

STATE OF MINNESOTA
DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed Rules
Related to Charges for, or in connection
with Independent Medical Examinations.
Minnesota Rules, Part 5219.0500

STATEMENT OF NEED
AND REASONABLENESS

I. INTRODUCTION

This Statement of Need and Reasonableness (SONAR) discusses proposed new rules governing maximum charges for independent medical examinations and related functions. The 1992 Minnesota legislature amended Minnesota Statutes, section 176.136 by adding subdivision 1c, which mandates that the Commissioner of the Department of Labor and Industry shall adopt rules that reasonably limit amounts which may be charged for, or in connection with, independent or adverse medical examinations.¹

The proposed rules identify the specific charges covered by the rule and define the statutory context for the application of charges "for or in connection with independent or adverse medical examinations requested by any party."

II. STATEMENT OF COMMISSIONER'S STATUTORY AUTHORITY

As indicated above, Minnesota Statutes, section 176.136, subdivision 1c (1992) provides that the Commissioner shall adopt rules that reasonably limit the amounts that may be charged for, or in connection with, independent or adverse medical examinations ("IMEs"). In addition, general rulemaking authority at Minnesota Statutes, 176.83, provides that the commissioner may adopt rules necessary to implement and carry out the intent and purposes of Chapter 176.

III. STATEMENT OF NEED

Minnesota Statutes, Chapter 14 (1990) requires that the Commissioner make an affirmative presentation of facts establishing the need for and reasonableness of the rules as proposed. In general terms, this means that the Commissioner must set forth reasons for the proposal which are not arbitrary and/or capricious. However, to the extent that need and reasonableness are separate, need has come to mean that a problem exists that requires administrative attention, and reasonableness means that the solution proposed by the Commissioner is appropriate.

¹**Charges for independent medical examinations.** The commissioner shall adopt rules that reasonably limit amounts which may be charged for, or in connection with, independent or adverse medical examinations requested by any party, including the amount that may be charged for depositions, witness fees, or other expenses. No party may pay fees above the amount in the schedule. Minnesota Statutes, section 176.136, subd. 1c (1992).

The IME fee schedule legislation reflects a mounting concern within the workers' compensation system about escalating medical costs but recognizes that the IME function within the system is distinct from the treating function which is to be governed by the relative value fee schedule under Minnesota Statutes, section 176.136, subdivision 1a. Minnesota Statutes, section 176.136, subdivision 1c is separate and distinct from the relative value fee schedule language at subdivision 1a, and does not expressly refer to the limiting standards of that subdivision. Instead, the IME fee schedule provision of subdivision 1c prescribes rules which "reasonably limit" charges for IME's, "including depositions, witness fees, or other expenses." The above statutory mandate for an IME fee schedule therefore indicates a need for identification, accountability and limitation of the components of workers' compensation costs which are related to the separate IME function. A related need is to execute the limitations in a manner which retains incentives for maximum availability of IME providers at competitive rates.

IV. STATEMENT OF REASONABLENESS

Minnesota Statutes, Chapter 14 (1992) requires that the Commissioner make an affirmative presentation of facts establishing the reasonableness of the proposed rules. Reasonableness is the opposite of arbitrariness or capriciousness. Reasonableness means that there is a rational basis for the Commissioner's proposed action. The reasonableness of the proposed rules are discussed below.

Subpart 2. Definitions

The statutory context for the application of the IME schedule is established by defining the phrase "for, or in connection with, independent or adverse medical examinations requested by any party" as consistently as possible with the statutory scheme of Minnesota Statutes, Chapter 176 and current practices. In general, as indicated above, the overall intent is to reasonably limit the cost of independent medical examinations in workers' compensation matters, including witness fees, depositions and other expenses as distinct from the relative value fee schedule.

Independent medical examinations are by statute made an integral part of the adjudicative process in workers' compensation in Minnesota. Minnesota Statutes, Section 176.155 is the statutory context for IME practice in Minnesota. Typically, under that section the IME examination is conducted by an IME provider selected by the employer/insurer within 120 days of service of the Claim Petition. Under Minnesota Rules, part 1415.1900, subp. 1, IME's must be scheduled within 30 days of the filing of claim petitions on disputed claims. The IME examination report is also to be served on the employee and commissioner within 120 days. Extensions may be granted where there are a limited number of physicians or health care providers with expertise in the particular injury or disease at issue available within the time limit to examine the petitioning employee. Employees are required to be compensated for travel expenses and lost wages, however, employee benefits may be suspended under Minnesota Statutes 176.155, subd. 3 if the employee refuses to comply with a reasonable request for an IME exam.

