

SB0040S01 compared with SB0040

~~{deleted text}~~ shows text that was in SB0040 but was deleted in SB0040S01.

Inserted text shows text that was not in SB0040 but was inserted into SB0040S01.

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Senator Karen Mayne proposes the following substitute bill:

WORKERS' COMPENSATION DEPENDENT BENEFIT

AMENDMENTS

2018 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Karen Mayne

House Sponsor: _____

LONG TITLE

General Description:

This bill modifies provisions related to workers' compensation disability benefits.

Highlighted Provisions:

This bill:

- ▶ modifies the calculation of benefits paid to one or more dependents of an employee with a disability under the Workers' Compensation Act.

Money Appropriated in this Bill:

None

Other Special Clauses:

~~{None}~~ This bill provides a special effective date.

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Utah Code Sections Affected:

AMENDS:

34A-2-410, as last amended by Laws of Utah 2015, Chapter 258

34A-2-411, as last amended by Laws of Utah 1999, Chapter 261

34A-2-412, as renumbered and amended by Laws of Utah 1997, Chapter 375

34A-2-413, as last amended by Laws of Utah 2016, Chapter 31

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

Section 1. Section **34A-2-410** is amended to read:

34A-2-410. Temporary disability -- Amount of payments -- State average weekly wage defined.

(1) (a) Subject to Subsections (1)(b) and (5), in case of temporary disability, so long as the disability is total, the employee shall receive 66-2/3% of that employee's average weekly wages at the time of the injury but:

(i) not more than a maximum of 100% of the state average weekly wage at the time of the injury per week; and

(ii) (A) subject to Subsections (1)(a)(ii)(B) and (C), not less than a minimum of \$45 per week plus:

(I) [~~\$5~~] \$20 for a dependent spouse; and

(II) [~~\$5~~] \$20 for each dependent child under the age of 18 years, up to a maximum of four dependent children;

(B) not to exceed the average weekly wage of the employee at the time of the injury; and

(C) not to exceed 100% of the state average weekly wage at the time of the injury per week.

(b) In no case shall the compensation benefits exceed 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of 12 years from the date of the injury.

(2) If a light duty medical release is obtained before the employee reaches a fixed state of recovery and no light duty employment is available to the employee from the employer, temporary disability benefits shall continue to be paid.

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(3) The "state average weekly wage" as referred to in this chapter and Chapter 3, Utah Occupational Disease Act, shall be determined by the commission as follows:

(a) On or before June 1 of each year, the total wages reported on contribution reports to the Unemployment Insurance Division for the preceding calendar year shall be divided by the average monthly number of insured workers determined by dividing the total insured workers reported for the preceding year by 12.

(b) The average annual wage obtained under Subsection (3)(a) shall be divided by 52.

(c) The average weekly wage determined under Subsection (3)(b) is rounded to the nearest dollar.

(4) The state average weekly wage determined under Subsection (3) shall be used as the basis for computing the maximum compensation rate for:

(a) injuries or disabilities arising from occupational disease that occurred during the 12-month period commencing July 1 following the June 1 determination; and

(b) any death resulting from the injuries or disabilities arising from occupational disease.

(5) The commission may reduce or terminate temporary disability compensation in accordance with Section 34A-2-410.5.

Section 2. Section **34A-2-411** is amended to read:

34A-2-411. Temporary partial disability -- Amount of payments.

(1) If the injury causes temporary partial disability for work, the employee shall receive weekly compensation equal to:

(a) 66-2/3% of the difference between the employee's average weekly wages before the accident and the weekly wages the employee is able to earn after the accident, but not more than 100% of the state average weekly wage at the time of injury; plus

(b) ~~[\$5]~~ \$20 for a dependent spouse and ~~[\$5]~~ \$20 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, but only up to a total weekly compensation that does not exceed 100% of the state average weekly wage at the time of injury.

(2) The commission may order an award for temporary partial disability for work at any time prior to 12 years after the date of the injury to an employee:

(a) whose physical condition resulting from the injury is not finally healed and fixed 12

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years after the date of injury; and

(b) who files an application for hearing under Section 34A-2-417.

(3) The duration of weekly payments may not exceed 312 weeks nor continue more than 12 years after the date of the injury. Payments shall terminate when the disability ends or the injured employee dies.

Section 3. Section **34A-2-412** is amended to read:

34A-2-412. Permanent partial disability -- Scale of payments.

