

1987

# Jay Rekward v. Industrial Commission of Utah, Howard Foley Company, Travelers Insurance and Second Injury Fund : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 870371-CA

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IN THE UTAH COURT OF APPEALS

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JAY REKWARD,	:	
Plaintiff,	:	APPELLANT'S BRIEF
vs.	:	
INDUSTRIAL COMMISSION OF	:	Case No. 870371-CA
UTAH, HOWARD FOLEY COMPANY,	:	Category 6 Appeal
TRAVELERS INSURANCE AND	:	
SECOND INJURY FUND,	:	
Defendants.	:	

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This is a petition for a writ of review from an order of the Industrial Commission, the Honorable Timothy Allen, administrative law judge, presiding.

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DEC 8 1987

COURT OF APPEALS

# STATEMENT OF JURISDICTION

Jurisdiction is granted in this court pursuant to Utah Code Annotated, Section 35-1-83 (1953, as amended).

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IN THE UTAH COURT OF APPEALS

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JAY REKWARD, :  
 :  
 Plaintiff, : APPELLANT'S BRIEF  
 :  
 vs. :  
 :  
 INDUSTRIAL COMMISSION OF : Case No. 870371-CA  
 UTAH, HOWARD FOLEY COMPANY, : Category 6 Appeal  
 TRAVELERS INSURANCE AND :  
 SECOND INJURY FUND, :  
 :  
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#### STATEMENT OF ISSUES PRESENTED ON APPEAL

I. Is the plaintiff, Jay Rekward, entitled to temporary total disability payments during the course of his vocational rehabilitation, even though he has reached a state of medical stability?

II. Is the plaintiff, Jay Rekward, entitled to a higher impairment rating based upon the credible evidence, or in the alternative, is he entitled to a remand for an evidentiary hearing to assess the credibility of the medical opinions?

#### STATEMENT OF THE CASE

This case is brought before the above-entitled court to review an Order of the Industrial Commission of the State of Utah, Workers Compensation Division.

A hearing was held before an administrative law judge of the Industrial Commission on the 10th day of December, 1986. After the conclusion of the testimony, the matter was referred to a medical panel. An objection to the medical panel report was made by Rekward, but was denied in the Findings of Fact, Conclusions of Law and Order entered by the administrative law judge. A motion for review was filed with the Industrial Commission, which denied the motion. A Petition for Writ of Review was then filed in this court.

The Industrial Commission denied to Rekward temporary total disability benefits during the time he is engaged in vocational rehabilitation. The Commission then awarded permanent partial disability benefits in accordance with the panel report, despite conflicting medical opinions and Rekward's objection to the panel



report, based on the conflicting opinions. No hearing was held to determine the credibility of the opinions.

#### FACTS

Jay Rekward (hereinafter Rekward) was working as a heavy equipment operator for the defendant, Howard Foley Company (hereinafter Foley), during August of 1983. On the 17th day of August, Rekward was involved in an industrial accident when the backhoe he was operating rolled three times down the side of mountain (R. p.6, 28 - 29). Rekward was taken to the Tooele Valley Hospital for emergency treatment (R. p.35) and was subsequently seen by a number of doctors. Dr. Jane Squires ultimately declared him medically stable as of the 21st day of July, 1986 (R. p.74). Her report to the Industrial Commission dated November 6, 1986 indicates that Rekward has not been released for usual work, but has been released for light work (R. p.74). She has also stated that he cannot return to his former occupation (R. p.83). His injuries were described as "neck injury with resultant severe DJD in cervical spine, fibrosis in cervical muscles with decreased range of motion, pain and headaches." (R. p.74). No impairment rating was given, as her employer, the Veteran's Administration, prohibits the giving of written ratings.

Rekward was referred to Dr. Robert Baer, to determine an impairment rating. Rekward was given a thirty percent (30%) impairment rating with an additional five percent (5%) for pain (R. p.90 - 91). Foley (through its insurance carrier, Travelers Insurance Company) requested an independent evaluation, which was performed by Dr. Geoffrey Orme. Dr. Orme found a twenty percent

(20%) impairment rating to the cervical spine, based upon the guidelines established by the American Academy of Orthopaedic Surgeons (R. p.178), and a two percent (2%) impairment for decreased sensation in the hand based upon the tables for unilateral spinal nerve involvement (R. p.178 - 179). Dr. Orme stated that Rekward would have difficulty working heavy machinery and that he should pursue vigorous rehabilitation (R. p.179). Dr. Orme felt that Rekward should be trained at lighter work (R. p.179).

Rekward testified that his restrictions included sitting for two hours, standing for two hours, walking for two hours, lifting twenty pounds or less, and bending occasionally (R. p.47). These restrictions were based on the advice of Dr. Squires (R. p.81). He further testified that the Social Security Administration had made a finding that there was no work available in the economy for him due to his injuries, and that he was receiving disability payments from the Social Security Administration (R. p.47 - 48). Rekward has a high school education (R. p.48) and has only training and experience as a heavy equipment operator (R. p.49). He has tried to find employment, but has been physically incapable of doing the work (R. p.49 - 50).

Following a hearing, Rekward was referred to a medical panel for further evaluation (R. p.63, 65). The panel, without referring to any guidelines as to how the rating was arrived at, found a ten percent (10%) impairment referable to cervical spondylosis, ten percent (10%) for depression, one percent (1%) for sensory loss in the right hand, and two and one-half percent

(2.5%) for hearing loss (R. p.212).

An objection to the medical panel report was timely filed, drawing to the attention of the administrative law judge the significant differences between the ratings of Dr. Baer, Dr. Orme and the medical panel (R. p.224 - 227). It was pointed out that Dr. Orme had relied on orthopedic guides in making his ratings, while the medical panel had not. No hearing was held following the objection to the report. The administrative law judge entered Findings of Fact, Conclusions of Law and Order, summarily dismissing the objections (R. p.228 - 235). A motion for review was timely filed, again pointing out the discrepancies between the medical reports (R. p.236 - 238). The motion argues that the weight of the credible evidence supports a higher rating (R. p.237). The Motion further sought an award of temporary total disability through the time of Rekward's vocational rehabilitation (R. p.236 - 237). Rekward's Motion was denied and an appeal was taken to this court.

#### SUMMARY OF ARGUMENTS

##### I. REKWARD IS ENTITLED TO TEMPORARY TOTAL DISABILITY PAYMENTS UNTIL HE HAS COMPLETED RETRAINING

Rekward is incapable of being employed without vocational retraining. Since the purpose of the Worker's Compensation Act is to provide for compensation until an injured worker is able to return to work, Rekward is entitled to temporary total benefits until he completes his retraining. This is in harmony with the legislative intent, since the legislature has required referral to the Division of Vocational Rehabilitation, prior to the finding of

permanent total disability.

II. REKWARD IS ENTITLED TO A HIGHER IMPAIRMENT RATING  
BASED UPON THE CREDIBLE EVIDENCE, OR IN THE ALTERNATIVE,  
A REMAND FOR AN EVIDENTIARY HEARING TO ASSESS THE  
CREDIBILITY OF THE MEDICAL OPINIONS

The medical evidence was contradictory as it related to the amount of impairment resulting from Rekward's cervical injuries. Only Dr. Orme indicated how he reached his opinion, having relied on the guidelines of the American Academy of Orthopaedic Surgeons. Rekward maintains that this report is thus, the most credible. In the alternative, Rekward seeks a remand to assess the credibility of the medical opinions. Although an objection to the medical panel report was made, pointing out the conflicting testimony, no hearing was held. Utah law and fundamental fairness require cross examination to determine credibility or to otherwise establish factual matters. The failure to hold a hearing to allow cross examination, when an objection to the panel report has been filed, is an abuse of discretion, requiring a remand.

ARGUMENT

I. REKWARD IS ENTITLED TO TEMPORARY TOTAL DISABILITY PAYMENTS  
UNTIL HE HAS COMPLETED RETRAINING

All of the testimony presented indicates that Rekward cannot return to his former occupation as a heavy equipment operator (R. p.46 - 50, 74, 83, 118, 179). The independent medical evaluation obtained by Foley recommends vigorous rehabilitation and training for lighter work (R. p.179). Rekward has a high school education and has no training nor experience except as a heavy equipment

operator (R. p.48 - 49). The Social Security Administration has found him totally disabled, there not being any jobs in the economy which Rekward is capable of performing (R. p.47 48). He has tried to find work, but has not been successful (R. p.49-50).

