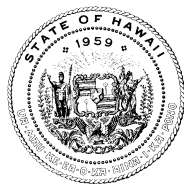

A Claimant's Guide



TO THE
Medical Claims Conciliation Panel



The Medical Claims Conciliation Panel
Office of Administrative Hearings
Department of Commerce
AND Consumer Affairs
State of Hawai'i

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1. What is the MCCP?

The Medical Claims Conciliation Panel (“MCCP”) was established in 1976 by Hawai‘i Revised Statutes (“HRS”) §671-11, et seq., to hear and render non-binding advisory decisions of liability and damages for all potential medical tort claims in the State of Hawai‘i.

2. What is the purpose of the MCCP?

The MCCP process is designed to help parties evaluate whether or not a case should be pursued further through the judicial system, and to help conciliate meritorious cases prior to the parties incurring the substantial expenses and time of extended litigation. The MCCP hearing provides an informal forum for both sides to test the strengths and weaknesses of their respective cases before an impartial Panel. Because of the composition and the collective experience of the Panel, the Panel’s decision should reflect a likely outcome of the claim, if the same evidence were presented to a judge or a jury.

3. Can the MCCP be bypassed and a lawsuit filed directly in court?

No. Pursuant to HRS §671-11, before a lawsuit can be filed against a physician, osteopath (D.O.), podiatrist (DPM), or a hospital (or hospital staff), for medical negligence, the claim must first be filed with the MCCP.

4. Can a claim be filed the MCCP, but not to set a hearing date?

Generally, no. Pursuant to HRS §671-12, once a claim is filed, the MCCP will set the matter for hearing and send the notice of hearing to the parties involved.

5. What kinds of claims should be filed with the MCCP?

Anyone wishing to bring a lawsuit for medical malpractice against a physician, surgeon, osteopath, podiatrist, or health care facility as defined in HRS §323D-2 (such as a hospital or clinic), licensed to practice or operate in the state of Hawaii, or the employees of any of these, must first file a claim with the MCCP before filing a lawsuit.

6. What kinds of claims should not be filed with the MCCP?

The jurisdiction of the MCCP does not cover claims against the following kinds of health care professionals: acupuncturists, chiropractors, dentists (including oral surgeons), naturopaths, or psychologists.

Claims against these kinds of health care professionals may therefore be filed directly with the appropriate courts.

7. How to file a claim, and is there a filing fee?

Claims may be submitted to the MCCC in the form of a letter to: **Medical Claims Conciliation Panel; P.O. Box 541; Honolulu, Hawai'i 96809**. For hand delivery, our street address is **250 South King Street, Penthouse; Honolulu, Hawai'i 96813**. We are located in the Kamamalu Building at the corner of King and Richards Street, across from Iolani Palace, next door to the Richards Street YWCA.

Claim letters must include: (1) the complete names and addresses of the health care providers against whom the claim is made ("respondents"); and (2) a description of the alleged malpractice such as what, when, where, which health care provider(s) was (were) responsible for the alleged negligence, and the alleged negligent acts or omissions which the claimant believes fell below the standard of care. If the claim is not sufficiently clear, the respondents may ask for a more detailed statement of the claim.

In addition to filing a claim letter, all claimants identified in a claim must each submit a filing fee of \$450.00 to cover the Panel's costs, at the time the claim is filed. Each respondent identified in the claim will also be required to submit a \$450.00 filing fee when the respondents file their responses to the claim.

8. What happens to the filing fee?

The filing fees submitted by the parties to a claim, are placed in an account to pay for the panel expenses. Additionally, \$50.00 from each filing fee is retained by the MCCC for administrative costs. After the Panel costs are paid for and the administrative fee retained, any remaining balances are returned to the parties on a proportionate basis.

9. What if a party cannot afford to pay the filing fee?

If any party cannot afford to pay the required filing fee, the party may submit a request to waive the filing fees. The MCCC utilizes the same financial guidelines used by the courts in determining whether a party is qualified to have judicial costs waived. The request to waive the filing fee must be filed with the claim letter. The request to waive the filing fee is reviewed by the Director of the Department of Commerce and Consumer Affairs, and the Director will make the final decision as to whether the filing fee should be waived. The person requesting the waiver will be informed of the Director's decision. The Ex Parte Motion to Waive of Filing Fees form is available from the MCCC, and may be filed with the MCCC and we will forward the request to the Director.

