

1
2 State of Arkansas
3 88th General Assembly
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A Bill

HOUSE BILL 1840

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

8 Filed with: Interim House Committee on Public Health, Welfare and Labor
9 pursuant to A.C.A. §10-3-217.

For An Act To Be Entitled

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

Subtitle

19
20
21 AN ACT TO AMEND THE ARKANSAS WORKERS'
22 COMPENSATION LAW ENACTED BY INITIATED ACT
23 4 OF 1948 TO RESTORE THE STATUTORY INTENT
24 OF THE 79TH GENERAL ASSEMBLY.
25
26
27

28 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
29

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

1 1993 whose stated purpose was to increase workers' compensation benefits for
2 employees, to pay timely temporary and permanent disability benefits to all
3 legitimately injured workers who suffer an injury or disease arising out of
4 and in the course of their employment, to pay reasonable and necessary
5 medical expenses resulting from an injury or disease arising out of and in
6 the course of their employment, to return the worker to the work force, to
7 improve workplace safety, to improve the health care delivery, to encourage
8 the return to work of injured workers, to deter and punish frauds of agents,
9 brokers, solicitors, employers, and employees, to curtail the rise in medical
10 costs associated with the provisions of workers' compensation benefits, and
11 to emphasize that the workers' compensation system in this state must be
12 returned to a state of economic viability. The Eighty-Eighth General
13 Assembly intends to restate that the major and controlling purpose of
14 workers' compensation is to pay timely temporary and permanent disability
15 benefits to all legitimately injured workers who suffer an injury or disease
16 arising out of and in the course of their employment, to pay reasonable and
17 necessary medical expenses resulting from an injury or disease arising out of
18 and in the course of their employment, and then to return the workers to the
19 work force, to improve workplace safety, to improve the health care delivery,
20 to encourage the return to work of injured workers, to deter and punish
21 frauds of agents, brokers, solicitors, employers, and employees, to curtail
22 the rise in medical costs associated with the provisions of workers'
23 compensation benefits, and to emphasize that the workers' compensation system
24 in this state must be returned to a state of economic viability. When, and if
25 the workers' compensation statutes of this state need to be changed, the
26 General Assembly acknowledges its responsibility to do so.

27 (b) It is the specific intent of the Eighty-Eighth General Assembly to
28 repeal, annul, and hold for naught all prior opinions or decisions of any
29 administrative law judge, the Workers' Compensation Commission, or courts of
30 this state contrary to or in conflict with any provision in this act. In the
31 future, if such things as the statute of limitations, the standard of review
32 by the Workers' Compensation Commission or courts, the extent to which any
33 physical condition, injury, or disease should be excluded from or added to
34 coverage by the law, or the scope of the workers' compensation statutes need
35 to be liberalized, expanded, broadened, or narrowed, those things shall be

1 addressed by the General Assembly and should not be done by administrative
2 law judges, the Workers' Compensation Commission, or the courts.

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

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

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

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

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

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

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

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

3 (b) "Objective findings" shall be made
4 specifically by a licensed physician.

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

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

13
14 SECTION 5. Arkansas Code § 11-9-410 is amended to read as follows:

15 11-9-410. Third-party liability.

16 (a) Liability Unaffected.

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

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

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

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

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

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

6 ~~(D) Any excess shall belong to the injured employee or his~~
7 ~~or her dependents.~~

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

12 (B)(i) By the acceptance of compensation under this
13 chapter, the employee grants the employer or employer's insurance carrier an
14 absolute first lien upon the proceeds of any settlement or judgment resulting
15 from the exercise of any rights of recovery of the employee against any third
16 party.

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

23 (b) Subrogation.

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

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

35 ~~(3)(A) After recovery shall be had against the third party, by~~
36 ~~suit or otherwise, the compensation beneficiary shall be entitled to any~~

1 ~~amount recovered over and above the amount that the employer and carrier have~~
2 ~~paid or are liable for in compensation, after deducting reasonable costs of~~
3 ~~collection.~~

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

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

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

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

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

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

24 (2) After reasonable notice and opportunity to be represented in
25 the action has been given to the employee or his or her dependents, the
26 liability of the third-party to the employee or his or her dependents shall
27 be determined in the action, as well as the third-party's liability to the
28 employer or employer's insurance carrier.

