



THE STATE CHAMBER OF OKLAHOMA
LEGISLATIVE ADVOCATES FOR BUSINESS

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Overview of Major Amendatory & New Sections of Law

DRAFT W.C. Bill – As of November 11, 2009

Prepared by The State Chamber’s

Workers’ Compensation Working Group

With Leadership from Rep. Mark McCullough & Rep. Lewis Moore

Section 85-1.2 – Pages 1–5

Amendatory – Renames the Workers’ Compensation “Court” with a Workers’ Compensation “Court for Existing Claims” to handle claims for which the date of injury was prior to the effective date of this act; reduces the number from ten to four; vacates all existing slots; requires Senate confirmation of the new judges; reinstates the requirement that these judges have at least five years of experience in workers’ compensation matters in Oklahoma.

Section 85-1.4 – Pages 7-8

New Law – Creates a three-member “Workers’ Compensation Commission” to run Oklahoma’s workers’ compensation system; one member must be an attorney; one member must be a physician and all must have five years experience in w.c. in Oklahoma.

Section 85-1.5 – Pages 8-9

New Law – Creates an administrative law judge system across Oklahoma under the jurisdiction of the Commission; sets out the counties assigned to each judge (one each in four regional quadrants and two each in Oklahoma City and Tulsa); all judges shall be subject to Senate confirmation and shall be reviewed every four years by the Commission with subsequent confirmation by the Senate.

Section 85-1.6 – Pages 9-10

New Law – Allows the Governor to remove any Commissioner; sets out procedure for doing so.

Section 85-1.7 – Page 10

New Law – Sets out procedural issues for the Commission.

Section 85-1.8 – Pages 10-12

New Law – Sets out role of the Commission in setting rules, regulations or forms. Sets out the role of the Administrative Law Judge:

C. It shall be the duty of an administrative law judge, under the rules adopted by the Commission, to hear and determine claims for compensation and to conduct hearings and investigations and to make such orders, decisions, and determinations as may be required by any rule or order of the Commission. The duty of an administrative law judge shall be to rule only on issues of determination of eligibility for compensation, and shall notify both parties of that decision. If the claim is deemed compensable, the Administrative Law Judge shall direct medical treatment, if appropriate, be provided by a physician selected by the employer, and temporary total disability, if appropriate.

Section 85-1.10 – Pages 13-15

New Law – Sets out duties and powers of the Commission including specifically:

Hear appeals from orders made by the Chief medical officer regarding ratings of permanent disability, need for medical services and/or assignment of independent medical evaluations; Employ a Chief medical officer and special medical examiners and advisors as necessary who shall be paid a reasonable amount per day to be determined by the Commission, plus reasonable traveling expenses;

Section 85-3 – Pages 21-40 (NOTE: If a definition wasn't changed, or deleted, it is not listed in this overview.)

Amendatory – Changes and/or adds to the Definitions Section of Title 85:

§85-3. Definitions.

As used in the Workers' Compensation Act:

2. "Amount in dispute" means the dollar value of any permanent disability award granted to the employee by the Court for a disability claim which is greater than the dollar amount offered by the employer to the employee for such disability claim if the employer **admits compensability within twenty (20) days of the filing of the Employee's First Notice of Accidental Injury and**

~~Claim for Compensation, has not disputed medical treatment, and~~ has made a written settlement offer within ~~fifteen (15)~~ thirty (30) days of the employee reaching maximum medical improvement;

3. "Case management" means the ongoing coordination, by a case manager, of health care services provided to an injured or disabled worker, including, but not limited to:

- a. systematically monitoring the treatment rendered and the medical progress of the injured or disabled worker,
- b. ensuring that any treatment plan follows all appropriate treatment protocols, utilization controls and practice parameters,
- c. assessing whether alternative health care services are appropriate and delivered in a cost-effective manner based upon acceptable medical standards, and
- d. ensuring that the injured or disabled worker is following the prescribed ~~health care~~ medical treatment plan which follows acceptable medical standards as adopted by the Chief medical officer with the advice of the Physician Advisory Council;
- e. Any final decision in authorizing medical care or treatment, including but not limited to medical device equipment or prescription drug authorization, shall be the sole responsibility of the loss adjuster, unless such responsibility has been delegated to another in writing.

34. "Case manager" means a person who:

- a. is a registered nurse with a current, active unencumbered license from the Oklahoma Board of Nursing, or
- b. possesses one or more of the following certifications which indicate the individual has a minimum number of years of case management experience, has passed a national competency test and regularly obtains continuing education hours to maintain certification:
 - (1) Certified Disability Management Specialist (CDMS),
 - (2) Certified Case Manager (CCM),
 - (3) Certified Rehabilitation Registered Nurse (CRRN),
 - (4) Case Manager - Certified (CMC),
 - (5) Certified Occupational Health Nurse (COHN), or
 - (6) Certified Occupational Health Nurse Specialist (COHN-S);
- c. The case manager's objective is to arrange for the delivery of cost-effective services that meet the patient's medical needs. The case manager acts both as an ombudsman for the patient and as an agent of the payor.

5. "Child" means any dependent child as defined by the Internal Revenue Service;

7. "Commission" means the Workers' Compensation Commission;

8. "Compensable injury"

a. means any injury or occupational illness, causing internal or external harm to the body, which arises out of and in the course of employment if such employment was the major cause of

the specific injury or illness. An injury, other than cumulative trauma, is compensable only if it is caused by a specific incident and is identifiable by time, place and occurrence unless it is otherwise defined as compensable in this title. A compensable injury must be established by objective medical evidence, as defined in this section.

