TITLE 115
LEGISLATIVE RULE
STATE BOARD OF RISK AND INSURANCE MANAGEMENT

SERIES 7
PATIENT INJURY COMPENSATION FUND

§115-7-1. General.

1.1. Scope -- This rule governs the implementation, administration and operation of the patient injury compensation fund, established by W. Va. Code § 29-12D-1 et seq. by the state board of risk and insurance management.

1.2. Authority. -- W. Va. Code ~~§§ 29-12-5(a)(10);~~ 29-12D-2(a)(6)~~; 29-12D-3(c); 29-12D-3(f); 29-12D-3(g)~~.

1.3. Filing Date. -- ~~May 13, 2005~~.

1.4. Effective Date. -- ~~July 1, 2005~~.

1.5. Sunset Provision: This rule shall terminate and have no further force or effect upon the expiration of five years from its effective date.

§115-7-2. Purpose.

Subject to applicable limitations, the purpose of the patient injury compensation fund is to provide fair and reasonable compensation to qualified claimants in medical professional liability actions for economic damage awards that are uncollectible because of statutory limitations on the recovery of economic damages.

§115-7-3. Definitions.

3.1. For purposes of this rule, the following words or terms shall have the same meanings as set forth in W. Va. Code §55-7B-2: "collateral source", "emergency condition", "health care", "health care facility", "health care provider", "medical injury", "medical professional liability", "medical professional liability insurance", "non-economic loss", "patient", "plaintiff" and "representative".

3.2. "Act" means W. Va. Code §29-12D-1 et seq.,W. Va. Code establishing the patient injury compensation fund.

3.3. "Actuarially sound" means funding sufficient to pay those claims for economic damages and all administrative or operational costs of the fund which are known or which are projected from analyses of claims, loss experience and other relevant factors.

3.4. "Agency" means the state board of risk and insurance management.

3.5. "Applicable Insurance" means all insurance available to provide indemnity coverage for

all tortfeasors pursued in the underlying medical malpractice claim.

~~3.5.~~3.6. "Application for compensation" means the ~~claim form prescribed by the agency by which a claimant submits a~~ written request to the fund for payment of economic damages.

~~3.6.~~3.7. "Board" means the governing body of the state board of risk and insurance management as provided in W. Va. Code § 29-12-3.

~~3.7.~~3.8. "Claimant" means the person submitting an application for compensation to the fund.

~~3.8.~~3.9. "Code" means the Code of West Virginia of 1931, as amended.

~~3.9.~~3.10. "Director" means the executive director of the state board of risk and insurance management.

~~3.10.~~3.11. "Economic damages" means those special damages which are reduced to an actual dollar amount that can be presented to a jury in an action brought under the medical professional liability act to compensate a plaintiff for the monetary costs of a medical injury, such as lost earnings, past and future medical care and rehabilitation services. Economic damages do not include non-economic damages, such as pain and suffering, or hedonic damages, court costs, post-judgment interest, attorneys' fees, extra-contractual damages, or punitive damages.

~~3.11.~~3.12. "Fund" means the West Virginia Patient Injury Compensation Fund created by W. Va. Code §29-12D-1(a).

3.13. "Medical professional liability act" means the provisions of Article 7B, Chapter 55 of the Code.

3.14. "Occurrence" means any act, series of acts, failure to act, or series of failures to act arising out of the rendering or failure to render medical professional services to any person within West Virginia by a health care provider resulting in a medical injury or injuries.

3.15. "Qualified claimant" means a claimant that is both a "patient" and a "plaintiff" as those terms are defined in the medical professional liability insurance act.

3.16. "Statutory limitations on the recovery of economic damages" means the limitations on recovery of economic damages in a medical malpractice action due to negligent treatment of emergency conditions at a designated trauma care center pursuant to W. Va. Code § 55-7B-9c or by operation of the joint and several liability principles and standards set out in W. Va. Code § 55-7B-9.

3.17. "Uncollectible economic damages" means any portion of an economic damages award or settlement in a medical malpractice action that a qualified claimant is unable to collect from the defendant due to statutory limitations on recovery of economic damages.

