



**THE STATE CHAMBER OF OKLAHOMA**  
LEGISLATIVE ADVOCATES FOR BUSINESS

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**May 26, 2010**

**Overview of Workers' Compensation Reforms**

**Conference Committee Substitutes For**

**SB 1973 – Sen. Glenn Coffee & Rep. Dan Sullivan**

**HB 1611 – Rep. Dan Sullivan & Sen. Glenn Coffee**

**HB 2650 – Rep. Dan Sullivan & Sen. Anthony Sykes**

**HB 2652 – Rep. Dan Sullivan & Sen. Glenn Coffee**

**Estimate Total Saving of All Four Bills = \$60,500,000**

**(Note: This estimate is 1/2 of the estimate given by Bob Burke)**

**SB 1973 – Estimated Savings = \$5,000,000**

- Requires all proceedings of the Court en banc to be recorded by a court reporter of the Workers' Compensation Court; Requires any order which reverses a decision by a trial judge to contain specific findings to explain such reversal.
- Adds new specific authorities of the Supreme Court in workers' compensation cases:

“The Supreme Court may modify, reverse, remand for rehearing, or set aside the order or award upon any of the following grounds:

1. The Court acted without or in excess of its powers;
2. The order or award was contrary to law;
3. The order or award was procured by fraud; or
4. The order or award was against the clear weight of the evidence.”

- Adds (or increases) fees at the Workers' Compensation Court.

- The Administrator shall mail a notice to ~~a claimant~~ the injured worker within thirty (30) days of the filing of an ~~Employee's First Notice of Accidental Injury and Claim for Compensation~~ Employer's First Notice of Injury (Form 2). The notice shall advise the ~~claimant~~ injured worker of the availability of the services of ~~workers' compensation counselors~~ the Workers' Compensation Court's counselor program and ~~of the availability of~~ mediation to assist the ~~claimant in resolution of the claimant's claim, how to contact the counselor program~~ injured worker. The Administrator shall provide contact information for the Court's counselor program and all such additional information as the Administrator may determine necessary.
- At the time of a mediation, the claimant shall be in attendance unless all parties agree, and all parties shall be represented during the entire mediation by a person with full settlement authority to settle any issue of the claim. If a party does not have full settlement authority, the mediator shall report to the assigned Judge of the Workers' Compensation Court who may for good cause shown assess costs, attorney's fees, and sanctions.
- Tightens up the Administrator's powers regarding abusive medical practices mandating that in such circumstances, the Administrator "shall" (formerly "may") waive payment for medical services or evaluation for permanent impairment for a period not to exceed five years.

## **HB 1611 – Estimated Savings are not quantifiable**

- Requires workers' compensation claims adjusters to be licensed and annually complete six hours of continuing education relating to the Oklahoma Workers' Compensation Act as part of the required twenty-four hours of continuing education.

## **SB 2652 - Estimated Savings = \$2,500,000**

- Reduces the number of Workers' Compensation Court judges from ten to eight; requires five to be permanently assigned to Oklahoma City and three to Tulsa; states that the next two positions to become vacant after November 1, 2010 shall not be refilled; restricts judges to one eight-year term; allows a former judge to reapply after three years off the Court; requires current judges to go back through the Judicial Nominating Commission if they want to reapply; requires Senate confirmation on any Workers' Compensation judge; requires that any Workers' Compensation judge to have not less than five years of workers' compensation experience; requires legislative approval to ever close the Tulsa court.

## **SB 2650 - Estimated Total Savings = \$53,000,000**

### **Section 1. Definition Changes – Estimated Savings = \$8,500,000**

- 9. “Employee” adds new language in the portion of the definition excluding certain individuals: “Sole proprietors, members of a partnership, individuals who are party to a franchise agreement as set out by the Federal Trade Commission franchise disclosure rule, 16 CFR 436.1 et seq., members of a limited liability company who own at least ten percent (10%) of the capital of the limited liability company or any stockholder-employees of a corporation who own ten percent (10%) or more stock in the corporation are specifically excluded from the foregoing definition of “employee”, and shall not be deemed to be employees as respects the benefits of the Workers’ Compensation Act.”
- 16. “Major cause” means the predominate cause of the resulting injury or illness more than fifty percent (50%) of the resulting injury, disease or illness. A finding of major cause shall be established by a preponderance of the evidence. A finding that the workplace was not a major cause of the injury, disease 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;
- 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. Objective findings are those findings which cannot come under the voluntary control of the patient. When determining physical or anatomical impairment, neither a physician, any other medical provider, a judge of the Workers’ Compensation Court, nor the courts may consider complaints of pain. For the purpose of making physical or anatomical impairment ratings to the spine, physicians shall use criteria established by the AMA guides or modifications thereto as approved by the Legislature. 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. Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty;
- 26. “Continuing Maintenance Medical” means medical treatment that is reasonable and necessary to maintain claimant’s condition resulting from the compensable injury or illness after reaching maximum medical improvement. Continuing Maintenance Medical shall not include diagnostic tests, surgery, injections, counseling, physical therapy, or pain management devices or equipment, unless specifically authorized by the Workers’ Compensation Court in advance of such treatment;
- 27. “Surgery” does not include an injection, or the forcing of fluids beneath the skin, for treatment or diagnosis;

