BEFORE THE NEW MEXICO SUPERINTENDENT OF INSURANCE AS CUSTODIAN OF THE PATIENT'S COMPENSATION FUND

IN THE MATTER OF DETERMINING PATIENT'S COMPENSATION FUND SURCHARGE RATES	))))	**DOCKET NO. 2022-0044**

FINAL ORDER

THIS MATTER comes before the New Mexico Superintendent of Insurance as Custodian of the Patient's Compensation Fund (hereinafter referred to as the "Custodian") upon his receipt of the Patient's Compensation Fund ("PCF") Advisory Board's Proposed Findings, Conclusions and Recommendations, after the PCF Advisory Board conducted a properly noticed public hearing on PCF surcharge rates on September 16, 2022. The Proposed findings, Conclusions and Recommendations of the PCF Advisory Board are incorporated into this Order by reference. The Custodian, having reviewed the PCF Advisory Board's Proposed Findings, Conclusions and Recommendations, having reviewed the evidence from the hearing, and being otherwise fully advised in the premises, **HEREBY FINDS AND CONCLUDES:**

1. The findings made by the PCF Advisory Board are accepted by the Custodian as his own.

2. House Bill 75 from the 2021 Regular Session of the New Mexico Legislature, entitled *Clarifying and Modernizing the Medical Malpractice Act* ("HB 75"), increases costs for all Qualified Health Care Providers ("QHPs"). Most significantly, HB 75 requires QHPs to eliminate the PCF deficit by December 31, 2026. Because hospitals have not participated in the fund for as long as independent providers, hospitals are responsible for less than twenty-five percent of the deficit. To extinguish the remainder of the deficit by December 31, 2026 requires imposing an annual deficit reduction surcharge, in addition to the base surcharge, that will increase

annual surcharge obligations more than fifty percent on independent providers. HB 75 also increases the future claim funding obligations of the PCF, first by raising the obligation of the PCF for maximum damages by $100,000 for calendar year 2022, and second by raising the "cap" of $750,000 by the increase of the consumer price index for all urban areas for calendar year 2023. That means the "cap" for 2023 is estimated to be increased to approximately $803,000, and the PCF will be responsible for covering the full amount of that increase. The losses estimated by this year's actuary are greater than those estimated by the prior year actuary. Finally, HB 75 requires the PCF to engage the services of an independent administrator, and to conduct an annual actuarial study.

3. The Custodian finds that, while hospitals and outpatient health care facilities may be able to withstand (or pass on) steep cost increases, independent providers would likely find the cost of participation in the PCF as recommended by the actuary and the PCF Advisory Board to be prohibitive and leave the PCF, or worse, leave the state. This would increase the cost of reducing the deficit to the remaining QHPs in the PCF, potentially leading to a cascade of participants leaving the PCF.

4. HB 75 originally raised the "cap" of recovery for outpatient health care facilities at the same rate as raising the "cap" for hospitals. The Second Special Session of the 55th Legislature amended the MMA to keep the cap at $750,000 for calendar years 2022 and 2023 for outpatient health care facilities that are not majority-owned and -controlled by a hospital. However, unless the Legislature changes the MMA in the upcoming Session, the caps for all outpatient health care facilities will rise to $5,000,000 for calendar year 2024. If the cap rises to that level, because of the unavailability of insurance coverage for those entities, outpatient health care facilities that are not majority-owned and -controlled by a hospital will be unable to participate in the PCF (and

may go out of business entirely), further depleting the surcharge base for the PCF.

5. The Custodian adopts the PCF Advisory Board's Recommendations except for Recommendation A.

IT IS THEREFORE ORDERED:

A. The PCF shall not implement the ERP for 2023 rates.

B. The PCF shall not adopt the PCF Advisory Board's recommendation that base surcharge increases for independent providers be set in a manner which would result in a 32 percent increase over 2022 surcharge assessments. The Custodian takes administrative notice that adopting this recommendation would likely result in decreased provider participation in the PCF and a decrease in the number of providers who deliver services to New Mexicans. Such an outcome would be an unintended and unacceptable consequence of HB 75.

C. The Custodian has reason to believe that the Legislature is interested in taking steps to stabilize the PCF. The Governor and the Legislature have repeatedly emphasized the importance of retaining independent providers in the state while reducing the PCF deficit. The OSI has submitted a budget request to the Office of the Governor and to the Legislative Finance Committee for $32.5 million for the deficit costs attributed to physicians and independent providers. The Custodian is requesting that any appropriation to the PCF be used to adjust independent provider base surcharges and reduce the deficit amounts attributable to independent physicians and providers. The Custodian further recommends that the Legislature take cost-saving actions to ensure the future financial stability of the PCF.

