

Task Force on No-Fault Insurance Issues

Meeting Notes

Prepared by Demian Moore, Management Analysis & Development,
demian.moore@state.mn.us

11/22/15

NOTE: Meeting notes are not a transcript or “official” documentation of task force meetings. They are intended to track the key themes of the discussion. They do not reflect agreement with or the accuracy of any statements, comments, or presentations. *Please contact Demian Moore (MAD) with any requested edits, additions, revisions, or overall questions/comments. (651) 259-3831 (direct), or demian.moore@state.mn.us*

Meeting Details

Date: November 17, 2015

Present: Marty Fleischhacker, Rep. Bob Loonan, Sen. Vicki Jensen, Douglas Broman, Bob Johnson, Vicky Rizzolo, Joel Carlson, Eric Dick, Joe Bagnoli (for Charles J. Lloyd), Brad L. Plowman, Dr. Timothy Johnson, Donald Bechtle, Mark Engdahl, Tammy Reno, JoAnn Aiken, Charlie Petersen and Demian Moore (MAD)

The Task Force is charged with submitting a report to the legislature with recommendations for changes to no-fault auto insurance, regarding:

- (1) no-fault arbitration process;
- (2) independent medical exam (IME) process; and
- (3) treatment standards and fee schedules.

Task Force information is available at the Department of Commerce website.

<https://mn.gov/commerce/insurance/ins-companies/information-resources/task-force-no-fault-auto.jsp>

Activities

- Introductions, review of outstanding issues from 11-5 meeting; review of 11-5 meeting notes
- Overview of the arbitration process:
Krista Peach, American Arbitration Association (AAA)
- Public comment period
- Overview of Minnesota’s Workers Compensation System:
MN Dept. of Labor and Industry
- Next Meetings

Arbitration Process Overview

(For details, refer to the AAA PowerPoint presentation emailed to task force members. It includes a section on statistics regarding cases heard/closed/award amounts/etc., and an accompanying spreadsheet.)

- It is a rules-based process, thus there is some room for interpretation
- Arbitration process/participants
 - Parties to the arbitration
 - Arbitrator panel
 - American Arbitration Association (AAA)
 - independent third-party administrator of the process
 - administers selection of arbitrator (among other duties)
 - No-fault standing committee
 - Meets four times/year
 - MN Supreme Court
- Any changes to the rules are ultimately made through a multi-step process that ends with approval (or not) by the MN Supreme Court
 - Proposed rules can come from essentially anywhere in the process
 - No-Fault Steering Committee would make any proposed changes to the Supreme Court
- When a case goes to arbitration AAA presents four arbitrators to choose from. Each side may strike one. AAA then makes the final choice (random, via computer).
- Arbitrators are prohibited from including attorney's fees in awards.
- **Observations/Comments on Process**
 - Number of motions is growing; the process is being slowed considerably by the backlog this is creating
 - Seems to be intended to slow down process
 - Currently getting about 9/day; used to be about 9/week
 - Big increase in "motions to compel", e.g. for:
 - IME
 - Postponement
 - Fee disputes
 - Examinations under oath (EOU)
 - Motions to dismiss
 - Motions to re-consider
 - Also seeing many more subpoenas
 - Another recent phenomena is that many claimant representatives have been withdrawing from cases, and another significant portion are "unreachable"
 - Also contributes to the backlog
 - Can't proceed with the case
 - Arbitrators discretion as to what course to follow (dismiss, keep open, etc.)
 - Related issues, AAA has been subsidizing payment of arbitrator fees in the case on no-shows (AAA didn't have exact numbers of occurrences at

the presentation, but they know that it is already much more frequent than last year)

Arbitration Process Presentation General Comments Q&A

- There currently is no requirement for record-keeping.
- There are no formal recordings, transcripts, etc., of the proceedings or detailed report of the arbitrator's decision. There may be single short piece of paper filed by the arbitrator recording the final decision and award (if any). Participants may bring their own court recorders (this happens increasingly frequently), but that is their proprietary record of events.
- Follow-up question: What if there's an appeal? What sort of records can be used as evidence?
 - Same response – whatever the participants may have recorded themselves, and whatever was filed by the arbitrator.
- Q: Arbitrators can just dismiss claims?
 - Yes, they have very broad authority
 - Note, they are lawyers and often also judges.
 - Also, there is no interpretation of law allowed; arbitrators simply rule on facts presented.
 - Only bases for appeal are fraud, bias, and on the law or dispute over the facts
- Q: what is the current pool of arbitrators?
 - Not fully up to date, but last check it was 543
 - 20-25/year are added
- Payments?
 - Filing fees are split between the parties
 - Arbitrator is paid by AAA
- Q: what about cases in excess of \$10,000?
 - Did not have that data with them
 - \$10,000 ceiling is only the limit of what the arbitrated case may be at filing; subsequent costs may be added and increase well above \$10,000
 - In consolidated cases (e.g. glass), individual cases bundled together may reach in the millions
 - (NOTE: discussion of glass-related arbitration was ceased here, due to concern that Charles Lloyd was not present, and the agreed upon schedule that the glass-arbitration discussion would occur at the Dec. 7 task force meeting)
- No breakdown is available of how many defense/plaintiffs lawyers make up the pool of arbitrators
 - Some defense attorneys can't be arbitrators based on their clients (e.g. those representing a large number of insurance companies, or a certain type of insurance company)
- Q: How does the rule-change process work?
 - Proposals are made, e.g. for provision of interpreters, changes to legal language, etc.
 - Input from AAA and parties affected

