

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

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**The Commonwealth of Massachusetts**

PRESENTED BY:

**McGee, Thomas (SEN)**

*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.

PETITION OF:

NAME:

McGee, Thomas (SEN)

DISTRICT/ADDRESS:

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:*

1                   SECTION 1. Section (1) of chapter 152 of the General Laws, as appearing  
2                   in the 2006 Official Edition, is hereby amended as follows:—  
3                   The following words as used in this chapter shall, unless a different meaning is plainly  
4                   required by the context or specifically prescribed, have the following meanings:  
5                   “Average Weekly Wage”, the earnings of the injured employee during the period of  
6                   twelve calendar months immediately preceding the date of injury, divided by fifty-two;  
7                   but if the injured employee lost more than two weeks’ time during such period, the  
8                   earnings the remainder of such twelve calendar months shall be divided by the number  
9                   of weeks remaining after the time so lost has been deducted. Where, by reason of the  
10                  shortness of time during which the employee has been in the employment of his  
11                  employer, or the nature or terms of the employment, it is impracticable to compute the

12 average weekly wages, as above defined, regard may be had to the average weekly  
13 amount which, during the twelve months previous to the injury, was being earned by a  
14 person in the same grade employed at the same work by the same employer, or, if there  
15 is no person so employed, by a person in the same grade employed in the same class of  
16 employment and in the same district. In case the injured employee is employed in the  
17 concurrent service of more than one employer, his total earnings from the several  
18 employers shall be considered in determining his average weekly wages. Weeks in  
19 which the employee received less than four hours in wages shall be considered time lost  
20 and shall be excluded in determining his average weekly wages; provided, however, that  
21 this exclusion shall not apply to employees whose normal working hours in the service  
22 of the employer are less than fifteen hours each week. Except as provided by section  
23 twenty-six of chapter one hundred forty-nine, such fringe benefits as health insurance  
24 plans, pension, day care, or education and training programs provided by employers  
25 shall not be included in employee earnings for the purpose of calculating average  
26 weekly wages under this section.

27 SECTION 2. Section 1(7A) of said chapter 152, as so appearing, is hereby amended as follows:—  
28 “Personal injury” includes infectious or contagious diseases if the nature of the employment is  
29 such that the hazard of contracting such diseases by an employee is inherent in the  
30 employment. “Personal injury” shall not include any injury resulting from an employees’ purely  
31 voluntary participation in any recreational activity, including but not limited to athletic events,  
32 parties, and picnics, even though the employer pays some or all of the costs thereof. Personal  
33 injuries shall include mental or emotional disabilities only where a significant contributing cause

34 of such disability in an event or series of events occurring within any employment. If a  
35 compensable injury or disease combines with a pre-existing condition which resulted from an  
36 injury or disease not compensable under this chapter, to cause or prolong disability or a need  
37 for treatment, the resultant condition shall be compensable only to the extent such  
38 compensable injury or disease remains a major but not necessarily predominant cause of  
39 disability or need for treatment. No mental or emotional disability arising principally out of a  
40 bona fide, personnel action including a transfer, promotion, demotion, or termination except  
41 such action which is the intentional infliction of emotional harm shall be deemed to be a  
42 personal injury within the meaning of this chapter.

43 SECTION 3. Section 6 of said chapter 152, as so appearing, is hereby amended by changing the  
44 last paragraph as follows:—

45 Any person who violates the provisions of this section in any year shall be punished by a fine of  
46 one hundred dollars for the first such violation. If subsequent violations occur within said year,  
47 the fine shall be increased by one hundred dollars for each subsequent violation. If an employer  
48 fails to make such notice to the division of administration, the employee and the insurer, it shall  
49 pay an additional penalty to the department of one thousand dollars into the special fund  
50 created pursuant to section sixty-five and one thousand dollars to the employee; provided,  
51 however, that such additional penalty shall be ten thousand dollars if said notice to the division  
52 of administration, the employee and the insurer, is not made within ninety days. Penalties  
53 under this section may be waived if an administrative judge finds that the failure to comply with  
54 the requirements herein set forth was due to events beyond the control of the employer or its  
55 agents. No additional penalties shall be levied for continuing violations under this section, but

56 the employer shall be allowed no defenses against any initial claim for weekly benefits until any  
57 penalty owed under this section has been paid. No amount paid as a penalty under this section  
58 shall be included in any formula utilized to establish premium rates for workers' compensation  
59 insurance. An employer's inability to defend on any issue shall not relieve an employee of the  
60 burden of proving each element of any case.

