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Claimant's View of the Medical Claim Conciliation Panel

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The enactment of the law relating to the Medical Claim Conciliation Panel and related legislation was prompted by an alleged crisis in the area of malpractice insurance and was intended to stabilize the medical malpractice insurance situation by reintroducing some principles of predictability in spreading of risks.¹ The 1976 law established the short-lived patients' compensation fund, put some limitations on fees and implemented other so-called "protections" for health care providers. One of the "protections" was the Medical Claim Conciliation Panel ("MCCP").

The MCCP is responsible for conducting informal conciliation hearings on claims against healthcare providers before such claims can be filed as lawsuits. The decisions of the MCCP panels are advisory in nature and not binding on the parties, in the event that any party still wishes to pursue the matter in court.

The primary purpose of the MCCP program is achieved when the parties make conscientious and thorough presentations to the MCCP panels. In such cases, the decisions rendered by the panels provide the parties with fairly accurate advisory determinations of the relevant merits of the claims, which should assist the parties in evaluating whether the claim should be pursued in the judicial system.

The MCCP also provides opportunities for the parties to exchange information in a relatively expedited and inexpensive manner, which in turn provides opportunities for the parties to explore the conciliation of meritorious claims prior to such claims being brought before a court.

Do the benefits of the MCCP process outweigh the drawbacks? I believe the answer is a resounding "yes." That being the case, how can a claimant's counsel make the process meaningful? Let me first review some of the procedural matters and I will then explain why I believe the benefits outweigh the drawbacks and how those of us representing claimants can make the process meaningful.

¹ 1976 Haw. Sess. L. Act 219; Hawaii Revised Statutes Chapter 671.

M CCP Procedures

The claimant files a claim with the M CCP paying the appropriate filing fees before the expiration of the statute of limitations. This can be a simple letter setting forth the basis of the medical negligence and identifying the claimants and the respondents. Once the claim is filed, the statute of limitations is tolled for 60 days following the mailing of the panel decision or for a maximum of 18 months from the filing of the claim, whichever occurs sooner. **[NOTE: The tolling period is now 12 months and not 18 months]**

After the claim is filed, the hearing date is set at the Department of Commerce and Consumer Affairs (“DCCA”) offices. Recently, several plaintiff and defense lawyers met with Rod Maile, the administrator of the M CCP program. One of the major issues those of us representing claimants had was the time it took to obtain a hearing date. Maile has always been flexible and responsive with respect to changes to make the M CCP more efficient. As a result of our meeting, claimants’ attorneys, if they use their offices for the hearing, can set the hearing at the time the claim letter is filed for a date not less than four months after the filing of the claim letter.

The M CCP consists of three persons, a doctor, an attorney and a chairperson, typically an attorney, but not required to be, according to Hawaii Revised Statutes (“H.R.S.”) §671-11. The physician member of the panel is generally chosen from the same medical specialty as the health care provider named in the claim. If several physicians are named, the physician chosen is typically from a specialty that can best evaluate the case.

H.R.S. § 671 provides that anyone wishing to bring a lawsuit against a physician, osteopath (D.O.), podiatrist (D.P.M.), or hospital, licensed to practice or operate in the State of Hawaii, must first file a claim with the M CCP before filing a lawsuit. Thus, claims against dentists (including oral surgeons), chiropractors or psychologists do not require an M CCP filing. Nurses are covered by the M CCP because invariably they are an employee of a physician or hospital against whom a claim is brought and are covered via respondeat superior. Rod Maile has informed me that at least one Circuit Court Judge in the First Circuit has ruled that a naturopath and a chiropractor may not be sued without first completing the M CCP process. My advice would be, particularly if the statute of limitations is approaching, to file concurrently with the M CCP and Circuit Court, if you have a claim against either a chiropractor or a naturopath.

Another positive outcome of the recent meeting between Rod Maile and several attorneys representing claimants and respondents, was the ability to name the panel chairperson for a particular case. If both or all of the parties agree and the person is an eligible panel chairperson (the Director of the DCCA will provide such a list), this can be accomplished by a written request to the Director of the DCCA.

The panel proceedings are not recorded and the outcome may not be used in any future litigation. The panel will include a suggested amount of damages, if the panel finds actionable negligence. Therefore, you must be prepared to present evidence on damages at the hearing. Although the panels have the right to split the hearing, entertaining the liability issues first, and then, if liability is found, entertaining evidence on damages, I have never, in my experience, had this happen. The panel’s written decision finds either actionable

negligence or no actionable negligence and, if there is actionable negligence, the panel will make a recommendation as to damages. No reasoning or basis for the decision is given. After the panel hearing, the panel members will often be willing to speak informally with you to discuss the basis for their decision. Occasionally, there will be a dissenting panel member, since only two out of three need to agree.

