

HAWAII REVISED STATUTES

PART II. MEDICAL CLAIM CONCILIATION

§671-11 Medical claim conciliation panels; composition, selection, compensation. (a) There are established medical claim conciliation panels which shall review and render findings and advisory opinions on the issues of liability and damages in medical tort claims against health care providers.

(b) A medical claim conciliation panel shall be formed for each claim filed pursuant to section 671-12 and after each panel renders its decision or the claim is otherwise disposed of it shall be disbanded. Each medical claim conciliation panel shall consist of one chairperson selected from among persons who are familiar with and experienced in the personal injury claims settlement process, one attorney licensed to practice in the courts of the State and experienced in trial practice, and one physician or surgeon licensed to practice under chapter 453 or chapter 460. The chairperson shall be appointed by the director of the department of commerce and consumer affairs from a list of eligible persons approved by the chief justice of the supreme court of Hawaii. The attorney shall be appointed by the chairperson from a list of not less than thirty-five attorneys experienced in trial practice submitted annually by the supreme court. The physician or surgeon shall be appointed by the chairperson and shall be currently licensed and in good standing under chapter 453 or under chapter 460.

(c) The chairperson shall preside at the meetings of the panel. The chairperson, all panel members, and any consultant called by the panel to appear before the panel shall be compensated at the rate of \$300 per claim which will become payable when the decision of the panel is submitted. At the discretion of the director, the chairperson, panel members, and any consultant called by the panel to appear before the panel, may be compensated at one-half the amount of compensation specified in this section, if the claim is disposed of by any means prior to the hearing by the panel. The chairperson, all panel members, and any consultant called by the panel to appear before the panel also shall be paid allowances for travel and living expenses which may be incurred as a result of the performance of their duties on or for the panel. These costs shall be paid by the department of commerce and consumer affairs from the filing fees paid by the parties.

(d) The claimant shall pay a filing fee of \$450 to the department upon the filing of the claim and the failure to do so shall result in the claim being rejected for filing. Each health care provider and other parties to the claim shall pay a filing fee of \$450 to the department within twenty days of being served with the claim. Each party to a claim shall be assessed a non-refundable processing fee by the department in the amount of \$50. The non-refundable processing fee shall be retained from each party's filing fee, and shall be used to defray the administrative costs of the medical claims conciliation panel program.

(e) After the panel has made a final decision on a claim, or after a final disposition of the claim has been made without a hearing before the panel, the department shall return any moneys remaining after all panel costs have been paid, to the respective parties on a pro rata basis.

(f) The office and meeting space, secretarial and clerical assistance, office equipment, and office supplies for the panel shall be furnished by the department. The chairperson may designate any alternative meeting place or site for the hearing.

(g) The board of medical examiners and board of osteopathic examiners shall each prepare a list of physicians, surgeons, and podiatrists, as the case may be, along with their respective specialties. These physicians and surgeons shall be eligible to serve as consultants to the panel in their respective fields. Panel members may consult with other legal, medical, and insurance specialists.

§671-11.5. Waiver of filing fee. (a) If any party to a claim cannot pay the required filing fee, the party may file with the director a motion to waive the filing fee. The motion to waive the filing fee shall be accompanied by an affidavit in a format prescribed by the department, showing in detail:

- (1) The party's inability to pay the filing fee;
- (2) The party's belief that the party is entitled to redress; and
- (3) A statement of the issues that the party intends to present at the hearing before a medical claims conciliation panel.

(b) The director shall decide on the motion to waive the filing fee as expeditiously as possible, and no oral arguments shall be permitted.

(c) If the director grants the motion to waive the filing fee, the party may proceed without further application to the director or panel, and without payment of the filing fee. If the motion is denied, the director shall state the reasons for the denial in writing. The director shall promptly provide the party with a filed copy of the director's order granting or denying the motion.

(d) If a motion to waive the filing fee is denied by the director, the party may seek judicial review under section 91-14.

(e) If the director denies a party's motion to waive the filing fee, the party shall pay the filing fee within thirty days after the denial of the motion, unless the party has filed an appeal under section 91-14. If the party has filed an appeal under section 91-14, the party may proceed without payment of the filing fee, until such time as a final judicial determination is rendered.

