

# 53 N.J.R. 1335(a)

VOLUME 53, ISSUE 16, AUGUST 16, 2021

## RULE PROPOSALS

### Reporter

53 N.J.R. 1335(a)

***NJ - New Jersey Register > 2021 > AUGUST > AUGUST 16, 2021 > RULE PROPOSALS > LABOR AND WORKFORCE DEVELOPMENT -- DIVISION OF WORKERS' COMPENSATION***

## Interested Persons Statement

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### INTERESTED PERSONS

Interested persons may submit comments, information or arguments concerning any of the rule proposals in this issue until the date indicated in the proposal. Submissions and any inquiries about submissions should be addressed to the agency officer specified for a particular proposal.

The required minimum period for comment concerning a proposal is 30 days. A proposing agency may extend the 30-day comment period to accommodate public hearings or to elicit greater public response to a proposed new rule or amendment. Most notices of proposal include a 60-day comment period, in order to qualify the notice for an exception to the rulemaking calendar requirements of N.J.S.A. 52:14B-3. An extended comment deadline will be noted in the heading of a proposal or appear in a subsequent notice in the Register.

At the close of the period for comments, the proposing agency may thereafter adopt a proposal, without change, or with changes not in violation of the rulemaking procedures at N.J.A.C. 1:30-6.3. The adoption becomes effective upon publication in the Register of a notice of adoption, unless otherwise indicated in the adoption notice. Promulgation in the New Jersey Register establishes a new or amended rule as an official part of the New Jersey Administrative Code.

## Agency

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LABOR AND WORKFORCE DEVELOPMENT > DIVISION OF WORKERS' COMPENSATION

## Administrative Code Citation

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**Proposed Amendments: N.J.A.C. 12:235-3.11 and 3.12**

**Proposed New Rule: N.J.A.C. 12:235-3.19**

## Text

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**Pre-Trial Conference; Conduct of Formal Hearings; Pension Offset; Public Employees; Accidental Disability Retirement**

## 53 N.J.R. 1335(a)

Authorized By: Robert Asaro-Angelo, Commissioner, Department of Labor and Workforce Development.

Authority: N.J.S.A. 34:1-20, 34:1A-3.e, 34:1A-12(b) and (c), and 34:15-64.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2021-076.

Submit written comments by October 15, 2021, to:

David Fish, Executive Director  
Legal and Regulatory Services  
New Jersey Department of Labor and Workforce Development  
PO Box 110-13th Floor  
Trenton, New Jersey 08625-0110  
Fax to: (609) 292-8246

Email: [david.fish@dol.nj.gov](mailto:david.fish@dol.nj.gov).

The agency proposal follows:

### Summary

The Department of Labor and Workforce Development (Department) is proposing amendments at N.J.A.C. 12:235-3.11 and 3.12, and a new rule at N.J.A.C. 12:235-3.19, which would effectuate recommendations of the Office of the State Comptroller (OSC) contained in its report, An Examination Into the Use of Medical Monitoring Settlements by the Division of Workers' Compensation and the Impact on the State's Pension Funds. The report describes a medical monitoring settlement as an arrangement whereby in order to resolve a workers' compensation case, a claim petitioner accepts, in lieu of payment of cash benefits to which he or she would otherwise be entitled by law, the respondent's (employer's/insurer's) commitment to provide "reasonable and necessary" treatment for injuries related to the work accident for the life of the claim petitioner (beyond the two-year statute of limitations for reopening a workers' compensation claim). According to the report, use of continuing medical monitoring settlements to conclude workers' compensation claims where the injury or illness that is the basis for the workers' compensation claim is also the basis for an accidental disability pension application prevents the various public pension funds from calculating and imposing a dollar-for-dollar offset of the workers' compensation award against the accidental disability pension allowance, as is required by law (See, for example, N.J.S.A. 43:15A-25.1.b and 43:16A-15.2.b). The OSC concluded in its report that use of continuing medical monitoring settlements under these circumstances has "exacerbated the underfunded status of the pension funds," because claimants receive the full value of their accidental disability pension allowance, plus the undefined and open-ended value of continuing medical monitoring, without the required pension offset.

The proposed amendments and new rule, written in consultation with the Division of Pensions and Benefits, are designed to ensure that the proper pension offset does, in fact, occur. The proposed amendments at N.J.A.C. 12:235-3.11 and 3.12 would do this by expressly stating that "good cause" for adjournment of either pre-trial conference or formal hearing before a Judge of Compensation, shall not include that the injury or illness upon which the subject claim before the Division of Workers' Compensation is based is also the basis for a pending accidental disability pension application to a pension fund administered by the Division of Pensions and Benefits. In addition, the Department is proposing new N.J.A.C. 12:235-3.19, which would, when the injury or illness upon which a workers' compensation claim is based is also the basis for a pending accidental disability pension application: (1) expressly prohibit the approval by a Judge of Compensation of a continuing medical monitoring settlement (except where the workers' compensation claim petition is for an occupational disease, like asbestosis, under the appropriate circumstances based on the fact presented, and when not used in a way to avoid a pension offset); and (2) require that both the workers' compensation petitioner and workers' compensation respondent notify the Division of Pensions and Benefits of the filing of the claim petition with the Division of Workers' Compensation, and that

each also notify the Division of Pensions and Benefits that a Judge of Compensation has granted a judgment, approved a settlement award, or dismissed petitioner's claim before the Division of Workers' Compensation.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirement at N.J.A.C. 1:30-3.3(a)5.

