11-28-95

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Minnesota Department of Labor & Industry

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November 21, 1995

Legislative Commission to Review
Administrative Rules
55 State Office Building
55 Constitution Avenue
St. Paul, Minnesota 55155

Re: SONAR for rules governing Workers' Compensation Equitable Apportionment Arbitration

To Whom It May Concern:

Attached is a copy of the SONAR that will be coming available to the public as it is anticipated that the rules will be published on November 27, 1995.

Sincerely,

Mary Miller
Attorney

and

Sara Stoltman
Attorney

MM/SS/kh

Enclosure

STATE OF MINNESOTA
DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed Rules Governing Workers' Compensation - Arbitration of Equitable Apportionment

STATEMENT OF NEED AND REASONABLENESS

I. OVERVIEW AND STATUTORY AUTHORITY

In 1995 the Legislature amended the Workers' Compensation Act to provide that equitable apportionment of liability for an injury, including requests for contribution and reimbursement on that basis, is no longer allowed except as provided in the law. The law allows apportionment among employers/insurers in a settlement agreement filed under M.S. §176.521 and allows arbitration of equitable apportionment under M.S. §176.191, subd. 5. Equitable apportionment of occupational diseases under the law remains intact and statutory apportionment, including Special Compensation Fund liabilities and benefits and apportionment of permanent partial disability under M.S. §176.101, subd. 4a remains. It is the arbitration of equitable apportionment under M.S. §176.191, subd. 5 that is governed by these rules.

Statutory authority for these rules is found at M.S. §176.191, subd. 1a which states, "In the arbitration of equitable apportionment under subdivision 5, the parties and the arbitrator must be guided by general rules of arbitrator selection and presumptive apportionment among employers and insurers that are developed and approved by the commissioner of the department of labor and industry." Minnesota Statutes §176.83, Subdivision 1 provides that, "In addition to any other section under this chapter giving the commissioner the authority to adopt rules, the commissioner may adopt...rules to implement the provisions of this chapter." Further general authority to adopt rules governing workers' compensation practice is found at M.S. §§175.17 and 175.171. These rules set out the arbitrator selection and presumptive apportionment rules that the statute requires as well as the procedures for utilizing them.

II. CONSIDERATIONS

Minnesota Statutes §14.11 concerning cost to local public bodies is not applicable to these rules. First, the total cost to public bodies to implement the rule for either of the

two years following its adoption is less than $100,000. Second, it is estimated that the statutory provision on which these rules are based will produce significant savings to system users.

The practice of dividing up liability for a workers' compensation benefit among a number of different employers/insurers did not have a basis in the workers' compensation statute. As practiced, the procedure involved many parties on one claim, each requiring their own witnesses, their own medical examination report, their own claims handler and their own attorney. In addition, it consumed the courts' and judges time to resolve these factual and legal issues for these parties. The 1995 legislation simply eliminated this practice that did not have statutory basis, limiting it as set out in Section I to agreement of the parties or to this arbitration process. The use of experienced arbitrators will reduce costs to the parties and the State. This will also free up the court's and judges time to assist in reducing any backlog and decrease decision-issuance times.

These procedures implement the statute that allows these practices to continue, but in a more structured setting. As such, it cannot be said that the rules add cost. They set out the arbitrator selection process, provide the presumption for the apportionment and give the procedures by which to accomplish those two.

These rules will not independently affect small businesses as defined by M.S. §14.115, subdivision 1 for much the same reason. It is the statute that eliminates equitable apportionment except to the extent the parties can agree or as it can be submitted to this arbitration. The equitable apportionment detailed in these rules is limited to that which is allowed under the law. The liability of small employers for workers' compensation benefits through their insurers remains the same as it was before the statutory change, except as limited by the statutory amendments. The rules change none of the substance of that liability.

