

**ADMINISTRATIVE RULES COMMITTEE**  
**June 10, 2010**

Good Afternoon Mr. Chairman, Members of the Committee:

My name is Jodi Bjornson. I am General Counsel with Workforce Safety and Insurance. I submit for your review responses to the questions posed by Legislative Council in their organizational materials. I direct your attention to section 6 of this document which outlines the subject matter and the reasons for these proposed amendments.

**1. Whether the rules resulted from statutory changes made by the Legislative Assembly:**

NDAC §92-01-02-11.1. Attorney's Fees.

ANSWER – Yes.

NDAC §92-01-02-12. Mileage and per diem for travel to and from medical treatment.

ANSWER – Yes.

NDAC §92-01-02-13. Merger, exchange, or transfer of business.

ANSWER – No.

NDAC §92-01-02-14. Procedure for penalizing employers accounts for failure to pay premium or failure to submit payroll reports.

ANSWER – No.

NDAC §92-01-02-15. Altering payroll reporting periods for employers.

ANSWER – No.

NDAC §92-01-02-16. Expiration date change.

ANSWER – No.

NDAC §92-01-02-18. Experience rating system.

ANSWER – No.

NDAC §92-01-02-24. Rehabilitation services.

ANSWER – Yes.

NDAC §92-01-02-25. Permanent impairment evaluations and disputes.

ANSWER – No.

NDAC §92-01-02-29.1. Medical necessity.

ANSWER – No.

NDAC §92-01-02-31. Who may be reimbursed.

ANSWER – No.

NDAC §92-01-02-41. Independent medical examinations.  
ANSWER – Yes.

NDAC §92-01-02-45.1. Provider responsibilities and billings.  
ANSWER – No.

NDAC §92-01-02-50. Other states' coverage.  
ANSWER – No.

NDAC §92-01-02-55. Dividend program.  
ANSWER – Yes.

NDAC §92-01-03. Decision Review Office  
NDAC §92-01-03-01. History and functions of the Decision Review Office  
NDAC §92-01-03-02. Definitions.  
NDAC §92-01-03-03. Request for assistance – Timely request for consideration or rehearing.  
NDAC §92-01-03-04. Procedure for dispute resolution.  
ANSWER – Yes – name change.

NDAC §92-02-01-01. Reference to other standards.  
ANSWER – No.

NDAC §92-05-02-03. Eligibility – Billing.  
ANSWER – No.

NDAC §92-05-02-04. Death Claims.  
ANSWER – No.

NDAC §92-05-02-05. Risk Management Program Plus.  
ANSWER – No.

NDAC §92-05-03-06. Hazard elimination learning program.  
ANSWER – No.

NDAC §92-05-03-07. Safety training and education program.  
ANSWER – No.

**2. Whether the rules are related to any federal statute or regulation.**

ANSWER – No.

**3. A description of the rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.**

ANSWER - For this amendment, WSI followed the provisions of N.D.C.C. Chapter 28-32. As required, both a full notice and abbreviated notice of the intent to amend and repeal were accomplished and are attached. The full notice was mailed to Legislative Council on July 20, 2009, and the

abbreviated notice was published in each official county newspaper in the state (N.D.C.C. § 28-32-10). Attached is a copy of the letter submitted to the Legislative Council and a copy of the letter submitted to the North Dakota Newspaper Association requesting publication, along with a copy of the affidavit of publication. The public hearing was held on August 28, 2009, in the Board Room at WSI's Bismarck offices. The hearing was transcribed and that transcription is on file with WSI. The hearing record was held open for thirty days after the hearing. We did receive comments at the public hearing and written comments were received during the subsequent 30-day comment period. A request for opinion as to legality of the proposed amendments was made to the Attorney General on October 23, 2009, and the opinion that the amendments are in compliance with N.D.C.C. Chapter 28-32 was issued on December 31, 2009. Publication of the amendments was requested of Legislative Council on February 5, 2010. Copies of all referenced documents, with the exception of the hearing transcript are attached.

**4. Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules. If so, describe the concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint. Please summarize the comments of any person who offered comments at the public hearings on these rules.**

ANSWER - Yes comments, written and oral, were received. A copy of WSI's summary and responses to the comments is attached to this document.

**5. The approximate cost of giving public notice and holding any hearings on the rules, and the approximate cost (not including staff time) of developing and adopting the rules.**

ANSWER -	Cost of Public Notice	\$1,573.00
	Cost of Hearing (transcript)	145.25
	Cost of expert opinion re: PPI rule	<u>\$1,800.00</u>
	<b>TOTAL COST</b>	<b>\$3,518.25</b>

**6. An explanation of the subject matter of the rules and the reasons for adopting those rules.**

1. The purpose of the proposed amendment to Administrative Code Section 92-01-02-11.1 relating to attorney fees is to increase fee caps for attorney's fees paid to claimant's counsel in connection with disputes, to eliminate a fee provision made obsolete by a statutory change, and to change the name of "Office of Independent Review" to "Decision Review Office" as a result of a statutory change.
2. The purpose of the proposed amendment to Administrative Code Section 92-01-02-12 relating to mileage and per diem travel expenses paid to claimant's is to allow for door-to-door mileage to coincide with a statutory change.

3. The purpose of the proposed amendment to Administrative Code Section 92-01-02-13 relating to merger, exchange, or transfer of a business is to merge experience rates on employer accounts where a merger, exchange, or transfer of a business has occurred.
4. The purpose of the proposed amendment to Administrative Code Section 92-01-02-14 relating to employer payroll reports is to change the time frame of a past due premium billing statement to coincide with current system flexibility.
5. The purpose of the proposed amendment to Administrative Code Section 92-01-02-15 relating to payroll periods, is to authorize WSI to change payroll reporting periods to coincide with regular quarter endings.
6. The purpose of the proposed amendment to Administrative Code Section 92-01-02-16 relating to expiration dates is to authorize WSI to change expirations dates on employer accounts to coincide with regular quarter endings if necessary.
7. The purpose of the proposed amendment to Administrative Code Section 92-01-02-18 relating to the experience rating system is to change the experience ratings period from five years to three years and reduce the ratable manual premium. This change is a result of recommendations from our actuaries and is also industry standard.
8. The purpose of the proposed amendment to Administrative Code Section 92-01-02-24 relating to rehabilitation services changes the rehabilitation allowance provisions to coincide with a statutory change.
9. The purpose of the proposed amendment to Administrative Code Section 92-01-02-25 relating to permanent partial impairment awards is to address qualifications of medical personnel who perform impairment evaluations, the procedure utilized when a medical dispute exists, and impairment ratings for mental conditions.