- Rules subcommittee of the No-fault Standing Committee considers proposed changes and then presents its recommendations to the full standing committee
- Full committee decides what recommendations to pass along to the MN Supreme Court
- SC receives
 - Notice of proposed rule changes is put into register
 - 60-day public comment period
 - If more than 25 comments received, then a full public hearing is required
 - SC issues final decision
- SC is currently considering a batch of rules that will be decided upon by the end of the month (See additional AAA-provided packet with the proposed changes)

Additional Arbitration Process Comments and Observations

- Large number of Examination Under Oath (EUO) requests are really slowing down the system
- Claimants can change the bills they've identified to be waived up until the hearing date (at the discretion of arbitrator, but it is always allowed; see Arbitration Rule 6)
- Arbitrator has a lot of leeway in interpreting the arbitration rules; Rule 5 is a good example where there is a lot of room for discretion/interpretation in/of the process
- Rule 22: also lots of discretion to proceed with the case (or not) if claimant fails to appear or is unable to be contacted
- There is no clear/specific guidance about postponing proceedings, what to do about no-shows, how long to allow for claimant to appear after attempting to contact, etc.
- Comment: Intent of the process is speed and efficiency; if we place additional requirements (e.g. formal reporting and recording of proceedings), it may as well just be a traditional legal process

Arbitration Presentation Takeaways

1. Standards
 - Need to make changes to reduce/eliminate backlog; speed up process
 - Can we better specify, e.g. when is a company is entitled to an EUO
 - Comment: lawyers often argue that the IME should be considered the "investigation"
 - Response: arbitrators already have the authority to make that determination
 - Need clearer standards of when an additional investigation is a "reasonable" request
 - Response: again, this is already at the discretion of arbitrator. If this is changed, then you're actually inserting less efficiency into the system
 - There are a small number of cases where blanket claims and motions are being made that is clogging up the system
2. Accountability of arbitrators
 - Doesn't seem to be consistency across how decisions are made
 - Lack of an evidentiary record is very troubling
 - Comment: record-keeping would be a huge added burden given the very small compensation arbitrators receive

3. Transparency

- More needed on all sides
- Different selection process for arbitrators (make it more random)?
- Need a record of evidence and proceedings

Comment: Please give a little more context on how the process is being slowed down. Can't the arbitrator exercise some authority to speed it up?

Comment: A lot of this seems to be coming from the insurer side. What about the consumer side?

Comment: Requiring a more formalized discovery/evidentiary/record-keeping process would do a lot of harm to the intention of the arbitration process, i.e. efficiency and not tying up the court system.

Response: A lot of what is slowing down the process happens after filing, but before an actual hearing. So the arbitrator is not as involved yet at this point.

Public Comments (one person, see handout)

Wayne Dahl, Chiropractor

- Medical providers are not represented at all within the existing system. They don't have any say about the characterization for the services they provide. Often don't even know a case they have provided services for is being arbitrated.
- No notification of whether any of their bills are part of the case
- No right to attorney's fees (RORAFF in workers comp cases in MN, and some other states); providers then must either absorb cost of their bills or pursue the patient themselves for payment

Labor and Industry Workers Comp Presentation (see PowerPoint)

- Two-part presentation:
 - Overview of WC system and payments
 - Overview of IME/Dispute resolution process

System Overview

- WC payments are based on an enormous spreadsheet that comes from (or is based on) CMS data (Centers for Medicare and Medicaid)
- spreadsheet is dozens of columns and dozens of rows long, and is for any number of claim, injury, treatment, etc. types; "RVU" (relative value unit) tables
- Payments based on RVU times a conversion factor; e.g.:
 - services provided at critical access hospitals are paid at 100% of Medicare
 - Inpatient hospital services are paid at 200% of Medicare MS-DRG
- There are treatment parameters, but there is also a great deal of flexibility depending on the individual case and need
- Claims can sometimes take years to fully process and close
- Great deal on MN statistics-WC provided – See lengthy document provided to task force members via email following the 11/17 meeting

