SENATE BILL REPORT
SB 5822

As Reported by Senate Committee On:
Commerce, Labor & Sports, February 15, 2017

Title: An act relating to improving workers' compensation system costs and administration and worker outcomes through modification of procedures for claims to self-insureds, clarification of recovery in third-party legal actions, clarification of occupational disease claims, and lowering age barriers for structured settlements.

Brief Description: Improving workers' compensation system costs and administration and worker outcomes through modification of procedures for claims to self-insureds, clarification of recovery in third-party legal actions, clarification of occupational disease claims, and lowering age barriers for structured settlements.

Sponsors: Senators Baumgartner, Braun, Rossi, Sheldon, Angel, Becker, Wilson, Schoesler, Bailey, Ericksen, Warnick, King, Honeyford, Brown, Padden, Short, Fain, O'Ban, Hawkins, Zeiger and Rivers.

Brief History:
Committee Activity: Commerce, Labor & Sports: 2/15/17 [DP, DNP].

Brief Summary of Bill

- Provides that all economic and noneconomic damages in injured workers' third-party claims are subject to the recovery statutes.
- Modifies the definition of occupational disease to require that the disease relate to the worker's particular employment and that a four-part test be met.
- Allows workers age 18 and older to enter into structured settlements.
- Permits a self-insured employer (self-insurer) to issue an order allowing a worker's compensation claim.

SENATE COMMITTEE ON COMMERCE, LABOR & SPORTS

Majority Report: Do pass.
Signed by Senators Baumgartner, Chair; Braun, Vice Chair; King, Rossi and Wilson.

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.

Minority Report: Do not pass.
Signed by Senators Keiser, Ranking Minority Member; Conway, Hasegawa and Saldaña.

Staff: Susan Jones (786-7404)

Background: Recovery in Third-Party Legal Actions. Under the state industrial insurance laws, a worker injured on the job will receive workers' compensation benefits, even if the employer was not liable for the injury. In cases where a third party caused the injury, the injured worker, or the Department of Labor and Industries (L&I) and/or the self-insurer, can sue the third party for damages. L&I and the self-insurer have a statutory right to use parts of any amount recovered in a third-party suit to reimburse the state fund and/or the self-insurer for benefits paid out to the injured worker. State law provides a specific formula to be used when distributing any third-party recovery, and damages for loss of consortium are excluded from the distribution formula.

The industrial insurance third-party recovery statutes were the subject of the 2010 state Supreme Court decision *Tobin v. the Department of Labor and Industries.* Tobin was injured at work by a third party, opened a workers compensation claim and received benefits, and brought a lawsuit against the third party responsible for the accident, settling for $1.4 million in damages, of which $793,000 was categorized as damages for pain and suffering. L&I sought to distribute Tobin's entire $1.4 million award pursuant to the third-party recovery formula. Tobin, and ultimately the Supreme Court, disagreed with L&I's position, finding that L&I could only seek reimbursement for benefits paid, and L&I never paid pain and suffering benefits. The court determined that the amount included in the settlement as damages for pain and suffering should be excluded from the reimbursement calculation.

Occupational Disease Claims. Workers who, in the course of employment, are injured or disabled from an occupational disease are entitled to workers' compensation benefits, which may include medical, temporary time-loss, vocational rehabilitation benefits, and permanent disabilities benefits. Occupational disease means a "disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title."

The statute of limitations for most occupational disease claims is two years and starts on the date the worker receives written notice from a physician or licensed advanced registered nurse practitioner of the existence of an occupational disease, and that a claim for benefits may be filed. The medical provider must send a copy of the notice to L&I, who must then send a copy to the worker and to the self-insurer, if appropriate. A claim is valid if filed within two years of the date of death of a worker suffering from an occupational disease. For hearing loss claims due to occupational noise exposure, the two-year statute of limitations starts on the date of the worker's last injurious exposure to occupational noise. A claim for hearing loss due to occupational noise exposure that is not filed within the two-year statute of limitations may be allowed for medical benefits only.

Age for Structured Settlements. Eligible workers have the option to settle parts of their workers' compensation claims through structured settlements. Settlements are available for injured workers who are age 50 and older. Medical benefits cannot be settled.

An unrepresented worker seeking to settle a claim must submit the agreement to an industrial appeals judge (IAJ) for approval. The IAJ can approve the settlement only if the settlement is in the best interest of the worker. If the IAJ approves the agreement, the agreement is forwarded to the Board of Industrial Insurance Appeals (BIIA) for approval. A worker who is represented by an attorney can submit the settlement agreement directly to the BIIA for approval. The BIIA must approve the agreement unless it finds that the parties have not entered into the agreement knowingly and willingly; the agreement does not meet the requirements of a settlement; the agreement is the result of a material misrepresentation of law or fact; the agreement is the result of harassment or coercion; or the agreement is unreasonable as a matter of law.

