

THE STATE OF NEW HAMPSHIRE  
INSURANCE DEPARTMENT

In Re Petition of Margaret McCarthy

INS 13-038-AP

**NHID's Response to Petitioner Margaret McCarthy's  
Objection Regarding Burden of Proof**

The New Hampshire Insurance Department ("NHID"), by and through its Staff Advocate, Richard P. McCaffrey, responds to Petitioner Margaret McCarthy's ("Petitioner") Objection Regarding Burden of Proof as follows:

1. The Hearing Officer conducted a prehearing conference in this case on May 8, 2014. During the conference, which was recorded, the Hearing Officer advised counsel for the parties that the Petitioner carried the burden of proof and to prevail she would have to demonstrate that Anthem's Pathway Network could only be adequate if Frisbie Memorial Hospital and its providers were included in the Pathway Network. Counsel for the Petitioner, Jeremy Eggleton, did not object to or otherwise comment on the Hearing Officer's ruling on burden of proof.
2. The Hearing Officer commenced the May 14, 2014 adjudicative hearing with a preliminary statement in which, among other things, the Hearing Officer again addressed the burden of proof issue, stating:

*The burden of proof. The Petitioner has the burden of proof in this hearing. She must present evidence that proves by a preponderance of this evidence that the Anthem Pathway Network used for plans offered on the Exchange did not meet the network adequacy standards without the inclusion of Frisbie Hospital and its providers. (Hearing transcript at p. 9, l. 9-17.)*

3. When the Hearing Officer completed his preliminary remarks, Mr. Eggleton addressed burden of proof for the first time in the case, stating:

*And then I have prepared an objection to the burden of proof that I was going to ask to read orally into the record. But if you prefer to have that in writing after the hearing, that's fine.*  
(Hearing transcript at p. 13, l. 16-20.)

4. The Petitioner, through Mr. Eggleton, did subsequently file with the Hearing Officer a pleading styled, "Petitioner Margaret McCarthy's Objection Regarding Burden of Proof."

5. It turns out, however, that this Objection has nothing whatsoever to do with burden of proof, as least as that term is ordinarily understood. (*See, e.g.*, NH. Code Admin. Rule Ins 204.05, "Burden and Standard of Proof"; *see also* N.H. Civil Jury Instruction 5.1: "A party who makes a claim has the burden of proving it. This is called the burden of proof.")

6. The Petitioner's Objection contains no citation to Ins 204.05 and no argument regarding why the Hearing Officer's ruling on burden of proof constituted an error as a matter of fact or law.

7. Instead of addressing burden of proof, the Petitioner's Objection is actually a thinly-disguised attempt to reargue the Hearing Officer's March 28, 2014 Order in which the Hearing Officer ruled that while the Petitioner had legal standing to request an adjudicative hearing pursuant to RSA 400-A:17, that standing was nevertheless limited.

8. There are at least two reasons why the Hearing Officer should overrule the Petitioner's Objection.

9. The first is that between the filing of the original Petition on November 6, 2013 and the issuance of the March 28, 2014 Order, the standing issue was thoroughly briefed by the Petitioner and Anthem and thoroughly considered by the Hearing Officer. The

arguments set forth in the Objection now before the Hearing Officer are a mere rehash of arguments the Petitioner has already made repeatedly in pleadings in the related matter identified as Docket No. 13-038-AR.<sup>1</sup>

10. A second reason is that the Petitioner is time-barred from appealing the Hearing Officer's March 28, 2014 Order.

11. RSA 541:3, "Motion for Rehearing," provides, in pertinent part, that:

*Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission . . . may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order. . . .*

12. The Petitioner's deadline, therefore, for filing a motion for rehearing of the March 28, 2014 on standing was April 27, 2014. Nevertheless, the Petitioner, who has been represented by counsel at all relevant times, failed to file a motion for rehearing of the March 28<sup>th</sup> Order by the statutorily-prescribed deadline of April 27<sup>th</sup>. Accordingly, the Petitioner's Objection is untimely and barred by RSA 541:3.

13. For the foregoing reasons, the Petitioner's Objection should be overruled.

Wherefore, the NHID requests that the Hearing Officer:

- A. Overrule the Petitioner's Objection;
- B. Rule that the question of standing and all issues related to standing were decided in the Order of March 28, 2014;
- C. Rule that the Objection is untimely and barred by RSA 541:3;

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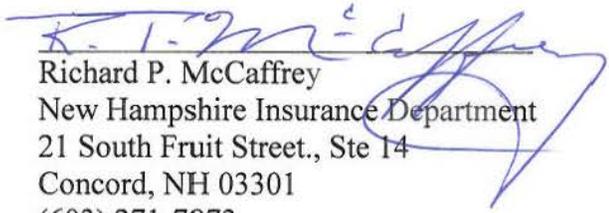
<sup>1</sup> In opposition to the instant Objection, the NHID relies on, and incorporates herein by reference, all orders and pleadings in INS 13-038-AR of which the Hearing Officer took official notice during the May 14, 2014 adjudicative hearing. (See hearing transcript at p. 12, l. 7-13.)

D. Rule that the Petitioner failed to timely move for a rehearing of the findings set forth in the March 28, 2014 Order, and, consequently, those findings and rulings are now final;

E. Deny the Petitioner's request for a new adjudicative hearing; and

F. Dismiss the Petition with prejudice.

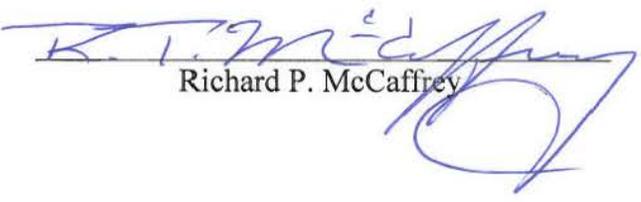
Respectfully submitted,

  
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#### Certificate of Service

A copy of the foregoing Response to Petitioner's Objection Regarding Burden of Proof was sent this date electronically and by first-class mail, postage prepaid, to Jeremy Eggleton, counsel for the Petitioner, and Michael Durham, counsel for the Intervenor.

Date: June 4, 2014

  
Richard P. McCaffrey