

# MAINE STATE LEGISLATURE

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L.D. 2202

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DATE: April 24, 2002

(Filing No. S-623)

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STATE OF MAINE  
SENATE  
120TH LEGISLATURE  
SECOND REGULAR SESSION

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 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.

**SENATE AMENDMENT**

**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 and any preexisting physical condition or injury that is aggravated or accelerated by the work injury at issue in the determination; or

B. For dates of injury on or after January 1, 2002, the work injury at issue in the determination and:

(1) Any prior injury that arose out of and in the course of employment for which a report of injury was completed pursuant to section 303 and the employee received a benefit or compensation under this Title, which has not been denied by the board, and that combines with the work injury at issue in the determination to contribute to the employee's incapacity, except that a prior injury that was the subject of a lump-sum settlement approved pursuant to section 352 that had a finding of permanent impairment equal to or in excess of the then applicable permanent impairment threshold may not be included; or

(2) Any preexisting physical condition or injury that is aggravated or accelerated by the work injury at issue in the determination.

Except as set forth in this subsection, "permanent impairment" does not include a condition that is not caused, aggravated or accelerated by the work injury.

**Sec. 3. 39-A MRSA §213, sub-§2**, as enacted by PL 1991, c. 885, Pt. A, §8 and as 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

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2 reflect ultimate loss development. In order to ensure the  
3 accuracy of the data, the board shall require that all cases  
4 involving permanent injury, including those settled pursuant to  
5 section 352, include an impairment rating performed in accordance  
6 with subsection 1-A and the guidelines adopted by the board and  
7 either agreed to by the parties or determined by the board. Each  
8 adjusted threshold is applicable to all cases with dates of  
9 injury on or after the date of adjustment and prior to the date  
10 of the next adjustment.

11 **Sec. 4. January 1, 2002 threshold adjustment.** Solely for the  
12 purposes of establishing the threshold adjustment to be effective  
13 January 1, 2002, as required by the Maine Revised Statutes, Title  
14 39-A, section 213, subsection 2, the Workers' Compensation Board  
15 shall retain 2 actuaries who are fellows of the Casualty  
16 Actuarial Society to each develop a recommendation for the  
17 percentage of permanent impairment to which the threshold should  
18 be adjusted, based upon sound actuarial principles that will  
19 produce an unbiased result. One actuary must be chosen in the  
20 exclusive discretion of the management representatives of the  
21 board and one must be chosen in the exclusive discretion of the  
22 labor representatives of the board. The retention of each  
23 actuary by the board is not subject to state procurement laws or  
24 any other competitive bid requirement.

25 In addition to actuarial modeling, the analysis must  
26 include, to the extent available, actual case data involving  
27 known noncausal work injuries for which the permanent impairment  
28 level is known or can be determined. Carriers and self-insureds  
29 shall cooperate in furnishing the actuaries with requested data.  
30 The identity of any claimant is confidential and that  
31 confidentiality must be preserved. Any information provided by  
32 any person for the purposes of this threshold adjustment must be  
33 provided to both actuaries.  
34

35 Each actuary shall submit a recommendation to the board by  
36 September 30, 2002. The recommendation must detail the  
37 methodology, modeling, assumptions, data relied upon and any  
38 adjustments to that data, basis for the recommendation and any  
39 other information the actuary believes is material to the  
40 recommendation. These recommendations must be the subject of  
41 written public comment to be received by the board by 5:00 p.m.,  
42 October 15, 2002.  
43

44 The threshold adjustment must be made by the board by  
45 November 1, 2002, based on the recommendations of these actuaries  
46 and the received written public comment. If the board does not  
47 adjust the threshold as required under this section, the matter  
48 must be referred to arbitration and the Executive Director of the  
49 Workers' Compensation Board shall request the American  
50

**11.01.02**

SENATE AMENDMENT "C" to S.P. 822, L.D. 2202

2 Arbitration Association to assign a neutral 3rd party by November  
7, 2002, according to its rules and procedures. Preference must  
4 be given to an arbitrator with experience in casualty actuarial  
sciences or statistical issues. The arbitrator must render a  
6 decision by December 1, 2002. The arbitrator's decision may not  
be appealed. The board shall adopt the threshold decided upon by  
the arbitrator.

8  
10 The adoption of the threshold pursuant to this section is  
not subject to the Maine Revised Statutes, Title 5, chapter 375  
and is not subject to appeal.

12 **Sec. 5. Appropriations and allocations.** The following  
14 appropriations and allocations are made.