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability supported by objective medical findings.

b. "Compensable injury" includes heart-related or vascular injury, illness or death only if an accident or the claimant's employment is the major cause of the heart-related or vascular injury. A heart-related or vascular injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.

An injury, illness or death included in this subsection shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the usual work of the employee in the course of the regular employment of the employee, or alternately, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm. Stress, physical or mental, shall not be considered in determining whether the employee or claimant has met the burden of proof.

The injury must be established by objective medical evidence, as defined in this section. The employee has the burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There is no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment.

c. "Compensable injury" includes personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eye glasses and other prostheses which are placed in or on the body to replace the physical structure which became damaged as a result of the injury.

d. "Compensable injury" includes injury due to the willful act of a third person directed against an employee because of the employee's employment.

e. "Compensable injury" includes an injury or disease resulting from a vaccine administered at the direction of the employer or in response to a declaration by the Secretary of the United States Department of Health and Human Services under the Public Health Service Act to address an actual or potential health risk related to the employee's employment.

f. "Compensable Injury" shall not include:

(1) mental injury that is unaccompanied by physical injury, except in the case of rape, holdups, witnessing killings, or violent death which arises out of and in the course of employment;

(2) Alcoholism and disabilities attributable thereto;

(3) Drug addiction or disabilities resulting therefrom, except when such addiction or disability resulted from the use of drugs or medicines prescribed for the treatment of the initial injury by an authorized physician and the employee followed the dosage prescribed;

(4) An employee's use of a motor vehicle that was provided to the employee by a motor vehicle dealer and bears a dealer's license plate for commuting to or from work or any other nonwork activity;

(5) Injury or disability caused primarily by the natural deterioration of tissue, an organ or part of the body, nor by the ordinary, gradual deterioration or progressive degeneration caused by the aging process, unless the employment is a major cause of the deterioration or degeneration and is supported by objective medical evidence;

(6) An injury incurred by an employee by the employee's willful intention to injure oneself or another;

(7) An injury or disease caused by exposure to a toxic substance, including, but not limited to, asbestos, silica, fungus or mold, unless there is a preponderance of the evidence establishing that exposure to the specific substance involved, at the levels to which the employee was exposed, can cause the injury or disease sustained by the employee;

(8) A claim for mental stress resulting solely from disciplinary action taken in good faith by the employer;

(9) An injury resulting directly or indirectly from idiopathic causes;

(10) Any contagious or infectious disease unless it arises out of and occurs during the course of employment;

(11) Death due to natural causes occurring while the worker is at work.

(12) Injury which was inflicted upon the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated, or

(13) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of the orders of a physician.

(a) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of orders of a physician shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of orders of a physician.

(b) Every employee is deemed by his or her performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the body of the employee.

(c) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the orders of the physician did not substantially occasion the injury or accident.

(d) Notwithstanding 40 O.S. Section 554.3, a public or private employer may require an employee to undergo drug or alcohol testing if the employee or another person has sustained a work-related injury. For purposes of workers' compensation, an

employee who tests positive for the presence of substances defined and consumed pursuant to Section 465.20 of Title 63 of the Oklahoma Statutes, alcohol, or prescription drugs not prescribed by the employee's treating medical provider shall not be eligible for such compensation unless the employee proves by a preponderance of the evidence that the substances or alcohol were not the proximate cause of the injury or accident.

g. A compensable injury must be established by medical evidence supported by objective findings as defined in this Act.

h. The burden of proof of a compensable injury shall be on the employee

i. When an employee is determined to have a compensable injury, the employee is entitled to medical and temporary disability as provided by this section.

(1) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(2) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

(3) Under this subparagraph, benefits shall not be payable for a condition which results from a non-work-related independent intervening cause following a compensable injury which causes or prolongs disability or a need for treatment. A non-work-related independent intervening cause does not require negligence or recklessness on the part of a claimant.

(4) Nothing in this subparagraph shall limit the payment of rehabilitation benefits or benefits for disfigurement as set forth in this section;

j. Aging and the effects of aging on a compensable injury are not to be considered in determining whether there has been a change in physical condition. Nor shall aging or the effect of aging on a compensable injury be considered in determining permanent disability pursuant to this section or any other section in this act. The purpose and intent of this section is to annul any and all case law inconsistent with this section.

9. "Court" means the Workers' Compensation Court for Existing Claims, the Workers' Compensation Commission, the Chief medical officer or any of the Administrative Law Judges;

10. "Compensation" means the benefit payable to the employee or to his or her dependents in the form of:

(a) temporary total or temporary partial disability payments;

(b) permanent partial or permanent total disability payments, settlements or awards;

(c) other compensation which may include medical care, prescription costs, other fees or costs associated with physical or vocational rehabilitation and funeral expenses;

Compensation shall be computed on the average weekly wage earned by the employee in force at the time of the accident. Where the injured employee was working other than full time, the

average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek as set out in this Title, as it applies to the claimant.

