9-1900-10927-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed Amendment to Rules Governing Boiler Operation and Attendance Standards, Repairs by Inspectors and Insured Coverage Reports; Minn. Rules, Pts. 5225.1110, 5225.1140, 5225.1180, 5225.2700, and 5225.3100.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha on March 21, 1997, at 9:00 a.m. in the Minnesota Room of the Department of Labor and Industry, 443 Lafayette Road, Saint Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. □□ 14.31 to 14.20 (1996), to hear public comment, to determine whether the Minnesota Department of Labor and Industry (hereafter "the Department") has fulfilled all relevant substantive and procedural requirements of the law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable, and whether or not modifications to the rules proposed by the Department after initial publication are impermissible, substantial changes.

Susan Gretz, Assistant Attorney General, 525 Park Street, St. Paul, Minnesota 55155, appeared on behalf of the Department at the hearing. The Department's hearing panel consisted of Gail Blackstone, Assistant Commissioner, Workplace Services Division, at the Department of Labor and Industry; Patrick J. Bauer, Chief Engineer for Ah-gwah-ching Center; Jim Larsen, Chief Boiler Inspector, Code Services Division, at the Department of Labor and Industry; Richard Post, Director of Public Works, Minnesota Army National Guard; Aaron Toltzman, Chief Inspector, Western National Insurance Group of Minneapolis, Minnesota; Steve Peddersen, Executive Director, Minnesota Mechanical Contractor's Association; and Steven Lindbeck, Manager of Governmental Affairs, National Borad of Water and Pressure Vessels Inspectors.

Approximately 92 persons attended the hearing. Sixty-two persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed amendments to these rules.

The record remained open for the submission of written comments for twenty calendar days following the hearing to April 17, 1997, the period having been extended by the ALJ to 20 calendar days following the hearing. During the initial comment period the ALJ received written comments from interested persons and the agency. Pursuant to Minn. Stat. □ 14.15, subd. 1, five working days were allowed for the filing of responsive comments. During the 5 day resonsive comment period the agency submitted comments replying to the written comments submitted during the initial comment period. The record closed on April 24, 1997.

NOTICE

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 Department makes changes in the rule other than those recommended in this report, it 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 January 24, 1997, the Department requested the scheduling of a hearing and 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 Notice of Hearing proposed to be issued.
(c) The Statement of Need and Reasonableness.

2. On February 3, 1997, 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. The Department gave discretionary notice to organizations of engineers and building owners and managers, unions representing smaller units of operating engineers, and various insurance companies who insure and are authorized to inspect boilers. Notice to these additional organizations was accomplished in two steps. First, these organizations were provided with a draft of the rules, a summary of the rules, and information on how members can be placed on the mailing list. Second, these organizations were provided the Notice of Hearing, including a more detailed description of the rules.

3. On February 18, 1997, a copy of the proposed rules and the Notice of Hearing were published at 21 State Register 1167.

4. On the day of the hearing, the Department placed the following additional documents in the record:

(a) The Notice of Hearing as mailed;
(b) The Department's Certificate of Mailing the Notice of Hearing and the Certificate of Mailing list.
(c) A Certificate of Additional Notice.
(d) A copy of the letter transmitting the Statement of Need and Reasonableness to the L.C.C.
(e) All written comments received by the Department prior to the hearing.
(f) All materials received following a Request for Comments published at 21 State Register 1167, 1997, and a copy of that request.
(g) The Petition requesting a Rule Hearing.
(h) A copy of the authorization to omit the text of the proposed rule from publication in the State Register.

5. A Notice Plan was filed on January 24, 1997 by the Department and approved on January 31, 1997. Persons notified and involved in the rulemaking process include individuals

who commented or requested a hearing on the previously proposed 1995 amendments. The Department determined that giving notice of the Department's intent to adopt new rules can be accomplished efficiently by also targeting organizations that represent engineers and building owners primarily effected by the proposed rules. A Notice of Hearing on the proposed rules was provided to these constituents, as presented in the Department's SONAR at pages 17-18.

