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April 10, 2018

ENGROSSED HOUSE
BILL NO. 2722

By: Russ of the House

and

Allen of the Senate

An Act relating to workers' compensation; amending Section 2, Chapter 208, O.S.L. 2013 (85A O.S. Supp. 2017, Section 2), which relates to definitions used in the Administrative Workers' Compensation Act; modifying definition; clarifying application of exemption; and providing an effective date.

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

SECTION 1. AMENDATORY Section 2, Chapter 208, O.S.L.
2013 (85A O.S. Supp. 2017, Section 2), is amended to read as
follows:

Section 2. As used in the Administrative Workers' Compensation Act:

1. "Actually dependent" means a surviving spouse, a child or any other person who receives one-half (1/2) or more of his or her support from the employee;

1 2. "Carrier" means any stock company, mutual company, or
2 reciprocal or interinsurance exchange authorized to write or carry
3 on the business of workers' compensation insurance in this state.
4 Whenever required by the context, the term "carrier" shall be deemed
5 to include duly qualified self-insureds or self-insured groups;

6 3. "Case management" means the ongoing coordination, by a case
7 manager, of health care services provided to an injured or disabled
8 worker, including but not limited to systematically monitoring the
9 treatment rendered and the medical progress of the injured or
10 disabled worker; ensuring that any treatment plan follows all
11 appropriate treatment protocols, utilization controls and practice
12 parameters; assessing whether alternative health care services are
13 appropriate and delivered in a cost-effective manner based upon
14 acceptable medical standards; and ensuring that the injured or
15 disabled worker is following the prescribed health care plan;

16 4. "Case manager" means a person who is a registered nurse with
17 a current, active unencumbered license from the Oklahoma Board of
18 Nursing, or possesses one or more of the following certifications
19 which indicate the individual has a minimum number of years of case
20 management experience, has passed a national competency test and
21 regularly obtains continuing education hours to maintain
22 certification:

- 23 a. Certified Disability Management Specialist (CDMS),
- 24 b. Certified Case Manager (CCM),

- c. Certified Rehabilitation Registered Nurse (CRRN),
- d. Case Manager - Certified (CMC),
- e. Certified Occupational Health Nurse (COHN), or
- f. Certified Occupational Health Nurse Specialist (COHN-S);

5. "Certified workplace medical plan" means an organization of health care providers or any other entity, certified by the State Commissioner of Health, that is authorized to enter into a contractual agreement with an employer, group self-insurance association plan, an employer's workers' compensation insurance carrier, third-party administrator or an insured to provide medical care under the Administrative Workers' Compensation Act. Certified plans shall only include plans which provide medical services and payment for services on a fee-for-service basis to medical providers;

6. "Child" means a natural or adopted son or daughter of the employee under eighteen (18) years of age; or a natural or adopted son or daughter of an employee eighteen (18) years of age or over who is physically or mentally incapable of self-support; or any natural or adopted son or daughter of an employee eighteen (18) years of age or over who is actually dependent; or any natural or adopted son or daughter of an employee between eighteen (18) and twenty-three (23) years of age who is enrolled as a full-time student in any accredited educational institution. The term "child"

1 includes a posthumous child, a child legally adopted or one for whom
2 adoption proceedings are pending at the time of death, an actually
3 dependent stepchild or an actually dependent acknowledged child born
4 out of wedlock;

5 7. "Claimant" means a person who claims benefits for an injury
6 or occupational disease pursuant to the provisions of the
7 Administrative Workers' Compensation Act;

8 8. "Commission" means the Workers' Compensation Commission;

9 9. a. "Compensable injury" means damage or harm to the
10 physical structure of the body, or prosthetic
11 appliances, including eyeglasses, contact lenses, or
12 hearing aids, caused solely as the result of either an
13 accident, cumulative trauma or occupational disease
14 arising out of the course and scope of employment. An
15 "accident" means an event involving factors external
16 to the employee that:

- 17 (1) was unintended, unanticipated, unforeseen,
18 unplanned and unexpected,
19 (2) occurred at a specifically identifiable time and
20 place,
21 (3) occurred by chance or from unknown causes, and
22 (4) was independent of sickness, mental incapacity,
23 bodily infirmity or any other cause.

