APPROVED
JUNE 17, 2019
BY GOVERNOR

CHAPTER
344
PUBLIC LAW

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND NINETEEN

H.P. 561 - L.D. 756

An Act To Improve the Maine Workers' Compensation Act of 1992

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 39-A MRSA §102, sub-§4, ¶H, as amended by PL 2003, c. 437, §1, is further amended to read:

H. "Average weekly wages, earnings or salary" does not include any fringe or other benefits paid by the employer that continue during the disability. Any fringe or other benefit paid by the employer that does not continue during the disability must be included for purposes of determining an employee's average weekly wage to the extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount that is greater than 2/3 of the state average weekly wage at the time of injury. The limitation on including discontinued fringe or other benefits only to the extent that such inclusion does not result in a weekly benefit amount greater than 2/3 of the state average weekly wage at the time of injury does not apply if the injury results in the employee's death. For injuries occurring on or after January 1, 2020, any fringe or other benefit paid by the employer that does not continue during the disability must be included for purposes of determining an employee's average weekly wage to the extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount that is greater than 2/3 of 125% of the state average weekly wage at the time of injury. The limitation on including discontinued fringe or other benefits only to the extent that such inclusion does not result in a weekly benefit amount greater than 2/3 of 125% of the state average weekly wage at the time of injury does not apply if the injury results in the employee's death.

Sec. 2. 39-A MRSA §152, sub-§5, as amended by PL 2015, c. 297, §3, is further amended to read:

5. Employment of and contracts with administrative law judges and mediators. The board shall obtain the services of persons qualified by background and training to serve as administrative law judges, who are authorized to take action and enter orders consistent with this Act in all cases assigned to them by the board, and mediators. Beginning January 1, 2020, except for the reappointment of administrative law judges

appointed prior to that date, the board may not contract for the services of or employ administrative law judges without a vote supported by 5 of the 7 members of the board notwithstanding section 151, subsection 5. In the exercise of its discretion, the board may obtain the services of administrative law judges and mediators by either of the 2 following methods:

A. The board may contract for the services of administrative law judges and mediators, in which case they must be paid reasonable per diem fees for their services plus reimbursement of their actual, necessary and reasonable expenses incurred in the performance of their duties, consistent with policies established by the board; or

B. The board may employ administrative law judges and mediators to serve at the pleasure of the board and who are not subject to the Civil Service Law. They are entitled to receive reimbursement of their actual, necessary and reasonable expenses incurred in the performance of their duties, consistent with policies established by the board.

Sec. 3. 39-A MRSA §205, sub-§2, as enacted by PL 1991, c. 885, Pt. A, §8 and affected by §§9 to 11, is amended to read:

2. Time for payment. ~~The~~ Unless otherwise provided in this subsection, the first payment of compensation for incapacity under section 212 or 213 is due and payable within 14 days after the employer has notice or knowledge of the injury or death, on which date all compensation then accrued must be paid. Subsequent incapacity payments must be made weekly and in a timely fashion. Every insurance carrier, self-insured and group self-insurer shall keep a record of all payments made under this Act and of the time and manner of making the payments and shall furnish reports, based upon these records, to the board as it may reasonably require.

A. There is no penalty for a failure to make a timely payment under this section if the first payment cannot be paid within 14 days due to an act of God, to a mistake of fact or to unavoidable circumstances. An employer's failure to timely report an injury for which proper notice was given is not an excuse for the insurer.

B. If the end of the 14-day period the employer has not filed a notice of controversy, the employer shall begin payments as required by this subsection.

C. An employer may cease payments as required under this subsection and file a notice of controversy with the board no later than 45 days after the employer has notice or knowledge of the injury or death. Payments may be made without prejudice under this paragraph and, if so made, do not constitute a compensation payment scheme. If the employer does not file a notice of controversy prior to the expiration of the 45-day period, payments may be discontinued or reduced only in accordance with subsection 9, paragraph B, subparagraph (1) unless the failure to file a notice of controversy within 45 days is due to an act of God.

D. The penalty for the failure to make timely payment under this subsection is limited to the penalty established in subsection 3, and further consequences for the failure to make timely payment under this subsection are not a subject for rulemaking.

