

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of Proposed Amendments to
the Workers' Compensation Division Rules
LAW JUDGE
of Practice.

REPORT OF THE
ADMINISTRATIVE

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on July 2, 1986, in St. Paul, Minnesota.

This report is part of a rulemaking proceeding held pursuant to Minn. Stat. 14.131 through 14.20 to determine whether the Agency has fulfilled a relevant substantive and procedural requirements of law, whether the proposed rules are needed and reasonable, and whether or not the rules, as modified, are substantially different from those originally proposed.

Members of the agency panel appearing at the hearing included Commissioner Steve Keefe, Special Assistant Attorney General William R. Howard, Chief Counsel Joan Volz, Division Counsel Mary Miller, and Compensation Attorney Penny Johnson.

Approximately 14 people attended the hearing, and ten signed the hearing register. The Agency submitted 20 written exhibits. Six timely written comments were submitted by members of the public.

The Department must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Department of actions which will correct the defects and the Department may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Department may either adopt the Chief Administrative Law Judge's suggested

actions to cure the defects or, in the alternative, if the Department does not elect to adopt the suggested actions, it may submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Department elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Department may proceed to adopt the rule and submit it to the Revisor of-

Statutes for a review of the form. If the Department makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Department files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On May 13, 1986, the Department 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) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (d) The Statement of Need and Reasonableness.
- (e) A Statement of Additional Notice.

2. On May 29, 1986, 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.

3. On June 2, 1986, a Notice of Hearing and a copy of the proposed rules were published at 10 State Register 2388.

4. On June 9, 1986, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
- (d) The names of Department personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited to appear on its behalf.
- (e) A copy of the State Register containing the proposed rules.
- (f) All materials received following a Notice of Intent to Solicit Outside Opinion published at 9 State Register 296, October 11, 1984 and a copy of the Notice.
- (g) A copy of the State Register for March 17, 1986 (10 S.R. 1881) wherein the Department published notice of its intent to adopt the rules without a hearing.
- (h) Letters from more than 25 persons requesting a hearing on the rules.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comment and statements remained open until July 22, 1986.

Background

6. The removal of the Workers' Compensation Court of Appeals from the jurisdiction of the Department and the transfer of the Compensation Judges from the Department to the Office of Administrative Hearings necessitated changes in the Division's former rules of practice. The adoption of separate rules governing the Workers' Compensation Court of Appeals and separate rules governing hearings conducted by the Office of Administrative Hearings, and the related repeal of prior rules of the Department resulted in the need to reorganize and rewrite rules of practice for those matters which still remained under the jurisdiction of the Division. In particular, items such as administrative conference procedures, penalties, death benefits, and attorney fees do remain, and up to date rules were needed.

Statutory Authority

7. There are a variety of statutes which grant the Department authority to adopt rules included in this package. Minn. Stat. 175.17, subd. 2 permits the Commissioner to adopt rules of practice before the Workers' Compensation Division. Minn. Stat. 176.83, subds. 1, 7 and 9 all authorize rulemaking in various areas covered by these rules. Minn. Stat. 176.171 and 176.135 also confer authority in certain areas. The Agency has met its burden of proving that it has statutory authority to adopt the rules proposed.

Section-by-Section analysis

8. Most of the attention at the hearing and written comments focused on a few of the many proposed rules. Indeed, the bulk of the proposals received no comments. This Report focuses on those rules which received comments or otherwise were noticed to have problems. Any rules not discussed below are hereby found to be supported by adequate statutory authority, and justified by the Agency as both needed and reasonable. Since all the rules that will be discussed come from Part 5220, those four digits will not be repeated when identifying a rule henceforth.

9. Part 2520 deals with definitions. There is confusion over what is meant by the word "office". While experienced persons know what this means, others do not. It is recommended (but not required) that the Department add

simple definitions of "Office", "Commissioner", "Department", and "Division".

Although the Judge does not find any parts of the proposed rules to be unreasonable without these definitions, their adoption is recommended to assist the untrained reader in understanding the rules.

