

THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT

In re Petition of McCarthy

INS 13-038-AP

**PETITIONER MARGARET MCCARTHY'S OBJECTION REGARDING
BURDEN OF PROOF**

Margaret McCarthy objects to the Commissioner's decision, in his capacity as hearing officer in the adjudicative hearing scheduled for May 14, 2014, to narrowly define Ms. McCarthy's Burden of Proof so as to preclude her from submitting evidence and making arguments concerning the sufficiency of Anthem Blue Cross Blue Shield's ("Anthem's") submissions for approval of its Pathway Network as a Qualified Health Plan under the Patient Protection and Affordable Care Act.

1. The Commissioner's March 28, 2014 Order and Notice of Hearing, described Ms. McCarthy's burden as limited to demonstrating "that Anthem's network can only be adequate within the meaning of applicable network adequacy standards if it includes Frisbie [Memorial Hospital, which employs her physician(s)]." *Id.* at 6. In contrast, Ms. McCarthy's original Petition sought:

a hearing on whether the Anthem plans approved by the Department and offered on the Marketplace meet the requirements of federal and New Hampshire law for, among other things, network adequacy, including distance and time to access providers, wait times for health care, and more. Such a hearing must detail the process by which Anthem arrived at its network inclusion decisions, provide Petitioners and the public with the full breadth of information the Department considered in approving the Anthem "narrow network plans," and permit the excluded hospitals, at a minimum, to participate in the Anthem networks, if willing, at rates offered to other providers.

Petition for Hearing Pursuant to RSA 400-A:17 at ¶18.

2. The Commissioner's ruling on Ms. McCarthy's burden of proof prohibited her from arguing that the Anthem Pathway Network, or "narrow network," is inadequate in other counties of the State of New Hampshire; and the ruling was relied upon at the hearing to restrict Ms. McCarthy from eliciting testimony or arguing that Anthem failed to fulfill the basic procedural requirements of N.H. Admin. R. Ins. 2701 ("Ins. ____") regarding network adequacy.

3. The error regarding burden of proof is therefore twofold: (a) having established standing through the demonstration of a cognizable injury-in-fact, Ms. McCarthy should have been permitted to argue that the Department failed to require Anthem to submit documentation that was essential for establishing network adequacy statewide; and (b) Ms. McCarthy should not have been precluded from submitting evidence concerning the statewide effects of the Department's failure to enforce its own regulations.

4. Regarding the first error, it is well established law that the doctrine of standing does not limit a party's ability to argue about the inadequacy of agency action. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Supreme Court noted that "the fact of economic injury is what gives a person standing to seek review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate." *Id.* at 737. Here, Ms. McCarthy is arguing that the Department has failed to comply with its statutory and regulatory mandate to ensure Anthem's compliance with the network adequacy requirements of Ins. 2701. The Commissioner has deemed her to have standing, properly invoking review of the Department's decision to certify Anthem's

narrow network as adequate. Under *Sierra Club v. Morton*, which is controlling in New Hampshire law on the question of standing, Ms. McCarthy may argue that the Department has failed to comply with its statutory mandate and submit evidence to meet her burden of proof in that regard. Therefore, it is error for the Commissioner to exclude evidence concerning the Department's failure to require Anthem to adhere to the various regulatory requirements of Ins. 2701 and its subsections. *See also, Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n. 7 (1992) (permitting an individual with standing to argue procedural and regulatory failures even if it is not absolutely certain that fulfilling the failed requirement will actually redress an injury in fact); *Massachusetts v. EPA*, 549 U.S. 497, 517–18 (2007) (“When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.”); *Sugar Cane Growers Cooperative of Fla. v. Veneman*, 289 F.3d 89, 94–95 (C.A.D.C. 2002) (“A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result”).

