

Rulemaking Hearing Rules
of
The Tennessee Department of Labor and Workforce Development
Division of Workers' Compensation

Chapter 0800-2-20
Medical Impairment Rating Registry Program

New rules

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0800-2-20-.01 Definitions. The following definitions are for the purposes of this chapter only:

- (1) "Act" means the Tennessee Workers' Compensation Act, Tenn. Code Ann. § 50-6-101 et seq., as amended.
- (2) "Administrator" means the chief administrative officer of the Workers' Compensation Division of the Tennessee Department of Labor and Workforce Development.
- (3) "Commissioner" means the Commissioner of the Tennessee Department of Labor and Workforce Development or the Commissioner's designee.
- (4) "Department" means the Tennessee Department of Labor and Workforce Development.
- (5) "Dispute of degree of medical impairment" means one of two things: either at least two (2) different physicians have issued differing permanent medical impairment ratings in compliance with the Act and the parties disagree as to those permanent impairment ratings; or, a dispute may also exist if a physician has issued an opinion in compliance with the Act that no permanent medical impairment exists, yet that physician has issued permanent physical restrictions to the injured employee.
- (6) "Division" means the Workers' Compensation Division of the Tennessee Department of Labor and Workforce Development.

- (7) "Employee" shall have the same meaning as set forth in Tenn. Code Ann. § 50-6-102.
- (8) "Employer" shall have the same meaning as set forth in Tenn. Code Ann. § 50-6-102.
- (9) "Form" means the "Application for a Medical Impairment Rating," required to be used to request a MIR Registry physician from the Commissioner. The Form is available upon request from the Department or online at www.state.tn.us/labor-wfd/mainforms.html.
- (10) "Insurer" or "carrier" means an employer's workers' compensation insurance carrier and additionally shall include any entity claiming, operating, or attempting to operate as a self-insured employer, self-insured pool, or self-insured trust pursuant to the requirements of Tenn. Code Ann. § 50-6-405 and Chapter 0780-1-54, Self-Insured Pools, of the Rules of the Department of Commerce and Insurance, Insurance Division.
- (11) "Medical Director" means the Division's Medical Director, appointed by the Commissioner pursuant to Tenn. Code Ann. § 50-6-126 (Repl. 1999).
- (12) "Medical Impairment Rating Registry" or "MIR Registry" means the registry or listing of physicians established by the Commissioner pursuant to Tenn. Code Ann. § 50-6-204 (2005) to perform independent medical impairment ratings when there is a dispute as to the degree of medical impairment, as defined in 0800-2-20-.01(5) above.
- (13) "Party" means any person or entity which either could be liable for payment of workers' compensation benefits or a person who has a potential right to receive workers' compensation benefits. "Party" shall include a legal representative of a party.
- (14) "Physician," when used throughout these rules, shall include both persons duly and actively licensed to practice medicine in Tennessee and persons duly and actively licensed to practice osteopathy in Tennessee.
- (15) "Program Coordinator" means the chief administrative officer of the MIR Registry Program, appointed by the Administrator, or the Program Coordinator's Designee.

Authority: Tenn. Code Ann. §§ 4-5-202 and 50-6-204 (2005).

0800-2-20-.02 Purpose and scope.

- (1) Purpose. The purpose of the Medical Impairment Rating Registry Program is to comply with and implement Tenn. Code Ann. § 50-6-204(d)(5) and (6) (Repl. 2005) by establishing a resource to resolve disputes regarding the degree of permanent medical impairment ratings for injuries or occupational diseases to which the Act is applicable. In order to ensure high-quality independent medical impairment evaluations, the Department establishes these Rules for parties and physicians. MIR Registry physicians shall provide evaluations in a manner consistent with the standard of care in their community and in compliance with these Rules, as well as issue opinions based upon the applicable edition of the AMA Guides to the Evaluation of Permanent Impairment or other appropriate method pursuant to the Act.

- (2) Scope. The MIR Registry is available to any party with a dispute of the degree of medical impairment rating as defined herein for injuries or any occupational disease which occurred on or after July 1, 2005. The only aspect considered by a MIR Registry physician shall be the degree of permanent medical impairment.

Authority: Tenn. Code Ann. §§ 4-5-202 and 50-6-204 (2005).

0800-2-20-.03 Severability.

- (1) If any provision of these Rules or the application thereof to any person or circumstance is, for any reason, held to be invalid, the remainder of the Rules and the application of the provisions to other persons or circumstances shall not be affected in any respect whatsoever.

Authority: Tenn. Code Ann. §§ 4-5-202 and 50-6-204 (2005).

0800-2-20.04 Requisite Physician Qualifications for Inclusion on Medical Impairment Rating Registry.

- (1) A physician seeking appointment to the MIR Registry shall make application and must satisfy the following qualifications:
 - (a) Possess a license to practice medicine or osteopathy in Tennessee which is current, active, and unrestricted;
 - (b) Be board-certified in his/her medical specialty by a board recognized by the American Board of Medical Specialties, the American Osteopathic Association or another organization acceptable to the Commissioner;
 - (c) Have successfully completed a training course, approved by the Commissioner, dedicated to the proper application of the applicable edition of the American Medical Association Guides to the Evaluation of Permanent Impairment (hereafter the "AMA Guides") in impairment evaluations and furnish satisfactory evidence thereof; and
 - (d) Furnish satisfactory proof of carrying the minimum medical malpractice insurance coverage.

Authority: Tenn. Code Ann. §§ 4-5-202 and 50-6-204 (2005).

