

MAINE STATE LEGISLATURE

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DATE: 4-24-02

(Filing No. H-1120)

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
120TH LEGISLATURE
SECOND REGULAR SESSION

HOUSE AMENDMENT "A" to SENATE AMENDMENT "C" to S.P. 822, L.D. 2202, Bill, "An Act to Ensure that 25% of Workers' Compensation Cases with Permanent Impairment Remain Eligible for Duration-of-disability Benefits in Accordance With the Workers' Compensation Act"

Amend the amendment by striking out everything after the title and before the summary and inserting in its place the following:

'Amend the bill by striking out everything after the enacting clause and before the summary and inserting in its place the following:

'Sec. 1. 39-A MRSA §213, sub-§1, as enacted by PL 1991, c. 885, Pt. A, §8 and affected by §§9 to 11, is amended to read:

1. **Benefit and duration.** While the incapacity for work is partial, the employer shall pay the injured employee a weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage that the injured employee is able to earn after the injury, but not more than the maximum benefit under section 211. Compensation must be paid for the duration of the disability if the employee's permanent impairment, determined according to subsection 1-A and the impairment guidelines adopted by the board pursuant to section 153, subsection 8 resulting from the personal injury is in excess of 15% to the body. In all other cases an employee is not eligible to receive compensation under this section after the employee has received 260 weeks of compensation under section 212, subsection 1, this section or both. The board may in the exercise of its discretion extend the duration of benefit entitlement beyond 260 weeks in cases involving extreme financial hardship due to inability to return to gainful employment. This authority may not be delegated to a hearing officer and such decisions must be made expeditiously.

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Sec. 2. 39-A MRSA §213, sub-§1-A is enacted to read:

1-A. Determination of permanent impairment. For purposes of this section, "permanent impairment" includes only permanent impairment resulting from:

A. The work injury at issue in the determination;

B. Any preexisting condition or injury that is aggravated or accelerated by the work injury at issue in the determination; and

C. Any prior work injury that combines with the work injury at issue in the determination to contribute to the employee's incapacity, if the employer had completed a report of the prior work injury and there was no denial of a claim regarding the injury by the board or other agency having jurisdiction over the workers' compensation laws of this State or of any other state or jurisdiction. This paragraph does not include a prior work injury that was subject to a lump-sum settlement, if there was a finding of permanent impairment for that injury equal to or in excess of the then applicable permanent impairment threshold.

Except as set forth in this subsection, "permanent impairment" does not include conditions that are not caused, aggravated or accelerated by the work injury at issue in the determination.

Sec. 3. 39-A MRSA §213, sub-§2, as enacted by PL 1991, c. 885, Pt. A, §8 and affected by §§9 to 11, is amended to read:

2. **Threshold adjustment.** Effective January 1, 1998 and every other January 1st thereafter, the board, using an independent actuarial review based upon actuarially sound data and methodology, must adjust the 15% impairment threshold established in subsection 1 so that 25% of all cases with permanent impairment will be expected to exceed the threshold and 75% of all cases with permanent impairment will be expected to be less than the threshold. The actuarial review must include all cases receiving permanent impairment ratings on or after January 1, 1993, irrespective of date of injury, but may utilize a cutoff date of 90 days prior to each adjustment date to permit the collection and analysis of data. The data must be adjusted to reflect ultimate loss development. In order to ensure the accuracy of the data, the board shall require that all cases involving permanent injury, including those settled pursuant to section 352, include an impairment rating performed in accordance with subsection 1-A and the guidelines adopted by the board and either agreed to by the parties or determined by the board. Each adjusted threshold is applicable to all cases with dates of

injury on or after the date of adjustment and prior to the date
of the next adjustment.

Sec. 4. Actuarial determinations. This section provides a
method for assisting the Workers' Compensation Board with its
obligation under the Maine Revised Statutes, Title 39-A, section
213, subsection 2.

1. The Workers' Compensation Board shall retain 2 actuaries
who are fellows of the Casualty Actuarial Society to each develop
recommendations on the issue set forth in subsection 2 of this
section. One actuary must be chosen in the exclusive discretion
of the management representatives of the board and one must be
chosen in the exclusive discretion of the labor representatives
of the board. The retention of each actuary by the board is not
subject to state procurement laws or any other competitive bid
requirement. Any information provided by any person for the
purpose set forth in this section must be provided to both
actuaries. Notwithstanding any confidentiality law to the
contrary, any person or entity that holds records relating to
employees who are subject to study by the actuaries shall make
those records available to the actuaries or their agents for the
purposes of this section.

