File

5-1004-4462-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Proposed
Adoption of Rules Relating to
Appeal of Denial of Health Claims

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Howard L. Kaibel, Jr., Administrative Law Judge, at 9:30 a.m. on May 3, 1990, at the Commerce Department Headquarters in St. Paul, Minnesota.

This is a rule-making proceeding under Minn. Stat. §§ 14.131-14.20 held to determine whether the Department of Commerce has fulfilled all relevant, substantive and procedural requirements of law applicable to the adoption of rules, whether the proposed provisions are needed and reasonable, and whether any suggested modifications would constitute impermissible substantial changes.

The Department staff panel consisted of Richard Gomsrud, Department Counsel, and Kim Greene, Special Assistant Attorney General.

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Commerce Commissioner makes changes in the rule other than those recommended in this report, he must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On February 15, 1990, the Department filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules certified by the Revisor of Statutes.
(b) The Order for Hearing.
(c) The Notice of Hearing proposed to be issued.

(d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
(e) The Statement of Need and Reasonableness.
(f) A Statement of Additional Notice.

2. On March 19, 1990, a Notice of Hearing and a copy of the proposed rules were published at 14 State Register No. 38, p. 2224.

3. On March 9, 1990, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

4. On April 9, 1990, the Department filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.
(c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
(d) An Affidavit of Additional Notice.
(e) The names of Department personnel who would represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
(f) A copy of the State Register containing the proposed rules.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comments and statements remained open through May 10, 1990, five working days following the close of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1, an additional three business days were allowed for the filing of responsive comments. The record therefore closed on May 15, 1990.

Statutory Authority

6. Minn. Stat. § 72A.327, subd. F authorizes adoption of procedural rules by the Commissioner implementing the statute. In addition, Minn. Stat. § 45.023 authorizes the Commissioner to "adopt, amend, suspend or repeal rules . . . whenever necessary or proper in discharging the Commissioner's official responsibilities." Statutory authority to adopt the rules has been demonstrated.

Fiscal Note

7. The rules will not result in increased costs to local governments exceeding $100,000 in either of the two years immediately following adoption. The Department was consequently not required by Minn. Stat. § 14.131 to prepare a fiscal note on costs to local public bodies.

Small Business Considerations

8. The Department staff's Statement of Need and Reasonableness considered the effect of the proposed rules on small businesses, concluding that special provisions for such businesses would be inappropriate and/or infeasible. No one disagreed with this conclusion. The Department has fully complied with Minn. Stat. § 14.115.

Nature of the Proposed Rules

9. Minn. Stat. § 72A.327, enacted in 1989, gives an insured the right to appeal denials of medical claims under the No-Fault law (Minn. Stat. Ch. 65B) whenever the claim was denied because the insurer deemed the treatment to be "experimental, investigative, not medically necessary, or otherwise not generally accepted by licensed healthcare providers." The statute provides for arbitration of such disputes by a three-member panel. One of the panel members must be selected from a list of individuals with medical expertise identified by contributing members under Minn. Stat. § 65B.01, subd. 2. A second panel member must be selected from a list of individuals with medical expertise as identified by professional societies. The third member must be chosen from a list of public members whose names have been solicited by publication in the State Register. The statute further directs the Commissioner to adopt procedural rules for implementing this appeal process, which was the subject of this hearing.

Department staff proposes to implement this responsibility by copying the Supreme Court Procedural Rules which govern the mandatory arbitration of other no-fault claim disputes of less than $5,000 (under Minn. Stat. § 65B.525) with minimal changes.

Documentation of Need and Reasonableness-Generally

10. The question of whether the Department staff has adequately documented the need for and reasonableness of the proposed rules by an affirmative presentation of facts, is a close call. The only fact presented was that the Supreme Court no-fault rules have been used extensively and that the system "appears to work well".

Professionals with expertise in utilizing the Supreme Court rules disputed the proficiency of that arbitration process. Attorneys for both insurers and the insured were very critical of the procedures. An acknowledged expert on both no-fault insurance and the arbitration appeals process was dubious of the likely success of the proposed adaptation of that process to implementation of this statute.

Moreover, a key facet of the Supreme Court rules - that arbitrators must be attorneys - has to be changed. The statute requires a different arbitration panel which may not include any attorneys. Consequently, past success of the court rules is not necessarily predictive of success or reasonableness of the proposals herein.

On balance, although the no-fault arbitration process could be and probably will be improved, it has generally fulfilled the legislative intent. Speedy, efficient and inexpensive resolution of no-fault disputes has been

regularly and extensively provided. It is reasonable to experiment with extension of this alternative dispute resolution process in implementation of Minn. Stat. § 72A.327. Final decisions are reserved to the Commissioner, which should adequately protect against potential misuse or abuse of the process.

Specific Provisions

11. There is no need, based on this record, to discuss each part and subpart of the proposed rules in detail. Portions not commented on are all found to be needed and reasonable. They do not exceed the Department's statutory promulgation authority, discussed previously. No "substantial change" issues are presented.