Under M.S. §16A.1285 these rules do not establish or adjust individual charges. While they do refer to a non-refundable arbitration administration fee, that charge, if any, will be set by the agreement with the administrator referred to in the rules. To the extent that such a fee will be charged, it is exempt from the provisions of M.S. §16A.1285 under subd. 4 (1) which provides an exemption when "charges for ...services are provided for the direct and primary use of a private...business, or other similar entity". Here an employer/insurer that is unable to resolve a question of equitable apportionment that chooses to bring other employers/insurers into this arbitration process is to pay a fee to the administrator that is selected under these rules. While at first blush this could be seen as additional expense, it is anticipated that it will be accompanied by a large reduction in other costs, such as the sharing of the cost of the neutral physician report. This service is being provided by those parties and for those parties, and they simply front the cost of the procedure that they have chosen. This administration fee goes to the Administrator for the organization of the apportionment arbitration process.

If there is a hearing on the rule, witnesses from the Department of Labor and Industry will present the statutory basis for the rule and its provisions and the basis for the presumptive rule of apportionment. Witnesses from the rules committee will be called to elaborate on reasons why these criteria for arbitrators were chosen and why the procedures that were selected to implement the rules were selected from available options. Witnesses from other arbitration forums may also be called upon for their expertise in this dispute resolution method.

III. RULE PROVISIONS

Wide public notice of this rulemaking was given. CompAct, the Department's newsletter for persons and organizations interested in workers' compensation, contained notice of the new rulemaking authority in the legislation that the Department was undertaking. CompAct is mailed to about 2,500 workers' compensation professionals who have requested that their name be on that mailing list. At Department presentations on the new law, review was made of the new rulemaking authority in the statute, and it was noted to those groups that these rules would be a priority for the Department to implement because of the rapid repeal, on July 1, 1995, of other equitable apportionment. Notice was given in the State Register, and letter solicitations were mailed to entities requesting suggestions for administration of the arbitration process. Several suggestions were received and a panel consisting of members of the Apportionment Arbitration Rules Committee (detailed in the next paragraph) and of the Department met with the entities that had made suggestions. Interim notice under Minn. Rules 5220.2960 was given in the State Register on August 14, 1995 that this rulemaking process was under way and the direction that it was heading. Notice of Solicitation of Outside Opinion or Comment was published in the State Register on August 28, 1995 stating that a draft of the rules would be available and how to request one. One general comment in response to the Solicitation was received. A dozen requests for the draft were received, and the drafts were mailed out in response.

In developing the rules, the Department of Labor and Industry sought the input and expertise of both those who will be using the system and working with it and those who are experts in dispute resolution processes: workers' compensation insurers, self-insured employers, the Special Compensation Fund, the Workers' Compensation Reinsurance Association and judges of the Workers' Compensation Court of Appeals, the Office of Administrative Hearings and of the Department of Labor and Industry. One of the goals of the proposed rules is the development of a system to be used by claims handlers of insurers, third party administrators and self-administered employers. The rules provide for legal involvement, but propose a system that will be easily understood and accepted by claim handlers. A Committee was formed by the Department to develop the rules in response to the legislation. A list of the members who worked on the Apportionment Arbitration Task Force is attached as an Addendum to this Statement. The formation of the Committee was advertised widely, and the Department sought input and membership

at numerous seminars conducted by the Department as well as in its Advisory Committees and Task Forces. Representatives of the interest groups identified agreed to sit on the Committee. A series of meetings was held to prepare the Rule draft. The draft became available on October 2 and, as stated in the Notice of Solicitation, was furnished for comment to those who requested it.

For purposes of need and reasonableness the rule can be divided generally in to three parts. Part 5229.0350 sets out the Presumptive Rule of Equitable Apportionment. Part 5229.0400 provides for the Nomination and Qualifications of the Arbitrators. The remainder of the rule provides the procedures for how to obtain arbitrators who will apply the presumptive rule of apportionment to the matters before them. This statement will deal with each of these general categories.

A. PRESUMPTIVE RULE OF EQUITABLE APPORTIONMENT, Part 5229.0350

The enacting legislation provides at M.S. §176.191, subd. 1a that, "In the arbitration of equitable apportionment under subdivision 5, the parties and the arbitrator must be guided by general rules of ...presumptive apportionment among employers and insurers that are developed and approved by the commissioner of the department of labor and industry." Such a rule, then, is needed in order to implement the legislation.

