

1 SB77  
2 134727-1  
3 By Senator Orr  
4 RFD: Business and Labor  
5 First Read: 07-FEB-12  
6 PFD: 12/09/2011

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8 SYNOPSIS: This bill would revise portions of the  
9 workers' compensation law to limit the use of  
10 evidence of pain complaints by a trial court, to  
11 limit an employer's liability for permanent total  
12 disability benefits after the sixty-fifth birthday  
13 of the employee, to increase the maximum weekly  
14 compensation payable for permanent partial  
15 disability from \$220 to \$240, to limit the  
16 obligation of an employer to pay medical benefits  
17 if an employee does not seek medical attention for  
18 a claimed work injury within a certain time period,  
19 and to provide for the weighing of evidence on both  
20 sides of the issue before the pure findings of fact  
21 of the circuit court may be reversed.

22  
23 A BILL  
24 TO BE ENTITLED  
25 AN ACT  
26

1           To amend Sections 25-5-57, 25-5-68, 25-5-77, and  
2           25-5-81, Code of Alabama 1975, relating to workers'  
3           compensation; to limit the use of evidence of pain complaints  
4           by a trial court; to limit an employer's liability for  
5           permanent total disability benefits after an employee reaches  
6           the age of 65; to increase the maximum weekly compensation  
7           payable for permanent partial disability from \$220 to \$240; to  
8           limit the obligation of an employer to pay the medical  
9           benefits of an employee who does not promptly seek medical  
10          attention for a claimed work injury; and to provide further  
11          for the weighing of evidence before pure findings of fact of  
12          the circuit court may be reversed.

13       BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

14               Section 1. Sections 25-5-57, 25-5-68, 25-5-77, and  
15               25-5-81 of the Code of Alabama 1975, are amended to read as  
16               follows:

17               "§25-5-57.

18               "(a) Compensation schedule. Following is the  
19               schedule of compensation:

20               "(1) TEMPORARY TOTAL DISABILITY. For injury  
21               producing temporary total disability, the compensation shall  
22               be 66 2/3 percent of the average weekly earnings received at  
23               the time of injury, subject to a maximum and minimum weekly  
24               compensation as stated in Section 25-5-68, but if at the time  
25               of injury the employee received average weekly earnings of  
26               less than the minimum stated in Section 25-5-68, then he or  
27               she shall receive the full amount of the average weekly

1 earnings per week. This compensation shall be paid during the  
2 time of the disability, but at the time as a temporary total  
3 disability shall become permanent, compensation for the  
4 continued total disability shall be governed by (a) (4) of this  
5 section with respect to permanent total disability. Payments  
6 are to be made at the intervals when the earnings were  
7 payable, as nearly as may be, unless the parties otherwise  
8 agree.

9 "(2) TEMPORARY PARTIAL DISABILITY.

10 "a. Amount and Duration of Compensation. For  
11 temporary partial disability, the compensation shall be  $66 \frac{2}{3}$   
12 percent of the difference between the average weekly earnings  
13 of the worker at the time of the injury and the average weekly  
14 earnings he or she is able to earn in his or her partially  
15 disabled condition. This compensation shall be paid during the  
16 period of the disability, but not beyond 300 weeks. Payments  
17 shall be made at the intervals when the earnings were payable,  
18 as nearly as may be, unless the parties otherwise agree, and  
19 shall be subject to the same maximum weekly compensation as  
20 stated in Section 25-5-68.

21 "b. Effect of Change in Employment. If the injured  
22 employee who is receiving compensation for temporary partial  
23 disability leaves the employment of the employer by whom he or  
24 she was employed at the time of the accident for which the  
25 compensation is being paid, he or she shall, upon securing  
26 employment elsewhere, give to the former employer an affidavit  
27 in writing containing the name of his or her new employer, the

1 place of employment, and the amount of wages being received at  
2 the new employment, and until he or she gives the affidavit,  
3 the compensation for temporary partial disability shall cease.  
4 The employer for whom the employee was employed at the time of  
5 the accident for which the compensation is being paid may also  
6 at any time demand of the employee an additional affidavit, in  
7 writing, containing the name of his or her employer, the place  
8 of his or her employment, and the amount of wages he or she is  
9 receiving; and if the employee upon demand fails or refuses to  
10 make and furnish the affidavit, his or her right to  
11 compensation for temporary partial disability shall cease  
12 until the affidavit is made and furnished.

13 "(3) PERMANENT PARTIAL DISABILITY.

14 "a. Amount and Duration of Compensation. For  
15 permanent partial disability, the compensation shall be based  
16 upon the extent of the disability. In cases included in the  
17 following schedule, the compensation shall be 66 2/3 percent  
18 of the average weekly earnings, during the number of weeks set  
19 out in the following schedule:

20 "1. For the loss of a thumb, 62 weeks.

21 "2. For the loss of a first finger, commonly called  
22 the index finger, 43 weeks.

23 "3. For the loss of a second finger, 31 weeks.

24 "4. For the loss of a third finger, 22 weeks.

25 "5. For the loss of a fourth finger, commonly called  
26 the little finger, 16 weeks.

1           "6. The loss of the first phalange of the thumb or  
2 of any finger shall be considered as equal to the loss of one  
3 half of the thumb or finger, and compensation shall be paid at  
4 the prescribed rate during one half of the time specified  
5 above for the thumb or finger.

6           "7. The loss of two or more phalanges shall be  
7 considered as the loss of the entire finger or thumb, but in  
8 no case shall the amount received for more than one finger  
9 exceed the amount provided in this schedule for the loss of a  
10 hand.

11           "8. For the loss of a great toe, 32 weeks.

12           "9. For the loss of any of the toes other than the  
13 great toe, 11 weeks.

14           "10. The loss of the first phalange of any toe shall  
15 be considered to be equal to the loss of one half of the toe,  
16 and compensation shall be paid at the prescribed rate during  
17 one half the time prescribed above for the toe.

