

2011 -- S 0417

=====
LC01073
=====

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2011

A N A C T

RELATING TO LABOR AND LABOR RELATIONS -- WORKERS' COMPENSATION

Introduced By: Senators Ruggerio, Goodwin, McCaffrey, Ciccone, and Doyle

Date Introduced: March 10, 2011

Referred To: Senate Labor

It is enacted by the General Assembly as follows:

1 SECTION 1. Sections 28-29-2 and 28-29-6.1 of the General Laws in Chapter 28-29
2 entitled "Workers' Compensation - General Provisions" are hereby amended to read as follows:

3 **28-29-2. Definitions.** -- In chapters 29 -- 38 of this title, unless the context otherwise
4 requires:

5 (1) "Department" means the department of labor and training.

6 (2) "Director" means the director of labor and training or his or her designee unless
7 specifically stated otherwise.

8 (3) (i) "Earnings capacity" means the weekly straight time earnings which an employee
9 could receive if the employee accepted an actual offer of suitable alternative employment.
10 Earnings capacity can also be established by the court based on evidence of ability to earn,
11 including, but not limited to, a determination of the degree of functional impairment and/or
12 disability, that an employee is capable of employment. The court may, in its discretion, take into
13 consideration the performance of the employee's duty to actively seek employment in scheduling
14 the implementation of the reduction. The employer need not identify particular employment
15 before the court can direct an earnings capacity adjustment. In the event that an employee returns
16 to light duty employment while partially disabled, an earnings capacity shall not be set based
17 upon actual wages earned until the employee has successfully worked at light duty for a period of
18 at least thirteen (13) weeks.

19 (ii) As used under the provisions of this title, "functional impairment" means an

1 anatomical or functional abnormality existing after the date of maximum medical improvement as
2 determined by a medically or scientifically demonstrable finding and based upon the Sixth (6th)
3 edition of the American Medical Association's Guide to the Evaluation of Permanent Impairment
4 or comparable publications of the American Medical Association.

5 (iii) In the event that an employee returns to employment at an average weekly wage
6 equal to the employee's pre-injury earnings exclusive of overtime, the employee will be presumed
7 to have regained his/her earning capacity.

8 (4) "Employee" means any person who has entered into the employment of or works
9 under contract of service or apprenticeship with any employer, except that in the case of a city or
10 town other than the city of Providence it shall only mean that class or those classes of employees
11 as may be designated by a city, town, or regional school district in a manner provided in this
12 chapter to receive compensation under chapters 29 -- 38 of this title. Any person employed by the
13 state of Rhode Island, except for sworn employees of the Rhode Island State Police, or by the
14 Rhode Island Airport Corporation who is otherwise entitled to the benefits of chapter 19 of title
15 45 shall be subject to the provisions of chapters 29 -- 38 of this title for all case management
16 procedures and dispute resolution for all benefits. The term "employee" does not include any
17 individual who is a shareholder or director in a corporation, general or limited partners in a
18 general partnership, a registered limited liability partnership, a limited partnership, or partners in
19 a registered limited liability limited partnership, or any individual who is a member in a limited
20 liability company. These exclusions do not apply to shareholders, directors and members who
21 have entered into the employment of or who work under a contract of service or apprenticeship
22 within a corporation or a limited liability company. The term "employee" also does not include a
23 sole proprietor, independent contractor, or a person whose employment is of a casual nature, and
24 who is employed other than for the purpose of the employer's trade or business, or a person
25 whose services are voluntary or who performs charitable acts, nor shall it include the members of
26 the regularly organized fire and police departments of any town or city; provided, however, that it
27 shall include the members of the police and aircraft rescue and firefighting (ARFF) units of the
28 Rhode Island Airport Corporation. Whenever a contractor has contracted with the state, a city,
29 town, or regional school district any person employed by that contractor in work under contract
30 shall not be deemed an employee of the state, city, town, or regional school district as the case
31 may be. Any person who on or after January 1, 1999, was an employee and became a corporate
32 officer shall remain an employee, for purposes of these chapters, unless and until coverage under
33 this act is waived pursuant to subsection 28-29-8(b) or section 28-29-17. Any person who is
34 appointed a corporate officer between January 1, 1999 and December 31, 2001, and was not

1 previously an employee of the corporation, will not be considered an employee, for purposes of
2 these chapters, unless that corporate officer has filed a notice pursuant to subsection 28-29-19(b).
3 In the case of a person whose services are voluntary or who performs charitable acts, any benefit
4 received, in the form of monetary remuneration or otherwise, shall be reportable to the
5 appropriate taxation authority but shall not be deemed to be wages earned under contract of hire
6 for purposes of qualifying for benefits under chapters 29 -- 38 of this title. Any reference to an
7 employee who had been injured shall, where the employee is dead, include a reference to his or
8 her dependents as defined in this section, or to his or her legal representatives, or, where he or she
9 is a minor or incompetent, to his or her conservator or guardian. A "seasonal occupation" means
10 those occupations in which work is performed on a seasonal basis of not more than sixteen (16)
11 weeks.