In determining what a reasonable presumptive rule would be, the committee looked at several statutory provisions:

1. M.S. §176.191, subd. 1a states, "...the arbitration proceeding is for the limited purpose of apportioning liability for workers' compensation benefits payable among employers and insurers."

2. M.S. §176.191, subd. 5 states, "The decision of the arbitrator shall be conclusive...among employers and insurers."

3. M.S. §176.191, subd. 5 also states, "...and the employee is not bound by the results of the arbitration."

From these provisions the committee and the department discerned a clear legislative intent that these changes were not to be substantive. They were not intended to change the law on how equitable apportionment is done but only to limit it and to modify the method and, perhaps, the forum for reaching decisions on the issues. It follows from these conclusions that, within these rules, the substantive law with respect to equitable apportionment could not be changed. From there it followed that the most reasonable rule of presumptive apportionment was an adoption of the law. Any attempt to restate or summarize the law was subject to attack as not an accurate reflection of what the law is. Indeed, one of the most prevalent and guiding principles of the law in the area is that, "The

apportionment decision can, of necessity, be based on no predetermined and precise formulas, but must be determined based upon the facts of each case." Goetz v. Bulk Commodity Carriers 303 Minn 197 at 200, 27 WCD 797 (1975). The presumptive rule of apportionment, adopting the law in the area is, therefore, the most reasonable of the options for the presumptive rule. The rule gives guidance to the arbitrator and the parties as to the parameters of a decision under the Workers' Compensation Act's arbitration of equitable apportionment provisions and this chapter.

B. NOMINATION AND QUALIFICATION OF ARBITRATORS, Part 5229.0400

Minnesota Statutes §176.181 Subd. 1a states that, "In the arbitration of equitable apportionment under subdivision 5, the parties and the arbitrator must be guided by general rules of arbitrator selection...that are developed and approved by the commissioner of the department of labor and industry." It is in response to this legislative directive that this rule and Subp. 2 of Part 5229.0420 on arbitrator selection are proposed. Because it is employers/insurers among whom liability will be apportioned, and because they will be the ones using the arbitration system, the rules provide for their nomination of arbitrators. In their experience the most important qualification for this job is experience in the workers' compensation system. The area is very specialized and complex, and dispute resolution in it requires persons with knowledge in the area and hands-on work in it as well as skills in problem solving. The requirement of five years of such experience ensures the nomination of persons who understand the system and have weathered work in it. Either technical claims handling or legal experience in Minnesota workers' compensation are seen by the Committee to provide the background of experience necessary to do the job effectively. The one comment received in response to the Solicitation of Opinion was to the effect that workers' compensation defense attorneys would make good arbitrators. This criteria is also thought to provide a large enough pool from which arbitrator selection can be made and yet provide the necessary qualifications. The qualifications and selection process were also developed with an eye to what would be the most efficient and cost-effective choice of arbitrator. These goals can also be accomplished by using people within the system that the users are familiar with and whose abilities are known. Proposed rule 5229.0400, subpart 1 also reasonably allows for insurers or self-insured employers who were unable originally to nominate individuals to have a renewed chance each year to do so.

C. ARBITRATION PROCEDURES

The rest of the proposed rules are procedures for utilizing the two general rules required by the legislation. The Committee discussed several options for these procedures including adopting Chapter 572 of Minnesota Statutes and having no procedures at all. Generally it was agreed that there needed to be procedures set out so that the system users would know what they were getting into using the new proposed apportionment process. A Committee member referred to a decade ago when an

arbitration process was first enacted in workers' compensation legislation and employer/insurers were hesitant to use it because of not knowing what the process held for them or what the result might be.