18           "11. The loss of two or more phalanges shall be  
19 considered as the loss of an entire toe.

20           "12. For the loss of a hand, 170 weeks.

21           "13. For the loss of an arm, 222 weeks.

22           "14. For the loss of a foot, 139 weeks.

23           "15. Amputation between the elbow and wrist shall be  
24 considered as the equivalent to the loss of a hand, and  
25 amputation between the knee and ankle shall be considered as  
26 the equivalent of the loss of a foot.

27           "16. For the loss of a leg, 200 weeks.

1               "17. For the loss of an eye, 124 weeks.

2               "18. For the complete and permanent loss of hearing  
3 in both ears, 163 weeks.

4               "19. For the complete and permanent loss of hearing  
5 in one ear, 53 weeks.

6               "20. For the loss of an eye and a leg, 350 weeks.

7               "21. For the loss of an eye and one arm, 350 weeks.

8               "22. For the loss of an eye and a hand, 325 weeks.

9               "23. For the loss of an eye and a foot, 300 weeks.

10              "24. For the loss of two arms, other than at the  
11 shoulder, 400 weeks.

12              "25. For the loss of two hands, 400 weeks.

13              "26. For the loss of two legs, 400 weeks.

14              "27. For the loss of two feet, 400 weeks.

15              "28. For the loss of one arm and the other hand, 400  
16 weeks.

17              "29. For the loss of one hand and one foot, 400  
18 weeks.

19              "30. For the loss of one leg and the other foot, 400  
20 weeks.

21              "31. For the loss of one hand and one leg, 400  
22 weeks.

23              "32. For the loss of one arm and one foot, 400  
24 weeks.

25              "33. For the loss of one arm and one leg, 400 weeks.

26              "34. For serious disfigurement, not resulting from  
27 the loss of a member or other injury specifically compensated,

1 materially affecting the employability of the injured person  
2 in the employment in which he or she was injured or other  
3 employment for which he or she is then qualified, 66 2/3  
4 percent of the average weekly earnings for the period as the  
5 court may determine, but not exceeding 100 weeks.

6 "b. Successive or Concurrent Temporary Total and  
7 Permanent Partial Disabilities Resulting from Same Injury.  
8 When a permanent partial disability, the number of weeks  
9 compensation for which is scheduled in subdivision (a) (3) of  
10 this section, follows or accompanies a period of temporary  
11 total disability resulting from the same injury, the number of  
12 weeks of the temporary total disability shall not be deducted  
13 from the number of weeks payable for the permanent partial  
14 disability.

15 "c. Concurrent Disabilities. If an employee sustains  
16 concurrent injuries resulting in concurrent disabilities, he  
17 or she shall receive compensation only for the injury which  
18 entitled him or her to the largest amount of compensation, but  
19 this paragraph shall not affect liability for the concurrent  
20 loss of more than one member for which members compensation is  
21 provided in the specific schedule.

22 "d. Loss of Use of Member. The permanent and total  
23 loss of the use of a member shall be considered as equivalent  
24 to the loss of that member, but in such cases the compensation  
25 specified in the schedule for such injury shall be in lieu of  
26 all other compensation, except as otherwise provided herein.  
27 For permanent disability due to injury to a member resulting



1 in less than total loss of use of the member not otherwise  
2 compensated in this schedule, compensation shall be paid at  
3 the prescribed rate during that part of the time specified in  
4 the schedule for the total loss or total loss of use of the  
5 respective member which the extent of the injury to the member  
6 bears to its total loss.

7 "e. Effect of Refusal of Suitable Employment. If an  
8 injured employee refuses employment suitable to his or her  
9 capacity offered to or procured for him or her, he or she  
10 shall not be entitled to any compensation at any time during  
11 the continuance of the refusal, unless at any time, in the  
12 opinion of the judge of the circuit court of the county of his  
13 or her residence, the refusal is justifiable.

14 "f. Maximum and Minimum Compensation Awards.  
15 Compensation provided in this subsection (a) for loss of  
16 members or loss of use of members is subject to the same  
17 limitations as to maximum and minimum weekly compensation as  
18 stated in Section 25-5-68.

19 "g. Compensation for Permanent Partial Disabilities  
20 Not Enumerated. For all other permanent partial disabilities  
21 not above enumerated, the compensation shall be 66 2/3 percent  
22 of the difference between the average weekly earnings of the  
23 worker at the time of the injury and the average weekly  
24 earnings he or she is able to earn in his or her partially  
25 disabled condition, subject to the same maximum weekly  
26 compensation as stated in Section 25-5-68. If a permanent  
27 partial disability, compensation for which is not calculated

1 by use of the schedule in subdivision (a) (3) of this section,  
2 follows a period of temporary total disability resulting from  
3 the same injury, the number of weeks of the temporary total  
4 disability shall be deducted from the number of weeks payable  
5 for the permanent partial disability. Compensation shall  
6 continue during disability, but not beyond 300 weeks.

7 "h. Affidavit of New Employment. If the injured  
8 employee leaves the services of the employer for whom he or  
9 she was working at the time of the accident and accepts  
10 employment elsewhere, he or she shall make and furnish  
11 affidavit as to his or her new employment in the manner as  
12 required in (a) (2) of this section.

13 "i. Return to Work. If, on or after the date of  
14 maximum medical improvement, except for scheduled injuries as  
15 provided in Section 25-5-57(a) (3), an injured worker returns  
16 to work at a wage equal to or greater than the worker's  
17 pre-injury wage, the worker's permanent partial disability  
18 rating shall be equal to his or her physical impairment and  
19 the court shall not consider any evidence of vocational  
20 disability. Notwithstanding the foregoing, if the employee has  
21 lost his or her employment under circumstances other than any  
22 of the following within a period of time not to exceed 300  
23 weeks from the date of injury, an employee may petition a  
24 court within two years thereof for reconsideration of his or  
25 her permanent partial disability rating:

26 "(i) The loss of employment is due to a labor  
27 dispute still in active progress in the establishment in which

1 he or she is or was last employed. For the purposes of this  
2 section only, the term "labor dispute" includes any  
3 controversy concerning terms, tenure, or conditions of  
4 employment, or concerning the association or representation of  
5 persons in negotiating, fixing, maintaining, changing, or  
6 seeking to arrange terms or conditions of employment,  
7 regardless of whether the disputants stand in the proximate  
8 relation of employer and employee. This definition shall not  
9 relate to a dispute between an individual worker and his or  
10 her employer.

