Rules and Regulations

Federal Register

Vol. 83, No. 76

Thursday, April 19, 2018

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

20 CFR Part 702

RIN 1240–AA06

Longshore and Harbor Workers' Compensation Act: Maximum and Minimum Compensation Rates

AGENCY: Office of Workers' Compensation Programs, Labor.

ACTION: Final rule.

SUMMARY: This final rule contains regulations implementing the Longshore and Harbor Workers' Compensation Act's provisions on maximum and minimum amounts of compensation payable. These regulations clarify how the Department interprets and applies these provisions in accordance with several court decisions to ensure injured workers are compensated properly and insurers and employers are aware of their responsibilities. In addition, the rule implements the Act's annual compensation-adjustment mechanism for permanent total disability compensation and death benefits.

DATES: This rule is effective May 21, 2018.

FOR FURTHER INFORMATION CONTACT: Douglas Fitzgerald, Director, Division of Longshore and Harbor Workers' Compensation, Office of Workers' Compensation Programs, 202–354–9620 (this is not a toll-free number), *Fitzgerald.Douglas@dol.gov*. TTY/TDD callers may dial toll free 1–877–889–5627 for further information.

SUPPLEMENTARY INFORMATION:

I. Background of This Rulemaking

On August 26, 2016, the Department issued a Notice of Proposed Rulemaking (NPRM) under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* (LHWCA or Act), proposing rules implementing the LHWCA's provisions on maximum and minimum amounts of compensation payable. 81 FR 58878–90 (Aug. 26, 2016). The comment period closed on October 25, 2016.

As explained in the NPRM, 81 FR 58878–79, the LHWCA establishes a federal workers' compensation system for an employee's disability or death arising in the course of covered maritime employment. 33 U.S.C. 903(a), 908, 909. LHWCA compensation is generally based on the employee's average weekly wages at the time of his or her disabling injury or death. 33 U.S.C. 910. Section 6 of the Act caps compensation at a maximum of twice the applicable fiscal year's national average weekly wage (NAWW). 33 U.S.C. 906(b)(1). Section 6 also establishes a minimum below which compensation may not fall. The minimum rate is the lower of fifty percent of the NAWW or the employee's actual average weekly wages. 33 U.S.C. 906(b)(2). The Secretary of Labor determines the NAWW for each fiscal year, and that determination applies to employees or survivors ''currently receiving'' compensation for permanent total disability or death, as well as those ''newly awarded'' compensation of any type, including for partial and temporary disability. 33 U.S.C. 906(b)(3), (c).

In addition to the provisions in section 6 that allow for adjustments to the maximum and minimum compensation rates based on the NAWW, section 10(f) of the Act provides another mechanism for adjusting compensation amounts so that their value is not eroded over time. Benefits payable for permanent total disability or death are increased at the beginning of each fiscal year by the same percentage as any increase in the NAWW, but no more than five percent per year. 33 U.S.C. 910(f). Section 10(f) applies to all claimants receiving compensation for permanent total disability or death, while section 6 applies only to those whose compensation is affected by the maximum or minimum rates.

The Department proposed rules to implement the minimum and maximum compensation rate provisions of section 6(c), specifically clarifying which maximum compensation rates apply to any particular injury under the section's ''newly awarded'' and ''currently receiving'' clauses, and relatedly, how the Act's minimum compensation provisions apply. Additionally, the proposed rules implement section 10(f)'s annual adjustment provision generally and address how section 10(f) integrates with section 6's maximum and minimum compensation rates.

As the NPRM discussed, these rules are primarily based on the Supreme Court's controlling decision in *Roberts* v. *Sea-Land Services, Inc.,* 566 U.S. 93 (2012), the Ninth and Eleventh Circuits' decisions in *Roberts* v. *Dir., OWCP,* 625 F.3d 1204 (9th Cir. 2010), and *Boroski* v. *Dyncorp Intern.,* 700 F.3d 446 (11th Cir. 2012), and the Benefits Review Board's decisions in *Reposky* v. *Int'l Transp. Servs.,* 40 BRBS 65 (2006), and *Lake* v. *L–3 Communications,* 47 BRBS 45 (2013). Aside from one small exception, those decisions and this rule comport with the Director's longstanding interpretation and application of the maximum and minimum compensation provisions. 81 FR 58887. Additionally, the Department has been following the Ninth Circuit's construction of the statute since 2012 and the regulations reflect this construction as well.

The Department received only six written comments in response to the NPRM from a variety of entities in the longshore industry. The commenters included longshore employer associations, insurance-industry members, and longshore claims administrators associations. These comments are addressed in Section III below.

This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

II. Statutory Authority

Section 39(a) of the LHWCA, 33 U.S.C. 939(a), authorizes the Secretary of Labor to prescribe rules and regulations necessary for the administration of the Act.