5. The Commissioner suggested, in his Order on Motion in Limine (May 13, 2014) prohibiting Ms. McCarthy from arguing about the failure of the Department to submit all required information necessary to determine network adequacy, that allowing her to do so would put her in the position of impermissibly representing other consumers' interests. *Id.* at 2–3 (citing *Petition of Burling*, 139 N.H. 266, 272 (1994)). *Burling* is inapposite. In *Burling*, the Supreme Court rejected the appeal of a petitioner seeking the

disclosure of files relating to an investigation by the Professional Conduct Committee ("PCC") into the conduct of a third party attorney because the petitioner was neither the subject of the PCC investigation, nor a victim of the conduct in question, nor a witness or other participant in the PCC proceeding. *Id.* Ms. McCarthy, by contrast, having established standing, need not represent other consumers' interests in order to argue and submit evidence about the Department's failure to properly enforce its regulations—in doing so, she is representing her interests. That she also may be representing the interests of others is immaterial.

6. The proper analogy is not to *Burling*, but rather to *US v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (permitting local student group from DC area to challenge application of rate increase on railroads throughout the country). In that case, the Supreme Court observed:

Unlike the specific and geographically limited federal action of which the petitioner complained in *Sierra Club*, the challenged agency action in this case is applicable to substantially all of the Nation's railroads, and thus allegedly has an adverse environmental impact on all the natural resources of the country. Rather than a limited group of persons who used a picturesque valley in California, all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury. Indeed some of the cases on which we relied in *Sierra Club* demonstrated the patent fact that persons across the Nation could be adversely affected by major governmental actions. To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

Id. at 687–88. Similarly, as Ms. McCarthy has standing to argue the insufficiency of the Department's regulatory enforcement as to herself, so may she argue that it has impacted the rest of the State.

7. Regarding the second error, the Commissioner's ruling on the burden of proof impermissibly prevented Ms. McCarthy from arguing or submitting evidence about the effects of the Department's failure to properly enforce its regulations on locations in Strafford County and throughout the State. Among the errors were the following:

- a. The Commissioner accepted certain of Ms. McCarthy's exhibits that were drawn from the Department's own file concerning the network adequacy of Anthem's narrow network, or from other sources, provisionally, subject to further argument concerning their relevancy. While Ms. McCarthy will discuss the admissibility of each of her proposed exhibits in more detail in her Memorandum of Law, to the extent that the burden of proof defined the issue in controversy so narrowly that it potentially excluded valid parts of the Department's file, it was error.
- b. Ms. McCarthy was prevented from cross examining Department personnel, including Alexander Feldvebel, concerning his direct testimony about the motivations of Anthem in forming its narrow network. In addition to being a violation of the opening-the-door doctrine, *see Wambala*, 155 N.H. at 589, this restriction of Ms. McCarthy's opportunity to cross examine erroneously relied upon the burden of proof in limiting the scope of relevant testimony.
- c. Ms. McCarthy was prevented from cross examining Department personnel, including Michael Wilkey, concerning his direct testimony about the Department's review of Anthem's narrow network pursuant

to the requirements of Ins. 2701 *et seq.* In addition to being a violation of the opening-the-door doctrine, *see State v. Wambala*, 155 N.H. 583, 589 (2009), this restriction of Ms. McCarthy's opportunity to cross examine erroneously relied upon the burden of proof as a basis for limiting the scope of relevant testimony, particularly as to the location of providers and insured individuals in Strafford County, Anthem's compliance with waiting time standards, and Anthem's failure to submit the information required by regulation.