3.18. "Year" or "fiscal year" means the twelve (12) consecutive month period beginning the first day of July and ending the last day of June.

§115-7-4. Patient Injury Compensation Fund.

The fund shall be operated as a fund of last resort. Payment by the fund to a qualified claimant for uncollectible economic damages may be made only when all insurance coverages have been exhausted.

§115-7-5. Fund Administration.

5.1. The director may employ or contract for personal, professional or consulting services regarding the administration, operation and defense of the fund and for services necessary or advisable to implement the authority and discharge the responsibilities imposed on the board by the act, including, but not by way of limitation:

5.1.a. Retaining the services of a qualified, competent, independent consulting actuary to advise and consult with the agency on all aspects of the fund's administration, operation, and defense which require application of actuarial science and to perform and submit an annual actuarial study; ~~The actuary shall determine on an annual basis the actuarial soundness of the fund and make recommendations regarding the level of funding needed to make the fund actuarially sound;~~

5.1.b. Employing or contracting with legal counsel to advise and represent the agency and represent the fund in matters relating to the operation of the fund or payment from the fund. Legal counsel may assist in the investigation of the claim for compensation and whether all applicable insurance in the underlying action has been exhausted; ~~and~~

5.1.c. Retaining the services of a qualified independent auditor to conduct an annual audit of the fund. The annual audit may be conducted as part of the annual fiscal year-end audit of the other programs administered by the agency; and

5.1.d. Retaining the services of qualified experts in the fields of accounting, economics, medicine, life care planning, or other field or fields relevant to one or more claims.

5.2. The agency may establish a reasonable contingency reserve for unexpected contingencies, consistent with generally accepted accounting principles.

§115-7-6. Payment of Compensation.

6.1. If the agency's fund's actuary determines that the fund is actuarially sound and fully funded, or otherwise sufficiently funded to make payments to eligible claimants using any of the methods set forth in this section, the agency may, but is not required to, make a payment or payments out of the fund to a qualified claimant following a judgment or settlement of a claim arising under the medical professional liability act.

6.2. The agency, in exercising its discretion regarding payments to eligible claimants following judgment or settlement of a claim, shall determine whether a payment from the fund to a qualified claimant is in the best interests of the fund and other claimants. In making this determination the agency may consider the following:

6.2.a. The current actuarial soundness of the fund;

6.2.b. The sufficiency and strength of the proof in the claim settlement or the underlying medical professional liability civil action establishing the following:

6.2.b.1. Legal liability under the medical professional liability act;

6.2.b.2. The fault of the respective responsible persons;

6.2..b.3. The exhaustion of all reasonable means to recover from all available insurance and collateral sources;

6.2.c. Any other matter deemed relevant by the agency, including but not limited to the total amount of awards that become final in a fiscal year. The agency reserves the right to fully investigate all relevant issues prior to reaching a determination.

~~6.1.~~ 6.3. Upon a final determination approving payment to a qualified claimant as provided in these rules, the agency shall, to the extent funds are available, make a payment in satisfaction or partial satisfaction of the claim for economic damages. Compensation payments may be made only to qualified claimants who would have collected economic damages but for the statutory limitations on recovery of economic damages.

~~6.2.~~6.4. Subject to the provisions of section ~~6.3~~ 6.5 of this rule, the amount payable by the fund to a qualified claimant is the amount of uncollectible economic damages. In determining the amount of uncollectible economic damages, payments of available insurance in the underlying professional medical liability action are considered to have been applied first to satisfy any economic damages award.

~~6.3.~~6.5. The maximum amount payable out of the fund in respect to any one occurrence~~, inclusive of attorney fees,~~ shall be the lesser of: one million dollars or the maximum amount of money that could have been collected for applicable insurance and collateral sources prior to the creation of the fund. For purposes of this rule, amounts payable by any insurance guaranty funds due to the insolvency of an insurance company are deemed applicable insurance.

~~6.4.~~6.6. The agency, in its discretion, may make payments to a qualified claimant in a lump sum amount or in the form of periodic payments in the form of a structured payment plan using federally-qualified assignments.

