HOUSE BILL REPORT
HB 1503

As Reported by House Committee On:
Commerce & Labor

Title: An act relating to injured worker medical rights.

Brief Description: Regarding injured worker medical rights.

Sponsors: Representatives Conway, McCoy, Wood, Campbell, Williams, Green, Kenney, Moeller, Ormsby and Chase.

Brief History:
Committee Activity:
Commerce & Labor: 2/1/07, 2/23/07 [DPS].

Brief Summary of Substitute Bill

- Establishes requirements related to contact with industrial insurance medical providers after an appeal is filed with the Board of Industrial Insurance Appeals.
- Requires employers to create written reports detailing contact with industrial insurance medical providers.
- Establishes procedures for the Department of Labor and Industries (Department) and self-insured employers to use when ordering a medical examination of an injured worker.
- Specifies criteria for Department rules governing the qualifications of medical examiners and their eligibility for the approved list of medical examiners.

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 2 members: Representatives Condotta, Ranking Minority Member and Chandler, Assistant Ranking Minority Member.

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.

Staff: Sarah Beznoska (786-7109).

Background:

Availability of Medical Information

Under the Industrial Insurance Act (Act), providers examining or attending injured workers must make reports requested by the Department of Labor and Industries (Department) or 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, in the opinion of the Department, and pertaining to any worker whose injury or occupational disease is the basis of an industrial insurance claim, must be made available at any stage of proceedings, upon request, to the employer, the worker's representative, and to the Department. The Act states that no person shall incur any legal liability for releasing this medical information.

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

Medical Examinations of Injured Workers

Injured workers claiming industrial insurance benefits are required to submit to medical examinations when requested by the Department or self-insured employer. These examinations are sometimes referred to as independent medical examinations or "IMEs." These examinations must be conducted at a place reasonably convenient for the worker. A worker who unreasonably refuses to submit to a medical examination may have his or her benefits suspended.

The Department or a self-insurer may order a medical examination for a number of reasons, including to:

- establish a diagnosis;
- establish medical data for determining whether a work-connected causal relationship exists for the worker's condition;
- outline a treatment program;
- determine whether the worker's condition has reached maximum benefit from treatment;
- rate a permanent disability; or
- determine whether the worker's condition has worsened after closure of the claim.

These examinations must be conducted by a physician selected by the director of the Department. The Department maintains a list of examiners who have applied and qualified to conduct examinations. By rule, qualified examiners must be medical or osteopathic physicians, podiatrists, dentists, or chiropractors. After an examination is completed, the examiner must provide a report to the person ordering the examination.

Under Department rules, workers may be accompanied at a medical examination by an uncompensated person. The worker is not permitted, however, to record the examination.

The Department is required to develop standards for conducting examinations to rate permanent disabilities. These standards relate to qualifications of persons conducting examinations, criteria for conducting the examinations, including guidelines for appropriate treatment of injured workers, and the content of examination reports.

Under court decisions, the Department or self-insurer is required to give special consideration to the opinion of the worker's attending physician when making medical decisions.

Studies Discussing Industrial Insurance Medical Examinations

1998 JLARC Audit. The 1998 Workers' Compensation System Performance Audit by the Joint Legislative Audit and Review Committee (JLARC) noted that all parties raised concerns about IMEs. The JLARC Audit report made several recommendations that were expected to reduce the need for IMEs by, among other things, improving claims manager communication with the worker, employer, and doctor, and by reducing the formality of claims closure which frequently involves IMEs.

1998 Long-Term Disability Prevention Pilot Project. The Long-Term Disability Prevention Pilot Project generally encouraged the use of attending physician examinations, or consultations obtained by the attending physician, to resolve medical issues or rate disabilities. The Department's review of the pilot project found that encouraging examinations by attending physicians reduced the need for IMEs, reduced the time it took to receive the physician report, and improved worker satisfaction. However, the pilot projects generally did not reduce time loss or medical costs.

2002 IME Improvement Project. In 2000 the Department began an IME Improvement Project. The project identified concerns regarding the appropriate use of IMEs, the quality of IMEs and the providers conducting the examinations, and the incentives for providers to conduct examinations. The Department began a re-application process that was completed and resulted in a new list of approved IME examiners in July 2001. That year the Department also contracted with Med-Fx, LLC, to conduct a best practices review and make recommendations for improving the IME process. The Med-Fx report in 2002 made recommendations in the areas of contracting for administrative services to recruit and train examiners, making IME requests, working with attending physicians, and improving the quality of examiners and the treatment of injured workers.

Summary of Substitute Bill:

Availability of Medical Information

Doctor-Patient Privilege

The statute related to a physician or licensed advanced registered nurse practitioner's testimony is amended to explicitly state that the worker is deemed to have waived the doctor-patient privilege.

