

WORKERS' COMPENSATION AMENDMENTS

2016 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Stephen H. Urquhart

House Sponsor: Val L. Peterson

LONG TITLE

General Description:

This bill modifies workers' compensation amendments to address permanent total disabilities.

Highlighted Provisions:

This bill:

- ▶ modifies the language regarding an employee's burden in establishing that an employee has a permanent, total disability; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

34A-2-413, as last amended by Laws of Utah 2014, Chapter 286

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

30 shall prove by a preponderance of evidence that:

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

34 (ii) the employee has a permanent, total disability; and

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

37 (c) To establish that an employee has a permanent, total disability the employee shall
38 prove by a preponderance of the evidence that:

39 (i) the employee is not gainfully employed;

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

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

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

48 (A) age;

49 (B) education;

50 (C) past work experience;

51 (D) medical capacity; and

52 (E) residual functional capacity.

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

55 (i) may be presented to the commission;

56 (ii) is not binding; and

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

58 Occupational Disease Act.

59 (e) In determining under Subsections (1)(b) and (c) whether an employee cannot
60 perform other work reasonably available, the following may not be considered:

61 (i) whether the employee is incarcerated in a facility operated by or contracting with a
62 federal, state, county, or municipal government to house a criminal offender in either a secure
63 or nonsecure setting; or

64 (ii) whether the employee is not legally eligible to be employed because of a reason
65 unrelated to the impairment or combination of impairments.

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

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

71 (b) (i) subject to Subsection (2)(b)(ii), compensation per week may not be less than the
72 sum of \$45 per week and:

73 (A) \$5 for a dependent spouse; and

74 (B) \$5 for each dependent child under the age of 18 years, up to a maximum of four
75 dependent minor children; and

76 (ii) the amount calculated under Subsection (2)(b)(i) may not exceed:

77 (A) the maximum established in Subsection (2)(a); or

78 (B) the average weekly wage of the employee at the time of the injury; and

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

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

84 (a) The employer or [its] the employer's insurance carrier is liable for the initial 312
85 weeks of permanent total disability compensation except as outlined in Section [34A-2-703](#) as

86 in effect on the date of injury.

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

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

- 94 (i) to the employer or [~~its~~] the employer's insurance carrier; and
- 95 (ii) out of the Employers' Reinsurance Fund's liability to the employee.

96 (d) After an employee receives compensation from the employee's employer, [~~its~~] the
97 employer's insurance carrier, or the Employers' Reinsurance Fund for any combination of
98 disabilities amounting to 312 weeks of compensation at the applicable permanent total
99 disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining
100 permanent total disability compensation.

101 (e) Employers' Reinsurance Fund payments shall commence immediately after the
102 employer or [~~its~~] the employer's insurance carrier satisfies its liability under this Subsection (3)
103 or Section 34A-2-703.

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

106 (a) The employer or [~~its~~] the employer's insurance carrier is liable for permanent total
107 disability compensation.

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

113 (c) The employer or [~~its~~] the employer's insurance carrier may recoup the overpayment

114 of compensation described in Subsection (4) by reasonably offsetting the overpayment against
115 future liability paid before or after the initial 312 weeks.

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

118 (i) an administrative law judge reviews a summary of reemployment activities
119 undertaken pursuant to Section 34A-2-413.5;

120 (ii) the employer or ~~[its]~~ the employer's insurance carrier submits to the administrative
121 law judge:

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

124 (B) notice that the employer or ~~[its]~~ the employer's insurance carrier will not submit a
125 plan; and

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

128 (A) consider evidence regarding rehabilitation; and

129 (B) review any reemployment plan submitted by the employer or ~~[its]~~ the employer's
130 insurance carrier under Subsection (5)(a)(ii).

131 (b) Before commencing the procedure required by Subsection (5)(a), the administrative
132 law judge shall order:

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

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

136 (c) Notwithstanding Subsection (5)(a), an order for payment of benefits described in
137 Subsection (5)(b) is considered a final order for purposes of Section 34A-2-212.

138 (d) The employer or ~~[its]~~ the employer's insurance carrier shall be given credit for any
139 disability payments made under Subsection (5)(b) against its ultimate disability compensation
140 liability under this chapter or Chapter 3, Utah Occupational Disease Act.

141 (e) An employer or ~~[its]~~ the employer's insurance carrier may not be ordered to submit

142 a reemployment plan. If the employer or [its] the employer's insurance carrier voluntarily
143 submits a plan, the plan is subject to Subsections (5)(e)(i) through (iii).

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

145 (A) retraining;

146 (B) education;

147 (C) medical and disability compensation benefits;

148 (D) job placement services; or

149 (E) incentives calculated to facilitate reemployment.