6.7. If, after the payment of all expenses incurred for the administration of the fund during the fiscal year, the available cash and invested assets remaining in the fund are insufficient to pay in full all claims for uncollectible economic damages that have become final during the fiscal year, the board, in its discretion, may do any of the following, alone or in combination: ~~the amount paid to each qualified claimant shall be prorated in a manner so that each qualified claimant with a final claim receives the same percentage of compensation as his or her amount of approved and outstanding compensation at the end of the fiscal year relates to the total amount of all approved and outstanding compensation at the end of the fiscal year.~~:

6.7.a. Make prorated payments on claims in a manner so that each qualified claimant with a final claim receives the same percentage of compensation as his or her amount of

approved and outstanding compensation at the end of the fiscal year relates to the total amount of all approved and outstanding compensation at the end of the fiscal year; or

6.7.b. Make payments in the form of periodic installments, which may, but are not required to be in the form of a structured payment plan using federally-qualified assignments. If a structured settlement is used, the final award representing uncollectible economic damages from the PICF shall be the amount received by the claimant via the structured settlement and shall not be the amount used to fund the purchase of the structured payment plan;

6.7.c. Place a claim or claims in nonpayment status until such time as sufficient moneys are received by the fund to initiate or resume payments.

6.8. If claims are prorated, paid in periodic installments other than through a structured payment plan, or placed in nonpayment status in any fiscal year, any amounts due and unpaid to qualified claimants for final awards shall be carried forward and be paid in subsequent fiscal years from available funds using any of the methods set forth in this section. Payment may be made in subsequent fiscal years only to the extent funds are available and sufficient to pay administrative and operating expenses and make claim payments.

~~6.5.~~6.9. ~~Any uncollectible economic damages unpaid to qualified claimants after the proration, shall be carried forward to the next fiscal year as a final claim.~~ Unpaid claims are not a debt of the state of West Virginia or a charge against the general revenue fund or any other state fund. The state shall not be liable for any of the liabilities of the fund, and payments in future years shall be entirely dependent on the contributions, revenues or moneys paid into the fund by the state or from any other source.

~~6.6. The board, in its discretion, may make payments to a qualified claimant in the form of periodic payments.~~

§115-7-7. Application for Compensation.

7.1. A claim for reimbursement of uncollectible economic damages shall be made by filing an original and two (2) copies of a verified written application for compensation ~~on a form prescribed by the agency~~. An application for compensation must be signed by the claimant or his or her legal representative ~~and duly verified by a notary public~~.

7.2. As a condition of receiving compensation from the fund, the claimant shall execute appropriate confidentiality or privacy waivers granting the agency access to all of his or her medical records.

7.3. ~~The claimant must file the application for compensation, with all supporting documentation, with the agency within sixty (60) days after the judgment in the underlying medical professional liability action became final.~~ All applications for compensation must be received by the Board or, if mailed, postmarked on or before June 30, 2016, in order to be eligible for review or payment from the fund.

7.4. The verified application for compensation shall set forth and provide the following information:

7.4.a. The name and address of the claimant and other identifying information which the agency may require;

7.4.b. The name and address of the legal representative of the claimant and the basis for his or her representation of the claimant;

7.4.c. The date(s), time(s) and place(s) where the underlying medical injury occurred;

7.4.d. A statement of the facts and circumstances regarding the underlying medical injury leading to and ultimately giving rise to the submission of the application for compensation.

7.4.e. A detailed description of the economic damages for which the claim is made;

7.4.f. Documentation of expenses and services incurred to date, indicating whether such expenses and services have been paid for, and if so, by whom;

7.4.g. Documentation of any applicable private or government source of services or reimbursement relative to the underlying medical injury;

7.4.h. A schedule listing all liability insurance, policy limits, and amounts collected by claimant to date from responsible persons with respect to the medical injury and the underlying medial liability civil action. Copies of all applicable liability insurance policies or policy declaration pages shall be attached to the application;

7.4.i. A detailed statement of the facts and circumstances, including any declaratory judgments or rulings, demonstrating how the claimant exhausted all reasonable means to recover economic damages from all applicable liability insurance coverages;

