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₵ 01-30-02 12:19 PM ₵

WORKERS' COMPENSATION - FIRE DEPARTMENT EMPLOYEES

2002 GENERAL SESSION

STATE OF UTAH

Sponsor: Joseph G. Murray

This act modifies the Utah Labor Code to provide for a presumption that certain occupational diseases are employment related for fire department employees and to make technical changes.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

34A-2-413, as renumbered and amended by Chapter 375, Laws of Utah 1997

ENACTS:

34A-3-113, Utah Code Annotated 1953

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 cases of permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section.

(b) [~~To~~] Except as provided in Section 34A-3-113, to establish entitlement to permanent total disability compensation, the employee has the burden of proof to show 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 was the direct cause of the employee's permanent total disability.

(c) To find an employee permanently totally disabled, the commission shall conclude 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 age, education, past work experience, medical capacity, and residual functional capacity.

(d) Evidence of an employee's entitlement to disability benefits other than those provided under this chapter and Chapter 3, Utah Occupational Disease Act, if relevant, may be presented to the commission, but is not binding and creates no presumption of an entitlement under this chapter and Chapter 3, Utah Occupational Disease Act.

(2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 66-2/3% of the employee's average weekly wage at the time of the injury, limited as follows:

(a) compensation per week may not be more than 85% of the state average weekly wage at the time of the injury;

(b) compensation per week may not be less than the sum of $45 per week, plus $5 for a dependent spouse, plus $5 for each dependent child under the age of 18 years, up to a maximum of four dependent minor children, but not exceeding the maximum established in Subsection (2)(a) nor exceeding the average weekly wage of the employee at the time of the injury; and

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

(3) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or before June 30, 1994:

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

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410 through 34A-2-412 and Sections 34A-2-501 through 34A-2-507 in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).

(c) Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.

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

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

(4) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or after July 1, 1994:

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

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410 through 34A-2-412 and Sections 34A-2-501 through 34A-2-507, in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).

(c) Any overpayment of this compensation shall be recouped by the employer or its insurance carrier by reasonably offsetting the overpayment against future liability paid before or after the initial 312 weeks.

(5) Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the employer, its insurance carrier, or the Employers' Reinsurance Fund, after an employee has received compensation from the employer or the employer's insurance carrier for any

combination of disabilities amounting to 312 weeks of compensation at the applicable total disability compensation rate, shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.

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

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

(ii) the employer or its insurance carrier submits to the administrative law judge a reemployment plan as prepared by a qualified rehabilitation provider reasonably designed to return the employee to gainful employment or the employer or its insurance carrier provides the administrative law judge notice that the employer or its insurance carrier will not submit a plan; and

(iii) the administrative law judge, after notice to the parties, holds a hearing, unless otherwise stipulated, to consider evidence regarding rehabilitation and to review any reemployment plan submitted by the employer or its insurance carrier under Subsection (6)(a)(ii).

(b) Prior to the finding becoming final, the administrative law judge shall order:

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

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

(c) The employer or its insurance carrier shall be given credit for any disability payments made under Subsection (6)(b) against its ultimate disability compensation liability under this chapter or Chapter 3, Utah Occupational Disease Act.

(d) An employer or its insurance carrier may not be ordered to submit a reemployment plan. If the employer or its insurance carrier voluntarily submits a plan, the plan is subject to Subsections (6)(d)(i) through (iii).

(i) The plan may include retraining, education, medical and disability compensation benefits, job placement services, or incentives calculated to facilitate reemployment funded by the employer or its insurance carrier.

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

(iii) The employer or its insurance carrier shall diligently pursue the reemployment plan.

The employer's or insurance carrier's failure to diligently pursue the reemployment plan shall be cause for the administrative law judge on the administrative law judge's own motion to make a final decision of permanent total disability.

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

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

(i) with the death of the employee; or

(ii) when the employee is capable of returning to regular, steady work.

(b) An employer or its insurance carrier may provide or locate for a permanently totally disabled employee reasonable, medically appropriate, part-time work in a job earning at least minimum wage provided that employment may not be required to the extent that it would disqualify the employee from Social Security disability benefits.

(c) An employee shall fully cooperate in the placement and employment process and accept the reasonable, medically appropriate, part-time work.

