

Certificate

STATE OF WISCONSIN
DEPARTMENT OF ADMINISTRATION } SS
DIVISION OF HEARINGS AND APPEALS

I, Brian K. Hayes, Administrator of the Division of Hearings and Appeals in the Department of Administration, and custodian of the official records, certify that the attached rules, relating to rules of procedure for adjudication of worker's compensation and related claims in Wis. Admin. Code ch. HA 4, were duly approved and adopted by this division on June 6, 2019.

I further certify that I have compared the attached copy with the signed original on file in this division and that it is a true and complete copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department of Administration, Division of Hearings and Appeals at the Hill Farms State Office Building, 4822 Madison Yards Way, in the city of Madison, this 6th day of June, 2019.

Brian K. Hayes
Administrator, Division of Hearings and Appeals
Department of Administration
(Seal)

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	ORDER OF DEPARTMENT OF ADMINISTRATION, DIVISION OF HEARINGS AND APPEALS, ADOPTING RULES (CLEARINGHOUSE RULE 18-059)
--	--

ORDER ADOPTING RULES

The Department of Administration, Division of Hearings and Appeals hereby adopts an order to: **renumber and amend** HA 4.15 (1) to (6); **amend** HA 4.04 (1) and (2), 4.07, 4.08 (2), (3), and (4), 4.11 (1) and (2) (intro.), (a), and (b), 4.13 (intro.), (1), and (3), 4.15 (title), 4.16, and 4.17, and **create** HA 4.01, 4.02, 4.03 and 4.03 (Note), 4.04 (3), (4), and (5), 4.05, 4.06, 4.09, 4.14, 4.15(1), and 4.18, **relating to** rules of procedure for adjudication of worker’s compensation and related claims.

The scope statement for this rule, SS 052-18, was approved by the Governor on May 14, 2018, published in Register No. 749A3 on May 21, 2018, and approved by the Administrator of the Division of Hearings and Appeals in the Department of Administration on June 5, 2018.

Analysis by the Department of Administration, Division of Hearings and Appeals

Statutes interpreted: None

Statutory authority: Wis. Stat. §§ 15.03, 15.103, 102.01(2)(ar), 102.15, 102.17(1)(d)3, and 227.11(2)(b)

Explanation of agency authority:

Wis. Stat. § 102.01(2)(ar)

“(2) In this chapter: ... (ar) ‘Division’ means the division of hearings and appeals [DHA] in the department of administration.”

Wis. Stat. § 102.15.

“(1) Subject to this chapter, the division [DHA] may adopt its own rules of procedure and may change the same from time to time.

“(2) The division [DHA] may provide by rule the conditions under which transcripts of testimony and proceedings shall be furnished.”

Wis. Stat. § 102.17(1)(d)3.

“The division [DHA] may, by rule, establish the qualifications of and the form used for certified reports submitted by experts who provide information concerning loss of earning capacity under s. 102.44 (2) and (3)...”

Wis. Stat. § 15.03

“Any division ... attached under this section to a department or independent agency or a specified division thereof shall be a distinct unit of that department, independent agency or specified division. Any division, ... so attached shall exercise its powers, duties and functions prescribed by law, including rule making, licensing and regulation, and operational planning within the area of program responsibility of the division ...”

Wis. Stat. § 15.103

“(1) DIVISION OF HEARINGS AND APPEALS. There is created a division of hearings and appeals which is attached to the department of administration under s. 15.03. ...”

Wis. Stat. § 227.11 (2) (b)

“(2) Rule-making authority is expressly conferred on an agency as follows: ... (b) Each agency may prescribe forms and procedures in connection with any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but this paragraph does not authorize the imposition of a substantive requirement in connection with a form or procedure.”

Related statute or rule: Wis. Stat. § 102.15(1) and (2); Wis. Admin. Code, ss. DWD ch. 80.

