

1 State of Arkansas
2 88th General Assembly
3 Regular Session, 2011
4

A Bill

HOUSE BILL 1840

5 By: Representatives Rice, Perry, Sanders
6 By: Senators B. Pritchard, Holland
7

For An Act To Be Entitled

9 AN ACT TO AMEND THE ARKANSAS WORKERS' COMPENSATION
10 LAW ENACTED BY INITIATED ACT 4 OF 1948 TO RESTORE THE
11 STATUTORY INTENT OF THE 79TH GENERAL ASSEMBLY WHICH
12 HAS BEEN ERODED BY THE COMMISSION AND THE COURTS AND
13 TO SPECIFICALLY OVERTURN CASE LAW WHICH HAS
14 IMPERMISSIBLY DEVIATED FROM THE INTENT AND PLAIN
15 LANGUAGE OF ACT 796 OF 1993 CONTRARY TO SECTION 35 OF
16 SAID ACT; AND FOR OTHER PURPOSES.
17
18

Subtitle

19 AN ACT TO AMEND THE ARKANSAS WORKERS'
20 COMPENSATION LAW ENACTED BY INITIATED ACT
21 4 OF 1948 TO RESTORE THE STATUTORY INTENT
22 OF THE 79TH GENERAL ASSEMBLY.
23
24
25

26 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
27

28 SECTION 1. DO NOT CODIFY. (a) The Eighty-Eighth General Assembly
29 realizes that the Arkansas workers' compensation statutes must be revised and
30 amended from time to time. Unfortunately, many of the changes made by this
31 act have become necessary because administrative law judges, the Workers'
32 Compensation Commission, and the Arkansas courts have continually broadened
33 the scope and eroded the purpose of the workers' compensation statutes of
34 this state as amended by the Seventy-Ninth General Assembly by Act 796 of
35 1993 whose stated purpose was to increase workers' compensation benefits for
36 employees, to pay timely temporary and permanent disability benefits to all



1 legitimately injured workers who suffer an injury or disease arising out of
2 and in the course of their employment, to pay reasonable and necessary
3 medical expenses resulting from an injury or disease arising out of and in
4 the course of their employment, to return the worker to the work force, to
5 improve workplace safety, to improve the health care delivery, to encourage
6 the return to work of injured workers, to deter and punish frauds of agents,
7 brokers, solicitors, employers, and employees, to curtail the rise in medical
8 costs associated with the provisions of workers' compensation benefits, and
9 to emphasize that the workers' compensation system in this state must be
10 returned to a state of economic viability. The Eighty-Eighth General
11 Assembly intends to restate that the major and controlling purpose of
12 workers' compensation is to pay timely temporary and permanent disability
13 benefits to all legitimately injured workers who suffer an injury or disease
14 arising out of and in the course of their employment, to pay reasonable and
15 necessary medical expenses resulting from an injury or disease arising out of
16 and in the course of their employment, and then to return the workers to the
17 work force, to improve workplace safety, to improve the health care delivery,
18 to encourage the return to work of injured workers, to deter and punish
19 frauds of agents, brokers, solicitors, employers, and employees, to curtail
20 the rise in medical costs associated with the provisions of workers'
21 compensation benefits, and to emphasize that the workers' compensation system
22 in this state must be returned to a state of economic viability. When, and if
23 the workers' compensation statutes of this state need to be changed, the
24 General Assembly acknowledges its responsibility to do so.

25 (b) It is the specific intent of the Eighty-Eighth General Assembly to
26 repeal, annul, and hold for naught all prior opinions or decisions of any
27 administrative law judge, the Workers' Compensation Commission, or courts of
28 this state contrary to or in conflict with any provision in this act. In the
29 future, if such things as the statute of limitations, the standard of review
30 by the Workers' Compensation Commission or courts, the extent to which any
31 physical condition, injury, or disease should be excluded from or added to
32 coverage by the law, or the scope of the workers' compensation statutes need
33 to be liberalized, expanded, broadened, or narrowed, those things shall be
34 addressed by the General Assembly and should not be done by administrative
35 law judges, the Workers' Compensation Commission, or the courts.

