

E2SHB 3139 - CONF REPT
By Conference Committee

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

3 "Sec. 1. RCW 51.52.050 and 2004 c 243 s 8 are each amended to read
4 as follows:

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

26 (2)(a) Whenever the department has taken any action or made any
27 decision relating to any phase of the administration of this title the
28 worker, beneficiary, employer, or other person aggrieved thereby may
29 request reconsideration of the department, or may appeal to the board.

1 In an appeal before the board, the appellant shall have the burden of
2 proceeding with the evidence to establish a prima facie case for the
3 relief sought in such appeal(~~(:—PROVIDED, That)~~).

4 (b) An order by the department awarding benefits shall become
5 effective and benefits due on the date issued. Subject to (b)(i) and
6 (ii) of this subsection, if the department order is appealed the order
7 shall not be stayed pending a final decision on the merits unless
8 ordered by the board. Upon issuance of the order granting the appeal,
9 the board will provide the worker with notice concerning the potential
10 of an overpayment of benefits paid pending the outcome of the appeal
11 and the requirements for interest on unpaid benefits pursuant to RCW
12 51.52.135. A worker may request that benefits cease pending appeal at
13 any time following the employer's motion for stay or the board's order
14 granting appeal. The request must be submitted in writing to the
15 employer, the board, and the department. Any employer may move for a
16 stay of the order on appeal, in whole or in part. The motion must be
17 filed within fifteen days of the order granting appeal. The board
18 shall conduct an expedited review of the claim file provided by the
19 department as it existed on the date of the department order. The
20 board shall issue a final decision within twenty-five days of the
21 filing of the motion for stay or the order granting appeal, whichever
22 is later. The board's final decision may be appealed to superior court
23 in accordance with RCW 51.52.110. The board shall grant a motion to
24 stay if the moving party demonstrates that it is more likely than not
25 to prevail on the facts as they existed at the time of the order on
26 appeal. The board shall not consider the likelihood of recoupment of
27 benefits as a basis to grant or deny a motion to stay. If a
28 self-insured employer prevails on the merits, any benefits paid may be
29 recouped pursuant to RCW 51.32.240.

30 (i) If upon reconsideration requested by a worker or medical
31 provider, the department has ordered an increase in a permanent partial
32 disability award from the amount reflected in an earlier order, the
33 award reflected in the earlier order shall not be stayed pending a
34 final decision on the merits. However, the increase is stayed without
35 further action by the board pending a final decision on the merits.

36 (ii) If any party appeals an order establishing a worker's wages or
37 the compensation rate at which a worker will be paid temporary or

1 permanent total disability or loss of earning power benefits, the
2 worker shall receive payment pending a final decision on the merits
3 based on the following:

4 (A) When the employer is self-insured, the wage calculation or
5 compensation rate the employer most recently submitted to the
6 department; or

7 (B) When the employer is insured through the state fund, the
8 highest wage amount or compensation rate uncontested by the parties.

9 Payment of benefits or consideration of wages at a rate that is
10 higher than that specified in (b)(ii)(A) or (B) of this subsection is
11 stayed without further action by the board pending a final decision on
12 the merits.

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

18 **Sec. 2.** RCW 51.32.240 and 2004 c 243 s 7 are each amended to read
19 as follows:

20 (1)(a) Whenever any payment of benefits under this title is made
21 because of clerical error, mistake of identity, innocent
22 misrepresentation by or on behalf of the recipient thereof mistakenly
23 acted upon, or any other circumstance of a similar nature, all not
24 induced by willful misrepresentation, the recipient thereof shall repay
25 it and recoupment may be made from any future payments due to the
26 recipient on any claim with the state fund or self-insurer, as the case
27 may be. The department or self-insurer, as the case may be, must make
28 claim for such repayment or recoupment within one year of the making of
29 any such payment or it will be deemed any claim therefor has been
30 waived.

31 (b) Except as provided in subsections (3), (4), and (5) of this
32 section, the department may only assess an overpayment of benefits
33 because of adjudicator error when the order upon which the overpayment
34 is based is not yet final as provided in RCW 51.52.050 and 51.52.060.
35 "Adjudicator error" includes the failure to consider information in the
36 claim file, failure to secure adequate information, or an error in
37 judgment.

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

6 (2) Whenever the department or self-insurer fails to pay benefits
7 because of clerical error, mistake of identity, or innocent
8 misrepresentation, all not induced by recipient willful
9 misrepresentation, the recipient may request an adjustment of benefits
10 to be paid from the state fund or by the self-insurer, as the case may
11 be, subject to the following:

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

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

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

35 (4) Whenever any payment of benefits under this title has been made
36 pursuant to an adjudication by the department or by order of the board
37 or any court and timely appeal therefrom has been made where the final
38 decision is that any such payment was made pursuant to an erroneous

1 adjudication, the recipient thereof shall repay it and recoupment may
2 be made from any future payments due to the recipient on any claim
3 (~~with the state fund or self-insurer, as the case may be~~) whether
4 state fund or self-insured.