7.4.j. ~~Certified copies of court documents including complaint, answer, judgment, special jury interrogatories, verdict forms, declaratory rulings and dispositive motion orders;~~ If the underlying medical injury claim was the subject of a civil action, the court (federal or state) in which it was filed, the docket or civil action number, the parties to such action, and its present status, including certified copies of court documents including complaint, answer, judgment, special jury interrogatories, verdict forms, declaratory rulings and dispositive motion orders;

7.4.k. Appropriate and relevant assessments, evaluations, and prognoses and other records and documents the agency deems reasonably necessary for the determination of the amount of compensation to be paid to, or on behalf of, the claimant.

7.4.l. All available relevant medical records relating to the claimant and the underlying medical injury and an identification of any unavailable medical records known to the claimant and the reasons for the unavailability.

7.5. In addition to the application for compensation, the agency may require the claimant to submit materials substantiating the facts in the application. If the agency finds that an application does not contain the required information or that the facts stated therein have not been adequately explained or documented, it shall notify the claimant or his or her representative in writing the specific additional items of information or materials required and that he or she has

thirty (30) days from receipt of the notification in which to supplement the application. Unless a claimant requests and is granted in writing an extension of time by the agency, the agency may reject the claim for failure to file additional information or materials within the specified time.

7.6. The claimant may file an amended application or additional substantiating material to correct inadvertent errors at any time before the agency has completed its consideration of the original application for compensation.

7.7. When a final award is made by the Board, the claimant shall file a petition for approval of the final award with the court in which the underlying civil action is pending or if none is pending, in a court of appropriate jurisdiction. The claimant shall be responsible for all court costs associated with, or relating to, approval of the final award by the court. No award may become final until approval by the court.

7.8. The claimant shall sign a written release which absolves the fund, the agency and the board of any liability or further obligation with respect to the claim, following approval of the final award and before payment.

~~**§115-7-8. Settlements.**~~

~~8.1. If the agency's fund's actuary determines that the fund is actuarially sound and fully funded, the agency may, but is not required to, make a payment or payments out of the fund to a qualified claimant in connection with the settlement of a claim arising under the medical professional liability act.~~

~~8.2. The agency may, but is not required to, consider, approve or disapprove any settlement petition.~~

~~8.3. The agency , in exercising its discretion whether to consider a settlement of a medical liability claim arising under the medical professional liability act, shall consider whether a payment from the fund to a qualified claimant is in the best interests of the fund. In making this consideration the agency may consider the following:~~

~~8.3.a. The current actuarial soundness of the fund;~~

~~8.3.b. The sufficiency and strength of the proof in the settlement petition and underlying medical professional liability civil action establishing the following:~~

~~8.3.b.1. Legal liability under the medical professional liability act;~~

~~8.3.b.2. The fault of the respective responsible persons;~~

~~8.3.b.3. The exhaustion of all reasonable means to recover from all available liability insurance;~~

~~8.3.c. Any other matter deemed relevant by the agency.~~

~~8.4. The claimant shall file an original and two (2) copies of a petition for settlement on forms prescribed by the agency. The petition shall include the information required by section~~

~~7.5 of this rule, and the following:~~

~~8.4.a. A statement indicating the court (federal or state) in which the underlying medical injury action is pending, the docket or civil action number, the parties to such action, and its present status;~~

~~8.4.b. A description of the economic damages for which compensation from the fund is proposed;~~

~~8.4.c. A statement setting forth the amount proposed as a settlement;~~

~~8.4.d. A statement setting forth the proposed method and duration of dispersal of proceeds from the fund as a lump sum or as a periodic award.~~

~~8.5. The agency may not approve any settlement amount until the agency has completed its investigation of the settlement petition. The agency reserves the right to fully investigate all relevant issues prior to reaching a determination.~~

~~8.6. When the claimant and the agency reaches an agreement on a settlement amount, the proposed settlement shall be presented to the court in accordance with the act. The claimant shall be responsible for all court costs associated with, or relating to approval of a settlement by the court. Any agreed- settlement amount shall not become final until approved by the court.~~

~~8.7. The claimant of an approved settlement petition shall sign a written release which absolves the fund, the agency and the board of any liability or further obligation with respect to the claim.~~

~~§115-7-9.~~§115-7-8. Initial Review and Determination.