24 b. "Compensable injury" does not include:

- 1 (1) injury to any active participant in assaults or
2 combats which, although they may occur in the
3 workplace, are the result of non-employment-
4 related hostility or animus of one, both, or all
5 of the combatants and which assault or combat
6 amounts to a deviation from customary duties;
7 provided, however, injuries caused by horseplay
8 shall not be considered to be compensable
9 injuries, except for innocent victims,
- 10 (2) injury incurred while engaging in or performing
11 or as the result of engaging in or performing any
12 recreational or social activities for the
13 employee's personal pleasure,
- 14 (3) injury which was inflicted on the employee at a
15 time when employment services were not being
16 performed or before the employee was hired or
17 after the employment relationship was terminated,
- 18 (4) injury where the accident was caused by the use
19 of alcohol, illegal drugs, or prescription drugs
20 used in contravention of physician's orders. If,
21 within twenty-four (24) hours of being injured or
22 reporting an injury, an employee tests positive
23 for intoxication, an illegal controlled
24 substance, or a legal controlled substance used

1 in contravention to a treating physician's
2 orders, or refuses to undergo the drug and
3 alcohol testing, there shall be a rebuttable
4 presumption that the injury was caused by the use
5 of alcohol, illegal drugs, or prescription drugs
6 used in contravention of physician's orders.
7 This presumption may only be overcome if the
8 employee proves by clear and convincing evidence
9 that his or her state of intoxication had no
10 causal relationship to the injury,

11 (5) any strain, degeneration, damage or harm to, or
12 disease or condition of, the eye or
13 musculoskeletal structure or other body part
14 resulting from the natural results of aging,
15 osteoarthritis, arthritis, or degenerative
16 process including, but not limited to,
17 degenerative joint disease, degenerative disc
18 disease, degenerative
19 spondylosis/spondylolisthesis and spinal
20 stenosis, or

21 (6) any preexisting condition except when the
22 treating physician clearly confirms an
23 identifiable and significant aggravation incurred
24 in the course and scope of employment.

- 1 c. The definition of "compensable injury" shall not be
2 construed to limit or abrogate the right to recover
3 for mental injuries as described in Section 13 of this
4 ~~act~~ title, heart or lung injury or illness as
5 described in Section 14 of this ~~act~~ title, or
6 occupational diseases as described in Section 65 of
7 this ~~act~~ title.
- 8 d. A compensable injury shall be established by medical
9 evidence supported by objective findings as defined in
10 paragraph ~~30~~ 31 of this section.
- 11 e. The injured employee shall prove by a preponderance of
12 the evidence that he or she has suffered a compensable
13 injury.
- 14 f. Benefits shall not be payable for a condition which
15 results from a non-work-related independent
16 intervening cause following a compensable injury which
17 causes or prolongs disability, aggravation, or
18 requires treatment. A non-work-related independent
19 intervening cause does not require negligence or
20 recklessness on the part of a claimant.
- 21 g. An employee who suffers a compensable injury shall be
22 entitled to receive compensation as prescribed in this
23 act. Notwithstanding other provisions of law, if it
24 is determined that a compensable injury did not occur,

1 the employee shall not be entitled to compensation
2 under this act;

3 10. "Compensation" means the money allowance payable to the
4 employee or to his or her dependents and includes the medical
5 services and supplies provided for in Section 50 of this ~~act~~ title
6 and funeral expenses;

7 11. "Consequential injury" means injury or harm to a part of
8 the body that is a direct result of the injury or medical treatment
9 to the part of the body originally injured in the claim. The
10 Commission shall not make a finding of a consequential injury unless
11 it is established by objective medical evidence that medical
12 treatment for such part of the body is required;

13 12. "Continuing medical maintenance" means medical treatment
14 that is reasonable and necessary to maintain claimant's condition
15 resulting from the compensable injury or illness after reaching
16 maximum medical improvement. Continuing medical maintenance shall
17 not include diagnostic tests, surgery, injections, counseling,
18 physical therapy, or pain management devices or equipment;

19 13. "Course and scope of employment" means an activity of any
20 kind or character for which the employee was hired and that relates
21 to and derives from the work, business, trade or profession of an
22 employer, and is performed by an employee in the furtherance of the
23 affairs or business of an employer. The term includes activities
24 conducted on the premises of an employer or at other locations

1 designated by an employer and travel by an employee in furtherance
2 of the affairs of an employer that is specifically directed by the
3 employer. This term does not include:

- 4 a. an employee's transportation to and from his or her
5 place of employment,
- 6 b. travel by an employee in furtherance of the affairs of
7 an employer if the travel is also in furtherance of
8 personal or private affairs of the employee,
- 9 c. any injury occurring in a parking lot or other common
10 area adjacent to an employer's place of business
11 before the employee clocks in or otherwise begins work
12 for the employer or after the employee clocks out or
13 otherwise stops work for the employer, or
- 14 d. any injury occurring while an employee is on a work
15 break, unless the injury occurs while the employee is
16 on a work break inside the employer's facility and the
17 work break is authorized by the employee's supervisor;