This is factually similar to United Park City Mines Company vs. Prescott, 15 Utah 2d 410, 393 P.2d 800 (1963). In that case, a miner was injured in an industrial accident. The injury sustained rendered him incapable of returning to work at his former occupation. The employer argued he could do lighter work and was entitled only to an award of permanent partial disability. The Supreme Court disagreed, holding:

In considering the attack upon the order made, these principles ought to be kept in mind: that a worker may be found totally disabled if by reason of the disability resulting from his injury he cannot perform work of the general character he was performing when injured, or any other work which a man of his capabilities may be able to do or to learn to do; ...  
393 P.2d at 801-802.

In Marshall vs. Industrial Commission, 681 P.2d 208 (Utah 1984), a coal miner was injured and was unable to return to mining as an occupation. Although his impairment rating was found to be only twenty-six percent (26%), he was awarded permanent total disability payments because his disability was total, in terms of employability. The Supreme Court stated:

At the outset, we note that the purpose of the Worker's Compensation Act is "to secure workmen ... against becoming objects of charity, by making reasonable compensation for calamities incidental to the employment ..." [citation omitted]. This compensation is not in the form of damages for injury, as in a tort action, but in the form of payments to compensate for the loss of employability resulting from the injury. [citation omitted]. Thus, the Utah Worker's

Compensation Statutes key the amount of the weekly payment not merely to the medical nature of the injury, but to a percentage of the worker's average weekly wages, reflecting the economic impact of the injury on the particular individual. (Emphasis in original).  
681 P.2d at 210-211.

A long line of cases follow these principles that impairment and disability are different concepts and a worker may be disabled even though his physical impairment may be slight. See Norton vs. Industrial Commission, 728 P.2d 1025 (Utah 1986); Hardman vs. Salt Lake City Fleet Management, 725 P.2d 1323 (Utah 1986); Entwistle Company vs. Wilkins, 626 P.2d 495 (Utah 1981); Brundage vs. IML Freight, Inc., 622 P.2d 790 (Utah 1980); Morrison-Knudson Construction Company vs. Industrial Commission, 18 Utah 2d 390, 424 P.2d 138 (1967).

Thus, a worker suffering an industrial injury, who is unable to return to his former occupation, should be held to be permanently totally disabled. In this case, Rekward, by consensus medical opinion, cannot return to his former occupation as a heavy equipment operator. Dr. Squires, the treating physician, imposed certain restrictions limiting Rekward to sitting for two hours, standing for two hours, walking for two hours, occasional bending and stooping, and lifting no more than fifteen to twenty pounds (R. p.81). Rekward has a high school education and has no training nor experience other than as a heavy equipment operator (R. p.48 - 49). The Social Security Administration has found there is no work he is capable of performing in the economy (R. p.47 - 48). The independent evaluation by Dr. Orme indicates Rekward can probably be retrained (R. p.179). Indeed, Rekward feels he can be retrained and is desirous of being retrained. He

had taken the initiative prior to the hearing, to have himself accepted into an Idaho vocational rehabilitation program (R. p.24). This is expected to be a two-year program. Until that program is completed, it is not known if Rekward can be retrained or not.

Because Rekward is hopeful of being retrained, he had not asked for permanent total disability, but has asked that temporary total disability continue through his retraining. He should not be penalized by his ambitious desire to retrain himself and make himself productive. Indeed, Rekward is totally disabled absent retraining. However, he is not eligible for total disability payments until after a referral to the Division of Vocational Rehabilitation. Utah Code Annotated Section 35-1-67 (1953 as amended) provides that permanent total disability cannot be paid an employment until after referral to and the employee's cooperation with the Division of Vocational Rehabilitation. Thus, the legislature had in mind a rehabilitation program prior to the awarding of total disability payments. Given the purpose of the Worker's Compensation Law as set forth in Marshall vs. Industrial Commission, 681 P.2d 208, 211 (Utah 1984) "... to compensate for the loss of employability ...", the legislative intent is best met by allowing temporary total disability payments through the retraining mandated by Utah Code Annotated Section 35-1-67 (1953 as amended). Indeed, the purpose of temporary total disability payments is to compensate an injured worker until they are able to return to work. In Intermountain Health Care, Inc. vs. Ortega, 562 P.2d 617, 619 - 620 (Utah 1977) the Supreme Court

stated: "said benefits [temporary total] are intended to compensate a workman during the period of healing and until he is able to return to work ..." At the conclusion of the retraining, a determination of permanent total, or permanent partial disability may be made.

The Minnesota Court in Schulte vs. C. H. Peterson Construction Company, 278 Minn. 79, 153 N.W.2d 130 (1967) has reached this conclusion. In a case involving a 48 year old injured worker, with a high school education, unable to return to his former occupation, the Supreme Court stated:

It is well settled that the concept of total disability is not a mere reflection of an employee's physical condition. Minnesota Statutes 176.101, Subdivision 5, defines "total disability" as meaning, among other things, "any other injury which totally incapacitates the employee from working at an occupation which brings him an income". This court in interpreting this language has formulated the rule that a person is totally disabled if his physical condition, in combination with his age, training and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income. A total disability is temporary when it is likely it will exist over a limited period of time only. If the inability-to-earn-wages aspect of the rule is satisfied, the fact that the injury itself is permanent and partial in a physical sense will not preclude a determination that the employee has a temporary total disability. The concept of temporary total disability is primarily dependent upon the employee's ability to find and hold a job, not his physical condition.  
153 N.W.2d at 133-134.

Although this decision is based on a statute that relates to income, the decision is wholly consonant with the purpose of the Utah Act, to provide temporary compensation while the employee is unable to be employed. In addition, the Utah Statute (Utah Code Annotated section 35-1-65) ties compensation to a percentage of income.



In Minshall vs. Plains Manufacturing Company, 215 Neb. 881, 341 N.W.2d 906 (1983) the injured worker was unable to return to his former occupation. He had received some retraining, but was not employable, due to his industrial injuries, though he attempted to work. He had been given a twenty percent (20%) permanent impairment rating by one of his doctors. Nevertheless, the court held:

A workman who is unable to perform or to obtain any substantial amount of labor, either in his particular line of work or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act [citation omitted].  
341 N.W.2d at 909.

See also State Ex Real. Horne vs. Industrial Commission, 18 Ohio State 3rd 79, 489 N.E.2d 753 (1985) and Barkdull vs. Homestake Mining Company, 317 N.W.2d 417 (S. D. 1982).

Foley, in responding to Rekward's motion for review, relied on Booms vs. Rapp Construction Company, 720 P.2d 1363 (Utah 1986). In Booms, the injured worker, although stable enough to receive an impairment rating, wanted to continue his temporary total payments until a specific finding of being able to return to work was made by the Industrial Commission. The court ruled, on the facts of that case, that temporary total benefits cease when the injury is medically stable. This is not necessarily inconsistent with Rekward's request, under the facts of this case, in light of the statute and case law in interpreting the Worker's Compensation Act. In Marshall vs. Industrial Commission, 681 P.2d 208 (Utah 1984), the injured worker was stable enough to receive an impairment rating of twenty-six percent (26%), but was found to be totally disabled because he could not return to his work. In

Norton vs. Industrial Commission, 728 P.2d 1025 (Utah 1986), the injured worker had received a permanent partial impairment rating of thirty-one percent (31%), yet was found totally disabled due to his inability to return to work. In Brundage vs. IML Freight, Inc., 622 P.2d 790 (Utah 1980) the worker received a thirty percent (30%) impairment rating, but was found to be totally disabled because he could not return to work. The court further held, in the absence of contradictory evidence concerning the employability of the injured worker, that the employer has the burden of proving available work:

In the face of such evidence, none of which was contradicted, it then became incumbent upon the defendants to show that plaintiff "is able to secure employment of a special nature not generally available or that he is able to perform the duties of such employment." {citation omitted}  
622 P.2d at 792.