61 SECTION 4. Section 7(2) of said chapter 152, as so appearing, is hereby amended as follows:—

62 If an insurer fails to commence such payment or make such notification within fourteen days, it  
63 shall pay to the employee a penalty in an amount equal to two hundred dollars or his  
64 compensation rate as calculated under section 34 of this chapter, whichever is higher. If an  
65 insurer fails to commence such payment or make such notification within sixty days, it shall pay  
66 an additional penalty to the department of one thousand dollars into the special fund created  
67 pursuant to section sixty-five, and one thousand dollars to the employee. Provided, however,  
68 that such additional penalty shall be ten thousand dollars if said payment is not commenced  
69 and such notice not made within ninety days. Penalties under this section may be waived if an  
70 administrative judge finds that the failure to comply with the requirements herein set forth was  
71 due to events beyond the control of the insurer or its agents. No additional penalties shall be  
72 levied for continuing  
73 violations under this section, but the insurer shall be allowed no defenses against any initial  
74 claim for weekly benefits until any penalty owed under this section has been paid. No amount  
75 paid as a penalty under this section shall be included in any formula utilized to establish  
76 premium rates for workers' compensation insurance. An insurer's inability to defend on any  
77 issue shall not relieve an employee of the burden of proving each element of any case.

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

90 SECTION 6. Section 8(4) of said chapter 152, as so appearing, is hereby amended as follows:—  
91 An insurer who makes prompt payment of benefits pursuant to section seven and continues  
92 payment for ninety days or more, without contesting liability, may, no sooner than sixty days  
93 following the referral to the industrial accident board of a complaint for termination or  
94 reduction of benefits under section thirty-four, thirty-four A or thirty-five, if no conference  
95 order has been issued during such sixty day period, request the senior judge to appoint an  
96 impartial physician to examine the employee. The senior judge shall, within seven days of a  
97 request for an impartial examination, appoint a physician from the appropriate roster to  
98 conduct an examination of the employee and make a report within fourteen days. If such  
99 report contains evidence of increased capability to work, the insurer may reduce or terminate

100 benefits in accordance with such report, pursuant to the provisions of section thirty-five D. In  
101 such instances, if the requirements of this subsection have been complied with, when an order  
102 is issued on the insurer's complaint, if such order requires that retroactive weekly benefits are  
103 due the employee, an additional payment equal to two times the average weekly wage in the  
104 commonwealth shall also be paid to the employee.

105 SECTION 7. Section 8(6) of said chapter 152, as so appearing, is hereby amended as follows:—

106 (6) Any ninety day payment without prejudice period herein provided may be extended in  
107 ninety day increments not to exceed one year by agreement of the parties provided that:

108 (a) the agreement sets out the last day of such extension; and

109 (b) a conciliator, administrative judge, or administrative law judge approves such agreement as  
110 not detrimental to the employee's case.

111 SECTION 8. Section 13A(5) of said chapter 152, as so appearing, is hereby amended as  
112 follows:—

113 Whenever an insurer files a complaint or contests a claim for benefits and then either (i)  
114 accepts the employee's claim or withdraws its own complaint within ten days of the date set  
115 for a hearing pursuant to section eleven; or (ii) the employee prevails at such hearing the  
116 insurer shall pay a fee to the employee's attorney in an amount equal to three thousand, five  
117 hundred dollars plus necessary expenses. An administrative judge may increase or decrease  
118 such fee based on the complexity of the dispute or the effort expended by the attorney.

119 SECTION 9. Section 28, paragraph 1, of said chapter 152, as so appearing, is hereby amended as  
120 follows:—

121 If an employee is injured by reason of the serious and willful misconduct of the employer or of  
122 any person regularly entrusted with and exercising the powers of superintendence, the  
123 amounts of compensation hereinafter provided shall be doubled. In case the employer is  
124 insured, he shall repay to the insurer the extra compensation paid to the employee. If a claim is  
125 made under this section, and the employer is insured, the employer may appear and defend  
126 against such claim only. The employment of any minor, known to be such, in violation of any  
127 provision of sections sixty to seventy-four, inclusive, or of section one hundred and four of  
128 chapter one hundred and forty-nine, or a knowing and willful violation of the Federal and/or  
129 State O.S.H.A. standards shall constitute serious and willful misconduct under this section.