Plain language analysis: 2015 Wisconsin Act 55 (Act 55) 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 and authorized DHA to adopt its own rules of procedure. Act 55 also provided for the direct transfer to DHA of rules in Wis. Admin. Code, ch. DWD 80 that were primarily related to adjudicatory functions, and those rules are currently in Wis. Admin. Code, ch. HA 4.

This proposed rule order brings HA 4 in compliance with the requirements of Act 55. It makes technical changes necessitated by the transfer of rules under Act 55, including adding non-substantive provisions regarding the statutory authority for the transferred rules, the manner which forms, papers and materials may be served on DHA, and the use of stipulations in adjudicatory proceedings before DHA. It states that substantive rules promulgated by DWD apply in the adjudication of disputes before DHA and incorporates by reference DWD rules governing review of compromises and the inspection and copying of records. 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. It also makes a number of stylistic changes to the transferred rules.

Section 1 creates provisions setting out the specific proceedings in which ch. HA 4 applies (HA § 4.01) and general definitions (HA § 4.02). Section 1 also creates a provision (§ HA 4.03) stating that:

- the provisions of substantive rules promulgated by DWD in ch. DWD 80, apply in the adjudication of disputed worker's compensation and related claims by DHA.
- the DWD rule governing the inspection and copying of records applies to records in the custody of DHA.
- the DWD rule governing action on compromises applies to compromises acted upon by DHA.

Sections 2, 6, 7, 9, 10, 12, 13, 14, 15, and 16 make stylistic or technical changes in existing rules already transferred to DHA under Act 55. (§§ HA 4.04 (1), (2), (3)(d) and (e), HA 4.07, HA 4.08 (2), (3), and (4), HA 4.11 (1), (2) (intro.), (a), and (b), HA 4.13 (intro.), (1), and (3), HA 4.15, HA 4.16, and HA 4.17.)

Section 3 creates provisions setting out DHA's current procedures for managing its caseload in the adjudication of disputed worker's compensation and related claims (§ HA 4.04 (3)(a), (b) and (c), and (4).)

Sections 3, 4, 5, 8, 11 reproduce provisions within ch. HA 4 that parallel current rules retained in ch. DWD 80, and that are necessary due to the transfer of adjudication of disputed worker's compensation and related claims to DHA by Act 55. These include:

- § HA 4.04 (5), regarding information to be provided to DHA when acting on compromises, tracking § DWD 80.02 (2)(intro.), (2)(f), and (3m).
- § HA 4.05 allowing for appearances before DHA by an attorney or agent, tracking the last sentence of § DWD 80.06.
- § HA 4.06, dealing with the service and filing of material in matters pending before DHA, tracking § DWD 80.07.
- § HA 4.09, dealing with the use of stipulations in matter pending before DHA, tracking DWD § 80.10.
- § HA 4.14 regarding the submission of reports of certain experts for use in hearings before DHA, tracking § DWD 80.21.

Section 17 codifies DHA's existing practice for mediation in worker's compensation claims after a hearing application has been filed. (§ HA 4.18.)

Summary of, and comparison with, existing or proposed federal regulation: There is no existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

Comparison with rules in adjacent states:

Ill. Admin. Code tit. 50, part 9030 (Hearings before workers compensation arbitrators)

Iowa Admin. Code Rule 876-4 (Workers compensation contested case procedure)

Iowa Admin. Code Rule 876-10.1 (Dispute resolution procedure after a contested case proceeding is filed in a workers compensation case)

Mich. Admin. Code Rule 408.34 to 408.40 (Workers compensation agency hearings)

Mich. Admin. Code Rule 408.40b (Appearances at mediation conferences before workers compensation agency)

Minn. Admin Code Rule 1420 (Workers' compensation litigation procedures)

The proposed rules are similar to procedural rules governing worker's compensation procedures in other states.

