History of Senate Bill 194

SENATE BILL 194
An Act to renumber and amend 102.29 (1) of the statutes; relating to: the formula for distributing the proceeds of a 3rd-party claim between an employe, or the employe's personal representative or other person entitled bring action, and the employer, the employer's worker's compensation insurer or the department of workforce development. (FE)
1999
06-15. S. Introduced by Senators George, Breske and Burke; cosponsored by Representatives Cullen, Colon, Musser, Staskunas, Kreuser and Krug.
06-15. S. Read first time and referred to committee on Labor 176
07-06. S. Fiscal estimate received.
2000
04-06. S. Failed to pass pursuant to Senate Joint Resolution 1 583

Text of Senate Bill 194

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MEMORANDUM

DATE: July 20, 1999

TO: Members of the Council on Worker's Compensation

FROM: Richard D. Smith, Director
Bureau of Legal Services

RE: 1999 SB 194
Third-Party Distribution
Section 102.29, Wis. Stats.

SB 194 was introduced at the request of the Wisconsin Academy of Trail Lawyers (WATL). Paul Sicula, Legislative Representative, WATL, has requested an opportunity to discuss SB 194 with the Council at your August 10, 1999 meeting. Enclosed for your information are several background items related to the bill:

- SB 194
- Smith summary of the impact of the bill.
- ***Sutton v. Kaarakka***, 168 Wis. 2d 160 (1992)
- Sicula letter, June 22, 1999
- Frohman letter, June 22, 1999

Henderson, Patrick

From: Smith, Richard
Sent: Tuesday, August 10, 1999 11:14 AM
To: Sen.Baumgart
Subject: FW: Council on Worker's Compensation -ATTENTION ANN

ATTENTION ANN--per our conversation.

99-8-10.DOC

I am enclosing a copy of the minutes from today's meeting of the Council on Worker's Compensation. Mr. Sicula's comments are summarized in item 3. He recognized that it was too late for this session's agreed bill, but asked the Council to review the proposal for consideration in the next bill.

--- D R A F T ---

Council on Worker's Compensation
Meeting Minutes
August 10, 1999

Members present: Mr. Bagin, Mr. Glaser, Mr. Grassl, Mr. Muelver, Mr. Newby, Ms. Norman-Nunnery, Mr. Olson, Mr. Vetter, Mr. Cafuro for Mr. Fronk.

Staff present: Ms. Piraino, Mr. O'Malley, Mr. Smith.

Liaison present: Ms. Kathy Anderson, State Medical Society of Wisconsin.

1. ***Minutes.*** Ms. Norman-Nunnery convened the meeting in accordance with Wisconsin's open meetings law. Mr. Bagin moved adoption of minutes of the May 24, 1999 meeting. Mr. Glaser seconded the motion. The motion passed unanimously.

2. ***Agreed-Upon Bill (LRB draft 3192/2).*** Mr. Smith said there were two changes in the bill from the bill draft that had been mailed to the Council members prior to the meeting. On page 4, line 9, the word, "a," was deleted. On page 10, the effective date for all the provisions was set at January 1, 2000.

   Mr. Bagin moved that the Department jacket LRB 3192/2 for introduction and that the Council work with the Senate and Assembly Labor Committees to secure passage of the bill. Mr. Glaser seconded the motion. The motion passed unanimously.

3. ***Senate Bill 194 relating to the distribution of 3rd-party proceeds.*** Mr. Paul Sicula, representing the Wisconsin Association of Trial Attorneys, requested that the Council review SB 194 as part of the next agreed-upon bill. He said he was familiar with the Council's role in such matters from his service in the Legislature and felt that the bill was better left to the Council's jurisdiction.

4. ***Open records.*** Mr. Smith distributed the opinion of the Attorney General supporting the Department's position that certain insurance records obtained from the Wisconsin Compensation Rating Bureau were not subject to release under the open records statute.

   Mr. Bagin said the Department and Council should continue to monitor federal health care legislation that would limit insurers' access to injured workers' health care records.

   Mr. Grassl asked if there was any further activity at the state level relating to the various privacy bills that had been introduced earlier in the session. Mr. Metcalf said the Governor had appointed a Commission to study the subject. He said that he was representing WMC on the Council.