11 "(ii) The loss of employment is voluntary, without  
12 good cause connected with such work.

13 "(iii) The loss of employment is for a dishonest or  
14 criminal act committed in connection with his or her work, for  
15 sabotage, or an act endangering the safety of others.

16 "(iv) The loss of employment is for actual or  
17 threatened misconduct committed in connection with his or her  
18 work after previous warning to the employee.

19 "(v) The loss of employment is because a license,  
20 certificate, permit, bond, or surety which is necessary for  
21 the performance of such employment and which he or she is  
22 responsible to supply has been revoked, suspended, or  
23 otherwise become lost to him or her for a cause.

24 "The burden of proof is on the employer to prove, by  
25 clear and convincing evidence, that an employee's loss of  
26 employment was due to one of the causes (i) through (v) above.  
27 At the hearing, the court may consider evidence as to the

1 earnings the employee is or may be able to earn in his or her  
2 partially disabled condition, and may consider any evidence of  
3 vocational disability. The fact the employee had returned to  
4 work prior to his or her loss of employment shall not  
5 constitute a presumption of no vocational impairment. In  
6 making this evaluation, the court shall consider the permanent  
7 restriction, if any, imposed by the treating physician under  
8 Section 25-5-77, as well as all available reasonable  
9 accommodations that would enable the employee in his or her  
10 condition following the accident or onset of occupational  
11 disease to perform jobs that he or she in that condition  
12 otherwise would be unable to perform, and shall treat an  
13 employee able to perform with such accommodation as though he  
14 or she could perform without the accommodation. Nothing  
15 contained in this section shall be construed as having any  
16 effect upon any evidentiary issues or claims made in third  
17 party actions pursuant to Section 25-5-11.

18 "j. In the event of an injury to an enumerated  
19 member under paragraph a. of this subdivision, evidence of an  
20 employee's pain complaints that are limited to that member may  
21 not be relied upon by the trial court as the sole basis for an  
22 award of compensation benefits beyond those otherwise  
23 available for the loss, or loss of use, of that body part as  
24 provided under paragraph a. or d. of this subdivision.

25 "(4) PERMANENT TOTAL DISABILITY.

26 "a. Amount, Duration, and Payment of Compensation.  
27 For permanent total disability, as defined in paragraph d. of

1 this subdivision, the employee shall receive 66 2/3 percent of  
2 the average weekly earnings received at the time of the  
3 injury, subject to a maximum and minimum weekly compensation  
4 as stated in Section 25-5-68. Notwithstanding the foregoing,  
5 if at the time of injury the employee was receiving earnings  
6 of less than the minimum as stated in Section 25-5-68, then he  
7 or she shall receive the full amount of his or her earnings  
8 per week. This compensation shall be paid during the permanent  
9 total disability, as defined in paragraph d. of this  
10 subdivision. Payment of the compensation shall be made at the  
11 intervals when the earnings were payable, as nearly as may be,  
12 unless the parties otherwise agree. The payments, with the  
13 approval of the circuit judge or by the agreement of the  
14 parties, may be made monthly, quarterly, or otherwise as the  
15 parties may agree. Payments for permanent total disability  
16 shall not be ordered to be paid in a lump sum without the  
17 consent of both the employer and the employee. Notwithstanding  
18 the foregoing, the obligation of an employer to pay benefits  
19 based upon a permanent total disability shall continue during  
20 the permanent total disability of the employee, except that  
21 benefits based upon permanent total disability shall otherwise  
22 terminate upon either the date of the employee's sixty-fifth  
23 birthday or the date 500 weeks after the date of injury,  
24 whichever is longer.

25 "b. Alteration, Amendment, or Revision of  
26 Compensation. At any time, the employer may petition the court  
27 that awarded or approved compensation for permanent total

1 disability to alter, amend, or revise the award or approval of  
2 the compensation on the ground that as a result of physical or  
3 vocational rehabilitation, or otherwise, the disability from  
4 which the employee suffers is no longer a permanent total  
5 disability and, if the court is so satisfied after a hearing,  
6 it shall alter, amend, or revise the award accordingly. If  
7 compensation for permanent total disability is being paid  
8 pursuant to a written agreement between employer and employee  
9 without approval, the employer may make application to the  
10 court that would have had jurisdiction to award the  
11 compensation to the employee to alter, amend, or revise the  
12 agreement on such grounds. If an employee is receiving  
13 benefits for permanent total disability other than as a result  
14 of an award or a written agreement between the employer and  
15 employee and if the employer terminates the payment of the  
16 benefits, the employee may, within two years of the last  
17 payment, petition the court to reinstate the benefits and,  
18 upon a showing that the permanent total disability still  
19 exists, shall be entitled to have the benefits reinstated  
20 effective the date of the last payment.