- DLI Comment: Based on hearing the AAA presentation. Great deal of difference between WC and No-fault IME processes

IME/Dispute resolution process overview

- About 75% of cases don't require arbitration
- Arbitration is not "binding"; also provides mediation services
- There can be dueling IMEs among parties
- Hotline available if any party feels the process is proceeding too slowly
- Final decision is reviewable; evidence is kept and process is documented; very much like a typical court process if it gets to that point
- In many cases regarding the overall process, WC is at the "other extreme" of keeping information, notifying providers, etc., compared to the No-fault system
- There is a mechanism to pay attorney fees that is outside of an awards/payments to the worker
- There is a health care provider report regarding when (or if) worker can return to work; would include any restrictions, duration of restrictions, or in the case of permanent or partial disability, the extent of that
- Worker or insurer can ask for a second doctor's opinion
- Provider's representative has to provide testimony under deposition
- Little used provision of statute: either side can ask for the appointment of a neutral medical examiner
- All parties to claim must be regularly notified of the worker's employment/employability status
- There are a number of MN supreme court cases on "reasonable and necessary"
- WC has a very structured system of determining reasonable and necessary, but it is generally a case by case basis if either party raises an issue
- Alternative Dispute Resolution (ADR) is essentially a mediation/consensus process; it isn't binding; almost always come to some sort of agreement without needing court
- What is RORAFF? System whereby if claimant wins, attorney's fees are paid by insurer
- There's a cap on the amount related to medical care that DLI can make a determination on
- Question: how are the treatment guidelines developed:
 - Lengthy process
 - Input from medical field, labor, industry, etc.
 - Physicians have input on treatment guidelines, but not really on payment rates (indirectly, CMS's database); hospitals and health organizations negotiate certain parts of the Medicare and services rates, which make up the CMS spreadsheet
- Comments/Closing questions
 - Apportionment of payment is always going to be a sticking point
 - In WC there is a lot of permanent and permanent partial disability – this is a much different situation than the majority of No-fault cases; some considerations:
 - Is the disability directly related to the on the job injury?
 - Is it an aggravation/worsening of a pre-existing condition?

- Or, is the condition more a function of age?
- Would the WC fee schedule be a good model for No-fault?
 - Enormous task to build; perhaps you could use some form of it
 - It was constructed specifically for WCV and is directly tied to the Medicare fee/cost schedule
 - May have to add some different types of rates and coverages that aren't in the WC system; very difficult to know without much more detailed review/comparison
 - No-fault population may be very different – WC of course is just for people that are working; differences for No-fault coverage for:
 - Elderly and already disabled
 - Children and infants
 - Other?
- WC is probably also very different than fees/costs of major medical coverage that are not workplace or auto-accident related
- Unlike No-fault, WC system is over 70 years old and has the history/background of all 50 states to draw on (as well as Medicare system)
- Comparatively, the dollar amounts for No-fault are typically much smaller
 - Comment: administrative costs of fully developed separate No-fault system may not be worthwhile
 - They have two very different purposes
- Comment/Questions:
 - WC structure/system seems much more organized, structured, professionalized
 - Much clearer lines of accountability, and means for holding people accountable
 - How did the No Fault Standing Committee come to be?
 - WC is very much aligned with/dictated by the medical assessment side of things, No-fault is not at all
 - Do we want to consider making No-fault non-binding?
 - Response: That would actually make the process less efficient; would essentially be telling people to take things into court. One intent of No-fault was the ceding of the “right” to go to court, for the purpose of streamlining the process

Closing Comments/Observations

- Under No-fault there already exists the right to select a different arbitrator. No one ever does this
- Fees under No-fault are currently already set by medical professionals
- Under WC rules/guidelines are very clear and proscriptive; Seems to not be the case under No-fault
 - Response: Except for the “bad apples,” the rules that exist are largely being followed; there is a lot of decision-making that is and should be left to the doctor and patient as far as treatment goes

- It seems like we are really just looking at outliers – the bad actors. There are going to be a bunch of good guys that get caught up in this yet we're talking about casting. Are we working on a problem that really isn't that bad?

Next Steps

- There will be two meetings in December.
 - Next meeting is December 7, 1-4:30 p.m., Department of Revenue, Skejstad Room, 600 North Robert St., St. Paul, 55101.
 - Second meeting is fairly firmly set for, the afternoon of December 17. Location TBD.

Meeting notes prepared by Demian Moore, MAD. Please direct revisions, additions, or questions to demian.moore@state.mn.us.

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