5. ***The assignment of benefits.*** Ms. Norman-Nunnery distributed a copy of a memorandum and bill draft (LRB 1195/1, not introduced yet) she had discussed with Attorney Peter Christenson relating to structured settlement agreements. Currently, s. 102.27(1) prohibits the assignment of benefits. The material from Mr. Christenson suggests that similar provisions in other jurisdictions have not been fully effective in preventing creative financing arrangements that effectively transfer future benefit payments for a current lump sum—at a heavily discounted rate.

   Mr. Glaser asked the insurance representatives of the Council why Mr. Christenson had chosen to circulate draft legislation rather than working with the Council. Mr.Grassl and Mr. Cafuro agreed. Mr. Grassl said he would work with his industry contacts to get copies of legislation enacted in other states. The members agreed to continue the discussion at a future meeting.

6. ***Van crash involving Yes.*** Mr. Glaser asked for an update on claims against the uninsured employer fund as a result of the van crash near Janesville. Ms. Piraino said the Department had two claims, but said she that currently the Department did not think the total of all claims would reach the $250,000 threshold of the Department's excess insurance policy. She said they had determined that Yes was the employer and turned the matter over to the Attorney General to collect uninsured employer penalties and payments from the UEF.

7. ***Adjournment.*** The Council adjourned. The members agreed to reconvene subject to the call of the Chair. No future dates were set.

1999 SB 194

Revising Third-Party Distributions in s. 102.29, Wis. Stats.

A. Current Law.

Generally, worker's compensation is the exclusive remedy for an injured worker to pursue against his or her employer, insurer or co-workers. However, where a third party caused the injury (e.g., a pizza delivery person hurt in auto accident) the employee may sue the third party for damages. Just like any other tort claim, these third-party actions are in circuit court, not the worker's compensation system. However, by law, the worker's compensation insurer is entitled to recover its costs (e.g., medical payments and wage reimbursement) out of the proceeds of the 3rd-party settlement. In fact, worker's compensation insurers may participate in the prosecution of the third-party claim.

Currently, in a worker's compensation claim in which there is also a third-party settlement, s. 102.29(1), Stats., distributes the settlement proceeds between the injured employee and the worker's compensation insurer in the following sequence; from the settlement amount:

(1) Pay the reasonable costs of collecting the settlement (attorneys fees and costs);
(2) From the remainder, pay one-third to the injured worker;
(3) From what then remains, reimburse the insurer:
- for payments already made, and
- for payments which it may be obligated to make in the future;

(4) Pay any balance to the employee.

The amount remaining after the first two steps and after reimbursing the carrier for payments already made to the employe is commonly called the "cushion." Under current law, insurers are entitled to use interest on the cushion to offset the cost of future payments. See Sutton v. Kaarakka, 168 Wis. 2d 160 (Ct. App. 1992). The court held that the principal and interest earned on that principal are a "unitary fund" intended to serve the purpose of the statute--reimbursing the employer or insurer for those worker's compensation payments the employer or insurer must make in the future.

In the Sutton case, the principal amount of the cushion was $1,001.416. Assuming an annual 6% rate of return, the insurer would be entitled to use $60,000 per year in interest to offset its future obligations. Generally, the principal (and related interest) would decline over time as the insurer covers the costs anticipated by the cushion amount.

Section 102.29, Stats., authorizes both the courts and the Department to approve 3rd-party settlement distributions under the four-step formula outlined above. The Department does not keep records of how many 3rd-party settlements it approves, nor does it have any systematic information about how many are approved by courts

(typically, the court in which the 3rd-party tort action is pending). Each year, there are about 65,000 serious injuries reported to the Department. The Department estimates that it annually approves about 500 3rd-party distributions, and that the Wisconsin courts approve another 250 or so.

In the overwhelming majority of 3rd-party settlements, the principal is under $10,000 and the interest relatively small. At the other extreme, the Department estimates that 5 or 10 each year might involve significant dollar amounts as in the Sutton case. Since these larger distributions are typically approved by the courts handling the 3rd-party tort claims rather than by the Department, the actual number is unknown.

B. **Proposed Change.**

The net effect is that ***interest*** earned on the cushion will no longer reduce the insurer's or self-insured employer's liability. The bill shifts the custody of the cushion from the insurer to the employee. It also tolls the insurer's responsibility to pay benefits until the future worker's compensation benefits accrued exceed the amount in the cushion. However, the insurance carrier would not be entitled to count the interest earned on the principal amount of the cushion in determining the date on which its obligation to reinstate benefits begins.

