WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 03-038

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 October 2002.]

1. Statutory Authority

Section 655.27 (5) (a) 2., Stats., provides that, if an action is brought in a jurisdiction in which the Patients Compensation Fund (Fund) cannot be named as a party, a person may recover from the Fund only if the Fund is notified of the action within 60 days of service of process on the health care provider or the employee of the health care provider. It further provides that the Fund's Board of Governors (Board) may extend the time limit if the Board finds that enforcement of the time limit would: (a) be prejudicial to the purposes of the Fund; and (b) benefit neither insureds nor claimants.

In contrast, s. Ins 17.40 (2) provides that a primary insurer or self-insurer must notify the Fund in writing within 60 days of the insurer's or self-insurer's first notice of the filing of an action outside the state or within 60 days of service of process on the provider or employee of the provider, whichever is later. If the deadline is missed, s. Ins 17.40 (3) specifies that coverage under the Fund will be denied if the Board finds: (a) the Fund was prejudiced by the failure to give timely notice; and (b) it was reasonably possible to give notice within the time limit.

One difference between the statute and the proposed rule is that, if the deadline is missed, the statutes provide that coverage ***is denied*** unless the Board makes a finding that the time limit should not be enforced; whereas, the proposed rule provides that coverage ***is not denied*** unless the Board makes certain findings. Not only are the findings different but, in contrast to the statutes, the proposed rule appears to switch the burden of proof to the Board before coverage can be denied following a missed deadline.

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Another difference is that the statute has only one deadline, that is, within 60 days of service of process on the provider; in contrast, the proposed rule permits a different deadline, that is, within 60 days of the insurer's or self-insurer's first notice of the filing of an action outside the state, if that occurs later. Is this expansion of the statutes intended to be a finding by the Board that enforcement of the statutory time limit would prejudice the purposes of the Fund and not benefit insureds or claimants in all such cases? If so, the fact that the Board made such a finding should be stated in the analysis. If not, it is not clear that there is statutory authority for using the alternative deadline. Also, how is the date of the insurer's first notice established?

2. Form, Style and Placement in Administrative Code

a. The treatment clause of SECTION 1 should simply indicate that "Ins 17.40 is created to read:". Then, in the text of the rule, it is not necessary to repeat "Ins 17.40" before each subsection number.

b. A title must be included for s. Ins 7.40. [See s. 1.05 (1), Manual.] It should be inserted on the first line of the text between "17.40" and "(1)," and it should be in bold print with an initial capital letter. [See s. 1.05 (2) (b), Manual.]

c. References to "Ins" should not be followed by a period.

d. In s. Ins 17.40 (1) and (4), the references to "Wis. Stats." should be changed to "Stats." Also, in s. Ins 17.40 (1), a comma should follow "Stats." In addition, the reference to "ss." when referring to s. 655.27 (5) (a), (b), and (c) should be changed to "s." inasmuch as only one section is cited.

e. In s. Ins 17.40 (3), the reference to the "board of governors" and in s. Ins 17.40 (4), the reference to the "fund board of governors" should be changed to use the defined term "board" from s. Ins 17.001 (1).

f. Section Ins 17.40 (3) should be reorganized to include an introductory clause and two paragraphs, rather than referring to "a)" and "b)" in the subsection. In addition, it should be written in the active voice. For example, it could be changed to read:

> **(3)** FAILURE TO GIVE NOTICE. The board shall deny . . . finds all of the following:
>
> (a) The fund was prejudiced by the failure to give notice as required.
>
> (b) It was reasonably possible to give notice within the time limit.

[See s. 1.03 (8), Manual.] (However, a comment about the content, rather than the style, of s. Ins 17.40 (3) is provided in item 1. above.)

4. Adequacy of References to Related Statutes, Rules and Forms

a. The submission indicates that it is a proposed order of the Office of the Commissioner of Insurance (OCI) and the Board. However, the "statutory authority" sections cited refer only to the authority of OCI to promulgate rules. It appears that the only specific statutory role for the Board in rule-making relates to the establishment of fees under s. 655.27 (3) (b), Stats. Under what statutory authority is the Board proposing this order?

b. Section 655.27 (5) (a) 2., Stats., does not specify whether the insurer or self-insurer or the health care provider (or both) is responsible for providing notice to the Fund of an action. Section 655.27 (5) (b), Stats., requires the insurer or self-insurer to act in good faith and in a fiduciary relationship to the Fund. Section 655.27 (5) (c), Stats., imposes these same requirements on the health care provider. Section Ins 17.40 (1) indicates that s. Ins 17.40 implements s. 655.27 (5) (a), (b), ***and*** (c), Stats. However, the proposed rule imposes notice requirements only on the insurer or self-insurer and indicates that failure to provide timely notice constitutes bad faith on the part of the insurer and self-insurer under certain circumstances.

Were the omission of notice requirements with respect to the health care provider and the omission of a parallel provision stating that the provider's failure to provide timely notice constitutes bad faith on the provider's part in violation of s. 655.27 (5) (c), Stats., intentional? If so, it is not clear that s. Ins 17.40 implements s. 655.27 (5) (c), Stats., as stated in s. Ins 17.40 (1).

Moreover, it is not clear what occurs if the provider notifies the Fund directly of an action being filed, rather than the insurer or self-insurer notifying the Fund.

c. If the Board denies coverage under s. Ins 17.40 (3), an explanation or cross-reference to any rights of appeal would be helpful.

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

a. Section Ins 17.40 (4) provides that if it was reasonably possible to give notice within the time limit and the Board denies coverage under s. Ins 17.40 (3), then failure to timely give the required notice in s. Ins 17.40 (2) constitutes bad faith on the part of the insurer or self-insurer in violation of s. 655.27 (5) (b), Stats.

First, it seems unnecessary to include the phrase "If it was reasonably possible to give notice within the time limit" because that must have happened in order for the Board to have denied coverage under s. Ins 17.40 (3). Repeating that condition precedent but not the other condition precedent from s. Ins 17.40 (3) creates confusion.

Second, because s. Ins 7.40 (4) applies when the Board has denied coverage and has no liability, it is not clear what purpose is served by stating that the insurer's or self-insurer's failure to give notice constitutes bad faith.

b. In s. Ins 17.40 (2), in the phrase "later in time," "in time" should be deleted as it is superfluous.