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

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

34 (B) Any balance remaining after payment of necessary
35 expenses and the satisfaction of the employer's or carrier's lien shall be

1 paid to the employee and be applied as credit against any future compensation
2 benefits for the same injury.

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

4 ~~(1) Settlement of claims under subsections (a) and (b) of this~~
5 ~~section must have the approval of the court or of the commission, except that~~
6 ~~the distribution of that portion of the settlement which represents the~~
7 ~~compensation payable under this chapter must have the approval of the~~
8 ~~commission.~~

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

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

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

20 (c)(1) The purpose and intent of this section is to prevent double
21 recovery to the employee and to annul specifically any case law inconsistent
22 with this subsection, including without limitation all case law interpreting
23 the previous § 11-9-410, and Travelers Ins. Co. v. McCluskey, 252 Ark. 1045,
24 483 S.W.2d 179 (1972); General Accident Ins. v. Jayne, 343 Ark. 143, 33
25 S.W.3d 161 (2001) and Phillip Morris USA v. James 79 Ark. App. 72, 835 S.W.3d
26 441 (2002).

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

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

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

3
4 SECTION 6. Arkansas Code § 11-9-508(a), concerning the liability of
5 employers for medical services and supplies under the Workers' Compensation
6 Law, is amended to read as follows:

7 (a)(1) The employer shall promptly provide for an injured employee
8 such medical, surgical, hospital, chiropractic, optometric, podiatric, and
9 nursing services and medicine, crutches, ambulatory devices, artificial
10 limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may
11 be reasonably necessary in connection with the injury received by the
12 employee.

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

15 (3) The purpose of subdivision (a)(2) of this section is to
16 annul any case law inconsistent with subdivision (a)(2) of this section,
17 including without limitation Williams v. L & W Janitorial, 85 Ark. App. 1,
18 145 S.W.3d 383 (2004).

19
20 SECTION 7. Arkansas Code § 11-9-514(a)(3)(A)(ii) and (iii), concerning
21 changes of physicians under the Workers' Compensation Law, is amended to read
22 as follows:

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

1 conditions regarding services performed by the managed care entity chosen by
2 the employer.

3 (iii) Where the employer does not have a contract
4 with a managed care organization certified by the commission, the claimant
5 employee, however, ~~shall~~ may be allowed to change physicians by petitioning
6 the commission one (1) time only for a change of physician and establishing
7 by a preponderance of the evidence that there is a compelling reason or
8 circumstance justifying the change, to a physician who must either be
9 associated with any managed care entity certified by the commission or be the
10 regular treating physician of the employee who maintains the employee's
11 medical records and with whom the employee has a bona fide doctor-patient
12 relationship demonstrated by a history of regular treatment prior to the
13 onset of the compensable injury, but only if the primary care physician
14 agrees to refer the employee to a physician associated with any managed care
15 entity certified by the commission for any specialized treatment, including
16 physical therapy, and only if the primary care physician agrees to comply
17 with all the rules, terms, and conditions regarding services performed by any
18 managed care entity certified by the commission.

19 (iv) A purpose of the 2011 amendment to this
20 subdivision (a)(3)(A) of this section by this act is to specifically annul
21 any case law inconsistent with subdivision (a)(3)(A) of this section,
22 including without limitation Collins v. Lennox Industries, Inc., 77 Ark. App.
23 303, 75 S.W.3d 204 (2002).