12 (5) "Employer" includes any person, partnership, corporation, or voluntary association,
13 and the legal representative of a deceased employer; it includes the state, and the city of
14 Providence. It also includes each city, town, and regional school district in the state that votes or
15 accepts the provisions of chapters 29 -- 38 of this title in the manner provided in this chapter.

16 (6) "General or special employer":

17 (i) "General employer" includes but is not limited to temporary help companies and
18 employee leasing companies and means a person who for consideration and as the regular course
19 of its business supplies an employee with or without vehicle to another person.

20 (ii) "Special employer" means a person who contracts for services with a general
21 employer for the use of an employee, a vehicle, or both.

22 (iii) Whenever there is a general employer and special employer wherein the general
23 employer supplies to the special employer an employee and the general employer pays or is
24 obligated to pay the wages or salaries of the supplied employee, then, notwithstanding the fact
25 that direction and control is in the special employer and not the general employer, the general
26 employer, if it is subject to the provisions of the Workers' Compensation Act or has accepted that
27 Act, shall be deemed to be the employer as set forth in subdivision (5) of this section and both the
28 general and special employer shall be the employer for purposes of sections 28-29-17 and 28-29-
29 18. However, the special employee shall not be deemed to be the employer for purposes of
30 sections 28-29-20.

31 (iv) Effective January 1, 2003, whenever a general employer enters into a contract or
32 arrangement with a special employer to supply an employee or employees for work, the special
33 employer shall require an insurer generated insurance coverage certification, on a form prescribed
34 by the department, demonstrating Rhode Island workers' compensation and employer's liability

1 coverage evidencing that the general employer carries workers' compensation insurance with that
2 insurer with no indebtedness for its employees for the term of the contract or arrangement. In the
3 event that the special employer fails to obtain and maintain at policy renewal and thereafter this
4 insurer generated insurance coverage certification demonstrating Rhode Island workers'
5 compensation and employer's liability coverage from the general employer, the special employer
6 is deemed to be the employer pursuant to the provisions of this section. Upon the cancellation or
7 failure to renew, the insurer having written the workers' compensation and employer's liability
8 policy shall notify the certificate holders and the department of the cancellation or failure to
9 renew and upon notice, the certificate holders shall be deemed to be the employer for the term of
10 the contract or arrangement unless or until a new certification is obtained.

11 (7) (i) "Injury" means and refers to personal injury to an employee arising out of and in
12 the course of his or her employment, connected and referable to the employment.

13 (ii) An injury to an employee while voluntarily participating in a private, group, or
14 employer-sponsored carpool, vanpool, commuter bus service, or other rideshare program, having
15 as its sole purpose the mass transportation of employees to and from work shall not be deemed to
16 have arisen out of and in the course of employment. Nothing in the foregoing provision shall be
17 held to deny benefits under chapters 29 -- 38 and chapter 47 of this title to employees such as
18 drivers, mechanics, and others who receive remuneration for their participation in the rideshare
19 program. Provided, that the foregoing provision shall not bar the right of an employee to recover
20 against an employer and/or driver for tortious misconduct.

21 (8) "Maximum medical improvement" means a point in time when any medically
22 determinable physical or mental impairment as a result of injury has become stable and when no
23 further treatment is reasonably expected to materially improve the condition. Neither the need for
24 future medical maintenance nor the possibility of improvement or deterioration resulting from the
25 passage of time and not from the ordinary course of the disabling condition, nor the continuation
26 of a pre-existing condition precludes a finding of maximum medical improvement. A finding of
27 maximum medical improvement by the workers' compensation court may be reviewed only
28 where it is established that an employee's condition has substantially deteriorated or improved.

29 (9) "Physician" means medical doctor, surgeon, dentist, licensed psychologist,
30 chiropractor, osteopath, podiatrist, or optometrist, as the case may be.

31 (10) "Suitable alternative employment" means employment or an actual offer of
32 employment which the employee is physically able to perform and will not exacerbate the
33 employee's health condition and which bears a reasonable relationship to the employee's
34 qualifications, background, education, and training. The employee's age alone shall not be

1 considered in determining the suitability of the alternative employment.

2 (11) "Independent contractor" means a person who has filed a notice of designation as
3 independent contractor with the director pursuant to section 28-29-17.1 or as otherwise found by
4 the workers' compensation court.

