STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Procedural Rules for Workers' Compensation Hearings.

STATEMENT OF NEED AND REASONABLENESS

Minn. Stat. § 14.51 (1982) authorizes the Chief Hearing Examiner to adopt rules to govern the procedural conduct of all hearings, relating to both rule adoption, amendment, suspension or repeal hearings, contested case hearings, and workers' compensation hearings. To that end, in 1982, the Office of Administrative Hearings adopted procedural rules relating to workers' compensation hearings which are found at 9 MCAR §§ 2.301 through 2.326.

During the 1983 Legislative Session, the Minnesota Legislature amended the Minnesota Workers' Compensation Law (Minn. Stat. Ch. 176). The amendments are found in Minn. Laws 1983, Ch. 290. That legislation is a comprehensive reform of the Minnesota Workers' Compensation system. Included in the legislation were numerous procedural changes which impact on the procedures utilized in the conduct of contested workers' compensation claims, the hearings for which are conducted by compensation judges from the Office of Administrative Hearings.

Because the newly-enacted statute now would supersede the previously adopted procedural rules with which they are in conflict, it is necessary amend the procedural rules to conform to the statute and to implement those sections of the statute which require additional specificity.

The following are statements of the need for and reasonableness of the amendments to the existing rules, identified through the section of the existing rule being amended.

9 MCAR § 2.306

This rule relates to hearings conducted when an employer/insurer has discontinued the payment of benefits to an injured employee or when they have petitioned to discontinue the compensation payments. Under the prior law, an employer/insurer could file a notice of discontinuance and cease paying benefits on the date the notice was served and filed with the Commissioner. Also, an employer/insurer could simply petition the Commissioner for a discontinuance. In the initial instance, when an employee objected to the discontinuance, the matter was referred to the Office of Administrative Hearings for assignment to a compensation judge for hearing within 75 days of the receipt of the file in the office. A petition to discontinue was treated in the same fashion.

Minn. Laws 1983, Ch. 290, § 140 (to be codified Minn. Stat. § 176.242) changes the procedure for discontinuances of compensation. Under the statutory changes, when an employer/insurer files a notice of discontinuance, if the employee objects within 10 calendar days, the benefits may not be discontinued until such time as the Commissioner of Labor and Industry has conducted an administrative conference and has ruled that the benefits can be discontinued. In that event, if the employee then files an objection to the discontinuance, the

matter is immediately referred to the Office of Administrative Hearings for assignment to a compensation judge. Following the administrative conference, if the Commissioner rules that the discontinuance is improper, the employer/insurer may file a petition for discontinuance which will be sent to the Office of Administrative Hearings for assignment to a compensation judge for hearing within 75 days.

It is necessary to amend Rule 9 MCAR § 2.306 to conform to the statutory changes. The changes in the rule are made to reflect the fact that the office will now receive cases based on the objection to a decision of the Commissioner or on a petition to discontinue following the Commissioner's decision. The rule is also amended to provide that priority treatment (setting a case within 75 days of receipt of the file) will not be given unless the objection has been filed within 120 days of the notice of discontinuance or following an order of the Commissioner allowing the discontinuance. Finally, language must be added to the rule to indicate that priority status will be given to petitions to discontinue which are filed within 120 days following an order of the Commissioner indicating that the discontinuance should not be allowed.

The purpose in giving priority treatment is to ensure that cases of discontinuance will be heard promptly so that if employees have been wrongly discontinued, their benefits can be reinstated as soon as possible. Over the past two years, this writer has received numerous calls from individuals whose benefits have been discontinued indicating that they are having their cars repossessed, and their houses foreclosed because of inability to pay their bills. Likewise, it is reasonable that an insurance carrier be given a hearing as promptly as possible so that it will not be paying benefits where benefits should not be paid. When an insurer has been making payments which should not be paid, it raises the total cost of the workers' compensation system in the State of Minnesota which has an end result of raising the rates paid by Minnesota employers to insurance carriers for liability insurance. This further raises the costs of doing business in the State of Minnesota which results in higher prices which must be paid for the goods and services provided by the employer, all of which is to the detriment of citizens of the State of Minnesota. Therefore, it is reasonable that priority treatment be given as long as objections or petitions are filed within a reasonable time (120 days) following action of the Commissioner. (The 120-day time frame is not new to these rules.)

