



State of Wisconsin  
2011 - 2012 LEGISLATURE



LRB-3926/1  
GMM:cjs:rs

## 2011 SENATE BILL 409

January 30, 2012 - Introduced by Senator WANGGAARD, cosponsored by Representative BALLWEG. Referred to Committee on Labor, Public Safety, and Urban Affairs.

1     **AN ACT** *to renumber and amend* 102.29 (1); *to amend* 16.865 (4), 20.445 (1)  
2           (t), 102.03 (4), 102.11 (1) (intro.), 102.13 (2) (c), 102.16 (2) (d), 102.17 (4), 102.35  
3           (1), 102.43 (5), 102.43 (7) (b), 102.44 (1) (am), 102.44 (1) (b), 102.44 (1) (c), 102.49  
4           (1), 102.56 (1), 102.56 (2), 102.59 (1), 102.61 (1), 102.61 (1g) (b), 102.61 (1m) (c),  
5           102.61 (1m) (d), 102.61 (1r) (c), 102.64 (2), 102.66 (1) and 102.66 (2); and *to*  
6           **create** 102.43 (5) (c), 102.65 (3) and 102.65 (4) of the statutes; **relating to:**  
7           various changes to the worker's compensation law, granting rule-making  
8           authority, and making an appropriation.

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### ***Analysis by the Legislative Reference Bureau***

This bill makes various changes to the worker's compensation law, as administered by the Department of Workforce Development (DWD).

#### **PAYMENT OF BENEFITS**

***Maximum weekly compensation for permanent partial disability.*** Under current law, permanent partial disability benefits are subject to maximum weekly compensation rates specified by statute. Currently, the maximum weekly compensation rate for permanent partial disability is \$302. This bill increases that maximum weekly compensation rate to \$312 for injuries occurring before January 1, 2013, and to \$322 for injuries occurring on or after that date.

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***Vocational rehabilitation.*** Under current law, an injured employee is entitled to receive compensation for temporary disability while the employee is receiving vocational rehabilitation services under the federal Rehabilitation Act of 1973. If, however, the injury causes only partial disability, the employee's weekly indemnity is the proportion of the weekly indemnity rate for total disability that the actual wage loss of the injured employee bears to the injured employee's average weekly wage at the time of injury.

This bill provides that compensation for temporary disability on account of receiving vocational rehabilitation services shall not be reduced on account of any wages earned for the first 24 hours worked by an employee during a week in which the employee is receiving those services, but that if an employee performs more than 24 hours of work during a week in which the employee is receiving those services, all wages earned for hours worked in excess of 24 during that week shall be offset against the employee's average weekly wage in calculating compensation for temporary disability. This provision, however, does not apply after the last day of the 24th month beginning after publication of the bill.

Under current law, an injured employee who is receiving vocational rehabilitation services is entitled to payment for the expense of travel to receive those services and, if the employee receives those services elsewhere than his or her place of residence, payment for the expense of maintenance during his or her rehabilitation.

This bill provides that an injured employee who is receiving vocational rehabilitation services is entitled to payment for the cost of tuition, fees, and books required for the employee's vocational rehabilitation program.

***Disfigurement benefits.*** Under current law, DWD may allow compensation for a permanent disfigurement that occasions potential wage loss, except that if an employee who claims compensation for permanent disfigurement returns to work for his or her employer at the time of the injury at the same or a higher wage, DWD may not allow that compensation unless the employee shows that he or she probably has lost or will lose wages due to the disfigurement.

This bill prohibits DWD from allowing compensation for permanent disfigurement for an employee who returns to work for his or her employer at the time of injury, *or who is offered employment with that employer*, unless the employee suffers an *actual* wage loss due to the disfigurement.

**WORK INJURY SUPPLEMENTAL BENEFIT FUND**

***Introduction.*** This bill makes various changes relating to the work injury supplemental benefit (WISB) fund administered by DWD with the assistance of the Department of Justice (DOJ), which is a fund that is used to pay supplemental worker's compensation to employees with permanent total disability, additional death benefits to the children of a deceased employee, additional worker's compensation to an employee with permanent partial disability who incurs further permanent disability, and worker's compensation when an otherwise meritorious claim for occupational disease is barred by the statute of limitations, when the status or existence of the employer or worker's compensation insurer (insurer) cannot be determined, or when there is otherwise no adequate remedy.

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***Traumatic injuries.*** Under current law, an application for worker's compensation that is not filed within 12 years from the date of the injury or from the date that worker's compensation, other than for treatment or burial expenses, was last paid, whichever is later, is barred by the statute of limitations, except that in cases of occupational disease or in cases of traumatic injury resulting in the loss or total impairment of a hand or any part of the rest of the arm proximal to, that is, toward the trunk from, the hand or of a foot or any part of the rest of the leg proximal to the foot, any loss of vision, any permanent brain injury, or any injury causing the need for an artificial spinal disc or a total or partial knee or hip replacement (traumatic injury) there is no statute of limitations. In cases in which there is no statute of limitations, benefits or treatment expenses for occupational disease becoming due 12 years after the date of injury or after the date that compensation was last paid, whichever is later, are paid by DWD from the WISB fund and benefits or treatment expenses for traumatic injury becoming due 12 years after the date are paid by the employer or insurer.

