SENATE DOCKET, NO. FILED ON: 1/9/2009

**SENATE . . . . . . . . . . . . . . . No.**

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The Commonwealth of Massachusetts

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PRESENTED BY:

**McGee, Thomas (SEN)**

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*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General
 Court assembled:*

 The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act relative to worker's compensation.

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PETITION OF:

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| --- | --- |
| Name: | District/Address: |
| McGee, Thomas (SEN) | Third Essex and Middlesex |

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. S01076 OF 2007-2008.]

The Commonwealth of Massachusetts

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**In the Year Two Thousand and Nine**

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An Act relative to worker's compensation.

 *Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

 SECTION 1. Section (1) of chapter 152 of the General Laws, as appearing in the 2006 Official Edition, is hereby amended as follows:—
The following words as used in this chapter shall, unless a different meaning is plainly required by the context or specifically prescribed, have the following meanings:
“Average Weekly Wage”, the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks’ time during such period, the earnings the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of time during which the employee has been in the employment of his employer, or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district. In case the injured employee is employed in the concurrent service of more than one employer, his total earnings from the several employers shall be considered in determining his average weekly wages. Weeks in which the employee received less than four hours in wages shall be considered time lost and shall be excluded in determining his average weekly wages; provided, however, that this exclusion shall not apply to employees whose normal working hours in the service of the employer are less than fifteen hours each week. Except as provided by section twenty-six of chapter one hundred forty-nine, such fringe benefits as health insurance plans, pension, day care, or education and training programs provided by employers shall not be included in employee earnings for the purpose of calculating average weekly wages under this section.

SECTION 2. Section 1(7A) of said chapter 152, as so appearing, is hereby amended as follows:—
“Personal injury” includes infectious or contagious diseases if the nature of the employment is such that the hazard of contracting such diseases by an employee is inherent in the employment. “Personal injury” shall not include any injury resulting from an employees’ purely voluntary participation in any recreational activity, including but not limited to athletic events, parties, and picnics, even though the employer pays some or all of the costs thereof. Personal injuries shall include mental or emotional disabilities only where a significant contributing cause of such disability in an event or series of events occurring within any employment. If a compensable injury or disease combines with a pre-existing condition which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment. No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

SECTION 3. Section 6 of said chapter 152, as so appearing, is hereby amended by changing the last paragraph as follows:—
Any person who violates the provisions of this section in any year shall be punished by a fine of one hundred dollars for the first such violation. If subsequent violations occur within said year, the fine shall be increased by one hundred dollars for each subsequent violation. If an employer fails to make such notice to the division of administration, the employee and the insurer, it shall pay an additional penalty to the department of one thousand dollars into the special fund created pursuant to section sixty-five and one thousand dollars to the employee; provided, however, that such additional penalty shall be ten thousand dollars if said notice to the division of administration, the employee and the insurer, is not made within ninety days. Penalties under this section may be waived if an administrative judge finds that the failure to comply with the requirements herein set forth was due to events beyond the control of the employer or its agents. No additional penalties shall be levied for continuing violations under this section, but the employer shall be allowed no defenses against any initial claim for weekly benefits until any penalty owed under this section has been paid. No amount paid as a penalty under this section shall be included in any formula utilized to establish premium rates for workers’ compensation insurance. An employer’s inability to defend on any issue shall not relieve an employee of the burden of proving each element of any case.

SECTION 4. Section 7(2) of said chapter 152, as so appearing, is hereby amended as follows:—
If an insurer fails to commence such payment or make such notification within fourteen days, it shall pay to the employee a penalty in an amount equal to two hundred dollars or his compensation rate as calculated under section 34 of this chapter, whichever is higher. If an insurer fails to commence such payment or make such notification within sixty days, it shall pay an additional penalty to the department of one thousand dollars into the special fund created pursuant to section sixty-five, and one thousand dollars to the employee. Provided, however, that such additional penalty shall be ten thousand dollars if said payment is not commenced and such notice not made within ninety days. Penalties under this section may be waived if an administrative judge finds that the failure to comply with the requirements herein set forth was due to events beyond the control of the insurer or its agents. No additional penalties shall be levied for continuing
violations under this section, but the insurer shall be allowed no defenses against any initial claim for weekly benefits until any penalty owed under this section has been paid. No amount paid as a penalty under this section shall be included in any formula utilized to establish premium rates for workers’ compensation insurance. An insurer’s inability to defend on any issue shall not relieve an employee of the burden of proving each element of any case.