The Department also notified operating engineers and others of the proposed rules by participating in seminars throughout the state at four locations: Duluth (January 10, 1997, with 42 attendees); Minneapolis (January 17, 1997, with 70 attendees); Rochester (January 24, 1997, with 70 registrants); and St. Paul (January 31, 1997, with 100 registrants). In addition, the Department attempted to provide Notice of Hearing to attendees at a seminar for the National Board of Boilers and Pressure Vessels Inspectors in Rochester (March 13, 1997). This additional meeting was cancelled due to low registration.

The Administrative Law Judge finds that the cancellation of this particular seminar does not defeat the approved Notice Plan for this rulemaking procedure. The Department cancelled that seminar due to low registration. Because the seminar was scheduled to take place in Rochester, the January 24, 1997 seminar in the same location reached interested boiler operators and building owners in that location. Therefore, the Notice Plan, as approved and implemented, fulfills notice requirements under Minnesota law.

6. The Comment Period for submission of written statements remained open through April 17, 1997, the period having been extended by order of the Administrative Law Judge to 20 calendar days following the hearing. Following the Comment Period, a five-working-day Reply Period occurred. During this period, the Department or any interested person may respond in writing to any new information submitted. No additional evidence was submitted during this five-day Reply Period. The record closed on April 24, 1997.

Nature of the Proposed Rules.

7. This rulemaking procedure involves amendments to the Department of Labor and Industry's rules governing the safety and regulation of boilers, pressure vessels, and boats carrying passengers for hire, and licensing persons qualified to operate those types of objects. The Department identified certain problems with these rules, and wants to address these problems with the proposed rule change.

8. The proposed rule changes arose out of a previous rule change that occurred in 1994. Minn. Rules, Chapter 5225 governs the manufacture, installation, repair, operation, safety, and inspection of boilers, pressure vessels, appurtenances, and boats for hire in accordance with Minn. Stat. Chapter 183. Most of the rules in Chapter 5225 were amended in September, 1994 (19 SR 591). These 1994 amendments were drafted with the goal of clarifying and updating rules. The 1994 amendments included the creation of definitions for terms used in Chapter 5225, an expansion of the engineer's presence in a boiler plant through broader boiler attendance requirements, a clarification of the boiler licensing examination process, simplified experience requirements for all classes of boiler licenses, specific items that require inspection, methods to report repairs and alterations, and penalties for non-compliance and late payment. One of the primary effects of the 1994 adoption of part 5225.1110 and mandatory compliance with Section VI of the ASME Code was to incorporate a suggested daily-check recommendation for *low pressure* boilers.

In 1995, the Department concluded that there existed a need for additional amendments in three respects: (1) requirements to check and attend low pressure boilers under part 5225.1110 and the ASME Code needed clarification; (2) repairs by division boiler inspectors under part 5225.2700 needed to be prohibited; and (3) the time period within which an owner of a boiler must display a certificate of exemption from inspection under part 5225.3100 needed to be expanded. These amendments form the basis of the proposed 1997 rule changes. The

Department asserts that the minimum attendance requirements for high pressure boilers are not intended to be modified from the present rules. Instead, they are re-organized in the 1997 proposed rules and are relocated to parts 5225.1140 and 5225.1180.

Statutory Authority.

9. The statutory provisions governing boilers and pressure vessels in Minnesota are found in Minn. Stat. □□ 183.375 to 183.62. The Department identified its specific rulemaking authority to adopt the proposed amendments to the rules in Minn. Stat. □ 175.71, subd. 2, which authorizes the Department to adopt reasonable and proper rules relative to the exercise of its powers and duties, and proper rules to govern its proceedings. According to the Department, Minn. Stat. □ 183.001 authorizes the commissioner to administer chapter 183, and Minn. Stat. □ 183.44 authorizes the division of boiler inspection to make rules for inspection and operation of boilers and pressure vessels, and the licensing of engineers. The Department maintains that Minn. Stat.□ 183.45 provides that the engineering standards for boilers and pressure vessels used in Minnesota are those established by the current edition of the construction, operation and care, or in-service inspection, testing, and controls and safety devices codes of the American Society of Mechanical Engineers (hereafter "ASME") and rules of the Division of Boiler Inspection adopted by the Department. In addition, the Department claims that Minn. Stat. □ 183.466 provides that the rules for repair of boilers and pressure vessels for use in Minnesota shall be those established by the National Board of Boilers and Pressure Vessel Inspectors Inspection Code and the rules of the Division of Boiler Inspection adopted by the Department. And finally, the Department maintains that Minn. Stat. □□ 183.54 and 183.57 govern the issuance of certificates of inspection, certificates or exemption of inspection, and posting of the certificates by owners of boilers and pressure vessels.