Summary of factual data and analytical methodologies: The proposed rule order primarily makes stylistic and technical changes to provisions transferred to current ch. HA 4 by Act 55 and codifies DHA's current practice for managing its worker's compensation caseload, including its existing procedure for mediation in worker's compensation claims after a hearing application has been filed. It also incorporates existing procedures from ch. DWD 80 into ch. HA 4 in light of the transfer of worker's compensation adjudicatory functions from DWD to DHA under Act 55. No factual data or analytical methodologies were used in the preparation of the proposed rules.

Analysis and supporting documents used to determine effect on small business: The proposed rule order primarily makes stylistic and technical changes to provisions transferred to current ch. HA 4 by Act 55 and codifies DHA's current practice for managing its worker's compensation caseload, including its existing procedure for mediation in worker's compensation claims after a hearing application has been filed. It also incorporates existing procedures from ch. DWD 80 into ch. HA 4 in light of the transfer of worker's compensation adjudicatory functions from DWD to DHA under Act 55. It makes no policy or other changes having an effect on small business.

Anticipated costs incurred by private sector: This proposed rule does not have a fiscal effect on the private sector.

Fiscal Estimate and Economic Impact Analysis: The Fiscal Estimate and Economic Impact Analysis document is attached.

Effect on small business: This proposed rule does not affect small business.

Agency contact person: Please contact Jeffrey Shampo at (608) 266-3048 or jeffrey.shampo@wisconsin.gov, if you have any questions regarding this proposed rule, including substantive questions on the rules or the internal processing of the rules.

Public Hearing: A public hearing is scheduled on this proposed rule order for:

Wednesday, September 5, 2018
9:00 a.m. to 10:30 a.m.

Room S148
Hill Farms State Office Building
4822 Madison Yards Way
Madison, WI 53705

Place where comments are to be submitted and deadline for submission: Comments may be submitted no later than 4:30 p.m. on Friday, September 7, 2018, by email to DHAMail@wisconsin.gov; or to <http://docs.legis.wisconsin.gov/code/comment>, or by mail to

Office of Worker's Compensation Hearings
Division of Hearings and Appeals
4822 Madison Yards Way Fifth Floor
Madison, WI 53705

Text of rule

Section 1. HA 4.01, 4.02, 4.03, and 4.03 (Note) are created to read:

HA 4.01 Application of rules. (1) AUTHORITY. This chapter is promulgated under the authority of ss. 15.03, 102.15, 102.17 (1) (d) 3., and 227.11 (2) (b), Stats.

(2) SCOPE AND APPLICATION. This chapter applies to the procedure of the division with respect to worker's compensation hearings under ch. 102, Stats., and to hearings under ss. 40.65 (2), 59.88 (3), 62.624 (2), 106.25, 303.07 (7), and 303.21, Stats., and s. 66.191, 1981 Stats.

HA 4.02 Definitions. In this chapter: (1) "Administrative law judge" means a hearing examiner employed by the office of worker's compensation hearings to conduct hearings under s. 102.17 (2) (b) and (c), Stats.

(2) "Applicant" means a party filing an application for relief.

(3) "Department" means the department of workforce development.

(4) "Division" means the division of hearings and appeals.

(5) "Office of worker's compensation hearings" is one of several subunits authorized by the division administrator and is the subunit that administers adjudicatory functions related to worker's compensation claims.

(6) "Respondent" means a party adverse to an application for relief.

HA 4.03 Application of department rules. (1) Section DWD 80.025 applies to the procedure for inspection and copying of worker's compensation records in the custody of the division.

(2) (a) Except as provided in par. (b), the provisions of s. DWD 80.03 apply with respect to the division when the division acts on a compromise under s. 102.16 (1) (c), Stats., to the same extent those provisions apply to the department when acting on a compromise under s. 102.16 (1) (b), Stats.

(b) All written compromise agreements submitted to the division shall contain the following statement:

The employee has the right to petition the department of administration, division of hearings and appeals to set aside or modify this compromise agreement within one year of its approval by the division. The division may set aside or modify the compromise agreement. The right to request the division to set aside or modify the compromise agreement does not guarantee that the compromise will in fact be reopened.

