

Pay Pending Appeal

Report to the Legislature

as required by Chapter 280, Laws of 2008

November 2010



Washington State Department of
Labor & Industries

Executive Summary

This report provides background and implementation information for legislation passed in 2008 requiring the payment of workers' compensation benefits during the appeal of an order granting benefits. This information was also provided in the 2009 legislative report.

The report also includes highlights from the most recent fiscal year:

- The balance of the self-insured overpayment reimbursement fund (SIORF) as of October 2010 was approximately \$752,000. This is an increase of just over \$500,000 from the previous year's balance. To date, no funds have been withdrawn.
- The total number of appeals from last year has not varied significantly, but the duration of appeals has decreased. The decrease in time is in the area of agreements or settlements and dismissals. This is influenced by variables other than the legislation.
- The number of motions for stays of benefits saw a modest increase from last year. The Board of Industrial Insurance Appeals (BIIA) granted more stays in FY 2010, but it also denied nearly 90 percent of the requests.
- The number of requests by workers to cease benefits went from one in fiscal year 2009 to three in fiscal year 2010.
- There had been an overall increase in protests since implementation, mainly from state fund employers, but these numbers returned to near fiscal year 2008 levels in fiscal year 2010. Self-insured employer protests are lower in fiscal year 2010 than they were in fiscal year 2008.
- In the first year of implementation, no overpayments were assessed. In FY 2010, there were 33 appeals that resulted in overpayments. Twenty-two of those appeals were resolved by agreement of the parties and eleven were decisions by the BIIA. The average overpayment for the state fund was approximately \$14,500.
- Of the 33 overpayments, only one involved a self-insured employer. The overpayment was the result of a settlement between the parties rather than a

decision by the BIIA or court, so the employer is not eligible to request reimbursement from the SIORF.

Introduction

This report is the second of three required by Engrossed Second Substitute House Bill 3139 [Chapter 280, Laws of 2008]. The legislature directed the department to study appeals of workers' compensation cases and to collect information on the impacts of the legislation. It read:

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

- (a) The frequency and outcomes of appeals;*
- (b) The duration of appeals and any procedural or process changes made by the Board to implement this act and expedite the process;*
- (c) The number of and amount of overpayments resulting from decision of the Board or court; and*
- (d) The processes used and efforts made to recoup overpayments and the results of those efforts.*

The legislation directed the department to report to the Workers' Compensation Advisory Committee (WCAC) and to the appropriate committees of the legislature by December 1, 2009, and annually thereafter, with the final report due by December 1, 2011. The legislation went on to require the WCAC to provide its recommendations for addressing overpayments resulting from the act, including the need for and ability to fund a permanent method to reimburse self-insured employer and state fund overpayment costs.

Brief Summary

ESSHB 3139 created a new section in the workers' compensation laws that states any order by the department awarding benefits shall become effective and benefits due on the date the order is issued. Upon appeal, such orders are not stayed pending a final decision on the merits unless ordered by the Board of Industrial Insurance Appeals

(BIIA), or unless the worker requests in writing that benefits cease pending the final decision.

Under the new provisions, employers may move for a stay of the order on appeal within fifteen days of the order granting appeal. The BIIA will review the claim file provided by the department as it existed on the date of the department order. The BIIA must issue a final decision on the motion to stay benefits within 25 days of the filing of the motion or of the date of the order granting appeal, whichever is later. A motion to stay must be granted if the moving party can demonstrate they are more likely than not to prevail on the facts as they existed at the time the order was issued. The BIIA will not consider the likelihood of recoupment of any overpayments when making its decision.

The department must collect information on self-insured claim overpayments resulting from final decisions of the BIIA and the courts. In addition to recovery efforts by self-insurers, these overpayments must be recouped by the department on behalf of self-insurers from any open, new, or reopened state fund or from self-insured claims with other employers, if applicable.

For purposes of the act, payments made to health services providers whose treatment or services were authorized by the department or the self-insurer prior to any appeal decision cannot be recouped from the health services provider.

If, after 24 months of recoupment efforts, a self-insured employer has not fully recovered an overpayment resulting from a BIIA or court decision, the self-insurer will be reimbursed the remainder of the amount due from the self-insured employer overpayment reimbursement fund which was created by the act. Moneys for this fund are retained through payroll deduction from employees of self-insured employers. Self-insurers may also be reimbursed from this fund any time the director waives an overpayment that resulted from a decision of the BIIA or the courts.

Background

Pursuant to RCW 51.52.050, department orders do not become final until 60 days after affected parties receive them. Prior to the passage of this legislation, when orders were issued that provided or granted the payment of benefits, self-insured employers or the department were not required to begin benefits until the order awarding them became final. An order does not become final if protested or appealed by any party until the litigation is resolved. For state fund claims, under a department policy a worker could receive payments during an employer's appeal if the employer was considered unlikely to prevail by the department. For self-insured claims, employers did not generally pay benefits until the BIIA made its decision on the appeal.