10. Part 2520, subp. 5, contains the definition of "permanent total disability". A number of persons raised questions about the definition proposed. The Agency has accepted one of these recommendations (from Laurence F. Koll), which is not a substantial change. As so amended, the Department's proposal would define "permanent total disability" as meaning:

that after completion of medical and vocational assessment and rehabilitation, and after consideration of the employee's age, physical restrictions, transferable skills, and economic factors in the employee's employment community, the employee has not found and cannot be reasonably expected to find employment that is within medical restrictions and brings a consistent income.

this definition is an amalgamation of a number of concepts taken from statutory and case law. The primary criticism directed against it is that it differs from a statutory definition contained in Minn. Stat. 176.101, subd. 5. That definition lists certain specific disabilities which result in permanent total disability, but then goes on to include "or any other injury which totally incapacitates the employee from working at an occupation which brings him an income". It is this last clause in the statutory definition which has given rise to a number of reported court decisions. In fact, the Supreme Court candidly admits that it has "formulated a rule" in attempting to interpret the general language. See, Schulte v. C.H. Peterson Construction Co., 278 Minn. 79, 153 N.W.2d 130, 24 W.C.D. 290 (1967). What the Department's proposed rule definition does is to incorporate the courts' language into the statutory definition so that a person reading the rule would be aware of concepts from not only the statute but also from court decisions. This is not an unreasonable approach, nor does it result in a rule which is contrary to the law. The proposed definition is found to be both needed and reasonable, and may be adopted.

11. Part 2540, subp. 4, deals with penalties, and it is the first of a number of penalty provisions. A comment was received that the statute and rule imposed numerous reporting requirements, questioning whether the Department would be able to monitor them all adequately. In order to "assist" in compliance, the commentator suggested that all of the penalty requirements should be mandatory, rather than discretionary (as some of them are, including this subpart 4). The Department responded by pointing out that applicable statutes (such as Minn. Stat. 176.221, subds. 3 and 3a, as well as Minn. Stat. 176.225, subd. 1) authorized penalties in terms of permissive, not mandatory, language. More importantly, however, the Department stated that it does not have adequate personnel to monitor and penalize all violations, be they large or small. Instead, it feels that it needs discretion to allocate its resources to the most troublesome areas or against the most frequent violators. It argued that it would be a waste of its resources to impose penalties, for example, for every first payment which was one day late while

ignoring a pattern of very late payments on large settlements because its resources were exhausted.

The Administrative Law Judge finds that the Department has made an adequate showing of the need for prosecutorial discretion so as to allow it to adopt discretionary rules in those cases where the statute is also discretionary. However, the Department may not adopt discretionary rules in the case of penalties where the statute is mandatory. If the statute requires that penalties be assessed, then the Department may not adopt a rule which gives itself discretion. In such cases, the rule must provide for mandatory assessment. With that caveat, it is found that the proposed rule has been justified as both needed and reasonable.

12. Another question that arose with regard to penalties is more narrow. It has to do with whether the use of Part 2550, subp. 4 and Part 2760, subp. 1(C) might result in situations where an employee was precluded from later seeking penalties under Minn. Stat. 176.225, subd. 1. This was not the Department's intent. Without going into detail, it can be said that where a statute grants a right to a penalty, the Department may not, by rule, take away that right. Any such action would have to come as a result of amending the statute. To avoid any confusion at this point, however, the Department indicated a willingness to add a sentence to Part 2760, subp. 1, stating that using the rule does not affect an employee's independent right to proceed under the statute. While such an addition is not required in order to make the proposed rule reasonable, it is recommended to avoid any confusion.

13. A question arose about the adequacy of the title for Part 2550. The Department agreed to expand the title, and the proposed change is not substantial.

14. Part 2560 deals with attachment and garnishment of benefits. The rule essentially prohibits them except for cases of child support and spousal maintenance obligations which are specifically covered by statute. A number of questions arose with regard to this rule. First of all, it was suggested that a Notice of Withholding be required to be sent to the employee. However, Minn. Stat. 518.611, subd. 2, already requires copies of both an Order for Withholding and a Notice of Income Withholding to be served upon the obligor (the employee). The proposed additional notice would only duplicate those Notices. It is found that the rule is reasonable without requiring any additional notice. The Department, in a post-hearing submission, proposed to change the title of the rule from "Attachment and Garnishment of Benefits" to "Right to Compensation". This would not be a substantial change, nor would it affect the reasonableness of the rule. However, the Judge recommends that the Department reconsider this proposed change, because the original title does a better job of describing the contents of the rule than does the revised one. While the Department may adopt either title, it is recommended that it stick with the original one.

15. Proposed Rule 2570, subp. 3, relates to denials of liability by an employer or insurer. The existing rule contains a provision designed to inform employees of the statute of limitations for commencing a claim. That

provision has been deleted from the proposed rules. The Minnesota Nurses Association objected to that deletion because they feel it is needed to inform employees. The Department's justification for the deletion is that it views the law as uncertain and until the uncertainty is resolved by either the Legislature or courts, it does not want to run the risk of either confusing or misleading employees as to the appropriate time period. This confusion arises from a 1984 amendment to the statute. The Administrative Law Judge concludes that the Department is acting in a prudent manner by removing the language.

