

HOUSE BILL REPORT

EHB 2123

As Passed House:
May 23, 2011

Title: An act relating to stabilizing workers' compensation premium rates and claim costs through the limited means of creating the stay-at-work program, suspending cost-of-living adjustments for fiscal year 2012 with no catch-up and delaying the initial adjustment, allowing claim resolution structured settlements for injured workers age fifty-five and older effective 2012, fifty-three and older effective 2015, and fifty and older effective 2016, adjusting pension benefits for prior permanent partial disability awards, eliminating the interest on permanent partial disability award schedules, providing safety and health investment grants, creating the industrial insurance rainy day fund, directing the department of labor and industries to increase its employer, worker, and provider fraud prevention efforts, requiring a performance audit by the joint legislative audit and review committee of workers' compensation claims management in the workers' compensation system to include self-insured claims, and studying occupational disease claims in the workers' compensation system.

Brief Description: Addressing the workers' compensation system.

Sponsors: Representatives Green and Condotta; by request of Governor Gregoire.

Brief History:

Committee Activity:

None.

First Special Session

Floor Activity:

Passed House: 5/23/11, 69-26.

Brief Summary of Engrossed Bill

- Creates the Stay-at-Work program, authorizing State Fund employers to receive a wage subsidy and reimbursements for employing an injured worker at light duty or transitional work.
- Eliminates the fiscal year 2012 cost-of-living adjustment with no catch-up, and delays the first cost-of-living adjustment.
- Authorizes claim resolution structured settlement agreements initially for workers age 55 or older, then age 53 or older beginning in 2015, and age 50

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or older beginning in 2016, and establishes minimum and maximum periodic payments.

- Requires permanent total disability awards to be offset by prior permanent partial disability (PPD) awards and eliminates interest on unpaid PPD awards.
- Establishes in statute Safety and Health Investment Projects grants.
- Creates an Industrial Insurance Rainy Day Fund.
- Requires the Department of Labor and Industries (Department) to apply certain best practices to address employer, worker, and provider fraud.
- Requires the Joint Legislative Audit and Review Committee to conduct a performance audit of the workers' compensation claims management system.
- Requires the Department to contract for a study of occupational disease.

Staff: Joan Elgee (786-7106).

Background:

Under the state's industrial insurance laws, employers must insure through the State Fund administered by the Department of Labor and Industries (Department) or may self-insure if qualified. Workers who, in the course of employment, are injured or disabled from an occupational disease are entitled to benefits. Depending on the disability, workers are entitled to medical, temporary time-loss, and vocational rehabilitation benefits, as well as benefits for permanent disabilities. The act provides that a worker may not waive industrial insurance benefits by an agreement and that any such agreement is void.

The Workers Compensation Advisory Committee (WCAC) is a 10-member committee tasked with studying aspects of the workers compensation system. Workers and employers are represented on the WCAC.

Temporary Time-Loss and Permanent Total Disability.

Workers temporarily unable to work receive time-loss benefits. A worker who suffers specified catastrophic injuries or other condition permanently incapacitating the worker from performing any work at any gainful occupation is entitled to permanent total disability (TPD or also referred to as pension) benefits. The amount of the time-loss or pension benefits is 60 to 75 percent of the worker's wages, depending on the worker's family status and number of dependents, and subject to minimum and maximum amounts. Certain survivors are also entitled to benefits.

Return to Work.

An employer may request that a worker receiving time-loss benefits be certified by a physician or Advanced Registered Nurse Practitioner (ARNP) to be able to perform light duty or transitional work. The physician or ARNP must decide whether the worker is physically able to perform the work and, if so, the time-loss benefits end.

Permanent Partial Disability.

If a permanent partial disability (PPD) results from an injury, a worker receives one-time compensation under a statutory schedule. If the award is more than three times the average monthly wage, payment is made monthly and interest is paid at the rate of 8 percent on the balance.

If a worker receives a pension award following a PPD award, any portion of the PPD award that exceeds the amount that would have been paid if the TPD award had been paid in the first instance is deducted from the worker's TPD benefits. This provision has been interpreted to result in no deduction of PPD awards in many cases. If amounts are deducted, the worker has a choice of whether the deduction is from the worker's monthly benefit amount or from the pension reserve of the worker. The deduction from the monthly benefit amount is capped at 25 percent of the monthly amount or one-sixth the total overpayment, whichever is less.

