

Report From Agency

STATE OF WISCONSIN
DEPARTMENT OF ADMINISTRATION
DIVISION OF HEARINGS AND APPEALS

IN THE MATTER OF RULEMAKING PROCEEDINGS BEFORE DEPARTMENT OF ADMINISTRATION, DIVISION OF HEARINGS AND APPEALS	PROPOSED ORDER OF DEPARTMENT OF ADMINISTRATION, DIVISION OF HEARINGS AND APPEALS, ADOPTING RULES (CLEARINGHOUSE RULE 18-059)
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Report to Legislature from Agency under Wis. Stat. § 227.19

1. The proposed rule:

The final draft of the proposed rule, including the analysis and text, is attached (attachment A).

2. Statement describing how the proposed rule complies with any applicable requirement under Wis. Stat. § 227.116:

The proposed rule does not include any provision requiring a business to obtain a permit to do business in this state.

3. Reference to applicable forms:

Not applicable.

4. Fiscal Estimate and Economic Impact Analysis:

The Fiscal Estimate and Economic Impact Analysis is attached (attachment B). No revisions have been made.

DHA believes that the proposed rule order will not have an economic impact on the state's economy, local governmental units, specific businesses/sectors, public utility rate payers, or small businesses.

5. Copy of the Rules Clearinghouse Report:

A copy of the Rules Clearinghouse report is attached (attachment C).

6. Detailed statement explaining the basis and purpose of the proposed rule, including how the proposed rule advances relevant statutory goals or purposes:

2015 Wisconsin Act 55 (Act 55), the executive budget bill act of the 2015 legislature, transferred the adjudication of disputed worker's compensation claims and related claims from the Department of Workforce Development (DWD) to the Division of Hearings and Appeals (DHA) in the Department of Administration. Act 55 gave DHA the authority to adopt and change its own rules of procedure (Section 2769, amending Wis. Stat. 102.15(1)), and provided for the direct transfer to DHA of rules in Wis. Admin. Code, ch. DWD 80, that were primarily related to the transferred adjudicatory functions (Section 9151(2)(g)). Those transferred rules are currently in Wis. Admin. Code, ch. HA 4.

The primary purpose of the proposed rule order is to complete the transfer of the procedural rules related to adjudicatory functions in worker's compensation cases to DHA in compliance with Act 55. The proposed rule order includes provisions setting out definitions for terms used in the rules and the statutory authority for the transferred rules. It creates a number of non-substantive provisions paralleling rules that remain in DWD 80 regarding:

- how materials may be served on DHA in connection with adjudicatory proceedings,
- the use of stipulations in adjudicatory proceedings, and
- appearances by agents of parties in adjudicatory proceedings.

The rule order also states that substantive rules promulgated by DWD apply in the adjudication of disputes before DHA. It incorporates by reference DWD rules governing the inspection and copying of records and the review of compromises. It also adds provisions codifying DHA's current procedures for managing its caseload in the adjudication of disputed worker's compensation and related claims, including its current practice for mediation in worker's compensation claims after a hearing application has been filed. These provisions advance the legislative decision to transfer the adjudication of worker's compensations claims to DHA and to authorize DHA to adopt its own rules of procedure for the adjudication of those claims.

7. Summary of public comments and DHA's responses, explanation of modifications to proposed rules prompted by public comments:

DHA held a public hearing on September 5, 2018, and invited public comment from August 6 to September 7, 2018. DHA received four public comments or testimony regarding the proposed

rule order. Three comments concerned the Worker's Compensation Advisory Council (WCAC). A fourth concerned the Fiscal Estimate & Environmental Impact Analysis.

a. Public comments.

Ronald Kent, a former member of the WCAC and representative of the Wisconsin State AFL-CIO, gave a statement at the public hearing. He stated that because proposed rules have a major impact on rights and responsibilities of parties in worker's compensation proceedings, they should have been vetted by the WCAC. He also stated the WCAC's input and consideration would make the rules more effective and efficient.

Chris Reader, representative of Wisconsin Manufacturers and Commerce and the management chair of the WCAC, and Stephanie Blumenstein, representative of the Wisconsin State AFL-CIO and the labor chair of the WCAC, gave a written statement (attachment D-1). Mr. Reader also gave an oral statement at the public hearing. Mr. Reader and Ms. Blumenstein stated that the proposed rule should be brought before the WCAC, noting that Wis. Stat. § 102.15(2) directs WCAC to advise DHA in carrying out the purposes of the worker's compensation statutes. Mr. Reader stated that DWD rules that implement the worker's compensation act go through a full vetting by the WCAC. Mr. Reader and Ms. Blumenstein asked that DHA schedule a hearing with the WCAC to review the proposed rule before taking any additional steps.

James O'Malley, Director of the Office of Legal Services in the Worker's Compensation Division of the Department of Workforce Development, submitted a written comment (attachment D-2). He stated that the proposed rule should be submitted to the WCAC and not be finalized until after the WCAC has had an opportunity to provide input.

Bernard Rosaur, president of the Wisconsin Compensation Ratings Bureau, submitted a written comment (attachment D-3). He stated that the Fiscal Estimate & Economic Impact Analysis submitted in connection with the rule inaccurately stated that there was no fiscal impact, noting that no cost-benefit analysis was used in preparing the proposed rules. He expressed a concern that DHA keep its expenses from becoming fungible, adding that employers and insurers must be sure that only expenses incurred in the adjudication of worker's compensation cases are billed to the DWD's Worker's Compensation Division. Second, Mr. Rosauer stated that in accepting the transfer of management of the worker's compensation caseload, it was extremely important that DHA understand that the time to resolution has a direct impact both on loss payments and expenses which affect worker's compensation premiums. He stated that it was extremely important that timeliness results from the filing of the hearing application to the conclusion of the case measure up to past standards. He stated that anecdotal evidence suggested that this had suffered since the adjudicatory function was transferred to DHA. He stated that proposed rule lacked indications of proper vetting, appropriate thought, and fact finding concerning issues necessary to preserve and improve the integrity of results upon which employers depend.

b. Response of DHA

Regarding the Worker's Compensation Advisory Council (WCAC), DHA was advised on May 24, 2017, that the WCAC would agree to the transfer of ten rules to what is now Wis. Admin.