The Administratvie Law Judge finds that the Department has the general and specific authority to adopt the proposed rule amendments.

Rulemaking Legal Standards.

10. Under Minn. Stat. □ 14.14, subd, 2, and Minn. Rule 1400.2100, one of the determinations which must be made in a rulemaking procedure is whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of the facts. In support of a rule, the Department may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences. *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984); *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989). The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of the amendments of the rule. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by the Department at the public hearing and in its written post- hearing comments.

The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule. *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281. 284 (1950). Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case. *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975). A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute. *Mammenga v. Department of Human Services*, 442 N.W.2d 786, 789-90 (Minn. 1989*); Broen Memorial Home v. Minnesota Department of Human Services,* 364 N.W.2d 436, 444 (Minn. Ct. App. 1985). The Minnesota Supreme Court has further defined the Department's burden in adopting rules by requiring it to "explain on what evidence it is relying

and how the evidence connects rationally with the agency's choice of action to be taken." *Manufactured Housing Institute*, supra, 347 N.W.2d at 244. The Department is entitled to make choices between possible approaches as long as the choice it makes is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy- making discretion of the Department. The question is rather whether the choice made by the Department is one a rational person could have made. *Federal Security Administrator v. Quaker Oats Company*, 318 U.S. 218, 233 (1943).

In addition to need and reasonableness, the Administrative Law Judge must assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Department has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule. Minn. Rule 1400.2100.

Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed. Minn. Stat. 14.15, subd. 3 (Supp. 1995). The standards to determine if the new language is substantially different are found in Minn. Stat. 14.05, subd. 2 (Supp. 1995).

Impact on Farming Operations.

11. Minn. Stat. 14.111, (1996), imposes an additional notice requirement when rules are propsed that affect farming operations. The Department asserts that it does not have jurisdiction over boilers located on farms used solely for agricultural or horticultural purposes. Therefore, the proposed rules will not affect farming operations. The Administrative Law Judge finds that the proposed rule change will not impact farming operations in Minnesota, and finds that no additional notice is required.

Analysis of the Proposed Rules.

General.

12. This Report is limited to the discussion of the portions of the proposed rule amendments that received significant critical comment or otherwise need to be examined. Accordingly, the Report will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this report should know that each and every suggestion has been carefully read and considered. Moreover, because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, and thus, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of the provisions of the amended rules that are not discussed in this report by an affirmative presentation of the facts, that such provisions are specifically authorized by statute, and that there are no other problems that prevent their adoption.

Furthermore, where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed. Minn. Stat 14.05, subd. 3. The Standards to determine if the new language is substantially different from that which was originally proposed by the Department are found in Minn. Stat. 14.05, subd. 2. Any language proposed by the Department which differs from the rules as published in the State Register and is not discussed in this report is found not to constitute a substantially different rule.

Rule-by-Rule Discussion.

13. The comments received by letters and through the public hearing focused on the proposed amendments to Minn. Rules, part 5225.1110, subpart 1. This portion of the proposed rule change forms the basis of this Report. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of the remaining rule amendments proposed in part 5225.1110, subpart 2, parts 5225.1140, 5225.1180, subparts 1-4, parts 5225.2700, and 5225.3100 of the proposed amended rules. These provisions are supported by an affirmative presentation of the facts, are specifically authorized by statute, and do not create problems that prevent their adoption. No significant comments or letters were received regarding these proposed amendment parts.

5225.1110: Boiler Operation Standards.

Subpart 1: Safe Boiler Operations.

