STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed Permanent Rules Relating to Workers' Compensation: Managed Care; Independent Medical Examination Fees; Rules of Practice; Relative Value Medical Fee Schedule and Medical Rules of Practice; and Independent Contractors (Minnesota Rules Chapters 5218, 5219, 5220, 5221, and 5224.)

THIRD REPORT OF THE ADMINISTRATIVE LAW JUDGE RELATING TO WORKERS' COMPENSATION RULES OF PRACTICE

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on July 27, 1993, at 9:00 a.m. in Rooms C-14 and C-15 of the St. Paul Civic Center, 144 West Fourth Street, St. Paul, Minnesota. The hearing continued on July 28, 29, and 30, 1993.

This Report is part of a rulemaking proceeding held pursuant to Minn. Star. §14.131 to 14.20 (1992) to hear public comment, determine whether the Minnesota Department of Labor and Industry (hereinafter referred to as "the Department") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, assess whether the proposed rules are needed and reasonable, and determine whether or not modifications to the rules proposed by the Department after initial publication are substantially different from those originally proposed.

Six separate sets of rules were consolidated for consideration in this rulemaking proceeding. The rules relate to the following subjects:

1. Independent Contractor Rules (Minn. Rules pt. 5224.0010):

2. Independent Medical Examination Fees (Minn. Rules pt. 5219.0500);

3. Managed Care Plans for Workers' Compensation (Minn. Rules pts. 5218.0010 through 5218.0900);

4. Relative Value Medical Fee Schedule (Minn. Rules pt. 5221.4000 through 5221.4070);

5. Medical Rules of Practice (Minn. Rules pts. 5221.0100 through 5221.0700); and

6. Workers' Compensation Rules of Practice (Minn. Rules pts. 5220.0105 through 5220.2960).

Although, for convenience, the proposed rules were heard in a continuous proceeding, each set of rules is independent of and severable from the others. This Third Report of the Administrative Law Judge relates to the Workers' Compensation Rules of Practice.

Gilbert S. Buffington, Assistant Attorney General, 520 Lafayette Road, Suite 200, St. Paul, Minnesota 55155, and Penny Johnson, Assistant General Counsel, Department of Labor and Industry, 443 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Department. The Department's hearing panel for the Workers' Compensation Rules of Practice consisted of Deputy Commissioner and General Counsel Gary Bastian, Assistant General Counsel Penny Johnson, Brian Zaidman, Research Analyst with the Department's Research and Education Unit, and Dale Kinnunen, Qualified Rehabilitation Consultant with the Department's Vocational Rehabilitation Unit.

Approximately 150 persons attended the hearing and 138 signed the hearing register. Many of the attendees gave testimony about these rules. The Department submitted changes to the proposed rules at the hearing. The Administrative Law Judge received 20 agency exhibits and 5 public exhibits as evidence during the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until August 191993, twenty calendar days following the date of the hearing. Pursuant to Minn. Stat. §14.15, subd. 1 (1992), five working days were allowed for the filing of responsive comments. At the close of business on August 26, 1993, the rulemaking record closed for all purposes. The comment period set in this rulemaking proceeding is the maximum period allowed under Minnesota law.

The Administrative Law Judge received numerous written comments from interested persons during the comment period. The Department submitted written comments responding to matters discussed at the hearing and comments filed during the twenty-day period. In its written comments, the Department proposed further amendments to the rules.

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 agency of actions which will correct the defects and the agency 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 agency may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the agency does not elect to adopt the suggested actions, it must submit the propsoed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the agency 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 agency may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the agency 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 hearing 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 agency 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. The Procedural Findings set forth in paragraphs 1 to 4 of the First Report of the Administrative Law Judge are hereby incorporated herein by reference.

Small Business Considerations in Rulemaking

2. Minn. Stat. § 14.115, subd. 2 (1992), requires state agencies proposing rules that may affect small business to consider methods for reducing adverse impact on those businesses. The proposed rules will have an impact on workers' compensation insurers and self-insured employers. Because of their size, these entities do not meet the statutory definition of a "small business." Small employers are not directly affected by the proposed rules because they are represented in the workers' compensation system by insurance companies.

The proposed rules regarding attorney's fees will affect small law firms. Because law firms are service businesses regulated by government bodies for standards and costs within the meaning of Minn. Stat. § 14.115, subd. 7(3), however, the Department argues that the impact on law firms need not be considered. The Department nevertheless considered methods for reducing the impact on the rules on small law firms. The Department determined that no changes to the proposed rules for small law firms are warranted because the need for the proposed rules does not change because of the size of the law firms and because attorneys, whether in large firms or small firms, are well able to comply with the rules. Furthermore, while many commentators objected to the proposed amendments governing attorneys' fees, none suggested that the requirements should be different for small firms than for large firms. Therefore, the Administrative Law Judge finds that the Department has considered the potential impact of the proposed rules on small business as required by Minn. Stat. § 14.115 and has demonstrated that no changes to the propsoed rules for small businesses are warranted.

Fiscal Note

3. Minn. Stat. §14.11, subd. 1 (1992), requires state agencies proposing rules that will require the expenditure of public funds in excess of $100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two years immediately following adoption of the rules. The Department has determined that the proposed rules will not require the expenditure of public monies by local public bodies. No contrary evidence was presented at the hearing or during the comment period. Therefore, the Administrative Law Judge finds that the Department was not required to prepare a fiscal note with respect to the proposed rules.

Impact on Agricultural Land

4. Minn. Stat. §14.11, subd. 2 (1992), requires state agencies proposing rules that have a direct and substantial adverse impact on agricultural land in the state to comply with the requirements set forth in Minn. Stat. §§17.80-17.84. Because the proposed rules will not have a direct and substantial adverse impact on agricultural land within the meaning of Minn. Stat. §14.11, subd. 2, these statutory provisions do not apply in this rulemaking proceeding.

Outside Information Solicited

5. During the past three years, the Department has published several notices in the State Register soliciting outside information and opinions. Three comments were received addressing the Workers' Compensation Rules of Practice. Ex. F-3. The Department also held open meetings in Richfield, Minnesota, on July 16 and 17, 1992, to obtain input on changes or additions to any aspect of the workers' compensation rules. More than 25 members of the public made presentations at the open meetings. Ex. L.

Thirteen members of the Minnesota House of Representatives submitted a comment during the rulemaking process indicating, inter alia, that none of the proposed rules had been considered by the Advisory Council on Workers' Compensation. The Department responded that the Council was informed concerning the Department's proposed rules at several of its meetings during 1992 and 1993. The Department indicated that the Council elected to focus on the review of legislation and did not seek to conduct a detailed review of the proposed rules. Department's August 19, 1993, submission at 14-15. The duties of the Advisory Council include advising the Department in carrying out the purposes of Chapter 176, and the input of Council members could obviously be of assistance in establishing rule requirements. The Commissioner is not, however, required by statute to submit proposed rules to the Advisory Council. See Minn. Stat. § 175.007 (1992).

In addition, the Assistant Chief Administrative Law Judge of the Workers' Compensation Division of the Office of Administrative Hearings asserted that the Division was not consulted by the Department prior to the publication of the proposed rules. The Workers' Compensation Division of the Office of Administrative Hearings could have provided valuable assistance in formulating the proposed rules. It is unfortunate that the Department did not invite the comments of the Division during the process of drafting the rules. However, the Commissioner is not required by statute to engage in such consultation.

Analysis of the Proposed Rules

6. The Administrative Law Judge must determine, inter alia, whether the need for and reasonableness of the proposed rules has been established by the Department by an affirmative presentation of fact. The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of the adoption of each of the proposed rules. At the hearing, the Department primarily relied upon the SONAR for that rule as its affirmative presentation of need and reasonableness for each rule. Each SONAR was supplemented by the comments made by the Department at the public hearing and in its written post-hearing comments.

The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn. Ct. App. 1985); Blocher Outdoor Advertising Co. v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn. Ct. App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). An agency is entitled to make choices between possible standards as long as the choice it makes is rational. If commentators suggest approaches other than that selected by the agency, it is not the proper role of the Administrative Law Judge to determine which alterative presents the "best" approach.

This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Because some 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. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of the provisions of the Workers' Compensation Rules of Practice that are not discussed in this Report by an affirmative presentation of facts, that such provisions are specifically authorized by statute, and that there are no other problems that prevent their adoption.

Where changes are made to the rule after publication in the State Register the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed. Minn. Stat. § 14.15, subd. 4 (1992). The standards to determine if the new language is substantially different are found in Minn. Rules pt. 1400.1100. Any language proposed by the Department in the Workers' Compensation Rules of Practice which differs from the rules as published in the State Register and is not discussed in this Report is found not to constitute a substantial change.

Format of Rule Report

7. As discussed above, the proposed rules involved in this rulemaking proceeding are actually divisible into six disparate rules within five discrete rule sections. To retain some degree of control over the voluminous comments and myriad issues raised by these rules, both the Department and the Judge have treated each rule separately within this proceeding. This Third Report of the Administrative Law Judge will address only those proposed rules relating to the Workers' Compensation Rules of Practice.

