

1 SB403  
2 95177-2  
3 By Senators Smitherman, Means, Bedford, Sanders, Little (Z),  
4 Figures, Coleman, and McClain  
5 RFD: Judiciary  
6 First Read: 19-FEB-08

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8 SYNOPSIS: Under existing law, the amount of monetary  
9 compensation to which an injured employee is  
10 entitled under the Workers' Compensation Law is  
11 limited in both amount and duration depending on  
12 the type and severity of the resulting permanent  
13 disability.

14 This bill would compensate persons who are  
15 injured while in the line and scope of their  
16 employment, regardless of the amount of their  
17 earnings; would remove the differences between  
18 permanent partial and permanent total disability  
19 benefits; would remove the monetary caps upon  
20 higher income workers; would reduce the amount and  
21 costs of litigation for workers' compensation  
22 benefits; would provide protection for the  
23 employees from attempts to set aside permanent and  
24 total disability awards; and would allow lump sum  
25 settlements upon the petition of either party and  
26 the approval of the court.

1 A BILL  
2 TO BE ENTITLED  
3 AN ACT  
4

5 To amend Sections 25-5-1, 25-5-57, 25-5-68, and  
6 25-5-83, Code of Alabama 1975, relating to the Workers'  
7 Compensation Law, to alter certain definitions, to compensate  
8 persons who are injured while in the line and scope of their  
9 employment, regardless of the amount of their earnings, to  
10 remove the differences between permanent partial and permanent  
11 total disability benefits, to remove the monetary caps upon  
12 higher income workers, to reduce the amount and costs of  
13 litigation for workers' compensation benefits, to provide  
14 protection for the employees from attempts to set aside  
15 permanent and total disability awards, and to allow lump sum  
16 settlements upon the petition of either party and the approval  
17 of the court.

18 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

19 Section 1. Sections 25-5-1, 25-5-57, 25-5-68, and  
20 25-5-83 are amended to read as follows:

21 "§25-5-1.

22 "Throughout this chapter, the following words and  
23 phrases as used therein shall be considered to have the  
24 following meanings, respectively, unless the context shall  
25 clearly indicate a different meaning in the connection used:

26 "(1) COMPENSATION. The money benefits to be paid on  
27 account of injury or death, as provided in Articles 3 and 4.

1 The recovery which an employee may receive by action at law  
2 under Article 2 of this chapter is termed "recovery of civil  
3 damages," as provided for in Sections 25-5-31 and 25-5-34.

4 "Compensation" does not include medical and surgical treatment  
5 and attention, medicine, medical and surgical supplies, and  
6 crutches and apparatus furnished an employee on account of an  
7 injury.

8 "(2) CHILD or CHILDREN. The terms include posthumous  
9 children and all other children entitled by law to inherit as  
10 children of the deceased; stepchildren who were members of the  
11 family of the deceased, at the time of the accident, and were  
12 dependent upon him or her for support; a grandchild of the  
13 deceased employee, whose father is dead or is an invalid, and  
14 who was supported by and a member of the family of the  
15 deceased grandparent at the time of the accident.

16 "(3) DEPENDENT CHILD or ORPHAN. An unmarried child  
17 under the age of 18 years or one over that age who is  
18 physically or mentally incapacitated from earning.

19 "(4) EMPLOYER. Every person who employs another to  
20 perform a service for hire and pays wages directly to the  
21 person. The term shall include a service company for a  
22 self-insurer or any person, corporation, copartnership, or  
23 association, or group thereof, and shall, if the employer is  
24 insured, include his or her insurer, the insurer being  
25 entitled to the employer's rights, immunities, and remedies  
26 under this chapter, as far as applicable. The inclusion of an  
27 employer's insurer within the term shall not provide the

1 insurer with immunity from liability to an injured employee,  
2 or his or her dependent in the case of death to whom the  
3 insurer would otherwise be subject to liability under Section  
4 25-5-11. Notwithstanding the provisions of this chapter, in no  
5 event shall a common carrier by motor vehicle operating  
6 pursuant to a certificate of public convenience and necessity  
7 be deemed the "employer" of a leased-operator or  
8 owner-operator of a motor vehicle or vehicles under contract  
9 to the common carrier.

