

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of Proposed Permanent
Rules Relating to Workers'
Compensation; Permanent Partial
Disability Schedule; Minnesota Rules
Part 5223

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge (ALJ) Beverly Jones Heydinger conducted a hearing concerning the above-entitled rules proposed by the Minnesota Department of Labor and Industry (DOLI or Department) on March 4, 2010, at the Department of Labor and Industry, Minnesota Room, 443 Lafayette Road North, Saint Paul, Minnesota. The hearing continued until everyone present had an opportunity to state his or her views on the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.¹ The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in the rules being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons request one. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

The members of the Department's hearing panel were Kathryn Berger, Department Attorney, and Dr. William Lohman, the Department's Medical Consultant. Ten members of the public signed the hearing register.

The Department and the Administrative Law Judge received written comments on the proposed rules prior to the hearing. At the hearing, the initial deadline for filing written comment was set at six calendar days (March 12, 2010), to allow interested persons and the Department an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five business days (March 19, 2010), to allow interested persons and the Department the opportunity to file a written response to the comments received during the initial period. Several

¹ Minn. Stat. §§ 14.131 through 14.20. (Unless otherwise specified, all references to Minnesota Statutes are to the 2008 edition, and all references to Minnesota Rules are to the 2009 edition.)

comments were received during the rulemaking process. The hearing record closed for all purposes on March 19, 2010.

NOTICE

The Department must make this Report available for review by anyone who wishes to review it for at least five working days before the Department takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Department makes changes in the rules other than those recommended in this Report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Secretary of State must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Elections Division of the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Department, and the Department will notify those persons who requested to be informed of their filing.

Based on the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Background and Nature of the Proposed Rules

1. The permanent partial disability (PPD) schedule is used to determine the amount of workers' compensation that is paid to an injured worker for permanent loss of function of a body part due to a work-related injury. The PPD schedule provides percentage ratings to the body as a whole for loss of function of a part of the body. The percentage rating is then converted to a dollar amount and paid to an injured worker as permanent partial disability compensation according to the table in Minn. Stat. § 176.101, subd. 2a. The PPD schedule was last amended in 1993.²

2. For the most part, the proposed rule changes do not increase or decrease payments under the existing PPD schedule. The Department has proposed the rule amendments to make technical changes to correct internal inconsistencies, rating gaps, and confusing language. The changes are intended to promote objectivity and consistency, promote workability of the schedule, and reduce unnecessary litigation over the interpretation of the rules. The changes that are more substantive are proposed to modify, clarify or update ratings in response to case law or to correct omissions or rating errors in the 1993 schedule. Some of the changes increase or decrease payments under the PPD schedule and some minor impairments are given a

² SONAR at p. 1-3.

zero rating as permitted by Minn. Stat. § 176.105, subd. 1(b). The more substantive changes will apply only to future dates of injury.³

II. Compliance with Procedural Rulemaking Requirements

3. On May 29, 2001, the Department published a Request for Comments in the State Register. The Department indicated that it was considering rule amendments to make technical changes, correct oversights, omissions and technical errors, and clarify PPD rating procedures and the medical conditions subject to rating. The notice indicated that the Department had not yet prepared a draft of the possible rules and requested comments on its proposal.⁴

4. On August 18, 2008, the Department published another Request for Comments in the State Register. The Department indicated that it was considering rule amendments to correct inconsistencies, gaps in coverage, omissions, confusing language and technical errors. The Department indicated it was also considering amendments that modified, clarified, and updated ratings in response to case law and changes in medical diagnoses or conditions subject to rating. The Department indicated that ratings for thoracic outlet syndromes and other conditions not previously rated would also be considered. The Department indicated that it had prepared a draft of the possible rule amendments and invited comments on the draft.⁵

5. On September 18, 2009, the Department filed copies of the proposed Notice of Intent to Adopt Rules without a Public Hearing, proposed rules, and draft Statement of Need and Reasonableness (SONAR) with the Office of Administrative Hearings. The filings complied with Minn. R. 1400.2060, subp. 2. On the same date, the Department also filed a proposed additional notice plan for its Notice of Hearing and requested that the plan be approved pursuant to Minn. R. 1400.2060. By letter dated September 25, 2009, Administrative Law Judge Eric L. Lipman approved the additional notice plan.

6. The Department received more than 25 requests for a hearing and on December 31, 2009, the Department filed copies of the proposed Notice of Hearing, proposed rules, and SONAR. The filings complied with Minn. R. 1400.2080. By letter dated January 8, 2010, Administrative Law Judge Manuel J. Cervantes approved the Notice of Hearing.