5 (a) The director, pursuant to rules adopted in accordance with the
6 procedures provided in the administrative procedure act, chapter 34.05
7 RCW, may exercise ((his)) discretion to waive, in whole or in part, the
8 amount of any such payments where the recovery would be against equity
9 and good conscience. However, if the director waives in whole or in
10 part any such payments due a self-insurer, the self-insurer shall be
11 reimbursed the amount waived from the self-insured employer overpayment
12 reimbursement fund.

13 (b) The department shall collect information regarding self-insured
14 claim overpayments resulting from final decisions of the board and the
15 courts, and recoup such overpayments on behalf of the self-insurer from
16 any open, new, or reopened state fund or self-insured claims. The
17 department shall forward the amounts collected to the self-insurer to
18 whom the payment is owed. The department may provide information as
19 needed to any self-insurers from whom payments may be collected on
20 behalf of the department or another self-insurer. Notwithstanding RCW
21 51.32.040, any self-insurer requested by the department to forward
22 payments to the department pursuant to this subsection shall pay the
23 department directly. The department shall credit the amounts recovered
24 to the appropriate fund, or forward amounts collected to the
25 appropriate self-insurer, as the case may be.

26 (c) If a self-insurer is not fully reimbursed within twenty-four
27 months of the first attempt at recovery through the collection process
28 pursuant to this subsection and by means of processes pursuant to
29 subsection (6) of this section, the self-insurer shall be reimbursed
30 for the remainder of the amount due from the self-insured employer
31 overpayment reimbursement fund.

32 (d) For purposes of this subsection, "recipient" does not include
33 health service providers whose treatment or services were authorized by
34 the department or self-insurer.

35 (e) The department or self-insurer shall first attempt recovery of
36 overpayments for health services from any entity that provided health
37 insurance to the worker to the extent that the health insurance entity

1 would have provided health insurance benefits but for workers'
2 compensation coverage.

3 (5)(a) Whenever any payment of benefits under this title has been
4 induced by willful misrepresentation the recipient thereof shall repay
5 any such payment together with a penalty of fifty percent of the total
6 of any such payments and the amount of such total sum may be recouped
7 from any future payments due to the recipient on any claim with the
8 state fund or self-insurer against whom the willful misrepresentation
9 was committed, as the case may be, and the amount of such penalty shall
10 be placed in the supplemental pension fund. Such repayment or
11 recoupment must be demanded or ordered within three years of the
12 discovery of the willful misrepresentation.

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

17 (i) Willful false statement; or

18 (ii) Willful misrepresentation, omission, or concealment of any
19 material fact.

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

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

27 (e) For purposes of this subsection (5), a material fact is one
28 which would result in additional, increased, or continued benefits,
29 including but not limited to facts about physical restrictions, or
30 work-type activities which either result in wages or income or would be
31 reasonably expected to do so. Wages or income include the receipt of
32 any goods or services. For a work-type activity to be reasonably
33 expected to result in wages or income, a pattern of repeated activity
34 must exist. For those activities that would reasonably be expected to
35 result in wages or produce income, but for which actual wage or income
36 information cannot be reasonably determined, the department shall
37 impute wages pursuant to RCW 51.08.178(4).

1 (6) The worker, beneficiary, or other person affected thereby shall
2 have the right to contest an order assessing an overpayment pursuant to
3 this section in the same manner and to the same extent as provided
4 under RCW 51.52.050 and 51.52.060. In the event such an order becomes
5 final under chapter 51.52 RCW and notwithstanding the provisions of
6 subsections (1) through (5) of this section, the director, director's
7 designee, or self-insurer may file with the clerk in any county within
8 the state a warrant in the amount of the sum representing the unpaid
9 overpayment and/or penalty plus interest accruing from the date the
10 order became final. The clerk of the county in which the warrant is
11 filed shall immediately designate a superior court cause number for
12 such warrant and the clerk shall cause to be entered in the judgment
13 docket under the superior court cause number assigned to the warrant,
14 the name of the worker, beneficiary, or other person mentioned in the
15 warrant, the amount of the unpaid overpayment and/or penalty plus
16 interest accrued, and the date the warrant was filed. The amount of
17 the warrant as docketed shall become a lien upon the title to and
18 interest in all real and personal property of the worker, beneficiary,
19 or other person against whom the warrant is issued, the same as a
20 judgment in a civil case docketed in the office of such clerk. The
21 sheriff shall then proceed in the same manner and with like effect as
22 prescribed by law with respect to execution or other process issued
23 against rights or property upon judgment in the superior court. Such
24 warrant so docketed shall be sufficient to support the issuance of
25 writs of garnishment in favor of the department or self-insurer in the
26 manner provided by law in the case of judgment, wholly or partially
27 unsatisfied. The clerk of the court shall be entitled to a filing fee
28 under RCW 36.18.012(10), which shall be added to the amount of the
29 warrant. A copy of such warrant shall be mailed to the worker,
30 beneficiary, or other person within three days of filing with the
31 clerk.

