

SENATE No. 694

The Commonwealth of Massachusetts

PRESENTED BY:

Thomas M. McGee

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act relative to worker's compensation.

PETITION OF:

NAME:

Thomas M. McGee

DISTRICT/ADDRESS:

Third Essex and Middlesex

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. S01076 OF 2007-2008.]

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT RELATIVE TO WORKER'S COMPENSATION.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

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

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

25 SECTION 2. Section 1(7A) of said chapter 152, as so appearing, is hereby amended as
26 follows:— “Personal injury” includes infectious or contagious diseases if the nature of the
27 employment is such that the hazard of contracting such diseases by an employee is inherent in
28 the employment. “Personal injury” shall not include any injury resulting from an employees’
29 purely voluntary participation in any recreational activity, including but not limited to athletic
30 events, parties, and picnics, even though the employer pays some or all of the costs thereof.
31 Personal injuries shall include mental or emotional disabilities only where a significant
32 contributing cause of such disability in an event or series of events occurring within any
33 employment. If a compensable injury or disease combines with a pre-existing condition which
34 resulted from an injury or disease not compensable under this chapter, to cause or prolong
35 disability or a need for treatment, the resultant condition shall be compensable only to the extent
36 such compensable injury or disease remains a major but not necessarily predominant cause of

37 disability or need for treatment. No mental or emotional disability arising principally out of a
38 bona fide, personnel action including a transfer, promotion, demotion, or termination except such
39 action which is the intentional infliction of emotional harm shall be deemed to be a personal
40 injury within the meaning of this chapter.

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

58 SECTION 4. Section 7(2) of said chapter 152, as so appearing, is hereby amended as
59 follows:— If an insurer fails to commence such payment or make such notification within
60 fourteen days, it shall pay to the employee a penalty in an amount equal to two hundred dollars
61 or his compensation rate as calculated under section 34 of this chapter, whichever is higher. If an
62 insurer fails to commence such payment or make such notification within sixty days, it shall pay
63 an additional penalty to the department of one thousand dollars into the special fund created
64 pursuant to section sixty-five, and one thousand dollars to the employee. Provided, however, that
65 such additional penalty shall be ten thousand dollars if said payment is not commenced and such
66 notice not made within ninety days. Penalties under this section may be waived if an
67 administrative judge finds that the failure to comply with the requirements herein set forth was
68 due to events beyond the control of the insurer or its agents. No additional penalties shall be
69 levied for continuing violations under this section, but the insurer shall be allowed no defenses
70 against any initial claim for weekly benefits until any penalty owed under this section has been
71 paid. No amount paid as a penalty under this section shall be included in any formula utilized to
72 establish premium rates for workers' compensation insurance. An insurer's inability to defend on
73 any issue shall not relieve an employee of the burden of proving each element of any case.

74 SECTION 5. Section 8 of said chapter 152, as so appearing, is hereby amended as
75 follows:— (1) An insurer which makes timely payments pursuant to subsection one of section
76 seven, may make such payments for a period of ninety calendar days from the commencement of
77 disability without affecting its right to contest any issue arising under this chapter. An insurer
78 may terminate or modify payments at any time within such ninety day period without penalty if
79 such change is based on the actual income of the employee or if it gives the employee and the
80 division of administration at least seven day written notice of its intent to stop or modify

81 payments and contest any claim filed. The notice shall specify the grounds and factual basis for
82 stopping or modifying payment of benefits and the insurer's intention to contest any issue and
83 shall state that in order to secure additional benefits the employee shall file a claim with the
84 department and insurer within any time limits provided by this chapter.

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

100 SECTION 7. Section 8(6) of said chapter 152, as so appearing, is hereby amended as
101 follows:—(6) Any ninety day payment without prejudice period herein provided may be
102 extended in ninety day increments not to exceed one year by agreement of the parties provided

103 that:

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

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

107 SECTION 8. Section 13A(5) of said chapter 152, as so appearing, is hereby amended as
108 follows:— Whenever an insurer files a complaint or contests a claim for benefits and then either
109 (i) accepts the employee's claim or withdraws its own complaint within ten days of the date set
110 for a hearing pursuant to section eleven; or (ii) the employee prevails at such hearing the insurer
111 shall pay a fee to the employee's attorney in an amount equal to three thousand, five hundred
112 dollars plus necessary expenses. An administrative judge may increase or decrease such fee
113 based on the complexity of the dispute or the effort expended by the attorney.