7. On January 22, 2010, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department to receive such notice. The Notice contained the elements required by Minn. R. 1400.2080, subp. 2. The Notice identified the date and location of the hearing in this

³ SONAR at p. 3.

⁴ Ex. 1A.

⁵ Ex. 1B.

matter. The Notice also announced that the hearing would continue until all interested persons had been heard.⁶

8. The hearing was held at 9:30 a.m. on March 4, 2010, at the Department of Labor and Industry, Minnesota Room, 443 Lafayette Road North, Saint Paul, Minnesota.

9. At the hearing the Department filed copies of the following documents, as required by Minn. R. 1400.2220:

A. The Request for Comments as published in the State Register on May 29, 2001 (25 S.R. 1867); and the Request for Comments as published in the State Register on August 18, 2008 (33 S.R. 341);⁷

B. The proposed rules dated July 14, 2009, including the Revisor's approval;⁸

C. The Statement of Need and Reasonableness (SONAR);⁹

D. The certification that the Department mailed a copy of the SONAR to the Legislative Reference Library on October 15, 2009;¹⁰

E. The Notice of Hearing as published in the State Register on January 25, 2010 (34 S.R. 1013), and the Notice of Hearing as mailed;¹¹

F. The Certificate of Mailing the Notice of Hearing to the Rulemaking Mailing List on January 22, 2010, and the Certificate of Accuracy of the Mailing List;¹²

G. The Certificates of sending Additional Notice under the Additional Notice Plan;¹³

H. Public comments received by the Department before the hearing and requests for a hearing;¹⁴

I. A copy of the transmittal letter showing that the Department sent notice to Legislators pursuant to Minn. Stat. § 14.116;¹⁵

⁶ Ex. 6-C; Ex. 7-C.

⁷ Ex. 1-A; Ex. 1-B.

⁸ Ex. 3.

⁹ Ex. 4.

¹⁰ Ex. 5.

¹¹ Ex. 6-D; Ex. 6-C.

¹² Ex. 7-C; Ex. 7-D.

¹³ Ex. 8.

¹⁴ Ex. 9.

¹⁵ Ex. 11.

J. A copy of the transmittal letter and response showing that the Department consulted with the Department of Management and Budget pursuant to Minn. Stat. § 14.131;¹⁶

K. The Certificate of Mailing the Notice of Hearing to those who submitted comments or requested a hearing following publication of the Notice of Intent, pursuant to Minn. Stat. § 14.25;¹⁷ and

L. Minutes from the Medical Services Review Board meetings on November 9, 2006, July 19, 2007, January 17, 2008, April 17, 2008, October 23, 2008, July 16, 2009.¹⁸

10. The Administrative Law Judge finds that the Department has met all of the procedural requirements under applicable statutes and rules.

III. Statutory Authority

11. In its SONAR, the Department asserts that its statutory authority to adopt these rules regarding PPD is provided in Minn. Stat. § 176.105.¹⁹ Subdivision 1(a) of that section provides that:

[the Commissioner of the Department must] establish by rule a schedule of degrees of disability resulting from different kinds of injuries. Disability ratings under the schedule for permanent partial disability must be based on objective medical evidence. The Commissioner, in consultation with the Medical Services Review Board, shall periodically review the rules adopted under this paragraph to determine whether any injuries omitted from the schedule should be included and amend the rules accordingly.

12. Minn. Stat. § 176.105, subdivision 4(b) provides in part:

The commissioner shall by rulemaking adopt procedures setting forth rules for the evaluation and rating of functional disability and the schedule for permanent partial disability and to determine the percentage of loss of function of a part of the body based on the body as a whole, including internal organs, described in section 176.101, subdivision 3, and any other body part not listed in section 176.101, subdivision 3, which the commissioner deems appropriate. The rules shall promote objectivity and consistency in the evaluation of permanent functional impairment due to personal injury and in the assignment of a numerical rating to the functional impairment.

¹⁶ Ex. 12.

¹⁷ Ex. 13.

¹⁸ Ex. 14.

¹⁹ SONAR at p. 1-2.

13. The Department's rulemaking authority set forth in Minn. Stat. § 176.105 was adopted and effective before January 1, 1996.²⁰

14. The Administrative Law Judge finds that the Department has general and specific statutory authority to adopt the proposed rules.

