

FINAL BILL REPORT

ESHB 3188

C 243 L 04

Synopsis as Enacted

Brief Description: Concerning liability to the department of labor and industries for premiums, overpayments, and penalties.

Sponsors: By House Committee on Commerce & Labor (originally sponsored by Representatives Conway and Wood).

House Committee on Commerce & Labor

Background:

Benefit Payments to Workers

When an injured worker files a claim application with the Department of Labor and Industries (Department) or self-insurer, the worker provides certain information, including information about the injury or exposure, marital status, dependents, and employment. The application must be signed by the worker under a statement declaring the information to be true, to the worker's best knowledge and belief.

If the Department or a self-insured employer pays industrial insurance benefits that are induced by fraud, the recipient of the benefits must repay the amount with a penalty of 50 percent of the benefits. The total amount may also be recouped from future benefits. Recovered penalties are paid into the Supplemental Pension Fund.

The industrial insurance law does not define "fraud." Instead, to prove that the payment of industrial insurance benefits have been induced by fraud, the Department must prove common law civil fraud, which is found if all of the following are shown by clear, cogent, and convincing evidence:

- the person represented an existing fact;
- the fact was material;
- the fact was false;
- the person knew that the fact was false or was ignorant of its truth;
- the person intended the Department or self-insurer to act on the fact;
- the Department or self-insurer was ignorant of the falsity of the fact;
- the Department or self-insurer relied on the truth of the representation;
- the Department or self-insurer had a right to rely on the representation; and
- the Department or self-insurer was damaged as a consequence.

If a benefit overpayment results from an appeal of a Department order where the final decision is that the payment was made because of erroneous adjudication, the claimant must repay the overpaid benefits. If benefits fail to be paid because of clerical error or other nonfraudulent

mistakes, the claimant must seek an adjustment within one year of the incorrect payment. However, the claimant may not seek such an adjustment because of adjudicator errors.

Employer Liability for Premiums

Under the Industrial Insurance Act, a person other than the employer may be liable for payment of industrial insurance premiums owed on particular work. For example, business successors, public agencies, and private entities that let contracts for work may be liable for the payment of certain premiums.

Successor Liability. Persons who become successors to businesses also become liable for industrial insurance premiums owed to the Department but not paid within 10 days of the sale of such businesses. "Successor" is defined as a person to whom a business sells a major part of the business's "materials, supplies, merchandise, inventory, fixtures, or equipment."

Contractor Liability. Many private entities that let contracts for work are liable for payment of industrial insurance premiums owed on such work. Private entities are entitled to collect the full amount payable to the Accident Fund from the contractor, and the contractor is entitled to collect from a subcontractor a proportionate share of that amount. Consequently, the person letting the contract functions as a surety for the industrial insurance premiums.

The Washington Court of Appeals has described these provisions as "facilitat[ing] and broaden[ing] the premium collection powers of the Department." The Court of Appeals also said that the rationale for giving the Department these collection powers is that "the more the [Industrial Insurance Act] facilitates full collection of premiums, the better it serves the accident fund from which compensation is paid."

However, if certain requirements are satisfied, registered contractors and licensed electrical contractors are not liable for premiums owed on a subcontractor's work. The requirements that must be satisfied are as follows:

- The subcontractor is a registered contractor or a licensed electrical contractor.
- The subcontractor has a principal place of business that is eligible for a business deduction for IRS purposes.
- The subcontractor maintains separate records reflecting business income and expenses
- The subcontractor contracted to perform certain types of work, such as construction, alteration, or demolition of a structure, or electrical work.

Corporate Officer Liability. Generally, corporate officers and other individuals are not personally liable for premiums owed by corporations or limited liability companies.

Collection of Provider Overpayments

The Department is authorized to conduct audits of health services providers, including medical, chiropractic, dental, vocational, and other providers of services to injured workers. In these audits, the Department may examine records relating to services rendered to an injured worker that were reimbursed by the Department.