9 MCAR § 2.312

This rule relates to the disqualification of a workers' compensation judge. Under the existing rule, compensation judges must withdraw from cases if they feel they are disqualified for any reason. The amendments will not change that provision. However, under the existing rule; if a person files an affidavit of prejudice against a judge, it is not an automatic removal of the judge from the case but, rather, they must show absolute cause for the removal of the judge and a determination as to whether or not the judge would be removed from the case was left with the Chief Hearing Examiner to be determined as a part of the record.

Minn. Laws 1983, Ch. 290, § 144 (to be codified Minn. Stat. § 176.312) specifically now allows the filing of an affidavit of prejudice against a compensation judge, in the same manner as an affidavit of prejudice is filed pursuant to law or rule of District Court. Once filed, the affidavit has the same effect and shall be treated in the same manner as in the courts. In the district courts, an affidavit properly filed results in the automatic removal of the judge to whom the case was assigned.

Based on the foregoing, it is necessary to amend our rule to comply with the statutory mandate. It is reasonable that a party filing an affidavit be required to serve a copy of the affidavit on the opposing party or parties in order that the other parties may have notice of the fact that the assigned trial judge will not be hearing the case. It is reasonable that the original affidavit be filed with the Chief Hearing Examiner for it is the Chief Hearing Examiner's specific responsibility, by statute, to assign or reassign judges to hear workers' compensation cases. It is reasonable that each party be allowed no more than one such filing under a case in order to prohibit "judge shopping", undue delay in the process and to conform to the practice before the district courts of this state. Finally, language must be added to provide that the case will be reassigned immediately upon the filing of the affidavit, with proof of service, with the Chief Hearing Examiner.

9 MCAR § 2.314

This rule, relating to depositions, must be amended in two ways. First of all, the Revisor of Statutes has recommended that the proper citation be given to Minnesota Statutes. Secondly, the substantive change is required as a result of Minn. Laws 1983, § 111, which amends Minn. Stat. § 176.155, subd. 5 (1982). That newly-enacted section of law requires that all medical evidence presented in a workers' compensation case is to be presented by written report only unless a compensation judge makes a written finding that the appearance of the position of health care provider is crucial to the accurate determination of the employee's disability. It also provides the right to cross-examination, by deposition, of the physician or health care provider, but provides that all of these reports and depositions are to be taken and submitted prior to or at the time of the hearing or they will not be considered by the compensation judge. Again, the compensation judge does have the authority to allow submissions following the hearing.

The amendments to this rule simply reference the new statutory section, indicating that the cross-examination of a physician or health care provider prior to the hearing is specifically allowed. It is found that it is crucial to the person reading these rules relating to depositions that they have a total understanding of all such depositions which are allowable and that they be informed of this fact without the necessity of having to read the very lengthy and complex sections of the Minnesota Workers' Compensation law. It is also necessary to paraphrase the statute in order that the persons will have an understanding, by reading the rules, that the cross-examination depositions are to be completed and filed prior to or at the hearing unless otherwise ordered by the judge. The new language merely paraphrases the statute but is crucial to the reader's understanding of the rules of depositions in their entirety.

9 MCAR § 2.317

The amendments to this rule are necessary to conform the rules to the provisions of Minn. Laws 1983, § 111, which were discussed above. It is necessary to spell out a procedure whereby a party may obtain an order from a compensation judge allowing the full testimony either by deposition or in person of a physician or health care provider. It is also necessary to provide a procedure whereby a compensation judge, on his or her own motion, can order the full testimony to be taken.

The new language of the statute indicates that all evidence related to health care must be submitted by written report "as prescribed by the chief hearing examiner". It is therefore necessary to specifically delineate, by rule, the fact that medical evidence must be submitted in a specific format and that it answer the questions necessary to a full determination of the workers' compensation case. Finally, it is necessary that the rules specifically provide the procedures for the exchange of medical reports, prior to the hearing, and the filing at a specific time so that the case can proceed.

It is reasonable that a party requesting that the oral testimony of a physician or health care provider be allowed in full not be required to bring on an oral motion before a compensation judge. Appearing personally before a judge would take time from the judge, would be costly to all parties, and could create delays in all of the workers' compensation system. Therefore, the procedure to make this request, by written motion, is the most reasonable method. It is reasonable that such a motion be filed prior to or at the time of the filing of a pretrial statement because the medical reports required by the statute and by the proposed amendments to these rules required that the reports must be filed with the pretrial statement. Obviously, due process requires an opportunity for persons to object to any motions of this nature and, therefore, a procedure for filing of an objection and the minimum 10 calendar days for the filing of such an objection are provided by the rule. It is reasonable that a judge would wait until the objections are filed before issuing a decision and that, in granting or denying the motion, state the specific reasons for the order so that persons desiring to utilize the granting or denying of the motion as a grounds for appeal will be able to state with specificity the errors alleged.

