

1 **WORKERS' COMPENSATION BENEFITS -**
2 **SOCIAL SECURITY OFFSET**

3 2010 GENERAL SESSION

4 STATE OF UTAH

5 **Chief Sponsor: Wayne A. Harper**

6 Senate Sponsor: Karen Mayne

8 **LONG TITLE**

9 **General Description:**

10 This bill modifies the Workers' Compensation Act to remove a reduction in workers'
11 compensation benefits on the basis of the receipt of Social Security retirement benefits.

12 **Highlighted Provisions:**

13 This bill:

- 14 ▶ repeals the reduction in workers' compensation benefits on the basis of the receipt
- 15 of Social Security retirement benefits;
- 16 ▶ provides intent language;
- 17 ▶ requires the Labor Commission to report to the Business and Labor Interim
- 18 Committee; and
- 19 ▶ makes technical amendments.

20 **Monies Appropriated in this Bill:**

21 None

22 **Other Special Clauses:**

23 This bill provides for retrospective operation to correspond to the date a Utah Supreme
24 Court case addressing the reduction in benefits was issued.

25 **Utah Code Sections Affected:**

26 AMENDS:

27 **34A-2-413**, as last amended by Laws of Utah 2009, Chapter 158

28 **Uncodified Material Affected:**

29 ENACTS UNCODIFIED MATERIAL

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Be it enacted by the Legislature of the state of Utah:

Section 1. Section **34A-2-413** is amended to read:

34A-2-413. Permanent total disability -- Amount of payments -- Rehabilitation.

(1) (a) In the case of a permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section.

(b) To establish entitlement to permanent total disability compensation, the employee must prove by a preponderance of evidence that:

(i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;

(ii) the employee is permanently totally disabled; and

(iii) the industrial accident or occupational disease is the direct cause of the employee's permanent total disability.

(c) To establish that an employee is permanently totally disabled the employee must prove by a preponderance of the evidence that:

(i) the employee is not gainfully employed;

(ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;

(iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational disease that is the basis for the employee's permanent total disability claim; and

(iv) the employee cannot perform other work reasonably available, taking into consideration the employee's:

(A) age;

(B) education;

(C) past work experience;

- 58 (D) medical capacity; and
- 59 (E) residual functional capacity.
- 60 (d) Evidence of an employee's entitlement to disability benefits other than those
- 61 provided under this chapter and Chapter 3, Utah Occupational Disease Act, if relevant:
- 62 (i) may be presented to the commission;
- 63 (ii) is not binding; and
- 64 (iii) creates no presumption of an entitlement under this chapter and Chapter 3, Utah
- 65 Occupational Disease Act.
- 66 (e) In determining under Subsections (1)(b) and (c) whether an employee cannot
- 67 perform other work reasonably available, the following may not be considered:
- 68 (i) whether the employee is incarcerated in a facility operated by or contracting with a
- 69 federal, state, county, or municipal government to house a criminal offender in either a secure
- 70 or nonsecure setting; or
- 71 (ii) whether the employee is not legally eligible to be employed because of a reason
- 72 unrelated to the impairment or combination of impairments.
- 73 (2) For permanent total disability compensation during the initial 312-week
- 74 entitlement, compensation is 66-2/3% of the employee's average weekly wage at the time of
- 75 the injury, limited as follows:
- 76 (a) compensation per week may not be more than 85% of the state average weekly
- 77 wage at the time of the injury;
- 78 (b) (i) subject to Subsection (2)(b)(ii), compensation per week may not be less than the
- 79 sum of \$45 per week and:
- 80 (A) \$5 for a dependent spouse; and
- 81 (B) \$5 for each dependent child under the age of 18 years, up to a maximum of four
- 82 dependent minor children; and
- 83 (ii) the amount calculated under Subsection (2)(b)(i) may not exceed:
- 84 (A) the maximum established in Subsection (2)(a); or
- 85 (B) the average weekly wage of the employee at the time of the injury; and

86 (c) after the initial 312 weeks, the minimum weekly compensation rate under
87 Subsection (2)(b) is 36% of the current state average weekly wage, rounded to the nearest
88 dollar.

89 (3) This Subsection (3) applies to claims resulting from an accident or disease arising
90 out of and in the course of the employee's employment on or before June 30, 1994.

91 (a) The employer or its insurance carrier is liable for the initial 312 weeks of
92 permanent total disability compensation except as outlined in Section 34A-2-703 as in effect
93 on the date of injury.

94 (b) The employer or its insurance carrier may not be required to pay compensation for
95 any combination of disabilities of any kind, as provided in this section and Sections
96 34A-2-410 through 34A-2-412 and Part 5, Industrial Noise, in excess of the amount of
97 compensation payable over the initial 312 weeks at the applicable permanent total disability
98 compensation rate under Subsection (2).