When Chapter 572, the Uniform Arbitration Act (UAA), was reviewed, it was noted that a number of the provisions would not be applicable to this process. For example, costs and expenses of the arbitration here are governed by M.S. §176.191, subd. 5 rather than by the UAA provision. For purposes of these rules the entire basis for the arbitration is found in M.S. §176.191, rather than in a written agreement of the parties as under the UAA. The decisions made by the Committee on arbitrator selection and the need for an administrator were not consistent with adoption of the entire Chapter 572. Although the Committee members were not philosophically opposed to adoption of the entire UAA, they felt the need for a straightforward set of procedures that could comply with the workers' compensation statute and compile in one place the arbitration process for this apportionment. Some members felt that adopting the UAA would be more costly than procedures utilized before this arbitration was enacted. So instead, it was decided to incorporate only those provisions of Chapter 572 that were pertinent and needed in order to implement this law. Consequently, the concepts in, for example, M. S. §572.13, 572.14, and 572.19 are incorporated into these rules. This adoption of only the applicable provisions serves the purpose of limiting the regulation in the area, yet providing user-friendly tools to make the system work. In a sense, these rules spell out what the "agreement" is that is referred to in the UAA. The specificity and codification of the "agreement" is needed in the workers' compensation forum to achieve a resolution of a matter if the parties have not had success otherwise in getting resolution. If they are able to reach agreement on the equitable apportionment issues, a stipulation can be drawn up and submitted for approval to a compensation judge under M.S. §176.521. If, however, agreement cannot be reached, the paying party can require others to enter this forum. Because of the context in which these disputes arise, it was concluded that some binding procedures were needed.

Overall the procedures proposed were arrived at for several reasons. The representatives on the Department's committee have been using these methods of dispute resolution for some time. The procedures proposed are those that they have found workable, efficient and effective. They have been tested in other arenas and used to some extent in the workers' compensation arena as well. Experienced arbitrators were consulted for their input as part of the procedures-development process. Finally, a number of the procedures pull in provisions from the legislation where they are necessary for clarification.

1. DEFINITIONS 5229.0100

More specifically, definitions are needed because arbitration has not been widely used in the worker's compensation field in the past. The statute introduces this new procedure that claim administrators and legal counsel will need to feel comfortable using. Everyone will need to be able to mutually understand the terms of art and expectations of

each other. The first step in this process is to clearly define terms used in the process that are not used elsewhere in the workers' compensation statute. The terms "Administrator," "Arbitrator," "Arbitration advisor," "Panel," and "Roster" are all specific to the new arbitration process and new to workers' compensation. The definitions are needed for the sake of clarity, agreement of understanding, and to make drafting of the rules with fewer words easier. These definitions are reasonable as the agreed-upon understanding of what the terms refer to. The terms "employer/insurer" and "self-insured employer" are used in the rules and have not otherwise been defined in statute or rule but are terms this system's users are comfortable with as understood by these definitions.

2. PURPOSE 5229.0200

This part is needed to give the reader a quick way to determine what these rules are for. Use of a "Purpose" clause is suggested in the Revisor's rule-drafting manual. The Part restates the two purposes of the rules provided by the statute and adds the purpose of setting out the procedures needed to implement the other two.

3. SCOPE 5229.0300

Because there has been much confusion about what is and is not encompassed by these rules, a lengthy Scope rule is proposed. This provision contains a detailed explanation of the statutory background and context for the rules and an explanation of what is and is not included. Another reason this part is needed is to limit application of the chapter solely to arbitration of the issues for which it is intended. Because of concern about the effect of the procedures on the Special Compensation Fund, a detailed explanation of the statute and its applicability to the Fund is also set out in the Scope rule. The language of the rule part reasonably explains in more detail the limitations on the applicability of these proceedings - solely to the resolution of equitable apportionment (including contribution and reimbursement), the dividing up of existing liability among several entities as provided by 176.191 subds. 1a and 5.