The Wisconsin Supreme Court recently held, however, in *Society Insurance v. LIRC*, 2010 WI 68, 326 Wis. 2d 444, that retroactive application, that is, application to injuries occurring before April 1, 2006, of the provision holding employers or insurers liable for benefits or treatment expenses for a traumatic injury becoming due 12 years after the date of injury or after the date that compensation was last paid, whichever is later, constitutes an unconstitutional impairment of contract and violation of due process rights. Accordingly, this bill provides that the WISB fund, rather than the employer or insurer, is liable for such benefits or treatment expenses only if the date of injury or last payment of compensation, other than for treatment or burial expenses, whichever is later, is before April 1, 2006.

***Third-party liability.*** Under current law, worker's compensation is the exclusive remedy for an employee who is injured while performing services growing out of and incidental to his or her employment, except that, subject to certain exceptions, an injured employee may claim worker's compensation from his or her employer and bring an action in tort against a third party for damages by reason of the injury. Current law also permits an employer or insurer that has paid or is obligated to pay worker's compensation for an injury to bring an action in tort against a third party and permits DWD to bring such an action, if DWD has paid or is obligated to pay a claim for an injury from the uninsured employer's fund. When a third party is found liable for damages by reason of an injury, the employer, insurer, or, if applicable, the uninsured employers fund is entitled to reimbursement from the proceeds collected from the third party for any worker's compensation paid to the injured employee.

This bill permits DWD to bring an action in tort against a third party for damages by reason of an injury for which DWD has paid or is obligated to pay a claim from the WISB fund and entitles the WISB fund to reimbursement from the proceeds collected from the third party for any payments made to an injured employee from that fund.

***Reimbursement of supplemental benefits.*** Under current law, an injured employee who is receiving worker's compensation for permanent total disability or

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continuous temporary total disability resulting from an injury that occurred before January 1, 2001, is entitled to receive supplemental benefits that in the first instance are payable by the employer or insurer. The employer or insurer then is entitled to reimbursement from the WISB fund for the supplemental benefits paid. This bill requires an employer or insurer that has paid supplemental benefits to file a claim for reimbursement with DWD by no later than 12 months after the end of the year in which the supplemental benefits were paid in order to receive reimbursement from the WISB fund for the supplemental benefits paid.

***Second injury.*** Under current law, if an employee who has permanent partial disability that would entitle the employee to 200 weeks of worker's compensation incurs further permanent disability that entitles the employee to 200 weeks of worker's compensation as a result of a second injury, the employee is entitled to additional compensation from the WISB fund after the end of the period for which compensation for permanent disability as a result of the second injury is payable by the employer or insurer. That additional compensation is equivalent to the amount that would be payable for the previous disability or the amount that is payable for the further disability resulting from the second injury, whichever is less.

This bill permits an employee with such permanent partial disability who incurs such further disability as a result of a second injury to receive that additional compensation from the WISB fund only if the employee has not already received compensation from the WISB fund as a result of a second injury.

***Surcharges.*** Current law requires employers that are subject to the worker's compensation law to keep records of all accidents causing death or disability of an employee while performing services growing out of and incidental to the employee's employment, requires insurers and self-insured employers to keep records of all payments made under the worker's compensation law, and requires reports based on those records to be furnished to DWD at the times and in the manner as DWD may require by rule or general order. An employer or insurer that fails to keep those records or to make those reports is subject to a surcharge of not less than \$10 nor more than \$100 for each offense, which must be deposited in the WISB fund.

Current law provides that such a surcharge is due within 90 days after the date on which notice of the surcharge is mailed to the employer or insurer. This bill provides that such a surcharge is due within 30 days after that date.

***Claims processing.*** Under current law, DOJ is required to defend claims against the WISB fund. This bill permits DWD to retain the Department of Administration (DOA) to process, investigate, and pay claims for payments from the WISB fund. If retained by DWD, DOA may compromise a claim that it processes, subject to review by DWD.

***Adequacy of fund balance.*** Finally, with respect to the WISB fund, the bill provides that if the secretary of workforce development determines that the expected ultimate losses to the WISB fund on known claims exceed 85 percent of the cash balance in that fund and that there is a reasonable likelihood that the cash balance in that fund may become inadequate to fund all claims against the fund, the secretary must file with the secretary of administration a certificate attesting that the cash balance in that fund is likely to become inadequate to fund those claims and

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specifying: 1) that payment of those claims will be made as provided in a schedule that DWD must promulgate by rule; 2) a date after which payment of those claims will be reduced; or 3) a date after which no new claims will be paid.

**HEARINGS AND PROCEDURES**

***Final practitioner's report.*** Under current law, if an injured employee has a period of temporary disability of more than three weeks or a permanent disability or has undergone surgery to treat an injury, other than surgery to correct a hernia, the employer or insurer must submit to DWD a final treating practitioner's report. This bill also requires that report to be submitted when an injured employer sustains an eye injury requiring medical treatment on three or more occasions off the employer's premises. The bill, however, prohibits DWD from requiring submission of that report when the employer or insurer denies the employee's claim for compensation and the employee does not contest that denial.

**PROGRAM ADMINISTRATION**

***Health service fee disputes.*** Under current law, if a health service provider, injured employee, insurer, or employer submits to DWD a dispute over the reasonableness of a health service fee charged by the health service provider for services provided to the injured employee, DWD must determine the reasonableness of the disputed fee by comparing the disputed fee to the mean fee for the procedure for which the disputed fee was charged, as shown by data from a database certified by DWD. If the disputed fee is at or below the mean fee, plus 1.4 standard deviations from that mean, DWD must determine that the disputed fee is reasonable and order the fee to be paid. If the disputed fee is above the mean fee, plus 1.4 standard deviations from that mean, DWD must determine that the disputed fee is unreasonable and order that a reasonable fee be paid, unless the health service provider proves that a higher fee is justified. This bill lowers the standard deviations used to determine the reasonableness of a disputed health service fee to 1.2 standard deviations from the mean.