99 (c) The Employers' Reinsurance Fund shall for an overpayment of compensation
100 described in Subsection (3)(b), reimburse the overpayment:

101 (i) to the employer or its insurance carrier; and

102 (ii) out of the Employers' Reinsurance Fund's liability to the employee.

103 (d) After an employee receives compensation from the employee's employer, its
104 insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities
105 amounting to 312 weeks of compensation at the applicable permanent total disability
106 compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total
107 disability compensation.

108 (e) Employers' Reinsurance Fund payments shall commence immediately after the
109 employer or its insurance carrier satisfies its liability under this Subsection (3) or Section
110 34A-2-703.

111 (4) This Subsection (4) applies to claims resulting from an accident or disease arising
112 out of and in the course of the employee's employment on or after July 1, 1994.

113 (a) The employer or its insurance carrier is liable for permanent total disability

114 compensation.

115 (b) The employer or its insurance carrier may not be required to pay compensation for
116 any combination of disabilities of any kind, as provided in this section and Sections
117 34A-2-410 through 34A-2-412 and Part 5, Industrial Noise, in excess of the amount of
118 compensation payable over the initial 312 weeks at the applicable permanent total disability
119 compensation rate under Subsection (2).

120 (c) The employer or its insurance carrier may recoup the overpayment of
121 compensation described in Subsection (4) by reasonably offsetting the overpayment against
122 future liability paid before or after the initial 312 weeks.

123 [~~(5) (a) Subject to Subsection (5)(b) and notwithstanding the minimum rate
124 established in Subsection (2), an employer, its insurance carrier, or the Employers'
125 Reinsurance Fund, after an employee receives compensation from the employer or the
126 employer's insurance carrier for any combination of disabilities amounting to 312 weeks of
127 compensation at the applicable total disability compensation rate, shall reduce the
128 compensation payable:]~~

129 [~~(i) to the extent allowable by law;]~~

130 [~~(ii) by the dollar amount of 50% of the Social Security retirement benefits the
131 employee is eligible to receive for a four week period as of the first day the employee is
132 eligible to receive a Social Security retirement benefit; and]~~

133 [~~(iii) that the employee receives during the same period as the Social Security
134 retirement benefits:]~~

135 [~~(b) (i) An employer, its insurance carrier, or the Employers' Reinsurance Fund may
136 not reduce compensation payable under this section on or after May 5, 2008, to an employee
137 by an amount related to a cost-of-living increase to the Social Security retirement benefit that
138 the employee is first eligible to receive for a four week period, notwithstanding whether the
139 employee is injured on or before May 4, 2008:]~~

140 [~~(ii) For purposes of an employee whose compensation payable is reduced under this
141 Subsection (5) on or before May 4, 2008, the reduction is limited to the amount of the~~

142 ~~reduction as of May 4, 2008.]~~

143 ~~[(6)] (5)~~ (a) A finding by the commission of permanent total disability is not final,
144 unless otherwise agreed to by the parties, until:

145 (i) an administrative law judge reviews a summary of reemployment activities
146 undertaken pursuant to Chapter 8a, Utah Injured Worker Reemployment Act;

147 (ii) the employer or its insurance carrier submits to the administrative law judge:

148 (A) a reemployment plan as prepared by a qualified rehabilitation provider reasonably
149 designed to return the employee to gainful employment; or

150 (B) notice that the employer or its insurance carrier will not submit a plan; and

151 (iii) the administrative law judge, after notice to the parties, holds a hearing, unless
152 otherwise stipulated, to:

153 (A) consider evidence regarding rehabilitation; and

154 (B) review any reemployment plan submitted by the employer or its insurance carrier
155 under Subsection ~~[(6)] (5)~~(a)(ii).

156 (b) Before commencing the procedure required by Subsection ~~[(6)] (5)~~(a), the
157 administrative law judge shall order:

158 (i) the initiation of permanent total disability compensation payments to provide for
159 the employee's subsistence; and

160 (ii) the payment of any undisputed disability or medical benefits due the employee.

161 (c) Notwithstanding Subsection ~~[(6)] (5)~~(a), an order for payment of benefits
162 described in Subsection ~~[(6)] (5)~~(b) is considered a final order for purposes of Section
163 34A-2-212.

164 (d) The employer or its insurance carrier shall be given credit for any disability
165 payments made under Subsection ~~[(6)] (5)~~(b) against its ultimate disability compensation
166 liability under this chapter or Chapter 3, Utah Occupational Disease Act.

167 (e) An employer or its insurance carrier may not be ordered to submit a reemployment
168 plan. If the employer or its insurance carrier voluntarily submits a plan, the plan is subject to
169 Subsections ~~[(6)] (5)~~(e)(i) through (iii).

170 (i) The plan may include, but not require an employee to pay for:

171 (A) retraining;

172 (B) education;

173 (C) medical and disability compensation benefits;

174 (D) job placement services; or

175 (E) incentives calculated to facilitate reemployment.

