STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed Workers' Compensation Rules

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Bruce D. Campbell, Administrative Law Judge, at 9:00 a.m. on January 26, 1993, at the St. Paul Civic Center, St. Paul, Minnesota. Additional hearings were held at the same location on January 27 and 28, 1993.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.01 - 14.28 (1992), to determine whether the proposed workers' compensation rules should be adopted by the Minnesota Department of Labor and Industry (Department or Agency). The Department must fulfill all relevant substantive and procedural requirements of law applicable to the adoption of rules, demonstrate the need for and reasonableness of the proposed rules and limit any modifications of the rules after initial publication to permissible nonsubstantial changes.

The Department consolidated in this one rulemaking proceeding six separate sets of rules:

1. Permanent Partial Disability Schedule. The Department proposes to substitute an entirely new Permanent Partial Disability Schedule for all injuries occurring after July 1, 1993, by adopting Minn. Rule 5223.0300-5223.0650.

2. Rehabilitation Services. The Department proposes amendments to Minn. Rule 5220.0100-5220.2780.

3. Fraud Unit. The Department proposes adoption of new rules, Minn. Rule 5228.0100-5228.0130, to govern the Department's fraud investigation unit.

4. Safety Account Grant and Loan Program. The Department proposes adoption of new rules, Minn. Rule 5203.0010-5203.0070, to govern the safety account grant and loan program.

5. Safety and Health Committees. The Department proposes adoption of new rules, Minn. Rule 5204.0010-5204.0090, to govern safety and health committees.

6. Insurance Verification. The Department proposes amendment of Minn. Rule 5222.2001.

Although for convenience, all six sets of rules were heard in one continuous proceeding, the rules are not practically or legally interdependent in this consolidated proceeding.

The Department was represented by Gilbert S. Buffington, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155. Mr. Buffington was also assisted by Penny Johnson, Assistant General Counsel, Department of Labor and Industry, 443 Lafayette Road, St. Paul, Minnesota 55155. Members of the Department panel appearing at the hearing included the following persons: Permanent Partial Disability Schedule - Dr. William Lohman, M.D., Medical Consultant, Minnesota Department of Labor and Industry, and Susan Witcraft, Actuarial Consultant, Minnesota Department of Labor and Industry; Rehabilitation Services - Stephen Serkland, Medical and Rehabilitation Services Division, and Mary Miller, Legal Services Division; Fraud Unit - Sam Crecelius, Compensation Attorney; Safety Account Grant and Loan Program - Sam Crecelius, Compensation Attorney; Safety and Health Committees - John Ellefson, Attorney; and, Insurance Verification - Alan Miner, Director of Information Management Services.

The hearing register was signed by 116 persons. The following public testimony was received: Permanent Partial Disability Schedule - two members of the public provided oral testimony; Rehabilitation Services - seven members of the public provided oral testimony; and, no member of the public provided oral testimony on the Fraud Unit, Safety Account Grant and Loan Program, Safety and Health Committees, or Insurance Verification rules. All persons desiring to testify were given an opportunity to do so. The record remained open through February 17, 1993, for the submission of initial written comments. As authorized by Minn. Stat. § 14.15, subd. 1 (1992), five business days were allowed for the filing of responsive comments. The responsive comment period ended on February 25, 1993. On February 25, 1993, at 4:30 p.m., the record of this consolidated rulemaking proceeding finally closed for all purposes.

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

If the Commissioner 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 Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then the Commissioner shall submit the rule, with

the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

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

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

FINDINGS OF FACT

Procedural Requirements

1. On December 3, 1992, the Department filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules certified by the Revisor of Statutes.

(b) The Order for Hearing.

(c) The Notice of Hearing proposed to be issued.

(d) A statement of the number of persons expected to attend the hearing and estimated length of the Department's presentation.

(e) The Statement of Need and Reasonableness discussing the proposed rules, except for the Permanent Partial Disability Schedule, Rehabilitation Services and Safety and Health Committee rules. Those three Statements of Need and Reasonableness were provided to the Administrative Law Judge on December 18, 1992.

(f) A statement of additional notice.

2. On December 21, 1992, a Notice of Hearing and a copy of the proposed rules were published at 17 State Register 1494-1588.

3. On December 17, 1992, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice. The Department also gave discretionary notice to all rehabilitation providers registered with it pursuant to Minn. Stat. § 176.102, subd. 10.

4. On December 30, 1992, the Department filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed.

(b) The Department's certification that its mailing list was accurate and complete.

(c) The Affidavit of Mailing the notice to all persons on the Department's list.

(d) An Affidavit of additional notice.

(e) The names of Department personnel who will represent the Department at the hearing together with the names of any other witnesses solicited by the Department to appear on its behalf.

(f) A copy of the State Register containing the proposed rules.

(g) All materials received following Notices of Intent to Solicit Outside Opinion published at 16 State Register 2993, 14 State Register 2014 and 14 State Register 1069.

(h) Transcripts from public meetings held on July 16 and 17, 1992, to solicit information or opinions concerning proposed workers' compensation rules.

(i) A press release announcing the July 16 and 17, 1992, public meeting made available to all major Minnesota newspapers, wire services, and media services.

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

5. The period for submission of written comments and statements remained open until February 17, 1993, having been extended by order of the Administrative Law Judge to 20 calendar days following the hearing. The record closed on February 25, 1993, the fifth business day following the close of the comment period.

The time for the issuance of this Report has been extended in writing by the Chief Administrative Law Judge due to the physical incapacity of the Administrative Law Judge following the close of the hearing record.

Other Rulemaking Requirements

6. The adoption of the proposed rules will not require the expenditure of public money by local public bodies within the meaning of Minn. Stat. § 14.11, subd. 1. The proposed rules do not adversely impact agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2. The impact of the proposed rules on small businesses is as follows:

Permanent Partial Disability Schedule - Insurers, self-insured employers and health care providers may be affected by these rules. Because of their size, insurers and self-insured employers are not small businesses within the meaning of Minn. Stat. § 14.115, subd. 1. Health care providers are service businesses within the meaning of Minn. Stat. § 14.115, subd. 7; therefore, Minn. Stat. § 14.115 does not apply to these providers.

Rehabilitation Services - Rehabilitation providers, almost all of whom qualify as small businesses, will be affected by these rules. However, rehabilitation providers are service providers within the meaning of Minn. Stat. § 14.115, subd. 7; therefore, Minn. Stat. § 14.115 does not apply to these providers.

Fraud Unit - These rules will not place any direct regulatory burden on small businesses.

Safety Account Grant and Loan Program - These rules do not place any direct regulatory burden on small businesses. The Commissioner considered the impact of these rules on small businesses under the factors set out in Minn. Stat. § 14.115, subd. 2. The Commissioner concluded that simplicity and clarity of reporting and accountability procedures and definite timelines for notice would be fair and equitable to all program applicants and that further exemption, simplification, or less stringent standards for small business would be counterproductive and unnecessary to accommodate small business needs.

Safety and Health Committees - These rules do not place any direct regulatory burden on small businesses. The Commissioner considered the impact of these rules on small businesses under the factors set out in Minn. Stat. § 14.115, subd. 2.

Insurance Verification - These rules do not place any direct regulatory burden on small businesses.

7. Some of the proposed rule provisions received no negative public comment and were adequately supported by the Statements of Need and Reasonableness. This Report will not specifically address those provisions in the discussion below. It is found that the need for and reasonableness of those proposed rules which are not discussed below has been demonstrated and that the Commissioner does have statutory authority to adopt them. Also, in response to public comments at the hearing and based on further review of the rule, the Department proposed changes to the proposed rules. Proposed changes to the Permanent Partial Disability Schedule are attached hereto as Appendix A. Proposed changes to the Rehabilitation Services rules are attached hereto as Appendix B. Changes to other sets of the rules are noted in subsequent Findings. These changes involve primarily corrections and clarifications and do not change the intent of the rules as originally proposed and, therefore, are not discussed further below. The Administrative Law Judge finds that the amendments to the proposed rules suggested by the Agency which did not receive public comment do not constitute prohibited substantial changes within the meaning of Minn. Stat. § 14.15, subd. 3 and Minn. Rules 1400.1000, subp. 1 and 1400.1100. The Agency has also demonstrated the need for and reasonableness of these amendments to the rules as published. Proposed modifications which did receive public comment will be discussed individually under the appropriate section.

The balance of the Report will address the degree to which the Department has documented its statutory authority, and demonstrated the need for and reasonableness of the remaining rule provisions.

8. An agency may demonstrate the reasonableness of its proposed rule by showing that the rule is rationally related to the end sought to be achieved. Blocher Outdoor Advertising Co. v. Minnesota Department of Transportation, 347 N.W.2d 88 (Minn. App. 1984). An agency is entitled to choose among possible alternative standards, so long as the choice is a rational one. If commentators suggest alternatives to the proposed rules, it is not the role of the Administrative Law Judge to determine which alternative is the "best".

PERMANENT PARTIAL DISABILITY SCHEDULE

Nature of Proposed Rules - Permanent Partial Disability Schedule

9. The proposed Permanent Partial Disability Schedule, Minn. Rule 5223.0300 - 5223.0650, is a schedule establishing the amount of permanent partial disability of the whole body for specified permanent partial impairments. The schedule is proposed to apply to injuries occurring on or after July 1, 1993, provided that the revised schedule has been adopted by that date. The proposed schedule makes substantial revisions in the existing Permanent Partial Disability Schedule and also adds new categories. The Permanent Partial Disability Schedule is based on loss of function as being the most objective way of rating impairment and, therefore, disability. Loss of function relates to some action of an organ of the body which can be measured by generally accepted measurement testing techniques according to a reasonable scale. Tr. 42. Where loss of function cannot be measured, abnormality is used as an appropriate proxy for the loss of function. Tr. 42-43. Abnormality is considered to be an anatomical change in the body which can be detected either by persistent physical signs or by some well-defined laboratory or radiographic technique. Tr. 43. The proposed Permanent Partial Disability Schedule also discards diagnostic labels in favor of sets of operational criteria that refer to objective physical findings or findings on standardized tests. Tr. 44-46. The proposed rules also use a categorical approach to rating disability over a scalar method of analysis. A scalar approach attempts to measure a precise point of remaining function to establish a percentage of disability. Tr. 48-49. A categorical approach uses meaningful groups of ranges which have functional significance. Tr. 50-51. Finally, the proposed rules focus on end organ impairment without regard to diagnostic labels or corrective procedures. End organ impairment is conceptualized as permanent alteration in function or structure of the affected body part. Tr. 51-52.

Several commentators criticized the operative principles used by the Agency in formulating the Permanent Partial Disability Schedule. The primary concern appears to be that the operative principles exclude the subjective symptoms expressed by individual claimants, in favor of an objective approach. The Administrative Law Judge finds that the principles discussed in the preceding paragraph are needed and reasonable and provide an appropriate basis for constructing a Permanent Partial Disability Schedule. The governing statute, Minn. Stat. § 176.105, subd. 1, in fact, requires such objectivity, if practical.

Statutory Authority - Permanent Partial Disability Schedule

10. In its Statement of Need and Reasonableness, Ex. B-1 (SONAR), the Department relies on Minn. Stat. § 176.105 (1992) for its statutory authority to promulgate the Permanent Partial Disability Schedule. That statute, in several subdivisions, specifically authorizes the Commissioner of Labor and Industry (Commissioner) to adopt by rule a schedule for permanent partial disability. The statute also includes a number of guidelines, governing the methodology and content of such a schedule. See, Minn. Stat. § 176.105, subd. 1, subd. 4 (1992).

11. A number of legislative commentators argued that the Department has exceeded its statutory authority in this combined rulemaking proceeding

generally, and with respect to the Permanent Partial Disability Schedule in particular. Senator Randy C. Kelly and Representatives Alan Welle and Charles Brown argue that the Department has exceeded its statutory authority because it has engaged in rulemaking without consulting the Advisory Council on Workers' Compensation created by the 1992 Legislature in Minn. Stat. § 175.007 (1992). In its Reply Comments, the Department states that the new Workers' Compensation Advisory Council was not fully formed at the time the Department developed its Permanent Partial Disability Schedule. The schedule was, however, reviewed by the statutory advisory group in existence at the time the rules were being developed. Prior to the 1992 amendments to Minn. Stat. § 175.007, the composition of the Workers' Compensation Advisory Council was as stated in Minn. Stat. § 175.007, subd. 1 (1990) and its duties were as stated in Minn. Stat. § 175.007, subd. 2 (1990). That advisory group was consulted in the development of the rules. Effective July 1, 1992, that advisory group was replaced by the Workers' Compensation Advisory Council specified in Minn. Stat. § 175.007, subd. 1 (1992). There is no evidence in the record as to when the new advisory group created by the 1992 statute actually became functional. Moreover, Minn. Stat. § 175.007, subd. 2 (1992) does not specifically require the submission of proposed rules to that advisory group for its review and comment. The Administrative Law Judge, therefore, finds that the failure of the Commissioner to delay the submission of the proposed rules until after the Advisory Council created by Minn. Stat. § 175.007, subd. 1 (1992) was fully functional and to obtain its recommendation does not affect the statutory authority of the Commissioner to adopt the proposed Permanent Partial Disability Schedule.