Statutory Authority

8. The Department cites as statutory authority for its adoption of the proposed rules numerous provisions in Chapters 175 and 176 of the Minnesota Statutes. In particular, the Department relies on the general authority set out in Minn. Stat. §§ 176.83, subds. 1 and 7, and 175.171 (1992). Minn. Stat. § 176.83, subd. 1 (1992), provides that, "[i]n addition to any other section under this chapter giving the commissioner the authority to adopt rules, the commissioner may adopt, amend, or repeal rules to implement the provisions of this chapter. The rules include but are not limited to the rules listed in this section." Minn. Stat. § 176.83, subd. 7, empowers the Commissioner to adopt "[r]ules necessary for implementing and administering the provisions of sections . . . 176.251." Section 176.251 in turn provides that the Commissioner "shall actually supervise and require prompt and full compliance with all provisions of this chapter relating to the payment of compensation." Finally, Minn. Stat. § 175.171(2) (1992) authorizes the Department "[t]o adopt reasonable and proper rules relative to the exercise of its powers and duties, and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings. . . ." The Administrative Law Judge finds that the Department has the statutory authority to adopt workers' compensation rules of practice.

9. Although the general subject matter of proposed rules may be within the Department's statutory authority, it is also necessary to determine whether specific rule provisions conflict with enabling legislation or exceed the Department's statutory authority. A rule that is contrary to the language of the statute or to legislative intent is invalid. State v. Hopf, 323 N.W.2d 746 (Minn. 1982); Can Manufacturers Institute, Inc. v. State, 289 N.W.2d 416 (Minn. 1979). While the legislature may afford an agency discretion in implementing or administering a law, the legislature may not give the agency authority to determine what the law should be or to supply a substantive provision of the law which the agency thinks the legislature should have included in the first place. Wallace v. Commissioner of Taxation, 184 N.W.2d 588 (Minn. 1971). Many of the comments in regard to the proposed rules challenged the statutory authority of the Department to adopt specific provisions of the proposed rules, arguing either that the proposed rules were in conflict with the statute or that the proposed rules exceeded the scope of the Department's authority. The issue of whether a particular provision is consistent with the Department's statutory authority will be addressed below as the specific rule provisions are discussed.

Nature of the Proposed Rules

10. Chapter 5220 of the Minnesota Rules governs the administration of workers' compensation claims. In this rulemaking proceeding, the Department has proposed substantial revisions to the existing rules. Among other things, the proposed rules seek to incorporate more specific criteria to determine economically suitable employment, permanent total disability and removal of an employee from the job market; require additional reporting and disclosure of attorneys' fees; modify the penalty rules; and amend other procedural requirements of the existing rules. The portions of the proposed rules that received substantial critical comment will be discussed below.

Modifications to the Proposed Rules Made by the Department

11. At the time of and subsequent to the hearing on this matter, and after a review of all of the written submissions, the Department made several additional modifications to the proposed rules. These modifications are as follows:

5220.2540 PAYMENT OF TEMPORARY TOTAL, TEMPORARY PARTIAL, OR PERMANENT TOTAL COMPENSATION.

Subpart 1. **Time of payment.** Payment of compensation must be commenced within 14 days of:

C. an order by the division, compensation judge, or workers' compensation court of appeals requiring payment of benefits which is not appealed. . . . With the initial payment of temporary total or permanent total disability benefits, the insurer must notify the employee in writing of the day of the week that further payments will be made and the frequency with which payments will be made. If the initial payment is a first and final payment, then notification need not be sent.

* * *

Subpart 3. **Notice to division.** The insurer must keep the division advised of all payments of compensation and amounts withheld and amounts directly paid for attorney fees by the filing of interim status reports ~~60 days after commencement of payment or an R-1 form, and thereafter~~ each year ~~on the anniversary of the date of injury unless another time interval is specified~~ and upon specific request by the division.

* * *

Subpart 6. **Permanent total disability.** An employee shall not be found to be permanently and totally disabled within the meaning of Minnesota Statutes, section 176.101, subdivision 5, clause (2), unless the employee has not refused a suitable job under Minnesota Statutes, section 176.101, subdivision 3e, and the employee:

* * *

F. has diligently searched for employment for a period of at least two years and has received all other appropriate services under Minn. Stat. Section 176.102, and has been unable to secure anything more than sporadic employment resulting in an insubstantial income. . . .

5220.2630 DISCONTINUANCE OF COMPENSATION.

Subpart 1. **Generally.** When an insurer proposes or intends to reduce, suspend, or discontinue an employee's benefits, it shall file one of the following documents described in this part. A form need not be filed when an insurer increases or decreases an employee's periodic temporary partial benefit due to changes in the employee's earnings while employed, provided that a payment continues to be made based on the employee's actual earnings.

* * *

Subpart 4. **Notice of intention to discontinue benefits.**

* * *

B. A notice of intention to discontinue benefits must be fully completed and on the form prescribed by the commissioner, containing substantially the following:

* * *

(5) the legal reason or reasons for the proposed discontinuance or reduction, stated in language which may easily be read and understood by a person of average intelligence and education, and in sufficient detail to inform the employee of the factual basis for the discontinuance;

* * *

C. The liability of the insurer to make compensation payments continues at least until the notice of intention to discontinue benefits is received by the division and served on the employee and the employee's attorney, except that benefits may be discontinued on the date the employee returned to work and temporary partial benefits may be discontinued as of the date the employee ceased employment. ~~Where benefit amounts are difficult to determine because the employee's circumstances have changed, payments up to the date of the notice may be averaged based on benefit payments in the 26 weeks before the change. . . .~~

5220.2640 DISCONTINUANCE CONFERENCES.

Subpart 3. **Continuation of benefits.**

A. If an employee requests an administrative conference within the time set out in this part, benefits must be paid through the date of the conference unless:

* * *

(3) the employee fails to appear at the conference without good cause ~~and no continuance is allowed~~; . . . .

5220.2760 ADDITIONAL AWARD AS PENALTY.

Subpart 1. **Basis.** Penalties under Minnesota Statutes, section 176.225, subdivision 1, in an amount up to 25 percent of the total amount of the compensation award may be assessed by the division on the grounds listed in that section, including:

A. underpaying, delaying payment of, or refusing to pay within 14 days of the filing of an order by the division or a compensation judge, the workers' compensation court of appeals or the Minnesota Supreme Court unless the order is appealed within the time limits for an appeal. . . . Payments made after the 14th day must include interest pursuant to Minn. Stat. § 176.221, subd. 7 or 176.225, subd. 5 to the payee; . . . .

5220.2780. FAILURE TO PAY UNDER ORDER; PENALTY.

* * *

Subpart 2. **Amount.** . . . Penalties under Minnesota Statutes, section 176.221, subdivision 3a, shall be assessed as follows:

A. ~~17 to 30 days late, $500~~ 1 to 15 days late, $250;

B. ~~31~~ 16 to 60 days late, ~~$750~~ $500; and

C. over 60 days late, $1,000.

5220.2810 FAILURE TO RELEASE MEDICAL DATA; PENALTY.

* * *

Subpart 3. **Amount.**

A. If a collector or a possessor of medical data was not issued a warning under this part in the preceding ~~year~~ 12-month period, the division must send a warning letter before a monetary penalty is assessed.

5220.2920 ATTORNEY FEES.

~~Subpart 6. **Waiver of objection period.** The parties may not waive by stipulation for settlement or mediation agreement the right to object within ten days to the~~

~~requested attorney fee. An agreement by a party in a stipulation for settlement, mediation agreement, or similar document to waive the ten day period in which to object to an attorney's fee is not binding on the party. The party may, despite the agreement, file an objection to the requested fee in any manner provided by Minnesota Statutes, section 176.081. The objection to attorney fees does not render the party's consent to other terms of the agreement ineffective.~~

Subpart 7. **Defense attorney fees.** . . . The insurer or self-insured employer must include defense fees and costs incurred by itself and its agents and representatives, including but not limited to adjusting companies, and third-party administrators, ~~and~~. Costs include charges for contract service providers such as surveillance companies and transcription service organizations.

The Department's August 19, 1993, submission was somewhat unclear regarding its proposed modifications to subpart 3 of rule part 5220.2540. The Administrative Law Judge presumes that the Department intended to retain certain language contained in the current rule which was originally proposed to be deleted as well as add certain new language, as reflected above. In addition, the Judge assumes that the modification intended to be made to subpart 2 of proposed rule part 5220.2780 is accurately set out above.

The Department made these modifications to clarify the proposed rules. Several were made in response to hearing testimony and post-hearing comments. The Administrative Law Judge finds that the need for and reasonableness of these modifications has been demonstrated and that none of these modifications constitutes a substantial change from the rules as initially proposed. The Judge notes, however, that the Department may wish to add the phrase "or reduction" after the final reference to "discontinuance" in subpart 4B(5) of rule part 5220.2630, to be consistent with the modification set forth in the first line of that subpart. Such a modification would not constitute a substantial change.

Proposed Rule Part 5220.2510 - Scope and Purpose

12. The existing language of Minn. Rules pt. 5220.2510 provides that the Workers' Compensation Rehabilitation Services rules and the Workers' Compensation Rules of Practice govern all workers' compensation matters before the Department except matters governed by the Joint Rules of Practice of the Department's Workers' Compensation Division and the Office of Administrative Hearings. The proposed rule amends the existing language of the rule to provide that Chapter 5220 governs all workers' compensation matters before the Commissioner and the Office of Administrative Hearings and that the Joint Rules of Practice set out in Minn. Rules Chapter 1415 also govern workers' compensation matters. The Department indicated in its SONAR that the proposed rules "clarify that the Department's rulemaking authority extends beyond decisions by the Department and includes promulgation of substantive rules which bind the workers' compensation courts as well." SONAR at 4. The Department further states that the proposed rules "do not supersede the Joint Rules in any way, but are applicable in situations where the joint rule provisions do not address an issue contained in these rules, such as time periods for payment of benefits and standards for change of doctor." Id.