Rekward should not be penalized because of his desire to return to work, and thus has asked for temporary total, rather than permanent total, benefits during his retraining. Indeed, the Supreme Court in Entwistle Company vs. Wilkins, 626 P.2d 495 (Utah 1981) observed:

The law should not and does not encourage indolence by requiring that a man be completely idle in order to remain eligible for disability compensation.  
626 P.2d at 497.

Indeed, the legislative intent is to prevent indolence. Utah Code Annotated Section 35-1-67 (1953 as amended) requires vocational rehabilitation before a permanent total disability is found. Thus, an uncontradicted inability to work, despite medical stabilization, justifies a payment of temporary total benefits through vocational retraining, when the extent of the permanent

total or permanent partial disability can be better known.

Thus, the issue of receiving temporary total payments through retraining is a distinct issue from that presented in Booms. Rekward is entitled to temporary total benefits, in order to carry into effect the purposes of the Worker's Compensation Act to rehabilitate injured workers and to provide for their financial needs until they can be productive following their injuries, and to prevent them from being public charges and objects of charity.

II. REKWARD IS ENTITLED TO A HIGHER IMPAIRMENT RATING  
BASED UPON THE CREDIBLE EVIDENCE, OR IN THE ALTERNATIVE,  
A REMAND FOR AN EVIDENTIARY HEARING TO ASSESS THE CREDIBILITY  
OF THE MEDICAL OPINIONS

Because Rekward's treating physician was prohibited from making an impairment rating by the Veteran's Administration policies, the three ratings given Rekward were all independent. Dr. Baer found a thirty percent (30%) impairment for his cervical injuries. Dr. Orme found a twenty percent (20%) impairment due to the cervical injuries, and the medical panel found a ten percent (10%) impairment due to the cervical injuries. Only Dr. Orme, of the three evaluators, indicated how he calculated the impairment rating. Dr. Orme, in determining the cervical impairment, relied on the guidelines established by the American Academy of Orthopaedic Surgeons (R. p.179). Absent a hearing to assess the credibility of the various ratings, Dr. Orme's report must be deemed the most credible, as it is the only one setting forth the guidelines relied upon.

The administrative law judge apparently did not hold a hearing due to his belief that "so that while at first blush the

ratings of Dr. Orme and the medical panel would seem inconsistent, upon the bigger view, it is clear that both are consistent." (R. p.229). This statement was based on the fact that the total impairment, as found by the panel is twenty-three percent (23%), while the total impairment as found by Dr. Orme, was twenty-two percent (22%). However, Dr. Orme did not rate the psychiatric injury and the hearing loss, which were rated by the panel. Indeed, Dr. Orme could not rate them, as he is not a psychiatrist nor an audiologist. Thus, comparing the ratings for the cervical injuries, which were rated by both, there is a great disparity between the twenty percent (20%) found by Dr. Orme and the ten percent (10%) found by the panel.

In the event this court declines to find Dr. Orme's report the most credible, since it is the function of the Industrial Commission to be the fact finding body, Rekward is entitled to a remand for an evidentiary hearing to determine the credibility of the various ratings. Although the objection to the medical panel report and a motion for review to the Industrial Commission pointed out the disparity of the ratings, and argues the credibility of the same (R. p.224 - 227, 236 - 238), no hearing was held. Utah Code Annotated Section 35-1-82.51 (1953 as amended) gives to each party the right to cross examine. The pertinent part reads as follows:

All parties in interest shall have the right to be present at any hearing, in person or by attorney or by any other agent, and to present such testimony as may be pertinent to the controversy before the commission and shall have the right to cross examine.

When Rekward objected to the panel report, setting forth the

disparities between the various ratings, he was entitled to cross examine the various doctors in order to assess and determine the credibility of each. Indeed, the opportunity to challenge the panel report with conflicting medical opinion was referred to by the administrative law judge at the conclusion of the hearing. (R. p.68). It is an abuse of discretion to deny a claimant the fundamental right of cross examination. 3 Larson, Workmen's Compensation Law (1983) Section 79.63 states:

Under the increasingly common practice of referral of claimants to an official medical examiner or an independent physician chosen by the commission, it is particularly important that the commissions not lose sight of the elementary requirement that the parties be given an opportunity to see such doctor's report, cross examine him, and, if necessary, provide rebuttal testimony.

In Northwest Trailer Sales vs. McCann, 217 S.2d 310 (Florida 1968), the Florida Supreme Court, in construing a statute similar to our own, has stated:

We find nothing in this statute which authorizes a deputy [administrative law judge] to obtain independent medical advice by requesting a claimant to submit to a physical examination, and then deny to the claimant the right to examine or cross examine the doctor.  
217 So.2d at 312.

Thus, when the credibility of various impairment ratings is placed in question before the Industrial Commission, the claimant is entitled to a hearing to determine the credibility of each of the ratings. The denial of such a fundamental right is an abuse of discretion warranting a remand.

Rekward is entitled to a higher impairment rating based on the more credible evidence, or in the alternative, he is entitled to a remand for a hearing to determine the credibility of each of the ratings given.

### CONCLUSION

The consensus medical opinion is that Rekward is physically incapable of returning to his former occupation. He has a high school education and no training nor experience for any line of work other than a heavy equipment operator. He will require vocational rehabilitation in order to return to work. The legislature has mandated vocational rehabilitation prior to the determination of permanent total disability. The purpose of the Worker's Compensation Act is to provide financial means to an injured worker until he can regain productivity. It, therefore, follows that Rekward is entitled to temporary total benefits until he completes vocational rehabilitation.

Rekward is also entitled to a higher rating for his cervical injuries, or in the alternative, is entitled to a remand for purposes of taking an evidentiary hearing in order to properly assess the credibility of the ratings given. The failure to grant such a hearing is a denial of a fundamental right and an abuse of discretion.

Respectfully submitted this 7 day of December, 1987.

  
S. JUNIOR BAKER

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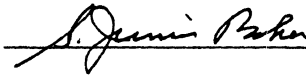
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on the 8 day of December, 1987.

  
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## ADDENDUM



## DECISIONS UNDER FORMER LAW

**Same employment.**

Where decedent employee of general contractor was electrocuted, allegedly through negligence of subcontractor, in accident occurring prior to 1975 amendment of this section, subcontractor was in same employment as decedent

under 35-1-42, and heirs were precluded from maintaining wrongful death action against it by provisions of 35-1-60. *Shupe v. Wasatch Electric Co., Inc.* (Utah 1976) 546 P 2d 896.

### **35-1-65. Temporary disability — Amount of payments — State average weekly wage defined.**

(1) In case of temporary disability, the employee shall receive  $66\frac{2}{3}\%$  of that employee's average weekly wages at the time of the injury so long as such disability is total, but not more than a maximum of 100% 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 for a dependent spouse and \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 100% of the state average weekly wage at the time of the injury per week. In no case shall such 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 eight years from the date of the injury.

In the event a light duty medical release is obtained prior to the employee reaching a fixed state of recovery, and when no such light duty employment is available to the employee from the employer, temporary disability benefits shall continue to be paid.

(2) The "state average weekly wage" as referred to in chapters 1 and 2 of this Title shall be determined by the commission as follows: on or before June 1 of each year, the total wages reported on contribution reports to the department of employment security under the commission 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 twelve. The average annual wage thus obtained shall be divided by 52, and the average weekly wage thus determined rounded to the nearest dollar. The state average weekly wage as so determined shall be used as the basis for computing the maximum compensation rate for injuries or disabilities arising from occupational disease which occurred during the twelve-month period commencing July 1 following the June 1 determination, and any death resulting therefrom.

**History:** L. 1917, ch. 100, § 76; C.L. 1917, § 3137; L. 1919, ch. 63, § 1; 1921, ch. 67, § 1; R.S. 1933, 42-1-61; L. 1937, ch. 41, § 1; 1939, ch. 51, § 1; C. 1943, 42-1-61; L. 1945, ch. 65, § 1; 1949, ch. 52, § 1; 1951, ch. 55, § 1; 1955, ch. 57, § 1; 1957, ch. 62, § 1; 1959, ch. 55, § 1; 1961, ch. 71, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1967, ch. 65, § 1; 1969, ch. 86, § 3; 1971, ch. 76, § 4; 1973, ch. 67, § 2; 1975, ch. 101, § 4; 1977, ch. 151, § 1; 1981, ch. 287, § 1.