14. The Department concluded that 5225.1110, subpart 1, must be clarified to provide safe boiler operations. The Department proposes in 5225.1110, subpart 1 that the minimum daily check for low pressure boilers be replaced with a discretionary inspection standard characterized by a seven factor analysis that relies upon the reasoned judgement of the licensed operating engineer to determine the frequency of the inspection. As published in the State Register on February 18, 1997, the Department proposed the following amendment to 5225.1110, subpart 1:

> All boilers, unless specifically exempted by Minnesota Statutes, section 183.56, must be operated, maintained, and attended by an operating engineer in a prudent and attentive manner to avoid endangering human life and property. At a minimum, all operating boilers must be checked by an operating engineer in compliance with this chapter. **Specific minimum attendance requirements for hobby boilers are given in part 5225.1140 and specific minimum attendance requirements for high pressure plants are given in part 5225.1180.**
>
> **In determining whether a boiler is operated, maintained, and attended in a prudent and attentive manner, the division and the chief engineer or operating engineer shall consider** the recommendations of the American Society of Mechanical Engineers Boiler and Pressure Vessel Code, Section VI, for low pressure and Section VII for high pressure **along with the following additional factors:**
>
> **A. the size or capacity of the boiler plant;**
> **B. the condition of boilers and appurtenances;**
> **C. the frequency of boiler checks and past maintenance history;**
> **D. the extent of public occupancy of the building containing the boiler plant;**
> **E. the operating service conditions, including the weather;**
> **F. compliance with other statutes and rules of this division; and**
> **G. any other factor which would adversely affect the safety of the boiler.**
>
> **A logbook must be maintained in the boiler room by the chief engineer or an operating engineer designated by the chief engineer. The log shall document when the boiler checks were made, who made the boiler checks, and what specific checks of equipment were made. This log shall be made available to the boiler inspector during inspections and at other times upon request of the boiler inspector**.

(New Language underlined)

Need And Reasonableness Of The Proposed Amendment.

15. The Department claims that there exists a need for additional amendments to clarify the requirements to check and attend low pressure boilers under part 5225.1110 and the ASME Code. The Department maintains that the minimum attendance requirements for high pressure boilers are not intended to be modified from the present rules.

Background.

16. A boiler is defined in Minn. Rules part 5225.0050 as "a vessel in which steam or other vapor, hot water or other hot liquid is generated for use external to itself." Boilers are built to the ASME Code which strictly mandates fabrication requirements. Minn. Rules, part 5225.0050, subpart 13, and Minn. Stat. □ 183.51, subd. 3, distinguish between high and low pressure boilers. A low pressure boiler can be hot water or steam boilers, and can be used to heat office buildings, schools, churches and residential buildings. Residential buildings with five or fewer families, are exempt from Department regulation under Minn. Stat. □ 183.56(1). Low pressure boilers range in size from the size of a two-drawer cabinet to several stories tall. High pressure boilers are typically used for industrial purposes such as dry cleaning and laundering, generating electricity, processing chemicals or manufacturing products, refineries, and central heating for a large building complex. Some high pressure boilers are used in a dual fashion for heating and processing purposes.

Part 5225.1110 applies to all pressure boilers, while part 5225.1180 applies to all high pressure boilers in particular. The proposed amendment to part 5225.1110 requires that all boilers be operated, maintained and attended in a prudent and attentive manner to avoid endangering human life and property. The current rule mandates compliance with Section VI of the ASME Code governing low pressure boilers, and section VII of the ASME Code governing high pressure boilers. The proposed rule provides that in determining whether a boiler is being operated, maintained and attended in a safe manner, the engineer must consider the recommendations of Sections VI and VII of the ASME Code along with seven other relevant factors.

ASME Code Sections VI And VII.

16. According to the Department, the proposed rule is consistent with the ASME Code and uses Sections VI and VII in the manner intended by the American Society of Mechanical Engineers and the ASME Boiler and Pressure Vessel Committee. The Department claims the code should be considered mandatory only where the ASME explicitly states so. Sections VI and VII are stated as "recommended" sections in the ASME Code, not mandatory sections. The Department also suggests that Sections VI and VII are recommendations to be considered in light of other factors identified by the Code and the proposed rule amendment. The proposed rule requires the engineer to consider ASME Code in assessing safe boiler operation. The engineer is to use the Code in support of boiler checks to ensure safe and prudent boiler operation.

Mr. R. Bauer and Mr. S. Allers commented at the public hearing that the American Society of Mechanical Engineers and Pressure Vessel Code require daily boiler checks of low pressure boilers. (R. Bauer, T. 123 and S. Allers. T. 80-81). Both commentators read the ASME Code to require daily checks of low pressure boilers, and therefore, deviating from ASME standards would be less than prudent.