21 "c. Employees in Public Institutions. In case an  
22 employee who is permanently and totally disabled becomes an  
23 inmate of a public institution, no compensation shall be  
24 payable unless the employee has wholly dependent on him or her  
25 for support a person or persons named in Sections 25-5-61 and  
26 25-5-62, whose dependency shall be determined as if the  
27 employee were deceased, in which case the compensation

1 provided for in this subdivision shall be paid for the benefit  
2 of the person so dependent, during dependency, in the manner  
3 so ordered by the court, while the employee is an inmate in  
4 the institution. Nothing contained herein shall be construed  
5 to deprive a permanently and totally disabled employee who has  
6 no dependent named in Sections 25-5-61 and 25-5-62 from  
7 receiving benefits to which he or she would otherwise be  
8 entitled if the employee, although an inmate of a public  
9 institution, is paying or on whose behalf funds are paid from  
10 any source to the public institution the normal and customary  
11 charge for the services rendered by the public institution.  
12 Normal and customary charge shall mean that charge actually  
13 made by the public institution to persons able to pay for the  
14 services rendered them whether the charge actually covers the  
15 expense of the upkeep of the inmate or not. If the employee  
16 has had a guardian appointed by a court of competent  
17 jurisdiction, the workers' compensation payments shall be  
18 directly paid to the guardian.

19 "d. Definition. The total and permanent loss of the  
20 sight of both eyes or the loss of both arms at the shoulder or  
21 any physical injury or mental impairment resulting from an  
22 accident, which injury or impairment permanently and totally  
23 incapacitates the employee from working at and being retrained  
24 for gainful employment, shall constitute prima facie evidence  
25 of permanent total disability but shall not constitute the  
26 sole basis on which an award of permanent total disability may  
27 be based. Any employee whose disability results from an injury

1 or impairment and who shall have refused to undergo physical  
2 or vocational rehabilitation or to accept reasonable  
3 accommodation shall not be deemed permanently and totally  
4 disabled.

5 "e. Second Permanent Injuries Generally. If an  
6 employee has a permanent disability or has previously  
7 sustained another injury than that in which the employee  
8 received a subsequent permanent injury by accident, as is  
9 specified in this section defining permanent injury, the  
10 employee shall be entitled to compensation only for the degree  
11 of injury that would have resulted from the latter accident if  
12 the earlier disability or injury had not existed.

13 "f. Second Permanent Injury in Same Employment  
14 Resulting in Permanent Total Disability. If an employee  
15 receives a permanent injury as specified in this section after  
16 having sustained another permanent injury in the same  
17 employment, and if the previous and subsequent injuries result  
18 in permanent total disability, compensation shall be payable  
19 for permanent total disability only.

20 "g. Concurrent Compensation Payments. If an employee  
21 receives an injury for which compensation is payable while he  
22 or she is still receiving or entitled to receive compensation  
23 for a previous injury in the same employment, he or she shall  
24 not at the same time be entitled to compensation for both  
25 injuries, unless the later injury is a permanent injury, as  
26 specified in this section, but he or she shall be entitled to  
27 compensation for that injury and from the time of that injury



1       which will cover the longest period and the largest amount  
2       payable under this article and Article 4 of this chapter.

3               "If an employee receives a permanent injury as  
4       specified in this section, after having sustained another  
5       permanent injury in the same employment, he or she shall be  
6       entitled to compensation for both injuries, subject to  
7       paragraph e. of this subdivision, but the total compensation  
8       shall be paid by extending the period and not by increasing  
9       the amount of weekly compensation, and in no case for  
10      permanent partial disability exceeding 700 weeks.

11              "h. Effect of Rehabilitation or Recovery on  
12      Permanent Total Disability Benefits. If an employee who is  
13      receiving benefits for permanent total disability shall, as a  
14      result of physical or vocational rehabilitation or otherwise,  
15      obtain gainful employment, the obligation to pay permanent  
16      total disability benefits shall thereupon terminate; provided,  
17      that at any time that the employee's weekly wage from the  
18      employment shall be less than the employee's average weekly  
19      wage at the time of injury, the employer shall remain  
20      obligated to pay to the employee as compensation an amount  
21      equal to 66 2/3 percent of the difference, subject to each of  
22      the following limitations:

23              "1. The employer's liability for the payment of 66  
24      2/3 percent of the difference shall continue for 200 weeks  
25      from the date of reemployment or 300 weeks from the date of  
26      injury, whichever is the longer period.

1           "2. In no event shall the amount of weekly benefits  
2       paid by the employer to the employee exceed the weekly benefit  
3       the employee was receiving for permanent total disability.

4           "3. No payments shall be due for any week the  
5       employee earns as much as or more than his or her average  
6       weekly wage at the time of injury. If the employee who obtains  
7       gainful employment suffered a permanent partial disability as  
8       specified in subsection (a), subdivision (3) of this section,  
9       the total amount of compensation paid for permanent total  
10      disability shall not be less than that amount which would have  
11      been payable for the permanent partial disability.

12          "i. Affidavit of Gainful Employment. If an employee  
13      who is receiving benefits for permanent total disability  
14      shall, as the result of physical or vocational rehabilitation,  
15      accommodation, or otherwise, obtain gainful employment with an  
16      employer other than with his or her former employer, he or she  
17      shall, upon securing employment, give to his or her former  
18      employer an affidavit in writing containing the name of his or  
19      her new employer, the place of employment and the amount of  
20      wages being received at the new employment. Until he or she  
21      gives the affidavit, the compensation for permanent total  
22      disability shall cease. The employer for whom the employee was  
23      employed at the time of the accident for which compensation is  
24      being paid may also at any time demand of the employee  
25      additional affidavit, in writing, containing the name of his  
26      or her employer, the place of his or her employment, and the  
27      amount of wages he or she is receiving. If the employee, upon

1 demand, fails or refuses to make and furnish the affidavit,  
2 his or her rights to compensation shall cease until the  
3 affidavit is made and furnished.

4 "(5) DEATH FOLLOWING DISABILITY. If an employee  
5 sustains an injury occasioned by an accident arising out of  
6 and in the course of his or her employment and, during the  
7 period of disability caused thereby, death results proximately  
8 therefrom, all payments previously made as compensation for  
9 the injury shall be deducted from the compensation, if any,  
10 due on account of death. If an employee who sustains a  
11 permanent partial or permanent total disability, the degree of  
12 which has been agreed upon by the parties or has been  
13 ascertained by the court, and death results not proximately  
14 therefrom, the employee's surviving spouse or dependent  
15 children or both shall be entitled to the balance of the  
16 payments which would have been due and payable to the worker,  
17 whether or not the decedent employee was receiving  
18 compensation for permanent total disability, not exceeding,  
19 however, the amount that would have been due the surviving  
20 spouse or dependent children or both if death had resulted  
21 proximately from an injury on account of which compensation is  
22 being paid to an employee.