12. Several legislators also generally characterized the consolidated rulemaking as beyond the statutory authority of the Commissioner. A number of additional legislative commentators stated that the Department is exceeding its statutory authority by attempting to have adopted as rules proposals that have been rejected by the Legislature when presented in bill form. Randy C. Kelly, State Senator; Charles Brown, State Representative; Alan Welle, State Representative; Pat Piper, State Senator; Harold "Skip" Finn, State Senator; James P. Farrell, State Representative. These letters do not state in what particular respect the Department is presenting proposals which have been specifically rejected by the Legislature in the past. In the absence of more specificity to such charges, these general comments about exceeding statutory authority and violating legislative intent cannot be evaluated by the Administrative Law Judge.

13. A number of legislative commentators and several public commentators argue that the wholesale revision of the Permanent Partial Disability Schedule is a violation of Minn. Stat. § 176.105, subd. 1. Pat Piper, State Senator; Harold "Skip" Finn, State Senator; James P. Farrell, State Representative; Carl W. Kroening, State Senator; James I. Rice, State Representative; Phil Carruthers, State Representative; Comments of Thomas D. Mottaz, Friedrich A. Reeker, and Mark G. Olive. The argument made by the legislators and public commentators is that the Legislature amended Minn. Stat. § 176.105, subd. 1 as follows:

> The commissioner of Labor and Industry shall by rule establish a schedule of degrees of disability resulting from different kinds of injuries. <u>Disability ratings under the schedule for permanent partial disability must be based on</u>

objective medical evidence. The commissioner, in consultation with the medical services review board, shall periodically review the rules adopted under this paragraph to determine whether any injuries omitted from the schedule should be included and amend the rules accordingly.

Minn. Laws 1992, Ch. 510, art. 2, §4. The argument is made that the language emphasized above is a limitation on the authority of the Commissioner to revise the Permanent Partial Disability Schedule currently in existence. Under that argument, the Commissioner could add injuries omitted from the schedule, but other changes would be prohibited. The Department, in its Reply Comments, states that the Legislature did not intend by its 1992 amendments to abrogate the general authority of the Commissioner to adopt a Permanent Partial Disability Schedule. The Department reasons that the amendments were enacted by the Legislature in response to the decision of the Minnesota Supreme Court in Weber v. City of Inver Grove Heights, 461 N.W.2d 918 (Minn. 1990), in which the Court noted that some permanent partial impairments were not within the existing schedule. The Legislature, it is argued, only intended to direct the Commissioner to make the schedule comprehensive without limiting the authority to adopt more extensive revisions of existing schedules as deemed appropriate.

14. The Administrative Law Judge rejects the argument that the 1992 amendments to Minn. Stat. § 176.105, subd. 1, limit the authority of the Commissioner to only including omitted disabilities from the Permanent Partial Disability Schedule and prevent a revision of individual benefit levels or methods of determining disability. Minn. Stat. § 176.105, subd. 4 includes unqualified authority for the Commissioner to adopt by rule a Permanent Partial Disability Schedule and provides guidelines for doing so. If it were the intent of the Legislature that the existing schedule could not be modified by the Commissioner, except to include omitted disabilities, subdivision 4 of Minn. Stat. § 176.105 would serve no purpose. The Administrative Law Judge also agrees with the Department that the argument of the commentators that benefit levels for individual conditions cannot be adjusted is inconsistent with other provisions of the statute. Minn. Stat. § 176.105, subd. 4 (1992) requires that a Permanent Partial Disability Schedule be revenue neutral as to benefits, based on the benefit level which existed on January 1, 1983. If new conditions are to be included, without increasing the total amount of benefits paid, some individual benefit levels must, of necessity, be reduced.

The Department has statutory authority to revise the existing schedule of permanent partial disability payments as a consequence of Minn. Stat. § 176.105, as to conditions included, the level of disability assigned for individual conditions and the method of determining disability. Minn. Stat. § 176.105, subd. 1, subd. 4 (1992).

15. Minn. Stat. § 176.105, subd. 4 provides that the permanent partial disability schedule is to be "revenue neutral". More specifically, the statute requires that the schedule is to be based on the benefit level in effect on January 1, 1983, such that the aggregate total of impairment compensation and economic recovery benefits payable under the revised schedule is approximately equal to the total aggregate amount payable for permanent partial disability under the schedule in effect as of that date. The statute requires the determination to be made on the basis of "sound actuarial

evaluation." The Department's actuarial study of the proposed rules relied on a previous actuarial study, as well as a comparison between payments under the current rules and the proposed rules. The previous actuarial study determined that the total aggregate compensation payable under the current rules is approximately equal to the total aggregate payable under the law in effect in 1983. The Department then made the assumption that if the total aggregate compensation payable under the proposed rules is approximately equal to the total aggregate payable under the current rules, the proposed rules meet the requirements of the statute. An independent actuary, Susan E. Witcraft, Milliman & Robertson, Inc., found the methodology used by the Department in its study to be a sound actuarial approach. Ex. O, App. 5 & 6. The actuarial study showed an approximate 3.4% increase in aggregate total permanent partial disability payments from the combined effects of changes and additions in the proposed rules. Ex. O. Thus, the Department has demonstrated that the proposed rules are in compliance with the provisions of Minn. Stat. § 176.105, subd. 4.

Substantive Provisions -- Permanent Partial Disability Schedule

16. In assessing the need for and reasonableness of the specific provisions of the Permanent Partial Disability Schedule, it is important to understand the development of the proposed schedule. Work on the proposed schedule began in 1987. The Department requested the Medical Services Review Board, which is comprised of employers, employees, insurers and health care professionals and which serves in an advisory capacity to the Department on medical issues related to workers' compensation, to review the existing schedule. The Medical Services Review Board then set up a Permanent Partial Disability Task Force. The Task Force, with input from a wide range of affected persons, prepared a draft revised schedule. This draft schedule was reviewed by various medical specialty groups. All comments of these groups were then considered by the Task Force. The draft schedule was also sent to insurers, employers, plaintiff's attorneys, defense attorneys, and other health care professionals. After this lengthy and comprehensive process of drafting, feedback, and revision, the proposed schedule represents a consensus opinion of the Medical Services Review Board.

The Agency must make an affirmative presentation of fact to support the need for and reasonableness of the proposed rules. See, Finding 8, supra. In this rulemaking record, the Agency did not attempt to replicate, by an affirmative showing, the reasoning process that resulted in each of the literally hundreds of ratings assigned to particular disabilities. The Administrative Law Judge finds, however, in the absence of contrary, substantive public comment, the medical consensus described in the previous paragraph provides the requisite showing. In later Findings, therefore, the Administrative Law Judge will specifically consider only those portions of the Permanent Partial Disability rules that received negative public comment.

17. Several attorneys who represent employees in workers' compensation matters suggested that the proposed rules were not needed because the existing Permanent Partial Disability Rules have already been extensively litigated and virtually all issues have been resolved. They suggest that the proposed rules will result in increased litigation in order to "sort out" the new language. Testimony of John Horvei, Comments of John R. Malone, Thomas D. Mottaz, Mark G. Olive. Other commentators felt that the proposed rules would reduce litigation because outcomes would be more predictable. Comments of Abe

Rosenthal, Minnesota Transport Services Association, Testimony of Mahlon Schneider, Minnesota Chamber of Commerce. The Department has demonstrated that the proposed rules are needed to make the rating system more objective and consistent and to fill in gaps in the schedule.

18. The attorney commentators also objected to the rules as being "too complex" to be useful. The Department disagrees with this contention and points out that the rules give a step-by-step guide for rating the loss of function for each organ. The rules also contain cross references which may be relevant to rate an entire condition. The format of the proposed rules is reasonable.

Minn. Rule 5223.0360 Central Nervous System

19. Minn. Rule 5223.0360, subp. 3, establishes the percent of disability for total loss of taste or smell. State Farm Mutual Insurance Co. suggested that the rule state that a partial or temporary loss of either taste or smell equal zero percent. The Department does not believe any clarification is necessary since the rule states that the loss must be total and all impairments must be permanent to be rated. The proposed language is found to be needed and reasonable without clarification.

Minn. Rule 5223.0370 Musculoskeletal Schedule; Cervical Spine; 5223.0380 Musculoskeletal Schedule; Thoracic Spine; 5223.0390 Musculoskeletal Schedule; Lumbar Spine.

20. Minn. Rule 5223.0370, subp. 2C, 5223.0380, subp. 2C, and 5223.0390, subp. 2C establish a four percent disability rating for an acute fracture, other than those specified. State Farm Mutual Insurance Co. suggested that the language be amended to identify which specific fractures are included or that the language be deleted, but does not elaborate on its reasons. The Department declined to amend or delete the language, relying on the consensus opinion of the Medical Services Review Board. It is appropriate to rely on the judgment of the Medical Services Review Board and the proposed rules are found to be needed and reasonable.

21. Minn. Rule 5223.0370, subp. 3C and 4C, 5223.0380, subp. 3C and 4C, and 5223.0390, subp. 3C and 4C establish a disability rating for symptoms of pain or stiffness in the region of the spine, substantiated by "persistent objective clinical findings . . . with any radiographic . . . abnormality." State Farm Mutual Insurance Company suggests language to clarify that the radiographic findings must also involve a work-related injury. The Administrative Law Judge agrees with the Department that the rules are needed and reasonable as written since any impairment must be work-related to be compensable under the proposed rules.

22. Minn. Rule 5223.0370, subp. 3 and 4, 5223.0380 subp. 3 and 4, and 5223.0390, subp. 3 and 4 establish ratings for cervical pain syndrome and radicular syndrome, thoracic pain syndrome and radicular syndrome, and lumbar pain syndrome and radicular syndrome, respectively. Dennis J. Callahan, M.D. and Molly Sigel, Minnesota Medical Association, stated that the ratings suggest increased disability for "any radiographic, myelographic, CT scan or MRI scan abnormality . . . or evidence of intervertebral disc bulging, protrusions", and that abnormal findings alone should not result in this rating. The Department agrees with that abnormal findings alone should not

result in the rating; however, the Department believes that rules, as written, do not allow this result since the abnormal findings must also be accompanied by persistent symptoms and persistent clinical findings. The proposed rules as written are needed and reasonable.

23. Minn. Rule 5223.0370, subp. 4D(1) and 4E(1), 5223.0380, subp. 4D(1) and 5223.0390, subp. 4D(1) and 4E(1) establish ratings for radicular syndrome and provide that the percentage is increased if chronic radicular pain or paresthesia persist despite treatment. Dr. Callahan and Ms. Sigel suggested that an increased rating for the chronic pain was not appropriate. The proposed rules are the same as the present rules in regard to this rating system. The Department, in reliance on the opinion of the Minnesota Orthopedic Society and the Medical Services Review Board, believes no change should be made to the existing system. The proposed rules are found to be needed and reasonable.

24. Minn. Rule 5223.0370, subp. 2A establishes a rating for a compression fracture of vertebral body, the percentage of which varies depending upon the decrease in vertebral height. Mary Arneson, M.D., stated that the rule provides no guidance for fracture with significant wedging, which can produce disabling curvature and can make it hard to decide what the loss of height really is.

In its February 17, 1993 post-hearing comments, the Department proposed language which would provide that the compression fracture is rated by the "greatest loss of vertebral height among the involved segments". Appendix A at p. 2, ¶ 8. In its February 24, 1993 comments, the Department agrees with Dr. Arneson's comment and stated that it supported a clarification that the measurement should be based upon the maximum loss of height. Department Response to Permanent Partial Disability Rule Comments at 7. The February 17 amendment proposed by the Department appears responsive to Dr. Arneson's comment. The rule with the proposed change is needed and reasonable and does not constitute an impermissible substantial change.

Minn. Rules 5223.0460, subp. 2D(2) and 2D(3); 5223.0470, subp. 2B(2) and 2B(3); 5223.0500, subp. 2B(2) and 2B(3); 5223.0510, subp. 2H(2) and 2H(3); and 5223.0520, subp. 2D(2) and 2D(3).

25. The above cited rule provisions establish the disability rating for nerve entrapment syndrome at zero percent if pain and paresthesia are not substantiated by objective findings on electrodiagnostic testing and at varying percentages, depending on the body part involved, if substantiated by persistent findings on electrodiagnostic testing. E. C. McElfresh, M.D., and Molly Sigel, Minnesota Medical Association, suggested that the word "on" should be changed to "or" so that other objective clinical findings could be used in lieu of electrodiagnostic testing. The Department declined to amend the rule, relying on the opinion of the Medical Services Review Board that electrodiagnostic testing was necessary to substantiate the employee's report of pain and paresthesia. It is appropriate to rely on the opinion of the Medical Services Review Board and the proposed rules are found to be needed and reasonable.

