

1 **WORKERS' COMPENSATION ATTORNEY FEES**
2 **AMENDMENTS**

3 2018 GENERAL SESSION
4 STATE OF UTAH

5 **Chief Sponsor: Karen Mayne**

6 House Sponsor: James A. Dunnigan

8 **LONG TITLE**

9 **General Description:**

10 This bill modifies provisions of the Workers' Compensation Act related to attorney
11 fees.

12 **Highlighted Provisions:**

13 This bill:

- 14 ▶ provides that to the extent allowed by court rule, an employee may be awarded
15 reasonable attorney fees in an adjudication of a medical benefits claim; and
16 ▶ makes technical and conforming changes.

17 **Money Appropriated in this Bill:**

18 None

19 **Other Special Clauses:**

20 None

21 **Utah Code Sections Affected:**

22 AMENDS:

23 **34A-2-413**, as last amended by Laws of Utah 2016, Chapter 31

24 **34A-2-801**, as last amended by Laws of Utah 2016, Chapters 187 and 242

25 REPEALS AND REENACTS:

26 **34A-1-309**, as last amended by Laws of Utah 2009, Chapter 216



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

29 Section 1. Section **34A-1-309** is repealed and reenacted to read:

30 **34A-1-309. Attorney fees.**

31 For an adjudication of a medical benefits claim, reasonable attorney fees may be
32 awarded in accordance with and to the extent allowed by rule adopted by the Utah Supreme
33 Court and implemented by the Labor Commission.

34 Section 2. Section **34A-2-413** is amended to read:

35 **34A-2-413. Permanent total disability -- Amount of payments -- Rehabilitation.**

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

38 (b) To establish entitlement to permanent total disability compensation, the employee
39 shall prove by a preponderance of evidence that:

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

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

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

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

48 (i) the employee is not gainfully employed;

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

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

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

57 (A) age;

58 (B) education;

- 59 (C) past work experience;
- 60 (D) medical capacity; and
- 61 (E) residual functional capacity.
- 62 (d) Evidence of an employee's entitlement to disability benefits other than those
- 63 provided under this chapter and Chapter 3, Utah Occupational Disease Act, if relevant:
- 64 (i) may be presented to the commission;
- 65 (ii) is not binding; and
- 66 (iii) creates no presumption of an entitlement under this chapter and Chapter 3, Utah
- 67 Occupational Disease Act.
- 68 (e) In determining under Subsections (1)(b) and (c) whether an employee cannot
- 69 perform other work reasonably available, the following may not be considered:
- 70 (i) whether the employee is incarcerated in a facility operated by or contracting with a
- 71 federal, state, county, or municipal government to house a criminal offender in either a secure
- 72 or nonsecure setting; or
- 73 (ii) whether the employee is not legally eligible to be employed because of a reason
- 74 unrelated to the impairment or combination of impairments.
- 75 (2) For permanent total disability compensation during the initial 312-week
- 76 entitlement, compensation is 66-2/3% of the employee's average weekly wage at the time of the
- 77 injury, limited as follows:
- 78 (a) compensation per week may not be more than 85% of the state average weekly
- 79 wage at the time of the injury;
- 80 (b) (i) subject to Subsection (2)(b)(ii), compensation per week may not be less than the
- 81 sum of \$45 per week and:
- 82 (A) \$5 for a dependent spouse; and
- 83 (B) \$5 for each dependent child under the age of 18 years, up to a maximum of four
- 84 dependent minor children; and
- 85 (ii) the amount calculated under Subsection (2)(b)(i) may not exceed:
- 86 (A) the maximum established in Subsection (2)(a); or
- 87 (B) the average weekly wage of the employee at the time of the injury; and
- 88 (c) after the initial 312 weeks, the minimum weekly compensation rate under
- 89 Subsection (2)(b) is 36% of the current state average weekly wage, rounded to the nearest

90 dollar.

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

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

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

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

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

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

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

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

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

115 (a) The employer or the employer's insurance carrier is liable for permanent total
116 disability compensation.