23 "(6) HERNIA.

24 "a. Proof. For hernia resulting from injury by an  
25 accident arising out of and in the course of the employee's  
26 employment, it must be definitely proven to the satisfaction  
27 of the court all of the following:

1           "1. That there was an injury resulting in hernia.

2           "2. That the hernia appeared suddenly.

3           "3. That it was accompanied by pain.

4           "4. That the hernia immediately followed an  
5 accident.

6           "5. That the hernia did not exist prior to the  
7 accident for which compensation is claimed.

8           "b. Treatment. All hernia, inguinal, femoral, or  
9 otherwise, proved to be the result of an injury by accident  
10 arising out of and in the course of the employment, shall be  
11 treated in a surgical manner by radical operation. If the  
12 injured employee refuses to undergo the radical operation for  
13 the cure of the hernia, no compensation will be allowed during  
14 the time the refusal continues. If, however, it is shown that  
15 the employee has some chronic disease or is otherwise in  
16 physical condition that the court considers it unsafe for the  
17 employee to undergo the operation, the employee shall be paid  
18 as otherwise provided in this chapter.

19           "(b) Computation of compensation; determination of  
20 average weekly earnings. Compensation under this section shall  
21 be computed on the basis of the average weekly earnings.  
22 Average weekly earnings shall be based on the wages, as  
23 defined in Section 25-5-1(6) of the injured employee in the  
24 employment in which he or she was working at the time of the  
25 injury during the period of 52 weeks immediately preceding the  
26 date of the injury divided by 52, but if the injured employee  
27 lost more than seven consecutive calendar days during the

1 period, although not in the same week, then the earnings for  
2 the remainder of the period, although not in the same week,  
3 then the earnings for the remainder of the 52 weeks shall be  
4 divided by the number of weeks remaining after the time so  
5 lost has been deducted. Where the employment prior to the  
6 injury extended over a period of less than 52 weeks, the  
7 method of dividing the earnings during that period by the  
8 number of weeks and parts thereof during which the employee  
9 earned wages shall be followed, provided results just and fair  
10 to both parties will thereby be obtained. Where by reason of  
11 the shortness of the time during which the employee has been  
12 in the employment of his or her employer or the casual nature  
13 or terms of the employment it is impracticable to compute the  
14 average weekly earnings as above defined, regard shall be had  
15 to the average weekly amount which during the 52 weeks prior  
16 to the injury was being earned by a person in the same grade,  
17 employed at the same work by the same employer, and if there  
18 is no person so employed, by a person in the same grade  
19 employed in the same class of employment in the same district.  
20 Whatever allowances of any character made to an employee in  
21 lieu of wages are specified as part of the wage contract shall  
22 be deemed a part of his or her earnings.

23 "(c) Setoff for other recovery. In calculating the  
24 amount of workers' compensation due:

25 "(1) The employer may reduce or accept an assignment  
26 from an employee of the amount of benefits paid pursuant to a  
27 disability plan, retirement plan, or other plan providing for

1 sick pay by the amount of compensation paid, if and only if  
2 the employer provided the benefits or paid for the plan or  
3 plans providing the benefits deducted.

4 "(2) The employee shall forfeit to the employer all  
5 compensation paid for any period to which is attributed any  
6 award of back pay either by a court, administrative agency,  
7 arbitration, or settlement, provided, however, social security  
8 payments shall not be included herein.

9 "(3) If an employer continues the salary of an  
10 injured employee during the benefit period or pays similar  
11 compensation during the benefit period, the employer shall be  
12 allowed a setoff in weeks against the compensation owed under  
13 this article. For the purposes of this section, voluntary  
14 contributions to a Section 125-cafeteria plan for a disability  
15 or sick pay program shall not be considered as being provided  
16 by the employer.

17 "§25-5-68.

18 "(a) The compensation paid under this article shall  
19 be not less than, except as otherwise provided in this  
20 article, 27 1/2 percent of the average weekly wage of the  
21 state as determined by the director, rounded to the nearest  
22 dollar, pursuant to subsection (b) of this section and, in any  
23 event, no more than 100 percent of the average weekly wage.  
24 Notwithstanding the foregoing, the maximum compensation  
25 payable for permanent partial disability shall be no more than  
26 the lesser of ~~\$220.00~~ two hundred forty dollars (\$240) per  
27 week or 100 percent of the average weekly wage.

1           "(b) For the purpose of this section, the average  
2 weekly wage of the state shall be determined by the director  
3 as follows: On or before June 1 of each year, the total wages  
4 reported on contribution reports to the unemployment  
5 compensation division of the department for the preceding  
6 calendar year shall be divided by the average monthly number  
7 of insured workers, which shall be determined by dividing the  
8 sum of the number of insured workers reported for each month  
9 of the preceding year by 12. The average annual wage thus  
10 obtained shall be divided by 52, and the average weekly wage  
11 thus determined rounded to the nearest cent. The average  
12 weekly wage as so determined shall be applicable for the  
13 12-month period beginning July 1 following the June 1  
14 determination. If the determination shall not be made on or  
15 before June 1, the effective date of the average weekly wage  
16 when determined shall be the first day of the month next  
17 following 30 days after the determination is made.

18           "(c) The maximum and minimum weekly benefit shall  
19 not be changed on any July 1 or as a result of any annual  
20 determination, unless the computation provided for in  
21 subsection (b) of this section results in an increase or  
22 decrease of two dollars (\$2) or more in the amount of either  
23 the maximum or minimum benefit.