12. "Death" means only death resulting from a compensable injury as defined in this Title;

13. "Employer", except when otherwise expressly stated, means a person, partnership, association, limited liability company, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association, corporation, or limited liability company, departments, instrumentalities and institutions of this state and divisions thereof, counties and divisions thereof, public trusts, boards of education and incorporated cities or towns and divisions thereof, employing a person included within the term "employee" as herein defined. "Employer" may also mean its insurance company or representative of its insurance company if appropriate;

~~12. "Compensation" means the money allowance payable to an employee as provided for in the Workers' Compensation Act;~~

~~13. a. "Compensable injury" means any injury or occupational illness, causing internal or external harm to the body, which arises out of and in the course of employment if such employment was the major cause of the specific injury or illness. An injury, other than cumulative trauma, is compensable only if it is caused by a specific incident and is identifiable by time, place and occurrence unless it is otherwise defined as compensable in this title. A compensable injury must be established by objective medical evidence, as defined in this section.~~

~~b. "Compensable injury" includes heart related or vascular injury, illness or death only if an accident or the claimant's employment is the major cause of the heart related or vascular injury. Such injury shall be compensable only if it is demonstrated that the exertion necessary to produce the harm was extraordinary and unusual in comparison to other occupations and that the occupation was the major cause of the harm. The injury must be established by objective medical evidence, as defined in this section.~~

~~c. "Injury" or "personal injury" shall not include mental injury that is unaccompanied by physical injury, except in the case of rape which arises out of and in the course of employment.~~

~~d. "Compensable injury" shall not include the ordinary, gradual deterioration or progressive degeneration caused by the aging process, unless the employment is a major cause of the deterioration or degeneration and is supported by objective medical evidence, as defined in this section; nor shall it include injury incurred while engaging in, performing or as the result of engaging in or performing any recreational or social activities;~~

19. a. "Major cause" means the predominate cause of the resulting injury or illness is more than fifty-one percent (51%) of the cause.

b. A finding of major cause shall be established according to the preponderance of the objective medical evidence only;

- c. A determination that a work related injury or illness is noncompensable for any reason, including a finding that the workplace was not a major cause of the injury or illness, shall not adversely affect the exclusive remedy provisions of this Title, and shall not create a separate cause of action outside of this Title.

20. "Objective findings" are those findings which cannot come under the voluntary control of the patient.

- (a) When determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative law judge, the Workers' Compensation Commission, nor the courts may consider complaints of pain.
- (b) For the purpose of making physical or anatomical impairment ratings to the spine, straight-leg-raising tests or range-of-motion tests shall not be considered objective findings.
- (c) Objective evidence necessary to prove physical or anatomical impairment in occupational hearing loss cases may be established by medically recognized and accepted clinical diagnostic methodologies, including, but not limited to, audiological tests that measure air and bone conduction thresholds and speech discrimination ability.
- (d) Any difference in the baseline hearing levels must be confirmed with a subsequent test within four (4) weeks following the initial test or tests performed pursuant to subdivision (a) of division (3) of subparagraph a of this paragraph but not before five (5) days and being adjusted for presbycusis.
- (e) "Objective findings" in support of medical evidence are verifiable indications of injury or disease that may include, but are not limited to, range of motion, atrophy, muscle strength and palpable muscle spasm. "Objective findings" does not include physical findings or subjective responses to physical examinations that are not reproducible, measurable or observable.
- (f) Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty, Any medical opinion addressing the issue of compensability must be based on the treatment guidelines adopted under this Title; and any medical opinion addressing permanent impairment must be based on the Commission's most recently adopted version of the American Medical Association's Guides to the Evaluation of Permanent Impairment, excluding pain.

21. "Wages" means the money rate at which the service rendered is recompensed ~~under the contract of hiring~~ in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer;

22. "Insurance carrier" shall include CompSource Oklahoma, stock corporations, reciprocal or interinsurance associations, or mutual associations with which employers have insured, and employers permitted to pay compensation, directly under the provisions of paragraph 4 of subsection A of Section 61 of this title. Whenever required by the context, the term "insurance carrier" shall be deemed to include duly qualified self-insureds or self-insured groups;

~~16. "Major cause" means the predominate cause of the resulting injury or illness;~~

~~17. "Objective medical evidence" means evidence which meets the criteria of Federal Rule of Evidence 702 and all U.S. Supreme Court case law applicable thereto;~~

23. "Occupational disease" means only that disease or illness which is due to causes and conditions characteristic of or peculiar to the particular trade, occupation, process or employment in which the employee is exposed to such disease. An occupational disease arises out of the employment only if the employment was the major cause of the resulting occupational disease and such is supported by objective medical evidence, as defined in this section. No compensation shall be payable for any ordinary disease of life to which the general public is exposed;