Several commentators, including Daniel C. Berglund, Falsani, Balmer, Berglund & Merritt; Steven B. Creason, Quinlivan, Sherwood, Spellacy & Tarvestad, P.A.; Timothy J. McCoy, Sieben, Grose, Von Holtum, McCoy & Carey, Ltd.; Steven D. Hawn, Sieben Polk LaVerdiere Jones & Hawn; and John C. Wallraff, Assistant Chief Administrative Law Judge, Office of Administrative Hearings, Workers' Compensation Division, argued that the Workers' Compensation Rules of Practice should not be applicable to proceedings before the Office of Administrative Hearings, particularly insofar as the proposed amendments were offered without consultation with the Office of Administrative Hearings and establish substantive as well as procedural requirements. The Department argued in response that it is authorized by Minn. Stat. §§ 176.183, 175.171, and 176.251 (1992), to adopt substantive rules to govern workers' compensation matters and that such rules are applicable to all workers' compensation matters, whether handled through informal Department processes or through formal hearings before the Office of Administrative Hearings. Department's Aug. 19, 1993, submission at 5-9; Department's Aug. 26, 1993, submission at 4-5.

13. The Minnesota Supreme Court has defined the circumstances under which an agency is authorized to adopt rules. Minnesota-Dakotas Retail Hardware Association v. State, 279 N.W.2d 360 (Minn. 1979), involved rules adopted by the Consumer Services Section of the Department of Commerce. The agency's enabling legislation authorized it to adopt rules "to implement" the statute which, among other provisions, involved enforcement of consumer fraud laws. The Court differentiated between procedural, legislative, and interpretative rules as follows:

> [I]nterpretative rules are those rules . . . which are promulgated to make specific the law enforced or administered by the agency. . . . Legislative rules, on the other hand, are enacted pursuant to delegated powers to make substantive law and, in contrast to interpretative rules, have the force and effect of law . . . .

Id. at 364-365. The Court concluded that the rules, which related to deceptive sales practices, were within the agency's statutory authority to promulgate interpretative rules. In response to the Minnesota-Dakotas Retail Hardware case, Minn. Stat. § 14.38, subd. 1, was amended to provide that "every rule, regardless of whether it might be known as a substantive, procedural, or interpretative rule," has the force and effect of law as long as it has been adopted in compliance with applicable requirements. See also Mammenga v. Department of Human Services, 442 N.W.2d 786 (Minn. 1989); Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238 (Minn. 1984); Stasny v. Department of Commerce, 474 N.W.2d 195 (Minn. Ct. App. 1991); Vang v. Commissioner of Public Safety, 432 N.W.2d 203 (Minn. Ct. App. 1988).

The Department has broad general authority to adopt rules to implement the provisions of the workers' compensation law. See, e.g., Minn. Stat. § 176.83, subd. 1 (1992). The Department has also been given specific authority to adopt procedural rules. See, e.g., Minn. Stat. § 176.83, subd. 10 (1992). Therefore, the Administrative Law Judge finds that the Department has the authority to adopt "substantive" as well as "procedural" rules relating to the workers' compensation system.

14. Consistent with Finding No. 39 in the Second Report of the Administrative Law Judge, however, the Judge finds that the Department has not established the need for including in rule part 5220.2510 the statement that Chapter 5520 "governs all workers' compensation matters before . . . the Office of Administrative Hearings." Pursuant to Minn. Stat. § 176.371 (1992), the decisions of compensation judges must "include a determination of all contested issues of fact and law and an award or disallowance or other order as the pleadings, evidence, this chapter and rule require." To the extent a rule is relevant in a particular case, the statute thus requires that it be applied. The Department has not shown that compensation judges have failed to apply its rules in appropriate situations or that the rule is needed for some other reason. The statement in the proposed rules is superfluous and unnecessary under these circumstances.

To correct this defect in the rules, the Department may modify this section of the proposed rules by modifying the provision to state as follows: "Chapter 5220 and the Joint Rules of Practice of the Workers' Compensation Division and the Office of Administrative Hearings contained in chapter 1415 govern workers' compensation matters." In the alternative, the Department may correct the defect by referring to "chapter 5220" and "chapter 1415" but otherwise retaining the existing rule language. [1]

Proposed Rule Part 5220.2540 - Payment of Temporary Total, Temporary Partial, or Permanent Total Compensation

Subpart 1 - Time of Payment

15. Subpart 1C of the existing rule generally provides that payment of compensation must be commenced within 14 days of an order requiring compensation which is not appealed. The Department proposes to amend this provision to specify that "[a] party's consideration of an appeal does not excuse payment beyond the 14-day time limit" and that payments made after the 14th day are subject to interest and penalties when an appeal is not filed. The Department has proposed this rule as a means of resolving frequent disagreements regarding the allowable time period for payments which arise because Minn. Stat. § 176.221, subd. 8 (1992), requires payment within fourteen days of an order, while the appeal period from a decision and order is generally thirty days. SONAR at 5-6. Peter J. Pustorino of Pustorino, Pederson, Tilton & Parrington, argued that the proposed amendment attempted to make a change in the substantive law and exceeded the Department's statutory authority. Minn. Stat. § 176.83, subd. 1 (1992), affords the Commissioner general authority to "adopt, amend, or repeal rules to implement the provisions" of Chapter 176 of the Minnesota Statutes. The Administrative Law Judge thus finds that the proposed rule is within the statutory authority of the Department.

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[1] Because it is a well-established principle that an agency is bound by its own rules, see G. Beck, L. Bakken, and T. Muck, Minnesota Administrative Procedure, § 16.3 (1987), it is unnecessary for the rules to state that chapter 5220 governs all workers' compensation matters before the Commissioner. However, this provision is contained in the existing rules and thus may be retained if the Department wishes.

16. Subpart 1C of the proposed rule also provides that the insurer must notify the employee in writing of the day of the week that payments will be made and the frequency with which payments will be made. Andrea J. Linner, Chief Corporate Counsel for State Fund Mutual Insurance Company, suggested that language be added to prove that notification need not be sent if the initial payment is a first and final payment. The Department agrees that no notice is necessary if ongoing payments are not anticipated and has incorporated the commentator's suggestion into the Department's post-hearing amendments to the proposed rules. Department's August 19, 1993, submission at 9; see Finding 11 above. The Administrative Law Judge finds that the proposed rule, as modified, is needed and reasonable to avoid disputes between employees and insurers regarding payment dates. As noted in Finding 11 above, the modification does not result in a substantial change.

Subpart 2a - Suitable Employment

17. Subpart 2a of the proposed rule provides that:

> If a rehabilitation plan has been completed, the employee is ineligible for rehabilitation services, or the employee has not requested rehabilitation services, a job which pays at least 50 percent of the gross weekly wage on the date of injury is economically suitable under Minnesota Statutes, section 176.101, subdivision 3e, if the job represents the employee's current earning capacity and that earning capacity cannot reasonably be expected to significantly change.

The Department stated that this proposed rule is intended to clarify Minn. Stat. § 176.101, subd. 3e, "by more specifically providing a method for determining whether employment offered to the employee is economically suitable." SONAR at 6-7. The Department asserts that, under the proposed rules, fifty percent of the employee's former earnings will be set as the floor for consideration as a suitable job:

> Fifty percent is a floor only and does not imply that any employment paying at least 50 percent of former wages is suitable. If the employee is capable of earning more than 50 percent, the employer must restore the employee's earning capacity as closely as possible . . . . A balancing of interests is accomplished by the proposed rule. It provides clearer guidance to the parties in an area of the law in which the courts have fashioned broad standards, but confined their holdings to specific factual situations.

SONAR at 7.

The "suitable job" issue is an important determinant of benefits in the current "two-tier" benefit system enacted as part of the 1983 amendments to the workers' compensation statutes. Ex. O-1. Minn. Stat. § 176.101, subd. 3e(a) (1992), provides that the employee's temporary total compensation shall cease ninety days after an employee has reached maximum medical improvement

and the required medical report has been served on the employee, or ninety days after the end of an approved retraining program, whichever is later. Minn. Stat. § 176.101, subd. 3e(b) provides:

> If at any time prior to the end of the 90-day period . . . the employee retires or the employer furnishes work to the employee that is consistent with an approved plan of rehabilitation . . . or, if no plan has been approved, that the employee can do in the employee's physical condition and that job produces an economic status as close as possible to that the employee would have enjoyed without the disability . . . temporary total compensation shall cease and the employee shall, if appropriate, receive impairment compensation. . . . This impairment compensation is in lieu of economic recovery compensation. . . .

(Emphasis supplied.) Thus, whether an employee receives impairment compensation or economic recovery compensation depends upon whether or not the employee's job is "suitable." This determination makes an economic difference to employees since economic recovery compensation is higher than impairment compensation. Cassem v. Crenlo, Inc., 470 N.W.2d 102 (Minn. 1991).

The Department acknowledges that the workers' compensation courts have addressed the issue of "suitable employment" on a case-by-case basis and that the question not yet addressed by the Minnesota Supreme Court is whether or not the post-injury job need only provide an economic status "as close as possible" to that of the pre-injury job or whether the post-injury job must in fact produce an income "close" to pre-injury income. SONAR at 6. In its SONAR, the Department contends that the proposed rule is supported by case law but cites no authority for this assertion. SONAR at 7. At the hearing, the Department asserted that the appellate court has "generally been unwilling to label employment as suitable employment if it pays less than half," but acknowledged that it has occasionally happened. T. 63.