0800-2-20-.05 Application Procedures for Physicians to Join the Registry.

- (1) Appointment to the MIR Registry shall be for a two (2) year term, except as otherwise set forth in these Rules. Physicians may seek renewal appointments by the same process as the initial application described herein. The Division reserves the right to charge physicians a non-refundable application fee upon appointment, renewal, or reinstatement to the MIR Registry. The Commissioner, upon the advice of the Medical Director, shall have the sole and exclusive authority to approve or reject applications for inclusion on the MIR Registry.

- (2) Physicians seeking appointment to the MIR Registry shall complete an "Application for Appointment to the MIR Registry," available upon request or on-line at www.state.tn.us/labor-wfd/mainforms.html, certify to and, upon approval of the application, comply with the following conditions:
- (a) Conduct all MIR evaluations based on the guidelines in the applicable edition of the AMA Guides and submit the original "MIR Impairment Rating Report" with all attachments to the Program Coordinator. In cases not covered by the applicable AMA Guides, any impairment rating allowed under the Act shall be appropriate;
 - (b) Decline requests to conduct an evaluation only on the basis of good cause shown. Consideration will be given to a physician's schedule and other previously arranged or emergency obligations;
 - (c) Comply with the MIR Registry's Rules;
 - (d) While on the MIR Registry, agree to maintain an active and unrestricted license to practice medicine or osteopathy in Tennessee and to immediately notify the Commissioner of any change in the status of the license, including any restrictions placed upon the license;
 - (e) While on the MIR Registry, agree to maintain all board certifications listed on the application and to immediately notify the Commissioner of any change in their status;
 - (f) Conduct MIR evaluations in an objective and impartial manner, and shall:
 - 1. Conduct these evaluations only in a professional medical office suitable for medical or psychiatric evaluations where the primary use of the site is for medical service.
 - 2. Comply with all local, state and federal laws, regulations, and other requirements with regard to business operations, including specific requirements for the provision of medical services.
 - 3. Not conduct a physical examination on a claimant of the opposite sex without a witness of the same sex as the claimant present.
 - (g) Not refer any MIR Registry claimant to another specific physician for any treatment or testing nor suggest referral or treatment. However, if new diagnoses are discovered, the physician has a medical obligation to inform the requesting party and the claimant about the condition and recommend further medical assessment;
 - (h) Not become the treating physician for the claimant regarding the work-related injury;
 - (i) Not evaluate an MIR Registry claimant if a conflict of interest exists;
 - (j) Not substitute, or allow to be substituted, anyone else, including any other physician, physician assistant, nurse practitioner, physical therapist or staff member, as the physician to conduct the MIR Registry evaluation;

- (k) No later than fifteen (15) calendar days after a request by the Program Coordinator to refund to the paying party part or all of any fee paid by that party for a MIR Registry evaluation, as may be required by these Rules and the Commissioner; and
 - (l) For each MIR Registry case assigned, address only the issue of permanent impairment rating.
- (3) Physicians denied appointment to the MIR Registry on their initial application may seek reconsideration of their application by submitting a request for reconsideration stating the grounds for such reconsideration to the Program Coordinator within fifteen (15) calendar days of the issuance of the Notice of Denial of their application. The Commissioner may affirm or reverse the initial determination upon reconsideration of the initial decision. The Commissioner shall issue a Notice of Final Determination which shall be the final decision.

Authority: Tenn. Code Ann. §§ 4-5-202 and 50-6-204 (2005).

0800-2-20-.06 Requests for a MIR Registry Physician.

- (1) When a dispute of the degree of medical impairment, as defined in Rule 0800-2-20-.01(5) exists, any party may request a listing of physicians from the Commissioner's MIR Registry by completing the "Application for a Medical Impairment Rating" (hereinafter "Form"), available upon request from the Department or online at www.state.tn.us/labor-wfd/mainforms.html. The completed Form must then be returned to the Program Coordinator via electronic mail, facsimile or U.S. Mail.
- (2) The Commissioner requires the request for a MIR Registry physician designate:
 - (a) All body part(s) or medical condition(s) to be evaluated, including whether mental impairment shall be evaluated;
 - (b) The names of all physicians that have previously evaluated, treated, or are currently evaluating or treating the claimant for the work-related injury at employer and/or employee expense;
 - (c) The names of all physicians made available to the claimant. If an employer provides the claimant with the name of a group of physicians rather than with individual physician names, the same information shall be included on the request form;
 - (d) The state file number assigned to the claims.
- (3) Selection of MIR Registry physician through party agreement:

Within five (5) business days of receipt of the completed Form from the requesting party, the Commissioner shall issue a listing of all qualified physicians in the appropriate geographic area, (which shall mean within a one hundred (100) mile radius of the employee's residence) from the MIR Registry to all parties listed on the Form so the parties may negotiate an agreement on the selection of a physician as the MIR Registry physician. If the parties agree, they shall notify the Program Coordinator of the agreement so she or he may schedule the appointment with the selected physician for the MIR examination. Parties agreeing to the selection of the MIR Registry physician under this paragraph must abide by all of the Rules set forth here in Chapter 0800-2-20. A

written opinion as to the permanent impairment rating given by the MIR Registry physician selected pursuant to this Rule shall be presumed to be the accurate impairment rating.