(d) In a consecutive four-week period when an employee's gross income from the work provided under Subsection (7)(b) exceeds $500, the employer or insurance carrier may reduce the employee's permanent total disability compensation by 50% of the employee's income in excess of $500.

(e) If a work opportunity is not provided by the employer or its insurance carrier, a permanently totally disabled employee may obtain medically appropriate, part-time work subject to the offset provisions contained in Subsection (7)(d).

(f) (i) The commission shall establish rules regarding the part-time work and offset.

(ii) The adjudication of disputes arising under Subsection (7) is governed by Part 8, Adjudication.

(g) The employer or its insurance carrier shall have the burden of proof to show that medically appropriate part-time work is available.

(h) The administrative law judge may:

(i) excuse an employee from participation in any job that would require the employee to

undertake work exceeding the employee's medical capacity and residual functional capacity or for good cause; or

(ii) allow the employer or its insurance carrier to reduce permanent total disability benefits as provided in Subsection (7)(d) when reasonable, medically appropriate, part-time employment has been offered but the employee has failed to fully cooperate.

(8) When an employee has been rehabilitated or the employee's rehabilitation is possible but the employee has some loss of bodily function, the award shall be for permanent partial disability.

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

(10) (a) The loss or permanent and complete loss of the use of both hands, both arms, both feet, both legs, both eyes, or any combination of two such body members constitutes total and permanent disability, to be compensated according to this section.

(b) A finding of permanent total disability pursuant to Subsection (10)(a) is final.

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

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

(c) The reexamination may include:

(i) the review of medical records;

(ii) employee submission to reasonable medical evaluations;

(iii) employee submission to reasonable rehabilitation evaluations and retraining efforts;

(iv) employee disclosure of Federal Income Tax Returns;

(v) employee certification of compliance with Section 34A-2-110; and

(vi) employee completion of sworn affidavits or questionnaires approved by the division.

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

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

(f) (i) Should the reexamination of a permanent total disability finding reveal evidence that reasonably raises the issue of an employee's continued entitlement to permanent total disability compensation benefits, an insurer or self-insured employer may petition the Division of Adjudication for a rehearing on that issue. The petition shall be accompanied by documentation supporting the insurer's or self-insured employer's belief that the employee is no longer permanently totally disabled.

(ii) If the petition under Subsection (11)(f)(i) demonstrates good cause, as determined by the Division of Adjudication, an administrative law judge shall adjudicate the issue at a hearing.

(iii) Evidence of an employee's participation in medically appropriate, part-time work may not be the sole basis for termination of an employee's permanent total disability entitlement, but the evidence of the employee's participation in medically appropriate, part-time work under Subsection (7) may be considered in the reexamination or hearing with other evidence relating to the employee's status and condition.

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

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

(12) If any provision of this section, or the application of any provision to any person or

circumstance, is held invalid, the remainder of this section shall be given effect without the invalid provision or application.

Section 2. Section **34A-3-113** is enacted to read:

34A-3-113. Presumption for fire department employees.

(1) As used in this section:

(a) (i) "Fire department employee" means an individual that:

(A) is a member of a fire department or other organization that:

(I) provides fire suppression and other fire-related services; and

(II) is an agency of a political subdivision; and

(B) (I) is in a capacity that includes responsibility for the extinguishment of fire; or

(II) is an emergency medical service provider, as defined in Section 26-8a-102, who is a member of a fire department or other organization described in Subsection (1)(a)(i) when providing services as an emergency medical service provider.

(ii) "Fire department employee" includes a volunteer member of a fire department or other organization described in Subsection (1)(a)(i).

(b) (i) "Line-of-duty employment" means an activity of a fire department employee for which the fire department employee is obligated or authorized to perform as a fire department employee by:

(A) rule;

(B) condition of employment or service; or

(C) law.

(ii) "Line-of-duty employment" includes a social, ceremonial, or athletic function that the fire department employee is assigned to or compensated for by the fire department or other organization that is being served by the fire department employee.

