VERMONT DEPARTMENT OF LABOR
PROPOSED CHANGES TO WORKERS' COMPENSATION RULES 1-27

RESPONSIVENESS SUMMARY

The Vermont Department of Labor held a public hearing on proposed changes to Workers' Compensation and Occupational Disease Rules 1-27 on July 24, 2024, at the Department's Central Office, 5 Green Mountain Drive, Montpelier, with an interactive attendance component via Microsoft Teams. Public comment was invited, both by notice published by the Secretary of State and as posted on the Department's website. The deadline for public comment was August 21, 2024.

The Department received six verbal comments at the public hearing and no written comments. The Department's response to each of the comments appears below.

SUMMARY OF PUBLIC COMMENTS AND THE DEPARTMENT'S RESPONSES

#1 - Proposed Changes to Rule 8.1820 [with Rules 8.1600, 8.1620, 8.1700 and 8.1710 also shown here for context]

8.1600 Compensation rate; temporary total disability. An injured worker's weekly compensation rate for temporary total disability shall be two-thirds (0.667) of his or her average weekly wage, calculated in accordance with 21 V.S.A. §650 and this Rule. 21 V.S.A. §642. In addition, the following rules shall apply:

. . .

8.1620 The compensation rate shall be adjusted annually beginning on the first July 1st following the receipt of 26 weeks of indemnity benefits, in accordance with 21 V.S.A. §650(d) and **Rule 8.2000**, provided, however, that it does not exceed the maximum weekly compensation rate.

8.1700 **Compensation rate; temporary partial disability.** An injured worker's weekly compensation rate for temporary partial disability shall be the greater of (a) the difference between the amount the injured worker would be eligible to receive under 21 V.S.A. §642, including any applicable cost of living adjustment or dependency benefits, and the injured worker's current weekly wage; and (b) two-thirds (0.667) of the difference between the injured worker's ~~his or her~~ pre-injury average weekly wage, calculated in accordance with 21 V.S.A. §650 and this Rule, and his or her current weekly wage. 21. V.S.A. §646(a). In addition, the following rules shall apply:

8.1710 The compensation rate shall be adjusted annually beginning on the first July 1st following the receipt of 26 weeks of indemnity benefits, in accordance with 21 V.S.A. §650(d) and Rule 8.2000. 21 V.S.A. §646(a).

8.1800 **Compensation rate; permanent partial and permanent total disability.** An injured worker's weekly compensation rate for permanent partial and/or permanent total disability shall be two-thirds (0.667) of his or her average weekly wage, calculated in accordance with 21 V.S.A. §650 and this Rule. 21 V.S.A. §648(a). In addition, the following rules shall apply:

8.1810 The compensation rate shall not be more than the maximum nor less than the minimum weekly compensation rate as set annually in accordance with 21 V.S.A. §650(d) and **Rule 8.2000**. 21 V.S.A. §648(a).

8.1820 The compensation rate shall be adjusted annually on July 1st, in accordance with 21 V.S.A. §650(d) and **Rule 8.2000**, provided that it does not exceed the maximum weekly compensation rate. ~~Such cost of living adjustments shall begin on the first July 1st following the date on which temporary total disability benefits cease, or if there is no temporary total disability, on the first July 1st following the date of injury.~~ The compensation shall be adjusted for each July 1 following the date of injury regardless of whether indemnity benefits were paid on each intervening July 1st. 21 V.S.A. §650(d)(3).

Comment from Attorney Wesley Lawrence

Attorney Lawrence supports the proposed change to Rule 8.1820 because it clarifies that permanency attaches to the claim at the time of injury and that the calculation of permanent disability benefits is based on the claimant's wages at the time of injury. Unlike temporary disability, the right to permanency and the calculation of permanent disability benefits are effectively fixed at the time of the injury, subject to the applicable COLA adjustments on July 1.

Comment from Attorney Heidi Groff

Attorney Groff does not support the proposed change to Rule 8.1820. She favors looking at the date of *disability* in determining permanent partial disability benefits, not the date of *injury*. For example, consider a claimant who receives temporary total disability, then goes back to work and starts earning higher wages, and then goes out on temporary total disability a second time. That claimant's *temporary* disability benefits for the second period of disability are based on his or her higher earnings (both currently and under the proposed rule changes – there is no proposal to change this). However, under the proposed rule change, in calculating *permanent disability* benefits, the Department would use the wages the claimant was earning at the time of the injury, regardless of whether the claimant returned to work and then had a second period of temporary disability at higher wages.

Comment from Attorney Kelly Massicotte

Attorney Massicotte does not support the proposed change to Rule 8.1820. She thinks that the compensation rate should not be fixed for permanent partial disability benefits at the time of the injury. If the claimant becomes entitled to a higher rate for his or her temporary total disability benefits at a later date, she thinks the higher rate should be used to calculate permanent partial disability benefits, too.

