STATE OF MINNESOTA
Department of Labor and Industry
Workers' Compensation Division
443 Lafayette Road
St. Paul, Minnesota 55155-4319

In the Matter of the Proposed Adoption by the Minnesota Department of Labor and Industry, Workers' Compensation Division, of a Rule, and Repeal of Other Rules, Governing Permanent Total Disability and Reimbursement of Supplemental Benefits.

STATEMENT OF NEED AND REASONABLENESS

INTRODUCTION

The proposed rule concerns determinations, following work-related injuries, of whether an employee is permanently and totally disabled from working. It provides an informal administrative procedure for obtaining a finding of permanent total disability (PTD) where ongoing benefits are being paid. The proposed rule replaces entirely the existing rules for obtaining, at the Department of Labor and Industry, an administrative finding of PTD resulting from a work-related injury. The existing rules will be repealed.

An official determination or finding that an employee is permanently and totally disabled is especially important to employers and insurers for a number of reasons. First, the Minnesota Supreme Court decision in McClish v. Pan-O-Gold Banking Co., et al, 336 N.W.2d 538 (Minn. 1983) requires a finding of PTD before an employer or insurer may apply the offset provision in M.S. § 176.101, subd. 4. The offset allows a reduction of workers' compensation benefits after receipt of $25,000 in PTD benefits when the employee is receiving government disability or retirement benefits. Second, Christensen v. Whirlpool, 41 W.C.D. 1047 (1989), requires that only benefits determined to be PTD benefits be counted in the calculation of the $25,000 necessary to be paid before the offset may be taken. Third, the Social Security Administration will not recognize the workers' compensation offset until there has been an official finding of PTD by the Commissioner or a compensation judge.

In a typical case an employee receiving Temporary Total Disability benefits (TTD) and Social Security Disability Income benefits (SSDI) will have SSDI reduced because of the TTD being received. After an official finding of PTD, and after $25,000 in PTD benefits are paid, M.S. § 176.101, subd. 4 allows PTD benefits to be offset based on SSDI being paid. At the same time, federal law provides that when the PTD offset begins, the SSDI offset will end. Additionally, as a result of the reduction in PTD benefits due to the offset, the employee may be entitled to supplementary benefits under M.S. § 176.132. Supplementary benefits are paid by the employer or insurer and reimbursed by the Special Compensation Fund (SCF).

The proposed rule provides a quick and informal process to obtain a finding of PTD which applies to a greater number of cases than the existing rule while providing a mechanism for resolving any disputes. It gives

employers and insurers a less burdensome method of getting a PTD determination and obtaining reimbursement for supplementary benefits paid as a result of the offset. Also, it avoids disruption of weekly benefits to those employees who are permanently and totally disabled.

Currently, a finding of PTD can be obtained by the employer, insurer, or employee, by petition to a compensation judge or by stipulated agreement approved by the commissioner or compensation judge. In addition to these formal procedures, an insurer or employer may apply for an informal administrative finding of PTD under Minn. Rules, Parts 5222.0100 through 5222.1000. Under those rules, the Commissioner may, in cases which satisfy the requirements provided therein, make a finding of PTD without an administrative conference or hearing.

Among the requirements provided in the existing rules is that the total amount of weekly benefits, from both workers' compensation and other government disability programs, will not be reduced as a result of the finding. In cases where the finding would result in an overall reduction in benefits, the employer or insurer is forced to proceed by way of a formal petition or stipulated agreement. This is true even where there is no dispute over the issue of PTD. The purpose of this requirement is to avoid reducing monetary benefits without the opportunity for a due process hearing.

The proposed rule, while leaving the formal procedures intact, would entirely replace the existing rules. Like the existing rules, the proposed rule will only apply where ongoing benefits are being paid. However, because the rule provides for an administrative conference where the employee or the SCF objects to the proposed finding, the procedure includes those cases with an overall reduction in benefits. Because the SCF is allowed to object to proposed findings of PTD, and request a conference and because the SCF has potential liability for supplementary benefits, reviewed by the SCF acts as a safeguard against unfounded claims of PTD.

Unlike the existing rules, the proposed rule also allows the employee to obtain a finding of PTD in cases where the employer or insurer has not raised the issue of PTD but is attempting to discontinue the employee's temporary total disability or temporary partial disability benefits for other reasons. This additional procedure is intended to be limited to cases where the PTD is clear and the employee has documentation readily available. Thus the applicability of the procedure is limited by strict filing requirements. Also, because the proposed rule is so strongly tied to the administrative conference procedures it has been proposed as a new rule in Minn. Rules Chapter 5220, with the other administrative conference rules, rather than an amendment to the existing rules in Chapter 5222. The existing rules will be repealed.

Part 5220.2645 (Proposed) Permanent Total Disability Conferences.

Subp. 1. Where Temporary Total Disability (TTD) or Temporary Partial Disability (TPD) benefits are being paid and the employer or insurer wants to initiate PTD benefits, a Notice of Intention to Discontinue benefits (NOID) will be filed pursuant to M.S. § 176.238 (1988) showing a proposed discontinuance of TTD or TPD based on the employer or insurer's allegation that the employee is permanently and totally disabled and therefore entitled to PTD benefits. This subpart requires the employer or insurer to file a NOID just as in any other case of a proposed discontinuance - with two differences. First, the NOID must be served on the SCF as well as the other

parties. Second, the NOID must have attached a "Notice of Permanent Total Disability", on a form prescribed by the Commissioner, which will give the employee notice of the consequences of the employer's or insurer's action and the right to request a conference. Here the NOID and attached Notice of PTD act as a request to change from one benefit to another and as a request for an administrative finding of PTD.