**Compiler's Notes.** — The 1975 amendment, in subsec. (1), substituted "100%" for " $66\frac{2}{3}\%$ " before "of the state average weekly wage" in three places; increased the minimum benefit

per week from \$35 to \$45 in the first sentence of subsec. (1); and inserted "not to exceed the average weekly wage of the employee at the time of the injury" in the first sentence of subsec. (1).

The 1977 amendment substituted "that employee's" for "his" near the beginning of subsec. (1); and substituted "spouse" for "wife" near the middle of subsec. (1).

The 1981 amendment deleted "minor" before "child" and "children" in the first paragraph of subsec. (1); added the last paragraph in subsec. (1); and made a minor change in style.

**35-1-67. Permanent total disability — Amount of payments — Vocational rehabilitation — Procedure and payments.**

In cases of permanent total disability the employee shall receive  $66\frac{2}{3}\%$  of his average weekly wages at the time of the injury, but not more than a maximum of 85% 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 for a dependent spouse and \$5 for each dependent minor child under the age of 18 years, up to a maximum of four dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week. However, in no case of permanent total disability shall the employer or its insurance carrier be required to pay weekly compensation payments for more than 312 weeks. A finding by the commission of permanent total disability shall in all cases be tentative and not final until such time as the following proceedings have been had: If the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer the employee to the division of vocational rehabilitation under the state board of education for rehabilitation training and it shall be the duty of the commission to order paid to the vocational rehabilitation division, out of the second injury fund provided for by Subsection 35-1-68 (1), not to exceed \$1,000 for use in the rehabilitation and training of the employee; the rehabilitation and training of the employee shall generally follow the practice applicable under § 35-1-69, relating to the rehabilitation of employees having combined injuries. If the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that the employee has fully cooperated with the division of vocational rehabilitation in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, the commission shall order that there be paid to the employee weekly benefits at the rate of  $66\frac{2}{3}\%$  of his average weekly wages at the time of the injury, but not more than a maximum of 85% 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 for a dependent spouse and \$5 for each dependent minor child under the age of 18 years, up to a maximum of four dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week out of the second injury fund provided for by Subsection 35-1-68 (1), for such period of time beginning with the time that the payments, as in this section provided, to be made by the employer or its insurance carrier terminate and ending with the death of the employee. No employee shall be entitled to any such benefits if he fails or refuses to cooperate with the division of vocational rehabilitation under this section.

All persons who are permanently and totally disabled and entitled to benefits from the second injury fund under Subsection 35-1-68 (1), including those injured prior to March 6, 1949, shall receive not less than \$120 per week when paid only by the second injury fund, or when combined with compensation payments of the employer or the insurance carrier. The division of vocational rehabilitation shall, at the termination of the vocational training of the employee, certify to the industrial commission of Utah the work the employee is

qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, constitutes total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability is required in those instances. In all other cases where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in §§ 35-1-65, 35-1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

**History:** L. 1917, ch. 100, § 78; C.L. 1917, § 3139; L. 1919, ch. 63, § 1; R.S. 1933, 42-1-63; L. 1937, ch. 41, § 1; 1939, ch. 51, § 1; C. 1943, 42-1-63; L. 1945, ch. 65, § 1; 1949, ch. 52, § 1; 1951, ch. 55, § 1; 1955, ch. 57, § 1; 1957, ch. 62, § 1; 1959, ch. 55, § 1; 1961, ch. 71, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1967, ch. 65, § 1; 1969, ch. 86, § 5; 1971, ch. 76, § 6; 1973, ch. 67, § 4; 1974, ch. 13, § 1; 1975, ch. 101, § 5; 1977, ch. 150, § 1; 1977, ch. 151, § 3; 1977, ch. 156, § 6; 1979, ch. 138, § 2; 1981, ch. 286, § 1; 1983, ch. 356, § 1; 1985, ch. 160, § 1.

**Compiler's Notes.** — The 1975 amendment substituted "85% of the state average weekly wage" for "66⅔% of the state average weekly wage" four times in the first paragraph and once in the last paragraph; increased the minimum benefit per week from \$35 to \$45 in the first paragraph; inserted "not to exceed the average weekly wage of the employee at the time of the injury" twice in the first paragraph; increased the benefit per week from \$50 to \$60 at the end of the third paragraph (deleted by the 1977 amendment) and near the end of the fourth paragraph (deleted by the 1977 amendment); and substituted "July 1, 1975" for "July 1, 1974" in the fourth paragraph (deleted by the 1977 amendment).

The 1977 amendment by chapter 151 substituted "spouse" for "wife" in the first paragraph.

The 1977 amendment by chapter 156 made the same changes as the 1977 amendment by chapter 151; combined the first two paragraphs into one paragraph; inserted the second paragraph; and deleted the former third and fourth paragraphs which read: "Commencing July 1, 1971, all persons who are permanently and totally disabled and on that date or prior thereto were receiving compensation benefits from the special fund provided for by section

35-1-68(1) shall be paid compensation benefits at the rate of \$60 per week.

"Commencing July 1, 1975, all persons who were permanently and totally disabled on or before March 5, 1949, and were receiving compensation benefits and continue to receive such benefits shall be paid compensation benefits from the special fund provided for by section 35-1-68(1) at a rate sufficient to bring their weekly benefit to \$60 when combined with employer or insurance carrier compensation payments."

The 1977 amendment by chapter 150, in the two paragraphs deleted by the 1977 amendment by chapter 156 (quoted above) substituted "1977" for "1971" and "1975" and substituted "\$75" for "\$60."

The 1979 amendment increased the minimum benefit in the second paragraph from \$75 to \$85.

The 1981 amendment substituted "second injury fund" for "special fund" throughout the section; and increased the amount in the second paragraph from \$85 to \$100.

The 1983 amendment substituted "under this section" at the end of the first paragraph for "as set forth herein"; increased the minimum amount in the first sentence of the second paragraph from \$100 to \$110; and made minor changes in phraseology, punctuation and style.

The 1985 amendment substituted "\$120" for "\$110" in the first sentence of the second paragraph.

**Effective Date.** — Section 2 of Laws 1985, ch. 160 provided: "This act takes effect upon approval by the governor, or the day following the constitutional time limit of Article VII, Sec. 8 without the governor's signature, or in the case of a veto, the date of veto override." Approved March 18, 1985.

and effect of provisions in relation to compensation of physician or others rendering

services to injured employee, 143 A. L. R. 1264.

#### DECISIONS UNDER FORMER LAW

##### "Particular cases"

Where injured employee was bedridden and had lost sensation and movement of lower extremities because of paralysis he was "particular case" under this section, prior to 1971 amendment, so that order denying application for additional medical expense was annulled since commission was required to ascertain whether case was ordinary or particular, and if it found case to be a particular one, it was required to determine and fix such reasonable amount as under the circumstances

would be fair and just. *Sullivan v. Industrial Comm.*, 83 U. 187, 27 P. 2d 443.

As to whether a case was a "particular" one under this section, prior to 1971 amendment, was a matter left to judgment of commission, and its conclusion in respect thereto would not be disturbed unless it appeared such conclusion was clearly erroneous. *Buckingham Transp. Co. v. Industrial Comm.*, 93 U. 342, 72 P. 2d 1077; *Anderson v. Industrial Comm.*, 108 U. 52, 157 P. 2d 253.

#### 35-1-82. Repealed.

##### Repeal.

Section 35-1-82 (R. S. 1933, 42-1-76; L. 1941 (1st S. S.), ch. 15, § 1; C. 1943, 42-1-76), relating to rehearing before commis-

sion, was repealed by Laws 1965, ch. 67, § 3. For present provisions, see 35-1-82.53 to 35-1-82.55.

**35-1-82.51. Hearings by commission—Notice to parties—Right of parties to be present and present testimony.**—Hearings shall be held by the commission upon reasonable notice to be given to each interested party, by service upon him personally or by mailing a copy to him at his last known post-office address. Such hearings may be adjourned from time to time in the discretion of the commission and may be held in such places as the commission shall designate. All parties in interest shall have the right to be present at any hearing, in person or by attorney or by any other agent, and to present such testimony as may be pertinent to the controversy before the commission and shall have the right to cross-examine.