10 "(5) EMPLOYEE or WORKER. The terms are used  
11 interchangeably, have the same meaning throughout this  
12 chapter, and shall be construed to mean the same. The terms  
13 include the plural and all ages and both sexes. The terms  
14 include every person in the service of another under any  
15 contract of hire, express or implied, oral or written,  
16 including aliens and also including minors who are legally  
17 permitted to work under the laws of this state, and also  
18 including all employees of Tannehill Furnace and Foundry  
19 Commission. Any reference in this chapter to a "worker" or  
20 "employee" shall, if the worker or employee is dead, include  
21 his or her dependent, as defined in this chapter, if the  
22 context so requires.

23 "(6) WAGES or WEEKLY WAGES. The terms shall in all  
24 cases be construed to mean "average weekly earnings", based on  
25 those earnings subject to federal income taxation and  
26 reportable on the Federal W-2 tax form which shall include  
27 voluntary contributions made by the employee to a

1 tax-qualified retirement program, voluntary contributions to a  
2 Section 125 cafeteria program, and fringe benefits as defined  
3 herein. Average weekly earnings shall not include fringe  
4 benefits if and only if the employer continues the benefits  
5 during the period of time for which compensation is paid.  
6 "Fringe benefits" shall mean only the employer's portion of  
7 health, life, and disability insurance premiums.

8 "(7) ACCIDENT. The term, as used in the phrases  
9 "personal injuries due to accident" or "injuries or death  
10 caused by accident" shall be construed to mean an unexpected  
11 or unforeseen event, happening suddenly and violently, with or  
12 without human fault, and producing at the time injury to the  
13 physical structure of the body or damage to an artificial  
14 member of the body by accidental means.

15 "(8) INJURIES BY AN ACCIDENT ARISING OUT OF AND IN  
16 THE COURSE OF THE EMPLOYMENT. Without otherwise affecting  
17 either the meaning or interpretation of the clause, the clause  
18 does not cover workers except while engaged in or about the  
19 premises where their services are being performed or where  
20 their service requires their presence as a part of service at  
21 the time of the accident and during the hours of service as  
22 workers.

23 "(9) INJURY. "Injury and personal injury" shall mean  
24 only injury by accident arising out of and in the course of  
25 the employment, and shall not include a disease in any form,  
26 except for an occupational disease or where it results  
27 naturally and unavoidably from the accident. Injury shall

1 include physical injury caused either by carpal tunnel  
2 syndrome disorder or by other cumulative trauma disorder if  
3 either disorder arises out of and in the course of the  
4 employment, and breakage or damage to eyeglasses, hearing  
5 aids, dentures, or other prosthetic devices which function as  
6 part of the body, when injury to them is incidental to an  
7 on-the-job injury to the body. Injury does not include an  
8 injury caused by the act of a third person or fellow employee  
9 intended to injure the employee because of reasons personal to  
10 him or her and not directed against him or her as an employee  
11 or because of his or her employment. Injury does not include a  
12 mental disorder or mental injury that has neither been  
13 produced nor been proximately caused by some physical injury  
14 to the body, unless the employer is a first responder.

15 "(10) SINGULAR and PLURAL. Wherever the singular is  
16 used, the plural shall be included.

17 "(11) GENDER. Where the masculine gender is used,  
18 the feminine and neuter shall be included.

19 "(12) LOSS OF HAND OR FOOT. Amputation between the  
20 elbow and wrist shall be considered as the equivalent to the  
21 loss of a hand, and the amputation between the knee and ankle  
22 shall be considered as the equivalent of the loss of a foot.

23 "(13) PROVIDERS. A medical clinic, pharmacist,  
24 dentist, chiropractor, psychologist, podiatrist, physical  
25 therapist, pharmaceutical supply company, rehabilitation  
26 service, or other person or entity providing treatment,

1 service, or equipment, or person or entity providing  
2 facilities at which the employee receives treatment.

3 "(14) MEDICAL. All services, treatment, or equipment  
4 provided by a provider.

5 "(15) PREVAILING. The most commonly occurring  
6 reimbursements for health services, other than those provided  
7 by federal and state programs for the elderly (Medicare) and  
8 economically disadvantaged (Medicaid). "Prevailing" shall  
9 include not only amounts per procedure code, but also commonly  
10 used adjudication rules as applied to multiple procedures,  
11 global procedures, use of assistant surgeons, and others as  
12 appropriate. For hospitals, "prevailing" rate of reimbursement  
13 or payment shall be established by the method contained in  
14 Section 25-5-77.

