

LEGISLATURE OF NEBRASKA

ONE HUNDRED FIRST LEGISLATURE

SECOND SESSION

LEGISLATIVE BILL 963

Introduced by Carlson, 38.

Read first time January 19, 2010

Committee: Business and Labor

A BILL

1 FOR AN ACT relating to the Nebraska Workers' Compensation Act;
2 to amend section 48-128, Reissue Revised Statutes of
3 Nebraska, and section 48-121, Revised Statutes Cumulative
4 Supplement, 2008; to change disability compensation after
5 retirement as prescribed; to harmonize provisions; and to
6 repeal the original sections.
7 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 48-121, Revised Statutes Cumulative
2 Supplement, 2008, is amended to read:

3 48-121 (1) The following schedule of compensation is
4 hereby established for injuries resulting in disability:

5 ~~(1)~~ (a) For total disability, the compensation during
6 such disability shall be sixty-six and two-thirds percent of the
7 wages received at the time of injury, but such compensation shall
8 not be more than the maximum weekly income benefit specified in
9 section 48-121.01 nor less than the minimum weekly income benefit
10 specified in section 48-121.01, except that if at the time of
11 injury the employee receives wages of less than the minimum weekly
12 income benefit specified in section 48-121.01, then he or she shall
13 receive the full amount of such wages per week as compensation.
14 Nothing in this subdivision shall require payment of compensation
15 after disability shall cease;

16 ~~(2)~~ (b) For disability partial in character, except
17 the particular cases mentioned in subdivision ~~(3)~~ (1)(c) of this
18 section, the compensation shall be sixty-six and two-thirds percent
19 of the difference between the wages received at the time of the
20 injury and the earning power of the employee thereafter, but such
21 compensation shall not be more than the maximum weekly income
22 benefit specified in section 48-121.01. This compensation shall be
23 paid during the period of such partial disability but not beyond
24 three hundred weeks. Should total disability be followed by partial
25 disability, the period of three hundred weeks mentioned in this

1 subdivision shall be reduced by the number of weeks during which
2 compensation was paid for such total disability;

3 ~~(3)~~ (c) For disability resulting from permanent injury
4 of the classes listed in this subdivision, the compensation shall
5 be in addition to the amount paid for temporary disability, except
6 that the compensation for temporary disability shall cease as
7 soon as the extent of the permanent disability is ascertainable.
8 For disability resulting from permanent injury of the following
9 classes, compensation shall be: For the loss of a thumb, sixty-six
10 and two-thirds percent of daily wages during sixty weeks. For the
11 loss of a first finger, commonly called the index finger, sixty-six
12 and two-thirds percent of daily wages during thirty-five weeks. For
13 the loss of a second finger, sixty-six and two-thirds percent of
14 daily wages during thirty weeks. For the loss of a third finger,
15 sixty-six and two-thirds percent of daily wages during twenty
16 weeks. For the loss of a fourth finger, commonly called the little
17 finger, sixty-six and two-thirds percent of daily wages during
18 fifteen weeks. The loss of the first phalange of the thumb or of
19 any finger shall be considered to be equal to the loss of one-half
20 of such thumb or finger and compensation shall be for one-half of
21 the periods of time above specified, and the compensation for the
22 loss of one-half of the first phalange shall be for one-fourth of
23 the periods of time above specified. The loss of more than one
24 phalange shall be considered as the loss of the entire finger or
25 thumb, except that in no case shall the amount received for more

1 than one finger exceed the amount provided in this schedule for
2 the loss of a hand. For the loss of a great toe, sixty-six and
3 two-thirds percent of daily wages during thirty weeks. For the
4 loss of one of the toes other than the great toe, sixty-six and
5 two-thirds percent of daily wages during ten weeks. The loss of the
6 first phalange of any toe shall be considered equal to the loss of
7 one-half of such toe, and compensation shall be for one-half of the
8 periods of time above specified. The loss of more than one phalange
9 shall be considered as the loss of the entire toe. For the loss of
10 a hand, sixty-six and two-thirds percent of daily wages during one
11 hundred seventy-five weeks. For the loss of an arm, sixty-six and
12 two-thirds percent of daily wages during two hundred twenty-five
13 weeks. For the loss of a foot, sixty-six and two-thirds percent of
14 daily wages during one hundred fifty weeks. For the loss of a leg,
15 sixty-six and two-thirds percent of daily wages during two hundred
16 fifteen weeks. For the loss of an eye, sixty-six and two-thirds
17 percent of daily wages during one hundred twenty-five weeks. For
18 the loss of an ear, sixty-six and two-thirds percent of daily
19 wages during twenty-five weeks. For the loss of hearing in one ear,
20 sixty-six and two-thirds percent of daily wages during fifty weeks.
21 For the loss of the nose, sixty-six and two-thirds percent of daily
22 wages during fifty weeks.

