

SENATE BILL REPORT

SB 5102

As Reported by Senate Committee On:
Labor, Commerce & Tribal Affairs, February 15, 2021

Title: An act relating to industrial insurance medical examinations.

Brief Description: Concerning industrial insurance medical examinations.

Sponsors: Senators Stanford, Conway, Das, Keiser and Kuderer.

Brief History:

Committee Activity: Labor, Commerce & Tribal Affairs: 1/21/21, 2/15/21 [DPS-WM, DNP].

Brief Summary of First Substitute Bill

- Limits the number of independent medical examinations (IMEs) in certain circumstances.
- Requires a self-insurer to provide 28-days notice before a scheduled IME.
- Allows a worker to have a person present to observe all IMEs and to record all IMEs, provided the worker pays all recording costs and provides a copy of the recording to the Department of Labor and Industries (L&I) or the self-insured employer.
- Limits each party, in a Board of Industrial Insurance Appeals proceedings, to presenting the testimony of one medical expert witness of the same medical specialty, except the attending physician.
- Reduces the time period for a self-insurer to submit certain information to L&I from ten days to five days.

SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

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

Majority Report: That Substitute Senate Bill No. 5102 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Keiser, Chair; Conway, Vice Chair, Labor; Stanford, Vice Chair, Commerce & Tribal Affairs; Robinson and Saldaña.

Minority Report: Do not pass.

Signed by Senators King, Ranking Member; Braun, Honeyford and Schoesler.

Staff: Susan Jones (786-7404)

Background: An injured worker, for workers' compensation purposes, must submit to examination by a physician selected by the Department of Labor and Industries (L&I), also known as an independent medical exam (IME), whenever L&I or the self-insurer deems it necessary in order to:

- make a decision regarding claim allowance or reopening;
- resolve a new medical issue, an appeal, or case progress; or
- evaluate the worker's permanent disability or work restriction.

New medical issue means a medical issue not covered by a previous medical examination requested by L&I or the self-insurer, such as an issue regarding medical causation, medical treatment, work restrictions, or evaluating permanent partial disability.

An IME report must be provided to the person ordering the examination, the attending physician, and the injured worker. The examination must be at a place reasonably convenient to the injured worker or utilize telemedicine, if appropriate. Reasonably convenient means at a place where residents in the injured worker's community would normally travel to seek medical care for the same specialty as the examiner. L&I must address in rule how to accommodate the injured worker if no approved medical examiner in the specialty needed is available in that community.

L&I or the self-insurer must provide the physician performing an examination with all relevant medical records from the worker's claim file.

Examination means, a physical or mental examination by a medical care provider licensed to practice medicine, osteopathy, podiatry, chiropractic, dentistry, or psychiatry at the request of L&I or the self-insured employer or by order of the board of industrial insurance appeals.

On any industrial injury claim where the self-insured employer or injured worker has requested a determination by L&I, the self-insurer must submit all medical reports and any other specified information not previously submitted to L&I. When L&I requests information from a self-insurer by certified mail, the self-insurer must submit all information in its possession concerning a claim within ten working days from the date of receipt of the certified notice.

In 2020, an IME work group was established. The work group was required to:

- develop strategies for reducing the number of medical examinations per claim while considering claim duration and medical complexity and for improving access to medical records, including records and reports created during or pursuant to the IME;
- consider whether L&I should do all the IME scheduling, the circumstances for which examiners should be randomly selected or specified, and worker's rights, including attendance, specialist consultants, recordings, distance and location of exams;
- recommend changes to improve the efficiency of the IME process; and
- identify barriers to increasing the supply of in-state IME physicians.

The work group met and L&I provided a report, including recommendations, to the Legislature in December, 2020.

Summary of Bill (First Substitute): An appeal or case progress are removed from the general criteria for IMEs. In addition to the general criteria, L&I must:

- specify the amount of time, after a final allowance order, before such an exam may be scheduled and the amount of time since the last exam took place pursuant to these rules before another exam may be scheduled;
- adopt additional rules necessary to prevent duplicate exams that address whether to authorize necessary and proper medical treatment; and
- adopt rules to permit rare exceptions to the limitations on the number of exams in the case of extraordinary circumstances, such as the death or disability of an examiner prior to completion of the report, or irretrievable loss of examination data.