According to H.R.S. § 671-15, the decision must be mailed to you 30 days following the completion of the hearing.

If you disagree with the M CCP panel, you may file suit. However, before filing in court, pursuant to H.R.S. § 671-16, you must file a written rejection of the panel's decision with the M CCP.

The M CCP, even though it proceeds in the same order as a trial, is an informal process and the rules of evidence are very loosely applied. Many panel hearings are concluded in half a day.

Both the claimant and health care provider or providers must attend the M CCP along with counsel, if any. If it is extremely onerous for my client to be present, I am usually granted permission to have my client excused. Generally, the panel requires claimants and health care providers to be present, even if they no longer live in Hawaii. The reasoning is that the purpose of the panel is conciliation and it is hard for this to occur if the parties are not present.

One side note, a Federal District Court of Hawaii decision in 1995, *Hum v. Dericks*,² has held that the M CCP requirement is procedural and does not apply to preclude malpractice actions brought in Federal Court on the basis of diversity jurisdiction where no M CCP claim has been filed.

Benefits versus Drawbacks of the M CCP

Although we never file until we have completely examined all the relevant medical records and have experts committed (unless the statute of limitations is imminent and it looks as though there is potentially a very good case), we invariably learn something new about the case during the panel process.

One of the most important reasons I take the process seriously is because the defense, to my knowledge without exception, takes it seriously. The two major carriers in this state are MIEC (Medical Insurance Exchange of California) and HAPI (Hawaii Association of Physicians Indemnification) and I know they feel the M CCP is a helpful process. I have found that a case is somewhat easier to resolve if there is a favorable panel result.

I know there are one or two people that represent claimants that do not put on a case at the M CCP. I am informed that they do this because they feel they are giving up too much information about their case without a sufficient quid pro quo. There may be strategic reasons for withholding certain parts of a claim, for instance, because the healthcare provider is not under oath, and it might be better to confront the healthcare provider with that information for the first time when the provider is under oath at his or her deposition. In general, I find that if I have a meritorious case, letting the defense know the basis of my

² 162 F.R.D. 628 (D.C. Haw. 1995).

claim at the panel is not a detriment, as I will usually then learn in advance of suit what their defenses are. In general, I believe if the panel is going to help, both sides should make an effort to present their case so that I, representing the claimant, can learn of any weaknesses which may not have been fully appreciated, and the defense can understand where they have problems in defending the case.

Although we will not go to the panel without the medical experts, except in the rare situation I mentioned earlier, there have been occasions when we have learned matters at the panel which have caused us to reconsider and not proceed further. I recall a case defended by Kenneth Robbins, Esq. a number of years ago where my clients' son was blinded at birth as a result of excessive oxygen. We had excellent experts telling us that the defense had breached the standard of care, but Mr. Robbins presented videotapes at the MCCP from two experts demonstrating that there were two legitimate schools of thought on how to handle this infant's problem. As a result of his presentation, we felt that our odds of prevailing were very slim, and we did not proceed past the MCCP.

If you do not present a case at the MCCP, the 1993 Legislature passed a bill giving the MCCP power to assess costs of the hearing, including the costs of expert witnesses and panel stipends, for such non-cooperation.³ This assessment of costs may be appealed to the Circuit Court.

I think many of us representing plaintiffs have the concern that the doctor on the panel almost invariably, particularly if he or she is in the same field, knows the respondent doctor. Although there have been occasional decisions where I am afraid that that friendship has maybe colored the outcome, I would say that more often than not, doctor members of the panel have tried to make an objective assessment of the medical facts. In almost all cases, the doctor's opinion will carry the day on whether there is or is not actionable negligence found. It is not easy for the panel chairpersons to obtain doctors to sit on the panels, but I have found that, if there is a physician on the panel that we feel will not be open-minded, that both the panel chairs and Rod Maile have been receptive to our concerns.

A legitimate concern for claimants regarding the panel is the time that is added to the process of bringing a malpractice action to finality. Against that delay has to be weighed how many cases are actually resolved at the panel (which I will cover later) and other factors such as costs. To bring even the more routine medical malpractice case through trial costs many tens of thousands of dollars. If you can have a case resolved at the panel level or learn something at the panel level which leads you not to pursue the case further, the cost to your client, and in many cases, ultimately you as the claimant's attorney, is significantly reduced. I have also found that counsel for respondent doctors have told me that their doctors were totally against settlement and then, having been presented with the claimant's case at the MCCP, have agreed to authorize settlement. In almost all medical malpractice insurance contracts, although there are a few that I know do not require this, the doctor must consent to settlement. So, although you obviously will have to convince the doctor's lawyer that your case has merit, you will also need to have the doctor himself convinced of that fact.