176 (ii) The plan shall include payment of reasonable disability compensation to provide
177 for the employee's subsistence during the rehabilitation process.

178 (iii) The employer or its insurance carrier shall diligently pursue the reemployment
179 plan. The employer's or insurance carrier's failure to diligently pursue the reemployment plan
180 is cause for the administrative law judge on the administrative law judge's own motion to
181 make a final decision of permanent total disability.

182 (f) If a preponderance of the evidence shows that successful rehabilitation is not
183 possible, the administrative law judge shall order that the employee be paid weekly permanent
184 total disability compensation benefits.

185 (g) If a preponderance of the evidence shows that pursuant to a reemployment plan, as
186 prepared by a qualified rehabilitation provider and presented under Subsection [~~(6)~~] (5)(e), an
187 employee could immediately or without unreasonable delay return to work but for the
188 following, an administrative law judge shall order that the employee be denied the payment of
189 weekly permanent total disability compensation benefits:

190 (i) incarceration in a facility operated by or contracting with a federal, state, county, or
191 municipal government to house a criminal offender in either a secure or nonsecure setting; or

192 (ii) not being legally eligible to be employed because of a reason unrelated to the
193 impairment or combination of impairments.

194 [~~(7)~~] (6) (a) The period of benefits commences on the date the employee became
195 permanently totally disabled, as determined by a final order of the commission based on the
196 facts and evidence, and ends:

197 (i) with the death of the employee; or

- 198 (ii) when the employee is capable of returning to regular, steady work.
- 199 (b) An employer or its insurance carrier may provide or locate for a permanently
200 totally disabled employee reasonable, medically appropriate, part-time work in a job earning at
201 least minimum wage, except that the employee may not be required to accept the work to the
202 extent that it would disqualify the employee from Social Security disability benefits.
- 203 (c) An employee shall:
- 204 (i) fully cooperate in the placement and employment process; and
- 205 (ii) accept the reasonable, medically appropriate, part-time work.
- 206 (d) In a consecutive four-week period when an employee's gross income from the work
207 provided under Subsection [~~(7)~~] (6)(b) exceeds \$500, the employer or insurance carrier may
208 reduce the employee's permanent total disability compensation by 50% of the employee's
209 income in excess of \$500.
- 210 (e) If a work opportunity is not provided by the employer or its insurance carrier, a
211 permanently totally disabled employee may obtain medically appropriate, part-time work
212 subject to the offset provisions of Subsection [~~(7)~~] (6)(d).
- 213 (f) (i) The commission shall establish rules regarding the part-time work and offset.
- 214 (ii) The adjudication of disputes arising under this Subsection [~~(7)~~] (6) is governed by
215 Part 8, Adjudication.
- 216 (g) The employer or its insurance carrier has the burden of proof to show that
217 medically appropriate part-time work is available.
- 218 (h) The administrative law judge may:
- 219 (i) excuse an employee from participation in any work:
- 220 (A) that would require the employee to undertake work exceeding the employee's:
- 221 (I) medical capacity; or
- 222 (II) residual functional capacity; or
- 223 (B) for good cause; or
- 224 (ii) allow the employer or its insurance carrier to reduce permanent total disability
225 benefits as provided in Subsection [~~(7)~~] (6)(d) when reasonable, medically appropriate,

226 part-time work is offered, but the employee fails to fully cooperate.

227 ~~[(8)]~~ (7) When an employee is rehabilitated or the employee's rehabilitation is possible
228 but the employee has some loss of bodily function, the award shall be for permanent partial
229 disability.

230 ~~[(9)]~~ (8) As determined by an administrative law judge, an employee is not entitled to
231 disability compensation, unless the employee fully cooperates with any evaluation or
232 reemployment plan under this chapter or Chapter 3, Utah Occupational Disease Act. The
233 administrative law judge shall dismiss without prejudice the claim for benefits of an employee
234 if the administrative law judge finds that the employee fails to fully cooperate, unless the
235 administrative law judge states specific findings on the record justifying dismissal with
236 prejudice.

237 ~~[(10)]~~ (9) (a) The loss or permanent and complete loss of the use of the following
238 constitutes total and permanent disability that is compensated according to this section:

- 239 (i) both hands;
- 240 (ii) both arms;
- 241 (iii) both feet;
- 242 (iv) both legs;
- 243 (v) both eyes; or
- 244 (vi) any combination of two body members described in this Subsection ~~[(10)]~~ (9)(a).

245 (b) A finding of permanent total disability pursuant to Subsection ~~[(10)]~~ (9)(a) is final.

246 ~~[(11)]~~ (10) (a) An insurer or self-insured employer may periodically reexamine a
247 permanent total disability claim, except those based on Subsection ~~[(10)]~~ (9), for which the
248 insurer or self-insured employer had or has payment responsibility to determine whether the
249 employee remains permanently totally disabled.