- (4) If the parties cannot agree upon selection of a MIR Registry physician from the Commissioner's listing of MIR Registry physicians provided within fifteen (15) calendar days of the Commissioner issuing the requested listing, it shall be the responsibility of the employer to provide a written request to the Commissioner to provide a three-physician list by submitting such request on the Form. A written opinion as to the permanent impairment rating given by the MIR Registry physician selected pursuant to this Rule shall be presumed to be the accurate impairment rating.
- (5) The submitting party shall certify that all parties, as well as the Program Coordinator, have been sent the completed Form at the same time. The Form will not be processed until all required information has been provided.
- (6) The three (3) physician listing.
 - (a) Within five (5) business days of receipt of the completed "Application for a Medical Impairment Rating," the Division shall produce a list of three qualified physicians drawn from the Commissioner's MIR Registry, from which one physician shall be designated to perform the evaluation. The three-physician listing created will be comprised of physicians qualified, based on the information provided by the physician and on their accreditation to perform evaluations of the body part(s) and/or medical condition(s) designated on the application for an evaluation. Psychiatric or psychological evaluations regarding mental and/or behavioral impairment shall be performed by a psychiatrist.
 - (b) All physician selections shall be derived from the pool of qualified physicians.
- (7) MIR Registry three (3) physician list selection process.
 - (a) Within three (3) business days of the issuance of the three-physician listing, the employer shall strike one name and inform the Program Coordinator and all parties of the remaining physicians. Within three (3) business days of the date of receipt of that name from the employer, the claimant shall strike one of the two remaining names and inform the Program Coordinator and other parties of the name of the remaining physician, who will perform the evaluation.
 - (b) If one party fails to timely strike a name from the listing, the other party shall notify the Program Coordinator and at the same time provide to Program Coordinator the name that it wishes to strike. In that situation, the Medical Director may randomly select one physician from the remaining two, and that physician shall perform the evaluation. The Program Coordinator shall inform the parties of the name of the selected physician in writing.
 - (c) If a selected physician is unable to perform the evaluation, the Medical Director shall provide one replacement name to the original listing using the same criteria and process set forth above, and present that revised listing to the parties and each shall again strike one name according to the above procedures. Additionally, if a physician is removed from the three-physician listing for any reason other than having been struck by one of the parties, the Medical Director will issue one replacement physician name.

- (8) Appointment date.
 - (a) Within three (3) business days of providing or receiving notice of the MIR physician selection, the Program Coordinator shall contact the MIR Registry physician to schedule the evaluation, and shall immediately notify all parties, and the Workers' Compensation Specialist if currently assigned, of the date and time of the evaluation. Only after this notification should the employer or insurance carrier contact the MIR Registry physician and only to arrange for payment and for medical records submission required by these Rules.
- (9) Submission of Medical Records.
 - (a) All parties shall concurrently provide to the MIR registry physician and all other parties a complete copy of all pertinent medical records pertaining to the subject injury, postmarked or hand-delivered at least ten (10) calendar days prior to the evaluation. If necessary, the claimant shall promptly sign a "MIR Waiver and Consent" permitting the release of information relevant to the subject injury to the MIR physician.
 - (b) In cases involving untimely medical record submission by a party, the Commissioner, in his/her sole discretion, may elect to reschedule the evaluation to allow the physician adequate time for record review. Otherwise, the physician shall perform the evaluation and shall produce an "MIR Impairment Rating Report."
 - (c) The medical records shall include a dated cover sheet listing the claimant's name, MIR Registry physician's name, MIR Registry case number, date and time of the appointment, and the state file number. The medical records shall be in chronological order, by provider, and tabbed by year.
 - (d) Medical bills, adjustor notes, surveillance tapes, denials, vocational rehabilitation reports, case manager records or commentaries to the MIR Registry physician shall not be submitted.
- (10) Any forms the MIR physician requests to be completed should be completed by the claimant only. If the claimant needs assistance in completing these forms for any reason, the claimant shall notify the MIR Registry physician prior to the evaluation so that assistance can be provided by the MIR Registry physician's staff. The case manager shall not meet with the MIR Registry physician.
- (11) The claimant shall notify the Program Coordinator of the necessity for a language interpreter concurrently with his/her notification of the chosen physician's name. The Program Coordinator shall arrange for such services and the employer shall be responsible for paying for such language interpreter. The language interpreter shall be impartial and independent, and have no professional or personal affiliation with any party to the claim or to the MIR Registry physician.
- (12) When a claimant is required to travel outside a radius of fifteen (15) miles from the claimant's residence or workplace, then such claimant shall be reimbursed by the employer for reasonable travel expenses as allowed in the Act.

0800-2-20-.07 Payments/Fees.

