

HOUSE BILL REPORT

E2SHB 3139

As Passed Legislature

Title: An act relating to industrial insurance benefits on appeal.

Brief Description: Providing for stays of industrial insurance orders on appeal.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives Conway, Wood, Green, Moeller, Simpson and Ormsby).

Brief History:

Committee Activity:

Commerce & Labor: 2/1/08, 2/5/08 [DPS];
Appropriations: 2/11/08 [DP2S(w/o sub CL)].

Floor Activity:

Passed House: 2/18/08, 62-32.
Senate Amended.
Passed Senate: 3/7/08, 49-0.
House Refused to Concur.
Conference Committee.
Passed Senate: 3/12/08, 35-14.
Passed House: 3/13/08, 62-35.
Passed Legislature.

Brief Summary of Engrossed Second Substitute Bill

- Provides that industrial insurance benefits are paid pending appeal unless the Board of Industrial Insurance Appeals orders a stay or the worker requests that benefits cease.
- Requires the Department of Labor and Industries to establish procedures for self-insured employers to recoup overpayments from state fund claims.
- Establishes a self-insured employer overpayment reimbursement fund, financed by amounts retained from employee earnings, to reimburse self-insured employers for overpayments.

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.

- Requires the Department of Labor and Industries to study workers' compensation appeals and the impacts of the legislation.

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, Assistant Ranking Minority Member; Crouse.

Staff: Joan Elgee (786-7106).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Commerce & Labor. Signed by 21 members: Representatives Sommers, Chair; Dunshee, Vice Chair; Cody, Conway, Darneille, Ericks, Fromhold, Grant, Green, Haigh, Hunt, Kagi, Kenney, Kessler, Linville, McIntire, Morrell, Pettigrew, Schual-Berke, Seaquist and Sullivan.

Minority Report: Do not pass. Signed by 11 members: Representatives Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Haler, Assistant Ranking Minority Member; Anderson, Chandler, Hinkle, Kretz, Priest, Ross, Schmick and Walsh.

Staff: Kirk Schmidt (786-7118).

Background:

Under the Industrial Insurance Act (Act), employers must insure with the state fund managed by the Department of Labor and Industries (Department) or may self-insure if the employer meets certain criteria. The Act permits employers and workers on state fund and self-insured claims to contest orders regarding benefits. Aggrieved parties may appeal directly to the Board of Industrial Insurance Appeals (Board) or may first request reconsideration by the Department. When an appeal is filed, the Department transmits the record to the Board. If the Board does not deny the appeal or allow the relief requested based on the record, the appeal is granted and the appeal proceeds.

The Act allows the Department to adopt policies regarding payment of benefits pending appeal. The Department's written policy, which applies to employers insured with the state fund, states that time-loss benefits are not paid while an employer's appeal is pending unless the issue does not involve the payment of time-loss benefits or the allowance or reopening of the claim, or unless the employer's appeal is unfounded. The Department's policy states that it

is intended to avoid unnecessary recoupment costs when an employer prevails. If benefits are not paid and the worker prevails, the worker is entitled to interest on the award.

The Act provides procedures for recovery of benefits overpaid because of clerical error, innocent misrepresentation, an erroneous adjudication as determined by a final decision of the Board or a court, and for other reasons. If benefits are overpaid, the recipient must repay the benefits and recoupment may be made from future payments due to the recipient on any claim with the state fund or self-insurer, as applicable. Recipients of benefits include workers and health service providers. Under some circumstances, the Director of the Department may waive all or part of the overpayments. If an order assessing an overpayment becomes final, the Department or self-insurer may obtain a warrant in superior court.

Summary of Engrossed Second Substitute Bill:

Payment of Benefits Pending Appeal.

An order awarding industrial insurance benefits becomes effective and benefits due when the order is issued. Benefits are generally paid pending appeal unless the Board of Industrial Insurance Appeals (Board) orders a stay or the worker requests that benefits cease. When the Board issues an order granting an appeal, it must notify the worker of the potential for an overpayment and the requirements for interest on unpaid benefits. The worker may request that benefits cease pending appeal by submitting written notice to the employer, the Board, and the Department of Labor and Industries (Department).

In certain types of appeals, payment of some benefits is stayed without further action by the Board. If the Department orders an increase in a permanent partial disability award upon reconsideration, the worker receives the amount reflected in the earlier order. If a party appeals an order establishing a worker's wages or the compensation rate for purposes of temporary or permanent total disability or loss of earning power benefits, the worker receives payment based on the wage or rate not in dispute. In these cases, payment of an increased award, or at a higher wage or rate, is stayed without further action by the Board pending a final decision on the merits.

Motions to Stay Orders Awarding Benefits.

Procedures are established for motions to stay. A motion for a stay must be filed within 15 days of an order granting an appeal. The Board must conduct an expedited review of the claim file as it existed on the date of the Department order. Within 25 days of the filing of the motion or the order granting appeal, whichever is later, the Board must issue a decision on the stay motion. The Board must grant a motion to stay if the person seeking the stay demonstrates that it is more likely than not to prevail on the facts as they existed at the time of the order. The Board must not consider the likelihood of recoupment of benefits as a basis to grant or deny a stay.

Recoupment From Other Claims.

The Department must collect information concerning self-insured claim overpayments resulting from decisions of the Board and courts and recoup the overpayments from any state fund or self-insurer claims. The Department may also provide overpayment information to a

self-insurer from whom payments may be collected on behalf of the Department or another self-insurer. If overpayments are collected in these cases, the self-insurer must pay the Department and the Department must credit the amounts to the appropriate state funds or forward the amounts to the other self-insurer.