**History:** C. 1953, 35-1-82.51, enacted by L. 1965, ch. 67, § 2.

##### Title of Act.

An act amending sections 35-1-10, 35-1-83, 35-1-84, 35-1-85, 35-1-86, and 35-1-88, Utah Code Annotated 1953, relating to workmen's compensation and enacting new

sections to be known as sections 35-1-82.51, 35-1-82.52, 35-1-82.53, 35-1-82.54, 35-1-82.55, and 35-1-82.56, Utah Code Annotated 1953, relating to hearings, hearing examiners, appeals and procedures under workmen's compensation and repealing section 35-1-82, Utah Code Annotated 1953.—L. 1965, ch. 67.

**35-1-82.52. Hearings before commission or hearing examiner—Appointment of hearing examiners—Record of proceedings—Findings of fact and order.**—Hearings may be held before the commission or any hearing examiner of the commission, or any commissioner as hearing examiner, when said commissioner has been especially appointed by the commission to hold any such hearing. The commission shall appoint one or more hearing examiners and the commission or any hearing examiner shall have power and authority to call, preside at, and conduct hearings, including the power to issue subpoenas. A full and complete record will be kept of all proceedings before the commission or hearing examiner and all testimony shall be taken down by a reporter employed by the commission. Upon the conclusion of a

**48-121. Compensation; schedule; total and partial disability; injury to specific parts of the body; amounts and duration of payments.** The following schedule of compensation is hereby established for injuries resulting in disability:

(1) For total disability, the compensation during such disability shall be sixty-six and two-thirds per cent of the wages received at the time of injury, but such compensation shall not be more than two hundred dollars per week, nor less than forty-nine dollars per week; *Provided*, that if at the time of injury the employee receives wages of less than forty-nine dollars per week, then he or she shall receive the full amount of such wages per week as compensation. Nothing in this subdivision shall require payment of compensation after disability shall cease.

(2) For disability partial in character, except the particular cases mentioned in subdivision (3) of this section, the compensation shall be sixty-six and two-thirds per cent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but such compensation shall not be more than two hundred dollars per week. This compensation shall be paid during the period of such partial disability, but not beyond three hundred weeks. Should total disability be followed by partial disability, the period of three hundred weeks mentioned in this subdivision shall be reduced by the number of weeks during which compensation was paid for such total disability.

(3) For disability resulting from permanent injury of the following classes, the compensation shall be in addition to the amount paid for temporary disability; *Provided*, the compensation for temporary disability shall cease as soon as the extent of the permanent disability is ascertainable, viz: For the loss of a thumb, sixty-six and two-thirds per cent of daily wages during sixty weeks. For the loss of a first finger, commonly called the index finger, sixty-six and two-thirds per cent of daily wages during thirty-five weeks. For the loss of a second finger, sixty-six and two-thirds per cent of daily wages during thirty weeks. For the loss of a third finger, sixty-six and two-thirds per cent of daily wages during twenty weeks. For the loss of a fourth finger, commonly called the little finger, sixty-six and two-thirds per cent of daily wages during fifteen weeks. The loss of the first phalange of the thumb or of any finger shall be considered to be equal to the loss of one half of such thumb or finger and compensation shall be for one half of the periods of time above specified, and the compensation for the loss of one half of the first phalange shall be for one-fourth of the periods of time above specified. The loss of more than one phalange shall be considered as the loss of the entire finger or thumb; *Provided*, that in no case shall the amount received for more than one finger exceed the amount

provided in this schedule for the loss of a hand. For the loss of a great toe, sixty-six and two-thirds per cent of daily wages during thirty weeks. For the loss of one of the toes other than the great toe, sixty-six and two-thirds per cent of daily wages during ten weeks. The loss of the first phalange of any toe shall be considered equal to the loss of one half of such toe, and compensation shall be for one half of the periods of time above specified. The loss of more than one phalange shall be considered as the loss of the entire toe. For the loss of a hand, sixty-six and two-thirds per cent of daily wages during one hundred seventy-five weeks. For the loss of an arm, sixty-six and two-thirds per cent of daily wages during two hundred twenty-five weeks. For the loss of a foot, sixty-six and two-thirds per cent of daily wages during one hundred fifty weeks. For the loss of a leg, sixty-six and two-thirds per cent of daily wages during two hundred fifteen weeks. For the loss of an eye, sixty-six and two-thirds per cent of daily wages during one hundred twenty-five weeks. For the loss of an ear, sixty-six and two-thirds per cent of daily wages during twenty-five weeks. For the loss of hearing in one ear, sixty-six and two-thirds per cent of daily wages during fifty weeks. For the loss of the nose, sixty-six and two-thirds per cent of daily wages during fifty weeks.

In any case in which there shall be a loss or loss of use of more than one member or parts of more than one member set forth in this subdivision, but not amounting to total and permanent disability, compensation benefits shall be paid for the loss or loss of use of each such member or part thereof, with the periods of benefits to run consecutively. The total loss or permanent total loss of use of both hands, or both arms, or both feet, or both legs, or both eyes, or hearing in both ears, or of any two thereof, in one accident, shall constitute total and permanent disability and be compensated for according to the provisions of subdivision (1) of this section. In all other cases involving a loss or loss of use of both hands, both arms, both feet, both legs, both eyes, or hearing in both ears, or of any two thereof, total and permanent disability shall be determined in accordance with the facts. Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand, and amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot. Amputation at or above the elbow shall be considered as the loss of an arm, and amputation at or above the knee shall be considered as the loss of a leg. Permanent total loss of the use of a finger, hand, arm, foot, leg, or eye shall be considered as the equivalent of the loss of such finger, hand, arm, foot, leg, or eye. In all cases involving a permanent partial loss of the use or function of any of the members mentioned in this subdivision, the compensation shall bear such relation to the amounts named in said subdivision as the disabilities bear to those

produced by the injuries named therein. Should the employer and the employee be unable to agree upon the amount of compensation to be paid in cases not covered by the schedule, the amount of compensation shall be settled according to the provisions of sections 48-173 to 48-185. Compensation under this subdivision shall not be more than two hundred dollars per week, nor less than forty-nine dollars per week; *Provided*, that if at the time of the injury the employee received wages of less than forty-nine dollars per week, then he or she shall receive the full amount of such wages per week as compensation.

(4) For disability resulting from permanent disability, if immediately prior to the accident the rate of wages was fixed by the day or hour, or by the output of the employee the weekly wages shall be taken to be computed upon the basis of a work week of a minimum of five days, if the wages are paid by the day, or upon the basis of a work week of a minimum of forty hours, if the wages are paid by the hour, or upon the basis of a work week of a minimum of five days or forty hours, whichever results in the higher weekly wage, if the wages are based on the output of the employee.

(5) The employee shall be entitled to compensation from his or her employer for temporary disability while undergoing rehabilitation.

**Source:** Laws 1913, c. 198, § 21, p. 586; R.S.1913, § 3662; Laws 1917, c. 85, § 7, p. 202; Laws 1919, c. 91, § 2, p. 228; Laws 1921, c. 122, § 1, p. 521; C.S.1922, § 3044; C.S.1929, § 48-121; Laws 1935, c. 57, § 41, p. 210; C.S.Supp.,1941, § 48-121; R.S.1943, § 48-121; Laws 1945, c. 112, § 1, p. 357; Laws 1949, c. 160, § 1, p. 403; Laws 1951, c. 152, § 1, p. 617; Laws 1953, c. 162, § 1, p. 506; Laws 1955, c. 186, § 1, p. 527; Laws 1957, c. 203, § 1, p. 710; Laws 1957, c. 204, § 1, p. 716; Laws 1959, c. 223, § 1, p. 784; Laws 1963, c. 284, § 1, p. 847; Laws 1963, c. 285, § 1, p. 854; Laws 1965, c. 279, § 1, p. 800; Laws 1967, c. 288, § 1, p. 783; Laws 1971, LB 320, § 1; Laws 1973, LB 193, § 1; Laws 1974, LB 807, § 1; Laws 1974, LB 808, § 1; Laws 1974, LB 710, § 1; Laws 1975, LB 198, § 1; Laws 1977, LB 275, § 1; Laws 1978, LB 446, § 1; Laws 1979, LB 114, § 1; Laws 1979, LB 358, § 1; Laws 1983, LB 158, § 1.