### **Social Impact**

The proposed amendments and new rule seek to restore an appropriate balance between workers' compensation claims and State pension benefits in the wake of the OSC's report citing the burden on New Jersey's underfunded pension funds created by the use of continuing medical monitoring settlements in the manner described in the Summary above. Whereas the only purpose of workers' compensation insurance is to compensate injured workers, the purpose of the State pension system is to provide financial security in retirement to all covered workers based on [page=1336] age and years of service. One component of the overall pension system provides accidental disability pensions to certain workers who are no longer able to perform the responsibilities of their positions due to an injury sustained on the job. The funds paid out to those workers are derived from the same pension funds that provide retirement benefits to public workers. There are no premiums or experience ratings that public employee pension funds can charge to address conditions causing disability. The sole method of funding pensions for public workers is through salary deductions from employees' paychecks, and State and local government contributions made into the retirement systems, which must cover all of the pensions, including age and service-based pensions, and not just the accidental disability pensions. By contrast, workers' compensation exists exclusively to compensate the injured worker. N.J.S.A. 34:15-1 provides, "[w]hen personal injury is caused to an employee by accident arising out of and in the course of his employment, ... he shall receive compensation therefor from his employer, ..." Workers' compensation insurance is required pursuant to N.J.S.A. 34:15-73, and insurance carriers are "directly liable" for payments to injured employees pursuant to N.J.S.A. 34:15-86. Workers' compensation insurers may classify "risks, rates, and schedules" pursuant to N.J.S.A. 34:15-88. Clearly, workers' compensation insurers are in the best position to provide for safer workplaces by considering the experience rating of insureds and past claims for disability of workers. Eliminating the use of continuing medical monitoring settlements under the circumstances outlined in the proposed amendments and new rule furthers the social policy favoring safer workplaces because it places workers' compensation insurers, rather than the pension systems, in their suited and mandated role of litigating or settling workers' compensation claims on the merits and adjusting rates and changing workplace conditions for insureds in the wake of the outcomes of such cases. Eliminating the use of medical monitoring settlements under the circumstances set forth within the proposed amendments and new rule supports this social policy.

### **Economic Impact**

As indicated in the Social Impact above, there is an economic benefit to the various public pension funds and ultimately to the financial security of retirees, because eliminating the use of medical monitoring settlements under the circumstances outlined in the proposed amendments and new rule, would shift the burden of compensating injured workers for particular kinds of losses back to the workers' compensation system, which was created to do so. This has the effect of saving those pension funds money, and, thus, saving the taxpayers money in underfunded pensions. Workers' compensation insurers are in the best position to adjust costs through the experience rating of insureds. Experience rating is a method that adjusts an insured's (employer's) premium up or down based upon the employer's historical loss experience, providing incentive for employers to undertake corrective measures in the workplace because safety reduces or eliminates future accidents or exposures, thereby reducing injury claims, and ultimately the cost of workers' compensation borne by employers and insurers. To the degree that insurers and employers have benefited economically for approximately the past 15 years from the statutorily unsupported policy of the Division of Workers' Compensation that encouraged the use of continuing medical monitoring settlements in cases such as those at issue in this rulemaking, the proposed amendments and new rule will reverse that trend going forward by restoring the balance that was intended from the beginning. Any perceived negative economic impact on those insurers and employers will in actuality be reflected in direct proportion to the economic benefit that will inure to the affected pension funds, which should have existed previously. That is more of an economic recalibration than an economic impact, intended to restore the appropriate balance between workers' compensation

and the State pension funds, which is the express purpose of this rulemaking, as recommended by the OSC in its report.

#### **Federal Standards Statement**

The proposed amendments and new rule do not exceed standards or requirements imposed by Federal law as there are currently no Federal standards or requirements applicable to the subject matter of this rulemaking. As a result, a Federal standards analysis is not required.

#### **Jobs Impact**

The Department does not anticipate that the proposed amendments and new rule would result in either the generation or loss of jobs.

#### **Agriculture Industry Impact**

It is not anticipated that the proposed amendments and new rule would impact the agriculture industry, as the proposed amendments and new rule would only impact employers with employees who are eligible to benefit from the pension funds administered by the Division of Pensions and Benefits; namely, public employers like the State, counties, and municipalities, and the various school districts throughout the State; and, of course, those who insure them. No such employers are in the agriculture industry.