-

While he agrees with the Nurses Association that it is desirable to have that on the form, it is reasonable to have nothing at all than to give improper information. It is likely that this matter will be settled relatively promptly, and the Department can respond at that time.

16. Proposed rule Part 2590, subp. 1, requires insurers to file with the Division "all significant medical reports" concerning the nature and extent of any injury or disease arising under the act. At the hearing, an attorney proposed that the rule ought to be amended so as to require that a copy of the

report-be sent to the employee at the same time that it is, filed with the Division. The Department pointed out that the statute has never required such service and that requiring it would increase the insurer's cost because, in some cases, medical reports can be voluminous. The Department pointed out that employees have access to their file at the Division, and also at the treating doctor's office. Minn. Stat. 176.138 allows the employee to request existing medical reports at anytime from the possessor of the report, and Minn. Stat. 176.155, subd. 1, requires independent medical evaluations to be provided free of charge to the employee upon request.

The Judge concludes that the Department has justified its proposed rule as needed and reasonable, and that it need not be amended to require the serving of all such reports.

17. An additional comment concerning Part 2590, subp. 1, questioned the use of the word "significant" as ambiguous. The Department admitted that it was imperfect, but that it was only seeking to maintain the current practice. An existing rule requires the filing of all medical reports "that facilitate the statutory obligation of the Division to keep itself fully informed as to the nature and extent of any injury to an employee arising under the Workers' Compensation Act". Under this existing provision, insurers do not send every report because it is economically and administratively burdensome to do so. The Department is satisfied with the current system, and only seeks to continue it by substituting the word "significant" for the existing requirement. It is found that the admittedly imperfect word "significant" is less ambiguous than the existing language, and if both insurers and the Department have reached an understanding with regard to what that language means, and the understanding is to continue, then the rule may be adopted as proposed.

18. Part 2590, subps. 2 and 3, specify the contents of physician's reports. Both subparts contain lengthy laundry lists of what must be included. At the hearing, an attorney suggested that the required reports were too lengthy and too detailed, especially because the physician is not allowed to charge for their preparation. The Department defends the rule on the basis that the Medical Services Review Board has reviewed the forms and suggestions of providers have been incorporated. The forms are very similar to those required by 176.231, subds. 3 and 6, and they have been provided for years. The forms themselves do allow for a "fill in the blank" response. While the record contains at least one letter of comment from a physician, he does not mention this proposed rule at all.

19. Both subparts contain language requiring the reports to be on forms

"prescribed by the Commissioner, containing substantially, but not limited to, the following:". Such language would allow the Commissioner to modify his forms to require additional information without amending the rule. While the intent of the quoted language may be to allow physicians to tailor their reports to the applicable injury, that explanation is not obvious. One of the purposes of adopting administrative rules is to provide detail and certainty to general statutes. The above-quoted language flies in the face of that goal. The language which would allow the Commissioner to expand the information requested beyond the laundry list in the rules must be removed. The Administrative Law Judge sees no problem in language which would read substantially as follows:

. . . must be on the form prescribed by the Commissioner,,
containing the following information if applicable:

Another way to cure the defect would be to simply provide that the reports:

Must be on the form prescribed by the Commissioner and
contain the following:

The rule may not be adopted without curing this defect. The same defect occurs, and must also be cured, in proposed rule 2530; 2550, subp. 2; 2570, subp. 2; and, 2630, subp. 3.

20. Part 2610, subp 4, deals with the conduct of administrative conferences. It permits the presiding official to ask questions of participants and allows parties to question other parties. A concern was raised that pro se employees would be disadvantaged by artful cross-examination. The Department agrees that these conferences may include pro se individuals, that they are intended to be informal, and are designed to allow for free discussion and promotion of settlements. The Department believes that it is possible to allow questions which bring out facts without permitting cross-examination. It favors the former, but is opposed to the later. The Department appears to agree with the commentator that cross-examination should be prohibited, and only differs with regard to how that ought to be accomplished. The Department did suggest, in a post-hearing submission, that it may be appropriate to add a clarifying disclaimer to the effect that the presiding official shall not allow cross-examination.