Several commentators, including Daniel Berglund, Peter Pustorino, Steven Creason, Timothy McCoy, Steven Hawn, Christopher Roe (Associate Counsel for the American Insurance Association), John G. Engberg (Peterson, Engberg & Peterson), David R. Vail (Sieben, Grose, Von Holtum, McCoy & Carey, Ltd.) and thirteen members of the Labor-Management Committee of the House of Representatives (Patrick Beard, Irv Anderson, Jim Farrell, Alice Johnson, Walter Perlt, Tom Rukavina, Kathleen Sekhom, David Battaglia, Thomas Huntley, Mary Murphy, James Rice, John Sarna, and Stephen Wenzel), disagreed with the Department and objected to the proposed rule, alleging that it exceeds the Department's statutory authority, conflicts with the underlying statute and case law interpreting that statute, and is not needed or reasonable.

In its post hearing comments, the Department cited several cases in which jobs paying less than fifty percent of the pre-injury job were approved as suitable by the Workers' Compensation Court of Appeals, as well as others in which jobs paying forty and fifty percent (and less) of the pre-injury job were found unsuitable. Department's Aug. 19, 1993, submission at 13. The Department acknowledges that there are two contradictory lines of cases concerning the applicable standard to determine economic suitability, one of which focuses on the economic disparity between the employee's income

post-injury and pre-injury, and the second of which focuses on the specific facts of the case to ascertain whether the employee's post-injury employment produces an economic status "as close as possible" to pre-injury income. Department's Aug. 19, 1993, submission at 13-14; Department's Aug. 26, 1993, submission at 12. The Department argues that, while the proposed rule sets an income "floor," the rule also requires a determination that the post-injury job represents the employee's earning capacity and that earning capacity cannot reasonably be expected to significantly change. Id. The Department contends that its proposed rule "reconciles" conflicting case law on the "suitable job" issue to produce greater certainty in workers' compensation cases. Id.

18. In Jerde v. Adolfson and Peterson, 484 N.W.2d 793 (Minn. 1992), the Minnesota Supreme Court addressed the issue of whether an employee was entitled to receive economic recovery benefits because his post-injury employment did not meet the requirements of Minn. Stat. § 176.101, subd. 3e. The employee in Jerde had a pre-injury job that paid $675 per week plus fringe benefits. The post-injury job, which was the best economically the employee could do at that time in his partially disabled condition, paid $170 per week and provided neither fringe benefits nor opportunity for future income. There was no evidence as to past or future rehabilitation efforts. The compensation judge found that the employee's post-injury employment did not satisfy the requirements of subdivision 3e and awarded economic recovery compensation. On appeal, the Workers' Compensation Court of Appeals reversed. The Supreme Court found that the compensation judge had "quite properly considered all of those factors typically relevant in rehabilitation matters, such as pre-injury economic status, age, education, skills, disability, etc." and determined that "there was sufficient evidence to support the determination that employee was entitled to receive economic recovery compensation because his post-injury employment did not meet the requirements of subdivision 3e of section 176.101." Id. at 795. The Court thus reversed the Workers' Compensation Court of Appeals and reinstated the Compensation Judge's award of economic recovery compensation.

Cases decided subsequent to Jerde emphasize that wage disparity is just one factor to be considered in deciding whether a job is economically suitable under subdivision 3e. For example, in Rogholt v. Knight Electric, No. 472-56-9556 (W.C.C.A. April 2, 1993), the Workers' Compensation Court of Appeals considered a situation in which the employee had a pre-injury income of $760 per week plus fringe benefits and a post-injury income of $5 per hour with no fringe benefits. The Court of Appeals reversed the compensation judge's holding that the employee was entitled to receive his permanent partial disability benefits as economic recovery compensation and not as impairment compensation. The court stated:

> The test under section 176.101, subd. 3(e), or section 176.102, subd. 1, is not the relative disparity in economic status or whether the employee's post injury status is "close" or "not close" to his pre injury non-disabled economic status. The statutory test is whether the post-injury economic status is "as close as possible" to his non-disabled economic status.

Id. The court went on to state that, by focusing solely on the degree of wage disparity, the compensation judge did not undertake the deliberation process endorsed in Jerde, under which "the court should evaluate the job by

using the 'factors typically relevant in rehabilitation matters.'" Jerde, 484 N.W.2d at 794, citing Minn. Rules pt. 5220.0100, subp. 13. The court indicated that the factors to be considered in deciding the "suitable job" issue are:

1) the employee's former employment,
2) the employee's qualifications, including but not limited to, the employee's
   a. age,
   b. education,
   c. previous work history,
   d. interests, and
   e. skills.

The Rogholt court also noted that the Legislature may wish to address the wage disparity issue:

> While the "wage disparity" method is easily quantified, it does not answer the "close as possible" issue. It does, however, raise the issue of whether the employee's post-injury wage is "close" or "not close" to the pre-injury wage. The practical problem with the "close" or "not close" method is that it is not subject to consistent application and is not predictable. These issues, however, are not legal issues raised by the statute, but are ones the legislature may wish to wrestle with in drafting a statute. They are not ones related to the interpretation of the language currently in the statute.

(Emphasis supplied.)

The approach taken in Rogholt is consistent with several other recent decisions of the Workers' Compensation Court of Appeals. See, e.g., Schmitz v. Transport Leasing, No. 475-56-7255 (W.C.C.A. Dec. 18, 1992) (under Jerde and prior decisions of the Workers' Compensation Court of Appeals, "wage disparity by itself is not dispositive in determining the economic suitability of a job"); Wageman v. Apple Valley Health Care Center, 47 W.C.D. 340 (W.C.C.A. 1992) (suitable job issue is a question of fact to be determined based on consideration of such factors as "the employee's pre-injury economic status, age, education, skills, disability, and the rehabilitation assistance offered"); Klayman v. Metropolitan Transit Commission, No. 472-46-3030 (W.C.C.A. March 5, 1991) (many factors may be relevant in determining whether a post-injury job produces an "economic status as close as possible to that the employee would have enjoyed without the disability," including wage disparity; comparison of fringe benefits both pre- and post-injury; the employee's opportunity for future income; the status of the current job market; and the employee's disability, age, qualifications, education, interests, skills, and general employment history); Sarber v. Russnick Contractors, No. 469-88-0124 (W.C.C.A. April 24, 1991) (question of whether a job meets the economic status requirement of subd. 3e(b) is one of fact, citing Klayman; affirmed compensation judge's finding that post-injury job was not suitable, noting that, while compensation judge dwelled on disparity in wages between pre- and post-injury jobs, proceedings contained other evidence regarding the circumstances and progress of the employee's rehabilitation and job search that also provided support for the judge's findings on the suitability issue); Kantorowicz v. East Side Beverage, No. 470-32-7154

(W.C.C.A. April 1, 1991) (numerous factors should be considered when determining whether a job meets the suitability standard, citing Klayman); see also Root v. Special School District 1, No. 500-40-1303 (W.C.C.A. Feb. 8, 1993) (the "[s]uitability of a post-injury job is a fact question, and as with medical opinions, the compensation judge's choice of vocational opinions is given great deference").

Several past decisions issued by the Workers' Compensation Court of Appeals suggested that it was appropriate to rely solely or primarily upon relative wage disparity in deciding a suitable job issue. See, e.g., Holden v. Fluorocarbon Co., 44 W.C.D. 168 (W.C.C.A. 1990) (job paying one-third of prior earnings not suitable); Hoffman v. Eastside Beverage Co., 43 W.C.D. 497 (W.C.C.A. 1990) (job paying $160 per week not suitable where pre-injury wages were $845 per week); Wark v. Franchise Services, Inc., 43 W.C.D. 126 (W.C.C.A. 1990) (job paying $260 per week not suitable where pre-injury earnings were $754 per week); Machacek v. George A. Hormel & Co., 41 W.C.D. (W.C.C.A. 1988) (job paying about half of pre-injury job not suitable). As noted in the Rogholt decision, however, these rulings predated the Supreme Court's decision in Jerde and the Court of Appeals' decision in Wageman v. Apple Valley Health Center, 47 W.C.D. 340 (W.C.C.A. 1992), and thus should not be followed. Rogholt at n.2.

19. Based upon an analysis of the language of Minn. Stat. §176.101, subd. 3e (1992), and cases interpreting the statute, the Administrative Law Judge finds that subpart 2a of the proposed rules is in conflict with the language of the statute. Since the enactment of the 1983 amendments to the workers' compensation laws, courts have determined the "suitable job" issue under Minn. Stat. §176.101, subd. 3e as a factual matter on a case-by-case basis. The more recent decisions cited by the Department and commentators, particularly those decided subsequent to Jerde, are not based primarily on wage disparity but rather upon a consideration of many factors. By focusing solely upon wage disparity, the proposed rule diverges from the analysis approved in recent cases. Although the wage disparity approach taken in the proposed rule would have the benefit of being easily quantified, it does not provide for consideration of all of the factors necessary to determine whether the job provides an economic status "as close as possible to that the employee would have enjoyed without the disability." The Legislature presumably is aware of the current case-by-case, multiple-factor determination of the "suitable job" issue and has not chosen to adopt a more objective standard for defining when a job is to be deemed suitable. While the Department has the authority to interpret the law administered or enforced by it, the Department is not authorized to "determine what the law shall be or to supply a substantive provision of the law which [it] thinks the legislature should have included in the first place." Wallace v. Commissioner of Taxation, 184 N.W.2d 588, 594 (Minn. 1971). Subpart 2a is thus found to exceed the statutory authority of the Department. To correct this defect, subpart 2a must be deleted from the proposed rules. [2] It will also be necessary to delete the reference to subpart 2a from subpart 6F of the proposed rules.

