

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Exempt Permanent
Rules of the Department of Labor and
Industry Relating to Workers'
Compensation; 2016 Adjustments to
Independent Medical Examination Fees
and Relative Value Fee Schedule
Conversion Factors and Tables

**ORDER ON REVIEW
OF RULES UNDER
MINN. STAT. §§ 14.386
AND MINN. R. 1400.2400**

This matter came before Administrative Law Judge Jessica A. Palmer-Denig upon the application of the Minnesota Department of Labor and Industry (Department) for a legal review of the above-entitled rules under Minn. Stat. § 14.386 (2016) and Minn. R. 1400.2400 (2015).

The Department filed documents with the Office of Administrative Hearings seeking review and approval of its proposed rules on August 16, 2016. The Department requests approval under section 14.386 of proposed changes to the rules related to the calculation of fees payable for medical treatment for workers' compensation injuries.

The Department originally also sought to use the "good cause" exempt rulemaking process under section 14.388 to make editorial changes to Minn. R. ch. 5221, but it amended its filing on August 29, 2016 to withdraw its request for approval of those rules.¹ Minnesota law allows an agency to withdraw a proposed rule, or a portion of a proposed rule, at any time prior to filing it with the Secretary of State, unless the withdrawal renders the remaining rule substantially different from the rule as published.²

Based upon a review of the written submissions by the Department, and for the reasons set out in the Memorandum which follows below,

IT IS HEREBY DETERMINED THAT:

1. The Department's proposed rules under Minn. Stat. § 14.386 amend existing rules by: (1) implementing the relative value fee schedule tables issued by the Centers for Medicare and Medicaid Services (Minn. R. 5221.0100-.4070); (2) revising conversion factors for medical services and fees (Minn. R. 5221.4020, subp. 1b); and

¹ See Department's NOTICE OF WITHDRAWAL OF RULES AND SUBMISSION OF REVISED AMENDED RULES AND REVISED PROPOSED FINDINGS AND ORDER (August 29, 2016).

² Minn. Stat. § 14.05, subd. 3 (2016).

(3) revising workers' compensation Independent Medical Examination (IME) fees (Minn. R. 5219.0500).

2. The proposed rules were adopted in compliance with the procedural requirements of Minn. Stat. ch. 14 (2016), and Minn. R. ch. 1400 (2015).

3. According to Minn. Stat. § 176.136, subd. 1a (2016), the Department has the statutory authority to adopt the proposed rules using the exempt rulemaking process under Minn. Stat. § 14.386.

4. The Department's failure to publish a Notice of Incorporation by Reference of Relative Value Tables in the *State Register* at least 60 days before the tables' effective date, as required by Minn. Stat. § 176.136, subd. 1a, was harmless error.

5. The Department's withdrawal of the rule changes proposed under Minn. Stat. § 14.388 does not render the remaining proposed rules "substantially different," under the standards in Minn. Stat. § 14.05, subd. 2.

IT IS HEREBY ORDERED THAT:

The rules proposed for adoption under Minn. Stat. § 14.386 are **APPROVED**.

Dated: August 30, 2016


JESSICA A. PALMER-DENIG
Administrative Law Judge

MEMORANDUM

Minnesota Statutes, section 176.136, subdivision 1a, authorizes and establishes the procedure for setting maximum fees payable for treatment of workers' compensation injuries. At least once every three years, the Department must update the workers' compensation fee schedules with new Relative Value Unit (RVU) tables issued by the Centers for Medicare and Medicaid Services (CMS).³ The Department must also adjust the conversion factors, which are the dollar amounts by which the RVU is multiplied to arrive at the maximum fee allowed for a particular service.⁴ Under Minn. Stat. § 176.136, subd. 1a(d)(1), the Commissioner of the Department (Commissioner) is authorized to use the exempt rulemaking procedure of Minn. Stat. § 14.386 to adopt the adjusted conversion factors and any amendments to implement the RVU tables.

The Commissioner is permitted to incorporate the revised RVU tables into the rules by reference by publishing a Notice of Incorporation by Reference of Relative Value

³ Minn. Stat. § 176.136, subd. 1a(d)(2).

⁴ Department's PROPOSED FINDINGS AND ORDER ADOPTING RULE AMENDMENTS (Proposed Findings), at 1; Minn. Stat. § 176.136, subd. 1a(c).

Tables in the *State Register* at least 60 days before the tables' effective date.⁵ According to the Department, the revised RVU table must be adopted by October 1, 2016.⁶ The Department, however, failed to meet the 60-day statutory requirement; the Notice of Incorporation by Reference was published only 54 days before the proposed effective date.⁷ The Department states that its failure to meet this deadline was inadvertent.⁸

The Department contends that the revised RVU tables should still become effective on October 1, noting that section 176.136, subdivision 1a(d)(2), provides:

“[t]he published notices of incorporation by reference and the incorporated tables are not rules subject to section 14.386 or other provisions of chapter 14, but have the force and effect of law as of the date specified in the notice.

Additionally, the Department argues that the fee schedule conversion factors have been updated annually on October 1 since 1992, and as a result health care providers and workers' compensation insurers have an expectation that fee schedule updates will be effective every year as of that date.⁹ The Department also notes it has received no inquiries regarding the proposed effective date since publication of the notice.¹⁰ Under these specific circumstances, the Administrative Law Judge finds that the Department's failure to satisfy the notice publication requirement by six days “did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process” and is, therefore, harmless error.¹¹

The Administrative Law Judge also finds that the proposed rules meet the standard for legality under Minn. R. 1400.2100, Items A and D to G.¹² Those standards provide that a rule must be disapproved if the rule:

A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded under Minnesota Statutes, section 14.15, subdivision 5, or 14.26, subdivision 3, paragraph (d);

...

D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law;

⁵ Minn. Stat. § 176.136, subd. 1a(d)(2).

⁶ Proposed Findings, at 2.

⁷ Proposed Findings, at 2 n.6.

⁸ *Id.*

⁹ *Id.* (citing 1992 Minn. Laws, ch. 510, art. 4 and Minn. Stat. § 176.136, subd. 1a(b) and (c)).

¹⁰ *Id.*

¹¹ Minn. Stat. § 14.15, subd. 5.

¹² See Minn. R. 1400.2400, subp. 3.

E. is unconstitutional or illegal;

F. improperly delegates the agency's powers to another agency, person, or group;

G. is not a "rule" as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law.

...

The Department has explicit authority to adopt the proposed rules under Minn. Stat. §§ 14.386, 176.136 (2016), and the Department has satisfied the procedural requirements of chapter 14. The rules proposed for adoption by the Department under Minn. Stat. § 14.386 are approved.

J. P. D.