(f) If the party files an appeal under section 91-14, and the court upholds the director's denial of the aggrieved party's motion to waive the filing fee, the party shall pay the filing fee within thirty days after the court's affirmation of the denial. If the court determines that the party's motion for waiver of the filing fee was improperly denied, the party shall be entitled to proceed without payment of the filing fee.

§671-12 Review by panel required; notice; presentation of claims; request for a more definite statement of the claim. (a) Effective July 1, 1976, any person or the person's representative claiming that a medical tort has been committed shall submit a statement of the claim to the medical claim conciliation panel before a suit based on the claim may be commenced in any court of this State. Claims shall be submitted to the medical claim conciliation panel in writing. The claimant shall set forth facts upon which the claim is based and shall include the names of all parties against whom the claim is or may be made who are then known to the claimant.

(b) Within five business days thereafter the panel shall give notice of the claim and the statement of the claim, by certified mail, to all health care providers and others who are or may be parties to the claim and shall furnish copies of written claims to such persons. Such notice shall set forth a date, not more than twenty days after mailing the notice, within which any health care provider against whom a claim is made shall file a written response to the claim, and a date and time, not less than five days following the last date for filing a response, for a hearing of the panel. Such notice shall describe the nature and purpose of the panel's proceedings and shall designate the place of the meeting. The times originally set forth in the notice may be enlarged by the chairperson, on due notice to all parties, for good cause.

(c) If the statement of the claim in the notice is so vague or ambiguous that any party receiving notice of the claim cannot reasonably be required to frame a written response, the party may submit a written request to the director of commerce and consumer affairs for a more definite statement before filing the written response. Copies of the request shall be provided to the panel, the claimant, and other affected parties. The request, which shall be ex parte and stay the proceedings of the panel until notice of the director's decision is given to the panel and all parties, shall specify the defects complained of and the details desired. The director may deny, grant, or modify the request at the director's own discretion, without the necessity of a hearing, although the director may reach a decision after consulting with the panel or the claimant. The director shall provide notice of the decision to the panel, the claimant, and other affected parties. If the request is granted and the claimant fails to provide a more definite statement of the claim within five days after notice of the decision, the panel may make such order as it deems just. This subsection shall not be used as a tactic to delay the proceedings.

§671-12.5. Certificate of consultation. (a) Any claim filed with the medical claim conciliation panel under this chapter shall be accompanied by a certificate which declares one of the following:

- (1) That the claimant or the claimant's attorney has consulted with at least one physician who is licensed to practice in this State or any other state, and who is knowledgeable or experienced in the same medical specialty as the health care professional against whom the claim is made, and that the claimant or claimant's attorney has concluded on the basis of such consultation that there is a reasonable and meritorious cause for filing the claim. If the claimant or the claimant's attorney is not able to consult with a physician in the same medical specialty as the health care professional against whom the claim is made, the claimant or claimant's attorney may consult with a physician who is licensed in this State or in any other state who is knowledgeable and experienced in a medical specialty that is as closely related as practicable to the medical specialty of the health care professional against whom the claim is made. The physician or physicians consulted by the claimant or the claimant's attorney may not be a party to the case, nor be compelled to testify or otherwise participate in the hearing before the medical claim conciliation panel;

- (2) That the claimant or the claimant's attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed by the claimant or the claimant's attorney within ninety days after filing the claim; or
- (3) That the claimant or the claimant's attorney was unable to obtain the consultation required by paragraph (1) after the claimant or the claimant's attorney had made a good faith attempt to obtain such consultation and the physician contacted would not agree to such a consultation. For purposes of this paragraph, "good faith attempt" refers to the responsibility of a claimant or claimant's attorney to make reasonable efforts to contact a physician for the purpose of reviewing the circumstances upon which a claim is based. The claimant or claimant's attorney may contact physicians by letter, telephone, facsimile, or other electronic means of communication. If the physician does not respond within a reasonable time, the claimant or claimant's attorney may submit its claim to the medical claim conciliation panel along with a certificate declaring such nonresponse to claimant's good faith attempt. A "good faith attempt" shall ultimately be evaluated in light of the goal of having a qualified physician assist the claimant or claimant's attorney in understanding the basis of the claim, and such determination shall depend upon the circumstances of each individual case.

