

BEFORE THE NEW MEXICO SUPERINTENDENT OF INSURANCE
AS CUSTODIAN OF THE PATIENT'S COMPENSATION FUND

IN THE MATTER OF THE PETITION FOR
 HEARING BY ALTEON HEALTH LLC
 SUBMITTED BY THE DOCTORS COMPANY

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Docket No. [2022-0024](#)

HEARING OFFICER'S RECOMMENDED DECISION

THIS MATTER comes before Hearing Officer Richard B. Word, appointed by the New Mexico Superintendent of Insurance ("Superintendent") following a petition submitted by The Doctors Company ("TDC") and an amended petition submitted by Alteon Health, LLC ("Alteon") on the question of the admission of Alteon to the Patient Compensation Fund ("PCF") for the last two months of 2021 ("the contested coverage period"). TDC and Alteon seek a ruling by the Superintendent overturning the decision by the PCF third-party Administrator, Integrion Group, Inc. ("the TPA," "PCF Custodian" or "Integrion") to refuse to accept payment of PCF surcharges submitted by TDC on behalf of its insured Alteon where the payment was tendered more than 60 days after coverage began. Having considered the submissions of the parties, including the amended petition submitted by TDC and Alteon, joint Stipulated Proposed Findings of Fact and briefs, and being fully informed in the premises,

THE HEARING OFFICER FINDS AND CONCLUDES:

FINDINGS OF FACT

Preliminary and Procedural Findings of Fact

1. The petition and the amended petition meet the requirements to invoke the Superintendent's authority to conduct a hearing under NMSA 1978, Section 59A-4-15.

2. On March 4, 2022, the Superintendent entered an Order Setting Hearing and Appointing Hearing Officer (“Order Setting Hearing”) which found the petition to have been submitted on behalf of Alteon Health, LLC, as the aggrieved party. The Order Setting Hearing appointed Richard B. Word as the Hearing Officer and set the hearing for March 22, 2022.

3. TDC, through its counsel Jennifer Anderson and Kevin Pierce of the Modrall Sperling Law Firm, and on behalf of Alteon filed a Motion to Vacate Setting on March 11, 2022. The Hearing Officer entered an order on March 17, 2022, vacating the setting and directing the parties to submit an agreed date for the hearing. In accordance with that order, the parties subsequently filed a notice of agreement to conduct the hearing on April 27, 2022.

4. On April 8, 2022, the TPA filed a Brief on Standing in which it argued that Alteon and not TDC had standing in this matter and that no proceedings should take place until Alteon made an appearance through counsel. The TPA argued that any injury or liability to TDC resulting from its late payment of the surcharge was hypothetical, citing *N.M. Pub. Sch. Ins. Auth. v. Arthur J. Gallagher and Co.*, 2008-NMSC-067, ¶41. The TPA also argued in its Notice of Supplemental Authority that 13.21.2.13 and 14 NMAC provide that only an applicant and not an applicant’s insurer can appeal a denial of admission to the PCF.

5. TDC on behalf of Alteon, filed a Motion to Continue Hearing on April 19, 2022, noting that in addition to the illness of one of its counsel, time was needed for discussions regarding Alteon’s role in the proceeding in light of the TPA’s Brief on Standing.

6. The Hearing Officer issued an order on April 25, 2022, granting TDC’s Motion to Continue and scheduling a Status Conference on April 27, 2022. At the status conference on that date, the parties agreed to attempt to reach agreement on as many relevant facts as possible.

Counsel for TDC also agreed to submit a more detailed request for relief expanding upon the original one-page email from TDC dated February 22, 2022.

7. On May 5, 2022, counsel for TDC submitted a letter clarifying that they represented both TDC and Alteon. The letter also set forth in more detail the factual and legal bases supporting the request in the February 22, 2022, petition to overturn the TPA's decision and approve eligibility and admission to the PCF of Alteon providers as qualified health providers for the period from November 1, 2021, through December 31, 2021. The Hearing Officer deems this letter as an amended petition for hearing by both TDC and Alteon.

8. Based upon an agreement of the parties, the Hearing Officer entered an order setting the hearing in this matter on August 24, 2022.