Contact with Medical Providers

After notice of appeal is filed with the Board of Industrial Insurance Appeals (Board), the Department of Labor and Industries (Department) and the employer are generally prohibited from having *ex parte* contact, or contact without notice to the injured worker or the workers' representative, with any provider who provided treatment to the worker. This prohibition on*ex parte* contact does not apply if authorization for the contact is given by the worker or the worker's representative.

This prohibition on contact applies to providers who examined the worker for "consultative purposes" at the request of the worker or a treating provider, but it does not apply to an examination for "consultative purposes" that was initiated by the Department. In all cases, the prohibition applies only with respect to providers that the worker named when confirming witnesses for the hearing.

Similarly, after an appeal is filed with the Board, a worker and a representative of the worker are generally prohibited from having *ex parte* contact to discuss facts or issues involved in the appeal with a provider who examined the worker for an IME at the request of the Department or self-insured employer. This prohibition on *ex parte* contact does not apply if written authorization for the contact is given by the Department or self-insured employer. In all cases, the prohibition applies only with respect to providers that the Department or self-insured employer named when confirming witnesses for the hearing.

Medical Reports

Any time that an examining or attending provider is contacted by an employer or a representative of the employer, the employer or the person initiating contact on behalf of the employer must create a written report. The written report must fully disclose all subjects discussed and responses given. The written report must be completed within five days of the meeting and a copy must be mailed to the worker. Failure to comply is subject to a $500 penalty payable to the worker.

In addition, when an attorney, vocational counselor, nurse case manager, or other representative of the employer seeks to meet with an examining or attending provider to discuss the worker's physical capacities, medical treatment, permanent partial disability, ability to work, or other issues pertaining to the claim, the person seeking to meet with the provider must give at least seven days prior written notice to the worker or the worker's designated representative. The worker and the designated representative have the right to attend and participate in the conference and the party scheduling the meeting must make reasonable efforts to coordinate the scheduling. Within five days of the meeting, the employer must create a complete report of the meeting, including all questions asked and information provided. The report must be mailed to the worker.

Medical Examinations

Requesting Medical Examinations

General statutory authority is created for a worker to be accompanied by a person of his or her choice to observe any medical examination conducted under the act.

A new process is established when the Department or self-insured employer requests a medical examination to resolve a medical issue. When requesting a medical examination, the Department or self-insured employer must first request, in writing, that the worker's attending provider conduct an examination and make a report on the medical issue in question.

If the medical issue is not resolved by the requested examination and report, the Department or self-insured employer must request the attending provider to make a consultation referral to a provider approved by the director of the Department and licensed to practice in the same field or specialty as the worker's attending provider, as appropriate. This consulting provider must conduct an examination and make a report.

Providers conducting an examination ordered by the Department or self-insured employer must submit reports to the Department or self-insured employer and to the worker, the worker's representative, and the worker's attending provider. If the Department or self-insured employer relies on the report to deny, limit, or terminate benefits, the Department or self-insured employer must give the worker's attending provider no less than 30 days to provide a written response to the report.

Rules Governing Medical Examinations

The current requirement that the Department adopt rules governing "special medical examinations for determining permanent disabilities" is made applicable to all medical examinations.

The types of providers that are permitted under the rules must include licensed psychologists.

The criteria for removing providers from the list of approved providers must include certain elements, including misconduct, incompetency, making materially false statements regarding qualifications or in medical reports, failing to transmit medical reports, and refusing to testify or produce material documents in a workers' compensation proceeding.

Rules on examination reports must include a requirement for a signed statement certifying that the report is a full and truthful representation of the provider's professional opinion.

The Department's rules must ensure that examinations are performed only by qualified providers meeting Department standards.

Application

The bill applies to all workers' compensation medical examinations ordered on or after the bill's effective date.

Substitute Bill Compared to Original Bill:

The substitute bill changes language in section 5 that stated that the Department or self-insurer may order a worker to submit to an examination. The language in the substitute bill provides that the Department or self-insurer may request a worker to submit to examination.

The substitute bill removes the requirement that the Department keep a rotating list of examiners and removes the corresponding rotating list requirement. When requesting an examination, there is no requirement for the Department or self-insurer to request an examination by an examiner who is listed next on the rotating list. However, the Department or self-insurer still must first request an examination by the injured worker's attending provider and an examination by a provider referred by the attending provider.

The substitute bill states that the person who may accompany a worker to a medical examination is a person of the worker's choice.

The substitute bill clarifies that the examiner conducting an examination requested by the Department or self-insured employer is not required to be an examiner licensed to practice in the same specialty as the worker's attending provider.

The substitute bill explicitly states that a claimant is deemed to have waived the doctor-patient privilege in proceedings before the Board subject to court rules and the *ex parte* limitations established in the bill. In addition, it explicitly states that, in proceedings before the Department, a physician or advanced registered nurse practitioner must make requested reports (instead of "testify") and is not exempt from doing so based on the doctor-patient privilege.