- (1) A physician performing evaluations under these Rules shall be prepaid by the employer a total evaluation fee for each evaluation performed, under a MIR Registry physician estimated time-table as outlined below:
 - (a) Completed reports received and accepted by the Program Coordinator within thirty (30) calendar days of scheduling the appointment \$1,000.00
 - (b) Completed reports received and accepted by the Program Coordinator between thirty-one (31) and forty-five (45) calendar days of the scheduling the appointment \$850.00
 - (c) Completed reports received and accepted by the Program Coordinator between forty-six (46) and sixty (60) calendar days of the scheduling of the appointment \$500.00
 - (d) Completed reports received and accepted by the Program Coordinator later than sixty (60) calendar days of scheduling the appointment No fee paid
- (2) The evaluation fee includes normal record review, the evaluation, and production of a standard "MIR Impairment Rating Report." All non-routine test(s) for an impairment rating essential under the applicable edition of the AMA Guides to the Evaluation of Permanent Impairment shall have been performed prior to the evaluation. Routine tests necessary for a complete evaluation, such as range of motion or spirometry tests, should be performed by the MIR Registry physician as part of the evaluation at no additional cost.
- (3) Late fees and penalties. Failure by an employer or insurer to pre-pay the evaluation fee shall allow the physician to charge the employer an additional \$100.00 late fee for the evaluation. If the evaluation fee and/or late fee remains unpaid fifteen (15) calendar days following the date of the evaluation, an additional \$250.00 penalty is authorized. If any portion of a fee or penalty remains unpaid after an additional thirty (30) calendar day period, an additional \$500.00 penalty is authorized, and again for each additional thirty (30) calendar day period, or portion thereof, that it remains unpaid until all fees and/or penalties are fully paid. Failure by a MIR Registry physician to timely refund any unearned evaluation fee shall allow the employer or insurer to recover in addition to the unearned fee a \$100.00 late fee from that MIR Registry physician. If the unearned fee and/or late fee remains unpaid fifteen (15) calendar days following the date of the evaluation, an additional \$250.00 penalty against the MIR Registry physician is authorized. If any portion of the unearned fee or penalty remains unpaid after an additional thirty (30) calendar day period, an additional \$500.00 penalty is authorized, and again for each additional thirty (30) calendar day period, or portion thereof, that it remains unpaid until all fees and/or penalties are fully paid.
- (4) Cancellations. To be considered timely, notice of a party's desire to cancel an evaluation appointment shall be given to the Program Coordinator at least three (3) business days prior to the date of the evaluation. An evaluation may be canceled or rescheduled only after obtaining the consent of the Commissioner. The Commissioner shall decide whether an evaluation may be rescheduled within ten (10) calendar days of a request to cancel.

- (a) If the request to cancel is not timely, the MIR registry physician shall be entitled to collect/retain a \$300.00 cancellation penalty fee. If the evaluation is rescheduled, the MIR Registry physician is entitled to the entire evaluation fee (for the rescheduled evaluation) in addition to this fee.
 - 1. If the claimant fails to appear for the evaluation with good cause, the Program Coordinator shall reschedule the evaluation.
 - 2. If the claimant fails to appear for the evaluation without good cause as determined by the Commissioner, this may be deemed a refusal to comply with a reasonable request for medical examination and the injured employee's right to compensation may be suspended pursuant to Tenn. Code Ann. § 50-6-204(d)(8) and no compensation shall be due and payable while the injured employee continues such refusal.

Authority: Tenn. Code Ann. §§ 4-5-202 and 50-6-204 (2005).

0800-2-20-.08 Multiple Impairment Rating Evaluations.

- (1) In instances of more than one impairment rating being disputed in more than one medical specialty, and there is an insufficient number of physicians on the Registry who are qualified to perform all aspects of the evaluation, separate evaluations may be required, each being separate application and physician-selection processes and fees.

Authority: Tenn. Code Ann. §§ 4-5-202 and 50-6-204 (2005).

0800-2-20-.09 Communication with Registry Physicians.

- (1) During the MIR physician selection process, registry physicians cannot render opinions as to the impairment relating to the subject injury to a party to the case in cases in which the physician's name appears on the three-physician listing. MIR Registry physicians who have rendered an opinion as to the impairment relating to the subject injury to a party to the case must disclose the nature and extent of those discussions to the Commissioner immediately upon their selection as the MIR registry physician. The Commissioner, in his or her sole authority, will determine whether or not a conflict of interest exists. Failure to disclose a potential conflict of interest may result in a physician's removal from the MIR Registry. While removed from the Registry, physicians shall not be eligible to perform MIR evaluations.
- (2) If selected as the MIR physician, there shall be no communication with the parties or their representatives prior to the evaluation, unless allowed by the Rules or approved by the Commissioner. Any approved communication, other than arranging for payment and the submission of medical records and the evaluation itself, shall be in writing with copies to all parties and the Program Coordinator. Failure by a Registry physician to disclose such communications will subject the physician to penalties under the Rules.
- (3) A party who seeks the presence of the MIR physician as a witness at a proceeding for any purpose, by subpoena, deposition or otherwise, shall be responsible for payment for those services to the MIR physician. Deposition fees shall be in accordance with applicable state rules and laws.

Authority: Tenn. Code Ann. §§ 4-5-202 and 50-6-204 (2005).

0800-2-20-.10 Requirements for the Evaluation.

- (1) The MIR Registry physician's responsibilities prior to the evaluation are to:
 - (a) Review all materials provided by the parties subject to these Rules; and,
 - (b) Review the purpose of the evaluation and the impairment questions to be answered in the evaluation report.
- (2) The MIR Registry physician's responsibilities following the evaluation are to:
 - (a) Consider all medical evidence obtained in the evaluation and provided by the parties subject to the Rules;
 - (b) Complete an "MIR Impairment Rating Report";
 - (c) Notify the Program Coordinator when the report has been completed;
 - (d) Send that complete report with all required attachments to the Program Coordinator only, via electronic mail or overnight delivery. The Program Coordinator will acknowledge, to the physician, receipt of the report.
- (3) No physician-patient relationship is created between the MIR physician and the claimant through the MIR Registry evaluation. The sole purpose of the evaluation is to establish an impairment rating and not to recommend future treatment or to provide a diagnosis or other medical advice. However, if new diagnoses are discovered, the physician has a medical obligation to inform the requesting party and the claimant about the condition and recommend further medical assessment.