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[2] Those opposing the proposed rule pointed out that the Legislature failed to enact a bill that was introduced during the 1993 legislative session which involved the "suitable job" issue. H.F. 53 would have defined "suitable job" as a job that the injured employee is reasonably able to perform in the employee's physical condition and that restores the employee to employment paying no less than 70 percent of the employee's wage at the time of the work-related injury. The bill would have [footnote 2 continued on next page]

Subpart 5 - Removal From Labor Market

20. Subpart 5 of the proposed rule provides that "[a]n employee who voluntarily removes himself or herself from the labor market is no longer entitled to temporary total, temporary partial, or permanent total disability benefits." Under the provisions of the rule, a removal from the labor market is deemed to have occurred "when the employee is released to return to work by a health care provider and the employee retires or the employee's opportunities for gainful employment or suitable employment are significantly diminished due to the employee's move to another labor market." The Department states that the proposed rule summarizes current case law on this issue. SONAR at 7.

Daniel Berglund, John Engberg, Steven Hawn, Peter Pustorino, David Vail, and Dean Margolis of David G. Moeller & Associates asserted that this rule provision exceeds the scope of the governing statute. Mr. Hawn also argued that the proposed rule is inconsistent with case law precedent under which withdrawal from the labor market may preclude a finding of permanent total disability but does not automatically do so. In its post-hearing response, the Department agreed that not every employee removal from the labor market would preclude eligibility for permanent total disability benefits and emphasized that the proposed rule only precludes eligibility if the removal is voluntary. Department's Aug. 26, 1993, submission at 14.

In Paine v. Beek's Pizza, 323 N.W.2d 812 (Minn. 1982), the Minnesota Supreme Court addressed the issue of an employee's voluntary withdrawal from the labor market. The Court in that case denied benefits to an employee who moved from the Twin Cities to Roseau County based upon its determination that the employee effectively and voluntarily withdrew from the labor market by voluntarily leaving the metropolitan area for a sparsely populated area where substantially no employment opportunities for him existed. Compare Kurrell v. National Con Rod, Inc., 322 N.W.2d 199 (Minn. 1982) (Court upheld determination of Workers' Compensation Court of Appeals that employee's "relocation was not part of a plan to retire from the labor market" because she accepted a job at her new location and diligently searched for other employment when the first job failed).

21. The Administrative Law Judge finds that the proposed rule is consistent with applicable case law and within the scope of the Department's statutory authority. The Department has demonstrated that the rule is needed and reasonable to provide guidance regarding the applicable standards.

Subpart 6 - Permanent Total Disability

22. Minn. Stat. § 176.101, subd. 5 provides as follows:

> (a) For purposes of subdivision 4, permanent total disability means only:

[footnote 2 continued from prior page] precluded consideration of other factors in determining whether a job is suitable. Because there is no evidence regarding what, if any, serious consideration was given to the bill by the Legislature and because the standard proposed in the bill varies in any event from that contained in the proposed rule, the Administrative Law Judge has not given this factor any weight in determining the statutory authority issue.

(1) the total and permanent loss of the sight of both eyes, the loss of both arms at the shoulder, the loss of both legs so close to the hips that no effective artificial members can be used, complete and permanent paralysis, total and permanent loss of mental faculties; or

(2) any other injury which totally and permanently incapacitates the employee from working at an occupation which brings the employee an income.

(b) For purposes of paragraph (a), clause (2), "totally and permanently incapacitated" means that the employee's physical disability, in combination with the employee's age, education, training, and experience, causes the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income.

Although the statutory definition of "totally and permanently incapacitated" was added by the Legislature in 1992 (Minn. Laws 1992, Ch. 510, Art. 1, §5), the Department notes that courts have used this analysis for years. See, e.g., Schulte v. C.H. Peterson Construction Co., 153 N.W.2d 130 (Minn. 1967). Thus, the legislative amendment simply codified an existing case law definition.

The Department asserts that subpart 6 of the proposed rules clarifies the statutory definition of permanent total disability set out in Minn. Stat. § 176.101, subd. 5(b). Subpart 6 of the proposed rule provides as follows:

An employee shall not be found to be permanently and totally disabled within the meaning of Minnesota Statutes, section 176.101, subdivision 5, clause (2), unless the employee has not refused a suitable job under Minnesota Statutes, section 176.101subdivision 3e, and the employee:

A. has a permanent partial disability rating of at least 20 percent of the whole body;

B. has a permanent partial disability rating of at least 17 percent of the whole body, and:

(1) is over 45 years old;

(2) has not earned a high school diploma or its equivalent; or

(3) has been employed during the three years immediately preceding the disability only in jobs classified by the Dictionary of Occupational Titles, fourth edition, 1991, at specific vocational preparation level three or below;

C. has a permanent partial disability rating of at least 14 percent of the whole body and has two of the following three characteristics:

(1) is over 45 years old;

(2) has not earned a high school diploma or its equivalent;

(3) has been employed during the three years immediately preceding the disability only in jobs classified . . . at specific vocational preparation level three or below;

D. has a permanent partial disability rating of at least ten percent of the whole body, and:

(1) is over 45 years old;

(2) has not earned a high school diploma or its equivalent; and

(3) has been employed during the three years immediately preceding the disability only in jobs classified . . . at specific vocational preparation level three or below;

E. has been evaluated by the vocational rehabilitation unit of the division and it has been found by that unit that the employee would be unlikely to be able to secure anything more than sporadic employment resulting in an insubstantial income even after the employee had received all appropriate services under Minnesota Statutes, section 176.102; or

F. has diligently searched for employment for a period of at least two years and has received all other appropriate services under Minn. Stat. § 176.102 and has been unable to secure anything more than sporadic employment resulting in an insubstantial income . . . .

The underlined text was proposed by the Department after the hearing. See Department's Aug. 19, 1993, submission at 20; Finding 11 above.

Many commentators, including Daniel Berglund, Steven Creason, John Engberg, Steven Hawn, Timothy McCoy, Peter Pustorino, David Vail, the American Insurance Association, Russell G. Sundquist of Russell G. Sundquist Ltd., and Reps. Beard, Anderson, Farrell, Johnson, Perlt, Rukavina, Sekhon, Battaglia, Huntley, Murphy, Rice, Sarna, and Wenzel, objected to the proposed rule, arguing that it conflicts with the workers' compensation statute and existing case law. In particular, opponents of the rule contended that the statutory definition does not specify any numerical level of permanent partial disability an employee must suffer before the employee may be eligible for permanent total disability and that, therefore, paragraphs A, B, C, and D are in conflict with the statute. Likewise, these commentators asserted that

nothing in the statute authorizes an evaluation of an employee by the vocational rehabilitation unit as a condition of eligibility, as contemplated by paragraph E of the proposed rule. The commentators also argued that paragraph F of the proposed rule is contrary to case law since a job search is not a prerequisite if the job search would be futile. Several individuals objecting to the rule disputed the reasonableness of the proposed numerical categories, arguing that they are arbitrary. The American Insurance Association stated that the proposed rule would increase the frequency of permanent total disability cases.

23. The Administrative Law Judge finds that the proposed rule does not exceed the statutory authority of the Department. The underlying statute, like the case law it codified, indicates that an injury has "totally and permanently incapacitated" an employee from working when the employee's physical disability, in combination with other factors (age, education, training, and experience), causes the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. Paragraphs A, B, C, and D of the proposed rule interpret the general terms of the underlying statute by providing specific impairment percentages which, in combination with specific age, education, and skill levels, correlate with the inability to secure and maintain suitable employment. The specific impairment percentages as well as the specific age, education, and skill levels are based upon information in the Digest of Data on Persons with Disabilities, Science Management Corporation (for the U.S. Department of Education, National Institute on Disability and Rehabilitation Research), 1992, as well as the Department's experience and expertise. SONAR at 8-12.

The Department acknowledges that the specific thresholds established by paragraphs A through D of the proposed rule may fail to include all employees who, because of their disability, are unable to secure suitable employment. Accordingly, paragraph E of the proposed rule provides for an evaluation of the employee by the Department to determine whether the employee is likely to obtain suitable employment after rehabilitation and paragraph F allows a finding of permanent total disability if the employee is unable to secure suitable employment following a diligent two-year job search. The Department agrees that, under paragraph F, an employee is not required to conduct a job search if one would be futile. In such cases, the Department notes that, if the employee does not otherwise qualify under paragraphs A through D, an evaluation could be performed under paragraph E.

The Administrative Law Judge thus finds that subpart 6 of the proposed rules is within the broad general authority afforded the Department under Minn. Stat. §§ 176.83 and 176.251 (1992), to administer and enforce the provisions of the workers' compensation law and supervise the payment of compensation. The Department has demonstrated that subpart 6 is a needed and reasonable interpretation of the statute. There is no evidence that the approach taken by the proposed rules conflicts with current case law. The modifications proposed by the Department would not result in a rule that is substantially different from that originally proposed.

Subpart 7 - Apprentices, Temporary Partial Disability Benefits

24. Subpart 7 of the proposed rule provides that "[a]n apprentice, upon return to the same apprenticeship program in the same position or a similar position to that held on the date of injury, has not suffered a loss of earning capacity where the wage upon return to the apprenticeship program is

the same or greater than the wage on the date of injury." The rule also provides that the employee is not eligible for temporary partial disability benefits if there is no loss in earning capacity. The Department states that the proposed rule "codifies" existing case law regarding minors to make it applicable to apprentices as well. SONAR at 12.

