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DATE: April 1, 2004
TO: PCF Participants
FROM: Theresa Wedekind
Director Patients Compensation Fund
SUBJECT: Medical Directors (Administrative Staff) and Fund participation

The PCF Legal Committee (and Board) has reviewed this issue on many occasions in the past and has taken the consistent position that if the medical director's position description requires the person holding the position must have a license to practice medicine, then the person must participate in the Fund and have complying underlying coverage under ch. 655 of the Wisconsin statutes. Medical directors generally viewed medical records, render medical decisions and judgments as to whether a procedure or treatment was medically necessary and performed utilization review services and peer review. The Board's position on this issue is based on the mandatory participation requirement set forth in s. 655.002(1)(a), Wis. Stats.

PCF in-house counsel, Alice Shuman-Johnson offers the following:

"I have reviewed the McEvoy and Burks cases. Neither of these cases deals directly with the issue as to whether a medical director for an insurance company can be held liable for medical malpractice. Both cases have language considering what constitutes medical malpractice under ch. 655, some of which language. In McEvoy, the Wisconsin Supreme Court held a plaintiff HMO subscriber could bring and maintain an action for the tort of bad faith against the defendant HMO in a case where the HMO denied continuing out-of-network provider services against the recommendation of treating physicians solely on the basis of cost-containment concerns when the subscriber had not reached the contractual coverage limits. McEvoy v. Group Health Cooperative, 213 Wis.2d 507 (1997). The McEvoy Court acknowledged as a practical matter that certain decisions by HMO employees may create liability for medical malpractice while others place liability on HMOs for the tort of bad faith. McEvoy, 213 Wis.2d at 523.

In Burks v. St. Joseph's Hospital, the Wisconsin Supreme Court held the defendant hospital's refusal to provide care and treatment for plaintiff's severely prematurely born baby was a medical decision, not an economic decision and therefore coverage under the PCF existed for the plaintiff's claimed federal Emergency Medical Treatment and Active Labor Act (EMTALA) violation. Burks v. St. Joseph's Hospital, 227 Wis.2d 811 (1999). In this decision, the Court stated the following regarding the definition of "malpractice" for Ch. 655 purposes:

"In McEvoy, after citing five references to *malpractice* in the chapter, this court said: 'We conclude that ch. 655 applies only to negligent medical acts or decisions made in the course of rendering professional medical care. To hold otherwise would exceed the bounds of the chapter

and would grant seeming immunity from non-ch. 655 suits to those with a medical degree.’
McEvoy, 213 Wis.2d at 530.

We know that chapter 655 applies only to medical malpractice claims, but this begs the question. What is a medical malpractice claim? Chapter 655 does not define medical malpractice. The Wisconsin Jury Instruction—Civil 1023 states that the standard to determine medical malpractice is ‘whether (doctor) failed to use the degree of care, skill, and judgment which reasonable (general practitioners) (specialists) would exercise given the state of medical knowledge at the time of the (treatment) (diagnosis) in issue’ ”. Burks, 227 Wis.2d at 825.

Finally, I note underlying medical malpractice insurers and the PCF are required to provide coverage for peer review and utilization review activities of health care providers pursuant to s. 655.27(1m), Wis. Stats. and s. Ins. 17.35(2), Wis. Adm. Code.”

The PCF Legal Committee did conclude that in instances where a medical director is able to document the amount of time spent on administrative work versus “medical practice”, the physician may be able to qualify for a part-time classification.

Please contact me at 608-266-0953 for any further details or discussion.