10. What if a party doesn't submit a filing fee or a request for waiver?

If a claim is submitted to the MCCC without the required filing *or* a request to waive the filing fee, the claim will not be accepted for filing. If a respondent does not submit the required filing fees, sanctions may be imposed against the respondent by the MCCC or by the courts.

11. What happens to the Statute of Limitations when a claim is filed?

Pursuant to HRS §671-18, once a claim is filed with the MCCP, 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**.

12. What happens after a claim is filed?

After the claim is filed, we will process and log the claim, schedule a date for the hearing on the claim, and send notices to the parties informing the parties of the date of the hearing, and the deadlines for submitting required documents to the MCCP. Generally, the hearing takes place within four to six months from the time we process the claim. In some circumstances, we may be able to expedite the processing of a claim, particularly in cases involving ongoing serious medical conditions or complications.

13. Who will be on the Panel?

Panels consist of three members: a chairperson, an attorney, and a doctor, selected pursuant to HRS §671-11. The chairperson is generally an attorney, but according to statute, need not be an attorney. Therefore, most MCCP Panels consist of two attorneys (one of whom serves as chairperson) and a physician. The physician member of the Panel is generally chosen from the same specialty as the health care provider named in the claim. If several health care providers are named in the claim, the Panel physician chosen will be from a specialty that can best evaluate the case.

14. How is the hearing conducted?

Generally, the MCCP hearings are less formal than judicial proceedings, and although the judicial rules of evidence are not strictly applied, the Panel may use the rules of evidence as guidelines for purposes of relevancy. However, MCCP hearings are structured hearings and, as such, are conducted with some formality.

In order to prevail in MCCP cases, the claimant must prove by a preponderance of the evidence (more than 50%) that the respondent health care provider(s) breached of the applicable standard of care.

In most cases, the Panel first asks for opening statements from all parties. After the opening statements, the claimant presents the claimant's case first, and then respondents put on their respective cases. Lastly, the Panel generally asks for brief closing arguments, and following that, the hearing is generally adjourned.

Occasionally a Panel may decide to separate the hearing into two parts: 1) first, evidence is presented regarding liability; and 2) if the Panel finds actionable negligence, the Panel will then ask the parties to present evidence on damages.

15. What kind of decision does the Panel issue?

The Panel issues a written decision signed by all Panel members, either of “actionable negligence” or “no actionable negligence.” A Panel member may also issue a separate concurring or dissenting opinion. The actual wording of the decision is prescribed by HRS §671-15.

16. What about damages?

When a Panel determines that actionable negligence has been proven, the Panel must then make a determination as to the damages that should be awarded. Therefore, the claimant must be prepared to present evidence on damages at the hearing.

If there is not enough evidence regarding the amount of damages that should be awarded, the Panel may not be able to make a determination as to damages.

17. How does the Panel make its decision?

The Panel bases its decision on evidence presented by parties before the hearing, such as medical records and prehearing statements, and on evidence presented at the hearing itself, including expert testimony, exhibits, and evidence regarding damages.

18. When do the parties receive the Panel's decision?

The decision will be mailed to the parties no later than thirty (30) days following the completion of the hearing, pursuant to HRS §671-15.

19. What if one or both parties disagree with the Panel's decision?

Because the decisions of the Panel are only advisory and non-binding on the parties, after the MCCP hearing has been completed, the parties are may pursue their cases through the judicial system. However, pursuant to HRS §671-16, before a lawsuit based upon the claim can be filed in court, a party rejecting the Panel's decision must file a written rejection with the MCCP.

20. Do all MCCP claims have to be heard by a Panel?

Generally, yes. Pursuant to HRS §671-12, the MCCP must set a hearing date for all cases filed. There are a small number of cases in which all of the parties agree to have the hearing taken off the hearings calendar.