IV. Additional Notice Requirements

15. Minn. Stat. §§ 14.131 and 14.23 require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule or explain why these efforts were not made. As discussed above, the Department submitted an additional notice plan to the Office of Administrative Hearings, which was reviewed and approved by Administrative Law Judge Eric L. Lipman in a letter dated September 25, 2009. During the rulemaking hearing the Department introduced evidence that certified the provision of notice to those on the rulemaking list maintained by the Department and in accordance with its additional notice plan.²¹

16. The Department took action to inform and involve the following interested and affected parties in this rulemaking:

A. The members of the Workers' Compensation Advisory Council (WCAC), which consists of labor, employer, and legislative representatives, established pursuant to Minn. Stat. § 176.007, and persons who have requested to receive notice of WCAC meetings;

B. Members of the Workers' Compensation Insurers Task Force (WCITF), an ad hoc group of workers' compensation payers who meet at the Department of Labor and Industry several times a year to learn about and discuss workers' compensation issues with the Department. The WCITF consists of 19 representatives of workers' compensation insurers, self-insured employers, and third-party administrators. Persons who requested to receive notice of the WCITF meetings were also provided with the Notice;

C. Members of the Workers' Compensation Medical Services Review Board, which consists of persons representing health care providers, labor and payers, as specified in Minn. Stat. § 176.103; and persons who requested to receive notice of Medical Services Review Board meetings;

D. Persons and organizations who requested to be on the electronic mailing list for *CompAct*, the Department's quarterly workers' compensation publication;

²⁰ See SONAR p. 1, n. 4.

²¹ Ex. 8.

E. Persons and organizations who are on the Department's e-mail list for health care providers;

F. Persons and organizations who are on the Department's e-mail list for workers' compensation insurers;

G. Attorneys on the Office of Administrative Hearing's e-mail list for workers' compensation attorneys;

H. The Minnesota Medical Association, the Minnesota Chiropractic Association, the Minnesota Nurses Association, the Minnesota Chapter of the American Physical Therapy Association, and the Minnesota Occupational Therapy Association;

I. The three workers' compensation managed care plans certified under Minn. Stat. § 176.1351;

J. The League of Minnesota Cities; the Association of Minnesota Counties; the University of Minnesota workers' compensation department; and the Minnesota Department of Finance, Employee Relations division; and

K. Those who had commented on the draft amendments since the Request for Comment was published in the *State Register* on August 18, 2008.

17. A copy of the proposed rules, the Notice of Hearing and the SONAR were available on the Department's website.

18. The Department has widely disseminated the proposed rules to affected parties. Therefore the ALJ finds that the Department has satisfied the notice requirements.

V. Impact on Farming Operations

19. Minn. Stat. § 14.111 imposes an additional requirement calling for notification to be provided to the Commissioner of Agriculture when rules are proposed that affect farming operations. In addition, where proposed rules affect farming operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

20. The proposed rules do not affect farming operations, and the Administrative Law Judge concludes that the Department was not required to notify the Commissioner of Agriculture.

VI. Compliance with Other Statutory Requirements

A. Cost and Alternative Assessments

21. Minn. Stat. § 14.131 requires an agency adopting rules to include in its SONAR:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

22. With respect to the first factor, in its SONAR the Department stated that the proposed rules will directly affect employees and employers and insurers, and indirectly their representatives (attorneys and third-party administrators). The rules will also affect health care providers, because they use the PPD schedule to rate injured workers' impairments. The Department stated that because the proposed amendments are technical and housekeeping changes, the proposed amendments are not expected to increase or decrease payments in comparison to the 1993 PPD schedule, but that there will be a benefit to employees and payers because the rules will be clearer and easier to understand. The more substantive changes proposed in response to caselaw or to correct omissions in the 1993 schedule may increase or decrease payments but they will only apply to future dates of injury. The extent to which injured workers and payers will benefit or bear the costs of these amendments cannot be quantified because the Department cannot predict the type or severity of injuries that will be rated under the

these amendments or how they would have been rated without the amendments. The more substantive amendments are expected to reduce litigation to the extent they make the schedule more accurate, easier to apply by physicians, and more consistent with case law and other areas of the schedule.²²

23. With respect to the second factor regarding the enforcement cost to the agency and any anticipated effect on state revenues, the Department noted that there is no anticipated cost to the Department to implement the proposed changes. The Department already reviews permanent partial disability awards and undertakes enforcement action when necessary. If there are fewer errors in rating permanent partial disability, the Department's costs for compliance activities will decline. The Department of Labor and Industry Special Compensation Fund pays the claims against uninsured employers. As with the possible costs to other payers, it is not reasonably possible to determine the probable costs to the Special Compensation Fund. There is no anticipated effect on state revenues.²³