36

1 SECTION 2. Arkansas Code § 11-9-102(4)(B)(iii), concerning exclusions
2 from the definition of "compensable injury" under the Workers' Compensation
3 Law, is amended to read as follows:

4 (iii)(a) Injury ~~which~~ that was inflicted upon the
5 employee at a time when employment services were not being performed or
6 before the employee was hired or after the employment relationship was
7 terminated.

8 (b) When an employee is on break, whether
9 mandatory or voluntary, scheduled or unscheduled, on the clock or off, or has
10 clocked out for the day and is exiting the premises, or when the employee has
11 not clocked in for the day and is entering the premises and sustains an
12 injury, a rebuttable presumption shall arise that the injury was inflicted
13 upon the employee at a time when employment services were not being
14 performed.

15 (c) A purpose of subdivision (4)(B)(ii)(b) of
16 this section is to specifically annul any case law inconsistent with this
17 subdivision (4)(B)(ii), including without limitation Wood v. Wendy's Old
18 Fashioned Hamburgers, 2010 Ark. App. 307, S.W.3d (2010); Barrett v. C.L.
19 Swanson Corp., 2010 Ark. App. 91, S.W.3d (2010); Dearman v. Deltic Timber
20 Corp., 2010 Ark. App. 87, S.W.3d (2010); and Jonesboro Care & Rehab Center v.
21 Woods, 2010 Ark. 482, S.W.3d (2010);or

22
23 SECTION 3. Arkansas Code § 11-9-102(4)(D), concerning the burden of
24 proof under the definition of "compensable injury" under the Workers'
25 Compensation Law, is amended to read as follows:

26 (D) A compensable injury must be established by medical
27 evidence ~~supported by~~ of objective findings as defined in subdivision (16) of
28 this section.

29
30 SECTION 4. Arkansas Code § 11-9-102(16)(A)(i), concerning the
31 definition of "objective findings" under the Workers' Compensation Law, is
32 amended to read as follows:

33 (16)(A)(i)(a) "Objective findings" are those findings ~~which~~ that
34 cannot come under the voluntary control of the patient.

35 (b) "Objective findings" shall be made
36 specifically by a licensed physician.

1 (c) "Objective findings" does not include a
 2 prescription, without a specific finding.

3 (d) A purpose of subdivisions (16)(A)(i)(b)
 4 and (c) of this section is to specifically annul any case law inconsistent
 5 with this subdivision (16)(A)(i), including without limitation Denning v.
 6 Wal-Mart Associates, 2009 Ark. App. 842, S.W.3d (2009); Estridge v. Waste
 7 Management, 343 Ark. 276, 33 S.W.3d 167 (2002); and Fred's, Inc. v.
 8 Jefferson, 361 Ark. 258, 206 S.W.3d 238 (2005).

9
 10 SECTION 5. Arkansas Code § 11-9-410 is amended to read as follows:

11 11-9-410. Third-party liability.

12 (a) Liability Unaffected.

13 ~~(1)(A) The making of a claim for compensation against any~~
 14 ~~employer or carrier for the injury or death of an employee shall not affect~~
 15 ~~the right of the employee, or his or her dependents, to make a claim or~~
 16 ~~maintain an action in court against any third party for the injury, but the~~
 17 ~~employer or the employer's carrier shall be entitled to reasonable notice and~~
 18 ~~opportunity to join in the action.~~

19 ~~(B) If they, or either of them, join in the action, they~~
 20 ~~shall be entitled to a first lien upon two thirds (2/3) of the net proceeds~~
 21 ~~recovered in the action that remain after the payment of the reasonable costs~~
 22 ~~of collection, for the payment to them of the amount paid and to be paid by~~
 23 ~~them as compensation to the injured employee or his or her dependents.~~

24 ~~(2) The commencement of an action by an employee or his or her~~
 25 ~~dependents against a third party for damages by reason of an injury to which~~
 26 ~~this chapter is applicable, or the adjustment of any claim, shall not affect~~
 27 ~~the rights of the injured employee or his or her dependents to recover~~
 28 ~~compensation, but any amount recovered by the injured employee or his or her~~
 29 ~~dependents from a third party shall be applied as follows:~~