(3) Substantive rules of the department that implement, interpret, or make specific legislation enforced or administered by the department within the meaning of s. 227.01 (13), Stats., have the force and effect of law in proceedings before the division under this chapter.

Note: Substantive rules of the department dealing with worker's compensation have the force and effect of law in worker's compensation and related proceedings before the division. These include, without limitation, the factors listed in s. DWD 80.34 in determining loss of earning capacity, the factors listed in s. DWD 80.39 in determining whether to order full or partial payment of unaccrued compensation to an employee or his or her dependents under s. 102.32 (6m), Stats., the provisions of s. DWD 80.48 in determining the amount of attorney fees and costs under s. 102.26 (3), Stats., and the factors set out in s. DWD 80.49 (9) (b) in determining whether an offer of employment is suitable under s. DWD 80.49 (8) (c) and (9) (b).

Section 2. HA 4.04 (1) and (2) are amended to read:

HA 4.04 (1) In cases of disputes in matters coming under the jurisdiction of ch. 102, Stats., or s. 40.65, 59.88 (3), 62.624 (2), 106.25, 303.07 (7), or 303.21, Stats., and s. 66.191, 1981 Stats., any party to the dispute may apply to the department of workforce development for relief and the division of hearings and appeals shall make such order or award as shall be lawful and just under the circumstances.

(2) In all such cases under sub. (1), the party complaining applicant shall file his or her application with the department of workforce development, along with sufficient copies of the application for service on the adverse parties respondents. The department of workforce development shall thereupon serve the adverse parties respondents with a copy of the application and the adverse parties respondents shall file an answer to the application with the division of hearings and appeals within 20 days after the service and likewise serve a copy of the answer on the party making application applicant. The division of hearings and appeals shall thereupon notify the parties of the time and place of hearing, at least 10 days prior to the hearing. If no answer is mailed by the respondent within 20 days of mailing by the department of workforce development service of the application by the department, the division of hearings and appeals may issue an order by default, without hearing, in accordance with the application, as provided by s. 102.18 (1) (a), Stats.

Section 3. HA 4.04 (3), (4), and (5) are created to read:

(3) After an application for hearing is served, the division shall manage its caseload by appropriate action including any of the following:

- (a) Determining whether any answer received is complete, identifies the correct date of injury, and identifies the correct parties for that date of injury.
- (b) Filing documents or other material received or issued in connection with the claim.
- (c) Controlling its calendar and scheduling matters for hearing.
- (d) Notifying the parties of the time and place of hearing, at least 10 days prior to the hearing.
- (e) Conducting hearings and making findings, orders, and awards that are lawful and just under the circumstances.

(4) After an application for hearing is served, the division, when appropriate, may take other action to manage its caseload, including any of the following:

- (a) In cases of vision loss and hearing loss, obtaining a computation of permanent disability indemnity.
- (b) Impleading other employers or insurance carriers.
- (c) Securing the participation of the uninsured employers fund or the work injury supplemental benefit fund.
- (d) Dismissing parties improperly served with the application.
- (e) Dismissing the application if defective or upon request of a party.
- (f) Scheduling and conducting prehearing conferences.
- (g) Adjourning or postponing prehearing conferences and hearings scheduled under par. (f) and sub. (3) (c).
- (h) Within 21 days of issuance, setting aside, reversing, or modifying findings, orders or awards as provided in s. 102.18 (3), Stats.

(5) For injuries for which an employer is required to give notice under s. DWD 80.02 (1) (a), a self-insured employer or insurance company shall, when submitting a stipulation or compromise to the division, and at the time of hearing, submit a current form WKC-13 indicating all worker's compensation payments to date and the periods of time for which these payments were made. This subsection does not apply if the information has been submitted via electronic, magnetic or other reporting media under s. DWD 80.02 (3m).

