

2SHB 3139 - H AMD 1253

By Representative Condotta

FAILED 02/19/2008

1 Strike everything after the enacting clause and insert the  
2 following:

3 "Sec. 1. RCW 51.32.240 and 2004 c 243 s 7 are each amended to read  
4 as follows:

5 (1)(a) Whenever any payment of benefits under this title is made  
6 because of clerical error, mistake of identity, innocent  
7 misrepresentation by or on behalf of the recipient thereof mistakenly  
8 acted upon, or any other circumstance of a similar nature, all not  
9 induced by willful misrepresentation, the recipient thereof shall repay  
10 it and recoupment may be made from any future payments due to the  
11 recipient on any claim with the state fund or self-insurer, as the case  
12 may be. The department or self-insurer, as the case may be, must make  
13 claim for such repayment or recoupment within one year of the making of  
14 any such payment or it will be deemed any claim therefor has been  
15 waived.

16 (b) Except as provided in subsections (3), (4), and (5) of this  
17 section, the department may only assess an overpayment of benefits  
18 because of adjudicator error when the order upon which the overpayment  
19 is based is not yet final as provided in RCW 51.52.050 and 51.52.060.  
20 "Adjudicator error" includes the failure to consider information in the  
21 claim file, failure to secure adequate information, or an error in  
22 judgment.

23 (c) The director, pursuant to rules adopted in accordance with the  
24 procedures provided in the administrative procedure act, chapter 34.05  
25 RCW, may exercise his discretion to waive, in whole or in part, the  
26 amount of any such timely claim where the recovery would be against  
27 equity and good conscience.

28 (2) Whenever the department or self-insurer fails to pay benefits  
29 because of clerical error, mistake of identity, or innocent  
30 misrepresentation, all not induced by recipient willful

1 misrepresentation, the recipient may request an adjustment of benefits  
2 to be paid from the state fund or by the self-insurer, as the case may  
3 be, subject to the following:

4 (a) The recipient must request an adjustment in benefits within one  
5 year from the date of the incorrect payment or it will be deemed any  
6 claim therefore has been waived.

7 (b) The recipient may not seek an adjustment of benefits because of  
8 adjudicator error. Adjustments due to adjudicator error are addressed  
9 by the filing of a written request for reconsideration with the  
10 department of labor and industries or an appeal with the board of  
11 industrial insurance appeals within sixty days from the date the order  
12 is communicated as provided in RCW 51.52.050. "Adjudicator error"  
13 includes the failure to consider information in the claim file, failure  
14 to secure adequate information, or an error in judgment.

15 (3) Whenever the department issues an order rejecting a claim for  
16 benefits paid pursuant to RCW 51.32.190 or 51.32.210, after payment for  
17 temporary disability benefits has been paid by a self-insurer pursuant  
18 to RCW 51.32.190(3) or by the department pursuant to RCW 51.32.210, the  
19 recipient thereof shall repay such benefits and recoupment may be made  
20 from any future payments due to the recipient on any claim with the  
21 state fund or self-insurer, as the case may be. The director, under  
22 rules adopted in accordance with the procedures provided in the  
23 administrative procedure act, chapter 34.05 RCW, may exercise  
24 discretion to waive, in whole or in part, the amount of any such  
25 payments where the recovery would be against equity and good  
26 conscience.

27 (4) Whenever any payment of benefits under this title has been made  
28 pursuant to an adjudication by the department or by order of the board  
29 or any court and timely appeal therefrom has been made where the final  
30 decision is that any such payment was made pursuant to an erroneous  
31 adjudication, the recipient thereof shall repay it and recoupment may  
32 be made from any future payments due to the recipient on any claim  
33 (~~with the state fund or self-insurer, as the case may be~~) whether  
34 state fund or self-insured. The director, pursuant to rules adopted in  
35 accordance with the procedures provided in the administrative procedure  
36 act, chapter 34.05 RCW, may exercise his discretion to waive, in whole  
37 or in part, the amount of any such payments where the recovery would be  
38 against equity and good conscience, however, if the director waives in