15 "(16) PARTICIPATING AND NONPARTICIPATING HOSPITALS.  
16 Those hospitals that have a negotiated rate of reimbursement  
17 or payment with the Department of Industrial Relations.  
18 "Nonparticipating hospitals" means those hospitals that have  
19 not negotiated a rate of reimbursement or payment with the  
20 Department of Industrial Relations.

21 "(17) HOSPITAL. A hospital, ambulatory surgical  
22 center, outpatient rehabilitation center licensed by the State  
23 of Alabama, and diagnostic facilities accredited by the  
24 Commission on Accreditation of Rehabilitation Facilities.

25 "(18) THE COURT. The circuit court that would have  
26 jurisdiction in an ordinary civil action involving a claim for

1 the injuries or death in question, and "the judge" means a  
2 judge of that court.

3 "(19) UTILIZATION REVIEW. The determination of  
4 medical necessity for medical and surgical in-hospital,  
5 out-patient, and alternative settings treatments for acute and  
6 rehabilitation care. It includes precertification for elective  
7 treatments. Concurrent review and, if necessary, retrospective  
8 review are required for emergency cases.

9 "(20) BILL SCREENING. The evaluation and  
10 adjudication of provider bills for appropriateness of  
11 reimbursement relative to medical necessity and prevailing  
12 rates of reimbursement, duplicate charges, unbundling of  
13 charges, relativeness of services to injury or illness,  
14 necessity of assistant surgeons, adjudication of multiple  
15 procedures, number of modalities, global procedures, and any  
16 other prevailing adjudication issues that may apply.

17 "(21) ADJUDICATION. The review of claims to apply  
18 prevailing rules that adjust reimbursements for the amount of  
19 work required when multiple procedures are performed at the  
20 same time, when assisting surgeons are present, to eliminate  
21 duplicate billing from the unbundling of global fees, and to  
22 adjust for the most commonly occurring method adopted for  
23 total reimbursement.

24 "(22) OMBUDSMAN. An individual who assists injured  
25 or disabled employees, persons claiming death benefits,  
26 employers, and other persons in protecting their rights and

1 obtaining information available under the workers'  
2 compensation law.

3 "(23) FIRST RESPONDER. A first responder shall  
4 include municipal police officers, dispatchers, sheriffs and  
5 their deputies; firefighters; correctional officers; and  
6 paramedics providing emergency medical services.

7 "\$25-5-57.

8 "(a) Compensation schedule. Following is the  
9 schedule of compensation:

10 "(1) TEMPORARY TOTAL DISABILITY. For injury  
11 producing temporary total disability, the compensation shall  
12 be 66 2/3 percent of the average weekly earnings received at  
13 the time of injury, subject to a maximum and minimum weekly  
14 compensation as stated in Section 25-5-68, but if at the time  
15 of injury the employee received average weekly earnings of  
16 less than the minimum stated in Section 25-5-68, then he or  
17 she shall receive the full amount of the average weekly  
18 earnings per week. This compensation shall be paid during the  
19 time of the disability, but at the time as a temporary total  
20 disability shall become permanent, compensation for the  
21 continued total disability shall be governed by (a) (4) of this  
22 section with respect to permanent total disability. Payments  
23 are to be made at the intervals when the earnings were  
24 payable, as nearly as may be, unless the parties otherwise  
25 agree.

26 "(2) TEMPORARY PARTIAL DISABILITY.

1            "a. Amount and Duration of Compensation. For  
2 temporary partial disability, the compensation shall be 66 2/3  
3 percent of the difference between the average weekly earnings  
4 of the worker at the time of the injury and the average weekly  
5 earnings he or she is able to earn in his or her partially  
6 disabled condition. This compensation shall be paid during the  
7 period of the disability, but not beyond 300 weeks. Payments  
8 shall be made at the intervals when the earnings were payable,  
9 as nearly as may be, unless the parties otherwise agree, and  
10 shall be subject to the same maximum weekly compensation as  
11 stated in Section 25-5-68.