I have found more recently that even though H.R.S. § 671-19 states that as part of the cooperation both parties should have authority to negotiate a settlement, the defense often

³For examples, see H.R.S. § 671-19.

does not come to the panel with that in mind. I would urge that counsel representing health care providers let their carriers know that they should arrive at the panel, in a case where they have exposure, prepared to discuss resolution. The attorneys representing the insurance carriers are experienced medical malpractice attorneys, and it would be a rare case where they were not able to fairly accurately evaluate their exposure before the start of the MCCP.

In summary, I believe the benefits of the MCCP far outweigh the two potential drawbacks, those two being the delay of cases and informing the defense of the theory of your case.

As stated earlier, the MCCP findings are confidential. I personally am in favor of this confidentiality requirement. Several years ago, I was asked to handle a case in Arizona where, at the time, the result of the finding of that panel, negligence or no negligence, was able to be used as the equivalent of an expert opinion. In my view, this turned what should have been a fact-finding and conciliation hearing into a mini trial with the attendant expense and trial-like posturing. In my view, the procedure as it then existed in Arizona (which is no longer the case), really was not a beneficial process, and added to delay of the case.

A Few Thoughts on How to Make the MCCP Process Meaningful

Before you file your claim letter, you should: a) know the medical records; b) know your client's story; c) have spoken to a doctor or doctors in the appropriate medical fields - that you know will be candid in his or her opinions; and d) have obtained a written report or reports from the healthcare providers that you have retained. We often find that the story the client provides at the initial interview varies dramatically from what is contained in the medical records. Although we sometimes wonder about the accuracy of the medical records, we rarely find that we are able to prove that they were altered.

At the panel hearing itself, you should: a) establish the respondent's position as to the essential medical facts; b) have the respondent explain any differences in his or her opinions from what is contained in the medical records; c) have the respondent explain why any critical facts are omitted from the medical records; d) examine other critical healthcare personnel, such as nurses, to see if they differ on important issues from the respondent; e) have the respondent explain how his or her position can be supported in contrast to your own experts' opinions; and f) observe carefully the demeanor of the respondent - a likeable doctor can sometimes make the difference in whether an otherwise close case is won or lost.

MCCP Statistics

In 1999, there were 144 claims filed, which is very similar to the numbers filed in the preceding two years, although slightly less than the numbers filed in 1995 and 1996. Interestingly, if we go back 15 years, the number of cases that were filed in 1985 were essentially the same as filed last year. The 144 cases filed in 1999 involved 265 claimants and 375 respondents. No claimant filed more than one claim in 1999; however, the 375 respondents were not all different healthcare professionals and facilities. In fact, of the 375 healthcare professionals named, 26 of these claims were against one particular group of respondents.⁴

⁴MCCP DCCA Annual Report to the 2000 Legislature.

In 1999, the MCCP panels heard 129 cases that involved a total of 240 claimants and 489 respondents. In 20 of those cases, the claimants were pro se. In only one of the cases in which the claimant did not have an attorney was there a finding of actionable negligence. The panels found actionable negligence on the part of all or some of the respondents in 47 of the 129 cases and rendered advisory determinations of damages ranging from \$25,000 to \$3.2 million. In one case, the panel found actionable negligence but was not able to make a damages determination.⁵

In summary, as to the claims heard in 1999, actionable negligence was found in 33%, no actionable negligence in 61%, 2% were dismissed by the panel, and in cases with multiple respondents, at least one was found negligent and at least one non-negligent in 4% of cases. Thirty-seven claims were closed without hearings for various reasons such as withdrawal, settlement prior to hearing, dismissal by stipulation, termination, and lapse of the tolling period. Over the years, the percentage of cases in which negligence is found has varied roughly between 20% and 33%.⁶ There has not been any dramatic change in the approximately 25 years since the MCCP has been in operation.

In my opinion, the statistics showing a two to one or as much as four to one ratio of losses versus wins by claimants at the MCCP is somewhat skewed. I know that some claimants' lawyers will go to the panel to give their client his or her "day in court." There is also the occasional claimant's attorney who does not present a case at the panel and, of course, that case will likely result in a finding of no negligence. Therefore, it has been my experience that even though local doctors, who will probably know the respondent doctor, sit on the panel, if the plaintiff presents his or her case fully with expert reports, the claimants will win as many cases as they lose.

In conclusion, the MCCP process is the law. I think we should utilize it, so as to provide the most possible benefit to clients.

⁵ *Id.*

⁶ *Id.*