

CERTIFICATION OF ENROLLMENT
ENGROSSED SECOND SUBSTITUTE HOUSE BILL 3139

60th Legislature
2008 Regular Session

Passed by the House March 13, 2008
Yeas 62 Nays 35

Speaker of the House of Representatives

Passed by the Senate March 12, 2008
Yeas 35 Nays 14

President of the Senate

Approved

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SECOND SUBSTITUTE HOUSE BILL 3139** as passed by the House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

**Secretary of State
State of Washington**

ENGROSSED SECOND SUBSTITUTE HOUSE BILL 3139

AS RECOMMENDED BY THE CONFERENCE COMMITTEE

Passed Legislature - 2008 Regular Session

State of Washington 60th Legislature 2008 Regular Session

By House Appropriations (originally sponsored by Representatives
Conway, Wood, Green, Moeller, Simpson, and Ormsby)

READ FIRST TIME 02/11/08.

1 AN ACT Relating to industrial insurance benefits on appeal;
2 amending RCW 51.52.050 and 51.32.240; adding a new section to chapter
3 51.32 RCW; adding a new section to chapter 51.44 RCW; adding a new
4 section to chapter 51.52 RCW; creating a new section; and providing an
5 effective date.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 **Sec. 1.** RCW 51.52.050 and 2004 c 243 s 8 are each amended to read
8 as follows:

9 (1) Whenever the department has made any order, decision, or award,
10 it shall promptly serve the worker, beneficiary, employer, or other
11 person affected thereby, with a copy thereof by mail, which shall be
12 addressed to such person at his or her last known address as shown by
13 the records of the department. The copy, in case the same is a final
14 order, decision, or award, shall bear on the same side of the same page
15 on which is found the amount of the award, a statement, set in black
16 faced type of at least ten point body or size, that such final order,
17 decision, or award shall become final within sixty days from the date
18 the order is communicated to the parties unless a written request for
19 reconsideration is filed with the department of labor and industries,

1 Olympia, or an appeal is filed with the board of industrial insurance
2 appeals, Olympia(~~(:—PROVIDED, That)~~). However, a department order or
3 decision making demand, whether with or without penalty, for repayment
4 of sums paid to a provider of medical, dental, vocational, or other
5 health services rendered to an industrially injured worker, shall state
6 that such order or decision shall become final within twenty days from
7 the date the order or decision is communicated to the parties unless a
8 written request for reconsideration is filed with the department of
9 labor and industries, Olympia, or an appeal is filed with the board of
10 industrial insurance appeals, Olympia.

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

18 (b) An order by the department awarding benefits shall become
19 effective and benefits due on the date issued. Subject to (b)(i) and
20 (ii) of this subsection, if the department order is appealed the order
21 shall not be stayed pending a final decision on the merits unless
22 ordered by the board. Upon issuance of the order granting the appeal,
23 the board will provide the worker with notice concerning the potential
24 of an overpayment of benefits paid pending the outcome of the appeal
25 and the requirements for interest on unpaid benefits pursuant to RCW
26 51.52.135. A worker may request that benefits cease pending appeal at
27 any time following the employer's motion for stay or the board's order
28 granting appeal. The request must be submitted in writing to the
29 employer, the board, and the department. Any employer may move for a
30 stay of the order on appeal, in whole or in part. The motion must be
31 filed within fifteen days of the order granting appeal. The board
32 shall conduct an expedited review of the claim file provided by the
33 department as it existed on the date of the department order. The
34 board shall issue a final decision within twenty-five days of the
35 filing of the motion for stay or the order granting appeal, whichever
36 is later. The board's final decision may be appealed to superior court
37 in accordance with RCW 51.52.110. The board shall grant a motion to
38 stay if the moving party demonstrates that it is more likely than not

1 to prevail on the facts as they existed at the time of the order on
2 appeal. The board shall not consider the likelihood of recoupment of
3 benefits as a basis to grant or deny a motion to stay. If a
4 self-insured employer prevails on the merits, any benefits paid may be
5 recouped pursuant to RCW 51.32.240.