Authority: Tenn. Code Ann. §§ 4-5-202 and 50-6-204 (2005).

0800-2-20-.11 Requirements for the "MIR Impairment Rating Report."

- (1) After conducting the evaluation, the MIR physician shall produce the "MIR Impairment Rating Report". The format, available by using the Program's electronic access, available upon request from the Program Coordinator or available online at www.state.tn.us/labor-wfd/mainforms.html, or a materially substantial equivalent approved by the Program Coordinator shall be used in all cases to detail the evaluation's results. The MIR physician shall first review the determination by the attending physician that the claimant has reached Maximum Medical Improvement (MMI).
- (2) If, after reviewing the records, taking a history from the claimant and performing the evaluation, the MIR Registry physician concurs with the attending doctor's determination of MMI, the report shall, at a minimum, contain the following:
 - (a) A brief description and overview of the claimant's medical history as it relates to the subject injury, including reviewing and recapping all previous treatments.
 - (b) A statement of concurrence with the attending doctor's determination of MMI;
 - (c) Pertinent details of the physical or psychiatric evaluation performed (both positive and negative findings);

- (d) An impairment rating consistent with the findings and utilizing a standard method as outlined in the applicable AMA Guides, calculated as a total to the whole person if appropriate. In cases not covered by the AMA Guides, an impairment rating by any appropriate method used and accepted by the medical community is allowed, however, a statement that the AMA Guides fails to cover the case as well as a statement of the system on which the rating was based shall be included;
- (e) The rationale for the rating based on reasonable medical certainty, supported by specific references to the clinical findings, especially objective findings and supporting documentation including the specific rating system, sections, tables, figures, and AMA Guides page numbers, when appropriate, to clearly show how the rating was derived; and
- (f) A true or electronic signature and date by the MIR physician performing the evaluation certifying to the following:
 - 1. “It is my opinion, both within and to a reasonable degree of medical certainty that, based upon all information available to me at the time of the MIR impairment evaluation and by utilizing the relevant AMA Guides or other appropriate method as noted above, the claimant has the permanent impairment so described in this report. I certify that the opinion furnished is my own, that this document accurately reflects my opinion, and that I am aware that my signature attests to its truthfulness. I further certify that my statement of qualifications to serve on the MIR Registry is both current and completely accurate.”
- (3) If, after reviewing the records, taking a history from the claimant and performing the evaluation, the MIR physician does not concur with the attending doctor’s determination of MMI, a report shall be completed similar to the one outlined above which documents and certifies to, in sufficient detail, the rationale for disagreeing. The physician is still entitled to collect/retain the appropriate MIR fee.
- (4) Services rendered by an MIR Registry physician shall conclude upon the Commissioner’s acceptance of the final “MIR Impairment Rating Report.” An MIR report is final and accepted for the purpose of these Rules when it includes the requested determination regarding final medical impairment rating and any necessary worksheets. Once the report has been accepted, the Program Coordinator will distribute copies of the report to the parties and the Workers’ Compensation Specialist, if one is currently assigned. After acceptance of the “MIR Impairment Rating Report” the medical records file, including the final “MIR Impairment Rating Report,” shall be stored and/or disposed of by the MIR registry physician in a manner used for similar health records containing private information and within a time frame consistent with all applicable federal, state and local law and the Tennessee Board of Medical Examiners’ rules.

Authority: Tenn. Code Ann. §§ 4-5-202 and 50-6-204 (2005).

0800-2-20-.12 Peer Review.

- (1) All MIR Impairment Rating Reports are subject to review for appropriateness and accuracy by an individual or organization designated by the Commissioner at any time. Failure to properly apply the AMA Guides in determining an impairment rating, as determined by the Medical Director, may result in penalties up to and including removal from the MIR Registry.

Authority: Tenn. Code Ann. §§ 4-5-202 and 50-6-204 (2005).

0800-2-20-.13 Removal of a Physician from the Registry.

- (1) The Commissioner, upon the advice of the Medical Director, may remove a physician from the MIR Registry permanently or temporarily. In doing so, the Commissioner shall first notify the physician in writing that he or she is at risk of being removed from the MIR Registry. The procedures followed for removal under this section shall follow the same procedures as those set forth below in Rule 0800-2-20-.13(2) and (3). The Commissioner may remove a physician from the MIR Registry permanently or temporarily based upon any of the following grounds:
 - (a) Misrepresentation on the "Application for Appointment to the MIR Registry" as determined by the Commissioner;
 - (b) Failure to timely report a conflict of interest in a case assignment, as determined by the Commissioner;
 - (c) Refusal or substantial failure to comply with the provisions of these Rules, including, but not limited to, failure to determine impairment ratings correctly using the AMA Guides, as determined by the Medical Director;
 - (d) Failure to maintain the requirements of the Rules, as determined by the Commissioner; or
 - (e) Any other reason for the good of the Registry as determined solely and exclusively by the Commissioner.
- (2) Written complaints regarding any MIR Registry physician shall be submitted to the Program Coordinator. Upon receipt of a complaint regarding a MIR Registry physician, the Commissioner shall send written notice of the complaint (or in cases arising under Rule 0800-2-20-.13(1), notice and grounds for possible removal) to such physician, stating the grounds, and notifying the physician that he or she is at risk of being removed from the MIR Registry.
 - (a) The physician shall have thirty (30) calendar days from the date the Notice of Complaint in which to respond in writing to the complaint(s), and may submit any responsive supporting documentation to the Program Coordinator for consideration. Failure of the physician to submit a timely response to the Notice of Complaint may result in removal of the physician from the MIR Registry.
 - (b) The Commissioner, in consultation with the Medical Director, shall consider the complaint(s) and any response(s) from the physician in reaching a decision as to whether the physician shall be removed from the MIR Registry, and if removed, whether the removal will be permanent or temporary.
 - (c) Upon reaching a determination on the complaint(s), the Commissioner shall issue a written Notice of Determination and set forth the basis for the decision in such Notice. The determination set forth shall become final fifteen (15) calendar days after issuance of the Notice of Determination, unless a timely request for reconsideration is received.
 - (d) A MIR Registry physician may seek reconsideration of an adverse decision from the Commissioner by submitting a request for reconsideration stating the grounds for such reconsideration to the Program Coordinator within fifteen (15)