RESPONSE FROM THE DEPARTMENT: The Department has proposed the change to Rule 8.1820 because it is required to implement the statutory amendment adopted by the Vermont Legislature, effective July 1, 2023. *See* 21 V.S.A. § 650(d)(3) ("Permanent total and permanent partial compensation shall be adjusted for each July 1 following the date of injury regardless of whether indemnity benefits were paid on each intervening July 1.") Upon consideration, the Department has concluded that the proposals from Attorneys Groff and Massicotte would not be consistent with the statute as amended.

#2 - Proposed Changes to Rules 8.1210 and 8.1220

8.1200 **Total gross wages; weeks excluded.** In determining the injured worker's total gross wages, the following weeks shall not be included:

> 8.1210 Any week(s) during which the injured worker worked ~~and/or was paid for less~~ for fewer than one-half of his or her normally scheduled hours on account of unpaid time off due to sickness, vacation, holiday or personal leave, or because the employer either suspended operations and/or did not schedule the employee accordingly;
>
> 8.1220 Any week(s) during which the injured worker did not work at all on account of unpaid time off due to sickness, vacation, holiday or personal leave or suspension of work by the employer, ~~regardless of whether he or she was paid for the absence~~; and
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> 8.1230 Any weeks preceding a raise, promotion and/or transfer as a result of which the injured worker was paid and/or due larger regular wages. 21 V.S.A. §650(a).

Comments from Attorney Kelly Massicotte

Part 1: Attorney Massicotte does not support this proposed rule change because it could have a negative impact on claimants who earn overtime pay. *Under the current rule*, if a claimant has a week's vacation during the 26 weeks prior to the work injury, that week is not included in the average weekly wage calculation, regardless of whether the claimant was paid for the time off. If a claimant who typically works overtime receives 40 hours of vacation pay for a week off, then excluding that vacation week from the calculation, as we do now, benefits the claimant by resulting in a higher average weekly wage calculation. *Under the proposed rule change*, the Department would include the paid vacation week in the calculation of average weekly wage, which would lower the claimant's overall average weekly wage.

RESPONSE FROM THE DEPARTMENT: The statute provides that average weekly wages shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the 26 weeks preceding an injury. 21 V.S.A. § 650(a). The Department's intent in proposing this rule change is to more closely approximate the claimant's actual average weekly wage over the 26 weeks prior to the work injury. If a claimant takes a one-week paid vacation during the prior 26 weeks and is paid for 40 hours, then that is an accurate part of his or her wage history that should be included. The 26-week look-back period is sufficiently long that it provides a fair picture of a claimant's wage history prior to the injury. The same logic governs if a claimant works three days and takes two paid vacation (or sick) days during a week; including that week provides a more accurate picture of the claimant's earnings during the 26-week look-back period.

Part 2: Attorney Massicotte provides another example of a claimant who misses a week of work to get surgery during the 26 weeks prior to the compensable injury. If that claimant happened to have only 3 hours of sick time available, he or she would be paid for only 3

hours that week. Attorney Massicotte wants to exclude this hypothetical week from the average weekly wage calculation. (For a claimant who works a 40-hour week, that claimant would have 37 hours of unpaid time off for the hypothetical week.)

RESPONSE FROM THE DEPARTMENT: *Under the current Rule 8.1210*, the hypothetical week at issue would be excluded from the average weekly wage calculation because the claimant worked and/or was paid for less than half of his or her normally scheduled hours. *Under the proposed rule change*, the hypothetical week would still be excluded because the claimant would have worked for fewer than half of his or her regularly scheduled hours on account of the 37 hours of unpaid time off.

Part 3: Attorney Massicotte provides another example: a claimant who misses some weeks of work for illness/medical reasons, then returns to work and suffers a work-related injury. If that claimant was out of work for medical reasons during some portion of the 26-week look-back period, he or she might have received benefits from a short-term disability policy, or might have received wages (paid sick time) from the employer. Short-term disability benefits are not included in the average weekly wage because they are not "wages." Attorney Massicotte thinks that the wages/sick time paid by the employer under those circumstances should be treated the same as short-term disability benefits, namely they should be excluded from the average weekly wage calculation.

RESPONSE FROM THE DEPARTMENT: Although there is a similarity between a claimant who collects benefits under a short-term disability policy and one who receives paid sick time from the employer, the Department does not support treating the two situations the same. The calculation of average weekly wage is based on *wages* paid by the employer, not on benefits that may be received under an insurance policy. If the Department were going to exclude paid sick time when it is the functional equivalent of a short-term disability policy, the employers, adjusters, and department specialists would have to gather additional information in each case and analyze whether the sick time was the functional equivalent of short-term disability paid by an employer who does not provide that benefit. To do this would unduly complicate the calculation of average weekly wage. The proposed rule change provides a simpler and more workable approach to closely approximating a claimant's average weekly wage.