24           "(d) In no event, except as provided for permanent  
25 total disability in subdivision (a)(4) of Section 25-5-57 or  
26 except for compensation benefits payable for permanent partial  
27 and temporary total disability in connection with a disability

1 scheduled in subdivisions (1) and (3) of subsection (a) of  
2 Section 25-5-57, shall the total amount of compensation  
3 payable for an accident or an occupational disease exceed the  
4 product of 500 times the maximum weekly benefit applicable on  
5 the date of the accident.

6 "(e) The minimum and maximum benefits that are in  
7 effect on the date of the accident which results in injury or  
8 death shall be applicable for the full period during which  
9 compensation is payable.

10 "§25-5-77.

11 "(a) In addition to the compensation provided in  
12 this article and Article 4 of this chapter, the employer,  
13 where applicable, shall pay the actual cost of the repair,  
14 refitting, or replacement of artificial members damaged as the  
15 result of an accident arising out of and in the course of  
16 employment, and the employer, except as otherwise provided in  
17 this amendatory act, shall pay an amount not to exceed the  
18 prevailing rate or maximum schedule of fees as established  
19 herein of reasonably necessary medical and surgical treatment  
20 and attention, physical rehabilitation, medicine, medical and  
21 surgical supplies, crutches, artificial members, and other  
22 apparatus as the result of an accident arising out of and in  
23 the course of the employment, as may be obtained by the  
24 injured employee or, in case of death, obtained during the  
25 period occurring between the time of the injury and the  
26 employee's death therefrom. If the employee is dissatisfied  
27 with the initial treating physician selected by the employer



1 and if further treatment is required, the employee may so  
2 advise the employer, and the employee shall be entitled to  
3 select a second physician from a panel or list of four  
4 physicians selected by the employer. If surgery is required  
5 and if the employee is dissatisfied with the designated  
6 surgeon, he or she may so advise the employer, and the  
7 employee shall be entitled to select a second surgeon from a  
8 panel or list of four surgeons selected by the employer. If  
9 four physicians or surgeons are not available to be listed,  
10 the employer shall include on the list as many as are  
11 available. The four physicians or surgeons selected by the  
12 employer hereunder shall not be from or members of the same  
13 firm, partnership, or professional corporation. The total  
14 liability of the employer shall, unless otherwise provided in  
15 this chapter, not exceed the prevailing rate or the maximum  
16 schedule of fees as established herein. Notwithstanding the  
17 foregoing, in ascertaining the prevailing rate of  
18 reimbursement or payment with regard to participating  
19 hospitals and ambulatory surgical centers or outpatient  
20 rehabilitation centers licensed by the State of Alabama, as  
21 well as diagnostic facilities accredited by the Commission on  
22 Accreditation of Rehabilitation Facilities, the prevailing  
23 rate shall be negotiated with each individual hospital,  
24 ambulatory surgical center, licensed outpatient rehabilitation  
25 facility, or diagnostic facility based on that institution's  
26 treatment of comparable type cases for the 12-month period  
27 immediately preceding August 1, 1992. These rates shall be

1 updated every 12 months thereafter. Initial rates shall be  
2 established within six months of August 1, 1992. For those  
3 non-participating hospitals the prevailing rate shall be  
4 determined by a committee. In the first year following August  
5 1, 1992, the committee shall be composed of five members. The  
6 director shall appoint one member from the Department of  
7 Industrial Relations and two members from the community in  
8 which the non-participating hospital is located. The  
9 non-participating hospital shall appoint two members. This  
10 committee shall by a majority vote establish the maximum rates  
11 of reimbursement or payment for the non-participating  
12 hospital, and the hospital shall be bound for one year by the  
13 determined rates of reimbursement or payment for workers'  
14 compensation cases. If, following the first year after the  
15 rates were established by this committee, the hospital is  
16 again non-participating, then another committee shall be  
17 appointed. This second committee shall have three members  
18 selected by the non-participating hospital and two members  
19 selected by the director. The committee composition shall  
20 alternate as above described each year the hospital is  
21 non-participating. The total liability of the employer shall  
22 not exceed the rates established by the committee. This  
23 committee, in determining the rates of reimbursement or  
24 payments to the hospital, may consider such factors as the  
25 size, staffing, and medical equipment of the hospital, and any  
26 other factors which the committee may consider relevant. If an  
27 insurer of the employee or a benefit association has paid or

1 is liable for the employee's medical, surgical, and hospital  
2 service or for a part thereof, or if the employee is entitled  
3 to the same or a part thereof, from any source whatever by  
4 virtue of any agreement or understanding or law, state or  
5 federal, without any loss of benefit to the employee, the  
6 employer shall not be required to pay any part of the expense.  
7 If the benefits are insufficient to pay all the employee's  
8 expense, the employer shall be liable for the deficiency only.  
9 All cases of dispute as to the necessity and value of the  
10 services shall be determined by the tribunal having  
11 jurisdiction of the claim of the injured employee for  
12 compensation.

13 "(b) If requested to do so by the employer, the  
14 injured employee shall submit to examination by the employer's  
15 physician at all reasonable times, but the employee shall have  
16 the right to have a physician of his or her own selection  
17 present at the examination, in which case the employee shall  
18 be liable to the physician of his or her own selection for his  
19 or her services. The employer shall pay for the services of  
20 the physician making the examination at the instance of the  
21 employer. If a dispute arises as to the injury, or as to the  
22 extent of the disability therefrom, the court may, at the  
23 instance of either party or of its own motion, appoint a  
24 neutral physician of good standing and ability to make an  
25 examination of the injured employee and to report his or her  
26 findings to the court, the expense of which examination shall  
27 be borne equally by the parties. If the injured employee