Under this proposed rule, the IME charges are also defined in the context of Minnesota Statutes, Section 176.155. Since that statute, and current practices indicate that IME's are conducted by health care providers, including physicians, the definitional context was reinforced by adding reference to the statutory definition of "health care provider" at Minnesota Statute, Section 176.011, subdivision 24.

The definitional provisions at subpart 2 were further contextually refined at A-J by the addition of a series of medical and forensic (medical/legal) functions which are typically undertaken by the provider in the course of conducting an IME. The functions are expressed or implied in Minnesota Statutes, Section 176.155 and are reasonably related to the examination of the employee's medical/legal claim. They include reviewing records and reading, interpreting, or analyzing x-rays, MRI scans, CT scans, or other diagnostic imaging or tests, travel, taking patient history, examining the patient, preparing reports which include MMI diagnosis, analysis, and recommended treatment, and following up with depositions, attorney conferences, and court appearances. A charge for examination by mental health professionals is included as item J.

The provider's loss of patient availability and preparation time are also typically compensated when there are cancellations of appointments for IME exams. Accordingly, a cancellation fee was added at subpart 3G. The charges for cancellation of appointments are not intended to duplicate or add on to the charges itemized in subparts 3A through E, but rather to function as a substitute charge. To clarify this, the proposed rule states that the cancellation charges are "in lieu of the amounts in subparts 3A through E."

Subpart 3. Charges.

Independent Medical Evaluations, as indicated above, are by law made an integral part of the adjudication process in this state in contested workers' compensation cases. The IME function is to a considerable extent forensic (medical/legal), requiring expertise and interaction with the legal system in the factfinding process of evaluating medical and related legal issues. Physicians and other providers who do IME's should retain current incentives to continue participation in the IME process without reducing the quality or degree of availability of IMEs. At the same time, there is a need for reasonable limits and accountability regarding charges related to the IME function. This rule sets charges for IME functions that relate to current "market" rates as maximums in order to "reasonably limit" charges while retaining incentives for participation by IME providers in the legally required role. Components are itemized to approximately reflect the incremental functions of an IME and provide for some variation relating to the complexity of the case. When totaled, the aggregate fees correlate to current market amounts.²

²According to the April 8, 1993 memorandum of Lisa Thornquist, Director of the Research Unit for the Department of Labor and Industry (Appendix A), the aggregate amounts for IME fees paid obtained from several independent sources demonstrate that the amounts in the proposed rule appear to be within mid-market ranges. The departmental research memo reviewed data from a current Workers' Compensation Research Institute (WCRI) research project which considered Minnesota IME fees as part of a cost comparison analysis of IME fees for California, New Jersey, Maryland, and Minnesota. The WCRI study evaluated payment data from five nationwide insurers representing 15 percent share of market nationwide.

Departmental research also compared the proposed IME fee schedule to current amounts paid based on data obtained from State Fund Mutual, a competitive state-initiated insurance company set up by the legislature in 1984 which represents 5.7 percent of all Minnesota risk. The State Fund Mutual data review consisted of payments for IMEs, supplemental reports, and radiologic reviews between March 1992 and February 1993.

Subpart 3A sets forth a fee for record review. Number of pages rather than time spent reviewing was chosen as a standard because of its greater objectivity.

Subpart 3B reflects the fee component for taking the employee's patient history and conducting the examination. This function is often undertaken in a single patient encounter during which the IME provider must become familiar with the employee's relevant medical history and treatment, and must, on that basis, reach significant conclusions regarding diagnosis, prognosis and evaluation of recommended future treatment. In addition to the medical knowledge and experience required, the IME provider must be prepared to present findings and be subjected to cross examination in a legal context.

Subpart 3C presents an additional charge for reading, interpretation and analysis of x-rays and other diagnostic imaging or tests. This single, incremental fee component represents an additional examining function which is often undertaken in an IME.

