

STATE OF MINNESOTA
HAZARDOUS SUBSTANCE INJURY COMPENSATION BOARD

In the matter of the proposed new
permanent rules relating to board
operation procedure

STATEMENT OF NEED
AND REASONABLENESS

I. INTRODUCTION

The Hazardous Substance Injury Compensation Board (Board) was created by the 1985 Legislature (Laws 1985, 1st special session, chapter 8) as part of revisions to the Minnesota Environmental Response and Liability Act (MERLA), Minnesota Statutes, Chapter 115B. These revisions were codified as Minn. Stat. §§ 115B.25-115B.37. The Board was established as a new state agency to administer a \$2 million Hazardous Substance Injury Compensation Fund (Fund). The Board's primary responsibility is to investigate claims of certain types of property damage or personal injury caused by the release of hazardous substances into the environment, and to compensate eligible persons from the Fund for certain types of losses. The Legislature directed the Board to adopt rules describing various aspects of this compensation system, including rules governing practice and procedure before the board, the form and procedure for applications for compensation, procedures for claims investigations, emergency compensation, the value of household labor lost due to eligible injury or disease, and death benefits.

The Board met for the first time November 26, 1985. It published a Notice of Intent to Solicit Outside Opinion in the State Register on January 6, 1986 (10 S.R. 1509), seeking comments for rules describing practice and procedure before the board,

the form and procedure for applications for compensation, procedures for claim investigations, and death benefits. The Board received one comment letter in response to the notice.

The proposed rules on Board operation procedures describe the organization of the Board, the conduct of its meetings and members, the information required on applications, the processing of claim applications, and challenge and acceptance or rejection of Board determinations on compensation.

II. STATEMENT OF THE BOARD'S STATUTORY AUTHORITY

The Board statutory authority to adopt rules relating to board operation is set forth in Minn. Stat. § 115B.28, subd. 1 (1986), which provides in relevant part:

In addition to performing duties specified in sections 115B.25 to 115B.37 or in other law, and subject to the limitations on disclosure contained in section 115B.35, the board shall:

(1) adopt rules as soon as practicable after all members are appointed, including rules governing practice and procedure before the board, the form and procedure for applications for compensation, and procedures for claims investigations;

As a new state agency, the Board is also directed by Minn. Stat. § 14.06 to adopt rules describing its procedures:

Each agency shall adopt rules in the form prescribed by the revisor of statutes, setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights or procedures available to the public.

Under these statutes the Board has the statutory authority to adopt rules governing its operation.

III. STATEMENT OF NEED

The need to adopt the proposed Minn. Rules Parts 7190.0001 through 7190.0017 arises from the need of the public and claimants to understand what information is essential to the evaluation of a claim, how claims will be considered at Board meetings, and how Board determinations can be challenged, accepted or rejected. The proposed Minn. Rules Parts 7190.0001 through 7190.0017 are needed to establish the timelines and clarify the responsibilities of the claimant, the Board and the Board staff in the operation of this administrative compensation system.

IV. STATEMENT OF REASONABLENESS

The proposed new rules are reasonable because they describe organizational procedures and standards of Board conduct which are similar to other state boards, such as the Pollution Control Agency Board and the Waste Management Board. They consider the needs of the claimant for a fair, efficient and understandable system of handling claims; they address the right of the public to information while also recognizing the Board's obligation to safeguard protected and confidential information as required by the statute.

Part 7190.0001 Definitions

This proposed rule sets forth five definitions of words or phrases used in the rule. It is reasonable to define these terms to shorten the language in the rule and clarify possible ambiguity such as the meaning of "days".

Part 7190.0002 Officers and Duties

Minn. Stat. § 115B.27, subd. 1 provides that one member of the five member Board shall be elected to serve as chair for a term of one year. It is reasonable to clarify the statute as to when this election will occur so that members can anticipate the election and give consideration to their choice. Since the chair is invested with the responsibility for assigning claims (Minn. Stat. § 115B.35), it is reasonable to provide for procedures to ensure the chair's responsibilities in investigation can continue to be performed in the chair's absence. The establishment of the position of vice chair is a commonly accepted means of providing for a chair's absence. The establishment of procedures for filling vacancies in these positions is reasonable to ensure that the Board's investigative work can continue without interruption. Since the chair and vice chair are elected by the members, it is reasonable to provide that if a majority of the members so vote, these officers may be removed from office. To simplify the administration of Board actions it is reasonable to assign responsibility for execution of documents to the chair and for the chair to be able to delegate to the director this responsibility. Having such delegation filed with the secretary of state is consistent with the procedures applicable to other state agencies provided in Minn. Stat. § 15.06, subd. 6.

