

PERMANENT TOTAL DISABILITY

AMENDMENTS

2005 GENERAL SESSION

STATE OF UTAH

Sponsor: Ed Mayne

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

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.



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

30 (b) To establish entitlement to permanent total disability compensation, the employee
31 has the burden of proof to show by a preponderance of evidence that:

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

35 (ii) the employee is permanently totally disabled; and

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

38 (c) To find an employee permanently totally disabled, the commission shall conclude
39 that:

40 (i) the employee is not gainfully employed;

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

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

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

49 (A) age[;];

50 (B) education[;];

51 (C) past work experience[;];

52 (D) medical capacity[;]; and

53 (E) residual functional capacity.

54 (d) Evidence of an employee's entitlement to disability benefits other than those
55 provided under this chapter and Chapter 3, Utah Occupational Disease Act, if relevant[;];

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

57 (ii) is not binding; and

58 (iii) creates no presumption of an entitlement under this chapter and Chapter 3, Utah

59 Occupational Disease Act.

60 (2) For permanent total disability compensation during the initial 312-week
61 entitlement, compensation shall be $66\frac{2}{3}\%$ of the employee's average weekly wage at the time
62 of the injury, limited as follows:

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

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

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

73 (3) ~~[For]~~ This Subsection (3) applies to claims resulting from an accident or disease
74 arising out of and in the course of the employee's employment on or before June 30, 1994[:].

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

78 (b) The employer or its insurance carrier may not be required to pay compensation for
79 any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410
80 through 34A-2-412 and ~~[Sections 34A-2-501 through 34A-2-507]~~ Part 5, Industrial Noise, in
81 excess of the amount of compensation payable over the initial 312 weeks at the applicable
82 permanent total disability compensation rate under Subsection (2).

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

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

90 disability compensation.

91 (e) Employers' Reinsurance Fund payments shall commence immediately after the
92 employer or its insurance carrier has satisfied its liability under this Subsection (3) or Section
93 34A-2-703.

94 (4) ~~[For]~~ This Subsection (4) applies to claims resulting from an accident or disease
95 arising out of and in the course of the employee's employment on or after July 1, 1994~~[:]~~.

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

98 (b) The employer or its insurance carrier may not be required to pay compensation for
99 any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410
100 through 34A-2-412 and ~~[Sections 34A-2-501 through 34A-2-507]~~ Part 5, Industrial Noise, in
101 excess of the amount of compensation payable over the initial 312 weeks at the applicable
102 permanent total disability compensation rate under Subsection (2).

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

106 (5) Notwithstanding the minimum rate established in Subsection (2), the compensation
107 payable by the employer, its insurance carrier, or the Employers' Reinsurance Fund, after an
108 employee has received compensation from the employer or the employer's insurance carrier for
109 any combination of disabilities amounting to 312 weeks of compensation at the applicable total
110 disability compensation rate, shall be reduced, to the extent allowable by law, by the dollar
111 amount of 50% of the Social Security retirement benefits received by the employee during the
112 same period.

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

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

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

118 (A) a reemployment plan as prepared by a qualified rehabilitation provider reasonably
119 designed to return the employee to gainful employment; or ~~[the employer or its insurance~~
120 ~~carrier provides the administrative law judge]~~

121 (B) notice that the employer or its insurance carrier will not submit a plan; and
122 (iii) the administrative law judge, after notice to the parties, holds a hearing, unless
123 otherwise stipulated, to:

124 (A) consider evidence regarding rehabilitation; and [to]

125 (B) review any reemployment plan submitted by the employer or its insurance carrier
126 under Subsection (6)(a)(ii).

127 (b) [~~Prior to the finding becoming final~~] Before commencing the procedure required by
128 Subsection (6)(a), the administrative law judge shall order:

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

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

132 (c) Notwithstanding Subsection (6)(a), an order for payment of benefits described in
133 Subsection (6)(b) is considered a final order for purposes of Section 34A-2-212.

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

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

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

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

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

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

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

- 155 (i) with the death of the employee; or
- 156 (ii) when the employee is capable of returning to regular, steady work.

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

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

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

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

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

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

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

175 (h) The administrative law judge may:

176 (i) excuse an employee from participation in any job that would require the employee
177 to undertake work exceeding the employee's medical capacity and residual functional capacity
178 or for good cause; or

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

182 (8) When an employee has been rehabilitated or the employee's rehabilitation is

183 possible but the employee has some loss of bodily function, the award shall be for permanent
184 partial disability.

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

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

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

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

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

203 (c) The reexamination may include:

204 (i) the review of medical records;

205 (ii) employee submission to reasonable medical evaluations;

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

208 (iv) employee disclosure of Federal Income Tax Returns;

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

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

212 (d) The insurer or self-insured employer shall pay for the cost of a reexamination with
213 appropriate employee reimbursement pursuant to rule for reasonable travel allowance and per

214 diem as well as reasonable expert witness fees incurred by the employee in supporting the
215 employee's claim for permanent total disability benefits at the time of reexamination.

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

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

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

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

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

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

243 (12) If any provision of this section, or the application of any provision to any person
244 or circumstance, is held invalid, the remainder of this section shall be given effect without the

245 invalid provision or application.

Legislative Review Note
as of 1-11-05 3:23 PM

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

Office of Legislative Research and General Counsel

Fiscal Note
Bill Number SB0115

Permanent Total Disability Amendments

24-Jan-05

4:45 PM

State Impact

No fiscal impact.

Individual and Business Impact

No fiscal impact.

Office of the Legislative Fiscal Analyst