III. Response to Significant Comments and Explanation of Changes

Most commenters provided general remarks about the rulemaking rather than comments on specific proposed regulations. Thus, rather than including a full section-by-section analysis in the discussion below, the Department's response is organized by the broader issues raised. The Department appreciates these comments and has made one change to the final rule in response.

A. Application of ''Newly Awarded Compensation'' Clause

Several commenters stated that the proposed rules addressing the application of section 6(c)'s ''newly awarded'' clause were unnecessary because the Supreme Court had already clearly addressed how to apply the clause in *Roberts,* 132 U.S. 1350. The fact that the Supreme Court has addressed the issue does not make this part of the rule unnecessary. The rule seeks to ensure a consistent application of section 6(c) in its entirety by addressing the proper application of both the ''newly awarded'' and ''currently receiving'' clauses. Codifying the Supreme Court's ruling in a regulation clarifies and informs all stakeholders of the proper interpretation of the provision. The rule also provides additional guidance with concrete examples of how the *Roberts* decision applies in a variety of factual situations. Accordingly, the Department believes the regulations implementing the ''newly awarded'' clause are important and has retained them in the final rule.

B. Application of ''Currently Receiving'' Clause

Several commenters objected generally to the proposed rules clarifying the application of the ''currently receiving'' clause of section 6(c). These commenters argued that the rule is premature because the Supreme Court declined to address the application of that clause in *Roberts,* 564 U.S. 1066, and to date, only two Courts of Appeals have addressed it. *See Boroski,* 700 F.3d 446, *Roberts,* 625 F.3d 1204. Some of these commenters expressed concerns that the rule would preempt further development through the courts on matters that were not considered at any stage of the *Roberts* litigation, namely, the computation of the minimum compensation rate under section 6(b), computation of weekly compensation payable for death under section 9(e), or the computation of a claimant's average weekly wage under section 10. On the other hand, one commenter commended the Department for using the rulemaking process to resolve legal issues arising from judicial statutory interpretations.

The Department is not required to wait for an issue to be adjudicated by the Supreme Court or any other court before it can promulgate regulations to administer the LHWCA. Indeed, litigation often demonstrates the need for an agency regulation. *See generally Smiley* v. *Citibank (South Dakota), N.A.,* 517 U.S. 735, 740–41 (1996) (fact that agency regulation was prompted by litigation does not undermine deference agency is due; ''That it was litigation which disclosed the need for the regulation is irrelevant.'') Here, the litigation in *Roberts, Boroski, Reposky, Lake* and other cases highlighted the need for regulations in this area. And this rule falls well within the scope of the Secretary of Labor's authority to prescribe rules and regulations necessary for the administration of the LHWCA. 33 U.S.C. 939(a).

Furthermore, as explained in the NPRM, the rule does not mark a change in the Director's longstanding interpretation and application of the maximum and minimum compensation provisions. 81 FR 58887. The Department has been following the Ninth Circuit's construction of the statute in its entirety since 2012, and aside from one small exception, had been following this construction since the Board's 2006 decision in *Reposky,* 40 BRBS 65. That exception involved cases in which the employee's disability was initially something other than permanent total—temporary total, permanent partial, or temporary partial—and in a later fiscal year became permanently totally disabling. In *Reposky,* the Department took the view that the employee's compensation amount should remain at the maximum rate in effect on the date of disability until the next October 1, at which time the employee would become subject to the new fiscal year's maximum rate. But the Ninth Circuit held in *Roberts* that the employee need not wait until the next October 1 and is instead immediately subject to the maximum rate in effect on the day he or she becomes permanently totally disabled under section 6(c)'s ''currently receiving'' clause. *Roberts,* 625 F.3d at 1208–09. The rule reflects this construction and clarifies the Department's longstanding interpretation of the other aspects of section 6(c).

One commenter contended that the rule is inconsistent with the Benefit Review Board's approach in *Pittman* v. *New Century Fabricators, Inc.,* 50 BRBS 17 (2016). In *Pittman,* the Board declined to extend the Supreme Court's reasoning in *Estate of Cowart* v. *Nicklos Drilling Co.,* 505 U.S. 469 (1992), to an issue not directly addressed by the Court. The Board held that ''absent a Supreme Court or circuit court decision to the contrary,'' prior Board decisions on the specific issue in the case established the precedent that bound the Board. 50 BRBS at 20. The comment argues that because the Supreme Court declined to address the application of the ''currently receiving'' clause in *Roberts,* the Board's approach in *Pittman* would dictate that the Department should not address the application of the clause. This ignores two facts. First, *Pittman* says nothing about the Department's authority to issue a rule. Second, while the Supreme Court did not interpret the ''currently receiving'' clause, the Ninth and Eleventh Circuits did, and this rule is consistent with both those rulings. *See Boroski,* 700 F.3d 446; *Roberts,* 625 F.3d 1204.

