

SENATE BILL REPORT

ESSB 5378

As Reported By Senate Committee On:
Commerce & Trade, January 29, 2004

Title: An act relating to simplifying and adding certainty to the calculation of workers' compensation benefits.

Brief Description: Simplifying and adding certainty to the calculation of workers' compensation benefits.

Sponsors: Senate Committee on Commerce & Trade (originally sponsored by Senators Honeyford, Hewitt, T. Sheldon, Mulliken, Rasmussen and Hale).

Brief History:

Committee Activity: Commerce & Trade: 1/30/03, 2/6/03 [DPS, DNP]; 1/23/04, 1/29/04 [DP2S, DNP].

Passed Senate: 3/12/03, 25-24.

SENATE COMMITTEE ON COMMERCE & TRADE

Majority Report: That Second Substitute Senate Bill No. 5378 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Honeyford, Chair; Hewitt, Vice Chair; and Mulliken.

Minority Report: Do not pass.

Signed by Senators Franklin and Keiser.

Staff: Jennifer Strus (786-7316)

Background: A worker who is injured in the course of employment is entitled to benefits under Washington's industrial insurance law. Benefits include compensation for time lost from work (time-loss benefits) and for medical care related to the injury or occupational disease.

Calculation of Wages. Benefits for lost wages are based on the worker's monthly wage at the time of the injury. If a worker's employment is seasonal in nature or essentially part-time or intermittent, the monthly wages are determined by dividing by 12 the total wages earned from all employment in any 12 successive calendar months preceding the injury.

The current statutory definition of wages includes tips, to the extent they are reported to the employer for federal income tax purposes, and the "reasonable value of board, housing, and fuel or other consideration of like nature."

Time-Loss Benefits. If a worker is injured or dies as the result of an occupational injury or disease, the injured worker or the surviving spouse and children are eligible for 60-72 percent of the worker's monthly wage. The actual percentage of benefits received is determined by the number of dependents.

Payments to a worker with a temporary total disability cease when the present earning power of the worker, at any kind of work, is restored. If the present earning power is partially restored, the worker must receive 80 percent of the difference between the actual wages and the worker's earning power at the time of injury.

An injured worker with a permanent partial disability receives compensation for the disability according to a statutory schedule. Payments made under this program increase each July by the annual change in the U.S. Consumer Price Index for Urban Wage Earners and Clerical Workers.

Benefit payments for lost wages must not exceed 120 percent of the state's average monthly wage.

Relevant Court Cases. Two recent Washington Supreme Court decisions have affected the way wages are calculated. In *Cockle v. The Department of Labor and Industries*, the court held that the statutory phrase "board, housing, fuel, or other consideration of like nature" in RCW 51.08.178(1) means readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival.

In *Avundes v. The Department of Labor and Industries*, the court established a test to determine whether an employee's work was intermittent. If the Department of Labor and Industries (L&I) or a self-insured employer determines that the work is intermittent, wages must be calculated by dividing the total year's wages by 12. If the work is not intermittent, wages must be calculated based on the worker's current monthly wage.

Summary of Second Substitute Bill: Changes are made to the calculation of wages and time-loss benefits.

Calculation of Wages. Wages are defined as the gross remuneration paid in cash by the employer to the worker for services performed for a pay period, before any deductions. Wages also include tips to the extent they are reported for federal income tax purposes and the actual value of board, housing and fuel received from the employer. The actual value of board, housing and fuel is not included in the calculation of wages if the employer continues to provide those benefits while the worker is not working.

Wages do not include fringe benefits. Fringe benefits include, but are not limited to: retirement and financial benefit plans; mental and physical health insurance; life, disability and wage replacement insurance; unused, accrued leave; memberships; employee discounts; materials; equipment and facilities; training and education; and other employee or beneficiary benefit plans.

To determine a worker's monthly wage, L&I or a self-insurer must divide by 12 the total wages in any four successive quarters in the 24 months preceding the injury or disease that most reasonably represent the worker's wages. If the worker is self-employed or sustains an injury or occupational disease less than one year after beginning an employment relationship, L&I or a self-insurer must calculate the monthly wage based on the usual wage paid other employees of the employer who perform similar duties. If no other employees exist for comparison purposes, L&I or a self-insurer shall calculate the wage based on other employees in the worker's labor market who perform similar duties.

Time-Loss Benefits. Benefits for death, permanent total disability and temporary total disability after July 1, 2004 and before June 30, 2005 may not exceed 120 percent of the average monthly wage in the state on June 30, 2004. After July 1, 2005, the department must annually adjust the state's average monthly wage based on the wage during the previous 12 month period, to account for inflation. Burial benefits must remain at 200 percent of the state's average monthly wage.

A worker with a temporary total disability is eligible for benefits until the worker is capable of gainful employment on a reasonably continuous basis. If the worker's present earning power is partially restored and the worker is working, the worker must receive 80 percent of the difference between the worker's present wages and the worker's earning power at the time of injury. An injured worker is eligible for these temporary total disability benefits until the worker's condition is "medically fixed and stable."

The department must adjust permanent partial disability payments annually for inflation, beginning July 1, 2004.

Second Substitute Bill Compared to Substitute Bill: Dates are changed and the definition of wages is clarified.

Appropriation: None.

Fiscal Note: Updated fiscal note requested on January 19, 2004.

Effective Date: The bill contains an emergency clause and takes effect on July 1, 2004.

Testimony For: This bill simplifies an overly complex system of wage determinations for workers' compensation purposes. Workers should not be able to make more money on time-loss benefits than they do working and that is what happens under the current system. The *Cockle* and *Avundes* decisions have caused the number of appeals being filed with the Board of Industrial Insurance Appeals to increase dramatically. This bill will solve the issues created by the court cases and save money for the system.

Testimony Against: This bill would require the Department of Labor and Industries to use information that is not up-to-date. There are a number of items in the bill that L&I is unsure how to implement. The bill complicates wage determinations and would result in lower partial wage replacement than currently exists. It's only fair to consider fringe benefits as part of wages. Labor should be a full partner in any reform to the workers' compensation system and in the development of this bill, labor was excluded.

Testified: PRO: Laurie Carlson, Sellen Construction; Jan Gee, Washington Retail Association. CON: Robby Stern, WSLC; David Johnson, Building Trades; Robert Helmsly, Pulp and Paper Workers. CONCERNS: Paul Trause, Department of Labor & Industries.