

# HOUSE BILL REPORT

## SHB 1402

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### As Passed House:

March 11, 2009

**Title:** An act relating to contact with medical providers after appeals have been filed under industrial insurance.

**Brief Description:** Restricting contact with medical providers after appeals have been filed under industrial insurance.

**Sponsors:** House Committee on Commerce & Labor (originally sponsored by Representatives Williams, Campbell, Conway, Moeller and Green).

### Brief History:

#### Committee Activity:

Commerce & Labor: 1/28/09, 2/18/09 [DPS].

#### Floor Activity

Passed House: 3/11/09, 55-42.

### Brief Summary of Substitute Bill

- Restricts contact by employers, workers, and the Department of Labor and Industries with medical providers at specified stages after an appeal has been received in industrial insurance cases.

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## HOUSE COMMITTEE ON COMMERCE & LABOR

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Conway, Chair; Wood, Vice Chair; Green, Moeller and Williams.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Condotta, Ranking Minority Member; Chandler and Crouse.

**Staff:** Joan Elgee (786-7106)

### Background:

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

Under the Industrial Insurance Act (Act), medical providers examining or attending injured workers must make reports requested by the Department of Labor and Industries (Department) or a self-insured employer about the condition or treatment of an injured worker, or about any other matters concerning an injured worker in their care. All medical information in the possession or control of any person relevant to a particular injury must be made available at any stage of proceedings to the employer, the worker's representative, and to the Department. The Act states that no person incurs any legal liability for releasing this medical information.

The Act also provides that in all proceedings before the Department, the Board of Industrial Insurance Appeals (Board), or before any court, providers may be required to testify regarding examination or treatment of an injured worker and are not exempt from testifying based on the doctor-patient relationship.

When the Director of the Department (Director) or a self-insured employer deems it necessary to resolve a medical issue, an injured worker must submit to an independent medical examination by a physician selected by the Director.

Parties aggrieved by an order of the Department may appeal to the Board.

#### **Summary of Substitute Bill:**

Restrictions are placed on contact by employers and the Department of Labor and Industries (Department) with attending and treating medical providers and on contact by workers with independent medical examination (IME) providers.

Employer Contact. After receipt of a notice of appeal, an employer may not have contact to discuss the issues in question in the appeal with any medical provider who examined or treated the worker unless the worker provides written authorization for the contact.

Without written authorization, communication must be:

- in writing, sent contemporaneously to all parties with a distinct notice to the provider that any response must be in writing;
- in person, by telephone, or by video conference, at a mutually agreed to time and date, with the worker given the opportunity to fully participate; or
- by deposition.

Contact is permitted for the ongoing management of the claim, including communication regarding the worker's treatment needs and the provider's treatment plan, vocational and return-to-work issues and assistance, and certification of the worker's inability to work, unless these issues are in question in the appeal.

Worker Contact with Employer IME Provider. After receipt of a notice of appeal, the worker may not have contact to discuss the issues in question in the appeal with any IME provider who has examined the worker at the request of the employer unless the employer provides written authorization.

Without written authorization, communication must be:

- in writing, sent contemporaneously to all parties with a distinct notice to the provider that any response must be in writing;
- in person, by telephone, or by video conference, at a mutually agreed to time and date, with the Department and employer given the opportunity to fully participate; or
- by deposition.

Department Contact. After an appeal is filed, a conference has been held to schedule hearings, and the worker has named witnesses, the Department may not have contact to discuss the issues in question in the appeal with any medical provider who has examined or treated the worker and been named as a witness unless the worker provides written authorization.

Without written authorization, communication must be:

- in writing, sent contemporaneously to all parties with a distinct notice to the provider that any response must be in writing;
- in person, by telephone, or by video conference, at a mutually agreed to time and date, with the worker given the opportunity to fully participate; or
- by deposition.

Contact is permitted for the ongoing management of the claim, including communication regarding the worker's treatment needs and the provider's treatment plan, vocational and return-to-work issues and assistance, and certification of the worker's inability to work, unless these issues are in question in the appeal.