Code, ch. HA 4, but was not interested in pursuing other joint rules that would apply to both adjudicated claims before DHA and claims outside the adjudicatory process that remained in DWD (attachment D-4). While the WCAC is charged with advising DHA in carrying out the purposes of the worker's compensation statutes, Wis. Act 55 provided for the direct transfer of rules primarily related to the transferred adjudicatory functions as determined by the secretary of administration. Wisconsin Stat. § 102.15(1) provides that DHA has the authority to adopt its own procedural rules. Neither the statutes nor Act 55 require approval of the WCAC regarding DHA's procedural rules.

However, after considering the comments, DHA administrator Brian Hayes appeared at a meeting of the WCAC on December 11, 2018 at Mr. Reader's invitation, presented the proposed rule to the WCAC, and solicited advice and feedback on the proposed rule. As of the date of this report, DHA has not received any communication or comment from WCAC regarding the proposed rule. A copy of the notice and agenda of the WCAC meeting on December 11, 2018, showing Administrator Hayes's appearance and presentation regarding the proposed rule as Topic 4, is attached (attachment D-5).

DHA also considered Mr. Rosaur's concern about the fiscal impact of the proposed rule order. DHA believes any fiscal concerns result from the transfer of the adjudicatory function in worker's compensation cases from DWD to DHA by Act 55 itself, not the proposed rule order. Mr. Rosaur identified no specific proposed rule that increases the potential for expense fungibility. DHA believes that the portions of the proposed rules that define an Office of Worker's Compensation Hearings within DHA, that specify that administrative law judges employed by that office hear worker's compensation cases, and that clearly delineate the procedure DHA uses in managing its worker's compensation caseload would, if anything, decrease the expense fungibility concern rather than increase it. Contrary to the assertion that the transfer has led, or may lead, to the fungibility of expense increasing costs to employers and insurers, of the \$4,794,200 budgeted for the Office of Worker's Compensations Hearings for fiscal year 2018, DHA spent only \$4,135,049, or \$659,151 less than the projected budget (attachment D-6).

The concern that DHA measure up to past performance in the timeliness of issuing decisions, again, would stem from the transfer of adjudicative functions by Act 55 itself, not any specific provision in the proposed rule order. Mr. Rosaur identified no specific proposed rule that increases the time between the filing of a hearing application and the issuance of a decision. In addition to the proposed rule order's incorporation by reference of the DWD rule governing the procedure for decisions on review of compromise agreements, DHA has affirmatively taken steps to ensure that most compromise agreements submitted to DHA for review are acted upon by an administrative law judge within 21 days of submission. Contrary to the assertion that anecdotal evidence shows that the time from application to resolution has increased since adjudicative authority was transferred to DHA, DHA's statistics show that the time lapse from the point at which an applicant's attorney files a certificate of readiness on an application to the date a hearing is scheduled remains at 2.0 months, the same number of months as it was before the transfer of adjudicatory authority (attachment D-7).

DHA remains of the opinion that the proposed rule order—much of which simply replicates procedural rules already existing in Wis. Admin. Code ch. DWD 80—will not have an economic impact on the state’s economy, local governmental units, specific businesses/sectors, public utility rate payers, or small businesses.

8. List of persons who appeared or registered for or against the proposed rule at the public hearing:

See item 7 above. The following persons were present at the public hearing but did not comment:

Jean Wiza, Aurora- Milwaukee
Cathy Lake, Madison
Kelly McCormick, Madison
Frank Lasse, Madison
Nia Trammell, Madison
Jennifer Collingon, Madison
Suzanne Xu, Madison
Sharon Stremcha-Gulvik, Madison

9. Changes to the rule summary or fiscal estimate

None.

10. Response to Legislative Council Rules Clearinghouse staff recommendations:

DHA took the following actions based on Rules Clearinghouse recommendations:

2. Form, Style and Placement in Administrative Code

- a. Accepted proposed change.
- b. Accepted proposed change.

5. Clarity, Grammar, Punctuation and Use of Plain Language

- a. Did not accept proposed change. Use of the word “substantive” in the Note to modify “rule” is consistent with Wis. Stat. § 102.15(2) which provides that DHA adopts its own procedural rules.
- b. Did not accept proposed change. Section HA 4.09, which authorizes stipulations in adjudicated cases before DHA is identical to current section DWD 80.10 dealing with stipulations in worker’s compensation outside of the adjudicatory process in DWD. Changing the wording in section HA 4.09 could create confusion in cases where a

stipulation was entered into before the adjudicatory process began, but then continues to be relied upon by the parties during the adjudicatory process.

- c. Accepted proposed change.
- d. Accepted proposed change.
- e. Accepted proposed change.
- f. Accepted proposed change.

11. Additional information; report from the SBRRB and final regulatory flexibility analysis:

No additional information is required to be submitted under Wis. Stat. § 227.19 (3) (e) to (h) because the proposed rule will not have an effect on small business, no energy impact report was required under Wis. Stat. § 227.117 (2), no housing report was required under Wis. Stat. § 227.115, and the Small Business Regulatory Review Board did not prepare a report on this rule proposal under Wis. Stat. § 227.14 (2g).

(End)