

STATE OF OKLAHOMA

2nd Session of the 48th Legislature (2002)

SENATE BILL 1603

By: Pruitt

AS INTRODUCED

An Act relating to workers' compensation; amending 85 O.S. 2001, Sections 3, 17 and 30, which relate to definitions, determination of disability, and costs; adding definition; modifying definitions; requiring mediation in certain cases within specified time; modifying when certain testimony may be challenged; limiting parties who may challenge certain testimony; modifying selection of certain physician; requiring Workers' Compensation Court to give deference to certain testimony under certain circumstances; providing standard for determining reliability and relevance of certain testimony; prohibiting certain use of specific testimony; limiting certain opinion testimony; deleting obsolete language; limiting certain fee for specified claims; repealing 85 O.S. Section 3.10, which relates to voluntary mediation; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 85 O.S. 2001, Section 3, is amended to read as follows:

Section 3. As used in the Workers' Compensation Act:

1. "Administrator" means the Administrator of ~~workers' compensation~~ the Workers' Compensation Court as provided for in the Workers' Compensation Act;

2. "Amount in dispute" means either the dollar amount claimed by the employee which is in excess of the dollar amount agreed to and paid by the employer, or in the event no amount is offered and tendered by the employer and accepted by the employee, the dollar amount which is in excess of the recommendation of a mediator where the case has been mediated, or in excess of the award granted by the Court;

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

- a. systematically monitoring the treatment rendered and the medical progress of the injured or disabled worker,
- b. ensuring that any treatment plan follows all appropriate treatment protocols, utilization controls and practice parameters,
- c. assessing whether alternative health care services are appropriate and delivered in a cost-effective manner based upon acceptable medical standards, and
- d. ensuring that the injured or disabled worker is following the prescribed health care plan;

~~3.~~ 4. "Case manager" means a person who:

- a. is a registered nurse with a current, active unencumbered license from the Oklahoma Board of Nursing, or
- b. possesses one or more of the following certifications which indicate the individual has a minimum number of years of case management experience, has passed a national competency test and regularly obtains continuing education hours to maintain certification:
 - (1) Certified Disability Management Specialist (CDMS),
 - (2) Certified Case Manager (CCM),
 - (3) Certified Rehabilitation Registered Nurse (CRRN),
 - (4) Case Manager - Certified (CMC),
 - (5) Certified Occupational Health Nurse (COHN), or
 - (6) Certified Occupational Health Nurse Specialist (COHN-S);

~~4.~~ 5. "Claimant" means a person who claims benefits for an injury pursuant to the provisions of the Workers' Compensation Act;

~~5.~~ 6. "Court" means the Workers' Compensation Court;

~~6.~~ 7. "Cumulative trauma" means an injury resulting from employment activities which are repetitive in nature and engaged in over a period of time;

~~7.~~ 8. "Employer", except when otherwise expressly stated, means a person, partnership, association, limited liability company, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association, corporation, or limited liability company, departments, instrumentalities and institutions of this state and divisions thereof, counties and divisions thereof, public trusts, boards of education and incorporated cities or towns and divisions thereof, employing a person included within the term "employee" as herein defined;

