

BEFORE THE NEW MEXICO SUPERINTENDENT OF INSURANCE

AS CUSTODIAN OF THE PATIENT'S COMPENSATION FUND

FILED

October 19, 2021 at 9:13 A.M.

by FKT

IN THE MATTER OF ADOPTION OF RULES)

Patient's Compensation Fund

FOR THE PATIENT'S COMPENSATION FUND) Docket No. 21-0005-PCF

NOTICE OF PROPOSED RULEMAKING

OCTOBER 18, 2021

9:10 A.M.

(ZOOM VIDEOCONFERENCE)

BEFORE: ROBERT J. DESIDERIO, HEARING OFFICER (REMOTE)

REPORTED BY: KIM KAY SHOLLENBARGER, RPR
PAUL BACA PROFESSIONAL COURT REPORTING
500 4th Street, Northwest, Suite 105
Albuquerque, New Mexico 87102

1 HEARING OFFICER DESIDERIO: Let's go on the record,
2 please. For everyone, this hearing is being recorded for
3 later transcription by the court reporter.

4 Good morning, my name is Robert J. Desiderio and I
5 have been appointed by the Custodian of the Patient's
6 Compensation Fund as the Hearing Officer for this hearing.

7 Because we are conducting the hearing by
8 videoconference and by telephone, I ask all participants to
9 mute your microphone or telephone until called upon. This
10 will ensure that the court reporter will make a clean record
11 and that all participants can hear the proceedings.

12 I will be presiding over this hearing in Docket
13 Number 21-0005-PCF. Transcript of the hearing will be filed
14 in the docket for the proposed rule.

15 The caption in this rulemaking is In The Matter Of
16 Adoption Of Rules For Patient's Compensation Fund. Statutory
17 authority for promulgation of the proposed amended rules is
18 found in Section 4-5-25 of the New Mexico Statutes Annotated.

19 The Notice of Proposed Rulemaking was published as
20 required by law in the New Mexico Register on September 14,
21 2021 and in the Albuquerque Journal on September 14, 2021 and
22 was distributed via the Office of Superintendent of Insurance
23 newsletter to a list of potentially interested parties.

24 The Notice of Proposed Rulemaking and the full text
25 of the proposed rules are available on the PCF website or the

1 New Mexico Sunshine Portal and upon request from the New
2 Mexico Office of Superintendent of Insurance.

3 In addition to scheduling this public comment
4 hearing, the Notice of Proposed Rulemaking provided
5 interested insurers, the Attorney General, members of the
6 judiciary, and members of the public with the opportunity to
7 submit written comments no later than 4 p.m. today, Monday,
8 October 18, 2021.

9 Oral comments will be accepted today at this public
10 hearing from interested persons and written responses to any
11 written or oral comments may be filed in the docket no later
12 than 4 p.m. on Thursday, October 28, 2021. Comments maybe
13 submitted via email or mailed to Freya Tschantz at the
14 address designated in Paragraph 6 of the Notice of Proposed
15 Rulemaking.

16 Pursuant to the Notice of Proposed Rulemaking any
17 oral comments from today's hearing and written comments filed
18 to the docket will be considered by the Custodian. There has
19 been to now one written comment filed to the docket and the
20 docket remains open for filing of comments until 4 p.m.
21 today.

22 So that the Custodian does not initiate, permit, or
23 consider a communication directly or indirectly with a party
24 or a party's representative outside the presence of other
25 parties regarding this matter until the record has been

1 closed, the Custodian will close the record in this matter on
2 the earlier of 30 days following the public hearing or the
3 date a final order is issued in this case. Once the record
4 is closed no further oral or written communication concerning
5 the rulemaking will be entertained or considered by the
6 Custodian.

7 The purpose of this hearing is for the Custodian to
8 receive oral comments on the rule incorporated by reference
9 in the Notice of Proposed Rulemaking. Pursuant to the Notice
10 of Proposed Rulemaking all public comments will be accepted
11 at this hearing.

12 Because of COVID that we are currently experiencing,
13 we are conducting this public hearing by videoconference and
14 by telephone. I ask you to bear with me as we attempt to
15 navigate this unusual situation.

16 Again, for the benefit of our record and for the
17 benefit of all participants, please mute your telephone or
18 microphone until called upon. When I call upon you don't
19 forget to unmute your audio, but please put it on mute again
20 when finished with your comments. Even normal background
21 noise can interfere with the ability to conduct this hearing.