117 (b) The employer or the employer's insurance carrier may not be required to pay
118 compensation for any combination of disabilities of any kind, as provided in this section and
119 Sections 34A-2-410 through 34A-2-412 and Part 5, Industrial Noise, in excess of the amount of
120 compensation payable over the initial 312 weeks at the applicable permanent total disability

121 compensation rate under Subsection (2).

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

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

127 (i) an administrative law judge reviews a summary of reemployment activities
128 undertaken pursuant to Section [34A-2-413.5](#);

129 (ii) the employer or the employer's insurance carrier submits to the administrative law
130 judge:

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

133 (B) notice that the employer or the employer's insurance carrier will not submit a plan;
134 and

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

137 (A) consider evidence regarding rehabilitation; and

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

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

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

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

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

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

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

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

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

154 (A) retraining;

155 (B) education;

156 (C) medical and disability compensation benefits;

157 (D) job placement services; or

158 (E) incentives calculated to facilitate reemployment.

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

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

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

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

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

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

177 (6) (a) The period of benefits commences on the date the employee acquired the
178 permanent, total disability, as determined by a final order of the commission based on the facts
179 and evidence, and ends:

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

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

182 (b) An employer or the employer's insurance carrier may provide or locate for a

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

186 (c) An employee shall:

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

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

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

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

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

197 (ii) The adjudication of disputes arising under this Subsection (6) is governed by Part
198 8, Adjudication.

199 (g) The employer or the employer's insurance carrier has the burden of proof to show
200 that medically appropriate part-time work is available.

201 (h) The administrative law judge may:

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

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

204 (I) medical capacity; or

205 (II) residual functional capacity; or

206 (B) for good cause; or

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

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

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

214 disability compensation, unless the employee fully cooperates with any evaluation or
215 reemployment plan under this chapter or Chapter 3, Utah Occupational Disease Act. The
216 administrative law judge shall dismiss without prejudice the claim for benefits of an employee
217 if the administrative law judge finds that the employee fails to fully cooperate, unless the
218 administrative law judge states specific findings on the record justifying dismissal with
219 prejudice.

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

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

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

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

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

236 (c) The reexamination may include:

- 237 (i) the review of medical records;
- 238 (ii) employee submission to one or more reasonable medical evaluations;
- 239 (iii) employee submission to one or more reasonable rehabilitation evaluations and
240 retraining efforts;
- 241 (iv) employee disclosure of Federal Income Tax Returns;
- 242 (v) employee certification of compliance with Section 34A-2-110; and
- 243 (vi) employee completion of one or more sworn affidavits or questionnaires approved
244 by the division.

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

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

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

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

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

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

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

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

279 Section 3. Section **34A-2-801** is amended to read:

280 **34A-2-801. Initiating adjudicative proceedings -- Procedure for review of**
281 **administrative action.**

282 (1) (a) To contest an action of the employee's employer or its insurance carrier
283 concerning a compensable industrial accident or occupational disease alleged by the employee
284 or a dependent any of the following shall file an application for hearing with the Division of
285 Adjudication:

286 (i) the employee;

287 (ii) a representative of the employee, the qualifications of whom are defined in rule by
288 the commission; or

289 (iii) a dependent as described in Section [34A-2-403](#).

290 (b) To appeal the imposition of a penalty or other administrative act imposed by the
291 division on the employer or its insurance carrier for failure to comply with this chapter or
292 Chapter 3, Utah Occupational Disease Act, any of the following shall file an application for
293 hearing with the Division of Adjudication:

294 (i) the employer;

295 (ii) the insurance carrier; or

296 (iii) a representative of either the employer or the insurance carrier, the qualifications
297 of whom are defined in rule by the commission.

298 (c) A person providing goods or services described in Subsections [34A-2-407](#)(12) and
299 [34A-3-108](#)(13) may file an application for hearing in accordance with Section [34A-2-407](#) or
300 [34A-3-108](#).