24. With respect to the third requirement, the Department must determine if there are less costly or less intrusive methods to achieve the purposes of the proposed rules. The Department has not identified any less costly or less intrusive alternatives for correcting typographical mistakes, drafting errors, omissions, gaps in coverage and textual ambiguities or for updating ratings to promote workability and consistency in response to case law other than to amend the rules as proposed.²⁴

25. With respect to the fourth requirement, the Department identified no alternatives to achieve the purpose of the proposed amendments.²⁵

26. With respect to the fifth requirement, the Department must note the probable cost of complying with the proposed rules. The Department asserts that the changes are not expected to increase or decrease payments under the existing PPD schedule because the amendments reflect the way the injuries would likely be rated under Minn. Stat. § 176.105, subd. 1(c) as currently interpreted and applied. With respect to the changes that will result in PPD ratings that are different from ratings that would be assigned under the current schedule, there is not enough data to determine with any certainty the extent to which the different ratings will increase or decrease costs of compliance for payers. The actual increase or decrease in PPD payments will depend on the type and severity of injuries that will occur in the future and the extent to which the PPD rating will change from what would have been assigned under the current schedule. There are too many variables to predict the cost of compliance in any meaningful way. The Department solicited input on the cost of complying with the proposed amendments from members of the Medical Services Review Board and the

²² SONAR at p. 3-4.

²³ SONAR at p. 4.

²⁴ SONAR at p. 5.

²⁵ SONAR at p. 5.

Workers' Compensation Insurers Task Force, but no costs were identified in response to the Department's inquiry.²⁶

27. With respect to the sixth factor, the Department asserts that the consequence of not adopting these rules is that the PPD schedule will continue to have errors and will be medically out-of-date. It will also have gaps in coverage. Not adopting the proposed rules will adversely affect the objectivity, consistency and ease of use of the schedule for all affected parties, including government payers of workers' compensation claims.²⁷

28. With respect to the seventh factor, the Department asserts that nothing in the proposed rules conflicts with federal regulations.²⁸

29. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

B. Performance-Based Regulation

30. Minn. Stat. § 14.131 also requires that an agency include in its SONAR a description of how it "considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002." Section 14.002 states, in relevant part, that "whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals."

31. The Department explained in the SONAR that the commissioner is required to adopt a PPD schedule under Minn. Stat. § 176.105, for the purpose of determining PPD compensation payable to injured workers. As such, the statute does not allow for flexibility and the rules cannot be "performance-based."²⁹

C. Consultation with the Commissioner of Finance

32. Under Minn. Stat. § 14.131, the agency is also required to "consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

33. The Department sent its proposed rule and draft SONAR to the Minnesota Management and Budget on July 7, 2009. On behalf of the Commissioner of Finance,

²⁶ SONAR at p. 5-6.

²⁷ SONAR at p. 6.

²⁸ SONAR at p. 6.

²⁹ SONAR at p. 6.

Executive Budget Officer Ryan Baumtrog opined on July 24, 2009, that the proposed changes will not impose a significant cost on local governments.³⁰

34. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 for consulting with the Commissioner of Finance.

D. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

35. Under Minn. Stat. § 14.127, the Department must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.”³¹ The Department must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.³²

36. In the SONAR, the Department stated that the proposed rules are not anticipated to increase costs by more than \$25,000 for any small business or small city. The rules do not directly affect small businesses because they typically purchase insurance for workers’ compensation. Workers’ compensation insurers and self-insured employers are not typically small businesses. The rules may affect small cities that are self-insured. However, the cost of complying with the rules is not anticipated to exceed \$25,000 in the first year for any small business or small city. The cost of complying cannot be precisely quantified because the department cannot predict the type or severity of injuries that will be rated under these amendments or how they would have been rated without the amendments. The greatest increase in any PPD rating is to the neck, which for certain injuries may provide for an increased rating of up to 5%. However, under Minn. Stat. § 176.101, subd. 2a, a five-percent impairment rating would result in a PPD payment of at most \$5,500. It is highly unlikely that a small business or small city would have enough injuries in one year of the type affected by the rule amendments such that increases to its premium or other costs would exceed \$25,000.³³

37. The Administrative Law Judge finds that the Department has made the determination required by Minn. Stat. § 14.127 and approves that determination.

E. Adoption or Amendment of Local Ordinances under Minn. Stat. § 14.128

38. Under Minn. Stat. § 14.128, the Department must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The Department must make this determination

³⁰ SONAR at p. 8; *see also*, Ex. 12.