Minn. Rule 5223.0560 Respiratory

26. The procedures used in evaluating permanent partial disability of the respiratory system established in Minn. Rule 5223.0560, subp. 1, include a pulmonary function test and, if necessary, a cardiopulmonary exercise test. Both of these tests are well-established measures of respiratory system function. The rule then establishes five classes of impairment (excluding Class 1 which has a zero percent rating) which roughly correspond to the five levels in the present schedule. Each class of impairment is defined by the results of the testing. The ranges established for each class of impairment are based upon the opinion of the Medical Service Review Board and the recommendations of the American Medical Association.

27. Robert H. Yaeger, workers' compensation attorney, submitted comments regarding several provisions of this rule. He suggested that the values for the "normal" population be taken from the "Kory" norms (which is from a population which includes smokers), rather than from the "Crapo" norms (which is from a population of nonsmokers.) The Department disagrees with this suggestion, stating that the inclusion of smokers in developing population norms creates inequities because the lungs of smokers are not normal.

28. Mr. Yaeger stated that the pulmonary function test was subject to errors of various kinds, including tester error and claimant manipulation. The methodology for the test requires that the patient perform the test three times and that the test results vary by less than five percent. If these conditions are met, then the best results of the three trials are used as a measure of the patient's lung function. The Department believes that this methodology diminishes the chance for error or manipulation. Therefore, the Department believes that test is an accurate measure of loss of function.

29. Mr. Yaeger also disagrees with the categories of impairment set out in the proposed rules and argues that the American Medical Association guides be used without change. The Department stated that the categories were considered in detail by the Medical Services Review Board and that they represent the opinion of that body based on the recommendation of the American Medical Association. It is appropriate to rely on the judgment of the Medical Services Review Board and the categories are reasonable as proposed.

30. Mr. Yaeger also suggests that the rules delete any reference to use of the cardiopulmonary exercise test because it is expensive, and measures things other than pulmonary dysfunction. The Department recognizes that the cardiopulmonary exercise test costs in the $200-$400 range, while the pulmonary function test costs only $20-$60. However, because the more expensive test will be used only when, in the opinion of the physician, the results of the pulmonary function test do not adequately represent the impairment, the costs are not excessive. The Department recognizes that the cardiopulmonary exercise test also measures the effects of cardiovascular disease and deconditioning; however, the Department believes, when properly performed, the test can differentiate those factors in determining the limitations created by the pulmonary condition. The use of the test is found to be reasonable as proposed.

31. Mr. Yaeger also suggests that the rule specifically state that an equitable apportionment for nonoccupational smoking inhalation history be permitted as a reduction in compensable impairment. The Department rejects

this suggestion as not being authorized by statute. Minn. Stat. § 176.101, subd. 4a provides that an apportionment of a permanent partial disability shall be made only if the preexisting condition is clearly evidenced in the medical report or record made prior to the current personal injury. The Administrative Law Judge finds that the rule as proposed is needed and reasonable and is consistent with statutory provisions.

Minn. Rule 5223.0610 Hematopoietic

32. Mary Arneson, M.D., proposed alternative language for the entirety of Minn. Rule 5223.0610. She stated that the proposed rules do not cover major work-related hematopoietic disorders and that the proposed ratings have very little relationship to the clinical realities of hematologic disease. The Department does not accept any of the changes proposed by Dr. Arneson. The Department states that many of the ratings in her proposal are different than those developed by the Medical Services Review Board. Additionally, many categories in the proposal are based on diagnosis, treatment or etiology, rather than on a loss of function. The methodology proposed by Dr. Arneson is, therefore, inconsistent with the rest of the proposed rules. It is the Department's position that all of the conditions of concern to Dr. Arneson can be appropriately rated under the rules as proposed. The Administrative Law Judge agrees with the Department. The Administrative Law Judge finds the rule as proposed by the Department is needed and reasonable.

REHABILITATION SERVICES

Nature of Proposed Rules -- Rehabilitation Services

33. Minn. Rules 5220.0100, et seq., govern the provision of vocational rehabilitation to injured workers. Vocational rehabilitation includes such services as vocational evaluation, counseling, job analysis, job modification, job development, job placement, labor market survey, vocational testing, transferable skills analysis, work adjustment, job seeking skills training, on-the-job training and retraining. The rules also govern the providers of these services. The proposed amendments implement changes necessitated by 1992 legislation as well as make other changes. The subjects of the proposed amendments include: amendments to definitions, including "qualified employee"; implementation of rehabilitation consultation only upon request; implementation of waiver of rehabilitation services; establishment of time frames for developing and filing rehabilitation plans; defining the right of employees and other parties to choose a qualified rehabilitation consultant (QRC); establishing the right of insurers to select vendor of job placement or job development services; providing for the registration of occupational therapists as QRCs; clarifying the respective roles of QRCs and registered vendors; and establishing fee limitations for QRCs and registered vendors.

Statutory Authority -- Rehabilitation Services

34. The provisions of Minn. Stat. § 176.102 govern the delivery of rehabilitation services to injured workers. The statutory authority for the proposed amendments is found in Minn. Stat. § 176.83, subds. 1 and 2 which provide general rulemaking authority to the Commissioner to implement the provisions of Chapter 176 and, specifically, section 176.102. Minn. Stat. § 176.102, subd. 2 also authorizes the Commissioner to by rule establish a fee

schedule or otherwise limit fees charged by qualified rehabilitation consultants and vendors.

35. The majority of the testimony and comments in regard to these proposed rules involved, at least to some extent, disagreement with the Department's interpretation of Minn. Stat. Ch. 176. A general discussion of the areas of disagreement is set out below. However, the same rule provisions which were challenged on statutory grounds were also generally challenged on "need" and "reasonableness" grounds. Therefore, each of the specific rule provisions and the objections thereto will also be discussed in the later portion of this Report headed "Substantive Provisions - Rehabilitation Services".

36. In 1992 the Legislature amended Minn. Stat. Ch. 176 in several respects. Section 176.102, subd. 1 was amended to read as follows:

> (a) This section applies only to vocational rehabilitation of injured employees . . . . Physical rehabilitation of injured employees is considered treatment subject to section 176.135.
>
> (b) Rehabilitation is intended to restore the injured employee so the employee may return to a job related to the employee's former employment or to a job in another work area which produces an economic status as close as possible to that the employee would have enjoyed without disability.

Section 176.102, subd. 4 was also amended from a requirement of "mandatory" rehabilitation consultation, following 60 days of lost work due to work related injury (30 days if a back injury was involved) to a requirement of rehabilitation consultation upon request:

> (a) A rehabilitation consultation must be provided by the employer to an injured employee upon request of the employee, the employer, or the commissioner . . . .

Unchanged by the 1992 amendments to the statute is section 176.102, subd. 4 (h), which provides as follows:

> (h) The commissioner or compensation judge may waive rehabilitation services under this section if the commissioner or compensation judge is satisfied that the employee will return to work in the near future or that rehabilitation services will not be useful in returning an employee to work.

37. Many commentators disputed the Department's statutory authority to adopt the proposed rule amendments governing the definitions of "qualified employee" and "rehabilitation services" and the proposed waiver rule. Comments of United Rehabilitation Association of Minnesota (URAM); Comments of State Senators Phil Riveness, Sam Solon and Ted A. Mondale; Comments of State Representatives Ted Winter, Tom Rukavina, Dee Long, John J. Sarna, Bob Anderson, Irv Anderson, Mike Jaros, and Patrick Beard; Comments of Scott N. Soderberg.

38. Under the provisions of the rules, rehabilitation services are available to qualified employees. The existing rule, Minn. Rule 5220.0100, subp. 22, defines the term "qualified employee" to mean an employee who, because of the effects of a work-related injury or disease, whether or not combined with the effects of a prior injury or disability: (1) is permanently precluded or is likely to be precluded from engaging in the usual and customary occupation or in the job held at the time of injury; and, (2) can reasonably be expected to return to suitable gainful employment through the provision of rehabilitation services. The major amendment to this definition is the inclusion of another condition: "cannot reasonably be expected to return to suitable gainful employment with the date-of-injury employer." It is the position of the Department that the focus of rehabilitation under Minn. Stat. § 176.102, subd. 1 is the need to change employment because of a work-related injury. The Department believes that the current definition is inadequate because it does not require the QRC to assess the likelihood of an employee's return to the date-of-injury employer. It is the position of the Department that the Commissioner has the statutory authority to adopt the proposed amendment which it believes is consistent with the intent of the statute. Some commentators agree with the Department's interpretation. Burgess Eberhardt, Sedgwick James of Minnesota, Inc.; Mike Hickey, National Federation of Independent Business; Kermine A. Bender, Berkley Administrators; Andrea J. Linner, State Fund Mutual Insurance Company.

39. URAM argues that the Department lacks the statutory authority to adopt the amendment to the definition of "qualified employee" because the amendment establishes a substantive requirement for rehabilitation services which, in URAM's view, is unauthorized "legislative" rulemaking. The Administrative Law Judge does not agree. Initially, the existing rules already define the term "Qualified Employee". The proposed amendment only adds another condition to the rules' definition. Secondly, to the extent there is a legal distinction between legislative rules and interpretative rules, the proposed definition is an interpretative rule which the Department has the unquestioned authority to adopt. Minnesota-Dakota Retail Hardware Association v. State, 279 N.W.2d 360, 364 (Minn. 1979) (interpretative rule is one which makes specific the law enforced or administered by the agency.) Further, in addition to the Department's general rulemaking authority, Minn. Stat. § 176.102, subd. 6, specifically authorizes the Commissioner to determine eligibility for rehabilitation services. URAM argues that subdivision 6 only allows the Department to enforce the eligibility requirements in specific cases. Such a narrow reading would be inconsistent with the general rulemaking authority granted to the Commissioner to adopt rules necessary to implement and administer Minn. Stat. § 176.102. Minn. Stat. § 176.83, subd. 1 and 2. Therefore, the Administrative Law Judge rejects the arguments. The proposed amendments to Minn. Rule 5220.0100, subp. 22 are within the Department's statutory authority.

40. Commentators also argue that the proposed amendment is contrary to the intent of the statute and that rehabilitation services must be provided regardless of whether post-injury employment is with the date-of-injury employer or with a different employer. The Department responds that the statute does not require the provision of rehabilitative services to injured employees who will return to work for their date-of-injury employers. Department Comments, February 24, 1993, pp. 8-9. The Administrative Law Judge

finds the statute is ambiguous. The Department's interpretation of the statute, however, is reasonable and should be given deference.

An administrative construction of an ambiguous statute, reasonably susceptible to varying interpretations, is entitled to significant deference, unless there are strong indications that the administrative construction is incorrect. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); Bremer v. Commissioner of Taxation, 246 Minn. 446, 75 N.W.2d 470 (1956). This is particularly true when, as here, the subject of the statute is technical in nature and the agency has specialized experience in the area. Resident v. Noot, 305 N.W.2d 311, 312 (Minn. 1981). The Administrative Law Judge need not find that the agency's construction is the only reasonable one or the one that he would have reached if the question had initially arisen before him. FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 39 (1981). The Department's interpretation is reasonable. By diverting workers likely to obtain post-injury employment with their date-of-injury employer, the statutory rehabilitation services will be focused on "hard" cases in which the need for rehabilitation services are the greatest.

41. Under the existing rules, rehabilitation consultation consists of two levels of assessment: a claim screening consultation; and, an eligibility consultation. Under the proposed rules, the claim screening consultation is eliminated and the term "eligibility consultation" is replaced by the term "rehabilitation consultation." Minn. Rule 5220.0100, subp. 29 defines "rehabilitation services" as a program of vocational rehabilitation which "begins with the first in-person visit of the employee by the assigned qualified rehabilitation consultant, including a visit for purposes of a rehabilitation consultation." The rule is amended primarily by replacing the term "eligibility consultation" with the term "rehabilitation consultation."

42. Commentators challenge the Department's authority to define "rehabilitation services" to include "rehabilitation consultation." The reason for the concern about this definition involves the issue of whether rehabilitation consultation is subject to waiver under Minn. Stat. § 176.102, subd. 4(h) and Minn. Rule 5220.0120, which is later discussed in further detail. Commentators argue that the two terms are mutually exclusive and that the purpose of a rehabilitation consultation is to determine whether an employee is eligible for rehabilitation services. They argue that because Minn. Stat. § 176.102 uses both terms, the rules must recognize the distinction. They further argue that under Minn. Stat. § 176.102, subd. 4(a), an injured employee has an absolute right to a rehabilitation consultation and that only subsequent rehabilitation services are subject to waiver.