Worker Contact with Department IME Provider. After an appeal is filed, a conference has been held to schedule hearings, and the worker has named witnesses, the worker may not have contact to discuss the issues in question in the appeal with any medical provider who examined the worker at the request of the Department unless the Department provides written authorization.

Without written authorization, communication must be:

- in writing, sent contemporaneously to all parties with a distinct notice to the provider in bold type that any response must be in writing;
- in person, by telephone, or by video conference, at a mutually agreed to time and date, with the Department given the opportunity to fully participate; or
- by deposition.

Provisions Applicable to All Contacts. Written authorization for contact is valid only if given after the appeal is filed and expires in 90 days. Written authorization is not required if the worker, employer, or the Department, as the case may be, fails to identify the provider as a witness. The provisions also apply to representatives of the employer, worker, and the Department.

Upon motion by either party, the industrial appeals judge assigned to the case may determine whether a party has made itself reasonably available to participate in an in-person, telephone, or video conference communication. If the judge finds that a party has not made itself reasonably available, the judge may determine appropriate remedies, including setting a date and time for contact and/or sanctioning a party.

The Department and the Board of Industrial Insurance Appeals may adopt rules to implement the provisions, which apply to orders entered on or after the effective date.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) A fundamental tenet of civil law is that one party should not be able to have contact with the experts of another party. The Washington Supreme Court's holding in the Holbrook case that workers compensation cases are not adversarial and that the physician-patient privilege should not apply is unrealistic. This bill recognizes the legal fiction that during claims administration the process is not adversarial and contact is allowed. Once the case is before the the Board of Industrial Insurance Appeals (Board), the process is adversarial and a limited privilege is recognized. In no other area of civil litigation is contact allowed. The parameters are reasonable. Physicians can still be contacted but you have to let the parties know. A formal deposition is not required.

This bill addresses practices that can occur when doctors are contacted by self-insured employers and "flipped." These practices can jeopardize the goal of returning injured workers to work and may drive good doctors out of the system. The bill also protects doctors.

The Department of Labor and Industries (Department) is treated differently in recognition of the Department's trustee relationship as set out in court cases. For employers, contact is restricted once an appeal is filed; for the Department, contact is restricted after the appeal is filed and the scheduling conference has been held.

All parties should hear the same information at the same time. Workers are entitled to know when their doctor is contacted. This is a basic workers' rights bill.

The proponents are working with the Department and the Board on some technical issues.

(Neutral) An informal system was part of the grand compromise of 1911. With changes made since last year's bill, the Department is now neutral. The bill recognizes that the Department is an objective, neutral party. It is important to protect pro se parties. Technical changes are needed.

(Opposed) To state that the intent is to create a trust relationship for employees only is revisionist history. Self-insurers also have a responsibility to deliver benefits and should not be held to a different standard. The same rules are routinely applied to self-insured employers and the Department.

This bill will harm the relationship between employers and doctors. Doctors will be conservative and will choose not to talk, which will delay benefits and make claims more costly. The system is already complex. This bill adds one more layer of friction and will likely add two to three more months after witnesses are confirmed for the parties to contact the doctors. There will be motions that the opposing side was not cooperating in communicating.

The bill will inhibit how state-funded companies manage claims. More appeals will stay with the Board and the parties can't try to resolve the cases.

It's disconcerting to have a doctor "flip" but this is the reality.

**Persons Testifying:** (In support) Representative Williams, prime sponsor; Owen Linch, Joint Council of Teamsters; Michael Temple, Kathy Comfort, and David Lauman, Washington State Association for Justice; and David Johnson, Washington State Building and Construction Trades Council.

(Neutral) Vickie Kennedy, Department of Labor and Industries.

(Opposed) Kris Tefft, Association of Washington Business; Terry Peterson, Washington Self-Insurers Association; Rebecca Forrester, Group Health Cooperative; and John Meier, Employer Resources Northwest.

**Persons Signed In To Testify But Not Testifying:** None.