1 whole or in part any such payments due to a self-insured employer, the  
2 employer shall be reimbursed the amount waived from the employer  
3 overpayment reimbursement fund. The department shall collect  
4 information regarding self-insured claim overpayments resulting from  
5 final decisions of the board of industrial insurance appeals and the  
6 courts, and at a self-insurer's request, recoup such overpayments on  
7 behalf of the self-insurer from any open, new, or reopened state fund  
8 or self-insured claims. The department shall forward the amounts  
9 collected to the self-insured employer to whom the payment is owed.  
10 The department may provide information as needed to any self-insurers  
11 from whom payments may be collected on behalf of the department or  
12 another self-insurer. Notwithstanding RCW 51.32.040, any self-insurer  
13 requested by the department to forward payments to the department  
14 pursuant to this subsection shall pay the department directly. The  
15 department shall credit the amounts recovered to the appropriate fund,  
16 or forward amounts collected to the appropriate self-insurer, as the  
17 case may be. If a self-insurer is not fully reimbursed within eighteen  
18 months of the final decision of the board or court order through the  
19 collection process pursuant to this subsection and by means of  
20 processes pursuant to subsection (6) of this section, the self-insurer  
21 shall be reimbursed for the remainder of the amount due from the  
22 employer overpayment reimbursement fund. The fund shall also reimburse  
23 the self-insured employer its reasonable attorney fees in pursuing  
24 payment under this subsection or subsection (6) of this section.

25 (5)(a) Whenever any payment of benefits under this title has been  
26 induced by willful misrepresentation the recipient thereof shall repay  
27 any such payment together with a penalty of fifty percent of the total  
28 of any such payments and the amount of such total sum may be recouped  
29 from any future payments due to the recipient on any claim with the  
30 state fund or self-insurer against whom the willful misrepresentation  
31 was committed, as the case may be, and the amount of such penalty shall  
32 be placed in the supplemental pension fund. Such repayment or  
33 recoupment must be demanded or ordered within three years of the  
34 discovery of the willful misrepresentation.

35 (b) For purposes of this subsection (5), it is willful  
36 misrepresentation for a person to obtain payments or other benefits  
37 under this title in an amount greater than that to which the person  
38 otherwise would be entitled. Willful misrepresentation includes:

1 (i) Willful false statement; or

2 (ii) Willful misrepresentation, omission, or concealment of any  
3 material fact.

4 (c) For purposes of this subsection (5), "willful" means a  
5 conscious or deliberate false statement, misrepresentation, omission,  
6 or concealment of a material fact with the specific intent of  
7 obtaining, continuing, or increasing benefits under this title.

8 (d) For purposes of this subsection (5), failure to disclose a  
9 work-type activity must be willful in order for a misrepresentation to  
10 have occurred.

11 (e) For purposes of this subsection (5), a material fact is one  
12 which would result in additional, increased, or continued benefits,  
13 including but not limited to facts about physical restrictions, or  
14 work-type activities which either result in wages or income or would be  
15 reasonably expected to do so. Wages or income include the receipt of  
16 any goods or services. For a work-type activity to be reasonably  
17 expected to result in wages or income, a pattern of repeated activity  
18 must exist. For those activities that would reasonably be expected to  
19 result in wages or produce income, but for which actual wage or income  
20 information cannot be reasonably determined, the department shall  
21 impute wages pursuant to RCW 51.08.178(4).