12            "b. Effect of Change in Employment. If the injured  
13 employee who is receiving compensation for temporary partial  
14 disability leaves the employment of the employer by whom he or  
15 she was employed at the time of the accident for which the  
16 compensation is being paid, he or she shall, upon securing  
17 employment elsewhere, give to the former employer an affidavit  
18 in writing containing the name of his or her new employer, the  
19 place of employment, and the amount of wages being received at  
20 the new employment, and until he or she gives the affidavit,  
21 the compensation for temporary partial disability shall cease.  
22 The employer for whom the employee was employed at the time of  
23 the accident for which the compensation is being paid may also  
24 at any time demand of the employee an additional affidavit, in  
25 writing, containing the name of his or her employer, the place  
26 of his or her employment, and the amount of wages he or she is  
27 receiving; and if the employee upon demand fails or refuses to

1 make and furnish the affidavit, his or her right to  
2 compensation for temporary partial disability shall cease  
3 until the affidavit is made and furnished.

4 "(3) PERMANENT PARTIAL DISABILITY.

5 "a. Amount and Duration of Compensation. For  
6 permanent partial disability, the compensation shall be based  
7 upon the extent of the disability. In cases included in the  
8 following schedule, where the worker has sustained no loss of  
9 earning capacity, the compensation shall be 66 2/3 percent of  
10 the average weekly earnings, during the number of weeks set  
11 out in the following schedule:

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

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

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

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

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

19 "6. The loss of the first phalange of the thumb or  
20 of any finger shall be considered as equal to the loss of one  
21 half of the thumb or finger, and compensation shall be paid at  
22 the prescribed rate during one half of the time specified  
23 above for the thumb or finger.

24 "7. The loss of two or more phalanges shall be  
25 considered as the loss of the entire finger or thumb, but in  
26 no case shall the amount received for more than one finger

1 exceed the amount provided in this schedule for the loss of a  
2 hand.

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

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

6 "10. The loss of the first phalange of any toe shall  
7 be considered to be equal to the loss of one half of the toe,  
8 and compensation shall be paid at the prescribed rate during  
9 one half the time prescribed above for the toe.

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

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

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

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

15 "15. Amputation between the elbow and wrist shall be  
16 considered as the equivalent to the loss of a hand, and  
17 amputation between the knee and ankle shall be considered as  
18 the equivalent of the loss of a foot.

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

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

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

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

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

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

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

1                   "23. For the loss of an eye and a foot, 300 weeks.  
2                   "24. For the loss of two arms, other than at the  
3                   shoulder, 400 weeks.  
4                   "25. For the loss of two hands, 400 weeks.  
5                   "26. For the loss of two legs, 400 weeks.  
6                   "27. For the loss of two feet, 400 weeks.  
7                   "28. For the loss of one arm and the other hand, 400  
8                   weeks.  
9                   "29. For the loss of one hand and one foot, 400  
10                  weeks.  
11                  "30. For the loss of one leg and the other foot, 400  
12                  weeks.  
13                  "31. For the loss of one hand and one leg, 400  
14                  weeks.  
15                  "32. For the loss of one arm and one foot, 400  
16                  weeks.  
17                  "33. For the loss of one arm and one leg, 400 weeks.  
18                  "34. For serious disfigurement, not resulting from  
19                  the loss of a member or other injury specifically compensated,  
20                  materially affecting the employability of the injured person  
21                  in the employment in which he or she was injured or other  
22                  employment for which he or she is then qualified, 66 2/3  
23                  percent of the average weekly earnings for the period as the  
24                  court may determine, but not exceeding 100 weeks.  
25                  **"b. Successive or Concurrent Temporary Total and**  
26                  **Permanent Partial Disabilities Resulting from Same Injury.**  
27                  When a permanent partial disability, the number of weeks

1 compensation for which is scheduled in subdivision (a) (3) of  
2 this section, follows or accompanies a period of temporary  
3 total disability resulting from the same injury, the number of  
4 weeks of the temporary total disability shall not be deducted  
5 from the number of weeks payable for the permanent partial  
6 disability.

7 "c. Concurrent Disabilities. If an employee sustains  
8 concurrent injuries resulting in concurrent disabilities, he  
9 or she shall receive compensation only for the injury which  
10 entitled him or her to the largest amount of compensation, but  
11 this paragraph shall not affect liability for the concurrent  
12 loss of more than one member for which members compensation is  
13 provided in the specific schedule.