4. ADMINISTRATOR 5229.0410

The Committee decided that an entity was needed to select the arbitrator for each case. It was also concluded that it was not desirable for the arbitrators to be responsible for maintaining records of the proceedings. Consequently, it was determined that an administrator for the system is needed. This part of the rules, then, provides for the selection of the administrator. The administrator will perform those necessary functions that are not appropriate for the arbitrator or any arbitration advisors. It is reasonable that the administrator be selected by the Commissioner of the Department of Labor and Industry, because that is who is responsible for the implementation of the legislation. It is also reasonable that the Commissioner make the decision on administrator in consultation with three insurers and a self-insured employer as they are the ones who will be using the system and need to ensure its workability. This consultative selection allows input from the "consumers" while allowing the Commissioner to protect the larger interest of the public and the system by choosing an appropriate administrator. The three-year

term of the administrator at subpart 3 was selected so as to allow sufficient time for the administrator to gain expertise and show a smoothly functioning process and yet not so long that scrutiny of performance was not an issue.

The subpart on recordkeeping was added because, without records, there would be no way to review the effectiveness of the system or assess the quality of the arbitration decision. Requiring the administrator to keep the record assures neutrality and allows the use of the data for statistical purposes by the Department.

5. SELECTION AND COMPOSITION OF ARBITRATION PANEL 5229.0420

Subparts 1 and 3. The arbitration panel concept developed because some of the experienced arbitrators that the group talked to proposed such a panel as the ideal arbitration procedure. Others thought that the arbitration advisor system began to look too much like an adversarial system. The conclusion reached incorporates part of each concept. If the parties all agree that arbitration advisors are needed, the panel will consist of the arbitrator and one arbitration advisor for each party to the dispute, and the procedure for utilizing them is set out. If, however, the parties are not all in agreement that arbitration advisors are needed, the panel will consist solely of the arbitrator. This approach is reasonable as a melding or compromise of the varying viewpoints represented. More detail is provided on the arbitration advisor's role at 5229.0600 subp. 2 and the need for it and reasonableness of it are as set out here.

Subpart 2 on "Selection of arbitrator" is needed to ensure both that the list of arbitration advisors for a particular case is chosen on a random basis and that each party has the opportunity to strike an arbitator if there is reason to do so. Because much power is given to the arbitrator in arbitration it is important that procedures be set for the arbitrator's selection such that the parties are comfortable with that choice. The part is reasonable because it permits all parties to have assurance as to the neutrality of the arbitrator. The streamlined striking process helps to promote more timely resolution of disputes. The clause permitting the party with the "oldest injury" was added simply to settle the question of who goes first. Item "E" on finding a new arbitrator provides a timely means for the arbitration to go forward should an arbitrator be unable to continue.

Subpart 4 on "Notification of parties" is needed and reasonable both so that the parties will know who they'll be working with and so that they will know the status of the proceeding for preparation purposes.

6. PROCEDURE FOR INITIATION OF ARBITRATION 5229.0500

This part provides the method for starting the process when a party wants it. There is provision that the process cannot be initiated if the statutory requirements are not met. This places the requirements for initiating the process in one place in a user-friendly way. It is reasonable to use the form of the administrator because it promotes uniformity of the requests, which helps ensure that all the required information is submitted and promotes administrative simplicity and recordkeeping. It makes it clear when the process should

start and what the apportionment issues are. What is needed to initiate the process is set out in Subpart 1 B. as including a statement of facts, documentation that the requirements of the statute are met, medical evidence in support of the request, argument with support, and the administration fee. In the experience of those on the Committee, these are the items needed for a request that can then be expedited toward resolution of the dispute. Similarly, in Subpart 3, the items that must be set out in a response from the responding party are the party's position and any support including documentation and medical. These are required for the same reasons. While a 60-day response time was initially proposed, the Committee later modified it to 90 days in consideration of the possibility that these claims may pull in old dates of injury for which files are archived, medicals may need to be obtained, and other information gathered. A deadline for response is important in order to keep the matter moving toward resolution.