During the written comment period, WSI received correspondence relating to this proposed rule requiring symptom validity testing when evaluating mental disorders. After inquiry and consideration of the comments, WSI partially amended the proposed rule. In addition, WSI sought the opinion of another expert. This expert concluded that the use of symptom validity testing continues to grow as a standard practice in the insurance industry. He expressed concern, however, regarding WSI's proposal of using specific, named tests rather than permitting an evaluating physician to choose at least two symptom validity tests of their choice. After additional consideration, WSI seeks to remove the requirement of using specific, named tests in its proposed rule. Pursuant to N.D.C.C. 28-32-18(3), WSI seeks to amend N.D.A.C 92-01-02-25(5)(c)(1) and asks the committee for its concurrence.



The proposed amendment is attached to your materials and marked "Exhibit A".

10. The purpose of the amendment to Administrative Code Section 92-01-02-29.1 relating to medical necessity and treatment, is to add prolotherapy as a treatment for which the organization will not pay as it is not considered an effective treatment by reliable medical literature.
11. The purpose of the amendments to Administrative Code Sections 92-01-02-31 and 92-01-02-45.1(8) and (23) relating to reimbursement for medical treatment is to allow an injured worker the flexibility to seek and pay for treatment that WSI would not otherwise pay for.
12. The purpose of the amendments to Administrative Code Section 92-01-02-34 relating to preservice authorization for medical treatment removes prolotherapy from the list of services where preservice authorization is required, as it is not a compensable service as noted in number 10.
13. The purpose of the proposed amendment to Administrative Code Section 92-01-02-41 relating to independent medical examinations is to define "duly qualified doctor" and "reasonable effort" to further clarify statutory changes.
14. The purpose of the proposed amendment to Administrative Code Section 92-01-02-45.1 relating to provider responsibilities and billing changes provides for the requirement of electronic submission of pharmacy billings so that prescriptions can be processed through WSI's pharmacy benefit manager.
15. The purpose of the proposed amendment to Administrative Code Section 92-01-02-50 relating to other states coverage, is to eliminate language that is no longer necessary or relevant to extraterritorial coverage, and to increase attorney fee reimbursements under this provision to a more reasonable rate.
16. The purpose of the proposed amendment to Administrative Code Section 92-01-02-55 relating to dividend programs, eliminates the requirement that dividends be declared by the board of directors due to a statutory change.
17. The purpose of the proposed amendments to Administrative Code Chapter 92-01-03 and Sections 92-01-03-01, 92-01-03-02, 92-01-03-03, and 92-01-03-04 is to change the name of the "Office of Independent Review" to "Decision Review Office: and to change "advocate" to "Decision Review Specialist" and "program" to "office" to coincide with a statutory change.
18. The purpose of the proposed amendment to Administrative Code Section 92-02-01-01 relating to industrial safety codes and adoption of federal safety codes, allows the most current federal regulations to be the North Dakota workplace standards.

19. The purpose of the proposed amendment to Administrative Code Section 92-05-02-01 relating to risk management program definitions is to remove the definition of preferred provider. It has no relevance in this section.
20. The purpose of the proposed amendment to Administrative Code Section 92-05-02-03 relating to eligibility for risk management programs, eliminates the reference to the risk management program plus as this program is has been replaced with an alternative results-based program as well as additional safety incentive programs.
21. The purpose of the proposed amendment to Administrative Code Section 92-05-02-04 is to repeal this section relating to the risk management program plus. (See 20).
22. The purpose of the proposed amendment to Administrative Code Section 92-05-02-05 is to repeal the risk management program plus. This program is being replaced with new performance-based and documentation-based programs. (See 20).
23. The purpose of the proposed amendment to Administrative Code Section 92-05-02-06 is to repeal the hazard elimination learning program. This program has been replaced with other safety grant programs.
24. The purpose of the proposed amendment to Administrative Code Section 92-05-02-07 relating to alternative risk management programs is to more accurately or specifically describe the risk management programs that may be created or modified.

**7. Whether a regulatory analysis was required by North Dakota Century Code (NDCC) Section 28-32-08 and whether a regulatory analysis was issued. Please provide a copy if one was prepared.**

ANSWER - A Copy of the regulatory analysis is attached.

**8. Whether a regulatory analysis or economic impact statement of impact on small entities was required by NDCC Section 28-32-08.1 and whether that regulatory analysis or impact statement was issued. Please provide copies.**

ANSWER - A copy of the Small Entity Regulatory Analysis and Small Entity Economic Impact Statement is attached.

**9. Whether a constitutional takings assessment was prepared as required by North Dakota Century Code Section 28-32-09. Please provide a copy if one was prepared.**

ANSWER - None were required.

**10. If these rules were adopted as emergency (interim final) rules under NDCC Section 28-32-03, provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support that declaration and provide a copy of the Governor's approval of the emergency status of the rules.**

ANSWER – These amendments were not adopted as emergency rules.

## **REGULATORY ANALYSIS OF REPEALED RULE**

**Section: 92-05-02-05**

**Title of Rule:** Risk management program plus

**GENERAL:** The following analysis is submitted in compliance with 28-32-08 of the NDCC.

The repeal of the WSI risk management program plus will add no additional regulations for employers. This existing results-based program, which is mandatory, has been replaced with a new performance-based discount program and other voluntary safety programs.

**DESCRIPTION OF PERSONS AFFECTED:** Approximately 17,500 employer participants.

**IMPACT OF REPEALED CHAPTER:** Statewide discounts for participation in safety programs amount to approximately \$15 million per year, or 10% of written premium. Premium discounts are funded out of WSI's fund surplus. As per 92-05-02-02, the availability of risk management programs is contingent on sufficient fund surplus as determined by the organization.

**COST OF IMPLEMENTATION AND ENFORCEMENT/EFFECT ON REVENUES:** No implementation or enforcement costs are anticipated with repeal of this section.

**DESCRIPTION OF ALTERNATIVES:** Alternative discount programs are being provided by Section 92-01-02-18 and Chapter 92-05-02. Discount percentages available under these chapters range from a 25% discount to a 25% surcharge of standard premium, which is expected to result in credits of \$5 million to \$15 million per year.

### **SMALL ENTITY REGULATORY ANALYSIS OF REPEALED RULE**

**Section: 92-05-02-05**

**Title of Rule:** Risk management program plus

**GENERAL:** The following analysis is submitted in compliance with §28-32-08.1(2) of the NDCC.

#### **POSSIBLE WAYS TO MINIMIZE THE ADVERSE IMPACT ON SMALL ENTITIES:**

- A. Establishing less stringent compliance or reporting requirements:** The repeal of the WSI Risk management program plus will not impact the reporting requirements of participating employers.

**B. Establishing less stringent schedules or deadlines for compliance or report:** None

**C. Consolidating or simplifying compliance or reporting requirements:** None

**D. Establishing performance standards that replace design or operational standards required in the proposed rule:** None

**E. Exempting small entities from all or part of the rule's requirements:** None

**SMALL ENTITY ECONOMIC IMPACT STATEMENT**

**GENERAL:** The following analysis is submitted in compliance with §28-32-08.1(3) of the NDCC.

The repeal of the WSI Risk management program plus will add no additional regulations for employers. The existing results-based program, which was mandatory, has been replaced with new performance-based and documentation-based programs as outlined in Chapters 92-01-02-18 and 92-05-02.

