CHAPTER 102

WORKER'S COMPENSATION

Cross-reference: See also ch. DWD 80, Wis. adm. code.

102.01 Definitions. (1) This chapter may be referred to as the "Worker's Compensation Act" and allowances, recoveries and liabilities under this chapter constitute "Worker's Compensation".

(2) In this chapter:

(a) "Commission" means the labor and industry review commission.

(ag) "Commissioner" means a member of the commission.

(am) "Compensation" means worker's compensation.

(ap) "Department" means the department of workforce development.

(bm) "General order" means such order as applies generally throughout the state to all persons, employments, places of employment or public buildings, or all persons, employments or places of employment or public buildings of a class under the jurisdiction of the department. All other orders of the department shall be considered special orders.

(c) "Injury" means mental[1] or physical harm to an employee caused by accident or disease, and also means damage to or destruction of artificial members, dental appliances, teeth, hearing aids and eyeglasses, but, in the case of hearing aids or eyeglasses, only if such damage or destruction resulted from accident which also caused personal injury entitling the employee to compensation therefor either for disability or treatment. [2]

(d) "Municipality" includes a county, city, town, village, school district, sewer district, drainage district and long-term care district and other public or quasi-public corporations.

(dm) "Order" means any decision, rule, regulation, direction, requirement or standard of the department, or any other determination arrived at or decision made by the department.

(e) "Primary compensation and death benefit" means compensation or indemnity for disability or death benefit, other than increased, double or treble compensation or death benefit.

(eg) "Religious sect" means a religious body of persons, or a division of a religious body of persons, who unite in holding certain special doctrines or opinions concerning religion that distinguish those persons from others holding the same general religious beliefs.

(em) "Secretary" means the secretary of workforce development.

(f) "Temporary help agency" means an employer who places its employee with or leases its employees to another employer who controls the employee's work activities and compensates the first employer for the employee's services, regardless of the duration of the services. [3]

(g) Except as provided in s. 102.555 with respect to occupational deafness, "time of injury", "occurrence of injury", or "date of injury" means:

1. In the case of accidental injury, the date of the accident which caused the injury.

2. In the case of disease, the date of disability or, if that date occurs after the cessation of all employment that contributed to the disability, the last day of work for the last employer whose employment caused disability. [4]

(gm) "Wisconsin compensation rating bureau" means the bureau provided for in s. 626.06.

(h) "Uninsured employer" means an employer that is in violation of s. 102.28 (2).

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[1]The definition of mental injury had included the phrase "if it arises from exposure to conditions or circumstances beyond those common to occupational or non-occupational life." This language was ambiguous and resulted in conflicting court interpretations. Therefore, this language was deleted by Wis. Act 179, effective April 1, 1988. The language as previously interpreted by the court in School District No. 1 v. ILHR Dept., 62 Wis.2d 370 (1974) is restored. This requires that a non-traumatic mental injury must have resulted from a situation of greater dimensions than the day-to-day emotional strain and tension all employees must experience.

[2] As to eyeglasses and hearing aids, damage or destruction must result from an accident which also causes personal injury entitling the employee to medical treatment or payment of compensation. If an employee merely slips and eyeglasses or hearing aids drop to the floor and break, but no personal injury results to the employee, there will be no payment for damage to eyeglasses or hearing aids.

[3] Leasing agencies that lease employees to other employers would be responsible for worker's compensation benefits in the same way that temporary help agencies are. An employee continues to be the employee of the original employer, though that employee may have been loaned or leased to another employer, if the original employer continues to retain at least some rights or obligations of the original employment contract such as payment of wages or the power to terminate the employee. This corrects the situation that can occur when employees leased to another employer are injured during the leasing period and the employers litigate who is responsible for the benefits while the employee waits for his or her compensation. This clarification also eliminates the double collection of premiums by insurance carriers on the wages of the employee from both the leasing agency and the employer to whom the employee is leased.

[4] Compensation benefits may be recovered for disability which occurs after the severance of the employer-employee relationship, even though there was neither wage loss, nor time loss during the time that the employee was in service.

(j) "Uninsured employers fund" means the fund established under s. 102.80 (1).

(jm) "Uninsured employer surcharge" means the surcharge under s. 102.85 (4).

(k) "Workweek" means a calendar week, starting on Sunday and ending on Saturday. [5]

History: 1975 c. 147 ss. 7 to 13, 54; 1975 c. 200; 1979 c. 89, 278; 1981 c. 92; 1983 a. 98, 189; 1985 a. 83; 1987 a. 179; 1989 a. 64; 1995 a. 27 ss. 3737 to 3741, 9130 (4); 1995 a. 117, 417; 1997 a. 3; 1999 a. 9, 14; 2001 a. 37; 2003 a. 139; 2007 a. 20.

In an occupational disease claim, the examiner may find the date of injury to be other than the last day of work. Royal-Globe Insurance Co. v. DILHR, 82 Wis. 2d 90, 260 N.W.2d 670 (1978).

An intentionally inflicted injury, unexpected and unforeseen by the injured party, is an accident under sub. (2) (c). Jenson v. Employers Mutual Casualty Co. 161 Wis. 2d 253, 468 N.W.2d 1 (1991).

Cessation of employment under sub. (2) (g) 2. does not require that the employee no longer be employed, but requires that the employee no longer be employed in the employment that contributed to the disability. If that is the case, the employer that caused the injury is responsible. North River Insurance Co. v. Manpower Temporary Services, 212 Wis. 2d 63, 568 N.W.2d 15 (Ct. App. 1997), 96-2000.

LIRC's determination of "scope of employment" is given great weight deference. Whether an agency's determination is given great weight depends on whether it has experience in interpreting a particular statutory scheme and not on whether it has ruled on the specific facts. Town of Russell Volunteer Fire Department v. LIRC, 223 Wis. 2d 723, 589 N.W.2d 445 (Ct. App. 1998), 98-0734.

Sub. (2) (g) sets the date of injury of an occupational disease, and s. 102.42 (1) provides that medical expenses incurred before an employee knows of the work-related injury are compensable. Read together, medical expenses in occupational disease cases are not compensable until the date of injury, but once the date is established all expenses associated with the disease, even if incurred before the date of injury, are compensable. United Wisconsin Insurance Co. v. LIRC, 229 Wis. 2d 416, 600 N.W.2d 186 (Ct. App. 1999), 97-3776.

Sub. (2) (g) 2. does not represent a comprehensive statement of a claimant's burden of proof nor does it abrogate the requirement of s. 102.03 (1) (e) that the claimant must prove that the injury arose out of employment. It merely sets out a mechanism for fixing the time, occurrence, or date of an injury for purposes of identifying the proper employer against whom a claim may be made. White v. LIRC, 2000 WI App 244, 239 Wis. 2d 505, 620 N.W.2d 442, 00-0855.

In the case of disease, the date of disability under sub. (2) (g) 2. was the date when the employee could no longer work, not when he first underwent an employer-required medical examination. Virginia Surety Co., Inc. v. LIRC, 2002 WI App 277, 258 Wis. 2d 665, 654 N.W.2d 306, 02-0031.

[5] This section was created by 2001 Wis. Act 37, effective January 1, 2002, and defines workweek as a calendar week starting on Sunday and ending on Saturday.

102.03 Conditions of liability. (1) Liability under this chapter shall exist against an employer only where the following conditions concur:

(a) Where the employee sustains an injury.

(b) Where, at the time of the injury, both the employer and employee are subject to the provisions of this chapter.

(c) 1. Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment.

2. Any employee going to and from his or her employment in the ordinary and usual way,[6] while on the premises of the employer, or while in the immediate vicinity of those premises if the injury results from an occurrence on the premises; any employee going between an employer's designated parking lot and the employer's work premises while on a direct route and in the ordinary and usual way; any volunteer fire fighter, first responder, emergency medical technician, rescue squad member, or diving team member while responding to a call for assistance, from the time of the call for assistance to the time of his or her return from responding to that call, including traveling to and from any place to respond to and return from that call, but excluding any deviations for private or personal purposes,[7] or any fire fighter or municipal utility employee responding to a call for assistance outside the limits of his or her city or village, unless that response is in violation of law, is performing service growing out of and incidental to employment.

3. An employee is not performing service growing out of and incidental to his or her employment while going to or from employment in a private or group or employer-sponsored car pool, van pool, commuter bus service, or other ride-sharing program in which the employee

[6] This extends coverage to injuries on a public street or sidewalk where injury occurs while the employee is on a direct route between the employer's designated parking lot after parking there and the employer's work premises.

[7] This amendment provides that volunteer firefighters, first responders, emergency medical technicians, rescue squad members and diving team members are in the course of employment for worker's compensation purposes while responding to calls from the time of the call to the time of return from the call, except for deviations for private and personal purposes. Created by 2009 Wis. Act 206, effective May 1, 2010.

participates voluntarily and the sole purpose of which is the mass transportation of employees to and from employment.[8] An employee is not performing service growing out of and incidental to employment while engaging in a program, event, or activity designed to improve the physical well-being of the employee, whether or not the program, event, or activity is located on the employer's premises, if participation in the program, event, or activity is voluntary and the employee receives no compensation for participation.[9]

4. The premises of the employer include the premises of any other person on whose premises the employee performs service.

5. To enhance the morale and efficiency of public employees in this state and attract qualified personnel to the public service, it is the policy of the state that the benefits of this chapter shall extend and be granted to employees in the service of the state or of any municipality therein on the same basis, in the same manner, under the same conditions, and with like right of recovery as in the case of employees of persons, firms or private corporations. Accordingly, the same considerations, standards, and rules of decision shall apply in all cases in determining whether any employee under this chapter, at the time of the injury, was performing service growing out of and incidental to the employee's employment. For the purposes of this subsection no differentiation shall be made among any of the classes of employers enumerated in s. 102.04 or of employees enumerated in s. 102.07; and no statutes, ordinances, or administrative regulations otherwise applicable to any employees enumerated in s. 102.07 shall be controlling.

(d) Where the injury is not intentionally self-inflicted.

(e) Where the accident or disease causing injury arises out of the employee's employment.

(f) Every employee whose employment requires the employee to travel shall be deemed to be performing service growing out of and incidental to the employee's employment at all times while on a trip, except when engaged in a deviation for a private or personal purpose. Acts reasonably necessary for living or incidental thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employee's employment.[10]

(g) Members of the state legislature are covered by this chapter when they are engaged in performing their duties as state legislators including:

1. While performing services growing out of and incidental to their function as legislators;

2. While performing their official duties as members of committees or other official bodies created by the legislature;

3. While traveling to and from the state capital to perform their duties as legislators; and

4. While traveling to and from any place to perform services growing out of and incidental to their function as legislators, regardless of where the trip originated, and including acts reasonably necessary for living but excluding any deviations for private or personal purposes except that acts reasonably necessary for living are not deviations.

(2) Where such conditions exist the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employee of the same employer and the worker's compensation insurance carrier. This section does not limit the right of an employee to bring action against any coemployee for an assault intended to cause bodily harm, or against a coemployee for negligent operation of a motor vehicle not owned or leased by the employer, or against a

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[8] If an employer assists in organizing or financing a carpool or vanpool, the employer is not liable for injuries incurred going to or coming from work unless there is a specific agreement for transportation as part of the contract of hire.

[9] This excludes injuries to employees engaged in well-being programs if the participation is voluntary and uncompensated. This subdivision was amended by 2005 Wis. Act 172, effective April 1, 2006, to include well-being activities and events in addition to programs.

[10] Accident or disease must arise out of a hazard of employment, and accidents and diseases not caused by reason of incidents of service are not to be compensated. Injuries, whether accidental or otherwise, must therefore arise out of the business circumstances of the trip and not merely occur because of a personal condition or disability bearing no relation whatsoever to service.

coemployee of the same employer to the extent that there would be liability of a governmental unit to pay judgments against employees under a collective bargaining agreement or a local ordinance.[11]

(3) Providing or failing to provide any safety inspection or safety advisory service incident to a contract for worker's compensation insurance or to a contract for safety inspections or safety advisory services does not by itself subject an insurer, an employer, an insurance service organization, a union, a union member or any agent or employee of the insurer, employer, insurance service organization or union to liability for damages for an injury resulting from providing or failing to provide the inspection or services.

(4) The right to compensation and the amount of the compensation shall in all cases be determined in accordance with the provisions of law in effect as of the date of the injury except as to employees whose rate of compensation is changed as provided in ss. 102.43 (7) and 102.44 (1) and (5) and employees who are eligible to receive private rehabilitative counseling and rehabilitative training under s. 102.61 (1m) [12] and except as provided in s. 102.555 (12) (b).

(5) If an employee, while working outside the territorial limits of this state, suffers an injury on account of which the employee, or in the event of the employee's death, his or her dependents, would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee, or in the event of the employee's death resulting from such injury, the dependents of the employee, shall be entitled to the benefits provided by this chapter, if at the time of such injury any of the following applies:

(a) His or her employment is principally localized in this state.

(b) He or she is working under a contract of hire made in this state in employment not principally localized in any state.

(c) He or she is working under a contract made in this state in employment principally localized in another state whose worker's compensation law is not applicable to that person's employer.

(d) He or she is working under a contract of hire made in this state for employment outside the United States.

(e) He or she is a Wisconsin law enforcement officer acting under an agreement authorized under s. 175.46.

History: 1971 c. 148, 307, 324; 1975 c. 147 ss. 15, 54; 1977 c. 195, 272, 418; 1979 c. 278; 1981 c. 92; 1983 a. 98; 1985 a. 83; 1993 a. 49, 370, 490, 492; 2005 a. 172; 2007 a. 185; 2009 a. 206.

Committee Note, 1971: The Wisconsin Supreme Court in the case of Halama v. ILHR Department, 48 Wis. 2d 328 (1970), suggested that consideration be given to extending coverage to an employee who is injured while going to or from work on a direct route between two portions of the employer's premises, i.e., parking lot and work premises. [Bill 371-A]

The department correctly found on a claim for death benefits for an employee murdered while she alone remained in an office that had been vacated by all other employees, that the accident arose out of the deceased's employment since the isolated work environment in which the deceased worked constituted a zone of special danger, and hence the positional risk doctrine was applicable. Allied Manufacturing, Inc. v. DILHR, 45 Wis. 2d 563, 173 N.W.2d 690 (1970).

The holding in *Brown v. Ind. Comm*, 9 Wis. 2d 555, that causation legally sufficient to support compensation does not require a showing of strain or exertion greater than that normally required by the employee's work efforts, was not intended to preclude a doctor determining causation, from considering whether the employee was engaged in usual work at the time of injury. However, the doctor should not automatically conclude each time an employee is injured while performing a task previously performed on a regular basis that the injury was caused by a preexisting condition rather than employment. Pitsch v. DILHR, 47 Wis. 2d 55, 176 N.W.2d 390 (1970).

When a herniated disc was diagnosed within a few days after the claimed injury, the evidence did not justify the department's finding that the employee did not meet the burden of proof. Erickson v. DILHR, 49 Wis. 2d 114, 181 N.W.2d 495 (1970).

The department cannot divide liability for compensation among successive employers for the effects of successive injuries in the absence of evidence to sustain a finding that the disability arose from the successive injuries, nor can it assess all liability against one of several employers nor divide liability equally among each of several employers if there is no evidence to support a finding that the injury or injuries contributed to the disability in that manner. Semons Department Store v. DILHR, 50 Wis. 2d 518, 184 N.W.2d 871 (1971).

[11] The exceptions permit the right of recovery against a fellow employee of the same employer who was negligent in the operation of a motor vehicle owned by or leased to the fellow employee. The exception does not apply to a vehicle owned or leased by the employer. The employee has a right of recovery against a fellow employee of the same employer for an assault intended to cause bodily harm. The exception also extends to governmental units if a collective bargaining agreement or a local ordinance provides for payment.

[12] This allows employees who cannot be served by the DVR to receive rehabilitative training under s. 102.61(1m) regardless of the date of injury.

While susceptibility to further injury does not necessarily establish a permanent disability under the "as is" doctrine, an employee's predisposition to injury does not relieve a present employer from liability if the employee becomes injured due to the employment even though the injury may not have caused disability in another person. Semons Department Store v. DILHR, 50 Wis. 2d 518, 184 N.W.2d 871 (1971).

A salesperson on a trip who deviated to the extent of spending several hours in a tavern before being killed on his ordinary route home may have been in the course of employment, in which case his estate would be entitled to compensation. Lager v. DILHR, 50 Wis. 2d 651, 185 N.W.2d 300 (1971).

A wife cannot assert a separate and independent cause of action against her husband's employer for loss of consortium due to injuries sustained by the husband in an industrial accident covered by this chapter. Rosencrans v. Wisconsin Telephone Co. 54 Wis. 2d 124, 194 N.W.2d 643 (1972).

A commission finding that the deceased was performing services when killed while walking on a Milwaukee street at 3 a.m. while intoxicated was sustained. Phillips v. DILHR, 56 Wis. 2d 569, 202 N.W.2d 249 (1972).

Members of a partnership are employers of the employees of the partnership. An employee cannot bring a 3rd-party action against a member of the employing partnership. Candler v. Hardware Dealers Mutual Insurance Co. 57 Wis. 2d 85, 203 N.W.2d 659 (1973).

The "exclusive remedy" provision in sub. (2) does not prevent an action for personal injuries against a supervisory coemployee on the basis of negligence by common law standards. It makes no difference that the coemployee is brought in by means of a 3rd-party complaint. Lampada v. State Sand & Gravel Co. 58 Wis. 2d 315, 206 N.W.2d 138 (1973).

A salesperson, employed on a part-salary and part-commission basis, who travelled each day from his home, servicing and soliciting orders within a prescribed territory, using a delivery truck furnished by his employer whose office he was not required to report to, was performing services incidental to employment when he fell on his icy driveway going to his delivery truck to leave for his first call. Black River Dairy Products, Inc. v. DILHR, 58 Wis. 2d 537, 207 N.W.2d 65 (1973).

Since the decedent's employment status for services rendered in this state was substantial and not transitory, and the relationship was not interrupted by cessation of work for the Wisconsin employer, the department erred when it predicated its denial of benefits on the employer's conflicting testimony that during the year in which the employee met his death his working time in Wisconsin had been reduced to 10%. Simonton v. DILHR, 62 Wis. 2d 112, 214 N.W.2d 302 (1974).

Under sub. (1) (f), no purpose of the employer was served by an extended deviation to test road conditions in bad weather to determine if visiting a boyfriend or going on a hunting trip the next day would be feasible, nor was it a reasonably necessary for living or incidental thereto. Hunter v. DILHR, 64 Wis. 2d 97, 218 N.W.2d 314 (1974).

Under the 4-element test for deciding whether a worker was a loaned or special employee, the 1st element, actual or implied consent to work for the special employer, was negated by the existence of a work order providing that the plaintiff would not be employed by the special employer for a period of 90 days, and by the absence of any other evidence indicating consent; hence, the plaintiff was a business invitee and not an employee at the time of the accident. Nelson v. L. & J. Press Corp. 65 Wis. 2d 770, 223 N.W.2d 607 (1974).

Nontraumatically caused mental injury is compensable only if it results from a situation of greater dimensions than the day-to-day mental stresses and tensions that all employees must experience. Swiss Colony, Inc. v. DILHR, 72 Wis. 2d 46, 240 N.W.2d 128 (1976).

A provider of medical services to an employee did not have a cause of action under the worker's compensation act against the employer when the employer denied liability and compromised an employee's claim. La Crosse Lutheran Hospital v. Oldenburg, 73 Wis. 2d 71, 241 N.W.2d 875 (1976).

The doctrines of required travel, dual purpose, personal comfort, and special mission are discussed. Sauerwein v. DILHR, 82 Wis. 2d 294, 262 N.W.2d 126 (1978).

The personal comfort doctrine did not apply to an employee while going to lunch off of the employer's premises and not during specific working hours; a denial of benefits for an injury received while eating lunch off the premises did not deny equal protection. Marmolejo v. DILHR, 92 Wis. 2d 674, 285 N.W.2d 650 (1979).

The presumption in favor of traveling employees does not modify the requirements for employer liability. Goranson v. DILHR, 94 Wis. 2d 537, 289 N.W.2d 270 (1980).

That sub. (2) denies 3rd-party tort-feasors the right to a contribution action against a negligent employer who was substantially more at fault does not render the statute unconstitutional. Mulder v. Acme-Cleveland Corp. 95 Wis. 2d 173, 290 N.W.2d 276 (1980).

Use of the parking lot is a prerequisite for coverage under sub. (1) (c) 1. [now (1) (c) 2.]. Injury on a direct path between the lot and the work premises is insufficient. Jaeger Baking Co. v. Kretschmann, 96 Wis. 2d 590, 292 N.W.2d 622 (1980).

Sub. (2) is constitutional. Oliver v. Travelers Insurance Co. 103 Wis. 2d 644, 309 N.W.2d 383 (Ct. App. 1981).

The provision by an employer of alleged negligent medical care to an employee injured on the job by persons employed for that purpose did not subject the employer to tort liability for malpractice. Jenkins v. Sabourin, 104 Wis. 2d 309, 311 N.W.2d 600 (1981).

Repeated work-related back trauma was compensable as an occupational disease. Shelby Mutual Insurance Co. v. DILHR, 109 Wis. 2d 655, 327 N.W.2d 178 (Ct. App. 1982).

Injury due to horseplay was compensable. The "positional risk" doctrine applied. That doctrine provides that an accident arises out of employment when the connection between employment and the accident is such that the obligations of the employment place the employee in the particular place at the time the employee is injured by a force not personal to him or her. Bruns Volkswagen, Inc. v. DILHR, 110 Wis. 2d 319, 328 N.W.2d 886 (Ct. App. 1982).

When an employee who witnessed an injury to another was an active work-related participant in the tragedy, resulting nontraumatic psychic injury was compensable. International Harvester v. LIRC, 116 Wis. 2d 298, 341 N.W.2d 721 (Ct. App. 1983).

The "horseplay" rule barred recovery when the decedent jokingly placed his head inside a mold compression machine and accidentally started it. Nigbor v. DILHR, 115 Wis. 2d 606, 340 N.W.2d 918 (Ct. App. 1983); aff'd 120 Wis. 2d 375, 355 N.W.2d 532 (1984).

An employee injured by machinery manufactured by a corporation that had merged with the employer prior to the

accident could recover in tort against the employer under the "dual persona" doctrine. Schweiner v. Hartford Accident & Indemnity Co. 120 Wis. 2d 344, 354 N.W.2d 767 (Ct. App. 1984).

Under the "positional risk" doctrine, the murder of an employee by a coemployee off work premises was an injury arising out of employment. Applied Plastics, Inc. v. LIRC, 121 Wis. 2d 271, 359 N.W.2d 168 (Ct. App. 1984).

Worker's compensation provides the exclusive remedy for injuries sustained as the result of a company doctor's negligence. Franke v. Durkee, 141 Wis. 2d 172, 413 N.W.2d 667 (Ct. App. 1987).

The "dual persona" doctrine is adopted, replacing the "dual capacity" doctrine. A 3rd-party may recover from an employer only when the employer has operated in a distinct persona as to the employee. Henning v. General Motors Assembly, 143 Wis. 2d 1, 419 N.W.2d 551 (1988).

The legal distinction between a corporation/employer and a partnership/landlord that leased the factory to the corporation, although both entities were composed of the same individuals, eliminated the partners' immunity as individuals under the exclusivity doctrine for negligence in maintaining the leased premises. Couillard v. Van Ess, 152 Wis. 2d 62, 447 N.W.2d 391 (Ct. App. 1989).

The injured employee, and not an injuring coemployee, must have been acting within the scope of employment at the time of injury. Jenson v. Employers Mutual Casualty Co. 161 Wis. 2d 253, 468 N.W.2d 1 (1991).

An assault under sub. (2) must be more than verbal; it must be physical. Jenson v. Employers Mutual Casualty Co. 161 Wis. 2d 253, 468 N.W.2d 1 (1991).

A parent corporation can be liable as a 3rd-party tortfeasor to an employee of a subsidiary when the parent negligently undertakes to render services to the subsidiary that the parent should have recognized were necessary for the protection of the subsidiary's employees. Miller v. Bristol-Myers, 168 Wis. 2d 863, 485 N.W.2d 31 (1992).

A compromise of a worker's compensation claim based on an allegation that an injury was job related precluded the claimant from pursuing a discrimination claim against the same employer on the theory that the injury was not job related. Marson v. LIRC, 178 Wis. 2d 118, 503 N.W.2d 582 (Ct. App. 1993).

A coemployee of the plaintiff who closed a car door on the plaintiff's hand was not engaged in the "operation of a motor vehicle" under sub. (2). Hake v. Zimmerlee, 178 Wis. 2d 417, 504 N.W.2d 411 (Ct. App. 1993).

A corporation's president who purchased and leased a machine to the corporation as an individual held a dual persona and was subject to tort liability. Rauch v. Officine Curioni, S.P.A. 179 Wis. 2d 539, 508 N.W.2d 12 (Ct. App. 1993).

This section does not bar an employee from seeking arbitration under a collective bargaining agreement to determine whether termination following an injury violated the agreement. This section only excludes tort actions for injuries covered by the act. County of Lacrosse v. WERC, 182 Wis. 2d 15, 513 N.W.2d 708 (1994).

A contract ''made in this state" under sub. (5) (b) is determined by where the contact was accepted. A contract accepted by telephone is made where the acceptor speaks. Horton v. Haddow, 186 Wis. 2d 174, 519 N.W.2d 736 (Ct. App. 1994).

Settlement of an employee's worker's compensation claim for a work related injury precluded the assertion of the employee's claim that she was entitled to leave for the injury under the Family Medical Leave Act, s. 103.10. Finell v. DILHR, 186 Wis. 2d 187, 519 N.W.2d 731 (Ct. App. 1994).

Employer payment of travel expenses does not alone render commuting a part of employment subject to coverage. When travel is a substantial part of employment and the employer provides a vehicle under its control and pays costs, coverage may be triggered. Doering v. LIRC, 187 Wis. 2d 471, 523 N.W.2d 142 (Ct. App. 1994).

Whether physical contact of a sexual nature was an assault by a coemployee not subject to the exclusive remedy provision of sub. (2) is a question of fact. A reasonable juror could conclude that sexual conduct could be so offensive that a reasonable person would have understood that physical injury such as loss of sleep, weight loss, or ulcers was substantially certain to follow. West Bend Mutual Insurance Co. v. Berger, 192 Wis. 2d 743, 531 N.W.2d 636 (Ct. App. 1995).

An employee's claims of defamation by an employer are preempted by this section. Claims for tortious interference with contract are not for injuries covered by the worker's compensation act and are not precluded. Wolf v. F & M Banks, 193 Wis. 2d 439, 534 N.W.2d 877 (Ct. App. 1995).

Nothing in this chapter precludes an employer from agreeing with employees to continue salaries for injured workers in excess of worker's compensation benefits. Excess payments are not worker's compensation and may be conditioned on the parties' agreement. City of Milwaukee v. DILHR, 193 Wis. 2d 626, 534 N.W.2d 903 (Ct. App. 1995).

A waiver of employer immunity from suit under this section may be made by an express agreement of indemnification. Schaub v. West Bend Mutual, 195 Wis. 2d 181, 536 N.W.2d 123 (Ct. App. 1995), 94-2174.

If an employer injures an employee through intentional sexual harassment, the injury is not an accident under sub. (1) (e) and not subject to the exclusivity provision of sub. (2). Lentz v. Young, 195 Wis. 2d 457, 536 N.W.2d 451 (Ct. App. 1995), 94-3335.

An employee must prove unusual stress in order to receive benefits for a nervous disability that resulted from emotional stress. Milwaukee v. LIRC, 205 Wis. 2d 255, 556 N.W.2d 340 (Ct. App. 1996), 95-0541.

An attack that occurs during employment arising from a personal relationship outside the employment arises out of the employment if employment conditions contribute to the attack. Emotional injury from harassing phone calls by an ex-spouse to the employee at her place of work, after her employer unwittingly gave out her phone number, was an injury in the course of employment. Weiss v. City of Milwaukee, 208 Wis. 2d 95, 559 N.W.2d 558 (1997), 94-0171.

The elements of proof placed on a claimant alleging physical injury as a result of emotional stress in the workplace requires that work activity precipitate, aggravate, or accelerate beyond normal progression a progressively deteriorating or degenerative condition. Unlike emotional injury from stress, showing "unusual stress" is not required. UPS v. Lust, 208 Wis. 2d 306, 560 N.W.2d 301 (Ct. App. 1997), 96-0137.

The exclusive remedy provision in s. 102.03 (2) does not bar a complainant whose claim is covered by worker's compensation from pursuing an employment discrimination claim under the Fair Employment Act, subch. II of ch. 111. Byers v. LIRC, 208 Wis. 2d 388, 561 N.W.2d 678 (1997), 95-2490.

An employee terminated for misrepresenting his or her medical condition while receiving disability benefits for a

concededly work-related injury continues to be entitled to benefits. Brakebush Brothers, Inc. v. LIRC, 210 Wis. 2d 623, 563 N.W.2d 512 (1997), 95-2586.

A work-related injury that plays any role in a second injury is properly considered a substantial factor in the reinjury. To find a work-related injury not a factor in a second injury, it must be found that the claimant would have suffered the same injury, to the same extent, despite the first injury. New symptoms alone do not suggest an unrelated second injury. Lange v. LIRC, 215 Wis. 2d 561, 573 N.W.2d 856 (Ct. App. 1997), 97-0865.

The *Seaman* loaned employee test is a 3-element test that is often miscast because the *Seaman* court indicated that there are 4 "vital questions" that must be answered. The 3 elements are: 1) consent by the employee; 2) entry by the employee upon work for the special employer; and 3) power of the special employer to control details of the work. The distinction between employee consent to perform certain acts and consent to enter into a new employment relationship is important. Borneman v. Corwyn Transport, Ltd. 219 Wis. 2d 346, 580 N.W.2d 253 (1998), 96-2511.

Under sub. (1) (f), there is a presumption that a travelling employee performs services incidental to employment at all times on a trip. The burden of proving a personal deviation on the trip is on the party asserting the deviation. Recreational activities may be considered a usual and proper part of the trip but do not always fit the presumption. CBS, Inc. v. LIRC, 219 Wis. 2d 564, 579 N.W.2d 668 (1998), 96-3707.

LIRC's determination of "scope of employment" is given great weight deference. Whether any agency's determination is given great weight depends on whether it has experience in interpreting a particular statutory scheme and not on whether it has ruled on the specific facts. Town of Russell Volunteer Fire Department v. LIRC, 223 Wis. 2d 723, 589 N.W.2d 445 (Ct. App. 1998), 98-0734.

A compensable injury must arise out of employment, which refers to the causal origin of the injury, and occur while the employee performs a service growing out of and incidental to employment, which refers to the time, place, and circumstances of the injury. Ide v. LIRC, 224 Wis. 2d 159, 589 N.W.2d 363 (1999), 97-1649.

Intentional harm to an employee is an "accident " subject to this chapter if caused by acts of a coemployee, but not if caused by acts of an employer. Intentionally self-inflicted injury is not subject to this chapter, but death by suicide is not necessarily "intentionally self-inflicted" and is subject to this chapter if the suicide results from a work-related injury without an independent intervening cause. Cohn v. Apogee, Inc. 225 Wis. 2d 815, 593 N.W.2d 921 (Ct. App. 1999), 97-3817.

Sub. (1) (f) does not establish a bright line rule that if a travelling employee stays over past the conclusion of a business part of a trip, there is a personal deviation. An employee is not required to seek immediate seclusion in a hotel and to remain away from human beings at the risk of being charged with deviating from employment. Wisconsin Electric Power Co. v. LIRC, 226 Wis. 2d 778, 595 N.W.2d 23 (1999), 97-2747.

Injuries did not arise out of employment when the injured party was injured while collecting a paycheck as a matter of personal convenience. Secor v. LIRC, 2000 WI App 11, 232 Wis. 2d 519, 606 N.W.2d 175, 99-0123.

An employee's claim under s. 134.01 against fellow employees for injury to reputation and profession was preempted by this section. Mudrovich v. Soto, 2000 WI App 174, 238 Wis. 2d 162, 617 N.W.2d 242, 99-1410.

Under sub. (2), recovery of compensation is the exclusive remedy against a worker's compensation carrier and the carrier's agents. Walstrom v. Gallagher Bassett Services, Inc. 2000 WI App 247, 239 Wis. 2d 473, 620 N.W.2d 223, 00-1334.

It was reasonable for LIRC to hold that an employee had temporarily abandoned his job and was not performing services incidental to employment under sub. (1) (c) 1. when he left the workplace to seek medical attention for an immediate need that was not related to his employment, even though intending to return. Fry v. LIRC, 2000 WI App 239, 239 Wis. 2d 574, 620 N.W.2d 449, 00-0523.

Whether a traveling employee's multiple drinks at a tavern was a deviation was irrelevant when the employee was injured while engaged in a later act reasonably necessary to living. Under s. 102.58, intoxication does not defeat a worker's compensation claim but only decreases the benefits. Heritage Mutual Insurance Co. v. Larsen, 2001 WI 30, 242 Wis. 2d 47, 624 N.W.2d 129, 98-3577.

Under the private errand doctrine, if a person in authority over the employee asks the employee to perform a service for the personal benefit of the employer or the employee's superior and the employee is injured while performing the task, the injury grew out of and was incidental to employment unless the request is clearly unauthorized. Begel v. LIRC, 2001 WI App 134, 246 Wis. 2d 345, 631 N.W.2d 220, 00-1875.

Under the "dual persona" doctrine, the employer's second role must be so unrelated to its role as an employer that it constitutes a separate legal person. St. Paul Fire & Marine Insurance Co. v. Keltgen, 2003 WI App 53, 260 Wis. 2d 523, 659 N.W.2d 906, 02-1249.

When one company was the injured employee's employer on the date of the injury, but another company contracted to become the employer retroactive to a date prior to the injury, the former and its insurer were the responsible for providing benefits under ch. 102. Epic Staff Management, Inc. v. LIRC, 2003 WI App 143, 266 Wis. 2d 369, 667 N.W.2d 765, 02-2310.

Under the last exception in sub. (2), an employee who receives worker's compensation benefits may also file suit against a coemployee when a governmental unit is obligated to pay judgments against that employee pursuant to a collective bargaining agreement or a local ordinance. Keller v. Kraft, 2003 WI App 212, 267 Wis. 2d 444, 671 N.W.2d 361, 02-3377.