The Department responded during the Reply Period with a written comment, stating that even the ASME standards do not consistently recommend a daily check for low pressure boilers. According to the Department, the ASME standards recommend daily preventive maintenance and testing only for high pressure boilers, and for low pressure boilers, a weekly check of the low water cut-off is the most frequent maintenance task advised, as follows:

The owner or user of an automatic boiler system should set up a formal system of periodic preventive maintenance and testing. Tests should be conducted on a regular basis and the results recorded in a log book. Table CM-1 contains a recommended check list. Because of the variety of equipment, owners and users should draw up a detailed check list for operator's use in accordance with the boiler unit assembly manufacturer's instructions and these requirements . . .

(a) Daily

(1) For high-pressure boilers, test low-water fuel cut off and alarm,

(2) Check burner flame,

(b) Weekly

(1) Check igniter,

(2) Check flame failure detection system,

(3) For low-pressure steam boilers, test low-water fuel cut off and alarm.

ASME Code, Controls and Safety Devices for Automatically Fired Boilers CSD-1 (Department Exhibit #14). Therefore, according to the Department, the ASME does not recommend daily checks for low pressure boilers.

The Administrative Law Judge finds that the proposed rule is needed and reasonable. Moreover, the amended rule is consistent with the ASME Code and uses Sections VI and VII of the ASME Code in the manner intended by the American Society of Mechanical Engineers and the ASME Boiler and Pressure Vessel Committee.

17. The Department claims the code should be considered mandatory only where the ASME explicitly states so. Sections VI and VII are stated as "recommended" sections in the ASME Code, not mandatory sections. The Department also suggests that Sections VI and VII are recommendations to be considered in light of other factors identified by the Code and the proposed rule amendment. The proposed rule requires the engineer to consider ASME Code in assessing safe boiler operation. The engineer is to use the Code in support of boiler checks to ensure safe and prudent boiler operation.

Ms. Kristine Bolander, Counsel for the International Union of Operation Engineers, Hoisting and Portable Local 49 - and - Stationary Engineers Local 70, AFL-CIO (hereafter "the Union") responded by letter during the five day Reply Period. The Union claims that the Department does not have statutory authority to adopt proposed rule 5225.1110. The Union asserts that Minn. Stat. □ 183.465 (1996) requires that the inspection standards of the ASME Code shall be complied with. According to the Union, the ASME Code does not distinguish between low pressure and high pressure boilers in Chapter 183, and therefore, the Union asserts that any proposed rule having different attendance standards for low pressure boilers lacks authority. In short, the Union asserts that the Department's interpretation of Minn. Stat. □ 14.05 does not grant the Department the authority to adopt a standard contrary to the standard adopted by the Minnesota Legislature.

The Department responded during the five day Reply Period with written comments on April 17, 1997. According to the Department, low pressure boilers are distinguished from high pressure boilers throughout Chapter 183 of Minnesota law. First, Minn. Stat. □ 183.51, subd. 3 (1996) defines low and high pressure boilers. Second, subdivisions 3-14 of that statute describe the level of experience with low or high pressure boilers that must be shown before a license is granted in Minnesota. Therefore, the Department concludes that the Minnesota Legislature has in fact adopted the standard proposed by the Department.

The Department also asserts that Minn. Stat. □ 183.465 refers to "engineering standards" as those required by the ASME Code. According to the Department, the common

definition of a "standard" is synonymous with the definition of a "rule." The ASME Code presents rules and recommendations. Consequently, only when a procedure is establihed by the ASME for use as a rule can it be considered a standard under Minn. Stat. □ 183.465 (1996). The Department asserts that Chapters VI and VII of the ASME Code are entitled "Recommendations" and are not intended for use as a rule, and thus, do not constitute engineering standards as contemplated by Minn. Stat. □ 183.465. Accordingly, the Department maintains that the proposed rule uses the ASME Code in the manner intended by the ASME, which the Department asserts is entirely consistent with Minn. Stat. □ 183.465 (1996).

Finally, the Department claims that if other provisions of Chapters VI and VII were read as mandatory rules, such an interpretation would lead to absurd results, which the Legislature cannot have intended. Minn. Stat. □ 645.17 (1996). Minn. Stat. □ 183.645 authorizes the Department to adopt rules governing boiler operation standards, anticipating that the rules will operate with the ASME Code. From the point of view of the Department, interpreting the meaning and applicability of ASME Code provisions as they apply to conditions in Minnesota is the agency function desired by the Legislature in granting rulemaking authority to the Department.