The rule is also consistent with the Board's decision in *Lake,* 47 BRBS 45, which adopted the same interpretation of section 6(c)'s ''currently receiving'' clause as the Ninth and Eleventh Circuits. In *Lake,* the Board held that a claimant is ''currently receiving compensation'' under section 6(c) ''during a period in which he is entitled to receive compensation, regardless of whether his employer actually pays it.'' *Id.* at 48. The Board also held that when a claimant's temporary total disability changes to permanent total disability during a fiscal year, the maximum rate in effect during that year applies immediately. *Id.* Thus, the rule's implementation of the section 6(c) ''currently receiving'' clause is consistent with the precedent from the Board and all courts of appeals that have ruled on the issue.

Two commenters stated that Congress did not intend the ''currently receiving'' clause to have any effect beyond the four-fiscal-year period after the 1972 amendments to the LHWCA, which annually increased the maximum compensation rate until it reached 200 percent of the national average weekly wage in 1975. They contended that Congress intended section 6(c) to apply only to claimants who were ''currently receiving compensation for permanent total disability or death'' during the four-year phase-in period.

Later statutory enactments, however, demonstrate that Congress intended to apply the ''currently receiving'' clause beyond the phase-in period. In 1984, Congress amended section 6 again to remove the phase-in provisions yet retained the ''currently receiving'' clause and reenacted it as section 6(c). If Congress had intended the outcome urged by the commenters—to have section 6(c)'s ''currently receiving clause'' apply only to the phase-in years—it could have drafted section 6(c) to say exactly that. Instead, Congress removed the phase-in provisions, making reference to them impossible. It nonetheless retained section 6(c) and changed the text of the provision to make clear that all claimants ''currently receiving compensation for permanent total disability or death'' are subject to the maximum rate based on the national average weekly wage as set under section 6(b)(3). Congress knew that, under section 6(b)(3), the national average weekly wage is determined anew every year, and thus must be deemed to have understood that the maximum rate applicable to those currently receiving compensation for permanent total disability or death would also change annually. *See generally Pucetti* v. *Ceres Gulf,* 24 BRBS 25, 31 (1990) (considering phase-in provisions in context of 1984 amendments and holding that ''during a yearly period when a given national average weekly wage is in effect, those 'currently receiving' benefits for permanent total disability or death are entitled to that year's new maximum.''); *see Dir., OWCP* v. *Perini North River Assoc.,* 459 U.S. 297 (1983) (where Congress amended the Act to extend coverage to land-based workers if they met a status test for maritime employees, it was presumed to know that the law already covered those injured on navigable waters, and its amendment of the Act was not intended to require those ''traditionally covered'' employees to also prove status).

Several commenters stated that section 6 does not allow for the maximum compensation rate applicable to a claimant to change each year, *i.e.,* that even a permanently totally disabled claimant is forever subject to the maximum rate in effect at the time of his injury. First, this is contrary to the text of the provision. Section 6 sets the maximum rate at 200 percent of the national average weekly wage, 33 U.S.C. 906(b)(1), requires a new national average weekly wage to be determined each October 1, 33 U.S.C. 906(b)(3), and provides that a given year's determination ''shall apply to employees . . . currently receiving compensation for permanent total disability'' during that year. As a claimant can be ''currently receiving compensation for permanent total disability'' in more than one year, it is apparent that he can be subject to a different national average weekly wage—and, thus, a different maximum rate as determined by that national average weekly wage—for each year in which he is being compensated for permanent total disability. Second, the commenter's approach is contrary to the legislative history of the 1972 Amendments. *See* H.R. Report 92–1441 at 3; S. Report 92–1125 at 5–6. Third, the Board rejected this very argument in *Marko* v. *Morris Boney, Inc.,* 23 BRBS 353 (1990), a decision the Board reaffirmed in *Lake,* 47 BRBS at 48–50. Finally, this approach would treat those receiving compensation for permanent total disability or death the same as those receiving compensation for any other type of disability, while the statute clearly treats permanent total disability and death differently.

C. Impact on Average Weekly Wage Calculations

A few commenters expressed concern that the rule could adversely affect how an individual's average weekly wage is calculated under section 10, 33 U.S.C. 910. The Department does not intend this rule to govern the basic average weekly wage calculation necessary to determine the amount of compensation payable. As explained in the NPRM, ''[t]he proposed regulations do not govern general compensation calculations.'' 81 FR 58881. Instead, the maximum and minimum regulations apply only once that calculation (called the ''calculated compensation rate'' in the rule) is made.

D. Application of the Rule to Existing Injuries, Disabilities, and Deaths

Two commenters stated that the Department should limit the proposed rule's applicability to future injuries. They contended applying the new rules to currently existing matters could lead to large additional liabilities (which are not fully secured) if claimants with pending cases seek increased compensation under the new standards.