In some cases, a judge will not know whether the full testimony of a physician or health care provider is necessary until the hearing has started and the judge hears other testimony. It is therefore reasonable to provide a vehicle for a judge, on his or her own motion, to issue an order requiring the full testimony to be presented either in person or by oral deposition. It is also reasonable for the judge to either continue the hearing for the testimony to be taken or to order that the testimony be taken in full by oral deposition. This will prohibit parties from seeking unreasonable delays. it also will lead to an expeditious handling of the case by the judge.

Rather than adopt a form for physician or health care providers to present their medical testimony, which would limit the amount of information provided, it is reasonable to prescribe only a format for the doctors to follow, allowing the doctors to state as much or as little as they deem appropriate in

the medical report. It is reasonable to require that all medical reports contain the data in the order prescribed so that uniformity can be accomplished in the system. A study of other states wherein this process is followed indicates that all doctors have been able to utilize the same format which has been a great aid in the expeditious handling in workers' compensation cases.

It is necessary to add item j. to the rules as a result of changes in the Workers' Compensation Law allowing a compensation judge to apportion the responsibility for the payment of benefits between different injuries. This apportionment can only occur following the testimony of a physician or health care provider. It is also necessary that testimony be presented on apportionment, in order that the judge can determine the respective liabilities when two or more employers are involved. Finally, it is necessary that a doctor give an opinion on the necessity for future medical care or treatment, and a statement of the nature and extent of the treatment so that the judge can made a proper determination on the liability of the employer/insurer to continue compensation payments following the hearing.

9 MCAR § 2.318

Minn. Laws 1983, Ch. 296, § 149, amended Minn. Stat. § 176.371 (1982) by deleting the requirement that compensation judges' decisions contain findings of fact and conclusions of law. The statute now closely tracks the requirements imposed on county and district court judges which is that the judges shall determine all contested issues of fact and law and issue an award or disallowance of compensation following those determinations. It is also required that the judge's decision be issued and filed with the Commissioner within 60 days after the submission of the case, which is when the record in the matter has closed, and if they fail to do so, unless the parties have agreed to an extension of the 60-day time limit or the Chief Hearing Examiner has extended the time, no part of the compensation judge's salary shall be paid. Finally, the statute spells out what is and is not required by a memorandum attached to the decision.

It is necessary to amend 9 MCAR § 2.318 B. and E. to conform to the statutory amendments. Previously, the rule indicated that the compensation judge would issue the decision following the close of the record. It is necessary to amend the rule to conform to the 60-day requirement. Because there is a very substantial penalty to a compensation judge for failure to issue a decision within the 60 days, it is necessary to delineate when a record is considered to be closed which is the date of final submission to the judge. It is reasonable to keep the record in a case open for the submission of all evidence on which the decision must be based but not including any proposed findings submitted by a party which are not actual evidence in the case. A proposed decision is not evidence in a case and, thus, the record should not remain open for receipt of such proposals. It is also reasonable to point out, by rule, the fact that a memorandum is necessary only to delineate the reasons for the decision or discuss the credibility of witnesses, which conforms the rule to the statute. This is necessary because parties will look to this rule for advice when they, themselves, are preparing a proposed decision for a compensation judge, which proposed decision must comply with the rules.

Section D. is amended to conform this rule to the rest of the rules that the proposed decision is submitted without any indication of it being included as part of the record and also so that it cannot be implied that the submission would keep the record open. Finally, because the statute provides for extensions of time for the issuance of the decisions, it is necessary and reasonable to specify a procedure whereby the written consent of the parties will be submitted. As the Chief Hearing Examiner is responsible for enforcement of the law, it is necessary and reasonable that a copy of the written consent be filed with the Chief Hearing Examiner. It is necessary and reasonable that the written consent explain the reasons in order that the office may be able to respond to questions from persons who call wondering why the decisions have not been issued and, if an extension has been granted, what the reasons for the extension given by the parties was. It is also necessary that we be able to compile the information on the reasons for extensions in order that we may properly respond to questions from the Legislature on this issue. It is also reasonable that, if the Chief Hearing Examiner grants an extensions pursuant to the statute, that the extension be in writing and that all parties be informed of the extension and the reasons. Again, the public has a right to know what a state agency is doing and the reasons for it. Further, a question could arise that the extension might be appealable to the courts but without a specific written extension explaining reasons, the party would be foreclosed from obtaining relief from a court.