³¹ Minn. Stat. § 14.127, subd. 1.

³² Minn. Stat. § 14.127, subd. 2.

³³ SONAR at p. 8-9.

before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.³⁴

39. The Department determined that no local governments would be required to adopt or amend an ordinance to comply with the proposed rules because local governments are required to comply with the workers compensation law as set forth in Minn. Stat. chapter 176, including the PPD schedule.³⁵ The Administrative Law Judge approves that determination.

VII. Rulemaking Legal Standards

40. Under Minnesota law,³⁶ one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In support of a rule, an agency 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.³⁷ The Department prepared a SONAR in support of its proposed rules. At the hearing, the Department relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Department staff at the public hearing and by the Department's written post-hearing comments and reply.

41. 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.³⁸ Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.³⁹ A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.⁴⁰ The Minnesota Supreme Court has further defined an agency'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."⁴¹

³⁴ Minn. Stat. § 14.128, subd. 1. A determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2 and 3.

³⁵ SONAR at p. 8.

³⁶ Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

³⁷ *Mammenga v. Dept. of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

³⁸ *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

³⁹ *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

⁴⁰ *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

⁴¹ *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d at 244.

42. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the 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 agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.⁴²

43. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the Department complied with the rule adoption procedure, 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.⁴³

VIII. Analysis of the Proposed Rules

44. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined, and it 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, including those made prior to the hearing, has been carefully read and considered. Moreover, because sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary.

45. The Administrative Law Judge finds that the Department has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule provisions not specifically discussed in this Report. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

IX. Broad Issues Relating to the Proposed Rules

Public Support for the Proposed Rules

46. The Department received a number of similar requests for a hearing. The requests did not object to any specific rule part, but indicated that the proposed amendments put the interests of employers and insurers over injured workers, and therefore a hearing should be held to allow submission of further comments and evidence.⁴⁴

47. At the hearing, Charles Cochrane expressed general support for the proposed amendments on behalf of the Workers’ Compensation Committee of the Minnesota Association for Justice, which consists of 65 to 70 attorneys who represent

⁴² *Federal Sec. Adm’r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

⁴³ Minn. R. 1400.2100.

⁴⁴ Ex. 9.

injured workers. He stated that the amendments clarify the rules and correct the drafting errors made in 1993.⁴⁵

48. The Department received comments regarding two proposed rule parts. All of the testimony and exhibits offered at the hearing related to the proposed amendments to Minn. R. 5223.0450, subpart 3, item E, which pertains to the rating for a rotator cuff tear. The Department also received two written comments regarding proposed rule part 5223.0435, which addresses Complex Regional Pain Syndrome, Reflex Sympathetic Dystrophy, or Causalgia.

X. Rule-by-Rule Analysis

Part 5223.0435

49. The Department proposes a new rule, part 5223.0435, regarding Complex Regional Pain Syndrome (CRPS), Reflex Sympathetic Dystrophy (RSD) or Causalgia. The proposed rule provides in relevant part:

Subpart 1. Applicability. This part applies to dates of injury on or after the effective date of this part....

Subp. 2. Rating. To rate complex regional pain syndrome, reflex sympathetic dystrophy, causalgia, and cognate conditions, determine the impairment to the peripheral nervous system, the musculoskeletal system, the skin, and the vascular system as provided in items A to I. The ratings obtained are then combined for the final rating as described in part 5223.0300, subpart 3, item E. The percent of whole body disability for complex regional pain syndrome, reflex sympathetic dystrophy, or causalgia of a member shall not exceed the percent of whole body disability for amputation of that member. If there is no rating under items A to I, then the final rating is zero percent.

- A. For upper extremity motor loss rate as provided in part 5223.0400, subparts 1 to 5.
- B. For upper extremity sensory loss rate as provided in part 5223.0410, subparts 1 to 6.
- C. For upper extremity vascular loss rate as provided in part 5223.0580.
- D. For loss of range of motion in the upper extremity rate as provided in parts 5223.0450 to 5223.0480.
- E. For lower extremity motor loss rate as provided in part 5223.0420, subparts 1 to 5.

⁴⁵ Test. of C. Cochrane, Trans. p. 17.

- F. For lower extremity sensory loss rate as provided in part 5223.0430, subparts 1 to 5.
- G. For lower extremity vascular loss rate as provided in part 5223.0580.
- H. For loss of range of motion in the lower extremity rate as provided in parts 5223.0500 to 5223.0530.
- I. For impairment due to disorder of the skin rate as provided in part 5223.0630.