24
25 SECTION 8. Arkansas Code § 11-9-514(c)(1), concerning changes of
26 physicians under the Workers' Compensation Law, is amended to read as
27 follows:

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

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

36

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

4 (c) In all other cases, permanent total disability shall ~~be~~ include a
5 physical impairment rating and determined in accordance with the facts.
6

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

9 (h) The purpose of the amendment to this section by this act is to
10 eliminate the discrepancy between permanent partial and permanent total
11 disability benefits and to specifically annul any case law inconsistent with
12 the amendment to this section by this act, including without limitation
13 Rutherford v. Mid-Delta Community Services, 102 Ark. App. 317, 285 S.W.3d 248
14 (2008).
15

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

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

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

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

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

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

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

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

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

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

- 1 (9) Third finger amputated, twenty-four (24) weeks;
- 2 (10) Fourth finger amputated, nineteen (19) weeks;
- 3 (11) Foot amputated, one hundred thirty-one (131) weeks;
- 4 (12) Great toe amputated, thirty-two (32) weeks;
- 5 (13) Toe other than great toe amputated, eleven (11) weeks;
- 6 (14) Eye enucleated, in which there was useful vision, one
- 7 hundred five (105) weeks;
- 8 (15) Loss of hearing of one ear, forty-two (42) weeks;
- 9 (16) Loss of hearing of both ears, one hundred fifty-eight (158)
- 10 weeks;
- 11 (17) Loss of one testicle, fifty-three (53) weeks; loss of both
- 12 testicles, one hundred fifty-eight (158) weeks.

13
14 SECTION 12. Arkansas Code § 11-9-521 is amended to add an additional
15 subsection to read as follows:

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

19 (B) The purpose of subdivision (i)(i) of this section is to
20 specifically annul any case law inconsistent herewith, including without
21 limitation Wheeler Construction v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822
22 (2001) and the line of cases relying on those cases.

23
24 SECTION 13. Arkansas Code § 11-9-704(c)(1)(B), concerning proceedings
25 on claims under the Workers' Compensation Law, is amended to read as follows:

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

29 (ii) A purpose of subdivision (c)(1)(B) of this
30 section is to specifically annul any case law inconsistent with the 2011
31 amendment to subdivision (c)(1)(B) of this section, including without
32 limitation Singleton v. City of Pine Bluff, 97 Ark. App. 59, 244 S.W.3d 709
33 (2007); and Groom v. Nekoosa Papers, Inc., CA 06-406 (opinion issued 12-13-
34 2006 Not Designated for Publication).

35
36 SECTION 14. Arkansas Code § 11-9-1001 is amended to read as follows:

1 11-9-1001. Legislative declaration.

2 The ~~Seventy-Ninth~~ Eighty-Eighth General Assembly realizes that the
3 Arkansas workers' compensation statutes must be revised and amended from time
4 to time. Unfortunately, many of the changes made by this act ~~were~~ are
5 necessary because administrative law judges, the Workers' Compensation
6 Commission, and the Arkansas courts have continually broadened the scope and
7 eroded the purpose of ~~the workers' compensation statutes of this state~~ Act
8 796 of 1993. The ~~Seventy-Ninth~~ Eighty-Eighth General Assembly intends to
9 restate that the major and controlling purpose of workers' compensation is to
10 pay timely temporary and permanent disability benefits to all legitimately
11 injured workers ~~that~~ who suffer an injury or disease arising out of and in
12 the course of their employment, to pay reasonable and necessary medical
13 expenses resulting therefrom, and then to return the worker to the work
14 force. When, and if, the workers' compensation statutes of this state need to
15 be changed, the General Assembly acknowledges its responsibility to do so. It
16 is the specific intent of the ~~Seventy-Ninth~~ Eighty-Eighth General Assembly to
17 repeal, annul, and hold for naught all prior opinions or decisions of any
18 administrative law judge, the Workers' Compensation Commission, or courts of
19 this state contrary to or in conflict with any provision in this act. In the
20 future, if such things as the statute of limitations, the standard of review
21 by the Workers' Compensation Commission or courts, the extent to which any
22 physical condition, injury, or disease should be excluded from or added to
23 coverage by the law, or the scope of the workers' compensation statutes need
24 to be liberalized, broadened, or narrowed, those things shall be addressed by
25 the General Assembly and should not be done by administrative law judges, the
26 Workers' Compensation Commission, or the courts.

27
28 Referred by the Arkansas House of Representatives

29 Prepared by: MGF/VJF
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