A claim of negligent hiring, training, and supervision against an employer for injuries caused by a sexual assault committed by a coemployee is precluded by the exclusivity provision in sub. (2). This chapter's purpose, history, and application demonstrate that the court is not a proper authority to create a public policy exception to the exclusivity provision. Peterson v. Arlington Hospitality Staffing, Inc. 2004 WI App 199, 276 Wis. 2d 746, 689 N.W.2d 61, 03-2811.

A Labor and Industry Review Commission's (LIRC) determination that an employee who sustained a knee injury while playing softball during a paid break period deserved worker's compensation benefits was reasonable. LIRC reasonably relied upon a treatise that holds that recreational activities are within the course of employment when they have gone on long enough to become an incident of employment. E. C. Styberg Engineering v. LIRC, 2005 WI App 20, 278 Wis. 2d 540, 692 N.W.2d 322, 04-1039.

A state session law that was never adopted by the common council or any other local legislative body as an ordinance, but was numbered and reprinted in the Milwaukee City Charter because it was not a local ordinance under sub. (2). Keller v

Kraft, 2005 WI App 102, 381 Wis. 2d 784, 698 N.W.2d 843, 04-1315.

When two employees, who each work for separate temporary help agencies are both placed with the same client of the temporary help agencies, sub. (2) does not prevent the employee who is injured by the conduct of the other employee from suing the latter's temporary help agency under a theory of *respondeat superior*. Warr v. QPS Companies, 2007 WI App 14, 298 Wis. 2d 440, 728 N.W.2d 39, 06-0208.

The exception to coemployee immunity due to negligent operation of a vehicle in sub. (2) must be narrowly construed. The distinction between operation and maintenance or repairs should apply in the context of the exception. When the action under consideration is undertaken to service or repair a vehicle, and the condition of the vehicle is such that it could not then be driven on a public roadway, the action does not constitute operation of a motor vehicle. McNeil v. Hansen, 2007 WI 56, 300 Wis. 2d 358, 731 N.W.2d 273, 05-0423.

An injured employee was entitled to temporary total disability (TTD) benefits after being terminated for violating plant safety rules while assigned to light duty work while within his healing period and without having regained the use of a hand. The employee suffered a wage loss while his injury limited his ability to work, meeting the statutory criteria for TTD. This chapter contains no exception to liability for an injured employee who is subsequently terminated, even for good cause. Emmpak Foods, Inc. v. LIRC, 2007 WI App 164, 303 Wis. 2d 771, 737 N.W.2d 60, 06-0729.

Wisconsin's worker's compensation jurisprudence clearly recognizes that an in-state injury in the course of employment will give rise to coverage under the act. When an out-of-state employer sends an out-of-state employee to Wisconsin and the employee is injured or killed in Wisconsin in the course of employment, Wisconsin's act is applicable. Therefore, a coemployee has no liability for the employee's death and the coemployee's insurers were properly dismissed from the case. state of Torres v. Empire Fire and Marine Insurance Company, 2008 WI App 113, 313 Wis. 2d 371, 756 N.W.2d 662, 07-1519.

The negligent operation of a motor vehicle exception to the exclusive remedy provision in sub. (2) did not apply to the incorrect placement of a vehicle on a hoist for repairs. The alleged negligence here was the way the vehicle was positioned on the hoist, which is independent of how the vehicle was operated. Under any definition of operation, the defendant's manipulation of or control over the vehicle, its movement, or its instruments was not negligent in and of itself. Kuehl v. Sentry Select Insurance Company, 2009 WI App 38, 316 Wis. 2d 506, 765 N.W.2d 860, 08-1681.

When an employee was required to report to a job site not owned or controlled by the employer to render services to a customer and the making of the journey was not part of the service for which the employee was paid, there was nothing to distinguish the employee's regular commute to work from that of any employees who leave their home to travel to their place of employment where the workday begins. The employee was not a traveling employee under sub. (1) (f). The travel contemplated by sub. (1) (f) must be something more and something different than a daily commute to or from work at an established job site. McRae v. Porta Painting, Inc. 2009 WI App 89, 320 Wis. 2d 178, 769 N.W.2d 74, 08-1946.

The exclusive remedy provision does not bar a ship owner from asserting a right to indemnification against the employer of the injured worker even though he has been paid compensation. Bagrowski v. American Export Isbrantsen Lines, Inc. 440 F.2d 502 (1971).

Emotional distress injury due to sexual harassment was exclusively compensable under this section. Zabkowicz v. West Bend Co., Div. Dart Industries, 789 F.2d 540 (1986).

When 2 employees left their place of employment to fight each other, neither was acting within the scope of employment. There was no cause of action against the employer under ch. 102 or tort or agency law. Johnson v. Hondo, Inc. 125 F.3d 408 (1997).

Sexual harassment was an accident under sub. (1) (e) and subject to the exclusivity provision of sub. (2). *Lentz,* 195 Wis. 2d 457, is distinguished. Hibben v. Nardone, 137 F.3d 480 (1998).

A 3rd-party was required to pay 95% of the damages even though only 25% negligent because an employer was shielded by sub. (2). Schuldies v. Service Machine Co. 448 F. Supp. 1196 (1978).

The plaintiff was a special employee of a 3rd-party defendant and a 3rd-party action was barred by the exclusivity provisions of this section. Simmons v. Atlas Vac Mach. Co. 493 F. Supp. 1082 (1980).

Although the employer of an injured employee was found to be at fault, a manufacturer who was also found to be at fault was not entitled to contribution from the employer. Ladwig v. Ermanco, Inc. 504 F. Supp. 1229 (1981).

Unauthorized sexual touching did not constitute an assault intended to cause bodily harm under sub. (2). Hrabak v. Marquip, Inc. 798 F. Supp. 550 (1992).

The exclusivity provision of the worker's compensation act does not bar a claim for invasion of privacy under s. 895.50. Marino v. Arandell Corp. 1 F. Supp. 2d 947 (1998).

Worker's Compensation Act No Longer Protects Against Employment Discrimination Claims. Skinner. Wis. Law. March 1998.

102.04 Definition of employer. (1) The following shall constitute employers subject to the provisions of this chapter, within the meaning of s. 102.03:

(a) The state, each county, city, town, village, school district, sewer district, drainage district, long-term care district and other public or quasi-public corporations therein.

(b) 1. Every person who usually employs 3 or more employees for services performed in this state, whether in one or more trades, businesses, professions, or occupations, and whether in one or more locations. [13] [14]

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[13] This amendment was created by 2009 Wis. Act 206, effective May 1, 2010, to include a territorial limitation for the service of three or more employees to be performed in Wisconsin to make the employer subject to this chapter.

[14] The court in Stapleton Cheese Co. v. Industrial Comm., 249 Wis. 133 (1947) held that employment of three persons for a single moment, even though some of the employees may have been only casual employees, is sufficient to make the employer subject to the WC Act. Based on the holding in Stapleton, an employer is subject to the Act immediately upon the employment of three or more persons.

2. Every person who usually employs less than 3 employees, provided the person has paid wages of $500 or more in any calendar quarter for services performed in this state. Such employer shall become subject on the 10th day of the month next succeeding such quarter.

3. This paragraph shall not apply to farmers or farm labor.

(c) Every person engaged in farming who on any 20 consecutive or nonconsecutive days during a calendar year employs 6 or more employees, whether in one or more locations. The provisions of this chapter shall apply to such employer 10 days after the twentieth such day.

(d) Every joint venture electing under s. 102.28 (2) (a) to be an employer.

(e) Every person to whom pars. (a) to (d) are not applicable, who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the injury to the employee for which compensation may be claimed, shall, as provided in s. 102.05, have elected to become subject to the provisions of this chapter, and who shall not, prior to such accident, have effected a withdrawal of such election.

(2) Except with respect to a partner or member electing under s. 102.075, members of partnerships or limited liability companies shall not be counted as employees.[15] Except as provided in s. 102.07 (5) (a), a person under contract of hire for the performance of any service for any employer subject to this section is not the employer of any other person with respect to that service, and that other person shall, with respect to that service, be an employee only of the employer for whom the service is being performed.[16]

(2m) A temporary help agency is the employer of an employee whom the temporary help agency has placed with or leased to another employer that compensates the temporary help agency for the employee's services. A temporary help agency is liable under s. 102.03 for all compensation and other payments payable under this chapter to or with respect to that employee, including any payments required under s. 102.16 (3), 102.18 (1) (b) or (bp), 102.22 (1), 102.35 (3), 102.57, or 102.60. Except as permitted under s. 102.29, a temporary help agency may not seek or receive reimbursement from another employer for any payments made as a result of that liability.[17]

(3) As used in this chapter "farming" means the operation of farm premises owned or rented by the operator. "Farm premises" means areas used for operations herein set forth, but does not include other areas, greenhouses or other similar structures unless used principally for the production of food and farm plants. "Farmer" means any person engaged in farming as defined. Operation of farm premises shall be deemed to be the planting and cultivating of the soil thereof; the raising and harvesting of agricultural, horticultural or arboricultural crops thereon; the raising, breeding, tending, training and management of livestock, bees, poultry, fur-bearing animals, wildlife or aquatic life, or their products, thereon; the processing, drying, packing, packaging, freezing, grading, storing, delivering to storage, to market or to a carrier for transportation to market, distributing directly to consumers or marketing any of the above-named commodities, substantially all of which have been planted or produced thereon; the clearing of such premises and the salvaging of timber and management and use of wood lots thereon, but not including logging, lumbering or wood cutting operations unless conducted as an accessory to other farming operations; the managing, conserving, improving and maintaining of such premises or the tools, equipment and improvements thereon and the exchange of labor, services or the exchange of use of equipment with other farmers in pursuing such activities. The operation for not to exceed 30 days during any calendar year, by any person deriving the person's principal income from farming, of farm machinery in performing farming services for other farmers for a consideration other than exchange of labor shall be deemed farming.

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[15] This gives the members of limited liability companies the same status as partners.

[16] A possible dual status of employer and employee is objectionable because of confusion, delay and expense caused in determining who is actually to assume liability. This provision makes it clear that an employee cannot also be an employer.

[17] This clarifies that the agency also pays the penalties in addition to compensation.

Operation of such premises shall be deemed to include also any other activities commonly considered to be farming whether conducted on or off such premises by the farm operator.[18]

History: 1975 c. 199; 1983 a. 98; 1989 a. 64; 1993 a. 112; 1997 a. 38; 1999 a. 9; 2001 a. 37; 2005 a. 172; 2007 a. 20; 2009 a. 206.

When an employee simultaneously performs service for 2 employers under their joint control and the service for each is the same or closely related, both employers are liable for worker's compensation. Insurance Co. of North America v. DILHR 45 Wis. 2d 361, 173 N.W.2d 192 (1970).

Wisconsin's worker's compensation jurisprudence clearly recognizes that an in-state injury in the course of employment will give rise to coverage under the act. When an out-of-state employer sends an out-of-state employee to Wisconsin and the employee is injured or killed in Wisconsin in the course of employment, Wisconsin's act is applicable. Therefore, a coemployee has no liability for the employee's death and the coemployee's insurers were properly dismissed from the case. Estate of Torres v. Empire Fire and Marine Insurance Company, 2008 WI App 113, 313 Wis. 2d 371, 756 N.W.2d 662, 07-1519.

102.05 Election by employer, withdrawal. (1) An employer who has had no employee at any time within a continuous period of 2 years shall be deemed to have effected withdrawal, which shall be effective on the last day of such period.[19] An employer who has not usually employed 3 employees and who has not paid wages of at least $500 for employment in this state in every calendar quarter in a calendar year may file a withdrawal notice with the department, which withdrawal shall take effect 30 days after the date of such filing or at such later date as is specified in the notice. If an employer who is subject to this chapter only because the employer elected to become subject to this chapter under sub. (2) cancels or terminates his or her contract for the insurance of compensation under this chapter, that employer is deemed to have effected withdrawal, which shall be effective on the day after the contract is canceled or terminated.[20]

(2) Any employer who shall enter into a contract for the insurance of compensation, or against liability therefor, shall be deemed thereby to have elected to accept the provisions of this chapter, and such election shall include farm laborers, domestic servants and employees not in the course of a trade, business, profession or occupation of the employer if such intent is shown by the terms of the policy. Such election shall remain in force until withdrawn in the manner provided in sub. (1).

(3) Any person engaged in farming who has become subject to this chapter may withdraw by filing with the department a notice of withdrawal, if the person has not employed 6 or more employees as defined by s. 102.07 (5) on 20 or more days during the current or previous calendar year. Such withdrawal shall be effective 30 days after the date of receipt by the department, or at such later date as is specified in the notice. Such person may again become subject to this chapter as provided by s. 102.04 (1) (c) and (e).

History: 1983 a. 98 s. 31; 1993 a. 81, 492; 1999 a. 14.

An injured worker who never had individuals in his service as employees and did not otherwise fulfill the statutory definition of an employer was not an employer, because he had purchased a worker's compensation policy. Lloyd Frank Logging v. Healy, 2007 WI App 249, 306 Wis. 2d 385, 742 N.W.2d 337, 07-0692.

102.06 Joint liability of employer and contractor. An employer shall be liable for compensation to an employee of a contractor or subcontractor under the employer who is not subject to this chapter, or who has not complied with the conditions of s. 102.28 (2) in any case where such employer would have been liable for compensation if such employee had been working directly for the employer, including also work in the erection, alteration, repair or demolition of improvements or of fixtures upon premises of such employer which are used or to be used in the operations of such employer. The contractor or subcontractor, if subject to this chapter, shall also be liable for such compensation, but the employee shall not recover compensation for the same injury from more than one party. The employer who becomes liable for and pays such compensation may recover the same from such contractor, subcontractor or other employer for whom the employee was working at the time of

[18] Commercial threshers, clover hullers, silo fillers, corn shredders, and other employers who work for farmers are not considered to be engaging in farming operations and become subject to this chapter as do other non-farming employers.

[19] 1999 Wis. Act 14 clarified that an employer may withdraw only if the employer did not pay $500 in wages in each of the four calendar quarters during an entire calendar year.

[20] This simplifies the withdrawal procedure for employers who elected coverage.

the injury if such contractor, subcontractor or other employer was an employer as defined in s. 102.04.[21] This section does not apply to injuries occurring on or after the first day of the first July beginning after the day that the secretary files the certificate under s. 102.80 (3) (a), except that if the secretary files the certificate under s. 102.80 (3) (ag) this section does apply to claims for compensation filed on or after the date specified in that certificate.

History: 1975 c. 147 s. 54; 1975 c. 199; 1989 a. 64; 1995 a. 117.

A "contractor under the employer" is one who regularly furnishes to a principal employer materials or services that are integrally related to the finished product or service provided by that principal employer. Green Bay Packaging, Inc. v. DILHR, 72 Wis. 2d 26, 240 N.W.2d 422 (1976).

A franchisee was a "contractor under" a franchisor within the meaning of this section. Maryland Casualty Co. v. DILHR, 77 Wis. 2d 472, 253 N.W.2d 228 (1977).

Liability of principal employer for injuries to employees of his contractors or subcontractors. 1977 WLR 185.

102.07 Employee defined. "Employee" as used in this chapter means:

(1) (a) Every person, including all officials, in the service of the state, or of any municipality therein whether elected or under any appointment, or contract of hire, express or implied, and whether a resident or employed or injured within or without the state. The state and any municipality may require a bond from a contractor to protect the state or municipality against compensation to employees of such contractor or employees of a subcontractor under the contractor. This paragraph does not apply beginning on the first day of the first July beginning after the day that the secretary files the certificate under s. 102.80 (3) (a), except that if the secretary files the certificate under s. 102.80 (3) (ag) this paragraph does apply to claims for compensation filed on or after the date specified in that certificate.[22]

(b) Every person, including all officials, in the service of the state, or of any municipality therein whether elected or under any appointment, or contract of hire, express or implied, and whether a resident or employed or injured within or without the state. This paragraph first applies on the first day of the first July beginning after the day that the secretary files the certificate under s. 102.80 (3) (a), except that if the secretary files the certificate under s. 102.80 (3) (ag) this paragraph does apply to claims for compensation filed on or after the date specified in that certificate.

(2) Any peace officer shall be considered an employee while engaged in the enforcement of peace or in the pursuit and capture of those charged with crime.

(3) Nothing herein contained shall prevent municipalities from paying teachers, police officers, fire fighters and other employees full salaries during disability, nor interfere with any pension funds, nor prevent payment to teachers, police officers or fire fighters therefrom.

(4) (a) Every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer, including minors, who shall have the same power of contracting as adult employees, but not including the following:

1. Domestic servants.

2. Any person whose employment is not in the course of a trade, business, profession or occupation of the employer, unless as to any of said classes, the employer has elected to include them.

(b) Par. (a) 2. shall not operate to exclude an employee whose employment is in the course of any trade, business, profession or occupation of the employer, however casual, unusual, desultory or isolated the employer's trade, business, profession or occupation may be.

(4m) For the purpose of determining the number of employees to be counted under s. 102.04 (1) (b), but for no other purpose, a member of a religious sect is not considered to be an employee if the conditions specified in s. 102.28 (3) (b) have been satisfied with respect to that member.

[21] This provision is not intended to limit the other provisions of the section, but to make clear that if work is being performed under the circumstances stated, liability will exist against the principal employer.

[22] This section is suspended while the uninsured employers fund is accepting claims.

(5) For the purpose of determining the number of employees to be counted under s. 102.04 (1) (c), but for no other purpose, the following definitions shall apply:

(a) Farmers or their employees working on an exchange basis shall not be deemed employees of a farmer to whom their labor is furnished in exchange.

(b) The parents, spouse, child, brother, sister, son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of a farmer shall not be deemed the farmer's employees.

(c) A shareholder-employee of a family farm corporation shall be deemed a "farmer" for purposes of this chapter and shall not be deemed an employee of a farmer. A "family farm corporation" means a corporation engaged in farming all of whose shareholders are related as lineal ancestors or lineal descendants, whether by blood or by adoption, or as spouses, brothers, sisters, uncles, aunts, cousins, sons-in-law, daughters-in-law, fathers-in-law, mothers-in-law, brothers-in-law or sisters-in-law of such lineal ancestors or lineal descendants.

(d) A member of a religious sect is not considered to be an employee of a farmer if the conditions specified in s. 102.28 (3) (b) have been satisfied with respect to that member.

(6) Every person selling or distributing newspapers or magazines on the street or from house to house. Such a person shall be deemed an employee of each independent news agency which is subject to this chapter, or (in the absence of such agencies) of each publisher's (or other intermediate) selling agency which is subject to this chapter, or (in the absence of all such agencies) of each publisher, whose newspapers or magazines the person sells or distributes. Such a person shall not be counted in determining whether an intermediate agency or publisher is subject to this chapter.

(7) (a) Every member of a volunteer fire company or fire department organized under ch. 213, a legally organized rescue squad or a legally organized diving team[23] is considered to be an employee of that company, department, squad or team. Every member of a company, department, squad or team described in this paragraph, while serving as an auxiliary police officer at an emergency, is also considered to be an employee of that company, department, squad or team. If a company, department, squad or team described in this paragraph has not insured its liability for compensation to its employees, the municipality or county within which that company, department, squad or team was organized shall be liable for that compensation.[24]

(b) The department may issue an order under s. 102.31 (1) (b) permitting the county within which a volunteer fire company or fire department organized under ch. 213, a legally organized rescue squad, an ambulance service provider, as defined in s. 256.01 (3), or a legally organized diving team is organized to assume full liability for the compensation provided under this chapter of all volunteer members of that company, department, squad, provider or team.[25]

Cross-reference: See also s. DWD 80.30, Wis. adm. code.

(7m) An employee, volunteer, or member of an emergency management program is considered an employee for purposes of this chapter as provided in s. 323.40, a member of a regional emergency response team who is acting under a contract under s. 323.70 (2) is considered an employee of the state for purposes of this chapter as provided in s. 323.70 (5), and a practitioner is

[23] A legally organized diving team is a team of people, organized and operating under the general direction of a law enforcement officer, who dive or directly assist a diver, to help the law enforcement official in the performance of his or her legal duties. The term "legally organized" refers to direction and control by a law enforcement official, not to a formal organizational status by a team. Created by 1999 Wis. Act 14, effective January 1, 2000.

[24] Volunteer firefighters and members of rescue squads are to be considered employees and entitled to benefits in event of injury. If the company or department has not insured liability of its members, the municipality becomes liable for compensation.

[25] This authorizes counties to assume full liability for coverage for these volunteers.

considered an employee of the state for purposes of this chapter as provided in s. 257.03.[26]

(8) (a) Except as provided in par. (b), every independent contractor is, for the purpose of this chapter, an employee of any employer under this chapter for whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

(b) An independent contractor is not an employee of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:

1. Maintains a separate business with his or her own office, equipment, materials and other facilities.

2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the previous year.[27]

3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.

4. Incurs the main expenses related to the service or work that he or she performs under contract.

5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.

6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.

7. May realize a profit or suffer a loss under contracts to perform work or service.

8. Has continuing or recurring business liabilities or obligations.

9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.[28]

(c) The department may not admit in evidence state or federal laws, regulations, documents granting operating authority or licenses when determining whether an independent contractor meets the conditions specified in par. (b) 1. or 3.

(d) Any employer described in s. 108.18 (2) (c) or engaged in the painting or drywall finishing of buildings or other structures who willfully and with intent to evade any requirement of this chapter misclassifies or attempts to misclassify an individual who is an employee of the employer as a nonemployee shall be fined $25,000 for each violation.[29]

(8m) An employer who is subject to this chapter is not an employee of another employer for whom the first employer performs work or service in the course of the other employer's trade, business, profession or occupation.

(9) Members of the national guard and state defense force, when on state active duty under direction of appropriate authority, but only in case federal laws, rules or regulations provide no benefits substantially equivalent to those provided in this chapter.

(10) Further to effectuate the policy of the state that the benefits of this chapter shall extend and be granted to employees in the service of the state, or of any municipality therein on the same basis, in the same manner, under the same conditions, and with like right of recovery as in the case of employees of persons, firms or private corporations, any question whether any person is an employee under this chapter shall be governed by and determined under the same standards, considerations, and rules of decision in all cases

[26] This section was created by 2001 Wis. Act 37, effective January 1, 2002, and provides that an employee, volunteer, member of an emergency management unit or a member of a regional emergency response team is an employee for worker's compensation purposes.

[27] The added language was taken from the unemployment insurance definition of independent contractors.

[28] This nine-part test applies to independent contractors who are not statutory employees. Created by Chapter 64, Laws of 1989, effective January 1, 1990.

[29] This paragraph was created by 2009 Wis. Act 28, effective July 1, 2009, and provides for a fine of $25,000 for any employer engaged in the construction business as defined by s.108.18 (2)(c), Stats., who willfully and with the intent to evade any requirement of this chapter misclassifies or attempts to misclassify an individual as an employee of the employer as a nonemployee. The amendment by 2009 Wis. Act 288, effective May 27, 2010, included employers engaged in painting or drywall finishing of buildings or other structures.

under subs. (1) to (9). Any statutes, ordinances, or administrative regulations which may be otherwise applicable to the classes of employees enumerated in sub. (1) shall not be controlling in deciding whether any person is an employee for the purposes of this chapter.

(11) The department may by rule prescribe classes of volunteer workers who may, at the election of the person for whom the service is being performed, be deemed to be employees for the purposes of this chapter. Election shall be by endorsement upon the worker's compensation insurance policy with written notice to the department. In the case of an employer exempt from insuring liability, election shall be by written notice to the department. The department shall by rule prescribe the means and manner in which notice of election by the employer is to be provided to the volunteer workers. [30]

(11m) Subject to sub. (11), a volunteer for a nonprofit organization described in section 501 (c) of the internal revenue code, as defined in s. 71.01 (6), that is exempt or eligible for exemption from federal income taxation under section 501 (a) of the internal revenue code who receives from that nonprofit organization nominal payments of money or other things of value totaling not more than $10 per week is not considered to be an employee of that nonprofit organization for purposes of this chapter. [31]

(12) A student in a technical college district while, as a part of a training program, he or she is engaged in performing services for which a school organized under ch. 38 collects a fee or is engaged in producing a product sold by such a school is an employee of that school. [32]

(12m) A student of a public school, as described in s. 115.01 (1), or a private school, as defined in s. 115.001 (3r), while he or she is engaged in performing services as part of a school work training, work experience or work study program, and who is not on the payroll of an employer that is providing the work training or work experience or who is not otherwise receiving compensation on which a worker's compensation carrier could assess premiums on that employer, is an employee of a school district or private school that elects under s. 102.077 to name the student as its employee. [33]

(13) A juvenile performing uncompensated community service work as a result of a deferred prosecution agreement under s. 938.245, a consent decree under s. 938.32 or an order under s. 938.34 is an employee of the county in which the court ordering the community service work is located. No compensation may be paid to that employee for temporary disability during the healing period. [34]

(14) An adult performing uncompensated community service work under s. 304.062, 943.017 (3), 971.38, 973.03 (3), 973.05 (3), 973.09 or 973.10 (1m) is an employee of the county in which the district attorney requiring or the court ordering the community service work is located or in which the place of assignment under s. 304.062 or 973.10 (1m) is located. No compensation may be paid to that employee for temporary disability during the healing period. [35]

[30] To date no rule prescribes any class of volunteer to be deemed employees.

[31] This keeps "volunteer" status for persons who receive items of minimal value.

[32] Students in a vocational school who perform services for which the school charges a fee for producing a product that the school sells as part of their training program are employees of the school while engaged in those activities.

[33] This allows school districts to accept liability for certain work experience students and extends the exclusive remedy protection to the worksite employers.

[34] When a juvenile is ordered by a court to perform uncompensated community service work, the juvenile is an employee of the county where the court is located while doing such work. No benefits are paid for temporary disability.

[35] Adult offenders sentenced to perform uncompensated community service work are also employees. See prior footnote.

(15) A sole proprietor or partner or member electing under s. 102.075 is an employee. [36]

(16) An inmate participating in a work release program under s. 303.065 (2) or in the transitional employment program is an employee of any employer under this chapter for whom he or she is performing service at the time of the injury.

(17) A prisoner of a county jail who is assigned to a work camp under s. 303.10 is not an employee of the county or counties providing the work camp while the prisoner is working under s. 303.10 (3).

(17g) A state employee who is on a leave of absence granted under s. 230.35(3) (e) to provide services to the American Red Cross in a particular disaster is not an employee of the state for the purposes of this chapter during the period in which he or she is on the leave of absence, unless one of the following occurs:

(a) The American Red Cross specifies in its written request under s. 230.35 (3) (e) 2. c. that a unit of government in this state is requesting the assistance of the American Red Cross in the particular disaster and the state employee during the leave of absence provides services related to assisting the unit of government.

(b) The American Red Cross specifies in its written request under s. 230.35 (3) (e) 2. c. that it has been requested to provide assistance outside of this state in a particular disaster and there exists between the state of Wisconsin and the state in which the services are to be provided a mutual aid agreement, entered into by the governor, which specifies that the state of Wisconsin and the other state may assist each other in the event of a disaster and which contains provisions addressing worker's compensation coverage for the employees of the other state who provide services in Wisconsin. [37]

(17m) A participant in a trial job under s. 49.147 (3) is an employee of any employer under this chapter for whom the participant is performing service at the time of the injury.

(18) A participant in a community service job under s. 49.147 (4) or a transitional placement under s. 49.147 (5) is an employee of the Wisconsin works agency, as defined under s. 49.001 (9), for the purposes of this chapter, except to the extent that the person for whom the participant is performing work provides worker's compensation coverage.

History: 1975 c. 147 s. 54; 1975 c. 224; 1977 c. 29; 1979 c. 278; 1981 c. 325; 1983 a. 27, 98; 1985 a. 29, 83, 135; 1985 a. 150 s. 4; 1985 a. 176, 332; 1987 a. 63; 1989 a. 31, 64, 359; 1993 a. 16, 81, 112, 399; 1995 a. 24, 77, 96, 117, 225, 281, 289, 417; 1997 a. 35, 38, 118; 1999 a. 14, 162; 2001 a. 37; 2005 a. 96; 2007 a. 130; 2009 a. 28, 42, 288.

A truck owner who fell and sustained injuries in a company's truck parking area while in the process of repairing his truck was properly found under sub. (8) to be a statutory employee of the company at the time of his injury although he was an independent contractor who worked exclusively for the trucking company under a lease agreement. Employers Mutual Liability Insurance Co. v. DILHR, 52 Wis. 2d 515, 190 N.W.2d 907 (1971).

There was no employment when a member of an organization borrowed a refrigerated truck from a packing company for use at a picnic and was injured when returning it. Kress Packing Co. v. Kottwitz, 61 Wis. 2d 175, 212 N.W.2d 97 (1973).

Nothing in this chapter precludes an employer from agreeing with employees to continue salaries for injured workers in excess of worker's compensation benefits. Excess payments are not worker's compensation and may be conditioned on the parties' agreement. City of Milwaukee v. DILHR, 193 Wis. 2d 626, 534 N.W.2d 903 (Ct. App. 1995).

Sub. (8) (b) supplants the common law and provides the sole test for determining whether a worker is an independent contractor for purposes of ch. 102. Jarrett v. LIRC, 2000 WI App 46, 233 Wis. 2d 174, 607 N.W.2d 326, 99-1413.

A person injured upon the premises of a temporary help agency prior to receiving a work assignment was an employee under this section when the agency operated essentially as a hiring hall contracting with persons seeking work assignments and requiring that the persons seeking work physically present themselves each day at the hall and remain there until they have a work assignment. Labor Ready, Inc. v. LIRC, 200

The primary test for determining an employer-employee relationship is whether the alleged employer has a right to control the details of the work. In assessing the right to control, 4 secondary factors are considered: 1) direct evidence of the exercise of the right of control; 2) the method of payment of compensation; 3) the furnishing of equipment or tools for the performance of the work; and 4) the right to terminate the employment relationship. Acuity Mutual Insurance Company v. Olivas, 2007 WI 12, 298 Wis. 2d 640, 726 N.W.2d 258, 05-0685.

Sub. (8m) allows for a distinction between a person as an employee and as the proprietor of a side business that the employee runs separately. Acuity Insurance Company v.

[36] Sole proprietors and partners may elect to be eligible for worker's compensation benefits by endorsement to their existing policy or by securing a new policy. Members of limited liability companies may also elect coverage. They are not eligible for worker's compensation benefits unless they elect.

[37] This section was created by Chapter 118, Laws of 1997, effective May 1, 1998, regarding leaves of absence for certain state employees in providing disaster relief services.

Whittingham, 2007 WI App 210, 305 Wis. 2d 613, 740 N.W.2d 154, 06-2379.

Members of state boards, committees, commissions, or councils who are compensated by per diem or by actual and necessary expense are covered employees. 58 Atty. Gen. 10.

102.075 [38] **Election by sole proprietor, partner or member. (1)** Any sole proprietor, partner or member of a limited liability company engaged in a vocation, profession or business on a substantially full-time basis may elect to be an employee under this chapter by procuring insurance against injury sustained in the pursuit of that vocation, profession or business. This coverage may be obtained by endorsement on an existing policy of worker's compensation insurance or by issuance of a separate policy to the sole proprietor, partner or member on the same basis as any other policy of worker's compensation insurance. [39]

(2) For the purpose of any insurance policy other than a worker's compensation insurance policy, no sole proprietor, partner or member may be considered eligible for worker's compensation benefits unless he or she elected to be an employee under this section.

(3) Any sole proprietor, partner or member who elected to be an employee under this section may withdraw that election upon 30 days' prior written notice to the insurance carrier and the Wisconsin compensation rating bureau.

History: 1983 a. 98; 1993 a. 112.

102.076 Election by corporate officer. (1) Not more than 2 officers of a corporation having not more than 10 stockholders may elect not to be subject to this chapter. If the corporation has been issued a policy of worker's compensation insurance, an officer of the corporation may elect not to be subject to this chapter and not to be covered under the policy at any time during the period of the policy. Except as provided in sub. (2), the election shall be made by an endorsement, on the policy of worker's compensation insurance issued to that corporation, naming each officer who has so elected. The election is effective for the period of the policy and may not be reversed during the period of the policy. An officer who so elects is an employee for the purpose of determining whether the corporation is an employer under s. 102.04 (1) (b). [40]

(2) If a corporation has not more than 10 stockholders, not more than 2 officers and no other employees and is not otherwise required under this chapter to have a policy of worker's compensation insurance, an officer of that corporation who elects not to be subject to this chapter shall file a notice of that election with the department on a form approved by the department. The election is effective until the officer rescinds it by notifying the department in writing. [41]

History: 1985 a. 83; 1987 a. 115, 179; 1989 a. 64; 1991 a. 85; 1997 a. 38.

102.077 Election by school district or private school. (1) A school district or a private school, as defined in s. 115.001 (3r), may elect to name as its employee for purposes of this chapter a student described in s. 102.07 (12m) by an endorsement on its policy of worker's compensation insurance or, if the school district or private school is exempt from the duty to insure under s. 102.28 (2), by filing a declaration with the department in the manner provided in s. 102.31 (2) (a) naming the student as an employee of the school district or private school for purposes of this chapter. A declaration under this subsection shall list the name of the student to be covered under this chapter, the name and address of the employer that is providing the work training or work experience for that student and the title, if any, of the work training, work experience or work study program in which the student is participating.

(2) A school district or private school may revoke a declaration under sub. (1) by providing written notice to the department in the manner provided in s. 102.31 (2) (a), the student and the employer who is providing the work training or work experience for that student. A revocation under

[38] See s. 102.07(15).

[39] This gives members of limited liability companies the same status as sole proprietors and partners.

[40] This permits one or two officers of small, closely-held corporations to elect not to receive benefits under a worker's compensation policy. The amendment allows them to non-elect any time during the policy period, but once they do so they may not reelect for that period.

[41] The purpose of this section is to avert the necessity of buying a policy if the employer is not otherwise subject to the law.

this subsection is effective 30 days after the department receives notice of that revocation.

History: 1995 a. 117; 1997 a. 38; 1999 a. 14; 2001 a. 37.

102.08 Administration for state employees. The department of administration has responsibility for the timely delivery of benefits payable under this chapter to employees of the state and their dependents and other functions of the state as an employer under this chapter. The department of administration may delegate this authority to employing departments and agencies and require such reports as it deems necessary to accomplish this purpose. The department of administration or its delegated authorities shall file with the department of workforce development the reports that are required of all employers. The department of workforce development shall monitor the delivery of benefits to state employees and their dependents and shall consult with and advise the department of administration in the manner and at the times necessary to ensure prompt and proper delivery.

History: 1981 c. 20; 1995 a. 27 s. 9130 (4); 1997 a. 3.