C. **Legislative Action in Previous Session.** None.

D. **Impact of Legislation.**

1. ***In some cases involving large jury awards insurers will lose money (the ability to use the interest on the cushion to offset their future liability) and employees will gain money***. We don't know the number of cases in which this will be a factor or how much money will be involved. In the overwhelming majority of 3rd-party settlements, it will not be a factor because there is no future liability on the part of the WC insurer. However, the larger 3rd-party settlements are associated with the more serious the injuries where the comp carrier is liable for medical and indemnity for many years. Thus, the bigger the case, the more likely that the bill will have some impact and that it will involve a significant dollar amount. Even in cases involving larger awards, the bill would seem to directly impact the distribution only in cases in which the jury awards benefits (although it would arguably have an indirect impact on the negotiation process in those cases which the parties settle).

However, in support of this change, the Legislative Representative of the Wisconsin Academy of Trail Lawyers raises at least two arguments:

- Juries sometimes make excessive awards for future expenses. Rather than carefully and discretely awarding realistic amounts for future medical expenses and, say, punitive damages, the jury will lump the amounts together under future medical costs. Where the jury's award for anticipated future medical expenses is far more than what is likely to actually be necessary (based on sound actuarial insurance principles) then the cushion is

excessively large—and the worker is denied the immediate distribution of the amount in excess of what is actually likely to be necessary to cover the insurer's medical costs.

- Insurers and self-insurers who don't participate in the prosecution of the tort case do not share the risk of failure and should not share in the benefits of the award.

2. ***The bill would impact the Uninsured Employers Fund (UEF) just like any other insurer***. The UEF pays claims to employees who were hurt while working for employers who were illegally uninsured. The UEF then attempts to collect reimbursement from the uninsured employer for any benefits paid out. This bill would not have an impact on the UEF if the UEF successfully recovers payments from the illegally uninsured employer. However, often the illegally uninsured employers have no assets to cover the UEF loses and the UEF is not reimbursed. In this situation, the UEF could no longer use the interest from the cushion to defer their liability for future worker's compensation benefit payments.

3. ***An insurer's ability to timely challenge whether medical treatment is "reasonable and necessary" will be affected***. The bill does not specify a process for notifying insurers about accruing medical bills during the period for which the insurer is not liable to pay them. This may create a false sense of security for the injured worker and the medical provider who continues treatment that is ultimately found to be not reasonably priced or not necessary to cure and relieve the work injury.

4. ***The bill is silent on how to deal with other procedural problems.*** Employes will have to keep careful records of expenditures related to the medical condition to insure that insurer's re-instate payments after the cushion is exhausted. This could be a significant factor in cases where the comp benefits are suspended for 5 or 10 years in more serious cases. This will lead to some increase in litigation. It is also assumed that some unknown number of injured workers will forget that they are entitled to have comp benefits re-instated after time covered by the cushion is over.

E. **Fiscal Effect.** Unknown.

F. **Laws in Other States.**

Wisconsin already has a feature that benefits injured workers in its current formula for distributing 3rd-party settlements. Few other states, if any, allow the injured employe to take one-third of the settlement off the top. In most states, the insurer's payments come first. If the insurer's current out-of-pocket costs are reimbursed first there may be little left for the employee.

Prepared by Richard D. Smith, Director
Bureau of Legal Services
Worker's Compensation Division
July 20, 1999

Jeanne M. SUTTON, by her guardian, Jeffrey S. Sutton, Jeffrey S. Sutton, Chayce Sutton, by his Guardian ad Litem, Eugene A. Gasiorkiewicz, and Carly Sutton, by her Guardian ad Litem, Eugene A. Gasiorkiewicz, Plaintiffs-Appellants,†

v.

Olli KAARAKKA, M.D., and Wisconsin Patients Compensation Fund, Defendants,

LIBERTY MUTUAL INSURANCE COMPANY and In-Sink-Erator, Inc., Intervening-Parties-Respondents.

Court of Appeals

No. 91-1557. Submitted on briefs January 24, 1992.—Decided March 11, 1992.

(Also reported in 483 N.W.2d 259.)

1. **Workers' Compensation § 451*—third-party action—reimbursement to employer—payment of interest.**

Statute providing distribution formula for employee's award against third-party tortfeasor envisions payment of interest on money targeted for reimbursement to employer who is obligated to its employee for future worker's compensation benefits (Stats § 102.29(1)).

2. **Workers' Compensation § 6*—construction of statute—employer reimbursement fund for future workers'compensation payments—bifurcation of principal and interest.**

†Petition to review denied.