(1) An employee who sustained a permanent impairment as a result of an industrial accident and who files an application for hearing under Section 34A-2-417 may receive a permanent partial disability award from the commission.

(2) Weekly payments may not in any case continue after the disability ends, or the death of the injured person.

(3) (a) In the case of the injuries described in Subsections (4) through (6), the compensation shall be 66-2/3% of that employee's average weekly wages at the time of the injury, but not more than a maximum of 66-2/3% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus [~~\$5~~] \$20 for a dependent spouse and [~~\$5~~] \$20 for each dependent child under the age of 18 years, up to a maximum of four dependent children, but not to exceed 66-2/3% of the state average weekly wage at the time of the injury per week.

(b) The compensation determined under Subsection (3)(a) shall be:

(i) paid in routine pay periods not to exceed four weeks for the number of weeks provided for in this section; and

(ii) in addition to the compensation provided for temporary total disability and temporary partial disability.

(4) For the loss of:	Number of Weeks	
(a) Upper extremity		
(i) Arm		
(A) Arm and shoulder (forequarter amputation).....	218	{ }
(B) Arm at shoulder joint, or above deltoid insertion.....	187	{ }
(C) Arm between deltoid insertion and elbow joint, at elbow joint, or below elbow joint proximal to insertion of biceps tendon.....	178	{ }

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(D) Forearm below elbow joint distal to insertion of biceps tendon.....	168	{ }
(ii) Hand		
(A) At wrist or midcarpal or midmetacarpal amputation.....	168	{ }
(B) All fingers except thumb at metacarpophalangeal joints.....	101	{ }
(iii) Thumb		
(A) At metacarpophalangeal joint or with resection of carpometacarpal bone.....	67	{ }
(B) At interphalangeal joint.....	50	{ }
(iv) Index finger		
(A) At metacarpophalangeal joint or with resection of metacarpal bone	42	{ }
(B) At proximal interphalangeal joint.....	34	{ }
(C) At distal interphalangeal joint.....	18	{ }
(v) Middle finger		
(A) At metacarpophalangeal joint or with resection of metacarpal bone	34	{ }
(B) At proximal interphalangeal joint.....	27	{ }
(C) At distal interphalangeal joint.....	15	{ }
(vi) Ring finger		
(A) At metacarpophalangeal joint or with resection of metacarpal bone	17	{ }
(B) At proximal interphalangeal joint.....	13	{ }
(C) At distal interphalangeal joint.....	8	{ }
(vii) Little finger		
(A) At metacarpophalangeal joint or with resection of metacarpal bone..	8	{ }
(B) At proximal interphalangeal joint.....	6	{ }
(C) At distal interphalangeal joint.....	4	{ }
(b) Lower extremity		
(i) Leg		
(A) Hemipelvectomy (leg, hip and pelvis).....	156	{ }
(B) Leg at hip joint or three inches or less below tuberosity of ischium	125	{ }
(C) Leg above knee with functional stump, at knee joint or Gritti-Stokes amputation or below knee with short stump (three inches or less below intercondylar notch).....	112	{ }

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(D) Leg below knee with functional stump.....	88	{ }
(ii) Foot		
(A) Foot at ankle.....	88	{ }
(B) Foot partial amputation (Chopart's).....	66	{ }
(C) Foot midmetatarsal amputation.....	44	{ }
(iii) Toes		
(A) Great toe		
(I) With resection of metatarsal bone.....	26	{ }
(II) At metatarsophalangeal joint.....	16	{ }
(III) At interphalangeal joint.....	12	{ }
(B) Lesser toe (2nd -- 5th)		
(I) With resection of metatarsal bone.....	4	{ }
(II) At metatarsophalangeal joint.....	3	{ }
(III) At proximal interphalangeal joint.....	2	{ }
(IV) At distal interphalangeal joint.....	1	{ }
(C) All toes at metatarsophalangeal joints.....	26	{ }
(iv) Miscellaneous		
(A) One eye by enucleation.....	120	{ }
(B) Total blindness of one eye.....	100	{ }
(C) Total loss of binaural hearing.....	109	{ }

(5) Permanent and complete loss of use shall be deemed equivalent to loss of the member. Partial loss or partial loss of use shall be a percentage of the complete loss or loss of use of the member. This Subsection (5) does not apply to the items listed in Subsection (4)(b)(iv).

(6) (a) For any permanent impairment caused by an industrial accident that is not otherwise provided for in the schedule of losses in this section, permanent partial disability compensation shall be awarded by the commission based on the medical evidence.