The total number of IMEs per claim is limited as follows:

- one exam prior to an order allowing or denying a new claim, becoming final and binding;
- one exam for a permanent disability evaluation. Another permanent disability evaluation examination is allowed following each time a claim is reopened or after completion of further treatment if L&I or the self-insurer authorizes curative or rehabilitative treatment;
- one examination following the filing of any application to reopen a claim and prior to a final order allowing or denying reopening of the claim; and
- additional examinations may be performed after a final allowance order or final order to reopen a claim and prior to any permanent disability evaluation but no more than one examination per each new medical issue.

In claims involving self-insurers, notices of IMEs scheduled must be mailed to the injured worker no later than 28 days prior to the exam. Where a timely dispute of the IME has been filed by an injured worker, L&I must adjudicate whether or not the injured worker should be compelled to attend. L&I must adopt rules governing what constitutes a timely dispute and under what circumstances it may delay such examinations to complete its investigation.

A worker has the right to record either the audio, video, or both, of all IMEs ordered by L&I, the self-insurer, or by the Board of Industrial Insurance Appeals (BIIA). The worker must pay the costs of recording the IME and must provide one copy, upon request, to L&I or the self-insured employer within 14 days of receiving the request, but in no case prior to the issuance of a written report of examination. The worker must take reasonable steps to ensure the recording equipment does not interfere with the examination. Any material alteration of the recording by the injured worker or done on their behalf that results in the receipt of benefits may require repayment of those benefits. All such recordings must be kept confidential as provided in law regarding claims files and confidential records.

The worker has the right to have one person, of the worker's choosing, present to observe all examinations ordered by L&I, the self-insurer, or by the BIIA. The observer must be unobtrusive and not interfere with the exam. Observers at exams must be at least 21 years old and not a legal representative.

In proceedings before the BIIA, each party is limited to presenting the testimony of one medical expert witness of the same medical specialty, except the attending physician, unless good cause is shown.

A self-insurer must electronically submit information to L&I. The time period to submit the information is reduced from ten days to five days.

Psychology is added to the types of medical care provider licenses for IMEs.

EFFECT OF CHANGES MADE BY LABOR, COMMERCE & TRIBAL AFFAIRS COMMITTEE (First Substitute):

- Allows L&I or a self-insurer to order an exam or request the attending provider to arrange a consultation in the event of complication, controversy, or dispute over the treatment aspects of any claim.
- Requires L&I to: (1) specify the amount of time, after a final allowance order, before such an exam may be scheduled and the amount of time since the last exam took place pursuant to these rules before another exam may be scheduled; (2) adopt additional rules necessary to prevent duplicate exams that address whether to authorize necessary and proper medical treatment; and (3) adopt rules to permit rare exceptions to the limitations on the number of exams in the case of extraordinary circumstances, such as the death or disability of an examiner prior to completion of the report, or irretrievable loss of examination data.
- Limits observers at exams to person at least 21 years old and not a legal representative.
- All such recordings must be kept confidential as provided in law regarding claims files and confidential records.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: The work group did a lot of work on IME issues over the interim. Rulemaking and policy changes suggested by L&I are a good step forward. However, there are significant issues that the work group was not able to resolve. L&I says they may adopt some of the recommendations, but self-insurers are not bound by L&I policies. Injured workers should have one set of rules for IMEs. They should have the same system and protections no matter who they work for.

Reducing the number of IMEs will reduce costs, possible worker pain, and worker's time. IMEs are intrusive and sometimes uncomfortable. The bill will limit IMEs to one per issue. Most workers only have one to two exams. This bill will limit the number of exams for complex claims. Back injuries are one of the most difficult to treat. These injured workers are subjected to many burdensome exams that do nothing to advance the medical treatment. It is not uncommon to see up to four IMEs for an injured worker. This combats tie breaker exams where they are sending the worker to one more IME than the worker has treating physicians. This will put the injured worker on equal footing.