**Note:** "This act" includes sections 48-120, 48-121, 48-157, and 48-162.01.

1. Permanent total disability
2. Temporary total disability
3. Partial disability
4. Permanent injury, specific classes
5. Miscellaneous

**1. Permanent total disability**

Whether a partial loss or loss of use of two members results in total and permanent disability is to be determined in accordance with the facts. Evidence shows that plaintiff

was permanently totally disabled as a matter of law. *Krijan v. Mainelli Constr. Co.*, 216 Neb. 186, 342 N.W.2d 662 (1984).

An employee may be totally disabled but still able, on occasion, to obtain trivial

retainer agreement in which the provisions of this section are specifically set out and provide a copy of this agreement to the employee. The retainer agreement shall provide space for the signature of the employee. A signed agreement shall raise a conclusive presumption that the employee has read and understands the statutory fee provisions. No fee shall be awarded pursuant to this section in the absence of a signed retainer agreement.

Subd. 10. An attorney who knowingly violates any of the provisions of this chapter with respect to authorized fees for legal services in connection with any demand made or suit or proceeding brought under the provisions of this chapter is guilty of a gross misdemeanor.

Subd. 11. **When fees due.** Attorney fees and other disbursements for a proceeding under this chapter shall not be due or paid until the issue for which the fee or disbursement was incurred has been resolved.

**History:** 1953 c 755 s 8; 1973 c 388 s 16; 1975 c 271 s 6; 1975 c 359 s 7; 1976 c 134 s 78; 1977 c 342 s 7-11; Ex1979 c 3 s 32; 1981 c 346 s 67-74; 1983 c 290 s 36-41; 1986 c 444; 1986 c 461 s 7

**176.09** [Repealed, 1953 c 755 s 83]

#### **176.091 MINOR EMPLOYEES.**

A minor employee has the same power to enter into a contract, make election of remedy, make any settlement, and receive compensation as an adult employee, subject to the power of the commissioner of the department of labor and industry, compensation judge, or workers' compensation court of appeals to require the appointment of a guardian for the minor employee to make such settlement and to receive moneys thereunder or under an award.

**History:** 1953 c 755 s 9; 1957 c 781 s 1; 1973 c 388 s 17; 1975 c 271 s 6; 1975 c 359 s 23; 1976 c 134 s 78

#### **176.095 LEGISLATIVE FINDINGS.**

The legislature finds that workers' compensation benefits for total disabilities should exceed those benefits provided for partial disabilities in order to fairly compensate the person unable to engage in gainful employment or suffering an injury described in section 176.101, subdivision 5. It is the policy of the legislature that any change in the benefit schedule for total disability be accompanied by an appropriate change in the benefit schedule for partial disability.

**History:** 1969 c 936 s 1; 1975 c 359 s 23

**176.10** [Repealed, 1953 c 755 s 83]

#### **176.101 COMPENSATION SCHEDULE.**

Subdivision 1. **Temporary total disability.** For injury producing temporary total disability, the compensation is 66-2/3 percent of the weekly wage at the time of injury (1) provided that during the year commencing on October 1, 1979, and each year thereafter, commencing on October 1, the maximum weekly compensation payable is the statewide average weekly wage for the period ending December 31, of the preceding year.

(2) The minimum weekly compensation benefits for temporary total disability shall be not less than 50 percent of the statewide average weekly wage or the injured employee's actual weekly wage, whichever is less. In no case shall a weekly benefit be less than 20 percent of the statewide average weekly wage.

Subject to subdivisions 3a to 3u this compensation shall be paid during the period of disability, payment to be made at the intervals when the wage was payable, as nearly as may be.



Subd. 2. **Temporary partial disability.** In all cases of temporary partial disability the compensation shall be  $66\frac{2}{3}$  percent of the difference between the weekly wage of the employee at the time of injury and the wage the employee is able to earn in the employee's partially disabled condition. This compensation shall be paid during the period of disability except as provided in this section, payment to be made at the intervals when the wage was payable, as nearly as may be, and subject to a maximum compensation equal to the statewide average weekly wage.

Subd. 3. [Repealed, 1983 c 290 s 173]

Subd. 3a. **Economic recovery compensation.** If an employee is not eligible for an impairment award pursuant to subdivision 3b, then the employee shall receive economic recovery compensation for a permanent partial disability pursuant to this subdivision. The compensation shall be  $66\frac{2}{3}$  percent of the weekly wage at the time of injury subject to a maximum equal to the statewide average weekly wage. For permanent partial disability up to the percent of the whole body in the following schedule the compensation shall be paid for the proportion that the loss of function of the disabled part bears to the whole body multiplied by the number of weeks aligned with that percent.

Percent of disability	Weeks of compensation
0-25	600
26-30	640
31-35	680
36-40	720
41-45	760
46-50	800
51-55	880
56-60	960
61-65	1040
66-70	1120
71-100	1200

The percentage loss in all cases under this subdivision is determined according to the rules adopted by the commissioner pursuant to section 176.105, subdivision 4. This subdivision applies to an injury which occurs on or after January 1, 1984.

Subd. 3b. **Impairment compensation.** An employee who suffers a permanent partial disability due to a personal injury and receives impairment compensation under this section shall receive compensation in an amount as provided by this subdivision. For permanent partial disability up to the percent of the whole body shown in the following schedule the amount shall be equal to the proportion that the loss of function of the disabled part bears to the whole body multiplied by the amount aligned with that percent in the following schedule:

Percent of disability	Amount
0-25	\$ 75,000
26-30	80,000
31-35	85,000
36-40	90,000
41-45	95,000
46-50	100,000
51-55	120,000
56-60	140,000
61-65	160,000
66-70	180,000
71-75	200,000
76-80	240,000
81-85	280,000
86-90	320,000

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91-95	360,000
96-100	400,000

For all cases under this subdivision the percentage loss of function of a part of the body is determined according to the rules adopted by the commissioner pursuant to section 176.105, subdivision 4. This subdivision applies to an injury which occurs on or after January 1, 1984.

Subd. 3c. **Maximum payable.** The maximum amount payable under subdivisions 3a and 3b is the maximum compensation payable to an employee who has a 100 percent disability to the body as a whole and under no conditions shall an employee receive more than those amounts even if the employee sustains a disability to two or more body parts.

Subd. 3d. **General.** An employee who has incurred a personal injury shall receive temporary total compensation until these benefits are no longer payable pursuant to this section. If the injury results in a permanent partial disability the employee shall receive compensation as provided in this section.

Subd. 3e. **End of temporary total compensation; suitable job.** (a) Ninety days after an employee has reached maximum medical improvement and the medical report described in clause (c) has been served on the employee, or 90 days after the end of an approved retraining program, whichever is later, the employee's temporary total compensation shall cease. This cessation shall occur at an earlier date if otherwise provided in this chapter.

(b) If at any time prior to the end of the 90-day period described in clause (a) the employee retires or the employer furnishes work to the employee that is consistent with an approved plan of rehabilitation and meets the requirements of section 176.102, subdivision 1, or, if no plan has been approved, that the employee can do in the employee's physical condition and that job produces an economic status as close as possible to that the employee would have enjoyed without the disability, or the employer procures this employment with another employer or the employee accepts this job with another employer, temporary total compensation shall cease and the employee shall, if appropriate, receive impairment compensation pursuant to subdivision 3b. This impairment compensation is in lieu of economic recovery compensation under subdivision 3a, and the employee shall not receive both economic recovery compensation and impairment compensation. Temporary total compensation and impairment compensation shall not be paid concurrently. Once temporary total compensation ceases no further temporary total compensation is payable except as specifically provided by this section.

(c) Upon receipt of a written medical report indicating that the employee has reached maximum medical improvement, the employer or insurer shall serve a copy of the report upon the employee and shall file a copy with the division. The beginning of the 90-day period described in clause (a) shall commence on the day this report is served on the employee for the purpose of determining whether a job offer consistent with the requirements of this subdivision is made. A job offer may be made before the employee reaches maximum medical improvement.

(d) The job which is offered or procured by the employer or accepted by the employee under clause (b) does not necessarily have to commence immediately but shall commence within a reasonable period after the end of the 90-day period described in clause (a). Temporary total compensation shall not cease under this subdivision until the job commences.