(b) Compensation for any impairment described in Subsection (6)(a) shall, as closely as possible, be proportionate to the specific losses in the schedule set forth in this section.

(c) Permanent partial disability compensation may not:

(i) exceed 312 weeks, which shall be considered the period of compensation for

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permanent total loss of bodily function; and

(ii) be paid for any permanent impairment that existed prior to an industrial accident.

(7) The amounts specified in this section are all subject to the limitations as to the maximum weekly amount payable as specified in this section, and in no event shall more than a maximum of 66-2/3% of the state average weekly wage at the time of the injury for a total of 312 weeks in compensation be required to be paid.

Section 4. 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 shall 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 has a permanent, total disability; 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 has a permanent, total disability the employee shall 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 reasonably 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;

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- (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;
- (ii) is not binding; and
- (iii) creates no presumption of an entitlement under this chapter and Chapter 3, Utah Occupational Disease Act.

Occupational Disease Act.

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

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

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

(2) For permanent total disability compensation during the initial 312-week entitlement, compensation is 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) (i) subject to Subsection (2)(b)(ii), compensation per week may not be less than the sum of \$45 per week and:

(A) [~~\$5~~] \$20 for a dependent spouse; and

(B) [~~\$5~~] \$20 for each dependent child under the age of 18 years, up to a maximum of four dependent minor children; and

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

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

(B) 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) is 36% of the current state average weekly wage, rounded to the nearest

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dollar.

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

(i) to the employer or the employer's insurance carrier; and

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

(d) After an employee receives compensation from the employee's employer, the employer's 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 the employer's insurance carrier satisfies its liability under this Subsection (3) or Section 34A-2-703.

(4) 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 the employer's insurance carrier is liable for permanent total disability compensation.

(b) The employer or the employer's 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 Part 5, Industrial Noise, in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability

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compensation rate under Subsection (2).

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

(5) (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 Section 34A-2-413.5;

(ii) the employer or the employer's 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

(B) notice that the employer or the employer's 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

(B) review any reemployment plan submitted by the employer or the employer's insurance carrier under Subsection (5)(a)(ii).

(b) Before commencing the procedure required by Subsection (5)(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 (5)(a), an order for payment of benefits described in Subsection (5)(b) is considered a final order for purposes of Section 34A-2-212.

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

(e) An employer or the employer's insurance carrier may not be ordered to submit a reemployment plan. If the employer or the employer's insurance carrier voluntarily submits a

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plan, the plan is subject to Subsections (5)(e)(i) through (iii).

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

(A) retraining;

(B) education;

(C) medical and disability compensation benefits;

(D) job placement services; or

(E) incentives calculated to facilitate reemployment.

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

(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.

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

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

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

(6) (a) The period of benefits commences on the date the employee acquired the permanent, total disability, 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 the employer's insurance carrier may provide or locate for a

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permanently totally disabled employee reasonable, medically appropriate, part-time work in a job earning at least minimum wage, except that the employee may not be required to accept the work to the extent that it would disqualify the employee from social security disability benefits.

(c) An employee shall:

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

(ii) 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 (6)(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 the employer's insurance carrier, an employee with a permanent, total disability may obtain medically appropriate, part-time work subject to the offset provisions of Subsection (6)(d).

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

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

(g) The employer or the employer's insurance carrier has 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 work:

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

(I) medical capacity; or

(II) residual functional capacity; or

(B) for good cause; or

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

(7) When an employee is 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.

(8) As determined by an administrative law judge, an employee is not entitled to

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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.

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

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

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

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

(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 the employer's insurance carrier to allow more frequent reexaminations.

(c) The reexamination may include:

- (i) the review of medical records;
- (ii) employee submission to one or more reasonable medical evaluations;
- (iii) employee submission to one or more 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 one or more sworn affidavits or questionnaires approved by the division.

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(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) If the reexamination of a permanent total disability finding reveals 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 insurer or self-insured employer shall include with the petition, documentation supporting the insurer's or self-insured employer's belief that the employee no longer has a permanent, total disability.

(ii) If the petition under Subsection (10)(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 (6) 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 attorney 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 attorney fees shall be set at \$1,000. The attorney fees awarded shall be paid by the employer or the employer's 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.

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(11) 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 is given effect without the invalid provision or application.

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Legislative Review Note

~~Office of Legislative Research and General Counsel~~

Section 5. Effective date.

This bill takes effect on July 1, 2018.