In general, an agency may apply a new regulation to existing matters when it does not change the legal landscape. Thus, a rule that ''is substantively consistent with prior regulations or prior agency practices, and has been accepted by all Courts of Appeals to consider the issue,'' may be applied to matters pending at the time the regulation is promulgated. *Nat'l Mining Assoc.* v. *Dept. of Labor,* 292 F.3d 849, 860 (D.C. Cir. 2002). Conversely, agencies are not required ''to apply rules retroactively even where it would be permissible for them to do so.'' *Grant Medical Center* v. *Hargan,* 875 F.3d 701, 706 (D.C. Cir. 2017).

Under these principles, the Department believes it could choose to apply the rule to all matters, including those injuries, disabilities, and deaths occurring before the rule's effective date. The Department's interpretation of the ''newly awarded'' and ''currently receiving'' clauses is longstanding (since at least 1979 for the former and 2012 for the latter) and fully consistent with all Court of Appeals and Supreme Court precedent. *See Nat'l Mining Assoc.,* 292 F.3d at 860. The rules implementing the minimum compensation provisions and section 10(f) similarly ensconce the Department's longstanding positions and are not inconsistent with any Court of Appeals precedent.

But given the commenters' expressed concern, the Department has decided to apply the rule only to injuries and deaths occurring after the rule's effective date and has added a clause to § 702.802(a) to make this clear. Because the current case law interpreting these provisions and the rule reach the same conclusions, the Department sees little difference in applying the rule retroactively and applying it only prospectively. The Department makes this change, however, to emphasize its intent not to upset any settled expectations the regulated parties may hold.

Despite the Department's decision on this issue, parties should be aware that existing case law construing section 6(c) still governs injuries, disabilities and deaths occurring before the rule's effective date. The Department will continue to administer claims in accordance with those precedents. *Rivers* v. *Roadway Exp., Inc.,* 511 U.S. 298, 312–313 and n.12 (''A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction,'' and thus ''of what the statute has meant continuously since the date when it became law.'').

Finally, the examples in the regulations continue to use maximum and minimum compensation rates for injuries or deaths that occurred in fiscal years prior to the effective date of this rule. This is done out of necessity; the Department cannot calculate with any certainty future maximum and minimum compensation amounts because they are based on the NAWW, which is determined anew each year. The Department believes using concrete numbers from past fiscal years will better inform the regulated parties about how the regulations should be applied. Of course, because the examples apply the current state of the law, they may be instructive in calculating compensation for disabilities and deaths occurring before the rule's effective date even though not explicitly governed by the rule.

IV. Collection of Information (Subject to the Paperwork Reduction Act)

This rulemaking imposes no new collections of information.

V. Executive Orders 12866 and 13563 (Regulatory Planning and Review)

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Department has considered this rule with these principles in mind and has concluded that the regulated community will benefit from this regulation.

This rule will provide the parties with greater guidance on applying the Act's maximum and minimum compensation provisions and section 10(f) adjustments in determining the amount of disability compensation or death benefits payable. By clarifying how these provisions apply, the rule will also promote consistency so that similarly situated claimants receive similar compensation or death benefits. In addition, the rule will benefit the regulated community by forestalling further litigation over the ''currently receiving'' clause in cases governed by this rule. The Department also sees no countervailing burden—economic or otherwise—other than those imposed by the statute itself that would counsel against promulgating this rule.

One commenter generally stated that the Department had not fully addressed the proposed rule's financial impact on the industry or compensation claimants, noting the importance of predictability for reserving funds to cover compensation payments. The final rule sets out clear standards for applying the LHWCA's maximum and minimum compensation provisions and will thus provide the predictability the commenter seeks.

Finally, because this is not a ''significant regulatory action'' within the meaning of Executive Order 12866, the Office of Management and Budget waived its review.

VI. Regulatory Flexibility Act and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)

The Regulatory Flexibility Act of 1980, as amended (5 U.S.C. 601 *et seq.*), requires an agency to prepare a regulatory flexibility analysis when it proposes regulations that will have ''a significant economic impact on a substantial number of small entities'' or to certify that the proposed regulations will have no such impact, and to make the analysis or certification available for public comment.

For the reasons set forth in the NPRM, the Department determined that a complete regulatory flexibility analysis was not necessary, and certified that the proposed rules would not have a significant economic impact on a substantial number of small entities. 81 FR 58887. The Department invited public comment on the certification and delivered a copy of the certification to the chief counsel for Advocacy of the Small Business Administration. *See generally* 5 U.S.C. 605.

The Chief Counsel for Advocacy has not filed comments on the certification. Although one commenter generally stated that the Department had not quantified the economic impact on industry or the benefit to Longshore employees, the commenter provided no additional information regarding the rule's potential impact on small entities. Because the comments provide no basis for departing from its prior conclusion, the Department again certifies that this rule will not have a significant economic impact on a substantial number of small entities. As a result, no regulatory flexibility analysis is required.

VII. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector, ''other than to the extent that such regulations incorporate requirements specifically set forth in law.'' For purposes of the Unfunded Mandates Reform Act, this rule does not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, or increased expenditures by the private sector of more than $100,000,000.