Part 7190.0003 Board Meetings

This proposed rule is divided into eight subparts which clarify that the Board will adhere to common parliamentary proce-

dures in the conduct of its business.

Subpart 1 establishes that the Board will have a predictable meeting date and place to ease the public access to Board meetings. In order to eliminate unnecessary meetings if the Board lacks claims for consideration and to accommodate special needs of the members which may arise, the rule allows the chair the flexibility to cancel, postpone or advance a meeting.

Subpart 2 provides the chair the power to call a special meeting in addition to the regularly scheduled meeting if necessary in the chair's judgment or on request of two Board members. It is reasonable to give the chair this discretion to address unanticipated needs for the Board to meet and to provide other members with recourse to assembling the Board.

Subpart 3 makes it clear that three members of the five member Board constitute a quorum and that no business will be conducted without a quorum. It is reasonable to require that the majority of members be present for business because any decision requires the vote of the majority.

Subpart 4 invests in the chair the responsibility to preside at meetings and control the conduct of the meeting. It is reasonable that the chair be the presiding officer because the chair is elected by a majority of the members.

Subpart 5 clarifies that three votes from the five member Board are needed for a Board decision.

Subpart 6 emphasizes that the Board meetings shall be open to the public with one exception: those portions of meetings when the Board is discussing "protected information" are closed

to the public. Since Minn. Stat. § 115B.35, subd. 2 requires the Board to "examine protected information outside of the presence of the claimant, the claimant's attorney, or any other person except staff to the board", it is reasonable to close the Board's meeting to the public when the Board discusses protected information. Because most of the Board's discussions will be consideration of claims from specific individuals, and not determinations that have general applicability to large numbers of parties, it is reasonable for the Board to limit participation at its meetings to those people the Board has requested to speak or to those people the chair or director in their judgment have authorized to address the Board.

Subpart 7 provides that the Board will use the widely accepted Robert's Rules of Order to determine proper parliamentary procedures.

Subpart 8 makes it clear that the Board's activities will be documented in the minutes, which is reasonable to inform the public.

Part 7190.0004 Conflict of Interest

This proposed rule makes clear that Board members have a responsibility to report a direct and substantial financial or employment interest in any matter the Board has under consideration, and remove themselves from voting on the matter. However, since there are only five members on the Board, and the participation of three are required to conduct business, it is reasonable to provide a mechanism that enables the Board to function if more than two Board members disqualify themselves. The choice of members whose interests are least likely to affect their

impartiality to participate in the decision is reasonable so that the Board can fulfill its responsibilities.

Part 7190.0005 Representation

This proposed rule makes clear that a claimant can seek the services of an attorney or other individual to represent the claimant in dealings with the Board, and that the Board will inform both the claimant and the representative of Board activity on a claim. It is reasonable that a claimant who feels inadequate to handle the claim process delegate the handling to a representative of the claimant's choice.

Part 7190.0006 Application for Compensation

This proposed rule details the information that a claimant must supply for the Board on the claim form. It is reasonable to require the information in this part because it enables the Board:

- 1) to evaluate the claimant's eligibility for compensation under Minn. Stat. §§ 115B.29 and 115B.30;
- 2) to investigate the claim and verify the evidence supplied;
- 3) to determine the amount of proper compensation under Minn. Stat. § 115B.36;
- 4) to determine the feasibility of a subrogation action as provided in Minn. Stat. § 115B.31, subd. 3; and
- 5) to collect and report data on exposure to hazardous substances as required by Minn. Stat. § 115B.28, subdivisions 3 and 4.

Minn. Stat. § 115B.32 provides that the Board describe the form in rule and outlines the required information to be

supplied on the form. It is reasonable to clarify for the claimant in rule what is broadly required by statute.