Claims to Self-Insurers. Generally, a self-insurer provides any and all appropriate benefits to the injured worker and manages the claims of its employees. Self-insurers receive claims from workers, make the initial decision to accept or deny the claim, and request L&I's approval. L&I makes the official decision as an order.

In 2011, the Legislature directed the Joint Legislative Audit & Review Committee (JLARC) to conduct a performance audit of the workers' compensation claims management at L&I. JLARC hired a consulting firm with expertise evaluating workers' compensation programs to assist with the audit. The consultants' review focused largely on claims management between 2010 and 2013. Between 2010 and 2013, an average of 125,000 claims were accepted for compensation each year. Of these, L&I directly managed an average of 87,000 state fund claims and self-insurers managed another 38,000 claims with L&I oversight.

The JLARC report provided that the L&I approval step delays decisions and may not add value for acceptance decisions, known as "allowance orders." The consultants reviewed a sample of 111 claims and found that L&I accepted 110 of the claims—99 percent. The one exception involved a denial that was later overturned and accepted. JLARC reported that allowing self-insured employers to issue the formal decision when accepting claims could eliminate 30 to 45 days from the process for certain claims. JLARC recommended that the Legislature should allow self-insurers to issue formal orders when accepting claims, and L&I should incorporate a review of those orders in its audits of self-insurers.

Summary of Bill: Clarification of Recovery in Third-Party Legal Actions. All economic and noneconomic damages, except loss of consortium, in injured workers' third-party claims are subject to the recovery statutes. The payments from the recovery are modified to provide that after payments are made for reasonable legal costs and 25 percent is paid to the injured worker or beneficiary, L&I or the self-insurer is reimbursed from the recovery in the amount it paid to or on behalf of the injured worker or beneficiary in benefits. The remainder is paid to the injured worker or beneficiary.

An explicit restatement is provided of the Legislature's original intent to grant L&I or a self-insurer the authority to reimburse itself from a third-party recovery for the amount paid on behalf of the worker or beneficiary for all economic and noneconomic damages, except loss of consortium.

These provisions apply to all causes of action commenced on or after the effective date of the Act, regardless of when the cause of action arose.

Modification of the Definition of Occupational Disease. The statutory definition of occupational disease is changed, so that an occupational disease must arise out of and in the course of the particular employment in which the worker is exposed to the disease and which meets a four-part test:

- the disease is proximately caused by the distinctive conditions of the work and risk of exposure inherent in the work;
- the disease arose as a natural incident of the employment-related exposure;
- the worker would not have ordinarily been exposed to the disease outside of the worker's employment; and
- the disease is not an ordinary condition of life to which the general public is exposed without regard to employment.

Proximate cause is defined as the cause which, in a direct sequence, unbroken by any new, independent cause, produces the disease and without which the disease would not have occurred.

The statute of limitations on most occupational disease claims is changed from two years to one year. The statute of limitations starts on the date the disease was first diagnosed, the date the worker first received treatment for symptoms of the disease from any health services provider, or the date the worker was first restricted from work due to the disease, whichever is earliest.

On claims for hearing loss, the two-year statute of limitations remains in place, and a claim not filed within two years is not allowed. The provision allowing medical aid benefits if the claim is not timely filed is removed.

Lowering Age Limit for Structured Settlements. Workers age 18 and older can enter into structured settlements.

Modification of Procedures for Claims to Self-Insurers. For any industrial insurance claim where the worker may be entitled to benefits other than medical treatment only, when a self-insurer has determined to allow a claim, the self-insurer must issue an order allowing the claim to the injured worker, attending medical provider, and L&I within 60 days from the date that the claim is filed or 120 days from the date that the claim is filed, if an order is issued for additional time to make the decision. The order of the self-insurer must be issued consistent with L&I rules. The self-insurer must request denial of a claim within 60 days from the date that the claim is filed or 120 days from the date that the claim is filed, if an order is issued for additional time to make the decision. If the self-insurer fails to act, L&I must promptly intervene and adjudicate the claim.

When a self-insurer requires additional time to determine whether to allow or request denial of the claim, the self-insurer must issue an order to the injured worker, attending medical provider, and L&I within 60 days from the date that the claim is filed. The order must state the reasons why the self-insurer requires additional time. During the 60-day period after this order is issued, the self-insurer must pay temporary disability benefits as entitled if the attending provider certifies that the worker cannot return to work because of the injury or illness provided in the claim, and pay for any medical examination or test required by the

self-insurer to determine whether to allow or request denial of the claim. In the event the claim is denied by L&I, any temporary disability and other benefits paid may be recovered by the self-insurer. Pending a decision of allowance or denial, temporary disability compensation must be paid in accordance with the law.