Fund.

A self-insured employer overpayment reimbursement fund is created to reimburse the reserve fund and self-insured employers for benefits overpaid and not recovered. The Director of the Department (Director) must determine on amount to be retained from self-insured employee earnings for deposit into the fund. The moneys collected must be no more than necessary to make the payments on a current basis. A self-insurer must be reimbursed from the fund for any overpayments the Director waives and for any amounts not fully reimbursed within 24 months of the first attempt at recovery through collection from other claims and through court action.

Overpayments to Health Service Providers.

Health service providers who provided treatment or services to a worker are not considered recipients of benefits from whom the Department or a self-insurer may recover overpayments resulting from a Board or court decision. The Department or self-insurer must first attempt recovery of overpayments from any entity that provided health insurance to the extent that entity would have provided health insurance benefits but for workers' compensation coverage.

Study.

The Department is directed to study appeals of workers' compensation cases and collect information on the impacts of the legislation on state fund and self-insured workers and employers. The study must consider the types of benefits that may be paid pending an appeal, and must include the frequency and outcomes of appeals, the duration of appeals and any procedural or process changes made by the Board to implement the legislation and expedite the process, the number of and amount of overpayments resulting from decisions of the Board or court, and the processes used and efforts made to recoup overpayments and the results of those efforts.

A report on preliminary results of the study is due to the Workers' Compensation Advisory Committee (Committee) by July 1, 2009. By December 1, 2009 and December 1, 2010, with the final report due by December 1, 2011, the Department must report to the Committee and the appropriate committees of the Legislature on the results of the study. The Committee must provide its recommendations for addressing overpayments, including the need for and ability to fund a permanent method to reimburse self-insured employer and state fund overpayment costs.

The legislation applies to orders issued after the effective date of the act.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed, except section 2, relating to self-insured claim overpayments, which takes effect January 1, 2009.

Staff Summary of Public Testimony: (Commerce & Labor)

(In support) This bill safeguards the delivery of benefits while protecting the employer's right to a quick review. The bill is fair to both workers and employers. Employers can keep appealing and workers don't receive benefits. A delay in benefits can complicate medical treatment. This bill covers medical and time-loss benefits.

There is a disparity between the state fund and self-insured claims because injured workers in the state fund can get time-loss benefits. Self-insured employers are not required to pay benefits until the final decision, even after the Department determines the worker is entitled to benefits. Self-insurers should either pay or seek a stay.

(Neutral) An amendment would make clear it is not a full hearing, which is more expensive and that the stay would be based on information from the Department.

As a matter of principle, workers should get benefits. Also, cases should be resolved quickly for the benefit of all parties.

The inclusion of medical benefits raises issues. Should it be all medical or just conservative treatment or treatment for life-threatening conditions? If there is an overpayment order, it would be against the provider.

There is also concern about large overpayments.

(Opposed) Increased costs will negatively impact the ability to be competitive as other state's industrial insurance rates are lower. This is another cost management issue for self-insurers. It takes an average of nine months before a final decision, which could mean \$36,000 in time-loss benefits. Self-insurers make careful decisions on whether to appeal and the employer prevails in 61 percent of the cases, indicating the Department was not correct. This bill hurts good employers.

There are concerns for both state fund and self insured employers. The standard for a stay is higher than the Superior Court standard, which is whether the case is debatable. The lack of due process is also a concern, as is the issue of whether the stay would be preserved if the case went to Superior Court.

Suggested amendments if the bill moves forward are to have the Department repay all monies expended if the employer prevails, eliminate the presumption, limit the provisions to time-loss, get Department help on overpayment orders, provide for no payments until the Board has granted a stay order, and allow another motion for a stay if the employee's action delays the appeal.

Recoupment is virtually impossible; employers must go to Superior Court.

There is no express statutory authority for the Department to pay benefits on appeal in state fund cases. Many other amendments would be needed.

Staff Summary of Public Testimony: (Appropriations)

(In support) This bill will not allow benefits to be withheld due to employer appeal. The bill allows for the inclusion of medical and time loss benefits while an appeal is pending. Currently self insured employers are not required to pay medical and time loss benefits until after the appeal is decided.

(Opposed) This bill requires employers to pay benefits, including medical, while waiting appeal. Employers win appeal in 60 percent of cases. There are few options to recouping money paid while waiting appeal if the appeal is overturned.

Persons Testifying: (Commerce & Labor) (In support) Owen Linch, Teamsters JC-28; Jane Dickeson; Kevin Rojecki, Washington State Council of Firefighters; Karen Gude, United Food and Commercial Workers; and Michael Temple, Washington State Trial Lawyers Association.

(Neutral) Frank Fennerty and Tom Egan, Board of Industrial Insurance Appeals; and Vickie Kennedy, Department of Labor and Industries.

(Opposed) Dawn Yeager, Weyerhaeuser; Bernadette Pratt, Craig, Jessup and Stratton; Lori Hanson, Boeing; Kathleen Collins, Washington Self Insurer's Association; and Kris Tefft, Association of Washington Business.

Persons Testifying: (Appropriations) (In support) Owen Lynch, Teamsters.

(Opposed) Kathleen Collins, Washington Self Insurers Association.

Persons Signed In To Testify But Not Testifying: (Commerce & Labor) (In support) Chris Vandyk, BYG Taxicab Cooperative.

Persons Signed In To Testify But Not Testifying: (Appropriations) None.