2. The actuaries selected in subsection 1 shall each
prepare a report recommending a permanent impairment threshold
for all new determinations made on or after May 1, 2002 that
meets the 25/75% standard set forth in the Maine Revised
Statutes, Title 39-A, section 213, subsection 2. To determine
the threshold, each actuary shall develop a methodology that
includes actual case studies of a relevant sample of persons with
dates of injury on or after January 1, 1993, and any additional
methodology the actuary considers appropriate. Notwithstanding
the last sentence of Title 39-A, section 213, subsection 2, the
permanent impairment threshold established pursuant to this
section must apply to all determinations of permanent impairment
made on or after May 1, 2002, regardless of date of injury, until
a different threshold is established under that law for dates of
injury on or after the date of the new threshold.

3. Each actuary shall submit a recommendation on the
permanent impairment threshold to the Workers' Compensation Board
by September 30, 2002. The recommendation must detail the
methodology, modeling, assumptions, data relied upon and any
adjustments to that data, basis for the recommendation and any
other information the actuary believes is material to the
recommendation. The board shall accept written public comment on
the actuaries' recommendations until 5:00 p.m., October 15, 2002.

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2 4. The Workers' Compensation Board shall take affirmative
3 action on setting the permanent impairment threshold by November
4 1, 2002, based on recommendations of the actuaries and written
5 public comment received on those recommendations. If the board
6 does not take affirmative action on that issue, it must be
7 referred to arbitration. The Executive Director of the Workers'
8 Compensation Board shall request the American Arbitration
9 Association to assign a neutral 3rd party by November 7, 2002,
10 according to its rules and procedures. By December 1, 2002, the
11 arbitrator must render a decision as to what the impairment
12 threshold should be, based on the Maine Revised Statutes, Title
13 39-A, section 213 and information presented by the actuaries.
14 The arbitrator's decision may not be appealed, except as provided
15 in the Uniform Arbitration Act, Title 14, chapter 706. The board
16 shall adopt the threshold finding decided upon by the
17 arbitrator.

18 5. The adoption of the permanent impairment threshold made
19 pursuant to this section is not subject to the Maine Revised
20 Statutes, Title 5, chapter 375 and is not subject to appeal.

22 **Sec. 5. Transition.** Except as provided in this section, the
23 Workers' Compensation Board shall discontinue making permanent
24 impairment determinations until a permanent impairment threshold
25 is established consistent with section 4 of this Act. If the
26 benefits of an injured employee are subject to discontinuance
27 prior to January 1, 2003, pursuant to the Maine Revised Statutes,
28 Title 39-A, section 213, subsection 1, the board or a hearing
29 officer employed by the board shall determine that person's
30 permanent impairment and, if the impairment exceeds the 11.8%
31 threshold, shall order that benefits continue for the duration of
32 the disability or until the new threshold is established,
33 whichever is sooner. Entitlement to benefits after the date the
34 new threshold is established will be determined by comparison to
35 the new threshold.

36 **Sec. 6. Review.** The joint standing committee of the
37 Legislature having jurisdiction over labor matters shall review
38 the use of actuaries to assist the Workers' Compensation Board in
39 its adjustment duties under the Maine Revised Statutes, Title
40 39-A, section 213 to determine whether to enact a law calling for
41 such assistance in future adjustment determinations. The
42 committee is authorized to report out legislation to the First
43 Regular Session of the 121st Legislature following this review.

46 **Sec. 7. Application.** Notwithstanding the Maine Revised
47 Statutes, Title 1, section 302, the provisions of this Act
48 relating to the determination of permanent impairment apply to
49 determinations of permanent impairment made by the Workers'
50 Compensation Board on or after May 1, 2002, regardless of the
date of injury, including determinations for dates of injury on

or after January 1, 1993 and determinations made in cases pending before the board.

4 Sec. 8. Funding of actuarial studies and arbitration.
Notwithstanding the Maine Revised Statutes, Title 39-A, section
6 154, subsection 6, the Workers' Compensation Board may use
8 collected amounts or savings above the allowed reserve to fund
10 the actuarial studies and arbitration process required in this
Act, rather than using the funds to reduce the assessment for the
following fiscal year.

