

## **Protests and Appeals**

### Self-insurance Claim Adjudication Guidelines

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## **Protests and Appeals – Authority** [RCW 51.52.050](#)

Any party aggrieved by an order and notice has a right to dispute the decision(s). Orders issued by a self-insured employer can be protested to the department. Orders issued by the department can be:

- Protested to the department, or
- Appealed to the Board of Industrial Insurance Appeals.

The law requires protest and appeal rights be printed on department orders, and protest rights on self-insured orders. Any protest or appeal to an order must be made in writing, in a timely manner.

## **Timeliness of Protests and Appeals**

[RCW 51.52.050](#), [RCW 51.52.060](#), [WAC 296-15-480](#)

A written protest must be received by the department or self-insured employer, or an appeal must be received by the Board of Industrial Insurance Appeals.

The timeliness requirement is met if the protest or appeal is received, mailed or postmarked within 60 days of the day the order was communicated. Actual calendar days are counted. The 60 day period does not start to run until the day after the order was communicated to the affected parties or their representative. If a timely protest or appeal is not received the order becomes final and binding on all parties.

A written protest or appeal received by a self-insured employer must be sent to the department within five working days of receipt. The date the protest or appeal is received by the employer is considered the date received by the department.

## **Timely Medical Information**

Particularly in protests to claim closure, reopening denial, and questions of casual relationship, the presence of a medical opinion near the date of the order is important in defending a determination.

Medical opinions are weighed and utilized by courts in reaching decisions regarding issues raised in appeals. Once the matter is under the jurisdiction of the Board or a higher court, the department has no authority to require a worker to appear or cooperate in a medical examination on that same issue, and the opportunity to correct mistakes or omission in securing additional opinion may be lost.

The legal issue presented upon appeal may concern the extent of a worker's disability on the date the final order was entered from which the appeal was taken. For example, assume a worker was examined for closure on January 1 and the claim closed with award for permanent partial

disability on February 2, based on the exam. Assume further that the worker protested the award on April 5, of the same year and the adjudicator determined the award was adequate and fair, but no affirming order was issued until August 31. In such an example, the question on appeal would be the extent of the worker's disability on August 31, rather than February 2. If the worker was examined closer to August 31 on self-referral or through referral by a legal representative, the latter medical testimony may carry more weight with the court (assuming the qualifications of the physicians were comparable).

As a general rule, medical opinion is subject to becoming less reliable after a few months has elapsed, particularly where some type of change in the worker's condition can be demonstrated after the examination.

## Protest Process

### Review Following Protest

When a timely protest is received, the department adjudicator reviews in detail the claim and decision protested. If additional information is needed to complete the review, the order will be put in abeyance while the necessary information is obtained. Any new contentions or issues raised in the protest must be addressed. The consideration in each review is whether the decision being protested is just and in conformity with the law. Once the review is completed, a new order will be issued affirming, reversing or modifying the original determination. All new orders will have protest and/or appeal rights.

## Board Appeal Process

### Board of Industrial Insurance Appeals Composition [RCW 51.52.010](#), [RCW 51.52.095](#)

The Board of Industrial Insurance Appeals was created as an independent state agency in 1949. There are three board members appointed by the governor:

- A labor member selected from a list of candidates submitted by the Washington State Labor Council, AFL-CIO,
- An industry member selected from a list of candidates submitted by the Association of Washington Business, and
- A chairperson, who must be an attorney and is acceptable to both groups.

The Board also employs attorneys as industrial appeal judges who:

- Conduct mediation/settlement conferences, or
- Hold formal hearings governed by the rules of the Superior Court.

## **Department Action** [RCW 51.52.060](#)

The Board assigns a docket number to each appeal and forwards a copy of the appeal to the department. The department has 30 days to review the appeal, determine if further consideration should be given by the department or additional information obtained, and return the file to the Board. If the department reassumes jurisdiction of the claim, an order is issued holding the appealed decision in abeyance. A further appealable order must be entered within 90 days; however, the time may be extended an additional 90 days for good cause.