XIII. Executive Order 13132 (Federalism)

The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have ''federalism implications.'' The rule will not ''have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

IX. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

List of Subjects in 20 CFR Part 702

Administrative practice and procedure, Claims, Longshore and harbor workers, Maximum compensation rates, Minimum compensation rates, Workers' compensation.

For the reasons stated in the preamble, the Department of Labor amends 20 CFR part 702 as follows:

PART 702—ADMINISTRATION AND PROCEDURE

■ 1. The authority citation for part 702 is revised to read as follows:

Authority: 5 U.S.C. 301, and 8171 *et seq.;* 33 U.S.C. 901 *et seq.;* 42 U.S.C. 1651 *et seq.;* 43 U.S.C. 1333; Reorganization Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; Secretary's Order 10–2009, 74 FR 58834.

■ 2. Add subparts G and H to read as follows:

Subpart G—Section 10(f) Adjustments

Sec.
702.701 What is an annual section 10(f) adjustment and how is it calculated?

Subpart H—Maximum and Minimum Compensation Rates

General

Sec.
702.801 Scope and intent of this subpart.
702.802 Applicability of this subpart.
702.803 Definitions.
702.804 What are the weekly maximum and minimum rates for each fiscal year and how are they calculated?

Maximum Rates

702.805 What weekly maximum rates apply to compensation for permanent partial disability, temporary total disability, and temporary partial disability?
702.806 What weekly maximum rates apply to compensation for permanent total disability?
702.807 What weekly maximum rates apply to death benefits?

Minimum Rates

702.808 What weekly minimum rates apply to compensation for partial disability?
702.809 What weekly minimum rates apply to compensation for temporary total disability?
702.810 What weekly minimum rates apply to compensation for permanent total disability?
702.811 What weekly minimum rates apply to death benefits?

Subpart G—Section 10(f) Adjustments

§ 702.701 What is an annual section 10(f) adjustment and how is it calculated?

(a) Claimants receiving compensation for permanent total disability or death benefits are entitled to section 10(f) adjustments each fiscal year. A section 10(f) adjustment cannot decrease the compensation or death benefits payable to any claimant.

(b) The section 10(f) adjustment for a given fiscal year is the lower of:

(1) The percentage by which the new fiscal year's national average weekly wage exceeds the prior fiscal year's national average weekly wage as determined by the Department (*see* § 702.804(b)); or

(2) 5 percent.

(c) Section 10(f) percentage increases are applied each October 1 to the amount of compensation or death benefits payable in the prior fiscal year.

(d) In applying section 10(f) adjustments—

(1) Calculations are rounded to the nearest dollar; and

(2) No adjustment is made if the calculated amount is less than one dollar.

(e) A section 10(f) adjustment must not increase a claimant's weekly compensation or death benefits beyond the applicable fiscal year's maximum rate.

(f) Section 10(f) adjustments do not apply to compensation for temporary or partial disability.

Subpart H—Maximum and Minimum Compensation Rates

General

§ 702.801 Scope and intent of this subpart.

(a) This subpart implements the Act's provisions that affect the maximum and minimum rates of compensation and death benefits payable to employees and survivors. These statutory provisions include sections 6(b) and (c), and 9(e). 33 U.S.C. 906(b), (c); 909(e). It is intended that these statutory provisions be construed as provided in this subpart.

(b) These regulations implement section 6(c), 33 U.S.C. 906(c), based on the following concepts:

(1) An employee is ''newly awarded compensation'' when he or she first becomes disabled due to an injury;

(2) A survivor is ''newly awarded compensation'' on the date the employee died; and

(3) An employee or survivor is ''currently receiving compensation'' when compensation for permanent total disability or death benefits is payable, regardless of when payment is actually made.

§ 702.802 Applicability of this subpart.

(a) This subpart applies to all compensation and death benefits paid under the Act as a result of injuries or deaths occurring on or after May 21, 2018 with the following exceptions:

(1) Amounts payable under an approved settlement (*see* 33 U.S.C. 908(i));

(2) Amounts paid for an employee's death to the Special Fund (*see* 33 U.S.C. 944(c)(1));

(3) Any payments for medical expenses (*see* 33 U.S.C. 907); and

(4) Any other lump sum payment of compensation or death benefits, including aggregate death benefits paid when a survivor remarries (*see* 33 U.S.C. 909(b)) or aggregate compensation paid under a commutation (*see* 33 U.S.C. 909(g)).

(b) The rules in this subpart governing minimum disability compensation and death benefits do not apply to claims arising under the Defense Base Act, 42 U.S.C. 1651 (*see* 42 U.S.C. 1652(a); 20 CFR 704.103).

§ 702.803 Definitions.

The following definitions apply to this subpart:

Calculated compensation rate means the amount of weekly compensation for total disability or death that a claimant would be entitled to if there were no maximum rates, minimum rates, or section 10(f) adjustments.