24. "Permanent impairment" means any anatomical abnormality after maximum medical improvement has been achieved, which abnormality or loss the physician considers to be capable of being evaluated at the time the rating is made. Except as otherwise provided herein, any examining physician shall only evaluate impairment in accordance with the latest publication of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" in effect at the time of the injury and as adopted by the Physician Advisory Council and approved by the Chief medical officer. Such Guides shall be in force 120 days after approval by the Chief medical officer. The Physician Advisory Committee may, pursuant to Section 201.1 of this title, recommend the adoption of a method or system to evaluate permanent impairment that shall be used in place of or in combination with the American Medical Association's "Guides to the Evaluation of Permanent Impairment". Such recommendation shall be made to the Administrator of the Workers' Compensation Court who may adopt the recommendation in part or in whole. The adopted method or system shall be submitted by the Administrator to the Governor, the Speaker of the House of Representatives and the President Pro Tempore of the Senate within the first ten (10) legislative days of a regular session of the Legislature. Such method or system to evaluate permanent impairment that shall be used in place of or in combination with the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be subject to disapproval in whole or in part by joint or concurrent resolution of the Legislature during the legislative session in which submitted. Such method or system shall be operative one hundred twenty (120) days after the last day of the month in which the Administrator submits the adopted method or system to the Legislature if the Legislature takes no action or one hundred twenty (120) days after the last day of the month in which the Legislature disapproves it in part. If adopted, permanent impairment shall be evaluated only in accordance with the latest version of the alternative method or system in effect at the time of injury. Except as otherwise provided in Section 11 of this title, all evaluations shall include an apportionment of injury causation. ~~However, revisions to the guides made by the American Medical Association which are published after January 1, 1989, and before January 1, 1995, shall be operative one hundred twenty (120) days after the last day of the month of publication. Revisions to the guides made by the American Medical Association which are published after December 31, 1994, may be adopted in whole or in part by the Administrator following recommendation by the Physician Advisory Committee. Revisions adopted by the Administrator shall be submitted by the Administrator to the Governor, the Speaker of the House of Representatives and the President Pro Tempore of the Senate within the first ten (10)~~

~~legislative days of a regular session of the Legislature. Such revisions shall be subject to disapproval in whole or in part by joint or concurrent resolution of the Legislature during the legislative session in which submitted. Revisions shall be operative one hundred twenty (120) days after the last day of the month in which the Administrator submits the revisions to the Governor and the Legislature if the Legislature takes no action or one hundred twenty (120) days after the last day of the month in which the Legislature disapproves them in part. The examining physician shall not follow the guides based on race or ethnic origin. The examining physician shall not deviate from said guides or any alternative thereto except as may be specifically provided for in the guides or modifications to the guides or except as may be specifically provided for in any alternative or modifications thereto, adopted by the Administrator of the Workers' Compensation Court as provided for in Section 201.1 of this title. These officially adopted guides or modifications thereto or alternative system or method of evaluating permanent impairment or modifications thereto shall be the exclusive basis for testimony and rating conclusions with regard to permanent impairment with the exception of paragraph 3 of Section 22 of this title, relating and, as it relates to individual scheduled member injury or loss; and, these officially adopted guides shall be the exclusive basis for testimony and rating conclusions with regard to permanent impairment combining scheduled member injury or loss of function ; including pain or loss of strength; Permanent impairment may be awarded with respect to those injuries or areas of the body not specifically covered by said guides, or alternative to said guides; However in no event shall a scheduled member injury or impairment, including injuries to the shoulder or hip, be converted or combined to the body as a whole. All evaluations of permanent impairment must be supported by objective medical evidence, and shall not include pain;~~

25. "Permanent total disability" means incapacity because of accidental injury or occupational disease to earn any wages in any employment for which the employee may become physically suited and reasonably fitted by education, training or experience, including vocational rehabilitation; loss of both hands, or both feet, or both arms, or both legs, or both eyes, or any two thereof, shall constitute permanent total disability;

29. Removes the restriction on CWMPs only including discounted fee for service programs thus allowing them to contract in any other manner, including capitated plans.

Section 85-3.1 – Pages 40-41 (NOTE: If a definition wasn't changed, or deleted, it is not listed in this overview.)

Amendatory – Definitions applicable to death benefits:

~~(3) "Child" means a natural or adopted son or daughter of the employee under eighteen (18) years of age; or a natural or adopted son or daughter of an employee eighteen (18) years of age or over and physically or mentally incapable of selfsupport; or any natural or adopted son or daughter of an employee eighteen (18) years of age or over who is actually dependent; or any natural or adopted son or daughter of an employee between eighteen (18) and twentythree (23) years of age who is enrolled as a fulltime student in any accredited educational institution. The term "child" includes a posthumous child, a child legally adopted or one for whom adoption~~

~~proceedings are pending at the time of death, an actually dependent stepchild or an actually dependent acknowledged child born out of wedlock;~~

Section 85-3.2 – Page 41

Section 3.2 NEW LAW

Compensation to alien nonresident dependents of the United States shall be the same in amount as provided for resident dependents, except that alien nonresident dependents in any foreign country shall be limited to the surviving spouse and/or minor children.

Section 85-3.4 – Pages 42-47

Amendatory – Commencement of claims

Added to beginning of Section:

A. Unless a single-incident injury either renders the employee physically or mentally unable to do so, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and if not reported in writing within ten (10) business days of the date of injury, the employer shall not be responsible for disability, medical or other benefits. All reporting procedures must be reasonable and shall afford each employee reasonable notice of the reporting requirements. Furthermore, any signed statement by an employee that an injury or illness was not work-related shall serve as an absolute bar against any future claim of workers' compensation for that injury or illness. If a claim is found to be non-compensable due to late filing of notice of injury, or for a prior statement having been signed by the employee indicating that the injury or illness was not work-related, there shall be no further remedy for the employee outside of this Title.