~~9.1.~~8.1. The director shall appoint an application review committee, consisting of three individuals, including an agency claims manager or assistant claims manager, and two other managerial or professional employees or contractors.

~~9.2.~~8.2. Upon receipt of an application for compensation, the application review committee shall undertake an evaluation, investigation and review of the application for compensation.

~~9.3.~~8.3. Based upon its review, analysis and investigation, the application review committee shall make a written recommendation to the executive review committee whether payment should be made from the fund and the amount of payment to be made from the fund consistent with the award in the underlying medical liability action, the evidence, the applicable law, and the purpose and best interests of the fund.

~~9.4.~~8.4. The application review committee shall determine on the basis of evidence presented to it or gathered by it, the following matters:

~~9.4.a.~~8.4.a. Whether the claimant is a qualified claimant;

~~9.4.b.~~8.4.b. Whether the petition for compensation was filed in accordance with the act and these rules;

~~9.4.c.~~8.4.c. Whether there has been an award of economic damages as a result of a medical injury in a civil action filed under the medical professional liability act;

~~9.4.d.~~8.4.d. Whether the claimant has satisfactorily established that he or she has exhausted all reasonable means to recover economic damages from all applicable liability insurance, including pursuing all available legal means to determine applicability and availability of liability insurance coverages from all responsible persons;

~~9.4.e.~~8.4.e. The portion of the economic damages awarded that is uncollectible as a result of the statutory limitations on recovery of economic damage.

~~§115-7-10.~~§115-7-9. Executive Review Committee.

~~10.1.~~9.1. The board shall appoint an executive review committee, consisting of three individuals, one of whom shall be the director. The other two individuals shall be ~~professionals or executive level staff and may include one board member.~~ a professional and an agency claims manager.

~~10.2.~~9.2. The executive review committee shall meet upon call of the director or chairperson of the board to review the recommendations of the application review committee.

~~10.3.~~9.3. The executive review committee may adopt, modify, remand or reject the recommendations of the application review committee. The executive review committee shall provide the reason or reasons for modification, rejection or remand of a recommendation of the application review committee. On remand, the application review committee shall reconsider its recommendation and address the issues identified by the executive review committee.

~~10.4.~~9.4. If the recommendation of the application review committee is accepted by the executive review committee, notice of the determination shall promptly be sent to the claimant or his or her authorized representative stating with reasonable specificity the grounds for the determination. The notice shall be sent by certified mail, return receipt requested.

~~§115-7-11.~~§115-7-10. Administrative Appeal.

~~11.1.~~10.1. Claimant aggrieved by the determination of the executive review committee may appeal the decision to the board within thirty (30) days of receipt of the determination for an administrative hearing as provided in the administrative hearing rules promulgated by the board.

~~11.2.~~10.2. ~~The claimant may present evidence and testimony on his or her own behalf and may retain counsel for purposes of the administrative appeal~~. At the hearing, BRIM and the claimant, or their counsel, shall be afforded an opportunity to review the evidence, to cross-examine the witnesses, and present testimony and enter evidence in support of the parties' respective positions.

~~§115-7-12.~~§115-7-11. Judicial Appeal of Final Decision.

A claimant adversely affected by a final administrative order or decision of the board, pursuant to section 11 of this rule, has the right to appeal the decision to circuit court pursuant to

W. Va. Code §29A-5-4, and may request, at his or her expense, a transcript of the administrative hearing.

~~§115-7-13. Attorneys' Fees.~~

~~If the board determines that the fund is actuarially sound, the board may authorize the payment out of the fund for the reasonable attorneys' fees of qualified claimants receiving compensation.~~

~~§115-7-14.~~§115-7-12. Confidentiality of Information.

To the extent required by law or by court order, the agency shall maintain as confidential and exempt from disclosure personal or medical information regarding the claimant. The agency may maintain as exempt from disclosure, to the extent permitted by law, its internal memoranda.