On July 1, 2019, all responsibility for the issuance of final and binding orders on claims of workers of a self-insurer will be vested in the self-insurer. L&I must develop, in consultation with self-insurers, a model that provides for full self-insured claims management responsibility while ensuring L&I retains appropriate audit and accountability oversight. L&I must report to the Legislature by December 1, 2018 about any necessary amendments.

L&I is authorized to adopt rules as necessary to implement this Act to include the form of orders allowing industrial insurance claims consistent with the standards followed by L&I.

Legislative Findings. Legislative findings are made.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

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

Staff Summary of Public Testimony on Draft Bill: PRO: These reforms are not intended to reduce workers' compensation benefits, but to make the system more efficient. This is a positive change. It is fair and consistent with providing excellent benefits to workers and taking into account the needs of SI employers.

For SI employers, L&I rarely changes the recommendation. It is proven to work. Why re-adjudicate? Why not have a reasonable system of oversight?

For settlements, BIIA reviews settlements; therefore, there are safeguards built in to the structured settlement process. Workers complain about the age restriction. It should be eighteen.

Eighteen year olds can enter into contracts. As an attorney, I can negotiate a structured settlement for clients but not for myself because I am under 50. These settlements can be a substantial net savings to the employer. Many workers find other employment after the settlement. Forty-four other states allow 18 year olds to settle workers' compensation claims.

Reimbursements from third-party claims are getting to be less and less. A quote from BIIA is that the Legislature is aware of the issue with respect to pain and suffering.

With respect to occupational disease, an employer has to defend against something that is not job related. We are not caring about proximate cause. How much do we care about the link/ proximate cause. The food and beverage industry sees a lot of claims. The bill gives clarity around occupational disease. The system is so loose; it gives the claims manager too much

discretion. Occupational disease is increasing in Washington while it is declining in Oregon and B.C.

CON: Settlement offers look good in the short term. Younger workers struggle with financial planning and long term decisions. A 55 year old has a better idea of future work than a younger worker.

With respect to pain and suffering, workers' compensation does not make the injured worker whole. There is a statute to void a deficient settlement.

For SI employer's authority to issue orders, this is not cost effective for the worker. For SI approval, it does remove L&I's authority even with a protest or dispute.

With respect to occupational disease, the one year time frame tied to diagnosis makes it virtually impossible; the worker needs notice.

OTHER: For occupational disease, this is a significant change. Courts have altered the definition over the years. In one year, even if the worker is seeking treatment, neither the worker nor the medical professional may know it relates to occupational disease.

Persons Testifying: PRO: Tom Kwieciak, Building Industry Assn. of WA; Sheri Sundstrom, WSIA/Hoffman Construction; Natalee Fillinger, Holmes Weddle & Barcott; Paul Chasco, Educ. Service Dist. 113; Jan Gee, Washington Food Industry Association; Lauren Gubbe, AGC; Mark Streuli, Washington Farm Bureau; Bob Battles, AWB; Tammie Hetrick, Washington Retail Association.

CON: Dustin Dailey, Washington State Association from Justice; Brenda Weist, Teamsters 117-Tukwila; Cody Arledge, Sheet Metal Workers-Olympia.

OTHER: Vickie Kennedy, L&I.

Persons Signed In To Testify But Not Testifying: PRO: Patrick Connor, NFIB/ Washington; Scott Dilley, Washington State Dairy Federation; Gary Smith, Independent Business Association; Jim King, WA St. HVAC Industry Assn.; Susan Champlain, The Boeing Company; Kris Tefft, WSIA; Holly Chisa, NW Grocery Assn.; Anthony Chavez, Weyerhaeuser; Sheri Call, Washington Trucking Associations; Dave Ducharme, National Utility Contractors Assn.; Cliff Webster, Associated Builders & Contractors; Brent Ludeman, National Electrical Contractors Association.

CON: Michael White, Washington State Council of Fire Fighters; Neil Hartman, Washington State Building & Construction Trades Council; Lucinda Young, Washington Education Association; Dennis Eagle, WA Federation of State Employees; Matthew Hepner, IBEW; Shaunie Wheeler IBEW 77; Cory Elliott, Pacific Northwest Regional Council of Carpenters - Government Relation; H. S. Krohn, SMART Union Transportation Division.

OTHER: No one.