9. On August 10, 2022, counsel for TDC and Alteon submitted a letter stating that after working together on factual stipulations the parties jointly concluded that the near absence of contested issues made an evidentiary hearing unnecessary. The letter further stated that the parties had agreed to a process and schedule by which they would submit a list of stipulated facts, with an opportunity for a party to submit contested facts together with affidavits or documents the party believed to support such contested facts. Finally, as stated in the letter, the parties proposed submitting briefs by September 12, 2022, setting forth the legal and equitable arguments they would have made at a hearing.

10. On August 19, 2022, the Hearing Officer entered an Order Vacating Hearing and Scheduling Submissions that adopted the process and schedule proposed by the parties.

11. Following the granting of an extension of time by the Hearing officer, the parties filed their Stipulated Proposed Findings of Fact on August 26, 2022, containing 41 numbered stipulated findings of fact with four supporting exhibits. Neither party submitted a list of contested

facts. The Hearing Officer approves the Stipulated Proposed Findings submitted by the parties and they are hereby adopted as findings Nos. 12-52 as set forth below.

The Parties' Stipulated Findings of Fact Adopted by the Hearing Officer

12. To be qualified under the Medical Malpractice Act (“MMA”), a health care provider must file proof that it is insured by a policy of malpractice liability insurance that meets statutory requirements, and it must pay the appropriate surcharge. NMSA 1978, §41-5-5(A).

13. Surcharge rates are published annually on the PCF website.

14. Applicants are admitted to the PCF on the date of their application. If the surcharge is paid after the application is submitted, then the admission date relates back to the inception date of the underlying coverage, so long as the surcharge is paid to the PCF within 60 days of that inception date. NMAC 13.21.2.21.

15. The administrator of the PCF maintains a public portal that allows users to search for records of admission to the PCF by provider name or license number. The search results show beginning and ending dates of coverage for each provider admitted to the PCF. The portal is updated in real time, so new records are searchable as soon as the surcharge is paid.

16. The PCF administrator is responsible for certifying the presence or absence of PCF coverage when a malpractice claim or complaint is filed.

17. Before filing a malpractice complaint in court against a provider covered by the PCF, an attorney must submit a case for the consideration of the medical review panel. Attorneys use the PCF records portal to determine if a case must be submitted to the panel.

18. TDC issued Alteon a professional liability policy with an effective date of 11/1/2021 – 11/1/2022 under policy no. 2253680-1 (“Policy 1”).

19. In the course of making policy changes to comply with the provisions of H.B. 75 (2021 New Mexico Laws Ch. 16) – among other things, to match the effective policy date to the date new PCF surcharge rates became applicable under H.B. 75 – TDC cancelled Policy 1 effective 1/1/2022 and re-issued an updated policy with an effective date of January 1, 2022 – January 1, 2023 under policy no. 2253680-2 (“Policy 2”).

20. This cancellation reflected the directive issued to “Carriers” by then-PCF Director Sandra Romero in an email dated April 22, 2021. *See* Exhibit 1 of Stipulated Proposed Findings of Fact, filed August 26, 2022.

21. Policy 1 and Policy 2 provided coverage in an amount sufficient to qualify the Alteon providers for participation in the PCF.

22. In order to apply to participate in the PCF, an insurance carrier must upload a “batch” spreadsheet to the PCF portal. The spreadsheet contains information about each of the health care providers who will participate in the PCF. The carrier must also send corresponding certificates of insurance to the PCF administrator.

23. After a batch is received, the PCF administrator verifies that the dates on the certificates of insurance match the batch data. The administrator also verifies that the effective dates of coverage are no more than 60 days prior to the date the batch was submitted.

24. If no discrepancies are found, the administrator invoices the carrier for the surcharge. If discrepancies are found, the administrator invoices the carrier for the surcharge if and when the discrepancies are resolved. Alternatively, the carrier may remit payment of the PCF surcharge at the time of the batch upload to the PCF portal. The PCF administrator may then address any discrepancies in either the submitted batch or the remitted surcharge amount upon completion of its review.