Steven Creason, John Engberg, Peter Pustorino, and Scott Soderberg (Sieben, Grose, Von Holtum, McCoy & Carey) argued that the proposed rule conflicts with the underlying statutory provisions and redefines benefits for apprentices without statutory authority. Mr. Soderberg asserted that, under applicable case law, earning capacity cannot be equated with the actual pre-injury wage.

Subpart 7 of the proposed rule relates to Minn. Stat. §176.101, subd. 6 (1992), which provides as follows:

> (a) If any employee entitled to the benefits of this chapter is an apprentice of any age and sustains a personal injury arising out of and in the course of employment resulting in permanent total or a compensable permanent partial disability, for the purpose of computing the compensation to which the employee is entitled for the injury, the compensation rate for temporary total, temporary partial, a permanent total disability or economic recovery compensation shall be the maximum rate for temporary total disability under subdivision 1.
>
> (b) If any employee entitled to the benefits of this chapter is a minor and sustains a personal injury arising out of and in the course of employment resulting in permanent total disability, for the purpose of computing the compensation for which the employee is entitled for the injury, the compensation rate for a permanent total disability shall be the maximum rate for temporary total disability under subdivision 1.

The provisions of subdivision 6(a) regarding apprentices were the same as those pertaining to minors until the statute was amended in 1992 to provide that this benefit calculation for minors would apply only in cases of permanent total disability. Minn. Laws 1992, Ch. 510, Art. 1, § 6.

Prior to the enactment of the 1992 amendments, the Minnesota Supreme Court in Woodwick v. Shamp's Meat Market, 435 N.W.2d 816 (Minn. 1989), interpreted the provisions of Minn. Stat. § 176.101, subd. 6, as they related to minors. Woodwick involved an injured minor who sought benefits under the provisions of the statute. The Court held that the purpose of subdivision 6 was to compensate for lost earning capacity by ensuring that benefits received while an adult are not determined by a wage rate earned as a minor. Id. at 818. The Court found that a comparison of pre-injury and post-injury wages is insufficient and that, additionally, it must be determined whether the employee has suffered any loss of earning capacity.

Mr. Soderberg asserted that the proposed rule incorrectly equates earning capacity with actual wages earned at the time of the injury. The Department in its post-hearing comments agreed that it would be incorrect to measure the

earning capacity solely on the basis of the wages earned at the time of the injury. However, the Department points out that the proposed rule requires both a comparable wage and the return of the employee to the same apprenticeship program in the same or similar position. Thus, the Department argues that the rule is consistent with Woodwick and simply establishes a circumstance in which an employee cannot be found to have suffered a loss in earning capacity. Department's Aug. 26, 1993, submission at 15-16.

25. The Administrative Law Judge finds that the proposed rule is within the statutory authority of the Department and is not in conflict with the statute. While the Administrative Law Judge does not agree that the rule "codifies" existing case law, the rule does not conflict with the Woodwick holding. The rule reasonably interprets Minn. Stat. § 176.101, subd. 6 (a) (1992), by providing that an apprentice has not suffered a loss in earning capacity under the defined circumstances.

Proposed Rule Part 5220.2550 - Payment of Permanent Partial Disability, Including Impairment Compensation and Economic Recovery Compensation

Subpart 2a - Inability to Return to Former Employment

26. Subpart 2a of the proposed rule provides that an employee is not "unable to return to former employment" within the meaning of Minn. Stat. § 176.101, subd. 3t(b) "when the employee returns to suitable employment with the employer." Minn. Stat. § 176.101, subd. 3t(b) (1992), provides as follows:

> Where an employee has suffered a personal injury for which temporary total compensation is payable but which produces no permanent partial disability and the employee is unable to return to former employment for medical reasons attributable to the injury, the employee shall receive 26 weeks of economic recovery compensation. . . .

The Department states that the purpose of the statute is to provide permanent partial disability benefits for the employee who is unable to return to former employment because of the injury, but who is otherwise unable to collect permanent partial disability benefits because the disability does not fit any of the categories of permanent partial disabilities in the Department's rules. The Department further asserts that "[t]he purpose of the statute is best fulfilled by limiting the payment of economic recovery compensation benefits . . . where there is no ratable permanent partial disability to situations involving loss of suitable employment with the original [date of injury] employer." SONAR at 13. In the Department's view, the proposed rule will encourage employers to offer alternative employment to injured workers and will correct inequities in the current system. SONAR at 13-14. John Engberg, Timothy McCoy, Peter Pustorino, and Scott Soderberg contend that the proposed rule is in conflict with the provisions of the statute and case law and is in excess of the Department's statutory authority.

27. Prior to 1984, Minn. Stat. § 176.101, subd. 3t(b) provided:

> An employee who has suffered a personal injury for which temporary total compensation is payable but which produces no permanent partial disability shall receive twenty-six weeks of economic recovery compensation if no job is offered within the time limit specified in and meeting the criteria of subdivision 3e.

Minn. Stat. § 176.101, subd. 3t(b) (1983 Supp.). In 1984, the statute was amended to its present form. Minn. Laws 1984, Ch. 432, Art. 2, § 12. Thus, the Legislature eliminated the 3e "suitable job" condition from the statute and included instead the condition that the employee be "unable to return to former employment."

Minn. Stat. § 176.101, subd. 3t(b) was interpreted by the Workers' Compensation Court of Appeals in Hansen v. George A. Hormel & Co., No. 475-46-2927 (W.C.C.A. 1988). The court considered the effect of the 1984 statutory amendment and found that the amendment deleting the "no suitable job criterion" and providing for 26 weeks of economic recovery compensation in cases where the employee is "unable to return to former employment" reflected "the legislature's intent that the primary consideration not be whether the employee has been returned to an otherwise 3e suitable job but whether the employee has been able to return to the actual type of work being performed at the time of injury." The court also rejected the employer's argument that the statute should be construed as limited in applicability to employees who do not return to work with their former employer.

28. The Department argues that the proposed rule, because it requires a suitable job with the same employer, is different from the 1983 version of the same statute and is consistent with the Hansen analysis. Department's Aug. 26, 1993, submission at 16-17. The Administrative Law Judge does not agree. In enacting the amendment to the statute, the Legislature clearly evidenced its intent to eliminate the "suitable job" requirement. The Hansen decision rejects the argument that the statute should be interpreted to mean "unable to return to work with the former employer." Therefore, the Administrative Law Judge finds that proposed rule part 5220.2550, subp. 2a conflicts with the statute and relevant case law and thus exceeds the statutory authority of the Department. To correct this defect, subpart 2a must be deleted from the proposed rules.

Proposed Rule Part 5220.2555 - Retraining Compensation

29. Proposed rule part 5220.2555 governs retraining compensation. The Department states that the provisions of the proposed rule are, in substance, the same as the provisions of an existing rule contained in the Department's Rehabilitation Rules and that the rule has simply been moved to the Workers' Compensation Rules of Practice from the Rehabilitation Rules because it relates to the payment of benefits. SONAR at 14. John Engberg and Timothy McCoy asserted that the proposed rule made substantive changes in law not authorized by statute. The commentators are mistaken. The proposed rule is identical to Minn. Rules pt. 5220.0750, subp. 4 (1991), which has been shown to be needed and reasonable in a previous rulemaking proceeding.

Proposed Rule Part 5220.2570 - Denials of Liability

30. The proposed rules amend subpart 2 of existing rule part 5220.2570 to provide that a denial of primary liability under Minn. Stat. § 176.221, subd. 1, must contain not only a specific reason for the denial but also a clear statement of the facts forming the basis for the denial. A similar requirement is set out in subparts 4E and 5E regarding letter denials. Subpart 10 of the proposed rule establishes penalties for frivolous denials and subpart 11 sets forth penalties for nonspecific denials. Steven Creason

and Peter Pustorino objected that subparts 10 and 11 are beyond the Department's statutory authority. State Fund Mutual Insurance Company objected to subpart 11 of the proposed rule because it imposes a penalty for a nonspecific denial without regard to the substantive validity of the denial of benefits.

Minn. Stat. § 176.221, subd. 3a (1992), provides that the Department may assess a penalty of up to $1,000 for each instance in which an employer or insurer does not pay benefits or file a notice of denial of liability within the time limits prescribed by the statute. Minn. Stat. § 176.225, subd. 1 (1992), provides that up to 25 percent of the total amount of compensation ordered may be awarded as a penalty where an employer or insurer has, among other things, interposed a defense which is frivolous. Minn. Stat. § 176.84, subd. 2 (1992), provides that a penalty of $300 may be imposed for denials of liability which are not "sufficiently specific to convey clearly, without further inquiry, the basis upon which the party issuing the notice or statement is acting." The Administrative Law Judge finds that the Department has statutory authority to adopt proposed rule part 5220.2570, subps. 10 and 11, by virtue of Minn. Stat. § 176.83, subd. 1 (1992). The Administrative Law Judge also finds that subpart 11 is needed and reasonable as proposed since the Legislature, through the enactment of Minn. Stat. § 176.84, subd. 2, made clear its intention to penalize employers and insurers for failing to provide specifically required information, regardless of whether the underlying denial is valid.

