

1 State of Arkansas  
2 88th General Assembly  
3 Regular Session, 2011  
4

As Engrossed: S3/29/11  
**A Bill**

SENATE BILL 778

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

**For An Act To Be Entitled**

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

**Subtitle**

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

26 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
27

28 SECTION 1. Arkansas Code § 11-9-410 is amended to read as follows:

29 11-9-410. Third-party liability.

30 (a) Liability Unaffected.

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



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

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

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

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

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

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

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

24                   (B)(i) By the acceptance of compensation under this  
25 chapter, the employee grants the employer or employer's insurance carrier an  
26 absolute first lien upon the proceeds of any settlement or judgment resulting  
27 from the exercise of any rights of recovery of the employee against any third  
28 party.

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

35                   (b) Subrogation.

36                   ~~(1) An employer or carrier liable for compensation under this~~

1 ~~chapter for the injury or death of an employee shall have the right to~~  
2 ~~maintain an action in tort against any third party responsible for the injury~~  
3 ~~or death. However, the employer or the carrier must notify the claimant in~~  
4 ~~writing that the claimant has the right to hire a private attorney to pursue~~  
5 ~~any benefits to which the claimant is entitled in addition to the subrogation~~  
6 ~~interest against any third party responsible for the injury or death.~~

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

11 ~~(3)(A) After recovery shall be had against the third party, by~~  
12 ~~suit or otherwise, the compensation beneficiary shall be entitled to any~~  
13 ~~amount recovered over and above the amount that the employer and carrier have~~  
14 ~~paid or are liable for in compensation, after deducting reasonable costs of~~  
15 ~~collection.~~

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

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

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

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

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

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

36 (2) After reasonable notice and opportunity to be represented in

1 the action has been given to the employee or his or her dependents, the  
2 liability of the third-party to the employee or his or her dependents shall  
3 be determined in the action, as well as the third-party's liability to the  
4 employer or employer's insurance carrier.

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

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

10 (B) Any balance remaining after payment of necessary  
11 expenses and the satisfaction of the employer's or carrier's lien shall be  
12 paid to the employee and be applied as credit against any future compensation  
13 benefits for the same injury.

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

15 ~~(1) Settlement of claims under subsections (a) and (b) of this~~  
16 ~~section must have the approval of the court or of the commission, except that~~  
17 ~~the distribution of that portion of the settlement which represents the~~  
18 ~~compensation payable under this chapter must have the approval of the~~  
19 ~~commission.~~

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

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

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

31 (c)(1) The purpose and intent of this section is to prevent double  
32 recovery to the employee and to annul specifically any case law inconsistent  
33 with this subsection, including without limitation all case law interpreting  
34 the previous § 11-9-410, and Travelers Ins. Co. v. McCluskey, 252 Ark. 1045,  
35 483 S.W.2d 179 (1972); General Accident Ins. v. Jayne, 343 Ark. 143, 33  
36 S.W.3d 161 (2001) and Phillip Morris USA v. James 79 Ark. App. 72, 835 S.W.3d

1 441 (2002).

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

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

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

13  
 14 SECTION 2. Arkansas Code § 11-9-521(a) concerning compensation for  
 15 disability under the Workers' Compensation Law, is amended to read as  
 16 follows:

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

23 (1) *Arm amputated at the elbow, or between the elbow and*  
 24 *shoulder, ~~two hundred forty-four (244)~~ two hundred fifty-six (256) weeks;*

25 (2) *Arm amputated between the elbow and wrist, ~~eighty-three~~*  
 26 *~~(183)~~ one hundred ninety-two (192) weeks;*

27 (3) *Leg amputated at the knee, or between the knee and the hip,*  
 28 *~~one hundred eighty-four (184)~~ one hundred ninety-three (193) weeks;*

29 (4) *Leg amputated between the knee and the ankle, ~~one hundred~~*  
 30 *~~thirty-one (131)~~ one hundred thirty-eight (138) weeks;*

31 (5) *Hand amputated, ~~one hundred eighty-three (183)~~ one hundred*  
 32 *ninety-two (192) weeks;*

33 (6) *Thumb amputated, ~~seventy-three (73)~~ seventy-seven (77)*  
 34 *weeks;*

35 (7) *First finger amputated, ~~forty-three (43)~~ forty-five (45)*  
 36 *weeks;*

- 1                   (8) *Second finger amputated, ~~thirty-seven (37)~~ thirty-nine (39)*
- 2 *weeks;*
- 3                   (9) *Third finger amputated, ~~twenty-four (24)~~ twenty-five (25)*
- 4 *weeks;*
- 5                   (10) *Fourth finger amputated, ~~nineteen (19)~~ twenty (20) weeks;*
- 6                   (11) *Foot amputated, ~~one hundred thirty-one (131)~~ one hundred*
- 7 *thirty-eight (138) weeks;*
- 8                   (12) *Great toe amputated, ~~thirty-two (32)~~ thirty-four (34)*
- 9 *weeks;*
- 10                  (13) *Toe other than great toe amputated, ~~eleven (11)~~ twelve (12)*
- 11 *weeks;*
- 12                  (14) *Eye enucleated, in which there was useful vision, ~~one~~*
- 13 *~~hundred five (105)~~ one hundred ten (110) weeks;*
- 14                  (15) *Loss of hearing of one ear, ~~forty-two (42)~~ forty-four (44)*
- 15 *weeks;*
- 16                  (16) *Loss of hearing of both ears, ~~one hundred fifty-eight (158)~~*
- 17 *one hundred sixty-six weeks (166) weeks;*
- 18                  (17) *Loss of one testicle, ~~fifty-three (53)~~ fifty-six (56)*
- 19 *weeks; loss of both testicles, ~~one hundred fifty-eight (158)~~ one hundred*
- 20 *sixty-six (166) weeks.*

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/s/B. Pritchard