Sec. 4. 39-A MRSA §211, as amended by PL 2011, c. 647, §3, is further amended to read:

§211. Maximum benefit levels

Effective January 1, 1993, the maximum weekly benefit payable under section 212, 213 or 215 is $441 or 90% of state average weekly wage, whichever is higher. Beginning on July 1, 1994, the maximum benefit level is $441 or 90% of the state average weekly wage as adjusted annually utilizing the state average weekly wage as determined by the Department of Labor, whichever is higher. If the injured employee's date of injury is on or after January 1, 2013, the maximum benefit level is $441 or 100% of the state average weekly wage as adjusted annually utilizing the state average weekly wage as determined by the Department of Labor, whichever is higher. If the injured employee's date of injury is on or after January 1, 2020, the maximum benefit level is $441 or 125% of the state average weekly wage as adjusted annually utilizing the state average weekly wage as determined by the Department of Labor, whichever is higher.

Sec. 5. 39-A MRSA §212, sub-§4 is enacted to read:

4. Annual adjustment. For dates of injury on or after January 1, 2020, beginning after the receipt of 260 weeks of benefits under this section, for an injury or injuries that contribute to benefits under this section, weekly compensation benefits under this section must be adjusted annually. The adjustment is equal to the actual percentage increase or decrease in the state average weekly wage, as computed by the Department of Labor, for the previous year or 5%, whichever is less.

The annual adjustment must be made after the receipt of 260 weeks of benefits under this section and on each succeeding anniversary date of the injury, except that when the effect of the maximum benefit under section 211 is to reduce the amount of compensation to which the claimant would otherwise be entitled, the adjustment must be made annually on July 1st.

Sec. 6. 39-A MRSA §213, sub-§1, ¶B, as amended by PL 2015, c. 297, §8, is further amended to read:

B. If the injured employee's date of injury is on or after January 1, 2013 but before January 1, 2020, the weekly compensation is equal to 2/3 of the difference, due to the injury, between the employee's average gross weekly wages, earnings or salary before the injury and the average gross weekly wages, earnings or salary that the employee is able to earn after the injury, but not more than the maximum benefit under section 211. An employee is not eligible to receive compensation under this paragraph after the employee has received a total of 520 weeks of compensation under section 212, subsection 1-A, this paragraph or both. The board may in the exercise of its discretion extend the duration of benefit entitlement beyond 520 weeks in cases involving extreme financial hardship due to inability to return to gainful employment. This authority may be delegated by the board, on a case-by-case basis, to an administrative law judge or a panel of 3 administrative law judges. The board, administrative law judge or panel shall make a decision under this paragraph expeditiously. A decision under this paragraph made by an administrative law judge

or a panel of 3 administrative law judges may not be appealed to the board under section 320, but may be appealed pursuant to section 321-A.

Orders extending benefits beyond 520 weeks are not subject to review more often than every 2 years from the date of the board order or request allowing an extension.

Sec. 7. 39-A MRSA §213, sub-§1, ¶C is enacted to read:

C. If the injured employee's date of injury is on or after January 1, 2020, the weekly compensation is equal to 2/3 of the difference, due to the injury, between the employee's average gross weekly wages, earnings or salary before the injury and the average gross weekly wages, earnings or salary that the employee is able to earn after the injury, but not more than the maximum benefit under section 211. An employee is not eligible to receive compensation under this paragraph after the employee has received a total of 624 weeks of compensation under section 212, subsection 1-A, this paragraph or both. The board may in the exercise of its discretion extend the duration of benefit entitlement beyond 624 weeks in cases involving extreme financial hardship due to inability to return to gainful employment. This authority may be delegated by the board, on a case-by-case basis, to an administrative law judge or a panel of 3 administrative law judges. The board, administrative law judge or panel shall make a decision under this paragraph expeditiously. A decision under this paragraph made by an administrative law judge or a panel of 3 administrative law judges may not be appealed to the board under section 320, but may be appealed pursuant to section 321-A.

Orders extending benefits beyond 624 weeks are not subject to review more often than every 2 years from the date of the board order or request allowing an extension.