The bill also requires DWD to conduct an audit of the databases certified by the DWD. If the audit is not commenced by the first day of the seventh month beginning after the effective date of the bill: 1) the maximum weekly compensation rate for permanent partial disability is lowered from \$322 to \$317 for injuries occurring on or after January 1, 2013; and 2) the standard deviation used to determine the reasonableness of a disputed health service fee is increased from 1.2 standard deviations from the mean to 1.3 standard deviations from the mean beginning on January 1, 2013.

***Study of funding for permanent total disability increases.*** Under current law, the amount of the weekly indemnity for permanent total disability that is payable to an injured employee is determined as of the date of injury. An injured employee who is receiving compensation for permanent total disability resulting from an injury that occurred before January 1, 2001, however, is also entitled to receive certain supplemental benefits from the employer or insurer or, in certain cases, from the WISB fund.

This bill requires the secretary of workforce development to create a committee to study methods of funding the cost of providing regular, periodic increases in the

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weekly indemnity for permanent total disability, if legislation providing for those increases were to be enacted. The study must include methods of funding the cost of providing those increases for injured employees receiving that indemnity on the day before the effective date of that legislation.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1           **SECTION 1.** 16.865 (4) of the statutes is amended to read:

2           16.865 (4) Manage the state employees' worker's compensation program and  
3 the statewide self-funded programs to protect the state from losses of and damage  
4 to state property and liability and, if retained by the department of workforce  
5 development under s. 102.65 (3), process, investigate, and pay claims under ss.  
6 102.44 (1), 102.49, 102.59, and 102.66 as provided in s. 102.65 (3).

7           **SECTION 2.** 20.445 (1) (t) of the statutes is amended to read:

8           20.445 (1) (t) *Work injury supplemental benefit fund.* All moneys paid into the  
9 work injury supplemental benefit fund under ss. 102.35 (1), 102.47, 102.49, 102.59,  
10 102.60, and 102.75 (2), to be used for the discharge of liabilities payable under ss.  
11 102.44 (1), 102.49, 102.59, 102.63, 102.64 (2), and 102.66 and for the retention of  
12 services under s. 102.65 (3).

13           **SECTION 3.** 102.03 (4) of the statutes is amended to read:

14           102.03 (4) The right to compensation and the amount of the compensation shall  
15 in all cases be determined in accordance with the provisions of law in effect as of the  
16 date of the injury except as to employees whose rate of compensation is changed as  
17 provided in ss. 102.43 (7) and or 102.44 (1) and or (5) or, before the first day of the  
18 25th month beginning after the effective date of this subsection ... [LRB inserts  
19 date], as provided in s. 102.43 (5) (c) and employees who are eligible to receive private

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1 rehabilitative counseling and rehabilitative training under s. 102.61 (1m) and except  
2 as provided in s. 102.555 (12) (b).

3 **SECTION 4.** 102.11 (1) (intro.) of the statutes is amended to read:

4 102.11 (1) (intro.) The average weekly earnings for temporary disability,  
5 permanent total disability, or death benefits for injury in each calendar year on or  
6 after January 1, 1982, shall be not less than \$30 nor more than the wage rate that  
7 results in a maximum compensation rate of 110 percent of the state's average weekly  
8 earnings as determined under s. 108.05 as of June 30 of the previous year. The  
9 average weekly earnings for permanent partial disability shall be not less than \$30  
10 and, for permanent partial disability for injuries occurring on or after ~~May 6, 2010,~~  
11 ~~and before January 1, 2011, not more than \$438, resulting in a maximum~~  
12 ~~compensation rate of \$292, and, for permanent partial disability for injuries~~  
13 ~~occurring on or after January 1, 2011, not more than \$453, resulting in a maximum~~  
14 ~~compensation rate of \$302~~ the effective date of this subsection ... [LRB inserts date],  
15 and before January 1, 2013, not more than \$468, resulting in a maximum  
16 compensation rate of \$312, and, for permanent partial disability for injuries  
17 occurring on or after January 1, 2013, not more than \$483, resulting in a maximum  
18 compensation rate of \$322, except as provided in 2011 Wisconsin Act ... (this act),  
19 section 30 (2) (a). Between such limits the average weekly earnings shall be  
20 determined as follows:

21 **SECTION 5.** 102.13 (2) (c) of the statutes is amended to read:

22 102.13 (2) (c) If Except as provided in this paragraph, if an injured employee  
23 has a period of temporary disability that exceeds 3 weeks or a permanent disability  
24 ~~or~~, if the injured employee has undergone surgery to treat his or her injury, other than  
25 surgery to correct a hernia, or if the injured employee sustained an eye injury

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1 requiring medical treatment on 3 or more occasions off the employer's premises, the  
2 department may by rule require the insurer or self-insured employer to submit to  
3 the department a final report of the employee's treating practitioner. The  
4 department may not require an insurer or self-insured employer to submit to the  
5 department a final report of an employee's treating practitioner when the insurer or  
6 self-insured employer denies the employee's claim for compensation and the  
7 employee does not contest that denial. A treating practitioner may charge a  
8 reasonable fee for the completion of the final report, but may not require prepayment  
9 of that fee. An insurer or self-insured employer that disputes the reasonableness of  
10 a fee charged for the completion of a treatment practitioner's final report may submit  
11 that dispute to the department for resolution under s. 102.16 (2).