If a provider unintentionally receives reimbursement to which he or she was not entitled, the provider is required to repay the excess amount, plus interest. If the provider knowingly receives an overpayment because of willful false statement, willful misrepresentation of a material fact, or another fraudulent scheme, the provider must repay the excess amount, plus interest, and civil penalties of up to \$1,000 or three times the amount of the overpayment, whichever is greater. The provider is also subject to a class C felony, with a fine of up to \$25,000, for certain "knowing" violations. Civil penalties are deposited in the State General Fund.

To collect overpaid benefits from workers or unpaid premiums from employers, the Department, or self-insured employer in the case of overpaid benefits, is permitted to obtain a warrant in superior court on a final Department order. The warrant is treated like a judgment and becomes a lien on the property of the person named. The warrant may be executed in the same manner as other court judgments. This statutory collection authority does not apply to providers who fail to repay overpayments or penalties.

Summary:

Benefit Payments to Workers

Willful Misrepresentation. It is willful misrepresentation for a person to obtain industrial insurance payments or benefits that are more than the amount to which he or she is otherwise entitled. Willful misrepresentation includes:

- willful false statements; or
- willful misrepresentation, omission, or concealment of a material fact.

A "material fact" is one that would result in additional, increased, or continued benefits, including facts about physical restrictions, or work-type activities that result or would reasonably be expected to result in wages or income. For a work-type activity to be reasonably expected to result in wages or income, a pattern of repeated activity must exist. The Department is authorized to impute wages when wage information cannot be reasonably determined for activities that would reasonably be expected to result in wages or income.

"Willful" means a conscious or deliberate false statement, misrepresentation, omission, or concealment of a material fact with the specific intent of obtaining, continuing, or increasing benefits. Failure to disclose a work-type activity must be willful for a misrepresentation to have occurred.

These new provisions apply to willful misrepresentation determinations issued on or after July 1, 2004.

Adjudicator Error. If benefits are overpaid because of adjudicator error, the Department may only assess an overpayment when the order on which the overpayment is based is not yet final, unless the overpayment relates to an order rejecting the claim, results from a final appeal of a Department or Board of Industrial Appeals order, or has been induced by willful misrepresentation. If benefits fail to be paid because of adjudicator error, the claimant must

address the adjustment by filing a written request for reconsideration or an appeal within the statutory sixty-day appeal period.

Employer Liability for Premiums

The provisions of the Industrial Insurance Act relating to successor and contractor liability are modified. A provision relating to corporate officer liability is added.

Successor Liability. The definition of "successor" is modified. Instead of being restricted to a person to whom a business sells a major part of the business's "materials, supplies, merchandise, inventory, fixtures, or equipment," a successor is a person to whom a business sells the business's property, "whether real or personal, tangible or intangible."

Contractor Liability. The requirements that must be satisfied for registered contractors and licensed electrical contractors to be not liable for subcontractor premiums are modified. In addition to current statutory requirements, a subcontractor that is an employer must have an industrial insurance account in good standing or be a self-insurer when the subcontract is let. A contractor may consider a subcontractor's account to be in good standing if: (1) the contractor verifies that the account is in good standing within a year prior to letting the contractor and at least once a year thereafter; and (2) the contractor does not receive written notice that the account status has changed.

Corporate Officer Liability. When a corporate or limited liability company goes out of business, corporate officers and other persons are personally liable for premiums owed by the businesses, and any interest and penalties on the premiums, if: (1) the officers or other persons willfully failed to pay the premiums; and (2) the premiums became due while the officers or other persons were responsible for their payment.

Corporate officers and other persons are not liable, however, if they are subject to mandatory industrial insurance coverage and were directed to pay premiums by a person who is exempt from mandatory coverage.

"Willfully fails to pay or to cause to be paid" is defined as meaning a failure that was the result of an intentional, conscious, and voluntary course of action.

Taxpayer Education. The Department, when practical, must publish information and provide training to promote understanding of potential premium liability.

Collection of Provider Overpayments

The Department or self-insured employer is authorized to pursue the collection of unpaid overpayments, penalties, and interest from health care providers using the same procedures that are used to collect overpayments from workers.

Rule Adoption

The Department must adopt rules to implement the Act.

Votes on Final Passage:

House 95 0
Senate 49 0

Effective: June 10, 2004