30 ~~(A) Reasonable costs of collection shall be deducted;~~

31 ~~(B) Then, in every case, one third (1/3) of the remainder~~
 32 ~~shall belong to the injured employee or his or her dependents, as the case~~
 33 ~~may be;~~

34 ~~(C) The remainder, or so much as is necessary to discharge~~
 35 ~~the actual amount of the liability of the employer and the carrier; and~~

36 ~~(D) Any excess shall belong to the injured employee or his~~

1 ~~or her dependents.~~

2 (1)(A) The making of a claim for compensation against any
3 employer or carrier for the injury or death of an employee shall not affect
4 the right of the employee, or his or her dependents, to make a claim or
5 maintain an action in court against any third party for the injury.

6 (B)(i) By the acceptance of compensation under this
7 chapter, the employee grants the employer or employer's insurance carrier an
8 absolute first lien upon the proceeds of any settlement or judgment resulting
9 from the exercise of any rights of recovery of the employee against any third
10 party.

11 (ii) The employer or employer's carrier shall be
12 entitled to an absolute first lien upon the net proceeds recovered in the
13 action that remain after the payment of the reasonable cost of collection to
14 discharge the actual amount of liability of the employer or carrier, with any
15 excess being paid to the employee and serving as a credit against any future
16 compensation payments to be paid to the employee or his or her dependents.

17 (b) Subrogation.

18 ~~(1) An employer or carrier liable for compensation under this~~
19 ~~chapter for the injury or death of an employee shall have the right to~~
20 ~~maintain an action in tort against any third party responsible for the injury~~
21 ~~or death. However, the employer or the carrier must notify the claimant in~~
22 ~~writing that the claimant has the right to hire a private attorney to pursue~~
23 ~~any benefits to which the claimant is entitled in addition to the subrogation~~
24 ~~interest against any third party responsible for the injury or death.~~

25 ~~(2) After reasonable notice and opportunity to be represented in~~
26 ~~the action has been given to the compensation beneficiary, the liability of~~
27 ~~the third party to the compensation beneficiary shall be determined in the~~
28 ~~action, as well as the third party's liability to the employer and carrier.~~

29 ~~(3)(A) After recovery shall be had against the third party, by~~
30 ~~suit or otherwise, the compensation beneficiary shall be entitled to any~~
31 ~~amount recovered over and above the amount that the employer and carrier have~~
32 ~~paid or are liable for in compensation, after deducting reasonable costs of~~
33 ~~collection.~~

34 ~~(B) In no event shall the compensation beneficiary be~~
35 ~~entitled to less than one third (1/3) of the amount recovered from the third~~
36 ~~party, after deducting the reasonable cost of collection.~~

1 ~~(4) An employer or carrier who is liable for compensation under~~
2 ~~this chapter on account of injury or death of an employee shall be entitled~~
3 ~~to maintain a third party action against the employer's uninsured motorist~~
4 ~~coverage or underinsured motorist coverage.~~

5 ~~(5) The purpose and intent of this subsection is to prevent~~
6 ~~double payment to the employee.~~

7 (1)(A) If no action is brought by the employee, the employer or
8 employer's carrier liable for compensation under this chapter for the injury
9 or death of an employee shall have the right to initiate an action in tort
10 against any third party responsible for the injury or death of the employee.

11 (B) The employee or his or her dependents shall be
12 entitled to reasonable notice of a claim against a third party.

13 (C) The employer or employer's insurance carrier shall
14 notify the employee or his or her dependents in writing that the employee or
15 his or her dependents have the right to hire a private attorney to pursue any
16 benefits to which the employee is entitled in addition to the subrogation
17 interest against any third-party responsible for the injury or death.

18 (2) After reasonable notice and opportunity to be represented in
19 the action has been given to the employee or his or her dependents, the
20 liability of the third-party to the employee or his or her dependents shall
21 be determined in the action, as well as the third-party's liability to the
22 employer or employer's insurance carrier.

23 (3) The employee or his or her dependents shall cooperate in the
24 litigation or settlement of the claim against a third party.