#### **Regulatory Flexibility Analysis**

The proposed amendments and new rule do not impose any reporting, recordkeeping, or compliance requirements on small businesses as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed amendments and new rule place restrictions on Judges of Compensation and both petitioners and respondents in workers' compensation cases where the injury or illness upon which the workers' compensation claim is based is also the basis for an accidental disability pension application to a pension fund administered by the State Department of the Treasury's Division of Pensions and Benefits. Neither Judges of Compensation, nor the subject workers' compensation petitioners or respondents (public employees and public employers, respectively) are small businesses, as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Thus, a regulatory flexibility analysis is not required.

#### **Housing Affordability Impact Analysis**

The proposed amendments and new rule would not evoke a change in the average costs associated with housing. The basis for this finding is that the proposed amendments and new rule pertain to the conduct of hearings before the Division of Workers' Compensation. The proposed amendments and new rule do not pertain to housing, or the affordability of the same.

#### **Smart Growth Development Impact Analysis**

The proposed amendments and new rule would not evoke a change in the housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed amendments and new rule pertain to the conduct of hearings before the Division of Workers' Compensation. The proposed amendments and new rule do not pertain to housing production, either within Planning Areas 1 or 2, within designated centers, or anywhere in the State of New Jersey.

#### **Racial and Ethnic Community Criminal Justice and Public Safety Impact**

The Commissioner has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

**Full text** of the proposal follows (additions indicated in boldface, **thus**):

## SUBCHAPTER 3. FORMAL CLAIMS

## 12:235-3.11 Pre-trial conference

(a) In any formal proceeding, the Division shall schedule a pre-trial conference where the following shall be accomplished:

1.-4. (No change.)

5. There shall be an adjournment upon good cause shown.

i. **"Good cause" for an adjournment shall not include that the injury or illness upon which the subject claim before the Division of Workers' Compensation is based is also the basis for a pending application to a pension fund administered by the Division of Pensions and Benefits within the Department of the Treasury, including, but not limited to, the Public Employees' Retirement System (PERS), the Police and Firemen's Retirement System (PFRS), [page=1337] and the Teachers' Pension and Annuity Fund (TPAF), for an accidental disability pension allowance.**

(b)-(d) (No change.)

## 12:235-3.12 Conduct of formal hearings

(a)-(c) (No change.)

(d) The Judge of Compensation shall, at the commencement of the day, call the list of cases in open court. No adjournment shall be granted unless there is found to be good cause. No adjournment shall be granted for medical examination unless the name of the examining physician and date of examination are supplied.

1. **"Good cause" for an adjournment shall not include that the injury or illness upon which the subject claim before the Division of Workers' Compensation is based is also the basis for a pending application to a pension fund administered by the Division of Pensions and Benefits within the Department of the Treasury, including, but not limited to, the Public Employees' Retirement System (PERS), the Police and Firemen's Retirement System (PFRS), and the Teachers' Pension and Annuity Fund (TPAF), for an accidental disability pension allowance.**

(e)-(x) (No change.)

## 12:235-3.19 Pension offset; public employees; accidental disability retirement

(a) **When the injury or illness upon which the subject claim before the Division of Workers' Compensation is based is also the basis for a pending accidental disability pension application to a fund administered by the Division of Pensions and Benefits within the Department of the Treasury, including, but not limited to, the Public Employees' Retirement System (PERS), the Police and Firemen's Retirement System (PFRS), and the Teachers' Pension and Annuity Fund (TPAF), the following shall occur:**

1. **Both the workers' compensation petitioner and the workers' compensation respondent shall immediately notify the Division of Pensions and Benefits of the filing of the claim petition with the Division of Workers' Compensation;**

2. **Except at (a)3 below, the approval by a Judge of Compensation of a continuing medical monitoring settlement shall be prohibited and the workers' compensation claim petition shall result in one of the following outcomes:**

i. **The award by a Judge of Compensation of a monetary judgment after trial;**

ii. **The approval by a Judge of Compensation of a settlement agreement reached pursuant to N.J.S.A. 34:15-20 (Section 20 settlement);**

iii. The approval by a Judge of Compensation of a settlement agreement reached pursuant to N.J.S.A. 34:15-22 (Section 22 settlement);

iv. The dismissal by a Judge of Compensation of petitioner's claim after trial for failure of petitioner to meet their burden; or

v. The dismissal by a Judge of Compensation of petitioner's claim petition pursuant to N.J.S.A. 34:15-54 for lack of prosecution;

3. Where the workers' compensation claim petition is for an occupational disease (for example, asbestosis), under appropriate circumstances based on the facts presented, and when not used in a way to avoid a pension offset, a Judge of Compensation may approve a continuing medical monitoring settlement; and

4. Upon a Judge of Compensation granting a judgment, approving a settlement award, or dismissing petitioner's claim before the Division of Workers' Compensation, both the workers' compensation petitioner and the workers' compensation respondent shall immediately provide a copy of the award, order approving settlement, or order of dismissal, as the case may be, to the Division of Pensions and Benefits, within the Department of the Treasury.

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