

# SENATE BILL REPORT

## SB 5801

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As Passed Senate, February 11, 2022

**Title:** An act relating to attorney and witness fees in industrial insurance court appeals.

**Brief Description:** Concerning attorney and witness fees in industrial insurance court appeals.

**Sponsors:** Senators Keiser, Conway, Hasegawa and Nobles; by request of Department of Labor & Industries.

**Brief History:**

**Committee Activity:** Labor, Commerce & Tribal Affairs: 1/26/22, 2/02/22 [DP, DNP].

**Floor Activity:** Passed Senate: 2/11/22, 28-21.

**Brief Summary of Bill**

- Modifies payment of attorneys' and costs in workers' compensation appeals.
- Requires the employer or retrospective rating group to pay the worker's attorneys' fees and costs when the employer or group appeals a Board of Industrial Insurance decision, and the court sustains in full or in part the worker's or beneficiary's right to relief.

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### SENATE COMMITTEE ON LABOR, COMMERCE & TRIBAL AFFAIRS

**Majority Report:** Do pass.

Signed by Senators Keiser, Chair; Conway, Vice Chair, Labor; Stanford, Vice Chair, Commerce & Tribal Affairs; Robinson and Saldaña.

**Minority Report:** Do not pass.

Signed by Senators King, Ranking Member; Braun and Rivers.

**Staff:** Susan Jones (786-7404)

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

**Background:** Workers' Compensation—General. 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 Department of Labor and Industries (L&I) administers the state's workers' compensation system.

Fixing the Amount of Worker's Attorneys' and Witness Fees in Court Appeals. A reasonable fee for the services of the worker's or beneficiary's attorney must be fixed by the court if:

- on appeal to the superior or appellate court from a Board of Industrial Insurance Appeals (BIIA) decision and order, the decision and order is reversed or modified and additional relief is granted to a worker or beneficiary; or
- in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained.

In fixing the fee, the court must take into consideration the fee fixed by L&I and BIIA for the attorney's services before L&I and BIIA. If the court finds that the fee fixed by L&I or BIIA is inadequate for such services, or no fee was fixed, then the court shall fix a fee for the attorney's services before L&I or BIIA, in addition to the fee fixed for the services in the court.

Payment of Fees and Costs. The attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs must be paid out of L&I's administrative fund if in:

- a worker or beneficiary appeal, the decision and order of BIIA is reversed or modified and if the L&I accident fund or medical aid fund is affected by the litigation;
- an appeal by L&I or the employer, the worker or beneficiary's right to relief is sustained; or
- an appeal by a worker involving a state fund employer with 25 employees or less, in which L&I does not appear and defend, and the BIIA order in favor of the employer is sustained.

In the case of self-insured employers, the attorneys' fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs must be paid directly by the self-insured employer.

Attorneys' fees in Appeals—Certain Occupational Disease Presumptions. In an appeal to the superior or appellate court involving the presumption of occupational diseases related to certain firefighter, fire investigators, and law enforcement officers, the attorney's fee must be paid as provided in the presumption statute.

**Summary of Bill:** Attorneys' and Witness Fees in Court Appeals. The employer or

retrospective rating group will pay a worker's or beneficiary's attorneys' fees, fees of medical and other witnesses, and other statutory costs when the employer or retrospective rating group appeals a BIIA decision, and the court sustains in full or in part the worker's or beneficiary's right to relief.

The provisions involving payments of attorneys' fees and costs when a worker appeals a BIIA decision and the court reverses, modifies, or grants additional relief; when an employer has 25 employees or less; and self-insures remains the same. Technical changes are made.

Attorneys' Fees in Appeals—Certain Occupational Disease Presumptions. The presumption regarding certain Hanford site workers is added to the provisions requiring attorney's fees to be paid pursuant to that presumption statute.

**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:** PRO: The bill seeks to correct a very narrow anomaly. Currently, L&I must pay the attorneys' fees and costs even if L&I is aligned with the worker and the court upholds the worker's award. This is rare. On average there are 28 cases per year, costing about \$21,000 per year. When a large employer or retro group brings the appeal and loses, they would pay the worker's attorneys' fees and costs. This reduces L&I's administrative costs, which are collected from workers and employers.

CON: Small businesses don't believe they get a fair hearing before L&I and BIIA. They believe their best shot is before a judge and jury in these rare types of appeals. The bill denies small businesses access to justice in those rare cases where independent review is needed. The cost is minimal to the fund. This is not fair. Employers already pay more in premiums. Employers with seasonal and part-time workers may the cross threshold of the number of employees. The bill is also different than the bill shared in the Fall. Employers are still struggling from the pandemic.

The general rule in Washington is that parties are responsible for their own attorneys' fees, unless there is contract, statute, or case law. The statute already favors workers. This would make it even more unequal, discouraging employers from appeals when they are already very expensive. Mutual fee payment encourages settlement and is fair.

**Persons Testifying:** PRO: Tammy Fellin, Labor & Industries.

CON: Patrick Connor, NFIB; Rose Gundersen, Washington Retail Association; Julie Nichols.

**Persons Signed In To Testify But Not Testifying:** No one.