

THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT

In re Petition of McCarthy

INS 13-038-AP

PETITIONER'S STATEMENT OF EXCEPTIONS
REGARDING EVIDENTIARY RULINGS

Ms. Margaret McCarthy submits the following exceptions in relation to evidentiary rulings made during the course of the May 14, 2014 hearing in this matter. In support hereof, Ms. McCarthy states:

1. The Commissioner requested that legal arguments relating to exhibits and testimony be submitted in writing after the hearing in this matter. Transcript of May 14, 2014 Hearing at 244 ("T. at ____"). Ms. McCarthy states the following exceptions to evidentiary rulings made by the Commissioner during direct and cross examination of witnesses.

2. In cross examination of Michael Wilkey, Department witness, counsel for Ms. McCarthy attempted to ask the witness questions about the factors that went into the GeoAccess report filed by Anthem to substantiate its assertion that it met the requirements of Ins. 2701.06(b)(1). The Department objected to examination concerning whether the Department obtained waiting time information from Anthem or did any analysis of waiting times concerning the proposed narrow network, arguing that trying to ascertain what waiting times might be under the narrow network was "a waste of time." T. at 231-33. Ins. 2701.07 requires that a provider submit data concerning waiting times. Without data concerning waiting times it is impossible to see how Anthem fulfills the standard set by the Department. Cross examining the purported overseer of the network

adequacy analysis to elicit what steps the Department took to ensure that Ins. 2701.07 was fulfilled by Anthem is neither irrelevant nor a "waste of time." T. at 231, 233. It is important to note that the Commissioner clarified the admissibility of testimony and exhibits that Ms. McCarthy might want to introduce as follows: "The Petitioner can present *any evidence* that she believes shows that there are deficiencies in the network in Strafford County that would not exist if Frisbie had been included in the Anthem network." T. at 10 (emphasis added). It is difficult to understand how an examination of what, if any, evidence Anthem submitted relating to waiting times and how Anthem sought to address the waiting time requirement of Ins. 2701.07, is not "any evidence ... [that] shows there are deficiencies in the network in Strafford County[.]" *Id.* Therefore, the Commissioner erred in sustaining the Department's objection on this line of questions.

3. Anthem objected to a series of cross examination questions by counsel for Ms. McCarthy of Alexander Feldvebel, Department witness, concerning his understanding of Anthem's "business decisions" and strategy in forming its narrow network. T. at 152-58. Mr. Feldvebel testified at some length about his understanding of Anthem's business decisions and Anthem's rationale for forming a "narrow network," as well as the pricing and negotiation dynamics included in that formation process. T. at 109-12. Mr. Feldvebel's thorough explanation of the business reasoning behind Anthem's creation of the narrow network created a misleading advantage for the Department because it made generalized assumptions and representations about Anthem's motivations in forming its narrow network. *Id.* Under those circumstances, Ms. McCarthy is absolutely permitted to conduct a complete cross examination concerning specific contradictions she might produce with regard to his assertions, and to test the nature and

content of his knowledge and testimony. *See State v. Nightingale*, 160 N.H. 569, 579 (2010). It was an error of law for the Commissioner to permit the Department to create an extensive record about a given issue with its witnesses, and prohibit Ms. McCarthy from cross examining those witnesses about their very own testimony. *Id.*

4. During cross examination of Alexander Feldvebel by counsel for Ms. McCarthy, Anthem objected to questions about the policy goals of the ACA that sought to ascertain whether these policy goals were actually being met in northern Strafford County. T. at 167-69. The line of questioning deemed by the Commissioner to be irrelevant upon objection from Anthem related directly to the number of people in the towns of northern Strafford County where Anthem has no providers in its narrow network, their demographic profiles, and the assumptions about insurance coverage and demand that can be made from them. *Id.* at 167 (commencing inquiry with admission that 85% coverage in a county would be inadequate); *see* Petitioners' Exhibits 8, 9, 12, 13. Evidence produced from that line of questioning would be acutely relevant to the percentage of insured members in Anthem's narrow network that actually had access to a primary care provider within 15 miles or 40 minutes drive. *See* Ins. 2701.06(b)(1). It was error for the Commissioner to sustain the relevancy objection and attenuate that critical line of questioning. *See also*, T. at 10 ("The Petitioner can present *any evidence* that she believes shows that there are deficiencies in the network in Strafford County that would not exist if Frisbie had been included in the Anthem network.")(emphasis added)). In addition, the Department opened the door to the inquiry whether Anthem met its obligation under Ins. 2701.06(b)(1) when Mr. Feldvebel suggested that Ms. McCarthy

could not prove that the narrow network was inadequate under that standard because she herself was within 15 miles of two open panel providers. T. at 128-29.

WHEREFORE, Ms. McCarthy requests the Commissioner:

- A. Reconsider his evidentiary rulings concerning these objected-to lines of inquiry and reopen the hearing for additional testimony so that Ms. McCarthy can fully explore the issues raised by the Department's witnesses in their direct testimony.

Respectfully submitted,

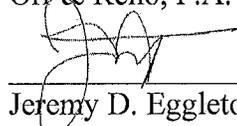
Margaret C. McCarthy

By her attorneys,

Orr & Reno, P.A.

Date: June 4, 2014

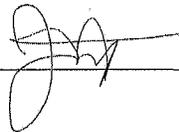
By:



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Certification

I, Jeremy D. Eggleton, certify that on this the 4th day of June, 2014, I caused a copy of the foregoing Statement of Exceptions to be served via electronic mail and US mail upon Richard McCaffrey, Esq., New Hampshire Department of Insurance, and Michael Durham, Esq., counsel for Anthem Blue Cross Blue Shield.



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