(b) Where a claimant or the claimant's attorney intends to rely solely on a failure to inform of the consequences of a procedure (informed consent), this section shall be inapplicable. The claimant or the claimant's attorney shall certify upon filing of the claim that the claimant or the claimant's attorney is relying solely on the failure to inform of the consequences of a procedure and for that reason is not filing a certificate as required by this section.

(c) For the purposes of this section, the claimant or the claimant's attorney shall not be required to disclose the names of any physician consulted to fulfill the requirements of subsection (a) to any of the other parties to the claim. The medical claims conciliation panel may require the claimant or the claimant's attorney to disclose the name of any physician consulted to fulfill the requirements of subsection (a). No disclosure of the name of any physician consulted to fulfill the requirements of subsection (a) shall be made to any of the other parties to the claim; provided that the medical claim conciliation panel may contact any such physician to determine if the requirements of subsection (a) were met.

(d) Unless a certificate is filed pursuant to subsection (a) or (b), the claim shall not be received for filing by the medical claim conciliation panel.

§671-13 Medical claim conciliation panel hearing; fact-finding; evidence; voluntary settlement. Every claim of a medical tort shall be heard by the medical claim conciliation panel within thirty days after the last date for filing a response. No persons other than the panel, witnesses, and consultants called by the panel, and the persons listed

in section 671-14 shall be present except with the permission of the chairperson. The panel may, in its discretion, conduct an inquiry of a party, witness, or consultant without the presence of any or all parties.

The hearing shall be informal. Chapters 91 and 92 shall not apply. The panel may require a stenographic record of all or part of its proceedings for the use of the panel, but such record shall not be made available to the parties. The panel may receive any oral or documentary evidence. Questioning of parties, witnesses, and consultants may be conducted by the panel, and the panel may, in its discretion, permit any party, or any counsel for a party to question other parties, witnesses, or consultants. The panel may designate who, among the parties, shall have the burden of going forward with the evidence with respect to such issues as it may consider, and unless otherwise designated by the panel, when medical and hospital records have been provided the claimant for the claimant's proper review, such burden shall initially rest with the claimant at the commencement of the hearing.

The panel shall have the power to require by subpoena the appearance and testimony of witnesses and the production of documentary evidence. When such subpoena power is utilized, notice shall be given to all parties. The testimony of witnesses may be taken either orally before the panel or by deposition. In cases of refusal to obey a subpoena issued by the panel, the panel may invoke the aid of any circuit court in the State, which may issue an order requiring compliance with the subpoena. Failure to obey such order may be punished by the court as a contempt thereof. Any member of the panel, the director of the department, or any person designated by the director of the department may sign subpoenas. Any member of the panel may administer oaths and affirmations, examine witnesses, and receive evidence. Notwithstanding such powers, the panel shall attempt to secure the voluntary appearance, testimony, and cooperation of parties, witnesses, and consultants without coercion.

At the hearing of the panel and in arriving at its opinion the panel shall consider, but not be limited to, statements or testimony of witnesses, hospital and medical records, nurses' notes, x-rays, and other records kept in the usual course of the practice of the health care provider without the necessity for other identification or authentication, statement of fact, or opinion on a subject contained in a published treatise, periodical, book, or pamphlet, or statements of experts without the necessity of the experts appearing at the hearing. The panel may upon the application of any party or upon its own decision appoint as a consultant, an impartial and qualified physician, surgeon, physician and surgeon, or other professional person or expert to testify before the panel or to conduct any necessary professional or expert examination of the claimant or relevant evidentiary matter and to report to or testify as a witness thereto. Such a consultant shall not be compensated or reimbursed except for travel and living expenses to be paid as provided in section 671-11. Except for the production of hospital and medical records, nurses' notes, x-rays, and other records kept in the usual course of the practice of the health care provider, discovery by the parties shall not be allowed.

During the hearing and at any time prior to the rendition of an advisory decision pursuant to section 671-15, the panel may encourage the parties to settle or otherwise dispose of the case voluntarily.