12 **SECTION 6.** 102.16 (2) (d) of the statutes is amended to read:

13 102.16 (2) (d) The department shall analyze the information provided to the  
14 department under par. (c) according to the criteria provided in this paragraph to  
15 determine the reasonableness of the disputed fee. The Except as provided in 2011  
16 Wisconsin Act .... (this act), section 30 (2) (b), the department shall determine that  
17 a disputed fee is reasonable and order that the disputed fee be paid if that fee is at  
18 or below the mean fee for the health service procedure for which the disputed fee was  
19 charged, plus 1.4 1.2 standard deviations from that mean, as shown by data from a  
20 database that is certified by the department under par. (h). The Except as provided  
21 in 2011 Wisconsin Act .... (this act), section 30 (2) (b), the department shall determine  
22 that a disputed fee is unreasonable and order that a reasonable fee be paid if the  
23 disputed fee is above the mean fee for the health service procedure for which the  
24 disputed fee was charged, plus 1.4 1.2 standard deviations from that mean, as shown  
25 by data from a database that is certified by the department under par. (h), unless the

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1 health service provider proves to the satisfaction of the department that a higher fee  
2 is justified because the service provided in the disputed case was more difficult or  
3 more complicated to provide than in the usual case.

4 **SECTION 7.** 102.17 (4) of the statutes is amended to read:

5 102.17 (4) Except as provided in this subsection and s. 102.555 (12) (b), the  
6 right of an employee, the employee's legal representative, or a dependent to proceed  
7 under this section shall not extend beyond 12 years after the date of the injury or  
8 death or after the date that compensation, other than for treatment or burial  
9 expenses, was last paid, or would have been last payable if no advancement were  
10 made, whichever date is latest. In the case of occupational disease; a traumatic  
11 injury resulting in the loss or total impairment of a hand or any part of the rest of  
12 the arm proximal to the hand or of a foot or any part of the rest of the leg proximal  
13 to the foot, any loss of vision, or any permanent brain injury; or a traumatic injury  
14 causing the need for an artificial spinal disc or a total or partial knee or hip  
15 replacement, there shall be no statute of limitations, except that benefits or  
16 treatment expense for an occupational disease becoming due 12 years after the date  
17 of injury or death or last payment of compensation, other than for treatment or burial  
18 expenses, shall be paid from the work injury supplemental benefit fund under s.  
19 102.65 and in the manner provided in s. 102.66 and benefits or treatment expense  
20 for such a traumatic injury becoming due 12 years after that date shall be paid ~~by~~  
21 ~~the employer or insurer~~ from that fund and in that manner if the date of injury or  
22 death or last payment of compensation, other than for treatment or burial expenses,  
23 is before April 1, 2006. Payment of wages by the employer during disability or  
24 absence from work to obtain treatment shall be considered payment of compensation

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1 for the purpose of this section if the employer knew of the employee's condition and  
2 its alleged relation to the employment.

3 **SECTION 8.** 102.29 (1) of the statutes is renumbered 102.29 (1) (a) (intro.) and  
4 amended to read:

5 102.29 (1) (a) (intro.) The making of a claim for compensation against an  
6 employer or compensation insurer for the injury or death of an employee shall not  
7 affect the right of the employee, the employee's personal representative, or other  
8 person entitled to bring action, to make claim or maintain an action in tort against  
9 any other party for such injury or death, hereinafter referred to as a 3rd party; nor  
10 shall the making of a claim by any such person against a 3rd party for damages by  
11 reason of an injury to which ss. 102.03 to ~~102.64~~ 102.66 are applicable, or the  
12 adjustment of any such claim, affect the right of the injured employee or the  
13 employee's dependents to recover compensation. ~~The An~~ employer or compensation  
14 insurer ~~who shall have~~ that has paid or is obligated to pay a lawful claim under this  
15 chapter shall have the same right to make claim or maintain an action in tort against  
16 any other party for such injury or death. If the department pays or is obligated to  
17 pay a claim under s. 102.66 (1) or 102.81 (1), the department shall also have the right  
18 to maintain an action in tort against any other party for the employee's injury or  
19 death. However, each shall give to the other reasonable notice and opportunity to  
20 join in the making of such claim or the instituting of an action and to be represented  
21 by counsel.

22 (b) If a party entitled to notice cannot be found, the department shall become  
23 the agent of ~~such~~ that party for the giving of a notice as required in ~~this subsection~~  
24 par. (a) and the notice, when given to the department, shall include an affidavit  
25 setting forth the facts, including the steps taken to locate ~~such~~ that party. Each shall

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1 have an equal voice in the prosecution of ~~said~~ the claim, and any disputes arising  
2 shall be passed upon by the court before whom the case is pending, and if no action  
3 is pending, then by a court of record or by the department. If notice is given as  
4 provided in ~~this subsection~~ par. (a), the liability of the tort-feasor shall be  
5 determined as to all parties having a right to make claim, and, irrespective of  
6 whether or not all parties join in prosecuting ~~such~~ the claim, the proceeds of ~~such~~ the  
7 claim shall be divided as follows:

8 1. After deducting the reasonable cost of collection, one-third of the remainder  
9 shall in any event be paid to the injured employee or the employee's personal  
10 representative or other person entitled to bring action.