14 "d. Loss of Use of Member. The permanent and total  
15 loss of the use of a member shall be considered as equivalent  
16 to the loss of that member, but in such cases the compensation  
17 specified in the schedule for such injury shall be in lieu of  
18 all other compensation, except as otherwise provided herein.  
19 For permanent disability due to injury to a member resulting  
20 in less than total loss of use of the member not otherwise  
21 compensated in this schedule, compensation shall be paid at  
22 the prescribed rate during that part of the time specified in  
23 the schedule for the total loss or total loss of use of the  
24 respective member which the extent of the injury to the member  
25 bears to its total loss.

26 "e. Effect of Refusal of Suitable Employment. If an  
27 injured employee refuses employment suitable to his or her

1 capacity offered to or procured for him or her, he or she  
2 shall not be entitled to any compensation at any time during  
3 the continuance of the refusal, unless at any time, in the  
4 opinion of the judge of the circuit court of the county of his  
5 or her residence, the refusal is justifiable.

6 "f. Maximum and Minimum Compensation Awards.

7 Compensation provided in this subsection (a) for loss of  
8 members or loss of use of members is subject to the same  
9 limitations as to maximum and minimum weekly compensation as  
10 stated in Section 25-5-68.

11 "g. Compensation for Permanent Partial Disabilities

12 Not Enumerated. For all other permanent partial disabilities  
13 not above enumerated, the compensation shall be 66 2/3 percent  
14 of the difference between the average weekly earnings of the  
15 worker at the time of the injury and the average weekly  
16 earnings he or she is able to earn in his or her partially  
17 disabled condition, subject to the same maximum weekly  
18 compensation as stated in Section 25-5-68. If a permanent  
19 partial disability, compensation for which is not calculated  
20 by use of the schedule in subdivision (a) (3) of this section,  
21 follows a period of temporary total disability resulting from  
22 the same injury, the number of weeks of the temporary total  
23 disability shall be deducted from the number of weeks payable  
24 for the permanent partial disability. Compensation shall  
25 continue during disability, but not beyond 300 weeks or age  
26 67, whichever is longer.

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

7            "i. Return to Work. ~~If, on or after the date of~~  
8 ~~maximum medical improvement, except for scheduled injuries as~~  
9 ~~provided in Section 25-5-57(a) (3), an injured worker returns~~  
10 ~~to work at a wage equal to or greater than the worker's~~  
11 ~~pre-injury wage, When an injured worker returns to work at a~~  
12 ~~wage equal to or greater than the worker's pre-injury wage,~~  
13 ~~there shall be a rebuttable presumption that the worker's~~  
14 ~~permanent partial disability rating shall be equal to his or~~  
15 ~~her physical impairment and the court shall not consider any~~  
16 ~~evidence of vocational disability as determined by the court~~  
17 ~~in its discretion. The court, in its discretion, is to~~  
18 ~~calculate the physical impairment rating and is not bound by~~  
19 ~~the impairment rating assigned by the employee's treating~~  
20 ~~physician.~~ 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 "(4) PERMANENT TOTAL DISABILITY.

19 "a. Amount, Duration, and Payment of Compensation.

20 For permanent total disability, as defined in paragraph d. of  
21 this subdivision, the employee shall receive 66 2/3 percent of  
22 the average weekly earnings received at the time of the  
23 injury, subject to a maximum and minimum weekly compensation  
24 as stated in Section 25-5-68. Notwithstanding the foregoing,  
25 if at the time of injury the employee was receiving earnings  
26 of less than the minimum as stated in Section 25-5-68, then he  
27 or she shall receive the full amount of his or her earnings

1 per week. This compensation shall be paid during the permanent  
2 total disability, as defined in paragraph d. of this  
3 subdivision. Payment of the compensation shall be made at the  
4 intervals when the earnings were payable, as nearly as may be,  
5 unless the parties otherwise agree. The payments, with the  
6 approval of the circuit judge or by the agreement of the  
7 parties, may be made monthly, quarterly, or otherwise as the  
8 parties may agree. Payments for permanent total disability  
9 shall not be ordered to be paid in a lump sum without the  
10 consent of both the employer and the employee, unless the  
11 employer is found to be in contempt of a previous order of the  
12 court.