A typical reason for this request occurs when the claimant's attorney withdraws as counsel for a case leaving the claimant *pro se*. Generally in these cases the claimant *pro se* then requests additional time to find other counsel. If the claimant is not able to find a new attorney, the case sometimes remains inactive at the claimant's request for the remainder of the 18 month period.

On the other hand, if any of the respondents wish to proceed, however, the MCCP will reschedule the case for hearing.

21. Can a lawsuit be filed in court if the claim is not heard by a Panel?

In very unusual situations, there have been some cases that do not proceed to hearing, either at the request of both parties, or for some other procedural reason. However, the provisions of HRS §671-18 only allows the MCCP to retain jurisdiction over a claim for a maximum of 18 months from the date that the claim is filed. In these kinds of cases, the MCCP will remind the parties that the 18 months will be lapsing, that any applicable statute of limitations will resume running, and that parties will then be able to proceed to court.

22. Can a claim be withdrawn, or amended to dismiss or add parties?

The MCCP can only accept only written withdrawals of claims and amendments to original claims. To withdraw a claim, simply write the MCCP advising us of your wish to withdraw the claim.

Similarly, if you wish to amend your claim to dismiss certain health care providers from your claim prior to the hearing, you must submit your written request to the MCCP.

23. How can documents or witnesses be subpoenaed?

The Panel and the MCCP have the authority to subpoena documentary evidence and the appearance and testimony of witnesses, pursuant to HRS §671-13. In order to have subpoenas issued, the requesting party is required to follow the language of HRS §671-13, since that section also limits discovery by parties to medical records and notes kept in connection with the practice of medicine.

Usually, the claimant or the claimant's attorney does not need to subpoena the claimant's medical records. Generally, a written request to the health care provider is sufficient. Once the claim is filed with the MCCP and a defense attorney is assigned to the case, the defense counsel may be willing to assist the claimant in obtaining the records, as a professional courtesy. The MCCP staff can also assist.

On the other hand, if a party requests the MCCP to issue a subpoena, the requesting party is responsible for: 1) preparing the subpoena; 2) having the subpoenaed served; and 3) any other appearance fees and costs related to the production of the documents. Generally, it is unnecessary to subpoena the health care provider(s) named in your claim to appear at the hearing, because HRS §671-14 requires their presence at the hearing, unless excused by the Panel.

The MCCP has subpoena forms that may be used by the parties for the production of records, and for witnesses to appear at the MCCP hearing.

24. Who must attend the MCCP hearing?

HRS §671-14 requires that both the claimants and the respondents appear at the hearing, along with their attorneys, if any. Any party that would like to be excused from having to attend

the hearing must get permission from the Panel. Every Panel makes that decision on a case by case basis. Generally, the Panel requires claimants and respondents to be present at the hearing, even if they no longer reside in the state. Unlike court, the purpose of the MCCP Panel program is conciliation and it is difficult to conciliate the claim if all of the parties are not present.

However, HRS §671-14 does provide the Panel with the authority to excuse parties from attendance at the hearing and you may make such a request of the Panel in advance of the hearing.

25. Are there other requirement before the hearing?

After the claim is processed, the MCCP will advise the parties in writing of the deadlines to submit the relevant medical records and the prehearing statements. A sample format for the prehearing statement is also sent to the parties.

Medical Records: We require that the claimant submit four paginated sets of the claimant's relevant medical records, within 20 days after the Notice of Claim is sent to the parties. If there are extensive medical records, it may be advisable for a claimant to start requesting and copying those records when the claimant files the claim, if not sooner. Generally, there should be very few, if any, problems in a claimant obtaining the claimant's own medical records from the health care provider. If any problems are encountered, a phone call to opposing counsel or to the MCCP, generally takes care of the problem. If a party would like to have the medical records returned, the MCCP can return 3 of the 4 sets, if the request is made to the MCCP no later than the morning of the hearing.

Prehearing Statement: Approximately 5 to 6 weeks prior to the hearing, we require the parties to submit 4 sets of their prehearing statements (an original plus three additional copies for a total of four) to the MCCP. In addition, the parties are required to exchange prehearing statements. The MCCP supplies a sample format for the claimant's and respondent's prehearing statements.