**DESCRIPTION OF ENTITIES AFFECTED:** Small entities currently participating in WSI's Risk management program plus.

**ADMINISTRATIVE OR OTHER COSTS REQUIRED FOR SMALL ENTITIES:** None anticipated. The repeal of this section will not increase or decrease the administrative burden for those entities currently participating in the program.

**PROBABLY COST AND BENEFIT TO PRIVATE PERSONS AND CONSUMERS:** Statewide discounts for participation in safety programs amount to approximately \$15 per year. Premium discounts are funded out of WSI's surplus. It is estimated that discounts currently available under 92-05-02 and 92-01-02-18 (4) will range from \$5 to \$15 million per year.

**PROBABLY EFFECT ON STATE REVENUES:** Not applicable. State Revenues are not impacted.

**ALTERNATIVES – LESS INTRUSIVE OR LESS COSTLY METHODS:** Alternative discount programs are currently available in Chapter 92-05-02 and 92-01-02-18.



## **Workforce Safety and Insurance**

### **Summary and Consideration of Oral and Written Comments Regarding Proposed Administrative Rule Changes August 28<sup>th</sup>, 2009**

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#### **WSI Administrative Rule Responses to Public Comment**

**Comment:** A telephone call was received from Allan Austad, North Dakota Association for Justice on August 27, 2009, regarding WSI's rulemaking hearing scheduled for August 28, 2009. Mr. Austad informed WSI that he hadn't been properly notified of this hearing and asked if WSI was going to reschedule the hearing. WSI informed Mr. Austad that WSI notified the public regarding the hearing by publishing in all newspapers in the state of North Dakota as required by law. Mr. Austad asked when the notice was published in the Mandan newspaper. WSI followed up on Mr. Austad's question and learned that its notice was published in the Mandan Newspaper on August 14, 2009, not on July 31, 2009, as requested in the notice.

**Response:** The request to publish WSI's Notice of Intent was made to the North Dakota Newspaper Association on July 20, 2009. WSI received North Dakota Newspaper Association's Affidavit of Publishing dated August 28, 2009, which states as follows:

"As requested, the North Dakota Newspaper Association scheduled and ordered the insertion of your public notice into the official county papers.

The Mandan News did not publish the "Workforce Safety & Insurance" notice as requested on July 31, 2009. The notice was published on August 14, 2009. That is less than the 20 day period required.

Technically, you did your part by requesting the notice be published. NDCC 28-32-10(a) states "the agency shall request publication..." The old language was "must be published". So, your department is covered according to the current law."

WSI's request dated July 20, 2009, to the North Dakota Newspaper Association to publish its notice was substantial compliance and satisfies the formal requirements of N.D.C.C. §§28-32-10(a) and 28-32-10(5).

**Result:** WSI proceeded with the scheduled hearing on August 28, 2009.

A Public Hearing was held on August 28<sup>th</sup>, 2009 in the Board Room at Workforce Safety and Insurance (WSI), 1600 East Century Avenue, Bismarck, North Dakota, for proposed rule amendments and rule adoption relating to Title 92 of the North Dakota Administrative Code. Oral and written comments were received throughout the comment period. Attached as Exhibit A is a listing identifying the entities or individuals that provided comment as well as the related proposed rules to which the comments were directed. All comments are addressed below.

**Administrative Rule:** 92-01-02-11.1

**Administrative Rule Title:** Attorney Fees

**Brief Description of Rule:** Attorney fees paid to claimant's counsel were increased.

**Comment:** Mr. Mark Schneider, on behalf of the North Dakota Association for Justice, submitted written comments dated September 8, 2008, alleging WSI "picked an arbitrary and capricious hourly rate that is well below even the **non**-contingent hourly rate currently charged by attorneys in North Dakota for similar work." Mr. Schneider further alleges, "WSI handsomely pays its outside counsel, win or lose, without 'caps'. Mr. Schneider requests WSI release data for the last ten years showing what it has paid for attorney fees for the attorneys representing injured workers and how fees and participation have declined. Mr. Schneider also asks for the release of information relating to "how many ...pro se litigants lose their case as opposed to those litigants...represented..." (Source Code: Written comment by Mr. Mark Schneider to proposed administrative rules dated September 8, 2009 at page 2 & 3).

**Response:** The fees established for claimant's counsel are reasonable and appropriate. Our research supports WSI's attorney fee reimbursement schedule is very competitive, when compared to other jurisdictions.

In 2008, WSI increased claimant's counsel fees to parallel the fees WSI pays to its own outside litigation counsel, private law firms throughout North Dakota. The hourly fees paid WSI contract attorneys, as well as Administrative Law Judges, are generally the same as the hourly fees paid to claimant's counsel. It is important to note that WSI's counsel, by contract, are subject to the same fee caps as are provided by claimant's counsel in this rule.

These facts provide further evidence of the rational process employed by WSI in establishing and amending the attorney fee structure.

Mr. Schneider also requests data relating to the dollars paid claimant's counsel and the number of attorneys representing injured workers. The numbers do reflect a decline in the level of dollars being paid to claimant's counsel. It is



speculation to conclude those numbers are reflective exclusively of negative profitability in practicing in the area of worker's compensation. Equally valid is WSI's assertion that attorney fees and costs have declined due, in part, to the restrictions on payment which require claimant's counsel to carefully analyze the probability of success before accepting a worker's compensation client and the efficiencies and advancements made by WSI in its litigation process since the mid-1990s.

The data requested by Mr. Schneider is attached as Exhibit B.

In response to the commenter's request, the prevail rates for pro se claimants as compared to those represented by counsel for fiscal year 2009 is as follows:

FY 09 - 7/01/2008 through 06/30/09				
Claimant's Counsel win/loss (All Cases)				
Firm	Wins	Lost	Total	Percentage of Wins
Little	7	36	43	16.0%
Schneider	4	6	10	40.0%
Latham	9	6	15	60.0%
Nodland	2	0	2	100.0%
Pro se	15	35	50	30.0%
Other	3	8	11	27.0%
<b>Total</b>	<b>40</b>	<b>91</b>	<b>131</b>	<b>31.0%</b>

Contrary to the commenter's assertion, pro se claimants prevail in 30% of the pro-se appeals. This is a higher prevail rate than at least one claimant's counsel.

Moreover, WSI is aware through anecdotal evidence that claimant's counsel charges the claimant a higher fee than WSI's established reimbursement amount. Many claimants' counsel likely receive additional fees than those reimbursed by WSI.

**Will there be a modification to the proposed rule:** No

**Administrative Rule:** 92-01-02-25(5)

**Administrative Rule Title:** Permanent impairment evaluations and disputes

**Brief Description of Rule:** Require symptom validity testing in permanent partial impairment evaluations for mental and behavioral disorders.