12 Sec. 9. Legislative intent. It is the intent of the Legislature
by this Act to override the Maine Law Court's decision regarding
14 stacking of certain prior non-work-related injuries in Kotch v.
American Protective Services, Inc., 2002 ME 19, but not to
16 override the Law Court's decision in Churchill v. Central
Aroostook Association for Retarded Citizens, Inc., 1999 ME 192.

18 Sec. 10. Appropriations and allocations. The following
20 appropriations and allocations are made.

22 WORKERS' COMPENSATION BOARD

24 Administration - Workers' Compensation Board

26 Initiative: Allocates funds for one Management Analyst II
28 position and other operating costs associated with determining
the permanent impairment threshold.

30 Other Special Revenue Funds	2001-02	2002-03
Positions - Legislative Count	(0.000)	(1.000)
32 Personal Services	\$0	\$60,000
All Other	0	5,000
34 Total	\$0	\$65,000

36 Administration - Workers' Compensation Board

38 Initiative: Allocates funds on a one-time basis for actuarial
40 and arbitration services associated with determining the
permanent impairment threshold. The funds allocated for
42 actuarial services of \$60,000 in fiscal year 2002-03 are to be
split equally between labor and management. The balance of
44 \$10,000 is allocated for arbitration services.

46 Other Special Revenue Funds	2001-02	2002-03
All Other	\$0	\$70,000

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WORKERS' COMPENSATION BOARD	2001-02	2002-03
DEPARTMENT TOTALS		
OTHER SPECIAL REVENUE FUNDS	\$0	\$135,000
DEPARTMENT TOTAL - ALL FUNDS	\$0	\$135,000

FISCAL NOTE

2002-03

APPROPRIATIONS/ALLOCATIONS

Other Funds \$135,000

REVENUES

Other Funds \$65,000

This amendment eliminates the cost associated with combining certain prior work-related injuries with current work injuries for permanent impairment determinations made on or after enactment of this bill. Costs are eliminated as a result of the adjustment of the threshold to maintain the proportion of injured workers entitled to benefits for the duration of the disability at 25%. If the Workers' Compensation Board is unable to rule on the threshold by November 1, 2002, this amendment requires the board to submit to arbitration for the determination of the permanent impairment threshold. There may be minor additional costs to continue benefits for a limited number of persons until the new threshold is determined. The amount can not be determined at this time.

This amendment provides Other Special Revenue funds allocations totaling \$135,000 in fiscal year 2002-03 to the Workers' Compensation Board. This amendment includes an Other Special Revenue funds allocation of \$65,000 in fiscal year 2002-03 for one Management Analyst II position and other costs associated with determining the permanent impairment threshold. The estimated future costs in fiscal year 2003-04 and 2004-05 will be approximately \$66,950 and \$68,959, respectively.

This amendment also includes a one-time Other Special Revenue funds allocation of \$70,000 in fiscal year 2002-03 for the costs associated with retaining 2 actuaries to develop a

HOUSE AMENDMENT

recommendation for the permanent impairment threshold and for arbitration services, if required. This amendment allows the board to use collected amounts or savings above the allowed reserve to fund the required actuarial studies and arbitration process.

The Workers' Compensation Board will also require an increase in the assessment cap of \$65,000 in fiscal year 2002-03 to cover the costs of the position and other expenses. Increasing the assessment cap in fiscal year 2002-03 will result in an increase in dedicated revenue of \$65,000 to the Workers' Compensation Board Administrative Fund.

SUMMARY

This amendment replaces the bill. It provides that the calculation of "permanent impairment" includes preexisting conditions or injuries that are aggravated or accelerated by the current work injury and other prior work injuries that combine with the current injury and contribute to the incapacity, as long as there was a contemporaneous record of the prior injury, there was not a denial of a claim regarding that prior injury by the Workers' Compensation Board or comparable agency in another state and the injury was not settled in a lump sum representing duration-of-disability benefits.

The amendment also requires the Workers' Compensation Board to retain 2 actuaries to assist the board in setting the appropriate permanent impairment threshold to meet the standard required by the statute for all determinations made on or after May 1, 2002, regardless of date of injury. If the board is unable to settle on an appropriate threshold and benefit duration, the issues are submitted to an arbitrator who must determine the appropriate threshold. The amendment freezes the process for determining permanent impairment and for determining who is entitled to duration-of-disability benefits until the new threshold is set, except that persons whose benefits would expire before that date may have their benefits continued until the new threshold is established if their impairments exceed the currently applicable threshold.

SPONSORED BY: [Signature]
(Representative BUNKER)

TOWN: Kossuth Township