## **Board Action** [RCW 51.52.060](#), [RCW 51.52.080](#), [RCW 51.52.090](#)

When the department reassumes jurisdiction of the claim, the Board issues an order denying the appeal. A subsequent appeal can be made from the department's final order and would be assigned a new docket number.

Appeals returned to the Board without department action are granted and assigned to an industrial appeals judge in the geographic area of the worker's residence. The granting of an appeal means only that the case will be heard on its merit and the nature of the appeal is something over which the Board has jurisdiction.

The Board will deny the appeal if the decision appealed was not a final decision (i.e., there is a pending protest on the issue that has not been resolved), or if they determine they do not have jurisdiction for some other reason.

## **Mediation Conferences** [RCW 51.52.095](#)

A granted appeal begins by being assigned to a mediation judge, who will facilitate communication between all parties to the appeal. Conferences are scheduled to discuss the parties' interests with the goal of clarifying the issues in dispute and resolving the case. Mediation conferences are informal, and the worker and employer may appear pro se or have legal or lay representation. The department is represented by the Office of the Attorney General, however they may not appear to actively represent the department in a self-insured claim.

After the mediation conferences an appeal can be:

- Dismissed by the appealing party. The Board will issue an Order Dismissing Appeal.
- Resolved by the parties reaching an agreement. The Board will issue an Order on Agreement of Parties indicating the general substance of the agreement. This may be supplemented with an additional agreement between the parties.
- Set for a formal hearing if the appeal cannot be resolved to the satisfaction of all parties.

## Hearing Process [RCW 51.52.100](#), [RCW 51.52.102](#), [RCW 51.52.104](#), [RCW 51.52.106](#)

Hearings before the Board are a more formal process with evidence provided by sworn witness testimony, before an industrial appeals judge, according to the rules of evidence used in Superior Court. The party appealing the decision bears the burden of proof in establishing a legally minimum (or prima facie) case for the relief sought. Prior to the hearing, the parties must confirm witnesses, and may conduct discovery. On the day of the hearing each party has the opportunity to call witnesses to support their case and cross examine the witnesses. Some witness examination can be done outside the day of hearing through perpetuation depositions, where a court reporter is present to take sworn testimony but the judge is not. Many parties are represented by attorneys at this level.

After hearings are concluded, the industrial appeals judge issues a Proposed Decision and Order (PDO). Each PDO contains:

- A discussion and analysis of the issues raised and evidence presented,
- Findings of fact, and
- Conclusions of law on each contested issue; which sustains, modifies, or reverses the order appealed.

Any party that disagrees with the PDO may file a Petition for Review (PFR) within 20 days of communication of the PDO. If no PFR or request for an extension is filed the PDO becomes final. A PFR must outline all reasons for disagreement with the judge's findings and conclusions and raise all evidentiary objections.

Within 20 days of filing a PFR, the Board by agreement of two members, may deny the Petition and adopt the PDO as the final order of the Board. Alternatively, if the Board grants the PFR the Board will issue a formal Decision and Order upon the agreement of at least two Board members. The Decision and Order may uphold, reverse, or modify the industrial appeals judge's decision.

## Court Appeals [RCW 51.52.110](#), [RCW 51.52.115](#)

A final decision from the Board can be appealed to **Superior Court** within 30 days of communication of the Board order. The appeal must be made with the Superior Court in the county of residence of the worker, or the county where the injury occurred if the worker is not a resident of Washington State. The department may appeal issues of law only. To make its decision, the Superior Court will review all transcripts, testimony and exhibits from the Board hearing. Additional evidence or testimony cannot be taken at Superior Court. Either party may demand a trial by jury. The court will issue a judgment that upholds, reverses, or modifies the Board's order.

A further appeal from a Judgment of the Superior Court may be made to the **Court of Appeals**. A Court of Appeals decision may be appealed to the **Washington State Supreme Court**. Determinations and interpretation of the law at these two levels may be considered to set precedent for the handling of future cases with similar factual makeup.