Part 4: Attorney Massicotte also raised a concern that employers and insurance carriers fill out the claimant's hours on Form 25, but the claimants do not always see that form and are not asked to sign it. She thinks there should be a mechanism for employee review of Form 25. Attorney Massicotte acknowledges that this concern is not specific to the proposed rule changes, as there is no proposed change to this rule.

RESPONSE FROM THE DEPARTMENT: There is no pending rule change related to this concern, but the Department has noted this concern for consideration during future rule making. Meanwhile, employees and their counsel are always able to request and review any forms in their workers' compensation file.

REVISION TO THE PROPOSED CHANGES TO RULES 8.1210 AND 8.1220:

In reviewing the comments to the proposed changes to Rules 8.1210 and 8.1220 (above), the Department recognized that the structure of the proposed changes to these rules was duplicative and somewhat confusing. Accordingly, the Department is rewriting the proposed changes to these two rules, as set forth below. This rewrite does not change the purpose or the mechanics of the proposed changes to these two rules. It just combines 8.1210 and 8.1220 into one rule to improve clarity. *(Compare the revised proposed rule change below with the original proposed rule change on page 4 above):*

8.1200 **Total gross wages; weeks excluded.** In determining the injured worker's total gross wages, the following weeks shall not be included:

8.1210 Any week(s) during which the injured worker (a) worked ~~and/or was paid for less~~ for fewer than one-half of his or her normally scheduled hours, including zero hours, and (b) was paid for ~~less~~ fewer than one half of his or her normally scheduled hours on account of unpaid time off due to sickness, vacation, holiday or personal leave, or because the employer either suspended operations and/or did not schedule the employee accordingly; and

~~8.1220 Any week(s) during which the injured worker did not work at all; and~~ [Repealed]

8.1230 Any weeks preceding a raise, promotion and/or transfer as a result of which the injured worker was paid and/or due larger regular wages. 21 V.S.A. §650(a).

#3 - Proposed New Rule 9.1700

9.1700 **Work Search Requirement**. An employer may require an injured worker who is receiving temporary disability benefits pursuant to 21 V.S.A. §646 to engage in a good faith work search if: (a) the injured worker is medically released to return to work, with or without restrictions; (b) the employer has provided the injured worker with written notice of the work release and any applicable restrictions; and (c) the employer cannot offer work that the injured worker is medically released to do. 21 V.S.A. §643d(a). The injured worker shall not be required to contact more than three employers per week as part of the good faith work search. 21 V.S.A. §643d(c).

> 9.1710 **Exceptions**. An injured worker shall not be required to engage in a work search if the worker (a) is already employed; or (b) has been referred for or is scheduled to undergo a surgical procedure. 21 V.S.A. §643d(b).

Comment from Peggy Gates, Vermont League of Cities and Towns

Ms. Gates has concerns about the exceptions set forth in proposed Rule 9.1710. She notes that if a claimant is going to have surgery in the next month, then it would make no sense to require that claimant to do a good faith work search at that time. However, if the claimant declines to undergo recommended surgery or does not plan to undergo the surgery for another year, then she thinks the claimant should be required to do a good faith work search. She thinks there should be a time limit that applies to a claimant who is "referred or scheduled" for surgery, during which the claimant should either undergo the surgery or be required to do a good faith job search.

RESPONSE FROM THE DEPARTMENT: The language of the proposed rule mirrors the 2023 statutory amendment. 21 V.S.A. § 643d(b). The Department agrees that a claimant who never schedules a recommended surgery or who schedules the surgery far in the future may be subject to the good faith job search requirement in the meantime. However, rather than adopting a specific deadline for scheduling or undergoing the surgery, the Department will address the reasonableness of the scheduling on a case-by-case basis. As the workers' compensation system develops some experience in the application of the new statutory language, the Department may consider adopting a specific deadline in the future.

#4 - Proposed New Rule 17.2550

> 17.2550 Absent prior leave, the following double-spaced page limitations shall apply to motions filed at the formal docket level: four (4) pages for discovery motions, six (6) pages for other non-dispositive motions, and fifteen (15) pages for dispositive motions, not including statements of undisputed material fact and exhibits.

Comment from Attorney Jennifer Meagher

Attorney Meagher asks whether the exclusion of exhibits applies to the 4-page and 6-page motions, as well as to dispositive motions.

RESPONSE FROM THE DEPARTMENT: Yes. The intent is not to count the exhibits in the page total for any motion. To clarify this, the Department has rewritten the proposed rule as follows:

> 17.2550 Absent prior leave, the following double-spaced page limitations shall apply to motions filed at the formal docket level: four (4) pages for discovery motions, six (6) pages for other non-dispositive motions, and fifteen (15) pages for dispositive motions. In all cases, the page limit shall not include statements of undisputed material facts or exhibits.