6 (i) If upon reconsideration requested by a worker or medical
7 provider, the department has ordered an increase in a permanent partial
8 disability award from the amount reflected in an earlier order, the
9 award reflected in the earlier order shall not be stayed pending a
10 final decision on the merits. However, the increase is stayed without
11 further action by the board pending a final decision on the merits.

12 (ii) If any party appeals an order establishing a worker's wages or
13 the compensation rate at which a worker will be paid temporary or
14 permanent total disability or loss of earning power benefits, the
15 worker shall receive payment pending a final decision on the merits
16 based on the following:

17 (A) When the employer is self-insured, the wage calculation or
18 compensation rate the employer most recently submitted to the
19 department; or

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

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

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

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

33 (1)(a) Whenever any payment of benefits under this title is made
34 because of clerical error, mistake of identity, innocent
35 misrepresentation by or on behalf of the recipient thereof mistakenly
36 acted upon, or any other circumstance of a similar nature, all not
37 induced by willful misrepresentation, the recipient thereof shall repay

1 it and recoupment may be made from any future payments due to the
2 recipient on any claim with the state fund or self-insurer, as the case
3 may be. The department or self-insurer, as the case may be, must make
4 claim for such repayment or recoupment within one year of the making of
5 any such payment or it will be deemed any claim therefor has been
6 waived.

7 (b) Except as provided in subsections (3), (4), and (5) of this
8 section, the department may only assess an overpayment of benefits
9 because of adjudicator error when the order upon which the overpayment
10 is based is not yet final as provided in RCW 51.52.050 and 51.52.060.
11 "Adjudicator error" includes the failure to consider information in the
12 claim file, failure to secure adequate information, or an error in
13 judgment.

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

19 (2) Whenever the department or self-insurer fails to pay benefits
20 because of clerical error, mistake of identity, or innocent
21 misrepresentation, all not induced by recipient willful
22 misrepresentation, the recipient may request an adjustment of benefits
23 to be paid from the state fund or by the self-insurer, as the case may
24 be, subject to the following:

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

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

36 (3) Whenever the department issues an order rejecting a claim for
37 benefits paid pursuant to RCW 51.32.190 or 51.32.210, after payment for
38 temporary disability benefits has been paid by a self-insurer pursuant

1 to RCW 51.32.190(3) or by the department pursuant to RCW 51.32.210, the
2 recipient thereof shall repay such benefits and recoupment may be made
3 from any future payments due to the recipient on any claim with the
4 state fund or self-insurer, as the case may be. The director, under
5 rules adopted in accordance with the procedures provided in the
6 administrative procedure act, chapter 34.05 RCW, may exercise
7 discretion to waive, in whole or in part, the amount of any such
8 payments where the recovery would be against equity and good
9 conscience.

10 (4) Whenever any payment of benefits under this title has been made
11 pursuant to an adjudication by the department or by order of the board
12 or any court and timely appeal therefrom has been made where the final
13 decision is that any such payment was made pursuant to an erroneous
14 adjudication, the recipient thereof shall repay it and recoupment may
15 be made from any future payments due to the recipient on any claim
16 (~~(with the state fund or self-insurer, as the case may be)~~) whether
17 state fund or self-insured.

18 (a) The director, pursuant to rules adopted in accordance with the
19 procedures provided in the administrative procedure act, chapter 34.05
20 RCW, may exercise (~~his~~) discretion to waive, in whole or in part, the
21 amount of any such payments where the recovery would be against equity
22 and good conscience. However, if the director waives in whole or in
23 part any such payments due a self-insurer, the self-insurer shall be
24 reimbursed the amount waived from the self-insured employer overpayment
25 reimbursement fund.