Cost-of-Living Adjustment.

Workers receiving time-loss or a pension and certain survivors receive a cost-of-living adjustment (COLA) on July 1 of each year. The COLA begins the first July 1 after injury. The COLA is based on the average monthly wage, and the formula depends on whether the worker began receiving compensation before, or on or after July 1, 1971.

Safety and Health Investment Projects Program.

Beginning in 2008, the Legislature has appropriated funds from the Medical Aid Account to the Department for safety and health projects for State Fund workplaces. By the terms of the budget provisos, priority must be given to projects fostering accident prevention through cooperation between employers and employees or their representatives. The Department has adopted rules to implement the Safety and Health Investment Projects (SHIP) Program. Grants may be awarded to trade and business associations, labor unions, employers, and other groups.

Premiums and Funds.

State Fund employers pay into the Accident Fund, which pays for time-loss, PPD, and pension benefits, and the Medical Aid Fund, which pays for medical and vocational rehabilitation benefits. Workers also pay into the Medical Aid Fund. The Department classifies industries by risk and sets basic premium rates. The basic premium rate is adjusted by an experienced rating for each employer. The rates must be the lowest necessary to maintain the actuarial solvency of the Accident and Medical Aid Funds in accordance with recognized insurance principles, and must be designed to attempt to limit fluctuations in premium rates. The WCAC advises the Department on appropriate levels of a contingency reserve, and when surplus funds exist, the circumstances under which the Department should give premium dividends, or similar measures, or temporarily reduce rates.

Summary of Engrossed Bill:

Stay-at-Work.

Legislative findings are made that long-term disability and the cost of injuries is significantly reduced when injured workers remain at work.

A State Fund employer may receive a wage subsidy and other reimbursements under certain circumstances for employing a worker at light duty or transitional work. To be eligible, an employer must submit a request for the subsidy or other reimbursement within one year of the date the work was performed. Wage subsidies and reimbursements are payable only if the physician or ARNP has restricted the worker from performing the worker's usual work and the physician or ARNP has released the worker to perform the work offered.

Wage subsidy. The wage subsidy is 50 percent of basic, gross wages paid for the work for a maximum of 66 work days in a consecutive 24-month period, up to a maximum of \$10,000. No subsidy is paid for compensation other than wages or salary, such as tips, health care, other specified payments, or any other payments. No subsidy is payable for a day in which the worker does not work.

Reimbursement. The employer is also eligible for reimbursement for the following:

- Training or instruction – tuition, books, fees, and materials, up to \$1,000.
- Clothing – up to \$400. No reimbursement is available for any clothing that an employer normally provides to its workers and the clothing becomes the workers' property.
- Tools or equipment – up to \$2,500. The reimbursement does not apply to any tools or equipment purchased before offering the work to the worker or for tools or equipment that the employer normally provides. The tools and equipment are the property of the employer.

Payments made for wage subsidies and reimbursements through willful misrepresentation are subject to a penalty of the amount paid plus 50 percent. An employer's experience rating is not affected by wage subsidies. A dispute about the validity of the work offered or the worker's ability to perform is an appealable order. The reimbursements are paid out of a newly created Stay-at-Work Account, which is funded by assessments of State Fund employers for the costs of the payments and a reserve. Employers may collect up to one-half the assessment from workers.

Claim Resolution Structured Settlement Agreements.

General. Certain injured workers may resolve their claims with a claim resolution structured settlement agreement (agreement). Beginning January 1, 2012, when settlements may first be agreed to, workers must be age 55 or older. Beginning January 1, 2015, workers must be age 53 or older, and beginning January 1, 2016, workers must be age 50 or older. The agreement may not settle medical benefits or reverse or set aside an order allowing a claim. The parties may initiate agreements after 180 days from the receipt of the claim by the Department or self-insurer. The order allowing the claim must be final and binding.

The agreement must provide a periodic payment schedule equal to at least 25 percent, but not more than 150 percent, of the average monthly wage except that the first payment may be up to six times the average monthly wage. A third party administrator of a self-insured employer must disburse payment pursuant to the agreement.