102.11 Earnings, method of computation. (1) The average weekly earnings for temporary disability, permanent total disability, or death benefits for injury in each calendar year on or after January 1, 1982, shall be not less than $30 nor more than the wage rate that results in a maximum compensation rate of 110 percent of the state's average weekly earnings as determined under s. 108.05 as of June 30 of the previous year.[42] The average weekly earnings for permanent partial disability shall be not less than $30 and, for permanent partial disability for injuries occurring on or after May 6, 2010, and before January 1, 2011, not more than $438, resulting in a maximum compensation rate of $292, and, for permanent partial disability for injuries occurring on or after January 1, 2011, not more than $453, resulting in a maximum compensation rate of $302. Between such limits the average weekly earnings shall be determined as follows:[43] [44] [45]

1. Daily earnings shall mean the daily earnings of the employee at the time of the injury in the employment in which the employee was then engaged. In determining daily earnings under this subdivision, any hours worked beyond the normal full-time working day as established by the employer, whether compensated at the employee's regular rate of pay or at an increased rate of pay, shall not be considered.

[42]The maximum benefit rate for total disability and death benefits is determined by 110 percent of the state's average weekly earnings from the prior year. This amendment was effected by 2005 Wis. Act 172, effective April 1, 2006.

[43]The intent of this provision is that earnings on a normal full-time basis shall be the basis for payment of compensation. Where board or lodging is furnished the employee as a part of the consideration, the fair value of these benefits is to be added to the money wage in computing the compensation due. Any bonus, tip or premium is also part of the wage and must be reported as such by the employer in the first report of injury (form WKC-12).

Where the worker at the time of injury is working part-time, the wage is to be extended to a normal full time basis by multiplying the hourly basis by the number of hours of the full time working day for the employment involved, and by multiplying the daily earnings by the number of days and fractional days normally worked per week at the time of the injury in the business operation of the employer for the particular employment in which the employee was engaged at the time of the injury.

Special treatment is provided for seasonal employment. Seasonal employment is defined as employment which can be conducted only during certain times of the year, and in no event is such employment to be considered seasonal if it extends over a period of more than 14 weeks within a calendar year.

In the case of persons performing service without fixed earnings, usual going earnings paid for similar services on a normal full time basis in the same or similar employment are to be utilized.

In no case is less than actual average weekly earnings to be taken, provided the employee has worked within each week of at least six calendar weeks during the 52 weeks preceding the injury in the business in the kind of employment and for the employer for whom he or she worked when injured. Except for this provision, overtime is not taken into consideration.

The court has held that where a given number of hours per week are worked the total number of hours is to be taken and that "premium" wage is to be considered in determining weekly wage for compensation purposes. "Overtime" means only time beyond the number of hours usually worked by the employee.

In no case shall average weekly earnings be less than 24 times normal hourly earnings at the time of injury.

[44] Permanent partial disability maximum weekly rates are $292 effective May 1, 2010 and $302 effective January 1, 2011. 2009 Wis. Act 206, effective May 1, 2010. The effective date for the permanent partial disability rate is May 1, 2010. The Revisor of Statutes incorrectly inserted May 6, 2010 as the effective date and will correct this error in a later bill.

[45] 2001 Wis. Act 37, effective January 1, 2002, created and renumbered these subsections to clarify that the employer's normal full-time scheduled workweek rather than the days and hours actually worked by the employee is used to calculate the average weekly wage.

2. a. In this subdivision, "part time for the day" means Saturday half days and any other day during which an employee works less than the normal full-time working hours established by the employer.

b. If at the time of the injury the employee is working part time for the day, the employee's daily earnings shall be arrived at by dividing the amount received, or to be received by the employee for such part-time service for the day, by the number of hours and fractional hours of the part-time service, and multiplying the result by the number of hours of the normal full-time working day established by the employer for the employment involved.

3. The average weekly earnings shall be arrived at by multiplying the employee's hourly earnings by the hours in the normal full-time workweek as established by the employer, or by multiplying the employee's daily earnings by the number of days and fractional days in the normal full-time workweek as established by the employer, at the time of the injury in the business operation of the employer for the particular employment in which the employee was engaged at the time of the employee's injury, whichever is greater.

4. It is presumed, unless rebutted by reasonably clear and complete documentation, that the normal full-time workweek established by the employer is 24 hours for a flight attendant, 56 hours for a firefighter, and not less than 40 hours for any other employee. If the employer has established a multi-week schedule with regular hours alternating between weeks, the normal full-time workweek is the average number of hours worked per week under the multi-week schedule.[46]

(am) In the case of an employee who is a member of a regularly-scheduled class of part-time employees, average weekly earnings shall be arrived at by the method prescribed in par. (a), except that the number of hours of the normal working day and the number of hours and days of the normal workweek shall be the hours and days established by the employer for that class. An employee is a member of a regularly-scheduled class of part-time employees if all of the following conditions are met:[47]

1. The employee is a member of a class of employees that does the same type of work at the same location and, in the case of an employee in the service of the state, is employed in the same office, department, independent agency, authority, institution, association, society, or other body in state government or, if the department determines appropriate, in the same subunit of an office, department, independent agency, authority, institution, association, society, or other body in state government.

2. The minimum and maximum weekly hours regularly scheduled by the employer for the members of the class during the 13 weeks immediately preceding the date of the injury vary by no more than 5 hours. Subject to this requirement, the members of the class do not need to work the same days or the same shift to be considered members of a regularly-scheduled class of part-time employees.

3. At least 10% of the employer's workforce doing the same type of work are members of the class.

4. The class consists of more than one employee.

(b) In case of seasonal employment, average weekly earnings shall be arrived at by the method prescribed in par. (a), except that the number of hours of the normal full-time working day and the number of days of the normal full-time workweek shall be the hours and the days in similar service in the same or similar nonseasonal employment. Seasonal employment shall mean employment that can be conducted only during certain times of the year, and in no event shall employment be considered seasonal if it extends during a period of more than fourteen weeks within a calendar year.

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[46] 2001 Wis. Act 37, effective January 1, 2002, created rebuttable presumptions that the normal full-time workweek for flight attendants is 24 hours, 56 hours for firefighters, not less than 40 hours for other employees and the average number of hours worked per week for multi-week schedules with regular hours alternating between weeks.

[47] 2001 Wis. Act 37, effective January 1, 2002, defines part-time employees who are part of a class. To be part of a class an employee must perform the same type of work at the same location, the scheduled working hours do not vary by more than five per week in the 13 weeks preceding the injury date, at least 10 percent of the employer's workforce perform the same type of work and a class must consist of more than one employee.

(c) In the case of persons performing service without fixed earnings, or where normal full-time days or weeks are not maintained by the employer in the employment in which the employee worked when injured, or where, for other reason, earnings cannot be determined under the methods prescribed by par. (a) or (b), the earnings of the injured person shall, for the purpose of calculating compensation payable under this chapter, be taken to be the usual going earnings paid for similar services on a normal full-time basis in the same or similar employment in which earnings can be determined under the methods set out in par. (a) or (b).

(d) Except in situations where par. (b) applies, average weekly earnings shall in no case be less than actual average weekly earnings of the employee for the 52 calendar weeks before his or her injury within which the employee has been employed in the business, in the kind of employment and for the employer for whom the employee worked when injured.[48] Calendar weeks within which no work was performed shall not be considered under this paragraph. This paragraph applies only if the employee has worked within a total of at least 6 calendar weeks during the 52 calendar weeks before his or her injury in the business, in the kind of employment and for the employer for whom the employee worked when injured. For purposes of this section, earnings for part-time services performed for a labor organization pursuant to a collective bargaining agreement between the employer and that labor organization shall be considered as part of the total earnings in the preceding 52 calendar weeks, whether payment is made by the labor organization or the employer.

(e) Where any things of value are received in addition to monetary earnings as a part of the wage contract, they shall be deemed a part of earnings and computed at the value thereof to the employee.

(f) 1. Except as provided in subd. 2., average weekly earnings may not be less than 24 times the normal hourly earnings at the time of injury.[49]

2. The weekly temporary disability benefits for a part-time employee who restricts his or her availability in the labor market to part-time work and is not employed elsewhere may not exceed the average weekly wages of the part-time employment.

(g) If an employee is under 27 years of age, the employee's average weekly earnings on which to compute the benefits accruing for permanent disability or death shall be determined on the basis of the earnings that the employee, if not disabled, probably would earn after attaining the age of 27 years. Unless otherwise established, the projected earnings determined under this paragraph shall be taken as equivalent to the amount upon which maximum weekly indemnity is payable.

(2) The average annual earnings when referred to in this chapter shall consist of 50 times the employee's average weekly earnings. Subject to the maximum limitation, average annual earnings shall in no case be taken at less than the actual earnings of the employee in the year immediately preceding the employee's injury in the kind of employment in which the employee worked at the time of injury.

(3) The weekly wage loss referred to in this chapter shall be the percentage of the average weekly earnings of the injured employee computed under this section that fairly represents the proportionate extent of the impairment of the employee's earning capacity in the employment in which the employee was working at the time of the injury and other suitable employments. Weekly wage loss shall be fixed as of the time of the injury, but shall be determined in view of the nature and extent of the injury.

[48] This returns to using the preceding 52 weeks to determine the average weekly wage rather than the four calendar quarters used from 1985 through 1997.

[49] 1987 Wis. Act 179, effective April 1, 1988, returns the right to receive the full-time wage as calculated under section 102.11(1)(a) to part-time employees who do not restrict their availability in the labor market to part-time employment and who are employed elsewhere.

History: 1971 c. 148; 1973 c. 150; 1975 c. 147; 1977 c. 195; 1979 c. 278; 1981 c. 92; 1983 a. 98; 1985 a. 83; 1987 a. 179; 1989 a. 64; 1991 a. 85; 1993 a. 81, 492; 1995 a. 117; 1997 a. 38, 253; 2001 a. 37, 107; 2005 a. 172; 2007 a. 185; 2009 a. 206.

Cross-reference: See also s. DWD 80.51, Wis. adm. code.

It was reasonable for the commission to determine that health insurance premiums were not "things of value (that) are received in addition to monetary earnings" under sub. (1) (e). Theuer v. LIRC, 2001 WI 26, 242 Wis. 2d 29, 624 N.W.2d 110, 00-1085.

102.12 Notice of injury, exception, laches. No claim for compensation may be maintained unless, within 30 days after the occurrence of the injury or within 30 days after the employee knew or ought to have known the nature of his or her disability and its relation to the employment, actual notice was received by the employer or by an officer, manager or designated representative of an employer. If no representative has been designated by posters placed in one or more conspicuous places, then notice received by any superior is sufficient. Absence of notice does not bar recovery if it is found that the employer was not misled thereby. Regardless of whether notice was received, if no payment of compensation, other than medical treatment or burial expense, is made, and no application is filed with the department within 2 years from the date of the injury or death, or from the date the employee or his or her dependent knew or ought to have known the nature of the disability and its relation to the employment, the right to compensation therefor is barred, except that the right to compensation is not barred if the employer knew or should have known, within the 2-year period, that the employee had sustained the injury on which the claim is based. Issuance of notice of a hearing on the department's own motion has the same effect for the purposes of this section as the filing of an application. This section does not affect any claim barred under s. 102.17 (4).

History: 1983 a. 98.

102.123 Statement of employee. If an employee provides to the employer or the employer's insurer a signed statement relating to a claim for compensation by the employee, the employer or insurer shall provide a copy of the statement to the employee within a reasonable time after the statement is made. If an employer or insurer uses a recording device to take a statement from an employee relating to a claim for compensation by the employee, the employer or insurer, on the request of the employee or the employee's attorney or other authorized agent, shall reduce the statement to writing and provide a written copy of the entire statement to the employee, attorney, or agent within a reasonable time after the statement is taken. The employer or insurer shall also make the actual recording of the statement available as an exhibit if a hearing on the claim is held. An employer or insurer that fails to provide an employee with a copy of the employee's statement as required by this section or that fails to make available as an exhibit the actual recording of a statement recorded by a recording device as required by this section may not use that statement in any manner in connection with the employee's claim for compensation.[50]

History: 2001 a. 37.

102.125 Fraudulent claims reporting and investigation. If an insurer or self-insured employer has evidence that a claim is false or fraudulent in violation of s. 943.395 and if the insurer or self-insured employer is satisfied that reporting the claim to the department will not impede its ability to defend the claim, the insurer or self-insured employer shall report the claim to the department. The department may require an insurer or self-insured employer to investigate an allegedly false or fraudulent claim and may provide the insurer or self-insured employer with any records of the department relating to that claim. An insurer or self-insured employer that investigates a claim under this section shall report on the results of that investigation to the department. If based on the investigation the department has a reasonable basis to believe that a violation of s. 943.395 has occurred, the department shall refer the results of the investigation to the district attorney of the county

[50] 2001 Wis. Act 37, effective January 1, 2002, creates the requirement that when employee provides the employer or insurance carrier a signed statement relating to the claim the employer or insurer must give a copy to the employee within a reasonable time. When the statement is recorded the employer or insurer must reduce the statement to writing after a request by the employee or his or her attorney or agent and provide a copy within a reasonable time after the statement is taken. The statement of the employee cannot be used in any manner in connection with the claim if the employer or insurer fails to comply.

in which the alleged violation occurred for prosecution. [51]

History: 1993 a. 81; 2001 a. 37.

102.13 Examination; competent witnesses; exclusion of evidence; autopsy. (1) (a) Except as provided in sub. (4), whenever compensation is claimed by an employee, the employee shall, upon the written request of the employee's employer or worker's compensation insurer, submit to reasonable examinations by physicians, chiropractors, psychologists, dentists, physician assistants, advanced practice nurse prescribers, [52] or podiatrists provided and paid for by the employer or insurer. No employee who submits to an examination under this paragraph is a patient of the examining physician, chiropractor, psychologist, dentist, physician assistant, advanced practice nurse prescriber, or podiatrist for any purpose other than for the purpose of bringing an action under ch. 655, unless the employee specifically requests treatment from that physician, chiropractor, psychologist, dentist, physician assistant, advanced practice nurse prescriber, or podiatrist.

(am) When compensation is claimed for loss of earning capacity under s. 102.44 (2) or (3), the employee shall, on the written request of the employee's employer or insurer, submit to reasonable examinations by vocational experts provided and paid for by the employer or insurer.[53] (b) An employer or insurer who requests that an employee submit to reasonable examination under par. (a) or (am) shall tender to the employee, before the examination, all necessary expenses including transportation expenses.[54] The employee is entitled to have a physician, chiropractor, psychologist, dentist, physician assistant, advanced practice nurse prescriber, or podiatrist provided by himself or herself present at the examination and to receive a copy of all reports of the examination that are prepared by the examining physician, chiropractor, psychologist, podiatrist, dentist, physician assistant, advanced practice nurse prescriber, or vocational expert immediately upon receipt of those reports by the employer or worker's compensation insurer. The employee is also entitled to have a translator provided by himself or herself present at the examination if the employee has difficulty speaking or understanding the English language.[55] The employer's or insurer's written request for examination shall notify the employee of all of the following: [56]

1. The proposed date, time, and place of the examination and the identity and area of specialization of the examining physician, chiropractor, psychologist, dentist, podiatrist, physician assistant, advanced practice nurse prescriber, or vocational expert.

2. The procedure for changing the proposed date, time and place of the examination.

3. The employee's right to have his or her physician, chiropractor, psychologist, dentist, physician assistant, advanced practice nurse prescriber, or podiatrist present at the examination.

[51] 2001 Wis. Act 37, effective January 1, 2002, repealed the requirement for the department to file an annual report on fraud with the legislature and the governor.

[52] The employer or insurer may also request that a dentist examine an employee. 2003 Wis. Act 144, effective March 30, 2004, permits employers and insurers to request that a physician assistant or advanced practice nurse prescriber examine an employee.

[53] When an employee claims loss of earning capacity, he or she must submit to reasonable examination by a vocational expert chosen by the employer or insurer.

[54] This provides that any necessary expenses the employee will incur in submitting to the examination must be tendered in advance. These expenses include wage loss. If the employee loses time from work to attend the examination, he or she is entitled to full wage replacement rather than the temporary disability rate.

[55] The employee may have his or her own language translator present during the examination.

[56] The employer must furnish in writing the specific information required any time an examination is requested.

4. The employee's right to receive a copy of all reports of the examination that are prepared by the examining physician, chiropractor, psychologist, dentist, podiatrist, physician assistant, advanced practice nurse prescriber, or vocational expert immediately upon receipt of these reports by the employer or worker's compensation insurer.[57]

5. The employee's right to have a translator provided by himself or herself present at the examination if the employee has difficulty speaking or understanding the English language.

(c) So long as the employee, after a written request of the employer or insurer which complies with par. (b), refuses to submit to or in any way obstructs the examination, the employee's right to begin or maintain any proceeding for the collection of compensation is suspended, except as provided in sub. (4). If the employee refuses to submit to the examination after direction by the department or an examiner, or in any way obstructs the examination, the employee's right to the weekly indemnity which accrues and becomes payable during the period of that refusal or obstruction, is barred, except as provided in sub. (4).

(d) Subject to par. (e):

1. Any physician, chiropractor, psychologist, dentist, podiatrist, physician assistant, advanced practice nurse prescriber, or vocational expert who is present at any examination under par. (a) or (am) may be required to testify as to the results of the examination.

2. Any physician, chiropractor, psychologist, dentist, physician assistant, advanced practice nurse prescriber, or podiatrist who attended a worker's compensation claimant for any condition or complaint reasonably related to the condition for which the claimant claims compensation may be required to testify before the department when the department so directs.

3. Notwithstanding any statutory provisions except par. (e), any physician, chiropractor, psychologist, dentist, physician assistant, advanced practice nurse prescriber, or podiatrist attending a worker's compensation claimant for any condition or complaint reasonably related to the condition for which the claimant claims compensation may furnish to the employee, employer, worker's compensation insurer, or the department information and reports relative to a compensation claim.[58]

4. The testimony of any physician, chiropractor, psychologist, dentist, physician assistant, advanced practice nurse prescriber, or podiatrist who is licensed to practice where he or she resides or practices in any state and the testimony of any vocational expert may be received in evidence in compensation proceedings.

(e) No person may testify on the issue of the reasonableness of the fees of a licensed health care professional unless the person is licensed to practice the same health care profession as the professional whose fees are the subject of the testimony. This paragraph does not apply to the fee dispute resolution process under s. 102.16 (2).[59]

(f) If an employee claims compensation under s. 102.81 (1), the department may require the employee to submit to physical or vocational examinations under this subsection.

(2) (a) An employee who reports an injury alleged to be work-related or files an application for hearing waives any physician-patient, psychologist-patient or chiropractor-patient privilege with respect to any condition or complaint reasonably related to the condition for which the employee claims compensation. Notwithstanding ss. 51.30 and 146.82 and any other law, any physician, chiropractor,

[57] Reports are to be sent to the injured employee immediately rather than waiting until he or she requests them.

[58] Practitioners under general statutory provisions are not allowed to disclose information that they may acquire while attending a patient in their professional capacity. A practitioner who attends a worker's compensation claimant is privileged to furnish to the employee, employer, worker's compensation insurance carrier, or the department, information and reports relative to a compensation claim. It is a practical necessity that practitioners attending injured workers be permitted to furnish information to the department upon which compensation can be based. Physicians will not be required, however, to disclose confidential communications communicated to them for the purpose of treatment unless such information is necessary to a proper disposition of the claim. The department regards the practitioner who treats the employee at the request of the employer for all intents and purposes as the practitioner of the injured worker. Testimony before department should be absolutely fair, factual and unbiased.

[59] The requirement that a person be licensed in the same health care profession to testify on reasonableness of fees does not apply under the fee dispute resolution process provided in s. 102.16(2).

psychologist, dentist, podiatrist, physician assistant, advanced practice nurse prescriber, hospital, or health care provider shall, within a reasonable time after written request by the employee, employer, worker's compensation insurer, or department or its representative, provide that person with any information or written material reasonably related to any injury for which the employee claims compensation.[60]

(b) A physician, chiropractor, podiatrist, psychologist, dentist, physician assistant, advanced practice nurse prescriber, hospital, or health service provider shall furnish a legible, certified duplicate of the written material requested under par. (a) upon payment of the actual costs of preparing the certified duplicate, not to exceed the greater of 45 cents per page or $7.50 per request, plus the actual costs of postage. Any person who refuses to provide certified duplicates of written material in the person's custody that is requested under par. (a) shall be liable for reasonable and necessary costs and, notwithstanding s. 814.04 (1), reasonable attorney fees incurred in enforcing the requester's right to the duplicates under par. (a).[61]

(c) If an injured employee has a period of temporary disability that exceeds 3 weeks or a permanent disability or if the injured employee has undergone surgery to treat his or her injury, other than surgery to correct a hernia, the department may by rule require the insurer or self-insured employer to submit to the department a final report of the employee's treating practitioner. A treating practitioner may charge a reasonable fee for the completion of the final report, but may not require prepayment of that fee. An insurer or self-insured employer that disputes the reasonableness of a fee charged for the completion of a treatment practitioner's final report may submit that dispute to the department for resolution under s. 102.16 (2).[62]

(3) If 2 or more physicians, chiropractors, psychologists, dentists or podiatrists disagree as to the extent of an injured employee's temporary disability, the end of an employee's healing period, an employee's ability to return to work at suitable available employment or the necessity for further treatment or for a particular type of treatment,[63] the department may appoint another physician, chiropractor, psychologist, dentist or podiatrist to examine the employee and render an opinion as soon as possible. The department shall promptly notify the parties of this appointment. If the employee has not returned to work, payment for temporary disability shall continue until the department receives the opinion. The employer or its insurance carrier or both shall pay for the examination and opinion. The employer or insurance carrier or both shall receive appropriate credit for any overpayment to the employee determined by the department after receipt of the opinion.[64]

(4) The rights of employees to begin or maintain proceedings for the collection of compensation and to receive weekly indemnities which accrue and become payable shall not be suspended or barred under sub. (1) when an employee refuses to submit to a physical examination, upon the request of the employer or worker's compensation insurer or at the direction of the department or an examiner, which would require the employee to travel a distance of 100 miles or more from his or her place of residence, unless the employee has claimed compensation for treatment from a practitioner whose office is located 100 miles or

[60] Any practitioner specified in this section, hospital or health care provider shall furnish reports reasonably related to a compensation claim upon request. The employee by claiming compensation waives the usual practitioner-patient privilege.

[61] This establishes a fair and reasonable rate with a minimum $7.50 charge plus postage for copies of medical records in worker's compensation cases.

[62] This amendment requires a final treating practitioner's report when an employee has undergone surgery, except surgery to correct a hernia, limits a treating practitioner to charge a reasonable fee for completion of the final medical report and prohibits any requirement for pre-payment for the final report. 2005 Wis. Act 172, effective April 1, 2006.

[63] This adds questions of the necessity for treatment or of a particular type of treatment to the issues for which the department may appoint a "tie-breaker" examiner.

[64] If there is disagreement about the continuance of temporary disability between different practitioners, the department may authorize a "tie-breaker" examination.

more from the employee's place of residence or the department or examiner determines that any other circumstances warrant the examination. If the employee has claimed compensation for treatment from a practitioner whose office is located 100 miles or more from the employee's place of residence, the employer or insurer may request, or the department or an examiner may direct, the employee to submit to a physical examination in the area where the employee's treatment practitioner is located.[65]

(5) The department may refuse to receive testimony as to conditions determined from an autopsy if it appears that the party offering the testimony had procured the autopsy and had failed to make reasonable effort to notify at least one party in adverse interest or the department at least 12 hours before the autopsy of the time and place it would be performed, or that the autopsy was performed by or at the direction of the coroner or medical examiner or at the direction of the district attorney for purposes not authorized by ch. 979. The department may withhold findings until an autopsy is held in accordance with its directions.

History: 1973 c. 272, 282; 1975 c. 147; 1977 c. 29; 1979 c. 102 s. 236 (3); 1979 c. 278; 1981 c. 92; 1983 a. 98, 279; 1985 a. 83; 1987 a. 179; 1989 a. 64, 359; 1991 a. 85; 1993 a. 81; 1997 a. 38; 2003 a. 144; 2005 a. 172.

102.14 Jurisdiction of department; advisory committee. **(1)** This chapter shall be administered by the department.

(2) The council on worker's compensation shall advise the department in carrying out the purposes of this chapter. Such council shall submit its recommendations with respect to amendments to this chapter to each regular session of the legislature and shall report its views upon any pending bill relating to this chapter to the proper legislative committee. At the request of the chairpersons of the senate and assembly committees on labor, the department shall schedule a meeting of the council with the members of the senate and assembly committees on labor to review and discuss matters of legislative concern arising under this chapter.

History: 1975 c. 147 s. 54; 1979 c. 278.

102.15 Rules of procedure; transcripts. **(1)** Subject to this chapter, the department may adopt its own rules of procedure and may change the same from time to time.

(2) The department may provide by rule the conditions under which transcripts of testimony and proceedings shall be furnished.

(3) All testimony at any hearing held under this chapter shall be taken down by a stenographic reporter, except that in case of an emergency, as determined by the examiner conducting the hearing, testimony may be recorded by a recording machine.

History: 1977 c. 418; 1989 a. 64.
Cross-reference: See also ch. DWD 80, Wis. adm. code.

102.16 Submission of disputes, contributions by employees. **(1)** Any controversy concerning compensation or a violation of sub. (3),[66] including controversies in which the state may be a party, shall be submitted to the department in the manner and with the effect provided in this chapter. Every compromise of any claim for compensation may be reviewed and set aside, modified or confirmed by the department within one year from the date the compromise is filed with the department, or from the date an award has been entered, based thereon, or the department may take that action upon application made within one year. Unless the word "compromise" appears in a stipulation of settlement, the settlement shall not be deemed a compromise, and further claim is not barred except as provided in s. 102.17 (4) regardless of whether an award is made. The employer, insurer or dependent under s. 102.51 (5) shall have equal rights with the employee to have review of a

[65] This provides that compensation may not be suspended or barred when the employee refuses to submit to an examination which would require him or her to travel a distance of 100 miles or more from his or her place of residence unless the department authorizes the examination. One hundred miles is determined from map miles as the crow flies from the place of the residence and not by highway mileage. The amendment effected by Chapter 81, Laws of 1993, effective January 1, 1994, waives the 100 mile limit if the employee has sought and claimed reimbursement for treatment from a practitioner beyond the 100 mile limit. In those cases the employer or insurer may request an examination in the same geographical area as the treating practitioner.

[66] This makes it clear that employees are not required to have a worker's compensation injury before they can claim reimbursement in an administrative proceeding before the department for the illegal withholding of worker's compensation premiums from their earnings.

compromise or any other stipulation of settlement. Upon petition filed with the department, the department may set aside the award or otherwise determine the rights of the parties. [67]

Cross-reference: See also s. DWD 80.03, Wis. adm. code.

(1m) (a) If an insurer or self-insured employer concedes by compromise under sub. (1) or stipulation under s. 102.18 (1) (a) that the insurer or self-insured employer is liable under this chapter for any health services provided to an injured employee by a health service provider, but disputes the reasonableness of the fee charged by the health service provider, the department may include in its order confirming the compromise or stipulation a determination as to the reasonableness of the fee or the department may notify, or direct the insurer or self-insured employer to notify, the health service provider under sub. (2) (b) that the reasonableness of the fee is in dispute. The department shall deny payment of a health service fee that the department determines under this paragraph to be unreasonable. A health service provider and an insurer or self-insured employer that are parties to a fee dispute under this paragraph are bound by the department's determination under this paragraph on the reasonableness of the disputed fee, unless that determination is set aside, reversed, or modified by the department under sub. (2) (f) or is set aside on judicial review as provided in sub. (2) (f). [68]

(b) If an insurer or self-insured employer concedes by compromise under sub. (1) or stipulation under s. 102.18 (1) (a) that the insurer or self-insured employer is liable under this chapter for any treatment provided to an injured employee by a health service provider, but disputes the necessity of the treatment, the department may include in its order confirming the compromise or stipulation a determination as to the necessity of the treatment or the department may notify, or direct the insurer or self-insured employer to notify, the health service provider under sub. (2m) (b) that the necessity of the treatment is in dispute. Before determining under this paragraph the necessity of treatment provided to an injured employee, the department may, but is not required to, obtain the opinion of an expert selected by the department who is qualified as provided in sub. (2m) (c). The standards promulgated under sub. (2m) (g) shall be applied by an expert and by the department in rendering an opinion as to, and in determining, necessity of treatment under this paragraph. In cases in which no standards promulgated under sub. (2m) (g) apply, the department shall find the facts regarding necessity of treatment. The department shall deny payment for any treatment that the department determines under this paragraph to be unnecessary. A health service provider and an insurer or self-insured employer that are parties to a dispute under this paragraph over the necessity of treatment are bound by the department's determination under this paragraph on the necessity of the disputed treatment, unless that determination is set aside, reversed, or modified by the department under sub. (2m) (e) or is set aside on judicial review as provided in sub. (2m) (e). [69]

(c) If an insurer or self-insured employer concedes by compromise under sub. (1) or stipulation under s. 102.18 (1) (a) that the insurer or self-insured employer is liable under this chapter for the cost of a prescription drug dispensed under s. 102.425 (2) for outpatient use by an injured employee, but disputes the reasonableness of the amount charged for the prescription drug, the department may include in its order confirming the compromise or stipulation a determination as to the reasonableness of the prescription drug charge or the department may notify, or direct the insurer or

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[67] Unless a genuine compromise is made and approved by the department the employee will not be foreclosed except by the 12 year limitation. Unless disputes arise, parties should not attempt to make "compromise" agreements but should stipulate facts without making use of the word "compromise." In case of a stipulation of settlement (not compromise), the right to review is the same as heretofore, that is 12 years, from the date of the last payment of compensation under the stipulation.

[68] This clarifies the department's authority to issue orders on treatment necessity or reasonableness of fees.

[69] This amendment requires the department to apply the treatment guidelines in determining necessity of treatment disputes. 2005 Wis. Act 172, effective April 1, 2006. See Rule DWD 81.

self-insured employer to notify, the pharmacist or practitioner dispensing the prescription drug under s. 102.425 (4m) (b) that the reasonableness of the prescription drug charge is in dispute. The department shall deny payment of a prescription drug charge that the department determines under this paragraph to be unreasonable. A pharmacist or practitioner and an insurer or self-insured employer that are parties to a dispute under this paragraph over the reasonableness of a prescription drug charge are bound by the department's determination under this paragraph on the reasonableness of the disputed prescription drug charge, unless that determination is set aside, reversed, or modified by the department under s. 102.425 (4m) (e) or is set aside on judicial review as provided in s. 102.425 (4m) (e). [70]

(2) (a) Except as provided in this paragraph, the department has jurisdiction under this subsection, sub. (1m) (a), and s. 102.17 to resolve a dispute between a health service provider and an insurer or self-insured employer over the reasonableness of a fee charged by the health service provider for health services provided to an injured employee who claims benefits under this chapter. A health service provider may not submit a fee dispute to the department under this subsection before all treatment by the health service provider of the employee's injury has ended if the amount in controversy, whether based on a single charge or a combination of charges for one or more days of service, is less than $25. [71] After all treatment by a health service provider of an employee's injury has ended, the health service provider may submit any fee dispute to the department, regardless of the amount in controversy. The department shall deny payment of a health service fee that the department determines under this subsection to be unreasonable.

(am) A health service provider and an insurer or self-insured employer that are parties to a fee dispute under this subsection are bound by the department's determination under this subsection on the reasonableness of the disputed fee, unless that determination is set aside on judicial review as provided in par. (f).

(b) An insurer or self-insured employer that disputes the reasonableness of a fee charged by a health service provider or the department under sub. (1m) (a) or s. 102.18 (1) (bg) 1. shall provide reasonable written notice to the health service provider that the fee is being disputed. After receiving reasonable written notice under this paragraph or under sub. (1m) (a) or s. 102.18 (1) (bg) 1. that a health service fee is being disputed, a health service provider may not collect the disputed fee from, or bring an action for collection of the disputed fee against, the employee who received the services for which the fee was charged. [72]

(c) After a fee dispute is submitted to the department, the insurer or self-insured employer that is a party to the dispute shall provide to the department information on that fee and information on fees charged by other health service providers for comparable services. The insurer or self-insured employer shall obtain the information on comparable fees from a database that is certified by the department under par. (h). Except as provided in par. (e) 1., if the insurer or self-insured employer does not provide the information required under this paragraph, the department shall determine that the disputed fee is reasonable and order that it be paid. If the insurer or self-insured employer provides the information required under this paragraph, the department shall use that information to determine the reasonableness of the disputed fee.

(d) The department shall analyze the information provided to the department under par. (c) according to the criteria provided in this paragraph to determine the reasonableness of the disputed fee. The department shall determine that a disputed fee is reasonable and order that the

[70] This amendment clarifies the department's authority to issue orders to resolve disputes over the reasonableness of charges for out patient use of prescription drugs. 2007 Wis. Act 185, effective April 1, 2008.

[71] 2003 Wis. Act 144, effective March 30, 2004, creates a minimum threshold disputed amount of $25.00 based on a single charge or a combination of charges for one or more dates of service for utilizing the reasonableness of fees dispute resolution process. This minimum amount does not apply if treatment for the injury by the provider has ended.

[72] This amendment provides the requirement for written notice by an insurance carrier or self-insured employer to a health care provider that reasonableness of a fee was disputed. 2009 Wis. Act 206, effective May 1, 2010.

disputed fee be paid if that fee is at or below the mean fee for the health service procedure for which the disputed fee was charged, plus 1.4 standard deviations from that mean, [73] as shown by data from a database that is certified by the department under par. (h). The department shall determine that a disputed fee is unreasonable and order that a reasonable fee be paid if the disputed fee is above the mean fee for the health service procedure for which the disputed fee was charged, plus 1.4 standard deviations from that mean, as shown by data from a database that is certified by the department under par. (h), unless the health service provider proves to the satisfaction of the department that a higher fee is justified because the service provided in the disputed case was more difficult or more complicated to provide than in the usual case.

(e) 1. Subject to subd. 2., if an insurer or self-insured employer that disputes the reasonableness of a fee charged by a health service provider cannot provide information on fees charged by other health service providers for comparable services because the database to which the insurer or self-insured employer subscribes is not able to provide accurate information for the health service procedure at issue, the department may use any other information that the department considers to be reliable and relevant to the disputed fee to determine the reasonableness of the disputed fee. [74]

2. Notwithstanding subd. 1., the department may use only a hospital radiology database that has been certified by the department under par. (h) to determine the reasonableness of a hospital fee for radiology services.