Subpart 3D reflects the fee component for presenting the diagnosis, analysis, and treatment recommendations in a written report. As indicated above, these reports and their supplemental counterparts at subpart 3F often play a significant role in the legal process. Reports must conform to the requirements of Minnesota Statutes, section 176.155, subd. 5 and Minnesota Rules, Part 1415.2900, subp. 3D and are subject to cross examination. There is an additional fee component for supplemental reports at subpart 3F.

Actual travel expenses charges are covered by subpart 3E. In the alternative, where appropriate, mileage at the maximum rate allowed for federal tax deductions by the Internal Revenue Service is provided. The latter provision is intended to apply where documentation of the actual expenses is not available. Minnesota Statutes, section 176.155, subd. 1 now provides, as a result of 1992 legislation, that IME's are to be scheduled at a location within 150 miles of the employee's residence, unless the employer can show cause for a more remote examination. Therefore, necessary travel expenses can reasonably be anticipated by IME providers.

Subpart 3G governs cancellation fees and is intended to reimburse the IME provider for lost patient availability and preparation time incurred when an employee does not appear for a scheduled examination. The amount is \$0.00 when cancellation occurs at least three days prior to cancellation date because there is likely sufficient lead time to reschedule patient appointments. For cancellations less than three days in advance, the charge is \$400.00. As indicated above, and in the rule, cancellation charges are in lieu of the aforementioned components at subparts 3A through E. Those components are not to be added to the cancellation charge.

Subpart 3H covers the IME function of testifying at depositions and court appearances. If new records are reviewed for the testimony, the records review provisions of subpart 3A, above, are invoked because the initial review requires more time and thoroughness.

A lesser charge is added for previously studied reports with an add-on charge for each additional 50 pages of material or parts thereof. The fee is to compensate the IME provider for the reviewing time which necessarily occurs prior to testifying while accounting for the degree of familiarity of the material reviewed.

Hourly fees are stated for deposition and trial appearances with a minimums of two and three hours, respectively. These minimum hours are realistic estimates of the lost time

incurred by the IME provider for participating in the legal process. There are also cancellation fees which vary according to the amount of prior notice. Because of the greater amount of preparation for testifying, six days advance notice is required to avoid incurring the cancellation fee which compensates for lost patient availability and other forfeited scheduling alternatives. The cancellation fees are greater, the less the notice, because of the greater preparation time spent proximate to the scheduled proceeding.

Independent medical examiners also spend time with attorneys in preparation of testimony and, accordingly, are compensated at subpart 3I, on an hourly basis, for attorney conferences with a minimum of one hour.

Subpart 3J covers situations where psychologists and psychiatrists must review and analyze medical data. They are compensated on an hourly basis for their particular expertise in lieu of any of the charges set forth in subparts 3A through E above.

Subpart 4. Adjustments.

Subpart 4 allows for a regulated and automatic adjustment in the IME schedule. This eliminates the necessity of constantly revising and re-promulgating the fee schedule under Chapter 14 to adjust for inflation, while attaining a degree of cost control and standardization of adjustments. The adjustments are made in the same manner as the conversion factors for Minnesota Statutes § 176.136, subd. 1(a).³ These are adjustments by reference to the general adjustment of benefits statute at Minnesota Statutes, section 176.645 which has historically been lower than medical cost increases for the most recent decade. The rule excludes travel costs from that adjustment.

SMALL BUSINESS CONSIDERATIONS, COST TO LOCAL PUBLIC BODIES, IMPACT ON AGRICULTURE LAND, AND EFFECT ON SPANISH SPEAKING PEOPLE

A. Small Business Considerations. Minnesota Statutes, section 14.115 (1992) requires state agencies proposing rules that affect small businesses to consider methods for reducing the impact of the rules on small business, however subdivision 7(3) provides that this requirement does not apply to providers of medical care. Since this rule governs the fees that IME health care providers may charge for IME services, it is excepted from Minnesota Statutes, section 14.115 (1992).

B. Local Public Bodies. These rules are for the purpose of setting forth maximum IME fees and the commissioner reasonably estimates it will not increase total expenditure of local public bodies within either of the two years following its adoption to implement the rule. Therefore, the rule is in compliance with Minnesota Statutes, section 14.11, subdivision 1 (1992).

