

**PERMANENT TOTAL DISABILITY**

**AMENDMENTS**

2005 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Ed Mayne**

House Sponsor: Jeff Alexander

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**LONG TITLE**

**General Description:**

This bill modifies the Workers' Compensation Act to address permanent total disability provisions.

**Highlighted Provisions:**

This bill:

- ▶ addresses procedures for when a determination of permanent total disability is final including providing that an order for subsistence and other undisputed benefits can be enforced as a final order; and
- ▶ makes technical changes.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

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

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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 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 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:

(A) age[;];

(B) education[;];

(C) past work experience[;];

(D) medical capacity[;]; and

(E) 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[;];

(i) may be presented to the commission[~~;~~but];

(ii) is not binding; and

(iii) 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]~~ This Subsection (3) applies to 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]~~ Part 5, Industrial Noise, 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~~] This Subsection (4) applies to 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~~] Part 5, Industrial Noise, 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) 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]~~
  - (B) 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:
  - (A) consider evidence regarding rehabilitation; and ~~[to]~~
  - (B) review any reemployment plan submitted by the employer or its insurance carrier under Subsection (6)(a)(ii).

(b) ~~[Prior to the finding becoming final]~~ Before commencing the procedure required by Subsection (6)(a), 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) Notwithstanding Subsection (6)(a), an order for payment of benefits described in Subsection (6)(b) is considered a final order for purposes of Section 34A-2-212.

~~[(c)]~~ (d) 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)]~~ (e) 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)]~~(e)(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)~~ (f) 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 this 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.