22 (6) The worker, beneficiary, or other person affected thereby shall  
23 have the right to contest an order assessing an overpayment pursuant to  
24 this section in the same manner and to the same extent as provided  
25 under RCW 51.52.050 and 51.52.060. In the event such an order becomes  
26 final under chapter 51.52 RCW and notwithstanding the provisions of  
27 subsections (1) through (5) of this section, the director, director's  
28 designee, or self-insurer may file with the clerk in any county within  
29 the state a warrant in the amount of the sum representing the unpaid  
30 overpayment and/or penalty plus interest accruing from the date the  
31 order became final. The clerk of the county in which the warrant is  
32 filed shall immediately designate a superior court cause number for  
33 such warrant and the clerk shall cause to be entered in the judgment  
34 docket under the superior court cause number assigned to the warrant,  
35 the name of the worker, beneficiary, or other person mentioned in the  
36 warrant, the amount of the unpaid overpayment and/or penalty plus  
37 interest accrued, and the date the warrant was filed. The amount of  
38 the warrant as docketed shall become a lien upon the title to and

1 interest in all real and personal property of the worker, beneficiary,  
2 or other person against whom the warrant is issued, the same as a  
3 judgment in a civil case docketed in the office of such clerk. The  
4 sheriff shall then proceed in the same manner and with like effect as  
5 prescribed by law with respect to execution or other process issued  
6 against rights or property upon judgment in the superior court. Such  
7 warrant so docketed shall be sufficient to support the issuance of  
8 writs of garnishment in favor of the department or self-insurer in the  
9 manner provided by law in the case of judgment, wholly or partially  
10 unsatisfied. The clerk of the court shall be entitled to a filing fee  
11 under RCW 36.18.012(10), which shall be added to the amount of the  
12 warrant. A copy of such warrant shall be mailed to the worker,  
13 beneficiary, or other person within three days of filing with the  
14 clerk.

15 The director, director's designee, or self-insurer may issue to any  
16 person, firm, corporation, municipal corporation, political subdivision  
17 of the state, public corporation, or agency of the state, a notice to  
18 withhold and deliver property of any kind if there is reason to believe  
19 that there is in the possession of such person, firm, corporation,  
20 municipal corporation, political subdivision of the state, public  
21 corporation, or agency of the state, property that is due, owing, or  
22 belonging to any worker, beneficiary, or other person upon whom a  
23 warrant has been served for payments due the department or self-  
24 insurer. The notice and order to withhold and deliver shall be served  
25 by certified mail accompanied by an affidavit of service by mailing or  
26 served by the sheriff of the county, or by the sheriff's deputy, or by  
27 any authorized representative of the director, director's designee, or  
28 self-insurer. Any person, firm, corporation, municipal corporation,  
29 political subdivision of the state, public corporation, or agency of  
30 the state upon whom service has been made shall answer the notice  
31 within twenty days exclusive of the day of service, under oath and in  
32 writing, and shall make true answers to the matters inquired or in the  
33 notice and order to withhold and deliver. In the event there is in the  
34 possession of the party named and served with such notice and order,  
35 any property that may be subject to the claim of the department or  
36 self-insurer, such property shall be delivered forthwith to the  
37 director, the director's authorized representative, or self-insurer  
38 upon demand. If the party served and named in the notice and order

1 fails to answer the notice and order within the time prescribed in this  
2 section, the court may, after the time to answer such order has  
3 expired, render judgment by default against the party named in the  
4 notice for the full amount, plus costs, claimed by the director,  
5 director's designee, or self-insurer in the notice. In the event that  
6 a notice to withhold and deliver is served upon an employer and the  
7 property found to be subject thereto is wages, the employer may assert  
8 in the answer all exemptions provided for by chapter 6.27 RCW to which  
9 the wage earner may be entitled.

10 This subsection shall only apply to orders assessing an overpayment  
11 which are issued on or after July 28, 1991: PROVIDED, That this  
12 subsection shall apply retroactively to all orders assessing an  
13 overpayment resulting from fraud, civil or criminal.

14 (7) Orders assessing an overpayment which are issued on or after  
15 July 28, 1991, shall include a conspicuous notice of the collection  
16 methods available to the department or self-insurer.