~~8.~~ 9. "Employee" means any person engaged in the employment of any person, firm, limited liability company or corporation covered by the terms of the Workers' Compensation Act, and shall include workers associating themselves together under an agreement for the performance of a particular piece of work, in which event such persons so associating themselves together shall be deemed employees of the person having the work executed; provided, that if such associated workers shall employ a worker in the execution of such contract, then as to such employed worker, both the associated employees and the principal employer shall at once become subject to the provisions of the Workers' Compensation Act relating to independent contractors. Sole proprietors, members of a partnership, 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. Provided, a sole proprietor, member of a partnership, member of a limited liability company who owns at least ten percent (10%) of the capital of the limited liability company or any stockholder-employee of a corporation who owns ten percent (10%) or more stock in the corporation who does not so elect to be covered by a policy of insurance covering benefits under the Workers' Compensation Act, when acting as a subcontractor, shall not be eligible to be covered under the prime contractor's policy of workers' compensation insurance; however, nothing herein shall relieve the entities enumerated from providing workers' compensation insurance coverage for their employees. Sole proprietors, members of a partnership, 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 may elect to include the sole proprietors, any or all of the partnership members, any or all of the limited liability company members or any or all stockholder-employees as employees, if otherwise qualified, by endorsement to the policy specifically including them under any policy of insurance covering benefits under the Workers' Compensation Act. When so included, the sole proprietors, members of a partnership, members of a limited liability company or any or all stockholder-employees shall be deemed to be employees as respects the benefits of the Workers' Compensation Act. "Employee" shall also include any person who is employed by the departments, instrumentalities and institutions of this state and divisions thereof, counties and divisions thereof, public trusts, boards of education and incorporated cities or towns and divisions thereof. "Employee" shall also include a member of the Oklahoma National Guard while in the performance of duties only while in response to state orders and

any authorized voluntary or uncompensated worker, rendering services as a fire fighter, peace officer or civil defense worker. Provided, "employee" shall not include any other person providing or performing voluntary service who receives no wages for the services other than meals, drug or alcohol rehabilitative therapy, transportation, lodging or reimbursement for incidental expenses. "Employee" shall also include a participant in a sheltered workshop program which is certified by the United States Department of Labor. "Employee" shall not include a person, commonly referred to as an owner-operator, who owns or leases a truck-tractor or truck for hire, if the owner-operator actually operates the truck-tractor or truck and if the person contracting with the owner-operator is not the lessor of the truck-tractor or truck. Provided, however, an owner-operator shall not be precluded from workers' compensation coverage under the Workers' Compensation Act if the owner-operator elects to participate as a sole proprietor. "Employee" shall not include a person referred to as a drive-away owner-operator who privately owns and utilizes a tow vehicle in drive-away operations and operates independently for hire, if the drive-away owner-operator actually utilizes the tow vehicle and if the person contracting with the drive-away owner-operator is not the lessor of the tow vehicle. Provided, however, a drive-away owner-operator shall not be precluded from workers' compensation coverage under the Workers' Compensation Act if the drive-away owner-operator elects to participate as a sole proprietor;

~~9.~~ 10. "Drive-away operations" include every person engaged in the business of transporting and delivering new or used vehicles by driving, either singly or by towbar, saddle mount or full mount method, or any combination thereof, with or without towing a privately owned vehicle;

~~10.~~ 11. "Employment" includes work or labor in a trade, business, occupation or activity carried on by an employer or any

authorized voluntary or uncompensated worker rendering services as a fire fighter, peace officer or civil defense worker;

~~11.~~ 12. "Compensation" means the money allowance payable to an employee as provided for in the Workers' Compensation Act;

~~12.~~ 13.

- a. "Injury" or "personal injury" means only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally result therefrom and occupational disease arising out of and in the course of employment as herein defined. Only injuries having as their source a risk not purely personal but one that is causally connected with the conditions of employment shall be deemed to arise out of the employment.
- b. "Injury" or "personal injury" includes heart-related or vascular injury, illness or death only if resultant from stress in excess of that experienced by a person in the conduct of everyday living. Such stress must arise out of and in the course of a claimant's employment.
- c. "Injury" or "personal injury" shall not include mental injury that is unaccompanied by physical injury, except in the case of rape which arises out of and in the course of employment;

~~13.~~ 14. "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer;

~~14.~~ 15. "Insurance carrier" shall include stock corporations, reciprocal or interinsurance associations, or mutual associations with which employers have insured, and employers permitted to pay

compensation, directly under the provisions of paragraph 4 of subsection A of Section 61 of this title;

~~15.~~ 16. "Occupational disease" means only that disease or illness which is due to causes and conditions characteristic of or peculiar to the particular trade, occupation, process or employment in which the employee is exposed to such disease. An occupational disease arises out of the employment only if there is a direct causal connection between the occupational disease and the conditions under which the work is performed;