Process. All agreements must be approved by the Board of Industrial Insurance Appeals (Board). If the worker is unrepresented, an industrial appeals judge (IAJ) with the Board

must schedule a conference with the parties within 14 days of submittal for purposes of reviewing the agreement terms and ensuring the worker has an adequate understanding of workers' compensation benefits and that an agreement may alter the benefits. The IAJ may approve an agreement only if the agreement is in the best interest of the worker. The IAJ must consider the following best interest factors, with no factor being determinative: nature and extent of the worker's injuries and disabilities; the worker's age and life expectancy; the worker's other benefits and the effect of an agreement on those benefits; and the marital and domestic partnership status of the worker. Within seven days of the conference, the IAJ must allow or reject the agreement. There is no appeal from this decision. If a worker is represented by an attorney, the parties submit the agreement directly to the Board.

The Board must approve the agreement within 30 days unless it finds that: (1) the parties have not entered the agreement knowingly or willingly; or (2) the agreement (a) is the result of a material misrepresentation of law or fact, (b) is the result of harassment or coercion, or (c) is unreasonable as a matter of law. A party may revoke consent to the agreement within 30 days after the Board approves the agreement. An agreement is not subject to appeal.

Other provisions. For a State Fund claim, the parties are the worker, the employer, and the Department. An employer is not a party if the claim costs are no longer included in the calculation of the employer's experience factor, or the employer cannot be located, is no longer in business, or fails to respond to notice. For a self-insured claim the parties are the worker and employer. An unrepresented worker may request the self-insured ombudsman to provide assistance or be present during negotiations. With respect to medical benefits, the agreement may provide that the claim remain open for future treatment or that further specific treatment may be provided. In addition, the worker may apply as under current law to reopen the claim for medical benefits.

The Director of the Department (Director) must approve subjecting any industrial insurance funds to any responsibility or burden. An agreement may not bind an employer not signatory to the agreement. Agreements must be signed by the parties or their representatives and clearly state the parties understand and agree to the terms.

The Department must maintain copies of agreements and must furnish copies upon request to any party actively negotiating a subsequent agreement with the worker.

To the extent the worker is entitled to any benefits, the benefits must be paid until the agreement is final.

Attorneys' fees are limited to 15 percent of the total amount to be paid to the worker. The Board hears any disputes regarding attorneys' fees.

Certain penalties apply. If a party fails to comply with an agreement, any other party may petition the Board within one year. If the Board finds noncompliance, it must order compliance and impose a penalty of up to 25 percent of the amount unpaid. If the Department determines an employer has engaged in a pattern of harassment or coercion, the employer may be subject to penalty or corrective action, and may be removed from the retrospective rating program or be decertified as a self-insurer. Consideration of an agreement when making an employment decision is prohibited.

The Department and Board have rule-making authority to implement the provisions.

On December 1, 2011, and annually thereafter through December 1, 2014, the Department must report to the Legislature on the implementation of agreements. In 2015, 2019, and 2023, the Department must contract, in consultation with the WCAC, for an independent study of agreements. The study must evaluate the quality and effectiveness of agreements, provide information on the impact of agreements to State Fund and self-insured employers, and evaluate worker outcomes. Studies must be submitted to the Legislature.

Safety and Health Investment Projects Program.

The SHIP Program is placed in statute. The Director may provide funding from the Medical Aid Fund, by grant or contract, for projects for State Fund workplaces. The funding authority includes projects to: prevent workplace injuries, illnesses, and fatalities; create early return-to-work programs; and reduce long-term disability through the cooperation of employers and employees or their representatives. Organizations that may receive awards include: trade and business associations; employers and employees; labor unions; employee organizations; joint labor and management groups; and education institutions in collaboration with State Fund employer and employee representatives. Funds may not be used for lobbying or political activities; supporting, opposing, or developing legislative or regulatory initiatives; any activity not designed to reduce workplace injuries, illnesses, or fatalities; or reimbursing employers for the normal costs of complying with safety and health rules.

Funds must be distributed as follows:

- 25 percent – projects designed to develop and implement innovative and effective return-to-work programs for injured workers;
- 25 percent – projects that specifically address small business needs; and
- 50 percent – projects that foster workplace injury and illness prevention by addressing priorities identified by the Department in cooperation with the Washington Industrial Safety and Health Act Advisory Committee and the WCAC.