Date of disability. (1) Except as provided in paragraph (2) of this definition, the date of disability is the date on which the employee first became incapable, because of an injury, of earning the same wages the employee was receiving at the time of the injury.

(2) Exceptions:

(i) For scheduled permanent partial disability benefits under 33 U.S.C. 908(c)(1)–(20) that are not preceded by a permanent total, temporary total, or temporary partial disability resulting from the same injury, the date of disability is the date on which the employee first becomes permanently impaired by the injury to the scheduled member.

(ii) For an occupational disease that does not immediately result in disability, the date of disability is the date on which the employee becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between his or her employment, the disease, and the disability.

(iii) For any disability lasting 14 or fewer days, the date of disability is 4 days after the date on which the employee first became incapable, because of an injury, of earning the same wages the employee was receiving at the time of the injury.

Fiscal year or *FY* means the period from October 1 of a calendar year until September 30 of the following calendar year.

Maximum rate means the maximum weekly compensation rate calculated by the Department for a given fiscal year as described in § 702.804(b).

Minimum rate means the minimum weekly compensation rate calculated by the Department for a given fiscal year as described in § 702.804(c).

Section 10(f) adjustment means the annual increase that certain claimants receiving compensation for permanent total disability or death are entitled to each fiscal year under 33 U.S.C. 910(f) and as calculated by the Department as described in § 702.701(b).

§ 702.804 What are the weekly maximum and minimum rates for each fiscal year and how are they calculated?

(a) For each fiscal year, the Department must determine a weekly maximum and minimum compensation rate. These amounts are called the maximum and minimum rates in this subchapter. In combination with other factors, these rates are used to determine compensation payments under the Act.

(b) The maximum compensation rate in effect for a given fiscal year is 200% of the national average weekly earnings of production or nonsupervisory workers on private, nonagricultural payrolls, as calculated by the Department, for the first three quarters of the preceding fiscal year.

(c) The minimum compensation rate in effect for a given fiscal year is 50% of the national average weekly earnings of production or nonsupervisory workers on private, nonagricultural payrolls, as calculated by the Department, for the first three quarters of the preceding fiscal year.

Maximum Rates

§ 702.805 What weekly maximum rates apply to compensation for permanent partial disability, temporary total disability, and temporary partial disability?

(a) The maximum rate in effect on the date of disability applies to all compensation payable for permanent partial disability, temporary partial disability, and temporary total disability.

(b) Examples:

(1) Employee *A* suffers a covered workplace injury on April 1, 2000, is temporarily totally disabled from that day through June 4, 2002, and is

thereafter permanently partially disabled. All compensation payable for *A's* disability is subject to the FY 2000 maximum rate.

(2) Employee *B* suffers a covered workplace injury on August 25, 2010, and is temporarily totally disabled until September 25, 2010, when he returns to work. On January 3, 2011, he again becomes temporarily totally disabled from the same injury. He ceases work and is unable to return until November 22, 2012. All compensation payable for *B's* disability is subject to the FY 2010 maximum rate.

(3) Employee *C* retires on May 6, 2011. She discovers on November 10, 2012, that she has a compensable occupational disease. All compensation payable for *C's* occupational disease is subject to the FY 2013 maximum rate. *See* § 702.601(b) (occupational diseases discovered post-retirement are compensated as permanent partial disabilities).

§ 702.806 What weekly maximum rates apply to compensation for permanent total disability?

(a) The maximum rate in effect on the date that the employee became totally and permanently disabled applies to all compensation payable for permanent total disability during that fiscal year.

(b) For all periods the employee is permanently and totally disabled in subsequent fiscal years, the weekly compensation payable is subject to each subsequent year's maximum rate.

(c) If a claimant is receiving compensation for permanent total disability at the maximum rate for the current fiscal year, but the next fiscal year's maximum rate will be higher than the claimant's calculated compensation rate, the claimant's compensation for the next fiscal year will increase by the amount of the 10(f) adjustment, subject to the maximum rate for the next fiscal year.

(d) Examples:

(1) Employee *A* suffers a covered workplace injury on April 1, 2000, and is permanently and totally disabled from that date forward. *A's* compensation for the period from April 1, 2000, until September 30, 2000, is subject to the FY 2000 maximum rate. Beginning October 1, 2000, *A's* compensation for FY 2001 is subject to the FY 2001 maximum rate, compensation for FY 2002 is subject to the FY 2002 maximum rate, *etc.*

(2) Employee *B* suffers a covered workplace injury on April 1, 2000, is temporarily totally disabled from that day through June 3, 2002, and is thereafter permanently totally disabled. *B's* compensation for the period from April 1, 2000, through June 3, 2002, is subject to the FY 2000 maximum rate (*see* § 702.805(a)). *B's* compensation for the period from June 4, 2002, through September 30, 2002, is subject to the FY 2002 maximum rate. Beginning October 1, 2002, *B's* compensation for FY 2003 is subject to the FY 2003 maximum rate, compensation for FY 2004 is subject to the FY 2004 maximum rate, *etc.*

