

54 N.J.R. 448(a)

VOLUME 54, ISSUE 5, MARCH 7, 2022

RULE ADOPTIONS

Reporter

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Agency

LABOR AND WORKFORCE DEVELOPMENT > DIVISION OF WORKERS' COMPENSATION

Administrative Code Citation

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

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

Text

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

Proposed: August 16, 2021, at 53 N.J.R. 1335(a).

Adopted: February 7, 2022, by Robert Asaro-Angelo, Commissioner, Department of **Labor and Workforce Development**.

Filed: February 7, 2022, as R.2022 d.033, **without change**.

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

Effective Date: March 7, 2022.

Expiration Date: August 3, 2028.

Summary of Hearing Officer's Recommendation and Agency's Response:

After reviewing the written comments submitted directly to the Department of **Labor and Workforce Development**'s (Department) Office of Legal and Regulatory Services, the hearing officer, David Fish, Executive Director, Legal and Regulatory Services, recommended that the Department proceed with **adoption** of the amendments and new rule without change.

Summary of Public Comments and Agency Responses:

Written comments were submitted by David N. Grubb, Executive Director, Municipal Excess Liability Joint Insurance Fund, Parsippany, New Jersey.

COMMENT: By way of background, the proposed amendments at N.J.A.C. 12:235-3.11 and 3.12, and the new rule at N.J.A.C. 12:235-3.19, are procedural rule changes regarding the conduct of cases before the Division of Workers' Compensation (Division) designed to end the practice within the Division of permitting the use of 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. As was explained in the notice of proposal that appeared in the August 16, 2021, issue of the New Jersey Register (53 N.J.R. 1335(a)), this practice has prevented 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. The commenter accepts, "that workers' compensation should be primary, because this adds additional economic motivation to prevent accidents," adding that the organization he represents is "also realistic enough to understand that the pension system is under serious financial pressure." However, the commenter urges in the interest of minimizing the financial impact of the proposed rule changes on local government, that the proposed amendments at N.J.A.C. 12:235-3.11 and 3.12 and the proposed new rule at N.J.A.C. 12:235-3.19 not be applied to contested workers' compensation claims regarding accidents that occurred prior to the date that the proposed amendments and new rule become effective. The commenter also urges that the administration work to secure legislation that provides budget cap relief for local governments.

RESPONSE: While the Department is not unsympathetic to insurance cost increases sustained by local government, the Department is unpersuaded that this should result in a delay in the date upon which the proposed rule changes become operative, predicated on the date of accident, as is suggested by the commenter.

The pension offset requirement at issue has been part of New Jersey law since 1996. See N.J.S.A. 43:15A-25.1.b and 43:16A-15.2.b. Thus, at all relevant times, it should have remained within the calculus of insurers' risk expectations for outcomes of claims. As indicated in the August 16, 2021, notice of proposal (53 N.J.R. 1335(a)), "[t]o 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." It is unfair to characterize this circumstance as creating an issue of retroactive application of the proposed amendments and new rule when the widespread use of medical monitoring settlements did not stem from any change in law or rule from the beginning, and based on the unchanged law and rules, insurers had no reason to expect that medical monitoring settlements should or would continue as a substitute for awards of periodic benefits to conclude workers' compensation cases.

Furthermore, the proposed rule changes are procedural, regarding the conduct of cases, for all Judges of Compensation to follow uniformly in all matters before the Division of Workers' Compensation from the effective date of the proposed amendments and new rule going forward. The proposed amendments and new rule are intended to apply evenly and prospectively based on when the cases are heard and decided. It would be counter-productive for the judges to have two sets of court rules based upon differing accident dates, which would undermine the policy correction that the proposed rule changes are designed to implement. To accept the delay in implementation of the proposed rule changes urged by the commenter would be to prolong the harm the rule changes seek to end and prevent going forward. The Department finds it unacceptable to allow the harm to the pension system occasioned by the widespread use of medical monitoring settlements to continue for that additional time when the remedy at hand is to simply apply the proposed amended rules and new rule uniformly to all workers' compensation cases going forward.

Finally, regarding the commenter's request that the administration work to secure legislation providing for budget cap relief to local governments, that is well beyond the scope of this rulemaking and, therefore, the Department offers no response.

The adopted 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.

Full text of the adoption follows:

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), 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 [page=449] 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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