5 (12) "Leased employee" means an employee leased to a special employer by a labor-
6 leasing firm under an agreement between the special employer and the labor-leasing firm, to
7 perform duties related to the conduct of the special employer's business. "Leased employee" does
8 not include a "temporary employee".

9 (13) "Temporary employee" means an employee who is furnished to a special employer
10 to substitute for a "permanent employee" or for a "leased employee" as defined in this section, or
11 to meet seasonal or short-term workload conditions of the special employer.

12 **28-29-6.1. Secondary provision of workers' compensation insurance.** -- (a) Whenever
13 a general contractor or a construction manager enters into a contract with a subcontractor for
14 work to be performed in Rhode Island, the general contractor or construction manager shall at all
15 times require written documentation evidencing that the subcontractor carries workers'
16 compensation insurance with no indebtedness for its employees for the term of the contract or is
17 an independent contractor pursuant to the provisions of section 28-29-17.1. In the event that the
18 general contractor or construction manager fails to obtain ~~the written documentation~~ and maintain
19 at policy renewal this insurer generated insurance coverage certification demonstrating Rhode
20 Island workers' compensation and employer's liability coverage from the subcontractor, the
21 general contractor or construction manager shall be deemed to be the employer pursuant to
22 provisions of section 28-29-2. Upon the cancellation or failure to renew, the insurer having
23 written the workers' compensation and employer's liability policy shall notify the certificate
24 holders and the division of workers' compensation of the cancellation or failure to renew, and
25 thereafter the certificate holders shall be deemed to be the employer for the duration of the
26 contract or arrangement unless or until a new certificate has been obtained.

27 (b) For the purposes of this section, "construction manager" means an individual
28 corporation, partnership, or joint venture or other legal entity responsible for supervising and
29 controlling all aspects of construction work to be performed on the construction project, as
30 designated in the project documents, in addition to the possibility of performing some of the
31 construction services itself. For the purposes of this section, the construction manager need have
32 no contractual involvement with any of the parties to the construction project other than the
33 owner, or may contract directly with the trade contractors pursuant to its agreement with the
34 owner.

1 (c) This section only applies to a general contractor, subcontractor, or construction
2 manager deemed an employer subject to the provisions of Chapters 29 -- 38 of this title, as
3 provided in section 28-29-6.

4 (d) Whenever the workers' compensation insurance carrier is obligated to pay workers'
5 compensation benefits to the employee of an uninsured subcontractor, the workers' compensation
6 insurance carrier shall have a complete right of indemnification to the extent benefits are paid
7 against either the uninsured subcontractor, uninsured general contractor or uninsured construction
8 manager.

9 SECTION 2. Sections 28-35-6, 28-35-8, 28-35-32 and 28-35-57 of the General Laws in
10 Chapter 28-35 entitled "Workers' Compensation - Procedure" are hereby amended to read as
11 follows:

12 **28-35-6. Notice of amendments to memorandum of agreement.** -- (a) If the workers'
13 compensation court makes any amendment or addition to the memorandum of agreement, the
14 administrator of the workers' compensation court shall immediately notify the department of the
15 changes in the agreement.

16 (b) If an employer or insurer and an employee and his or her attorney, if represented,
17 reach an agreement, subsequent to the filing of a memorandum of agreement, order, or decree, as
18 to any issue, the parties shall file a written agreement and receipt with the department, signed by
19 the parties, and on a form prescribed by the department. A copy of any agreement and receipt
20 shall be delivered to each of the parties. Upon the filing of the agreement and receipt with the
21 department, it shall be as binding upon both parties as a preliminary determination order or
22 decree.

23 (c) The attorney for an injured worker shall be entitled to a counsel fee reasonably
24 compensating him or her for the services he or she rendered on behalf of the injured worker in
25 securing the relief sought.

26 **28-35-8. Filing of non-prejudicial memorandum of agreement.** -- (a) Notwithstanding
27 section 28-35-1, if the employer files a memorandum of agreement but specifically designates
28 that agreement as a "non-prejudicial" or "without prejudice", the employer may pay weekly
29 compensation benefits not exceeding thirteen (13) weeks. In these cases, the employer shall send
30 a copy of the non-prejudicial memorandum and any amendments to it to the employee and his or
31 her attorney or the representative of the decedent and his or her attorney by certified mail, return
32 receipt requested, at the same time as it is filed with the department in the same manner as if it
33 were a memorandum of agreement. The non-prejudicial memorandum of agreement shall contain
34 all information as directed by section 28-35-1. Having done so, the non-prejudicial memorandum