Administrative conferences are conducted by rehabilitation and medical specialists, who are not legally trained. Nonetheless, any sensitive person can recognize the difference between a straightforward question to elicit a fact, and cross-examination which is harassing, intimidating, confusing, or designed to trick an unrepresented party. The Judge is satisfied that the Department has justified allowing questioning. However, the rule does not express the intention of the Department that such questioning not be allowed to stray into cross-examination. The Judge does not believe that this omission is enough to render the rule unreasonable, but he does recommend that the Department add a sentence specifically empowering the presiding officer to halt questioning if it is argumentative, harassing, intimidating, confusing, or designed to trick a participant.

21. Subpart 5 of proposed rule 2610 contains language which allows verbal presentations by health care providers only if the Commissioner's designee determines, in writing, that the appearance is crucial to the relevant issues as provided by Minn. Stat. 176.155, subd. 5, except where the health care

provider initiated the claim under 176.103. The rule goes on, in somewhat unusual language, to state that "There is no provision in the statute for cost for testimony at a medical administrative conference."

At the hearing, it was suggested that providers have a substantial interest in the outcomes of these administrative conferences, and prohibiting them from speaking violates their rights. Also, it was stated that if the employee needs a provider to appear or if medical records are needed, the costs of the provider's appearance or the records ought to be taxable.

The Department, in its post-hearing submission, accepted the suggestion that the prohibition against provider's oral testimony be deleted. It reasoned that since the prohibition was taken from Minn. Stat. 176.155,

subd. 5, which deals with "testimony" and seems to apply to formal litigation only, and since these administrative conferences are not in the class of formal litigation, a provider ought not to be required to obtain a written determination prior to making a verbal presentation. The Department agreed that that statute does not appear to address the situation which a doctor wishes to appear at an informal proceeding. The Administrative Law Judge concludes that it would not be a substantial change to remove the requirement of a written finding of need and that the Agency has justified its proposal, as amended, as reasonable.

The more substantial issue regarding Rule 2610 is the issue of taxable costs at administrative conferences. The two attorneys testifying at the hearing suggested that the rule's statement to the effect that there is no statutory provision allowing costs for testimony at a medical administrative conference ought to be deleted, because if an employee needs a doctor to appear or medical records are needed, the employee ought to be allowed to provide that evidence and have the costs be taxable. However, Minn. Stat. 176.511, provides that costs are not allowed except where they are specifically provided for. A recent amendment provides that parties may seek reimbursement of costs for appeal to the Rehabilitation Review Panel or the Medical Services Review Board. Those bodies provide de novo hearings, and it would not be inconsistent with the competing interests of informality and simplicity at the lower level, and greater detail at the de novo hearing, to allow costs at the later, but not the former.

It is also argued that *Heaton v. J.E. Fryer Construction Co.*, 36 W.C.D. 316 (1983) and *Roraff v. State*, 288 N.W.2d 15, 32 W.C.D. 297 (1980), justify the payment of these medical costs. However, those cases deal with attorneys fees, not medical costs. While there may be an analogy to be drawn, it is not unreasonable for the Department to refuse to draw it until the Legislature or the courts expand those holdings to include medical costs.

22. Proposed Part 2620 deals with medical conferences. It was proposed by a representative of the Injured Workers Association that if an insurance company at first denies liability, and then is later held liable, it ought not to be allowed to reduce the charges in accordance with the medical fee schedule. The purpose of such a provision would be to encourage companies to admit liability early in the process, at the risk of losing certain rights if they improperly deny liability.

The Department opposed this proposal on a number of grounds, primarily lack of statutory authority. It argued that the proposal would essentially prohibit the assertion of an otherwise valid defense, and would allow a provider to overcharge an insurer if the insurer had previously erroneously denied payment on the claim. The Department also urged that penalties and interest are authorized and are appropriate responses to an improper denial.

The Administrative Law Judge concludes that the requested change is beyond the scope of the Department to implement without legislative direction. Hopefully, the penalties proposed by these rules will provide an adequate deterrent to baseless denials of liability.

23. Part 2620, subp. 1(G), provides that one of the medical issues which may be dealt with at a medical conference is "the employee's cooperation with medical treatment". One of the attorneys argued that there was no statutory

authority for the Department to deal with the subject of cooperation. I t
may
be appropriate in a discontinuance conference, but not in a medical
conference, he argued. The Department responded that it had broad authority
over medical issues pursuant to Minn. Stat. 176.103, subds. I and 2,
and
that there were strong policy reasons favoring allowing this issue to be
discussed at medical administrative conferences. Those policy reasons
were
that Minn. Stat. 176.242 allows an insurer to discontinue benefits if it
is
determined that the employee has refused to submit to reasonable medical
examinations. The Department reasons that if an employee had an opportunity
to explain his or her viewpoint on reasonableness, and had a chance to come
to
an agreement with the insurer on that issue, it will avoid a later
discontinuance of benefits based upon failure to cooperate.