*See Callaghan's Wisconsin Digest, same topic and section number.

Nothing in statutory scheme providing distribution formula for employee's award against third-party tortfeasor suggests moneys held in cushion account for reimbursement of future workers' compensation payments were to be bifurcated between fund's principal to be paid to employer and fund's interest to be paid to employee where viewing principal and interest as unitary fund would serve statutory purpose of reimbursing employer for those worker's compensation payments employer has made in past or must make in future (Stats § 102.29(1)).

3. **Workers' Compensation § 10*—construction of statute—liberal construction to accomplish objectives.**

General rule of statutory construction which holds that Worker's Compensation Act is to be liberally construed to accomplish Act's overall objectives of protecting injured employees and those who depend on such employees for support does not permit court to repeal or change statute with obvious meaning.

4. **Workers' Compensation § 451.5*—employer reimbursement—fund for future workers' compensation payments—interest on funds.**

Clear meaning, scheme and purpose of statute providing for distribution of proceeds between employee, employer and its insurance carrier is to allow reimbursement to employer for its past and future worker's compensation payments from portion of moneys paid by third-party tortfeasor to employee and absent legislative statement to contrary, interest earned by such cushion fund must be applied to same statutory end (Stats § 102.29(1)).

APPEAL from an order of the circuit court for Racine county: STEPHEN A. SIMANEK, Judge. *Affirmed.*

On behalf of the plaintiffs-appellants, the cause was submitted on the briefs of *Alice A. Nejedlo* and *Eugene A. Gasiorkiewicz,* of *Hanson, Gasiorkiewicz & Weber, S.C.* of Racine.

*See Callaghan's Wisconsin Digest, same topic and section number.

On behalf of the intervening-party-respondent, *Liberty Mutual Insurance Company,* the cause was submitted on the brief of *Paul R. Riegel* of *Borgelt, Powell, Peterson & Frauen, S.C.* of Milwaukee.

On behalf of the intervening-party-respondent, *In-Sink-Erator, Inc.,* the cause was submitted on the brief of *Daniel J. Kelley* of *Schoone, Ware, Fortune & Lueck, S.C.* of Racine.

Before Nettesheim, P.J., Anderson and Snyder, JJ.

NETTESHEIM, P.J. Pursuant to sec. 102.29(1), Stats., of the Worker's Compensation Act, the trial court approved a medical malpractice settlement in favor of Jeanne M. Sutton. The court, however, reserved a portion of the settlement to guarantee payment of future worker's compensation obligations. Sutton, the employee, appeals the trial court's ruling that the interest earned by this reserved account is to be retained by the fund rather than paid directly over to her. We affirm the trial court's ruling.

This case makes its second appearance in the court of appeals. In *Sutton v. Kaarakka,* 159 Wis. 2d 83, 464 N.W.2d 29 (Ct. App. 1990) *(Sutton I),* this court held that the employer, In-Sink-Erator, Inc., and its worker's compensation insurance carrier, Liberty Mutual Insurance Company (collectively, the employer), were entitled to participate in the settlement structure pursuant to sec. 102.29(1), Stats. *See Sutton I,* 159 Wis. 2d at 87, 464 N.W.2d at 31.[1]

[1]The specific issue in *Sutton v. Kaarakka,* 159 Wis. 2d 83, 464 N.W.2d 29 (Ct. App. 1990), was whether a recent amendment to sec. 102.29, Stats., which permitted employer participation in a settlement with a third-party tortfeasor applied where the statutory amendment occurred after the work-related injury but before the malpractice. The court of appeals concluded that since the act

The facts are undisputed. We take them from *Sutton I.* In the fall of 1987, Sutton suffered a work-related injury to her shoulder. Treatment failed to relieve her condition and she agreed to stabilization surgery. On May 11, 1988, during the anesthetic induction just prior to the surgery, Sutton experienced cardiac arrest and, as a result, suffered oxygen deprivation to the brain. Sutton was comatose for several months. Although she regained consciousness, she was left with profound cognitive-motor deficits. She filed a medical malpractice action against the anesthesiologist. Eventually, the parties reached a settlement in the amount of $4,000,000. *Id.* at 85, 464 N.W.2d at 30.

In approving the settlement and distributing the proceeds, the trial court followed sec. 102.29(1), Stats., which provides in relevant part:

> After deducting the reasonable cost of collection, one-third of the remainder shall in any event be paid to the injured employe . . .. *Out of the balance remaining, the employer, insurance carrier . . . shall be reimbursed for all payments made by it, or which it may be obligated to make in the future, under this chapter* . . .. Any balance remaining shall be paid to the employe . . .. [Emphasis added.]