22 If you intend to offer oral comments at today's
23 hearing, please type your name in the chat function on your
24 screen directed to everyone. I will then call on
25 participants one at a time to provide comments. If you are

1 appearing by telephone I will ask for your comments after I
2 go through those in the chat. When I call on you by name for
3 comment, please speak clearly so that everyone can hear you,
4 and state your name, address and any organization you
5 represent. Please also spell your name for the benefit of
6 the record.

7 There may be times when I or the monitor will ask
8 you to slow down or repeat something so that we can make a
9 complete record of today's hearing.

10 Before commencing with your comments I would like to
11 inform you of my role. I will prepare and submit a report to
12 the Custodian around November 1, 2021, in which I will
13 explain your written and oral comments and I am permitted to
14 make recommendation as to the proposed rules to the
15 Custodian.

16 Thank you for your patience and let's begin with the
17 comments. Alfred.

18 MR. WALKER: Thank you, Mr. Hearing Officer, and
19 good morning. My name is R. Alfred Walker, I am Legal
20 Counsel for the Office of Superintendent of Insurance and my
21 address is 1120 Paseo de Peralta, Santa Fe.

22 As you know, the Superintendent of Insurance has
23 been appointed by the Legislature as the Custodian of the
24 Patient's Compensation Fund, and this responsibility has been
25 placed on him by the New Mexico Medical Malpractice Act.

1 As the PCF custodian, the Superintendent adopted
2 rules in 2019 to govern the admission of Qualified Healthcare
3 Providers, or QHPs, to the Fund. In the last legislative
4 session the legislature made extensive amendments to the
5 Medical Malpractice Act. The purpose of the proposed changes
6 to the existing rules is to bring the existing rules in line
7 with those amendments to the Act.

8 The Superintendent appreciates the time and effort
9 of the Hearing Officer, as well as those interested persons
10 who are providing either written or oral comments. The
11 Superintendent believes that this process will result in the
12 best rules possible to govern the admission of QHPs to the
13 Fund in line with the amendments to the Act.

14 Thank you again, Mr. Hearing Officer, for your time
15 and effort and for the opportunity to speak this morning.

16 HEARING OFFICER DESIDERIO: Thank you, Mr. Walker.
17 Craig Sherbondy.

18 MR. SHERBONDY: My name is Craig Sherbondy.
19 C-r-a-i-g, S-h-e-r-b-o-n-d-y. I am the Vice President of
20 Underwriting for MedPro Group. Our concern was in the entity
21 enrollment, Section 13.21.2.8, Item 2, where we must have all
22 qualifiable health care provider members or employers
23 admitted to the fund to have the business entity eligible for
24 fund coverage. The question we have is, we did not see
25 qualifiable as a defined term, and so we've had questions

1 from some of our entities in potential coverage.

2 Some examples that we have is, we have a current
3 entity that is anesthesiologists and they have CRNAs. The
4 CRNAs are allowed to have their own coverage and that is
5 outside of the Fund. So we're being informed that that
6 entity, even if we would exclude those CRNAs from our policy
7 so they wouldn't be covered under the entity, we still can't
8 submit that for PCF coverage.

9 Now, the concern with that entity, they have asked
10 us for one million/three million limits outside the Fund for
11 the entity and that's probably going to cost them over a
12 hundred thousand dollars more for insurance than if they
13 could be in the Fund.

14 Another example we have is when a physician in a
15 group has had adverse claims and therefore we don't want to
16 write them on the admitted side, so we would exclude them
17 from the entity policy and they would go to surplus lines and
18 get coverage; therefore, there would be no coverage under our
19 entity; therefore, the PCF would have no coverage, but we're
20 being told that now that entity cannot qualify even though
21 there would be no coverage for that insured. And in that
22 case I'm afraid that in order to help our clients, we're
23 going to need to potentially do an individual risk filing to
24 charge them a lot higher premium, but the Fund is going to
25 have a poor doctor now in the Fund and you're going to

1 potentially see more claims, which would be a concern as
2 well.

3 Those were a couple of the concerns I have. I don't
4 know if Tom Landrigan, our attorney, had anything else to
5 clarify.