25. It is TDC's standard practice to remit payment of the PCF surcharge amount at the time of submitting the batch upload.

26. Based on the providers that Alteon identified as comprising its practice, TDC calculated a PCF surcharge amount of \$62,220.99, and sent Alteon an invoice in that amount on December 2, 2021.

27. Alteon remitted \$62,220.99, the full amount of the PCF surcharge calculated by TDC, to TDC on December 17, 2021.

28. TDC writes policies for 1,233 members in the New Mexico market.

29. To help ensure accurate reporting, TDC generates an automated weekly report to identify the members who meet PCF reporting requirements. Typically, TDC reports new business and renewal members after it receives the PCF surcharge payment from the member or after applicable policy changes.

30. The Alteon Policy 1 was issued with an effective date of 11/1/2021 – 11/1/2022 using the TDC Large Account Rating Summary ("LARS") tool.

31. Due to a gap in the functionality of TDC's automated reporting system for New Mexico, LARS policies were not included in the automated report for the New Mexico PCF.

32. As a result, Policy 1 was omitted from TDC's reporting to the PCF, and TDC therefore did not tender the PCF surcharge on Alteon's behalf.

33. To date, no other TDC members have been impacted by a similar error.

34. TDC never submitted a batch for Policy 1 to the PCF.

35. On January 1, 2022, Integrion-began providing third-party administrator services to the PCF under Professional Services Contract #22-440-5000-00001 (the "Contract").

36. Integrion's scope of services under the Contract includes the following:

A. Admissions: Develop, receive, and process applications (and supporting documentation) for health care provider admissions to the Patient Compensation Fund (“PCF”) consistent with the Medical Malpractice Act (“MMA”) and PCF rules; provide the PCF Custodian with information required for issuing orders of admission; issue notices of non-admission where Contractor determines an applicant does not meet the qualifications for admission; issue notices of termination where Contractor determines termination is appropriate under the PCF rules; develop and maintain a public facing certified list showing provider admission status and history. Contractor may utilize its own application system with written permission of the PCF Custodian; or Contractor may utilize, manage and maintain the OSI’s PCF application system. The parties will cooperate in good faith to effectuate the transfer of the OSI’s PCF application system as quickly as practicable. OSI will maintain the PCF application system and grant Contractor such access as is necessary to perform its responsibilities under this Agreement until such time as Contractor can assume full responsibility for the PCF application system.

37. On February 22, 2022, while preparing to report Alteon’s Policy 2 to the PCF, TDC discovered that Policy 1 had not been reported to the PCF.

38. TDC immediately sent a letter to the PCF accepting full responsibility for the clerical error and offering to pay the belated surcharge plus any applicable penalties. TDC also requested that Alteon be deemed eligible for participation in the PCF from November 1, 2021 – January 1, 2022 (i.e. the effective policy period of Policy 1). *See Exhibit 2 of Stipulated Proposed Findings of Fact, filed August 26, /2022.*

39. On February 23, 2022, Integrion responded to TDC’s letter and denied the entirety of TDC’s requested relief because no application for admission based on Policy 1 was submitted within 60 days of the requested effective date of coverage. *See Exhibit 3 of Stipulated Proposed Findings of Fact, filed August 26, 2022.*

40. Integrion has denied Alteon admission to the PCF for the time period November 1, 2021 – January 1, 2022 because Integrion determined that Alteon did not meet the requirements for admission for that time period.

41. On at least four other occasions, carriers have failed to timely meet the requirements for admission and have asked for an exception. The requests were denied each time.

42. TDC is aware of at least one other occasion in which then-PCF Director Sandra Romero granted an exception and allowed admission of two solo entities that had been omitted from reporting in 2020. The circumstances of the omission and the reasons for the exception are described in the email string attached as Exhibit 4 of Stipulated Proposed Findings of Fact, filed August 26, 2022.

43. On other occasions, carriers have submitted applications with effective dates outside of the 60-day window. When notified by the PCF administrator, these carriers have adjusted the effective date to meet the 60-day requirement.