13 "b. Alteration, Amendment, or Revision of  
14 Compensation. At any time, the employer may petition the court  
15 that awarded or approved compensation for permanent total  
16 disability to alter, amend, or revise the award or approval of  
17 the compensation on the ground that as a result of physical or  
18 vocational rehabilitation, or otherwise, the disability from  
19 which the employee suffers is no longer a permanent total  
20 disability and, if the court is so satisfied after a hearing,  
21 it shall alter, amend, or revise the award accordingly. If  
22 compensation for permanent total disability is being paid  
23 pursuant to a written agreement between employer and employee  
24 without approval, the employer may make application to the  
25 court that would have had jurisdiction to award the  
26 compensation to the employee to alter, amend, or revise the  
27 agreement on such grounds. If an employee is receiving

1 benefits for permanent total disability other than as a result  
2 of an award or a written agreement between the employer and  
3 employee and if the employer terminates the payment of the  
4 benefits, the employee may, within two years of the last  
5 payment, petition the court to reinstate the benefits and,  
6 upon a showing that the permanent total disability still  
7 exists, shall be entitled to have the benefits reinstated  
8 effective the date of the last payment.

9 "c. Employees in Public Institutions. In case an  
10 employee who is permanently and totally disabled becomes an  
11 inmate of a public institution, no compensation shall be  
12 payable unless the employee has wholly dependent on him or her  
13 for support a person or persons named in Sections 25-5-61 and  
14 25-5-62, whose dependency shall be determined as if the  
15 employee were deceased, in which case the compensation  
16 provided for in this subdivision shall be paid for the benefit  
17 of the person so dependent, during dependency, in the manner  
18 so ordered by the court, while the employee is an inmate in  
19 the institution. Nothing contained herein shall be construed  
20 to deprive a permanently and totally disabled employee who has  
21 no dependent named in Sections 25-5-61 and 25-5-62 from  
22 receiving benefits to which he or she would otherwise be  
23 entitled if the employee, although an inmate of a public  
24 institution, is paying or on whose behalf funds are paid from  
25 any source to the public institution the normal and customary  
26 charge for the services rendered by the public institution.  
27 Normal and customary charge shall mean that charge actually

1 made by the public institution to persons able to pay for the  
2 services rendered them whether the charge actually covers the  
3 expense of the upkeep of the inmate or not. If the employee  
4 has had a guardian appointed by a court of competent  
5 jurisdiction, the workers' compensation payments shall be  
6 directly paid to the guardian.

7 "d. Definition. The total and permanent loss of the  
8 sight of both eyes or the loss of both arms at the shoulder or  
9 any physical injury or mental impairment resulting from an  
10 accident or occupational disease, which injury or impairment  
11 permanently and totally incapacitates the employee from  
12 working at and being retrained for gainful employment, shall  
13 constitute prima facie evidence of permanent total disability  
14 but shall not constitute the sole basis on which an award of  
15 permanent total disability may be based. Any employee whose  
16 disability results from an injury or impairment and who shall  
17 have refused to undergo reasonable physical or vocational  
18 rehabilitation or to accept reasonable accommodation shall not  
19 be deemed permanently and totally disabled.

20 "e. Second Permanent Injuries Generally. If an  
21 employee has a permanent disability or has previously  
22 sustained another injury than that in which the employee  
23 received a subsequent permanent injury by accident, as is  
24 specified in this section defining permanent injury, the  
25 employee shall be entitled to compensation only for the degree  
26 of injury that would have resulted from the latter accident if  
27 the earlier disability or injury had not existed.

1            "f. Second Permanent Injury in Same Employment  
2     Resulting in Permanent Total Disability. If an employee  
3     receives a permanent injury as specified in this section after  
4     having sustained another permanent injury in the same  
5     employment, and if the previous and subsequent injuries result  
6     in permanent total disability, compensation shall be payable  
7     for permanent total disability only.

8            "g. Concurrent Compensation Payments. If an employee  
9     receives an injury for which compensation is payable while he  
10    or she is still receiving or entitled to receive compensation  
11    for a previous injury in the same employment, he or she shall  
12    not at the same time be entitled to compensation for both  
13    injuries, unless the later injury is a permanent injury, as  
14    specified in this section, but he or she shall be entitled to  
15    compensation for that injury and from the time of that injury  
16    which will cover the longest period and the largest amount  
17    payable under this article and Article 4 of this chapter.