1 refuses to comply with reasonable request for examination, or  
2 refuses to accept the medical service or physical  
3 rehabilitation, which the employer elects to furnish under  
4 this chapter, the employee's right to compensation shall be  
5 suspended and no compensation shall be payable for the period  
6 of the refusal. A physician whose services are furnished or  
7 paid for by the employer, or a physician of the injured  
8 employee who treats or makes or is present at any examination  
9 of an injured employee may be required to testify as to any  
10 knowledge obtained by him or her in the course of the  
11 treatment or examination as the treatment or examination  
12 related to the injury or the disability arising therefrom. The  
13 physician shall, upon written request of the injured employee  
14 or his or her employer and without consent of or notice to the  
15 employee or employer not making the request, furnish the  
16 injured employee or his or her employer a written statement of  
17 his or her professional opinion as to the extent of the injury  
18 and disability. In all death claims where the cause of death  
19 is obscure or is disputed, any interested party may require an  
20 autopsy, the cost of which is to be borne by the party  
21 demanding the autopsy. The term "physicians" shall include  
22 medical doctor, surgeon, and chiropractor. A hospital, medical  
23 clinic, rehabilitation service, or other person or entity  
24 providing treatment to an employee or providing facilities at  
25 which the employee receives treatment shall, upon the written  
26 request of the employee or of the employer, furnish, at a  
27 reasonable cost, the employee or the employer a copy of the

1 records, including X-rays and laboratory reports, relating to  
2 the treatment of the injured employee. The copy may be  
3 furnished without the consent of or notice to the employee or  
4 employer not making the request. A physician, hospital,  
5 medical clinic, rehabilitation service, or other person or  
6 entity providing written statement of professional opinion or  
7 copies of records pursuant to this subsection shall not be  
8 liable to any person for a claim arising out of the release of  
9 medical information concerning the employee.

10 "(c) If the employer so elects, the employee shall  
11 submit to and undergo vocational rehabilitation at the  
12 employer's expense through a vocational rehabilitation  
13 specialist, who shall be qualified to render competent  
14 vocational rehabilitation service. If an employee who is  
15 unable in the opinion of the treating physician to return to  
16 his or her former employment shall request vocational  
17 rehabilitation and if both a vocational rehabilitation  
18 specialist and a treating physician, the cost of whose service  
19 is the obligation of the employer under this section, shall  
20 express their opinions in writing that in the judgment of each  
21 of them vocational rehabilitation is reasonably calculated to  
22 restore the employee to gainful employment and is in the best  
23 interest of the employee, the cost of the rehabilitation shall  
24 be borne by the employer. The cost, where rehabilitation  
25 requires residence at or near a facility or institution away  
26 from the employee's customary residence, shall include

1 reasonable charges for the employee's necessary board,  
2 lodging, and travel.

3 "(d) If an employee refuses, without the consent of  
4 the court, to accept vocational rehabilitation at the  
5 employer's request, the refusal shall result in loss of  
6 compensation for the period of refusal.

7 "(e) All disputes with regard to vocational  
8 rehabilitation may be submitted to the court for resolution.

9 "(f) The employer shall pay mileage costs to and  
10 from medical and rehabilitation providers at the same rate as  
11 provided by law for official state travel.

12 "(g) In a compensable workers' compensation claim,  
13 the injured employee shall not be liable for payment of any  
14 authorized and compensable medical expenses associated with  
15 the workers' compensation claim.

16 "(h) All undisputed medical reimbursements or  
17 payments shall be made within 25 working days of receipt of  
18 claims in the form specified in Section 25-5-3. There shall be  
19 added to any undisputed medical invoice which is not paid  
20 within 25 working days an amount equal to 10 percent of the  
21 unpaid balance.

22 "If the employer or insurer responsible for payment  
23 of the claim fails to add the additional 10 percent to the  
24 claim as required by this section, the person, firm,  
25 corporation, or partnership providing the medical service for  
26 which payment has been delayed beyond the period specified in  
27 this section may file a written complaint stating that fact

1 with the director. Upon investigation, if the director  
2 determines that the facts stated in the complaint are true,  
3 then in that event the director shall order the employer or  
4 insurer to pay to the provider the amount of the claim and any  
5 applicable penalty, and in addition may assess a civil  
6 monetary penalty in amount not to exceed \$500 against the  
7 employer or insurer, payment of which shall be made to the  
8 director within 30 days of the notice of assessment.

9 "(i) Any party, including a health care provider, is  
10 entitled to a review by an ombudsman of medical services that  
11 are provided or for which authorization of payment is sought  
12 if any party or the health care provider has any of the  
13 following:

14 "(1) Been denied payment or had the charge reduced  
15 for medical services rendered.

16 "(2) Been denied authorization for the payment of  
17 services requested or performed when authorization is  
18 required.

19 "(3) Been ordered by the director to refund payments  
20 received for the provision of medical services.

21 "(4) A party to a medical dispute that remains  
22 unresolved after a review of medical services as provided by  
23 this section may petition the court for relief.

24 "(5) In any review under this subsection of medical  
25 services provided by a physician, any party to a dispute may  
26 request that the ombudsman consult with an independent medical  
27 expert for the purpose of obtaining advice and consultation on

1 the resolution of any issue involving medical practice. If  
2 such a request is made, the ombudsman shall select an  
3 independent medical expert from among a list of at least three  
4 names provided by the Workers' Compensation Medical Services  
5 Board in a medical specialty appropriate to the issues raised  
6 in the dispute and shall secure a written opinion from the  
7 independent medical expert. In rendering a decision or  
8 recommendation, the ombudsman shall give full consideration to  
9 the opinion of the independent medical expert but shall not be  
10 bound by that opinion. The independent medical expert shall be  
11 compensated at a rate set by the Workers' Compensation Medical  
12 Services Board and approved by the director.

13 "(j) If the employee does not receive medical  
14 treatment related to the claimed injury for a period of two  
15 years, a rebuttable presumption arises that any subsequently  
16 obtained medical treatment is unrelated to the workers'  
17 compensation injury. The employer shall be liable for such  
18 medical treatment only upon a finding of clear and convincing  
19 proof that such treatment is related to the workers'  
20 compensation injury. The obligation of the employer for the  
21 payment of medical benefits shall conclusively end if the  
22 employee does not receive medical treatment related to the  
23 claimed injury for a period of four years.