44. Alteon has been admitted to the PCF effective January 1, 2022 (i.e. the effective date of Policy 2).

45. TDC insures more independent providers (physicians and medical groups) than any other carrier in New Mexico. From January 1, 2022 until now, TDC paid about \$7.2 million in surcharges on behalf of providers. The next-largest total by a single carrier was \$3 million. The PCF's website articulates the purposes and objectives of the PCF as follows:

The Patient's Compensation Fund ("PCF") was established in 1978 by the New Mexico Medical Malpractice Act NMSA 1978, § 41-5-1, et seq. The PCF is funded solely through the surcharges paid by its participants and the Superintendent of Insurance serves as the PCF Custodian. The purpose of the PCF is to promote the availability of coverage for medical professional liability to healthcare providers practicing in New Mexico. The PCF provides an excess layer of coverage to doctors, hospitals, and other health care providers who qualify under the provisions of the Medical Malpractice Act. The PCF provides limitations on monetary awards, time limits for filing claims, and mandatory panel review of claims. Most health care providers participating in the PCF meet the financial responsibility requirements of the Act by purchasing medical malpractice insurance policies written on occurrence basis at \$250,000 per claim from PCF authorized insurers.

These insurers collect the PCF surcharge along with the primary layer premium and remit it to the PCF.

46. The above statement from the PCF website contains some inaccuracies. By statute, the PCF is funded by income from investment of the fund, any other money deposited to the credit of the fund, as well as surcharges paid by its participants. NMSA 1978, § 41-5-25(A).

47. The purpose of the PCF, as stated in a former version of the statute and in case law, is to assure that health care providers are adequately insured so that patients may be reasonably compensated for their malpractice injuries. NMSA 1978, § 41-5-2 (repealed 2021); *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 28. This is accomplished in part by the purpose stated in paragraph 35, which is to promote the availability of coverage for medical professional liability to health care providers practicing in New Mexico.

48. The OSI understands that its objective in managing the PCF is to promote the availability of medical malpractice coverage in New Mexico, to help keep medical providers in the state and to ensure that injured patients are reasonably compensated for malpractice injuries.

49. The OSI drafted and passed the rules and regulations for admission in NMAC 13.21 to support the objective of the PCF, in order to protect the viability and financial soundness of the Fund, and to ensure its continued existence.

50. The OSI implemented the 60-day “relation-back” period to support its objectives in managing the PCF, by balancing the needs of the carriers, medical providers, and the Fund. The OSI determined that this period provides a reasonable amount of time for medical office administrators to determine coverage needs and for carriers to process applications and surcharges on their end. The OSI determined that it protects the fund against providers who might try to game

the system by not purchasing coverage until they think or know that there is a forthcoming claim against them, at which point they can obtain backdated coverage through the Fund.

51. The OSI takes the position that it must enforce its rules in every single case. If an exception is made, then the PCF may be obligated to grant exceptions in other cases.

Hearing Officer's Additional Findings of Fact

52. TDC and Alteon filed their joint Brief on Legal and Equitable Issues on September 12, 2022. Noting that the factual background in this matter is undisputed, they argue that TDC's failure to tender the surcharge for Alteon within the required timeframe was a "good faith error" and an "isolated mistake" by the carrier.

53. The brief of TDC and Alteon further asserts that the TPA's refusal to admit Alteon into the PCF for the final two months of 2021 is "contrary to public policy and the explicit objectives and purposes for which the PCF was created." They point to the broad statement in 13.21.1.6 NMAC that the rules adopted in Title 13, Chapter 21 "be construed, interpreted, and applied to achieve the purposes and objectives for which the fund was established." Their brief also points to the "remedial scheme" encompassed by Section 41-5-25(E) of the MMA, which states: "If the surcharge is collected but not paid timely, the superintendent may suspend the certificate of authority of the insurer until the annual premium surcharge is paid."

54. TDC and Alteon state that while 13.21.2.8 NMAC speaks of "apply[ing] for admission" to the PCF, submissions by TDC are typically accomplished by means of a "batch upload" to the OSI (and now the TPA) of the required information about covered providers made with payment of the required surcharge.