18           "If an employee receives a permanent injury as  
19    specified in this section, after having sustained another  
20    permanent injury in the same employment, he or she shall be  
21    entitled to compensation for both injuries, subject to  
22    paragraph e. of this subdivision, but the total compensation  
23    shall be paid by extending the period and not by increasing  
24    the amount of weekly compensation, and in no case for  
25    permanent partial disability exceeding 700 weeks.

26           "h. Effect of Rehabilitation or Recovery on  
27    Permanent Total Disability Benefits. If an employee who is

1 receiving benefits for permanent total disability shall, as a  
2 result of physical or vocational rehabilitation or otherwise,  
3 obtain gainful employment, the obligation to pay permanent  
4 total disability benefits shall thereupon terminate; provided,  
5 that at any time that the employee's weekly wage from the  
6 employment shall be less than the employee's average weekly  
7 wage at the time of injury, the employer shall remain  
8 obligated to pay to the employee as compensation an amount  
9 equal to 66 2/3 percent of the difference, subject to each of  
10 the following limitations:

11 "1. The employer's liability for the payment of 66  
12 2/3 percent of the difference shall continue for 200 weeks  
13 from the date of reemployment or 300 weeks from the date of  
14 injury, whichever is the longer period.

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

18 "3. No payments shall be due for any week the  
19 employee earns as much as or more than his or her average  
20 weekly wage at the time of injury. If the employee who obtains  
21 gainful employment suffered a permanent partial disability as  
22 specified in subsection (a), subdivision (3) of this section,  
23 the total amount of compensation paid for permanent total  
24 disability shall not be less than that amount which would have  
25 been payable for the permanent partial disability.

26 "i. Affidavit of Gainful Employment. If an employee  
27 who is receiving benefits for permanent total disability

1 shall, as the result of physical or vocational rehabilitation,  
2 accommodation, or otherwise, obtain gainful employment with an  
3 employer other than with his or her former employer, he or she  
4 shall, upon securing employment, give to his or her former  
5 employer an affidavit in writing containing the name of his or  
6 her new employer, the place of employment and the amount of  
7 wages being received at the new employment. Until he or she  
8 gives the affidavit, the compensation for permanent total  
9 disability shall cease. The employer for whom the employee was  
10 employed at the time of the accident for which compensation is  
11 being paid may also at any time demand of the employee  
12 additional affidavit, in writing, containing the name of his  
13 or her employer, the place of his or her employment, and the  
14 amount of wages he or she is receiving. If the employee, upon  
15 demand, fails or refuses to make and furnish the affidavit,  
16 his or her rights to compensation shall cease until the  
17 affidavit is made and furnished.

18 "(5) DEATH FOLLOWING DISABILITY. If an employee  
19 sustains an injury occasioned by an accident or occupational  
20 disease arising out of and in the course of his or her  
21 employment and, during the period of disability caused  
22 thereby, death results proximately therefrom, all payments  
23 previously made as compensation for the injury shall be  
24 deducted from the compensation, if any, due on account of  
25 death. If an employee who sustains a permanent partial or  
26 permanent total disability, the degree of which has been  
27 agreed upon by the parties or has been ascertained by the

1 court, and death results not proximately therefrom, the  
2 employee's surviving spouse or dependent children or both  
3 shall be entitled to the balance of the payments which would  
4 have been due and payable to the worker, whether or not the  
5 decedent employee was receiving compensation for permanent  
6 total disability, not exceeding, however, the amount that  
7 would have been due the surviving spouse or dependent children  
8 or both if death had resulted proximately from an injury on  
9 account of which compensation is being paid to an employee.

10 "(6) HERNIA.

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

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

16 "2. That the hernia appeared suddenly.

17 "3. That it was accompanied by pain.

18 "4. That the hernia immediately followed an  
19 accident.

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

22 "b. Treatment. All hernia, inguinal, femoral, or  
23 otherwise, proved to be the result of an injury by accident  
24 arising out of and in the course of the employment, shall be  
25 treated in a surgical manner by radical operation. If the  
26 injured employee refuses to undergo the radical operation for  
27 the cure of the hernia, no compensation will be allowed during

1 the time the refusal continues. If, however, it is shown that  
2 the employee has some chronic disease or is otherwise in  
3 physical condition that the court considers it unsafe for the  
4 employee to undergo the operation, the employee shall be paid  
5 as otherwise provided in this chapter.

