SENATE BILL REPORT
SB 5627

As of February 16, 2009

Title: An act relating to contact with medical providers after appeals have been filed under industrial insurance.

Brief Description: Restricting contact with medical providers after appeals have been filed under industrial insurance.

Sponsors: Senators McDermott, Kohl-Welles, Keiser, Kline and Pridemore.

Brief History:
Committee Activity: Labor, Commerce & Consumer Protection: 2/02/09, 2/03/09.

SENATE COMMITTEE ON LABOR, COMMERCE & CONSUMER PROTECTION

Staff: Mac Nicholson (786-7445)

Background: Washington's Industrial Insurance Act requires medical providers examining or treating injured workers to make reports as requested by the worker's self-insured employer or by the Department of Labor and Industries (L&I) on the injured worker's condition, treatment, or any other matters concerning the injured worker. All medical information in the possession of any person relevant to the injury must be made available at any stage of the proceedings to the employer, the claimant, and L&I. The law specifically provides that individuals will not incur legal liability for releasing such information.

L&I, or a self-insured employer, can order an independent medical examination of the injured worker in order to resolve any medical issue. Any action or decision made by L&I relating to any phase of an injured worker's claim can be appealed by the worker, beneficiary, employer, or any other aggrieved person to L&I or to the Board of Industrial Insurance Appeals (Board). Generally an appeal to the Board must be filed within 60 days from the day the order or decision was communicated to the person seeking appeal. The Board must notify all interested parties to an appeal within ten days of granting the appeal. After an appeal has been granted, the Board or any involved parties may request a conference prior to the hearing in order to settle the dispute or resolve other matters that may aid in the disposition of the appeal. At the hearing on the appeal, each party has the opportunity to present evidence with respect to issues raised on appeal. After hearing the evidence, the Board judge must enter a decision and order, which can be appealed to superior court.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Summary of Bill: Language in the bill provides that the Worker's Compensation Act is impressed with a trust with workers as beneficiaries of the State Accident and Medical Aid Funds and L&I, as a trustee of those funds, has a duty toward the beneficiaries. The language further provides that a trustee relationship doesn't exist between employers and workers; consequently, different rules, obligations, and standards are applied to employers than those applied to L&I.

Restrictions are placed on the ability of claimants, employers, and L&I to communicate with medical providers involved in workers compensation claims after appeals have been filed with the Board.

Contact by Employer with Claimant's Medical Provider. After a notice of appeal has been filed with the Board and the Board has notified the other interested parties to the appeal, the employer and its representatives cannot have contact with any medical provider who has treated the claimant to discuss issues in question in the appeal unless written authorization to do so has been given by the claimant.

Contact is permitted without prior authorization as necessary for ongoing management of the claim, including communications about the worker's treatment needs and the provider's treatment plan, vocational and return-to-work issues, and certification of the worker's inability to work, unless those issues are in question in the appeal.

An employer who has not obtained authorization from the claimant can communicate with the examining or treating medical provider about issues in question in the appeal as long as the communication is in writing and sent to all parties; is in person or by telephone at a date and time agreed to by all parties with the claimant having the opportunity to participate; or made pursuant to a properly scheduled and noted deposition.

Contact by Claimant with Employer's Medical Provider. After a notice of appeal has been filed with the Board and the Board has notified the other interested parties to the appeal, the claimant cannot have contact with any medical provider who has examined the claimant at the request of the employer to discuss issues in question in the appeal unless written authorization to do so has been given by the employer.

A claimant who has not obtained authorization from the employer can communicate with the examining medical provider as long as the communication is in writing and sent to all parties; is in person or by telephone at a date and time agreed to by all parties with L&I and the employer having the opportunity to participate; or made pursuant to a properly scheduled and noted deposition.

Contact by L&I with Claimant's Medical Provider. After a notice of appeal has been filed with the Board, a conference has been held to schedule hearings, and the claimant has named his or her witnesses, L&I cannot have any contact to discuss issues in question in the appeal with any medical provider who has examined or treated the claimant at the request of the claimant unless written authorization has been granted to do so.

Contact by L&I is permitted without prior authorization as necessary for ongoing management of the claim, including communications about the worker's treatment needs and

the provider's treatment plan, vocational and return-to-work issues, and certification of the worker's inability to work, unless those issues are in question in the appeal.