It is time we put the workers first in the workers' compensation system. The Legislature identified PTSD as a work-related injury for firefighters and police officers. It has been common place for self-insurers to have these worker undergo multiple exams before getting them the help they need for PTSD.

A Hanford worker gave examples of going to IMEs and the difficulties with the offices due to his disability, the dated nature of the examination, and the brevity of the exam, which was substantially shorter than the travel time.

Another particularly contentious issue is IME recording. A worker may not record an IME. Washington is an outlier. Forty-six other states allow recording. In the private sector, it is routine to record these examinations. It will be clarity, transparency, and fairness to the process. Workers find these exams difficult and stressful, making it difficult to recall. Workers whose first language is not English may review the recording with someone else to help them understand what went on during the exam.

CON: Some of the provisions in the bill conflict with the work group's recommendations. The bill seeks to re-do the work of the work group. Many ideas for recommendations did not have the information to back it up. Many provisions of the bill will not benefit the worker or their progress. Definitions are missing from the bill. It will create delays and litigation.

This will cause delay care to workers and more distrust and disputes. Eliminating case progress language removes checks and balances. It also may allow a worker to receive years of ineffectual treatment while the worker slips further into a state of disability. We should not be afraid of IME doctors' information.

IME firms are in a role in Washington's workers' compensation system to ensure timely and independent medical exams are available to injured workers. There is misunderstanding about IMEs. They are for a specific issue, not to address treatment or pain. Restricting further what they are allowed to do will not be helpful. They are really for claims managements. There is a lot of record preparation and that may be why the actual exam is short. Washington IMEs are truly independent because the L&I is unbiased and generally done as a panel, taking away bias from any one examiner. This results in a more fair examination to the injured worker. Stacking has never changed the opinion at the BIIA.

Recording does not necessarily improve the quality of an IME and may hinder it. Workers may act differently when being recorded. There may be a lack of quality interpreters or the cultural competency. We should improve interpreter quality. The IME should be the focus of the exam, not evidence building through recording. Once a recording is taken, there is no language in the bill about securing the recording so it does not get into the wrong hands, violating HIIPA.

The work group did not recommend recording in terms of increasing the number of examiners. Doctors have a concern about recording. We want to ensure there are high quality IMEs doctors. The bill deters examiners from opting into IMEs, particularly because of recording. When a claimant shows up with a tape recording or a camera, it signals that they do not trust the doctor. The process is already very transparent. The worker should read the IME report and be allowed to correct any misinformation. In other states, there are restrictions on recordings. Examining other states recording IMEs is important.

For psychologists, there should be more consideration before making this change.

OTHER: We have concerns about eliminating the language of case progress that was added in SB 6440. We have not let that language work yet. Case progress does not allow subsequent IMEs, except when the worker's status has changed. This helps address stacking.

SB 6440 has not been in the system long enough to see how it influences the number of IMEs. L&I and self-insurers need to be thoughtful of IMEs and realize they think they are intrusive. The bill does not allow an IME for an appeal but does not eliminate the worker's ability to get information through their own exam.

Persons Testifying: PRO: Senator Derek Stanford, Prime Sponsor; Brian Wright,

Washington State Association for Justice; AJ Johnson, Washington State Council of Fire Fighters; Joe Kendo, Washington State Labor Council, AFL-CIO; Mario Diaz, Retired; Brenda Wiest, Teamsters Local 117.

CON: Rose Gundersen, Washington Retail Association; Rich Reynolds, Providence , Director Injury Prevention, Ergonomics & Workers' Compensation; Ryan Miller, IME Workgroup Member, Self Insured, Hall & Miller PS; Richard Clyne, IME Workgroup Member, State Fund, Washington State Farm Bureau; Kristin McCoy, IME Workgroup Member, IME Panels & Providers, MES Solutions; Carolyn Logue, Washington IME Coalition; Kenneth Brait, Kenneth Brait, M.D.; Beth Doohan, Inland Medical Evaluations; Daniel Brzusek, Northwest rehabilitation Associates Inc.; Eugene Toomey.

OTHER: Vickie Kennedy, Labor & Industries; Tammy Fellin, Labor & Industries.

Persons Signed In To Testify But Not Testifying: No one.