SECTION 5. Section 8 of said chapter 152, as so appearing, is hereby amended as follows:—
(1) An insurer which makes timely payments pursuant to subsection one of section seven, may make such payments for a period of ninety calendar days from the commencement of disability without affecting its right to contest any issue arising under this chapter. An insurer may terminate or modify payments at any time within such ninety day period without penalty if such change is based on the actual income of the employee or if it gives the employee and the division of administration at least seven day written notice of its intent to stop or modify payments and contest any claim filed. The notice shall specify the grounds and factual basis for stopping or modifying payment of benefits and the
insurer’s intention to contest any issue and shall state that in order to secure additional benefits the employee shall file a claim with the department and insurer within any time limits provided by this chapter.

SECTION 6. Section 8(4) of said chapter 152, as so appearing, is hereby amended as follows:—
An insurer who makes prompt payment of benefits pursuant to section seven and continues payment for ninety days or more, without contesting liability, may, no sooner than sixty days following the referral to the industrial accident board of a complaint for termination or reduction of benefits under section thirty-four, thirty-four A or thirty-five, if no conference order has been issued during such sixty day period, request the senior judge to appoint an impartial physician to examine the employee. The senior judge shall, within seven days of a request for an impartial examination, appoint a physician from the appropriate roster to conduct an examination of the employee and make a report within fourteen days. If such report contains evidence of increased capability to work, the insurer may reduce or terminate benefits in accordance with such report, pursuant to the provisions of section thirty-five D. In such instances, if the requirements of this subsection have been complied with, when an order is issued on the insurer’s complaint, if such order requires that retroactive weekly benefits are due the employee, an additional payment equal to two times the average weekly wage in the commonwealth shall also be paid to the employee.

SECTION 7. Section 8(6) of said chapter 152, as so appearing, is hereby amended as follows:—
(6) Any ninety day payment without prejudice period herein provided may be extended in ninety day increments not to exceed one year by agreement of the parties provided that:
(a) the agreement sets out the last day of such extension; and
(b) a conciliator, administrative judge, or administrative law judge approves such agreement as not detrimental to the employee’s case.

SECTION 8. Section 13A(5) of said chapter 152, as so appearing, is hereby amended as follows:—
Whenever an insurer files a complaint or contests a claim for benefits and then either (i) accepts the employee’s claim or withdraws its own complaint within ten days of the date set for a hearing pursuant to section eleven; or (ii) the employee prevails at such hearing the insurer shall pay a fee to the employee’s attorney in an amount equal to three thousand, five hundred dollars plus necessary expenses. An administrative judge may increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney.

SECTION 9. Section 28, paragraph 1, of said chapter 152, as so appearing, is hereby amended as follows:—
If an employee is injured by reason of the serious and willful misconduct of the employer or of any person regularly entrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In case the employer is insured, he shall repay to the insurer the extra compensation paid to the employee. If a claim is made under this section, and the employer is insured, the employer may appear and defend against such claim only. The employment of any minor, known to be such, in violation of any provision of sections sixty to seventy-four, inclusive, or of section one hundred and four of chapter one hundred and forty-nine, or a knowing and willful violation of the Federal and/or State O.S.H.A. standards shall constitute serious and willful misconduct under this section.