B. Upon the filing of an employer's report of injury, the Workers' Compensation Commission is authorized and directed to promulgate appropriate rules to establish and implement, for claims with respect to injuries occurring on or after November 1, 2010, a preliminary conference procedure designed to accomplish the following objectives:

1. To provide the claimant an opportunity to confer with a counselor on the staff of the Commission to be advised of the rights of the claimant under this act. The conference may be held at the Career Tech center nearest to the accident or the residence of the claimant;

2. To provide an opportunity for, but not to compel, a binding settlement of some or all the issues present at the time;

3. To facilitate the resolution of issues without the expense of litigation or attorney fees for either party; and

4. a. (1) To achieve compromise settlements entered into at or as a result of the preliminary conference and facilitating the filing of those joint petition settlements entered into pursuant to this act.

b. The purpose and intent of this section is to affirm the duty of the Commission to provide assistance, thereby reducing litigation and workers' compensation costs.

Deleted old language:

85-3.4C2. All matters pertaining to such claims shall be presented to the Administrator until such time as the Administrator is notified in writing by a party that there is a controverted issue that cannot be resolved by the parties or that the parties have received an agreed final order from the Commission Court. The Administrator shall, within seven (7) days of the receipt of such notification, set the matter for hearing at the earliest available time to be heard by the Commission Court in the appropriate judicial district as provided in Section 3.5 of this title. The Administrator shall assign a member of the Commission Court to hear a docket in each judicial district of the state at least once each calendar month when there has been a request for a hearing in the judicial district. ~~The Administrator shall assign judges to the state judicial districts on a rotating basis for the purpose of holding prehearing conferences and settlement conferences and hearing cases. At the request of either party, a prehearing conference shall be held before the member of the Court assigned to the case within forty-five (45) days of the filing of a claimant's request for a hearing. The purpose of the prehearing conference shall be to mediate and encourage settlement of the case or determine issues in dispute.~~

3. ~~The Court, upon its own motion or at the request of any of the parties, may set a settlement conference at any practicable time. The conference shall be held before any Workers' Compensation Court Judge or an Active Retired Judge sitting by special designation for that purpose, other than the judge assigned to the case. The purpose of the settlement conference is to permit an informal discussion among the parties, the attorneys, and the settlement judge on every aspect of the case bearing on its settlement value in an effort to resolve the matter before trial. The settlement judge shall not have any communications regarding the case or the settlement conference with the assigned trial judge other than to advise the trial judge that a settlement was or was not reached. The setting of a settlement conference by the Court, or a request for a settlement conference by any party, shall not preclude any party from filing a Motion to Set for Trial.~~

Amended 85-3.4D: All claims so filed shall be heard by the administrative law judge sitting without a jury. ~~All petitions for final orders or awards filed pursuant to the provisions of Section 84 of this title must be approved by the Court having jurisdiction before a final order or award may be entered. Any agreed upon settlement between the claimant and the employer shall be final upon signed agreement by both parties.~~ All matters relating to a claim for benefits under the Workers' Compensation Act shall be filed with the Administrator.

Added new Sections 85-3.4E-G:

E. CONDUCT OF HEARING OR INQUIRY.

1. The Workers' Compensation Commission shall be bound by the Oklahoma Rules of Evidence and/or the Federal Daubert Guidelines. If there is a further question of evidence or procedure, Oklahoma Title 12 shall be used.

2. When deciding any issue, administrative law judges and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of evidence.

F. HEARINGS TO BE PUBLIC - RECORDS.

1. a. Hearings shall be open to the public and shall be stenographically reported or recorded in any other accurate and practicable manner. The Commission is authorized to contract for the reporting of the hearings.
- b. The Commission shall, by rule, provide for the preparation of a record of all hearings and other proceedings before it.

G. INTRODUCTION OF EVIDENCE.

1. a. All oral evidence or documentary evidence shall be presented to the designated representative of the Commission at the initial hearing on a controverted claim, which evidence shall be stenographically reported or recorded in any other accurate and practicable manner.
- b. Each party shall present all evidence at the initial hearing.
2. a. Any party proposing to introduce medical reports or testimony of physicians at the hearing of a controverted claim shall, as a condition precedent to the right to do so, furnish to the opposing party and to the Commission copies of the written reports or depositions of the physicians of their findings and opinions at least twenty (20) days prior to the date of the hearing. However, if no written reports or depositions are available to a party, then the party shall, in lieu of furnishing the report or deposition, notify in writing the opposing party and the Commission of the name and address of the physicians proposed to be used as witnesses at least twenty (20) days prior to the hearing and the substance of their anticipated testimony.
- b. If the opposing party desires to cross-examine the physician, the opposing party shall notify the party who submits a medical report as soon as practicable but no less than ten (10) days prior to the scheduled hearing, in order that the party submitting a medical report may make every effort to have the physician present for the hearing.
3. A party failing to observe the requirements of this subsection may not be allowed to introduce medical reports or testimony of physicians at a hearing, except in the discretion of the hearing officer or the Commission.
4. Medical reports or depositions shall only be allowed to assist the administrative law judge in determining compensability of the claim.

Section 85-3.6 – Pages 48-52

Amendatory – Appellate procedures

Establishes the three-member Commission as the appellate body for workers' compensation claims; eliminates the "Court en banc"; sets out that the Supreme Court may hear appeals in very specific circumstances:

C. “...The Supreme Court may hear appeals and modify, reverse, remand for rehearing, or set aside the order or award, upon any of the following grounds, and no other, that the:

- a. Commission acted without or in excess of its powers;
- b. order or award was procured by fraud;
- c. order or award was against the clear weight of the evidence of record.