43. The Administrative Law Judge rejects the commentators' arguments. The proposed rules do not make any substantive changes to the definition of "rehabilitation services". The only change is that the term "rehabilitation consultation" is substituted for the old term "eligibility consultation." Therefore, the substance of the rule is not actually at issue in this proceeding. Further, the Department's interpretation is reasonable because under Minn. Stat. § 176.102, subd. 4(h), the waiver authority applies to all rehabilitation services under section 176.102, which includes rehabilitation consultation. The Department's interpretation is subject to deference. See, Finding 40, supra.

44. Pursuant to Minn. Stat. § 176.102, subd 4(h), the Commissioner is authorized to waive rehabilitation services if "the employee will return to work in the near future" or if "rehabilitation services will not be useful in returning an employee to work." Minn. Rule 5220.0120 implements the waiver provision and provides that a wavier is granted when the employer documents that the otherwise qualified employee will return to suitable gainful employment with the date-of-injury employer within 180 days after the injury. The rule also contains provisions for renewal of the waiver. The rule further provides that if 180 days have passed since the date of injury and the employee has not returned to work, no rehabilitation consultation has taken place, and no waiver has been granted, the Commissioner must refer the employee for rehabilitation services at the insurer's expense to be provided by the vocational rehabilitation unit of the Department.

45. Commentators' first objection to the rule is that the waiver of rehabilitation services cannot include waiver of rehabilitation consultation. URAM argues that Minn. Stat. § 176.102, subd. 4(h) cannot be read as authorizing waiver of rehabilitation services because the 1987 amendments to the provision changed the authority from waiver of "rehabilitation consultation" to waiver of "rehabilitation services". Minn. Laws 1987, Ch. 332, ¶ 17. However, the change in language, without evidence of legislative intent, does not necessarily compel the conclusion urged by URAM. One could also interpret the change in language as a change from a limited waiver (rehabilitation consultation only) to a broader waiver (rehabilitation services, including consultation).

46. Commentators then argue that the proposed amendments are contrary to section 176.102, subd. 4(h) because the statute only authorizes waiver of rehabilitation services if the injured worker will return to the pre-injury job without rehabilitation. The Department disagrees, arguing that the intent of Minn. Stat. § 176.102, subd.1(b) is to provide rehabilitation services to those employees who need to change employment because of a work-related injury. The waiver provision in the proposed rule is consistent with the Department's definition of "qualified employee" discussed above. As noted above, the Department has statutory authority to adopt the rule amendments and the Department's interpretation is reasonable and subject to deference. See, Finding 40, supra.

47. Commentators also argue that there is no statutory authority for Minn. Rule 5220.0120, subp. 5, which allows Department employees to conduct rehabilitation consultations if the injured worker does not return to work after 180 days and if no waiver is in effect. They also argue that the proposed rule contradicts Minn. Stat. § 176.102, subd. 4(a) which grants injured workers the right to choose a QRC. The Department has the statutory authority to adopt this rule provision under Minn. Stat. § 176.102, subd. 4(f), which provides that if the employer does not provide rehabilitation consultation requested, the Commissioner shall appoint a QRC at the employer's expense. The Department states that under the proposed rule, an injured employee would continue to have the right to choose a different QRC in accordance with the provisions of Minn. Rule 5220.0710. However, the rule is not clear in this regard and is reasonably subject to a contrary interpretation. When a rule, as proposed, 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). See also, Thompson v. City of Minneapolis, 300 N.W.2d 763, 768

(Minn. 1980). The definition of a rule requires that it implement or make specific the law enforced or administered. Minn. Stat. § 14.02, subd. 4. A rule which is impermissibly vague does not meet that definition.

48. To correct the defect, the Agency must remove the ambiguity by modifying the proposed rules. An example of language acceptable for that is set out in Finding 50, which provides amendment to Minn. Rule 5220.0710. Such a modification would not constitute a prohibited substantial change.

49. Minn. Stat. § 176.102, subd. 4(a) governs the selection of the QRC for rehabilitation services and provides that if the injured employee objects to the employer's selection, the employee may select a QRC of the employee's own choosing within 60 days following the filing of a copy of the employee's rehabilitation plan with the Commissioner. Numerous comments were submitted regarding the proper interpretation of this provision. Susan Herboldt, Itasca Medical Center; John R. Baumgarth; Ted Winter, Irv Anderson, Mike Jaros, Patrick Beard, State Representatives. The Department recognizes that this statutory provision is ambiguous and could be read to provide that the only opportunity for an employee to choose a QRC is during a 60-day period after the rehabilitation plan is filed. This interpretation could result in a duplication of effort and increased costs due to the change in QRC only after a great deal of work had been done. An alternate interpretation of the statutory provision is that the employee's right to choose the QRC is available from the initiation of rehabilitation services up to 60 days after the rehabilitation plan is filed. It is the Department's opinion that the latter interpretation is consistent with legislative intent and sound public policy. Tr. at 245-50. Recognizing that this statutory provision is ambiguous in regard to the period during which the employee could choose the QRC, the Department proposed Minn. Rule 5220.0710 to clarify the statutory provision. The rule provides in relevant part:

> [T]he qualified employee has a right to choose a qualified rehabilitation consultant . . . once:
>
> A. before a referral by the insurer to a qualified rehabilitation consultant, or before a first in-person visit between a qualified rehabilitation consultant and the employee; or
>
> B. when the employee selects a qualified rehabilitation consultant within 60 days after filing of the rehabilitation plan to replace a qualified rehabilitation consultant selected by the insurer . . . .

Unfortunately, as one commentator pointed out, the proposed rule is also ambiguous. Comments of Scott H. Soderberg. Instead of clearly defining the single time period during which an employee may choose a QRC, the rule appears to create two separate time periods during which the choice may be made: one period before the insurer chooses the QRC or before the rehabilitation consultation; and, a second period starting with the filing of the rehabilitation plan and ending 60 days thereafter. The Administrative Law Judge agrees with the Department's interpretation of the statute, but does not agree that the proposed rule unambiguously provides such an interpretation. As previously noted, when a rule is facially ambiguous in a material respect, it is impermissibly vague. See, Finding 47, supra.

50. To correct the defect, the Agency must amend the rule to remove the ambiguity. An example of an amendment that would accomplish that result is as follows:

> Subpart 1. Employee right to choose. Pursuant to Minnesota Statutes, section 176.102, subdivision 4, the qualified employee has a right to choose a qualified rehabilitation consultant as defined in part 5220.0100, subpart 23, once during the period commencing before a referral by the insurer or Commissioner to a qualified rehabilitation consultant, or before a first in-person visit between a qualified rehabilitation consultant and the employee and continuing until 60 days after filing of the rehabilitation plan. If the employee chooses a qualified rehabilitation consultant under this subpart, the employee shall notify the insurer in writing of the name, address, and telephone number of the qualified rehabilitation consultant chosen.

Such an amendment would not constitute a prohibited substantial change.

51. In 1992 various provisions of Minn. Stat. § 176.102 were amended to provide timeframes for specific rehabilitation activities. In response to these changes, the Department proposed changes to Minn. Rule 5220.0130 and Minn. Rule 5220.0410. In response to public comments, the Department changed some of the timeframes in the proposed rules to better reflect the statutory changes. Department Response at 5-6. Appendix B. Subsequent to those proposed changes, the only provisions at issue are Minn. Rule 5220.0410, subps. 3, 4, 5 and 6 which, it is argued, are inconsistent with the requirements of Minn. Stat. § 176.102, subd. 4(e). URAM Reply Comments at 5-6.

Minn. Rule § 176.102, subd. 4(e) provides that the employee and employer shall enter into a program if one is prescribed in a rehabilitation plan within 30 days after the rehabilitation consultation if the QRC determines that rehabilitation is appropriate. Minn. Rule 5220.0410, subp. 3 provides that the QRC is required to provide a copy of the proposed rehabilitation plan to the parties within 30 days after the rehabilitation consultation. Under Minn. Rule 5220.0410, subp. 4, the parties must either sign the plan or file any objection with 15 days of receipt of the plan. URAM alleges the rule is inconsistent within the statute because the time allowed for filing and objection exceeds the 30-day provision in Minn. Stat. § 176.102, subd. 4(e). The Department did not make any changes in response to URAM's initial comments; therefore, it is assumed the Department believes the rule is consistent with the statute. The rule is, of course, consistent in those cases in which there is no objection to the plan. If there is objection, disagreements must be articulated and resolved prior to plan implementation. The proposed rule provides an appropriate mechanism to deal with these situations and is, therefore, needed and reasonable. In cases in which there is an objection to the plan, such that the employee and employer are unable to enter into a program within 30 days, the statute can reasonably be interpreted as being directory, rather than mandatory. State v. Frisby, 108 N.W.2d 769 (Minn. 1961); Christgau v. Fine, 27 N.W.2d 199 (Minn. 1947) (The provisions of an act directing doing of certain things within certain times without negative consequences for failure to act within the prescribed time are deemed directory, rather than mandatory). Therefore, the rule may be adopted as proposed.

Substantive Provisions - Rehabilitation Services

Minn. Rule 5220.0100, subp. 22

52. As noted above, a proposed amendment to Minn. Rule 5220.0100, subp. 22, would add a condition to the definition of "qualified employee", i.e., whether the employee can reasonably be expected to return to suitable gainful employment with the date-of-injury employer. An injured worker must be determined to be a "qualified employee", on the basis of a rehabilitation consultation, before a rehabilitation plan may be implemented under the rules. The Department is adding the provision to the definition of "qualified employee" to discourage the utilization of statutory rehabilitation services where the worker is likely to return to suitable gainful employment with the date-of-injury employer. At the present time, approximately 45% of workers who receive rehabilitation services under the statute return to work with their date-of-injury employer. SONAR at App. A. Approximately 25% of workers who receive rehabilitation service under the statute return to their pre-injury job. Id. It is the position of the Department that it is more cost effective to permit employers to provide services to bring their employees back to work at their pre-injury job or to other suitable gainful employment with the date-of-injury employer. It is the position of the Department that employers have strong incentives to return their employees to work, including avoiding payment of wage loss benefits, payment of higher permanent partial disability benefits, exposure to higher experience modification rating in workers' compensation insurance premiums, and, exposure to disability discrimination claims. When employers are free to use their own resources, including managed care organizations authorized under Minn. Stat. § 176.1351, to return workers to productive employment, then the resources of statutory rehabilitation services can be focused on injured workers who cannot return to work with their date-of-injury employers where, in the Department's view, the need is greatest.

53. URAM objects to the proposed rule, arguing that it is neither needed nor reasonable. URAM argues that the Department has failed to substantiate a problem of over-utilization of statutory rehabilitation services and points out that no evidence was presented to indicate that injured workers who returned to their date-of-injury employers would have done so without rehabilitation services. On the other hand, there is no evidence to indicate that any of the injured workers who returned to their date-of-injury employers would not have done so without rehabilitation services, other than anecdotal information. Tr. at 353-359, 372-377, 419-421. Additionally, it is the position of the Department that to the extent services are needed to return the injured employee to work the services can be more cost-effectively provided by employers for their own employees. The proposed amendments address the problem of utilization of statutory rehabilitation services by workers who ultimately return to their date-of-injury employers.

URAM also argues that the rule is unreasonable because it does not distinguish between employers who have return-to-work programs available to them and those that do not. This provision of the rule deals only with the definition of "qualified employee". The assessment of whether an injured worker meets this definition must be made by the QRC on the basis of the rehabilitation consultation. If the employee disagrees with the assessment, the employee has the right to file an objection with the Commissioner. These

procedural safeguards are a reasonable means of ensuring that there is a factual basis for the determination of whether or not an employee is a "qualified employee" for purposes of further rehabilitation services. The Administrative Law Judge finds that Minn. Rule 5220.0100, subp. 22, is needed and reasonable for the reasons stated in this Finding and Finding 53, supra.

Minn. Rule 5220.0120

54. Minn. Rule 5220.0120 governs waiver of rehabilitation services, including the rehabilitation consultation. Under the proposed amendments, a request for waiver must be documented on the disability status report required by part 5220.0110. The waiver is granted by the Commissioner if the employer demonstrates that the otherwise qualified employee will return to "suitable gainful employment with the date-of-injury employer within 180 days after the injury." The proposed rules authorize a renewal of the waiver; however, under changes proposed by the Department during the post-hearing comment period, the waiver is authorized only if the Commissioner determines that return to work is "imminent". Department Response; Appendix B, p. 1, ¶ 5. Also under the changes proposed, the employer is required to serve the disability report and request for renewal on the employee.