50. In the SONAR, the Department explained that it limited the applicability in subpart 1 to new dates of injury because the manner of rating the named conditions in this subpart is different than the way similar conditions are rated under other subparts of the existing schedule. The current schedule provides that the employee must have at least five of the eight listed conditions concurrently in the affected upper or lower extremity. Under the current schedule, if at least five of the eight conditions are present and persist despite treatment, the rating for mild RSD and cognate conditions is 25% of the rating for amputation of the involved member; 50% of the amputation rating for moderate RSD; and 75% of the amputation rating for severe RSD.⁴⁶

51. The Department further explained that proposed subpart 2 provides a new way of rating the named conditions and eliminates the requirement that five of the eight listed conditions must be present. The 1993 amendments to the PPD schedule required an “end organ impairment” approach in other sections, which requires the rater to determine the final functional outcomes of the condition, rate each functional outcome separately, and then combine individual ratings for the final overall rating. The proposed rule adopts this approach; it enumerates the possible functional outcomes of the condition and directs the examiner to the applicable parts of the schedule to rate the functional loss.⁴⁷

52. Minnesota Statutes, § 176.105, subd. 4 (c) requires the rules to “promote objectivity and consistency in the evaluation of permanent functional impairment due to personal injury and in the assignment of numerical rating to the functional impairment.” To provide more consistency and objectivity in rating RSD and similar conditions based on actual limitation of function, the proposed rule eliminates the threshold criteria that must be satisfied before the category applies. Instead, whenever there has been a diagnosis of RSD, CRPS, causalgia, or cognate (similar) conditions, the rule provides for graduated ratings based on the individual factors and actual level of functional impairment by referring to other parts of the schedule that rate motor, sensory, vascular and range of motion impairments to the affected body part based on objective findings. So instead of the somewhat subjective “mild,” “moderate,” or “severe” categories in the rule, the ratings will now be based on the actual functional impairment to the upper or lower extremity (in terms of motor, sensory, vascular and range of motion loss and skin

⁴⁶ SONAR at p. 14.

⁴⁷ SONAR at p. 14-15.

impairment) in the same way that other injuries to those extremities are rated in the rules referenced in items A to I. The proposed rule also clarifies that the appropriate rating is zero percent if there is no functional loss, as permitted by Minn. Stat. § 176.105, subd. 1(b).⁴⁸

53. This proposed rule also addresses issues raised in a series of Workers' Compensation Court of Appeals cases. The Workers' Compensation Court of Appeals (WCCA) initially applied the standard in the current rules that five out of the eight listed conditions must persist concurrently in the affected member in order to obtain a PPD rating for reflex sympathetic dystrophy. However, in *Stone v. Harold Chevrolet*, 45 W.C.D. 102 (2004), the WCCA held that this standard was not required to obtain a rating for RSD under Minn. R. part 5223.0430, subpart 6. In analyzing the rule the WCCA noted that "[t]he number of conditions present in a given case does not necessarily correlate to the severity of the employee's condition or the extent of disability." The Court also noted that under Minn. Stat. §§ 176.021 and 176.105, "impairments which are not minor may not receive a zero rating and must be compensated." In *Stone*, a treating physician, an independent medical examiner and the compensation judge all agreed that the employee had RSD and had functional impairment, even though the employee had only four of the eight listed conditions. Therefore, because there was no dispute that the employee had RSD, the employee was properly rated for RSD under part 5223.0430, subpart 6, even though only four of the eight conditions had been satisfied.⁴⁹

54. The WCCA expressed concern in *Stone* that under the current rules an employee with a functional impairment might not receive a rating based solely on the listed threshold criteria, contrary to Minn. Stat. § 176.105. The WCCA noted that the relevant issue is not the precise wording of the diagnosis, given the variety of diagnostic terms used by providers to describe a similar set of symptoms, but rather the functional limitation caused by the injury. To address these concerns, the WCCA cases permit a rating under the current rule even where only a few of the eight listed conditions are present, so long as the employee has functional impairment and a diagnosis similar to RSD. In *Hawley v. Kwik Trip, Inc.*, the WCCA authorized ratings other than the 25, 50, or 75 percent ratings in the current rule, depending on whether the level of functioning is better or worse than the categories in the rule.⁵⁰

55. Dr. Joel Gedan, a neurologist, submitted extensive commentary regarding proposed changes to this rule part. Dr. Gedan commented that the proposed amendment downplays the importance of a diagnosis-based impairment rating, and focuses instead on the functional outcome. He believes the Department should follow

⁴⁸ SONAR at p. 14-15.