The substitute amends the law that generally makes available medical information pertaining to any worker whose injury or occupational disease is the basis of an industrial insurance claim to state that in all hearings, actions, or proceedings before the Board, or before any court on appeal from the Board, requests for medical information are subject to limitations imposed pursuant to court rules and the *ex parte* limitations established in the bill.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on February 22, 2007.

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

Staff Summary of Public Testimony:

(In support of original bill) The independent medical examination (IME) issues contained in this bill came to attention from a constituent issue. This constituent was in the system for years with benefits being turned off after IMEs and being reinstated after appeals. This bill attempts to address that problem.

There are problems with the current IME process. Doctors are doing IMEs just to supplement income and are not current on their qualifications. They are not practicing physicians. Doctors are doing very short case reviews and examinations before making determinations. There are examples of the IME examiner falling asleep in the examination. The attending physician knows the patient and should have more input. In particular, the attending physician knows the patient's history and that is important to making an accurate determination.

I am a worker who developed an occupational disease on the job. An orthopedic surgeon suggested I needed a replacement of my knee. I had to battle to get people to listen to me that I had an occupational disease claim. The employer sent me a letter with the specific date for the examination. I was not given an opportunity to ask questions or verify qualifications. The examination was a visual examination that took less than 10 minutes. I was unable to get the results of the examination. The IME examiner did not agree with my attending physician and said my claim should be disregarded. The system that is supposed to protect the worker is not protecting the worker.

The section of the bill that deals with *ex parte* contact deals with claims that are already in litigation and the other side is represented by an attorney. In every other type of litigation, you cannot contact the other side's witnesses without their counsel being informed. Workers do waive certain rights, but there is still a physician-patient relationship and having the opposing side talk to that physician without notice damages that relationship. There can be situations where unrelated information comes up and without an advocate there on the other side, there is no protection. The worst problem is when an injured worker is not aware that someone is meeting with the attending physician and the defense attorney gives the attending physician wrong information.

The *Holbrook v. Department of Labor and Industries* decision envisioned an ideal situation where people would get along. The court said the Department process is not adversarial and prohibitions on *ex parte* contact are not needed. But once an issue goes to the Board, it is an adversarial system. It is litigation. There is no good reason to allow a defense attorney to have *ex parte* contact with an attending provider. Health care providers have weighed in on this and have said that this bill will increase the number of health care providers by reducing the adversarial process. The *ex parte* piece of this bill does that.

The notice and report piece of the bill does not apply to the Department. The Department already has a good system in which the worker can go online and see that the claims manager has contacted an attending physician. But with employers and aggressive third-party administrators, there is no way to know and the worker should be given a notice.

(Opposed to original bill) Independent medical examinations help to resolve workers' compensation claims. This bill would eliminate the ability to obtain IMEs in a timely manner at reasonable cost. It will reduce the pool of examiners. The concept of a rotating list of providers will complicate the process of arranging IMEs. Scheduling in the same speciality as the worker's attending physician is not always appropriate. There is already a process for dealing with complaints about IMEs. There has already been an extensive study by the Department that has improved IMEs a lot.

It is already hard to find physicians to do this type of work and we're already recruiting physicians from out of state to do this work. This will only get worse. There are retired physicians doing IMEs, but they have a lot of experience. Physicians do a lot of preparation before an IME, reviewing medical files, radiological reports, and other steps. There is a lot of work that is done in addition to just the examination. There is case history and an entire process to make sure the IME examiner has as much information as he or she needs.

The elimination of *ex parte* contact in this bill is a problem. Injured workers and their attorneys will not give permission for defense counsel to talk to medical witnesses. This will increase costs because there will be more depositions. In *Holbrook*, the supreme court of Washington interpreted certain provisions of the statute and the statutory changes about medical information in this bill try to undermine the *Holbrook* decision. Many entities would be affected by these provisions, including claims managers, nurse case managers, and vocational counselors. The nurse case manager and vocational counselor work for the injured worker so it does not make sense to not allow them to talk with an attending physician.

The Department has significant concerns, but there may be a way to work out a solution to some issues. Any time administrative burden and delays are added to the system it interferes with workers getting access to good medical care. The requirement to always ask an attending physician to do an examination does not make sense because some attending physicians do not want to participate in the process. There is also concern about employers contacting medical providers and being required to send written notice to a worker beforehand. There are situations where the relationship is contentious and there is a possibility of damaging relationships that have been worked out.

Persons Testifying: (In support of original bill) Representative McCoy; Diana Forde Ferrant; Tim Pearson, Pacific Northwest Labor Council of Carpenters; Lee Newgent, Seattle Building and Construction Trades Council; Michael Temple and Kathryn Comfort, Washington State Trial Lawyers Association; and Bill Kemble, Roofers Local No 54.

(Opposed to original bill) Sherry Davies, Reinisch, Weier, and Mackenzie, PC; Paul Mayer, Medical Consultants Network, Inc.; Kathleen Collins, Washington Self-Insurers Association; and Vickie Kennedy, Department of Labor and Industries.

Persons Signed In To Testify But Not Testifying: None.