55. URAM objects to the criteria for granting the waiver for the same reasons it objects to the proposed definition of "qualified employee." Another commentator agreed it was reasonable to include the waiver provision to avoid unnecessary expense to the workers' compensation system. Comments of Bernard L. Brommer, AFL-CIO. Likewise, for the same reasons as for the definition, the criteria are found to be reasonable. URAM also objects that the 180 day waiver period is unreasonable. The Department included a specific time frame to make specific the statutory term "in the near future." The Department chose 180 days because in the Department's experience six months is the time period following injury "within which the referral for rehabilitation is most like to occur voluntarily, by which rehabilitation intervention is most helpful, and after which it is more likely to fail." SONAR at 5. URAM agrees with the Department's statements, but argues that the Department's statistics support the current 60-day waiver period, rather than 180 day period proposed. The Department correctly notes that, in practical effect, the time frame in the proposed rule is the same as that in the existing rule. Under the existing rule, the mandatory rehabilitation consultation would not be triggered until 60 days of lost work time (30 days if a back injury was involved). Under the existing rule, the waiver is in effect for 60 days and is subject to renewal under the same standards as the original waiver. Under the proposed rules, only one waiver will be granted, unless the return to work is imminent. The Department's rationale justifying the rule is appropriate if the waiver could only be in effect until 180 days following the injury, unless a return to work was imminent. That result is not, however, apparent from the text of the rule as proposed. The rules does not state that only one waiver will be allowed. Since this part is reasonably susceptible of differing interpretations with respect to a material provision, it is impermissibly vague. See, Finding 47, supra.

56. To correct the defect, the Agency must amend the rule to state that the original waiver could only be in effect for a period of 180 days from the date of the injury. An example of an acceptable amendment is as follows:

Minn. Rule 5220.0120, subp. 2.

> Criteria. A rehabilitation waiver is granted when the employer documents that the otherwise qualified employee will return to suitable gainful employment with the date-of-injury employer within 180 days after the injury. The waiver shall not be effective more than 180 days following the injury unless a renewal is granted under subpart 4.

Such an amendment would not constitute a prohibited substantial change.

57. Under Minn. Rule 5220.0120, subp. 5, if 180 days have passed since the date of injury and if the employer has not returned to work, no rehabilitation consultation has occurred, and no waiver has been granted, the Commissioner is required to order rehabilitation consultation at the insurer's expense to be provided by qualified Department employees. It is the position of the Department that appointment of Department QRCs is a necessary and reasonable response in the above situation since the employer has failed to take necessary actions under the statute and rules. The Department states that its intent is that the statute and rules applicable to an employee's choice of QRC are also applicable in this circumstance. The rule as written, however, does not include a provision reflecting this departmental intent. The Administrative Law Judge finds this portion of the rule to be impermissibly vague.

58. To correct the defect, there must be an amendment to this rule or another part specifically stating that the statute and rules applicable to an employee's choice of a QRC are also applicable when rehabilitation consultation is to be provided by qualified department employees. If the Department adopts the amendment proposed by the Administrative Law Judge in Finding 48, supra, no further change to this subpart would be necessary.

Minn. Rule 5220.0410, subp. 9

59. Minn. Rule 5220.0410, subp. 9 provides that job development and job placement services shall be provided either by rehabilitation providers registered by the Commissioner or by an accredited facility. The rule also provides that the insurer may select the vendor of job development or job placement services. The Department determined that the issue of which party was entitled to select the vendor had been the subject of litigation, with varying outcomes. The Department's rationale for granting the right to the insurer is that insurers, by their experience as payers for services, are in a position to be knowledgeable regarding the competence and cost effectiveness of vendors. SONAR at p. 7. The Department also stated that this provision serves as a means of checking or limiting potential conflict of interest referral relationships between QRCs and vendors. Id. Finally, the Department stated that it provided a "balance" in the process because employees had the right to choose the QRC.

60. Several commentators objected to this provision. Comments of Bernard L. Brommer, AFL-CIO; Diane Tschida, Tschida Counseling. URAM argues that the employee's right to choose a QRC should extend to the right to choose job development or job placement services, since such services are provided under the supervision of a QRC. URAM also argues that there are other provisions in the rule which would prevent a conflict of interest between QRCs

and vendors and that there was a much greater likelihood of a conflict of interest between insurers and vendors. Other commentators stated that it is necessary for the QRC and employee to choose the vendor to develop an appropriate working relationship. Some commentators favored the Department's position. Comments of Bruce Engel, Engel & Associates Placement Services. There are sound policy reasons for and against allowing the insurer choose the vendor. However, since there is rational basis for the Department's proposal, it has met its statutory burden. Minn. Rule 5220.0410, subp. 9, is found to be needed and reasonable.

Minn. Rule 5220.0450

61. Minn. Stat. § 176.102, subd. 6(b) requires rehabilitation consultants to file a progress report six months after the rehabilitation plan has been filed and also provides that the Commissioner may require additional progress reports. Minn. Rule 5220.0450 provides that after an assigned QRC has filed an approved rehabilitation plan with the Commissioner, progress reports must be filed at the following intervals: three months after initial filing; three months thereafter; and, every six months thereafter. The Department's rationale for the three month progress report, which will only be sent to the insurer, is to advise the insurer early in the process of any difficulties which may hinder the successful completion of the rehabilitation plan. URAM objected to this requirement, arguing that it is an unnecessary burden that will only serve to increase costs. The Department has demonstrated a rational basis for its proposed rule.

62. Under the provisions of Minn. Rule 5220.0450, subp. 4B, if the Commissioner determines, based upon the rehabilitation plan progress reports, that the rehabilitation plan is inadequate to carry out the statutory objectives, other actions may be taken, including on-site inspections of the QRC's records. The Department has the statutory authority to conduct inspections pursuant to Minn. Stat. §§ 175.20 and 176.86. URAM objects to the reasonableness of this proposal. The Department has proposed changes to the language to clarify that such inspection would only take place during normal business hours. Department Response, Appendix B at p. 3, ¶ 13. Minn. Rule 5220.0450 as amended is found to be needed and reasonable. The amendment proposed by the Department does not constitute a prohibited substantial change.

Minn. Rule 5220.1250

63. Minn. Rule 5220.1250 defines the roles of registered rehabilitation providers. An entity may be approved by the Department as either a registered rehabilitation vendor or as a qualified rehabilitation consultant firm but not both. The rules provide that the roles of the two kinds of providers are distinct. A vendor may provide job development and job placement services under an approved rehabilitation plan, but may not function as a QRC. A QRC may not function as a vendor or as an agent of a vendor, although a QRC may provide job development and job placement services in cases for which the QRC is the assigned qualified rehabilitation consultant.

64. A number of comments from vendors criticized the provision of the rule allowing QRCs to provide "in-house" job development and job placement services. Comments of Wayne Onken, Complete Career Services, Inc.; David Laurie, David Laurie & Associates, Inc. The Department states that, although the proposed rule codifies the dominant practice among rehabilitation

providers, an explicit rule is necessary to resolve ongoing disputes in regard to which provider is entitled to provide what services. It is the position of the Department that, pursuant to Minn. Stat. § 176.102, subd. 10, a QRC is authorized to implement rehabilitation plans, which includes providing job placement and job development services. For this reason, the proposed rule provides that QRCs can perform job development and job placement services on their own rehabilitation plans. The Administrative Law Judge finds that Minn. Rule 5220.1250 is needed and reasonable.

Minn. Rule 5220.1600

65. The proposed amendment to Minn. Rule 5220.1600 provides that at least 60% of QRC firm employees must actually be QRCs, rather than the current rule's 80% requirement. The Department's rationale for the proposed change is that the 80% provisio has been found to be limiting and unnecessarily burdensome, in part because of the limited number of QRCs and the difficulty of maintaining compliance with the rule because of staff turnover. It is the Department's position that the amendment will address these problems while maintaining a dominance of registered persons in provider firms. SONAR at pp. 13-14. Some commentators objected to the amendment, arguing it will allow QRC firms to expand their firms solely to provide more job placement services. It is argued that this will increase rehabilitation services costs because job placement services are more cost-effectively provided by rehabilitation vendors. Comments of Bruce Engel, Engel & Associates Placement Services; Wayne Onken, Complete Career Services, Inc.; Paul R. Nelson, Nelson Placement Networks; David Laurie, David Laurie & Associates, Inc. The Administrative Law Judge agrees with the reasoning of the Department. The Department has met its burden of demonstrating the need for and reasonableness of the rule.

Minn. Rule 5220.1900

66. The Department has proposed various amendments to the rules designed to be cost containment measures, mandated by Minn. Stat. § 176.102, subd. 2 and Minn. Laws 1992, Ch. 510, art. 3, §35(b). These amendments include the following:

Subpart 1b. Fees for rehabilitation services are frozen at the hourly rates on file with the Commissioner as of July 15, 1992, until September 30, 1993, at which time annual adjustments are made.

Subpart 1c. The hourly billing rate for QRCs is subject to a maximum rate of $65 per hour. Rehabilitation providers are required to bill at one-half of their hourly rate for travel and wait time.

Subpart 1d. The maximum rate to be charged by QRC interns is $10 per hour less than the hourly rate charged for QRC services for the firm.

Subpart 1e. The hourly billing rate for job development and job placement services, whether provided by a QRC or a vendor, is $50 per hour.

Subpart 1f. Billing for services for QRCs and QRC interns is reduced by $10 per hour when the case exceeds 39 weeks (from the date of the

rehabilitation consultation) or the costs of rehabilitation services billed by the QRC exceed $3500.

Subpart 6a. When a vendor is billing for job development or job placement services under a rehabilitation plan, the QRC's billing is limited to 2 hours per 30 day period, unless prior approval is obtained.

Subpart 6b. The QRC cannot bill more than 8 hours for a rehabilitation consultation and the development, preparation, and filing of a rehabilitation plan, unless prior approval is obtained.

67. The underlying rationale for the measures is the directive by the Legislature to reduce workers' compensation premiums by 16% and to limit fees charged by rehabilitation providers. The Department's 1988 Report to the Legislature shows that the fees paid to QRCs and vendors were approximately $35-$40 million, or approximately 3.3% of the total cost of the workers' compensation system. Since 1989, rehabilitation cost growth has been higher than the cost growth of the entire workers' compensation system. Department Response at 10-11. Opponents of the proposed cost containment measures argue that there is no cost "problem". URAM asserts that the Department's statistics are misleading because from 1989 to 1991 the number of rehabilitation plan closures also increased by 23 percent and the cost per closed rehabilitation plan increased 10.3 percent. URAM Reply Comments at 3. They also argue that successful rehabilitation saves the workers' compensation system money in the long run. In particular, URAM relies on a study from Northwestern National Life Insurance Company to argue that there is a 30:1 benefit to cost ratio for rehabilitation. Public Ex. 1, Tab R; URAM Comments, Attachment A; URAM Reply Comments at 4-5. The Department does not dispute that vocational rehabilitation is an important part of the workers' compensation system. The Department has, however, demonstrated the need to contain these, as well as other costs, in the system.

68. The Department is not free to disregard the duty imposed upon it by the Legislature to reduce costs. The Department is not free to reevaluate the policy choices that are inherent in the legislative directive. Cost containment in the area of social benefit programs is a well recognized and judicially sanctioned policy objective. King v. Smith, 392 U.S. 309, 334 (1967); Norton v. Weinberger, 364 F. Supp. 1117, 1129 (D. Md. 1973), vacated on other grounds, 418 U.S. 902 (1974); Baker v. City of Concord, 916 F.2d 744, 750, 751 (1st Cir. 1990); Metrolina Family Practice Group v. Sullivan, 767 F. Supp. 1314, 1321 (W.D.N.C. 1989); Whitney v. Heckler, 780 F.2d 963, 969 (11th Cir. 1986); New York State Society of Orthopaedic Surgeons v. Gould, 796 F. Supp. 67, 74 (E.D.N.Y. 1992); Association of American Physicians and Surgeons v. Weinberger, 395 F. Supp. 125, 140 (N.D. Ill. 1975), aff'd, 423 U.S. 975 (1975).

The Administrative Law Judge must determine whether the Department has demonstrated the reasonableness of the cost control measures it has proposed. It is appropriate to enunciate the governing standards. As previously discussed, to demonstrate reasonableness, the Agency need only advance facts in the hearing record sufficient to allow the Administrative Law Judge to find that the measures it proposed are rationally related to the end sought to be achieved. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn. App. 1985). Those facts may either be adjudicative

facts or legislative facts. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). The agency must show that a reasoned determination has been made. Manufactured Housing Institute at 246. See, Finding 8, supra. The test of the existence of a rational relationship to the end sought to be achieved prevents the Administrative Law Judge from requiring the adoption of the "best" alternative or the alternative he would select if he were initially drafting the rule. Generally, the Agency must make an affirmative presentation in support of each of its proposals. The presentation may consist of adjudicative facts, legislative facts, statutory interpretation or articulated policy preferences. St. Paul Area Chamber of Commerce v. Minnesota Public Service Commission, 251 N.W.2d 350, 356-57 (Minn. 1977); 1 & 2 Davis Administrative Law Treatise (2nd Ed.), §§ 6.13-14, 12.3. In judging the efficacy of an agency's presentation, one must also realize that it may be necessary for an agency to make judgments and draw conclusions from suspected but not completely substantiated relationships between facts, from trends among facts, from theoretical projections based on imperfect data and from probative preliminary data. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). The Agency may also make informed policy choices of a quasi-legislative character based on its expertise in a technical area.