18 14. "Cumulative trauma" means an injury to an employee that is
19 caused by the combined effect of repetitive physical activities
20 extending over a period of time in the course and scope of
21 employment. Cumulative trauma shall not mean fatigue, soreness or
22 general aches and pain that may have been caused, aggravated,
23 exacerbated or accelerated by the employee's course and scope of
24 employment. Cumulative trauma shall have resulted directly and

1 independently of all other causes and the employee shall have
2 completed at least one hundred eighty (180) days of continuous
3 active employment with the employer;

4 15. "Death" means only death resulting from compensable injury
5 as defined in paragraph 9 of this section;

6 16. "Disability" means incapacity because of compensable injury
7 to earn, in the same or any other employment, substantially the same
8 amount of wages the employee was receiving at the time of the
9 compensable injury;

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

15 18. a. "Employee" means any person, including a minor, in the
16 service of an employer under any contract of hire or
17 apprenticeship, written or oral, expressed or implied,
18 but excluding one whose employment is casual and not
19 in the course of the trade, business, profession, or
20 occupation of his or her employer and excluding one
21 who is required to perform work for a municipality or
22 county or the state or federal government on having
23 been convicted of a criminal offense or while
24 incarcerated. "Employee" shall also include a member

1 of the Oklahoma National Guard while in the
2 performance of duties only while in response to state
3 orders and any authorized voluntary or uncompensated
4 worker, rendering services as a firefighter, peace
5 officer or emergency management worker. Travel by a
6 policeman, fireman, or a member of a first aid or
7 rescue squad, in responding to and returning from an
8 emergency, shall be deemed to be in the course of
9 employment.

10 b. The term "employee" shall not include:

11 (1) any person for whom an employer is liable under
12 any Act of Congress for providing compensation to
13 employees for injuries, disease or death arising
14 out of and in the course of employment including,
15 but not limited to, the Federal Employees'
16 Compensation Act, the Federal Employers'
17 Liability Act, the Longshore and Harbor Workers'
18 Compensation Act and the Jones Act, to the extent
19 his or her employees are subject to such acts,

20 (2) any person who is employed in agriculture,
21 ranching or horticulture by an employer who had a
22 gross annual payroll in the preceding calendar
23 year of less than One Hundred Thousand Dollars
24 (\$100,000.00) wages for agricultural, ranching or

1 horticultural workers, or any person who is
2 employed in agriculture, ranching or horticulture
3 who is not engaged in operation of motorized
4 machines. This exemption applies to any period
5 of time for which such employment exists,
6 irrespective of whether or not the person is
7 employed in other activities for which the
8 exemption does not apply. If the person is
9 employed for part of a year in exempt activities
10 and for part of a year in nonexempt activities,
11 the employer shall be responsible for providing
12 workers' compensation only for the period of time
13 for which the person is employed in nonexempt
14 activities,

15 (3) any person who is a licensed real estate sales
16 associate or broker, paid on a commission basis,

17 (4) any person who is providing services in a medical
18 care or social services program, or who is a
19 participant in a work or training program,
20 administered by the Department of Human Services,
21 unless the Department is required by federal law
22 or regulations to provide workers' compensation
23 for such person. This division shall not be
24 construed to include nursing homes,

- 1 (5) any person employed by an employer with five or
2 fewer total employees, all of whom are related by
3 blood or marriage to the employer, if the
4 employer is a natural person or a general or
5 limited partnership, or an incorporator of a
6 corporation if the corporation is the employer,
- 7 (6) any person employed by an employer which is a
8 youth sports league which qualifies for exemption
9 from federal income taxation pursuant to federal
10 law,
- 11 (7) sole proprietors, members of a partnership,
12 individuals who are party to a franchise
13 agreement as set out by the Federal Trade
14 Commission franchise disclosure rule, 16 CFR
15 436.1 through 436.11, members of a limited
16 liability company who own at least ten percent
17 (10%) of the capital of the limited liability
18 company or any stockholder-employees of a
19 corporation who own ten percent (10%) or more
20 stock in the corporation, unless they elect to be
21 covered by a policy of insurance covering
22 benefits under the Administrative Workers'
23 Compensation Act,
24

1 (8) any person providing or performing voluntary
2 service who receives no wages for the services
3 other than meals, drug or alcohol rehabilitative
4 therapy, transportation, lodging or reimbursement
5 for incidental expenses except for volunteers
6 specifically provided for in subparagraph a of
7 this paragraph,

8 (9) a person, commonly referred to as an owner-
9 operator, who owns or leases a truck-tractor or
10 truck for hire, if the owner-operator actually
11 operates the truck-tractor or truck and if the
12 person contracting with the owner-operator is not
13 the lessor of the truck-tractor or truck.