32 The director, director's designee, or self-insurer may issue to any
33 person, firm, corporation, municipal corporation, political subdivision
34 of the state, public corporation, or agency of the state, a notice to
35 withhold and deliver property of any kind if there is reason to believe
36 that there is in the possession of such person, firm, corporation,
37 municipal corporation, political subdivision of the state, public
38 corporation, or agency of the state, property that is due, owing, or

1 belonging to any worker, beneficiary, or other person upon whom a
2 warrant has been served for payments due the department or self-
3 insurer. The notice and order to withhold and deliver shall be served
4 by certified mail accompanied by an affidavit of service by mailing or
5 served by the sheriff of the county, or by the sheriff's deputy, or by
6 any authorized representative of the director, director's designee, or
7 self-insurer. Any person, firm, corporation, municipal corporation,
8 political subdivision of the state, public corporation, or agency of
9 the state upon whom service has been made shall answer the notice
10 within twenty days exclusive of the day of service, under oath and in
11 writing, and shall make true answers to the matters inquired or in the
12 notice and order to withhold and deliver. In the event there is in the
13 possession of the party named and served with such notice and order,
14 any property that may be subject to the claim of the department or
15 self-insurer, such property shall be delivered forthwith to the
16 director, the director's authorized representative, or self-insurer
17 upon demand. If the party served and named in the notice and order
18 fails to answer the notice and order within the time prescribed in this
19 section, the court may, after the time to answer such order has
20 expired, render judgment by default against the party named in the
21 notice for the full amount, plus costs, claimed by the director,
22 director's designee, or self-insurer in the notice. In the event that
23 a notice to withhold and deliver is served upon an employer and the
24 property found to be subject thereto is wages, the employer may assert
25 in the answer all exemptions provided for by chapter 6.27 RCW to which
26 the wage earner may be entitled.

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

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

34 NEW SECTION. **Sec. 3.** A new section is added to chapter 51.32 RCW
35 to read as follows:

36 (1) Except as provided in subsection (2) of this section, each
37 self-insured employer shall retain from the earnings of each of its

1 workers that amount as shall be fixed from time to time by the
2 director, the basis for measuring said amount to be determined by the
3 director. These moneys shall only be retained from employees and
4 remitted to the department in such manner and at such intervals as the
5 department directs and shall be placed in the self-insured employer
6 overpayment reimbursement fund. The moneys so collected shall be used
7 exclusively for reimbursement to the reserve fund and to self-insured
8 employers for benefits overpaid during the pendency of board or court
9 appeals in which the self-insured employer prevails and has not
10 recovered, and shall be no more than necessary to make such payments on
11 a current basis.

12 (2) None of the amount assessed for the employer overpayment
13 reimbursement fund under this section may be retained from the earnings
14 of workers covered under RCW 51.16.210.

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

17 The self-insured employer overpayment reimbursement fund is created
18 in the custody of the state treasurer. Expenditures from the account
19 may be used only for reimbursing the reserve fund and self-insured
20 employers for benefits overpaid during the pendency of board or court
21 appeals in which the self-insured employer prevails and has not
22 recovered. Only the director or the director's designee may authorize
23 expenditures from the account. The account is subject to allotment
24 procedures under chapter 43.88 RCW, but an appropriation is not
25 required for expenditures.

26 NEW SECTION. **Sec. 5.** A new section is added to chapter 51.52 RCW
27 to read as follows:

28 (1) The department shall study appeals of workers' compensation
29 cases and collect information on the impacts of this act on state fund
30 and self-insured workers and employers. The study shall consider the
31 types of benefits that may be paid pending an appeal, and shall
32 include, but not be limited to:

- 33 (a) The frequency and outcomes of appeals;
- 34 (b) The duration of appeals and any procedural or process changes
35 made by the board to implement this act and expedite the process;

1 (c) The number of and amount of overpayments resulting from
2 decisions of the board or court; and

3 (d) The processes used and efforts made to recoup overpayments and
4 the results of those efforts.

5 (2) State fund and self-insured employers shall provide the
6 information requested by the department to conduct the study.

7 (3) The department shall report to the workers' compensation
8 advisory committee by July 1, 2009, on the preliminary results of the
9 study. By December 1, 2009, and annually thereafter, with the final
10 report due by December 1, 2011, the department shall report to the
11 workers' compensation advisory committee and the appropriate committees
12 of the legislature on the results of the study. The workers'
13 compensation advisory committee shall provide its recommendations for
14 addressing overpayments resulting from this act, including the need for
15 and ability to fund a permanent method to reimburse employer and state
16 fund overpayment costs.

17 NEW SECTION. **Sec. 6.** Section 2 of this act takes effect January
18 1, 2009.

19 NEW SECTION. **Sec. 7.** This act applies to orders issued on or
20 after the effective date of this section."

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21 On page 9, line 18 of the title amendment, after "insert" strike
22 the remainder of the title amendment and insert "amending RCW 51.52.050
23 and 51.32.240; adding a new section to chapter 51.32 RCW; adding a new
24 section to chapter 51.44 RCW; adding a new section to chapter 51.52
25 RCW; creating a new section; and providing an effective date."

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