In determining the reasonableness of the Agency's cost containment proposals, it is also important to note that the subject matter involves judgments about cost containment in a government-sanctioned social benefit program in which the providers of the service in question -- here, vocational rehabilitation -- are not required to participate. While the specific holdings are not directly applicable, the Administrative Law Judge believes it instructive to look to caselaw in which similar cost containment proposals have been challenged on federal constitutional grounds. See, Association of American Physicians & Surgeons v. Weinberger, supra; New York State Society of Orthopaedic Surgeons v. Gould, supra; Whitney v. Heckler, supra; Metrolina Family Practice Group v. Sullivan, supra; Garelick v. Sullivan, supra; Harper-Grace Hospitals v. Schweiker, 708 F.2d 199 (6th Cir. 1983). The principles derived from these decisions may be summarized as follows: absent some particular contract or statute, neither a provider nor a participant has a right to a specified level of benefits or compensation; the governmental authority has broad discretion in adopting cost containment measures which involve no obvious, invidious discrimination; and a classification adopted by the governmental authority will be sustained if it does not relate to a "suspect class" and bears some rational relationship to the end to be achieved -- cost containment. With respect to a provider, it is under no legal obligation to participate in the program and, if it does so, it accepts reasonable cost containment measures. Garelick v. Sullivan, supra; Whitney v. Heckler, supra; Metrolina Family Practice Group v. Sullivan, supra.

The same principles developed in the area of social benefit legislation apply to workers' compensation legislation and rules. See, Richardson v. Belcher, 404 U.S. 78, 83-84 (1971); Estridge v. Stovall, 704 S.W.2d 653, 655 (Ky. App. 1986).

69. The freeze on hourly fees is proposed by the Department while further study of a fee schedule or other means of limiting rehabilitation costs is undertaken. The freeze is reasonable to prevent providers from increasing their fees in anticipation of a fee schedule. Whitney v. Heckler, supra;

Garelick v. Sullivan, supra. The annual adjustment of fees is limited to the annual increase in benefits for injured workers.

70. The maximum hourly rate of $65 for QRCs is based upon an analysis of QRC rate filings as of December 16, 1992. The median hourly QRC charge was determined to be $65. 78.8% of the firms had hourly charges of between $60 and $70. Opponents of the $65 hour limit suggest alternative means of computing the maximum amount. If a fee limit is to be established, a line must be drawn. The statistics provided by the Department establish a rational basis for the Department's maximum hourly rate. SONAR, Appendix D. The Administrative Law Judge finds that the maximum hourly rate proposed by the Department is reasonable.

71. The Department's rationale for limiting billing for travel and wait time to one-half of the provider's billing rate is to provide an incentive to providers to increase the time spent in direct services to injured employees and to encourage the location of providers closer to the persons served. The Department does not have a breakdown of the amount of time presently spent by providers in travel and wait time. It is the current practice of some providers to bill at one-half of their usual rate for travel and wait time. Opponents of this proposal argue that the travel and wait time is not within the control of providers and that the providers in the non-metro area will be penalized by this rule. In response the Department notes that injured employees are paid mileage to travel for rehabilitation services and that this will be a cost-effective means of reducing provider travel. Further, while some travel and wait time is unavoidable, the reduced rate is reasonable because no professional services are being rendered during this time. The proposed rule has a rational basis and is found to be needed and reasonable.

72. The rationale for limiting a QRC intern to $10 less per hour than a QRC in the same firm is to recognize the lesser experience of the intern. Opponents argue that the reduction is reasonable only if the QRCs in the firm are allowed to increase their billings by $10 per hour since the hourly rates are based upon the cost of doing business. Opponents also claim that the proposal would act as a disincentive to hire interns. The proposal is a needed and reasonable way of compensating interns who have not yet been certified as QRCs. This portion of the rule is found to be needed and reasonable.

73. The proposed limit of $50 per hour for job development and placement services is based upon the median rate charged by providers for this service. SONAR, p. 17. The maximum fee is lower than for QRC services because job development and job placement services are often provided by persons who are qualified by experience but are without professional education. An annual adjustment is provided. The hourly compensation limit has a rational basis and, therefore, is needed and reasonable.

74. The Department proposes to reduce QRC fees by $10 per hour after a case has been open 39 weeks or after the QRC has billed $3500. The rationale for the Department's proposal is that it will provide a strong incentive for rehabilitation services to be provided in as short an amount of time as possible. Department statistics show that in 1991 the average QRC firm cost for all closures was $3,476. The average cost for an employee who returned to work with the same employer, however, was $2,277, while the average for a return to work to a different employer was $4,646. The rational basis for the

fee reduction amount is, therefore, that it is based on a relatively contemporaneous average billing per case. The use of fee caps and other reimbursement limitations based on relatively contemporaneous averages has been sustained in a variety of circumstances. Garelick v. Sullivan, supra; Metrolina Family Practice Group v. Sullivan, supra; Whitney v. Heckler, supra; New York State Society of Orthopaedic Surgeons v. Gould, supra.

75. Several commentators argue that the "average" used by the Department in its statistical analysis is flawed, since other changes in the rules anticipate that many injured employees will be returned to work with their date-of-injury employer, instead of obtaining rehabilitation services as would be the case under the present rules. Therefore, it is asserted that the statistical basis for the Department's proposed cutoffs is flawed because it includes cases which will be excluded under the present rules. Additionally, several commentators argue that for a variety of very legitimate reasons some cases take longer and cost more that the cutoffs provided by the rules. Tr. at pp. 451-80; Comments of Diane Hansen, Hansen Rehabilitation Services, Inc.; Giancola Rehabilitation Services; Tschida Counseling. Finally, the argument is made that the fee reduction provides a strong disincentive for QRCs to take the more difficult, protracted cases which are the cases most in need of their services.

76. The Administrative Law Judge finds that the proposed fee reduction after a stated period of time or after a stated dollar amount of billings has been demonstrated to bear a rational relationship to the goal of cost containment without accomplishing an arbitrary result. The measure will encourage expeditious, cost-conscious service. The argument related to the statistical basis of the Agency's presentation is not appropriate. The Agency is required to achieve future cost savings over the current situation when the rules are in effect. It is appropriate, therefore, to use the existing average as the triggering mechanism. That some cases will be more protracted and require special or extensive services is true of any compensation program based on averages, including those decisions noted in Finding 68, supra. As long as the limitation is not applied to billings pending when the rules become effective, a person or entity undertaking to provide such services with knowledge of the limitation has no basis for complaint. Garelick v. Sullivan, supra; Whitney v. Heckler, supra; Metrolina Family Practice Group v. Sullivan, supra. The Administrative Law Judge finds that subpart 1.f. of Minn. Rule 5220.1900 is needed and reasonable.

77. In summary, subparts 6a and 6b limit the amount of time a QRC can bill for certain services. The proposed rules are needed and reasonable, since they are not unduly restrictive and provide a mechanism for an increase of billable time if circumstances allow.

FRAUD UNIT

Nature of the Proposed Rules - Fraud Unit

78. The proposed rules governing the Department's workers' compensation Fraud Unit, Minn. Rules 5228.0100-5228.0130, establish procedures for the administration of the unit. The proposed rules define key terms, establish criteria for identification of suspected fraud or payments not received in good faith, set out the investigative powers of the Fraud Unit, establish the

standard for determination of whether or not fraud or other illegal activity has occurred, and establish a standard for referral of the matter for prosecution.

Statutory Authority - Fraud Unit

79. Minn. Stat. § 176.86 (1992) requires the Department to establish a workers' compensation fraud unit to investigate fraudulent and other illegal practices of health care providers, employers, insurers, attorneys, employees, and others related to workers' compensation. The statute authorizes the Fraud Unit to conduct field investigations. The Commissioner is required to refer a matter to prosecuting authorities if the Department determines that there is illegal activity. There is no specific grant of rulemaking authority in this provision. However, the Commissioner has general rulemaking power under Minn. Stat. §§ 175.17, 175.171 and 176.83. The Commissioner has the statutory authority under these general grants of authority to adopt the proposed rules.

Some commentators argue that the rules proposed by the Department exceed the scope of the statute by dealing with non-criminal matters. Comments of Mary Murphy, State Representative; Stephen G. Wenzel, State Representative; David A. Stofferahn. The Department acknowledged that the powers of the Fraud Unit are limited to investigations of violations of Minn. Stat. §§ 176.178, 176.179 and 609.52; however, the Department argued that if the Fraud Unit found evidence of civil or criminal wrongdoing in the proper scope of its investigation, the matter could properly be referred for civil or disciplinary sanctions, referred to the appropriate paying party for recovery of overpayment or referred for criminal prosecution. The Administrative Law Judge agrees that the proposed rules do not exceed the statutory authority of the Commissioner.

Substantive Provisions - Fraud Unit

80. One commentator objected to the fraud unit rules generally as being overbroad, vague and impossible to interpret. Comments of David A. Stofferahn. In response the Department points out that the rules do not attempt to establish any new power or authority for the Commissioner. The Department states that the rules must be read in the context of the statute being implemented and, when so read, the rules are a reasonable clarification and interpretation of the statute. The Administrative Law Judge agrees that the rules are not impermissibly overbroad or vague.

Minn. Stat. § 5228.0100 Definitions

81. Minn. Rule 5228.0100 defines key phrases used in the fraud unit rules. Several commentators objected to the proposed definitions or offered additional language.

82. Minn. Rule 5228.0100, subp. 9, defines "illegal activity" to include certain acts and omissions. Mahlon Schneider suggested adding to the definition "making a knowingly false material statement or material misrepresentation regarding entitlement to benefits with the intent to encourage an employee to pursue a claim." The Department stated that it is not opposed to the addition, but suggested the following language:

Subp. 9.D. making a knowingly false material statement or material misrepresentation regarding entitlement to benefits with the intent to discourage an injured worker from pursuing a claim or with the intent to encourage an employee to pursue a claim.

Department Response to Fraud Rule Comment, February 17, 1993. This proposed definition with the change suggested by the Department is needed and reasonable and does not result in a prohibited substantial change.

83. In his post-hearing comments, David A. Stofferahn also suggests that the terms "fraudulent or other illegal practices" must be clearly defined. In response the Department noted that the term "fraud" is defined criminally in Minn. Stat. § 176.178 and the term "illegal activity" is defined in the rule. The Administrative Law Judge agrees that the proposed rule is reasonable without any additional definition.

84. Another commentator suggested that the term "probable cause" must be more narrowly defined than is proposed in Minn. Rule 5228.0100, subp. 13. Comments of Joe Wild. The definition proposed by the Department is reasonable because it is consistent with the legal standard generally applied in criminal and relevant civil caselaw. SONAR at p. 5.

Minn. Rule 5228.0120 Investigative Powers

85. Minn. Rule 5228.0120, subp. 2, provides that the Fraud Unit may require the disclosure of personal or privileged information without written authorization under Minn. Stat. § 72A.502. Commentators suggested that this provision would allow the Department access to privileged information and result in an abuse of power. Comments of David A. Stofferahn and Joe Wild. As the Department notes, the power set out in the proposed rule is provided by statute. The rule does not expand that authority. Minn. Rule 5228.0120, as proposed, is found to be needed and reasonable.

SAFETY ACCOUNT GRANT AND LOAN PROGRAM

Nature of Proposed Rules - Safety Account Grant and Loan Program

86. The proposed rules govern the administration of the safety account grant and loan program established by Minn. Stat. § 79.253. The proposed rules identify applicants, projects and costs that may be funded through the program; establish application procedures, criteria for the review of project and criteria for the award of grants and loans; and, specify the content of grant and loan agreements.

Statutory Authority - Safety Account Grant and Loan Program

87. Minn. Stat. § 79.253 establishes a separate "safety" account. Funds for the account come from fines and penalties assessed under Minn. Stat. Ch. 176. The principal and income of the safety account are annually appropriated to the Commissioner to make grants and loans for the purpose of implementing safety recommendations. The statute also authorizes the Commissioner to adopt rules necessary to implement the grant and loan program.

Substantive Provisions - Safety Account Grant and Loan Program

88. There were no public comments of a substantial nature regarding Minn. Rule 5203.0010-5203.0070 governing the Safety Account Grant and Loan Program. The proposed rules are found to be needed and reasonable for the reasons set out in the Statement of Need and Reasonableness.

SAFETY AND HEALTH COMMITTEES

Nature of the Proposed Rules - Safety and Health Committees

89. The proposed rules establish standards for safety and health committees, required by Minn. Stat. § 176.232. The proposed rules establish requirements regarding membership, safety surveys, and other duties. The proposed rules also provide for alternative forms of safety and health committees under certain circumstances.