26 (b) The department shall collect information regarding self-insured
27 claim overpayments resulting from final decisions of the board and the
28 courts, and recoup such overpayments on behalf of the self-insurer from
29 any open, new, or reopened state fund or self-insured claims. The
30 department shall forward the amounts collected to the self-insurer to
31 whom the payment is owed. The department may provide information as
32 needed to any self-insurers from whom payments may be collected on
33 behalf of the department or another self-insurer. Notwithstanding RCW
34 51.32.040, any self-insurer requested by the department to forward
35 payments to the department pursuant to this subsection shall pay the
36 department directly. The department shall credit the amounts recovered
37 to the appropriate fund, or forward amounts collected to the
38 appropriate self-insurer, as the case may be.

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

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

10 (e) The department or self-insurer shall first attempt recovery of
11 overpayments for health services from any entity that provided health
12 insurance to the worker to the extent that the health insurance entity
13 would have provided health insurance benefits but for workers'
14 compensation coverage.

15 (5)(a) Whenever any payment of benefits under this title has been
16 induced by willful misrepresentation the recipient thereof shall repay
17 any such payment together with a penalty of fifty percent of the total
18 of any such payments and the amount of such total sum may be recouped
19 from any future payments due to the recipient on any claim with the
20 state fund or self-insurer against whom the willful misrepresentation
21 was committed, as the case may be, and the amount of such penalty shall
22 be placed in the supplemental pension fund. Such repayment or
23 recoupment must be demanded or ordered within three years of the
24 discovery of the willful misrepresentation.

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

29 (i) Willful false statement; or

30 (ii) Willful misrepresentation, omission, or concealment of any
31 material fact.

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

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

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

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

1 under RCW 36.18.012(10), which shall be added to the amount of the
2 warrant. A copy of such warrant shall be mailed to the worker,
3 beneficiary, or other person within three days of filing with the
4 clerk.

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

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

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

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

10 (1) Except as provided in subsection (2) of this section, each
11 self-insured employer shall retain from the earnings of each of its
12 workers that amount as shall be fixed from time to time by the
13 director, the basis for measuring said amount to be determined by the
14 director. These moneys shall only be retained from employees and
15 remitted to the department in such manner and at such intervals as the
16 department directs and shall be placed in the self-insured employer
17 overpayment reimbursement fund. The moneys so collected shall be used
18 exclusively for reimbursement to the reserve fund and to self-insured
19 employers for benefits overpaid during the pendency of board or court
20 appeals in which the self-insured employer prevails and has not
21 recovered, and shall be no more than necessary to make such payments on
22 a current basis.

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

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

28 The self-insured employer overpayment reimbursement fund is created
29 in the custody of the state treasurer. Expenditures from the account
30 may be used only for reimbursing the reserve fund and self-insured
31 employers for benefits overpaid during the pendency of board or court
32 appeals in which the self-insured employer prevails and has not
33 recovered. Only the director or the director's designee may authorize
34 expenditures from the account. The account is subject to allotment
35 procedures under chapter 43.88 RCW, but an appropriation is not
36 required for expenditures.

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

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

8 (a) The frequency and outcomes of appeals;

9 (b) The duration of appeals and any procedural or process changes
10 made by the board to implement this act and expedite the process;

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

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

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

17 (3) The department shall report to the workers' compensation
18 advisory committee by July 1, 2009, on the preliminary results of the
19 study. By December 1, 2009, and annually thereafter, with the final
20 report due by December 1, 2011, the department shall report to the
21 workers' compensation advisory committee and the appropriate committees
22 of the legislature on the results of the study. The workers'
23 compensation advisory committee shall provide its recommendations for
24 addressing overpayments resulting from this act, including the need for
25 and ability to fund a permanent method to reimburse employer and state
26 fund overpayment costs.

27 NEW SECTION. **Sec. 6.** Section 2 of this act takes effect January
28 1, 2009.

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

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