**Comment:** Dr. Rodney Swenson provided testimony at the administrative rules hearing on August 28<sup>th</sup>, 2009 and submitted written comments dated September

8, 2009. Dr. Swenson raises two issues. First, he argues that “mandating...how psychologists would practice their craft when it comes to performing permanent impairment ratings for Workforce Safety and Insurance usurps the authority of the psychology licensing board. The WSI mandate is an attempt to control how psychologist’s practice in this state.” Secondly, Dr. Swenson questions the procedure that WSI proposes to adopt as an “inappropriate utilization of the WMT and would seriously compromise the validity and reliability of the use of such tests.” (Source Code: Written comment by Dr. Rodney Swenson to proposed administrative rules dated September 8, 2009 at page 2).

**Response:** The use of Symptom Validity Testing when evaluating mental and behavioral disorders has been endorsed by both the National Academy of Neuropsychology and the American Academy of Clinical Neuropsychology. (See American Academy of Clinical Neuropsychology Consensus Conference Statement on the Neuropsychological Assessment of Effort, Response Bias, and Malingering, 2009 Psychology Press, June 30, 2009. Symptom validity assessment: Practice issues and medical necessity NAN Policy and Planning Committee Symptom validity assessment: Practice issues and medical necessity NAN Policy and Planning Committee, Archives of Clinical Neuropsychology, February 28, 2005).

Dr. Swenson suggests that WSI’s proposed rules will usurp the authority of the psychology licensing board<sup>1</sup>. A review of the relevant statutes and administrative rules does not support Dr. Swenson’s assertion. The Board of Psychologist Examiners is engaged in the business of licensure, adjudication of complaints and compliance with continuing education requirements. WSI’s proposed administrative rule does not interfere in any way with those statutory duties.

Second, Dr. Swenson raises the concern regarding WSI’s proposed language on testing procedure:

“The method where an evaluator ‘determines good effort’ as proposed by Workforce Safety as well as the fact that they would interrupt the patient and have them retake the test until good effort is demonstrated is both a violation of the standardized administration these tests as well as frank coaching of the examinee. Such a practice would be an inappropriate utilization of the WMT and would seriously compromise the validity and reliability of the use of such tests.”

Additional research on this portion of the rule confirms that Dr. Swenson concerns have a basis in testing science. Consequently, in response to Dr. Swenson’s comments, WSI amended the section of the proposed rule relating to testing procedure.

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<sup>1</sup> Although referred to as the “licensing board,” by Dr. Swenson, North Dakota law only references one gubernatorially-appointed board regulating psychologists. It is found at N.D.C.C. §43-32-02 and is referred to as the Board of Psychologist Examiners.

**Comment:** Mr. Mark Schneider, on behalf of the North Dakota Association for Justice, asserts "the tests that WSI would require are not and cannot be objective. North Dakota law... requires that if an injured worker has an impairment, that impairment must be rated and a resulting award paid. There is absolutely no room in this law for WSI to make up the science as it goes along..."

**Response:** WSI continues to provide evaluations, rate permanent injuries and make monetary awards to injured workers. The proposed rule does not remove from that process the "blend of art science and, particularly in the case of mental disorders, ...the full skill, knowledge, education and clinical judgment of the mental behavioral doctor that is conducting the permanent partial impairment evaluation. (Source code NDAJ at page 4 quoting AMA Guides (5<sup>th</sup> Ed.), Section 1.5) On the contrary, the proposed rule continues to rely on the discretion and talent of the evaluating physician but includes testing for symptom validity. This is generally accepted medical practice in this area and has, in recent years, become the standard in the industry.

**Will there be a modification to the proposed rule:** Yes. Based on the comments of Dr. Swenson, the text requiring the evaluating physician to interrupt testing, provide information to the injured worker and restart the testing has been removed.

**Administrative Rule:** 92-01-02-25(3)

**Administrative Rule Title:** Permanent impairment evaluations and disputes

**Brief Description of Rule:** Use of specialists in permanent impairment evaluations

**Comment:** Mr. Mark Schneider, on behalf of the North Dakota Association for Justice, labels this proposed ruled change a "cynical charade" and the injured worker's opportunity to consult a "worthless canard."

**Response:** There are simply not enough physicians trained in the Guides to permanent impairment who are willing to perform evaluations. In some specialties, only one physician could be identified. To the extent that is the case, WSI must have the flexibility to engage that physician to evaluate the injured worker. The proposed rule provides for collaboration and input from the injured worker where multiple evaluators are identified.

**Will there be a modification to the proposed rule:** No

**Administrative Rule:** 92-01-02-25(5)(e)

**Administrative Rule Title:** Permanent impairment evaluations and disputes

**Brief Description of Rule:** Apportionment of permanent impairment awards.

**Comment:** Mr. Mark Schneider, on behalf of the North Dakota Association for Justice, comments that the proposed language requiring apportionment in permanent impairment reports where there are both work and non work related impairments "unnecessary and misleading."

**Response:** The language which Mr. Schneider objects to appears twice in the current version of the rules. It appears and remains in 92-01-02-25(2). It also appears in Appendix A of the rule which is being removed in its entirety in these amendments. The language regarding apportionment was relocated and preserved in this proposed version of the rule.

**Will there be a modification to the proposed rule:** No

**Administrative Rule:** 92-01-02-41

**Administrative Rule Title:** Independent Medical Examinations

**Brief Description of Rule:** Independent Medical Examinations

**Comment:** Mr. Dean Haas, apparently appearing on behalf of the N.D. Medical Association, expressed a concern that the amendment's definition of "reasonable effort" is not consistent with the statutory change that was the catalyst for the amendment. (Source Code: Transcript of Oral Comment by Attorney Dean Haas made at public hearing August 28, 2009, pages 10 and 11.)

**Response:** The amendment is consistent with the statutory change in that the statutory change was meant to place requirements upon WSI when it seeks to conduct an independent medical examination (IME) of injured employees. The statutory change was not intended to frustrate the IME process or create appealable situations that do not currently exist. Therefore, this rule amendment is intended to clarify that point.

**Comment:** Mr. Alan Austad expressed concern that the amendment means that WSI could appoint a person, like himself, to conduct an IME and his qualifications could not be questioned by injured employees' attorneys. (Source Code: Transcript of Oral Comment by Alan Austad made at public hearing August 28, 2009, pages 18 and 19.)

**Response:** Mr. Austad's concern is not accurate. Injured employees, through their attorneys, have always had the right to question the qualifications of IME examiners during the litigation process. The amendment does nothing to change that fact. If an examiner is lacking in qualifications, his or her testimony should

be afforded less credibility. Using Mr. Austad's hyperbolic example, if WSI hired him to perform an IME and used it as the basis for a reduction of benefits, the affected injured employee would rightfully and undoubtedly prevail in litigation because his lack of medical expertise would be exposed. Injured employees have never been able to challenge WSI's choice of examiners in any other way than through the test of litigation, so any allegation that this amendment is removing a right is mistaken. This amendment does not change the current paradigm for IMEs. Instead, it is intended to clarify that the pertinent statutory changes were not intended to frustrate the IME process or create appealable situations that do not currently exist.

