

SENATE No. 694

The Commonwealth of Massachusetts

In the Year Two Thousand Nine

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 in the 2006
2 Official Edition, is hereby amended as follows:— The following words as used in this chapter
3 shall, unless a different meaning is plainly required by the context or specifically prescribed,
4 have the following meanings:“Average Weekly Wage”, the earnings of the injured employee
5 during the period of twelve calendar months immediately preceding the date of injury, divided
6 by fifty-two; but if the injured employee lost more than two weeks’ time during such period, the
7 earnings the remainder of such twelve calendar months shall be divided by the number of weeks
8 remaining after the time so lost has been deducted. Where, by reason of the shortness of time
9 during which the employee has been in the employment of his employer, or the nature or terms
10 of the employment, it is impracticable to compute the average weekly wages, as above defined,
11 regard may be had to the average weekly amount which, during the twelve months previous to
12 the injury, was being earned by a person in the same grade employed at the same work by the
13 same employer, or, if there is no person so employed, by a person in the same grade employed in
14 the same class of employment and in the same district. In case the injured employee is employed

15 in the concurrent service of more than one employer, his total earnings from the several
16 employers shall be considered in determining his average weekly wages. Weeks in which the
17 employee received less than four hours in wages shall be considered time lost and shall be
18 excluded in determining his average weekly wages; provided, however, that this exclusion shall
19 not apply to employees whose normal working hours in the service of the employer are less than
20 fifteen hours each week. Except as provided by section twenty-six of chapter one hundred forty-
21 nine, such fringe benefits as health insurance plans, pension, day care, or education and training
22 programs provided by employers shall not be included in employee earnings for the purpose of
23 calculating average weekly wages under this section.

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

38 action which is the intentional infliction of emotional harm shall be deemed to be a personal
39 injury within the meaning of this chapter.

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

57 SECTION 4. Section 7(2) of said chapter 152, as so appearing, is hereby amended as
58 follows:— If an insurer fails to commence such payment or make such notification within
59 fourteen days, it shall pay to the employee a penalty in an amount equal to two hundred dollars
60 or his compensation rate as calculated under section 34 of this chapter, whichever is higher. If an

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

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

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

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

105 SECTION 8. Section 13A(5) of said chapter 152, as so appearing, is hereby amended as
106 follows:— Whenever an insurer files a complaint or contests a claim for benefits and then either

107 (i) accepts the employee's claim or withdraws its own complaint within ten days of the date set
108 for a hearing pursuant to section eleven; or (ii) the employee prevails at such hearing the insurer
109 shall pay a fee to the employee's attorney in an amount equal to three thousand, five hundred
110 dollars plus necessary expenses. An administrative judge may increase or decrease such fee
111 based on the complexity of the dispute or the effort expended by the attorney.

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

122 SECTION 10. Section 29 of said chapter 152, as so appearing, is hereby amended as
123 follows:— No compensation pursuant to section thirty-four or thirty-five shall be paid for any
124 injury which does not incapacitate the employee from earning full wages for a period of five or
125 more calendar days. If incapacity extends for a period of five days or more, compensation shall
126 be paid from the date of onset of incapacity. Except as otherwise provided in this chapter no
127 compensation shall be paid for any period for which any wages were earned. No mental or
128 emotional disability arising principally out of a bona fide, personnel action including a transfer,

129 promotion, demotion, or termination except that such action which is the intentional infliction of
130 emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

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

144 SECTION 12. Section 31, paragraph two, of said chapter 152, as so appearing, is hereby
145 amended as follows:—To the widow or widower, so long as he or she remains unmarried, a
146 weekly compensation equal to two-thirds of the average weekly wages of the deceased
147 employee, but not more than the average weekly wage of the commonwealth, as determined
148 according to the provisions of subsection (a) of section twenty-nine of chapter one hundred and
149 fifty-one A, and promulgated by the commissioner of the department of employment and training
150 on or before October first preceding the deceased employee’s injury or death; provided,
151 however, that in no instance shall said widow or widower, receive less than two hundred dollars

152 per week, to the widow or widower twelve dollars more a week for each child of the deceased
153 employee under the age of eighteen or over said age and physically or mentally incapacitated
154 from earning, or over said age and a full time student qualified for exemption as a dependent
155 under section one hundred and fifty-one (e) of the Internal Revenue Code, except that no
156 additional compensation for the benefits of the children of the employee shall be payable when
157 combined with the compensation due the spouse of the deceased employee as hereinbefore
158 provided in this section would allow the widow or widower an amount in excess of two hundred
159 fifty dollars per week; provided that in case any child of the deceased employee is a child by a
160 former wife or husband, the death benefit shall be divided between the surviving wife or husband
161 and all dependent children of the deceased employee in equal shares, the surviving wife or
162 husband taking the same share as the child. If the widow or widower dies or if there is no
163 surviving wife or husband of the deceased employee, such amount or amounts as would have
164 been payable to or for his or her own use and for the benefit of all the children of the employee
165 shall be paid in equal shares to all the surviving children of the employee.

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

169 SECTION 14. Section 34 of said chapter 152, as so appearing, is hereby amended as
170 follows:— While the incapacity for work resulting from injury is total, during each week of
171 incapacity, the insurer shall pay the injured employee compensation equal to two-thirds of his or
172 her average weekly wage before the injury, but not more than the maximum weekly
173 compensation rate, unless the average weekly wage of the employee is less than the minimum
174 weekly compensation rate, in which case said weekly compensation shall be equal to his average

175 weekly wage. The total number of weeks of compensation due the employee under this section
176 shall not exceed two hundred eight.

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

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

190 SECTION 17. Section 34B, paragraph (b) of said chapter 152, as so appearing, is hereby
191 amended as follows:— The death benefit under section thirty-one, or the temporary total
192 disability benefit under section thirty-four, or the partial disability benefit under section thirty-
193 five, or the total disability benefit under section thirty-four A that was being paid prior to any
194 adjustments under this section shall be the base benefit. The base benefit shall be changed on
195 each review date by the percentage as calculated in paragraph (a); the resulting amount shall be
196 termed the adjusted benefit and is the amount of benefit to be paid on and after the review date.

197 If the adjusted benefit is larger than the base benefit, the difference shall be termed the
198 supplemental benefit. In no instance shall the adjusted benefit under this section be greater than
199 three times the base benefit.

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

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

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

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

239 SECTION 22. Chapter 152 is hereby further amended by striking out section 35E, as so
240 appearing, and inserting in place thereof the following section:— Any person receiving old age
241 benefits pursuant to federal social security law or receiving pension benefits paid in part or

242 entirely by an employer shall not be entitled to benefits under section thirty-five, unless such
243 employee can establish that but for the injury, such employee would have remained active in the
244 labor market. Claims for compensation, or complaint for modification, or discontinuance of
245 benefits based on this section shall not be filed more often than once every twelve months.

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

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