D. Based on the anticipated Legislative appropriation, the Custodian orders that the 2023 base surcharge increases for independent providers be set at a 10 percent increase over 2022 surcharge assessments. PCF surcharges for entities owned by independent providers shall be

assessed at 10 percent of the cumulative individual independent provider surcharges for all providers who practice within the entity.

E. Base PCF surcharges for hospitals and outpatient health care facilities shall be assessed at the central confidence level resulting in a 15.8 percent increase for hospitals and outpatient health care facilities. Because HB 75 eventually eliminates hospital and outpatient health care facility participation in the PCF and requires all qualified hospitals and outpatient care facilities to cure any fund deficit attributable to hospitals and outpatient health care facilities by December 31, 2026, the assigned confidence level and associated percentage increases shall be reevaluated for PCF 2024 rates.

F. The risk classifications set out on page 17 of the actuary's report shall be adopted for use by the PCF.

G. For hospitals and outpatient health care facilities, the PCF shall adopt the proposed deficit reduction plan and apply the deficit reduction assessments of Recommendation B at a surcharge rate increase of 19.8 percent.

H. These changes shall become effective January 1, 2023.

I. The Custodian expresses his appreciation to the Governor and the Legislature for their assistance in reducing the deficit amounts that were not the fault of currently enrolled QHP providers.

J. The Custodian recommends that all parties work together to address the cost phenomena that are negatively impacting the PCF. The Custodian attaches as Exhibit A several recommended actions that would deliver significant cost savings to the PCF for an extended period of time.

K. A copy of this Final Order shall be sent to all persons as indicated on the attached

Certificate of Service and distributed through the PCF Newsletter.

L. This docket is now closed.

DONE AND ORDERED at Santa Fe, New Mexico, this 7th day of October, 2022.

RUSSELL TOAL
Superintendent of Insurance, as
Custodian of the PCF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 7th day of October 2022, I filed the foregoing *Order* through the OSI's e-filing system, which caused the parties to be served by electronic means, as more fully reflected on the eService recipients list for this case.

Freya Joshi, Law Clerk
Office of Legal Counsel
Office of Superintendent of Insurance

RECOMMENDED CHANGES TO THE MEDICAL MALPRACTICE ACT

41-5-3: We recommend that "malpractice claim" and "occurrence" be synonymously defined in such a way that a single, individual injury event be treated as a single malpractice claim or occurrence, regardless of the number of contributing providers or acts.

41-5-3(H): Define "medical care and related benefits" to be limited only to amounts actually paid by or on behalf of an injured patient and accepted by a health care provider in payment of charges. Make clear that amounts charged (but typically "written off" or dramatically reduced for insurance, Medicaid, or Medicare purposes) are not "reasonable" expenses.

41-5-6(B): Change "consumer price index for all urban consumers" to a different medical subcategory CPI, or postpone the increases until the PCF reaches solvency, or change increase to a set amount per year.

41-5-6(C): Make permanent the lower cap limitation for outpatient health care facilities that are not majority-owned and -controlled by a hospital.

41-5-7: Replace this paragraph that was removed from the prior version of the MMA: "Payment for medical care and related benefits shall be made as expenses are incurred." Add a provision that the PCF will not settle, and a court may not order, future medical expenses as a lump sum payment. Such payments threaten the financial stability of the fund, underestimate future medical expenses, and a significant amount of such payments do not go for medical expenses at all.

41-5-10: Replace this provision repealed by HB 75, to allow examinations to determine the necessity of future medical care.

41-5-25: Include a provision that the PCF Custodian shall not pay any settlement or judgment that requires payment of past medical expenses in excess of reasonable expenses as defined by the MMA or future medical expenses in a lump sum or discounted to present value.

41-5-25: The MMA should be revised to expressly authorize the PCF Custodian to continue the conventional practice of evaluating and approving all proposed settlements when the case implicates the PCF.

41.5.25.F: This paragraph should be revised that the deficit reduction obligation only applies to "qualified and participating hospitals and outpatient health care facilities".

We recommend that consideration be given to including a venue provision which requires that medical malpractice actions be brought in the county where the medical care occurred or in the county where the patient resided at the time of the alleged malpractice.

EXHIBIT A