SECTION 10. Section 29 of said chapter 152, as so appearing, is hereby amended as follows:—
No compensation pursuant to section thirty-four or thirty-five shall be paid for any injury which does not incapacitate the employee from earning full wages for a period of five or more calendar days. If incapacity extends for a period of five days or more, compensation shall be paid from the date of onset of incapacity. Except as otherwise provided in this chapter no compensation shall be paid for any period for which any wages were earned. No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except that such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

SECTION 11. Section 30, paragraph 1, of said chapter 152,
as so appearing, is hereby amended as follows:—
The insurer shall furnish to an injured employee adequate and reasonable health care services, and medicines if needed, together with the expenses necessarily incidental to such services, and in the case of an injured employee, a physical examination shall be given at least once a year while the employee is hospitalized. Except for the employee’s first scheduled appointment, which, pursuant to the terms of a preferred provider arrangement entered into under this section may be required to be with a health care provider within the plan, the employee may select a treating health care professional other than any provided or agreed to treating health care professional to another provider in a particular specialty, the employee may also change twice to a different provider in such specialty. In cases of emergency or where the insurer or administrative judge agree, the employee may seek treatment from additional providers. Where services are provided to employees under this section, the reasonable and necessary cost of such services shall be paid by the insurer.

SECTION 12. Section 31, paragraph two, of said chapter 152, as so appearing, is hereby amended as follows:—
To the widow or widower, so long as he or she remains unmarried, a weekly compensation equal to two-thirds of the average weekly wages of the deceased employee, but not more than the average weekly wage of the commonwealth, as determined according to the provisions of subsection (a) of section twenty-nine of chapter one hundred and fifty-one A, and promulgated by the commissioner of the department of employment and training on or before October first preceding the deceased employee’s injury or death; provided, however, that in no instance shall said widow or widower, receive less than two hundred dollars per week, to the widow or widower twelve dollars more a week for each child of the deceased employee under the age of eighteen or over said age and physically or mentally incapacitated from earning, or over said age and a full time student qualified for exemption as a dependent under section one hundred and fifty-one (e) of the Internal Revenue Code, except that no additional compensation for the benefits of the children of the employee shall be payable when combined with the compensation due the spouse of the deceased employee as hereinbefore provided in this section would allow the widow or widower an amount in excess of two hundred fifty dollars per week; provided that in case any child of the deceased employee is a child by a former wife or husband, the death benefit shall be divided between the surviving wife or husband and all dependent children of the deceased employee in equal shares, the surviving wife or husband taking the same share as the child. If the widow or widower dies or if there is no surviving wife or husband of the deceased employee, such amount or amounts as would have been payable to or for his or her own use and for the benefit of all the children of the employee shall be paid in equal shares to all the surviving
children of the employee.

SECTION 13. Section 33 of said chapter 152, as so appearing, is hereby amended as follows:—
In all cases, the insurer shall pay the reasonable expenses of burial, not exceeding six thousand dollars.

SECTION 14. Section 34 of said chapter 152, as so appearing, is hereby amended as follows:—
While the incapacity for work resulting from injury is total, during each week of incapacity, the insurer shall pay the injured employee compensation equal to two-thirds of his or her average weekly wage before the injury, but not more than the maximum weekly compensation rate, unless the average weekly wage of the employee is less than the minimum weekly compensation rate, in which case said weekly compensation shall be equal to his average weekly wage. The total number of weeks of compensation due the employee under this section shall not exceed two hundred eight.

SECTION 15. Section 34A of said chapter 152, as so appearing, is hereby amended as follows:—
While the incapacity for work resulting from the injury is both permanent and total, the insurer shall pay to the injured employee, a weekly compensation equal to two-thirds of his average weekly wage before the injury, but not more than the maximum weekly compensation nor less than the minimum weekly compensation rate.

SECTION 16. Section 34B, paragraph one of said chapter 152, as so appearing, is hereby amended as follows:—
October first of each year shall be the review date for the purposes of this section.
Any person receiving or entitled to receive benefits under the provisions of section thirty-one, section thirty-four, section thirty four A, or section thirty-five, whose benefits are based on a date of personal injury at least twenty-four months prior to the review date shall have his weekly benefit adjusted, without application, in accordance with the following provisions; provided, however, that no increase in benefits shall be payable which reduce any benefits the recipient is receiving pursuant to federal social security law.

SECTION 17. Section 34B, paragraph (b) of said chapter 152, as so appearing, is hereby amended as follows:—
The death benefit under section thirty-one, or the temporary total disability benefit under section thirty-four, or the partial disability benefit under section thirty-five, or the total disability benefit under section thirty-four A that was being paid prior to any adjustments under this section shall be the base benefit. The base benefit shall be changed on each review date by the percentage as calculated in paragraph (a); the resulting amount shall be termed the adjusted benefit and is the amount of benefit to be paid on and after the review date. If the adjusted benefit is larger than the base benefit, the difference shall be termed the supplemental benefit. In no instance shall the adjusted benefit under this section be greater than three times the base benefit.