(3) Employee *C* suffers a covered workplace injury in FY 2009 and is permanently totally disabled from that day forward. He was earning $1,950.00 a week when he was injured, making his calculated compensation rate $1,300.00 ($1,950.00 × 2 ÷ 3). His calculated compensation rate exceeds the maximum rate from FY 2009–2012; thus, his compensation is limited to each year's maximum rate. In FY 2013, *C's* calculated compensation rate of $1,300.00 is, for the first time, less than the FY 2013 maximum rate of $1,325.18. Applying the FY 2013 2.31% section 10(f) adjustment to *C's* FY 2012 compensation rate of $1,295.20 results in a compensation rate of $1,325.00 ($1,295.20 × .0231 = $29.92, rounded to the nearest cent; $1,295.20 + $29.92 = $1,325.12, rounded to the nearest dollar). This amount falls just below the FY 2013 maximum rate of $1,325.18. Thus, *C's* benefit rate for FY 2013 is $1,325.00, and is not limited by the maximum rate.

§ 702.807 What weekly maximum rates apply to death benefits?

(a) The maximum rate in effect on the date that the employee died applies to all death benefits payable during that fiscal year.

(b) Aggregate weekly death benefits paid to all eligible survivors during the fiscal year in which the employee died must not exceed the lower of—

(1) The maximum rate for that fiscal year; or

(2) The employee's average weekly wages.

(c) For subsequent fiscal years—

(1) Aggregate weekly death benefits paid during each subsequent fiscal year are subject to each subsequent year's maximum rate.

(2) If death benefits were paid in the first year at the employee's full average weekly wage under paragraph (b)(2) of this section, the aggregate weekly death benefits paid for each subsequent year may not exceed the current benefit rate plus the subsequent year's section 10(f) adjustment (*see* § 702.701).

(d) Post-retirement occupational diseases: Notwithstanding paragraphs (a) through (c) of this section, if an employee's death results from an occupational disease where the date of disability occurred after the employee voluntarily retired—

(1) Aggregate weekly death benefits paid to all eligible survivors during the fiscal year in which the employee died must not exceed the lower of:

(i) The maximum rate for that fiscal year; or

(ii) One fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.

(2) For subsequent fiscal years—

(i) Aggregate weekly death benefits paid during each subsequent fiscal year are subject to each subsequent year's maximum rate.

(ii) If death benefits were paid in the first year at 1/52 part of the employee's average annual earnings prior to retirement under paragraph (d)(1)(ii) of this section, the aggregate weekly death benefits paid for each subsequent year may not exceed the current benefit rate plus the subsequent year's section 10(f) adjustment (*see* § 702.701).

(e) Examples:

(1) Employee *A* suffers a covered workplace injury on May 1, 2013, and is permanently and totally disabled from that date until August 1, 2014, when he dies due to the injury. He has one eligible survivor and his average weekly wage at the time of injury was $3,000.00. The calculated compensation rate for *A's* survivor is $1,500.00 (*i.e.,* 50% of *A's* average weekly wage). *A's* weekly survivor's benefits for the period from August 2, 2014, to September 30, 2014, are limited to the FY 2014 maximum rate of $1,346.68. Beginning October 1, 2014, *A's* survivor's benefits for FY 2015 are subject to the FY 2015 maximum rate, benefits for FY 2016 are subject to the FY 2016 maximum rate, *etc.*

(2) Employee *B* suffers a covered workplace injury and dies on December 1, 2012. She has one eligible survivor and her average weekly wage was $300.00. Because *B's* average weekly wage of $300.00 falls below the FY 2013 national average weekly wage of $662.59, death benefits are calculated at 50% of that national average wage (*see* 33 U.S.C. 909(e)). This yields a calculated compensation rate of $331.30. But because this rate exceeds *B's* actual average weekly wages, weekly death benefits payable during FY 2013 are limited to $300.00. In FY 2014, *B's* survivor is entitled to a 1.62% section 10(f) adjustment, resulting in weekly death benefits of $305.00 ($300.00 × .0162 = $4.86; $300.00 + $4.86 = $304.86, rounded to the nearest dollar). *B's* survivor would continue to receive section 10(f) adjustments in subsequent fiscal years.

(3) Employee *C* retired on February 1, 1998. During his last year of employment, he earned $23,000. He discovers on April 15, 2002, that he has a compensable occupational disease resulting in a 50% permanent impairment. *See* § 702.601(b). Because he retired more than one year before this date, his payrate for calculating compensation is the FY 2002 national average weekly wage, or $483.04. *See* § 702.603(b). He is entitled to weekly compensation of $161.01 ($483.04 × 2 ÷ 3 × 50%). *C* dies from the disease on June 1, 2015, leaving two survivors. The payrate for calculating death benefits is the FY 2015 national average weekly wage, or $688.51. *See* § 702.604(b). The survivors' aggregate calculated compensation rate is $459.01 ($688.51 × 2 ÷ 3). But because compensation cannot exceed 1⁄52 part of *C's* last year of earnings, aggregate weekly death benefits payable for FY 2015 are limited to $442.31 ($23,000 ÷ 52). For FY 2016, *C's* survivors are entitled to a 2.10% section 10(f) adjustment resulting in weekly death benefits of $452.00 ($442.31 × .021 = $9.29, rounded to the nearest cent; $442.31 + $9.29 = $451.60, rounded to the nearest dollar). *C's* survivors would continue to receive section 10(f) adjustments in subsequent fiscal years.