H. The Supreme Court may require a bond from any party, if it deems necessary, in cases appealed to the Court.

Section 85-3.7 – Pages 52-53

The Administrator shall have the following powers and duties:

1. To ~~hear and approve~~ accept and record settlements ~~pursuant to direction by the judges of the Court;~~

Section 85-11 – Pages 61-65

Amendatory – Employer to pay compensation

Clarifies limitations to when an employer must pay compensation; deleting unneeded language.

A. “...Subject to limitations found in this Act, every employer subject to the provisions of the Workers' Compensation Act shall pay, or provide as required by the Workers' Compensation Act, compensation according to the schedules of the Workers' Compensation Act for the disability or death of an employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of employment, ~~without regard to fault as a cause of such injury, and in the event of disability only, except as follows:~~

- ~~1. An injury occasioned by the willful intention of the injured employee to bring about injury to himself or herself, or another;~~
- ~~2. An injury resulting directly from the willful failure of the injured employee to use a guard or protection against accident furnished for use pursuant to any statute or by order of the Commissioner of Labor;~~
- ~~3. An injury which occurs when an employee is using substances defined and consumed pursuant to Section 465.20 of Title 63 of the Oklahoma Statutes, or is using or abusing alcohol or illegal drugs, or is illegally using chemicals; provided, this paragraph shall only apply when the employee is unable to prove by a preponderance of the evidence that the substances, alcohol, illegal drugs, or illegally used chemicals were not the proximate cause of the injury or accident. For the purposes of this paragraph, post-accident alcohol or drug testing results shall be admissible as evidence; and~~
- ~~4. Except for innocent victims, an injury caused by a prank, horseplay, or similar willful or intentional behavior.~~

Section 85-12 – Pages 65-67

Amendatory – Deletes the following:

~~(v) Nothing contained herein shall abrogate any rights arising under the Oklahoma Constitution.~~

Section 85-12.1 – Pages 67-69

New Law – Sets out the penalties for an employer not having workers’ compensation coverage; sets out the procedure for appealing Commission orders on this issue.

Section 85-12.2 – Pages 69-70

New Law - A. Every employer who has secured compensation under the provisions of this act shall keep posted in a conspicuous place in and about the place of business of the employer, typewritten or printed notices in accordance with a form prescribed by the Workers' Compensation Commission. The notices shall state that the employer has secured the payment of compensation in accordance with the provisions of this act.

B. The notices shall contain the name and address of the carrier, if any, with whom the employer has secured payment of compensation.

Section 85-13.2 – Page 70

New Law – Sets out that no employer shall be liable for any payments if the Commission decides that the injury does not come under the provisions of this Act.

Section 85-13.3 – Page 70

New Law - The Workers' Compensation Commission is authorized to establish rules and regulations, including schedules of maximum allowable fees for medical services rendered with respect to compensable injuries, for the purpose of controlling the cost of medical and hospital services and supplies.

Section 85-14 – Pages 70-78

New Law – J. Duration of treatment is subject to the limitations established in the treatment guidelines and protocols recommended by the Physician Advisory Committee and approved by the Chief medical officer unless waived by the employer-respondent or approved by the chief medical officer. For compensable injuries resulting in the use of a medical device, ongoing service for the medical device would be provided in situations including, but not limited to, medical device battery replacement, ongoing medication refills related to the medical device, medical device repair or medical device replacement.

Section 85-14.3 – Pages 80-87

Amendatory – Expands the time period for an insured to contract with a CWMP where the insured’s carrier does not provide a CWMP from one year to five years.

Clarifies that an employee covered under a CWMP must receive a written confirmation from the certified workplace medical plan that the dispute resolution procedure of the certified workplace medical plan has been exhausted before seeking legal relief on an issue related to medical care under the plan, and that no evaluation shall be admissible from an outside medical source unless such confirmation has been received or that there is “clear and convincing evidence that the treatment offered under the Plan is contrary to the nationally recognized treatment guidelines adopted by the Plan.”

Amendatory – Requires all state agencies to participate in a CWMP.

Section 85-16 – Pages 87-90

Amendatory – States that the Commission shall hire a Vocational Rehabilitation Director to oversee the vocational rehabilitation program; Sets out duties, responsibilities and powers; further clarifies who gets payment for vocational rehabilitation services.

Section 85-17.2 – Pages 96-97

New Law – States that the determination for disability shall be the responsibility of the Chief medical officer; requires “competent medical testimony” to support a claim for permanent disability; and, include an evaluation by the treating physician or a “Medical Impairment Rating Registry (MIR) physician; sets out what is to be included in the evaluation.

Section 85-18 – Pages 97-119

New Law – Establishes a new “Medical Impairment Rating Registry Program” designed to eliminate dueling-doctors and streamline the process of determination of permanent disability.

Section 85-19 – Page 119

New Law – The Chief medical officer shall be hired by the Commission and shall be subject to Senate confirmation. Every four years, the Commission shall review the performance of the Chief medical officer and shall recommend to the State Senate for confirmation of reappointment for another four-year period. He or she shall be receive the same compensation as a Commissioner. In addition to determining disability ratings, the Chief medical officer shall handle all medical disputes outside of CWMP programs, oversee the reimbursement fee schedule for all medical providers outside of CWMPs, and determine the appropriateness of requests for continuing medical treatment. The Chief medical officer will determine the nature and extent of any such “maintenance medical” programs and issue the appropriate order(s) to ensure the need for such program. All such administrative orders are subject to appeal to the full Commission as set out in this Act.