By initiating the process with a NOID the decision can be made through an informal administrative conference procedure thus avoiding unnecessary formality in most cases and easing the burden on employees, insurers and the workers' compensation courts. By requiring adequate notice to the employee of the proposed changes, due process concerns are addressed while still allowing for a streamlined procedure for obtaining a finding of PTD without a conference if there are no objections. The rule also changes the role of the SCF from decision-maker on the issue of PTD to a more appropriate role as a party given its interest in the matter.

Subp. 2. Both the employee and the SCF are allowed to request a conference where either party does not agree that a finding of PTD is justified. The SCF has an interest in reviewing such NOIDs because of its potential liability for supplementary benefit reimbursement.

By giving the SCF the right to request a conference the Department retains an additional method of review of the appropriateness of a proposed finding even where the employee does not object. This reduces the chances of an inappropriate finding of PTD simply because the employee fails to act.

The employee has an interest in reviewing the proposed change because of the potential financial consequences involved. A request for conference by either the employee or the SCF must be within the same time limits for any other proposed discontinuance of benefits.

Subp. 3. Provides for an administrative finding of PTD, without a conference, where notice has been given to the employee and the SCF, and neither party has requested a conference. The subpart does require that the documentation provided by the employer or insurer actually supports a finding of PTD.

Although findings of PTD without a conference are available under the existing rule this subdivision allows such findings even if there is a reduction in overall benefits. Due process concerns are satisfied here by allowing the parties to object and obtain an administrative conference. By allowing the parties the option of not objecting to a proposed finding, or in the alternative obtaining an informal conference on the issue of PTD, unnecessary interruption of benefits to injured employees due to procedural delay is avoided.

Subp. 4. Where either the employee or the SCF requests a conference under this rule, the Commissioner will schedule the matter for an administrative conference before a settlement judge (although section 176.305, subd. 1(a) gives presiding officers the power to make summary decisions, currently only settlement judges exercise that power). At the conference the parties may discuss the issues raised by the NOID and the judge may issue a summary decision on any issue necessary to resolve the dispute. The decision is final unless a formal de novo hearing is requested.

If there is an objection to a proposed finding, the matter is referred to a settlement judge. Under normal administrative conference procedures a decision is limited to whether a discontinuance or change of benefits may occur. By combining administrative conference procedures with the summary decision power under section 176.305, a settlement judge will not only be able to decide the appropriateness of the benefit change but also to make a specific finding of PTD. As discussed above, a specific finding is necessary under the McClish case and is needed by the Social Security Administration.

Subp. 5. In any case where an employer or insurer propose to discontinue TTD or TPD benefits, for any reason other than that provided in subpart 1, the employee may allege PTD as a defense to the proposed discontinuance of benefits. This subpart requires that a request for conference include documentation supporting the PTD and that the request be timely as provided by Section 176.239, subd. 2. This goes beyond the scope of the existing rules and gives the employee the ability to affirmatively raise the issue of PTD in a discontinuance proceeding to avoid a lapse in weekly benefits. While this right is limited by the service requirements and the time frame for requesting a conference, it is only intended to apply to those clear cases of PTD where the employee would already possess supporting documentation or supporting documentation is readily available. Cases where documentation of PTD could be obtained, but not within the time frame for requesting a conference, can still be decided by way of a formal petition. Timely requests for conferences with supporting documentation will be referred to a settlement judge for a conference and summary decision.

Subparts 1-5 deal simply with a situation where the employer or insurer believe the employee is PTD. In cases where an employee is receiving TTD benefits or TPD benefits, and the employer or insurer wants to discontinue those benefits but does not agree that the employee is PTD, this subpart allows the employee, in limited circumstances, to raise PTD as a defense to the proposed discontinuance. Again this allows the issue to be raised in an informal proceeding in order to avoid a lapse in benefits caused by the procedural delay a more formal process would cause.

Subp. 6. This subpart clarifies that findings of PTD, whether made with or without a conference, can determine the date PTD commenced, even if it is a date prior to the filing of the NOID. The finding of PTD can have retroactive effect.

It is necessary to give findings of PTD retroactive effect because of the requirement that an offset may not be taken until $25,000 in PTD benefits have been paid. In most cases a person is actually at PTD status long before there is a finding or determination. PTD is not always immediately apparent; it may not be apparent until after an exhaustive job search or after a number of attempted medical treatments.

Impact on Small Business

The adoption of the proposed rule and repeal of the existing rules has no impact on small business. The rules affect only insurers and self-insured employers, none of which are small businesses as defined by M.S. § 14.115, subd. 1 (1988). As there is no impact on small business, it is not necessary to consider the methods described in M.S. § 14.115, subd. 2 (1988) for reducing the impact of the rule on small business.

Fiscal Impact on Local Public Bodies

The Commissioner has considered the fiscal impact of the adoption and repeal of these rules on local public bodies pursuant to M.S. § 14.11, subd. 1 (1988), and has found none. No additional financial burdens are placed on local public bodies as the proposed changes will not affect the expenditure of public monies by local public bodies.