Proposed Rule Part 5220.2605 - Disposition of Coverage Issues

31. Proposed rule part 5220.2605 provides an alternate method for resolving the issue of whether an injured worker is an employee or an independent contractor. The proposed rule would allow a party to move to bifurcate the issue and have it resolved upon affidavit or oral hearing. The Department states that the proposed rule will allow the parties to obtain an expedited decision on a dispositive issue. SONAR at 17-18. The proposed rule was supported by Kent Eggleston of Schanno Transportation, Inc., Donavan J. Olson of Fortune Transportation, Edmund D. Rydeen of Minn-Dak Transport, Inc., and the Minnesota Trucking Association on the grounds that it will permit this issue to be resolved in a more expeditious and cost-effective manner. Judge Wallraff contended that the proposed rule constitutes a substantive change in the law that it outside the statutory authority of the Department. Steven Creason commented that the proposed rule would encourage bifurcated hearings.

The proposed rule does not make any change in the substantive law, but merely provides an expedited procedure for resolving this substantive issue. The proposed rule may very well encourage bifurcated hearings, but it is reasonable to permit an expedited resolution of the injured worker's status before other issues are litigated since the resolution of this threshold issue may render any further proceedings unnecessary. The Administrative Law Judge finds that the proposed rule is within the statutory authority of the Department and is a needed and reasonable procedure for resolving the issue of an injured worker's status.

Proposed Rule Part 5220.2640 - Discontinuance Conferences

32. Proposed rule part 5220.2640 governs administrative conferences to determine whether reasonable grounds exist for a discontinuance of weekly benefits. Subpart 3 of the proposed rule provides that, if an employee

requests an administrative conference, benefits must be paid through the date of the conference except in certain specified circumstances. The Department asserts that the circumstances identified in the proposed rule involve situations in which the basis for discontinuance is fairly obvious and that the rule does not include situations which are usually more vigorously disputed. SONAR at 29.

In a letter submitted on behalf of thirteen members of the Minnesota House of Representatives, Rep. Patrick Beard argued that the proposed rule imposes an unnecessary burden on injured workers and should not be adopted. Daniel Berglund stated that the proposed rule reflects a reasonable approach but urged that the rule be amended to ensure that the due process rights of injured workers are protected. In its post-hearing comments, the Department asserted that the statute and case law already permit the discontinuance of benefits under the circumstances set forth in the proposed rule. Department's Aug. 19, 1993, submission at 17. The Department did not make any modifications to the proposed rule in response to these comments.

Pursuant to Minn. Stat. § 176.239, subd. 3 (1992), when an administrative conference is conducted, compensation is required to be paid through the date of the administrative conference unless the employee has returned to work, the employee fails to appear at the scheduled administrative conference, or the Commissioner so orders "due to unusual circumstances or pursuant to the rules of the division." The Administrative Law Judge finds that subpart 3 of the proposed rule is within the Department's statutory authority and is needed and reasonable to delineate circumstances under which benefits may be terminated prior to the date of the administrative conference. The rights of injured workers are adequately protected by other provisions of the proposed rules which, among other things, require the insurer to file appropriate notices prior to any discontinuance of benefits and impose penalties for improper discontinuance of benefits. See proposed rule parts 5220.2630 and 5220.2720.

Proposed Rule Parts 5220.2720; 5220.2740; 5220.2750; 5220.2760; 5220.2770; 5220.2780; 5220.2790; 5220.2810; 5220.2820; 5220.2830; 5220.2840; 5220.2850; 5220.2860; 5220.2870 - Penalty Provisions

33. Proposed rule parts 5220.2720 through 5220.2870 govern penalties which may be imposed for various violations of statute or rule. Ronald M. Holbach, Vice President, Berkley Administrators, objected that many of the penalty provisions in the proposed rules (as well as in the existing rules) were keyed to the number of violations with a given time frame without regard to the volume of business being conducted. The Department responded that, although a large insurer may, by virtue of the volume of business, incur a greater number of violations, such an insurer should also have the expertise to avoid such violations. The Department noted that, while it is willing to consider other options, a rule which ties penalties to the volume of business would be difficult to administer. Department's Aug. 26, 1993, submission at 24. The Administrative Law Judge finds that the Department has shown that the approach taken in these provisions of the proposed rules under which the penalty depends upon the number of violations is both needed and reasonable.

Proposed Rule Part 5220.2810 - Failure to Release Medical Data; Penalty

Subpart 3 - Amount

34. Minn. Rule 5220.2810, subp. 3, requires that the Department issue a warning letter before a penalty is assessed for failure to release medical

data. The proposed amendment to the rule provision would eliminate the need for the issuance of a warning letter if one has been issued in the preceding year. The Department states that the proposed rule will eliminate duplicate warnings and unnecessary paperwork. SONAR at 39. One commentator argued that the proposed rule violates the due process rights of providers by penalizing them without warning them.

The provisions of the proposed rule are adequate to provide fair notice of the requirements regarding the release of medical data and the penalties for violation of these requirements, and are not violative of due process. Those affected by the proposed amendment to the rule will already be on notice of the requirement because they will already have received a warning letter during the past year. The Department has demonstrated that the proposed rule is needed and reasonable to eliminate unnecessary paperwork burdens and encourage release of the necessary data.

Proposed Rule Part 5220.2920 - Attorney Fees

35. Proposed rule part 5220.2920 governs attorney fees paid in workers' compensation matters, both to plaintiff's attorneys and defense attorneys. The proposed rule implements the provisions of Minn. Stat. § 176.081 (1992). Several commentators, including Mary M. Morin, Theodore Dooley, Michael Lander, James A. Reichert, Thomas G. Lockhart, Steven Creason, Ronald Holbach, Timothy McCoy, Jeffrey W. Jacobs of Steffens, Wilkerson & Lang, and Philip C. Warner, Dudley and Smith, objected to the proposed rule, arguing that the provisions exceeded the scope of the underlying statute or that the provisions are not needed or reasonable. These comments are discussed more specifically in the Findings below.

Subpart 1 - Applicable Principles

36. Subpart 1 of the proposed rule also provides that "[a]n attorney who enters into a retainer agreement with an employee or dependent under which the attorney agrees to accept a fee that is less than the fee presumed reasonable by [Minn. Stat. § 176.081, subd. 1] may not claim a higher fee unless a new retainer agreement providing a higher fee is executed." The rule further provides that, if the attorney requests that the client sign a new retainer agreement, "the attorney must notify the client by conspicuous notice in the new retainer agreement that the client is not required by law to agree to a fee higher than a fee already negotiated. . . ." Jeffrey Jacobs and Timothy McCoy objected to these provisions as being unauthorized by the underlying statute, in conflict with applicable case law, and an interference with the attorney-client relationship.

Minn. Stat. § 176.081, subd. 9 (1992), requires retainer agreements in workers' compensation cases:

> An attorney who is hired by an employee to provide legal services with respect to a claim for compensation made pursuant to this chapter shall prepare a retainer agreement in which the provisions of this section are specifically set out and provide a copy of this agreement to the employee. The retainer agreement shall provide a space for the signature of the employee. A signed agreement shall raise a conclusive presumption that the

> employee has read and understands the statutory fee provisions. No fee shall be awarded . . . in the absence of a signed retainer agreement.

The Department indicates in its SONAR that it has received many questions and complaints from employees in the wake of the 1992 amendment to Minn. Stat. § 176.081 increasing the maximum contingency fee regarding whether the employee is obligated to renegotiate an existing retainer agreement. Some of these employees have indicated that their attorneys told them that they needed to sign a new retainer agreement due to the change in the law, and implied that they had no choice in the matter. SONAR at 43-44. The Department states that the proposed rule "balances the rights of the parties by allowing the attorney to change the fee arrangement by mutual consent, but also facilitates an informed choice by the employee concerning the fee arrangements." Id. at 44.

One commentator cited Engman v. Metalcote Grease & Oil, No. 476-34-2344 (W.C.C.A. February 26, 1993), for the proposition that a new retainer agreement is not required if higher fees are sought. The Administrative Law Judge does not agree with this view. The Engman case involved the issue of whether the 1992 amendment to Minn. Stat. § 176.081, subd. 1, increasing the maximum contingency fee from $6,500 to $13,000, should be retroactively applied. The court held that the statute was procedural, rather than substantive, and that, therefore, it applied to fee awards determined following its effective date. The court noted, however, that contingent fees awarded from the employee's compensation are limited to those permitted under the statute or those called for by the retainer agreement between the employee and the employee's attorney, whichever is less. (In the Engman case, the retainer agreement provided for fees calculated under the new statute.) While dicta, this language certainly suggests that a new retainer agreement is required if higher fees are sought. Similarly, in Matson v. Streater, Inc./Joyce International, No. 477-78-4813 (W.C.C.A. June 22, 1993), the employee signed a second retainer agreement incorporating the amended statute's higher maximum contingent fee. The compensation judge concluded that, since no evidence had been introduced as to the presence or absence of consideration for the second retainer agreement or the employee's state of mind in signing the second retainer agreement, only the first agreement would be given effect. The Workers' Compensation Court of Appeals reversed, holding that the agreement was presumed valid under Minn. Stat. § 176.081, subd. 9, in the absence of an objection by the employee or evidence of overreaching. However, the court noted that it is prudent to inquire as to the circumstances surrounding the signing of a new retainer agreement that provides for a higher fee, suggesting the importance of the employee's informed consent.

The Administrative Law Judge finds that subpart 1 of proposed rule part 5220.2920 is within the statutory authority of the Department and does not conflict with the underlying statute. The provision of the rule requiring a new retainer agreement if higher fees are sought and requiring a notice to the employee are needed and reasonable to ensure that the employee knowingly consents to the new agreement. These requirements are particularly appropriate since a signed retainer agreement creates a conclusive presumption that the employee has read and understands the statutory fee provisions.

