



Economic Affairs Interim Committee
66th Montana Legislature

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February 13, 2020

Commissioner Tom Lopach
Montana Department of Labor & Industry
P.O. Box 1728
Helena, MT 59624

Dear Commissioner Lopach,

A majority of the members of the Economic Affairs Interim Committee (EAIC) formally objected to Montana Administrative Register Notice 24-29-352. This notice relates to the amendment and repeal of rules pertaining to the description of a prosthesis for the purpose of reopening medical benefits in workers' compensation claims.

The EAIC made its objection under 2-4-406, MCA. This statute allows the committee to object to a rule if it believes the rule was not proposed or adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305. The salient statute, 2-4-305(3) and (5), provides:

- (3) [...] A substantive rule may not be proposed or adopted unless:
- (a) a statute granting the agency authority to adopt rules clearly and specifically lists the subject matter of the rule as a subject upon which the agency shall or may adopt rules; or
 - (b) the rule implements and relates to a subject matter or an agency function that is clearly and specifically included in a statute to which the grant of rulemaking authority extends.
- [...]
- (5) To be effective, each substantive rule adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

The EAIC maintains that the Department's notice was not adopted in substantial compliance with 2-4-305(3) and (5) because there is no statute that clearly and specifically provides authority for the Department's definition of a prosthesis; therefore, the proposed rule is not within the scope of authority that is statutorily conferred. Specifically, the EAIC maintains that there is no statutory authority providing that a prosthesis may include prescription eye glasses, prescription contact lenses, dentures, and hearing aids as contemplated under the proposed rule.

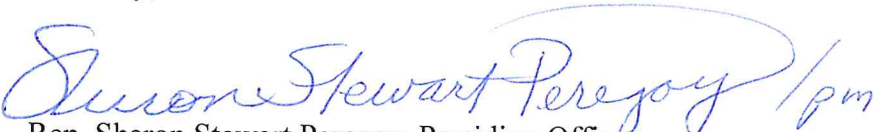
Section 2-4-406 requires the Department to respond in writing to the committee within 14 days after the mailing of a committee objection to a rule. After receipt of the response, the EAIC may withdraw or modify its objection.

Under 2-4-406, if the EAIC fails to withdraw or substantially modify its objection to a rule, it may vote to send the objection to the secretary of state, who shall, upon receipt of the objection, publish the objection in the register adjacent to any notice of adoption of the rule and in the ARM adjacent to the rule, provided the Department response must also be published if requested. The Department would bear the burden, in any action challenging the legality of the rule or portion of the rule objected to by the EAIC, of proving that the rule or portion of the rule objected to was adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305.

Additionally, under 2-4-305, if the EAIC does not withdraw its objection, the Department's proposed rule is not effective until the day after final adjournment of the regular session of the legislature that begins after the notice proposing the rule was published by the secretary of state. That notwithstanding, the EAIC may generally withdraw its objection before the proposed rule is adopted.

Thank you for your attention in this matter.

Sincerely,


Rep. Sharon Stewart Peregoy, Presiding Officer

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