Sec. 8. 39-A MRSA §213, sub-§1-B, as enacted by PL 2011, c. 647, §8, is amended to read:

1-B. Long-term partial incapacity; date of injury on or after January 1, 2013 but before January 1, 2020. After the exhaustion of benefits under subsection 1, paragraph B for an injury occurring on or after January 1, 2013 but before January 1, 2020, if the whole person permanent impairment resulting from the injury is in excess of 18% and if the employee is working and the employee's earnings, as measured by average weekly earnings over the most recent 26-week period documented by payroll records or tax returns, is 65% or less of the preinjury average weekly wage, the employer shall pay weekly compensation equal to 2/3 of the difference between the employee's average weekly wage at the time of the injury and the employee's postinjury wage, but not more than the maximum benefit under section 211. In order for the employee to qualify for benefits under this subsection, the employee's actual earnings must be commensurate with the employee's earning capacity, which includes consideration of the employee's physical and psychological work capacity as determined by an independent examiner under section 312. In addition, in order for the employee to qualify for benefits under this subsection, the employee must have earnings from employment for a period of not less than 12 months within a 24-month period prior to the expiration of the 520-week durational limit under subsection 1, paragraph B. Compensation under this subsection must be paid at a fixed rate.

While the employee is claiming or receiving extended partial incapacity benefits under this subsection, the employee shall complete and provide quarterly employment status reports and provide copies of current tax returns as early as practicable after the return is filed.

The employee's entitlement to extended partial incapacity benefits under this subsection is determined based upon the facts that exist at the time of expiration of 520 weeks of benefits under subsection 1, paragraph B. If the employee is not entitled to extended partial incapacity benefits upon the expiration of 520 weeks of benefits under subsection 1, paragraph B, the employee's entitlement to partial incapacity benefits expires. If the employee is entitled to extended partial incapacity benefits under this subsection, once the employee's earnings, as measured by average weekly earnings over the most recent 26-week period, are equal to or greater than the preinjury average weekly wage, the employee's entitlement to extended partial incapacity benefits under this subsection terminates permanently.

Sec. 9. 39-A MRSA §215, sub-§1-B is enacted to read:

1-B. Death of employee; date of injury on or after January 1, 2020. If an injured employee's date of injury is on or after January 1, 2020, if death results from the injury of the employee and if the employee has no dependents, the employer shall pay or cause to be paid to the parents of the employee during the parents' lifetime a weekly payment equal to 2/3 of the employee's gross average weekly wages, earnings or salary, but not more than the maximum benefit under section 211, for a period of 500 weeks from the date of death. This subsection does not apply to an injury or death of an employee occurring before January 1, 2020, except that for a death of an employee resulting from an injury the date of which is on or after January 1, 2019 but before January 1, 2020, payment made to the Treasurer of State under section 355, subsection 14, paragraph F must be transferred to the parents of the deceased employee. For the purposes of this subsection, "parent" means a natural or adoptive parent, unless that parent's parental rights have been terminated.

Sec. 10. 39-A MRSA §221, sub-§1, ¶B, as enacted by PL 1991, c. 885, Pt. A, §8 and affected by §§9 to 11, is amended to read:

B. Payments under a self-insurance plan, a wage continuation plan, paid time off or a disability insurance policy provided by the employer; or

Sec. 11. 39-A MRSA §221, sub-§3, ¶A, as amended by PL 2013, c. 152, §1, is further amended to read:

A. The employer's obligation to pay or cause to be paid weekly benefits other than benefits under section 212, subsection 2 or 3 is reduced by the following amounts:

(1) Fifty percent of the amount of the old-age insurance benefits received or being received under the United States Social Security Act. For injuries occurring on or after October 1, 1995, such a reduction may not be made if the old-age insurance benefits had started prior to the date of injury or if the benefits are spouse's benefits;

(2) The after-tax amount of the payments received or being received under a self-insurance plan, paid time off or a wage continuation plan or under a disability insurance policy provided by the same employer from whom benefits under section 212 or 213 are received if the employee did not contribute directly to the plan or to the payment of premiums regarding the disability insurance policy. If the self-insurance plans, paid time off, wage continuation plans or disability insurance policies are entitled to repayment in the event of a workers' compensation benefit recovery, the insurance carrier shall satisfy the repayment out of funds the insurance carrier has received through the coordination of benefits provided for under this section;