calendar days of the issuance of the Notice of Determination. The Commissioner may affirm, modify or reverse the initial determination upon reconsideration of the initial decision. The Commissioner shall issue a Notice of Determination upon Reconsideration which shall be the final decision.

- (3) A physician who has been removed from the MIR Registry by the Commissioner may apply for reinstatement six (6) months after the date of removal by submitting a written request to the Program Coordinator.

Authority: Tenn. Code Ann. §§ 4-5-202 and 50-6-204 (2005).

0800-2-20-.14 Other Penalties.

- (1) Notwithstanding any other provision in these rules to the contrary, and in addition to any other penalty provided for in these Rules and the Act, failure by any party to comply with these Rules in a manner for which no penalty has specifically been set forth herein may subject that party to civil penalties of \$100.00 per violation, as determined by the Commissioner. Any party so penalized may request a contested case hearing in accordance with the Penalty Program Rules of the Division, 0800-2-13, by submitting a request for such hearing within fifteen (15) days of issuance of the notice of violation and assessment of civil penalties hereunder.

Authority: Tenn. Code Ann. §§ 4-5-202, 50-6-118, 50-6-204 and 50-6-233 (2005).

0800-2-20-.15 Time Limits.

- (1) All time limits referenced in these Rules may be extended by the Commissioner in his or her sole and exclusive discretion.

Authority: Tenn. Code Ann. §§ 4-5-202 and 50-6-204 (2005).

0800-2-20-.16 Cooperation.

- (1) Injured workers, employers, insurers and carriers shall cooperate in good faith with the Department in scheduling MIR Registry evaluations. They shall also cooperate in good faith with all reasonable requests made by any MIR Registry physician.

Authority: Tenn. Code Ann. §§ 4-5-202 and 50-6-204 (2005).

0800-2-20-.17 Overturning a MIR Physician's Opinion.

- (1) Parties are prohibited from seeking a second MIR Registry impairment rating for the same injury if an impairment rating was issued after the first MIR Registry evaluation.

Authority: Tenn. Code Ann. §§ 4-5-202 and 50-6-204 (2005).

Legal contact and/or party who will approve final copy for publication:

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Signature of the agency officer or officers directly responsible for proposing and/or drafting these rules:

E. Blaine Sprouse, Attorney
Division of Workers' Compensation
Tennessee Dept. of Labor & Workforce Dev.

I certify that this is an accurate and complete copy of rulemaking hearing rules lawfully promulgated and adopted by the Tennessee Department of Labor and Workforce Development on the 11th day of January, 2006.

Further, I certify that the provisions of Tenn. Code Ann. § 4-5-222 have been fully complied with, that these rules are properly presented for filing, a notice of rulemaking hearing has been filed in the Department of State on the 23rd day of August, 2005 and such notice of rulemaking hearing having been published in the September, 2005 issue of the Tennessee Administrative Register, and such rulemaking hearing having been conducted pursuant thereto on the 25th day of October, 2005.

James Neeley
Commissioner

Subscribed and sworn to before me this the 11th day of January, 2006.

Notary Public

My commission expires on the 30 day of May, 2007



All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Paul G. Summers
Paul G. Summers
Attorney General and Reporter

The rulemaking hearing rules set out herein were properly filed in the Department of State on the 20 day of April, 2006, and will become effective on the 15 day of Jan., 2006.

Riley C. Darnell
Riley C. Darnell
Secretary of State

By: M. M. M.

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RESPONSES TO COMMENTS
Rulemaking Hearing – October 25, 2005
Chapter 0800-2-20
Medical Impairment Rating Registry Program

Pursuant to Tenn. Code Ann. § 4-5-222 of the Uniform Administrative Procedures Act, the Department of Labor and Workforce Development submits responses to the comments received at the rulemaking hearing of October 25, 2005 on the above-referenced proposed rules.

Comments: Objection was made to the definition (8) “Program Coordinator” on the basis that the only criteria established for this position in the rules is appointment by the Chief Administrative Officer of the Workers’ Compensation Division of the Tennessee Department of Labor and Workforce Development. If the proposed rules are to be adopted they should and must include specific requirements and criteria for the position of Program Coordinator because of the discretion and authority that the proposed rules place within this position. It is also pointed out that definition (8) exceeds the enabling authority at Section 24 of Public Chapter 962 (2004).

Response: Agency disagrees. The enabling statute, Tenn. Code Ann. § 50-6-204(d)(5) and (6) (Repl. 2005), gives the Commissioner the authority, *inter alia*, to adopt rules establishing, implementing and maintaining the MIR Registry and procedures surrounding it. Nowhere does it require that the Commissioner set-out detailed job requirements for a program coordinator or any other employee within the MIR Registry program. The Commissioner has discretion to select a program coordinator which she or he determines qualified for the position.