25 (4)(A) After payment of the reasonable cost of collection, the
26 net proceeds or any settlement or judgment shall be paid to the employer or
27 carrier to the total amount of compensation paid.

28 (B) Any balance remaining after payment of necessary
29 expenses and the satisfaction of the employer's or carrier's lien shall be
30 paid to the employee and be applied as credit against any future compensation
31 benefits for the same injury.

32 ~~(c) Settlement of Claims.~~

33 ~~(1) Settlement of claims under subsections (a) and (b) of this~~
34 ~~section must have the approval of the court or of the commission, except that~~
35 ~~the distribution of that portion of the settlement which represents the~~
36 ~~compensation payable under this chapter must have the approval of the~~

1 ~~commission.~~

2 ~~(2) Where liability is admitted to the injured employee or his~~
3 ~~or her dependents by the employer or carrier, the cost of collection may be~~
4 ~~deducted from that portion of the settlement under subsections (a) or (b) of~~
5 ~~this section representing compensation, upon direction and approval of the~~
6 ~~commission.~~

7 ~~(3) No party shall settle a claim under subsections (a) and (b)~~
8 ~~of this section without first giving three (3) days' written notice to all~~
9 ~~parties with an interest in the claim of the intent to settle.~~

10 ~~(4) Each party with an interest in a claim under subsections (a)~~
11 ~~and (b) shall cooperate with all other parties in litigation or settlement of~~
12 ~~such claims.~~

13 (c)(1) The purpose and intent of this section is to prevent double
14 recovery to the employee and to annul specifically any case law inconsistent
15 with this subsection, including without limitation all case law interpreting
16 the previous § 11-9-410, and Travelers Ins. Co. v. McCluskey, 252 Ark. 1045,
17 483 S.W.2d 179 (1972); General Accident Ins. v. Jayne, 343 Ark. 143, 33
18 S.W.3d 161 (2001) and Phillip Morris USA v. James 79 Ark. App. 72, 835 S.W.3d
19 441 (2002).

20 (2) The common law Made-Whole Doctrine as espoused by the courts
21 in General Accident Ins. v. Jayne, 343 Ark. 143, 33 S.W.3d 161 (2001) and
22 Phillip Morris USA v. James 79 Ark. App. 72, 835 S.W.3d 441 (2002) is
23 repealed.

24 (d) The subrogation right of an employer and its insurance carrier to
25 recover from a third-party tortfeasor who has caused injury or death to an
26 employee of the employer is absolute and cannot be waived by the employer or
27 its insurance carrier unless the employer or its insurance carrier elects to
28 do so in writing.

29 (e) Settlement of claims under this section shall be approved by the
30 commission.

31
32 SECTION 6. Arkansas Code § 11-9-508(a), concerning the liability of
33 employers for medical services and supplies under the Workers' Compensation
34 Law, is amended to read as follows:

35 (a)(1) The employer shall promptly provide for an injured employee
36 such medical, surgical, hospital, chiropractic, optometric, podiatric, and

1 nursing services and medicine, crutches, ambulatory devices, artificial
 2 limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may
 3 be reasonably necessary in connection with the injury received by the
 4 employee.

5 (2) The compensable injury must be the major cause of the need
 6 for treatment.

7 (3) The purpose of subdivision (a)(2) of this section is to
 8 annul any case law inconsistent with subdivision (a)(2) of this section,
 9 including without limitation Williams v. L & W Janitorial, 85 Ark. App. 1,
 10 145 S.W.3d 383 (2004).

11
 12 SECTION 7. Arkansas Code § 11-9-514(a)(3)(A)(ii) and (iii), concerning
 13 changes of physicians under the Workers' Compensation Law, is amended to read
 14 as follows:

15 (ii) Where the employer has contracted with a
 16 managed care organization certified by the commission, the claimant employee,
 17 however, ~~shall~~ may be allowed to change physicians by petitioning the
 18 commission one (1) time only for a change of physician and establishing by a
 19 preponderance of the evidence that there is a compelling reason or
 20 circumstance justifying the change to a physician who must either be
 21 associated with the managed care entity chosen by the employer or be the
 22 regular treating physician of the employee who maintains the employee's
 23 medical records and with whom the employee has a bona fide doctor-patient
 24 relationship demonstrated by a history of regular treatment prior to the
 25 onset of the compensable injury but only if the primary care physician agrees
 26 to refer the employee to the managed care entity chosen by the employer for
 27 any specialized treatment, including physical therapy, and only if the
 28 primary care physician agrees to comply with all the rules, terms, and
 29 conditions regarding services performed by the managed care entity chosen by
 30 the employer.