⁴⁹ SONAR at p. 14-15, citing line of CRPS cases, including *Mundy v. American Red Cross*, slip op. (W.C.C.A. Dec. 13, 2005); *Peterson v. Benedictine Health Center*, 66 W.C.D. 319 (W.C.C.A. Mar. 1, 2006); *Hawley v. Kwik Trip, Inc.*, slip op. (W.C.C.A. Jan. 10, 2007). The Department has included the cases in its submissions as Ex. 15.

⁵⁰ SONAR at p. 16.

the AMA Guides to the Evaluation of Permanent Impairment, which require a diagnosis of CRPS before the condition can be rated.⁵¹

56. The Department agrees with Dr. Gedan that the proposed ratings are based on functional outcome rather than diagnosis. The schedule is intended to rate functional loss, not diagnosis. The schedule is intended to rate any and all functional loss that occurs as a result of a work injury, regardless of the diagnosis of that work injury. Requiring a diagnosis for a rating subverts this principle. The Department specifically rejected the AMA Guides in the SONAR: “The sixth edition of the AMA guides requires that a patient meet a definition of CRPS/RSD before being eligible for a rating under that diagnosis. This approach is not used because it emphasizes diagnosis rather than functional impairment.”⁵² The Workers’ Compensation Court of Appeals in *Stone* and other cases, decided that the current rule cannot be used to limit PPD for functional loss from CRPS/RSD only to people who satisfy the diagnostic criteria in the rule. These conditions can be difficult to diagnose and physicians often do not agree on the diagnosis. Therefore the proposed rules eliminate any attempt to define diagnosis. Once a diagnosis has been made and the condition has been determined to be work-related, the proposed part 5223.0435 is used to determine the extent of the permanency resulting from the condition.⁵³

57. The ALJ finds that by ensuring that ratings for CRPS, RSD and similar conditions are based on the actual functional impairment of the affected extremity, the proposed rule addresses the concerns raised by the WCCA cases and promotes the objectives of Minn. Stat. § 176.105, including workability, ease of use, objectivity, consistency, and reduction of unnecessary litigation over the application of the rule. The Department has established the proposed rule is needed and reasonable.

Part 5223.0450

58. The Department proposes to amend Rule 5223.0450, entitled Musculoskeletal Schedule; Shoulder and Upper Arm, as follows (in part):

Subp. 3 Combinable categories.

A. For dates of injury from July 1, 1993, through the day before the effective date of item E: chronic rotator cuff tear, demonstrated by medical imaging study, with or without surgical repair:

(1) partial thickness, two percent;

(2) full thickness, six percent.

...

⁵¹ Letter, Mar. 5, 2010.

⁵² SONAR at p. 14.

⁵³ Dept. Comment, Mar. 19, 2010.

E. For dates of injury on or after the effective date of this item: rotator cuff tear, demonstrated by medical imaging study:

(1) healed or surgically repaired with no persistent tear, zero percent;

(2) partial thickness tear which persists despite treatment, two percent;

(3) full thickness tear which persists despite treatment, six percent.

59. In the SONAR, the Department explained that there has been confusion about whether the current rule applies to patients whose rotator cuff tear has been successfully repaired by surgery. The term “chronic” in the current rule was intended to represent the situation in which the tear persists after treatment. The proposed changes to subpart 3E make that intention clear. No changes are made in the assigned ratings for subitems (2) and (3) under item E from the corresponding ratings under item A. Rotator cuff tears are not specifically addressed in the AMA guides.⁵⁴

60. Dr. Stember suggested a rating should be added for a chronic rotator cuff strain or sprain.⁵⁵ The Department responds that such a rating would be beyond the scope of the proposed amendments, but that a new rating is unnecessary because there are existing ratings that could apply to a chronic rotator cuff strain or sprain in the current rules.⁵⁶

61. Charles Cochrane stated during the hearing that the proposed rules wrongfully eliminate the rating for a tear or repair of the rotator cuff.⁵⁷

62. The Department responds that Cochrane’s comment illustrates the confusion that the proposed rule attempts to correct. The current rule provides a rating for “chronic rotator cuff tear...with or without surgical repair.” “Chronic” is defined in Minn. R. part 5223.0310, subpart 14, as “the repeated or continuous occurrence of a specific condition or symptom.” A persistent rotator cuff tear is “continuous” in its “occurrence” and thus chronic. A successful repair of a rotator cuff is not chronic, does not invariably lead to functional loss, and does not create an anatomic defect.⁵⁸

63. Dr. Stember also suggested that a rating should be added for arthroscopic debridement of the glenohumeral joint because a surgical procedure typically results in adhesion formation, which creates tissue that is weaker, less flexible and neurologically hypersensitive.⁵⁹ Similarly, during the hearing Charles Cochrane, on behalf of the Minnesota Association for Justice, disagreed with the Department’s rating of surgically-corrected rotator cuff tears. He stated that the proposed rotator cuff repair rating should

⁵⁴ SONAR at p. 18.