Statutory Authority - Safety and Health Committees

90. Minn. Stat. § 176.232 requires every employer of more than 25 employees to establish a joint labor-management safety committee. Smaller employers are also required to establish such committees if: the employer has a lost workday cases incidence rate in the top ten percent of all rates for employers in the same industry; or, the workers' compensation premium classification assigned to the greatest portion of the payroll for the employer has a pure premium rate in the top 25 percent of premium rates for all classes. The statute authorizes the Commissioner to adopt rules regarding the training of safety committee members and the operation of safety committees.

Substantive Provisions - Safety and Health Committees

91. Minn. Rule 5204.0040 requires the safety and health committee for any employer that has a workers' compensation insurance experience modification factor of 1.4 or greater or has a workers' compensation premium rate of $30 or more per $100 of payroll assigned to the greatest portion of the payroll for the employer must conduct quarterly workplace safety and health surveys. One commentator stated that the rule's criteria were not reasonably related to safety problems and that the rule should use the AWAIR (A Workplace Accident and Injury Reduction Act) criteria instead. Comments of Abe Rosenthal. In response, the Department noted that Minn. Rule 5204.0040 is not used to determine which employers with less than 25 employees are subject to the provisions of the rule since that determination is made by the statute. The rule only requires that employers meeting the above criteria conduct quarterly safety surveys. The rule as proposed is needed and reasonable.

92. Minn. Rule 5204.0060 provides that an employee who is discharged or otherwise discriminated against because the employee has reported a safety hazard to the safety and health committee is subject to the protection afforded under Minn. Stat. § 182.669. One commentator suggested that the Department define the term "safety hazard" to mean a hazard that poses an unreasonable risk of death or serious injury. He also suggested that the rule provide: that reporting a safety hazard does not excuse the employee from meeting the requirements of the job unless there is an imminent risk of death or serious bodily injury; and, that an employee's failure to observe an

employer's safety rule is grounds for discipline. Comments of Mahlon Schneider. The Department does not accept these suggestions, noting that the rule simply affords the employee the protections of Minn. Stat. § 182.669 and is not intended to alter the rights of employees and employers regarding job performance standards. The Administrative Law Judge accepts the reasoning of the Department. The Administrative Law Judge finds that the rule as proposed is needed and reasonable.

93. Minn. Rule 5204.0070 provides, among other things, that safety and health committees established under a collective bargaining agreement or under the provisions of Minn. Stat. § 182.653 are considered to be in compliance with the requirements of the rule and are exempt from specific requirements of the rule. One commentator suggested that an employer with an experience rating of 1:0 or less should also be exempt from the provisions of the rule. Comments of Mahlon Schneider. The Department rejected this suggestion, stating that Minn. Stat. § 176.232 requires a safety committee, regardless of the employer's safety record. The Administrative Law Judge agrees that the rule as proposed is needed and reasonable.

94. Minn. Rule 5204.0090 provides that for the purposes of the proposed rules, the term "employee" includes an independent contractor engaged in construction activities and a person who has contracted with an independent contractor to supply construction services. One commentator recommended that the distinction be maintained between employees and independent contractors. The Department proposed this requirement because it is the common practice in the construction industry to designate workers as independent contractors, rather than employees, to avoid the high cost of workers' compensation for those occupations. It is the position of the Department that workers should not be denied the protections of this rule simply because of that practice. The Department notes that the rule does not attempt to "reclassify" the workers for any purpose other than the protection of the rule. The Administrative Law Judge finds the rule to be needed and reasonable as proposed.

INSURANCE VERIFICATION

Nature of Proposed Rule - Insurance Verification

95. Minn. Rule Ch. 5222 establishes procedures for the filing of insurance status reports by insurance companies licensed to write workers' compensation insurance in the state. Minn. Rule 5222.2000 - 5222.2006 establish procedures for the verification of workers' compensation coverage. The proposed rules would amend Minn. Rule 5222.2001 to require every employer's federal employer identification number (FEIN) and unemployment account number to be included on an insurer's policy declaration sheet or insurance binder. The proposed amendments also require parties who contract with the Commissioner for the collection of insurance coverage data to record the FEIN and unemployment account number.

Statutory Authority - Insurance Verification

96. Minn. Laws 1992, Ch. 510, art. 3, § 32 requires the Commissioner to study the issue of whether there is data in the possession of other state or private entities that would assist the Department in identifying employers that are not complying with the insurance requirements of Minn. Stat. Ch. 176.

The proposed amendments to the rule are consistent with this statutory provision and are authorized by the Department's general rulemaking authority of Minn. Stat. § 176.83.

Substantive Provisions - Insurance Verification

97. One commentator suggested that the proposed requirement of providing both the FEIN and the unemployment account number be implemented in two steps, under which one number would be required as of January 1, 1994, and the other added six months later, to permit necessary system changes and adjustments. Comments of Robert D. Johnson, Insurance Federation of Minnesota. The Department rejects this suggestion, noting that such a delay would mean no meaningful data would be available for two years. The Department acknowledges that it takes some time to change procedures, but points out that the lead time between rule proposal and rule adoption will provide ample time for planning. The Administrative Law Judge finds that the rule as proposed is needed and reasonable.

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

CONCLUSIONS

1. The Department gave proper notice of the hearing in this matter.

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

3. The Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Findings 47, 49, 55 and 57, supra.

4. The Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

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

6. The Administrative Law Judge has suggested action to correct the defects cited in Conclusion 3, supra, as noted at Findings 48, 50, 56 and 58, supra.

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

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 subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above.

Dated this 11th day of May, 1993.

BRUCE D. CAMPBELL
Administrative Law Judge

Reported: Kirby A. Kennedy & Associates; (612) 922-1955

CHANGES TO PERMANENT PARTIAL DISABILITY SCHEDULE AS PUBLISHED IN THE DECEMBER 21, 1992 *STATE REGISTER*

1. The following items should be relettered as indicated to provide a better format to enable the health care provider to easily rate the loss of range of motion in one continuous arc. The substance of the rule is exactly the same; the order of the categories is simply rearranged.

5223.0460, subp. 4B(5)(a) - (c): Reletter (a) as (c), and (c) as (a).

5223.0470, subp. 4A(6)(a) - (c): Reletter (a) as (b), (b) as (c), and (c) as (a).

subp. 4B(4)(a) - (c): Reletter (a) as (b), (b) as (c), and (c) as (a).

5223.0480, subp. 4A(7)(a) - (b): Reletter (a) as (b), and (b) as (a).

subp. 4B(7)(a) - (c): Reletter (a) as (b), (b) as (c), and (c) as (a).

subp. 4C(5)(a) - (c): Reletter (a) as (b), (b) as (c), and (c) as (a).

subp. 4E(5)(a) - (c): Reletter (a) as (b), (b) as (c), and (c) as (a).

5223.0500, subp. 4A(7)(a) - (d): Reletter (a) as (b), (b) as (c), (c) as (d), and (d) as (a).

subp. 4B(5)(a) - (c): Reletter (a) as (b), (b) as (c), and (c) as (a).

subp. 4C(7)(a) - (b): Reletter (a) as (b), and (b) as (a).

5223.0520, subp. 4A(6)(a) - (b): Reletter (a) as (b), and (b) as (a).

subp. 4B(7)(a) - (c): Reletter (a) as (b), (b) as (c), and (c) as (a).

2. Part 5223.0310, subp. 44: In this definition of "radicular pain", delete the words "that is" and insert the words "for example" on page 10, line 9. This is a minor clarification. Because radicular pain may also be experienced in the upper extremities, the straight leg raising test is not the only means of testing for radicular pain.

3. Part 5223.0315, C(1) Tables 1 and 2: In the column heading at Tables 1 and 2 on page 13, line 25 and page 14, line 7, insert the words "Conversion Factor for" above "Maximum Whole Body Disability (Percent)". This clarification indicates that the maximum percent of whole body disability listed in the table represents the conversion factor to convert a 100 percent disability to a member (body part) to whole body disability. This conversion is used to translate workers' compensation ratings under the law prior to 1984 into the whole body rating system used for injuries from 1984 to the present. In some cases, the number listed in the table does not represent the maximum percentage of disability to the body part under the proposed rules. Therefore, the altered heading more accurately states the contents and application of the table. This does not result in any change in application of the rule.

4. Part 5223.0315, C(1) Table 1: On page 13, lines 28, 31, and 38, delete the numbers "11, 2, 28" respectively and insert the numbers "9, 4, and 26". The numbers in this conversion factor table were not altered in the proposed rules as published to reflect the changes made in the substance of these proposed rules. The change in this table is needed to eliminate inconsistencies between the individual citations in the rules for the middle finger, little finger, and foot and ankle, and these conversion factors. The calculations will simply not produce the intended result in some instances without correcting Table 1 to reflect changes made in the finger and foot and ankle categories.

5. Part 5223.0320, subp. 7: On page 17, line 6, insert the word "complete" before "loss of teeth". This clarification is in response to a comment made in the record by State Fund Mutual Insurance Company. The amendment specifies that a partial loss of a tooth would not warrant a rating under this section. That is the original intent of the rule; the addition of the word "complete" clarifies that intent.

6. Part 5223.0340, subp. 4D: On page 24, line 11, delete the word "percent". The calculation in the ear schedule will only work as intended if the multiplier is 1.5. This becomes clear by examining the worksheet for calculating the percent of binaural hearing loss in subp. 5. Note the entry on page 24, line 40 which indicates "f x 1.5". Again, this modification is simply a clarification of the original intent. This error was brought to the attention of the Department by a member of the Workers' Compensation Administrative Task Force.

7. Part 5223.0340, subp. 5: In this worksheet for calculating the percent of binaural hearing loss, an addition is needed on page 24, line 44. To ensure that the formula results in the correct rating, insert brackets at the very beginning of line 44 and after the "(2)" on line 44. The calculations within the brackets must be done first, and that sum divided by 6 to arrive at the correct rating.

8. Part 5223.0370, subp. 2A: Cervical spine, Fractures.
Part 5223.0380, subp. 2A: Thoracic spine, Fractures.
Part 5223.0390, subp. 2A: Lumbar spine, Fractures.

On page 36, line 6, after the word "bodies" insert the phrase "is rated by the greatest loss of vertebral height among the involved segments". On page 36, line 7, delete the words "up to" and insert the words "no more than". On page 36, line 8, after the word "height" insert the phrase "in any vertebral segment". On page 36, lines 10 and 11, delete the words "all compressed vertebra" and insert the words "at least one vertebral segment". These same changes should be made in Parts 5223.0380 and 5223.0390 on pages 40, lines 23 through 28, and on page 43, lines 27 through 32. These modifications give greater specificity concerning application of the rule. The original language was somewhat vague concerning whether one measures the overall vertebral height in all vertebra or in individual vertebrae. The modified language reflects the intent of the Medical Services Review Board in proposing the rule. The substitution of the phrase "no more than" ten percent, is intended to include a loss of ten percent in vertebral height so that all possible losses fall into a specific category. It was not clear that "up to ten percent" includes ten percent.

9. Part 5223.0370, subp. 3C: Cervical pain syndrome.

Part 5223.0370, subp. 4C: Radicular syndromes, cervical spine.
Part 5223.0380, subp. 4C: Radicular syndromes, thoracic spine.
Part 5223.0390, subp. 3C: Lumbar pain syndrome.

On page 37, line 12, and on page 37, line 33, and on page 42, line 4, and on page 44, line 32, delete the words "and is". This is simply a grammar correction. The sentence is easier to read and understand without these two words.

10. Part 5223.0450, subp. 4A(7)(b), page 65, line 30.
Part 5223.0450, subp. 4B(5)(b), page 66, line 36.
Part 5223.0470, subp. 4B(4)(a), page 77, line 4.

In these categories concerning loss of range of motion in the extremities, delete the words "one degree" and insert the words "zero degrees". This minor modification more accurately states the complete degree of loss of range of motion possible. The amendment eliminates the possibility that an employee with a zero to one percent range of motion would be precluded from establishing a permanent partial disability based on a technical reading of the rule.

11. Part 5223.0500, subp. 4B(1)(b), page 94, line 10.
Part 5223.0500, subp. 4B(2)(b), page 94, line 20.
Part 5223.0500, subp. 4C(1)(b), page 95, line 11.
Part 5223.0500, subp. 4C(2)(b), page 95, line 26.
Part 5223.0500, subp. 4C(3)(b), page 96, line 1.

In these categories concerning loss of range of motion in the extremities, delete the words "zero degrees" and insert "one degree". This clarification avoids a zero range of motion measurement from inclusion under two different categories which measure the same loss. The change from zero to one eliminates overlapping categories.

