

Interpretive Bulletins

Director's interpretations of issues impacting the Colorado workers' compensation system

In an effort to provide guidance on the practical applications of the Colorado Workers' Compensation Act, we will be publishing Director's interpretations of statutes and other factors affecting the system, in the form of *Interpretive Bulletins*. The purpose is to provide greater levels of consistency and predictability as to how the Colorado system is intended to operate. While the opinions do not have the force and effect of rule, they are afforded as navigational tools to clarify and simplify processes, create efficiencies, and to reduce litigation.

If you have questions regarding this information or issues you would like to see addressed in future bulletins, please direct your inquiries to Paul Tauriello, Director of the Division of Workers' Compensation, at 633 17th St., Suite 400, Denver, CO 80202, FAX 303.318.8632, or e-mail at paul.tauriello@state.co.us

Cost of Living Adjustments on Claims for Permanent Total Disability

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Section 8-42-111 (4), of the Colorado Revised Statutes provides for a 2% annual increase or cost of living adjustment (COLA), on permanent total (PT) awards for dates of injury occurring on and after July 1, 1991 to July 1, 1994. In *Salazar vs. Industrial Claims Appeals Office*, 10 P.3d 666 (Colo. App. 2000), the Court of Appeals addressed the question of whether the 2% increase is subject to the weekly maximum benefit cap. In its decision of February 3, 2000, the court cited "an irreconcilable conflict" between the mandatory language imposing a maximum weekly cap for compensation benefits for this class and the separate but equally compelling language in paragraph (4) of the same section, increasing benefits by 2% each year:

(1) In cases of permanent total disability, the award shall be sixty-six and two-thirds percent of the average weekly wages of the injured employee and shall continue until death of such person so totally disabled but not in excess of the weekly maximum benefits specified in this article for injuries causing temporary total disability.

(4) For injuries occurring on and after July 1, 1991, and before July 1, 1994, the average weekly wage of injured employees used for computing compensation paid for awards pursuant to subsection (1) of this section shall be increased by two percent per year effective July 1 of each year,

and such increased compensation payable for the subsequent twelve months.

In accordance with the rules of statutory construction, the court determined that where the two statutes could not be reconciled, the most recently enacted provision would prevail. It specifically concluded that the 2% annual increase in benefits would be given full effect without regard to the maximum weekly benefit cap.

In giving effect to the legislative intent for a 2% increase in benefits not limited by the maximum benefit cap, the court ensured equitable treatment among members of this class. In the same manner, an increase in benefits of *greater than 2%* for some and not all members would misconstrue the legislative intent for a simple 2% per annum increase and result in disparate treatment of individuals in a similarly situated class.

For purposes of this discussion, it is noteworthy that in the majority of cases, an increase in the average weekly wage (AWW) by 2% will yield the same result as increasing the compensation rate by 2%. However, a disparity occurs when the average weekly wage is very high and the 2% increase is applied to AWW without regard to the previous compensation rate.

Consider the following examples:

Claimant #1:	Claimant #2
Date of Injury: June 1, 1993	Date of Injury: June 1, 1993
Date of PT: February 1, 1998	Date of PT: February 1, 1998
Average Weekly Rate: \$450.00	Average Weekly Rate: \$1000.00
Comp Rate: \$300.00	Comp Rate: \$442.64 (Max comp rate)

Assumptions: Both claimants are declared permanently and totally disabled (PT), effective February 1, 1998. Therefore, the initial 2% increase would take effect July 1, 1998.

Claimant #1

If the 2% increase is applied to either the average weekly wage or compensation rate of Claimant #1, the same mathematical result and increase is achieved--\$306.00 and 2% respectively:

Increase in the AWW by 2% equates to:

$$\$450.00 \times 2\% = \$459.00. \quad \$459 \times 66 \frac{2}{3} \% = \underline{\$306.00}$$

Similarly,

An increase in the compensation rate by 2% is equal to:

$$\$300.00 \times 2\% = \$6.00. \quad \$300.00 + \$6.00 = \underline{\$306.00}$$

Claimant #2

If the 2% increase is applied to the AWW as opposed to the compensation rate of Claimant #2, an inconsistent result occurs:

Increase in the AWW by 2% equates to:

$$\$1000.00 \times 2\% = \$20.00. \quad \$1020.00 \times 66 \frac{2}{3}\% = \underline{\$680.00}$$

The resultant increase from the previous year is 35%--far greater than that afforded Claimant #1 and inconsistent with the statutory intent for a 2% per year increase.

