the nature of the issues raised in this appeal, oral argument is not necessary. However, should the Court determine otherwise, Lynmarie Cusack, Assistant Attorney General, will present oral argument on behalf of the State.

Respectfully submitted,

STATE OF NEW HAMPSHIRE DEPARTMENTS
OF LABOR and TREASURY

By its attorneys,

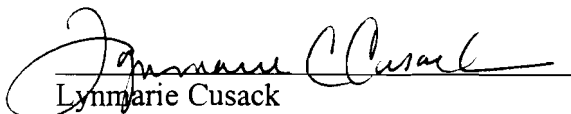
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(603) 271-3675

Certification of Service

I hereby certify that two copies of the foregoing were mailed this 2nd day of June, 2011, postage prepaid to Benjamin T. King, Esquire, Counsel for Appellant, at 6 Loudon Road, Concord, NH 03301.



Lynmarie Cusack

APPENDIX

Department of Labor Form 9WCA-211

Department of Labor Form WCSIF-2a..... 12

State of New Hampshire’s Motion for Reconsideration and
State’s Motion to Strike 13

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
95 PLEASANT STREET
CONCORD, NH 03301-3593

**APPLICATION FOR REIMBURSEMENT OF PAID COMBINED EARNINGS DIFFERENTIAL FROM
SPECIAL FUND FOR SECOND INJURIES, RSA 281-A:15 III, 281-A:55**

_____ Employee Name	_____ Social Security Number
_____ Date of Injury	_____ Claim #
_____ Primary Employer	_____ Average Weekly Wage/Comp Rate
_____ Concurrent Employer	_____ Average Weekly Wage/Comp Rate
_____ Combined AWW/Comp Rate	_____ Dates Covered by this Request

Temporary Total Disability Paid (include dates) _____

Temporary Partial Disability Paid (include dates) _____

Permanent impairment award –concurrent portion _____

Lump sum settlement – concurrent portion: _____

TOTAL AMOUNT TO BE REIMBURSED: _____

Application is made for reimbursement as set forth herein. **The Department must previously approve memorandums of payment in order to receive reimbursement for the time period requested above.** Payments made through December 31 of the previous calendar year should be included. All requests for reimbursement shall be forwarded to the Department of Labor **no later than September 1.**

Signature _____

Date _____

Insurance Carrier _____

Adjusting Office Number _____

Street _____

City/State/Zip Code _____

Check Payable To

Where to Send

FOR LABOR DEPARTMENT USE:

APPROVED BY _____

DATE _____

CHECK NO. _____

AMOUNT _____

Comments:

SCHEDULE OF REIMBURSABLE PAYMENTS
RSA 281-A:54,I,III & RSA 281-A:55

IMPORTANT INSTRUCTIONS: This schedule must be properly completed to obtain reimbursement and must be filed together with Request for Reimbursement, Form No. WCSIF-2 (8-08), not later than September 1st for all reimbursable benefits paid in the preceding calendar year. Include all payments issued by December 31st of the payment year shown. Exclude recovered and otherwise reimbursable amounts of third party liens. Enter reimbursable lump sum amounts only as ordinarily would have been payable for and within the payment year shown. Include any necessary adjustment, on account of overpaid or underpaid reimbursement in a prior year, within the appropriate benefit class of payment, and explain fully below.

CLAIM IDENTIFICATION _____ vs. _____
Employee's Name Employer's Name Date of Injury

SCHEDULE PREPARED BY: _____
Name Title Company Telephone

CALENDAR YEAR: _____ * DATE OF 104TH WEEKLY INDEMNITY PAYMENT _____
(If date is during this calendar year, then separate all amounts below to those occurring before and after this date.)

	Amount	
Medical treatment total (attach documentation)	\$ _____	For amounts before 104 weeks: Total times 50% \$ _____
Disability indemnity payments total (attach documentation)	\$ _____	* For amounts after 104 weeks: Total times 100% \$ _____
Lump sum allocation for year based on figures used in the settlement agreement	\$ _____	Adjustments for third party lien recoveries or prior years' overpayment or underpayment: \$ _____
Death benefits	\$ _____	Total reimbursement claim for this year: \$ _____
Subtotal	\$ _____	
If \$10,000 deductible fully met, in what prior year? _____		
If not met in prior years, deduct correct amount	\$ _____	
Total	\$ _____	

Comments: _____

For Labor Department use
Approved by: _____ Date _____

*DATES MUST MATCH

STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Docket No. 217-2010-CV-00148

PREMIUM RESEARCH SERVICES

v.

STATE OF NEW HAMPSHIRE DEPARTMENT OF LABOR, *ET AL.*

**OBJECTION TO MOTION FOR RECONSIDERATION AND
STATE'S MOTION TO STRIKE**

NOW COMES, Respondent State of New Hampshire, Department of Labor, and the State Treasurer, by and through its attorney, Office of Attorney General and respectfully submits this Response to Petitioner's Objection, and in support thereof states as follows:

1. Petitioner moves for reconsideration claiming that the Court has "overlooked and misapprehended key points of law and fact." *See* Motion at paragraph 1.

2. In any motion for reconsideration, pursuant to Sup. Ct. Rule 59-A, the moving party must state with "particular clarity, points of law or fact that the Court has overlooked or misapprehended...." Here, Petitioner contends the Court did not construe RSA 281-A:21-b in a manner that effectuates its purpose (Motion at paragraph 3) and attempts to steer the court back to legislative history.

3. The Court (McNamara, J.), however, was unambiguous in its finding that the statute at issue was clear on its face and it accorded the language in the statute its plain meaning. *See Order*, dated September 14, 2010 at p.3. The Court did not need to rely on legislative history. Thus, the Court did not overlook or misapprehend facts or the law.

4. Petitioner unhappy with the result notes that the State wants the court to "slavishly adhere to the literal language of the statute." *See* Motion at. Paragraph 6. There,

however, is no reason to ignore the law as it is written. Should Petitioner believe the law should be changed there is a legislative process for effectuating such a change. The remedy is not in a motion for reconsideration but for a proposed legislative change.

5. Additionally, Petitioner has made new arguments to the court in paragraphs 4 -6 of its Motion. Petitioner has also appended documents not previously considered and which are not documents just recently discovered. Instead, Petitioner attempts to rely on a new argument that could have been previously addressed. As such, the documents and argument should be stricken from the record. *See e.g. Koor Communications, Inc. v. City of Lebanon*, 148 NH 618 (2002)(a party waives arguments not previously briefed (or made)).

WHEREFORE, the Respondent respectfully requests that the Honorable Court:

- A. Deny Petitioners Motion for Reconsideration, and
- B. Strike documents attached as Exhibits A and B and comments relating to NCCI in paragraphs 4 - 6; and
- C. Grant such other and further relief as is just and equitable.

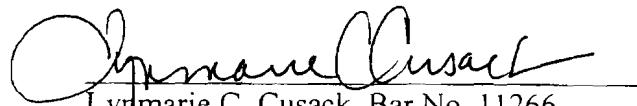
Respectfully submitted,

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR

by its attorney,

MICHAEL A. DELANEY
ATTORNEY GENERAL

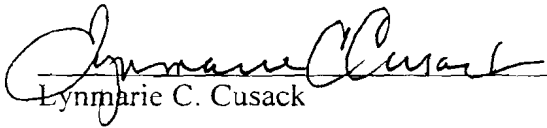
Date: October 12, 2010


Lynnmarie C. Cusack, Bar No. 11266
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(603) 271-3650

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to Benjamin T. King, Esq.,
counsel for Plaintiff.

Date: October 12, 2010


Lynmarie C. Cusack

#518999