23 In any case in which there is a loss or loss of use
24 of more than one member or parts of more than one member set
25 forth in this subdivision, but not amounting to total and permanent

1 disability, compensation benefits shall be paid for the loss or
2 loss of use of each such member or part thereof, with the periods
3 of benefits to run consecutively. The total loss or permanent total
4 loss of use of both hands, or both arms, or both feet, or both
5 legs, or both eyes, or hearing in both ears, or of any two thereof,
6 in one accident, shall constitute total and permanent disability
7 and be compensated for according to subdivision ~~(1)~~ (1)(a) of
8 this section. In all other cases involving a loss or loss of use
9 of both hands, both arms, both feet, both legs, both eyes, or
10 hearing in both ears, or of any two thereof, total and permanent
11 disability shall be determined in accordance with the facts.
12 Amputation between the elbow and the wrist shall be considered
13 as the equivalent of the loss of a hand, and amputation between
14 the knee and the ankle shall be considered as the equivalent of
15 the loss of a foot. Amputation at or above the elbow shall be
16 considered as the loss of an arm, and amputation at or above the
17 knee shall be considered as the loss of a leg. Permanent total
18 loss of the use of a finger, hand, arm, foot, leg, or eye shall
19 be considered as the equivalent of the loss of such finger, hand,
20 arm, foot, leg, or eye. In all cases involving a permanent partial
21 loss of the use or function of any of the members mentioned in
22 this subdivision, the compensation shall bear such relation to the
23 amounts named in such subdivision as the disabilities bear to those
24 produced by the injuries named therein.

25 If, in the compensation court's discretion, compensation

1 benefits payable for a loss or loss of use of more than one
2 member or parts of more than one member set forth in this
3 subdivision, resulting from the same accident or illness, do not
4 adequately compensate the employee for such loss or loss of use
5 and such loss or loss of use results in at least a thirty
6 percent loss of earning capacity, the compensation court shall,
7 upon request of the employee, determine the employee's loss of
8 earning capacity consistent with the process for such determination
9 under subdivision ~~(1)~~ or ~~(2)~~ (1)(a) or (1)(b) of this section, and
10 in such a case the employee shall not be entitled to compensation
11 under this subdivision.

12 If the employer and the employee are unable to agree upon
13 the amount of compensation to be paid in cases not covered by the
14 schedule, the amount of compensation shall be settled according
15 to sections 48-173 to 48-185. Compensation under this subdivision
16 shall not be more than the maximum weekly income benefit specified
17 in section 48-121.01 nor less than the minimum weekly income
18 benefit specified in section 48-121.01, except that if at the
19 time of the injury the employee received wages of less than the
20 minimum weekly income benefit specified in section 48-121.01, then
21 he or she shall receive the full amount of such wages per week as
22 compensation;

23 ~~(4)~~ (d) For disability resulting from permanent
24 disability, if immediately prior to the accident the rate of wages
25 was fixed by the day or hour, or by the output of the employee,

1 the weekly wages shall be taken to be computed upon the basis of a
2 workweek of a minimum of five days, if the wages are paid by the
3 day, or upon the basis of a workweek of a minimum of forty hours,
4 if the wages are paid by the hour, or upon the basis of a workweek
5 of a minimum of five days or forty hours, whichever results in
6 the higher weekly wage, if the wages are based on the output of
7 the employee; and

8 ~~(5)~~ (e) The employee shall be entitled to compensation
9 from his or her employer for temporary disability while
10 undergoing physical or medical rehabilitation and while undergoing
11 vocational rehabilitation whether such vocational rehabilitation is
12 voluntarily offered by the employer and accepted by the employee or
13 is ordered by the Nebraska Workers' Compensation Court or any judge
14 of the compensation court.