Subpart 3 - Statement of Fees, Petition for Disputed or Excess Attorney Fees

37. Subpart 3B of proposed rule part 5220.2920 provides that, under specified circumstances, the attorney must complete and file a petition for

disputed or excess attorney fees. Paragraph (19) of this subpart provides that, when all or a portion of the fee may be payable by the employee, the petition must include a prescribed notice to the employee requesting that the employee return an enclosed form within ten days. Jeffrey Jacobs suggested that this provision is unreasonable since the employee may not return the form as requested. Nothing in the proposed rule suggests that the award of fees is dependent upon the employee's return of the form. Therefore, the Administrative Law Judge finds that the proposed rule is reasonable. The Department may, however, wish to consider amending the proposed rule to expressly provide that the award of fees is not dependent upon the employee's return of the form. Such a modification would not constitute a substantial change.

Subpart 5 - Genuinely Disputed Portions of Claims

38. Subpart 1 of the proposed rule provides among other things that a contingent fee "must not be based on the time an attorney spends on a case" but rather "must be based on the amount awarded to a client which was "genuinely in dispute." Subparts 5A and 5B of the proposed rule set out principles for use in determining whether the benefit paid or payable was genuinely disputed for the purpose of calculation of a contingent fee. These portions of the proposed rule are derived from Minn. Stat. § 176.081, subd. 1(c) (1992), which provides that "allowable fees under this chapter shall be based solely upon genuinely disputed claims or portions of claims."

Mary Morin, Theodore Dooley, Michael Lander, James Reichert, and Thomas Lockhart suggested that the definition of "genuinely disputed" in the proposed rule is not broad enough to cover all cases in which fees may properly be awarded under the statute. For example, these commentators argued that the rule does not accommodate situations such as when legal services are necessary to ensure that an employee's rights are not compromised by litigation between two insurers. The Department did not address the general concern raised by the comment but did state that employee's attorney's fees arising from disputes between two employers or insurers would not fall within the scope of the rule because the fees would be awarded under Minn. Stat. §§ 176.081, subd. 8, and 176.191 (1992). Department's Aug. 26, 1993, submission at 30. No specific examples were provided by any commentator which could not be adequately addressed by the provisions of the proposed rule. Under these circumstances, the proposed rule is not rendered unreasonable by its failure to include a "catch-all" provision. The Department may, however, wish to consider adding such a provision to the rules, thereby allowing for a consideration of unusual situations which may arise. Such a modification would not constitute a substantial change from the rules as originally proposed.

Subpart 5B(12) provides that "[b]enefits that have not yet become due and are not in dispute under this subpart may not be used to compute the fee." Jeffrey Jacobs, Mary Morin, Theodore Dooley, Michael Lander, James Reichert, and Thomas Lockhart contended that this provision could be interpreted to require litigation before attorney fees could be paid out of future benefits and urged that it be deleted from the rules. The Department noted in its post-hearing response that there is nothing in the rule to suggest that litigation is a condition for the award of fees for future benefits. Department's Aug. 26, 1993, response at 31. The only requirement is that the benefits are genuinely in dispute. Therefore, the Administrative Law Judge finds that subparts 1 and 5 of the proposed rules relating to genuinely disputed portions of claims have been shown to be needed and reasonable.

39. Subpart 5 also specifies the information which must be included in the statement of attorney fees or petition for excess fees. Jeffrey Jacobs argued that the provisions imposed an unreasonable burden on attorneys and courts. In response, the Department asserted that the information required under the rule, while detailed, is necessary to provide sufficient information about the requested fees to employees and those determining the proper fee award. The Administrative Law Judge finds that the Department has demonstrated that subpart 5 of the proposed rule is needed and reasonable.

Subpart 6 - Waiver of Objection Period

40. As originally proposed, subpart 6 specified that the parties could not waive the ten-day period for objecting to attorney fees. Several commentators objected to this provision and it has been withdrawn by the Department. Department Response at 21-22. The withdrawal of this proposed rule provision does not result in a prohibited substantial change.

Subpart 7 - Defense Attorney Fees

41. Subpart 7 of the proposed rule governs defense attorney fees and requires every insurer and self-insured employer to file with the Department an annual statement of attorney fees containing the information required in the rule. Steven Creason, Ronald Holbach, Philip Warner, and the American Insurance Association objected that the proposed rule exceeded the statutory requirements and imposed an unreasonable burden on insurers and employers.

Minn. Stat. § 176.081, subd. 1(e) and (f) (1992), governs defense attorney fees:

> (e) Employers and insurers may not pay attorney fees or wages for legal services of more than $13,000 per case unless the additional fees or wages are approved. . . .
>
> (f) Each insurer and self-insured employer shall file annual statements with the commissioner detailing the total amount of legal fees and other legal costs incurred by the insurer or employer during the year. The statement shall include the amount paid for outside and in-house counsel, deposition and other witness fees, and all other costs relating to litigation.

The Department acknowledges that the proposed rule requires that insurers and employers provide detailed information, but argues that the rule simply implements the requirements of the statute. Department's Aug. 26, 1993, submission at 25-27. The Department also notes that, unlike plaintiff attorney fees, defense attorney fees have not been regulated prior to the 1992 amendments to the statute. Therefore, data provided under this rule will provide the first comprehensive analysis of the defense costs in workers' compensation matters.

The Administrative Law Judge finds that subpart 7 is consistent with the statutory provisions requiring insurers and self-insured employers to file statements "detailing" the total amount of legal fees and other legal costs.

42. The American Insurance Association contended that the rule is drafted so broadly that it could be read to include claims administration costs and costs associated with informal claims. In its response, the Department stated that the rule is not intended to apply to general claims adjusting costs or information claims costs other than legal fees and indicated that the rule was intended to require only that legal fees relating to litigation be reported. While the Department did not propose a modification to the rule part in its post-hearing comments, it stated that it "does not oppose clarifying language to correct any misconstruction of the rule." Department's Aug. 26, 1993, submission at 25.

The Administrative Law Judge finds that the proposed rule is defective. While the rule is intended only to apply to litigation-related legal fees and costs, it is not clear in this regard and could be construed to require the reporting of non-litigation expenditures. When a proposed rule is reasonably susceptible of differing constructions in a material respect, it is impermissibly vague. See In re Charges of Unprofessional Conduct Against N.P., 361 N.W.2d 386, 394 (Minn. 1985); Thompson v. City of Minneapolis, 300 N.W.2d 763, 768 (Minn. 1980). A rule which is impermissibly vague does not meet the requirement set forth in Minn. Stat. § 14.02, subd. 4 (1992), that a rule implement or make specific the law enforced or administered. To correct the defect, the Judge suggests that the Department amend subpart 7 to read as follows:

> On August 1 of each year, every insurer and self-insured employer must file with the department its annual statement of attorney fees containing the information required by this subpart for the previous 12-month period from July 1 to June 30. The insurer or self-insured employer must include defense fees and costs relating to litigation incurred by itself and its agents and representatives . . . .

The suggested amendment serves to clarify the application of the rule and would not result in a rule that is substantially different from the rule as originally proposed. As modified, subpart 7 is needed and reasonable to implement the requirements of the statute.

43. The American Insurance Association also noted that subpart 7B of the proposed rule uses the term "insurer" without including the term "self-insured employer." In response, the Department stated that the term "insurer" was intended to include "self-insured employer." Department's Aug. 26, 1993, submission at 26. The proposed rule is also ambiguous in this regard and thus is found to be impermissibly vague. See Finding 42 above. To correct this defect, the Administrative Law Judge finds that subpart 7B of proposed rule part 5220.2920 must be amended to read as follows:

> The insurer and self-insured employer must collect and make available for review by the department as needed individual case information relating to defense attorney fees and defense costs as provided in this item . . . .

The suggested amendment would not result in a substantial change.

Proposed Rule Part 5220.2960 - Commissioner Interim Notices and Orders

44. Proposed rule part 5220.2960 provides that the Department may publish interim notices and orders which do not have the force and effect of law in order to provide information and guidance to the public. The interim notices and orders would be binding upon the Department until (1) a statute, appellate court decision, rule, or subsequent notice or order conflicts with the notice or order; (2) the end date stated in the notice or order; or (3) one year after publication. Rep. Beard and other members of the House of Representatives asserted that one year was too long for such notices and orders to remain in effect and suggested that six months would be preferable. The Department stated in response that six months was an insufficient period of time since the issues which may be the subject of the interim notice or order may require judicial or legislative clarification. Department's Aug. 19, 1993, submission at 18. An agency is entitled to make choices between possible standards as long as the choice it makes is rational. The Administrative Law Judge finds that the proposed rule has a rational basis and is, therefore, reasonable.

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

CONCLUSIONS

1. The Department gave proper notice of this rulemaking proceeding.

2. The Department has fulfilled the procedural requirements of Minn. Stat. §14.14, subd. 1, 1a, and 2 (1992), and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. § 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii) (1992), except as noted in Findings 19, 28, 42, and 43.

4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii) (1992), except as noted in Finding 14.

5. The additions, deletions and amendments 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 (1992), and Minn. Rules pts. 1400.1000, subp. 1 and 1400.1100 (1991).

6. The Administrative Law Judge has suggested action to correct the defects cited at Conclusions 3 and 4 as noted at Findings 14, 19, 28, 42, and 43.

7. Due to Conclusions 3, 4, and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3 (1992).

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

9. A Finding or Conclusion of need and reasonableness in regard to any particular rule section 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 25th day of October, 1993

Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Transcript prepared by Angela D. Sauro
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(Workers' Compensation Rules of Practice - one volume)