§671-14 Same; persons attending hearings of panel. Unless excluded or excused by the panel, the following persons shall attend hearings before the panel:

- (1) The party or parties making the claim;
- (2) The health care provider or providers against whom the claim is made or representatives thereof; other than counsel, authorized to act for such health care provider or providers;
- (3) Counsel for the parties, if any.

§671-15 Same, decisions. (a) Within thirty days after the completion of a hearing, the medical claim conciliation panel shall file a written advisory decision with the insurance commissioner who shall thereupon mail copies to all parties concerned, their counsel, and the representative of each health care provider's liability insurance carrier authorized to act for such carrier, and the board of osteopathic examiners, as appropriate. The insurance commissioner also shall mail copies of the advisory decision to the department of commerce and consumer affairs, if the claim is against a physician or surgeon licensed under chapter 453 or an osteopathic physician and surgeon licensed under chapter 460 or a podiatrist licensed under chapter 463E. The panel shall decide the issue of liability and shall state its conclusions in substantially the following language: "We find the health care provider was actionably negligent in his or her care and treatment of the patient and we, therefore, find for the claimant"; or "We find the health care provider was not actionably negligent in his or her care and treatment of the patient and we, therefore, find for the health care provider".

(b) After a finding of liability, the medical claim conciliation panel shall decide the amount of damages, if any, which should be awarded in the case. The decision as to damages shall include in simple, concise terms a division as to which portion of the damages recommended are attributable to economic losses and which to noneconomic losses; provided the panel may not recommend punitive damages.

(c) The decisions shall be signed by all members of the medical claim conciliation panel; provided that any member of the panel may file a written concurring or dissenting opinion.

(d) The advisory decision required by this section need not be filed if the claim is settled or otherwise disposed of before the decision is written or filed.

§671-15.5. Expungement of records; malpractice insurance rates. (a) Upon a decision by the medical claim conciliation panel finding for the health care provider pursuant to section 671-15(a), the health care provider may apply to the panel for expungement of all records of the related proceedings. The panel shall expunge all records if a majority of the panel finds that the complaint is fraudulent or frivolous.

(b) No insurer providing professional liability insurance for a health care provider shall increase any premium rate for the health care provider on the basis of the filing of a medical tort claim against the health care provider that is determined by the medical claims conciliation panel to be fraudulent or frivolous.

§671-16 Subsequent litigation; excluded evidence. The claimant may institute litigation based upon the claim in an appropriate court only after a party to a medical

claim conciliation panel hearing rejects the decision of the panel, or after the twelve-month period under section 671-18 has expired.

No statement made in the course of the hearing of the medical claim conciliation panel shall be admissible in evidence either as an admission, to impeach the credibility of a witness, or for any other purpose in any trial of the action; provided that such statements may be admissible for the purpose of section 671-19, hereof. No decision, conclusion, finding, or recommendation of the medical claim conciliation panel on the issue of liability or on the issue of damages shall be admitted into evidence in any subsequent trial, nor shall any party to the medical claim conciliation panel hearing, or the counsel or other representative of such party, refer or comment thereon in an opening statement, an argument, or at any other time, to the court or jury; provided that such decision, conclusion, finding, or recommendation may be admissible for the purpose of section 671-19, hereof.

§671-16.5. Arbitration; subsequent litigation. Any person or the person's representative claiming that a medical tort has been committed or any health care provider against whom a claim has been made may elect to bypass the court annexed arbitration program under section 601-20 after the claim has been submitted to the medical claim conciliation panel and the panel has rendered a decision or has not reached a decision within the tolling period of the statute of limitations under section 671-18.

§671-16.6. Submission of claim to an alternative dispute resolution provider.
(a) Any claim initially filed with the medical claim conciliation panel may be subsequently submitted to an alternative dispute resolution provider upon the written agreement of all of the parties to the claim and with the written approval of the director. The director shall approve the alternative dispute resolution provider and the alternative dispute resolution procedures.

(b) The parties shall comply with the procedures established by the alternative dispute resolution provider and approved by the director. If a party does not comply with those procedures, any other party may file a motion with the director to have the claim resubmitted to the medical claim conciliation panel.

(c) Within thirty days after the completion of the alternative dispute resolution process, the alternative dispute resolution provider shall notify all parties concerned, their counsel, and the representative of each health care provider's liability insurance carrier authorized to act for the carrier, as appropriate, that the alternative dispute resolution process has been completed.