11 2. Out of the balance remaining after the deduction and payment specified in  
12 subd. 1., the employer, the insurance carrier, or, if applicable, the uninsured  
13 employers fund or the work injury supplemental benefit fund shall be reimbursed  
14 for all payments made by ~~it~~ the employer, insurance carrier, or department, or which  
15 ~~it~~ the employer, insurance carrier, or department may be obligated to make in the  
16 future, under this chapter, except that ~~it~~ the employer, insurance carrier, or  
17 department shall not be reimbursed for any payments made or to be made under s.  
18 102.18 (1) (bp), 102.22, 102.35 (3), 102.57, or 102.60.

19 3. Any balance remaining after the reimbursement described in subd. 2. shall  
20 be paid to the employee or the employee's personal representative or other person  
21 entitled to bring action.

22 (c) If both the employee or the employee's personal representative or other  
23 person entitled to bring action, and the employer, compensation insurer, or  
24 department, join in the pressing of said claim and are represented by counsel, the  
25 attorney fees allowed as a part of the costs of collection shall be, unless otherwise

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1 agreed upon, divided between ~~such~~ the attorneys for those parties as directed by the  
2 court or by the department.

3 (d) A settlement of ~~any a~~ 3rd-party claim shall be void unless said the  
4 settlement and the distribution of the proceeds ~~thereof is~~ of the settlement are  
5 approved by the court before whom the action is pending ~~and or~~, if no action is  
6 pending, then by a court of record or by the department.

7 **SECTION 9.** 102.35 (1) of the statutes is amended to read:

8 102.35 (1) Every employer and every insurance company that fails to keep the  
9 records or to make the reports required by this chapter or that knowingly falsifies  
10 such records or makes false reports shall pay a work injury supplemental benefit  
11 surcharge to the state of not less than \$10 nor more than \$100 for each offense. The  
12 department may waive or reduce a surcharge imposed under this subsection if the  
13 employer or insurance company that violated this subsection requests a waiver or  
14 reduction of the surcharge within 45 days after the date on which notice of the  
15 surcharge is mailed to the employer or insurance company and shows that the  
16 violation was due to mistake or an absence of information. A surcharge imposed  
17 under this subsection is due within ~~90~~ 30 days after the date on which notice of the  
18 surcharge is mailed to the employer or insurance company. Interest shall accrue on  
19 amounts that are not paid when due at the rate of 1 percent per month. All  
20 surcharges and interest payments received under this subsection shall be deposited  
21 in the fund established under s. 102.65.

22 **SECTION 10.** 102.43 (5) of the statutes is amended to read:

23 102.43 (5) (a) Temporary disability, during which compensation shall be  
24 payable for loss of earnings, shall include such period as may be reasonably required  
25 for training in the use of artificial members and appliances.

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1           **(b)** Except as provided in s. 102.61 (1g), temporary disability shall also include  
2 such period as the employee may be receiving instruction pursuant to under s. 102.61  
3 (1) or (1m). Temporary disability on account of receiving instruction of the ~~latter~~  
4 ~~nature~~ under s. 102.61 (1) or (1m), and not otherwise resulting from the injury, shall  
5 not be in excess of 80 weeks. Such 80-week limitation does not apply to temporary  
6 disability benefits under this section, the cost of tuition, fees, books, travel, or  
7 maintenance ~~expense~~ under s. 102.61 (1), or the cost of private rehabilitation  
8 counseling or rehabilitative training ~~costs~~ under s. 102.61 (1m) if the department  
9 determines that additional training is warranted. The necessity for additional  
10 training as authorized by the department for any employee shall be subject to  
11 periodic review and reevaluation.

12           **SECTION 11.** 102.43 (5) (c) of the statutes is created to read:

13           102.43 **(5)** (c) Compensation for temporary disability on account of receiving  
14 instruction under s. 102.61 (1) or (1m) shall not be reduced under sub. (2) on account  
15 of any wages earned for the first 24 hours worked by an employee during a week in  
16 which the employee is receiving that instruction. If an employee performs more than  
17 24 hours of work during a week in which the employee is receiving that instruction,  
18 all wages earned for hours worked in excess of 24 during that week shall be offset  
19 against the employee's average weekly wage in calculating compensation for  
20 temporary disability under sub. (2). An employee who is receiving compensation for  
21 temporary disability on account of receiving instruction under s. 102.61 (1) or (1m)  
22 shall report any wages earned during the period in which the employee is receiving  
23 that instruction to the insurance carrier or self-insured employer paying that  
24 compensation. This paragraph does not apply after the last day of the 24th month  
25 beginning after the effective date of this paragraph .... [LRB inserts date].

**SENATE BILL 409****SECTION 12**

1           **SECTION 12.** 102.43 (7) (b) of the statutes is amended to read:

2           102.43 (7) (b) An employee need not return to work at least 10 days preceding  
3 a renewed period of temporary disability to obtain benefits under sub. (5) (b) for  
4 rehabilitative training commenced more than 2 years after the date of injury.  
5 Benefits for rehabilitative training shall be made as provided in par. (c).

6           **SECTION 13.** 102.44 (1) (am) of the statutes is amended to read:

7           102.44 (1) (am) If the employee is receiving the maximum weekly benefits in  
8 effect at the time of the injury, the supplemental benefit for a week of disability  
9 occurring after May 6 1, 2010, shall be an amount that, when added to the regular  
10 benefit established for the case, shall equal \$582.

11           **SECTION 14.** 102.44 (1) (b) of the statutes is amended to read:

12           102.44 (1) (b) If the employee is receiving a weekly benefit that is less than the  
13 maximum benefit that was in effect on the date of the injury, the supplemental  
14 benefit for a week of disability occurring after May 6 1, 2010, shall be an amount  
15 sufficient to bring the total weekly benefits to the same proportion of \$582 as the  
16 employee's weekly benefit bears to the maximum in effect on the date of injury.