(f) Within 30 days after a determination under this subsection, the department may set aside, reverse, or modify the determination for any reason that the department considers sufficient. Within 60 days after a determination under this subsection, the department may set aside, reverse, or modify the determination on grounds of mistake. [75] A health service provider, insurer, or self-insured employer that is aggrieved by a determination of the department under this subsection may seek judicial review of that determination in the same manner that compensation claims are reviewed under s. 102.23. [76]

(g) Section 102.13 (1) (e) does not apply to the fee dispute resolution process under this subsection.

(h) The department shall promulgate rules establishing procedures and requirements for the fee dispute resolution process under this subsection, including rules specifying the standards that health service fee databases must meet for certification under this paragraph. Using those standards, the department shall certify databases of the health service fees that various health service providers charge. In certifying databases under this paragraph, the department shall certify at least one database of hospital fees for radiology services, including diagnostic and interventional radiology, diagnostic ultrasound and nuclear medicine. [77]

Cross-reference: See also s. DWD 80.72, Wis. adm. code.

(2m) (a) Except as provided in this paragraph, the department has jurisdiction under this subsection, sub. (1m) (b), and s. 102.17 to resolve a dispute between a health service provider and an insurer or self-insured employer over the necessity of treatment provided for an injured employee who claims benefits under this chapter. A health service provider may not submit a dispute over necessity of treatment to the department under this subsection before all treatment by the health service provider of the employee's injury has ended if the amount in controversy, whether based on a single charge

[73] 2003 Wis. Act 144, effective March 30, 2004, reduces the standard deviation from 1.5 to 1.4 for determining reasonableness of fee disputes.

[74] This clarifies the department's authority to consider information other than the formula amount if the database the insurer uses does not have reliable data for the disputed procedure.

[75] 2003 Wis. Act 144, effective March 30, 2004, permits the department to modify reasonableness of fee orders for any reason it deems sufficient within 30 days; and to modify such orders on grounds of mistake within 60 days.

[76] There is no administrative appeal to a determination of reasonableness under this section. However, the parties have the right to a review of the determination in the circuit court.

[77] This directs the department to develop a separate database for use in disputes regarding the reasonableness of radiology fees charged by hospitals.

or a combination of charges for one or more days of service, is less than $25.[78] After all treatment by a health service provider of an employee's injury has ended, the health service provider may submit any dispute over necessity of treatment to the department, regardless of the amount in controversy. The department shall deny payment for any treatment that the department determines under this subsection to be unnecessary.

(am) A health service provider and an insurer or self-insured employer that are parties to a dispute under this subsection over the necessity of treatment are bound by the department's determination under this subsection on the necessity of the disputed treatment, unless that determination is set aside on judicial review as provided in par. (e).

(b) An insurer or self-insured employer that disputes the necessity of treatment provided by a health service provider or the department under sub. (1m) (b) or s. 102.18 (1) (bg) 2. shall provide reasonable written notice to the health service provider that the necessity of that treatment is being disputed. After receiving reasonable written notice under this paragraph or under sub. (1m) (b) or s. 102.18 (1) (bg) 2. that the necessity of treatment is being disputed, a health service provider may not collect a fee for that disputed treatment from, or bring an action for collection of the fee for that disputed treatment against, the employee who received the treatment.[79]

(c) Before determining under this subsection the necessity of treatment provided for an injured employee who claims benefits under this chapter, the department shall obtain a written opinion on the necessity of the treatment in dispute from an expert selected by the department. To qualify as an expert, a person must be licensed to practice the same health care profession as the individual health service provider whose treatment is under review and must either be performing services for an impartial health care services review organization or be a member of an independent panel of experts established by the department under par. (f). The standards promulgated under par. (g) shall be applied by an expert and by the department in rendering an opinion as to, and in determining, necessity of treatment under this paragraph. In cases in which no standards promulgated under sub. (2m) (g) apply, the department shall find the facts regarding necessity of treatment. The department shall adopt the written opinion of the expert as the department's determination on the issues covered in the written opinion, unless the health service provider or the insurer or self-insured employer present clear and convincing written evidence that the expert's opinion is in error.[80] [81]

(d) The department may charge a party to a dispute over the necessity of treatment provided for an injured employee who claims benefits under this chapter for the full cost of obtaining the written opinion of the expert under par. (c). The department shall charge the insurer or self-insured employer for the full cost of obtaining the written opinion of the expert for the first dispute that a particular individual health service provider is involved in, unless the department determines that the individual health service provider's position in the dispute is frivolous or based on fraudulent representations. In a subsequent dispute involving the same individual health service provider, the department shall charge the losing party to the dispute for the full cost of obtaining the written opinion of the expert.[82]

[78] 2003 Wis. Act 144, effective March 30, 2004, creates a minimum threshold disputed amount of $25.00 based on a single charge or a combination of charges for one or more dates of service for utilizing the necessity of treatment dispute resolution process. This minimum amount does not apply if treatment for the injury by the provider has ended.

[79] This amendment provides the requirement for written notice by an insurance carrier or self-insured employer to a health care provider that treatment was unnecessary. 2009 Wis. Act 206, effective May 1, 2010.

[80] See Rule DWD 80.73(2)(c) for definition of those licensed to practice the same health care profession.

[81] This amendment requires experts selected by the department to apply the treatment guidelines in rendering necessity of treatment opinions. 2005 Wis. Act 172, effective April 1, 2006. See Rule DWD 81.

[82] When there is a dispute between a health care provider and an insurer or self-insurer regarding the necessity of treatment provided to an employee, this provision directs the department to obtain and adopt the opinion of an independent medical expert in the same profession. The losing party will pay the cost of obtaining the opinion, except for the first dispute involving a provider. Also see Rule DWD 80.73.

(e) Within 30 days after a determination under this subsection, the department may set aside, reverse, or modify the determination for any reason that the department considers sufficient. Within 60 days after a determination under this subsection, the department may set aside, reverse, or modify the determination on grounds of mistake. A health service provider, insurer, or self-insured employer that is aggrieved by a determination of the department under this subsection may seek judicial review of that determination in the same manner that compensation claims are reviewed under s. 102.23. [83]

(f) The department may contract with an impartial health care services review organization to provide the expert opinions required under par. (c), or establish a panel of experts to provide those opinions, or both. If the department establishes a panel of experts to provide the expert opinions required under par. (c), the department may pay the members of that panel a reasonable fee, plus actual and necessary expenses, for their services.

(g) The department shall promulgate rules establishing procedures and requirements for the necessity of treatment dispute resolution process under this subsection, including rules setting the fees under par. (f) and rules establishing standards for determining the necessity of treatment provided to an injured employee. Before the department may amend the rules establishing those standards, the department shall establish an advisory committee under s. 227.13 composed of health care providers providing treatment under s. 102.42 to advise the department and the council on worker's compensation on amending those rules. [84]

[83] 2003 Wis. Act 144, effective March 30, 2004, permits the department to modify its necessity of treatment orders for any reason it deems sufficient within 30 days; and to modify such orders on grounds of mistake within 60 days. There is no administrative appeal to a determination of necessity under this section. However, the parties have the right to a review of the determination in the circuit court.

[84] The department is authorized to promulgate rules to establish treatment guidelines for determining necessity of treatment disputes. See Rule DWD 81. 2007 Wis. Act 185, effective April 1, 2008 eliminated the requirement that the rules are to be consistent to the extent possible with the Minnesota worker's compensation treatment parameters.

Cross-reference: See also s. DWD 80.73 and ch. DWD 81, Wis. adm. code.

(3) No employer subject to this chapter may solicit, receive, or collect any money from an employee or any other person or make any deduction from their wages, either directly or indirectly, for the purpose of discharging any liability under this chapter or recovering premiums paid on a contract described under s. 102.31 (1) (a) or a policy described under s. 102.315 (3), (4), or (5) (a); nor may any employer subject to this chapter sell to an employee or other person, or solicit or require the employee or other person to purchase, medical, chiropractic, podiatric, psychological, dental, or hospital tickets or contracts for medical, surgical, hospital, or other health care treatment that is required to be furnished by that employer.

(4) The department has jurisdiction to pass on any question arising out of sub. (3) and has jurisdiction to order the employer to reimburse an employee or other person for any sum deducted from wages or paid by him or her in violation of that subsection.[85] In addition to the penalty provided in s. 102.85 (1), any employer violating sub. (3) shall be liable to an injured employee for the reasonable value of the necessary services rendered to that employee pursuant to any arrangement made in violation of sub. (3) without regard to that employee's actual disbursements for the same.

(5) Except as provided in s. 102.28 (3), no agreement by an employee to waive the right to compensation is valid.

History: 1975 c. 147, 200; 1977 c. 195; 1981 c. 92, 314; 1983 a. 98; 1985 a. 83; 1989 a. 64; 1991 a. 85; 1993 a. 81; 1995 a. 117; 1997 a. 38; 1999 a. 14, 185; 2001 a. 37; 2003 a. 144; 2005 a. 172; 2007 a. 185; 2009 a. 206.

The continuing obligation to compensate an employee for work related medical expenses under s. 102.42 does not allow agency review of compromise agreements after the one-year statute of limitations in s. 102.16 (1) has run if the employee incurs medical expenses after that time. Schenkoski v. LIRC, 203 Wis. 2d 109, 552 N.W.2d 120 (Ct. App. 1996), 96-0051.

An appeal under sub. (2m) (e) of a department determination may be served under s. 102.23 (1) (b) on the department or the commission. McDonough v. DWD, 227 Wis. 2d 271, 595 N.W.2d 686 (1999), 97-3711.

[85] The department has the authority to order reimbursement of sums illegally deducted.

102.17 Procedure; notice of hearing; witnesses, contempt; testimony, medical examination.[86] **(1)** (a) 1. Upon the filing with the department by any party in interest of any application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, the department shall mail a copy of the application to all other parties in interest, and the insurance carrier shall be considered a party in interest. The department may bring in additional parties by service of a copy of the application.

2. Subject to subd. 3., the department shall cause notice of hearing on the application to be given to each interested party, by service of that notice on the interested party personally or by mailing a copy of that notice to the interested party's last-known address at least 10 days before the hearing. If a party in interest is located without this state, and has no post-office address within this state, the copy of the application and copies of all notices shall be filed with the department of financial institutions and shall also be sent by registered or certified mail to the last-known post-office address of the party. Such filing and mailing shall constitute sufficient service, with the same effect as if served upon a party located within this state.

3. If a party in interest claims that the employer or insurer has acted with malice or bad faith as described in s. 102.18 (1) (b) or (bp), that party shall provide written notice stating with reasonable specificity the basis for the claim to the employer, the insurer, and the department before the department schedules a hearing on the claim of malice or bad faith.[87]

4. The hearing may be adjourned in the discretion of the department, and hearings may be held at such places as the department designates, within or without the state. The department may also arrange to have hearings held by the commission, officer, or tribunal having authority to hear cases arising under the worker's compensation law of any other state, of the District of Columbia, or of any territory of the United States, the testimony and proceedings at any such hearing to be reported to the department and to be part of the record in the case. Any evidence so taken shall be subject to rebuttal upon final hearing before the department.

(b) In any dispute or controversy pending before the department, the department may direct the parties to appear before an examiner for a conference to consider the clarification of issues, the joining of additional parties, the necessity or desirability of amendments to the pleadings, the obtaining of admissions of fact or of documents, records, reports and bills which may avoid unnecessary proof and such other matters as may aid in disposition of the dispute or controversy. After this conference the department may issue an order requiring disclosure or exchange of any information or written material which it considers material to the timely and orderly disposition of the dispute or controversy. If a party fails to disclose or exchange within the time stated in the order, the department may issue an order dismissing the claim without prejudice or excluding evidence or testimony relating to the information or written material. The department shall provide each party with a copy of any order.[88]

(c) Any party shall have the right to be present at any hearing, in person or by attorney or any other agent, and to present such testimony as may be pertinent to the controversy before the department. No person, firm, or corporation, other than an attorney at law who is licensed to practice law in the state, may appear on behalf of any party in interest before the department or any member or employee of the department assigned to conduct any hearing, investigation, or inquiry

[86] The practice before the department follows substantially the practice in courts of equity. The purpose is to secure the facts in as direct and simple a manner as possible. Parties will aid the department and make the administration of the act less expensive by stipulating all the facts not in dispute. In practice the department mails copies of its awards to both parties. If a mistake is found, the department may correct it upon having its attention called to the matter within 21 days after the date of the award. A complete statement of the rules of practice adopted by the department in the administration of the compensation act is set forth at the back of this publication.

[87] This amendment requires a party who claims an employer or insurance carrier acted in bad faith to provide written notice stating with reasonable specificity the basis for the claim to the employer, insurance carrier and the department before a hearing is scheduled in the claim. 2009 Wis. Act 206, effective May 1, 2010.

[88] After a prehearing conference the department may order disclosure of relevant information.

relative to a claim for compensation or benefits under this chapter, unless the person is 18 years of age or older, does not have an arrest or conviction record, subject to ss. 111.321, 111.322 and 111.335, is otherwise qualified, and has obtained from the department a license with authorization to appear in matters or proceedings before the department. Except as provided under pars. (cm) and (cr), the license shall be issued by the department under rules promulgated by the department. The department shall maintain in its office a current list of persons to whom licenses have been issued. Any license may be suspended or revoked by the department for fraud or serious misconduct on the part of an agent, any license may be denied, suspended, nonrenewed, or otherwise withheld by the department for failure to pay court-ordered payments as provided in par. (cm) on the part of an agent, and any license may be denied or revoked if the department of revenue certifies under s. 73.0301 that the applicant or licensee is liable for delinquent taxes. Before suspending or revoking the license of the agent on the grounds of fraud or misconduct, the department shall give notice in writing to the agent of the charges of fraud or misconduct and shall give the agent full opportunity to be heard in relation to those charges. In denying, suspending, restricting, refusing to renew, or otherwise withholding a license for failure to pay court-ordered payments as provided in par. (cm), the department shall follow the procedure provided in a memorandum of understanding entered into under s. 49.857. The license and certificate of authority shall, unless otherwise suspended or revoked, be in force from the date of issuance until the June 30 following the date of issuance and may be renewed by the department from time to time, but each renewed license shall expire on the June 30 following the issuance of the renewed license. [89]

(cg) 1. Except as provided in subd. 2m., the department shall require each applicant for a license under par. (c) who is an individual to provide the department with the applicant's social security number, and shall require each applicant for a license under par. (c) who is not an individual to provide the department with the applicant's federal employer identification number, when initially applying for or applying to renew the license.

2. If an applicant who is an individual fails to provide the applicant's social security number to the department or if an applicant who is not an individual fails to provide the applicant's federal employer identification number to the department, the department may not issue or renew a license under par. (c) to or for the applicant unless the applicant is an individual who does not have a social security number and the applicant submits a statement made or subscribed under oath or affirmation as required under subd. 2m.

2m. If an applicant who is an individual does not have a social security number, the applicant shall submit a statement made or subscribed under oath or affirmation to the department that the applicant does not have a social security number. The form of the statement shall be prescribed by the department. A license issued in reliance upon a false statement submitted under this subdivision is invalid.

3. The department of workforce development may not disclose any information received under subd. 1. to any person except to the department of revenue for the sole purpose of requesting certifications under s. 73.0301 or the department of children and families for purposes of administering s. 49.22.

(cm) The department of workforce development shall deny, suspend, restrict, refuse to renew, or otherwise withhold a license under par. (c) for failure of the applicant or agent to pay court-ordered payments of child or family support, maintenance, birth expenses, medical expenses, or other expenses related to the support of a child or former spouse or for failure of the applicant or agent to comply, after appropriate notice, with a subpoena or warrant issued by the department of children and families or a county child support agency under s. 59.53 (5) and related to paternity or child support proceedings, as provided in a memorandum of understanding entered into under s. 49.857. Notwithstanding par. (c), an action taken under this paragraph is subject to review only as provided in the

[89] Any person other than a Wisconsin attorney who wishes to represent parties in compensation hearings is required to obtain a license under rules formulated by the department. See Rule DWD 80.20.

memorandum of understanding entered into under s. 49.857 and not as provided in ch. 227. [90]

(cr) The department shall deny an application for the issuance or renewal of a license under par. (c), or revoke such a license already issued, if the department of revenue certifies under s. 73.0301 that the applicant or licensee is liable for delinquent taxes. Notwithstanding par. (c), an action taken under this paragraph is subject to review only as provided under s. 73.0301 (5) and not as provided in ch. 227.

(d) 1. The contents of certified medical and surgical reports by physicians, podiatrists, surgeons, dentists, psychologists, physician assistants, advanced practice nurse prescribers, [91] and chiropractors licensed in and practicing in this state, and of certified reports by experts concerning loss of earning capacity under s. 102.44 (2) and (3), presented by a party for compensation constitute prima facie evidence as to the matter contained in those reports, subject to any rules and limitations the department prescribes. [92] Certified reports of physicians, podiatrists, surgeons, dentists, psychologists, physician assistants, advanced practice nurse prescribers, and chiropractors, wherever licensed and practicing, who have examined or treated the claimant, and of experts, if the practitioner or expert consents to being subjected to cross-examination also constitute prima facie evidence as to the matter contained in those reports. Certified reports of physicians, podiatrists, surgeons, psychologists, and chiropractors are admissible as evidence of the diagnosis, necessity of the treatment, and cause and extent of the disability. Certified reports by doctors of dentistry, physician assistants, and advanced practice nurse prescribers are admissible as evidence of the diagnosis and necessity of treatment but not of the cause and extent of disability. Any physician, podiatrist, surgeon, dentist, psychologist, chiropractor, physician assistant, advanced practice nurse prescriber, or expert who knowingly makes a false statement of fact or opinion in such a certified report may be fined or imprisoned, or both, under s. 943.395.

2. The record of a hospital or sanatorium in this state that is satisfactory to the department, established by certificate, affidavit, or testimony of the supervising officer of the hospital or sanitorium, any other person having charge of the record, or a physician, podiatrist, surgeon, dentist, psychologist, physician assistant, advanced practice nurse prescriber, or chiropractor to be the record of the patient in question, and made in the regular course of examination or treatment of the patient, constitutes prima facie evidence as to the matter contained in the record, to the extent that the record is otherwise competent and relevant. [93]

3. The department may, by rule, establish the qualifications of and the form used for certified reports submitted by experts who provide information concerning loss of earning capacity under s. 102.44 (2) and (3). The department may not admit into evidence a certified report of a practitioner or other expert or a record of a hospital or sanatorium that was not filed with the department and all parties in interest at least 15 days before the date of the hearing, unless the department is satisfied that there is good cause for the failure to file the report. [94]

4. A report or record described in subd. 1., 2., or 3. that is admitted or received into evidence by the department constitutes substantial evidence under s. 102.23 (6) as to the matter contained in the report or record. [95]

(e) The department may, with or without notice to any party, cause testimony to be taken, an inspection of the premises where the injury occurred to be made, or the time books and payrolls of the employer to be examined by any

[90] Sections 102.17(1)(cg) & (cm) were created by 1997 Wis. Act 191 relative to enforcement of support payments. Section 102.17(1)(cr) was created by 1997 Wis. Act 237 relative to delinquent taxes.

[91] 2003 Wis. Act 144, effective March 30, 2004, adds physician assistants and advance practice nurse prescribers as practitioners who can complete certified medical reports and are given the same status as dentists to provide certified reports as evidence of the diagnosis and necessity of treatment but not of the cause and extent of disability.

[92] Previously the law provided that some documents be verified. Now all documents need only be certified.

[93] It must be shown that the record was made in the regular course of examination or treatment of the patient. The record then constitutes prima facie evidence insofar as it may otherwise be competent and relevant.

[94] Reports are required in advance of the hearing to prevent confusion and delay of the hearing or the necessity for a continued hearing.

[95] This amendment provides that records and reports described under this paragraph that are admitted or received into evidence at hearings constitute substantial evidence. 2005 Wis. Act 172, effective April 1, 2006.

examiner, and may direct any employee claiming compensation to be examined by a physician, chiropractor, psychologist, dentist, or podiatrist. The testimony so taken, and the results of any such inspection or examination, shall be reported to the department for its consideration upon final hearing. All ex parte testimony taken by the department shall be reduced to writing and any party shall have opportunity to rebut that testimony on final hearing.

(f) Sections 804.05 and 804.07 shall not apply to proceedings under this chapter, except as to a witness:

1. Who is beyond reach of the subpoena of the department; or

2. Who is about to go out of the state, not intending to return in time for the hearing; or

3. Who is so sick, infirm or aged as to make it probable that the witness will not be able to attend the hearing; or

4. Who is a member of the legislature, if any committee of the same or the house of which the witness is a member, is in session, provided the witness waives his or her privilege. [96]

(g) Whenever the testimony presented at any hearing indicates a dispute or creates a doubt as to the extent or cause of disability or death, the department may direct that the injured employee be examined, that an autopsy be performed, or that an opinion be obtained without examination or autopsy, by or from an impartial, competent physician, chiropractor, dentist, psychologist or podiatrist designated by the department who is not under contract with or regularly employed by a compensation insurance carrier or self-insured employer. The expense of the examination, autopsy, or opinion shall be paid by the employer or, if the employee claims compensation under s. 102.81, from the uninsured employers fund. The report of the examination, autopsy, or opinion shall be transmitted in writing to the department and a copy of the report shall be furnished by the department to each party, who shall have an opportunity to rebut such report on further hearing.

(h) The contents of certified reports of investigation, made by industrial safety specialists who are employed, contracted, or otherwise secured by the department and available for cross-examination, served upon the parties 15 days prior to hearing, shall constitute prima facie evidence as to matter contained in those reports. A report described in this paragraph that is admitted or received into evidence by the department constitutes substantial evidence under s. 102.23 (6) as to the matter contained in the report. [97]

(2) If the department shall have reason to believe that the payment of compensation has not been made, it may on its own motion give notice to the parties, in the manner provided for the service of an application, of a time and place when a hearing will be held for the purpose of determining the facts. Such notice shall contain a statement of the matter to be considered. Thereafter all other provisions governing proceedings on application shall attach insofar as the same may be applicable. When the department schedules a hearing on its own motion, the department does not become a party in interest and is not required to appear at the hearing. [98]

(2m) Any party, including the department, may require any person to produce books, papers and records at the hearing by personal service of a subpoena upon the person along with a tender of witness fees as provided in ss. 814.67 and 885.06. Except as provided in sub. (2s), the subpoena shall be on a form provided by the department and shall give the name and address of the party requesting the subpoena.

[96] This permits examinations of a witness beyond reach of the subpoena of the department, or when a witness shall be about to go out of the state not intending to return in time for hearing, or when the witness shall be so sick or infirm or aged as to make it probable that the witness will not be able to attend hearing, or in case of member of the legislature, if a committee or house of which the witness is a member is in session, provided the member is willing to waive his or her privilege. In other cases adverse examination before hearing is not permissible. This insures a minimum of delay and expense, and that as far as possible all proceedings are to be had before the department which has necessary machinery and personnel to insure prompt and proper procedure with little or no expense to the parties. See ch. 804.

[97] This paragraph was amended by 2001 Wis. Act 37, effective January 1, 2002, to include certified reports of investigation made by industrial safety specialists who are contracted by or otherwise secured by the department. 2005 Wis. Act 172, effective April 1, 2006 provided that reports described under this paragraph that are admitted or received into evidence at hearings constitute substantial evidence.

[98] This codifies a long-standing departmental policy.

(2s) A party's attorney of record may issue a subpoena to compel the attendance of a witness or the production of evidence. A subpoena issued by an attorney must be in substantially the same form as provided in s. 805.07 (4) and must be served in the manner provided in s. 805.07 (5). The attorney shall, at the time of issuance, send a copy of the subpoena to the appeal tribunal or other representative of the department responsible for conducting the proceeding.

(3) Any person who shall willfully and unlawfully fail or neglect to appear or to testify or to produce books, papers and records as required, shall be fined not less than $25 nor more than $100, or imprisoned in the county jail not longer than 30 days. Each day such person shall so refuse or neglect shall constitute a separate offense.

(4) Except as provided in this subsection and s. 102.555 (12) (b), the right of an employee, the employee's legal representative, or a dependent to proceed under this section shall not extend beyond 12 years after the date of the injury or death or after the date that compensation, other than treatment or burial expenses, was last paid, or would have been last payable if no advancement were made,[99] whichever date is latest. In the case of occupational disease; a traumatic injury resulting in the loss or total impairment of a hand or any part of the rest of the arm proximal to the hand or of a foot or any part of the rest of the leg proximal to the foot, any loss of vision, or any permanent brain injury; or a traumatic injury causing the need for an artificial spinal disc or a total or partial knee or hip replacement, there shall be no statute of limitations, except that benefits or treatment expense for an occupational disease becoming due 12 years after the date of injury or death or last payment of compensation shall be paid from the work injury supplemental benefit fund under s. 102.65 and in the manner provided in s. 102.66 and benefits or treatment expense for a traumatic injury becoming due 12 years after that date shall be paid by the employer or insurer.[100] Payment of wages by the employer during disability or absence from work to obtain treatment shall be considered payment of compensation for the purpose of this section if the employer knew of the employee's condition and its alleged relation to the employment.

(5) This section does not limit the time within which the state may bring an action to recover the amounts specified in ss. 102.49 (5) and 102.59 (6) If an employee or dependent shall, at the time of injury, or at the time the employee's or dependent's right accrues, be under 18 years of age, the limitations of time within which the employee or dependent may file application or proceed under this chapter, if they would otherwise sooner expire, shall be extended to one year after the employee or dependent attains the age of 18 years. If, within any part of the last year of any such period of limitation, an employee, the employee's personal representative, or surviving dependent be insane or on active duty in the armed forces of the United States such period of limitation shall be extended to 2 years after the date that the limitation would otherwise expire. The provision hereof with respect to persons on active duty in the armed forces of the United States shall apply only where no applicable federal statute is in effect.

(7) (a) Except as provided in par. (b), in a claim under s. 102.44 (2) and (3), testimony or certified reports of expert witnesses on loss of earning capacity may be received in evidence and considered with all other evidence to decide on an employee's actual loss of earning capacity.[101] [102]

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[99] This makes clear that even though an advancement or lump sum is granted, the time for proceeding is not cut down but is limited only by a period of 12 years from the date that compensation would have been last payable if no advancement or lump sum had been made.

[100] There no longer is a statute of limitations for traumatic injuries resulting in the loss or total impairment of a hand or any part of the rest of the arm proximal to 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 a total or partial knee or hip replacement. Claims for these injuries will be paid by self-insured employers and insurance carriers. This amendment was created by 2005 Wis. Act 172, effective April 1, 2006.

[101] Now the reports need only be certified rather than verified.

[102] This gives the department the option of using or not using the testimony or reports of expert witnesses in determining the loss of earning capacity resulting from nonscheduled injuries. The determination is made by considering all evidence in the record.

(b) Except as provided in par. (c), the department shall exclude from evidence testimony or certified reports from expert witnesses under par. (a) offered by the party that raises the issue of loss of earning capacity if that party failed to notify the department and the other parties of interest, at least 60 days before the date of the hearing, of the party's intent to provide the testimony or reports and of the names of the expert witnesses involved. Except as provided in par. (c), the department shall exclude from evidence testimony or certified reports from expert witnesses under par. (a) offered by a party of interest in response to the party that raises the issue of loss of earning capacity if the responding party failed to notify the department and the other parties of interest, at least 45 days before the date of the hearing, of the party's intent to provide the testimony or reports and of the names of the expert witnesses involved. [103]

(c) Notwithstanding the notice deadlines provided in par. (b), the department may receive in evidence testimony or certified reports from expert witnesses under par. (a) when the applicable notice deadline under par. (b) is not met if good cause is shown for the delay in providing the notice required under par. (b) and if no party is prejudiced by the delay.

(8) Unless otherwise agreed to by all parties, an injured employee shall file with the department and serve on all parties at least 15 days before the date of the hearing an itemized statement of all medical expenses and incidental compensation under s. 102.42 claimed by the injured employee. The itemized statement shall include, if applicable, information relating to any travel expenses incurred by the injured employee in obtaining treatment including the injured employee's destination, number of trips, round trip mileage and meal and lodging expenses. The department may not admit into evidence any information relating to medical expenses and incidental compensation under s. 102.42 claimed by an injured employee if the injured employee failed to file with the department and serve on all parties at least 15 days before the date of the hearing an itemized statement of the medical expenses and incidental compensation under s. 102.42 claimed by the injured employee, unless the department is satisfied that there is good cause for the failure to file and serve the itemized statement. [104]

History: 1971 c. 148; 1971 c. 213 s. 5; 1973 c. 150, 282; Sup. Ct. Order, 67 Wis. 2d 585, 774 (1975); 1975 c. 147 ss. 20, 54; 1975 c. 199, 200; 1977 c. 29, 195, 273; 1979 c. 278; 1981 c. 92, 314; 1981 c. 317 s. 2202; 1981 c. 380; 1981 c. 391 s. 211; 1985 a. 83; 1989 a. 64, 139, 359; 1991 a. 85; 1993 a. 81, 492; 1995 a. 27, 117; 1997 a. 38, 191, 237; 1999 a. 9; 2001 a. 37; 2003 a. 144; 2005 a. 172; 2007 a. 185; 2009 a. 180, 206.

Cross-reference: See also ch. DWD 80, Wis. adm. code.

A plaintiff-employer was not deprived of any substantial due process rights by the department's refusal to invoke its rule requiring inspection of the opposing parties' medical reports when the plaintiff had ample notice of the nature of the employee's claim. Theodore Fleisner, Inc. v. DILHR, 65 Wis. 2d 317, 222 N.W.2d 600 (1974).

Under the facts of the case, a refusal to grant an employer's request for adjournment was a denial of due process. Bituminous Casualty Co. v. DILHR, 97 Wis. 2d 730, 295 N.W.2d 183 (Ct. App. 1980).

Sub. (1) (d) does not create a presumption that evidence presented by treating physicians is correct. The statute enforces the idea that LIRC determines the weight to be given medical witnesses. Conradt v. Mt. Carmel School, 197 Wis. 2d 60, 539 N.W.2d 713 (Ct. App. 1995), 94-2842.

LIRC's authority under sub. (1) (a) to control its calendar and manage its internal affairs necessarily implies the power to deny an applicant's motion to withdraw an application for hearing. An appellant's failure to appear at a hearing after a motion to withdraw the application was denied was grounds for entry of a default judgment under s. 102.18 (1) (a). Baldwin v. LIRC, 228 Wis. 2d 601, 599 N.W.2d 8 (Ct. App. 1999), 98-3090.

In the absence of testimony in conflict with a claimant's medical experts, LIRC may reject the expert evidence if there is countervailing testimony raising legitimate doubt about the employee's injury. Kowalchuk v. LIRC, 2000 WI App 85, 234 Wis. 2d 203, 610 N.W.2d 122, 99-1183.

It was reasonable for LIRC to conclude that the statute of limitations under sub. (4) for death benefits begins to run at the time of death, rather than the time of injury. International Paper Co. v. LIRC, 2001 WI App 248, 248 Wis. 2d 348, 635 N.W.2d 823, 01-0126.

[103] This section was created to provide that all parties have ample notice that loss of earning capacity is in issue so adequate time will be set aside for the hearing and that all parties will be prepared to proceed. In addition to the 60-day notice which the party raising the issue of loss of earning capacity must give, the responding party must give notice at least 45 days before the hearing date that it will also provide testimony or reports, including the names of its witnesses. The department is given the authority to waive the notice requirement for good cause where neither party is prejudiced.

[104] This is required so the department and other parties know what is being claimed.

The retroactive application of sub. (4) and s. 102.66 (1), as amended effective April 1, 2006, is unconstitutional as applied to the insurer in this case for two reasons: 1) it violated the insurer's due process rights guaranteed by the 14th amendment to the U.S. Constitution and Article I, Section 1 of the Wisconsin Constitution; and 2) it substantially impaired the insurer's contractual obligation in violation of Article I, Section 10 of the U.S. Constitution and Article I, Section 12 of the Wisconsin Constitution. Society Insurance v. LIRC, 2010 WI 68, ___ Wis. 2d ___, ___ N.W.2d ___, 08-3135.

Prehearing discovery under Wisconsin's worker's compensation act. Towers. 68 MLR 597 (1985).

102.175 Apportionment of liability. (1) If it is established at the hearing that 2 or more accidental injuries, for each of which a party to the proceedings is liable under this chapter, have each contributed to a physical or mental condition for which benefits would be otherwise due, liability for such benefits shall be apportioned according to the proof of the relative contribution to disability resulting from the injury. [105]

(2) If after a hearing or a prehearing conference the department determines that an injured employee is entitled to compensation but that there remains in dispute only the issue of which of 2 or more parties is liable for that compensation, the department may order one or more parties to pay compensation in an amount, time and manner as determined by the department. If the department later determines that another party is liable for compensation, the department shall order that other party to reimburse any party that was ordered to pay compensation under this subsection. [106]

History: 1979 c. 278; 1993 a. 81.

102.18 Findings, orders and awards. (1) (a) All parties shall be afforded opportunity for full, fair, public hearing after reasonable notice, but disposition of application may be made by compromise, stipulation, agreement, or default without hearing. [107]

(b) Within 90 days after the final hearing and close of the record, the department shall make and file its findings upon the ultimate facts involved in the controversy, and its order, which shall state its determination as to the rights of the parties.[108] Pending the final determination of any controversy before it, the department may in its discretion after any hearing make interlocutory findings, orders, and awards, which may be enforced in the same manner as final awards. The department may include in any interlocutory or final award or order an order directing the employer or insurer to pay for any future treatment that may be necessary to cure and relieve the employee from the effects of the injury.[109] If the department finds that the employer or insurer has not paid any amount that the employer or insurer was directed to pay in any interlocutory order or award and that the nonpayment was not in good faith, the department may include in its final award a penalty not exceeding 25% of each amount that was not paid as directed. When there is a finding that the employee is in fact suffering from an occupational disease caused by the employment of the employer against whom the application is filed, a final award dismissing the application upon the ground that the applicant has suffered no disability from the disease shall not bar any claim the employee may thereafter have for

[105] This is to permit the department to make an apportionment of disability between two or more injuries according to proof of their relative contribution. Medical evidence on the exact percentage of contribution by each injury is not necessarily required.

[106] This authorizes the department to order interim payments in order to relieve the hardship for an injured employee where the only issue is which party is responsible for payment.

[107] This authorizes dismissal of application or award of benefits without requiring the expense and inconvenience of a formal hearing.

[108] The administrative law judge shall issue prompt orders and this clarifies that it should be done within 90 days of the close of the hearing record.

