Vermont Department of Labor
Proposed Changes to Workers' Compensation and Occupational Disease Rules 1-27

Summary of Public Comments

The following comments were received at the public hearing on July 24, 2024. No other comments were received prior to the August 21, 2024 deadline. Above each comment, the relevant section of the applicable rule appears, with the proposed rule changes in red:

Comments on 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

He supports the proposed change to Rule 8.1820 because it clarifies the difference between permanent disability benefits and temporary disability benefits, where permanency attaches to the claim at the outset of the injury and is based on the claimant's wages at the time of the injury, whereas temporary disability benefits may change over time if the claimant has multiple periods of disability with a change in wages, or even additional wages from a concurrent job that they started after the injury; unlike temporary disability, the right to permanency and the calculation of permanency is effectively fixed at the time of the injury, plus any cola that may be applied.

Comment from Attorney Heidi Groff

She does not support the proposed change to Rule 8.1820. She thinks the phrasing of the rule change may have an unintended consequence that the Department would only look at the *date of injury* for a claimant's permanent partial disability benefits, rather than looking at their *date of disability*. For example, say a claimant gets temporary total disability, then goes back to work, and then leaves work for another period of temporary total disability with higher wages than before. Under the proposed rule change, the Department would only look at the date of injury, not the date of disability, in calculating the claimant's permanent partial disability benefits. This would have an adverse impact on claimants who return to work and then have additional periods of disability with higher wages.

Comment from Attorney Kelly Massicotte

She 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 became entitled to a higher rate for his or her temporary total disability benefits, she thinks that higher rate should be used to calculate permanent partial disability benefits, too.

Comments on 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

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).

Comment from Attorney Kelly Massicotte

She does not support this proposed rule change. She has concerns that the proposed change would have a negative impact on some claimants, namely those who earn a lot of overtime (OT). For such claimants, under the current rule, if they have a week of paid vacation at 40 hours in their prior 26 weeks before the injury, then we do not include that lower earning week in the calculation of their average weekly wage. Under the proposed rule change, we would include the paid vacation week, which would lower the claimant's overall average weekly wage.

She provides another example: under the current rule, if the claimant worked for less than half his or her normally scheduled hours during a week, that week is excluded. Under the proposed rule, that week would be included if the claimant received paid time off for the days he or she did not work. Again, for claimants who work significant overtime, including this week in the calculation would lower their average weekly wage calculation. Attorney Massicotte thinks the rule should exclude any weeks where the claimant received paid time off, whether partial weeks or full vacation weeks; she advocates that the rule should just include weeks where the claimant worked a full week, including any overtime worked.

She provides another example: say a claimant misses one 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 PTO available when he underwent surgery, he might only be paid for three hours that week. She thinks that week with 3 hours of paid time off and no hours worked should be excluded from the calculation of the average weekly wage.

She provides another example: say a claimant is out on short term disability during the 26 weeks prior to their injury (for an unrelated condition). Some employers offer a short- term

disability policy, which would not be considered wages, and so those weeks would not be included in the average weekly wage calculation. However, other employers might pay the claimant wages, which might be at a lower rate than what the claimant regularly earns when he or she is working and getting overtime. Attorney Massicotte thinks that the lower wages paid by the employer to an employee who is out on short term disability should not be included in the average weekly wage calculation.

She is also concerned that the current rule relies on the claimant's "normally scheduled hours," which the department is not proposing to change in this set of proposed rule changes. Her concern is that employers and insurance carriers fill out the claimant's hours on Form 25, but the claimants don't always see that form and are not asked to sign that form. 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 the language is in the current rule also.

Comments on 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

She is concerned about the good faith work search requirements of this rule. If a claimant is going to have surgery in the next month, then she agrees that it makes sense not to require that claimant to do a good faith work search at that time. However, if a claimant has declined to undergo surgery entirely or isn't going to have surgery for another year or so, then she thinks that the claimant should be required to do a good faith work search. The proposed rule refers to a claimant who is "referred or scheduled" for surgery, but the rule includes no time frame or time limit. Without a time frame or time limit, she thinks that the adjuster will not be able to require a good faith job search even if the claimant has declined surgery or will not undergo surgery for the foreseeable future.

Comments on 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 Jen Meagher

She seeks clarity in the new rule section on motion practice. The proposed rule provides page limits for different types of motions and ends with the phrase "not including statements of undisputed material facts and exhibits." She wonders whether the exclusion of exhibits applies to the 4-page and 6-page motions, as well as to dispositive motions.

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