**Comment:** Mr. Mark Schneider indicated that he believes that the amendment grants WSI "*carte blanche*" to choose IME examiners, implying that new, unlimited authority is being granted. (Source Code: Letter by Mark Schneider dated September 8, 2009, pages 5, 6, and 7)

**Response:** Mr. Schneider is not correct. As it regards qualifications, the amendment does not give WSI any more authority to choose an IME examiner than it already has. Injured employees have never been able to challenge WSI's choice of examiners in any other way than through the test of litigation, so any allegation that this amendment is removing a right is mistaken. This amendment does not change the current paradigm for IMEs. Instead, it is intended to clarify that the pertinent statutory changes were not intended to frustrate the IME process or create appealable situations that do not currently exist.

**Comment:** Mr. Mark Schneider indicated that he believes that the amendment creates a situation where WSI could "get away with" sending an injured employee who suffers from an eye injury to a foot doctor for an IME. (Source Code: Letter by Mark Schneider dated September 8, 2009, pages 6)

**Response:** Mr. Schneider's comment is not accurate. Injured employees, through their attorneys, have always had the right to question the qualifications of IME examiners during the litigation process. The amendment does nothing to change that fact. If an examiner is lacking in qualifications, his or her testimony should be afforded less credibility. Using Mr. Schneider's exaggerated example, if WSI hired a foot doctor to perform an IME of an eye injury and used it as the basis for a reduction of benefits, the affected injured employee would rightfully and undoubtedly prevail in litigation because the examiner's lack of expertise would be exposed. Injured employees have never been able to challenge WSI's choice of examiners in any other way than through the test of litigation, so any allegation that this amendment is removing a right is mistaken. This amendment does not change the current paradigm for IMEs. Instead, it is intended to clarify that the pertinent statutory changes were not intended to frustrate the IME process or create appealable situations that do not currently exist.

**Comment:** A suggestion to incorporate independent medical review as part of rule as enacted by 2009 Legislative Assembly.

**Response:** Agree

**Will there be a modification to the proposed rule:** Yes, WSI added the language independent medical review.

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**Administrative Rule:** 92-01-02-50

**Administrative Rule Title:** Other States' Coverage

**Brief Description of Rule:** Rule provides benefits for North Dakota based employees who perform hazardous employment outside the state of North Dakota.

**Comment:** A concern was expressed that by expanding this rule to include a definition of "Significant Contacts", an undue burden was being placed on a North Dakota based employer who conducts commerce outside the State of North Dakota.

**Response:** This was not the intent of the proposed changes. The changes were an attempt to provide greater clarity between exposures which are "incidental" or "significant" in nature, as well as remove an outdated reference. However, after further review it was determined that the rule in its present state provides adequate clarity of "incidental" versus "significant" contacts.

**Will there be a modification to the proposed rule:** Yes, the proposed amendments have been modified by removing paragraph (e) which defined "significant contacts". Accordingly, within paragraph (d), references to "incidental operations" were left intact with the exception "in a state other than a qualified state" which was deleted.

**Administrative Rule:** 92-05-02-05

**Administrative Rule Title:** Risk management program plus

**Brief Description of Rule:** Rule provides describes the calculation and discounts resulting from successfully meeting established frequency and severity benchmarks.

**Comment:** A commenter indicated that the removal of the RMP+ program would result in a failure to adequately reward those smaller employers who generated positive results in regards to the frequency and severity of claims. Additionally, it was felt that safety programs should be "result based" rather than "program based", and the issuance of any discounts should be tied directly to loss frequency and severity rather than successfully implementing safety program requirements.



**Response:** With the application of the Experience Rating Program and the recently introduced Small Account Credit/Debit Program, employers of all sizes will continue to be rewarded for successfully managing the frequency and severity of claims. However, unlike the RMP+ program which addresses only favorable results, the Small Account Credit/Debit will also address unfavorable history, thus being more equitable in its application by debiting those accounts with negative loss history. Additionally, the program is easier to understand, allowing employers to understand its application to their accounts.

**Will there be a modification to the proposed rule:** No

**Notation to hearing transcript and Notice of Intent to Create**

The Notice of Intent to Create and Amend Administrative Rules dated July 20, 2009; and the August 28, 2009, hearing transcript inadvertently left out references to §§92-01-03-02 and 92-01-03-04 where WSI proposes changes of "advocate" to "claims examiner". The correct proposed changes should read "decision review specialist" instead of "claims examiner". The text of the proposed administrative rules was accurate.

**Result:** Changes "advocate" to "decision review specialist" instead of claims examiner.



## Exhibit A: Summary of Public Comments Received for WSI 2009 Proposed Administrative Rules

[illegible]

