WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 07-001

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated January 2005.]

1. Statutory Authority

a. Section 655.27 (3) (bg) 1., Stats., requires promulgation of a rule that provides for an automatic increase (surcharge) in a "health care provider's" fees paid to the Injured Patients and Families Compensation Fund (IPFCF) (subject to the exception in s. 655.27 (3) (bg) 2., Stats., as noted below), if the loss and expense experience of the IPFCF and other sources with respect to "the health care provider or an employee of the health care provider" exceeds either a number of claims paid threshold or a dollar volume of claims paid threshold.

"Health care provider" is defined in s. 655.001 (8), Stats., as a person to whom ch. 655, Stats., applies under s. 655.002 (1), Stats., or a person who elects to be subject to ch. 655 under s. 655.02 (2), Stats. As a legal concept, "person" is not limited to natural persons. [See s. 990.01 (26), Stats.] Section 655.002 (1) includes certain physicians and nurse anesthetists, and certain partnerships, corporations, organizations, or enterprises providing physician or nurse anesthetist services. It also includes cooperative sickness care associations, ambulatory surgery centers, hospitals, certain entities that are hospital affiliates, and certain nursing homes whose operations are combined with hospitals. Section 655.002 (2) includes certain physicians and nurse anesthetists and a graduate medical program.

Section Ins 17.28 (6s) states that it implements s. 655.27 (3) (bg) 1., Stats. However, s. Ins 17.28 defines "provider" as a health care provider subject to ch. 655 who is a natural person and specifies that "provider" does not include a hospital or other facility or entity that provides

health care service. Section Ins 17.28 (6s) (c) then applies the surcharge payable to the IPFCF based on loss and expense experience ***only to physicians and nurse anesthetists***.

However, it appears that s. 655.27 (3) (bg) 1., Stats., requires that the rule establish a surcharge in the IPFCF fee applicable to all health care providers as defined in s. 655.001 (8) based on the loss and expense experience of the IPFCF and other sources with respect to the health care provider or an employee of the health care provider, unless the exception in s. 655.27 (3) (bg) 2., applies. This exception to the surcharge applies if the Board of Governors determines that the performance of the IPFCF Peer Review Council in making recommendations under s. 655.275 (5) (a), Stats., adequately addresses the considerations in s. 655.27 (3) (a) 2m., Stats., which provides that one of the considerations in determining the IPFCF assessment for a health care provider is the loss and expense experience of the individual health care provider based on the recommendation of the IPFCF Peer Review Council. If this exception does not apply to a particular health care provider, the statutes require that the rule provide for a surcharge for the health care provider if the loss and expense experience with respect to that health care provider or employee of the health care provider exceeds the claims paid or dollar volume thresholds established in the rule.

Thus, it is not clear why s. Ins 17.28 (6s), which establishes the general rule (rather than the exception which, according to s. Ins 17.285 (1), is covered in s. Ins 17.285), applies the surcharge to a subset of health care providers (namely, just physicians and nurse anesthetists) instead of to all the health care providers covered by the IPFCF.

b. Similarly, s. 619.04 (5m) (a), Stats., requires promulgation of a rule that provides for a surcharge in a "health care provider's" premiums paid to the Wisconsin Health Care Liability Insurance Plan (WHCLIP) (subject to the exception in s. 619.04 (5m) (b), Stats.), if the loss and expense experience of WHCLIP and other sources with respect to "the health care provider or an employee of the health care provider" exceeds either a number of claims paid threshold or a dollar volume of claims paid threshold.

"Health care provider" is defined for this purpose in s. 655.001 (8) as a person to whom ch. 655, Stats., applies under s. 655.002 (1), Stats., or a person who elects to be subject to ch. 655 under s. 655.02 (2), Stats., and includes the entities listed in the second paragraph of comment a., above. In addition, s. 619.04 (10), Stats., permits additional health care providers to obtain coverage.

Section Ins 17.25 (12m) states that it implements s. 619.04 (5m) (a), Stats. However, s. Ins 17.25 defines "provider" as a health care provider subject to ch. 655 who is a natural person and specifies that "provider" does not include a hospital or other facility or entity that provides health care service. Section Ins 17.25 (12m) (c) then applies the surcharge payable to WHCLIP based on loss and expense experience ***only to physicians, podiatrists, nurse anesthetists, nurse midwifes, nurse practitioners, and cardiovascular perfusionists***.

However, it appears that s. 619.04 (5m) (a), Stats., requires that the rule establish a surcharge on the WHCLIP premium applicable to all health care providers covered by WHCLIP

based on the loss and expense experience of WHCLIP and other sources with respect to the health care provider or an employee of the health care provider, unless the exception in s. 619.04 (5m) (b) applies. This exception to the surcharge applies if the Board of Governors determines that the performance of the IPFCF Peer Review Council in making recommendations under s. 655.275 (5) (a), Stats., adequately addresses the considerations in s. 619.04 (5) (b), Stats., which provides that WHCLIP include a rating plan which takes into consideration the loss and expense experience of the individual health care provider which resulted in payment by WHCLIP or other sources for damages arising out of the rendering of health care by the health care provider or an employee of the health care provider but prohibits an adjustment in the health care provider's WHCLIP premium prior to the receipt of the recommendation of the IPFCF Peer Review Council and the expiration of the time in which the health care provider may comment on that recommendation. If this exception does not apply to a particular health care provider, the statutes require that the rule provide for a surcharge for the health care provider if the loss and expense experience with respect to that health care provider or employee of the health care provider exceeds the claims paid or dollar volume thresholds established in the rule.

Thus, it is not clear why s. Ins 17.25 (12m), which establishes the general rule (rather than the exception which, according to s. Ins 17.285 (1) is covered in s. Ins 17.285), applies the surcharge to a subset of health care providers (namely, just physicians, podiatrists, nurse anesthetists, nurse midwifes, nurse practitioners, and cardiovascular perfusionists) instead of to all the health care providers covered by WHCLIP.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The Notice of Rulemaking Hearing and Item 13 of the Analysis are confusing in that they give different information about where comments may be mailed or hand delivered. One indicates that the phrase "OCI Rule Comment for Rule Ins 1725" should be included, whereas the other indicates that the phrase "OCI Rule Comment for Rule Ins 17287 PCF fee rule" should be included.

b. In the third sentence of Item 5 of the Analysis, "council and if deemed appropriate the council" should be changed to "council, and, if deemed appropriate, the council."

c. In the second sentence of Item 9 of the Analysis, "surcharged" should be changed to "surcharge."

d. In Item 13 of the Analysis, the deadline for submitting comments should be changed from February 27, 2006 to February 27, 2007.

e. In both ss. Ins 17.25 (12m) (a) and 17.28 (6s) (a), "in provider's" should be changed to "in a provider's."

f. In ss. Ins 17.25 (12m) (b) 3. and 4. and 17.28 (6s) (b) 3. and 4., a period should be inserted at the end of each sentence.

g. In ss. Ins 17.25 (12m) (c) 1. to 5. and 17.28 (6s) (c) 1. and 2., a space should follow the word "to" and precede the dollar sign.

h. In ss. Ins 17.25 (12m) (c) 6. to 9. and 17.28 (6s) (c) 3. and 4., it appears that "5" should be changed to "5 or more."