55. The brief of TDC and Alteon cites no authorities in support of its request other than those noted above.

56. The Custodian also submitted its brief on September 12, 2022, reasserting that TDC lacked standing because it could not show it had suffered injury in fact as a result of the denial of the request for Alteon's admission to the PCF. The Custodian's brief also outlines how TDC and Alteon failed to meet the statutory requirements for admission to the PCF by not filing proof of medical malpractice liability insurance as required by the MMA and by failing to submit payment of the applicable PCF surcharge within the time allowed under that statute and regulations promulgated by the Superintendent.

57. The Hearing Officer finds that the record is devoid of any evidence or allegation that TDC has suffered an actual or imminent injury as a result of the TPA's rejection of its late-tendered PCF surcharge and the resulting denial of Alteon's admission to the PCF for the contested coverage period. It is conceivable that Alteon could in the future assert a claim against TDC for negligently failing to procure insurance should Alteon incur liability for medical malpractice claims arising from the contested coverage period. However, as noted in the TPA's *Brief on Standing* at p. 2, "[t]he injury in failure to failure to procure insurance cases occurs when liability to a third party is imposed and not when the client lost his or her legal right" *N.M. Pub. Sch. Ins. Auth.*, 2008-NMSC-067, ¶41. There is no evidence that Alteon is liable to a third party for any claims that would have been covered by the PCF had Alteon been admitted to PCF during the contested coverage period, nor is there any evidence or even a suggestion that Alteon faces a potential claim of medical malpractice arising from the conduct of one of its providers during November and December of 2021. In order to establish standing, TDC must establish that "they are directly injured as a result of the action they seek to challenge[.]" *Am. Fed'n of State, Cty. & Mun. Emp'ees v. Bd. of Cty. Comm'rs of Bernalillo Cty.*, 2016-NMSC-017 ¶32. "Hypothetical possibilities of injury will not suffice could give rise to claims of medical malpractice, and that

such claims could result in liability for Alteon. *Id.* (Internal quotations omitted.) The Hearing Officer finds that TDC has not suffered an injury in fact

58. The Superintendent, through counsel, has argued in a case pending before the New Mexico Court of Appeals¹ that a medical malpractice liability insurer and an entity serving as that insurer's malpractice insurance administrator that failed to timely pay the PCF surcharge for a provider practice group lacked standing to challenge the decision by the PFC custodian to reject the late-tendered surcharge. The Hearing Officer concurs with legal analysis in that case and finds that taking a contrary position in this matter is unwarranted.

59. Alteon is currently insured by TDC under a professional liability policy with an effective date of January 1, 2022, to January 1, 2023 (Policy 2). Based upon that policy and the timely payment of the PCF surcharge, Alteon is admitted to the PCF for that period. The issue in this matter is solely whether Alteon should be retroactively admitted to the PCF under Policy 1 for the contested coverage period of November 1, 2021, to December 31, 2021.

60. The version of Section 41-5-5 of the MMA in force during the contested coverage period² provides in relevant part:

A. To be qualified under the provisions of the Medical Malpractice Act, a health care provider shall:

(1) establish its financial responsibility by filing proof with the superintendent that the health care provider is insured by a policy of malpractice liability insurance issued by an authorized insurer in the amount of at least two hundred thousand dollars (\$200,000) per occurrence or for an individual health care provider, excluding hospitals and outpatient health care facilities, by having continuously on deposit the sum of six hundred thousand dollars (\$600,000) in

¹ See Appellee's Answer Brief filed in *Beecher Carlson Insurance Services, LLC, and California Medical Group Insurance Company Risk Retention Group, Plaintiff-Appellants vs. Russell Toal, as Superintendent of Insurance for the State of New Mexico, Defendant-Appellee*, No. A-1-CA-38334.

² Amendments to MMA that became effective January 1, 2022, included an increase in the minimum coverage amounts required by this section. These amendments do not impact the Hearing Officer's analysis of this matter.

cash with the superintendent or such other like deposit as the superintendent may allow by rule or regulation; provided that in the absence of an additional deposit or policy as required by this subsection, the deposit or policy shall provide coverage for not more than three separate occurrences; and

(2) pay the surcharge assessed on health care providers by the superintendent pursuant to Section 41-5-25 NMSA 1978.