31 (iii) Where the employer does not have a contract
 32 with a managed care organization certified by the commission, the claimant
 33 employee, however, ~~shall~~ may be allowed to change physicians by petitioning
 34 the commission one (1) time only for a change of physician and establishing
 35 by a preponderance of the evidence that there is a compelling reason or
 36 circumstance justifying the change, to a physician who must either be

1 associated with any managed care entity certified by the commission or be the
2 regular treating physician of the employee who maintains the employee's
3 medical records and with whom the employee has a bona fide doctor-patient
4 relationship demonstrated by a history of regular treatment prior to the
5 onset of the compensable injury, but only if the primary care physician
6 agrees to refer the employee to a physician associated with any managed care
7 entity certified by the commission for any specialized treatment, including
8 physical therapy, and only if the primary care physician agrees to comply
9 with all the rules, terms, and conditions regarding services performed by any
10 managed care entity certified by the commission.

11 (iv) A purpose of the 2011 amendment to this
12 subdivision (a)(3)(A) of this section by this act is to specifically annul
13 any case law inconsistent with subdivision (a)(3)(A) of this section,
14 including without limitation Collins v. Lennox Industries, Inc., 77 Ark. App.
15 303, 75 S.W.3d 204 (2002).

16
17 SECTION 8. Arkansas Code § 11-9-514(c)(1), concerning changes of
18 physicians under the Workers' Compensation Law, is amended to read as
19 follows:

20 (c)(1)(A) After being notified of an injury, the employer or insurance
21 carrier shall deliver to the employee, in person or by certified or
22 registered mail, return receipt requested, a copy of a notice, approved or
23 prescribed by the commission, ~~which~~ that explains the employee's rights and
24 responsibilities concerning change of physician.

25 (B) The employee's signature on this document is deemed
26 sufficient notice for purposes of the 2011 amendment to this chapter by this
27 act.

28
29 SECTION 9. Arkansas Code § 11-9-519(c), concerning compensation for
30 disability under the Workers' Compensation Law, is amended to read as
31 follows:

32 (c) In all other cases, permanent total disability shall ~~be~~ include a
33 physical impairment rating and determined in accordance with the facts.

34
35 SECTION 10. Arkansas Code § 11-9-519 is amended to add an additional
36 subsection to read as follows:

1 (h) The purpose of the amendment to this section by this act is to
2 eliminate the discrepancy between permanent partial and permanent total
3 disability benefits and to specifically annul any case law inconsistent with
4 the amendment to this section by this act, including without limitation
5 Rutherford v. Mid-Delta Community Services, 102 Ark. App. 317, 285 S.W.3d 248
6 (2008).

7
8 SECTION 11. Arkansas Code § 11-9-521(a) concerning compensation for
9 disability under the Workers' Compensation Law, is amended to read as
10 follows:

11 (a) An employee who sustains a permanent compensable injury scheduled
12 in this section shall receive, ~~in addition to compensation for temporary~~
13 ~~total and temporary partial benefits during the healing period or until the~~
14 ~~employee returns to work, whichever occurs first,~~ weekly benefits in the
15 amount of the permanent partial disability rate attributable to the injury,
16 for that period of time set out in the following schedule:

17 (1) Arm amputated at the elbow, or between the elbow and
18 shoulder, two hundred forty-four (244) weeks;

19 (2) Arm amputated between the elbow and wrist, one hundred
20 eighty-three (183) weeks;

21 (3) Leg amputated at the knee, or between the knee and the hip,
22 one hundred eighty-four (184) weeks;

23 (4) Leg amputated between the knee and the ankle, one hundred
24 thirty-one (131) weeks;