14 Provided, however, an owner-operator shall not be
15 precluded from workers' compensation coverage
16 under the Administrative Workers' Compensation
17 Act if the owner-operator elects to participate
18 as a sole proprietor,

19 (10) a person referred to as a drive-away owner-
20 operator who privately owns and utilizes a tow
21 vehicle in drive-away operations and operates
22 independently for hire, if the drive-away owner-
23 operator actually utilizes the tow vehicle and if
24 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 Administrative Workers' Compensation Act if the drive-away owner-operator elects to participate as a sole proprietor, and
(11) any person who is employed as a domestic servant or as a casual worker in and about a private home or household, which private home or household had a gross annual payroll in the preceding calendar year of less than Fifty Thousand Dollars (\$50,000.00) for such workers;

19. "Employer" 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 defined in this section. Employer may also mean the employer's workers' compensation insurance carrier, if applicable. Except as provided otherwise, this act applies to all public and private entities and institutions. Employer shall not include a

1 qualified employer with an employee benefit plan as provided under
2 the Oklahoma Employee Injury Benefit Act in Sections ~~107~~ 200 through
3 ~~120~~ 213 of this ~~act~~ title;

4 20. "Employment" includes work or labor in a trade, business,
5 occupation or activity carried on by an employer or any authorized
6 voluntary or uncompensated worker rendering services as a
7 firefighter, peace officer or emergency management worker;

8 21. "Evidence-based" means expert-based, literature-supported
9 and outcomes validated by well-designed randomized trials when such
10 information is available and which uses the best available evidence
11 to support medical decision making;

12 22. "Gainful employment" means the capacity to perform
13 employment for wages for a period of time that is not part-time,
14 occasional or sporadic;

15 23. "Impaired self-insurer" means a private self-insurer or
16 group self-insurance association that fails to pay its workers'
17 compensation obligations, or is financially unable to do so and is
18 the subject of any proceeding under the Federal Bankruptcy Reform
19 Act of 1978, and any subsequent amendments or is the subject of any
20 proceeding in which a receiver, custodian, liquidator,
21 rehabilitator, trustee or similar officer has been appointed by a
22 court of competent jurisdiction to act in lieu of or on behalf of
23 the self-insurer;

1 24. "Incapacity" means inadequate strength or ability to
2 perform a work-related task;

3 25. "Insurance Commissioner" means the Insurance Commissioner
4 of the State of Oklahoma;

5 26. "Insurance Department" means the Insurance Department of
6 the State of Oklahoma;

7 27. "Major cause" means more than fifty percent (50%) of the
8 resulting injury, disease or illness. A finding of major cause
9 shall be established by a preponderance of the evidence. A finding
10 that the workplace was not a major cause of the injury, disease or
11 illness shall not adversely affect the exclusive remedy provisions
12 of this act and shall not create a separate cause of action outside
13 this act;

14 28. "Maximum medical improvement" means that no further
15 material improvement would reasonably be expected from medical
16 treatment or the passage of time;

17 29. "Medical services" means those services specified in
18 Section 50 of this ~~act~~ title;

19 30. "Misconduct" shall include the following:

- 20 a. unexplained absenteeism or tardiness,
- 21 b. willful or wanton indifference to or neglect of the
22 duties required,
- 23 c. willful or wanton breach of any duty required by the
24 employer,

- d. the mismanagement of a position of employment by action or inaction,
- e. actions or omissions that place in jeopardy the health, life, or property of self or others,
- f. dishonesty,
- g. wrongdoing,
- h. violation of a law, or
- i. a violation of a policy or rule adopted to ensure orderly work or the safety of self or others;

31. a. (1) "Objective findings" are those findings which cannot come under the voluntary control of the patient.

(2) (a) When determining permanent disability, a physician, any other medical provider, an administrative law judge, the Commission or the courts shall not consider complaints of pain.

(b) For the purpose of making permanent disability ratings to the spine, physicians shall use criteria established by the most current edition of the American Medical Association "Guides to the Evaluation of Permanent Impairment".

1 (3) (a) Objective evidence necessary to prove
2 permanent disability in occupational hearing
3 loss cases may be established by medically
4 recognized and accepted clinical diagnostic
5 methodologies, including, but not limited
6 to, audiological tests that measure air and
7 bone conduction thresholds and speech
8 discrimination ability.