12. Part 5223.0450, subp. 4A(7)(d), page 65, line 34.
Part 5223.0460. subp. 4B(5)(a), page 72, line 19.
Part 5223.0500, subp. 4A(7)(b), page 93, line 36.
Part 5223.0510, subp. 4A(5)(b), page 101, line 16.

On page 65, line 34, change "101" to "100". On page 72, line 19, delete "ten" and insert "nine". On page 93, line 36, delete "30" and insert "31". On page 101, line 16, delete "120" and insert "121". These numbers concerning the extent of loss of the usual range of motion in the extremities are adjusted to allow the rule to provide for every possible loss. The current numbers in these rules isolate one degree of range of motion which does not fit in any of the stated categories. The correction, then, more completely encompasses all possible losses of range of motion.

13. Part 5223.0450, subp. 4C(3)(b), page 67, line 33: Delete the word "up" and after the word "to" insert the words "between zero degrees and". This is a minor modification which specifies that the loss of range of motion in this instance begins with zero degrees. The change in language makes this category consistent with the other categories in item C of this subpart.

14. Part 5223.0450, subp. 4C(4)(b), page 68, line 3: Before the word "between" insert the word "to". This is simply a grammar change to promote consistency in language throughout this item.

15. Part 5223.0460, subp. 2D(2), page 69, line 19.
Part 5223.0470, subp. 2B(2), page 73, line 27.
Part 5223.0500, subp. 2B(2), page 91, line 14.
Part 5223.0510, subp. 2H(2), page 98, line 20.
Part 5223.0520, subp. 2D(2), page 103, line 4.

Delete the word "objective" and insert the word "persistent" in these categories concerning nerve entrapment syndrome in the extremities. This is a change for consistency purposes, to provide parallel language in the number (2) category as compared to the number (3) category just below each of the affected categories. The electrodiagnostic test findings are always objective findings, but the key factor is whether those findings are persistent. In order for the condition to be rateable for permanent partial disability under category (3), persistent findings are necessary. Conversely, the zero percent category applies where persistent findings are absent. These changes respond to comments made at the hearing concerning inconsistencies in the rule language and potential resulting confusion.

16. Part 5223.0480, subp. 3A(2), page 79, line 32: Delete the words "less than 20" and insert the words "ten degrees to 19". This is a clarification in the hand and finger rule to avoid overlapping categories in numbers (1) and (2) of subpart 3A. Because degrees of less than ten degrees are also less than 20 degrees, without the change there could be confusion concerning whether degrees lower than ten percent might be rateable under category (2). This change eliminates any confusion in that regard.

17. Part 5223.0520, subp. 4B(5)(b), page 106, line 18: Delete the words "between 16 degrees and 30" and insert the words "less than 31" in the ankle rule. This modification results in the categories covering all possibilities of loss. The former language did not specify the rating for inversion between ten degrees and 16 degrees.

18. Part 5223.0560, subp. 3A(1), page 114, line 26: Delete the word "proceeding" and insert the word "preceding". This change simply corrects a typographical error in the original submission which was brought to the attention of the Department in the comment letter from State Fund Mutual Insurance Company.

19. Part 5223.0570, subp. 1, page 116, line 31. Before the period insert "and subpart 3". This organic heart disease rule as originally drafted contained ratings in subpart 2 only. This sentence was inadvertently not modified to include directions to the rater to also rate disabilities or impairments according to subpart 3 after the proposed rule expanded to three subparts. This is the obvious intent of the rule.

20. Part 5223.0580, subp. 3B, 3C, and 3D, page 119, lines 28, 31, and 34.

On line 28, before the period insert ", that is, six percent of the whole body for an upper extremity, four percent of the whole body for a lower extremity".

On line 31, before the period insert ", that is, 18 percent of the whole body for an upper extremity, 12 percent of the whole body for a lower extremity".

On line 34, insert before the period ", that is, 39 percent of the whole body for an upper extremity, 26 percent of the whole body for a lower extremity".

These amendments to the rule regarding vascular disease affecting the extremities complete the calculations described in the main body of subpart 3. Because these categories did not express the percent of disability in whole body terms, the Department is choosing to modify this section to convert the extremity rating to a whole body rating. There is no substantive change made by these amendments. The additional language simply translates the directions given earlier in the subpart into the numerical ratings to the whole body. The amendments promote accuracy and consistency, removing potential arguments or litigation concerning the correct conversion method.

21. Part 5223.0600, subp. 7D, page 129, lines 13 through 15: Delete lines 13 through 15 concerning inguinal hernia. This items conflicts with Part 5223.0440, subp. 3B(2) on page 61. Part 5223.0440 contains the correct citation for hernia as described in the Statement of Need and Reasonableness. The omission of a repeal of this provision was simply an oversight. The change in the hernia rating in part 5223.0440, subp. 3B(2) is explained in the Statement of Need and Reasonableness.

22. Part 5223.0650, subp. 2B(1), page 139, line 15: Insert the word "external" before the word "deformity". This change is made as a clarification of the original intent of the rules in response to a comment by State Fund Mutual Insurance Company. An internal deformity of the nose would not constitute disfigurement as otherwise described in Part 5223.0650.

PJ/ckc

CHANGES TO REHABILITATION RULE AMENDMENTS AS PUBLISHED IN THE DECEMBER 21, 1992 STATE REGISTER

1. Part 5220.0100, Subp. 22 "Qualified employee" and subp. 26 "rehabilitation-consultation" add "considering the treating physician's R-33" at the end of each definition. These modifications were suggested by a public commenter at the Rules hearing in order to avoid disputes over what medical report to base assessments on. The Department agrees that the document suggested, the treating physicians R-33, is an appropriate basis for making the assessment indicated. The change is not substantial as it merely states what document given is used.

2. Part 5220.0110, Subp. 7.A. on page 5, line 7 after "the insurer shall complete a disability status report" delete the "and" and add after, "file it with the commissioner", "and serve a copy on the employee". This type of notice was provided by the previous rule Part 5220.0110, subp. 3A as part of the claims screening consultation report but was deleted with the rest of the provisions pertaining to that report. The issue of the service was raised at the hearing and the Department believes that the notice should be part of the Rules in order to inform the employee of what the employer/insurer proposes with respect to their rehabilitation status. The addition is not substantial in that the statute and due process require the same type of notice given in the rule regardless of whether it is spelled out or not.

   In the same subpart and item in the last paragraph, on page 5, at line 17 after "A disability status report is," insert "also". This is simply an addition to clarify the rule language.

3. Part 5220.0110, Subp. 7.B.(8) at page 6, line 2 after "a current" insert "treating" to describe "physicians". This suggestion was made by an injured worker who presented comments at the Rule hearing and was intended in the drafting as well.

4. Part 5220.0110, Subp. 8 on page 6 at line 9 delete "refer the employee for" and insert "order". This modification is made for clarification purposes as it is more descriptive of the action that the commissioner actually takes.

5. Part 5220.0120, Subp. 4 on page 7 at lines 6 through 9 after "filing another disability status report." insert "A copy of the request for renewal shall be served on the employee who may object to the renewal by filing a rehabilitation request as provided at part 5220.0950." On line 7 after "waiver" insert "will be granted only upon additional". Then delete "requires" and after "documentation that" insert "convinces the commissioner that a consultation is not necessary because." On line 8 insert " 's" on the word "employee" and delete "will". On line 9 after "date of injury employer" delete the period and insert "is imminent." This change is in response to comment at the hearing and letter comment questioning whether it is reasonable to maintain the same standard for renewal of waiver as was set out for the grant of the initial waiver. The Department agrees that a higher standard should be met. This change

is not substantial in that it merely sets criteria for the Commissioner's review which will be occurring.

6. Part 5220.0120, Subp. 5 on page 7 at line 10 change the caption from "Referral" to "Commissioner's Order" and on line 17 change "refer the employee for" to "order". This change, like the change at number 4 is simply a clarification that is more descriptive of the action that the commissioner actually takes.

7. Part 5220.0130, Subp. 2 Criteria on page 8 at lines 11, 16, and 22 change "14" to "15". Comment was received at the hearing that this deadline should be changed to meet statutory requirements. We believe the statutory requirement being referred to is found at Minnesota Statutes § 176.102, subd. 4f which provides that an employer who does not provide rehabilitation as required is to be notified that, if the employer fails to provide a Qualified Rehabilitation Consultant within 15 days to conduct a rehab consultation, the commissioner or compensation judge shall appoint a Qualified Rehabilitation Consultant to provide the consultation. While the rule is nota reiteration of that statute, we have no problem with changing the 14 days to 15 and do so. This change is not substantial in any way.

8. Part 5220.0130, subp. 2 on page 8 at lines 18 and 19 after "If the insurer" delete "receives a" and after "request" insert "s a waiver of" and delete "for". On line 19 delete "consultation" and insert "services" and at the end of the line delete "has been" and insert "is". This modification is simply a clarification of language which makes the sentence more readable and concise.

9. Part 5220.0130, Subp. 3, Consultation Item A on page 8 at line 32. After "current" insert "treating" before "physician's". This change, like the change at number 3 was a suggestion made by a commenter at the public hearing and was what was intended in the Rule drafting as well.

10. Part 5220.0130, Subp. 3, Consultation Item C on page 9 at lines 32 and 33. The new proposed language should be removed from these two lines and it will be moved to a spot later in the Rules where it more appropriately becomes part of the qualified rehabilitation consultants assessment. See Number 12. This change along with number 12 is not substantial in that it simply moves rule language to a more appropriate placement.

11. Part 5220.0130, Subp. 3D on page 10 at line 7 "15" should be changed to "7". The 15 day limit for the qualified rehabilitation consultant to file the rehabilitation consultation report after the first in-person meeting needs to be shortened here. Testimony at the hearing pointed out that the new statutory language at Minnesota Statutes § 176.102, subd. 4(a) requires that the employer notify the employee within 14 days after the consultation if the consultation indicates that rehabilitation services are not appropriate. With this new requirement that the qualified rehabilitation consultant report within seven days to the employer, seven days will then remain for the employer to meet their statutory requirement of notifying the employee of

disqualification, if appropriate, within the total statutory period of 14 days. This change to comply with statutory language is not substantial in that it is required to meet the timeline.

12. Part 5220.0450, Subp. 2 on page 14 at lines 21 and 23. On line 21 delete "and" and after line 23 insert "and" and a new letter E. The identification of barriers to successful completion of the rehabilitation plan and measures to be taken to overcome those barriers." This is where the language from Part 5220.0130 is moved to. The examination of these topics is more appropriately a subject of the Plan Progress Report at 5220.0450 after the qualified rehabilitation consultant and the employee have begun working together on the employee's rehabilitation.

13. Part 5220.0450, Subp. 4B on page 15 at line 11 after "conducting an on-site inspection" insert "during normal business hours". This is in response to a comment raised at the hearing that providers were concerned that any on-site inspection of records be conducted during normal business hours. As that was certainly the intent of the Department all along, the Department has no difficulty with inserting that clarification.

14. Part 5220.1500, Subp. 3a in the second to last paragraph after the "The department of labor and industry's" delete "annual" and after "rehabilitation provider update sessions" insert "when held". This change is made in response to the limited resources of the Department with respect to presenting provider seminars. This change will clarify the Department's position that such sessions are not required by law to be held each year.

15. Part 5220.1800 on page 30 at line 4 and 5. At the end of line 4 change "service" to "rehabilitation services". In line 5 after "based upon" insert "substantial noncompliance with". After "prevailing norms of the profession" insert "to be" and after "established" insert "by rule". As was discussed at the hearing in some detail, the Department is in the process of gathering the data which will be used to establish the prevailing norms of the profession, which in turn will provide the basis for setting forth in rule what noncompliance will be considered substantial. Contact with professional rehabilitation-organization has not indicated any concern with this clarification and the change is not substantial.

16. Part 5220.1801, Subp. 2 on page 30 at line 28 delete "6," as that subpart has been repealed in this rule making.

17. Part 5220.1802 Communications at Subp. 4A on page 32 at line 32 leave in the deleted rule reference to part 5220.0710 and insert "and" after it. It is considered better to leave both references in the rule as a matter of full guidance to the parties reviewing them. This change is not substantial.

18. Part 5220.1900, Subp. 1C Consultants on page 36 at lines 27 and 28. After line 27 insert "a qualified rehabilitation consultant or" and on line 28 delete the "s" from

"firms" and delete "that bill". These changes are merely for clarification and do not change in any way the substance of the Rule provision.

19. Part 5220.1900, Subp. 7H on page 38 at line 24 delete the proposed "employer or". With the definitions of the terms as they are in the Rehabilitation Rules, the addition is not required for the purpose that it was inserted. This change, to correct an error is not substantial.

20. Repealer, Part 5220.0710 should not be included in the repealer as that provision remains in the rules in modified form.

Some further explanation and support for these changes are set out in the Response to Public Comments on the Rehabilitation Rule Amendments document attached.

MM/cj (190-1)