(3) The proportional amount, based on the ratio of the employer's contributions to the total insurance premiums for the policy period involved, of the after-tax amount of the payments received or being received by the employee pursuant to a disability insurance policy provided by the same employer from whom benefits under section 212 or 213 are received, if the employee did contribute directly to the payment of premiums regarding the disability insurance policy;

(5) The proportional amount, based on the ratio of that employer's contributions to the total contributions to the plan or program, of the after-tax amount of the pension or retirement payments received or being received by the employee pursuant to a plan or program established or maintained by the same employer from whom benefits under section 212 or 213 are received, regardless of whether the employee contributed directly to the pension or retirement plan or program; and

(6) For those employers who do not provide a pension plan, the proportional amount, based on the ratio of the employer's contributions to the total contributions made to a qualified profit sharing plan under the United States Internal Revenue Code, Section 401(a) or any successor to the United States Internal Revenue Code, Section 401(a) covering a profit sharing plan that provides for the payment of benefits only upon retirement, disability, death, or other separation of employment to the extent that benefits are vested under the plan.

Sec. 12. 39-A MRSA §221, sub-§3, ¶H is enacted to read:

H. An employer may not offset paid time off under this subsection if the use of paid time off is mandated by the employer or if it is paid upon separation from the employer.

Sec. 13. 39-A MRSA §301, first ¶, as amended by PL 2011, c. 647, §16, is further amended to read:

For claims for which the date of injury is prior to January 1, 2013, proceedings for compensation under this Act, except as provided, may not be maintained unless a notice of the injury is given within 90 days after the date of injury. For claims for which the date of injury is on or after January 1, 2013 and prior to January 1, 2020, proceedings for compensation under this Act, except as provided, may not be maintained unless a notice of the injury is given within 30 days after the date of injury. For claims for which the

date of injury is on or after January 1, 2020, proceedings for compensation under this Act, except as provided, may not be maintained unless a notice of the injury is given within 60 days after the date of injury. The notice must include the time, place, cause and nature of the injury, together with the name and address of the injured employee. The notice must be given by the injured employee or by a person in the employee's behalf, or, in the event of the employee's death, by the employee's legal representatives, or by a dependent or by a person in behalf of either.

Sec. 14. 39-A MRSA §325, sub-§6 is enacted to read:

6. Attorney's fees for lump-sum settlement in cases in which the injury occurred on or after January 1, 2020. In cases in which the injury to the employee occurred on or after January 1, 2020, attorney's fees for lump-sum settlements must be determined as follows.

A. Before computing the fee, reasonable expenses incurred on the employee's behalf must be deducted from the total settlement, including:

(1) Medical examination fee and witness fee;

(2) Any other medical witness fee, including cost of subpoena;

(3) Cost of court reporter service; and

(4) Appeal costs.

B. The computation of the fee, based on the amount resulting after deductions according to paragraph A, may not exceed 10%.

C. If a lump-sum settlement includes any amount that is allocated for past due benefits, the administrative law judge shall review the allocation to make sure that it is not for an amount that is greater than what the employee is claiming.

Sec. 15. Workers' Compensation Board; rulemaking. The Workers' Compensation Board may consider adopting a rule to establish time frames for the filing of any petition related to a controversy with the board if a full agreement is not reached by the parties after conclusion of any mediation pursuant to the Maine Revised Statutes, Title 39-A, section 313.

Sec. 16. Study of advocate pay. No later than January 1, 2020, the Workers' Compensation Board shall study the advocate program established pursuant to the Maine Revised Statutes, Title 39-A, section 153-A, including the salary paid to advocates, and make recommendations for any changes to improve the advocate program and its representation of injured workers. The Joint Standing Committee on Labor and Housing may report out legislation to the Second Regular Session of the 129th Legislature based on the board's report.

Sec. 17. Workers' Compensation Board to establish working group on certain issues; report. The Workers' Compensation Board shall convene a working group of stakeholders to evaluate issues related to work search and vocational rehabilitation requirements for injured workers and protections for injured workers whose employers have wrongfully not secured workers' compensation payments. On behalf of

the working group, the Workers' Compensation Board shall report to the Joint Standing Committee on Labor and Housing by January 30, 2020 with recommendations and any draft implementing legislation to address these issues. The Joint Standing Committee on Labor and Housing may report out legislation to the Second Regular Session of the 129th Legislature related to the report and recommendations.