17           **SECTION 15.** 102.44 (1) (c) of the statutes is amended to read:

18           102.44 (1) (c) The Subject to any certificate filed under s. 102.65 (4), an  
19 employer or insurance carrier paying the supplemental benefits required under this  
20 subsection shall be entitled to reimbursement for each such case from the fund  
21 established by s. 102.65, commencing one year ~~from~~ after the date of the first such  
22 payment of those benefits and annually thereafter while such ~~those~~ payments  
23 continue. ~~Claims~~ To receive reimbursement under this paragraph, an employer or  
24 insurance carrier must file a claim for such ~~that~~ reimbursement shall with the

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1 department by no later than 12 months after the end of the year in which the  
2 supplemental benefits were paid and the claim must be approved by the department.

3 **SECTION 16.** 102.49 (1) of the statutes is amended to read:

4 102.49 (1) ~~When~~ Subject to any certificate filed under s. 102.65 (4), when the  
5 beneficiary under s. 102.46 or 102.47 (1) is the spouse or domestic partner under ch.  
6 770 of the deceased employee and is wholly dependent on the deceased employee for  
7 support, an additional death benefit shall be paid from the funds provided by sub.  
8 (5) for each child by their marriage or domestic partnership under ch. 770 who is  
9 living at the time of the death of the employee, and who is likewise wholly dependent  
10 ~~upon the~~ on the deceased employee for support. That payment shall commence at  
11 ~~the time that~~ when primary death benefit payments are completed or, if  
12 advancement of compensation has been paid, ~~at the time~~ when payments would  
13 normally have been completed. Payments shall continue at the rate of ~~10%~~ 10  
14 percent of the surviving parent's weekly indemnity until the child's 18th birthday.  
15 If the child is physically or mentally incapacitated, payments may be continued  
16 beyond the child's 18th birthday but the payments may not continue for more than  
17 a total of 15 years.

18 **SECTION 17.** 102.56 (1) of the statutes is amended to read:

19 102.56 (1) ~~If~~ Subject to sub. (2), if an employee is so permanently disfigured as  
20 to occasion potential wage loss due to the disfigurement, the department may allow  
21 such sum as it deems the department considers just as compensation ~~therefor~~ for the  
22 disfigurement, not exceeding the employee's average annual earnings as ~~defined in~~  
23 ~~s. 102.11~~. In determining the potential for wage loss due to the disfigurement and  
24 the sum awarded, the department shall take into account the age, education,  
25 training, and previous experience and earnings of the employee, the employee's

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1 present occupation and earnings, and likelihood of future suitable occupational  
2 change. Consideration for disfigurement allowance is confined to those areas of the  
3 body that are exposed in the normal course of employment. The department shall  
4 also take into account the appearance of the disfigurement, its location, and the  
5 likelihood of its exposure in occupations for which the employee is suited.

6 **SECTION 18.** 102.56 (2) of the statutes is amended to read:

7 102.56 (2) ~~Notwithstanding sub. (1), if~~ If an employee who claims  
8 compensation under ~~this section sub. (1)~~ returns to work for the employer who  
9 employed the employee at the time of the injury, ~~or is offered employment with that~~  
10 employer, at the same or a higher wage, ~~the employee may not be compensated unless~~  
11 ~~the employee shows that he or she probably has lost or will lose wages~~ department  
12 may not allow that compensation unless the employee suffers an actual wage loss  
13 due to the disfigurement.

14 **SECTION 19.** 102.59 (1) of the statutes is amended to read:

15 102.59 (1) ~~If an employee has~~ Subject to any certificate filed under s. 102.65  
16 (4), if at the time of injury ~~an employee has~~ permanent disability ~~which that~~ if it had  
17 resulted from ~~such that~~ injury would have entitled ~~him or her~~ the employee to  
18 indemnity for 200 weeks and, ~~if~~ as a result of ~~such that~~ injury, ~~the employee~~ incurs  
19 further permanent disability ~~which that~~ entitles ~~him or her~~ the employee to  
20 indemnity for 200 weeks, the employee shall be paid from the funds provided in this  
21 section additional compensation equivalent to the amount ~~which that~~ would be  
22 payable for said ~~that~~ previous disability if ~~it that previous disability~~ had resulted  
23 from ~~such that~~ injury or the amount ~~which that~~ is payable for said ~~that~~ further  
24 disability, ~~whichever is the lesser~~ less, ~~except that an employee may not be paid that~~  
25 additional compensation if the employee has already received compensation under

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1 this subsection. If said the previous and further disabilities result in permanent  
2 total disability, the additional compensation shall be in such amount as will complete  
3 the payments ~~which~~ that would have been due had said the permanent total  
4 disability resulted from ~~such~~ that injury. This additional compensation accrues  
5 from, and may not be paid to any person before, the end of the period for which  
6 compensation for permanent disability resulting from ~~such~~ the injury is payable by  
7 the employer, and shall be subject to s. 102.32 (6), (6m), and (7). No compromise  
8 agreement of liability for this additional compensation may provide for any lump  
9 sum payment.