Administrative conferences are designed to be informal and, consistent
with elementary due process, to overcome the barriers imposed by legal
formalisms. It is consistent with this goal to allow consideration of an
employee's cooperation with medical treatment so that the employee will
know,
at this early stage, that he runs the risk of a discontinuance. If the
employee is, in fact, bound and determined not to accept certain
examinations
or treatment, there is no valid purpose to be served by not getting that
position out into the open so that it can be dealt with as an important
factor
in the overall rehabilitation process. If items such as the
reasonableness
and necessity of treatment, a request for change of physician, and the
appropriateness of medical services are to be discussed (they are set forth
in
the list of appropriate medical issues), only an artificial barrier would
exclude the subject of an employee's cooperation. Therefore, it is found
that
the rule is reasonable as proposed, and is justified by the broad language
of
Minn. Stat. 176.103, subd. 2 ("any other activity involving the
question of
utilization of medical services").

24. Another topic for discussion at medical conferences pursuant to
Part
2620, subp. 1, is "the reasonableness and necessity of nursing services".
One
commentator at the hearing argued that the statute is clear in allowing the
Department to rule on reasonableness, but not necessity. Minn. Stat.
176.135, subd. 1, as amended by Laws of Minnesota 1986, Ch. 461, 20,
requires the employer to "furnish any . . . treatment, including nursing
. . .
as may reasonably be required at the time of the injury and any time
thereafter to cure and relieve . . .". However, Minn. Stat. 176.103,
subd.
2, as amended by Laws of Minnesota 1986, Ch. 461, 10, directs the
Commissioner to "monitor the medical and surgical treatment" of injured

employees, including "determinations concerning the appropriateness of the service, whether the treatment is necessary and effective [and] the proper cost of services . . .". Looking at both of those statutes together, it is concluded that the Commissioner does have authority to determine not only the reasonableness but, implicitly, the need for nursing. Therefore, the rule may stand as proposed.

25. Other subparts of proposed Rule 2620 also drew criticism. Parts 2 and 4 deal with M-4 requests for assistance in resolving medical claims and applications to intervene on medical claims. A problem sometimes arises when the Department of Human Services pays medical assistance for employees who later are reimbursed by insurers. Sometimes, if medical assistance has paid all of the bills, the employee will not file the necessary papers with the Department to recoup from the insurer because any compensation the employee would receive would be used to reimburse DHS and medical assistance. DHS

operates in the role of an intervenor, and by definition, can only act after a party in interest (such as an employee) files a claim. However; employees have no incentive to file claims simply to reimburse DHS. DHS would like it clear that it can initiate a medical claim by filing a form M-4 despite the fact that it is not among the listed persons in subpart 2 of the rule. That subpart provides that "an employee, employer, insurer, or health care provider" may initiate a medical claim. Intervenor such as the Department of Human Services do not have the right to initiate claims. They can present a claim for reimbursement once a claim petition has been filed by a party, but they do run the risk that if the parties choose not to bring a claim before the Division, there is nothing for them to intervene into. It is alleged by the Department of Human Services that Compensation Judges occasionally overlook medical expenses in their orders, and therefore do not remand matters for a medical conference. In such cases, however, the Intervenor (and DHS would have intervened by that point) could seek a correctior of the findings and order in order to reflect the omitted referral. Beyond that, it is concluded that the Department of Human Services must seek a statutory change to make it clear that they may initiate such a matter regardless of whether the parties do or not. Commissioner Keefe testified that this has been proposed to the Legislature by the Department, but rejected. The Department's remedy must be to convince the Legislature that it is appropriate to allow them to do so. The subparts are found to be needed and reasonable as proposed.

26, Subpart 3 of the proposed rule deals with an insurer's response to the filing of an M-4 or M-10 form. It requires a response within 20 days after service of the M-4 or M-10. Mr. Mottaz pointed out that the rule does not contain a penalty for failing to respond, other than to note that failure will be considered in the determination of penalties and interest, The Department responded that the reason for no specific penalty in the rule was the fact that there is no specific authority in the statute to prescribe a penalty for failing to file a response. It noted, however, that Part 5220.2740 provides a penalty upon late payment of or late response to outstanding medical bills, and it is likely that an insurer who has failed to

respond to an M-4 will also be liable for a penalty under .2740.

It is found that the subpart is reasonable as proposed, and no change is needed.