25 (5) Hand amputated, one hundred eighty-three (183) weeks;

26 (6) Thumb amputated, seventy-three (73) weeks;

27 (7) First finger amputated, forty-three (43) weeks;

28 (8) Second finger amputated, thirty-seven (37) weeks;

29 (9) Third finger amputated, twenty-four (24) weeks;

30 (10) Fourth finger amputated, nineteen (19) weeks;

31 (11) Foot amputated, one hundred thirty-one (131) weeks;

32 (12) Great toe amputated, thirty-two (32) weeks;

33 (13) Toe other than great toe amputated, eleven (11) weeks;

34 (14) Eye enucleated, in which there was useful vision, one
35 hundred five (105) weeks;

36 (15) Loss of hearing of one ear, forty-two (42) weeks;

1 (16) Loss of hearing of both ears, one hundred fifty-eight (158)
2 weeks;

3 (17) Loss of one testicle, fifty-three (53) weeks; loss of both
4 testicles, one hundred fifty-eight (158) weeks.

5
6 SECTION 12. Arkansas Code § 11-9-521 is amended to add an additional
7 subsection to read as follows:

8 (i)(A) Temporary total disability benefits for
9 scheduled injuries shall be awarded under the same standard as applied to
10 injuries to the body as a whole.

11 (B) The purpose of subdivision (i)(i) of this section is to
12 specifically annul any case law inconsistent herewith, including without
13 limitation Wheeler Construction v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822
14 (2001) and the line of cases relying on those cases.

15
16 SECTION 13. Arkansas Code § 11-9-704(c)(1)(B), concerning proceedings
17 on claims under the Workers' Compensation Law, is amended to read as follows:

18 (B)(ii) Any determination of the existence or extent of
19 physical impairment shall be ~~supported by~~ established by and based upon
20 objective and measurable physical or mental findings.

21 (ii) A purpose of subdivision (c)(1)(B) of this
22 section is to specifically annul any case law inconsistent with the 2011
23 amendment to subdivision (c)(1)(B) of this section, including without
24 limitation Singleton v. City of Pine Bluff, 97 Ark. App. 59, 244 S.W.3d 709
25 (2007); and Groom v. Nekoosa Papers, Inc., CA 06-406 (opinion issued 12-13-
26 2006 Not Designated for Publication).

27
28 SECTION 14. Arkansas Code § 11-9-1001 is amended to read as follows:
29 11-9-1001. Legislative declaration.

30 The ~~Seventy-Ninth~~ Eighty-Eighth General Assembly realizes that the
31 Arkansas workers' compensation statutes must be revised and amended from time
32 to time. Unfortunately, many of the changes made by this act ~~were~~ are
33 necessary because administrative law judges, the Workers' Compensation
34 Commission, and the Arkansas courts have continually broadened the scope and
35 eroded the purpose of ~~the workers' compensation statutes of this state~~ Act
36 796 of 1993. The ~~Seventy-Ninth~~ Eighty-Eighth General Assembly intends to

1 restate that the major and controlling purpose of workers' compensation is to
2 pay timely temporary and permanent disability benefits to all legitimately
3 injured workers ~~that~~ who suffer an injury or disease arising out of and in
4 the course of their employment, to pay reasonable and necessary medical
5 expenses resulting therefrom, and then to return the worker to the work
6 force. When, and if, the workers' compensation statutes of this state need to
7 be changed, the General Assembly acknowledges its responsibility to do so. It
8 is the specific intent of the ~~Seventy-Ninth~~ Eighty-Eighth General Assembly to
9 repeal, annul, and hold for naught all prior opinions or decisions of any
10 administrative law judge, the Workers' Compensation Commission, or courts of
11 this state contrary to or in conflict with any provision in this act. In the
12 future, if such things as the statute of limitations, the standard of review
13 by the Workers' Compensation Commission or courts, the extent to which any
14 physical condition, injury, or disease should be excluded from or added to
15 coverage by the law, or the scope of the workers' compensation statutes need
16 to be liberalized, broadened, or narrowed, those things shall be addressed by
17 the General Assembly and should not be done by administrative law judges, the
18 Workers' Compensation Commission, or the courts.

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