If L&I has not obtained authorization from the claimant, L&I can communicate with the examining or treating medical provider about issues in question in the appeal as long as the communication is in writing and sent to all parties; is in person or by telephone at a date and time agreed to by all parties with the claimant having the opportunity to participate; or made pursuant to a properly scheduled and noted deposition.

Contact by Claimant With L&I's Medical Provider. After a notice of appeal has been filed with the Board, a conference has been held to schedule hearings, and the claimant has named his or her witnesses, the claimant cannot have any contact to discuss issues in question in the appeal with any medical provider who has examined the claimant at the request of L&I unless written authorization has been granted to do so.

A claimant who has not obtained authorization from L&I can communicate with the examining medical provider as long as the communication is in writing and sent to all parties; is in person or by telephone at a date and time agreed to by all parties with L&I and the employer having the opportunity to participate; or made pursuant to a properly scheduled and noted deposition.

General. In all cases, written authorization must be granted after the date the appeal is filed, and is good for 90 days. Written authorization is not needed if the claimant, employer, or L&I, as appropriate, fail to identify or confirm the medical provider as a witness.

The Board can determine whether the parties have made themselves reasonably available to participate in telephone conferences.

L&I is given rule-making authority to implement the legislation.

Appropriation: None.

Fiscal Note: Requested on January 27, 2009.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill has been heard before, and changes have been made to address L&I's concerns. L&I has a different relationship with workers than do self-insured employers, which is why L&I is treated differently. This is not a pure ex parte contact bill as employers can have contact with doctors if it is in writing and sent to all parties; or conversations in person as long as the other side has notice and the opportunity to participate. The workers compensation process is an adversarial proceeding at the Board of Industrial Insurance Appeals level, especially when dealing with self-insured employers. Claims management is not affected by this legislation. This is the only area of civil litigation where attorneys can contact witnesses without giving the other side notice. This bill basically says if one side is going to talk to an expert witness, they have to give notice and

opportunity for the other side to participate. Injured workers deserve protection and the grand compromise of workers compensation doesn't include trial by ambush. This bill addresses three basic concerns: it will help reduce the ability of third party administrators and employers to influence treating physicians through the use of aggressive questioning and repeated contacts during the appeals process; having both parties hear the same information at the same time from the same doctor will help cases settle; and finally the process laid out in the bill will help nonrelevant medical information stay out of the proceedings. It is critically import that all parties have the same information at the same time. Including workers in the discussions will facilitate settlements and ensure fair representation.

CON: This bill will be problematic in complex cases where claims management issues are going on at same time appeals are happening on other parts of the claim. Claims managers need to communicate with doctors, and doctors need to respond to claims managers. If this legislation passes, the claims process will slow down and become more costly, there may be a delay in getting benefits to workers, and it could create more controversy. Self-insured employers should be treated the same as L&I. The trigger should be the same for both L&I and employers. It is in the patient's interest to share information in order to expedite resolution of the claim. Physicians' opinions are not swayed by what attorneys on either side say. In workers compensation litigation, the attending physician is given a tremendous amount of weight, so if the bill passes the only person with unfettered access to the most important witness in the case is the claimant. This would throw the system out of balance. Claimants will doctor shop, but the legislation would prevent an employer from speaking with fired doctors because they treated the claimant at some point. This bill was designed to deal with a few cases where overly-aggressive attorneys are acting unreasonably. There is no problem that warrants this big a change. Anything that adds to the process will add to the costs and delays of the system.

OTHER: The concerns that L&I had with similar legislation last year have been addressed, so L&I is neutral on the current proposal. L&I can access medical providers up until hearings are scheduled at the board and witnesses have been named. The legislation will continue to allow representatives from the Office of the Attorney General to assist pro se claimants and doesn't impact L&I's ability to manage claims through the system.

Persons Testifying: PRO: David Louman, Kathryn Comfort, Larry Shannon, Washington State Association for Justice; Owen Linch, Joint Council of Teamsters; Dave Johnson, Washington State Building Trades.

CON: Rebecca Forrestor, Group Health Cooperative; Bernie Pratt, Craig, Jessup and Stratton; Dave Kaplan, Washington Self-Insurers Association; Kris Tefft, Association of Washington Business.

OTHER: Vickie Kennedy, L&I.