250 (b) Reexamination may be conducted no more than once every three years after an
251 award is final, unless good cause is shown by the employer or its insurance carrier to allow
252 more frequent reexaminations.

253 (c) The reexamination may include:

- 254 (i) the review of medical records;
- 255 (ii) employee submission to one or more reasonable medical evaluations;
- 256 (iii) employee submission to one or more reasonable rehabilitation evaluations and
257 retraining efforts;
- 258 (iv) employee disclosure of Federal Income Tax Returns;
- 259 (v) employee certification of compliance with Section 34A-2-110; and
- 260 (vi) employee completion of one or more sworn affidavits or questionnaires approved
261 by the division.

262 (d) The insurer or self-insured employer shall pay for the cost of a reexamination with
263 appropriate employee reimbursement pursuant to rule for reasonable travel allowance and per
264 diem as well as reasonable expert witness fees incurred by the employee in supporting the
265 employee's claim for permanent total disability benefits at the time of reexamination.

266 (e) If an employee fails to fully cooperate in the reasonable reexamination of a
267 permanent total disability finding, an administrative law judge may order the suspension of the
268 employee's permanent total disability benefits until the employee cooperates with the
269 reexamination.

270 (f) (i) If the reexamination of a permanent total disability finding reveals evidence that
271 reasonably raises the issue of an employee's continued entitlement to permanent total disability
272 compensation benefits, an insurer or self-insured employer may petition the Division of
273 Adjudication for a rehearing on that issue. The insurer or self-insured employer shall include
274 with the petition, documentation supporting the insurer's or self-insured employer's belief that
275 the employee is no longer permanently totally disabled.

276 (ii) If the petition under Subsection [~~(H)~~] (10)(f)(i) demonstrates good cause, as
277 determined by the Division of Adjudication, an administrative law judge shall adjudicate the
278 issue at a hearing.

279 (iii) Evidence of an employee's participation in medically appropriate, part-time work
280 may not be the sole basis for termination of an employee's permanent total disability
281 entitlement, but the evidence of the employee's participation in medically appropriate,

282 part-time work under Subsection [~~(7)~~] (6) may be considered in the reexamination or hearing
283 with other evidence relating to the employee's status and condition.

284 (g) In accordance with Section 34A-1-309, the administrative law judge may award
285 reasonable attorney fees to an attorney retained by an employee to represent the employee's
286 interests with respect to reexamination of the permanent total disability finding, except if the
287 employee does not prevail, the attorney fees shall be set at \$1,000. The attorney fees awarded
288 shall be paid by the employer or its insurance carrier in addition to the permanent total
289 disability compensation benefits due.

290 (h) During the period of reexamination or adjudication, if the employee fully
291 cooperates, each insurer, self-insured employer, or the Employers' Reinsurance Fund shall
292 continue to pay the permanent total disability compensation benefits due the employee.

293 [~~(12)~~] (11) If any provision of this section, or the application of any provision to any
294 person or circumstance, is held invalid, the remainder of this section is given effect without
295 the invalid provision or application.

296 Section 2. **Intent language -- Reporting by the Labor Commission.**

297 (1) In passing this H.B. 188, it is the intent of the Legislature to address only the
298 repeal of the reduction of permanent total disability compensation by 50% of the Social
299 Security retirement benefits that an employee is also eligible to receive, which was found to be
300 a constitutional violation by the Utah Supreme Court in *Merrill v. Utah Labor Commission*,
301 2009 UT 26 (April 24, 2009). The Legislature does not intend for the passage of this bill to be
302 construed as a determination by the Legislature that a reduction or offset on the basis of the
303 receipt of Social Security benefits is against public policy under other circumstances.

304 (2) The Labor Commission shall report to the Business and Labor Interim Committee
305 by no later than the November 2010 interim meeting regarding:

306 (a) the status of cases for which the Employers' Reinsurance Fund pays permanent
307 total disability compensation;

308 (b) the process the Labor Commission follows to facilitate the implementation of the
309 *Merrill* decision;

310 (c) the effect, if any, of implementing the *Merrill* decision on:
311 (i) the Employers' Reinsurance Fund;
312 (ii) assessments related to workers' compensation under Sections 34A-2-202 and
313 59-9-101; and
314 (iii) premiums for workers' compensation insurance;
315 (d) the status and nature of disputes, if any, that may arise in the implementation of
316 the *Merrill* decision; and
317 (e) the need, if any, for further legislative action.
318 Section 3. **Retrospective operation.**
319 This bill has retrospective operation to a payment of workers' compensation benefits
320 under Title 34A, Chapter 2, Workers' Compensation Act, or Chapter 3, Utah Occupational
321 Disease Act, made on or after April 24, 2009.