Pursuant to this statutory scheme, the trial court deducted the reasonable cost of collection and one-third of the remainder which was paid to Sutton.[2] The employer then laid claim to the balance of the settlement pursuant to the statutory language we have highlighted

of malpractice constituted a separate cause of action, the amendment permitted the employer to participate in the settlement. *Id.* at 87, 464 N.W.2d at 31.

[2]Before employing the statute, the trial court allocated a portion of the settlement to the claims of Sutton's husband and children.

above. The trial court denied this request but "froze" the balance pending appellate resolution of the issue. The end result was our ruling in *Sutton I* permitting the employer to participate in the settlement. We remanded for further proceedings consistent with our opinion. *Sutton I,* 159 Wis. 2d at 90, 464 N.W.2d at 33.

On remand, without objection from Sutton, the trial court directed that the employer be reimbursed for those worker's compensation payments it had made since the court "froze" the balance of the settlement pending our decision in *Sutton I.*[3] Nor did Sutton dispute that the employer was entitled to reimbursement for those worker's compensation payments it is obligated to make in the future. Therefore, again without objection, the court directed that the balance of the settlement ($1,001,416.60) be paid into "interest-bearing restrictive accounts" to be administered by a trust company. The parties refer to these accounts as a "cushion" fund.

Sutton then requested that the interest earned by this "cushion" fund be paid directly to her. The trial court denied this request, ruling that the interest was to be credited back to, and retained by, the fund. The parties' briefs represent that the employer's worker's compensation obligations to Sutton are in the amount of $348 per week for disability payments and $200 per day for medical expenses: a total annual liability in excess of $91,000. Sutton's brief represents that as of July 1991, the "cushion" account had earned interest in excess of $100,000.[4]

[3]The Wisconsin Supreme Court denied Sutton's petition for review in *Sutton I.*

[4]The parties have not provided us record cites as to these figures. However, since the parties do not dispute these figures, we accept them.

We conclude that this issue is governed by the Wisconsin Supreme Court's decision in *Hauboldt v. Union Carbide Corp.,* 160 Wis. 2d 662, 467 N.W.2d 508 (1991). There, although it was one of the lesser issues in the case, the supreme court rejected the employee's argument that sec. 102.29, Stats. (1987–88), "only allows employers a right to reimbursement for monies paid . . . as compensation benefits, and does not provide for interest on those benefits." *Id.* at 667, 467 N.W.2d at 509.

We acknowledge that the issue in *Hauboldt* arose in a different context than here. In *Hauboldt,* the employee's claim against the tortfeasor went to trial. The jury returned a favorable verdict for the employee, and the employer's compensation insurance carrier then made a claim against a portion of the award, together with interest, pursuant to sec. 102.29(1), Stats. The supreme court held, albeit in a somewhat terse analysis, "that the circuit court did not err when it awarded 12 percent interest to Employers on the amount due Employers as reimbursement under sec. 102.29(1), Stats. Employers was a party to the action and entitled to . . . interest since it was deprived of the use of its money." *Id.* at 687–88, 467 N.W.2d at 518.

[1]

We are not persuaded that the different procedural setting by which the interest dispute arose in *Haubolt* negates the application of the rule in this case. The fact remains that the supreme court held that sec. 102.29(1), Stats., envisions the payment of interest on money targeted for reimbursement to an employer who is obligated to its employee for future worker's compensation benefits.

Even though *Hauboldt* governs the issue, we nonetheless construe sec. 102.29(1), Stats., to demonstrate why the supreme court's holding was correct. We first

acknowledge that the statute does not expressly address interest earned on a "cushion" fund. We also acknowledge that legislative silence can sometimes create ambiguity. *See Hauboldt,* 160 Wis. 2d at 684, 467 N.W.2d at 516-17. Here, however, both the employer and Sutton agree that the statute is clear and unambiguous, although they offer differing interpretations.[5] We agree that the statute is unambiguous. We conclude that the interest earned by the "cushion" fund constitutes part of the fund.