27. Subpart 7 of proposed rule 2620 deals with changes of physicians, providing a procedure for an employee to change physicians. If the parties cannot agree to a change, the party requesting the change must file an M-10 and the adverse party must respond. The rule goes on to provide that if the adverse party fails to respond within 20 days of the filing of the M-10, then the change requested must be granted "absent a compelling reason to deny the request". This last phrase brought criticism from Mr. Mottaz, who urged that it be stricken so that the Department would have no discretion to disapprove in the event of a default. The Department responded stating that it would use the "compelling reason" exception to disapprove the change to a doctor whose medical license has been revoked, or one who is not properly trained to treat a particular type of injury, such as a podiatrist for an eye injury, or "any other very good reason" for disapproval. The Statement of Need and Reasonableness explains that this authority would be used to prevent a change "which is clearly not in the best interest of the requestor".

There are no standards set forth in the rule to guide the Division's authority to refuse, other than "compelling reason". While some of the examples mentioned above sound "compelling" to this Judge, there is nothing to prevent the abuse of the absolute discretion granted. It is found that the rule may not be adopted without placing some limitations on the discretion. This defect may be cured by either deleting the discretion, or limiting it.

28. Proposed Rule 2620, subp. 10 and 2640, subp. 5, both deal with the same topic: the granting of continuances for administrative conferences. The proposed rules indicate disfavor of continuances, but provide for their granting upon a showing of "good cause". They go on to define what is not "good cause". In particular, if an attorney is engaged in another court or otherwise, that is not good cause for a continuance unless the attorney's associates practicing in the Worker's Compensation field are also all committed elsewhere. An attorney objected to this, claiming that often times the attorney-client relationship is individual to the attorney, and does not extend to other persons in a law firm. This generated a comment from a representative of the Injured Workers Association, who stated that he did not care which lawyer represented him so long as he himself (the employee) had a voice in whether or not the conference would be continued. In a post-hearing submission, the Department proposed additional language as a compromise. It would apply to both employer and employee representatives, and would provide an exception to the concept that good cause does not include absence of a representative. If all parties, including the employee personally, agreed to the continuance, and if the continuance is requested at least ten business days before the conference date, then the matter could be continued.

The thrust of the proposed rule is very similar to existing Rules, Parts 1400.7500 (contested cases) and 1415.2800 (joint rules). It is concluded that the Department has justified the rule as both needed and reasonable. However, the "compromise" language is an improvement. While the Department may adopt both rules without the compromise language, it is recommended that the compromise language be added. It is not a substantial change.

The same logic applies to proposed rule 2640, subp 5.

29. Proposed rule 2630 deals with discontinuance of compensation, and sets forth procedures to be followed when an insurer proposes to reduce, suspend or discontinue benefits.

The primary complaint about this rule came from Mr. Peterson and Mr.

Mottaz, who urged that subparts 3 and 4 be amended so that an insurer who filed a Notice of Intention to Discontinue Benefits (NOID) to discontinue temporary total disability benefits would be ordered to pay temporary partial disability benefits, and if the insurer failed to do so, then its request to discontinue temporary total benefits would be denied. The Department's response to this suggestion was that it did not have statutory authority to order the initiation of temporary partial disability benefits following the cessation of temporary total disability benefits. While there are two explicit situations where the Department is authorized to order the commencement of benefits, they are recognized as exceptions to the general rule that only Compensation Judges have jurisdiction to order commencement pursuant to Minn. Stat. 176.242. The situation described by the attorneys

does not fall under either of the exceptions to that general rule, and until the statute is amended, the Department believes it does not have authority to adopt the suggestion. However, the Commissioner believes he does have authority to penalize an insurer under Rules 2770 and 2790, where benefits are clearly due, but not commenced.

It is concluded that the Department is without statutory authority to implement the procedure recommended by the two attorneys, and that its proposed rule has been demonstrated to be reasonable without it.

30. Another subpart of proposed rule 2630, subp. 4, drew a criticism from Mr. Peterson, who claimed that the Department did not have statutory authority to adopt it as proposed.

The proposed rule provides that in order to discontinue temporary total, temporary partial, or permanent total benefits in situations not covered by subpart 3 of the rules, the employer or insurer must file and serve a Notice of Intention to Discontinue Benefits or a Petition described in subpart 2. Mr. Peterson requested that "permanent total" be stricken from the types of benefits subject to this procedure, because he believes there is inadequate statutory authority for the Commissioner to decide this discontinuance issue. The Department relies on 176.242, subd. 1. That subdivision provides that if an employer or insurer files a Notice of Intention to Discontinue weekly payments of inter alia, permanent total disability benefits, a copy must be served on the Commissioner and the employee. Subdivision 2 (amended in 1976) empowers the employee to request an administrative conference.