6 "(b) Computation of compensation; determination of  
7 average weekly earnings. Compensation under this section shall  
8 be computed on the basis of the average weekly earnings.  
9 Average weekly earnings shall be based on the wages, as  
10 defined in Section 25-5-1(6) of the injured employee in the  
11 employment in which he or she was working at the time of the  
12 injury during the period of 52 weeks immediately preceding the  
13 date of the injury divided by 52, but if the injured employee  
14 lost more than seven consecutive calendar days during the  
15 period, although not in the same week, then the earnings for  
16 the remainder of the period, although not in the same week,  
17 then the earnings for the remainder of the 52 weeks shall be  
18 divided by the number of weeks remaining after the time so  
19 lost has been deducted. Where the employment prior to the  
20 injury extended over a period of less than 52 weeks, the  
21 method of dividing the earnings during that period by the  
22 number of weeks and parts thereof during which the employee  
23 earned wages shall be followed, provided results just and fair  
24 to both parties will thereby be obtained. Where by reason of  
25 the shortness of the time during which the employee has been  
26 in the employment of his or her employer or the casual nature  
27 or terms of the employment it is impracticable to compute the

1 average weekly earnings as above defined, regard shall be had  
2 to the average weekly amount which during the 52 weeks prior  
3 to the injury was being earned by a person in the same grade,  
4 employed at the same work by the same employer, and if there  
5 is no person so employed, by a person in the same grade  
6 employed in the same class of employment in the same district.  
7 Whatever allowances of any character made to an employee in  
8 lieu of wages are specified as part of the wage contract shall  
9 be deemed a part of his or her earnings.

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

12 "(1) The employer may reduce or accept an assignment  
13 from an employee of the amount of benefits paid pursuant to a  
14 disability plan, retirement plan, or other plan providing for  
15 sick pay by the amount of compensation paid, if and only if  
16 the employer provided the benefits or paid for the plan or  
17 plans providing the benefits deducted. If the employee  
18 contributes to the benefits provided, the employer shall only  
19 be entitled to a setoff consistent with the percentage of its  
20 contribution toward those benefits.

21 "(2) The employee shall forfeit to the employer all  
22 compensation paid for any period to which is attributed any  
23 award of back pay either by a court, administrative agency,  
24 arbitration, or settlement, provided, however, social  
25 security, and veteran disability payments shall not be  
26 included herein.

1           "(3) If an employer continues the salary of an  
2 injured employee during the benefit period or pays similar  
3 compensation during the benefit period, the employer shall be  
4 allowed a setoff in weeks against the compensation owed under  
5 this article. For the purposes of this section, voluntary  
6 contributions to a Section 125-cafeteria plan for a disability  
7 or sick pay program shall not be considered as being provided  
8 by the employer.

9           "(4) The foregoing setoff specified in subdivisions  
10 (1), (2), and (3) shall not be allowed in benefit programs  
11 which exist as a result of collective bargaining unless the  
12 collectively bargained benefit agreement specifically permit  
13 such a setoff.

14           "(5) The foregoing setoff provision shall not apply  
15 to permanent partial disability benefits as provided in  
16 Section 25-5-57(a)(3).

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 per week or 100 percent of the average~~  
27 ~~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 "\$25-5-83.

11 ~~"By agreement of the parties and with approval of  
12 the court, the The amounts of compensation payable  
13 periodically, under this article and Article 4 of this  
14 chapter, may be commuted to one or more lump sum payments by  
15 the petition of either party and by the approval of the court.  
16 No commutation shall be approved by the court unless the court  
17 is satisfied that it is in the best interest of the employee  
18 or the employee's dependent, in case of death, to receive the  
19 compensation in a lump sum rather than in periodic payments.  
20 In making the commutations, the lump sum payment shall, in the  
21 aggregate, amount to a sum equal to the present value of all  
22 future installments of compensation calculated on a six  
23 percent basis."~~

24 Section 2. This act shall become effective  
25 immediately following its passage and approval by the  
26 Governor, or its otherwise becoming law.