It is clear that the purpose of a "cushion" fund under sec. 102.29(1), Stats., is to *reimburse* the employer: "Out of the balance remaining, the employer . . . shall be *reimbursed* . . .." (Emphasis added.) It is also clear from the "laddered" payment scheme of sec. 102.29(1) that the employee is not entitled to the final remainder of the fund until the employer has been reimbursed for its payments—past and future. Then, and only then, shall the balance be paid to the employee or the employee's personal representative: "Any balance remaining shall be paid to the employe or the employe's personal representative . . .." Thus, an employee has no direct or immediate claim to a "cushion" fund.

[2]

It is axiomatic that moneys held in such a "cushion" account will earn interest. We see nothing in the statutory scheme of sec. 102.29(1), Stats., which suggests bifurcation of the fund's principal and interest in the manner Sutton urges. To the contrary, we see the principal and interest as a unitary fund, existing to serve the purpose of the statute—reimbursement to the employer

[5]The other respondent, Liberty Mutual Insurance Company, does not expressly state whether it believes the statute to be ambiguous or unambiguous. However, it shares the employer's interpretation of the statute.

for those worker's compensation payments the employer has made in the past or must make in the future.

[3]

We recognize the general rule of statutory construction which holds that the Worker's Compensation Act is to be liberally construed to accomplish the act's overall objectives of protecting injured employees and those who depend on such employees for support. *Larson v. DILHR,* 76 Wis. 2d 595, 615, 252 N.W.2d 33, 42 (1977). However, this rule does not permit us to repeal or change a statute with obvious meaning. *Id.* at 615, 252 N.W.2d at 43.

[4]

We conclude that the clear meaning, scheme and purpose of sec. 102.29(1), Stats., is to allow reimbursement to an employer for its past and future worker's compensation payments from a portion of the moneys paid by a third-party tortfeasor to the employee. We think it equally clear that, in the absence of a legislative statement to the contrary, the interest earned by such a "cushion" fund must be applied to the same statutory end.[6]

By the Court.—Order affirmed.

[6]Sutton relies on a decision of the New Hampshire Supreme Court, *Lakin v. Daniel Marr & Son Co.,* 495 A.2d 1299 (N.H. 1985). *Lakin,* however, is contrary to *Hauboldt* and our analysis of sec. 102.29(1), Stats.

Wisconsin Academy of Trial Lawyers

Keeping Wisconsin Families Safe

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414-271-8100

June 22, 1999

Contact@watl.org
415 N.W.

Mr. Dick Smith
State of Wisconsin
Department of Workforce Development
201 East Washington Avenue
Madison, Wisconsin 53702

Re: Senate Bill 194

Dear Dick:

It was a pleasure speaking with you on the phone today regarding the above legislation.

Pursuant to our conversation, please send notice of the next meeting of the Worker's Compensation Advisory Council to the above address Attention Jane E. Garrott.

If you have any question further questions regarding this issue, please feel free to contact me.

Sincerely,

Paul

Paul E. Sicula
Legislative Representative

KASDORF, LEWIS & SWIETLIK, S.C.

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June 22, 1999

Mr. John M. Thome
Branch Manager
Gallagher Bassett Services, Inc.
P O Box 8004
Madison WI 53708-8004

RE: Senate Bill 194

Dear John:

I reviewed the proposed change to Sec. 102.29(1) contained within Senate Bill 194. I believe the proposed changes are intended to respond to a court case, ***Sutton v. Kaarakka*** *(Ct. App. 1992)* and other cases suggesting that the employer/insurance carrier has a right to interest earnings of cushion amounts which are invested. In the case of a large third-party settlement, the current statute provides that the balance remaining after distribution is to constitute a "cushion" which is used to absorb any future worker's compensation benefit liabilities. When the cushion is used up, the employer/carrier has to start payments again. These court cases permitted the interest earned by the cushion amounts to be added to the cushion, and in very large settlements, the fund could actually be self-sustaining.

The change proposed by Senate Bill 194 would give the employer/carrier credit for the amount of the original cushion balance, but any worker's compensation benefits payable in the future which exceed that original cushion balance would be payable by the employer/carrier. There is no opportunity under the new proposal to allow interest earnings on the cushion balance to be added for the benefit of the employer/carrier.

In summary, the proposed changes to 102.29(1) would leave the current settlement distribution pattern intact, but the employer/carrier would be protected against making payments

of future benefits only to the extent of the original cushion amount. After that amount has been "used up" by future liability payments under the Worker's Compensation Act, the employer/carrier is again obligated to resume payments under the Act. The proposed bill contains no provision allowing cushion interest earnings to be added to the cushion balance for the benefit of the employer/carrier.

Very truly yours,

Michael C. Frohman

MCF/rmb