16 **WORKERS' COMPENSATION BOARD**

18 **Administration - Workers' Compensation Board**

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

24	<b>Other Special Revenue Funds</b>	<b>2001-02</b>	<b>2002-03</b>
	Positions - Legislative Count	(0.000)	(1.000)
26	Personal Services	\$0	\$60,000
	All Other	0	5,000
28			
	Total	\$0	\$65,000

30 **Administration - Workers' Compensation Board**

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

40	<b>Other Special Revenue Funds</b>	<b>2001-02</b>	<b>2002-03</b>
	All Other	\$0	\$70,000

42	<b>WORKERS' COMPENSATION BOARD</b>		
44	<b>DEPARTMENT TOTALS</b>	<b>2001-02</b>	<b>2002-03</b>
46	<b>OTHER SPECIAL REVENUE FUNDS</b>	<b>\$0</b>	<b>\$135,000</b>
48	<b>DEPARTMENT TOTAL - ALL FUNDS</b>	<b>\$0</b>	<b>\$135,000</b>

# SENATE AMENDMENT

**Sec. 6. Application; retroactivity.** Notwithstanding the Maine Revised Statutes, Title 1, section 302, this Act applies retroactively to pending cases and to injuries occurring on or after January 1, 1993, except that:

1. It does not allow a change in the permanent impairment assessment in an individual case in which a previous final decree finding the extent of permanent impairment has been issued and appeal proceedings have been completed; and

2. It does not permit the reopening of an individual case for which benefits under Title 39-A, section 213 have expired under the Maine Workers' Compensation Act of 1992.'

**FISCAL NOTE**

**2002-03**

**APPROPRIATIONS/ALLOCATIONS**

Other Funds \$135,000

**REVENUES**

Other Funds \$135,000

This amendment eliminates the cost associated with combining certain prior work-related injuries with current work injuries effective January 1, 2002. 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.

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. 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 recommendation for the permanent impairment threshold and for arbitration services, if required. The estimated future costs in fiscal year 2003-04 and 2004-05 will be approximately \$66,950 and \$68,959, respectively.

2 The Workers' Compensation Board will also require an  
4 increase in the assessment cap of \$135,000 in fiscal year 2002-03  
6 to cover the costs of the position and other expenses.  
8 Increasing the assessment cap in fiscal year 2002-03 will result  
in an increase in dedicated revenue of \$135,000 to the Workers'  
Compensation Board Administrative Fund.

## 10 SUMMARY

12 This amendment maintains the requirement contained in the  
14 Workers' Compensation Act of 1992, the Maine Revised Statutes,  
16 Title 39-A, section 213, that 25% of workers' compensation cases  
involving permanent injury be eligible for duration-of-disability  
benefits rather than the durational benefit cap.

18 The amendment overrides the court decision in Kotch v.  
20 American Protective Services, 2002 ME 19, which interpreted the  
22 law to allow work injuries to be combined with unrelated work and  
24 nonwork injuries in determining eligibility for  
duration-of-disability wage-loss benefits under section 213 of  
the Maine Workers' Compensation Act of 1992.

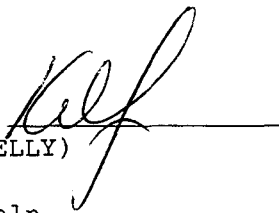
26 The amendment permits the "stacking," or combining, of  
28 preexisting physical conditions that are aggravated or  
accelerated by the work injury at issue in the determination when  
30 making a determination of permanent impairment. The amendment  
32 also permits the combining of certain prior unrelated work  
34 injuries when determining the level of an injured employee's  
36 permanent impairment under the Maine Revised Statutes, Title  
39-A, section 213, effective January 1, 2002. Prior work  
38 injuries for which a report of injury was filed under Title 39-A,  
40 section 303 and for which the employee received a benefit or  
42 compensation under Title 39-A may be included in the  
44 determination of permanent impairment for the work injury at  
46 issue in the determination if the prior work injuries combine  
with the work injury at issue to contribute to the employee's  
incapacity. Prior injuries that were the subject of a lump-sum  
settlement approved pursuant to Title 39-A, section 352 and that  
had a finding of permanent impairment equal to or in excess of  
the then applicable permanent impairment threshold may not be  
included in determinations of permanent impairment. Nonwork  
injuries that are not aggravated or accelerated by the work  
injury at issue in the determination may not be included in the  
determination of permanent impairment.

48 In order to implement the combination of unrelated work  
injuries as authorized in this amendment, the amendment also

SENATE AMENDMENT "C" to S.P. 822, L.D. 2202

2 directs the Workers' Compensation Board to hire 2 actuaries to  
develop recommendations on how the permanent impairment threshold  
4 should be adjusted in accordance with the permanent impairment  
threshold as described in Title 39-A, section 213, subsection  
2. If the board fails to make the required adjustment by  
6 November 1, 2002, the matter must be referred to an arbitrator  
for resolution. Because this method applies only to the January  
8 1, 2002 adjustment of the permanent impairment threshold, it is  
not subject to appeal.

10  
12 Finally, the amendment makes the changes contained in this  
bill retroactive to January 1, 1993.

14  
16  
18 SPONSORED BY:   
(Senator KILKELLY)

20 COUNTY: Lincoln

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