6 MR. LANDRIGAN: No, I think that was a good summary.
7 The one thing I would just clarify, the definition in
8 13.21.2.8(C)(2) where it says, "qualifiable health care
9 provider members." Our reading is, health care providers is
10 already defined under the MMA to be limited to the types of
11 providers that are eligible for PCF participation as long as
12 the other requirements are met. So it seems like the word
13 qualifiable is already in here in the definition health care
14 provider, so now this term qualifiable health care provider
15 we're unclear what that's intended to mean and it seems that
16 the word qualifiable should just be removed.

17 HEARING OFFICER DESIDERIO: Thank you. Nick Autio.

18 MR. AUTIO: Yes. Good morning, Mr. Hearing Officer.
19 If I refer to you as professor during this proceeding, I hope
20 you forgive me. I'm here on behalf of the New Mexico Medical
21 Society. We'll be submitting written comments this
22 afternoon, but wanted to bring up a few points during the
23 hearing this morning.

24 The first one deals with 13.21.1 General Provisions
25 under the PCF. Under Subsection 8(I), it appears that that

1 would give the third-party administrator ultimate authority
2 to both negotiate and authorize settlements, we have some
3 concern regarding that. It's our view that as the Custodian
4 of the Fund that the Superintendent should still have
5 ultimate authority to approve settlements that are drawing
6 funds from the PCF. We would ask that that subsection be
7 revised to make it clear that the Superintendent really still
8 has ultimate authority to approve settlements involving PCF
9 funds.

10 Our second comment deals with 13.21.2 under
11 subsection 8(C)(1), it mandates that an independent provider
12 that is a business entity must have at least one qualified
13 health care provider as a member or employee of the entity.
14 We believe, and it seems that departs from the definition of
15 independent provider under 41-5-3 and it also departs from
16 the qualifications under 41-5-5 forcing -- or requiring a
17 health care entity to have a qualified health care provider
18 is different from the definition, which simply requires the
19 business entity to have qualifiable health care providers as
20 members or employees of the entity. We respectfully request
21 that that be revised to be both consistent with the
22 definition in 41-5-3(E) and then the qualification under
23 41-5-5.

24 Next, our second to last comment, deals with
25 13.21.2.8(C)(2), which would require a business entity to

1 have all of its qualifiable health care providers admitted to
2 the Fund for the entity to qualify for coverage.

3 Much like my previous comment, I believe that places
4 a requirement on business entities that does not exist under
5 either 41-5-3 or 41-5-5 and it could for practical reasons
6 also lead to some significant problems. For example, if a
7 business entity employing a hundred qualified providers who
8 are participating in the PCF and covered by the Act, if one
9 of those providers exceeded their three occurrence limit a
10 policy period and lost coverage under the MMA, as written
11 13.21.2.8(C)(2) would strip that entire business entity of
12 their coverage, which would include their employees who were
13 qualified. So we would ask, once again, that that be deleted
14 or revised to be consistent with 41-5-3 and 41-5-5.

15 Lastly, in 13.21.5 dealing with the surcharge rate
16 hearings, as an entity that has two representatives on the
17 Advisory Board we would respectfully request that the
18 provisions in 13.21.5 be revised to allow the PCF Advisory
19 Board to appoint or designate a non-board member to function
20 as a hearing officer if the board decided to do so by a
21 majority vote, and that would give the board both an option
22 to function itself as the hearing officer or they could
23 appoint a non-board member to function as the hearing
24 officer.

25 We will be submitting the rest of our comments in

1 writing this afternoon. Thank you for your consideration.

2 HEARING OFFICER DESIDERIO: Thank you, Mr. Autio.

3 Anyone on the telephone who has any comments? Anyone else
4 have any comments? As I indicated when we started, comments
5 can be submitted by 4 p.m. today and any responses can be
6 submitted by Thursday, November 28, 2021.

7 If there are no other comments, I thank everyone for
8 your participation and attention to this hearing and this
9 concludes the hearing and I now state we are adjourned.

10 (Hearing adjourned at 9:30 a.m.)

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REPORTER'S CERTIFICATE

I, Kim Kay Shollenbarger, Registered Professional Reporter, do hereby certify that I reported the foregoing proceedings in stenographic shorthand via Zoom and that the foregoing pages are a transcript of those proceedings that were reduced to printed form by me to the best of my ability.

/s/ Kim Schollenbarger

Kim Kay Shollenbarger, RPR