~~16.~~ 17. "Permanent impairment" means any anatomical or functional abnormality or loss after maximum medical improvement has been achieved, which abnormality or loss the physician considers to be capable of being evaluated at the time the rating is made. Except as otherwise provided herein, any examining physician shall only evaluate impairment in accordance with the latest publication of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" in effect at the time of the injury. 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~~ for reference or use by mediators as needed. The Administrator may adopt the recommendation in part or in whole. The adopted method or system shall be submitted by the Administrator to the Governor, the Speaker of the House of Representatives and the President Pro Tempore of the Senate within the first ten (10) legislative days of a regular session of the Legislature. Such method or system to evaluate permanent impairment that shall be used in place of or in combination with the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be subject to disapproval

in whole or in part by joint or concurrent resolution of the Legislature during the legislative session in which submitted. Such method or system shall be operative one hundred twenty (120) days after the last day of the month in which the Administrator submits the adopted method or system to the Legislature if the Legislature takes no action or one hundred twenty (120) days after the last day of the month in which the Legislature disapproves it in part. If adopted, permanent impairment shall be evaluated only in accordance with the latest version of the alternative method or system in effect at the time of injury. Except as otherwise provided in Section 11 of this title, all evaluations shall include an apportionment of injury causation. However, revisions to the guides made by the American Medical Association which are published after January 1, 1989, and before January 1, 1995, shall be operative one hundred twenty (120) days after the last day of the month of publication. Revisions to the guides made by the American Medical Association which are published after December 31, 1994, may be adopted in whole or in part by the Administrator following recommendation by the Physician Advisory Committee. Revisions adopted by the Administrator shall be submitted by the Administrator to the Governor, the Speaker of the House of Representatives and the President Pro Tempore of the Senate within the first ten (10) legislative days of a regular session of the Legislature. Such revisions shall be subject to disapproval in whole or in part by joint or concurrent resolution of the Legislature during the legislative session in which submitted. Revisions shall be operative one hundred twenty (120) days after the last day of the month in which the Administrator submits the revisions to the Governor and the Legislature if the Legislature takes no action or one hundred twenty (120) days after the last day of the month in which the Legislature disapproves them in part. The examining physician shall not follow the guides based on race or ethnic

origin. The examining physician shall not deviate from said guides or any alternative thereto except as may be specifically provided for in the guides or modifications to the guides or except as may be specifically provided for in any alternative or modifications thereto, adopted by the Administrator of the Workers' Compensation Court as provided for in Section 201.1 of this title. These officially adopted guides or modifications thereto or alternative system or method of evaluating permanent impairment or modifications thereto shall be the exclusive basis for testimony and conclusions with regard to permanent impairment with the exception of paragraph 3 of Section 22 of this title, relating to scheduled member injury or loss; and impairment, including pain or loss of strength, may be awarded with respect to those injuries or areas of the body not specifically covered by said guides or alternative to said guides;

~~17.~~ 18. "Permanent total disability" means incapacity because of accidental injury or occupational disease to earn any wages in any employment for which the employee may become physically suited and reasonably fitted by education, training or experience, including vocational rehabilitation; loss of both hands, or both feet, or both legs, or both eyes, or any two thereof, shall constitute permanent total disability;

~~18.~~ 19. "Permanent partial disability" means permanent disability which is less than total and shall be equal to or the same as permanent impairment;

~~19.~~ 20. "Maximum medical improvement" means that no further material improvement would reasonably be expected from medical treatment or the passage of time;

~~20.~~ 21. "Independent medical examiner" means a licensed physician authorized to serve as a medical examiner pursuant to Section 17 of this title;

~~21.~~ 22.