Item A, the name, address, telephone number, social security number (optional), and age of the claimant requires the personal information essential to processing a claim and distinguishing among claimants;

Item B, the name, address, and telephone number of the claimant's employer, is reasonable in the cases of hardship or personal injury because the Board must verify income of the claimant to determine eligibility to file a claim for hardship and to determine proper compensation for lost wages if an award is made for personal injury;

Item C, the name, address, telephone number and relationship to the claimant of a representative is reasonable to enable the Board to communicate with the claimant's representative;

Item D, the identify of the hazardous substance, is reasonable to determine eligibility to file a claim and to investigate health impacts;

Item E, the description of the damage or injury, is reasonable to determine eligibility to file a claim;

Items F and G, the dates of discovery, are reasonable to determine if a claim is filed within the timeframe required by Minn. Stat. § 115B.30, subd. 3;

Item H, the name, address and phone number of medical practitioners who examined the claimant are reasonable for the Board to seek medical information on the claimant;

Item I, the cause of death, is reasonable to enable the

Board to investigate the likelihood of that injury or disease being connected to hazardous substances;

Item J, the identify of a government agency or official that the claimant has contacted concerning the presence of hazardous substances provides the Board the ability to investigate and verify the claimant's description;

Item K, the identity of the source of the hazardous substances, including its location and the responsible person, enables the Board to investigate how the claimant may have been exposed to the hazardous substance;

Item L, the duration and location of the exposure, is reasonable for the Board to determine if the exposure can cause or contribute to a claimant's injury;

Item M, the amount of compensation the claimant is seeking, is reasonable for the Board to determine liability against the Fund and evaluate if requested compensation is proper and within statutory limits;

Item N, the amount of reimbursement the claimant has received from other sources, is reasonable to determine proper compensation under Minn. Stat. § 115B.36;

Item O, a description of actions taken by the claimant to recover compensation from the person responsible for the release, enables a determination on eligibility to file a claim as described in Minn. Stat. § 115B.31;

Item P, a sworn statement by the claimant, is consistent with the statutory requirement for "a sworn verification by the claimant of the facts set forth in the claim to the best

of the claimant's knowledge;" Minn. Stat. § 115B.32, subd. 2(1);

Item Q, a release to view medical and financial records, permits the Board to investigate the injury and determine proper compensation; and

Item R, other relevant information which the director or Board deems essential to a determination on the application, permits the Board to elicit information unique to a specific claim that may be important to the determination of eligibility, or compensation, or the progress of the investigation.

Part 7190.0007 Claims Acceptance

This proposed rule describes how a claim is initiated with the Board and provides safeguards to prevent wrongful determinations on eligibility.

Subpart 1 provides that the director can accept the claim if the director determines that the claimant and the damage or injury for which compensation is being sought are described as eligible in Minn. Stat. Chapter 115B. It is reasonable that to speed the processing of claims the director be empowered to accept the claim if the claim complies with the requirements described in detail in Minn. Stat. §§ 115B.29, 115B.30, and 115B.31.

Subpart 2 ensures that a claim will not be refused solely on the review of one person. It is reasonable to require that an application be refused only after both the director and a Board member who routinely investigates claims concur on the finding in order to prevent an erroneous determination for a claimant. It is reasonable to inform the claimant of the reasons

the application is ineligible, so that the claimant can evaluate if refiling is feasible.

Subpart 3 allows a claimant to refile an application with the Board with new information. It is reasonable to allow the claimant another chance to file an application because upon receipt of the reasons for ineligibility the claimant may become aware of information not considered by the director or Board member in issuing the determination of ineligibility.

Part 7190.0008 Claim Review

This proposed rule clarifies Minn. Stat. § 115B.32, subd. 1 as to how a claim will be processed.

Subpart 1 provides that the director reviews the claim to assure all required information is provided.

Subpart 2 requires the director to notify the claimant in writing that a claim with required information is accepted. It is reasonable to notify the claimant of acceptance because the claimant's rights to commence a court action are restricted during the time a claim is pending before the board. (Minn. Stat. § 115B.31, subd. 9.)