Permanent Total and Permanent Partial Disability Awards.

If a pension is awarded after a PPD award, all PPD compensation must be either deducted from the worker's monthly pension benefits or deducted from the pension reserve. Any interest paid is not deducted. Deductions from monthly pension benefits are not capped. This provision applies to pension determinations on or after July 1, 2011.

Interest paid on monthly PPD awards is eliminated.

Cost-of-Living Adjustments.

Cost-of-living adjustments are suspended for July 1, 2011, with no "catch up." The COLA is the percentage change in the average monthly wage for the preceding year. (The new COLA formula applies regardless of when the worker first began receiving benefits.) The first COLA occurs the second July 1, rather than the first July 1, after the date of injury or disease manifestation.

Rainy Day Fund.

An Industrial Insurance Rainy Day Fund (Rainy Day Fund) is created. Before proposing premium rates, the Director must determine whether the assets of the Accident and Medical Aid Fund combined are at least 10 percent, but not more than 30 percent, in excess of funded liabilities, and if so, must transfer any excess to the Rainy Day Fund. The Director may not transfer funds if a transfer would threaten the Department's ability to meet industrial insurance obligations or result in total assets of the Rainy Day Fund combined with Accident and Medical Aid Funds assets to exceed 30 percent of the Accident and Medical Aid Funds' liabilities. The WCAC must create a Finance Subcommittee made up of three members representing business and three members representing labor. The Finance Subcommittee must provide recommendations for any changes to the 30 percent cap on amounts exceeding total assets to the Legislature by December 1, 2011.

When adopting rates the Director may transfer moneys from the Rainy Day Fund into the Accident or Medical Aid Fund if a transfer is necessary to reduce a rate increase or aid businesses in recovering from or during economic recessions. The Director may also transfer moneys at any time liabilities increase so that total liabilities exceed assets.

Fund transfer decisions are announced as part of rule-making and are not reviewable by any court or tribunal.

The Director must separately account for moneys from the Accident and Medical Aid Funds. Rainy Day Fund assets may not be used for any purposes other than industrial insurance.

Earnings from the Rainy Day Fund are deposited into the Rainy Day Fund and the State Investment Board may invest moneys in the Rainy Day Fund in the same manner as other industrial insurance funds.

Fraud.

The Department is directed to continue to apply best practices to address employer fraud and to apply these same best practices to address worker and provider fraud. These practices include participating in a national information exchange with other workers' compensation insurers to avoid duplication of claims and benefits, increasing public awareness of fraud and how to report fraud, establishing criteria for periodic review of pension recipients to determine whether they can be gainfully employed, and identifying provider billing patterns to target potentially abusive practices.

The Department's fraud activities must include approaches to prevent, educate, and ensure compliance by providers, employers, and workers.

The Department must provide a report to the Governor and appropriate legislative committees by December 1, 2012, that describes the Department's efforts and outcomes and makes recommendations for statutory changes to address barriers to addressing fraud.

Performance Audit of Claims Management System.

The Joint Legislative Audit and Review Committee (JLARC), in consultation with the Department and the WCAC, must conduct a performance audit of the workers' compensation claims management system, including self-insured claims. The JLARC may contract with an independent expert. The audit must evaluate the extent to which the Department: (1) makes

fair and timely decisions and resolves complaints in a timely, fair, and effective manner; and (2) communicates in a timely, responsive, and accurate manner. The audit must also determine if current claims management organization and service delivery models are the most efficient available; analyze organization and delivery for retrospective rating plan participants as compared to nonparticipants; and determine whether current initiatives improve service delivery, and meet other specified criteria. The JLARC must make recommendations regarding administrative changes to improve efficiency and any needed legislative changes.

Progress reports to the Legislature are due by December 1, 2012, and December 1, 2013, and the audit results are due by June 30, 2015.

Occupational Disease.

In consultation with the WCAC, the Department must contract with an independent entity with research experience in workers' compensation issues to study occupational disease claims. The study must include an examination of the frequency and severity of occupational disease claims, the impact of claims on long-term disability and pension trends, the definition of occupational disease, including as compared to other jurisdictions, and the statute of limitations, as compared to other jurisdictions. The study must be submitted to the appropriate committees of the Legislature by December 1, 2012.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill contains an emergency clause and takes effect immediately.