Comments: Objection was made that the payment schedule in rule 0800-2-20-.07 for MIR Registry physician services was too high.

Response: Agency disagrees. The highest fee set-forth is \$1000.00 for an impairment report that is rendered within 30 days. Given the extreme need for quick access MIR Registry physicians’ schedules so that appointment may be made very quickly, as well as the need for expeditious production by the physician of the impairment rating report, this fee, as well as the other, lesser fees set-out in rule 0800-2-20-.07 are reasonable and necessary. A survey of what physicians were currently charging for independent medical examinations thorough-out Tennessee for workers’ compensation cases revealed that the range was anywhere from \$500.00-\$1,500.00, without the scheduling and quick turn-around requirements of the MIR Registry Program.

Comments: Section 0800-2-20-.02. Although parts (1) and (2) purport to generically describe the “purpose” and “scope” of the MIR Registry, the proposed rules the “purpose” and the “scope” are inconsistent with each other. According to part (1), the purpose of the program is “to establish a resource to resolve conflicting opinions regarding permanent impairment ratings”. According to part (2), the scope of the

program is defined as a registry “available to any party who disputes an impairment rating of a physician in a workers’ compensation claim”.

Part (1) of this section would require that there be “conflicting opinions” in order for use of the registry to be initiated. On the other hand, the scope of the section as defined in part (2) provides that any party who “disputes” an impairment rating may utilize the Medical Impairment Rating Registry Program.

Public Chapter 962, Section 24 (2004), provides that “when a dispute as to the degree of medical impairment exists, either party may request an independent medical examiner”. Part (2) follows the clear language and intent of the enabling legislation as quoted above and part (1) which purports to “resolve conflicting opinions” is inconsistent with the underlying enabling legislation by requiring that the registry procedure only be used in cases where conflicting opinions in regard to permanent impairment ratings have been rendered.

Response: Agency agrees and these sections have been revised to address these concerns.

Comments: Section 0800-2-20-.03. The Department of Labor and Workforce Development rulemaking authority does not extend to resolving conflicts between rules or regulations and that any rule purporting to determine preemption is invalid on its face.

Response: Agency agrees in part. The Department’s rules cannot preempt any federal law or regulation. However, if there arises a conflict between rules of the Department, the Department may assert which rule should prevail. Subsection has been revised to reflect this.

Comments: Section 0800-2-20-.05. Objection was made to part (2)(k) of this section on the basis that this provision of the rules would allow the program coordinator to approve the substitution of non-physicians, including physical therapists or staff members, to conduct evaluations and submit opinions in respect to permanent medical impairment that would otherwise not be admissible as evidence in a Tennessee Court and would not meet the minimum requirements of the Workers’ Compensation Statute in respect to opinions in regard to permanent medical impairment. Objection was made to any procedure that would allow the program coordinator to approve the delegation of the independent medical examiner’s responsibilities under a statute that provides that the opinion or impairment rating of the examiner is entitled to a presumption of correctness. This section is patently unfair to all parties, both claimants and employers alike.

This section reflects the arbitrary authority which the proposed rules attempt to create within the position of program coordinator.

Response: Agency agrees. This section has been revised to address this concern.

Comments: Section 0800-2-20-.06. Objection was made to part (1) of this section. This part provides that in those cases where the parties to litigation have mutually agreed upon an MIR Registry physician to conduct an independent medical examination pursuant to the MIR Registry Program that “no greater legal presumption of correctness” shall be given to their opinions in respect to impairment rating. The basis of the Tennessee Trial Lawyers Association’s objection to this part of the proposed rules is that it is contrary to the clear intent of Public Chapter 962, Section 24 (2004). Section 24 of Public Chapter 962 provides in part as follows:

“If the parties are unable to mutually agree on the selection of an independent medical examiner from the Commissioner’s registry, it shall be the responsibility of the employer to provide a written request to the Commissioner for assignment of an independent medical examiner...”

It is obvious that the General Assembly intended for the parties to first attempt to agree upon an MIR Registry physician and that that physician’s opinion in respect to impairment would enjoy the same presumption of correctness as a physician chosen if the parties could not agree on the selection of a physician. To suggest or propose a rule otherwise is in direct conflict with the underlying enabling statute itself and is invalid on its face.

Objection was made to part 5(b) on the basis that the underlying enabling legislation does not provide that the Department has the authority to approve a “temporary MIR physician”.

Objection was made to part (5)(c) on the basis that there is absolutely no legal basis upon which the pool of physician names making up the Medical Impairment Rating Registry shall be kept confidential. In fact, it is implicit in the underlying enabling legislation that parties to litigation should and would know the names of approved and authorized Medical Impairment Rating Registry physicians in order that they might choose one mutually agreeable to both parties to proceed in litigation.

Objection was made to part (6)(b) on the basis that the underlying legislation does not provide that the Department of Labor shall have the authority through the program coordinator to select a physician to perform an independent medical examination. Nowhere in Section 24 of Public Chapter 962 (2004) is the Department of Labor and Workforce Development given the authority to select a physician for an independent medical examination for litigants.