130 SECTION 10. Section 29 of said chapter 152, as so appearing, is hereby amended as follows:—

131 No compensation pursuant to section thirty-four or thirty-five shall be paid for any injury which  
132 does not incapacitate the employee from earning full wages for a period of five or more  
133 calendar days. If incapacity extends for a period of five days or more, compensation shall be  
134 paid from the date of onset of incapacity. Except as otherwise provided in this chapter no  
135 compensation shall be paid for any period for which any wages were earned. No mental or  
136 emotional disability arising principally out of a bona fide, personnel action including a transfer,  
137 promotion, demotion, or termination except that such action which is the intentional infliction  
138 of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

139 SECTION 11. Section 30, paragraph 1, of said chapter 152,

140 as so appearing, is hereby amended as follows:—

141 The insurer shall furnish to an injured employee adequate and reasonable health care services,



142 and medicines if needed, together with the expenses necessarily incidental to such services,  
143 and in the case of an injured employee, a physical examination shall be given at least once a  
144 year while the employee is hospitalized. Except for the employee's first scheduled  
145 appointment, which, pursuant to the terms of a preferred provider arrangement entered into  
146 under this section may be required to be with a health care provider within the plan, the  
147 employee may select a treating health care professional other than any provided or agreed to  
148 treating health care professional to another provider in a particular specialty, the employee  
149 may also change twice to a different provider in such specialty. In cases of emergency or where  
150 the insurer or administrative judge agree, the employee may seek treatment from additional  
151 providers. Where services are provided to employees under this section, the reasonable and  
152 necessary cost of such services shall be paid by the insurer.

153 SECTION 12. Section 31, paragraph two, of said chapter 152, as so appearing, is hereby  
154 amended as follows:—

155 To the widow or widower, so long as he or she remains unmarried, a weekly compensation  
156 equal to two-thirds of the average weekly wages of the deceased employee, but not more than  
157 the average weekly wage of the commonwealth, as determined according to the provisions of  
158 subsection (a) of section twenty-nine of chapter one hundred and fifty-one A, and promulgated  
159 by the commissioner of the department of employment and training on or before October first  
160 preceding the deceased employee's injury or death; provided, however, that in no instance  
161 shall said widow or widower, receive less than two hundred dollars per week, to the widow or  
162 widower twelve dollars more a week for each child of the deceased employee under the age of  
163 eighteen or over said age and physically or mentally incapacitated from earning, or over said

164 age and a full time student qualified for exemption as a dependent under section one hundred  
165 and fifty-one (e) of the Internal Revenue Code, except that no additional compensation for the  
166 benefits of the children of the employee shall be payable when combined with the  
167 compensation due the spouse of the deceased employee as hereinbefore provided in this  
168 section would allow the widow or widower an amount in excess of two hundred fifty dollars per  
169 week; provided that in case any child of the deceased employee is a child by a former wife or  
170 husband, the death benefit shall be divided between the surviving wife or husband and all  
171 dependent children of the deceased employee in equal shares, the surviving wife or husband  
172 taking the same share as the child. If the widow or widower dies or if there is no surviving wife  
173 or husband of the deceased employee, such amount or amounts as would have been payable  
174 to or for his or her own use and for the benefit of all the children of the employee shall be paid  
175 in equal shares to all the surviving  
176 children of the employee.

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

180 SECTION 14. Section 34 of said chapter 152, as so appearing, is hereby amended as follows:—  
181 While the incapacity for work resulting from injury is total, during each week of incapacity, the  
182 insurer shall pay the injured employee compensation equal to two-thirds of his or her average  
183 weekly wage before the injury, but not more than the maximum weekly compensation rate,  
184 unless the average weekly wage of the employee is less than the minimum weekly

185 compensation rate, in which case said weekly compensation shall be equal to his average  
186 weekly wage. The total number of weeks of compensation due the employee under this  
187 section shall not exceed two hundred eight.

188 SECTION 15. Section 34A of said chapter 152, as so appearing, is hereby amended as follows:—

189 While the incapacity for work resulting from the injury is both permanent and total, the insurer  
190 shall pay to the injured employee, a weekly compensation equal to two-thirds of his average  
191 weekly wage before the injury, but not more than the maximum weekly compensation nor less  
192 than the minimum weekly compensation rate.

193 SECTION 16. Section 34B, paragraph one of said chapter 152, as so appearing, is hereby  
194 amended as follows:—

195 October first of each year shall be the review date for the purposes of this section.

196 Any person receiving or entitled to receive benefits under the provisions of section thirty-one,  
197 section thirty-four, section thirty four A, or section thirty-five, whose benefits are based on a  
198 date of personal injury at least twenty-four months prior to the review date shall have his  
199 weekly benefit adjusted, without application, in accordance with the following provisions;  
200 provided, however, that no increase in benefits shall be payable which reduce any benefits the  
201 recipient is receiving pursuant to federal social security law.