⁵⁵ Hearing Ex. 1.

⁵⁶ Dept. Comment, Mar. 12, 2010.

⁵⁷ Trans. p. 20.

⁵⁸ Dept. Comment, Mar. 12, 2010.

⁵⁹ Hearing Ex. 1.

recognize the anatomic change to the body.⁶⁰ Mark Olive, a workers' compensation attorney, also voiced this concern in his written submission.⁶¹

64. The Department responds that such a rating would be inconsistent with the current or proposed rules because they do not provide a positive rating for surgical procedures unless the procedure itself invariably leads to functional loss or creates an anatomic defect. If clinically significant adhesion formation does occur in the shoulder, it would likely result in loss of range of motion, which can be rated under Minn. R. 5223.0450, subp. 4, and can be adjusted depending on the severity of the actual loss of range in each case. The current and proposed rules provide positive ratings for surgical procedures only when they invariably lead to functional loss or create an anatomical defect. A successful repair of a rotator cuff does not invariably lead to functional loss and does not create an anatomic defect.⁶²

65. Mark Olive stated that a rotator cuff tear as confirmed by an MRI scan constitutes an underlying anatomic disruption to the rotator cuff and should be accorded a separate rating consideration.⁶³

66. The Department agrees that an unrepaired tear or a tear that recurs after repair and goes unrepaired thereafter deserves a rating because of the anatomic defect created and is therefore accorded either a 2% or 6% rating under item E(2) and E(3) of the proposed amendments. But if the anatomic defect has been resolved by a successful surgical procedure, the rating for the healed or repaired tear should be 0%. This is proposed as a combinable category because it is possible that there could be a persistent loss of function (ratable under Minn. R. 5223.0450 subpart 4) whether or not the anatomic defect has been repaired.⁶⁴

67. Mark Olive commented that the potential effect of this proposed rule part would be that injured workers will avoid surgery to receive PPD benefits. The Department responds that it is unlikely that an injured worker will refuse surgery that would restore function to the shoulder to obtain a PPD rating or increase the rating. The Department notes that it has no knowledge of people refusing treatment to obtain a PPD rating, and states that treatment avoidance has never been a problem in the past.⁶⁵

68. At the hearing Charles Cochrane voiced concern that the Department did not solicit input from injured workers, qualified rehabilitation consultants (QRCs) or

⁶⁰ Trans. p. 19.

⁶¹ Hearing Ex. 2.

⁶² Dept. Comment, Mar. 12, 2010.

⁶³ Hearing Ex. 2.

⁶⁴ Dept. Comment, Mar. 12, 2010.

⁶⁵ Hearing Ex. 2; Dept. Comment, Mar. 12, 2010.

physical therapists before it determined to assign a zero rating to a healed or surgically repaired rotator cuff.⁶⁶

69. The Department responds that it provided the proposed rules to many health care providers for review and comment, including the Minnesota Chapter of the American Physical Therapy Association; the Minnesota Medical Association; the Minnesota Chiropractic Association; and the Minnesota Occupational Therapy Association. Qualified rehabilitation consultants are individuals certified by the Department to provide vocational rehabilitation services to injured workers under Minn. Stat. § 176.102. Several qualified rehabilitation consultants received the proposed rules because they are on the department's rulemaking list, which included more than 900 people. The Department received no objection to the amendment proposed to rule part 5223.0450 from the health care providers.⁶⁷

70. The Administrative Law Judge finds that the Department has established that proposed rule part 5223.0450 is needed and reasonable.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department gave proper notice in this matter. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

2. 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).

3. 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).

4. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

5. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based on the Conclusions, the Administrative Law Judge makes the following:

⁶⁶ Trans. p. 18.

⁶⁷ SONAR at p. 4-5.

RECOMMENDATION

IT IS RECOMMENDED that the proposed rules be adopted.

Dated: April 9, 2010

s/Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

Recorded: Reported by Kirby A. Kennedy & Associates
Transcript (one volume)