Section 4. HA 4.05 is created to read:

HA 4.05 Appearance by attorney or agent. Any party may appear before the division in person or by an attorney or agent.

Section 5. HA 4.06 is created to read:

HA 4.06 Service and filing. (1) SERVICE. Service of materials, unless otherwise directed by the division or by law, may be made by mail and proof of mailing shall be prima facie proof of service. The time within which service shall be made shall be the same as in courts of record unless otherwise specified by rule or order of the division.

(2) **FILING DATE.** Regardless of how served, materials submitted to the division are considered filed on the date they are received by the division.

Section 6. HA 4.07 is amended to read:

HA 4.07 Amendments. Amendment may be made to the application or answer by letter mailed to the division ~~of hearings and appeals~~ prior to the date the notice of hearing is mailed. Copies of the letter shall be sent directly to the other parties. The letter shall state reasons for the amendment.

Section 7. HA 4.08 (2), (3), and (4) are amended to read:

HA 4.08 (2) Requests for postponements or continuances shall be considered by the division ~~of hearings and appeals~~ only if such requests are received within a reasonable time before the date of the hearing.

(3) The division ~~of hearings and appeals~~ shall grant postponements and continuances only because of extraordinary circumstances. Neither the scheduling problems nor the convenience of the parties shall be considered extraordinary circumstances.

(4) A postponement, continuance, or extension of time may not be granted upon the mutual agreement of the parties without the consent of the division ~~of hearings and appeals~~.

Section 8. HA 4.09 is created to read:

HA 4.09 Stipulations. Parties to a controversy may stipulate the facts in writing, and the division may make its order or award upon the written stipulation. Stipulations must set forth in detail the manner of computing the compensation due and must be accompanied by a report from a physician stating the extent of the disability.

Section 9. HA 4.11 (1) and (2) (intro.), (a), and (b) are amended to read:

HA 4.11 (1) (a) The rules of practice before the division ~~of hearings and appeals~~ shall be such as to secure the facts in as direct and simple a manner as possible.

(b) The ~~examiner~~ administrative law judge may limit testimony to only those matters which are disputed.

(c) The ~~examiner~~ administrative law judge may not allow into the record, either on direct or cross-examination, redundant, irrelevant or repetitive testimony. Hearsay testimony with probative value may be admitted at the discretion of the ~~examiner~~ provided such testimony has probative value administrative law judge.

(2) The division ~~of hearings and appeals~~ may select places for a hearing after considering the geographical location and volume of claims in an area. A list of sites will be furnished upon request to interested parties by the division ~~of hearings and appeals~~. From this list, a hearing site shall be selected at the discretion of the division ~~of hearings and appeals~~. The division ~~of hearings and appeals~~, in determining the site of the hearing, shall consider all of the following:

(a) The applicant's location choice ~~of the applicant;~~

(b) The location of the office of the treating practitioner or practitioner appointed ~~by the department of workforce development or division of hearings and appeals~~ under the provisions of s. 102.13 (3) or 102.17, Stats.; and

Section 10. HA 4.13 (intro.), (1), and (3) are amended to read:

HA 4.13 Transcripts. Transcripts of testimony taken or proceedings had before the division ~~of hearings and appeals~~ shall be furnished to the applicant or respondent or their attorneys in accordance with all of the following provisions:

(1) After the commencement of an action to review an order of the labor and industry review commission in circuit court, a copy of the hearing record will be furnished to the plaintiff or other parties upon payment to the division ~~of hearings and appeals~~ of the reporter's fees set forth in s. 757.57 (5), Stats., and not as set forth in s. 757.57 (2), Stats.

(3) Upon proper showing of financial inability to pay for copies of such testimony or proceedings, the division ~~of hearings and appeals~~ in its discretion will may furnish copies of the same on such terms as may be agreed upon.

Section 11. HA 4.14 is created to read:

HA 4.14 Reports by practitioners and expert witnesses. (1) Upon the request of the division, any party to a claim pending before the division under ch. 102, Stats., shall furnish to the division and to all

parties copies of all reports by practitioners and expert witnesses in their possession or procurable by them.