SECTION 18. Section 35, paragraph one of said chapter 152, as so appearing, is hereby amended as follows:—
While the incapacity for work resulting from the injury is partial, during each week of incapacity the insurer shall pay the injured employee a weekly compensation rate equal to sixty-six and two-thirds percent of the difference between his or her average weekly wage before the injury and the weekly wage he or she is capable of earning after the injury, but not more than the maximum weekly compensation rate.

SECTION 19. Section 35, paragraph two of said chapter 152, as so appearing, is hereby amended as follows:—
The total number of weeks of compensation due the employee under this section shall not exceed four hundred forty-two; provided, however, that this number may be extended if an insurer agrees or an administrative judge finds that the employee has, as a result of a personal injury under this chapter, suffered a permanent loss of seventy-five percent or more of any bodily function or sense, including but not limited to those specified in paragraph (a), (b), (e), (f), (g), or (h) of subsection (1) of section thirty-six, developed a permanently life-threatening physical nature and cause. Where applicable, losses under this section shall be determined in accordance with standards set forth in the American Medical Association Guides to the Evaluation of Permanent Impairments. Where the insurer agrees or the administrative judge finds such permanent partial disability as is described in this paragraph, the total number of weeks the employee may receive benefits under this section is left to the discretion of the administrative judge.

SECTION 20. Section 35A, paragraph one of said chapter 152, as so appearing, is hereby amended as follows:—
Where the injured employee has persons conclusively presumed to be dependent upon him or in fact so dependent, the sum of twelve dollars shall be added to the weekly compensation payable under section thirty-four, thirty-four A and thirty-five, for each person wholly dependent on the employee, but in no case shall the aggregate of such amounts exceed the average weekly wage of the employee. No weekly payment to the employee under this section shall allow the employee to receive an amount in excess of two hundred fifty dollars per week when combined with the compensation due under sections thirty-four, thirty-five and thirty-four A. For the purposes of this section the following persons shall be conclusively presumed to be wholly dependent for support upon an employee.

SECTION 21. Section 35D(5) of said chapter 152, as so appearing, is hereby amended as follows:—
Implementation of this section is subject to the procedures contained in section eight. For the purposes of this chapter, a suitable job or employment shall be any job that the employee is physically and mentally capable of performing, including light work, considering the nature and severity of the employee’s injury, so long as such job bears a reasonable relationship to the employee’s work experience, education, or training either before or after the employee’s injury. The fact that an employee has enrolled or is participating in a vocational rehabilitation program, whether or not it is paid for by the insurer or the department, shall not be used to support the contention that the employee’s compensation rate should be decreased in any proceeding under this chapter

SECTION 22. Chapter 152 is hereby further amended by striking out section 35E, as so appearing, and inserting in place thereof the following section:—
Any person receiving old age benefits pursuant to federal social security law or receiving pension benefits paid in part or entirely by an employer shall not be entitled to benefits under section thirty-five, unless such employee can establish that but for the injury, such employee would have remained active in the labor market. Claims for compensation, or complaint for modification, or discontinuance of benefits based on this section shall not be filed more often than once every twelve months.

SECTION 23. Section 36(k) of said chapter 152, as so appearing, is hereby amended as follows:—
For bodily disfigurement, an amount which, according to the determination of the member or the reviewing board, is a proper and equitable compensation, not to exceed twenty thousand dollars; which sum shall be payable in addition to all other sums due under this section.

SECTION 24. Section 50 of said chapter 152, as so appearing, is hereby amended as follows:—
Whenever payments of any kind are not made within sixty days of being claimed by an employee, dependent or other party, and an order or decision requires that such payments be made, interest at the rate of twelve percent per annum of all sums due from the date of the receipt of the notice of the claim by the department to the date of payment shall be required by such order or decision. Whenever such sums include weekly payments, interest shall be computed on each unpaid weekly payment.