## EXHIBIT

tabbles

B

## Claimant's Counsel Fees paid FY2000-FY2009

Law Firm	FY2000	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009
ROBERT VOGEL LAW OFFICE PC	\$8,453.95	\$1,360.14	\$1,743.44	\$6,371.65	\$457.55	\$7,299.88	\$2,282.40	\$12,856.93	\$9,692.82	\$1,875.00
MCCARTNEY LAW OFFICE	\$131.75	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
GERMAN NEIL & HASBROUCK LTD	\$85.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
JOHANNSON RUST VON STOCK & RA	\$1,388.50	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
SOLBERG STEWART MILLER JOHNSC	\$3,255.30	\$0.00	\$0.00	\$0.00	\$0.00	\$3,312.60	\$7,013.00	\$3,505.59	\$0.00	\$0.00
MACKOFF KELLOGG LAW FIRM	\$1,800.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$261.61	\$8,069.94	\$0.00	\$0.00
REICHERT & HERAUF PC	\$9,703.58	\$4,661.10	\$26,099.96	\$13,091.88	\$9,249.84	\$4,305.61	\$7,809.36	\$2,395.44	\$0.00	\$0.00
MCKENNETT STENEHJEM REIERSON	\$16,768.83	\$12,055.90	\$3,142.50	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
CONNY FESTE HUBBARD CORWIN & I	\$1,547.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
GARAAS LAW FIRM	\$2,479.50	\$1,219.75	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$8,732.66
SCHNEIDER SCHNEIDER & SCHNEIDE	\$341,756.00	\$123,673.92	\$70,763.12	\$57,042.95	\$62,594.66	\$46,089.93	\$42,912.87	\$58,747.22	\$79,260.72	\$98,099.22
PULKRABEK LAW FIRM	\$7,501.89	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
CAMERON D SILLERS PC	\$495.01	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
DIETZ & LITTLE	\$243,123.92	\$213,176.13	\$85,283.57	\$90,856.45	\$117,298.89	\$68,683.69	\$55,854.36	\$89,135.88	\$130,876.12	\$45,050.27
MCDONALD LAW OFFICE	\$861.95	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
DICKSON LAW OFFICE	\$7,870.62	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
KROPP LAW OFFICES PC	\$2,239.21	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
SENN LAW OFFICE	\$5,956.90	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
LARSON LATHAM HUETTL LLP	\$12,517.42	\$31,903.91	23,497.11	\$28,491.34	\$24,193.75	\$33,106.21	\$27,800.99	\$36,069.58	\$53,508.71	\$23,450.78
BRODEN BRODEN & WALKER/Broden	\$323.77	\$0.00	\$0.00	\$2,640.00	\$0.00	\$440.00	\$0.00	\$9.47	\$0.00	\$0.00
OMDAHL LAW OFFICE	\$8,285.80	\$0.00	300.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
ALLBRIGHT, GEORGE T	(\$556.56)	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
NORTH PRAIRIE LAW OFFICE	\$4,132.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
FICEK & BURESH PC/Gary A. Ficek	\$6,824.42	\$0.00	2,614.18	\$0.00	\$4,337.87	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Ohnstad Twichell	\$0.00	258.25	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Camrud Maddock Olson & Larson Ltd	\$0.00	394.25	542.10	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Pearson Christensen Clapp Fiedler Fisch	\$0.00	\$1,790.29	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Demars & Turman Ltd	\$0.00	\$150.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Severin Ringsak & Marrow	\$0.00	\$2,748.00	\$0.00	1902.87	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Larson Law Firm	\$0.00	\$935.25	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Chapman & Chapman PC	\$0.00	\$5,237.95	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Ackre Law Firm Ltd	\$0.00	\$1,500.00	\$0.00	\$99.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Chapman Law Office	\$0.00	\$3,034.15	5,299.14	984.5	\$1,188.50	\$228.00	\$0.00	\$874.15	\$0.00	\$7,732.94
Anseth Johnson Law Firm	\$0.00	\$2,892.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Nodland Law Firm	\$0.00	\$0.00	4,560.81	\$0.00	771.58	\$0.00	\$1,621.05	\$8,736.36	\$2,928.27	\$7,294.12
Cahill & Marquart PA	\$0.00	\$0.00	1,168.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Neff Eiken & Neff	\$0.00	\$0.00	498.02	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Haas Law	\$0.00	\$0.00	11,000.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Balerud Law Firm PC	\$0.00	\$0.00	3,306.00	\$0.00	2,403.50	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Tonner Tobin & King LLP	\$0.00	\$0.00	\$0.00	4660.15	\$0.00	\$0.00	\$0.00	\$0.00	\$5,607.00	\$0.00
Hellerud Law Office	\$0.00	\$0.00	\$0.00	\$818.82	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Fisher & Olson Ltd	\$0.00	\$0.00	\$0.00	\$0.00	184.40	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Ted D Seibel PC	\$0.00	\$0.00	\$0.00	\$0.00	1,411.67	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Anderson Bottrell Sanden & Thompson	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$440.00	\$0.00	\$0.00	\$0.00	\$0.00
Mark Rasmuson	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$4,134.01	\$0.00	\$0.00	\$0.00
Mike Halpren	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$6,890.22	\$0.00	\$0.00	\$0.00
James Vukelic Attorney At Law	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$446.47	\$0.00	\$0.00	\$0.00
Johnston Law Office	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$5,269.44	\$0.00	\$0.00
Kessel Splitt & Kessel	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$1,237.50	\$0.00	\$0.00
Sortland Law Office	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$11,991.82	\$0.00
Zuger Kirmis & Smith	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$6,361.10	\$0.00
Solem Law Firm	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$980.58	\$0.00
Johnson Ramstad & Mottinger Law Firm	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$500.00
Bucklin Klemin & McBride PC	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$3,480.79
	\$686,945.76	\$406,990.99	\$239,817.95	\$206,959.61	\$224,092.21	\$163,905.92	\$157,026.34	\$226,907.50	\$301,207.14	\$196,215.78

**92-01-02-25. Permanent impairment evaluations and disputes.**

1. Definitions:

- a. Amputations and loss as used in subsection 11 of North Dakota Century Code section 65-05-12.2.

"Amputation of a thumb" means disarticulation at the metacarpal phalangeal joint.

"Amputation of the second or distal phalanx of the thumb" means disarticulation at or proximal to the interphalangeal joint.

"Amputation of the first finger" means disarticulation at the metacarpal phalangeal joint.

"Amputation of the middle or second phalanx of the first finger" means disarticulation at or proximal to the proximal interphalangeal joint.

"Amputation of the third or distal phalanx of the first finger" means disarticulation at or proximal to the distal interphalangeal joint.

"Amputation of the second finger" means disarticulation at the metacarpal phalangeal joint.

"Amputation of the middle or second phalanx of the second finger" means disarticulation at or proximal to the proximal interphalangeal joint.

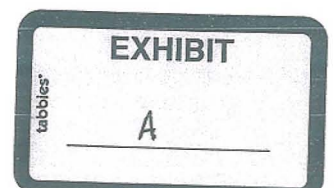
"Amputation of the third or distal phalanx of the second finger" means disarticulation at or proximal to the distal interphalangeal joint.

"Amputation of the third finger" means disarticulation at the metacarpal phalangeal joint.

"Amputation of the middle or second phalanx of the third finger" means disarticulation at or proximal to the proximal interphalangeal joint.

"Amputation of the fourth finger" means disarticulation at the metacarpal phalangeal joint.

"Amputation of the middle or second phalanx of the fourth finger" means disarticulation at or proximal to the proximal interphalangeal joint.





"Amputation of the leg at the hip" means disarticulation at or distal to the hip joint (separation of the head of the femur from the acetabulum).

"Amputation of the leg at or above the knee" means disarticulation at or proximal to the knee joint (separation of the femur from the tibia).

"Amputation of the leg at or above the ankle" means disarticulation at or proximal to the ankle joint (separation of the tibia from the talus).

"Amputation of a great toe" means disarticulation at the metatarsal phalangeal joint.

"Amputation of the second or distal phalanx of the great toe" means disarticulation at or proximal to the interphalangeal joint.

"Amputation of any other toe" means disarticulation at the metatarsal phalangeal joint.

"Loss of an eye" means enucleation of the eye.

- b. "Maximum medical improvement" means the injured employee's recovery has progressed to the point where substantial further improvement is unlikely, based on reasonable medical probability and clinical findings indicate the medical condition is stable.
  - c. "Medical dispute" means an employee has reached maximum medical improvement in connection with a work injury and has been evaluated for permanent impairment, and there is a disagreement between doctors arising from the evaluation that affects the amount of the award. It does not include disputes regarding proper interpretation or application of the American medical association guides to the evaluation of permanent impairment, fifth edition.
  - d. "Potentially eligible for an impairment award" means the medical evidence in the claim file indicates an injured employee has reached maximum medical improvement and has a permanent impairment caused by the work injury that will likely result in a monetary impairment award.
  - e. "Treating doctor" means a doctor of medicine or osteopathy, chiropractor, dentist, optometrist, podiatrist, or psychologist acting within the scope of the doctor's license who has physically examined or provided direct care or treatment to the injured employee.
2. Permanent impairment evaluations must be performed in accordance with the American medical association guides to the evaluation of permanent

impairment, fifth edition, and modified by this section. All permanent impairment reports must include the opinion of the doctor on the cause of the impairment and must contain an apportionment if the impairment is caused by both work-related and non-work-related injuries or conditions.