Subpart 3 assures that a claimant who must provide further information is informed in writing of what that information is, how long he has to supply it and what will happen if he does not supply it. It is reasonable to require that a claimant be informed of all of the above factors which affect the processing of the claim so that the claimant can ensure the claim progresses.

Subpart 4 allows a claimant to request an extension of

time to provide required information, explaining in writing the reasons the extension of time is needed and when the information will be supplied. Since the statute provides that the Board can consider "serious extenuating circumstances" when required information is not received within the timeframe, it is reasonable to provide for an extension of time if the claimant describes in writing the conditions creating the need. To speed the processing of the extension, it is reasonable that the director be given authority to grant the request. To protect the claimant, it is also reasonable that the judgment of the director be reviewed by a Board member when the decision is to deny the extension.

Part 7190.0009 Claim Access

This proposed rule clarifies how the Board intends to implement Minn. Stat. § 115B.28, subd 2(4), which says in relevant part that the Board may:

limit access to information collected and maintained by the Board and take any other action necessary to protect privileged or confidential information in accordance with the limitations contained in section 115B.35.

The Board has the responsibility under Minn. Stat. § 115B.35 to ensure that "protected information" as defined by Minn. Stat. § 115B.25, subd. 8 is not accessible to anyone other than the Board or the Board's staff. Information related to the claimant's medical and financial conditions is temporarily classified under the Minnesota Government Data Practices Act, Minn. Stat § 13.06, as confidential while the investigation is proceeding and private after the Board makes a determination on a claim. The permanent classification of these data under Minn. Stat. Chapter 13 is being sought during the 1987 legislative session.

Since the Board has the responsibility to protect these types of information from distribution to the public, it is reasonable for the proposed rule on claim access to limit access to the claim form, supporting documents and information collected to the Board and its staff, since these documents contain both protected and confidential information.

However, in order to accommodate the right of the public to know about public health hazards and consistent with the directive from the Legislature to report data on actual cases, "but excluding identification of the claimants" [Minn. Stat. § 115B.28, subd. 1(4)], the proposed rule provides that data in summary form or other form which does not identify the claimant may be distributed. Release of information concerning a claim in summary form informs the public of health hazards while ensuring that protected and confidential information remains so.

The final sentence of this proposed rule clarifies that the public shall have access to the final decision of the Board. Under Minn. Stat. § 115B.35, subdivision 6, the "decision must be in writing and include the reasons for the decision, subject to the limitations on disclosure of protected information." Because the public has a legitimate interest in being informed of the expenditure of public funds, and in understanding what factors were considered in the Board's determination of personal injury or property damage associated with exposure to hazardous substances, it is reasonable to allow the public access to the final decision.

Part 7190.0010 Claim Amendment

This proposed rule imposes on the claimant a responsibility to notify the Board of additional personal injury or property damage associated with a pending claim, and states the Board will decide whether to amend the claim. Minn. Stat. § 115B.31, subd 1(c) provides:

A person who files a claim with the Board for personal injury or property damage must include all known claims eligible for compensation in one proceeding before the Board.

Because of this requirement, it is reasonable for the Board to allow the claimant an opportunity to amend the claim.

Part 7190.0011 Claim Consolidation

If claims arise from the same release or present the same issues, and the consolidation would not prejudice the rights of any claimant and consolidation is administratively practical, this proposed rule reasonably allow the chair to speed the investigation and processing of claims by consolidating them.

Part 7190.0012 Claim Dismissal

This proposed rule provides four reasons the Board can dismiss a claim from consideration. It is reasonable to dismiss a claim if the claimant refuses to supply information or refuses to appear before the Board because the Board will lack information essential to the determination of personal injury or property damage. If the claimant has falsified or withheld relevant information it is reasonable to dismiss a claim because the determination of the Board will not be based on accurate or complete information and the dismissal will serve as a sanction for false claims. If the claimant receives an award from the

responsible party, is is reasonable to dismiss the claim because Minn. Stat. § 115B.31, subd. 1, prohibits the filing of a claim with the Board if the claimant has settled with the responsible party.