[109] Administrative law judges are now authorized to award payment for necessary medical treatment on a prospective basis. This section was amended by 2001 Wis. Act 37, effective January 1, 2002.

disability sustained after the date of the award.[110] [111] [112]

(bg) 1. If the department finds under par. (b) that an insurer or self-insured employer is liable under this chapter for any health services provided to an injured employee by a health service provider, but that the reasonableness of the fee charged by the health service provider is in dispute, the department may include in its order under par. (b) a determination as to the reasonableness of the fee or the department may notify, or direct the insurer or self-insured employer to notify, the health service provider under s. 102.16 (2) (b) that the reasonableness of the fee is in dispute. The department shall deny payment of a health service fee that the department determines under this subdivision to be unreasonable. An insurer or self-insured employer and a health service provider that are parties to a fee dispute under this subdivision are bound by the department's determination under this subdivision on the reasonableness of the disputed fee, unless that determination is set aside, reversed, or modified by the department under sub. (3) or by the commission under sub. (3) or (4) or is set aside on judicial review under s. 102.23.[113]

2. If the department finds under par. (b) that an employer or insurance carrier is liable under this chapter for any treatment provided to an injured employee by a health service provider, but that the necessity of the treatment is in dispute, the department may include in its order under par. (b) a determination as to the necessity of the treatment or the department may notify, or direct the employer or insurance carrier to notify, the health service provider under s. 102.16 (2m) (b) that the necessity of the treatment is in dispute. Before determining under this subdivision the necessity of treatment provided to an injured employee, the department may, but is not required to, obtain the opinion of an expert selected by the department who is qualified as provided in s. 102.16 (2m) (c). The standards promulgated under s. 102.16 (2m) (g) shall be applied by an expert in rendering an opinion as to, and in determining, necessity of treatment under this subdivision. In cases in which no standards promulgated under s. 102.16 (2m) (g) apply, the department shall find the facts regarding necessity of treatment. The department shall deny payment for any treatment that the department determines under this subdivision to be unnecessary. An insurer or self-insured employer and a health service provider that are parties to a dispute under this subdivision over the necessity of treatment are bound by the department's determination under this subdivision on the necessity of the disputed treatment, unless that determination is set aside, reversed, or modified by the department under sub. (3) or by the commission under sub. (3) or (4) or is set aside on judicial review under s. 102.23.[114]

3. If the department finds under par. (b) that an insurer or self-insured employer is liable under this chapter for the cost of a prescription drug dispensed under s. 102.425 (2) for outpatient use by an injured employee, but that the reasonableness of the amount charged for that prescription drug is in dispute, the department may include in its order under par. (b) a determination as to the reasonableness of the prescription drug charge or the department may notify, or direct the insurer or self-insured employer to notify, the pharmacist or practitioner dispensing the prescription drug under s. 102.425 (4m) (b) that the reasonableness of the prescription drug charge is in dispute. The department shall deny payment of a prescription drug charge that the department determines under

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[110] This is procedural to avoid confusion. The department may, but is not required to, make findings of evidentiary facts. Findings necessary to support the ultimate facts may be implied from the credible evidence or reasonable inferences therefrom.

[111] This provision prevents the final closing of a claim for occupational disease in those cases in which no showing of disability can be made to the time of the department's order but in which disability may develop at a date following such order. Sections 102.12 and 102.17 still apply however.

[112] This is intended to give full scope to the expertise of the department in reserving jurisdiction where the effect of injury may be uncertain or the medical evidence is considered inadequate.

[113] This clarifies the administrative law judges' authority to determine reasonableness and necessity of treatment issues. This was created by 1997 Act 38, effective January 1, 1998.

[114] The department is not required but has the option of obtaining an expert opinion on the necessity of treatment before resolving a case by finding of fact order or by a compromise settlement. With the amendment by 2005 Wis. Act 172, effective April 1, 2006, administrative law judges are required to apply the treatment guidelines in deciding necessity of treatment disputes following hearings.

this subdivision to be unreasonable. An insurer or self-insured employer and a pharmacist or practitioner that are parties to a dispute under this subdivision over the reasonableness of a prescription drug charge are bound by the department's determination under par. (b) on the reasonableness of the disputed prescription drug charge, unless that determination is set aside, reversed, or modified by the department under sub. (3) or by the commission under sub. (3) or (4) or is set aside on judicial review under s. 102.23. [115]

(bp) If the department determines that the employer or insurance carrier suspended, terminated, or failed to make payments or failed to report an injury as a result of malice or bad faith, the department may include a penalty in an award to an employee for each event or occurrence of malice or bad faith. This penalty is the exclusive remedy against an employer or insurance carrier for malice or bad faith. If this penalty is imposed for an event or occurrence of malice or bad faith that causes a payment that is due an injured employee to be delayed in violation of s. 102.22 (1) or overdue in violation of s. 628.46 (1), the department may not also order an increased payment under s. 102.22 (1) or the payment of interest under s. 628.46 (1). The department may award an amount that it considers just, not to exceed the lesser of 200 percent of total compensation due or $30,000 for each event or occurrence of malice or bad faith. The department may assess the penalty against the employer, the insurance carrier or both. Neither the employer nor the insurance carrier is liable to reimburse the other for the penalty amount. The department may, by rule, define actions which demonstrate malice or bad faith. [116]

(bw) If an insurer, a self-insured employer or, if applicable, the uninsured employers fund pays compensation to an employee in excess of its liability and another insurer is liable for all or part of the excess payment, the department may order the insurer or self-insured employer that is liable to reimburse the insurer or self-insured employer that made the excess payment or, if applicable, the uninsured employers fund. [117]

(c) If 2 or more examiners have conducted a formal hearing on a claim and are unable to agree on the order or award to be issued, the decision shall be the decision of the majority. If the examiners are equally divided on the decision, the department may appoint an additional examiner who shall review the record and consult with the other examiners concerning their personal impressions of the credibility of the evidence. Findings of fact and an order or award may then be issued by a majority of the examiners. [118]

(d) Any award which falls within a range of 5% of the highest or lowest estimate of permanent partial disability made by a practitioner which is in evidence is presumed to be a reasonable award, provided it is not higher than the highest or lower than the lowest estimate in evidence. [119]

(e) Except as provided in s. 102.21, if the department orders a party to pay an award of compensation, the party shall pay the award no later than 21 days after the date on which the order is mailed to the last-known address of the party, unless the party files a petition for review under sub. (3). This paragraph applies to all

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[115] This amendment provides authority for administrative law judges to determine by finding of fact order after hearing or by compromise settlement whether prescription drug fees are reasonable in the same manner as authorized for reasonableness of fee and necessity of treatment disputes. 2007 Wis. Act 185, effective April 1, 2008.

[116] "Bad faith" actions for malicious failure to report injuries or pay compensation are made an administrative rather than a civil action remedy. The penalty is 200 percent of the benefits payable with a maximum of $30,000 for acts of bad faith on and after April 1, 2006. 2005 Wis. Act 172, effective April 1, 2006. Rule DWD 80.70 defines bad faith for purposes of worker's compensation.

[117] The department may order reimbursement from one employer or insurance carrier to another employer or insurance carrier if it finds the wrong party paid compensation.

[118] Section 102.18(1)(c) creates a tie-breaking procedure when administrative law judges are equally divided on a decision.

[119] Section 102.18(1)(d) gives the department the right to make an order within the range of the highest and lowest estimates of permanent disability within five percent of any estimate in evidence.

awards of compensation ordered by the department, whether the award results from a hearing, the default of a party, or a compromise or stipulation confirmed by the department.[120]

(2) The department shall have and maintain on its staff such examiners as are necessary to hear and decide disputed claims and to assist in the effective administration of this chapter. These examiners shall be attorneys and may be designated as administrative law judges. These examiners may make findings and orders, and approve, review, set aside, modify or confirm stipulations of settlement or compromises of claims for compensation.

(3) A party in interest may petition the commission for review of an examiner's decision awarding or denying compensation if the department or commission receives the petition within 21 days after the department mailed a copy of the examiner's findings and order to the party's last-known address. The commission shall dismiss a petition which is not timely filed unless the petitioner shows probable good cause that the reason for failure to timely file was beyond the petitioner's control.[121] If no petition is filed within 21 days from the date that a copy of the findings or order of the examiner is mailed to the last-known address of the parties in interest, the findings or order shall be considered final unless set aside, reversed or modified by the examiner within that time. If the findings or order are set aside by the examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the examiner the time for filing a petition commences with the date that notice of reversal or modification is mailed to the last-known address of the parties in interest. The commission shall either affirm, reverse, set aside or modify the findings or order in whole or in part, or direct the taking of additional evidence. This action shall be based on a review of the evidence submitted.[122]

(4) (a) Unless the liability under s. 102.35 (3), 102.43 (5), 102.49, 102.57, 102.58, 102.59, 102.60 or 102.61 is specifically mentioned, the order, findings or award are deemed not to affect such liability.

(b) Within 28 days after a decision of the commission is mailed to the last-known address of each party in interest, the commission may, on its own motion, set aside the decision for further consideration.

(c) On its own motion, for reasons it deems sufficient, the commission may set aside any final order or award of the commission or examiner within one year after the date of the order or award, upon grounds of mistake or newly discovered evidence, and, after further consideration, do any of the following:

1. Affirm, reverse or modify, in whole or in part, the order or award.

2. Reinstate the previous order or award.

3. Remand the case to the department for further proceedings.

(d) While a petition for review by the commission is pending or after entry of an order or award by the commission but before commencement of an action for judicial review or expiration of the period in which to commence an action for judicial review, the commission shall remand any compromise presented to it to the department for consideration and approval or rejection pursuant to s. 102.16 (1). Presentation of a compromise does not affect the period in which to commence an action for judicial review.

(5) If it shall appear to the department that a mistake may have been made as to cause of injury in the findings, order or award upon an alleged injury based on accident, when in fact the

[120] Section 102.18 (1)(e) creates a uniform 21 day payment standard for all orders awarding compensation, including awards resulting from hearings, defaults of parties and compromises and stipulations confirmed by the department. 2003 Wis. Act 144, effective March 30, 2004, clarifies that where orders award benefits, the carrier or self-insured employer shall pay the undisputed amount within 21 days even if the employee files an appeal; and shall not wait to make payment until the appeal is resolved.

[121] The commission requested "petitioner" replace "petition" because, in practice, the commission allows petitioners to show probable good cause subsequent to filing the late petition. 1999 Wis. Act 14, effective January 1, 2000.

[122] In order that undue delay in decision may not result, simple and summary procedure under this provision becomes essential. This is especially true because the law provides in case of decision by the department for four appeals, one to the commission, one to the circuit court, one to the court of appeals, and one to the Supreme Court.

employee was suffering from an occupational disease, the department may upon its own motion, with or without hearing, within 3 years from the date of such findings, order or award, set aside such findings, order or award, or the department may take such action upon application made within such 3 years. Thereafter, and after opportunity for hearing, the department may, if in fact the employee is suffering from disease arising out of the employment, make new findings and award, or it may reinstate the previous findings, order or award.

(6) In case of disease arising out of the employment, the department may from time to time review its findings, order or award, and make new findings, order or award, based on the facts regarding disability or otherwise as they may then appear. This subsection shall not affect the application of the limitation in s. 102.17 (4). [123]

History: 1971 c. 148; 1973 c. 150; 1975 c. 147; 1977 c. 29, 195; 1979 c. 89, 278, 355; 1981 c. 92; 1983 a. 98; 1985 a. 83; 1987 a. 179; 1989 a. 64; 1997 a. 38; 1999 a. 14; 2001 a. 37; 2003 a. 144; 2005 a. 172; 2007 a. 185.

Cross-reference: See also LIRC and s. DWD 80.05, Wis. adm. code.

Committee Note, 1971: The intent is to authorize the commission within its absolute discretion to reopen final orders on the basis of mistake or newly discovered evidence within a period of one year from the date of such order where this is found to be just. It is intended that the commission have authority to grant or deny compensation, including the right to increase or to decrease benefits previously awarded. [Bill 371-A]

Interlocutory orders issued by the department in worker's compensation cases are not res judicata. Worsch v. DILHR, 46 Wis. 2d 504, 175 N.W.2d 201 (1970).

When the department reverses an examiner's findings and makes independent findings, the latter should be accompanied by a memorandum opinion indicating not only prior consultation with the examiner and review of the record, but a statement or statements of the reasons for reaching a different result or conclusion, particularly when the credibility of witnesses is involved. Transamerica Insurance Co. v. DILHR, 54 Wis. 2d 272, 195 N.W.2d 656 (1972). See also Mervosh v. LIRC, 2010 WI App 36, 324 Wis. 2d 134, 781 N.W.2d 236, 09-0271.

The department could properly find no permanent disability in the case of a successful fusion of vertebrae and still retain jurisdiction to determine future disability when doctors testified that there might be future effects. Vernon County v. DILHR, 60 Wis. 2d 736, 211 N.W.2d 441 (1973).

In a case involving conflicting testimony in which the department reverses an examiner's findings, fundamental fairness requires a separate statement by the department explaining why it reached its decision, as well as specifically setting forth in the record its consultation with the examiner with respect to impressions or conclusions in regard to the credibility of witnesses. Simonton v. DILHR, 62 Wis. 2d 112, 214 N.W.2d 302 (1974).

Sub. (5) is inapplicable if at the original hearing the examiner considered the possibility of both accidental injury and injury caused by occupational disease and denied the applicant benefits. Murphy v. DILHR, 63 Wis. 2d 248, 217 N.W.2d 370 (1974).

An award will be affirmed if it is supported by any credible evidence. When there are inconsistencies or conflicts in medical testimony, it is for the department and not the courts to reconcile inconsistencies. Theodore Fleisner, Inc. v. DILHR, 65 Wis. 2d 317, 222 N.W.2d 600 (1974).

The authority granted under sub. (3) to modify the findings of a hearing examiner does not extend to the making of findings and an order on an alternative basis of liability neither tried by the parties nor ruled on by the examiner. When another basis of liability is applicable, the examiner's findings must be set aside and an order directing the taking of additional testimony entered, directing the examiner to make new findings as to the substituted basis. Joseph Schlitz Brewing Co. v. DILHR, 67 Wis. 2d 185, 226 N.W.2d 492 (1975).

The dismissal of an application that was neither based upon a stipulation or compromise nor entered after a hearing was void. The original application was valid though made many years earlier. Kohler Co. v. DILHR, 81 Wis. 2d 11, 259 N.W.2d 695 (1977).

The department is not required to make specific findings as to a defense to a worker's claim, but it is better practice to either make findings or state why none were made. Universal Foundry Co. v. DILHR, 82 Wis. 2d 479, 263 N.W.2d 172 (1978).

Commission guidelines, formulated as internal standards of credibility in worker's compensation cases, are irrelevant to a court's review of the commission's findings. E. F. Brewer Co. v. DILHR, 82 Wis. 2d 634, 264 N.W.2d 222 (1978).

A general finding by the department implies all facts necessary to support it. A finding not explicitly made may be inferred from other properly made findings and from findings that were not made if there is evidence that would support those findings. Valadzic v. Briggs & Stratton Corp. 92 Wis. 2d 583, 286 N.W.2d 540 (1979).

Sub. (1) (bp) is constitutional. Messner v. Briggs & Stratton Corp. 120 Wis. 2d 127, 353 N.W.2d 363 (Ct. App. 1984).

An employer was penalized for denying a claim that was not "fairly debatable" under sub. (1) (bp). Kimberly-Clark Corp. v. LIRC, 138 Wis. 2d 58, 405 N.W.2d 684 (Ct. App. 1987).

Sub. (4) (c) grants the review commission exclusive authority to set aside findings due to newly discovered evidence. The trial court does not possess that authority. Hopp v. LIRC, 146 Wis. 2d 172, 430 N.W.2d 359 (Ct. App. 1988).

To show bad faith under sub. (1) (bp) a claimant must show that the employer acted without a reasonable basis for the delay

[123] If the department finds that a mistake has been made as to the cause of injury, mistakenly determined to be on the basis of accident when in fact an employee was suffering from an occupational disease, the department may with or without hearing within three years from the date of the erroneous findings set aside the order. Likewise, the department may take such action upon application made within such three years.

and with knowledge or a reckless disregard of the lack of reasonable basis for the delay. North American Mechanical v. LIRC, 157 Wis. 2d 801, 460 N.W.2d 835 (Ct. App. 1990).

After the commission makes a final order and the review period has passed, the commission's decision is final for all purposes. Kwaterski v. LIRC, 158 Wis. 2d 112, 462 N.W.2d 534 (Ct. App. 1990).

Sub. (3) does not authorize LIRC to take administrative notice of any fact; review is limited to the record before the hearing examiner. Amsoil, Inc. v. LIRC, 173 Wis. 2d 154, 496 N.W.2d 150 (Ct. App. 1992).

The commission may not reject a medical opinion absent something in the record to support the rejection; countervailing expert testimony is not required in all cases. Leist v. LIRC, 183 Wis. 2d 450, 515 N.W.2d 268 (Ct. App. 1994).

Issuance of a default order under sub. (1) (a) is discretionary. Rules of civil procedure do not apply to administrative proceedings. Nothing in the law suggests a default order must be issued in the absence of excusable neglect. Verhaagh v. LIRC, 204 Wis. 2d 154, 554 N.W.2d 678 (Ct. App. 1996), 96-0470.

The commission may not rule on and consider issues on appeal that were not litigated and may not consider evidence not considered by the administrative law judge unless the parties are allowed to offer rebuttal evidence. Wright v. LIRC, 210 Wis. 2d 289, 565 N.W.2d 221 (Ct. App. 1997), 96-1024.

LIRC's authority under s. 102.17 (1) (a) to control its calender and manage its internal affairs necessarily implies the power to deny an applicant's motion to withdraw an application for hearing. An appellant's failure to appear at a hearing after a motion to withdraw the application was denied was grounds for entry of a default judgment under sub. (1) (a). Baldwin v. LIRC, 228 Wis. 2d 601, 599 N.W.2d 8 (Ct. App. 1999), 98-3090.

LIRC's application of sub. (1) (bp) was entitled to great weight deference. Beverly Enterprises v. LIRC, 2002 WI App 23, 250 Wis. 2d 246, 640 N.W.2d 518, 01-0970.

To demonstrate bad faith under sub. (1) (bp), a claimant must show the absence of a reasonable basis for denying benefits and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. Brown v. LIRC, 2003 WI 142, 267 Wis. 2d 31, 671 N.W.2d 279, 02-1429.

Because sub. (1) (bp) specifically allows for the imposition of bad faith penalties on an employer for failure to pay benefits, and because s. 102.23 (5) specifically directs the employer to pay benefits pending an appeal when the only issue is who will pay benefits, an employer may be subject to bad faith penalties under sub. (bp), independent from its insurer, when it fails to pay benefits in accordance with s. 102.23 (5). Bosco v. LIRC, 2004 WI 77, 272 Wis. 2d 586, 681 N.W.2d 157, 03-0662.

Sub. (1) (d) does not prohibit determinations in excess of the highest medical assessment in evidence, but rather creates a presumption of reasonableness for awards that fall within the prescribed range. The statute does not state that an award outside of the prescribed range is unreasonable and does not prohibit DWD from setting minimum loss of use percentages by administrative rule. Daimler Chrysler v. LIRC, 2007 WI 15, 299 Wis. 2d 1, 727 N.W.2d 311, 05-0544.

Sub. (1) (bp) does not govern the conduct of the department or its agent and does not impose any penalty on the department or its agent for bad faith conduct in administering the uninsured employers fund. Sub. (1) (bp) constitutes the exclusive remedy for the bad faith conduct of an employer or an insurance carrier. Because sub. (1) (bp) does not apply to the department's agent, it does not provide an exclusive remedy for the agent's bad faith. Moreover, s. 102.81 (1) (a) exempts the department and its agent from paying an employee the statutory penalties and interest imposed on an employer or an insurance carrier for their misdeeds, but nothing in s. 102.81 (1) (a) exempts the department or its agent from liability for its bad faith conduct in processing claims. Aslakson v. Gallagher Bassett Services, Inc. 2007 WI 39, 300 Wis. 2d 92, 729 N.W.2d 712, 04-2588.

Because the parties explicitly stated the only claim against the employer was for accidental injury, the employer could not "know the charges or claims" against it included an occupational disease claim. It never had an opportunity to be heard on "the probative force of the evidence adduced by both sides" as applied to the occupational disease claim, or on the law applicable to the occupational disease claim, either during the hearing or in its brief to the commission. As such, the employer was denied both due process and a "fair hearing" under sub. (1) (a). Waste Management Incorporated v. LIRC, 2008 WI App 50, 308 Wis. 2d 763, 747 N.W.2d 782, 07-2405.

Once a permanent partial disability award is made, the worker's compensation statutes provide only limited provision for reopening. The statutes do not provide for the reopening of a final award two years after it is rendered in the event the employer rehires the employee. Schreiber Foods, Inc. v. LIRC, 2009 WI App 40, 316 Wis. 2d 516, 765 N.W.2d 850, 08-1977.

102.19 Alien dependents; payments through consular officers. In case a deceased employee, for whose injury or death compensation is payable, leaves surviving alien dependents residing outside of the United States, the duly accredited consular officer of the country of which such dependents are citizens or such officer's designated representative residing within the state shall, except as otherwise determined by the department, be the sole representative of the deceased employee and dependents in all matters pertaining to their claims for compensation. The receipt by such officer or agent of compensation funds and the distribution thereof shall be made only upon order of the department, and payment to such officer or agent pursuant to any such order shall be a full discharge of the benefits or compensation. Such consular officer or such officer's representative shall furnish, if required by the department, a bond to be approved by it, conditioned upon the proper application of all moneys received by such person. Before such bond is discharged, such consular officer or representative shall file with the department a verified account of the items of his or her receipts and disbursements of such compensation. Such consular officer or representative shall make interim reports to the department as it may require.

History: 1977 c. 29.

102.195 Employees confined in institutions; payment of benefits. In case an employee is adjudged insane or incompetent, or convicted of a felony, and is confined in a public institution and has wholly dependent upon the employee for support a person, whose dependency is determined as if the employee were deceased, compensation payable during the period of the employee's confinement may be paid to the employee and the employee's dependents, in such manner, for such time and in such amount as the department by order provides.

History: 1993 a. 492.

102.20 Judgment on award. If any party presents a certified copy of the award to the circuit court for any county, the court shall, without notice, render judgment in accordance with the award. A judgment rendered under this section shall have the same effect as though rendered in an action tried and determined by the court, and shall, with like effect, be entered in the judgment and lien docket.

History: 1995 a. 224; 2001 a. 37.

"Award" under this section means an award that has become final under s. 102.18 (3). Warren v. Link Farms, Inc. 123 Wis. 2d 485, 368 N.W.2d 688 (Ct. App. 1985).

102.21 Payment of awards by municipalities. Whenever an award is made by the department under this chapter or s. 66.191, 1981 stats., against any municipality, the person in whose favor it is made shall file a certified copy thereof with the municipal clerk. Within 20 days thereafter, unless an appeal is taken, such clerk shall draw an order on the municipal treasurer for the payment of the award. If upon appeal such award is affirmed in whole or in part the order for payment shall be drawn within 10 days after a certified copy of such judgment is filed with the proper clerk. If more than one payment is provided for in the award or judgment, orders shall be drawn as the payments become due. No statute relating to the filing of claims against, and the auditing, allowing and payment of claims by municipalities shall apply to the payment of an award or judgment under this section.

History: 1983 a. 191 s. 6.

102.22 Penalty for delayed payments; interest. (1) If the employer or his or her insurer inexcusably delays in making the first payment that is due an injured employee for more than 30 days after the day on which the employee leaves work as a result of an injury and if the amount due is $500 or more, the payments as to which the delay is found shall be increased by 10%.[124] If the employer or his or her insurer inexcusably delays in making the first payment that is due an injured employee for more than 14 days after the day on which the employee leaves work as a result of an injury, the payments as to which the delay is found may be increased by 10%. If the employer or his or her insurer inexcusably delays for any length of time in making any other payment that is due an injured employee, the payments as to which the delay is found may be increased by 10%. Where the delay is chargeable to the employer and not to the insurer s. 102.62 shall apply and the relative liability of the parties shall be fixed and discharged as therein provided. The department may also order the employer or insurance carrier to reimburse the employee for any finance charges, collection charges or interest which the employee paid as a result of the inexcusable delay by the employer or insurance carrier. [125] [126]

(2) If the sum ordered by the department to be paid is not paid when due, that sum shall bear interest at the rate of 10% per year. The state is liable for such interest on awards issued against it under this chapter. The department has jurisdiction to issue award for payment of such interest at any time within one year of the date of its order, or upon appeal after final court determination. Such interest becomes due from the date the examiner's order becomes final or from the date of a decision by the labor and industry review commission, whichever is later.

[124] The statute was amended to reflect the department's practices in enforcing this section.

[125] This gives the department authority to order the employer or insurance carrier to reimburse the employee for finance charges, collection charges or interest which the employee paid as the result of inexcusable delay. This affects medical expenses only.

[126] Withholding amounts unquestionably due because the injured employee refuses to execute a release of his or her right to claim further benefits or for other reasons will be regarded as inexcusable delay in the making of compensation payments.

(3) If upon petition for review the commission affirms an examiner's order, interest at the rate of 7% per year on the amount ordered by the examiner shall be due for the period beginning on the 21st day after the date of the examiner's order and ending on the date paid under the commission's decision.[127] If upon petition for judicial review under s. 102.23 the court affirms the commission's decision, interest at the rate of 7% per year on the amount ordered by the examiner shall be due up to the date of the commission's decision, and thereafter interest shall be computed under sub. (2).

History: 1977 c. 195; 1979 c. 110 s. 60 (13); 1979 c. 278; 1981 c. 92; 1983 a. 98; 1985 a. 83; 1993 a. 81.

The department can assess the penalty for inexcusable delay in making payments prior to the entry of an order. The question of inexcusable delay is one of law and the courts are not bound by the department's finding as to it. Milwaukee County v. DILHR, 48 Wis. 2d 392, 180 N.W.2d 513 (1970).

The penalty under sub. (1) does not bar an action for bad faith for failure to pay a claim. Coleman v. American Universal Insurance Co. 86 Wis. 2d 615, 273 N.W.2d 220 (1979).

LIRC's application of sub. (1) was entitled to great weight deference. Beverly Enterprises v. LIRC, 2002 WI App 23, 250 Wis. 2d 246, 640 N.W.2d 518, 01-0970.

102.23 Judicial review. (1) (a) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. The order or award granting or denying compensation, either interlocutory or final, whether judgment has been rendered on it or not, is subject to review only as provided in this section and not under ch. 227 or s. 801.02. Within 30 days after the date of an order or award made by the commission either originally or after the filing of a petition for review with the department under s. 102.18 any party aggrieved thereby may by serving a complaint as provided in par. (b) and filing the summons and complaint with the clerk of the circuit court commence, in circuit court, an action against the commission for the review of the order or award, in which action the adverse party shall also be made a defendant. If the circuit court is satisfied that a party in interest has been prejudiced because of an exceptional delay in the receipt of a copy of any finding or order, it may extend the time in which an action may be commenced by an additional 30 days. The proceedings shall be in the circuit court of the county where the plaintiff resides, except that if the plaintiff is a state agency, the proceedings shall be in the circuit court of the county where the defendant resides. The proceedings may be brought in any circuit court if all parties stipulate and that court agrees.[128]

(b) In such an action a complaint shall be served with an authenticated copy of the summons. The complaint need not be verified, but shall state the grounds upon which a review is sought. Service upon a commissioner or agent authorized by the commission to accept service constitutes complete service on all parties, but there shall be left with the person so served as many copies of the summons and complaint as there are defendants, and the commission shall mail one copy to each other defendant.

(c) Except as provided in par. (cm), the commission shall serve its answer within 20 days after the service of the complaint, and, within the like time, the adverse party may serve an answer to the complaint, which answer may, by way of counterclaim or cross complaint, ask for the review of the order or award referred to in the complaint, with the same effect as if the party had commenced a separate action for the review thereof.

(cm) If an adverse party to the proceeding brought under par. (a) is an insurance company, the insurance company may serve an answer to the complaint within 45 days after the service of the complaint.[129]

(d) The commission shall make return to the court of all documents and papers on file in the matter, all testimony that has been taken, and the commission's order, findings, and award. Such return of the commission when filed in the office of the clerk of the circuit court shall, with the papers specified in s. 809.15, constitute a judgment roll in the action; and it shall not be necessary to have a transcript approved. The

[127] Interest is due at the rate of 7 percent commencing 21 days after an administrative law judge's award until the date of a commission decision or date of payment on any part of the award which is affirmed.

[128] The procedure for commencing an appeal of a commission decision is made the same as for commencing other circuit court actions.

[129] The time for serving the answer is decreased from 45 to 20 days except the time for serving the answer by insurance carriers remains 45 days. 2005 Wis. Act 442, effective November 1, 2006.

action may thereupon be brought on for hearing before the court upon the record by any party on 10 days' notice to the other; subject, however, to the provisions of law for a change of the place of trial or the calling in of another judge.

(e) Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

1. That the commission acted without or in excess of its powers.

2. That the order or award was procured by fraud.

3. That the findings of fact by the commission do not support the order or award. [130] [131]

(2) Upon the trial of any such action the court shall disregard any irregularity or error of the commission or the department unless it is made to affirmatively appear that the plaintiff was damaged thereby.

(3) The record in any case shall be transmitted to the department within 5 days after expiration of the time for appeal from the order or judgment of the court, unless appeal shall be taken from such order or judgement.

(4) Whenever an award is made against the state the attorney general may bring an action for review thereof in the same manner and upon the same grounds as are provided by sub. (1).

(5) When an action for review involves only the question of liability as between the employer and one or more insurance companies or as between several insurance companies, a party that has been ordered by the department, the commission, or a court to pay compensation is not relieved from paying compensation as ordered.

(6) If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

History: 1973 c. 150; 1975 c. 199; Sup. Ct. Order, 73 Wis. 2d xxxi (1976); 1977 c. 29; 1977 c. 187 ss. 59, 135; 1977 c. 195, 272, 447; Sup. Ct. Order, 83 Wis. 2d xiii (1978); 1979 c. 278; 1981 c. 390 s. 252; 1983 a. 98, 122, 538; 1985 a. 83; 1997 a. 187; 2001 a. 37; 2005 a. 172, 442.

Judicial Council Committee's Note, 1976: The procedure for initiating a petition for judicial review under ch. 102 is governed by the provisions of s. 102.23 rather than the provisions for initiating a civil action under s. 801.02. [Re Order effective Jan. 1, 1977]

The fact that a party appealing from a DILHR order as to unemployment compensation labeled his petition "under 227.15" [now 227.52], is immaterial since the circuit court had subject matter jurisdiction. An answer by the department that s. 227.15 [now 227.52] gave no jurisdiction amounted to an appearance, and the department could not later claim that the court had no personal jurisdiction because the appellant had not served a summons and complaint. Lees v. DILHR, 49 Wis. 2d 491, 182 N.W.2d 245 (1971).

A finding of fact, whether ultimate or evidentiary, is still in its essential nature a fact, whereas a conclusion of law accepts those facts, and by judicial reasoning results from the application of rules or concepts of law to those facts whether undisputed or not. Kress Packing Co. v. Kottwitz, 61 Wis. 2d 175, 212 N.W.2d 97 (1973).

A challenge to the constitutionality of sub. (1) was not sustained since it is manifest from the statute that the legislature intended to have the department be the real party in interest and not a mere nominal party. Hunter v. DILHR, 64 Wis. 2d 97, 218 N.W.2d 314 (1974).

When the claimant timely appealed an adverse worker's compensation decision in good faith, but erroneously captioned the appeal, the trial court abused its discretion by dismissing the action. Cruz v. DILHR, 81 Wis. 2d 442, 260 N.W.2d 692 (1978).

An employer whose unemployment compensation account is not affected by the commission's determination has no standing to seek judicial review. Cornwell Personnel Associates v. DILHR, 92 Wis. 2d 53, 284 N.W.2d 706 (Ct. App. 1979).

[130] Comment by legislative committee of 1911: The finding of the board, in the absence of fraud, is made absolutely conclusive by this section. The award is reviewable only on three grounds: (1) That the board acted without or in excess of its power; (2) that the award was procured by fraud; (3) that the findings of fact by the board do not support the award. This review does not allow any retrial of the case as presented to the board. The facts found by the board are conclusive, and the review that is allowed in those cases where the findings of fact do not support the award, would occur only where the board had not given proper consideration to the act itself. In other words, the court will review only questions of law included in grounds 1 and 3 upon which an award may be reviewed. The fraud alluded to in the second ground will be only such as was perpetrated in procuring the award, and will not include false testimony of any party, because all such questions will be decided conclusively by the board. Buehler Bros. v. Industrial Comm., 220 Wis. 371 (1936). The object of having the action to review brought against the board is twofold: (1) If any error is made it will be an error made by the board. Consequently, the board should defend its own action, and this will be done at the expense of the state; (2) To relieve the party in whose favor the award was made of the expense of litigation in the circuit and supreme courts, the commission defends it own orders.

[131] A party must petition the commission for review of findings and order of an administrative law judge before appealing to the circuit court. Appeal to the court is always from an order of the commission.

An agency's mixed conclusions of law and findings of fact may be analyzed by using 2 methods: 1) the analytical method of separating law from fact; or 2) the practical or policy method that avoids law and fact labels and searches for a rational basis for the agency's decision. United Way of Greater Milwaukee v. DILHR, 105 Wis. 2d 447, 313 N.W.2d 858 (Ct. App. 1981).

A failure to properly serve the commission pursuant to sub. (1) (b) results in a jurisdictional defect rather than a mere technical error. Gomez v. LIRC, 153 Wis. 2d 686, 451 N.W.2d 475 (Ct. App. 1989).

Discretionary reversal is not applicable to judicial review of LIRC orders under ch. 102. There is no power to reopen a matter that has been fully determined under ch. 102. Kwaterski v. LIRC, 158 Wis. 2d 112, 462 N.W.2d 534 (Ct. App. 1990).

Who is an "adverse party" under sub. (1) (a) is discussed. Brandt v. LIRC, 166 Wis. 2d 623, 480 N.W.2d 673 (1992), Miller Brewing Co. v. LIRC, 173 Wis. 2d 700, 495 N.W.2d 660 (1993).

A LIRC decision is to be upheld unless it directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise without a rational basis. Wisconsin Electric Power Co. v. LIRC, 226 Wis. 2d 778, 595 N.W.2d 23 (1999), 97-2747.

An appeal under s. 102.16 (2m) (e) of a department determination may be served under sub. (1) (b) on the department or the commission. McDonough v. Department of Workforce Development, 227 Wis. 2d 271, 595 N.W.2d 686 (1999), 97-3711.