(e) If the job offered under clause (a) is offered or procured by the employer and not the job the employee had at the time of injury it shall be offered and described in writing. The written description shall state the nature of the job, the rate of pay, the physical requirements of the job, and any other information necessary to fully and completely inform the employee of the job duties and responsibilities. The written description and the written offer need not be contained in the same document.

The employee has 14 calendar days after receipt of the written description and offer

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to accept or reject the job offer. If the employee does not respond within this period it is deemed a refusal of the offer. Where there is an administrative conference to determine suitability under subdivision 3v, or section 176.242, the period begins to run on the date of the commissioner's decision.

(f) Self-employment may be an appropriate job under this subdivision.

The commissioner shall monitor application of this subdivision and may adopt rules to assure its proper application.

**Subd. 3f. Light-duty job prior to the end of temporary total compensation.** If the employer offers a job prior to the end of the 90-day period referred to in subdivision 3e, paragraph (a) and the job is consistent with an approved plan of rehabilitation or if no rehabilitation plan has been approved and the job is within the employee's physical limitations; or the employer procures a job for the employee with another employer which meets the requirements of this subdivision; or the employee accepts a job with another employer which meets the requirements of this subdivision, the employee's temporary total compensation shall cease. In this case the employee shall receive impairment compensation for the permanent partial disability which is ascertainable at that time. This impairment compensation shall be paid at the same rate that temporary total compensation was last paid. Upon the end of temporary total compensation under subdivision 3e, paragraph (a), the provisions of subdivision 3e or 3p apply, whichever is appropriate, and economic recovery compensation or impairment compensation is payable accordingly except that the compensation shall be offset by impairment compensation received under this subdivision.

**Subd. 3g. Acceptance of job offer.** If the employee accepts a job offer described in subdivision 3e and the employee begins work at that job, although not necessarily within the 90-day period specified in that subdivision, the impairment compensation shall be paid in a lump sum 30 calendar days after the employee actually commences work if the employment has not been substantially interrupted by the injury for any part of the 30 days and the employee is still employed at that job at the end of the period.

**Subd. 3h. Temporary partial compensation.** An employee who accepts a job under subdivision 3e or subdivision 3f and begins that job shall receive temporary partial compensation pursuant to subdivision 2, if appropriate.

**Subd. 3i. Lay off because of lack of work or released for other than seasonal conditions.** (a) If an employee accepts a job under subdivision 3e and begins work at that job and is subsequently unemployed at that job because of economic conditions, other than seasonal conditions, the employee shall receive monitoring period compensation pursuant to clause (b). In addition, the employer who was the employer at the time of the injury shall provide rehabilitation consultation by a qualified rehabilitation consultant if the employee remains unemployed for 45 calendar days. The commissioner may waive this rehabilitation consultation if the commissioner deems it appropriate. Further rehabilitation, if deemed appropriate, is governed by section 176.102.

(b) Upon the employee's initial return to work the monitoring period begins to run. If the employee is unemployed for the reason in clause (a), prior to the end of the monitoring period the employee shall receive monitoring period compensation. This compensation shall be paid until (1) the monitoring period expires, or (2) the sum of monitoring period compensation paid and impairment compensation paid or payable is equal to the amount of economic recovery compensation that would have been paid if that compensation were payable, whichever occurs first. No monitoring period compensation is payable if the unemployment occurs after the expiration of the monitoring period. Monitoring period compensation is payable at the same intervals and at the same rate as when temporary total compensation ceased, provided that the minimum monitoring period compensation rate is 66-2/3 percent of the weekly wage for permanent partial disability as determined by section 176.011, subdivision 18 and subject to the maximums specified therein.

(c) Compensation under this subdivision shall not be escalated pursuant to section 176.645.

(d) If the employee returns to work and is still receiving monitoring period compensation, this compensation shall cease. Any period remaining in the monitoring period upon this return to work shall be used to determine further benefits if the employee is again unemployed under clause (a).

(e) Upon the employee's return to work pursuant to this section the insurer shall notify the employee of the length of the employee's monitoring period and shall notify the employee of the amount of impairment to be paid and the date of payment.

**Subd. 3j. Medically unable to continue work.** (a) If the employee has started the job offered under subdivision 3e and is medically unable to continue at that job because of injury, that employee shall receive temporary total compensation pursuant to subdivision 3b. (b) In addition, the employer who was the employer at the time of the injury shall provide rehabilitation consultation by a qualified rehabilitation consultant. The employer's rehabilitation, if deemed appropriate, is governed by section 176.102.

(b) Temporary total compensation shall be paid for up to 90 days after the employee has reached maximum medical improvement or 90 days after the end of an approved retraining plan, whichever is later. The temporary total compensation shall be paid at any time within the 90-day period that the employee begins work meeting the requirements of subdivision 3e or 3f. If no job is offered to the employee by the end of the 90-day period, the employee shall receive economic recovery compensation pursuant to this section but reduced by the impairment compensation previously received by the employee for the same disability.

**Subd. 3k. Unemployment due to seasonal condition.** If an employee has started a job offered under subdivision 3e and is subsequently unemployed from that job because of the job's seasonal nature, the employee shall receive any unemployment compensation the employee is eligible for pursuant to chapter 268. The employee shall receive, in addition and concurrently, the amount that the employee was receiving for temporary partial disability at the time of the lay off. No further or additional compensation is payable under this chapter because of the seasonal lay off.

**Subd. 3l. Failure to accept job offer.** If the employee has been offered a job under subdivision 3e and has refused the offer, the impairment compensation shall not be paid in a lump sum but shall be paid in the same interval and amount that temporary total compensation was initially paid. This compensation shall not be escalated pursuant to section 176.645. Temporary total compensation shall cease upon the employee's refusal to accept the job offered and no further or additional temporary total compensation is payable for that injury. The payment of the periodic impairment compensation shall cease when the amount the employee is eligible to receive under subdivision 3b is reached, after which time the employee shall not receive additional impairment compensation or any other compensation under this chapter unless the employee has a greater permanent partial disability than already compensated for.

**Subd. 3m. Return to work after refusal of job offer.** If the employee has refused a job offer under subdivision 3e and is receiving periodic impairment compensation and returns to work at another job, the employee shall receive the remaining impairment compensation due, in a lump sum, 30 days after return to work if the employment has not been substantially interrupted by the injury for any part of the 30 days and the employee is still employed at that job at the end of the period.

**Subd. 3n. No temporary partial compensation or rehabilitation if job offer refused.** An employee who has been offered a job under subdivision 3e and has refused that offer and who subsequently returns to work shall not receive temporary partial compensation pursuant to subdivision 2 if the job the employee returns to provides a wage less than the wage at the time of the injury. No rehabilitation shall be provided to this employee.

**Subd. 3o. Inability to return to work.** (a) An employee who is permanently totally disabled pursuant to subdivision 5 shall receive impairment compensation as determined pursuant to subdivision 3b. This compensation is payable in addition to permanent total compensation pursuant to subdivision 4 and is payable concurrently. In this case the impairment compensation shall be paid in the same intervals and

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amount as the permanent total compensation was initially paid, and the impairment compensation shall cease when the amount due under subdivision 3b is reached. If an employee returns to work at any job during the period the impairment compensation is being paid, the remaining impairment compensation due shall be paid in a lump sum 30 days after the employee has returned to work and no further temporary compensation shall be paid.

(b) If an employee is receiving periodic economic recovery compensation and is determined to be permanently totally disabled no offset shall be taken against the permanent total compensation for the compensation paid and no permanent weekly compensation is payable for any period during which economic recovery compensation has already been paid. No further economic recovery compensation is payable even if the amount due the employee pursuant to subdivision 3a has not been reached.

(c) An employee who has received periodic economic recovery compensation and who meets the criteria under clause (b) shall receive impairment compensation pursuant to clause (a) even if the employee has previously received economic recovery compensation for that disability.

(d) Rehabilitation consultation pursuant to section 176.102 shall be provided to an employee who is permanently totally disabled.

**Subd. 3p. No job offer.** Where the employee has a permanent partial disability and has reached maximum medical improvement or upon completion of an approved retraining program, whichever is later, that employee shall receive economic recovery compensation pursuant to subdivision 3a if no job offer meeting the criteria of the employee in subdivision 3e is made within 90 days after reaching maximum medical improvement or 90 days after the end of an approved retraining plan, whichever is later.