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

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

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

146 SECTION 12. Section 31, paragraph two, of said chapter 152, as so appearing, is hereby
147 amended as follows:—To the widow or widower, so long as he or she remains unmarried, a
148 weekly compensation equal to two-thirds of the average weekly wages of the deceased
149 employee, but not more than the average weekly wage of the commonwealth, as determined
150 according to the provisions of subsection (a) of section twenty-nine of chapter one hundred and
151 fifty-one A, and promulgated by the commissioner of the department of employment and training
152 on or before October first preceding the deceased employee's injury or death; provided,
153 however, that in no instance shall said widow or widower, receive less than two hundred dollars
154 per week, to the widow or widower twelve dollars more a week for each child of the deceased
155 employee under the age of eighteen or over said age and physically or mentally incapacitated
156 from earning, or over said age and a full time student qualified for exemption as a dependent
157 under section one hundred and fifty-one (e) of the Internal Revenue Code, except that no
158 additional compensation for the benefits of the children of the employee shall be payable when
159 combined with the compensation due the spouse of the deceased employee as hereinbefore
160 provided in this section would allow the widow or widower an amount in excess of two hundred
161 fifty dollars per week; provided that in case any child of the deceased employee is a child by a
162 former wife or husband, the death benefit shall be divided between the surviving wife or husband
163 and all dependent children of the deceased employee in equal shares, the surviving wife or
164 husband taking the same share as the child. If the widow or widower dies or if there is no
165 surviving wife or husband of the deceased employee, such amount or amounts as would have
166 been payable to or for his or her own use and for the benefit of all the children of the employee
167 shall be paid in equal shares to all the surviving children of the employee.

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

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

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

184 SECTION 16. Section 34B, paragraph one of said chapter 152, as so appearing, is hereby
185 amended as follows:— October first of each year shall be the review date for the purposes of this
186 section. Any person receiving or entitled to receive benefits under the provisions of section
187 thirty-one, section thirty-four, section thirty four A, or section thirty-five, whose benefits are
188 based on a date of personal injury at least twenty-four months prior to the review date shall have
189 his weekly benefit adjusted, without application, in accordance with the following provisions;

190 provided, however, that no increase in benefits shall be payable which reduce any benefits the
191 recipient is receiving pursuant to federal social security law.

192 SECTION 17. Section 34B, paragraph (b) of said chapter 152, as so appearing, is hereby
193 amended as follows:— The death benefit under section thirty-one, or the temporary total
194 disability benefit under section thirty-four, or the partial disability benefit under section thirty-
195 five, or the total disability benefit under section thirty-four A that was being paid prior to any
196 adjustments under this section shall be the base benefit. The base benefit shall be changed on
197 each review date by the percentage as calculated in paragraph (a); the resulting amount shall be
198 termed the adjusted benefit and is the amount of benefit to be paid on and after the review date.
199 If the adjusted benefit is larger than the base benefit, the difference shall be termed the
200 supplemental benefit. In no instance shall the adjusted benefit under this section be greater than
201 three times the base benefit.

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

208 SECTION 19. Section 35, paragraph two of said chapter 152, as so appearing, is hereby
209 amended as follows:— The total number of weeks of compensation due the employee under this
210 section shall not exceed four hundred forty-two; provided, however, that this number may be
211 extended if an insurer agrees or an administrative judge finds that the employee has, as a result of

212 a personal injury under this chapter, suffered a permanent loss of seventy-five percent or more of
213 any bodily function or sense, including but not limited to those specified in paragraph (a), (b),
214 (e), (f), (g), or (h) of subsection (1) of section thirty-six, developed a permanently life-
215 threatening physical nature and cause. Where applicable, losses under this section shall be
216 determined in accordance with standards set forth in the American Medical Association Guides
217 to the Evaluation of Permanent Impairments. Where the insurer agrees or the administrative
218 judge finds such permanent partial disability as is described in this paragraph, the total number of
219 weeks the employee may receive benefits under this section is left to the discretion of the
220 administrative judge.

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

231 SECTION 21. Section 35D(5) of said chapter 152, as so appearing, is hereby amended as
232 follows:— Implementation of this section is subject to the procedures contained in section eight.
233 For the purposes of this chapter, a suitable job or employment shall be any job that the employee

234 is physically and mentally capable of performing, including light work, considering the nature
235 and severity of the employee's injury, so long as such job bears a reasonable relationship to the
236 employee's work experience, education, or training either before or after the employee's injury.
237 The fact that an employee has enrolled or is participating in a vocational rehabilitation program,
238 whether or not it is paid for by the insurer or the department, shall not be used to support the
239 contention that the employee's compensation rate should be decreased in any proceeding under
240 this chapter.

241 SECTION 22. Chapter 152 is hereby further amended by striking out section 35E, as so
242 appearing, and inserting in place thereof the following section:— Any person receiving old age
243 benefits pursuant to federal social security law or receiving pension benefits paid in part or
244 entirely by an employer shall not be entitled to benefits under section thirty-five, unless such
245 employee can establish that but for the injury, such employee would have remained active in the
246 labor market. Claims for compensation, or complaint for modification, or discontinuance of
247 benefits based on this section shall not be filed more often than once every twelve months.

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

252 SECTION 24. Section 50 of said chapter 152, as so appearing, is hereby amended as
253 follows:— Whenever payments of any kind are not made within sixty days of being claimed by
254 an employee, dependent or other party, and an order or decision requires that such payments be
255 made, interest at the rate of twelve percent per annum of all sums due from the date of the receipt

256 of the notice of the claim by the department to the date of payment shall be required by such
257 order or decision. Whenever such sums include weekly payments, interest shall be computed on
258 each unpaid weekly payment.