By contrast, when the compensation rate is used in the equation, a result consistent with the statutory intent is achieved:

Increase in the compensation rate by 2% is equal to:

$$\$442.64 \times 2\% = \$8.85. \quad \$442.64 + \$8.85 = \underline{\$451.49}.$$

This is inconsistent with the plain and simple language of the statute that requires a 2% increase in compensation for those individuals awarded permanent total disability with specific dates of injury.

The language of § 8-42-111 (1) states that the award for permanent total disability (PTD) is to be calculated at sixty-six and two-thirds percent of the claimant's "average weekly wage" not to exceed the weekly maximum benefits specified for injuries causing temporary total disability (TTD). According to § 8-42-105 (1), TTD benefits cannot exceed a "maximum of ninety-one percent of the state average weekly wage per week." When these sections are read together, the basis for a PTD award is an "average weekly wage, " two-thirds of which cannot surpass ninety-one percent of the state average weekly wage.

The language of § 8-42-111 (4) directs that "the average weekly wage of injured employees *used for computing compensation* paid for awards pursuant to subsection (1) of this section shall be increased by two percent per year..." (Emphasis added).

In effect, the AWW can never exceed the rate established by the Director to qualify a claimant for the maximum benefit rate based on the date of injury.

Therefore, for those claimants whose average weekly wage is sufficient to entitle them to the maximum weekly compensation rate at the time of injury, that same AWW used to establish the maximum compensation rate will be used to calculate the 2% per annum increase. *That rate, becomes the claimant's average weekly wage for purposes of calculating compensation.*

The following methodology should be used in applying the 2% increase:

Increase the claimant's AWW by 2% on July 1st in the first year after the claimant is declared a PT (and on the same date every year thereafter), and multiply the sum by sixty-six and two thirds to obtain the compensation rate. This methodology should be used **unless it results in an increase of greater than 2% in the compensation rate from the previous year.**

In such case, *the base average weekly wage rate, sufficient to entitle the claimant to the maximum compensation rate on the date of injury*, will be increased by 2% in the first year following a determination of PT, (and on July 1st every year thereafter). The sum shall then be multiplied by sixty-six and two thirds to obtain the compensation rate. The following maximum AWW rates will be used in these cases:

For dates of injury occurring on

July 1, 1991 to July 1, 1992, AWW = \$593.57

July 1, 1992 to July 1, 1993, AWW = \$621.08

July 1, 1993 to July 1, 1994, AWW = \$648.38

Quick Tip: The most efficient method for calculating the 2% increase is to multiply the compensation rate by 2% each year on July 1st beginning in the first year after a permanent total disability award and every July 1st thereafter.

In accordance with *Salazar*, the increased compensation rate is not subject to any maximum weekly benefit cap.

A separate, but related issue is found at subsection 5 of the same section 8-42-111, C.R.S. 2001:

(5) *For injuries occurring on and after July 1, 1991, and before July 1, 1994, compensation payable pursuant to this section shall cease when the employee reaches the age of sixty-five years.*

Although this paragraph has not been deleted, the Colorado Supreme Court affirmed a decision by the Court of Appeals finding termination of permanent total disability benefits at age 65 to be unconstitutional. *Romero v. Industrial Claim Appeals Office*, 902 P.2d 896 (Colo. App. 1995), *aff'd*, 912 P.2d 62 (Colo.1996). Benefits must therefore continue for the life of the claimant unless otherwise terminated by law.

Finally, statutory offsets, which serve to reduce the compensation rate in these claims, may be taken only *after* the average weekly wage is increased by 2% and a new compensation rate has been established. Authority for this is found at section 8-42-103, C.R.S., which specifically applies the reduction to "aggregate benefits."

Similarly, where a lump sum payment has been granted on these lifetime benefits, lump sum costs shall be applied only after the AWW has been increased by 2% and a new compensation rate has been established. This interpretation is consistent with the provisions of section 8-42-111 (4), which require that the AWW be increased by 2% and the increased compensation rate be payable for the subsequent 12 months (less applicable offsets or discounts).