9 MCAR § 2.320 Ch. 290

Minn. Laws 1983, §§ 156 through 159 amend Minn. Stat. § 176.521 (1982) which relate to settlement of workers' compensation matters. The amendments to the law clarify the fact that certain settlements are not subject to approval by a compensation judge, but rather, if all parties are represented by counsel, they are not subject to approval and the judge is to simply sign an award and issue the decision.

Several of the amendments in this rule are statutory citations which are form changes required by the Revisor of Statutes.

In order to expedite the handling of all stipulations, rather than requiring that a case be given to the judge previously assigned to the case for the signing of the award on stipulation, the rule is amended to provide that any compensation judge may sign the award. We have found that substantial delays result when a judge is on an extended vacation or is conducting hearings away from the office, for the rule required that this particular judge review the case and issue the award. This will give the office flexibility which will result in stipulations for settlement being concluded and final awards issued much faster which will benefit all parties and, especially, the injured employees. The statutory changes also relate to attorneys' fees and now require a filing of a statement of attorneys' fees "on a form prescribed by the Commissioner" (see, Minn. Laws 1983, Ch. 290, § 36. It is therefore necessary to amend the rule to indicate that the form for the statement of attorneys' fees must be that prescribed by the Commissioner of Labor and Industry.

9 MCAR § 2.321

As indicated above, Minn. Laws 1983, §§ 36 through 38 amend Minn. Stat. § 176.081 (1982) which relates to attorneys' fees. Under prior law, all attorneys' fees were subject to review and approval by a compensation judge or the Workers' Compensation Court of Appeals. Compensation judges were limited to approving fees of up to $6,500. Any requests for fees in excess of $6,500 were required to be petitioned to and approved by the Workers' Compensation Court of Appeals. The 1983 amendments delete the requirement for approval of any fees up to $6,500 and, further, requires that petitions for fees in excess of $6,500 are to be submitted to a compensation judge rather than the Court of Appeals. It is therefore necessary and reasonable that the existing rules on applications and petitions for attorneys' fees be repealed where they are in conflict with the statute as in the case of §§ 2.321 A., B. and C. In their place, it is reasonable to cite the readers of the rule to the statutes which are now very specific and which control the issuance of awards on attorneys' fees. It is believed that, for the most part, the statute is sufficiently specific and needs no further specificity in order to be implemented.

The Workers' Compensation Law requires that a retainer agreement be obtained by an attorney and that it be furnished as part of the record in a case. It is therefore reasonable that the rule provides a vehicle for the filing of this retainer agreement along with the Commissioner's prescribed statement of attorneys' fees so that they will be a part of the record.

The statute specifies that parties have 10 days to object following the filing of a statement of attorneys' fees. In order that a final decision by a judge will not be delayed when all parties are in agreement with the attorneys' fees, it is reasonable to provide a procedure whereby parties can agree, on the record, to the statement of attorneys' fees as filed and, in addition, to provide a procedure for the same thing to occur when stipulations for settlements are filed with the compensation judge for approval. To do otherwise would unnecessarily delay the issuance of an award and thereby delay the payment of benefits to injured employees.

The last two paragraphs of § 36 of Minn. Laws 1983, Ch. 290, create some uncertainty with respect to the question of when a compensation judge will apply all of the criteria of Minn. Stat. § 176.081, subd. 5 in approving these. Therefore, it is necessary and reasonable that the law be made specific in order that it may properly implement the legislative intent. It is clear that the intent of the Legislature is that attorneys' fees are not subject to approval by a compensation judge if the amount requested is less than $6,500, unless a specific objection is made. When an objection is made, the judge is directed to § 176.081, subd. 5 in order to clarify and rule on the objection. It cannot be stated that it was the intent of the Legislature than an objection on one issue would trigger all of the provisions of § 176.081, subd. 5, and require approval of all of the fees.

9 MCAR § 2.321 C. clarifies this ambiguity by stating that the compensation judge shall utilize the subdivision 5 criteria only as to those issues specifically raised by the objection.

Dated: June 24th, 1983.

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Chief Hearing Examiner