Objections were made to part (8) “Submission of Medical Records” as the section creates an impractical, unwieldy and arbitrary procedure for providing critical medical information to examining physicians. If a physician’s opinion is to be given a presumption of correctness, then there must be a system in place that will guarantee that all necessary medical information will be in the possession of and reviewed by the examining physician before an opinion is reached. Part (8) does not provide this guarantee. The discretion and intervention of the program coordinator in Section (8) is

arbitrary, unreasonable and irrational and because of the lack of criteria or qualifications for the position of program coordinator any opportunity for intervention will only create the opportunity for abuse and unfairness to all parties involved in this process.

Part (9)(a) in reality is totally impractical and unenforceable.

Part (9)(b) is objectionable on a number of bases. First and foremost, it allows the program coordinator to permit inadmissible, irrelevant, biased and prejudicial information to be provided to examining physicians whose opinions are afforded additional weight and authority without providing notice to the parties to the litigation. The suggestion that adjuster notes, surveillance tapes, denials, case manager records or commentaries be provided to a physician who is preparing a permanent medical impairment rating with a presumption of correctness violates the Tennessee Rules of Evidence, violates the due process rights of the parties and all concepts of fundamental fairness to the parties.

Objections were made to Part (11) on the basis that there is no foundation in the enabling legislation and no legal authority upon which the Department can dictate who may accompany an individual to an independent medical examination and the suggestion that the Department shall have the authority through rulemaking to dictate what persons may accompany any individual, regardless of the circumstances, to a physician's office for an independent medical examination is arbitrary, unreasonable and without legal authority, and not founded in Section 24, Public Chapter 962 (2004).

Response: Agency agrees as to the objection to Part 1 of this section and revisions have been made to address this concern.

Agency agrees as to Part 5(b) and 5(c) and revisions have been made to address these issues.

Objection was made to Part (6)(b) with which the Agency disagrees. There must be a mechanism by which the Commissioner may proceed with the MIR examination if one of the parties does not follow the prescribed procedures and timely strike a physician's name as required by these Rules. This Rule has been revised to give the compliant party the most discretion possible to select a MIR physician. The enabling legislation authorizes this.

Objections were made to Part (8) with which the Agency disagrees. Nothing can be "guaranteed," but the Rules require good faith cooperation by all of those involved and sets out penalties for those violating the Rules.

Agency disagrees regarding Part (9)(a) and Part (9)(b). This is not a court proceeding but an independent medical examination by an expert. All materials relevant to the subject injury and injured claimant necessary for determination of permanent impairment should be made available to the MIR physician.

Agency agrees as to Part (11) and this subsection of the rule has been revised to address this issue.

Comments: Section 0800-2-20-.07. Suggestion made to the Department of Labor and Workforce Development that, although entertaining, part (1) is totally impractical in its execution. Part (1) provides that fees are to be prepaid and in the same section provides that the amount of the fee shall be based upon the date which the program coordinator accepts the completed report of the examining physician.

Objection made to Part (4)(a) on the basis that there is no authority within Section 24 of Public Chapter 962 (2004) which would allow the Department to impose a penalty offsetting benefits provided by the General Assembly under the Workers' Compensation Act of the State of Tennessee which this part purports to do. In addition, the Association objects to the preparation of a "paper only" evaluation which would be entitled to a presumption of correctness because the program coordinator has exercised his or her discretion under this provision. No foundation exists and certainly no credibility should be given to an opinion in respect to medical impairment if a physician has, in fact, not even examined or seen a claimant.

Response: Agency disagrees regarding both Part (1) and (4)(a). The enabling statute provides "[t]he rules established shall include, but not be limited to, qualifications and procedures for submission of an application for inclusion on the registry, procedures for review and maintenance of the registry, and procedures for assignment that ensures that the composition of such panels is random." Tenn. Code Ann. § 50-6-204(d)(6). Emphasis supplied.

Comments: Section 0800-2-20-.16. The Tennessee Trial Lawyers Association in commenting on this section state inclusion of this provision in these proposed rules reflect a bias and overt prejudice against injured Tennessee workers by the Department of Labor and Workforce Development. This portion of the proposed rules has absolutely no practical or utilitarian impact in respect to the dictates of Public Chapter 962, Section 24 (2004). The Department intends to continue to confuse, intimidate, threaten, fine and otherwise obstruct the rights and opportunities made available to injured workers by the General Assembly.

Response: The Agency strongly disagrees and submits these Rules and all comments and suggestions concerning them have been thoroughly considered and the Agency has been fair and equitable to all parties in drafting them.

Comments: Section 0800-2-20-.17. Objections were made to the Department preventing parties to litigation from mutually agreeing upon the selection of an MIR Registry physician creating a rule that would deny a mutually agreeable MIR Registry physician opinion the presumption of accuracy provided at Public Chapter 962, Section 24 (2004). As argued above, the Legislature intended for parties to mutually agree upon an MIR Registry physician and for that physician's opinion to enjoy the presumption of accuracy.

Response: Agency agrees, as stated above and revisions have been made to address this issue.

Comments: As to rule 0800-2-20-13, the “peer review” committee should have authority to remove a MIR Registry physician from the MIR Registry.

Response: Agency disagrees. The enabling legislation grants authority to maintain the Registry to the Commissioner. Therefore, the Commissioner, with advice of the Medical Director, is properly designated to make the decisions regarding removal, and for addition to the Registry, for that matter.

Comments: Objection was made to the language of appropriate civil penalties in rule 0800-2-20-.14 as being vague and in violation of due process.

Response: Agency agrees and the rule has been revised to address this concern by setting forth a single amount for violation of any of the rules which do not have a specific penalty fee assigned.