³ "After permanent rules have been adopted to implement this section, the conversion factors must be adjusted annually on October 1 by no more than the percentage change computed under section 176.645, but without the annual cap provided by that section. The commissioner shall annually give notice in the State Register of the adjusted conversion factors. This notice shall be in lieu of the requirements of chapter 14. Minnesota Statutes, section 176.136, subd. 1(a) (1992).

C. **Agricultural Land.** The commissioner has determined that the adoption of this rule would not have a direct and substantial impact on agricultural land under Minnesota Statutes, section 14.11, subdivision 2 (1992). The rule applies to health care providers of IME services.

D. These rules do not have their primary effect on Spanish speaking people and are therefore not subject to Minnesota Statutes, section 3.9223, subdivision 4 (1992). The rule applies to health care providers of IME services.

Witnesses: Commissioner of Labor and Industry or other designated departmental staff,
including:
S.G. Creelius - Legal Services
Lisa Thornquist - Research and Education

SC/cj

DATE : April 8, 1993

TO : Sam Crecelius

FROM : Lisa Thornquist

PHONE : 297-4594

SUBJECT : Analysis of appropriate reimbursements for independent medical evaluations

Per your request, I got some independent data on the cost of independent medical evaluations for use in developing rules for a maximum fee schedule.

Workers Compensation Research Institute data

The Workers' Compensation Research Institute (based in Boston) is in the process of researching the cost of independent medical evaluations (IMEs) for some research on the California system. As part of the analysis, they are comparing IME costs between California, New Jersey, Maryland, and Minnesota. They received IME charge and payment data from five nationwide insurers which represent about a 15 percent share of market nationwide.

The data represent total IME payments. IMEs bills are not itemized with respect to preparatory work, the examination, and post exam report writing. Therefore, these data can only speak to the overall cost of IMEs.

The data from the WCRI show:

<u>year</u>	<u>average IME payment</u>	<u>payments by percentile</u>		
		<u>50th</u>	<u>75th</u>	<u>85th</u>
1990	\$610	\$720	\$790	\$864
1991	\$600	\$725	\$800	\$864
1992	\$661	\$725	\$880	\$991

APPENDIX A

State Fund Mutual data

The State Fund Mutual is a competitive state-initiated insurance company set up by the legislature in 1984. The State Fund Mutual represents 5.7 percent of all Minnesota risk. State Fund supplied the Department with payments for IMEs between March 1992 and February 1993.

The data available from State Fund listed reimbursements from IMEs, supplemental reports, and radiologic reviews. The table below lists the average, median (50th percentile), 75th and 85th percentile.

<u>type of exam</u>	<u>average IME payment</u>	<u>payments by percentile</u>		
		<u>50th</u>	<u>75th</u>	<u>85th</u>
IME	\$910	\$900	\$980	\$1050
supplemental report	\$167	\$100	\$200	\$ 375
radiologic review	\$208	\$150	\$250	\$ 250

Conclusions from the data

IME charge. The IME charge contemplated in the rules is \$775 and includes a review of the file, a history and examination of the patient, reading and interpreting diagnostic imaging, and writing the report. This charge is consistent with the data supplied by the WCRI and State Fund Mutual.

Breakdown of IME charge. While there are no direct data to evaluate the breakout of charges within an IME for preparation time, reading radiologic charts, conducting the exam, and writing the report, these breakouts appear to be reasonable. State Fund Mutual data indicate that a review of a radiologic report, by itself should be reimbursed between \$150 and \$250. However, the fee schedule amount of \$75 is not out of line since the review is part of reviewing the entire file and there should be some economies of scale in conducting this part of the exam.

Sam Crecelius
April 8, 1993
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Other charges. The charge for supplemental reports should be between \$100 and \$200, based on State Fund data. The amount of \$150 in the fee schedule appears to be reasonable.

Information on cancellation charges was submitted by John Diehl of Larkin, Hoffman, Daly and Lindgren, Ltd. He provided me with information on the charge schedule for two major IME firms, Diversified Medical and Medical Evaluations, Inc. Their schedules showed that appointments cancelled more than three days prior to the exam are not charged, cancellations between one and three days are charged half the fee.

I am still in the process of getting deposition charges and cancellation charges from State Fund Mutual. Anecdotally, State Fund indicated that late cancellations usually incur the full IME charge.