It is concluded that the Commissioner does have statutory authority to set forth a procedure for administrative conferences which includes conferences relating to the cessation of permanent total disability benefits, and that the proposal is both needed and reasonable.

31. Another issue relating to subpart 4 arose from the language of paragraph D, which provides that the issue of jurisdiction shall be resolved at the conference, but prior to dealing with discontinuance issues. Mr. Peterson recommended that jurisdictional issues should be resolved prior to the conference, rather than at it, to avoid wasting everyone's time. The Department did not disagree with the comment, and labeled it a "good suggestion". However, the Department said that it is already its general practice to weed out cases where there is no jurisdiction prior to conferences, but that there are occasions when a conference is necessary simply to clear up the jurisdiction issue. In addition, there are situations where issues of jurisdiction arise at the conferences which were previously unknown to the Department. The Department stated that it was certainly willing to strike any unnecessary conferences from the calendar where there is

no jurisdiction, and a telephone call would solve the problem. The Department believes that the rule, as proposed, is necessary to cover those situations where the jurisdictional facts are either (a) not clear, or (b) not even known to the Department at the time of scheduling the conference.

It is found that the rule, as proposed by the Department, has been justified as both needed and reasonable.

32. Both rule 2640, subp. 2 and rule 2650, subp. 4 contain provisions-allowing an employee to request the scheduling of an administrative conference. Both contain time limitations on the employee's request for a conference. Proposed rule 2640, subp 2, provides that the employee's request for a conference must be received by the Department no later than ten calendar days from the date that the Notice of Intention to Discontinue Benefits was received by the Division. Proposed rule 2650, subp. 4, requires that the employee request a conference no later than ten calendar days from the date that the insurer's notice to the Commissioner regarding employment status and wages was received by the Division.

Mr. Peterson objected to the requirement that the request must be received, because Minn. Stat. 176.242, subd. 2, provides:

(a) The employee has ten calendar days from the date the notice was filed with the commissioner to request that the commissioner schedule an administrative conference . . .

He pointed out that this leaves the employee responsible for fulfilling requirements over which he or she has no control, such as the efficiency of the post office. Although he did not mention it, it should also be noted that the Department's proposal would place an employee in a remote location (such as Baudette) under more time pressure than an employee in the Twin Cities. Not only does it take longer for the notice to reach the employee, but it also takes longer for the employee's request to reach the Commissioner. Mr. Peterson suggested amending these subparts to state that the request, if mailed, must be postmarked within ten calendar days. In other words, the postmark would govern.

The Department is opposed to the change because it would require the maintenance of envelopes and the deciphering of post office date stamps. These problems would be avoided by using the date that the Department received the request as the operative date.

It is found that the Department has justified the need for its proposed rule (the method of counting days must be specified), but that it has not justified its reasonableness. The employee can control (in virtually every case) when a request is post marked. An employee has virtually no control, on the other hand, over when it is delivered in St. Paul.

In order to cure this defect, the rule must be amended to measure the time from the date of mailing as evidence by the postmark.

33. Proposed rule 2690, subp. 2, deals with subrogation. It requires the parties to furnish the division with information necessary to issue an order determining subrogation rights of the employer and insurer. Mr. Peterson

suggested that the rule be amended by adding provisions requiring the Division to serve its subrogation order on the parties, and giving the parties 30 days to appeal the order to a Compensation Judge if there is a dispute over the calculations. The Department responded that it had no objection to adding the service requirement because it is already serving such determinations on the parties. It objected, however, to adding the 30 day appeal right for disputes over calculations because it would be contrary to the established appellate practice. The Department construes its subrogation determinations to be decisions of the Commissioner pursuant to Minn. Stat. 176.442, which are

(pursuant to that section) appealable to the Workers' Compensation Court of Appeals. The Department cited the recent case of Dahlbeck v. New London Concrete, file number 475-26-6124, filed on April 22, 1986, for the proposition that the appropriate jurisdiction for appeals from subrogation determinations is in the Workers' Compensation Court of Appeals. The majority in that case found no jurisdictional defect in the appeal. It is concluded that the proposed rule is reasonable without the addition proposed by Mr. Peterson. However, should the Division elect to add a provision requiring service on the parties, that would not be a substantial change and would not be unreasonable.