1 of agreement and any action taken pursuant to it shall be without prejudice to any party
2 subsequently maintaining any position as to employer liability for payments under chapters 29 --
3 38 of this title, maintainable in the absence of an agreement. If at any time within or at the close
4 of the thirteen-week period after payments of compensation have commenced the employer or
5 insurer terminates weekly payments to the employee or to those entitled to payments on account
6 of death of an employee, the employer or insurer shall notify the employee and his or her attorney
7 or the representative of the decedent employee and his or her attorney within ten (10) days on a
8 form prescribed by the department [by certified mail, return receipt requested](#) that:

- 9 (1) Payments have terminated;
- 10 (2) The claim has not been formally accepted; and
- 11 (3) The employee has the right to file a petition, within the two (2) year limitation as set
12 forth in section 28-35-57, to formally establish liability of the employer or insurer.

13 (b) If the employer or insurer makes payments of weekly benefits to the employee or to
14 those entitled to payments on account of death of an employee for more than the thirteen (13)
15 week period, the payments shall constitute a conclusive admission of liability and ongoing
16 incapacity as to the injuries set forth in the non-prejudicial memorandum of agreement. The
17 employer or insurer shall within ten (10) days of making additional payments file a memorandum
18 of agreement pursuant to section 28-35-1.

19 **28-35-32. Costs -- Counsel and witness fees.** – (a) No fee shall be charged by the clerk
20 of any court or by the administrator of the workers' compensation court for the performance of
21 any service required by this chapter, except for certified copies of decrees and copies of
22 transcripts. Notwithstanding any provisions of law to the contrary, the workers' compensation
23 court shall be allowed a filing fee of twenty dollars (\$20.00) for the filing of a petition under
24 chapters 29 -- 38 of this title, and a filing fee of twenty-five dollars (\$25.00) for the filing of an
25 appeal under section 28-35-28, which sums shall be deposited to provide additional funding to the
26 uninsured employers fund as established by chapter 28-53. In proceedings under this chapter, and
27 in proceeding under chapter 37 of this title, costs shall be awarded, including counsel fees and
28 fees for medical and other expert witnesses including interpreters, to employees who successfully
29 prosecute petitions for compensation, petitions for medical expenses, petitions to amend a
30 preliminary order or memorandum of agreement, and all other employee petitions, except
31 petitions for lump sum commutation, and to employees who successfully defend, in whole or in
32 part, proceedings seeking to reduce or terminate any and all workers' compensation benefits, and
33 to medical services providers who successfully prosecute petitions for the payment of medical
34 expenses except that medical services providers shall not be paid expert witness fees for

1 testimony in support of petitions filed in their behalf. These costs shall be assessed against the
2 employer by a single judge, by an appellate panel and by the supreme court on appeal consistent
3 with the services rendered before each tribunal and shall be made a part of the decree. No
4 employee's attorney shall accept any other or additional fees for his services for the particular
5 petition for which the fees are awarded in each tribunal.

6 [\(b\) Costs, including counsel fees, shall be awarded in the same manner as subsection \(a\)](#)
7 [to reasonably compensate attorneys who successfully secure relief for injured workers pursuant to](#)
8 [sections 28-35-1, 28-35-5, 28-35-6 and 28-35-7.1.](#)

9 **28-35-57. Limitation of claims for compensation.** -- (a) An employee's claim for
10 compensation under chapters 29 -- 38 of this title shall be barred unless payment of weekly
11 compensation has commenced, or a petition, as provided for in this chapter, has been filed within
12 two (2) years after the occurrence or manifestation of the injury or incapacity, or in case of the
13 death of the employee, or in the event of his or her physical or mental incapacity, within two (2)
14 years after the death of the employee or the removal of the physical or mental incapacity.

15 (b) The time for filing shall not begin to run in cases of latent or undiscovered physical
16 or mental impairment due to injury including disease until:

17 (1) The person claiming benefits knew, or by exercise of reasonable diligence should
18 have known, of the existence of the impairment and its causal relationship to his or her
19 employment; or

20 (2) After disablement, whichever is later.

21 (c) In any case in which weekly compensation benefits have been paid, pursuant to
22 section 28-35-8, in which the employer or insurer has failed to file the required notices, [or has](#)
23 [failed to comply with the requirements thereof regarding the mailing of documents required to be](#)
24 [sent to the employee](#) the claimant's right to file a petition for compensation benefits shall be
25 preserved without time limitation.

26 SECTION 3. This act shall take effect upon passage.

=====
LC01073
=====

EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF
A N A C T
RELATING TO LABOR AND LABOR RELATIONS – WORKERS' COMPENSATION

1 This act would make various amendments to the statutes applicable to workers'
2 compensation.

3 This act would take effect upon passage.

=====
LC01073
=====