(2) In cases involving nonscheduled injuries under s. 102.44 (2) or (3), Stats., any party to a claim pending before the division under ch. 102, Stats., shall, upon the request of the division, furnish to the division and to all parties any reports in the party's possession or reasonably available to that party relating to the loss of earning capacity as set forth in s. DWD 80.34.

(3) Any party who does not comply with the request of the division under sub. (1) or (2) shall be barred from presenting the reports or the testimony contained in the reports at the hearing.

(4) No testimony or reports from expert witnesses on the issue of loss of earning capacity may be received unless the party offering the evidence has notified the division and the other parties of interest of the party's intent to provide the testimony or reports and the names of expert witnesses involved as required under s. 102.17 (7), Stats.

Section 12. HA 4.15 (title) is amended to read:

HA 4.15 Use of physicians' reports as evidence.

Section 13. HA 4.15 (1) to (6) are renumbered HA 4.15 (2) to (7) and amended to read:

HA 4.15 (2) Matters stated in such a report which that would not be competent or material evidence if given as oral testimony shall are not be competent or material as prima facie evidence if objection is made, except as corroborated by competent and material oral testimony.

(3) Use of reports shall be permitted in any case in which claim for compensation is made, provided the reporting doctor practitioner or other expert is available for cross examination.

(4) Reports shall be submitted to the division on a prescribed form and shall be certified. An applicant shall be informed of the provisions of s. 102.17 (1) (d), Stats., and the department of workforce development's and division of hearings and appeals' rules ss. DWD 80.21 and HA 4.14, and also that a form for reporting will be supplied to the applicant upon request.

(5) Report shall be submitted to the division of hearings and appeals upon a form prescribed by the department of workforce development or division of hearings and appeals and shall be verified or certified. The division of hearings and appeals may require additional or supplementary reports. Upon failure of the applicant to submit such reports within the time specified prior to hearing, all reports previously filed may, in the discretion of the division of hearings and appeals, be excluded as evidence.

(6) Reports shall be filed with the application for adjustment of claim or as soon thereafter as possible. Reports not filed with the division of hearings and appeals 15 days prior to the date of hearing shall not be acceptable as evidence except upon good cause for failure so to file, established to the satisfaction of the division of hearings and appeals.

(7) Simultaneously with the filing of a WKC-16B form or a verified report of a vocational expert report with the division of hearings and appeals, a party shall serve copies upon all other parties in interest. Service upon the designated representative of a party shall be deemed service upon the party. Service upon the insurance carrier for an employer shall be deemed service upon the employer. However, if a party does not have a representative, the division of hearings and appeals may elect to make service upon other parties.

Section 14. HA 4.15 (1) is created to read:

HA 4.15 (1) In this section, “report” means a report by a practitioner or a report by an expert witness on the issue of loss of earning capacity, as described in s. HA 4.14.

Section 15. HA 4.16 is amended to read:

HA 4.16 Procedure and claims under ch. 40, Stats. The division ~~of hearings and appeals~~ shall observe the same rules and procedures and may use the same forms in processing and determining claims made under s. 40.65, Stats., as are used under ch. 102, Stats.

Section 16. HA 4.17 is amended to read:

HA 4.17 Witness fees and travel reimbursement. The fees and travel reimbursement of witnesses and interpreters for attending a hearing before an ~~examiner of the division of hearings and appeals,~~ administrative law judge shall be the statewide rate currently paid under s. 814.67 (1) (b), Stats., notwithstanding any local county variations.

Section 17. HA 4.18 is created to read:

HA 4.18 Mediation conferences. (1) DEFINITIONS. In this section:

(a) “Administrative law judge mediator” means an administrative law judge whose duties include conducting mediation conferences.