As a result, many workers did not receive the ordered benefits until a decision on an appeal was made. During lengthy appeal processes, workers could go months or even years without benefits. These cases prompted the passage of ESSHB 3139. The legislation included provisions to ensure recoupment of overpayments when workers do not prevail on appeal.

The legislation affects all department orders granting benefits that were issued on or after June 12, 2008. Orders that do not grant benefits such as those rejecting a claim, segregating a condition, or assessing a penalty are not affected.

Implementation Efforts at the Board of Industrial Insurance Appeals

The following information has been provided by the BIIA for this report:

The BIIA developed and implemented procedures for conducting a review of the department file and issuance of an order in response to an employer's motion to stay benefits pending the appeal. When a motion is filed before the appeal has been granted, the BIIA includes language in its order granting appeal advising the parties that a motion for stay has been filed. Orders granting appeal also include a notice to workers advising them of their responsibility to repay an overpayment of benefits and their ability to request benefits be suspended during the appeal.

Once a motion is received and the appeal granted, the motion is assigned to one of the BIIA's review judges. Parties may respond to the motion, but the BIIA will not delay ruling on the motion in order to consider a response that is not immediately filed. The assigned judge, using access to the department's electronic record, reviews the record as it existed on the date of the order under appeal. Because of the size of the record, this review can be extremely time consuming. The judge prepares a recommendation and draft order consistent with their recommendation. The three BIIA members review the recommendation. An order is issued consistent with the outcome as determined by a majority of the members.

Implementation Efforts at the Department of Labor and Industries

Fund Assessment

The self-insured employer overpayment reimbursement fund (SIORF) was established as a non-interest bearing account. Funded by workers of self-insured employers, this account was created to reimburse self-insured employers for overpayments that result from overturned benefit orders when they are unable to collect from the worker. Effective January 1, 2009, self-insured employers were required to collect a new assessment from their workers and forward the monies to the department quarterly. In 2010, the assessment rate was \$0.0004 per worker hour or just over \$0.06 per month per worker. The balance of the fund as of October, 2010 was approximately \$752,000. No funds have been withdrawn as of this date.

Automated Systems

Programming changes were made to modify existing payment processes. These included modification of the department's payment system for permanent partial disability (PPD) to comply with the automatic stay of any PPD award increase, and development of a system to track self-insured overpayments and to withhold money from state fund claims to reimburse these overpayments.

Appeal Review Processes

ESSHB 3139 requires workers to receive the time-loss rate that is based on wages most recently submitted by a self-insured employer or is uncontested by the parties in a state fund claim. Staff in the appeals section of the department developed a new process to identify and implement the appropriate wage or compensation rate upon appeal. Processes were also developed for handling granted stay motions and worker requests to cease benefits.

Overpayment Reimbursement

The law permits reimbursement from the SIORF two years after collection efforts start, which cannot occur until the overpayment assessment is made. To date, the department has not paid any self-insurers from the fund for uncollectable overpayments.

Education

To assist the self-insured community with compliance, the department provided several educational opportunities regarding the new legislation:

- A continuing education course, "Update 2008", covered basic requirements in mid-2008;
- We shared a question-and-answer document via the self-insurance listserv in June, 2008;
- In July, 2009, we developed a matrix clarifying what benefits, and when, a self-insured employer must pay after the department issues an order;
- A second continuing education course, "Update 2009", discussed the legislation and resulting process changes.

Compliance

On a small number of cases, the department has been made aware that some self-insured employers have failed to pay benefits during the appeal period, or have waited to begin payment until after the BIIA has denied a motion to stay. To ensure the parties understand the law's provisions, the department has developed a notification letter that is sent to the employer and the worker upon notice that the BIIA has granted an employer's appeal to an order awarding benefits. This letter informs all parties that benefits are due and payable during appeal.

Impacts on Appeals and Overpayments at the Board of Industrial Insurance Appeals

Number of Appeals

The following statistics show a comparison of appeal activity for the year before implementation and for two years after implementation. The data show a slight increase in overall appeals in the first year after implementation followed by a modest reduction in the second year. There was an initial decrease in the number of self-insured employer appeals and an increase in the number of state fund employer appeals. In the second year, the opposite occurred: self-insured employer appeals rose and state fund employer appeals decreased.

The number of appeals granted by the BIIA decreased for both self-insured and state fund appeals from the pre-implementation year. Based on information currently available, the changes in the number of appeals appear to be within normal variations and the legislation does not appear to have significantly increased or decreased the number of appeals.