- 28. “Evidence-based” means expert-based, literature-supported and outcomes validated by well-designed randomized trials when such information is available and which uses the best available evidence to support medical decision making;
- 29. “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;
- 30. “Scientifically-based” involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to medical testing, diagnoses and treatment; is adequate to justify the general conclusions drawn; and has been accepted by a peer-review journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review;
- 31. “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; and
- 32. “State-developed” includes formalized treatment guidelines developed and adopted by state governments, or by the Workers’ Compensation Court upon recommendation of the Physician Advisory Committee.

**Section 2. Exempts injuries occurring outside employment – Estimated Cost Savings = \$500,000**

- “5. An injury which occurs outside the course of employment. Employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer or areas where essential job functions are not performed; provided, however, when the employee is instructed by the employer to perform a work-related task away from the employer's place of employment, the employee shall be deemed to be in the course of employment when the employee is engaged in the performance of job duties directly related to the task as instructed by the employer; including travel time that is solely related and necessary to the employee’s performance of the task. Travel by a policeman, fireman, or a member of a first aid or rescue squad, in responding to and returning from an emergency, shall be deemed to be in the course of employment.

### **Section 3. Clarifies exclusive remedy – Estimated Cost Savings = \$1,000,000**

- Section 12. The liability prescribed in Section 11 of this title shall be exclusive and in place of all other liability of the employer and any of his employees, any architect, professional engineer, or land surveyor retained to perform professional services on a construction project, at common law or otherwise, for such injury, loss of services, or death, to the employee, or the spouse, personal representative, parents, or dependents of the employee, or any other person, except in the case of an intentional tort, or where the employer has failed to secure the payment of compensation for the injured employee as provided for in Section 61 of this title. An intentional tort shall exist only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury. Allegations or proof that the employer had knowledge that such injury was substantially certain to result from its conduct shall not constitute an intentional tort. The issue of whether an act is an intentional tort shall be a question of law for the court. If an employer has failed to secure the payment of compensation for his injured employee, as provided for in Section 61 of this title, an injured employee, or his legal representatives if death results from the injury, may maintain an action in the courts for damages on account of such injury, and in such action the defendant may not plead or prove as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee; provided...
- (v) If, as provided in this section, the employer has failed to secure the payment of compensation as provided for in Section 61 of this title or in case of an intentional tort, the injured employee or his legal representative may maintain an action either in the Workers' Compensation Court or in the courts, but not both.

### **Section 4. Changes how "light duty" is to be determined – Estimated Cost Savings = \$1,000,000**

- 2. The treating physician who renders treatment to the employee at any time shall promptly notify the employee and employer or the employer's insurer in writing after the employee has reached maximum medical improvement and is released from active medical care. If the employee is capable of returning to modified light duty work, the treating physician shall promptly notify the employee and the employer or the employer's insurer thereof in writing ~~and shall also specify what restrictions, if any, must be followed by the employer in order to return the employee to work. In the event the treating physician provides such notification to the employer's insurer, the insurer shall promptly notify the employer.~~ If an injured employee, only partially disabled, refuses employment consistent with any restrictions ordered by the treating physician, the employee shall not be entitled to temporary benefits during the continuance of such refusal unless in

~~the opinion of the treating physician such refusal was justifiable~~ In the event that the treating physician releases a claimant for light duty work and provides written restrictions from normal work duties, and the employer makes a good faith offer in writing to provide a light duty position at the same rate of pay that the claimant was receiving at the time of the injury, and the claimant refuses to accept the light duty assignment, the claimant is not entitled to temporary total disability;

- **Adds a new section dealing with Continuing Medical Maintenance – Estimated Cost Savings = \$15,000,000**
  - J. Unless recommended by the treating doctor at the time claimant reaches maximum medical improvement, Continuing Maintenance Medical shall not be awarded by the Workers’ Compensation Court unless there is clear and convincing evidence to the contrary. At any time, a judge, upon his own motion or at the request of any party, may appoint an Independent Medical Examiner to determine the nature and extent of Continuing Maintenance Medical.