10 **SECTION 20.** 102.61 (1) of the statutes is amended to read:

11 102.61 (1) Subject to subs. (1g) and (1m), an employee who is entitled to receive  
12 and has received compensation under this chapter, and who is entitled to and is  
13 receiving ~~instructions~~ instruction under 29 USC 701 to 797b, as administered by the  
14 state in which the employee resides or in which the employee resided at the time of  
15 becoming physically disabled, shall, in addition to other indemnity, be paid the  
16 actual and necessary ~~expenses of~~ costs of tuition, fees, books, and travel at the same  
17 ~~rate as is provided for state officers and employees under s. 20.916 (8)~~ required for  
18 the employee's rehabilitation training program and, if the employee receives  
19 ~~instructions~~ that instruction elsewhere than at the place of residence, the actual and  
20 necessary costs of maintenance, during rehabilitation, subject to the conditions and  
21 limitations specified in sub. (1r). The costs of travel under this subsection shall be  
22 paid at the same rate as is provided for state officers and employees under s. 20.916  
23 (8).

24 **SECTION 21.** 102.61 (1g) (b) of the statutes is amended to read:

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1           102.61 (1g) (b) If an employer offers an employee suitable employment as  
2 provided in par. (c), the employer or the employer's insurance carrier is not liable for  
3 temporary disability benefits under s. 102.43 (5) (b) or for the cost of tuition, fees,  
4 books, travel, and maintenance expenses under sub. (1). Ineligibility for  
5 compensation under this paragraph does not preclude an employee from receiving  
6 vocational rehabilitation services under 29 USC 701 to 797b if the department  
7 determines that the employee is eligible to receive those services.

8           **SECTION 22.** 102.61 (1m) (c) of the statutes is amended to read:

9           102.61 (1m) (c) The employer or insurance carrier shall pay the reasonable cost  
10 of any services provided for an employee by a private rehabilitation counselor under  
11 par. (a) and, subject to the conditions and limitations specified in sub. (1r) (a) to (c)  
12 and by rule, if the private rehabilitation counselor determines that rehabilitative  
13 training is necessary, the reasonable cost of the rehabilitative training program  
14 recommended by that counselor, including the cost of tuition, fees, books,  
15 maintenance, and travel at the same rate as is provided for state officers and  
16 employees under s. 20.916 (8). Notwithstanding that the department may authorize  
17 under s. 102.43 (5) (b) a rehabilitative training program that lasts longer than 80  
18 weeks, a rehabilitative training program that lasts 80 weeks or less is presumed to  
19 be reasonable.

20           **SECTION 23.** 102.61 (1m) (d) of the statutes is amended to read:

21           102.61 (1m) (d) If an employee receives services from a private rehabilitation  
22 counselor under par. (a) and later receives similar services from the department  
23 under sub. (1) without the prior approval of the employer or insurance carrier, the  
24 employer or insurance carrier is not liable for temporary disability benefits under s.  
25 102.43 (5) (b) or for tuition, fee, book, travel, and maintenance expenses costs under

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1 sub. (1) that exceed what the employer or insurance carrier would have been liable  
2 for under the rehabilitative training program developed by the private rehabilitation  
3 counselor.

4 **SECTION 24.** 102.61 (1r) (c) of the statutes is amended to read:

5 102.61 (1r) (c) The employee may not have ~~expenses of travel and~~ the costs of  
6 tuition, fees, books, travel, and maintenance paid under sub. (1) or the costs of  
7 private rehabilitation counseling and rehabilitative training paid under sub. (1m) on  
8 account of training for a period in excess of 80 weeks in all, except as provided in s.  
9 102.43 (5) (b).

10 **SECTION 25.** 102.64 (2) of the statutes is amended to read:

11 102.64 (2) Upon request of the department of administration, the attorney  
12 general shall appear on behalf of the state in proceedings upon claims for  
13 compensation against the state. ~~The~~ Except as provided in s. 102.65 (3), the  
14 department of justice shall represent the interests of the state in proceedings under  
15 s. 102.44 (1), 102.49, 102.59, 102.60, or 102.66. The department of justice may  
16 compromise claims in those proceedings, but the compromises are subject to review  
17 by the department of workforce development. Costs incurred by the department of  
18 justice in prosecuting or defending any claim for payment into or out of the work  
19 injury supplemental benefit fund under s. 102.65, including expert witness and  
20 witness fees but not including attorney fees or attorney travel expenses for services  
21 performed under this subsection, shall be paid from the work injury supplemental  
22 benefit fund.

23 **SECTION 26.** 102.65 (3) of the statutes is created to read:

24 102.65 (3) The department of workforce development may retain the  
25 department of administration to process, investigate, and pay claims under ss.

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1 102.44 (1), 102.49, 102.59, and 102.66. If retained by the department of workforce  
2 development, the department of administration may compromise a claim processed  
3 by that department, but a compromise made by that department is subject to review  
4 by the department of workforce development. The department of workforce  
5 development shall pay for the services retained under this subsection from the  
6 appropriation account under s. 20.445 (1) (t).

7 **SECTION 27.** 102.65 (4) of the statutes is created to read:

8 102.65 (4) The secretary shall monitor the cash balance in, and incurred losses  
9 to, the work injury supplemental benefit fund using generally accepted actuarial  
10 principles. If the secretary determines that the expected ultimate losses to the work  
11 injury supplemental benefit fund on known claims exceed 85 percent of the cash  
12 balance in that fund, the secretary shall consult with the council on worker's  
13 compensation. If the secretary, after consulting with the council on worker's  
14 compensation, determines that there is a reasonable likelihood that the cash balance  
15 in the work injury supplemental benefit fund may become inadequate to fund all  
16 claims under ss. 102.44 (1) (c), 102.49, 102.59, and 102.66, the secretary shall file  
17 with the secretary of administration a certificate attesting that the cash balance in  
18 that fund is likely to become inadequate to fund all claims under ss. 102.44 (1) (c),  
19 102.49, 102.59, and 102.66 and specifying one of the following:

20 (a) That payment of those claims will be made as provided in a schedule that  
21 the department shall promulgate by rule.