- a. "Certified workplace medical plan" means an organization of health care providers or any other entity, certified by the State Commissioner of Health pursuant to Section 14.3 of this title, that is authorized to enter into a contractual agreement with a self-insured employer, group self-insurance association plan, an employer's workers' compensation insurance carrier or an insured, which shall include any member of an approved group self-insured association, policyholder or public entity, regardless of whether such entity is insured by CompSource Oklahoma, to provide medical care under the Workers' Compensation Act. Certified plans shall only include such plans which provide medical services and payment for services on a fee-for-service basis to medical providers and shall not include other plans which contract in some other manner, such as capitated or pre-paid plans.
- b. If any insurer, except CompSource Oklahoma, fails to contract with or provide access to a certified workplace medical plan, an insured, after sixty (60) days' written notice to its insurance carrier, shall be authorized to contract independently with a plan of his or her choice for a period of one (1) year, to provide medical care under the Workers' Compensation Act. The insured shall be authorized to contract, after sixty (60) days' written notice to its insurance carrier, for additional one-year periods if his or her insurer has not contracted with or provided access to a certified workplace medical plan.
- c. If CompSource Oklahoma fails to contract with at least three certified workplace medical plans, each covering

at least fifty counties, then the insured, after sixty (60) days' written notice to CompSource Oklahoma, shall be authorized to contract independently with a plan of his or her choice for a period of one (1) year to provide medical care under the Workers' Compensation Act. The insured shall be authorized to contract, after sixty (60) days' written notice to CompSource Oklahoma, for additional one-year periods if CompSource Oklahoma has not contracted with or fails to continue contracts with at least three certified workplace medical plans covering at least fifty counties; and

~~22.~~ 23. "Treating physician" or "attending physician" means the licensed physician who has provided or is providing medical care to the injured employee.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 3.12 of Title 85, unless there is created a duplication in numbering, reads as follows:

Mediation shall be required for any claim arising pursuant to the provisions of the Workers' Compensation Act. Mediation shall take place after the filing of Employee's First Notice Of Accidental Injury And Claim For Compensation but before the filing of a Motion to Set for Trial.

SECTION 3. AMENDATORY 85 O.S. 2001, Section 17, is amended to read as follows:

Section 17. A. 1. The determination of disability shall be the responsibility of the Workers' Compensation Court. Any claim submitted by an employee for compensation for permanent disability must be supported by competent medical testimony which shall include an evaluation by a physician, including, but not limited to, the treating physician or an independent medical examiner stating his or her opinion of the employee's percentage of permanent impairment and

whether or not the impairment is job-related and caused by the accidental injury or occupational disease. Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. For purposes of this section, a physician shall have the same meaning as defined in Section 14 of this title and shall include a person licensed by another state who would be qualified to be a licensed physician under the laws of this state.

2. When the medical testimony to be introduced on behalf of the employee ~~and employer is divergent by more than twenty-five percent (25%) as to the extent of permanent impairment of the employee or when there is any disagreement in the evidence~~ disputed by the employer as to the medical cause of the medical permanent impairment or the percentage of impairment, or if the employee has no lost time from employment, ~~any party~~ the employer may challenge such testimony by giving written notice to all other parties and to the Administrator. The written notice shall be given prior to or during any prehearing conference. Upon receipt of such notice, the ~~challenging party and the party challenged shall select a third physician~~ Administrator shall permit the employer to select a physician of the employer's choice who shall be afforded a reasonable opportunity to examine the employee together with all medical records involved and any other medical data or evidence that the physician may consider to be relevant. The ~~third~~ physician shall issue a verified written report on a form provided by the Administrator to the Court stating his or her finding of the percentage of permanent impairment of the employee and whether or not the impairment is job-related and caused by the accidental injury or occupational disease. For evidentiary purposes, the treating physician's testimony shall be given deference for rating purposes only, and only after a determination of both relevance and reliability of testimony based on scientific, technical, or other

specialized knowledge. In determining the reliability of the testimony, the inquiry may include, but not be limited to, testing peer review, error rates, and acceptability in the relevant scientific community, depending on the nature of the issue, the physician's particular expertise, and the subject of the testimony. In determining the relevance of the testimony, the court shall determine whether the opinion may be validly and reliably drawn from the supporting medical evidence and whether the relationship between the opinion and the supporting medical evidence is sufficiently close and congruent so as not to render the opinion speculative. The Court shall not be permitted to split the difference between the treating physician's and independent medical examiner's opinions. The opinions of the treating physician and independent medical examiner shall be the only medical reports and opinions considered.