...

C. A health care provider not qualifying under this section shall not have the benefit of any of the provisions of the Medical Malpractice Act in the event of a malpractice claim against it.

61. As shown in the stipulated Findings of Fact Nos. 18 and 29 above, TDC issued a medical malpractice liability policy to Alteon (Policy 1) for the contested coverage period. However, as established in stipulated Findings of Fact Nos. 30, 31 and 33, TDC did not report this policy to the Superintendent or the TPA using its standard automated reporting system. Nor does the record contain evidence of any other attempt by TDC or Alteon to otherwise file proof of that coverage with the Superintendent or the TPA, as required by Section 41-5-5(A)(1) of the MMA.

62. Section 41-5-5(A)(2) establishes the requirement of payment of the surcharge in order for that provider to be admitted to the PCF, but the question of when the requisite surcharge amount must be submitted to the custodian is addressed in Section 41-5-25(E)(2021), which provides in relevant part: “The surcharge shall be collected on the same basis as premiums by each insurer from the health care provider. *The surcharge shall be due and payable within thirty days after the premiums for malpractice liability insurance have been received by the insurer from the health care provider in New Mexico.*” (Emphasis added.) The record does not specify when the premium for Policy 1 was received by TDC. The Hearing Officer takes administrative notice of the near universal practice by insurance providers of requiring payment of premiums on or before coverage commences under a policy. The Hearing Officer, therefore, concludes that it is more

likely than not that Alteon paid premiums on Policy 1 on or before the effective date of that policy, which the parties have stipulated was November 1, 2022. *See* Findings of Fact Nos. 18 and 30.

63. A rule adopted by the Superintendent addressing qualifications and admissions to the PCF provides further guidance regarding when the surcharge must be paid. Subsection A of 13.21.2.20 NMAC (Payment of Surcharges) states: “An insured health care provider must pay the applicable surcharge to the medical malpractice liability insurer *within 30 days of the inception of coverage*, and within 30 days of the inception of each period of renewal coverage.” (Emphasis added.)

64. As noted above, stipulated Findings of Fact Nos. 18 and 30 establish that Alteon’s Policy 1 with TDC had an effective date of November 1, 2021. The stipulated Findings of Fact Nos. 26 and 27 establish that TDC sent Alteon an invoice for the applicable PCF surcharge on December 2, 2021, and that Alteon paid the surcharge to TDC on December 17, 2021³. Accordingly, the Hearing Officer finds that Alteon did not pay the applicable surcharge to TDC within 30 days of the inception of coverage under Policy 1 as required by 13.21.2.20 NMAC.

65. Subsection C of 13.21.2.21 NMAC (Admission Date) (1/12/2022, 4/30/2019) also addresses the timing of the payment to the PCF of applicable surcharges in relation to the inception date of the underlying malpractice liability coverage. 13.21.2.21(C) NMAC (4/30/2019) states in relevant part that “. . . the admission date for an insured health care provider who applies to participate in the fund, and who pays all applicable surcharges to the fund, within 60 days of the inception of the base coverage, shall relate back to the inception date of the base coverage.” As noted in Finding of Fact No. 50 as stipulated to by the parties, this 60-day relation back period

³ An email attached as Exhibit 2 to the Proposed Findings of Fact indicates that the actual date was December 7, 2021. The discrepancy in dates does not impact the Hearing Officer’s analysis in this matter.

supports OSI's objective in managing the fund by balancing the needs of carriers, providers and the PCF. As stipulated by the parties, neither Alteon not TDC tendered payment of the applicable surcharges for the contested coverage period until February 22, 2022, or more than 110 days after the effective date of the base coverage provided by Policy 1.

66. Suspension of TDC's certificate of authority pursuant to Section 41-5-25(E) does not provide a remedy for or otherwise address the failure by Alteon and TDC to meet the requirements for admission to the PCF.