3. The organization shall establish a list of medical specialists who have the training and experience necessary to conduct an evaluation of permanent impairment and apply the American medical association guides to the evaluation of permanent impairment, fifth edition. When an employee requests an evaluation of impairment, the organization shall schedule an evaluation with a physician from the list. The organization may not schedule a permanent impairment evaluation with the employee's treating doctor. The organization and employee may agree to an evaluation by a physician not on the current list. In the event of a medical dispute, the organization ~~shall furnish the list of appropriate specialists to the employee. The organization and the employee, if they cannot agree on an independent medical specialist, shall choose a specialist by striking names of medical specialists from the list until a name is chosen.~~ will identify qualified specialists and submit all objective medical documentation regarding the dispute to specialist(s) who have the knowledge, training, and experience in the application of the American medical association guides to the evaluation of permanent impairment, fifth edition. To the extent more than one physician is identified, the organization will consult with the employee before appointment of the physician.
4. Upon receiving a permanent impairment rating report from the doctor, the organization shall audit the report and shall issue a decision awarding or denying permanent impairment benefits.
  - a. Pain impairment ratings. A permanent impairment award may not be made upon a rating solely under chapter 18 of the guides when there is no accompanying rating under the conventional organ and body system ratings of impairment. In addition, no rating for pain may be awarded when the evaluating physician determines the individual being rated has low credibility, when the individual's pain is ambiguous or the diagnosis is a controversial pain syndrome. A controversial pain syndrome is a syndrome that is not widely accepted by physicians and does not have a well-defined pathophysiologic basis.
  - b. An evaluating physician qualified in application of the guides to determine permanent impairment shall conduct an informal pain assessment and evaluate the individual under the guide's conventional rating system according to the body part or organ system specific to that person's impairment. If the body system impairment rating adequately encompasses the pain, no further assessment may be done.

- c. If the pain-related impairment increases the burden of the individual's condition slightly, the evaluating physician may increase the percentage attributable to pain by up to three percent and, using the combined values chart of the fifth edition, calculate a combined overall impairment rating.
- d. If the pain-related impairment increases the burden of the individual's condition substantially, the evaluating physician shall conduct a formal pain assessment using tables 18-4, 18-5, and 18-6 of the guides and calculate a score using table 18-7.
- e. The score from table 18-7 correlates to an impairment classification found in table 18-3.
- f. If the score falls within classifications two, three, or four of table 18-3, the evaluating physician must determine whether the pain is ratable or unratable.
- g. To determine whether the pain is ratable or unratable, the evaluating physician must answer the three questions in this section. If the answer to all three of the following questions is yes, the evaluating physician should consider the pain ratable. If any question is answered no, the pain is unratable.
  - (1) Do the individual's symptoms or physical findings, or both, match any known medical condition?
  - (2) Is the individual's presentation typical of the diagnosed condition?
  - (3) Is the diagnosed condition one that is widely accepted by physicians as having a well-defined pathophysiologic basis?
- h. If the pain is unratable, no percentage may be assigned to the impairment.
- i. If the pain is ratable, the evaluating physician shall classify the individual into one of the categories in table 18-3 and, using the combined values chart of the fifth edition, calculate a combined overall impairment rating.
- j. The impairment percentages assigned to table 18-3 are:
  - (1) Class 1, mild: one to three percent.
  - (2) Class 2, moderate: four to five percent.

(3) Class 3, moderately severe: six to seven percent.

(4) Class 4, severe: eight to nine percent.

5. Permanent mental and behavioral disorder impairment ratings.

a. Any evaluating physician determining permanent mental or behavioral disorder impairment shall:

(1) Include in the rating only those mental or behavioral disorder impairments not likely to improve despite medical treatment;

(2) Use the instructions contained in the American medical association guides to the evaluation of permanent impairment, fifth edition, giving specific attention to:

(a) Chapter 13, "central and peripheral nervous system"; and

(b) Chapter 14, "mental and behavioral disorders"; and

(3) Complete a full psychiatric assessment following the principles of the American medical association guides to the evaluation of permanent impairment, fifth edition, including:

(a) A nationally accepted and validated psychiatric diagnosis made according to established standards of the American psychiatric association as contemplated by the American medical association guides to the evaluation of permanent impairment, fifth edition; and

(b) A complete history of the impairment, associated stressors, treatment, attempts at rehabilitation, and pre-morbid history and a determination of causality and apportionment.

b. If the permanent impairment is due to organic deficits of the brain and results in disturbances of complex integrated cerebral function, emotional disturbance, or consciousness disturbance, then chapter 13, "central and peripheral nervous system", must be consulted and may be used, when appropriate, with chapter 14, "mental and behavioral disorders". The same permanent impairment may not be rated in both sections. The purpose is to rate the overall functioning, not each specific diagnosis. The impairment must be rated in accordance with the "permanent mental impairment rating work sheet" incorporated as appendix A to this chapter.



- c. The permanent impairment report must include a written summary of the mental evaluation and the "report work sheet" incorporated as appendix A to this chapter. The overall permanent impairment rating for depression and/or anxiety must be based upon objective psychological test results, utilizing the following accepted procedures and tests.

- (1.) Two or more symptom validity tests shall be conducted. If the evaluator determines good effort is not demonstrated on one or both of the symptom validity tests, no impairment rating is reported.
- (2) If chronic pain is rated, the Pain Patient Profile (P3) and either the MMPI-2 or the MMPI-2 RF may be administered.
- (3) Upon determination of the level of depression and/or anxiety through objective valid psychological test results, the evaluating physician shall classify the individual into one of the categories in Table 14-1 of the guides.

The levels of permanent mental impairment percentages assigned to Table 14-1 are:

<u>Percent</u>	<u>Category</u>
<u>0%</u>	<u>Class 1. No Impairment</u>
<u>1-15%</u>	<u>Class 2. Mild permanent Impairment</u>
<u>16-25%</u>	<u>Class 3. Moderate Permanent Impairment</u>
<u>26-50%</u>	<u>Class 4. Marked Permanent Impairment</u>
<u>51-100%</u>	<u>Class 5. Extreme Permanent Impairment</u>

- (4) The permanent impairment report must include a written summary of the mental evaluation.
- d. If other work-related permanent impairment exists, a combined whole-body permanent impairment rating may be determined.
- e. All permanent impairment reports must include an apportionment if the impairment is caused by both work and non-work injuries or conditions.
6. Errata sheets and guides updates. Any updates, additions, or revisions by the editors of the fifth edition of the guides to the evaluation of permanent impairment as of ~~April 1, 2009~~ July 1, 2010, are adopted as an update, addition, or revision by the organization.