~~3. Any party may request the deposition testimony of any physician providing a written medical report on the issue of temporary disability, permanent disability, causation, apportionment or rehabilitation. Except in the case of Independent Medical Examiners appointed by order of the Court, the party requesting the deposition testimony of any such physician shall be responsible for the reasonable charges of the physician for such testimony, preparation time, and the expense of the deposition.~~

~~B. When the challenging party and the challenged party are for any reason unable or unwilling to agree upon the appointment of a third physician within ten (10) days, the Court shall appoint the third physician. Upon receipt of the third physician's report, the party shall have the right to object to the introduction into evidence of the report. The objection must be made by giving written notification to all parties and to the Court within five (5) days after receipt of the report. The physicians must then testify in person or by deposition.~~

~~C.~~ Any physician who is appointed or selected pursuant to the provisions of this section shall be reimbursed for the medical examination, reports and fees in a reasonable and customary amount set by the Court, and these costs shall be borne by the employer.

~~D.~~ C. 1. The Court shall develop and implement an independent medical examiner system by no later than July 1, 1995. The Court shall create, maintain and review a list of licensed physicians who shall serve as independent medical examiners from a list of licensed physicians who have completed such course study as the Administrator of the Workers' Compensation Court may require. Such courses shall provide training to establish familiarity with the American Medical Association's "Guides to the Evaluation of Permanent Impairment", or alternative method or system of evaluating permanent impairment, for the category of injury established by the Administrator for which such physician desires to be an independent medical examiner. The Court shall, to the best of its ability, include the most experienced and competent physicians in the specific fields of expertise utilized most often in the treatment of injured employees. Physicians serving as third physicians before November 4, 1994, shall be considered to have met the requirements of this paragraph.

2. The independent medical examiner in a case involving permanent disability may not be a treating physician of the employee and may not have treated the employee with respect to the injury for which the claim is being made or the benefits are being paid. Nothing in this subsection precludes the selection of a health care provider authorized to receive reimbursement under Section 14 of this title to serve in the capacity of an independent medical examiner.

~~3. At any time during the pendency of the action but not less than thirty (30) days before a hearing, any party to the action may request the appointment of an independent medical examiner from the list of independent medical examiners. An independent medical~~

~~examiner may be appointed less than thirty (30) days before a hearing if mutually acceptable to the parties. If the parties are unable to agree on the independent medical examiner, the Court may make the appointment. An independent medical examiner also may be appointed by the Court on its own motion. The appointment or selection of the independent medical examiner may be made when requested by the parties even in the absence of any medical testimony supporting or contesting an issue.~~

~~4.~~ The Court shall, to the best of its ability, maintain a geographic balance of independent medical examiners.

~~5.~~ 4. The parties are responsible for the expeditious transmittal of the employee's medical records, prior Court orders involving the employee, and other pertinent information to the independent medical examiner. The independent medical examiner may examine the employee as often as the independent medical examiner determines necessary.

~~6.~~ 5. The independent medical examiner shall submit a verified written report to the Court as provided in subsection A of this section and shall provide a copy of the report to the parties. ~~If the independent medical examiner undertakes active treatment of the employee, the independent medical examiner shall provide the Court and parties with progress reports, not less often than every thirty (30) days.~~ The independent medical examiner's report shall include a determination of whether or not the employee is capable of returning to light duty work, and what restrictions, if any, shall be followed by the employer in order to permit the employee to return to work.

~~7.~~ 6. If the independent medical examiner determines that the employee is capable of returning to work and the claimant elects not to do so, temporary total disability and medical benefits shall cease, unless otherwise ordered by the Court. In any case where the claimant contests the cessation of such benefits, the Court shall

hear the dispute within thirty (30) days after the filing of the employee's Motion to Set for Trial. The trial shall not be delayed unless both parties agree.