Under s. 102.23 (1) (a), judicial review is available only from an order or award granting or denying compensation. Judicial review by common law certiorari was not available for a claim that LIRC failed to act within the statutory time limitations under sub. (4), which would be subject to judicial review of any subsequent order or award granting or denying compensation in that case. Vidal v. LIRC, 2002 WI 72, 253 Wis. 2d 426, 645 N.W.2d 870, 00-3548.

The plaintiff complied with the requirement of sub. (1) that every adverse party be made a defendant by naming the defendant's insurer in the caption of the summons and complaint, which were timely filed and served even though the insurer was not mentioned in the complaint's body. Selaiden v. Columbia Hospital, 2002 WI App 99, 253 Wis. 2d 553, 644 N.W.2d 690, 01-2046.

Sub. (5) requires an employer to make payment to a disabled employee pending appeal of a date of injury defense in an occupational disease case when the employer's liability is not disputed on appeal and the only question is who will pay benefits. Bosco v. LIRC, 2004 WI 77, 272 Wis. 2d 586, 681 N.W.2d 157, 03-0662.

Because s. 102.18 (1) (bp) specifically allows for the imposition of bad faith penalties on an employer for failure to pay benefits and because sub. (5) specifically directs the employer to pay benefits pending an appeal when the only issue is who will pay benefits, an employer may be subject to bad faith penalties under s. 102.18 (1) (bp), independent from its insurer, when it fails to pay benefits in accordance with sub. (5). Bosco v. LIRC, 2004 WI 77, 272 Wis. 2d 586, 681 N.W.2d 157, 03-0662.

Judicial review of workmen's compensation cases. Haferman, 1973 WLR 576.

102.24 Remanding record. **(1)** Upon the setting aside of any order or award, the court may recommit the controversy and remand the record in the case to the commission for further hearing or proceedings, or it may enter the proper judgment upon the findings of the commission, as the nature of the case shall demand. An abstract of the judgment entered by the trial court upon the review of any order or award shall be made by the clerk of circuit court upon the judgment and lien docket entry of any judgment which may have been rendered upon the order or award. Transcripts of the abstract may be obtained for like entry upon the judgment and lien dockets of the courts of other counties.

(2) After the commencement of an action to review any award of the commission the parties may have the record remanded by the court for such time and under such condition as they may provide, for the purpose of having the department act upon the question of approving or disapproving any settlement or compromise that the parties may desire to have so approved. If approved the action shall be at an end and judgment may be entered upon the approval as upon an award. If not approved the record shall forthwith be returned to the circuit court and the action shall proceed as if no remand had been made.

History: 1975 c. 147; 1977 c. 29; 1979 c. 278; 1995 a. 224.

102.25 Appeal from judgment on award. **(1)** Any party aggrieved by a judgment entered upon the review of any order or award may appeal therefrom within the time period specified in s. 808.04 (1). A trial court shall not require the commission or any party to the action to execute, serve or file an undertaking under s. 808.07 or to serve, or secure approval of, a transcript of the notes of the stenographic reporter or the tape of the recording machine. The state is a party aggrieved under this subsection if a judgment is entered upon the review confirming any order or award against it. At any time before the case is set down for hearing in the court of appeals or the supreme court, the parties may have the record remanded by the court to the department in the same manner and for the same purposes as provided for remanding from the circuit court to the department under s. 102.24 (2).

(2) It shall be the duty of the clerk of any court rendering a decision affecting an award of the

commission to promptly furnish the commission with a copy of such decision without charge.

History: 1971 c. 148; Sup. Ct. Order, 67 Wis. 2d 585, 774 (1975); 1977 c. 29, 187, 195, 418; 1979 c. 278; 1983 a. 219.

Judicial Council Note, 1983: Sub. (1) is amended to replace the appeal deadline of 30 days after service of notice of entry of judgment or award by the standard time specified in s. 808.04 (1), stats., for greater uniformity. The subsection is further amended to eliminate the superfluous provisions for calendaring and hearing the appeal. [Bill 151-S]

A court order setting aside an administrative order and remanding the case to the administrative agency disposed of the entire matter in litigation and was appealable as of right. Bearns v. DILHR, 102 Wis. 2d 70, 306 N.W.2d 22 (1981).

102.26 Fees and costs. (1) No fees may be charged by the clerk of any circuit court for the performance of any service required by this chapter, except for the entry of judgments and certified transcripts of judgments. In proceedings to review an order or award, costs as between the parties shall be in the discretion of the court, but no costs may be taxed against the commission.

(2) Unless previously authorized by the department, no fee may be charged or received for the enforcement or collection of any claim for compensation, nor may any contract for that enforcement or collection be enforceable when that fee, inclusive of all taxable attorney fees paid or agreed to be paid for that enforcement or collection, exceeds 20 percent of the amount at which that claim is compromised or of the amount awarded, adjudged, or collected, except that in cases of admitted liability in which there is no dispute as to the amount of compensation due and in which no hearing or appeal is necessary, the fee charged may not exceed 10 percent, but not to exceed $250, of the amount at which that claim is compromised or of the amount awarded, adjudged, or collected. [132] The limitation as to fees shall apply to the combined charges of attorneys, solicitors, representatives, and adjusters who knowingly combine their efforts toward the enforcement or collection of any compensation claim.

(3) (a) Except as provided in par. (b), compensation exceeding $100 in favor of any claimant shall be made payable to and delivered directly to the claimant in person. [133]

(b) 1. The department may upon application of any interested party and subject to sub. (2) fix the fee of the claimant's attorney or representative and provide in the award for that fee to be paid directly to the attorney or representative.

2. At the request of the claimant medical expense, witness fees and other charges associated with the claim may be ordered paid out of the amount awarded.

3. The claimant may request the insurer or self-insured employer to pay any compensation that is due the claimant by depositing the payment directly into an account maintained by the claimant at a financial institution. If the insurer or self-insured employer agrees to the request, the insurer or self-insured employer may deposit the payment by direct deposit, electronic funds transfer, or any other money transfer technique approved by the department. The claimant may revoke a request under this subdivision at any time by providing appropriate written notice to the insurer or self-insured employer. [134]

(c) Payment according to the directions of the award shall protect the employer and the employer's insurer, or the uninsured employers fund if applicable, from any claim of attorney's lien.

(4) The charging or receiving of any fee in violation of this section shall be unlawful, and the attorney or other person guilty thereof shall forfeit double the amount retained by the attorney or other person, the same to be collected by the state in an action in debt, upon complaint of the department. Out of the sum recovered the court shall direct payment to the injured party of the amount of the overcharge.

History: 1971 c. 148; 1975 c. 147 s. 54; 1975 c. 199; 1977 c. 29; 1979 c. 278; 1985 a. 83; 1989 a. 64; 1993 a. 490, 492; 1995 a. 224; 1999 a. 9; 2001 a. 37; 2007 a. 185.

Cross-reference: See also s. DWD 80.43, Wis. adm. code.

The only fee authorized to be paid to any clerk of court under sub. (1) is the fee under s. 814.61 (5), when applicable. 76 Atty. Gen. 148.

102.27 Claims and awards protected; exceptions. (1) Except as provided in sub. (2), no claim for compensation shall be assignable, but this provision shall not affect the survival thereof; nor shall any claim for compensation, or compensation awarded, or paid, be taken for the debts of the party entitled thereto.

[132] 2007 Wis. Act 185, effective April 1, 2008, increases the maximum amount of attorney fees from $100 to $250 in cases of admitted liability where there is no dispute as to the compensation due.

[133] All compensation payments are to be made directly to the employee unless, by request of a party, the department has set the fee of an attorney or agent and provided for direct payment of the fee.

[134] The department can authorize insureds and self-insureds to pay compensation directly into employees' accounts at financial institutions by direct deposit or electronic fund transfers if requested by employees. This section was created by 2001 Wis. Act 37, effective January 1, 2002.

(2) (a) A benefit under this chapter is assignable under s. 46.10 (14) (e), 49.345 (14) (e), 301.12 (14) (e), 767.225 (1) (L), 767.513 (3), or 767.75 (1) or (2m). [135]

(b) If a governmental unit provides public assistance under ch. 49 to pay medical costs or living expenses related to a claim under this chapter, the employer or insurance carrier owing compensation shall reimburse that governmental unit any compensation awarded or paid if the governmental unit has given the parties to the claim written notice stating that it provided the assistance and the cost of the assistance provided. Reimbursement shall equal the lesser of either the amount of assistance the governmental unit provided or two-thirds of the amount of the award or payment remaining after deduction of attorney fees and any other fees or costs chargeable under ch. 102. The department shall comply with this paragraph when making payments under s. 102.81. [136]

History: 1981 c. 20, 391; 1983 a. 27, 192; 1985 a. 83; 1989 a. 64; 1993 a. 481; 1997 a. 191, 237; 1999 a. 9; 2005 a. 443 s. 265; 2007 a. 20.

102.28 Preference of claims; worker's compensation insurance. (1) PREFERENCE. The whole claim for compensation for the injury or death of any employee or any award or judgment thereon, and any claim for unpaid compensation insurance premiums are entitled to preference in bankruptcy or insolvency proceedings as is given creditors' actions except as denied or limited by any law of this state or by the federal bankruptcy act, but this section shall not impair the lien of any judgment entered upon any award.

(2) REQUIRED INSURANCE; EXCEPTIONS. (a) *Duty to insure payment for compensation.* Unless exempted by the department under par. (b) or sub. (3), every employer, as described in s. 102.04 (1), [137] shall insure payment for that compensation in an insurer authorized to do business in this state. A joint venture may elect to be an employer under this chapter and obtain insurance for payment of compensation. [138] If a joint venture that is subject to this chapter only because the joint venture elected to be an employer under this chapter is dissolved and cancels or terminates its contract for the insurance of compensation under this chapter, that joint venture is deemed to have effected withdrawal, which shall be effective on the day after the contract is canceled or terminated. [139]

(b) *Exemption from duty to insure.* The department may grant a written order of exemption to an employer who shows its financial ability to pay the amount of compensation, agrees to report faithfully all compensable injuries and agrees to comply with this chapter and the rules of the department. The department may condition the granting of an exemption upon the employer's furnishing of satisfactory security to guarantee payment of all claims under compensation. The department may require that bonds or other personal guarantees be enforceable against sureties in the same manner as an award may be enforced. The department may from time to time require proof of financial ability of the employer to pay compensation. Any exemption shall be void if the application for it contains a financial statement which is false in any material respect. An employer who files an application containing a false financial statement remains subject to par.

[135] Effective July 31, 1981, benefits can be assigned for support. Upon receipt of executed copies of order from the circuit court or family court commissioner and the assignment by the employee, the employer or carrier shall make payments to the court as ordered. These payments should be reported to the department on form WKC-13 but separately from those paid to the employee.

[136] Effective July 2, 1983, government units can also be reimbursed for public assistance benefits paid to worker's compensation claimants.

[137] The language which was deleted "which is liable to pay compensation under this chapter" had been interpreted to mean that an employer was not required to insure for payment of compensation until after an event occurred. The purpose of this amendment was to state clearly that when an employer attains the status of an employer as defined by s. 102.04, that employer must then insure the liability for compensation and not delay obtaining such insurance until after a compensable injury.

[138] A joint venture may elect to be insured by itself. Under previous court decisions it could not be insured and the coverage was only through the individual policies issued to each party to the joint venture.

[139] This simplified the withdrawal procedure for joint ventures when they are dissolved.

(a). [140] The department may promulgate rules establishing an amount to be charged to an initial applicant for exemption under this paragraph and an annual amount to be charged to employers that have been exempted under this paragraph. [141]

(c) *Revocation of exemption.* The department, after seeking the advice of the self-insurers council, may revoke an exemption granted to an employer under par. (b), upon giving the employer 10 days' written notice, if the department finds that the employer's financial condition is inadequate to pay its employees' claims for compensation, that the employer has received an excessive number of claims for compensation or that the employer has failed to discharge faithfully its obligations according to the agreement contained in the application for exemption. The employer may, within 10 days after receipt of the notice of revocation, request in writing a review of the revocation by the secretary or the secretary's designee and the secretary or the secretary's designee shall review the revocation within 30 days after receipt of the request for review. If the employer is aggrieved by the determination of the secretary or the secretary's designee, the employer may, within 10 days after receipt of notice of that determination, request a hearing under s. 102.17. If the secretary or the secretary's designee determines that the employer's exemption should be revoked, the employer shall obtain insurance coverage as required under par. (a) immediately upon receipt of notice of that determination and, notwithstanding the pendency of proceedings under ss. 102.17 to 102.25, shall keep that coverage in force until another exemption under par. (b) is granted.

(d) *Effect of insuring with unauthorized insurer.* An employer who procures an exemption under par. (b) and thereafter enters into any agreement for excess insurance coverage with an insurer not authorized to do business in this state shall report that agreement to the department immediately. The placing of such coverage shall not by itself be grounds for revocation of the exemption.

(3) PROVISION OF ALTERNATIVE BENEFITS. [142] (a) An employer may file with the department an application for exemption from the duty to pay compensation under this chapter with respect to any employee who signs the waiver described in subd. 1. and the affidavit described in subd. 2. if an authorized representative of the religious sect to which the employee belongs signs the affidavit specified in subd. 3. and the agreement described in subd. 4. An application for exemption under this paragraph shall include all of the following:

1. A written waiver by the employee or, if the employee is a minor, by the employee and his or her parent or guardian of all compensation under this chapter other than the alternative benefits provided under par. (c).

2. An affidavit by the employee or, if the employee is a minor, by the employee and his or her parent or guardian stating that the employee is a member of a recognized religious sect and that, as a result of the employee's adherence to the established tenets or teachings of the religious sect, the employee is conscientiously opposed to accepting the benefits of any public or private insurance that makes payments in the event of death, disability, old age or retirement, or that makes payments toward the cost of or provides medical care, including any benefits provided under the federal social security act, 42 USC 301 to 1397f.

[140] An employer who has fraudulently obtained exemption from insuring liability under the worker's compensation act is in the same position as an employer who fails to carry worker's compensation insurance without securing exemption. The effect is to take away all the exemptions of such an employer in case of an injury to an employee and to render him or her liable to the penalties provided for failure to insure.

[141] The department has the authority to adopt administrative rules establishing fees from applicants for self-insurance or for the renewal of self-insurance and use those funds in the administration of the self-insurance program.

[142] This section exempts employers from the duty to insure employees whose religion is opposed to accepting the benefits of any public or private insurance payments for death, disability, old age, retirement or medical bills (including federal social security benefits) if: (1) the worker requests it; and (2) the religious sect agrees to pay benefits at a reasonable standard of living and medical treatment when compared to the general standards for members of the sect. The sect is no longer required to prove financial ability.

3. An affidavit by an authorized representative of the religious sect to which the employee belongs stating that the religious sect has a long-standing history of providing its members who become dependent on the support of the religious sect as a result of work-related injuries, and the dependents of those members, with a standard of living and medical treatment that are reasonable when compared to the general standard of living and medical treatment for members of the religious sect.

4. An agreement signed by an authorized representative of the religious sect to which the employee belongs to provide the financial and medical assistance described in subd. 3. to the employee and to the employee's dependents if the employee sustains an injury which, but for the waiver under subd. 1., the employer would be liable for under s. 102.03.

(b) The department shall approve an application under par. (a) if the department determines that all of the following conditions are satisfied:

1. The employee has waived all compensation under this chapter other than the alternative benefits provided under par. (c).

2. The employee is a member of a religious sect whose established tenets or teachings oppose accepting the benefits of insurance as described in par. (a) 2. and that, as a result of adherence to those tenets or teachings, the employee conscientiously opposes accepting those benefits.

3. The religious sect to which the employee belongs has a long-established history of providing its members who become dependent on the religious sect as a result of work-related injuries, and the dependents of those members, with a standard of living and medical treatment that are reasonable when compared to the general standard of living and medical treatment for members of the religious sect. In determining whether the religious sect has a long-standing history of providing the financial and medical assistance described in this subdivision, the department shall presume that a 25-year history of providing that financial and medical assistance is long-standing for purposes of this subdivision.

4. The religious sect to which the employee belongs has agreed to provide the financial and medical assistance described in subd. 3. to the employee and to the dependents of the employee if the employee sustains an injury that, but for the waiver under par. (a) 1., the employer would be liable for under s. 102.03.

(c) An employee who has signed a waiver under par. (a) 1. and an affidavit under par. (a) 2., who sustains an injury that, but for that waiver, the employer would be liable for under s. 102.03, who at the time of the injury was a member of a religious sect whose authorized representative has filed an affidavit under par. (a) 3. and an agreement under par. (a) 4. and who as a result of the injury becomes dependent on the religious sect for financial and medical assistance, or the employee's dependent, may request a hearing under s. 102.17 (1) to determine if the religious sect has provided the employee and his or her dependents with a standard of living and medical treatment that are reasonable when compared to the general standard of living and medical treatment for members of the religious sect. If, after hearing, the department determines that the religious sect has not provided that standard of living or medical treatment, or both, the department may order the religious sect to provide alternative benefits to that employee or his or her dependent, or both, in an amount that is reasonable under the circumstances, but not in excess of the benefits that the employee or dependent could have received under this chapter but for the waiver under par. (a) 1.

(d) The department shall provide a form for the application for exemption of an employer under par. (a) (intro.), the waiver and affidavit of an employee under par. (a) 1. and 2., the affidavit of a religious sect under par. (a) 3. and the agreement of a religious sect under par. (a) 4. A properly completed form is prima facie evidence of satisfaction of the conditions under par. (b) as to the matter contained in the form.

(4) CLOSURE ORDER. (a) When the department discovers an uninsured employer, the department may order the employer to cease operations until the employer complies with sub. (2).

(b) If the department believes that an employer may be an uninsured employer, the department shall notify the employer of the alleged violation of sub. (2) and the possibility of closure under this subsection. The employer may request and shall receive a hearing under s. 102.17 on the matter if

the employer applies for a hearing within 10 days after the notice of the alleged violation is served.

(c) After a hearing under par. (b), or without a hearing if one is not requested, the department may issue an order to an employer to cease operations on a finding that the employer is an uninsured employer.

(d) The department of justice may bring an action in any court of competent jurisdiction for an injunction or other remedy to enforce the department's order to cease operations under par. (c).

(5) EMPLOYER'S LIABILITY. If compensation is awarded under this chapter, against any employer who at the time of the accident has not complied with sub. (2), such employer shall not be entitled as to such award or any judgment entered thereon, to any of the exemptions of property from seizure and sale on execution allowed in ss. 815.18 to 815.21. If such employer is a corporation, the officers and directors thereof shall be individually and jointly and severally liable for any portion of any such judgment as is returned unsatisfied after execution against the corporation.

(6) REPORTS BY EMPLOYER. Every employer shall upon request of the department report to it the number of employees and the nature of their work and also the name of the insurance company with whom the employer has insured liability under this chapter and the number and date of expiration of such policy. Failure to furnish such report within 10 days from the making of a request by certified mail shall constitute presumptive evidence that the delinquent employer is violating sub. (2).

(7) INSOLVENT EMPLOYERS; ASSESSMENTS. (a) If an employer who is currently or was formerly exempted by written order of the department under sub. (2) is unable to pay an award, judgment is rendered in accordance with s. 102.20 against that employer, and execution is levied and returned unsatisfied in whole or in part, payments for the employer's liability shall be made from the fund established under sub. (8). If a currently or formerly exempted employer files for bankruptcy and not less than 60 days after that filing the department has reason to believe that compensation payments due are not being paid, the department in its discretion may make payment for the employer's liability from the fund established under sub. (8). The secretary of administration shall proceed to recover such payments from the employer or the employer's receiver or trustee in bankruptcy, and may commence an action or proceeding or file a claim therefor. The attorney general shall appear on behalf of the secretary of administration in any such action or proceeding. All moneys recovered in any such action or proceeding shall be paid into the fund established under sub. (8). [143]

(b) Each employer exempted by written order of the department under sub. (2) shall pay into the fund established by sub. (8) a sum equal to that assessed against each of the other such exempt employers upon the issuance of an initial order. The order shall provide for a sum sufficient to secure estimated payments of the insolvent exempt employer due for the period up to the date of the order and for one year following the date of the order and to pay the estimated cost of insurance carrier or insurance service organization services under par. (c). Payments ordered to be made to the fund shall be paid to the department within 30 days. If additional moneys are required, further assessments shall be made based on orders of the department with assessment prorated on the basis of the gross payroll for this state of the exempt employer, reported to the department for the previous calendar year for unemployment insurance purposes under ch. 108. If the exempt employer is not covered under ch. 108, then the department shall determine the comparable gross payroll for the exempt employer. If payment of any assessment made under this subsection is not made within 30 days of the order of the department, the attorney general may appear on behalf of the state to collect the assessment. [144]

[143] This provides for commencement of payments from the self-insured employers' liability fund 60 days after a self-insured employer files for bankruptcy.

[144] Section 102.28(7) shall apply to employers who are exempt on or after December 30, 1975, for injuries occurring after December 30, 1975.

(c) The department may retain an insurance carrier or insurance service organization to process, investigate and pay valid claims. The charge for such service shall be paid from the fund as provided under par. (b).

(8) SELF-INSURED EMPLOYERS LIABILITY FUND. The moneys paid into the state treasury under sub. (7), together with all accrued interest, shall constitute a separate nonlapsible fund designated as the self-insured employers liability fund. Moneys in the fund may be expended only as provided in s. 20.445 (1) (s) and may not be used for an other purpose of the state. [145]

History: 1973 c. 150; Sup. Ct. Order, 67 Wis. 2d 585, 774 (1975); 1975 c. 147 ss. 23, 54; 1975 c. 199; 1977 c. 195; 1981 c. 92; 1983 a. 98; 1985 a. 83; 1987 a. 179; 1989 a. 64; 1991 a. 85; 1993 a. 81; 1995 a. 117; 1997 a. 38, 39; 2003 a. 33; 2005 a. 172.

Cross-reference: See also ss. DWD 80.40 and 80.60, Wis. adm. code.

The "insure payment" requirement of sub. (2) (a) requires an employer to provide coverage for every employee in all possible employment situations. Substantial compliance with sub. (2) (a) is not sufficient. This provision does not violate due process. State v. Koch, 195 Wis. 2d 801, 537 N.W.2d 39 (Ct. App. 1995), 94-1230.

102.29 Third party liability. (1) The making of a claim for compensation against an employer or compensation insurer for the injury or death of an employee shall not affect the right of the employee, the employee's personal representative, or other person entitled to bring action, to make claim or maintain an action in tort against any other party for such injury or death, hereinafter referred to as a 3rd party; nor shall the making of a claim by any such person against a 3rd party for damages by reason of an injury to which ss. 102.03 to 102.64 are applicable, or the adjustment of any such claim, affect the right of the injured employee or the employee's dependents to recover compensation. [146] The employer or compensation insurer who shall have paid or is obligated to pay a lawful claim under this chapter shall have the same right to make claim or maintain an action in tort against any other party for such injury or death. If the department pays or is obligated to pay a claim under s. 102.81 (1), the department shall also have the right to maintain an action in tort against any other party for the employee's injury or death. However, each shall give to the other reasonable notice and opportunity to join in the making of such claim or the instituting of an action and to be represented by counsel. If a party entitled to notice cannot be found, the department shall become the agent of such party for the giving of a notice as required in this subsection and the notice, when given to the department, shall include an affidavit setting forth the facts, including the steps taken to locate such party. Each shall have an equal voice in the prosecution of said claim, and any disputes arising shall be passed upon by the court before whom the case is pending, and if no action is pending, then by a court of record or by the department. If notice is given as provided in this subsection, the liability of the tort-feasor shall be determined as to all parties having a right to make claim, and irrespective of whether or not all parties join in prosecuting such claim, the proceeds of such claim shall be divided as follows: After deducting the reasonable cost of collection, one-third of the remainder shall in any event be paid to the injured employee or the employee's personal representative or other person entitled to bring action. Out of the balance remaining, the employer, insurance carrier, or, if applicable, uninsured employers fund shall be reimbursed for all payments made by it, or which it may be obligated to make in the future, under this chapter, except that it shall not be reimbursed for any payments made or to be made under s. 102.18 (1) (bp), 102.22, 102.35 (3), 102.57, or 102.60. [147]

[145] The Self-Insured Employers Liability Fund is made nonlapsible with this amendment and the money in the fund may only be used for statutory purposes and no other state purposes. 2005 Wis. Act 172, effective April 1, 2006.

[146] Acceptance of compensation does not operate as an assignment of claim against a third party, nor does settlement with a third party operate as a waiver of claim for compensation.

[147] This provides that the employer or worker's compensation insurance carrier shall not be reimbursed out of third party settlements for payments of increased compensation made or to be made under the provisions of ss. 102.18 (1)(bp), 102.22, 102.35(3), 102.57 or 102.60. These respectively are penalties for bad faith; for delayed payments; for unreasonable refusal to rehire; increased compensation for violation of a safety order or double or treble compensation paid because of employment of a minor without required permit or at prohibited employment.

Any balance remaining shall be paid to the employee or the employee's personal representative or other person entitled to bring action. If both the employee or the employee's personal representative or other person entitled to bring action, and the employer, compensation insurer, or department, join in the pressing of said claim and are represented by counsel, the attorney fees allowed as a part of the costs of collection shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court or by the department. A settlement of any 3rd-party claim shall be void unless said settlement and the distribution of the proceeds thereof is approved by the court before whom the action is pending and if no action is pending, then by a court of record or by the department.

(2) In the case of liability of the employer or insurer to make payment into the state treasury under s. 102.49 or 102.59, if the injury or death was due to the actionable act, neglect or default of a 3rd party, the employer or insurer shall have a right of action against the 3rd party to recover the sum so paid into the state treasury, which right may be enforced either by joining in the action mentioned in sub. (1), or by independent action. Contributory negligence of the employee because of whose injury or death such payment was made shall bar recovery if such negligence was greater than the negligence of the person against whom recovery is sought, and the recovery allowed the employer or insurer shall be diminished in proportion to the amount of negligence attributable to such injured or deceased employee. Any action brought under this subsection may, upon order of the court, be consolidated and tried together with any action brought under sub. (1).

(3) Nothing in this chapter shall prevent an employee from taking the compensation that the employee may be entitled to under this chapter and also maintaining a civil action against any physician, chiropractor, psychologist, dentist, physician assistant, advanced practice nurse prescriber, or podiatrist for malpractice.[148] [149]

(4) If the employer and the 3rd party are insured by the same insurer, or by the insurers who are under common control, the employer's insurer shall promptly notify the parties in interest and the department. If the employer has assumed the liability of the 3rd party, it shall give similar notice, in default of which any settlement with an injured employee or beneficiary is void. This subsection does not prevent the employer or compensation insurer from sharing in the proceeds of any 3rd-party claim or action, as set forth in sub. (1).

(5) An insurer subject to sub. (4) which fails to comply with the notice provision of that subsection and which fails to commence a 3rd-party action, within the 3 years allowed by s. 893.54, may not plead that s. 893.54 is a bar in any action commenced by the injured employee under this section against any such 3rd party subsequent to 3 years from the date of injury, but prior to 6 years from such date of injury. Any recovery in such an action is limited to the insured liability of the 3rd party. In any such action commenced by the injured employee subsequent

[148] The sentence in this section which was deleted prevented the employer or insurance carrier from sharing in the distribution of proceeds obtained by an employee when that employee was successful in a malpractice action against any physician, chiropractor or podiatrist for improper treatment of a compensable injury. The court of appeals in a published decision held that this provision was unconstitutional. Therefore, the statute was amended to comply with this ruling. Subsequently, the Supreme Court reversed the court of appeals and found the prior statute constitutional. Racine Steel Castings v. Hardy, 139 Wis.2d 232 (Ct. of App. 1987); 144 Wis.2d 553 (1988). This amendment was effected by Chapter 179, Laws of 1987, effective April 1, 1988.

[149] 2003 Wis. Act 144, effective March 30, 2004, adds physician assistants and advance practice nurse prescribers as practitioners employees may maintain actions against for malpractice.

to the 3-year period, the insurer of the employer shall forfeit all right to participate in such action as a complainant and to recover any payments made under this chapter.[150]

(6) (a) In this subsection, "temporary help agency" means a temporary help agency that is primarily engaged in the business of placing its employees with or leasing its employees to another employer as provided in s. 102.01 (2) (f).

(b) No employee of a temporary help agency who makes a claim for compensation may make a claim or maintain an action in tort against any of the following [151]

1. Any employer that compensates the temporary help agency for the employee's services.

2. Any other temporary help agency that is compensated by that employer for another employee's services.

3. Any employee of that compensating employer or of that other temporary help agency, unless the employee who makes a claim for compensation would have a right under s. 102.03 (2) to bring an action against the employee of the compensating employer or the employee of the other temporary help agency if the employees were coemployees.

(c) No employee of an employer that compensates a temporary help agency for another employee's services who makes a claim for compensation may make a claim or maintain an action in tort against any of the following:

1. The temporary help agency.

2. Any employee of the temporary help agency, unless the employee who makes a claim for compensation would have a right under s. 102.03 (2) to bring an action against the employee of the temporary help agency if the employees were coemployees.

(6m) (a) No leased employee, as defined in s. 102.315 (1) (g), who makes a claim for compensation may make a claim or maintain an action in tort against any of the following:

1. The client, as defined in s. 102.315 (1) (b), that accepted the services of the leased employee.

2. Any other employee leasing company, as defined in s. 102.315 (1) (f), that provides the services of another leased employee to the client.

3. Any employee of the client or of that other employee leasing company, unless the leased employee who makes a claim for compensation would have a right under s. 102.03 (2) to bring an action against the employee of the client or the leased employee of the other employee leasing company if the employees and leased employees were coemployees.

(b) No employee of a client who makes a claim for compensation may make a claim or maintain an action in tort against any of the following:

1. An employee leasing company that provides the services of a leased employee to the client.

2. Any leased employee of the employee leasing company, unless the employee who makes a claim for compensation would have a right under s. 102.03 (2) to bring an action against the leased employee if the employee and the leased employee were coemployees. [152]

[150] The purpose of the provision is to give incentive to the common insurance carrier of the employer and third party to act in the interests of the employee in proceeding against the third party. There is not the same keen interest for the insurer to proceed where it is a common carrier as there is in the case where different carriers are involved. The penalty for failure to take prompt action is against the carrier that fails to initiate necessary steps to bring third party action. The carrier has already lost its right to proceed except as notice of injury has been served or action commenced within the three-year period. It, therefore, loses nothing under this provision but also fails to gain that which is gained by the employee who, under this provision, will be permitted to commence his or her action after the three-year period.

[151] Employees of a temporary help agency may not make a claim for negligence against the employer with whom they are placed.

[152] The amendments to s. 102.29(6) and (6m), Stats., extend the exclusive remedy to cover more than one temporary help agency, employee leasing company or professional employer organization and all the employees that they provide to a client employer. 2007 Wis. Act 185, effective April 1, 2008.

(7) No employee who is loaned by his or her employer to another employer and who makes a claim for compensation under this chapter may make a claim or maintain an action in tort against the employer who accepted the loaned employee's services.[153]

(8) No student of a public school, as described in s. 115.01 (1), or a private school, as defined in s. 115.001 (3r), who is named under s. 102.077 as an employee of the school district or private school for purposes of this chapter and who makes a claim for compensation under this chapter may make a claim or maintain an action in tort against the employer that provided the work training or work experience from which the claim arose.

(8m) No participant in a community service job under s. 49.147 (4) or a transitional placement under s. 49.147 (5) who, under s. 49.147 (4) (c) or (5) (c), is provided worker's compensation coverage by a Wisconsin works agency, as defined under s. 49.001 (9), and who makes a claim for compensation under this chapter may make a claim or maintain an action in tort against the employer who provided the community service job or transitional placement from which the claim arose.

(8r) No participant in a food stamp employment and training program under s. 49.79 (9) who, under s. 49.79 (9) (a) 5., is provided worker's compensation coverage by the department of health services or by a Wisconsin Works agency, as defined in s. 49.001 (9), or other provider under contract with the department of health services or a county department under s. 46.215, 46.22, or 46.23 or tribal governing body to administer the food stamp employment and training program and who makes a claim for compensation under this chapter may make a claim or maintain an action in tort against the employer who provided the employment and training from which the claim arose.

(9) No participant in a work experience component of a job opportunities and basic skills program who, under s. 49.193 (6) (a), 1997 stats., was considered to be an employee of the agency administering that program, or who, under s. 49.193 (6) (a), 1997 stats., was provided worker's compensation coverage by the person administering the work experience component, and who makes a claim for compensation under this chapter may make a claim or maintain an action in tort against the employer who provided the work experience from which the claim arose. This subsection does not apply to injuries occurring after February 28, 1998.

(10) A practitioner who, under s. 257.03, is considered an employee of the state for purposes of worker's compensation coverage while providing services on behalf of a health care facility, the department of health services, or a local health department during a state of emergency and who makes a claim for compensation under this chapter may not make a claim or maintain an action in tort against the health care facility, department, or local health department that accepted those services.

(11) No security officer employed by the department of military affairs who is deputed under s. 59.26 (4m), who remains an employee of the state for purposes of worker's compensation coverage while conducting routine external security checks around military installations in this state, and who makes a claim for compensation under this chapter may make a claim or bring an action in tort against the county in which the security officer is conducting routine external security checks or against the sheriff or undersheriff who deputed the security officer.

History: 1975 c. 147 ss. 24, 54; 1977 c. 195; 1979 c. 323 s. 33; 1981 c. 92; 1985 a. 83 s. 44; 1985 a. 332 s. 253; 1987 a. 179; 1989 a. 64; 1995 a. 117, 289; 1997 a. 38; 1999 a. 9, 14; 2001 a. 16, 37; 2003 a. 144; 2005 a. 96, 172, 253; 2007 a. 20 ss. 2645, 9121 (6) (a); 2007 a. 97, 185; 2009 a. 42, 154.

NOTE: See cases annotated under 102.03 as to the right to bring a 3rd-party action against a coemployee.

In a 3rd-party action under s. 102.29, safe place liability under s. 101.11 cannot be imposed on officers or employees of the employer. Their liability must be based on common law negligence. Pitrowski v. Taylor, 55 Wis. 2d 615, 201 N.W.2d 52 (1972).

Members of a partnership are employers of the employees of the partnership. An employee cannot bring a 3rd-party action against a member of the employing partnership. Candler v.

[153] The employer accepting a loaned employee's service has the same protection against negligence claims as the original employer.

Hardware Dealers Mutual Insurance Co. 57 Wis. 2d 85, 203 N.W.2d 659 (1973).