15 (2) For injuries occurring after the effective date
16 of this act, compensation for total and partial disability
17 benefits under subdivision (1)(a) or (1)(b) of this section or
18 compensation for disability benefits for classes of permanent
19 injury under subdivision (1)(c) of this section that are determined
20 in accordance with subdivision (1)(a) or (1)(b) of this section
21 shall, upon retirement of the employee, be reduced by fifty
22 percent of the amount of old age and survivors insurance retirement
23 benefits being received by such employee under the federal Social
24 Security Act. The amount of the reduction shall not be affected
25 by any subsequent increase or decrease in such benefits. Nothing

1 in this subsection shall be construed to compel an employee to
2 apply for early old age and survivors insurance retirement benefits
3 under the federal Social Security Act. The reduction provided for
4 pursuant to this subsection shall not be applicable to employees
5 receiving such benefits while collecting compensation for total
6 and partial disability benefits for an injury sustained prior to
7 the employee reaching the age of fifty-five years and more than
8 five years prior to his or her date of retirement. For purposes
9 of this subsection, retirement means that a preponderance of the
10 evidence supports a conclusion that an employee has retired. The
11 subjective statement of an employee that the employee is not
12 retired is not sufficient in itself to rebut objective evidence
13 of retirement but may be considered along with other evidence.
14 For injuries occurring after the effective date of this act, an
15 employee who receives old age and survivors insurance retirement
16 benefits under the federal Social Security Act or who receives
17 any other military-service-based government retirement pension, not
18 including a disability-based government pension, is presumed to be
19 in retirement. These presumptions are rebuttable by a preponderance
20 of the evidence.

21 Sec. 2. Section 48-128, Reissue Revised Statutes of
22 Nebraska, is amended to read:

23 48-128 (1) For injuries occurring before December 1,
24 1997:

25 (a) If an employee who has a preexisting permanent

1 partial disability whether from compensable injury or otherwise,
2 which is or is likely to be a hindrance or obstacle to his or
3 her obtaining employment or obtaining reemployment if the employee
4 should become unemployed and which was known to the employer prior
5 to the occurrence of a subsequent compensable injury, receives
6 a subsequent compensable injury resulting in additional permanent
7 partial or in permanent total disability so that the degree or
8 percentage of disability caused by the combined disabilities is
9 substantially greater than that which would have resulted from
10 the last injury, considered alone and of itself, and if the
11 employee is entitled to receive compensation on the basis of the
12 combined disabilities, the employer at the time of the last injury
13 shall be liable only for the degree or percentage of disability
14 which would have resulted from the last injury had there been
15 no preexisting disability. For the additional disability, the
16 employee shall be compensated out of the Workers' Compensation
17 Trust Fund. If the subsequent compensable injury of such an
18 employee shall result in the death of the employee and it shall
19 be determined that the death would not have occurred except for
20 such preexisting permanent partial disability, the employer shall
21 pay the compensation benefits prescribed by this subsection for a
22 period not exceeding three hundred twenty-five weeks, and for any
23 compensation benefits payable after such period of three hundred
24 twenty-five weeks, the dependents shall be compensated out of the
25 fund.

1 (b) In order to qualify under this subsection, the
2 employer must establish by written records that the employer had
3 knowledge of the preexisting permanent partial disability at the
4 time that the employee was hired or at the time the employee was
5 retained in employment after the employer acquired such knowledge.

6 (c) As used in this subsection, preexisting permanent
7 partial disability shall mean any preexisting permanent condition,
8 whether congenital or the result of injury or disease, of such
9 seriousness as to constitute a hindrance or obstacle to obtaining
10 employment or to obtaining reemployment if the employee should
11 become unemployed. No condition shall be considered a preexisting
12 permanent partial disability under this subsection unless it would
13 support a rating of twenty-five percent loss of earning power or
14 more or support a rating which would result in compensation payable
15 for a period of ninety weeks or more for disability for permanent
16 injury as computed under subdivision ~~(3)~~ (1)(c) of section 48-121.

17 (2) Any money in the Second Injury Fund on July 1, 2000,
18 shall be transferred to the Workers' Compensation Trust Fund.

19 Sec. 3. Original section 48-128, Reissue Revised Statutes
20 of Nebraska, and section 48-121, Revised Statutes Cumulative
21 Supplement, 2008, are repealed.