9 (b) Any difference in the baseline hearing
10 levels shall be confirmed by subsequent
11 testing; provided, however, such test shall
12 be given within four (4) weeks of the
13 initial baseline hearing level test but not
14 before five (5) days after being adjusted
15 for presbycusis.

16 b. Medical opinions addressing compensability and
17 permanent disability shall be stated within a
18 reasonable degree of medical certainty;

19 32. "Official Disability Guidelines" or "ODG" means the current
20 edition of the Official Disability Guidelines and the ODG Treatment
21 in Workers' Comp as published by the Work Loss Data Institute;

22 33. "Permanent disability" means the extent, expressed as a
23 percentage, of the loss of a portion of the total physiological
24 capabilities of the human body as established by competent medical

1 evidence and based on the current edition of the American Medical
2 Association guides to the evaluation of impairment, if the
3 impairment is contained therein;

4 34. "Permanent partial disability" means a permanent disability
5 or loss of use after maximum medical improvement has been reached
6 which prevents the injured employee, who has been released to return
7 to work by the treating physician, from returning to his or her pre-
8 injury or equivalent job. All evaluations of permanent partial
9 disability must be supported by objective findings;

10 35. "Permanent total disability" means, based on objective
11 findings, incapacity, based upon accidental injury or occupational
12 disease, to earn wages in any employment for which the employee may
13 become physically suited and reasonably fitted by education,
14 training, experience or vocational rehabilitation provided under
15 this act. Loss of both hands, both feet, both legs, or both eyes,
16 or any two thereof, shall constitute permanent total disability;

17 36. "Preexisting condition" means any illness, injury, disease,
18 or other physical or mental condition, whether or not work-related,
19 for which medical advice, diagnosis, care or treatment was
20 recommended or received preceding the date of injury;

21 37. "Pre-injury or equivalent job" means the job that the
22 claimant was working for the employer at the time the injury
23 occurred or any other employment offered by the claimant's employer
24

1 that pays at least one hundred percent (100%) of the employee's
2 average weekly wage;

3 38. "Private self-insurer" means a private employer that has
4 been authorized to self-insure its workers' compensation obligations
5 pursuant to this act, but does not include group self-insurance
6 associations authorized by this act, or any public employer that
7 self-insures pursuant to this act;

8 39. "Prosthetic" means an artificial device used to replace a
9 part or joint of the body that is lost or injured in an accident or
10 illness covered by this act;

11 40. "Scheduled member" or "member" means hands, fingers, arms,
12 legs, feet, toes, and eyes. In addition, for purposes of the
13 Multiple Injury Trust Fund only, "scheduled member" means hearing
14 impairment;

15 41. "Scientifically based" involves the application of
16 rigorous, systematic, and objective procedures to obtain reliable
17 and valid knowledge relevant to medical testing, diagnoses and
18 treatment; is adequate to justify the general conclusions drawn; and
19 has been accepted by a peer-review journal or approved by a panel of
20 independent experts through a comparably rigorous, objective, and
21 scientific review;

22 42. "State average weekly wage" means the state average weekly
23 wage determined by the Oklahoma Employment Security Commission in
24 the preceding calendar year. If such determination is not

1 available, the Commission shall determine the wage annually after
2 reasonable investigation;

3 43. "Subcontractor" means a person, firm, corporation or other
4 legal entity hired by the general or prime contractor to perform a
5 specific task for the completion of a work-related activity;

6 44. "Surgery" does not include an injection, or the forcing of
7 fluids beneath the skin, for treatment or diagnosis;

8 45. "Surviving spouse" means the employee's spouse by reason of
9 a legal marriage recognized by the State of Oklahoma or under the
10 requirements of a common law marriage in this state, as determined
11 by the Workers' Compensation Commission;

12 46. "Temporary partial disability" means an injured employee
13 who is temporarily unable to perform his or her job, but may perform
14 alternative work offered by the employer;

15 47. "Time of accident" or "date of accident" means the time or
16 date of the occurrence of the accidental incident from which
17 compensable injury, disability, or death results; and

18 48. "Wages" means money compensation received for employment at
19 the time of the accident, including the reasonable value of board,
20 rent, housing, lodging, or similar advantage received from the
21 employer and includes the amount of tips required to be reported by
22 the employer under Section 6053 of the Internal Revenue Code and the
23 regulations promulgated pursuant thereto or the amount of actual
24 tips reported, whichever amount is greater.

SECTION 2. This act shall become effective November 1, 2018.

COMMITTEE REPORT BY: COMMITTEE ON JUDICIARY
April 10, 2018 - DO PASS