**History:** Effective November 1, 1991; amended effective January 1, 1996; April 1, 1997; May 1, 1998; May 1, 2000; May 1, 2002; July 1, 2004; July 1, 2006; April 1, 2009; amended July 1, 2010.

**General Authority:** NDCC 65-02-08

**Law Implemented:** NDCC 65-05-12.2

## APPENDIX A

### ~~WORKFORCE SAFETY AND INSURANCE~~

#### ~~PERMANENT MENTAL IMPAIRMENT RATING REPORT~~

#### ~~WORK SHEET~~

~~Since the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, does not provide a quantified method for assigning permanent impairment percentages under Chapter 14, "Mental and Behavioral Disorders", the evaluating physician shall utilize this form. When using this form, the evaluating physician shall:~~

- ~~a. — Become familiar with the content of the work sheet and develop an understanding of the percentages and categories listed in "I. Level of Permanent Mental Impairment" and Table 14-1 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition;~~
- ~~b. — Enter the permanent mental category rating associated with each item in all sections of "II. Areas of Function" as it applies to the injured worker; and~~
- ~~c. — Enter a rating for the "Overall Permanent Impairment Rating" provided within this appendix. The "Overall Permanent Impairment Rating" must be based upon the categories provided in Table 14-1.~~
- ~~d. — All permanent impairment reports must include the cause of the impairment and must contain an apportionment if the impairment is caused by both work and non-work injuries or conditions.~~

~~The various degrees of permanent impairment from "II. Areas of Function" on within this appendix are not added, combined, or averaged. The overall mental rating should be based upon clinical judgment and Table 14-1, and be consistent with other chapters of the AMA guides.~~

~~—PLEASE PHOTOCOPY AS NEEDED—~~

**PERMANENT MENTAL IMPAIRMENT RATING  
REPORT WORK SHEET**

Patient Name \_\_\_\_\_ DOB \_\_\_\_\_

WC# \_\_\_\_\_ SSN \_\_\_\_\_

**I. ~~LEVELS OF PERMANENT MENTAL IMPAIRMENT~~ as identified in Table 14.1 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition:**

Percent	Category
0%	Class 1. No Impairment
1-15%	Class 2. Mild permanent Impairment
16-25%	Class 3. Moderate Permanent Impairment
26-50%	Class 4. Marked Permanent Impairment
51-100%	Class 5. Extreme Permanent Impairment

**II. ~~AREAS OF FUNCTION~~**

**1. ~~Activities of Daily Living~~**

_____	<del>Self-care personal hygiene (urinating, defecating, brushing teeth, combing hair, dressing oneself, bathing, eating, preparing meals, and feeding oneself)</del>
_____	<del>Communication (writing, typing, seeing, hearing, speaking)</del>
_____	<del>Physical activity (standing, sitting, reclining, walking, climbing stairs)</del>
_____	<del>Travel (driving, riding, flying)</del>
_____	<del>Nonspecialized hand activities (grasping, lifting, tactile discrimination)</del>
_____	<del>Sexual function (orgasm, ejaculation, lubrication, erection)</del>
_____	<del>Sleep (restful, nocturnal sleep pattern)</del>

**2. ~~Social Functioning~~**

- \_\_\_\_\_ Get along with others
- \_\_\_\_\_ Initiate social contacts
- \_\_\_\_\_ Communicate clearly with others
- \_\_\_\_\_ Interact and actively participate in group activities
- \_\_\_\_\_ Cooperative behavior, consideration for others, and awareness of others' sensitivities
- \_\_\_\_\_ Interacts appropriately with the general public
- \_\_\_\_\_ Asks simple questions or requests assistance
- \_\_\_\_\_ Accepts instructions and responds appropriately to criticism from supervisors
- \_\_\_\_\_ Gets along with coworkers and peers without distracting them or exhibiting behavioral extremes
- \_\_\_\_\_ Maintains socially appropriate behavior
- \_\_\_\_\_ Adheres to basic standards of neatness and cleanliness

### **3. Memory, Concentration, Persistence, and Pace**

- \_\_\_\_\_ Comprehend/follow simple commands
- \_\_\_\_\_ Works with or near others without being distracted
- \_\_\_\_\_ Sustains an ordinary routine without special supervision
- \_\_\_\_\_ Ability to carry out detailed instructions
- \_\_\_\_\_ Maintain attention and concentration for specific tasks
- \_\_\_\_\_ Makes simple work-related decisions
- \_\_\_\_\_ Performs activities within a given schedule
- \_\_\_\_\_ Maintains regular attendance and is punctual within customary tolerances
- \_\_\_\_\_ Completes a normal workday and

workweek without interruptions from  
psychologically based symptoms

\_\_\_\_\_

Maintains regular attendance and is  
punctual within customary tolerances

**4. ~~Deterioration or Decompensation in Complex or Worklife Settings~~  
(Adaptation to Stressful Circumstances)**

\_\_\_\_\_

Withdraws from the situation or  
experiences exacerbation of signs and  
symptoms of a mental disorder

\_\_\_\_\_

Decompensates and has difficulty  
maintaining performance of activities of  
daily living (ADLs), continuing social  
relationships, or completing tasks

\_\_\_\_\_

Able to make good autonomous  
decisions/exercises good judgment

\_\_\_\_\_

Perform activities on schedule

\_\_\_\_\_

Interacts appropriately with supervisors  
and peers

\_\_\_\_\_

Responds appropriately to changes in  
work setting

\_\_\_\_\_

Aware of normal hazards and takes  
appropriate precautions

\_\_\_\_\_

Able to use public transportation and can  
travel to and within unfamiliar places

\_\_\_\_\_

Sets realistic goals

\_\_\_\_\_

Makes plans independent of others

**OVERALL PERMANENT IMPAIRMENT RATING** \_\_\_\_\_

**IMPAIRMENT CAUSED BY WORK** \_\_\_\_\_

**Physician** \_\_\_\_\_ **Date** \_\_\_\_\_

(signature)

**PERMANENT WORK-RELATED MENTAL IMPAIRMENT RATING**

**REPORT WORK SHEET**



**92-02-01-01. References to other standards.** Any update, amendment or revision to Title 29 of the Code of Federal Regulations, part 1910, occupational safety and health standards for general industry, with amendments as of July 1, 2003, and, part 1926, occupational safety and health standards for the construction industry, with amendments as of July 1, 2003, both promulgated by the occupational safety and health administration of the United States department of labor effective as of July 1, 2010, are the standards of safety and conduct for the employers and employees of the state of North Dakota.

**History:** Amended effective August 1, 1987; June 1, 2000; July 1, 2004; amended July 1, 2010.

**General Authority:** NDCC 65-03-01

**Law Implemented:** NDCC 65-03-01