301 ~~[(d) An attorney may file an application for hearing in accordance with Section~~
302 ~~[34A-1-309](#).]~~

303 (2) (a) Unless all parties agree to the assignment in writing, the Division of
304 Adjudication may not assign the same administrative law judge to hear a claim under this
305 section by an injured employee if the administrative law judge previously heard a claim by the
306 same injured employee for a different injury or occupational disease.

307 (b) Unless all parties agree to the appointment in writing, an administrative law judge
308 may not appoint the same medical panel or individual panel member to evaluate a claim by an
309 injured employee if the medical panel or individual panel member previously evaluated a claim
310 by the same injured employee for a different injury or occupational disease.

311 (3) Unless a party in interest appeals the decision of an administrative law judge in
312 accordance with Subsection (4), the decision of an administrative law judge on an application
313 for hearing filed under Subsection (1) is a final order of the commission 30 days after the day
314 on which the decision is issued. An administrative law judge shall issue a decision by no later
315 than 60 days from the day on which the hearing is held under this part unless:

- 316 (a) the parties agree to a longer period of time; or
317 (b) a decision within the 60-day period is impracticable.

318 (4) (a) A party in interest may appeal the decision of an administrative law judge by
319 filing a motion for review with the Division of Adjudication within 30 days of the date the
320 decision is issued.

321 (b) Unless a party in interest to the appeal requests under Subsection (4)(c) that the
322 appeal be heard by the Appeals Board, the commissioner shall hear the review.

323 (c) A party in interest may request that an appeal be heard by the Appeals Board by
324 filing the request with the Division of Adjudication:

- 325 (i) as part of the motion for review; or
326 (ii) if requested by a party in interest who did not file a motion for review, within 20
327 days of the day on which the motion for review is filed with the Division of Adjudication.

328 (d) A case appealed to the Appeals Board shall be decided by the majority vote of the
329 Appeals Board.

330 (5) The Division of Adjudication shall maintain a record on appeal, including an
331 appeal docket showing the receipt and disposition of the appeals on review.

332 (6) Upon appeal, the commissioner or Appeals Board shall make its decision in
333 accordance with Section [34A-1-303](#). The commissioner or Appeals Board shall issue a
334 decision under this part by no later than 90 days from the day on which the motion for review is
335 filed unless:

- 336 (a) the parties agree to a longer period of time; or
337 (b) a decision within the 90-day period is impracticable.

338 (7) The commissioner or Appeals Board shall promptly notify the parties to a
339 proceeding before it of its decision, including its findings and conclusions.

340 (8) (a) Subject to Subsection (8)(b), the decision of the commissioner or Appeals
341 Board is final unless within 30 days after the date the decision is issued further appeal is
342 initiated under the provisions of this section or Title 63G, Chapter 4, Administrative
343 Procedures Act.

344 (b) In the case of an award of permanent total disability benefits under Section
345 [34A-2-413](#), the decision of the commissioner or Appeals Board is a final order of the
346 commission unless set aside by the court of appeals.

347 (9) (a) Within 30 days after the day on which the decision of the commissioner or
348 Appeals Board is issued, an aggrieved party may secure judicial review by commencing an
349 action in the court of appeals against the commissioner or Appeals Board for the review of the
350 decision of the commissioner or Appeals Board.

351 (b) In an action filed under Subsection (9)(a):

352 (i) any other party to the proceeding before the commissioner or Appeals Board shall
353 be made a party; and

354 (ii) the commission shall be made a party.

355 (c) A party claiming to be aggrieved may seek judicial review only if the party exhausts
356 the party's remedies before the commission as provided by this section.

357 (d) At the request of the court of appeals, the commission shall certify and file with the
358 court all documents and papers and a transcript of all testimony taken in the matter together
359 with the decision of the commissioner or Appeals Board.

360 (10) (a) The commission shall make rules, in accordance with Title 63G, Chapter 3,
361 Utah Administrative Rulemaking Act, to facilitate timely completion of administrative actions
362 under this part.

363 (b) The commission shall monitor the time from filing of an application for a hearing
364 to issuance of a final order of the commission for cases brought under this part.