**Section 5. Schedule of compensation changes – Estimated Cost Savings = \$17,000,000**

- Permanent Total Disability. In case of total disability adjudged to be permanent, seventy percent (70%) of the employee’s average weekly wages shall be paid to the employee during the continuance of such total the disability until such time as the employee reaches the age of one hundred percent (100%) Social Security retirement or for a period of fifteen (15) years, whichever is longer. In the event the claimant dies of causes unrelated to the injury or illness, any person entitled under provisions of this title to revive the action shall receive benefits only until the date the claimant’s benefits would have terminated had the claimant lived. In the event the Court awards both permanent partial disability and permanent total disability benefits, the permanent total disability award shall not be due until the permanent partial disability award is paid in full.
- **Permanent Partial Disability. (NOTE: While this section is long, it is basically a restatement of existing workers’ compensation law dealing with PPD. New language has been highlighted in blue.)**
  - (e) With respect to injuries occurring on or after the effective date of this act, in case of disability, partial in character but permanent in quality, the compensation shall be seventy percent (70%) of the employee's average weekly wages, with a minimum of One Hundred Fifty Dollars (\$150.00) per week, but not to exceed Three Hundred Twenty Three Dollars (\$323.00) per week, paid to the employee for the period prescribed by the following schedule; provided, however, after a period of five (5) years from the effective date of this act, the payment for permanent partial disability shall be seventy

percent (70%) of the employee's average weekly wages, but not to exceed fifty percent (50%) of the state's average weekly wage:

Thumb: For the loss of thumb, sixty-six (66) weeks.

First Finger: For the loss of the first finger, commonly called the index finger, thirty-nine (39) weeks.

Second Finger: For the loss of a second finger, thirty-three (33) weeks.

Third Finger: For the loss of a third finger, twenty-two (22) weeks.

Fourth Finger: For the loss of a fourth finger, commonly called the little finger, seventeen (17) weeks.

Phalange of Thumb or Finger: The loss of the first phalange of the thumb or finger shall be considered equal to the loss of one-half (1/2) of such thumb or finger, and compensation shall be one-half (1/2) of the amount above specified; the loss of more than one phalange shall be considered as the loss of the entire thumb or finger; provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

Great Toe: For the loss of a great toe, thirty-three (33) weeks.

Other Toes: For the loss of one of the toes other than the great toe, eleven (11) weeks.

Phalange of Toe: The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half (1/2) of the amount specified.

The loss of more than one phalange shall be considered as the loss of the entire toe.

Hand: For the loss of a hand, two hundred twenty (220) weeks.

Arm: For the loss of an arm, two hundred seventy-five (275) weeks.

Foot: For the loss of a foot, two hundred twenty (220) weeks.

Leg: For the loss of a leg, two hundred seventy-five (275) weeks.

Eye: For the loss of an eye, two hundred seventy-five (275) weeks.

Deafness: Deafness from industrial cause, including occupations which are hazardous to hearing, accident or sudden trauma, three hundred thirty (330) weeks, and total deafness of one ear from industrial cause, including occupations which are hazardous to hearing, accident or sudden trauma, one hundred ten (110) weeks. Except as otherwise provided herein, any examining physician shall only evaluate deafness or hearing 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. 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 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 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 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 such guides or any alternative thereof 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 in Section 201.1 of this title. The guides or modifications thereto or alternative system or method of evaluating permanent impairment or modifications thereto shall be the exclusive basis for testimony and conclusions with regard to deafness or hearing impairment.

Loss of Use: Permanent loss of use of a thumb, finger, toe, arm, hand, foot, leg or eye shall be considered as the equivalent of the loss of such thumb, finger, toe, hand, arm, foot, leg or eye.

For the permanent partial loss of use of a member, loss of hearing or sight of an eye, seventy percent (70%) of the employee's average weekly wage

during that portion of the number of weeks in the foregoing schedule provided for the loss of such member or sight of an eye which the partial loss of use thereof bears to the total loss of use of such member, loss of hearing or sight of an eye.

Amputations: Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand. Amputation between the knee and the ankle shall be considered as the loss of a foot. Amputation at or above the elbow shall be considered as the loss of an arm. Amputation at or above the knee shall be considered as the loss of a leg.

The compensation for the foregoing specific injuries shall be in lieu of all other compensation except the benefits provided in Section 14 of this title and Section 16 of this title.