(d) The claimant may institute litigation based upon the claim in an appropriate court only if:

- (1) The parties were not able to resolve the entire claim through the alternative dispute resolution process and the matter has not been resubmitted to the medical claim conciliation panel pursuant to subsection (b) of this section; or
- (2) The claim has not been resolved through the alternative dispute resolution process after twelve months from the date the claim was filed with the approved alternative dispute resolution provider.

(e) No statement made in the course of the approved alternative dispute resolution process shall be admissible in evidence as an admission, to impeach the credibility of a witness, or for any other purpose in any trial of the action. No decision, conclusion, finding, or recommendation of the approved alternative dispute resolution provider on the issue of liability or on the issue of damages shall be admitted into evidence in any subsequent trial, nor shall any party to the approved alternative dispute resolution hearing, their counsel, or other representative of such party, refer or comment thereon in an opening statement, in an argument, or at any time, to the court or jury.

§671-17. Immunity of panel members from liability. No member of a medical claim conciliation panel shall be liable in damages for libel, slander, or other defamation of character of any party to medical claim conciliation panel proceeding for any action taken or any decision, conclusion, finding, or recommendation made by the member while acting within the member's capacity as a member of a medical claim conciliation panel under this Act.

§671-18 Statute of limitations tolled. The filing of the claim with the medical claim conciliation panel or with an approved alternative dispute resolution provider shall toll any applicable statute of limitations, and any such statute of limitations shall remain tolled until sixty days after the date the decision of the panel or the notification of completion from the approved alternative dispute resolution provider is mailed or delivered to the parties. If a decision by the medical claim conciliation panel is not reached within twelve months, or the alternative dispute resolution process is not completed within twelve months, the statute of limitations shall resume running and the party filing the claim may commence a suit based on the claim in any appropriate court of this State. The panel or the approved alternative dispute resolution provider shall notify all parties in writing of this provision.

§671-19 Duty to cooperate; assessment of costs and fees. It shall be the duty of every person who files a claim with the medical claim conciliation panel, every health care provider against whom the claim is made, and every insurance carrier or other person providing medical tort liability insurance for the health care provider, to cooperate with the medical claim conciliation panel for the purpose of achieving a prompt, fair, and just disposition or settlement of the claim, provided that cooperation shall not prejudice the substantive rights of those persons.

Any party may apply to the panel to have the costs of the action assessed against any party for failure to cooperate with the panel. The panel may award costs, or a portion thereof, including attorney's fees, witness fees, including those of expert witnesses, filing fees, and costs of the medical claim conciliation panel hearing to the party applying therefor.

In determining whether any person has failed to cooperate in good faith, the panel shall consider, but is not limited to, the following:

- (1) The attendance of the persons at the hearing of the medical claim conciliation panel;

- (2) The extent to which representatives of parties and counsel representing parties came to panel hearings with knowledge of the claims and defenses and authority to negotiate a settlement or other disposition of the claim;
- (3) The testimony of members of the panel as to the facts of the person's participation in the panel hearing;
- (4) The extent of the person's cooperation in providing the panel with documents and testimony called for by the panel;
- (5) The reasons advanced by the person so charged for not fully cooperating or negotiating; and
- (6) The failure of the person to submit any required fees to the department of commerce and consumer affairs, as required by this chapter.

The party against whom costs are awarded may appeal the award to the circuit court. The court may affirm or remand the case with instructions for further proceedings; or it may reverse or modify the award if the substantial rights of the petitioners may have been prejudiced because the award is characterized as abuse of discretion.

§671-20. Annual report. The director of commerce and consumer affairs shall prepare and submit to the legislature annually, twenty days prior to the convening of each regular session, a report containing the director's evaluation of the operation and effects of this chapter. The report shall include a summary of the claims brought before the medical claim conciliation panel and the disposition of such claims, a description and summary of the work of the panel under this chapter, an appraisal of the effectiveness of this chapter in securing prompt and fair disposition of medical tort claims, a review of the number and outcomes of claims brought under section 671-12 and recommendations for changes, modifications or repeal of this chapter or parts thereof with accompanying reasons and data.