67. In its May 5, 2022, letter TDC suggested that it be assessed a penalty for its admitted error in not timely paying Alteon's PFC surcharge. TDC identifies no legal basis for assessing such a penalty, and the Hearing Officer is unable to find no authority for assessing a penalty. In their Brief on Legal and Equitable Issues, TDC and Alteon propose that the PCF accept the entire \$62,000 surcharge applicable to Policy 1 and grant Alteon retroactive admission to the PCF for two month contested coverage period. While the acceptance of the surcharge assessed for a 12-month period to cover only two months of PCF admission might financially benefit the fund, the Hearing Officer finds any such financial benefit cannot override Alteon's failure to comply with the mandatory statutory and regulatory requirements for admission to the fund.

CONCLUSIONS OF LAW

A. The New Mexico Superintendent of Insurance has jurisdiction over the subject matter of this proceeding and the parties pursuant to NMSA 1978, 59A-2-8, 59A-4-15 and the Medical Malpractice Act, NMSA 1978, 41-5-1 through 41-5-29 (1976 as amended).

B. The TPA was authorized under its contract with OSI, Section 41-5-25 of the MMA and 13.21.1.8 NMAC to address and act upon requests pertaining to admission to the PCF received after January 1, 2022 that involved facts arising prior to that date. In order to fulfill its duties as

contemplated by the legislature in enacting the amendments to the MMA, the TPA must necessarily consider and act upon contemporary claims and requests involving the PCF that arise from facts, claims or conduct that existed or occurred prior to January 1, 2022. Accordingly, the TPA was duly authorized to act upon the February 22, 2022 request to grant Alteon admission to the PCF for the period of November 1, 2021, to December 31, 2021.

C. The Superintendent's Appointment of Hearing Officer and Notice of Hearing correctly concluded that "[t]he aggrieved party is Alteon Health, LLC, which has standing to seek a hearing in this matter." TDC has failed to establish its standing to be heard in this matter by failing to demonstrate that it has suffered an injury in fact resulting from the challenged action.

D. The Hearing Officer finds no legal authority in MMA, the Insurance Code, or any regulation promulgated by the SOI for the assessment of a penalty against TDC for its failure to timely remit the required surcharge on behalf of Alteon.

E. Because neither TDC nor Alteon submitted proof of medical malpractice liability coverage for the contested coverage period, Alteon failed to meet the requirement of Section 41-5-5(A)(1) for admission to PFC for that period.

F. Neither TDC nor Alteon made the applicable PCF surcharge payments within the period allowed under Section 41-5-25(E) or more than to allow Alteon admission to the PCF for the contested coverage period.

G. The TPA's decision to refuse to accept TDC's late-tendered surcharge payment on behalf of Alteon did not violate the provisions of the MMA or 13.21 NMAC.

H. The TPA's decision to refuse to accept TDC's late-tendered surcharge payment on behalf of Alteon was in accord with all applicable statutes and regulations and was otherwise proper and the Hearing Officer recommends that it not be overturned.

WHEREFORE, in light of the findings and conclusions above, the Hearing Officer **RECOMMENDS** that the Superintendent should sign an Order declaring that: (1) there is no provision under the Medical Malpractice Act or the rules promulgated by the SOI under the MMA that allows for the TPA or SOI to accept surcharges outside of the time limits specified in the MMA and rules; and 2) the TPA's determination that it could not accept TDC's tender of a surcharge payment more than 110 days after the underlying malpractice coverage became effective was correct and should not be overturned.

A copy of this Hearing Officer's Recommended Decision should be sent to all persons on the attached Certificate of Service.

ISSUED at Santa Fe, New Mexico this 10th day of November, 2022.

OFFICE OF SUPERINTENDENT OF INSURANCE

A handwritten signature in blue ink, reading "Richard Word", written over a horizontal line.

Richard B. Word, Hearing Officer

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that, on this 10th day of November 2022, I filed the foregoing *Recommended Decision* through the OSI's e-filing system, which caused the parties to be served by electronic means, as more fully reflected on the eService recipients list for this case.



Freya Joshi, Law Clerk
Office of Superintendent of Insurance
Freya.Joshi@osi.nm.gov