Temporary total compensation shall cease upon commencement of the payment of economic recovery compensation. Temporary total compensation shall not be paid concurrently with economic recovery compensation.

**Subd. 3q. Method of payment of economic recovery compensation.** (a) Economic recovery compensation is payable at the same intervals and in the same amount as the temporary total compensation was initially paid. If the employee returns to work while the economic recovery compensation is still being paid, the remaining economic recovery compensation due shall be paid in a lump sum 30 days after the employee has returned to work if the employment has not been substantially interrupted by the injury for any part of the 30 days and the employee is still employed at that job at the end of the period.

(b) Periodic economic recovery compensation paid to the employee shall not be adjusted pursuant to section 176.645.

**Subd. 3r. Payment of compensation at death.** If an employee receiving economic recovery compensation or impairment compensation in periodic amounts dies during the period from causes unrelated to the injury, the compensation shall be paid in the following manner:

(a) If the deceased employee leaves a dependent surviving spouse and no dependent children, as defined by section 176.111, subdivision 1, the spouse shall receive the periodic economic recovery or impairment compensation that the deceased was receiving before the death. This compensation shall be paid for a period of up to ten years after the date of death at which time payments and future entitlement to it ceases.

(b) If the deceased employee leaves a dependent spouse and dependent children, as defined in section 176.111, subdivision 1, the periodic economic recovery or impairment compensation shall continue to be paid to the surviving spouse for up to ten years after the last child is no longer dependent after which time payments and future entitlement to the compensation ceases.

(c) If the deceased employee leaves a dependent child, as defined by section 176.111, and no dependent spouse, the periodic economic recovery or impairment compensation shall continue to be paid to the child until the child is no longer

ent or until the amount to which the employee was entitled to receive is paid, whichever is later.

Payment of compensation under this subdivision shall cease prior to the end of ten-year periods in this subdivision if the amount to which the employee is entitled to receive under subdivision 3a or 3b is reached prior to the end of the ten-year period except as provided in clause (c). If the deceased employee is not survived by dependent children or a dependent spouse as defined in section 176.111, no further economic recovery compensation or impairment compensation is payable to any

If the death results from the injury, the payment of economic recovery compensation or impairment compensation shall cease upon the death and in lieu thereof death benefits are payable pursuant to section 176.111.

**Subd. 3s. Additional economic recovery compensation or impairment compensation.** No additional economic recovery compensation or impairment compensation is payable to an employee who has received that compensation to which the employee is entitled pursuant to subdivision 3a or 3b unless the employee has a greater permanent disability than already compensated.

**Subd. 3t. Minimum economic recovery compensation.** (a) Economic recovery compensation pursuant to this section shall be at least 120 percent of the impairment compensation the employee would receive if that compensation were payable to the employee.

(b) Where an employee has suffered a personal injury for which temporary total compensation is payable but which produces no permanent partial disability and the employee is unable to return to former employment for medical reasons attributable to the injury, the employee shall receive 26 weeks of economic recovery compensation. This paragraph shall not be used to determine monitoring period compensation under subdivision 3i and shall not be a minimum for determining the amount of compensation when an employee has suffered a permanent partial disability.

**Subd. 3u. Medical benefits.** This section does not in any way limit the medical benefits to which an injured employee is otherwise entitled pursuant to this chapter.

**Subd. 3v. Administrative conference.** The provisions of section 176.242 apply if there exists a dispute regarding maximum medical improvement or whether the job actually meets the criteria under subdivision 3e or 3f.

**Subd. 4. Permanent total disability.** For permanent total disability, as defined in subdivision 5, the compensation shall be 66-2/3 percent of the daily wage at the time of injury, subject to a maximum weekly compensation equal to the maximum weekly compensation for a temporary total disability and a minimum weekly compensation equal to the minimum weekly compensation for a temporary total disability. Compensation shall be paid during the permanent total disability of the injured employee but after a total of \$25,000 of weekly compensation has been paid, the amount of the weekly compensation benefits being paid by the employer shall be reduced by the amount of any disability benefits being paid by any government disability benefit program if the disability benefits are occasioned by the same injury which give rise to payments under this subdivision. This reduction shall also apply to any old age and survivor insurance benefits. Payments shall be made at the same rate as when the wage was payable, as nearly as may be. In case an employee who is permanently and totally disabled becomes an inmate of a public institution, no compensation shall be payable during the period of confinement in the institution, if the employee is wholly dependent on the employee for support some person named in section 176.111, subdivision 1, 2 or 3, in which case the compensation provided for in section 176.111, during the period of confinement, shall be paid for the benefit of that dependent person during dependency. The dependency of this person shall be determined as though the employee were deceased.

**Subd. 4a. Preexisting condition or disability; apportionment.** (a) If a personal injury results in a disability which is attributable in part to a preexisting disability that

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arises from a congenital condition or is the result of a traumatic injury or incident, whether or not compensable under this chapter, the compensation payable for permanent partial disability pursuant to this section shall be reduced by the proportion of the disability which is attributable only to the preexisting disability. An apportionment of a permanent partial disability under this subdivision shall be made only if preexisting disability is clearly evidenced in a medical report or record made prior to the current personal injury. Evidence of a copy of the medical report or record in which apportionment is based shall be made available to the employee by the employer at the time compensation for the permanent partial disability is begun.

(b) The compensable portion of the permanent partial disability under this section shall be paid at the rate at which the entire disability would be compensated but for the apportionment.

**Subd. 5 Total disability.** The total and permanent loss of the sight of both eyes, the loss of both arms at the shoulder, the loss of both legs so close to the hips that effective artificial members can be used, complete and permanent paralysis, total permanent loss of mental faculties, or any other injury which totally incapacitate an employee from working at an occupation which brings the employee an income constitutes total disability.

**Subd. 6 Minors.** If any employee entitled to the benefits of this chapter is a minor or is an apprentice of any age and sustains a personal injury arising out of and in the course of employment resulting in permanent total or a compensable permanent partial disability, for the purpose of computing the compensation to which the employee is entitled for the injury the compensation rate for temporary total, temporary partial, a permanent total disability or economic recovery compensation shall be the statewide average weekly wage.

**Subd. 7** [Repealed, Ex1979 c 3 s 70]

**Subd. 8 Retirement presumption.** For injuries occurring after the effective date of this subdivision an employee who receives social security old age and survivors insurance retirement benefits is presumed retired from the labor market. This presumption is rebuttable by a preponderance of the evidence.

**History:** 1953 c 755 s 10, 1955 c 615 s 1-5, 1957 c 781 s 2-5, Ex1967 c 40 s 7-11, 1967 c 186 s 1, 1969 c 276 s 2, 1969 c 936 s 5-8, 1971 c 422 s 1,2, 1971 c 475 s 1-4, 1973 c 18-20, 1973 c 600 s 1, 1973 c 643 s 1-4, 1974 c 486 s 2-4, 1975 c 271 s 6, 1975 c 28,23, 1976 c 134 s 78, 1977 c 342 s 12, 1977 c 347 s 30, Ex1979 c 3 s 33-35, 1981 c 75, 1983 c 290 s 42-68, 1984 c 432 art 2 s 1-12, 1985 c 234 s 5-7, 1986 c 444, 1986 c 461 s 8,9

## 176.102 REHABILITATION.

**Subdivision 1 Scope.** Rehabilitation is intended to restore the injured employee through physical and vocational rehabilitation, so the employee may return to a job related to the employee's former employment or to a job in another work area which produces an economic status as close as possible to that the employee would have enjoyed without disability. Rehabilitation to a job with a higher economic status than would have occurred without disability is permitted if it can be demonstrated that rehabilitation is necessary to increase the likelihood of reemployment. Economic status is to be measured not only by opportunity for immediate income but also by opportunity for future income.

**Subd. 1a Surviving spouse.** Upon the request of a qualified dependent surviving spouse, rehabilitation services shall be provided through the rehabilitation services section of the workers' compensation division. For the purposes of this subdivision a qualified dependent surviving spouse is a dependent surviving spouse as determined under section 176.111, who is in need of rehabilitation assistance to become self-supporting. A spouse who is provided rehabilitation services under this subdivision is not entitled to compensation under subdivision 1.

**Subd. 2 Administrators.** The commissioner shall hire a director of rehabilitation