	<u>FY 2008</u>	<u>FY 2009</u>	<u>FY 2010</u>
Total Appeals Received	12,005	12,224	12, 148
Self-Insured Appeals	2,578	2,533	2,600
State Fund Appeals	9,427	9,691	9,548
Total Appeals by Employer	1,744	1,945	1,769
Self-Insured Appeals	630	473	535
State Fund Appeals	1,114	1,472	1,234
Total Appeals Granted	7,252	6,944	7,091
Self-Insured Appeals	2,106	1,810	1,970
State Fund Appeals	5,146	5,134	5,121

Duration of Appeals

The following statistics show a comparison of the duration of appeals for the year before and two years after implementation. The data show a decrease in the average weeks to completion by almost three weeks by fiscal year 2010. The reduction in time is most notable for settlements and dismissals where the process has been shortened by nearly three weeks, and in self-insured contested cases with a total reduction of over five weeks. Variables other than the legislation influence these numbers, and it does not appear the legislation is an independent cause for these changes. The BIIA has implemented a separate process for the review of stay requests so that appeals may proceed through mediation and on to hearing, keeping to associated procedural time frames.

	<u>FY 2008</u>	<u>FY 2009</u>	<u>FY 2010</u>
Average Weeks to Completion	34.1	32.8	31.0
Settlements and Dismissals	27.5	24.9	23.8
Self-Insured Appeals	29.3	27.6	25.8
State Fund Appeals	26.7	23.9	23.0
Contested Cases	55.6	55.9	53.7
Self-Insured Appeals	61.9	61.3	56.6
State Fund Appeals	52.4	53.7	52.8

Stay of Benefit Motions

The following data shows the number, and the outcome, of stay of benefit motions since the effective date of the legislation (June 12, 2008) as of October 27, 2009, from the first legislative report and for fiscal year 2010. As of October 27, 2009, out of 164 employer motions, the BIIA granted a stay of the department's order in eight cases, or approximately five percent. The worker requested that benefits cease in one case.

The number of stay motions increased slightly in fiscal year 2010, but the number of employer motions granted more than doubled from five percent to approximately eleven percent. Three workers requested that benefits stop in fiscal year 2010.

While there is an increase in granted stays, the percentage denied is at nearly 90 percent. This means, based on the record available to the department, the BIIA agrees in nine of ten cases that the department order to pay benefits is correct. Often these are complex cases, and we will continue to monitor the number of motions by employers and the proportion granted by the BIIA on a case by case basis.

	<u>As of OCT, 27 2009</u>	<u>FY 2010</u>
Number of Employer Stay of Benefit Motions:	164	176
• State Fund:	36 of 164 (22%)	48 of 176 (27%)
• Self-Insurance:	128 of 164 (78%)	128 of 176 (73%)
Number of Employer Stay Motions Granted:	8	20
• # Denied:	136	155
• # Dismissed:	1	0
• # Withdrawn:	1	1
• # Pending:	8	14
• # Reassumed:	10	10
Number of Worker Cease Benefit Requests:	1	3

Impacts on Appeals and Overpayments at the Department of Labor and Industries

Pre-Appeal Activity:

Protests

As the legislation provides that benefits are due on the date an order is issued, the activity prior to an appeal is also important. A protest to an order awarding benefits places the order on hold and benefits are not required to be paid until a further department order is issued. The department's instructions to employers that they commence benefits when the awarding order is issued, and that they stop benefits until the department takes further action on a protest, was an area of controversy. A review of stakeholder testimony and written documents about the legislation did not reveal any discussion of protests or activity prior to the filing of an appeal to help guide the department's application of the new statute. Our policy decision was ultimately based on the statutory language, past case law, and consultation with our legal counsel.

The following data show the number of protests received from any affected party, including the worker, by year. The data show an overall increase in the total protests received since 2008; however, that number did level off to near 2008 levels in 2010. A breakdown by self-insured and state fund shows an initial modest increase in self-insurance, but the number drops in 2010 below 2008 levels. For the state fund, initially, a more notable increase occurred. By 2010, the number was closer to that in 2008.

	<u>FY 2008</u>	<u>FY 2009</u>	<u>FY 2010</u>
Total Protests Received	32,968	35,528	33,108
Self-Insured Protests	5,345	5,406	5,221
State Fund Protests	27,623	30,122	27, 887

Post-Appeal Outcomes:

Number of Overpayments

From the effective date of the legislation to October 14, 2010, there were 4,041 employer appeals. Twenty-nine percent of these appeals remain unresolved, 32 percent were dismissed, and 17 percent were denied. The remaining 22 percent (897 appeals) were either settled by the parties or a decision was made by the BIIA.

Of these 897 appeals, the BIIA issued 55 decisions reversing an order awarding benefits. Of these, 33 resulted in overpayments: 32 state fund, and one self-insured. Twenty-two of the 33 appeals with overpayments involved appeals that were resolved through an order on agreement of parties before the BIIA, and 11 were decisions of the BIIA.

For the 32 state fund cases with overpayments, the average amount owed by the worker is approximately \$14,500. The self-insured case resulted in an overpayment in the amount of \$4,578.38; however, the overpayment was the result of an agreement at the BIIA, and so is not eligible for reimbursement from SIORF.

Next Report

The department's next report to the WCAC and the legislature is due December 1, 2011, and will be the final statutorily mandated report.