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

152 (iii) The employer or [its] the employer's insurance carrier shall diligently pursue the
153 reemployment plan. The employer's or insurance carrier's failure to diligently pursue the
154 reemployment plan is cause for the administrative law judge on the administrative law judge's
155 own motion to make a final decision of permanent total disability.

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

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

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

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

168 (6) (a) The period of benefits commences on the date the employee acquired the
169 permanent, total disability, as determined by a final order of the commission based on the facts

170 and evidence, and ends:

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

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

173 (b) An employer or ~~[its]~~ the employer's insurance carrier may provide or locate for a
174 permanently totally disabled employee reasonable, medically appropriate, part-time work in a
175 job earning at least minimum wage, except that the employee may not be required to accept the
176 work to the extent that it would disqualify the employee from social security disability benefits.

177 (c) An employee shall:

178 (i) fully cooperate in the placement and employment process; and

179 (ii) accept the reasonable, medically appropriate, part-time work.

180 (d) In a consecutive four-week period when an employee's gross income from the work
181 provided under Subsection (6)(b) exceeds \$500, the employer or insurance carrier may reduce
182 the employee's permanent total disability compensation by 50% of the employee's income in
183 excess of \$500.

184 (e) If a work opportunity is not provided by the employer or ~~[its]~~ the employer's
185 insurance carrier, an employee with a permanent, total disability may obtain medically
186 appropriate, part-time work subject to the offset provisions of Subsection (6)(d).

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

188 (ii) The adjudication of disputes arising under this Subsection (6) is governed by Part
189 8, Adjudication.

190 (g) The employer or ~~[its]~~ the employer's insurance carrier has the burden of proof to
191 show that medically appropriate part-time work is available.

192 (h) The administrative law judge may:

193 (i) excuse an employee from participation in any work:

194 (A) that would require the employee to undertake work exceeding the employee's:

195 (I) medical capacity; or

196 (II) residual functional capacity; or

197 (B) for good cause; or

198 (ii) allow the employer or [its] the employer's insurance carrier to reduce permanent
199 total disability benefits as provided in Subsection (6)(d) when reasonable, medically
200 appropriate, part-time work is offered, but the employee fails to fully cooperate.

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

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

211 (9) (a) The loss or permanent and complete loss of the use of the following constitutes
212 total and permanent disability that is compensated according to this section:

- 213 (i) both hands;
- 214 (ii) both arms;
- 215 (iii) both feet;
- 216 (iv) both legs;
- 217 (v) both eyes; or
- 218 (vi) any combination of two body members described in this Subsection (9)(a).

219 (b) A finding of permanent total disability pursuant to Subsection (9)(a) is final.

220 (10) (a) An insurer or self-insured employer may periodically reexamine a permanent
221 total disability claim, except those based on Subsection (9), for which the insurer or
222 self-insured employer had or has payment responsibility to determine whether the employee
223 continues to have a permanent, total disability.

224 (b) Reexamination may be conducted no more than once every three years after an
225 award is final, unless good cause is shown by the employer or [its] the employer's insurance

226 carrier to allow more frequent reexaminations.

227 (c) The reexamination may include:

228 (i) the review of medical records;

229 (ii) employee submission to one or more reasonable medical evaluations;

230 (iii) employee submission to one or more reasonable rehabilitation evaluations and
231 retraining efforts;

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

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

234 (vi) employee completion of one or more sworn affidavits or questionnaires approved
235 by the division.

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

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

244 (f) (i) If the reexamination of a permanent total disability finding reveals evidence that
245 reasonably raises the issue of an employee's continued entitlement to permanent total disability
246 compensation benefits, an insurer or self-insured employer may petition the Division of
247 Adjudication for a rehearing on that issue. The insurer or self-insured employer shall include
248 with the petition, documentation supporting the insurer's or self-insured employer's belief that
249 the employee no longer has a permanent, total disability.

250 (ii) If the petition under Subsection (10)(f)(i) demonstrates good cause, as determined
251 by the Division of Adjudication, an administrative law judge shall adjudicate the issue at a
252 hearing.

253 (iii) Evidence of an employee's participation in medically appropriate, part-time work

254 may not be the sole basis for termination of an employee's permanent total disability
255 entitlement, but the evidence of the employee's participation in medically appropriate, part-time
256 work under Subsection (6) may be considered in the reexamination or hearing with other
257 evidence relating to the employee's status and condition.

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

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

267 (11) If any provision of this section, or the application of any provision to any person
268 or circumstance, is held invalid, the remainder of this section is given effect without the invalid
269 provision or application.