34. Proposed rule 2740 sets forth penalties for failure to make timely payment of medical charges. The Minnesota Nurses Association requested that a provision be added to the proposal which would protect an employee's credit rating in cases where an insurance company has failed to compensate the employee, resulting in the employee having failed to pay medical bills in a timely manner. The Association stated that an employee's credit rating can be negatively affected in such circumstances, through no fault of the employee.

The Department responded that it did not have jurisdiction to promulgate rules regarding credit ratings. The Judge agrees. Moreover, the addition of such a provision would appear to enter into a subject matter area not contemplated by the original Notice of Hearing or the Statement of Need and Reasonableness. It would appear to be a substantial change. The Department's proposed rule is found to be needed and reasonable without the Association's proposal.

35. Proposed rule 2920 deals with attorney fees. It drew a number of comments. The first issue arose out of a statement in subpart 1 (D) which provides that "attorney fees shall not be awarded piecemeal." Concern was raised that this might be interpreted to mean that no fees will be awarded in a case until every issue was cleared up, a process which could take a substantial amount of time. The Department responded that this interpretation overstates its intent, which was to avoid double payments where two claims are resolved at the same time. It proposed to amend the paragraph so it would read as follows:

D. Attorney fees shall not be awarded piecemeal where to do so would result in a double recovery. Where more than one type of benefit is resolved simultaneously, all benefits resolved shall be considered in determining fees.

The Administrative Law Judge finds that this change (and a parallel proposed for subpart I (E)) would resolve the problem raised by the Department's original language. It was ambiguous. It is found that the proposed amendment for paragraphs D and E of subpart I is not a substantial change, and that, as amended, the paragraphs have been justified as both needed and reasonable.

35. A second concern arose in connection with subpart 2 of the proposed rule, which deals with withholding. A commentator proposed mandatory

withholding of 25% of the employee's benefits in all cases of disputed benefits with attorney representation. The proposed rule states that the

insurer may withhold fees on genuinely disputed portions of claims if it has received a notice of representation. Additionally, the proposal requires the withholding of attorney's fees upon the attorney's request.

The Department responded to this suggestion by pointing out that its proposal is identical to the parallel provisions in the Joint rules of practice of the Workers' Compensation Division and the Office of Administrative Hearings, and confusion would be created if the two rules differed in this respect because any case at the Office originated in the Department.

It is found that the Department's proposed rule has been justified as needed and reasonable, and may be adopted as proposed.

36. Another comment on proposed rule 2920 related to subpart 3, which requires the filing of a statement of attorney fees in all instances where fees are claimed. It was proposed that the statement be eliminated in cases where the parties have agreed to the fee in a stipulation and also have agreed to waive the ten day objection period provided by 176.081, subd. 1(b).

The Department is opposed to eliminating the statement on a number of grounds, principally because the statute requires the statement. Minn. Stat.

176.081, subd. 1(b), as amended by Laws of Minnesota 1986, Ch. 461, 7, provides that an attorney claiming fees under that section "shall file a statement of attorneys fees". In addition, a copy must be given to the employee and insurer. There are benefits to be derived from allowing the employee to examine the statement. The Department has justified its proposed rule as both needed and reasonable.

37. Mr. Mottaz suggested eliminating proposed rule 2920 entirely because the statute (176.081) already contains an effective check-and-balance system rendering the rule unnecessary. The Administrative Law Judge finds that the rule does contain detail not set forth in the statute (such as what information is required on the statement of attorney fees) and it is needed and reasonable.

38. Mr. Fanberg recommended that the time to object to the fee should be enlarged to 20 days, and the insurer should pay all the employee's attorney

fees if the employee is awarded benefits. It is concluded that such changes are far beyond the power of the Department to enact in light of the existing statute, and if either change were to be made, it must be made by the Legislature.

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

CONCLUSIONS

1. That the Department of Labor and Industry gave proper notice of the hearing in this matter.

2. That the Department has fulfilled the procedural requirements of Minn. Stat. 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.

3. That 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)(ii). except as noted at Findings 19 and 27.

4. That the Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. 14.14, subd. 2 and 14.50 (i) except as noted at Finding 32.

5. That the amendments and additions to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. 14.15, subd. 3, and Minn. Rule 1400.1000, Subp. 1 and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusions 3 and 4 as noted at Findings 19, 27 and 32.

7. That due to Conclusions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. 14.15, subd. 3.

8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. That 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 no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts 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 rules be adopted except where specifically otherwise noted above.

Dated this 22nd day of August, 1986.

v v I
ALLAN W. KLEIN
Administrative Law Judge