8. The Commissioner's evidentiary rulings erred by conflating the requirements of standing and the scope of relevant testimony and argumentation. Standing is a threshold analysis; having established standing, the claimant may then employ testimony and exhibits that tend to make a fact of consequence to the determination of the action more or less probable, and make broad arguments about the issue she has standing to raise. *See* N.H. R. Evid. 401.¹

9. For example, a case in point is *Massachusetts v. EPA*, 549 U.S. 497 (2007). In that case, the Supreme Court determined that the Commonwealth of Massachusetts had standing to require the Environmental Protection Agency ("EPA") to make rules regulating carbon dioxide as an atmospheric pollutant. But the evidence that the Commonwealth introduced during the trial was not limited to the effects of carbon dioxide only on the Commonwealth of Massachusetts. In fact, the trial record included substantial evidence and testimony concerning the broad effects of carbon dioxide on the

¹ Ms. McCarthy notes that the Commissioner stated at the start of the hearing that the N.H. Rules of Evidence did not apply in the context of her RSA 400-A:17, II hearing, insofar as the hearing would be governed by Ins. 200, and Ins. 203.01(d)(4), which requires the Commissioner to "[r]eceive relevant evidence and exclude irrelevant, immaterial or unduly repetitious evidence." Ins. 203.01(d)(4) does not define relevancy; therefore, Ms. McCarthy turns to N.H. R. Evid. 401.

planet, the United States, and the various regions of the country. *Id.* at 504–17, 521–27. To be sure, for the standing analysis, the Court relied upon those effects on Massachusetts. *Id.* at 518–21. But that evidence was no less relevant to the Court’s final determination that the EPA had an obligation to regulate carbon dioxide, and it was permitted into the record. In the same way, Ms. McCarthy should have been able to argue, and submit evidence about, the result of the Department’s failure to require sufficient information to render a proper decision on the adequacy of Anthem’s narrow network, which was the redlining of New Hampshire to place the poorest, least healthy individuals as far as possible from health care providers on the narrow network. Her injury in fact gave her standing to make those claims; it did not restrict her from making them, and neither the Department, nor Anthem, nor the Commissioner has provided any law supporting its restrictive interpretation of Ms. McCarthy’s burden of proof.

10. The Department, at the pretrial conference, dismissed federal law on standing as irrelevant to New Hampshire law; and the Commissioner appeared to take a similar view in his Order on Motion in Limine. The New Hampshire Supreme Court has relied upon *Sierra Club v. Morton*, 405 U.S. 727 since it was issued in 1973, and the U.S. Supreme Court’s standing decisions are not merely substantial persuasive authority, but are binding on New Hampshire law. *See Appeal of Richards*, 134 N.H. 148, 156 (1991); *N.H. Banker’s Ass’n v. Nelson*, 113 N.H. 127, 129 (1973). These seminal federal decisions are not distinguishable or irrelevant to the questions of standing, the scope of Ms. McCarthy’s standing, what standing implies about her burden of proof or what evidence she may introduce, merely because they involve associational standing (*Lujan*,

504 U.S. at 555; *Sierra Club*, 405 U.S. at 727) or the standing of a State (*Massachusetts*, 549 U.S. at 497).

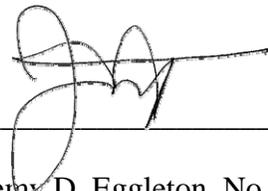
11. Therefore, the Commissioner has erred in narrowly defining Ms. McCarthy's burden of proof, in limiting her ability to introduce evidence and make arguments about the specific failures of the Department to require Anthem to adhere to its network adequacy regulations, and in limiting her ability to introduce evidence about the effects of the Department's failure on Strafford County, northern Strafford County, and other areas of the State.

12. The error in defining Ms. McCarthy's burden of proof was relied upon in the Commissioner's subsequent rulings on the Motion in Limine filed by the Department, and in relation to evidentiary rulings during the course of the May 14, 2014 hearing that prevented Ms. McCarthy from fully litigating her position. The cumulative effect of the error prevented Ms. McCarthy from using valid, relevant and admissible evidence, and damaged her entire case. She is entitled to a new adjudicative hearing, with a burden of proof that allows her broadly to challenge the Department's finding that Anthem's narrow network was adequate within the meaning of Ins. 2701 *et seq.*, and evidentiary rulings consistent with that new burden of proof.

Respectfully submitted,

Margaret McCarthy

By her attorneys,



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