22 (b) A date after which payment of those claims will be reduced.

23 (c) A date after which no new claims under those provisions will be paid.

24 **SECTION 28.** 102.66 (1) of the statutes is amended to read:

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1           102.66 (1) ~~In the event that~~ Subject to any certificate filed under s. 102.65 (4),  
2           if there is an otherwise meritorious claim for occupational disease, or for a traumatic  
3           injury described in s. 102.17 (4) in which the date of injury or death or last payment  
4           of compensation, other than for treatment or burial expenses, is before April 1, 2006,  
5           and if the claim is barred solely by the statute of limitations under s. 102.17 (4), the  
6           department may, in lieu of worker's compensation benefits, direct payment from the  
7           work injury supplemental benefit fund under s. 102.65 of such compensation and  
8           such medical expenses as would otherwise be due, based on the date of injury, to or  
9           on behalf of the injured employee. The benefits shall be supplemental, to the extent  
10          of compensation liability, to any disability or medical benefits payable from any  
11          group insurance policy whose premium is paid in whole or in part by any employer,  
12          or under any federal insurance or benefit program providing disability or medical  
13          benefits. Death benefits payable under any such group policy do not limit the  
14          benefits payable under this section.

15           **SECTION 29.** 102.66 (2) of the statutes is amended to read:

16           102.66 (2) In the case of occupational disease, or of a traumatic injury described  
17           in s. 102.17 (4) in which the date of injury or death or last payment of compensation,  
18           other than for treatment for burial expenses, is before April 1, 2006, appropriate  
19           benefits may be awarded from the work injury supplemental benefit fund when the  
20           status or existence of the employer or its insurance carrier cannot be determined or  
21           when there is otherwise no adequate remedy, subject to the limitations contained in  
22           sub. (1).

23           **SECTION 30. Nonstatutory provisions.**

24           (1) REIMBURSEMENT OF SUPPLEMENTAL BENEFITS PAID BEFORE 2011.  
25           Notwithstanding section 102.44 (1) (c) of the statutes, as affected by this act, to

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1 receive reimbursement under that provision for supplemental benefits paid before  
2 2011, an employer or insurance carrier must file a claim for that reimbursement with  
3 the department of workforce development by no later than December 31, 2012.

4 (2) AUDIT OF HEALTH SERVICE FEE DISPUTE DATABASES. The department of  
5 workforce development shall conduct an audit of the health service fee databases  
6 certified by that department under section 102.16 (2) (h) of the statutes. The  
7 secretary of workforce development shall create a committee under section 15.04 (1)  
8 (c) of the statutes to determine the scope of that audit. The committee shall consist  
9 of one representative of employers, one representative of employees, one  
10 representative of the department of workforce development, and one representative  
11 who is a liaison from the health care community to the council on worker's  
12 compensation. Upon determining the scope of the audit, the committee shall report  
13 its findings, conclusions, and recommendations to the department of workforce  
14 development and the council on worker's compensation, after which the committee  
15 shall terminate its activities and cease to exist. If the audit is not commenced by the  
16 first day of the 7th month beginning after the effective date of this subsection, all of  
17 the following apply:

18 (a) *Permanent partial disability compensation amount.* Notwithstanding  
19 section 102.11 (1) (intro.) of the statutes, as affected by this act, the average weekly  
20 earnings for permanent partial disability for injuries occurring on or after January  
21 1, 2013, shall be not more than \$475, resulting in a maximum compensation rate of  
22 \$317.

23 (b) *Reasonableness of disputed health service fees.* Notwithstanding section  
24 102.16 (2) (d) of the statutes, as affected by this act, beginning on January 1, 2013,  
25 the department of workforce development shall determine that a disputed health

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1 service fee is reasonable and order that the disputed fee be paid if that fee is at or  
2 below the mean fee for the health service procedure for which the disputed fee was  
3 charged, plus 1.3 standard deviations from that mean, as shown by data from a  
4 database that is certified by that department under section 102.16 (2) (h) of the  
5 statutes, and shall determine that a disputed health service fee is unreasonable and  
6 order that a reasonable fee be paid if the disputed fee is above the mean fee for the  
7 health service procedure for which the disputed fee was charged, plus 1.3 standard  
8 deviations from that mean, as shown by data from such a database, unless the health  
9 service provider proves to the satisfaction of that department that a higher fee is  
10 justified because the service provided in the disputed case was more difficult or more  
11 complicated to provide than in the usual case.

12 (3) STUDY OF FUNDING OF PERMANENT TOTAL DISABILITY INCREASES. The secretary  
13 of workforce development shall create a committee under section 15.04 (1) (c) of the  
14 statutes to study methods of funding the cost of providing regular, periodic increases  
15 in the weekly indemnity for permanent total disability, if legislation providing for  
16 those increases were to be enacted. The study shall include methods of funding the  
17 cost of providing those increases for injured employees receiving that indemnity on  
18 the day before the effective date of that legislation. The committee shall include  
19 representatives of employers, employees, worker's compensation insurers  
20 authorized to do business in this state, and the department of workforce  
21 development. Upon completion of the study, the committee shall report its findings,  
22 conclusions, and recommendations to the department of workforce development and  
23 the council on worker's compensation, after which the committee shall terminate its  
24 activities and cease to exist.

**SECTION 31. Initial applicability.**