Liability of a corporate officer in a 3rd-party action must derive from acts done in the capacity of coemployee, not as a corporate officer and supervisor. Kruse v. Schieve, 61 Wis. 2d 421, 213 N.W.2d 65 (1973).

Sub. (1) provides attorney fees are to be allowed as "costs of collection" and, unless otherwise agreed upon, are to be divided between the attorneys for both the employee and the compensation carrier pursuant to court direction. Diedrick v. Hartford Accident & Indemnity Co. 62 Wis. 2d 759, 216 N.W.2d 193 (1974).

The words "action commenced by the injured employee" in sub. (5) also encompass the bringing of wrongful death and survival actions. Ortman v. Jensen & Johnson, Inc. 66 Wis. 2d 508, 225 N.W.2d 635 (1975).

The 6-year limitation on 3rd-party actions for wrongful death provided in sub. (5) does not deny 3rd-party defendants equal protection although other wrongful death defendants are subject to the s. 893.205 (2) 3-year limitation. Ortman v. Jenson & Johnson, Inc. 66 Wis. 2d 508, 225 N.W.2d 635. (1975).

The extra-hazardous activity exception did not apply to an employee of a general contractor who was injured while doing routine work in a nuclear power plant. Snider v. Northern States Power Co. 81 Wis. 2d 224, 260 N.W.2d 260 (1975).

A "business pursuit" exclusion in a defendant coemployee's homeowner's policy did not offend public policy. Bertler v. Employers Insurance of Wausau, 86 Wis. 2d 13, 271 N.W.2d 603 (1978).

That sub. (2) denies 3rd-party tort-feasors the right to a contribution action against a negligent employer who was substantially more at fault does not render the statute unconstitutional. Mulder v. Acme-Cleveland Corp. 95 Wis. 2d 173, 290 N.W.2d 276 (1980).

The right to share in a jury award was not dependent on participation in the prosecution of the underlying action. Guyette v. West Bend Mutual Insurance Co. 102 Wis. 2d 496, 307 N.W.2d 311 (Ct. App. 1981).

The provision by an employer of alleged negligent medical care to an employee injured on the job by persons employed for that purpose did not subject the employer to tort liability for malpractice. Jenkins v. Sabourin, 104 Wis. 2d 309, 311 N.W.2d 600 (1981).

An award for loss of consortium is not subject to the distribution formula under sub. (1). DeMeulenaere v. Transport Insurance Co. 116 Wis. 2d 322, 342 N.W.2d 56 (Ct. App. 1983).

The trial court exceeded its authority under sub. (1) by applying an alternative allocation formula without the consent of all the parties. An award for pain and suffering is subject to allocation under sub. (1), but an award to a spouse for loss of consortium prior to the employee's death is not. Kottka v. PPG Industries, Inc. 130 Wis. 2d 499, 388 N.W.2d 160 (1986).

The distribution scheme under sub. (1) renders common-law subrogation principles inapplicable. Martinez v. Ashland Oil, Inc. 132 Wis. 2d 11, 390 N.W.2d 72 (Ct. App. 1986).

When there are competing claims for insufficient insurance proceeds and one claim is subject to sub. (1) allocation, while the other is not, the formula set forth in this case is to be followed. Brewer v. Auto-Owners Ins. Co. 142 Wis. 2d 864, 418 N.W.2d 841 (Ct. App. 1987).

The "dual persona" doctrine is adopted, replacing the "dual capacity" doctrine. A 3rd-party may recover from an employer only when the employer has operated in a distinct persona as to the employee. Henning v. General Motors Assembly, 143 Wis. 2d 1, 419 N.W.2d 551 (1988).

Unless he or she is affirmatively negligent with respect to the claimant, a person who employs an independent contractor may not be held vicariously liable to the independent contractor's employees. Wagner v. Continental Casualty Co. 143 Wis. 2d 379, 421 N.W.2d 835 (1988).

The legal distinction between a corporation/employer and a partnership/landlord that leased the factory to the corporation, although both entities were composed of the same individuals, eliminated the partners' immunity as individuals under the exclusivity doctrine for negligence in maintaining the leased premises. Couillard v. Van Ess, 152 Wis. 2d 62, 447 N.W.2d 391 (Ct. App. 1989).

In structured settlement situations, the "remainder" under sub. (1) from which an employee must receive the first one-third is the remainder of the front payment after deduction of collection costs. Skirowski v. Employers Mutual Casualty Co. 158 Wis. 2d 242, 462 N.W.2d 245 (Ct. App. 1990).

Sub. (6) does not require a temporary employer to control or have the right to control the details of the work being performed. The temporary employer need only control the work activities of the temporary employee; it need not have exclusive control over the employee's work. Gansch v. Nekoosa Papers, Inc., 158 Wis. 2d 743, 463 N.W.2d 682 (1990).

An employee's cause of action created by a 3rd-party's negligence does not relate back to the initial work injury, but creates a separate cause of action; the cause of action and the employer's rights of subrogation accrue at the time of the 3rd-party negligence. Sutton v. Kaarakka, 159 Wis. 2d 83, 464 N.W.2d 29 (Ct. App. 1990).

A parent corporation can be liable to an employee of a subsidiary as a 3rd-party tort-feasor when the parent negligently undertakes to render services to the subsidiary that the parent should have recognized were necessary for the protection of the subsidiary's employees. Miller v. Bristol-Myers, 168 Wis. 2d 863, 485 N.W.2d 31 (1992).

Rights under sub. (1) are not a type of subrogation, but provide a direct cause of action. Campion v. Montgomery Elevator Co. 172 Wis. 2d 405, 493 N.W.2d 244 (Ct. App. 1992).

An insurer must be paid under sub. (1) in a 3rd-party settlement for an injury that it concluded was noncompensable but was consequential to the original injury. Nelson v. Rothering, 174 Wis. 2d 296, 496 N.W.2d 87 (1993).

A worker's compensation insurer cannot bring a 3rd-party action against an insurer who paid a claimant under uninsured motorist coverage; uninsured motorist coverage is contractual and this section only applies to tort actions. Berna-Mork v. Jones, 174 Wis. 2d 645, 498 N.W.2d 221 (1993).

Sub. (1) does not require an interested party receiving notice of another's 3rd-party claim to give a reciprocal notice to the party making the claim in order to share in the settlement proceeds. Elliot v. Employers Mut. Cas. Co. 176 Wis. 2d 410, 500 N.W.2d 397 (Ct. App. 1993).

The "dual persona doctrine" that allows an employee to sue an employer in tort when the employer was acting in a persona distinct from its employer persona is available to a temporary employee subject to sub. (6). Melzer v. Cooper Industries, Inc. 177 Wis. 2d 609, 503 N.W.2d 291 (Ct. App. 1993).

Third-party claims under sub. (1) include wrongful death actions; settlement proceeds are subject to allocation under sub. (1). Stolper v. Owens-Corning Fiberglass Corp. 178 Wis. 2d 747, 505 N.W.2d 157 (Ct. App. 1993).

An insurer had no right to reimbursement from legal malpractice settlement proceeds arising from a failure to file an action for a work related injury. The employee's injury from the malpractice was the loss of a legal right not a physical injury. Smith v. Long, 178 Wis. 2d 797, 505 N.W.2d 429 (Ct. App. 1993).

Damages for a child's loss of a parent's society and financial support are not subject to allocation under sub. (1). Cummings v. Klawitter, 179 Wis. 2d 408, 506 N.W.2d 750 (Ct. App. 1993).

The traditional 4-prong *Seaman* test for determining whether a person was a "loaned employee" subject to the exclusive remedy provisions of this chapter applies to temporary employees not covered by sub. (6). Bauernfeind v. Zell, 190 Wis. 2d 701, 528 N.W.2d 1 (1995).

Pecuniary damages recovered in a 3rd-party wrongful death action are subject to distribution under this section. Johnson v. ABC Insurance Co. 193 Wis. 2d 35, 532 N.W.2d 130 (1995).

An insurer is entitled to reimbursement under sub. (1) from an employee's settlement with his or her employer when the employer's basis for liability is an indemnification agreement with a 3rd-party tort-feasor. Houlihan v. ABC Insurance Co. 198 Wis. 2d 133, 542 N.W.2d 178 (Ct. App. 1995), 95-0662.

Sub. (5) extends the statute of limitations only when s. 893.54 is the applicable statute; it does not extend the statute of another state when it is applicable under s. 893.07. That sub. (5) only applies to cases subject to the Wisconsin statute is not unconstitutional. Bell v. Employers Casualty Co. 198 Wis. 2d 347, 541 N.W.2d 824 (Ct. App. 1995), 95-0301.

The *Seaman* loaned employee test has 3 elements but is often miscast because the *Seaman* court indicated that there are four "vital questions" that must be answered. The 3 elements are: 1) consent by the employee; 2) entry by the employee upon work for the special employer; and 3) power in the special employer to control details of the work. When an employee of one employer assists the employees of another employer as a true volunteer, a loaned employee relationship does not result. Borneman v. Corwyn Transport, Ltd. 212 Wis. 2d 25, 567 N.W.2d 887 (Ct. App. 1997), 96-2511.

The allocation of a settlement to various plaintiffs cannot be contested by an insurer who defaults at the hearing to approve the settlement. An insurer does not lose its right to share in the proceeds by defaulting, but it does forfeit its right to object to the application of settlement proceeds to specific claims. Herlache v. Blackhawk Collision Repair, Inc. 215 Wis. 2d 99, 572 N.W.2d 121 (Ct. App. 1997), 97-0760.

In a 3rd-party action filed by an insurer under sub. (1), the insurer has the right to maintain an action for payments it has made or will make to the employee by making a claim for all of the employees' damages, including pain and suffering. Threshermens Mutual Insurance Co. v. Page, 217 Wis. 2d 451, 577 N.W.2d 335 (1998), 95-2942.

A variety of factors indicated that a party's participation in an action constituted "pressing" a claim under this section. Zentgraf v. The Hanover Insurance Co. 2002 WI App 13, 250 Wis. 2d 281, 640 N.W.2d 171, 01-0323.

Under the "dual persona" doctrine, the employer's second role must be so unrelated to its role as an employer that it constitutes a separate legal person. St. Paul Fire & Marine Insurance Co. v. Keltgen, 2003 WI App 53, 260 Wis. 2d 523, 659 N.W.2d 906, 02-1249.

A "temporary help agency" requires: 1) an employer who places its employee with a 2nd employer, 2) the 2nd employer controls the employee's work activities, and 3) the 2nd employer compensates the first employer for the employee's services. Placement turns not on the physical proximity of the employee to an employer, but upon the purpose of the employee's work. It is a matter of whose work the employee is performing, not where the work is being performed. Control requires some evidence of compulsion or specific direction concerning the employee's daily activities. Peronto v. Case Corporation, 2005 WI App 32, 278 Wis. 2d 800; 693 N.W.2d 133, 04-0846.

Any activities that the attorney takes to bring the claim to court on behalf of his or her client, as enumerated in *Zentgraf*, constitute a cost of collection amenable to recovery under sub. (1). Sub. (1) does not require a worker's compensation attorney to demonstrate that his or her activities substantially contributed to obtaining recovery from the third party, or that the activities were taken on behalf of the employee, in order to join in the pressing of a claim. Anderson v. MSI Preferred Insurance Company, 2005 WI 62, 281 Wis. 2d 66, 697 N.W.2d 73, 03-1880.

The deduction for costs of collection under sub. (1) must be reasonable. The circuit court must consider all of the circumstances to determine whether a contingency fee figure is reasonable and look to the factors in SCR 20:1.5(a) that help determine the reasonableness of an attorney's fee. For hourly attorney fees the court must follow the lodestar approach under which the circuit court must first multiply the reasonable hours expended by a reasonable rate then make adjustments using the SCR 20:1.5(a) factors. The sum of all the attorneys' reasonable fees and costs may, but need not, equal a reasonable cost of collection. The court must evaluate the total cost of collection and determine whether that sum is reasonable, in light of, among other things, the recovery. Anderson v. MSI Preferred Insurance Company, 2005 WI 62, 281 Wis. 2d 66, 697 N.W.2d 73, 03-1880.

The pro rata distribution formula under *Brewer*, 142 Wis. 2d 864, applies whenever the insurance proceeds are insufficient to satisfy all claims regardless of the reason for that insufficiency, including a settlement by the parties. Allocating a disproportionate amount of the total settlement to claims that are exempt from sub. (1) circumvents legislative intent. The *Brewer* formula prevents the parties from using settlement as an end-run around the purposes of the worker's compensation scheme. Green v. Advance Finishing Technology, Inc. 2005 WI App 70, 280 Wis. 2d 743, 695 N.W.2d 856, 04-0877.

Problems in 3rd-party action procedure under the Wisconsin worker's compensation act. Piper. 60 MLR 91.

Impleading a negligent employer in a third-party action when the employer has provided workman's compensation benefits. 1976 WLR 1201.

Product liability in the workplace: The effect of workers' compensation on the rights and liabilities of 3rd parties. Weisgall. 1977 WLR 1035.

Preoccupation with Work Defense to Contributory Negligence. Parlee. Wis. Law. May 1995.

Worker's Compensation Act No Longer Protects Against Employment Discrimination Claims. Skinner. Wis. Law. March 1998.

102.30 Other insurance not affected; liability of insured employer. (1) This chapter does not affect the organization of any mutual or other insurance company or the right of the employer to insure in mutual or other companies against such liability or against the liability for the compensation provided for by this chapter.

(2) An employer may provide by mutual or other insurance, by arrangement with employees or otherwise, for the payment to those employees, their families, their dependents or their representatives, of sick, accident or death benefits in addition to the compensation provided under this chapter. Liability for compensation is not affected by any insurance, contribution or other benefit due to or received by the person entitled to that compensation. [154]

(3) Unless an employee elects to receive sick leave benefits in lieu of compensation under this chapter, if sick leave benefits are paid during the period that temporary disability benefits are payable, the employer shall restore sick leave benefits to the employee in an amount equal in value to the amount payable under this chapter. The combination of temporary disability benefits and sick leave benefits paid to the employee may not exceed the employee's weekly wage.

(4) Regardless of any insurance or other contract, an employee or dependent entitled to compensation under this chapter may recover compensation directly from the employer and may enforce in the person's own name, in the manner provided in this chapter, the liability of any insurance company which insured the liability for that compensation. The appearance, whether general or special, of any such insurance carrier by agent or attorney constitutes waiver of the service of copy of application and of notice of hearing required by s. 102.17.

(5) Payment of compensation under this chapter by either the employer or the insurance company shall, to the extent thereof, bar recovery against the other of the amount so paid. As between the employer and the insurance company, payment by either the employer or the insurance company directly to the employee or the person entitled to compensation is subject to the conditions of the policy.

(6) The failure of the assured to do or refrain from doing any act required by the policy is not available to the insurance carrier as a defense against the claim of the injured employee or the injured employee's dependents.

(7) (a) The department may order direct reimbursement out of the proceeds payable under this chapter for payments made under a nonindustrial insurance policy covering the same disability and expenses compensable under s. 102.42 when the claimant consents or when it is established that the payments under the nonindustrial insurance policy were improper. No attorney fee is due with respect to that reimbursement.

(b) An insurer who issues a nonindustrial insurance policy described in par. (a) may not intervene as a party in any proceeding under this chapter for reimbursement under par. (a). [155]

History: 1973 c. 150; 1975 c. 147 ss. 25, 54; 1975 c. 199; 1985 a. 83; 1987 a. 179.

The prohibition of intervention by nonindustrial insurers under sub. (7) (b) is constitutional. An insurer is not denied a remedy for amounts wrongfully paid to its insured. It may bring a direct action the insured. Employers Health Insurance Co. v Tesmer, 161 Wis. 2d 733, 469 N.W.2d 203 (Ct. App. 1991).

Although sub. (7) (a), read in isolation, authorizes the reimbursement of a subrogated insurer, when an insurer becomes subrogated by paying medical expenses arising from injuries that are compensable under this chapter, and the employer's worker's compensation insurance carrier is in liquidation, s. 646.31 (11) precludes the commission from ordering the employer to reimburse the subrogated insurer for those expenses. Wisconsin Insurance Security Fund v. Labor and Industry Review Commission, 2005 WI App 242, 288 Wis. 2d 206, 707 N.W.2d 293, 04-2157.

[154] Liability for compensation is not reduced because the employee carries insurance, and no part of the wages of the employee may be taken to pay insurance premiums against liability under this act.

[155] This amendment allows reimbursement to a non-industrial insurance carrier of all covered benefits provided rather than the previously specifically defined benefits. It also provides that the non-industrial carrier cannot be a party to proceedings under the Wisconsin worker's compensation act.

102.31 Worker's compensation insurance; policy regulations. (1) (a) Every contract for the insurance of compensation provided under this chapter or against liability therefor is subject to this chapter and provisions inconsistent with this chapter are void.

(b) Except as provided in par. (c), a contract under par. (a) shall be construed to grant full coverage of all liability of the assured under this chapter unless the department specifically consents by written order to the issuance of a contract providing divided insurance or partial insurance.

(c) 1. Liability under s. 102.35 (3) is the sole liability of the employer, notwithstanding any agreement of the parties to the contrary.

2. An intermediate agency or publisher referred to in s. 102.07 (6) may, under its own contract of insurance, cover liability of employees as defined in s. 102.07 (6) for an intermediate or independent news agency, if the contract of insurance of the publisher or intermediate agency is endorsed to cover those persons. If the publisher so covers, the intermediate or independent news agency need not cover liability for those persons. [156]

(d) A contract procured to insure a partnership may not be construed to cover the individual liability of the members of the partnership in the course of a trade, business, profession or occupation conducted by them as individuals. A contract procured to insure an individual may not be construed to cover the liability of a partnership of which the individual is a member or to cover the liability of the individual arising as a member of any partnership. [157]

(dL) A contract procured to insure a limited liability company may not be construed to cover the individual liability of the members of the limited liability company in the course of a trade, business, profession or occupation conducted by them as individuals. A contract procured to insure an individual may not be construed to cover the liability of a limited liability company of which the individual is a member or to cover the liability of the individual arising as a member of any limited liability company. [158]

(e) An insurer who provides a contract under par. (a) shall file the contract as provided in s. 626.35. [159]

(2) (a) No party to a contract of insurance may cancel the contract within the contract period or terminate or not renew the contract upon the expiration date until a notice in writing is given to the other party fixing the proposed date of cancellation or declaring that the party intends to terminate or does not intend to renew the policy upon expiration. Except as provided in par. (b), when an insurance company does not renew a policy upon expiration, the nonrenewal is not effective until 60 days after the insurance company has given written notice of the nonrenewal to the insured employer and the department. [160] Cancellation or termination of a policy by an insurance company for any reason other than nonrenewal is not effective until 30 days after the insurance company has given written notice of the cancellation or termination to the insured employer and the department. Notice to the department may be given by personal service of the notice upon the department at its

[156] The law establishes no direct liability against the publisher for the employees of the intermediate or independent agency except as the agency may be a contractor under this publisher, in which case liability would exist under s. 102.06. The publisher is permitted to assume, under its insurance policy, the liability that exists directly against the intermediate or independent news agency, and to relieve those agencies from covering liability of carriers.

[157] This language operates to treat a partnership for insurance purposes as an entity. If A, an individual, has insurance and joins a partnership his or her individual insurance will not cover the partnership. Conversely, the partnership insurance will not cover A as an individual.

[158] This treats the limited liability companies in the same manner as partnerships under s. 102.31 (1)(d).

[159] Insurers must file copies of policies within 60 days of the date of coverage. The penalty adopted by the rating bureau for failure to file was raised to $150 effective January 1, 1998.

[160] An insurer is now required to give an employer 60 days notice of nonrenewal of a policy unless nonrenewal is based on a failure to pay premiums. This is to allow the employer ample time to purchase a replacement policy.

office in Madison or by sending the notice to the department in a medium approved by the department. [161] The department may provide by rule that the notice of cancellation or termination be given to the Wisconsin compensation rating bureau rather than to the department in a medium approved by the department after consultation with the Wisconsin compensation rating bureau. Whenever the Wisconsin compensation rating bureau receives such a notice of cancellation or termination it shall immediately notify the department of the notice of cancellation or termination. [162]

(b) 1. In the event of a court-ordered liquidation of an insurance company, a contract of insurance issued by that company terminates on the date specified in the court order.

2. Regardless of whether the notices required under par. (a) have been given, a cancellation or termination is effective upon the effective date of replacement insurance coverage obtained by the employer or of an order exempting the employer from carrying insurance under s. 102.28 (2).

(3) The department may examine from time to time the books and records of any insurer insuring liability or compensation for an employer in this state. The department may require an insurer to designate one mailing address for use by the department and to respond to correspondence from the department within 30 days. Any insurer that refuses or fails to answer correspondence from the department or to allow the department to examine its books and records is subject to enforcement proceedings under s. 601.64.

(4) If any insurer authorized to transact worker's compensation insurance in this state fails to promptly pay claims for compensation for which it is liable or fails to make reports to the department required by s. 102.38, the department may recommend to the commissioner of insurance, with detailed reasons, that enforcement proceedings under s. 601.64 be invoked. The commissioner shall furnish a copy of the recommendation to the insurer and shall set a date for a hearing, at which both the insurer and the department shall be afforded an opportunity to present evidence. If after the hearing the commissioner finds that the insurer has failed to carry out its obligations under this chapter, the commissioner shall institute enforcement proceedings under s. 601.64. If the commissioner does not so find, the commissioner shall dismiss the complaint.

(5) If any employer whom the department exempted from carrying compensation insurance arbitrarily or unreasonably refuses employment to or discharges employees because of a nondisabling physical condition, the department shall revoke the exemption of that employer.

(6) The department has standing to appear as a complainant and present evidence in any administrative hearing or court proceeding instituted for alleged violation of s. 628.34 (7).

(7) If the department by one or more written orders specifically consents to the issuance of one or more contracts covering only the liability incurred on a construction project and if the construction project owner designates the insurance carrier and pays for each such contract, the construction project owner shall reimburse the department for all costs incurred by the department in issuing the written orders and in ensuring minimum confusion and maximum safety on the construction project. All moneys received under this subsection shall be deposited in the worker's compensation operations fund and credited to the appropriation account under s. 20.445 (1) (rb).

(8) The Wisconsin compensation rating bureau shall provide the department with any information that the department may request relating to worker's compensation insurance coverage, including the names of employers insured and any insured employer's address, business status, type and date of coverage, manual premium code, and policy information including numbers, cancellations, terminations, endorsements, and reinstatement dates. The department may enter into contracts with the Wisconsin compensation rating bureau to share the costs of data processing and other services. No information obtained by

[161] 2009 Wis. Act 206, effective May 1, 2010, permits insurance carriers to give notice of cancellation, nonrenewal or termination of a policy to the Wisconsin Compensation Rating Bureau by a medium approved by the department.

[162] Section 102.31(2)(a) provides that the department may provide by rule for notice of cancellation or termination of an insurance policy to be made directly to the Wisconsin compensation rating bureau. See Rule DWD 80.65.

the department under this subsection may be made public by the department except as authorized by the Wisconsin compensation rating bureau. [163]

History: 1971 c. 260, 307; 1975 c. 39; 1975 c. 147 ss. 26, 54; 1975 c. 199, 371; 1977 c. 29, 195; 1979 c. 278; 1981 c. 92; 1983 a. 189 s. 329 (25); 1985 a. 29, 83; 1987 a. 179; 1989 a. 64, 332; 1993 a. 81, 112; 2001 a. 37; 2003 a. 144; 2005 a. 172; 2007 a. 185; 2009 a. 206.

Cross-reference: See also ss. DWD 80.61 and 80.65, Wis. adm. code.

Sub. (1) (b) [now (1) (d)] does not apply to a joint venture, and insurance written in the name of one venturer is sufficient to cover his or her joint liability. Insurance Company of North America v. DILHR, 45 Wis. 2d 361, 173 N.W.2d 192 (1970).

102.315 Worker's compensation insurance; employee leasing companies.[164] **(1)** DEFINITIONS. In this section:

(a) "Bureau" means the Wisconsin compensation rating bureau under s. 626.06.

(b) "Client" means a person that obtains all or part of its nontemporary, ongoing employee workforce through an employee leasing agreement with an employee leasing company.

(c) "Divided workforce" means a workforce in which some of the employees of a client are leased employees and some of the employees of the client are not leased employees.

(d) "Divided workforce plan" means a plan under which 2 worker's compensation insurance policies are issued to cover the employees of a client that has a divided workforce, one policy covering the leased employees of the client and one policy covering the employees of the client who are not leased employees.

(e) "Employee leasing agreement" means a written contract between an employee leasing company and a client under which the employee leasing company provides all or part of the nontemporary, ongoing employee workforce of the client.

(f) "Employee leasing company" means a person that contracts to provide the nontemporary, ongoing employee workforce of a client under a written agreement, regardless of whether the person uses the term "professional employer organization," "PEO," "staff leasing company," "registered staff leasing company," or "employee leasing company," or uses any other, similar name, as part of the person's business name or to describe the person's business. "Employee leasing company" does not include a cooperative educational service agency. This definition applies only for the purposes of this chapter and does not apply to the use of the term in any other chapter.

(g) "Leased employee" means a nontemporary, ongoing employee whose services are obtained by a client under an employee leasing agreement.

(h) "Master policy" means a single worker's compensation insurance policy issued by an insurer authorized to do business in this state to an employee leasing company in the name of the employee leasing company that covers more than one client of the employee leasing company.

(i) "Multiple coordinated policy" means a contract of insurance for worker's compensation under which an insurer authorized to do business in this state issues separate worker's compensation insurance policies to an employee leasing company for each client of the employee leasing company that is insured under the contract.

(j) "Small client" means a client that has an unmodified annual premium assignable to its business, including the business of all entities or organizations that are under common control or ownership with the client, that is equal to or less than the threshold below which employers are not experience rated under the standards and criteria under ss. 626.11 and 626.12, without regard to whether the client has a divided workforce.

(2) EMPLOYEE LEASING COMPANY LIABLE. An employee leasing company is liable under s. 102.03 for all compensation payable under this

[163] The department cannot make public any of the information specified in s. 102.31(8) except as authorized by the Wisconsin Compensation Rating Bureau. This section was created by 2001 Wis. Act 37, effective January 1, 2002.

[164] 2007 Wis. Act 185, effective April 1, 2008 establishes requirements for worker's compensation insurance coverage for professional employer organizations and employee leasing companies. This amendment requires insurance carriers to insure professional employer organizations and employee leasing companies through multiple coordinated policies. Small client employers whose premiums are not large enough for experience rating may continue to be insured under master policies. Insurance carriers may be permitted to cover all employee leasing companies and professional employer organizations under master policies in the future when unit statistical data and other claims data can be tracked for each client employer and the filing is approved by the Office of the Commissioner of Insurance and the Wisconsin Compensation Rating Bureau. This amendment repealed the previous s. 102.31(2m).

chapter to a leased employee, including any payments required under s. 102.16 (3), 102.18 (1) (b) or (bp), 102.22 (1), 102.35 (3), 102.57, or 102.60. Except as permitted under s. 102.29, an employee leasing company may not seek or receive reimbursement from another employer for any payments made as a result of that liability. An employee leasing company is not liable under s. 102.03 for any compensation payable under this chapter to an employee of a client who is not a leased employee.

(3) MULTIPLE COORDINATED POLICY REQUIRED. Except as provided in subs. (4) and (5) (a), an employee leasing company shall insure its liability under sub. (2) by obtaining a separate worker's compensation insurance policy for each client of the employee leasing company under a multiple coordinated policy. The policy shall name both the employee leasing company and the client as named insureds, shall indicate which named insured is the employee leasing company and which is the client, shall designate either the employee leasing company or the client, but not both, as the first named insured, and shall provide the mailing address of each named insured. Except as permitted under sub. (6), an insurer may issue a policy for a client under this subsection only if all of the employees of the client are leased employees and are covered under the policy.

(4) MASTER POLICY; APPROVAL REQUIRED. An employee leasing company may insure its liability under sub. (2) by obtaining a master policy that has been approved by the commissioner of insurance as provided in this subsection. The commissioner of insurance may approve the issuance of a master policy if the insurer proposing to issue the master policy submits a filing to the bureau showing that the insurer has the technological capacity and operation capability to provide to the bureau information, including unit statistical data, information concerning proof of coverage and cancellation, termination, and nonrenewal of coverage, and any other information that the bureau may require, at the client level and in a format required by the bureau and the bureau submits the filing to the commissioner of insurance for approval under s. 626.13. A master policy filing under this subsection shall also establish basic manual rules governing the issuance of an insurance policy covering the leased employees of a divided workforce that are consistent with sub. (6) and the cancellation, termination, and nonrenewal of policies that are consistent with sub. (10). On approval by the commissioner of insurance of a master policy filing, an insurer may issue a master policy to an employee leasing company insuring the liability of the employee leasing company under sub. (2).

(5) MASTER POLICY; SMALL CLIENTS. (a) Regardless of whether a master policy has been approved under sub. (4), an employee leasing company may insure its liability under sub. (2) with respect to a group of small clients of the employee leasing company by obtaining a master policy in the voluntary market insuring that liability. The fact that an employee leasing company has a client that is covered under a mandatory risk-sharing plan under s. 619.01 does not preclude the employee leasing company from obtaining a master policy under this paragraph so long as that client is not covered under the master policy. An insurer may issue a master policy under this paragraph insuring in the voluntary market the liability under sub. (2) of an employee leasing company with respect to a group of small clients of the employee leasing company regardless of whether any of those small clients has a divided workforce.

(b) Within 30 days after the effective date of an employee leasing agreement with a small client that is covered under a master policy under par. (a), the employee leasing company shall report to the department all of the following information:

1. The name and address of the small client and of each entity or organization that is under common control or ownership with the small client.

2. The number of employees initially covered under the master policy.

3. The estimated unmodified annual premium assignable to the small client's business, including the business of all entities or organizations that are under common control or ownership with the small client, without regard to whether the small client has a divided workforce, which information the small client shall report to the employee leasing company.

4. The effective date of the employee leasing agreement.

(c) Within 30 days after the effective date of coverage of a small client under a master policy under par. (a), the insurer or, if authorized by the insurer, the employee leasing company shall file proof of that coverage with the department. Coverage of a small client under a master policy becomes binding when the insurer or employee leasing company files proof of that coverage under this paragraph or provides notice of coverage to the small client, whichever occurs first. Nothing in this paragraph requires an employee leasing company or an employee of an employee leasing company to be licensed as an insurance intermediary under ch. 628.

(d) If at any time the unmodified annual premium assignable to the business of a small client that is covered under a master policy under par. (a), including the business of all entities or organizations that are under common control or ownership with the small client, without regard to whether the small client has a divided workforce, exceeds the threshold below which employers are not experience rated under the standards and criteria under ss. 626.11 and 626.12, the employee leasing company shall notify the insurer and obtain coverage for the small client under sub. (3) or (4).

(6) DIVIDED WORKFORCE. (a) If a client notifies the department as provided under par. (b) of its intent to have a divided workforce, an insurer may issue a worker's compensation insurance policy covering only the leased employees of the client. An insurer that issues a policy covering only the leased employees of a client is not liable under s. 102.03 for any compensation payable under this chapter to an employee of the client who is not a leased employee unless the insurer also issues a policy covering that employee. A client that has a divided workforce shall insure its employees who are not leased employees in the voluntary market and may not insure those employees under the mandatory risk-sharing plan under s. 619.01 unless the leased employees of the client are covered under that plan.

(b) A client that intends to have a divided workforce shall notify the department of that intent on a form prescribed by the department that includes all of the following:

1. The names and mailing addresses of the client and the employee leasing company, the effective date of the employee leasing agreement, a description of the employees of the client who are not leased employees, and such other information as the department may require.

2. Except as provided in par. (c), evidence that the employees of the client who are not leased employees are covered in the voluntary market. That evidence shall be in the form of a copy of the information page or declaration page of a worker's compensation insurance policy or binder evidencing placement of coverage in the voluntary market covering those employees.

3. An agreement by the client to assume full responsibility to immediately pay all compensation and other payments payable under this chapter as may be required by the department should a dispute arise between 2 or more insurers as to liability under this chapter for an injury sustained while a divided workforce plan is in effect, pending final resolution of that dispute. This subdivision does not preclude a client from insuring that responsibility in an insurer authorized to do business in this state.

(c) If the leased employees of a client are covered under a mandatory risk-sharing plan under s. 619.01, the client may, instead of providing the evidence required under par. (b) 2., provide evidence in its notification under par. (b) that both the leased employees of the client and the employees of the client who are not leased employees are covered under that mandatory risk-sharing plan. That evidence shall be in the form of a copy of the information page or declaration page of a worker's compensation insurance policy or binder evidencing placement of coverage under the mandatory risk-sharing plan covering both those leased employees and employees who are not leased employees.

(d) When the department receives a notification under par. (b), the department shall immediately provide a copy of the notification to the bureau.

(e) 1. If a client intends to terminate a divided workforce plan, the client shall notify the department of that intent on a form prescribed by the department. Termination of a divided

workforce plan by a client is not effective until 10 days after notice of the termination is received by the department.

2. If an insurer cancels, terminates, or does not renew a worker's compensation insurance policy issued under a divided workforce plan that covers in the voluntary market the employees of a client who are not leased employees, the divided workforce plan is terminated on the effective date of the cancellation, termination, or nonrenewal of the policy, unless the client submits evidence under par. (c) that both the leased employees of the client and the employees of the client who are not leased employees are covered under a mandatory risk-sharing plan.

3. If an insurer cancels, terminates, or does not renew a worker's compensation insurance policy issued under a divided workforce plan that covers under the mandatory risk-sharing plan under s. 619.01 the employees of a client who are not leased employees, the divided workforce plan is terminated on the effective date of the cancellation, termination, or nonrenewal of the policy.

(7) FILING OF CONTRACTS. An insurer that provides a policy under sub. (3), (4), or (5) (a) shall file the policy as provided in s. 626.35.

(8) COVERAGE OF CERTAIN EMPLOYEES. (a) A sole proprietor, a partner, or a member of a limited liability company is not eligible for worker's compensation benefits under a policy issued under sub. (3), (4), or (5) (a) unless the sole proprietor, partner, or member elects coverage under s. 102.075 by an endorsement on the policy naming the sole proprietor, partner, or member who has so elected.

(b) An officer of a corporation is covered for worker's compensation benefits under a policy issued under sub. (3), (4), or (5) (a), unless the officer elects under s. 102.076 not to be covered under the policy by an endorsement on the policy naming the officer who has so elected.