Section 85-22 – Pages 120-154

Amendatory – Schedule of Compensation

1. Permanent total disability (PTD) – Clarifies what constitutes permanent total disability; states that, except in a statutory permanent total disability case, no claimant can receive PTD and “any other form of disability” at the same time; allows the employer to require an employee receiving PTD to certify continuing permanent and total disability;
2. Deletes old language dealing with wages which is now contained in the “Definitions” section.
3. Temporary total disability (TTD) - Establishes a new percentage calculation for TTD be 66 2/3 percent of the employee’s average weekly wage, not to exceed 100 percent of the state’s average weekly wage; Caps TTD at 104 weeks.
4. Permanent partial disability (PPD) – Establishes a new schedule for PPD claims to be set at 66 2/3 percent of the employee’s average weekly wage, not to exceed \$342 per week; sets out a new schedule for loss of members; sets out a new payment for disfigurement and establishes eligibility for such disfigurement payment; sets out payment schedule for hernia and soft-tissue injury; disallows any use of the “odd-lot” doctrine.

Section 85-24.2 – Pages 155-156

Amendatory - A. Unless an employee or former employee gives ~~oral or~~ written notice to the employer or former employer within ~~thirty (30)~~ ten (10) business days of the date an injury occurs ~~or the employee receives medical attention from a licensed physician during the thirty-day period from the date an injury occurred~~, the rebuttable presumption shall be that the injury was not work related. Such presumption must be overcome by a preponderance of the evidence. For an occupational disease or cumulative trauma, written notice shall be given to the employer within the statutory period for occupational disease set out in ~~Section 43 of~~ this title; provided, there shall be a rebuttable presumption that injury from occupational disease or injury caused by cumulative trauma does not arise out of and in the course of employment unless ~~oral or~~ written notice is given by the employee to the employer within ~~ninety (90)~~ thirty (30) days of the employee's separation from employment. Such presumption must be overcome by a preponderance of the evidence.

Section 85-26 – Pages 158-160

Amendatory – Settlements - Deletes the requirement for the Court (or Commission) to approve a settlement.

Section 85-28 – Pages 160-161

New Law – Change of Condition –

1. Deletes old language;
2. Clarifies that “except where a joint petition settlement has been agreed upon and filed with the Commission...”, the Commission may review any compensation, order or decision;

3. States that “either an ALJ or the Commission may review any compensation order within three months of termination of the compensation period fixed in the original compensation order or award, upon the application of any party in interest, on the ground of a change in physical condition.”
4. Allows the Commission to terminate, continue, decrease or increase for the future compensation previously awarded, subject to the limits in the Act.
5. Allows the Commission to correct any clerical error within twelve months of the issuance of an order or award.

Section 85-30 – Pages 161-163

Amendatory – Legal fees

Changed the requirements for awarding lawyer fees for “value-added” claims and prohibits the diversion of workers’ compensation lawyers from withholding a portion of a client’s judgment for political purposes:

E. In any claim in which the respondent has ~~admitted compensability of an accidental injury within twenty (20) days of the filing of an Employee's First Notice of Accidental Injury and Claim for Compensation, has not disputed medical treatment, and has~~ made a settlement offer in writing within ~~fifteen (15)~~ thirty (30) days after receipt of notice that the claimant has reached maximum medical improvement, the attorney fee shall be limited to ~~thirty-five percent (35%)~~ twenty percent (20%) of the amount of any award or settlement of permanent partial disability which is greater than the amount of the offer. ~~In addition, an attorney fee shall be awarded for other contested benefits obtained on behalf of the claimant at any time during the pendency of the claim and shall be based upon a reasonable hourly rate.~~ In no event shall the total attorney fee be in excess of twenty percent (20%) of the total permanent partial disability award or settlement. All attorney fees shall be deducted from the award or settlement to the claimant.

F. An attorney and counselor shall not deduct or withhold any portion of a judgment from the Commission, a court of law, settlement proceeds of a client, or any monies held in trust for a client for the purpose of donating or contributing funds or monies to a political fund, political action committee, campaign of any kind, or candidate for state, federal or local office.

Section 85-41.1 – Page 166

Amendatory – Deductions & credits for overpayments

A. In the event salary or any other remuneration is paid in lieu of temporary total compensation during the period of temporary total disability or for any other period of time, ~~no a~~ respondent or insurance carrier shall be allowed to deduct from the amount of the award for permanent ~~total~~ or ~~partial~~ permanent partial disability any amounts paid for temporary total disability, ~~nor and~~ shall he be given credit for such additional payments on future temporary total

disability, permanent partial disability, disfigurement, or any other compensation provided by the workers' compensation law.

~~B. Notwithstanding the provisions of subsection A of this section, a qualified individual self-insured employer that pays temporary total disability benefits at a higher weekly rate than required by statute, without diminishing the employee's accrued leave on such payments, shall be given credit for such overpayment against any permanent partial disability owed, after payment of attorney fees and taxes. This provision shall not apply where salary continuation was made by the self-insured employer pursuant to an applicable collective bargaining agreement.~~

Section 85-42 – Pages 166-168

Amendatory – Interest: Changed interest on unpaid compensation from eighteen percent to “the average U.S. Treasury Bill rate of the preceding calendar year.”