In case of an injury resulting in serious and permanent disfigurement, compensation shall be payable in an amount to be determined by the Court, but not in excess of Twenty Thousand Dollars (\$20,000.00) for an injury occurring before November 1, 2005, and not in excess of Fifty Thousand Dollars (\$50,000.00) for an injury occurring on or after November 1, 2005; provided, that compensation for permanent disfigurement shall not be in addition to the other compensation provided for in this section but shall be taken into consideration in fixing the compensation otherwise provided. [An award for permanent disfigurement shall not be made to a part of the body for which permanent partial disability is awarded.](#)

Hernia: In case of an injury resulting in hernia, temporary total compensation for six (6) weeks, and all necessary medical costs including, but not limited to, the cost of an operation shall be payable. A claimant who has had surgery for a hernia may petition the court for one extension of temporary total compensation and the court may order such an extension, not to exceed six (6) additional weeks, if the treating physician indicates such an extension is appropriate, or as agreed to by all parties.

Soft Tissue Injury: In case of a nonsurgical soft tissue injury, [in which the employer has promptly provided medical care](#), temporary total compensation shall not exceed eight (8) weeks. [A claimant who has been recommended by a treating physician for one or more injections may petition the Court for one extension of temporary total compensation and the court may order such an extension, not to exceed eight \(8\) additional weeks.](#) A claimant who has been recommended by a treating physician for surgery for a soft tissue injury may petition the Court for one extension of temporary total compensation and the court may order such an extension, not to exceed sixteen (16) additional weeks, if the treating physician indicates that such an extension is appropriate or as agreed to by all parties. [In the event the surgery is not performed within One Hundred Twenty \(120\) days of the approval of the surgery by the employer or employer's insurance carrier or an order of the Court authorizing such surgery, the benefits for the extension period shall be terminated by the Court, unless the Court finds the delay was beyond the control of the claimant. In the event](#)

surgery is performed, the period of temporary total disability is subject to the limitations established by paragraph 2 of this section.

For purposes of this section, "soft tissue injury" means damage to one or more of the tissues that surround bones and joints. "Soft tissue injury" includes, but is not limited to: sprains, strains, contusions, tendonitis, and muscle tears. Cumulative trauma is to be considered a soft tissue injury. "Soft tissue injury" does not include any of the following:

(1) Injury to or disease of the spine, spinal disks, spinal nerves or spinal cord, where corrective surgery is performed;

(2) Brain or closed-head injury as evidenced by:

a. sensory or motor disturbances,

b. communication disturbances,

c. complex integrated disturbances of cerebral function,

d. episodic neurological disorders, or

e. other brain and closed-head injury conditions at least as severe in nature as any condition provided in subdivisions a through d of this division; or

(3) Any joint replacement. (NOTE: This was "total knee replacement")

In all cases of soft tissue injury, the employee shall only be entitled to appropriate and necessary medical care and temporary total disability as set out in paragraph 2 of this section, unless there is objective medical evidence of a permanent anatomical abnormality. In determining the existence of such an abnormality, the Court may consider if there is credible medical evidence that the ability of the employee to earn wages at the same level as before the injury has been permanently impaired.

Other Cases: In all other classes of disabilities, excluding only those heretofore referred to in this paragraph, which disabilities result in loss of use of any portion of an employee's body, and which disabilities are partial in character but permanent in quality, disability shall mean the percentage of permanent impairment. The compensation ordered paid shall be seventy percent (70%) of the employee's average weekly wage for the number of weeks which the partial disability of the employee bears to five hundred (500) weeks. No permanent disability shall be awarded unless there is objective medical evidence, as defined in Section 3 of this title, of a permanent anatomical abnormality. In determining the existence of such an abnormality, the Court may consider if there is credible medical evidence that the ability of the employee to earn wages at the same level as before the injury has been permanently impaired.

## **Section 6. Physician Advisory Committee – Estimated Cost Savings = \$10,000,000**

- Increases the power of the Physician Advisory Committee:
  - B. The Committee shall:  
Assist and advise the Administrator of the Workers' Compensation Court regarding utilization review as it relates to the medical practice and treatment

of work-related injuries. Such utilization review shall include a review of reasonable and necessary treatment; abusive practices; needless treatments, testing, or procedures; or a pattern of billing in excess of or in violation of the Schedule of Medical Fees. The Physician Advisory Committee shall review and make findings and recommendations to the Administrator of the Workers' Compensation Court with respect to charges of inappropriate or unnecessary treatment or procedures, abusive practices, or excessive billing disclosed through utilization review. The guidelines shall be designed to assist providers by offering an analytical framework for the evaluation and treatment of injured workers.

The Workers' Compensation Court shall be bound by the findings and recommendations of the Physician Advisory Committee in regard to reasonable and necessary medical treatment, duration of treatment, continuing medical maintenance, and development of a formulary for the use of prescription medicines, unless there is clear and convincing evidence to the contrary. Any order for medical care not consistent with findings and recommendations of the Physician Advisory Committee shall contain specific findings to support the deviation from said findings and recommendations;

(mds/5-26-10)