26. Does the MCCP have any authority to impose sanctions?

Yes. 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, to a party who does not cooperate with the MCCP. For examples of non-cooperation, see HRS §671-19. If the party does not agree with the assessment of costs, the party may appeal the assessment to circuit court.

27. Other considerations:

(1) **Bring the claim against the correct health care provider(s).** One of the most frequent mistakes made by claimants or their attorneys, is to assume that doctors are employees of a hospital, only to find out at the hearing that they have brought the claim against the wrong health care provider. The claimant or the claimant's attorney then has to go back to step one and file a new claim against the correct health care provider. This situation can be avoided by first doing a corporate search at DCCA of the health care provider(s)'s personal and professional corporate status.

If a claim is filed against the wrong health care provider, the statute of limitations could expire prior to the filing of a second claim against the correct health care provider(s)--a situation for which the MCCP has no remedy. Obviously, too, filing a second claim regarding the same incident requires additional costs and time.

(2) **Get help if you need it.** Keep in mind that the medical malpractice defense counsel in Hawaii are specialists in this highly technical field and are usually very prepared when they come to MCCP hearings. Defense counsel usually bring their medical experts to testify in person, by letter, or by telephone. Therefore, a claimant that is not experienced in medical malpractice proceedings, might consider consulting with an expert in the field. This can be done by retaining an attorney or by discussing the claim with a medical-legal consultant.

(3) **Present expert testimony.** It is the claimant's responsibility to show that the health care provider(s) care or conduct fell below the standard of care, and the claimant must therefore present evidence to show: a) what the applicable standard of care is for the particular circumstances of the claim; b) that the respondents did not provide applicable standard of care; and c) that the respondents' failure to provide the applicable standard of care was the proximate cause of the injury to the claimant.

Although there are expenses relating to retaining expert witnesses, the claimant must decide whether or not to spend the money at the MCCP level in the hope of resolving the claim at the MCCP level, or retain an expert for subsequent judicial proceedings. At the MCCP hearings, claimants have presented expert testimony by letter, telephone, or in person. (Please note that if a claimant plans to present expert testimony by telephone, the Panel and the MCCP must be informed in advance since different arrangements must then be made with the cooperation of the attorneys and the Panel to provide a room with a conference telephone.)

28. The Statute of Limitations for medical malpractice lawsuits:

§657-7.3 Medical torts; limitations of actions; time. No action for injury or death against a chiropractor, clinical laboratory technologist or technician, dentist, naturopath, nurse, nursing home administrator, dispensing optician, optometrist, osteopath, physician or surgeon, physical therapist, podiatrist, psychologist, or veterinarian duly licensed or registered under the laws of the State, or a licensed hospital as the employer of any such person, based upon such person's alleged professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice, shall be brought more than two years after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, but in any event not more than six years after the date of the alleged act or omission causing the injury or death. This six-year time limitation shall be tolled for any period during which the person has failed to disclose any act, error, or omission upon which the action is based and which is known to the person.

Actions by a minor shall be commenced within six years from the date of the alleged wrongful act except the actions by a minor under the age of ten years shall be commenced within six years or by the minor's tenth birthday, whichever provides a longer period. Such time limitation shall be tolled for any minor for any period during which the parent, guardian, insurer, or health care provider has committed fraud or gross negligence, or has been a party to a collusion in the failure to bring action on behalf of the injured minor for a medical tort. The time limitation shall also be tolled for any period during which the minor's injury or illness alleged to have arisen, in whole or in part, from the alleged wrongful act or omission could not have been discovered through the use of reasonable diligence.

INDIVIDUALS WITH SPECIAL NEEDS

Individuals who may require special accommodations for the hearing (e.g. sign language interpreter, large print, taped materials, etc.), are invited to call the Office of Administrative Hearings at 586-2828 at least two (2) days in advance of the hearing.

This publication can be made available for individuals with special needs in Braille, large print, or audio tape. Please submit your request to the Office of Administrative Hearings at 586-2828.