## **Attorney Fees** [RCW 51.52.120](#)

Prior to an appeal, an attorney can charge a reasonable fee that cannot exceed 30 percent of the increase in award. If a dispute over fees arises, any party may make a written request to the department for review of the fees within one year of the final department order. The department will determine and fix a reasonable fee for the services rendered. Written requests are handled by the Legal Services Program Manager.

If a claim has proceeded to hearing, the Board shall set reasonable fees. In Superior Court, fees will be set either by the Court or the Board.

## **Additional Awards from Board Orders and Superior Court Judgments**

When a Board order or Superior Court judgment orders payment of an additional permanent partial disability (PPD) award, the entire award should be paid in a lump sum so long as the worker would have received the full award by the judgment date had the PPD been paid at the time of closure.

If an additional award granted by the Board is appealed to Superior Court:

- By the worker, the award is paid as it cannot be less than the level determined at the Board.
- By the employer, the award is paid unless the employer obtains a motion for stay of benefits from the court.

## **Payment of Benefits During Protest and Appeal**

### **What Are Benefits?**

Examples of benefits include time loss compensation, LEP, PPD awards, medical treatment and vocational services. In addition, claim allowance is considered an award of benefits. An allowance order requires the self-insurer to begin payment of appropriate benefits on the claim.

## When Are Benefits Due? [RCW 51.52.050](#), [WAC 296-15-450](#)

Benefits are due on the date an order awarding benefits is issued. When a self-insured employer closes a claim with PPD the first payment must be made within five days of claim closure. On department closed PPD claims the first payment must be made without delay.

## Protests

When an order is protested by a self-insured employer, benefits ordered must be paid through the date the protest was sent to the department (i.e., department issued an allowance order, all benefits are payable until the day the protest was sent to the allowance order).

## Board Appeals [RCW 51.52.050](#), [RCW 51.52.135](#)

When an order awarding benefits is appealed to the Board, benefits must continue to be paid unless there is a stay of benefits. Two types of benefit orders are automatically stayed by law. If the department orders either an increase in PPD from a prior PPD order, or an increase in the wage or time loss order, the increase is automatically stayed. The employer does not need to file a motion for stay, and does not pay the increase until a final decision of the Board.

- **PPD Example:** The claim closed with a category 2 low back. The medical provider protested and the claims consultant awarded a category 3 low back. The employer appealed the category 3 order to the Board. The employer must pay the category 2. The difference is automatically stayed pending the Board's final decision.
- **Wage Example:** The employer requested a wage order calculating gross monthly wage at \$2,700. The department issued an order setting the gross monthly wage at \$3,000. The order was protested and affirmed. The employer appealed to the Board. The employer pays time loss based on the gross monthly wage of \$2,700. The higher amount is automatically stayed pending the Board's final decision.

For all other orders granting benefits the employer must pay during the period of appeal unless they are granted a stay by the Board. The employer can make a motion to stay benefits any time from the notice of appeal until 15 days after the Board order granting appeal. The motion should state specifically which benefits the employer wants stayed.

The Board shall conduct an expedited review of the claim file provided by the department as it existed on the date of the department order, and issue an order granting or denying the stay within 25 days of the filing of the motion for stay or the order granting appeal, whichever is later. The Board's decision can be appealed to Superior Court.

A worker may request benefits cease during the appeal, any time after the employer's motion for stay of benefits or order granting appeal, to avoid potential overpayment. The request must be made in writing to the employer, Board and department. If the worker requests a cease of benefits, and later prevails at the Board, interest is payable on any unpaid benefits.

## **Recovery of Overpayments** [RCW 51.32.240](#)

When an employer has paid benefits pursuant to a department, Board or Court order that is later overturned, creating an overpayment, the worker must repay it. Recoupment may be made from any future payments due to the worker on any claim. Overpayment balances not fully reimbursed within 24 months of first attempt at recovery through the processes allowed by law will be reimbursed from the self-insured employer overpayment reimbursement fund. The director can waive the overpayment; in that case, the employer will be entitled to immediate reimbursement from the self-insured overpayment reimbursement fund.

# Overview of the Process