12. All of the concerns of the public expressed at the hearing and in subsequent written comments have been carefully considered. The most important concerns are thoroughly and thoughtfully dealt with in responsive comments of Department staff. The public interest would not be advanced by regurgitating that analysis in this report.

The staff has promised to reconsider and revise the rules after the Supreme Court has completed the process of revising its arbitration rules governing the other no-fault appeals, which is currently proceeding in that forum. During the time between the adoption of these rules and their later revision after the Supreme Court has acted, the Department will be able to observe how the experiment is progressing and should be able to correct any problems.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Department gave proper notice of the hearing in this matter.

2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule.

3. That the Department has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. That the Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. That the additions and amendments to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, Minn. Rule 1400.1000, Subp. 1 and 1400.1100.

6. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this 1st day of June, 1990.

HOWARD L. KAIBEL, JR.
Administrative Law Judge

MEMORANDUM

The attached report does not really deal with the primary concerns of hearing participants, because it is not the function of the Administrative Law Judge (ALJ) to write rules. ALJ reports are limited to evaluating the documentation by an affirmative presentation of facts of the need for and reasonableness of provisions proposed by the agencies. ALJs do not ordinarily render judgments on ways that rules might be made more reasonable. This memorandum is consequently not part of the report and is appended merely to alert the Commissioner to what may turn out to be real problems with the approach that has been proposed.

Although the overall approach taken in these rules, copying the Minn. Stat. 65B.525 arbitration procedures as closely as possible, is not legally defective - there may be much better approaches worthy of further study. Concerned commentators agreed without exception that major improvements are needed in the current arbitration process. There was also some concern that we might be creating a "monster" if the process is not limited to the rare instances where there is a legitimate dispute over whether a particular medical technique is experimental, investigative, etc., as intended by the Legislature. The phrase "not medically necessary" contains some ambiguity and could be interpreted as including disputes over whether legitimate medical practices continue to be effective.

No one was solidly supportive of the rules as written or even mildly supportive, including Department staff authors who had tried their best to get the authorizing legislation repealed. An expert in the area specifically urged a new and different approach. None of the interests affected (including perhaps the staff) would probably be particularly upset, based on this record, if the Commissioner simply directed his staff to "return to the drawing board" and try to come up with a new and perhaps creative "streamlined" approach to implementing the legislative intent, as expeditiously as possible.

The result might be some hybrid of the existing proposal or a completely new approach, that would meet with greater public acceptance or at least present the public with an alternative. The Commissioner could also perhaps challenge the public to come up with their own alternatives.

One alternative procedural approach which might eliminate most of the concerns would be to use a simplified, expedited hearing process similar to the Revenue Recapture Act procedures (where the rules in Part 1400.8510 et seq. specifically provide for their use by other agencies) conducted by an ALJ. The Judge could make the initial legal decision on jurisdiction independently and impartially, avoiding concerns over abuse of Commissioner discretion in that area. It would also protect the Commissioner's appearance of objectivity, by isolating him from the case until after it has been heard, which is the customary mode of administrative decision-making.

Other evidentiary and legal questions would also be dealt with by a judge learned in the law and experienced in dealing with such matters on a daily basis. Doubtless the most important difference between the proposed rules and the Supreme Court rules for arbitration is the requirement in the court rules that all arbitrators must be attorneys. Moreover, the American Arbitration Association (AAA) arbitrators are also ordinarily experienced and skilled at conducting such hearings. Under the proposed rules, a majority of the panel (and perhaps in many cases the entire panel) will not have any legal training. This would particularly disadvantage claimants who would usually not be represented by counsel where the insurer is represented. Unlike the Supreme Court process described by the expert, there may be no legally-trained arbitrator to ensure due process to the unrepresented. It may also cause insurance companies to steer as many cases as possible to this appeal process, because of the advantage they would gain.

The judge would also be able to solve the prehearing and discovery problems expeditiously, to the advantage of both sides. S/he could oversee the complete sharing of information, promoting settlement and minimizing the need to utilize the services of the statutory panel.

Such an approach would allow the panel to devote its expertise solely to recommending a proper resolution of the dispute. It would also eliminate many of the other concerns and potential problems identified by the public, such as overburdening the AAA and avoiding its fees.

On the other hand, the cost of using ALJs to chair proceedings might be considerable and may not have been budgeted (costs of implementation were not examined and it is unclear how a three-member panel of arbitrators, including medical professionals, can be assembled funded solely on AAA fees of $150.00.)

An alternative variation which would have many of the same advantages would be use of an AAA attorney-arbitrator to chair the arbitration, leaving the recommendation on the merits to the statutory panel. This approach would be facilitated by leaving prehearing and conciliation proceedings in .9060 to the AAA chair who could implement the screening of communications with the panel, contemplated in .9070. Likewise, issuance of subpoenas and supervision of discovery in .9090 and .9100 could be left to the chair, eliminating the public concern over potential abuse of process by a panel unfamiliar with these procedures.

HLK