Section 85-43 – Pages 168-170

Amendatory – Limitations of Actions – Dismissal – Reopening Cases – Posting Notice

1. Changes right to claim compensation from ~~two years~~ after the date of injury to six months.
2. Provided that a claim may be filed within ninety days (formerly ~~two years~~) of the last medical treatment authorized or paid for by the employer.
3. Provided further, for cumulative trauma cases, a claim may be filed within six months (formerly ~~two years~~) of the date of last trauma.
4. Changes time period for filing a claim upon post-termination from ~~six months~~ to ten business days (30 days for an occupational disease or cumulative trauma).
5. Changes time period for a claimant to request a hearing from ~~three years~~ to two years from the date of filing the claim or within one year (formerly ~~three years~~) from the date of last payment of compensation.
6. Limits the jurisdiction of the Court to reopen any cause surgically-treated claim upon an application based upon a change in condition for the worse shall extend for ~~three~~ (3) two (2) years from the date of the last order, and unless filed within said period of time, shall be forever barred. An order denying an application to reopen a such surgically-treated claim shall not extend the period of the time set out herein for reopening the case.

Section 85-44 – Pages 170-172

Amendatory – Deletes prohibition against an employer seeking subrogation for a death claim.

Section 85-45 – Page 172

Amendatory – Clarifies that a claimant cannot receive TTD benefits covering the same period they are receiving unemployment benefits from any state.

Section 85-64 – Pages 186-189

Amendatory – adds new language: H. An insurance carrier or its representative commits an administrative violation under Title 36, if that person attends a workers' compensation dispute resolution proceeding without complete authority or fails to exercise authority to effectuate agreement or settlement;

Section 85-69.5 – Page 202

Amendatory – Deleted the powers and duties of the Presiding Judge.

Section 85-110 – Pages 210-212

Amendatory – A. Except as otherwise provided by state or federal law and subject to the provisions of this section, an employer may inquire about previous workers' compensation claims paid to an employee while the employee was employed by a previous employer. If the employee fails to answer truthfully about any previous ~~permanent partial disability awards made pursuant to~~ workers' compensation claims, the employee shall be subject to discharge by the employer.

Section 85-112 – Pages 212-215

Amendatory – Changes make-up of the Workers' Compensation Advisory Council from nine to seven; Requires the Governor, Speaker of the House and Senate President Pro Tempore to each appoint two representatives – one representing employers and one representing employees; and then requiring the six appointed to select a seventh member who shall serve as Chairman; states that no attorneys, employees of law firms, insurance companies, physicians, or employees of workers' compensation medical providers shall be on the Advisory Council.

Section 85-122 – Page 215

Deleted – Dealing with actions for injuries or death in defined employments abrogated exceptions.

Section 85-201.1 – Pages 260-269

Amendatory – Physician Advisory Council & Treatment Guidelines

1. States that the Physician Advisory Council shall review and recommend to the Chief medical officer (formerly the Court Administrator) “acceptable deviations” from the AMA “Guides to the Evaluation of Permanent Impairment”.

2. Allows the Chief medical officer to review and adopt “in part or in whole” the recommendations from the Physician Advisory Council.

New Law - . Ensure that appropriate medical treatment guidelines are recommended to the Chief Medical Director for adoption and use in all workers’ compensation claims.

(a) As used in this Section, and notwithstanding any other provision of law, medical treatment that is reasonably required to be proper and necessary for the injured worker from the effects of his or her injury means treatment that is based upon the guidelines adopted by the medical director. For all injuries not covered by the director’s medical treatment guidelines, authorized treatment shall be in accordance with other evidence-based medical treatment guidelines that are recognized generally by the national medical community and scientifically based, as noted in this section.

(b) These recommended guidelines pursuant to subdivision (a) shall reflect practices that are evidence and scientifically based, nationally recognized, or state developed. The guidelines shall be designed to assist providers by offering an analytical framework for the evaluation and treatment of injured workers, and shall constitute care for all injured workers diagnosed with work-related injuries or illnesses.

(c) A treating doctor may provide medical treatment that is outside of the treatment recommended by the treatment guideline if the medical treatment is reasonably required and necessary to relieve or cure the individual patient. Prior authorization from the insurer shall be required in order to be reimbursed for treatment outside of that which is recommended by the treatment guidelines.

(d) If the Medical Director is going to award payment of medical treatment that is outside that which is recommended by the treatment guidelines then the order must explain why the medical treatment was reasonably required and necessary to relieve or cure the individual patient.

6. Definitions applying to this Section:

(a) “Evidence based” means expert-based, literature supported and outcomes validated from well-designed randomized trials when such information is available and which uses the best available evidence to support medical decision making.

(b) “Nationally recognized” includes but is not limited to, syntheses of clinical issues that may take the form of published reports in the scientific literature, national consensus documents, formalized documents addressing standards of practice, practice parameters from professional societies or commissions, and technology assessments produced by independent evidence-based practice centers.

(c) “Scientifically based” involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to medical testing, diagnoses and treatment; are adequate to justify the general conclusions drawn; and, has been accepted by peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.

(d) “Peer review” means the process of subjecting submitted manuscripts, guidelines, or other clinical or scholarly work to the scrutiny of others who are experts in the same field.

(e) “State developed” includes formalized treatment guidelines developed and adopted by state governments.