

WORKERS' COMPENSATION ATTORNEY FEES

AMENDMENTS

2018 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Karen Mayne

House Sponsor: James A. Dunnigan

LONG TITLE

General Description:

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

Highlighted Provisions:

This bill:

- ▶ provides that to the extent allowed by court rule, an employee may be awarded reasonable attorney fees in an adjudication of a workers' compensation claim where only medical benefits are at issue; and
- ▶ makes technical and conforming 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 2016, Chapter 31

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

REPEALS AND REENACTS:

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

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

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 Section 34A-1-309 is repealed and reenacted to read:

31 **34A-1-309. Attorney fees.**

32 For an adjudication of a workers' compensation claim where only medical benefits are
33 at issue, reasonable attorney fees may be awarded in accordance with and to the extent allowed
34 by rule adopted by the Utah Supreme Court and implemented by the Labor Commission.

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

36 **34A-2-413. Permanent total disability -- Amount of payments -- Rehabilitation.**

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

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

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

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

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

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

49 (i) the employee is not gainfully employed;

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

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

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

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

86 (ii) the amount calculated under Subsection (2)(b)(i) may not exceed:
87 (A) the maximum established in Subsection (2)(a); or
88 (B) the average weekly wage of the employee at the time of the injury; and
89 (c) after the initial 312 weeks, the minimum weekly compensation rate under
90 Subsection (2)(b) is 36% of the current state average weekly wage, rounded to the nearest
91 dollar.

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

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

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

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

- 104 (i) to the employer or the employer's insurance carrier; and
- 105 (ii) out of the Employers' Reinsurance Fund's liability to the employee.

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

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

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

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

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

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

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

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

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

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

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

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

138 (A) consider evidence regarding rehabilitation; and

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

141 (b) Before commencing the procedure required by Subsection (5)(a), the administrative

142 law judge shall order:

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

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

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

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

151 (e) An employer or the employer's insurance carrier may not be ordered to submit a
152 reemployment plan. If the employer or the employer's insurance carrier voluntarily submits a
153 plan, the plan is subject to Subsections (5)(e)(i) through (iii).

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

155 (A) retraining;

156 (B) education;

157 (C) medical and disability compensation benefits;

158 (D) job placement services; or

159 (E) incentives calculated to facilitate reemployment.

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

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

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

169 (g) If a preponderance of the evidence shows that pursuant to a reemployment plan, as

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

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

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

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

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

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

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

187 (c) An employee shall:

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

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

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

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

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

198 (ii) The adjudication of disputes arising under this Subsection (6) is governed by Part
199 8, Adjudication.

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

202 (h) The administrative law judge may:

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

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

205 (I) medical capacity; or

206 (II) residual functional capacity; or

207 (B) for good cause; or

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

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

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

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

223 (i) both hands;

224 (ii) both arms;

225 (iii) both feet;

- 226 (iv) both legs;
- 227 (v) both eyes; or
- 228 (vi) any combination of two body members described in this Subsection (9)(a).
- 229 (b) A finding of permanent total disability pursuant to Subsection (9)(a) is final.
- 230 (10) (a) An insurer or self-insured employer may periodically reexamine a permanent
- 231 total disability claim, except those based on Subsection (9), for which the insurer or
- 232 self-insured employer had or has payment responsibility to determine whether the employee
- 233 continues to have a permanent, total disability.
- 234 (b) Reexamination may be conducted no more than once every three years after an
- 235 award is final, unless good cause is shown by the employer or the employer's insurance carrier
- 236 to allow more frequent reexaminations.
- 237 (c) The reexamination may include:
- 238 (i) the review of medical records;
- 239 (ii) employee submission to one or more reasonable medical evaluations;
- 240 (iii) employee submission to one or more reasonable rehabilitation evaluations and
- 241 retraining efforts;
- 242 (iv) employee disclosure of Federal Income Tax Returns;
- 243 (v) employee certification of compliance with Section [34A-2-110](#); and
- 244 (vi) employee completion of one or more sworn affidavits or questionnaires approved
- 245 by the division.
- 246 (d) The insurer or self-insured employer shall pay for the cost of a reexamination with
- 247 appropriate employee reimbursement pursuant to rule for reasonable travel allowance and per
- 248 diem as well as reasonable expert witness fees incurred by the employee in supporting the
- 249 employee's claim for permanent total disability benefits at the time of reexamination.
- 250 (e) If an employee fails to fully cooperate in the reasonable reexamination of a
- 251 permanent total disability finding, an administrative law judge may order the suspension of the
- 252 employee's permanent total disability benefits until the employee cooperates with the
- 253 reexamination.

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

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

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

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

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

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

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

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

282 **administrative action.**

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

- 287 (i) the employee;
- 288 (ii) a representative of the employee, the qualifications of whom are defined in rule by
289 the commission; or
- 290 (iii) a dependent as described in Section 34A-2-403.

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

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

299 (c) A person providing goods or services described in Subsections 34A-2-407(12) and
300 34A-3-108(13) may file an application for hearing in accordance with Section 34A-2-407 or
301 34A-3-108.

302 [~~(d) An attorney may file an application for hearing in accordance with Section~~
303 ~~34A-1-309.~~]

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

308 (b) Unless all parties agree to the appointment in writing, an administrative law judge
309 may not appoint the same medical panel or individual panel member to evaluate a claim by an

310 injured employee if the medical panel or individual panel member previously evaluated a claim
311 by the same injured employee for a different injury or occupational disease.

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

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

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

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

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

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

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

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

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

- 337 (a) the parties agree to a longer period of time; or

338 (b) a decision within the 90-day period is impracticable.

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

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

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

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

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

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

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

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

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

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

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