17 **Sec. 2.** RCW 51.52.050 and 2004 c 243 s 8 are each amended to read  
18 as follows:

19 (1) Whenever the department has made any order, decision, or award,  
20 it shall promptly serve the worker, beneficiary, employer, or other  
21 person affected thereby, with a copy thereof by mail, which shall be  
22 addressed to such person at his or her last known address as shown by  
23 the records of the department. The copy, in case the same is a final  
24 order, decision, or award, shall bear on the same side of the same page  
25 on which is found the amount of the award, a statement, set in black  
26 faced type of at least ten point body or size, that such final order,  
27 decision, or award shall become final within sixty days from the date  
28 the order is communicated to the parties unless a written request for  
29 reconsideration is filed with the department of labor and industries,  
30 Olympia, or an appeal is filed with the board of industrial insurance  
31 appeals, Olympia(~~(+PROVIDED, That)~~). However, a department order or  
32 decision making demand, whether with or without penalty, for repayment  
33 of sums paid to a provider of medical, dental, vocational, or other  
34 health services rendered to an industrially injured worker, shall state  
35 that such order or decision shall become final within twenty days from  
36 the date the order or decision is communicated to the parties unless a

1 written request for reconsideration is filed with the department of  
2 labor and industries, Olympia, or an appeal is filed with the board of  
3 industrial insurance appeals, Olympia.

4 (2)(a) Whenever the department has taken any action or made any  
5 decision relating to any phase of the administration of this title the  
6 worker, beneficiary, employer, or other person aggrieved thereby may  
7 request reconsideration of the department, or may appeal to the board.  
8 In an appeal before the board, the appellant shall have the burden of  
9 proceeding with the evidence to establish a prima facie case for the  
10 relief sought in such appeal(~~(:—PROVIDED, That)~~).

11 (b) An employer appeal of a department order shall operate as a  
12 stay of the order except:

13 (i) An employer appeal of an order awarding temporary total  
14 disability benefits shall not operate as a stay of temporary total  
15 disability benefits, and such temporary total disability benefits shall  
16 be paid no later than fifteen days after the board grants the appeal,  
17 unless an employer moves for a stay of the department's order within  
18 fifteen days after the board grants the appeal. Any employer may move  
19 for a stay of the order, in whole or in part. The board shall review  
20 the department's file as it existed as of the date of the order on  
21 appeal, and issue a written order granting or denying the stay within  
22 fifteen days of receipt of the motion. The board shall grant the  
23 motion if the department's file demonstrates the issues on appeal are  
24 debatable or if the hardship to the moving party if the stay were not  
25 granted is greater than the hardship to the nonmoving party if the stay  
26 were granted. If the board denies the motion for stay, the board shall  
27 reconsider the motion one hundred eighty days after issuance of the  
28 order denying the stay if a proposed decision and order on the merits  
29 of the appeal has not been issued. If the board denies a motion to  
30 stay payment of benefits, the board shall refer the appeal for  
31 scheduling of hearings and shall not place the case in mediation  
32 pursuant to RCW 51.52.095, unless requested and agreed by the parties.  
33 Notwithstanding the denial of a stay, temporary total disability  
34 benefits shall be terminated if changed circumstances indicate the  
35 worker is not totally disabled. If the self-insured employer prevails  
36 in the appeal on the merits, any benefits paid may be recouped pursuant  
37 to RCW 51.32.240.

1        (ii) If a self-insured employer appeals a department order only  
2 setting the basis or rate of monthly compensation to a worker, the  
3 appeal shall not be a stay of benefits not in dispute. The appeal  
4 shall operate as a stay of payment of benefits in dispute, and such  
5 benefits shall not be paid unless so ordered after the appeal on the  
6 merits has been finally determined, or unless agreed by the parties.

7        (c) In an appeal from an order of the department that alleges  
8 willful misrepresentation, the department or self-insured employer  
9 shall initially introduce all evidence in its case in chief. Any such  
10 person aggrieved by the decision and order of the board may thereafter  
11 appeal to the superior court, as prescribed in this chapter.