24 "§25-5-81.

25 "(a) Commencement of action in circuit court.

26 "(1) PROCEDURE. In case of a dispute between  
27 employer and employee or between the dependents of a deceased



1 employee and the employer with respect to the right to  
2 compensation under this article and Article 2 of this chapter,  
3 or the amount thereof, either party may submit the controversy  
4 to the circuit court of the county which would have  
5 jurisdiction of a civil action in tort between the parties.  
6 The controversy shall be heard and determined by the judge who  
7 would hear and determine a civil action between the same  
8 parties arising out of tort, and, in case there is more than  
9 one judge of the court, the controversies shall be set and  
10 assigned for hearing under the same rules and statutes that  
11 civil actions in tort are set and assigned. The court may hear  
12 and determine the controversies in a summary manner. The  
13 decision of the judge hearing the same shall be conclusive and  
14 binding between the parties, subject to the right of appeal  
15 provided for in this article.

16 "(2) RIGHT TO JURY TRIAL. When willful misconduct on  
17 the part of the employee is set up by the employer, as it is  
18 provided for in this article, the employer may, upon  
19 appearing, demand a jury to hear and determine, under the  
20 direction of the court, the issues involved in this defense.  
21 If the employer fails to demand a jury upon appearing, the  
22 employee may demand a jury to try the issues by filing a  
23 demand within five days after the appearance of the employer.  
24 When a jury is demanded by either party, the court shall  
25 submit the issues of fact as to willful misconduct set up by  
26 the employer to the jury, for a special finding of the facts  
27 subject to the usual powers of the court over verdicts

1 rendered contrary to the evidence or the law, but the judge  
2 shall determine all other questions involved in the  
3 controversy without a jury. Upon setting up the defense, the  
4 employer shall serve a copy of the answer, setting up the  
5 defense, upon the employee or the attorney of record.

6 "(b) Court deemed open at all times. For the purpose  
7 of hearing and determining controversies between an employer  
8 and employee or the dependents of a deceased employee and the  
9 employer arising under this article and Article 2 of this  
10 chapter, the circuit court shall be deemed always in session.

11 "(c) Evidence. The decision of the court shall be  
12 based on a preponderance of the evidence as contained in the  
13 record of the hearing, except in cases involving injuries  
14 which have resulted from gradual deterioration or cumulative  
15 physical stress disorders, which shall be deemed compensable  
16 only upon a finding of clear and convincing proof that those  
17 injuries arose out of and in the course of the employee's  
18 employment.

19 "For the purposes of this amendatory act, "clear and  
20 convincing" shall mean evidence that, when weighted against  
21 evidence in opposition, will produce in the mind of the trier  
22 of fact a firm conviction as to each essential element of the  
23 claim and a high probability as to the correctness of the  
24 conclusion. Proof by clear and convincing evidence requires a  
25 level of proof greater than a preponderance of the evidence or  
26 the substantial weight of the evidence, but less than beyond a  
27 reasonable doubt.

1           "(d) Interpleader of adverse claimants to  
2       compensation. If at any time there are adverse claimants to  
3       compensation under this article, the employer, in submitting  
4       the claim to the circuit court, may suggest in writing the  
5       claimants, and they shall be required to interplead. The court  
6       shall determine and order to which claimant or claimants  
7       compensation is justly due, and the employer, upon complying  
8       with the order of the judge, shall be released from the claims  
9       of any other claimants thereto.

10           "(e) Review. From an order or judgment, any  
11       aggrieved party may, within 42 days thereafter, appeal to the  
12       Court of Civil Appeals and review shall be as in cases  
13       reviewed as follows:

14           "(1) In reviewing the standard of proof set forth  
15       herein and other legal issues, review by the Court of Civil  
16       Appeals shall be without a presumption of correctness.

17           "(2) In reviewing pure findings of fact, the finding  
18       of the circuit court shall not be reversed if that finding,  
19       when weighed against evidence in opposition, is supported by  
20       substantial evidence.

21           "(f) Discovery. Methods of discovery shall be  
22       determined and established in rules promulgated by this  
23       amendatory act and the rules established by the Alabama Rules  
24       of Civil Procedure with the limitations of pre-trial discovery  
25       as set forth below. Additionally, the following rules of  
26       discovery shall apply to workers' compensation cases:

1           "(1) Two depositions for each side shall be  
2 permitted without leave of court, however, any additional  
3 depositions shall not be permitted except with leave of court  
4 for good cause shown including, but not limited to, a claim by  
5 the employee for permanent total disability.

6           "(2) Notwithstanding the limitations in (1) above,  
7 each party may take the deposition of every other party.

8           "(3) No more than 25 interrogatory questions with  
9 each sub-part to be considered a question shall be permitted  
10 without leave of court for good cause shown.

11           "(4) Certified sealed copies of records of medical  
12 treatment and charges therefor, whether from a physician,  
13 hospital, clinic, or other provider, shall be authenticated in  
14 accordance with Alabama Rules of Civil Procedure, Rule 44(h),  
15 without further need for authenticating testimony. Copies of  
16 records obtained by one party shall be furnished by certified  
17 mail to the other party not less than 21 days prior to trial,  
18 unless the party offering the records can establish unusual  
19 circumstances justifying their admission despite the failure  
20 to make the exchange after receiving the records of a  
21 physician's treatment prior to trial, the party not offering  
22 the records of a physician's treatment shall, without regard  
23 to the limitation set forth herein, have the right to depose  
24 prior to trial the physician whose records of treatment are to  
25 be offered by any other party.

26           "It is the intent of this section that limited  
27 discovery shall be available."

1                   Section 2. This act shall become effective on the  
2   first day of the third month following its passage and  
3   approval by the Governor, or its otherwise becoming law.