The Administrative Law Judge finds that the Department' proposed rule may use the ASME Code, Sections VI and VII, as an incorpoarted standard, not as a mandatory rule. In addition, the Administrative Law Judge holds that the Department is acting within its proper scope of authority. The ASME Code proposes standards, and in Chapters VI and VII, mere recommendations. Significant testimony at the public hearing (J. Larsen, T. 51-54, and S. Lindbeck, T. 149) was provided to support the Department's interpretation of the meaning and application of ASME Code in Minnesota. The Administrative Law Judge finds that the Department has the specific authority to adopt the proposed rule amendments.

Attendance Of High And Low Pressure Boilers.

18. The proposed rule amendment affects attendance of low pressure boilers, not high pressure boilers. The minimum daily attendance requirement for high pressure boilers are not modified from the current rules, but are only reorganized in parts 5225.1140 and 5225.1180. For low pressure boilers, the Department proposes to incorporate Section VI of the ASME Code as recommended guidelines rather than mandatory rules. Therefore, the preposed rule removes the previous daily-check requirement and replaces it with a factorial analysis to determine whether a low pressure boiler is being operated in a prudent and attentive manner.

Mr. S. Sandoval, Mr. S. Allers, Mr. D. Murphy, and Mr. H. Grigsby stated their concerns over how often a low pressure boiler must be checked. These commentators stated that the rule should not be changed because owners of boilers may not comply with the engineer's recommendation, simply to save money. (S. Sandoval at T. 23, S. Allers at 77-78, D. Murphy at T. 70, and H. Grigsby at T. 66-68).

The Department Response Period comments refer to a number of witnesses, owners and engineers whom believe the proposed law will not provide an incentive to ignore a boiler operation engineer's recommendations. (L. Emond at T. 68, R. Post at T. 115). It is an unlawful act to heed the operating engineer's advice under Minn. Stat. □□ 183.61 and 183.63, which is enforced against an owner who permits the operation of a boiler in an unsafe manner. Therefore, there is no reason to believe that owners will ignore the safety recommendations of their engineers.

The Administrative Law Judge finds that the proposed rule is consistent with the ASME Code recommended safety operations. The Administrative Law Judge holds that present Minnesota law provides enforcement measures under Minn. Stat. □□ 183.61 and 183.63 sufficient enough to deter any individual attempt to ignore the boiler safety reccomendation of the attending boiler engineer.

19. At the Hearing, Mr. D. Murphy, Mr. S. Sandoval, Mr. S. Allers, Mr. H. Grigsby, Mr. R. Bauer, and Mr. R. Dahl commented that accidents will likely occur without daily checks of low pressure boilers. Examples of serious accidents were presented, and concerns over the safety of public building occupants, such as school children, were voiced at the public hearing. Mr. R. Bauer, Mr. J . Larson, Mr. A. Tolzman, and Mr. S. Sandoval, all of whom are boiler engineers, expressed a concern that the minimum daily check has become a "maximum" requirement for inspecting boilers. (P. Bauer at T. 23, J. Larson at T. 56-57, A. Tolzman at T. 146, and S. Sandoval at T. 95-96). And finally, Mr. S. Allers commented that the proposed rule is flawed because it does not establish a minimum attendance standard for all low pressure boilers. (S. Allers at T. 74-82).

The Department responded at the Hearing that it recognizes the importance of safe boiler operations; however, there is no proof that accidents are more likely to occur if the proposed amendments are adopted. As presented in its SONAR at Attachment C-1, the accident rate in Minnesota is unchanged from 1994, when the daily check on low pressure boilers was adopted. In 1995, accidents rose to 9, and then went back down to 3 in 1996. It is not possible to infer a correlation between the daily check procedure and the frequency of boiler accidents in Minnesota. There is no evidence that the accident rate will increase by reverting to a standard based on the engineer's expertise.