202 SECTION 17. Section 34B, paragraph (b) of said chapter 152, as so appearing, is hereby  
203 amended as follows:—

204 The death benefit under section thirty-one, or the temporary total disability benefit under  
205 section thirty-four, or the partial disability benefit under section thirty-five, or the total

206 disability benefit under section thirty-four A that was being paid prior to any adjustments under  
207 this section shall be the base benefit. The base benefit shall be changed on each review date by  
208 the percentage as calculated in paragraph (a); the resulting amount shall be termed the  
209 adjusted benefit and is the amount of benefit to be paid on and after the review date. If the  
210 adjusted benefit is larger than the base benefit, the difference shall be termed the  
211 supplemental benefit. In no instance shall the adjusted benefit under this section be greater  
212 than three times the base benefit.

213 SECTION 18. Section 35, paragraph one of said chapter 152, as so appearing, is hereby amended  
214 as follows:—

215 While the incapacity for work resulting from the injury is partial, during each week of incapacity  
216 the insurer shall pay the injured employee a weekly compensation rate equal to sixty-six and  
217 two-thirds percent of the difference between his or her average weekly wage before the injury  
218 and the weekly wage he or she is capable of earning after the injury, but not more than the  
219 maximum weekly compensation rate.

220 SECTION 19. Section 35, paragraph two of said chapter 152, as so appearing, is hereby  
221 amended as follows:—

222 The total number of weeks of compensation due the employee under this section shall not  
223 exceed four hundred forty-two; provided, however, that this number may be extended if an  
224 insurer agrees or an administrative judge finds that the employee has, as a result of a personal  
225 injury under this chapter, suffered a permanent loss of seventy-five percent or more of any  
226 bodily function or sense, including but not limited to those specified in paragraph (a), (b), (e),

227 (f), (g), or (h) of subsection (1) of section thirty-six, developed a permanently life-threatening  
228 physical nature and cause. Where applicable, losses under this section shall be determined in  
229 accordance with standards set forth in the American Medical Association Guides to the  
230 Evaluation of Permanent Impairments. Where the insurer agrees or the administrative judge  
231 finds such permanent partial disability as is described in this paragraph, the total number of  
232 weeks the employee may receive benefits under this section is left to the discretion of the  
233 administrative judge.

234 SECTION 20. Section 35A, paragraph one of said chapter 152, as so appearing, is hereby  
235 amended as follows:—

236 Where the injured employee has persons conclusively presumed to be dependent upon him or  
237 in fact so dependent, the sum of twelve dollars shall be added to the weekly compensation  
238 payable under section thirty-four, thirty-four A and thirty-five, for each person wholly  
239 dependent on the employee, but in no case shall the aggregate of such amounts exceed the  
240 average weekly wage of the employee. No weekly payment to the employee under this section  
241 shall allow the employee to receive an amount in excess of two hundred fifty dollars per week  
242 when combined with the compensation due under sections thirty-four, thirty-five and thirty-  
243 four A. For the purposes of this section the following persons shall be conclusively presumed to  
244 be wholly dependent for support upon an employee.

245 SECTION 21. Section 35D(5) of said chapter 152, as so appearing, is hereby amended as  
246 follows:—

247 Implementation of this section is subject to the procedures contained in section eight. For the

248 purposes of this chapter, a suitable job or employment shall be any job that the employee is  
249 physically and mentally capable of performing, including light work, considering the nature and  
250 severity of the employee's injury, so long as such job bears a reasonable relationship to the  
251 employee's work experience, education, or training either before or after the employee's  
252 injury. The fact that an employee has enrolled or is participating in a vocational rehabilitation  
253 program, whether or not it is paid for by the insurer or the department, shall not be used to  
254 support the contention that the employee's compensation rate should be decreased in any  
255 proceeding under this chapter

256 SECTION 22. Chapter 152 is hereby further amended by striking out section 35E, as so  
257 appearing, and inserting in place thereof the following section:—

258 Any person receiving old age benefits pursuant to federal social security law or receiving  
259 pension benefits paid in part or entirely by an employer shall not be entitled to benefits under  
260 section thirty-five, unless such employee can establish that but for the injury, such employee  
261 would have remained active in the labor market. Claims for compensation, or complaint for  
262 modification, or discontinuance of benefits based on this section shall not be filed more often  
263 than once every twelve months.

264 SECTION 23. Section 36(k) of said chapter 152, as so appearing, is hereby amended as  
265 follows:—

266 For bodily disfigurement, an amount which, according to the determination of the member or  
267 the reviewing board, is a proper and equitable compensation, not to exceed twenty thousand  
268 dollars; which sum shall be payable in addition to all other sums due under this section.

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

276