(c) "Presumptive occupational disease" means:

(i) heart disease, including:

(A) coronary sclerosis; or

(B) myocarditis;

(ii) hypertension;

(iii) lung disease, including pneumonia;

(iv) one of the following cancers;

(A) aden cancer;

(B) bladder cancer;

(C) brain cancer;

(D) breast cancer;

(E) cancer of the blood or lymphatic systems;

(F) cancer of the digestive system;

(G) colon cancer;

(H) kidney cancer;

(I) leukemia;

(J) liver cancer;

(K) lung cancer;

(L) lymphoma, except for Hodgkin's disease;

(M) mesothelioma of the respiratory tract;

(N) multiple myeloma;

(O) pancreatic cancer;

(P) prostate cancer;

(Q) rectal cancer;

(R) skin cancer;

(S) testicular cancer; or

(T) throat cancer; or

(v) the following infectious diseases:

(A) botulinum toxin;

(B) cholera;

(C) diphtheria;

(D) ebola;

(E) hemorrhagic fever;

(F) hepatitis A, B, or C;

(G) inhalation anthrax;

(H) meningococcal disease;

(I) pneumonic plague;

(J) Q fever;

(K) rabies;

(L) ricin;

(M) smallpox;

(N) staphylococcal enterotoxin B;

(O) T-2 mycotoxins;

(P) tuberculosis;

(Q) tularemia;

(R) Venezuelan equine encephalitis; or

(S) any uncommon infectious disease the contraction of which the commission by rule, made in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, determines to be related to the hazards which a fire department employee would be subject.

(2) Notwithstanding the other provisions of this chapter or Chapter 2, Workers' Compensation Act, for a claim for compensation under this chapter that meets the requirements of Subsection (3), there is a rebuttable presumption that a presumptive occupational disease:

(a) arose out of and in the course of line-of-duty employment; and

(b) is medically caused or aggravated by the line-of-duty employment described in Subsection (2)(a).

(3) The presumption described in Subsection (2) is created if:

(a) the claim for compensation under this chapter is filed within the time periods provided in Sections 34A-3-108 and 34A-3-109;

(b) the fire department employee for which the claim is filed is employed in the line-of-duty employment:

(i) for at least 36 months; and

(ii) (A) at the time the claim for compensation is filed; or

(B) within no more than three years before the claim for compensation is filed;

(c) (i) as a condition of being employed in line-of-duty employment, the fire department employee passed a physical examination before the fire department employee made a claim under this chapter for a presumptive occupational disease; and

(ii) the examination described in Subsection (3)(c)(i) did not indicate evidence of a presumptive occupational disease; and

(d) the claim for compensation under this chapter is for a presumptive occupational

disease.

(4) The presumption described in Subsection (2) may be rebutted if the employer or the employer's insurer establishes by a preponderance of the evidence that the presumptive occupational disease:

(a) did not arise out of and in the course of the line-of-duty employment; and

(b) was not medically caused or aggravated by the line-of-duty employment described in Subsection (4)(a).

(5) Notwithstanding Subsection (3), an employer is not liable for a presumptive occupational disease if after a fire department employee is no longer employed in the line-of-duty employment, the fire department employee is injuriously exposed to the hazards of the presumptive occupational disease as provided in Section 34A-3-105.

(6) Notwithstanding the other provisions of this section, Title 26, Chapter 6a, Disease Testing and Workers' Compensation Presumption for Benefit of Emergency Medical Services Providers, governs whether there is or is not a presumption that a disease, as defined in Section 26-6a-1, is compensable under this chapter or Chapter 2, Workers' Compensation Act.

(7) This section may not be construed as preventing a fire department employee from receiving workers' compensation benefits under this chapter or Chapter 2, Workers' Compensation Act, because the fire department employee fails to meet the requirements under this section to establish the rebuttable presumption described in Subsection (2).

Legislative Review Note
as of 1-29-02 7:11 AM

This bill creates a class consisting of certain firefighters and medical providers of fire departments. For this class the bill provides a rebuttable presumption that certain diseases presumptively arose as a result of working for the fire department and therefore are compensable under workers' compensation statutes. Under equal protection principles of the Constitution of the United States and the uniform operation of the laws provisions of the Utah Constitution, there are limits on a legislature's ability to establish classifications and then treat members of the classes differently. In addition, because of the exclusive remedy element of workers' compensation, the open courts provision of the Utah Constitution may be implicated if the remedies provided under workers' compensation are found inadequate. In examining the permissibility of classes, courts look to factors such as the relationship between the class and the legislative objective being pursued. For example, a court may look at the relationship between the creation of the presumption and the level of exposure fire department employees may experience because of the nature of their employment.

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