7. ARBITRATOR 5229.0600

This part defines the role and powers of the arbitrator. In Subpart 1 only the powers needed to meet the statutory requirement of issuing a binding decision on apportionment are detailed for the arbitrator. The arbitrator has to have the ability to obtain information needed for the decision in the matter. The subpoena power of the Commissioner in workers' compensation matters is reasonable in order to obtain workers' compensation information. The subpoena power of arbitrators under Chapter 572 is reasonable in order for the arbitrator to perform the arbitration function. This will ensure that accurate information on which to base the decision is obtained. Those who will be utilizing the process will have had the opportunity to nominate arbitrators for the roster. Only those qualified will be placed on the roster. Other provisions clarify that the arbitrator is who is in charge of the procedural aspects of the apportionment arbitration. As the person responsible for the determination, it is reasonable for him or her to determine whether further information is needed, whether extensions should be granted and how the matter will be heard. Those who have the qualifications to be selected to decide these cases will appropriately assess the procedures that are needed to obtain a fair determination.

Subpart 3 on "Binding effect" reasonably incorporates the statutory provision that the arbitrator's decision be binding. This ensures that the arbitration will accomplish the purpose of resolving the dispute. It is recognized that there are limits to that binding effect, however, and the users want a statement as to exactly what those limits are in order to have certainty of result. Incorporation of the Uniform Arbitraton Act provisions with respect to vacation of such awards helps to bring closure to the dispute while allowing for vacation in those rare situations such as fraud specified in that Act. Those provisions are the Legislature's statement as to when it would be appropriate to vacate such a determination. As such, it provided a reasonable guide. In addition, it is a system that is already in place and has been used for some time as basis to, where needed, provide relief from an arbitration result. If additional grounds are needed, it is assumed that that statutory provision will be amended.

8. ARBITRATION PROCEDURE 5229.0700

This part is reasonable because it provides for a consistent method of conducting hearings which promotes fairness and predictability. Depending on the issues, the amount involved, and the number of parties, the arbitrator may decide the extent of formal hearing needed in the process. This is needed and reasonable in that multiple days of hearing are not needed in simple, small-value, few-party cases. The 30-day time limit in Subpart 1 A. for deciding whether there will be oral argument is reasonable as it promotes timely resolution and ensures that the parties will be able to prepare for the hearing. The processes for determining the matter either on written submissions or based on oral argument at hearing are proposed based on the experience of the Committee as to what is effective. The 90-day time limit in Subpart 1 C. for the hearing or panel meeting to occur gives the panel the opportunity to review the materials, and the arbitrator the time to set up the hearing process appropriate without undue rush or delay.

Subpart 3 or subpart 4 apply depending on the decision that is made by the arbitrator concerning the hearing process. If the case is simple and straightforward, the panel will reasonably meet as outlined in subpart 3. If the case is more difficult and complex, the procedures in subpart 4 will be undertaken. Provision is reasonably made in subpart 4 for the admission and consideration of all relevant evidence. It is reasonable to allow the panel to meet after oral argument if more than one day of hearing is required because it permits the panel to discuss issues and evidence raised at the hearing in a neutral setting to promote appropriate resolution of the dispute.

Because of the importance of a medical assessment in these issues, provision is made in Subpart 5 for the opportunity for the arbitrator to obtain the opinion of a neutral physician. The decision as to who is a neutral physician for this purpose is made by the parties or, if the parties are unable to agree, by the arbitrator. It is reasonable for the parties, where they can agree, to select the physician who will be rendering the opinion in the case, as the opinion will only be affecting them. It is also reasonable, where they cannot reach agreement, that the arbitrator that is on the neutral roster do the selection. These provisions permit the arbitrator to defer to a medical expert when the proper apportionment decision turns on medical issues beyond his or her expertise.

Subpart 6 on "Decision" is needed to bring finality to the issue and detail what should be included in the decision and award. The outside time limit of 240 days is provided to ensure that the matter does not delay and yet give the parties the time needed to prepare and present their case. Provision is reasonably made for the assessment of the costs of the arbitration as provided by the enacting legislation.

Finally, subpart 7 provides for enforcement of the order. The adoption of this part of the Uniform Arbitration Act is needed to see that there is enforcement support for the decision made by the arbitrator. It is reasonable to utilize this provision because it is the

provision developed by the Minnesota legislature for arbitration decisions and because it is a system already in place that has been tested by use.

Dated: 11-22-95

Commissioner
Department of Labor and Industry

ADDENDUM TO SONAR

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