12        **Sec. 3.** RCW 51.52.090 and 1971 ex.s. c 289 s 70 are each amended  
13 to read as follows:

14        If the appeal is not denied within thirty days after the notice is  
15 filed with the board, the appeal shall be deemed to have been  
16 granted(~~(: PROVIDED, That the board may extend the time within which~~  
17 ~~it may act upon such appeal, not exceeding thirty days)).~~

18        NEW SECTION. **Sec. 4.** A new section is added to chapter 51.32 RCW  
19 to read as follows:

20        (1) Except as provided in subsection (2) of this section, each  
21 employer shall retain from the earnings of each worker that amount as  
22 shall be fixed from time to time by the director, the basis for  
23 measuring said amount to be determined by the director. The money so  
24 retained shall be remitted to the department in such manner and at such  
25 intervals as the department directs and shall be placed in the employer  
26 overpayment reimbursement fund. However, the state apprenticeship  
27 council shall pay the entire amount into the employer overpayment  
28 reimbursement fund for registered apprentices or trainees during their  
29 participation in supplemental and related instruction classes. The  
30 moneys so collected shall be used exclusively for reimbursement to the  
31 accident fund, medical aid fund, reserve fund, and to self-insured  
32 employers for benefits overpaid to injured workers during the pendency  
33 of board or court appeals in which the department or self-insured  
34 employer prevails, and shall be no more than necessary to make such  
35 payments on a current basis.

1 (2) None of the amount assessed for the employer overpayment  
2 reimbursement fund under RCW 51.16.210 may be retained from the  
3 earnings of workers covered under RCW 51.16.210.

4 NEW SECTION. **Sec. 5.** A new section is added to chapter 51.44 RCW  
5 to read as follows:

6 The employer overpayment reimbursement fund is created in the  
7 custody of the state treasurer. Expenditures from the account may be  
8 used only for reimbursing the accident fund, medical aid fund, reserve  
9 fund, and self-insured employers for benefits overpaid to injured  
10 workers during the pendency of board or court appeals in which the  
11 department or self-insured employer prevails. Only the director or the  
12 director's designee may authorize expenditures from the account. The  
13 account is subject to allotment procedures under chapter 43.88 RCW, but  
14 an appropriation is not required for expenditures.

15 NEW SECTION. **Sec. 6.** This act applies to orders issued on or  
16 after the effective date of this act."

17 Correct the title.

EFFECT: Creates an employer overpayment reimbursement fund, from workers' earnings, to reimburse self-insured employers and the state fund for overpayments of benefits resulting from employer appeals. Provides for payments from the fund for overpayments if a self-insured employer is not reimbursed within 18 months through the process established in current law or through the collection of overpayments from other claims (as established in the Second Substitute Bill), as well as attorneys' fees. Makes changes in the process for collection of overpayments from other claims. Provides that if the director of the Department of Labor and Industries waives the recovery of overpayments due a self-insurer, the employer must also be reimbursed from the fund.

Modifies payments of benefits on appeal procedures and standard. Provides that an employer appeal operates as a stay, unless the appeal is for temporary total disability benefits, in which case benefits must be paid unless a stay is granted. Shortens the time to issue orders on stay motions from 25 to 15 days. Changes the burden of proof on a stay motion from more likely than not to prevail to that the issues on appeal are debatable or if the hardship to the moving party is greater than the hardship to the nonmoving party. Provides that if a stay is granted, the Board of Industrial Insurance Appeals (Board) must

reconsider the stay within 180 days if a proposed decision on the underlying appeal has not yet been issued. Provides that if the Board denies a stay, the case is not placed in mediation unless agreed to by the parties. Provides that temporary total disability benefits must be terminated if changed circumstances indicate the worker is not totally disabled. Strikes provision providing for payment of permanent partial disability awards of amounts not in dispute.

Allows recoupment from health service providers and eliminates provision providing for recoupment of overpayments from health insurance entities.

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