The Department stated in its Reply Comments that the present daily check requirement lulls owners into false sense of safe boiler operation. To address this problem, the proposed rule places no minimum or maximum frequency for boiler checks, but instead, requires the engineer to consider each boiler plant according to its unique characteristics and operating conditions. The Department believes this approach will increase safety because boilers that need more than a daily check will be identified and serviced. And where necessary, the proposed rule could require daily checks, hourly checks, or continuous monitoring, if that is determined to be the safe and prudent operation of the particular boiler by the Department or the engineer.

Finally, the Department stated in its Responsive Comments that each engineer is required to determine the maximum attendance necessary to ensure safe boiler operation, based on the enumerated factors applied to the unique characteristics of each boiler plant. Moreover, the Department believes that Minnesota operator licenses are well qualified to understand and apply these factors.

The Administrative Law Judge finds that the proposed attendance criteria for high and low pressure boilers is needed and reasonable. The comments presented do not present a significant challenge to the proposed rule.

Factors To Be Considered.

20. The proposed amendment incorporates seven factors for the engineer to assess when determining the appropriate frequency of low pressure boiler checks and to use in considering other recommendations in ASME Code Sections VI and VII. The Department merely expands the role of an engineer in a boiler plant, requiring the use of professional judgement obtained through state licensure procedures. None of the seven factors are considered independently of the others or the ASME Code recommendations. These seven factors require the engineer to consider the actual equipment and operating conditions in addition to the ASME Code recommendations, which may increase or decrease the engineer's attendance.

Mr. S. Allers indirectly addressed these seven factors by claiming the rule is flawed because it does not establish a minimum attendance requirement for all low pressure boilers. (S. Allers at T. 74-82). The Department responded at the Public hearing and in its five day Reply Comments, that Minnesota has among the highest skilled engineers in the nation, due to stringent licensure standards. At the hearing, engineers P. Bauer, A. Toltzman, J. Larson, S.

Lindbeck, and G. Koetz agreed that the factors in the proposed rule are relevant to safe operation of the boiler, and that Minnesota engineers are trained and able to apply these factors to determine safe boiler operations. It is the Department's view that engineers who must apply the proposed rule are empowered to do so. In short, the Department claims that Minnesota operating engineers have the expertise to determine how to how often to monitor low pressure boilers, and therefore, more safety will result from the exercise of that expertise than the present once daily minimum check.

The Administrative Law Judge finds the factor approach to boiler attendance is a safe and prudent method for boiler inspection. Therefore, the rule as amended is needed and reasonable.

The Log Book

21. The Department proposes that subpart 1 add more detail to the existing requirement that a log book must be maintained. The current rule specifies that only a log must be maintained to document compliance with ASME Code Sections VI and VII. The Department interprets the intent of these sections to require documentation when boiler checks are made, who made the boiler checks, and specific checks performed to create a record for the Department to determine if the boiler is being operated safely and attended. (SONAR at 9). The amendment requires the log to be made available to the inspector at other times as well, such as the investigation of complaints about a particular engineer or boiler. (Id.)

Mr. S. Allers responded with a written letter during the Comment Period, and asked that the log book become permanent so that it will not be subject to manipulation or tampering. The Department asserts that a permanent log book with numbered pages to avoid falsification will not prevent tampering. The Department choses, instead, to enhance the accuracy of reporting through additional language in the proposed rule which requires documentation by the operator performing boiler checks. According to the Deaprtment, annual inspections and conversations with the operating engineer will verify the log's accuracy.

The Administrative Law Judge finds that the proposed amendment for log book requirements is needed and reasonable. The post hearing comments by do not seriously challenge the need for and reasonableness of this proposed rule.

CONCLUSIONS

1. The Minnesota Department of Labor and Industry gave proper notice in this matter.

2. The Department has substantially fulfilled the procedural requirements of Minn. Stat. □□ 14.14, and all other procedural requirements of law or rule.

3. The Department has demonstrated 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. 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. 4 and 14.50 (iii).

5. The additions and amendments to the proposed rules which were suggested by the Department after publication of the proposed amended rules in the State Register do not result in

rules which are substantially different from the proposed amended rules as published in the State Register within the meaning of Minnesota Stat. □□ 14.05, subd. 2 and 14.15, subd. 3.

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

7. 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 proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts as 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 amended rules be adopted.

Dated this ____ day of May, 1997.

_____
PHYLLIS A. REHA
Administrative Law Judge

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