Part 7190.0013 Emergency Compensation

This proposed rule clarifies how the Board will respond to requests for emergency compensation as allowed by Minn. Stat. § 115B.28, subd. 2(3). That section provides the Board may grant emergency compensation if "undue hardship will result to the claimant if immediate payment is not made." The creation of a life-threatening or other seriously disruptive situation such as loss of critical medical care, loss of residence or basic necessities reasonably describe situations of undue hardship for the claimant. Since the Board is allowed to grant emergency compensation only for claims for which an award will probably be made and this may be difficult to determine early in an investigation, it is reasonable to limit the potential demand for such compensation by requiring the claimant to investigate other sources of assistance. Since such an emergency award would be made prior to the determination on the claim, it is also reasonable to limit it to the extent the claimant demonstrates immediate expenses.

Part 7190.0014 Claim Investigation

This proposed rule limits direct involvement with a claimant during the investigation to the Board member assigned the claim. This limitation is reasonable to prevent duplication of effort and confusion.

Part 7190.0015 Claim Determination

This proposed rule clarifies the timelines and more fully describes procedures outlined in Minn. Stat. § 115B.35, subd. 6.

Subpart 1 requires a written challenge which must indicate which findings are disputed. It is reasonable for the Board to know which part of the Board's determination is disputed so that it can review or gather further information in that area. It is reasonable for the Board to provide the claimant, within a short time, a date for the special Board meeting so that the claimant can prepare witnesses and gather further evidence. It is reasonable to require the claimant to supply the Board prior to the special meeting information on the evidence the claimant will present so that the Board members can schedule adequate time to hear the evidence and consider questions for the claimant regarding the evidence.

Subpart 2 requires that the member who wrote the preliminary decision not preside at the special meeting. This is reasonable to remove any appearance of bias in the conduct of the meeting. It also requires the claimant and witnesses to speak under oath. This is reasonable to assure the Board receives accurate information and consistent with the requirement of Minn. Stat. § 115B.32, subd. 2(1), that the claimant provide "a sworn verification...of the facts."

Subpart 3 clarifies a timeline for the review of protected information as allowed by law. It is reasonable to provide a timeline to speed resolution of the claim. It is reasonable to require the claimant sign a written statement to protect

the confidentiality of such information because Minn. Stat. § 115B.35, subd. 9 provides civil penalties for the release of this information.

Part 7190.0016 Reopening a Claim

This proposed rule allows the Board to reopen an investigation if new evidence is discovered relevant to the claim. It is reasonable to allow the Board to reexamine a claim because ongoing scientific investigations of release sites and epidemiological studies, animal studies or risk assessment studies which are being initiated in the area of hazardous substances may provide critical information the Board lacked during its determination.

Part 7190.0017 Payment of Compensation

This proposed rule clarifies how the Board will award compensation and the responsibility of the claimant if accepting the offer.

Subpart 1 clarifies that all compensation shall be paid directly to the claimant and not to providers of service to the claimant. This is reasonable to ease administration of the Fund.

Subpart 2 requires the claimant to assign the rights to recover for losses to the Board and to cooperate with the Board in a subrogation action. This is reasonable because Minn. Stat. § 115B.31, subd. 3 provides that the State is subrogated to the claimant's rights.

Subpart 3 requires the claimant to accept or reject in writing the Board's offer of compensation within 30 days. This is reasonable because during the time a claim is pending before

the Board, a claimant cannot begin a court action to recover for the same injuries or damage (Minn. Stat. § 115B.31, subd. 4). A person who receives an award from the Board and accepts it, cannot bring an action in court for the same eligible injury or damage. Because of these limitations on a claimant's rights, and to facilitate accurate accounting against the Fund, it is reasonable to have the final status of the claim determined in writing.

V. SMALL BUSINESS CONSIDERATIONS IN RULEMAKING

Because the Board awards compensation only to eligible persons with eligible injuries or eligible property damage at the person's principal residence, and the statute explicitly excludes occupational exposure the rules have no impact on small business. The proposed rules are exempted from small business considerations in rulemaking under Minn. Stat. § 14.115, subd. 7(b).

VI. CONCLUSION

Based on the foregoing, the proposed rules for Board operation procedures are both needed and reasonable.

Dated

January 30, 1987

Virginia L. Reiner
Virginia L. Reiner
Executive Director