Minimum Rates

§ 702.808 What weekly minimum rates apply to compensation for partial disability?

There is no minimum rate for compensation paid for partial disability, whether temporary or permanent.

§ 702.809 What weekly minimum rates apply to compensation for temporary total disability?

(a) The minimum compensation payable for temporary total disability is the lower of:

(1) The minimum rate in effect on the date of disability, or

(2) The employee's average weekly wage on the date of disability.

(b) Example: Employee *A* suffers a covered workplace injury on May 6, 2014. He is temporarily totally disabled until November 6, 2015, when he returns to work. His average weekly wages at the time of disability were $500.00. Because his calculated compensation rate (*i.e.,* 66 and ⅔% of $500.00, or $333.34) is lower than the $336.67 FY 2014 minimum rate, *A's* compensation is raised to $336.67 for the entire period of his disability.

§ 702.810 What weekly minimum rates apply to compensation for permanent total disability?

(a) The weekly minimum compensation payable for the fiscal year in which the employee became permanently and totally disabled is the lower of:

(1) The minimum rate in effect on the date of disability, or

(2) The employee's average weekly wage on the date of disability.

(b) For all periods the employee is permanently and totally disabled in subsequent fiscal years, the weekly minimum compensation payable is the lower of:

(1) Each subsequent fiscal year's minimum rate, or

(2) The employee's average weekly wage on the date of disability.

(c) Example: Employee *A* suffers a covered workplace injury on April 1, 2003, and is permanently totally disabled from that day forward. He was earning $250.00 a week when he was injured. His calculated compensation rate is $166.67 ($250 × 2 ÷ 3). The FY 2003 minimum rate is $249.14. Because *A's* calculated compensation rate is below the FY 2003 minimum rate, and his actual weekly wage is above that rate, he is entitled to compensation at the minimum rate of $249.14 from April 1, 2003, to September 30, 2003. The FY 2004 minimum rate is $257.70. Because *A's* actual weekly wages on the date of disability are lower than the FY 2004 minimum rate, *A's* minimum weekly compensation rate for FY 2004 is $250.00. His weekly compensation rate for FY 2004, however, is higher because of a section 10(f) adjustment. For FY 2004, *A's* compensation rate is increased by a 3.44% section 10(f) adjustment, raising his compensation level to $258.00 ($249.14 × .0344 = $8.57; $249.14 + $8.57 = $257.71, rounded to the nearest dollar).

§ 702.811 What weekly minimum rates apply to death benefits?

(a) The average weekly wage used to compute death benefits is the greater of—

(1) The deceased employee's average weekly wages; or

(2) The national average weekly wage in effect at the time of the employee's death.

(b) The weekly minimum rate does not apply to death benefits.

Signed at Washington, DC, on April 13, 2018.

Julia K. Hearthway,

Director, Office of Workers' Compensation Programs.

[FR Doc. 2018–08133 Filed 4–18–18; 8:45 am]

BILLING CODE 4510–CR–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 56 and 57

[Docket No. MSHA–2014–0030]

RIN 1219–AB87

Examinations of Working Places in Metal and Nonmetal Mines

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Announcement of public meetings.

SUMMARY: The Mine Safety and Health Administration (MSHA) is announcing the dates and locations of additional public stakeholder meetings on the Agency's standards for Examinations of Working Places in Metal and Nonmetal Mines.

DATES: The meeting dates and locations are listed in the **SUPPLEMENTARY INFORMATION** section of this document.

ADDRESSES: *Federal Register Publications:* Access rulemaking documents electronically at *http://www.msha.gov/regsinfo.htm* or *http://www.regulations.gov* [Docket Number: MSHA–2014–0030].

FOR FURTHER INFORMATION CONTACT: Sheila A. McConnell, Director, Office of Standards, Regulations, and Variances, MSHA, at *mcconnell.sheila.a@dol.gov* (email), 202–693–9440 (voice), or 202–693–9441 (fax). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

I. Stakeholder Meetings

On April 9, 2018, MSHA published a document (83 FR 15055) announcing six stakeholder meetings. To expand stakeholder outreach, MSHA has scheduled another meeting in Seattle, Washington and two video teleconference (VTC) meetings to be broadcast to seven local offices from MSHA headquarters in Arlington, VA. For the convenience of the public, the complete list of stakeholder meetings is included in this document.