~~8.~~ 7. Any independent medical examiner who is appointed or selected pursuant to the provisions of this subsection shall be reimbursed for the medical examination, reports and fees in a reasonable and customary amount set by the Court, and these costs shall be borne by the employer.

~~9.~~ 8. The Court, in consultation with the Advisory Council on Workers' Compensation, shall create a review process to oversee on a continuing basis the quality of performance and the timeliness of the submission of medical findings by independent medical examiners.

~~10.~~ 9. The Court shall promulgate rules necessary to effectuate the purposes of this subsection.

~~E. Until the implementation of the independent medical examiner system in subsection D of this section, third physicians shall be selected or appointed as provided in subsections A and B of this section. Upon implementation of the independent medical examiner system, independent medical examiners shall be selected or appointed as provided in subsection D of this section.~~

~~F. The parties may stipulate to the appointment of a third physician or, upon implementation of the independent medical examiner system in subsection D of this section, an independent medical examiner, even in the absence of divergent medical testimony.~~

~~G. The impairment rating determined by the third physician or, upon implementation of the independent medical examiner system, the independent medical examiner, may be followed by the Court. If the Court deviates from the impairment rating, the Court shall specifically identify by written findings of fact the basis for such deviation in its order.~~

~~H.~~ In no event may an independent medical examiner, or facility owned or operated, or partially owned or operated, by the independent medical examiner, treat an employee whose claim the independent medical examiner has reviewed for permanent impairment, return to work, or the necessity of further medical treatment, unless both parties agree.

SECTION 4. AMENDATORY 85 O.S. 2001, Section 30, is amended to read as follows:

Section 30. A. 1. If the Workers' Compensation Court before which any proceedings for compensation or concerning an award of compensation have been brought, under the Workers' Compensation Act, determines that such proceedings have not been brought on a reasonable ground, or that denial of benefits has not been based on a reasonable ground, the Court shall assess the total cost of the proceedings on the party, who has brought them or the party who has unreasonably denied payment of benefits.

2. In the event a respondent fails to pay travel expenses as required by an order of the Court within twenty-five (25) business days of such order, the Court shall assess a Five Hundred Dollar (\$500.00) penalty against the respondent and payable to the claimant.

B. Claims for services or treatment rendered or supplies furnished pursuant to Section 14 of this title shall not be enforceable unless approved by the Court. If approved, such claim shall become a lien upon the compensation awarded, but shall be paid therefrom only in the manner fixed by the Court.

C. A claim for legal services shall be determined by the Court on a quantum meruit basis.

1. A claim for legal services in contested temporary disability cases shall not exceed ten percent (10%) of the amount of the award for temporary disability. Legal service fees paid in uncontested

cases for temporary total disability shall not exceed ten percent (10%) based on quantum meruit as ordered by the Court.

2. A claim for legal services shall not exceed twenty percent (20%) of the amount of the award for permanent disability or death benefits.

D. Claims for legal services for temporary disability awards shall be paid periodically. Claims for legal fees for permanent total disability awards shall be paid periodically at the rate of twenty percent (20%) of each weekly check to the claimant until the attorney fee is satisfied, based upon a maximum of four hundred (400) weeks of compensation. The right to any such attorney fee shall be vested at the time the award therefor becomes final. Claims for legal services for permanent partial disability awards may be paid in a lump sum the same to be deducted from the end of the award. Claims for legal services for death awards may be paid in a lump sum which shall be deducted from the periodic compensation payments at a rate of ten percent (10%) per payment until the attorney fee is satisfied.

E. Claims for legal services for a claim for workers' compensation benefits filed on or after November 1, 2002, shall not exceed fifteen (15%) of the amount in dispute to the employee exclusive of medical and rehabilitation expenses.

SECTION 5. REPEALER 85 O.S. 2001, Section 3.10, is hereby repealed.

SECTION 6. This act shall become effective November 1, 2002.

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