(b) “Request to schedule a mediation conference form” means a form prescribed by the division that sets out the claims at issue in a requested mediation conference, identifies the conceded and disputed benefits, and describes the parties’ respective positions.

(c) “Mediation conference” means a voluntary, informal, off-record conference among an administrative law judge mediator and the parties, their representatives, or both, to explore settlement options in an effort to achieve a negotiated, conciliatory resolution of disputed claims without a formal hearing on the merits of a case.

(2) MEDIATION PROCESS. (a) 1. The purpose of a mediation conference is to resolve all disputed matters or issues in cases in which the issues are sufficiently well-developed.

2. A mediation conference should not be used to address minor disputes or effect piecemeal resolution of disputed claims.

(b) A mediation conference shall be scheduled only after all of the following have occurred:

1. An application for hearing has been served.
2. The applicant has submitted a request to schedule a mediation conference form.
3. The respondent has confirmed in writing that it concurs with the request for a settlement mediation.

4. The respondent has confirmed that that the insurance company has, or will have by the date of the scheduled mediation conference, authority to resolve the claim based on a good faith evaluation of the known facts and evidence of record.

(c) A party may request a particular administrative law judge mediator to serve in a particular case. The division shall assign an administrative law judge mediator to conduct mediation conferences based on division needs and resources after considering a party’s request.

(d) In conducting a mediation conference, an administrative law judge mediator may do all of the following:

1. Engage in ex parte communication with the parties or their representatives.
2. Adopt his or her own procedures regarding the submission of documents and evidence to be used in preparing for a mediation conference.

(e) A settlement achieved through a mediation conference must be approved by both the administrative law judge mediator and the chief administrative law judge or his or her designee. A settlement agreement achieved through mediation outside the office of worker's compensation hearings' mediation process must be reviewed and approved by an administrative law judge as provided in s. HA 4.03 (2).

(3) CONFIDENTIALITY. (a) 1. Subject to subd. 2. and par. (d), all communications or statements, oral or written, that take place within the context of a mediation conference and are not otherwise discoverable, are confidential and not subject to disclosure. Such communications or statements shall not be disclosed by any administrative law judge mediator, party, attorney attendee, or division employee, and may not be used as evidence for any purpose, including impeachment, at hearing or any other legal or administrative proceeding.

2. This paragraph does not apply to an executed compromise agreement derived from a mediation conference or any order approving any such mediated settlement.

(b) Subject to par. (d), neither the administrative law judge mediator nor any third-party observer present at a mediation conference with the permission of the parties may be subpoenaed or otherwise required to testify in any proceeding concerning a mediation or settlement negotiations. Absent waiver of confidentiality by the offended party, the notes, records, and recollections of the administrative law judge mediator, as well as any evidentiary compilation of records or documents utilized by the administrative law judge mediator in preparing for the mediation conference, shall be kept separate and apart from the division litigation file, are not subject to discovery, and shall not be used as evidence in any proceedings. If so called or subpoenaed, the person or entity called or subpoenaed may refuse to testify or produce the requested documents. Should any party attempt to compel such testimony or production of documents, such party shall be liable for, and shall indemnify the division and the administrative law judge mediator against any liabilities, costs, or expenses, including reasonable attorney fees, that may be incurred in resisting such compulsion.

(c) Upon request, the presiding administrative law judge mediator may issue a protective order to keep private spoken or written information that might otherwise become part of the official record in a contested case. Such an order does not preclude release or sharing of information already known or discovered outside the mediation process.

(d) This subsection does not apply to any of the following:

1. Threats of violence to the administrative law judge mediator or others.
2. Security personnel or law enforcement officials.
3. Party or attorney misconduct.
4. Legal or disciplinary complaints brought against an administrative law judge mediator or attorney arising out of and during the occurrence of an event that transpires in the course of a mediation.

Section 18. Effective date. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

(End of text of rule.)

Approved and dated this 6th day of June, 2019.

Brian K. Hayes
Administrator, Division of Hearings and Appeals
Department of Administration