(c) An employee leasing company shall obtain a worker's compensation insurance policy that is separate from a policy covering the employees whom it leases to its clients to cover the employees of the employee leasing company who are not leased employees.

(9) PREMIUMS. (a) An insurer that issues a policy under sub. (3), (4), or (5) (a) may charge a premium for coverage under that policy that complies with the applicable classifications, rules, rates, and rating plans filed with and approved by the commissioner of insurance under s. 626.13.

(b) For a policy issued under sub. (3) in which an employee leasing company is the first named insured or for a master policy issued under sub. (4) or (5) (a), an insurer may obligate only the employee leasing company to pay premiums due for a client's coverage under the policy and may not recover any unpaid premiums due for that coverage from the client.

(c) This subsection does not prohibit an insurer from doing any of the following:

1. Collecting premiums or other charges due with respect to a client by means of list billing through an employee leasing company.

2. Requiring an employee leasing company to maintain a letter of credit or other form of security to ensure payment of a premium.

3. Issuing policies that have a common renewal date to all, or a class of all, clients of an employee leasing company.

4. Grouping together the clients of an employee leasing company for the purpose of offering dividend eligibility and paying dividends to those clients in compliance with s. 631.51.

5. Applying a discount to the premium charged with respect to a client as permitted by the bureau.

6. Applying a retrospective rating option for determining the premium charged with respect to a client. No insurer or employee leasing company may impose on, allocate to, or collect from a client a penalty under a retrospective rating option arrangement. This subdivision does not prohibit an insurer from requiring an employee leasing company to pay a penalty under a retrospective rating option arrangement with respect to a client of the employee leasing company.

(10) CANCELLATION, TERMINATION, AND NONRENEWAL OF POLICIES. (a) 1. A policy issued under sub. (3) in which the employee leasing company is the first named insured and a policy issued under sub. (4) or (5) (a) may be cancelled, terminated, or nonrenewed as provided in subds. 2. to 4.

2. The insureds under a policy described in subd. 1. may cancel the policy during the policy period if both the employee leasing company and

the client agree to the cancellation, the cancellation is confirmed by the employee leasing company promptly providing written confirmation of the cancellation to the client or by the client agreeing to the cancellation in writing, and the insurer provides written notice of the cancellation to the department as required under s. 102.31 (2) (a).

3. Subject to subd. 4., an insurer may cancel, terminate, or nonrenew a policy described in subd. 1. by providing written notice of the cancellation, termination, or nonrenewal to the insured employee leasing company and to the department as required under s. 102.31 (2) (a) and by providing that notice to the insured client. The insurer is not required to state in the notice to the insured client the facts on which the decision to cancel, terminate, or nonrenew the policy is based. Except as provided in s. 102.31 (2) (b), cancellation or termination of a policy under this subdivision for any reason other than nonrenewal is not effective until 30 days after the insurer has provided written notice of the cancellation or termination to the insured employee leasing company, the insured client, and the department. Except as provided in s. 102.31 (2) (b), nonrenewal of a policy under this subdivision is not effective until 60 days after the insurer has provided written notice of the cancellation or termination to the insured employee leasing company, the insured client, and the department.

4. If an employee leasing company terminates an employee leasing agreement with a client in its entirety, an insurer may cancel or terminate a policy described in subd. 1. covering that client during the policy period by providing written notice of the cancellation or termination to the insured employee leasing company and the department as required under s. 102.31 (2) (a) and by providing that notice to the insured client. The insurer shall state in the notice to the insured client that the policy is being cancelled or terminated due to the termination of the employee leasing agreement. Except as provided in s. 102.31 (2) (b), cancellation or termination of a policy under this subdivision is not effective until 30 days after the insurer has provided written notice of the cancellation or termination to the insured employee leasing company, the insured client, and the department.

(b) 1. A policy issued under sub. (3) in which the client is the first named insured may be cancelled, terminated, or nonrenewed as provided in subds. 2. to 4.

2. The insureds under a policy described in subd. 1. may cancel the policy during the policy period if both the employee leasing company and the client agree to the cancellation, the cancellation is confirmed by the employee leasing company promptly providing written confirmation of the cancellation to the client or by the client agreeing to the cancellation in writing, and the insurer provides written notice of the cancellation to the department as required under s. 102.31 (2) (a).

3. An insurer may cancel, terminate, or nonrenew a policy described in subd. 1., including cancellation or termination of a policy providing continued coverage under subd. 4., by providing written notice of the cancellation, termination, or nonrenewal to the insured employee leasing company and to the department as required under s. 102.31 (2) (a) and by providing that notice to the insured client. Except as provided in s. 102.31 (2) (b), cancellation or termination of a policy under this subdivision for any reason other than nonrenewal is not effective until 30 days after the insurer has provided written notice of the cancellation or termination to the insured employee leasing company, the insured client, and the department. Except as provided in s. 102.31 (2) (b), nonrenewal of a policy under this subdivision is not effective until 60 days after the insurer has provided written notice of the cancellation or termination to the insured employee leasing company, the insured client, and the department.

4. If an employee leasing agreement is terminated during the policy period of a policy described in subd. 1., an insurer shall cancel the employee leasing company's coverage under the policy by an endorsement to the policy and coverage of the client under the policy shall continue as to all employees of the client unless the policy is cancelled or terminated as permitted under subd. 3.

History: 2007 a. 185.

102.32 Continuing liability; guarantee settlement, gross payment. (1m) In any case in

which compensation payments for an injury have extended or will extend over 6 months or more after the date of the injury or in any case in which death benefits are payable, any party in interest may, in the discretion of the department, be discharged from, or compelled to guarantee, future compensation payments by doing any of the following:

(a) Depositing the present value of the total unpaid compensation upon a 5 percent interest discount basis with a credit union, savings bank, savings and loan association, bank, or trust company designated by the department.

(b) Purchasing an annuity, within the limitations provided by law, from an insurance company licensed in this state that is designated by the department.

(c) Making payment in gross upon a 5 percent interest discount basis to be approved by the department.

(d) In cases in which the time for making payments or the amounts of payments cannot be definitely determined, furnishing a bond, or other security, satisfactory to the department for the payment of compensation as may be due or become due. The acceptance of the bond, or other security, and the form and sufficiency of the bond or other security, shall be subject to the approval of the department. If the employer or insurer is unable or fails to immediately procure the bond, then, in lieu of procuring the bond, deposit shall be made with a credit union, savings bank, savings and loan association, bank, or trust company designated by the department, of the maximum amount that may reasonably become payable in these cases, to be determined by the department at amounts consistent with the extent of the injuries and the law. The bonds and deposits are to be reduced only to satisfy claims and withdrawn only after the claims which they are to guarantee are fully satisfied or liquidated under par. (a), (b), or (c).

(5) Any insured employer may, within the discretion of the department, compel the insurer to discharge, or to guarantee payment of, the employer's liabilities in any case described in sub. (1m) and thereby release the employer from compensation liability in that case, but if for any reason a bond furnished or deposit made under sub. (1m) (d) does not fully protect, the compensation insurer or insured employer, as the case may be, shall still be liable to the beneficiary of the bond or deposit.

(6) (a) If compensation is due for permanent disability following an injury or if death benefits are payable, payments shall be made to the employee or dependent on a monthly basis as provided in pars. (b) to (e). [165]

(b) Subject to par. (d), if the employer or the employer's insurer concedes liability for an injury that results in permanent disability and if the extent of the permanent disability can be determined based on a minimum permanent disability rating promulgated by the department by rule, compensation for permanent disability shall begin within 30 days after the end of the employee's healing period or the date on which compensation for temporary disability ends due to the employee's return to work, whichever is earlier. [166]

(c) Subject to par. (d), if the employer or the employer's insurer concedes liability for an injury that results in permanent disability, but the extent of the permanent disability cannot be determined without a medical report that provides the basis for a minimum permanent disability rating, compensation for permanent disability shall begin

[165] This gives the department authority for its longstanding policy to have permanent disability and death benefits paid monthly.

[166] Payment of compensation for permanent partial disability must begin within 30 days after the end of the healing period and accrues and becomes payable during intermittent periods of temporary disability. 2003 Wis. Act 144, effective March 30, 2004, clarifies the requirements for the payment of permanent partial disability benefits. When a minimum disability rating is set by department rule, the carrier or self-insured employer shall begin paying compensation for permanent disability within 30 days of the end of the healing period. When the extent of disability is not set by department rule, and the insurer or self-insured employer admits liability for the injury, the carrier or employer shall begin paying compensation for permanent disability within 30 days after receiving a medical report providing the disability rating. Rule DWD 80.52 provides when compensation for permanent disability shall be paid when the insurer or employer disputes the extent of permanent disability but admits liability for the injury. With the amendment created by 2005 Wis. Act 172, effective April 1, 2006, an employee who is still in the healing period and has returned to work is eligible to receive payments based on minimum ratings established by Rule DWD 80.32.

within 30 days after the employer or the employer's insurer receives a medical report that provides a basis for a permanent disability rating.

(d) The department shall promulgate rules for determining when compensation for permanent disability shall begin in cases in which the employer or the employer's insurer concedes liability, but disputes the extent of permanent disability.

(e) Payments for permanent disability, including payments based on minimum permanent disability ratings promulgated by the department by rule, shall continue on a monthly basis and shall accrue and be payable between intermittent periods of temporary disability so long as the employer or insurer knows the nature of the permanent disability.

(6m) The department may direct an advance on a payment of unaccrued compensation for permanent disability or death benefits if the department determines that the advance payment is in the best interest of the injured employee or the employee's dependents. In directing the advance, the department shall give the employer or the employer's insurer an interest credit against its liability. The credit shall be computed at 5 percent. An injured employee or dependent may receive no more than 3 advance payments per calendar year.[167] [168]

(7) No lump sum settlement shall be allowed in any case of permanent total disability upon an estimated life expectancy, except upon consent of all parties, after hearing and finding by the department that the interests of the injured employee will be conserved thereby.

History: 1977 c. 195; 1979 c. 278; 1983 a. 98, 368, 538; 1991 a. 221; 1993 a. 492; 2001 a. 37; 2003 a. 144; 2005 a. 172; 2007 a. 185.

Cross-reference: See also ss. DWD 80.32, 80.33, 80.39, and 80.50, Wis. adm. code.

The interest credit under sub. (6) [now sub. (6m)] was properly calculated on a per annum basis rather than a one-time simple interest basis. Hamm v. LIRC, 223 Wis. 2d 183, 588 N.W.2d 358 (Ct. App. 1998), 98-0051.

[167] With this amendment employees and dependents are limited to 3 advancements per calendar year. 2005 Wis. Act 172, effective April 1, 2006.

[168] Under this amendment the interest credit for advancement and lump sum payments is reduced from 7% to 5%. 2007 Wis. Act 185, effective April 1, 2008.

102.33 Department forms and records; public access. **(1)** The department shall print and furnish free to any employer or employee any blank forms that the department considers necessary to facilitate efficient administration of this chapter. The department shall keep any record books or records that the department considers necessary for the proper and efficient administration of this chapter.

(2) (a) Except as provided in pars. (b) and (c), the records of the department, and the records of the commission, related to the administration of this chapter are subject to inspection and copying under s. 19.35 (1).[169]

(b) Except as provided in this paragraph and par. (d), a record maintained by the department or by the commission that reveals the identity of an employee who claims worker's compensation benefits, the nature of the employee's claimed injury, the employee's past or present medical condition, the extent of the employee's disability, or the amount, type, or duration of benefits paid to the employee and a record maintained by the department that reveals any financial information provided to the department by a self-insured employer or by an applicant for exemption under s. 102.28 (2) (b) are confidential and not open to public inspection or copying under s. 19.35 (1). The department or commission may deny a request made under s. 19.35 (1) or, subject to s. 102.17 (2m) and (2s), refuse to honor a subpoena issued by an attorney of record in a civil or criminal action or special proceeding to inspect and copy a record that is confidential under this paragraph, unless one of the following applies:[170]

[169] This provides that worker's compensation records are subject to Wisconsin public records law except for records identifying an employee's name, injury, medical condition, disability or benefits or financial records of applicants for self-insurance, which are confidential. Confidential records are generally available only to the parties to a worker's compensation claim or their representatives. Restrictions on access apply to confidential worker's compensation records at the Labor and Industry Review Commission under the amendment created by 2005 Wis. Act 172, effective April 1, 2006.

[170] This codifies the department's policy of not honoring subpoenas for claim records from parties to another legal proceeding.

1. The requester is the employee who is the subject of the record or an attorney or authorized agent of that employee. An attorney or authorized agent of an employee who is the subject of a record shall provide a written authorization for inspection and copying from the employee if requested by the department or the commission.

2. The record that is requested contains confidential information concerning a worker's compensation claim and the requester is an insurance carrier or employer that is a party to any worker's compensation claim involving the same employee or an attorney or authorized agent of that insurance carrier or employer, except that the department or the commission is not required to do a random search of its records and may require the requester to provide the approximate date of the injury and any other relevant information that would assist the department or the commission in finding the record requested. An attorney or authorized agent of an insurance carrier or employer that is a party to an employee's worker's compensation claim shall provide a written authorization for inspection and copying from the insurance carrier or employer if requested by the department or the commission. [171]

3. The record that is requested contains financial information provided by a self-insured employer or by an applicant for exemption under s. 102.28 (2) (b) and the requester is the self-insured employer or applicant for exemption or an attorney or authorized agent of the self-insured employer or applicant for exemption. An attorney or authorized agent of the self-insured employer or of the applicant for exemption shall provide a written authorization for inspection and copying from the self-insured employer or applicant for exemption if requested by the department.

4. A court of competent jurisdiction in this state orders the department or the commission to release the record. [172]

5. The requester is the department of children and families or a county child support agency under s. 59.53 (5), the request is made under s. 49.22 (2m), and the request is limited to the name and address of the employee who is the subject of the record, the name and address of the employee's employer, and any financial information about that employee contained in the record. [173]

6. The department of revenue requests the record for the purpose of locating a person, or the assets of a person, who has failed to file tax returns, who has underreported taxable income or who is a delinquent taxpayer; identifying fraudulent tax returns; or providing information for tax-related prosecutions. [174]

(c) A record maintained by the department or the commission that contains employer or insurer information obtained from the Wisconsin compensation rating bureau under s. 102.31 (8) or 626.32 (1) (a) is confidential and not open to public inspection or copying under s. 19.35 (1) unless the Wisconsin compensation rating bureau authorizes public inspection or copying of that information. [175]

(d) 1. In this paragraph:

a. "Government unit" has the meaning given in s. 108.02 (17) and also includes a corresponding unit in the government of another state or a unit of the federal government.

b. "Institution of higher education" has the meaning given in s. 108.02 (18).

c. "Nonprofit research organization" means an organization that is exempt from federal income tax under section 501 (a) of the Internal Revenue Code and whose mission is to engage in research.

2. The department or the commission may release information that is confidential under par. (b) to a government unit, an institution of higher education, or a nonprofit research organization for purposes of research and may

[171] This provides access to records of prior claims in order to facilitate settlements and prevent fraud. It also codifies the department's long-standing prohibition of random searches.

[172] The department will only honor court orders for release of records from Wisconsin courts.

[173] This was created by 1997 Wis. Act 191 relating to support enforcement.

[174] This was created by 1997 Wis. Act 237 concerning tax delinquencies.

[175] This section was created by 2001 Wis. Act 37, effective January 1, 2002 relating to records maintained by the department containing employer or insurer information obtained from the Wisconsin Compensation Rating Bureau.

release information that is confidential under par. (c) to those persons for that purpose if the Wisconsin compensation rating bureau authorizes that release. A government unit, institution of higher education, or nonprofit research organization may not permit inspection or disclosure of any information released to it under this subdivision that is confidential under par. (b) unless the department or commission authorizes that inspection or disclosure and may not permit inspection or disclosure of any information released to it under this subdivision that is confidential under par. (c) unless the department or commission, and the Wisconsin compensation rating bureau, authorize the inspection or disclosure. A government unit, institution of higher education, or nonprofit research organization that obtains any confidential information under this subdivision for purposes of research shall provide the results of that research free of charge to the person that released or authorized the release of that information. [176]

History: 1975 c. 147 s. 54; 1989 a. 64; 1991 a. 85; 1995 a. 117; 1997 a. 191, 237; 2001 a. 37, 107; 2005 a. 172; 2009 a. 180.

102.35 Penalties. (1) Every employer and every insurance company that fails to keep the records or to make the reports required by this chapter or that knowingly falsifies such records or makes false reports shall pay a work injury supplemental benefit surcharge to the state of not less than $10 nor more than $100 for each offense. The department may waive or reduce a surcharge imposed under this subsection if the employer or insurance company that violated this subsection requests a waiver or reduction of the surcharge within 45 days after the date on which notice of the surcharge is mailed to the employer or insurance company and shows that the violation was due to mistake or an absence of information. A surcharge imposed under this subsection is due within 90 days after the date on which notice of the surcharge is mailed to the employer or insurance company. Interest shall accrue on amounts that are not paid when due at the rate of 1 percent per month. All surcharges and interest payments received under this subsection shall be deposited in the fund established under s. 102.65. [177] [178]

(2) Any employer, or duly authorized agent thereof, who, without reasonable cause, refuses to rehire an employee injured in the course of employment, or who, because of a claim or attempt to claim compensation benefits from such employer, discriminates or threatens to discriminate against an employee as to the employee's employment, shall forfeit to the state not less than $50 nor more than $500 for each offense. No action under this subsection may be commenced except upon request of the department.

(3) Any employer who without reasonable cause refuses to rehire an employee who is injured in the course of employment, where suitable employment is available within the employee's physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employee the wages lost during the period of such refusal, not exceeding one year's wages. In determining the availability of suitable employment the continuance in business of the employer shall be considered and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall govern.

History: 1975 c. 147; 1977 c. 29, 195; 2003 a. 144; 2005 a. 172.

An employer cannot satisfy sub. (3) by rehiring with an intent to fire at a later date. Dielectric Corporation v. LIRC, 111 Wis. 2d 270, 330 N.W.2d 606 (Ct. App. 1983).

[176] This paragraph was created by 2005 Wis. Act 172, effective April 1, 2006, that authorizes the release of confidential information to government agencies, educational institutions and non-profit research organizations with the assurance that information will not be re-released without authorization for the department.

[177] 2003 Wis. Act 144, effective March 30, 2004, provides that the department may waive or reduce a forfeiture on the grounds that it was imposed due to a mistake or an absence of information. The insurer or employer must request a waiver or reduction within 45 days after the department mails the notice of the forfeiture.

[178] This amendment provides that forfeitures will be changed to surcharges and interest on unpaid surcharges will be deposited in the Work Injury Supplemental Benefit Fund. 2005 Wis. Act 172, effective April 1, 2006

An employer has the burden to prove that rehiring was in good faith. West Allis School Dist. v. DILHR, 116 Wis. 2d 410, 342 N.W.2d 415 (1984).

A one-day absence from work due to an injury triggered the rehire provision under sub. (3). Link Industries, Inc. v. LIRC, 141 Wis. 2d 551, 415 N.W.2d 574 (Ct. App. 1987).

For liability under sub. (3), the employee must show that he or she: 1) was an employee; 2) sustained a compensable injury;. 3) applied for rehire; 4) had the application for rehire refused due to the injury. Universal Foods Corporation v. LIRC, 161 Wis. 2d 1, 467 N.W.2d 793 (Ct. App. 1991).

Sub. (3) does not bar an employee from seeking arbitration under a collective bargaining agreement to determine whether termination following an injury violated the agreement. Sub. (3) relates to harm other than worker injuries and is not subject to the exclusive remedy provision of s. 102.03 (2); the "exclusive liability" language in sub. (3) does not bar lawsuits but imposes a penalty on the employer for refusal to hire. County of LaCrosse v. WERC, 182 Wis. 2d 15, 513 N.W.2d 708 (1994).

A LIRC interpretation of sub. (3), that a violation requires an employee who is unable to return to a prior employment to express an interest in reemployment in a different capacity, was reasonable. Hill v. LIRC, 184 Wis. 2d 110, 516 N.W.2d 441 (Ct. App. 1994).

If an employer shows that it refused to rehire an injured employee because the employee's position was eliminated to reduce costs and increase efficiency, reasonable cause has been shown under sub. (3). Ray Hutson Chevrolet, Inc. v. LIRC, 186 Wis. 2d 118, 519 N.W.2d 649 (Ct. App. 1994).

An attendance policy that includes absences due to work-related injuries as part of the total of absences allowed before termination violates sub. (3). Great Northern Corp. v. LIRC, 189 Wis. 2d 313, 525 N.W.2d 361 (Ct. App. 1994).

Sub. (3) does not contemplate requiring employers to either deviate from a facially reasonable and uniformly applied policy, or explain why it would be burdensome to do so, when a returning employee requests the deviation to accommodate a non-work and non-injury-related personal need. DeBoer Transportation, Inc. v. Swenson, 2010 WI App 54, 324 Wis. 2d 485, 781 N.W.2d 709, 09-0564.

Neither sub. (2) nor case law authorizes employees who are terminated for filing worker's compensation claims to bring wrongful discharge claims against their employers. Brown v. Pick 'n Save Food Stores, 138 F. Supp. 2d 1133 (2001).

102.37 Employers' records. Every employer of 3 or more persons and every employer who is subject to this chapter shall keep a record of all accidents causing death or disability of any employee while performing services growing out of and incidental to the employment. This record shall give the name, address, age, and wages of the deceased or injured employee, the time and causes of the accident, the nature and extent of the injury, and any other information the department may require by rule or general order. Reports based upon this record shall be furnished to the department at such times and in such manner as the department may require by rule or general order, in a format approved by the department.

History: 1975 c. 147 s. 54; 1985 a. 83; 2001 a. 37.

102.38 Records and reports of payments. Every insurance company that transacts the business of compensation insurance, and every employer who is subject to this chapter, but whose liability is not insured, shall keep a record of all payments made under this chapter and of the time and manner of making the payments and shall furnish reports based upon these records and any other information to the department as the department may require by rule or general order, in a format approved by the department.

History: 1975 c. 147 s. 54; 1975 c. 199; 1979 c. 89; 1985 a. 83; 2001 a. 37.

102.39 Rules and general orders; application of statutes. The provisions of s. 103.005 relating to the adoption, publication, modification, and court review of rules or general orders of the department shall apply to all rules promulgated or general orders adopted under this chapter.

History: 1995 a. 27; 2001 a. 37.

102.40 Reports not evidence in actions. Reports furnished to the department pursuant to ss. 102.37 and 102.38 shall not be admissible as evidence in any action or proceeding arising out of the death or accident reported.

102.42 Incidental compensation. (1) TREATMENT OF EMPLOYEE. The employer shall supply such medical, surgical, chiropractic, psychological, podiatric, dental, and hospital treatment, medicines, medical and surgical supplies, crutches, artificial members, appliances, and training in the use of artificial members and appliances, or, at the option of the employee, Christian Science treatment in lieu of medical treatment, medicines, and medical supplies, as may be reasonably required to cure and relieve from the effects of the injury, and to attain efficient use of artificial members and appliances, and in case of the employer's neglect or refusal seasonably to do so, or in emergency until it is practicable for the employee to give notice of injury, the employer shall be liable for the reasonable expense incurred by or on behalf of the employee in providing such treatment, medicines, supplies, and training. When the employer has knowledge of the injury and the

necessity for treatment, the employer's failure to tender the necessary treatment, medicines, supplies, and training constitutes such neglect or refusal. The employer shall also be liable for reasonable expense incurred by the employee for necessary treatment to cure and relieve the employee from the effects of occupational disease prior to the time that the employee knew or should have known the nature of his or her disability and its relation to employment, and as to such treatment subs. (2) and (3) shall not apply. The obligation to furnish such treatment and appliances shall continue as required to prevent further deterioration in the condition of the employee or to maintain the existing status of such condition whether or not healing is completed.[179]

(1m) LIABILITY FOR UNNECESSARY TREATMENT. If an employee who has sustained a compensable injury undertakes in good faith invasive treatment that is generally medically acceptable, but that is unnecessary, the employer shall pay disability indemnity for all disability incurred as a result of that treatment. An employer is not liable for disability indemnity for any disability incurred as a result of any unnecessary treatment undertaken in good faith that is noninvasive or not medically acceptable.[180] This subsection applies to all findings that an employee has sustained a compensable injury, whether the finding results from a hearing, the default of a party, or a compromise or stipulation confirmed by the department.

(2) CHOICE OF PRACTITIONER. (a) When the employer has notice of an injury and its relationship to the employment, the employer shall offer to the injured employee his or her choice of any physician, chiropractor, psychologist, dentist, physician assistant, advanced practice nurse prescriber,[181] or podiatrist licensed to practice and practicing in this state for treatment of the injury. By mutual agreement, the employee may have the choice of any qualified practitioner not licensed in this state. In case of emergency, the employer may arrange for treatment without tendering a choice. After the emergency has passed the employee shall be given his or her choice of attending practitioner at the earliest opportunity. The employee has the right to a 2nd choice of attending practitioner on notice to the employer or its insurance carrier. Any further choice shall be by mutual agreement. Partners and clinics are considered to be one practitioner. Treatment by a practitioner on referral from another practitioner is considered to be treatment by one practitioner.[182]

(b) The employer is liable for the expense of reasonable travel to obtain treatment at the same rate as is provided for state officers and employees under s. 20.916 (8). The employer is not liable for the expense of unreasonable travel to obtain treatment.[183]

(3) PRACTITIONER CHOICE UNRESTRICTED. If the employer fails to tender treatment as provided in sub. (1) or choice of an attending practitioner as provided in sub. (2), the employee's right to

[179] Medical treatment when necessary is to be provided regardless of whether or not indemnity is payable or whether indemnity disability has ceased. There is provision for payment of expense for treatment procured by an employee who does not learn until later of the nature of his or her disability, or its relation to employment. Formerly, no liability would have existed unless and until notice of injury had been given. In such cases as tuberculosis following silicosis, this worked hardship on an employee who, although reasonably diligent, could not give notice of necessity for treatment because the employee had not yet learned the nature of his or her disability and its relation to employment. The obligation to provide treatment continues even after a final order has been issued. See Lisney v. LIRC, 171 Wis.2d 499 (1992).

[180] This subsection was created by 2001 Wis. Act 37, effective January 1, 2002. The intent is to modify the holding in Spencer v. DILHR, 55 Wis.2d 525 (1972), in response to the decision in Honthaners Restaurants Inc. v. LIRC, 240 Wis.2d 234 (Ct. App. 2000). The intent is to permit insurance carriers and self-insured employers to use examining practitioner's opinions to defeat liability for compensation for indemnity in an otherwise conceded case that is a consequence of non-invasive unnecessary treatment even if the employee underwent the unnecessary treatment in good faith. It was not intended that this subsection modify the holding in City of Wauwatosa v. LIRC, 110 Wis.2d 298 (1982).

[181] 2003 Wis. Act 144, effective March 30, 2004, provides that physician assistants and advanced practice nurse prescribers are included as practitioners employees may select for treatment.

[182] Effective January 1, 2000, an employee's right to out-of-state treatment when referred by an in-state practitioner is not limited by a requirement for prior approval by the employer or carrier. See UFE Inc. v. LIRC, 201 Wis.2d 274 (1996). A restrictive amendment enacted in Chapter 38, Laws of 1997, effective January 1, 1998, expired January 1, 2000.

[183] This amendment codifies the department's policy of setting the mileage reimbursement rate that employees receive for travel to obtain treatment at the same rate state employees receive for business travel. 2005 Wis. Act 172, effective April 1, 2006. A listing of applicable mileage rates is set forth at the back of this publication.

choose the attending practitioner is not restricted and the employer is liable for the reasonable necessary expense thereof. [184]

(4) CHRISTIAN SCIENCE. The liability of an employer for the cost of Christian Science treatment provided to an injured employee is limited to the usual and customary charge for that treatment. [185]

(5) ARTIFICIAL MEMBERS. Liability for repair and replacement of prosthetic devices is limited to the effects of normal wear and tear. Artificial members furnished at the end of the healing period for cosmetic purposes only need not be duplicated.

(6) TREATMENT REJECTED BY EMPLOYEE. Unless the employee shall have elected Christian Science treatment in lieu of medical, surgical, dental or hospital treatment, no compensation shall be payable for the death or disability of an employee, if the death be caused, or insofar as the disability may be aggravated, caused or continued by an unreasonable refusal or neglect to submit to or follow any competent and reasonable medical, surgical or dental treatment or, in the case of tuberculosis, by refusal or neglect to submit to or follow hospital or medical treatment when found by the department to be necessary. The right to compensation accruing during a period of refusal or neglect to submit to or follow hospital or medical treatment when found by the department to be necessary in the case of tuberculosis shall be barred, irrespective of whether disability was aggravated, caused or continued thereby.

(8) AWARD TO STATE EMPLOYEE. Whenever an award is made by the department in behalf of a state employee, the department of workforce development shall file duplicate copies of the award with the department of administration. Upon receipt of the copies of the award, the department of administration shall promptly issue a voucher in payment of the award from the proper appropriation under s. 20.865 (1) (fm), (kr) or (ur), and shall transmit one copy of the voucher and the award to the officer, department or agency by whom the affected employee is employed.

(9) REHABILITATION; PHYSICAL AND VOCATIONAL. (a) One of the primary purposes of this chapter is restoration of an injured employee to gainful employment. To this end, the department shall employ a specialist in physical, medical and vocational rehabilitation.

(b) Such specialist shall study the problems of rehabilitation, both physical and vocational and shall refer suitable cases to the department for vocational evaluation and training. The specialist shall investigate and maintain a directory of such rehabilitation facilities, private and public, as are capable of rendering competent rehabilitation service to seriously injured employees.

(c) The specialist shall review and evaluate reported injuries for potential cases in which seriously injured employees may be in need of physical and medical rehabilitation and may confer with the injured employee, employer, insurance carrier or attending practitioner regarding treatment and rehabilitation.

History: 1971 c. 61; 1973 c. 150, 282; 1975 c. 147; 1977 c. 195 ss. 24 to 28, 45; 1977 c. 273; 1979 c. 278; 1981 c. 20; 1987 a. 179; 1989 a. 64; 1995 a. 27 ss. 3743m, 3744, 9130 (4); 1997 a. 3, 38; 1999 a. 9; 2001 a. 37; 2003 a. 144; 2005 a. 172; 2007 a. 185.

The requirement that medical treatment be supplied during the healing period, defined as prior to the time the condition becomes stationary, is not determined by reference to the percentage of disability, but by a determination that the injury has stabilized. Custodial care, as distinguished from nursing services, is not compensable. Mednicoff v. DILHR, 54 Wis. 2d 7, 194 N.W.2d 670 (1972).

In appropriate cases, the department may postpone a determination of permanent disability for a reasonable period until after a claimant completes a competent and reasonable course of physical therapy or vocational rehabilitation as an essential part of the treatment required for full recovery and minimization of damages. Transamerica Insurance Co. v. DILHR, 54 Wis. 2d 272, 195 N.W.2d 656 (1972).

An employee who wishes to consult a second doctor on the panel after the first says no further treatment is needed may do so without notice or consent. If the second doctor prescribes an operation that increases the amount of disability, the employer is liable. Spencer v. DILHR, 55 Wis. 2d 525, 200 N.W.2d 611 (1972).

Sub. (7) [now sub. (6)] relieves an employer of liability when the employee refuses treatment provided by the employer, as required under sub. (1). An employee is not required to seek treatment from someone other than the employer. Klein Industrial Salvage v. DILHR, 80 Wis. 2d 457, 259 N.W.2d 124 (1972).

[184] The intent is to allow complete free choice of practitioner rather than using restrictive panels, which had been allowed in the past.

[185] With this amendment employers are no longer permitted to elect not to have their employees covered by Christian science treatment and fees for Christian science treatment are limited to usual and customary charges. 2007 Wis. Act 185, effective April 1, 2008.

Under ss. 102.42 (9) (a), 102.43 (5), and 102.61, the department may extend temporary disability, travel expense, and maintenance costs beyond 40 weeks if additional training is warranted. Beloit Corporation v. State, 152 Wis. 2d 579, 449 N.W.2d 299 (Ct. App. 1989).

Sub. (1) requires an employer to pay medical expenses even after a final order has been issued. Linsey v. LIRC, 171 Wis. 2d 499, 493 N.W.2d 14 (1992).

Sub. (2) (a) does not require an employer to consent to out-of-state health care expenses that result from a referral by an in-state practitioner selected in accordance with the statute. UFE Inc. v. LIRC, 201 Wis. 2d 274, 548 N.W.2d 57 (1996), 94-2794.

The continuing obligation to compensate an employee for work related medical expenses under s. 102.42 does not allow agency review of compromise agreements after the one-year statute of limitations in s. 102.16 (1) has run if the employee incurs medical expenses after that time. Schenkoski v. LIRC, 203 Wis. 2d 109, 552 N.W.2d 120 (Ct. App. 1996), 96-0051.

Under sub. (2), an employee can seek reimbursement for expenses related to 2 practitioners regardless of whether they are the first 2 practitioners whom the employee has seen. Hermax Carpet Marts v. LIRC, 220 Wis. 2d 611, 583 N.W.2d 662 (Ct. App. 1998), 97-1119.

Section 102.01 (2) (g) sets the date of injury of an occupational disease and s. 102.01 (1) provides that medical expenses incurred before an employee knows of the work-related injury are compensable. Read together, medical expenses in occupational disease cases are not compensable until the date of injury, but once the date is established all expenses associated with the disease, even if incurred before the date of injury, are compensable. United Wisconsin Insurance Co. v. LIRC, 229 Wis. 2d 416, 600 N.W.2d 186 (Ct. App. 1999), 97-3776.

Spencer creates an exception to the general rule that compensation is permitted only if medical expenses are reasonably required and necessary. As long as a claimant engages in unnecessary and unreasonable treatment in good faith, the employer is responsible for payment. Honthaners Restaurants, Inc. v. LIRC, 2000 WI App 273, 240 Wis. 2d 234, 621 N.W.2d 660, 99-3002.

Continuing Payments for Medical Expenses in Worker's Compensation Proceedings. Carnell & Woog. Wis. Law. Nov. 1993.

102.425 Prescription and nonprescription drug treatment.[186] **(1)** DEFINITIONS. In this section:

(a) "Dispense" has the meaning given in s. 450.01 (7).

(b) "Drug" has the meaning given in s. 450.01 (10).

(c) "Drug product equivalent" has the meaning given in s. 450.13 (1).

(d) "Nonprescription drug product" has the meaning given in s. 450.01 (13m).

(e) "Pharmacist" has the meaning given in s. 450.01 (15).

(f) "Practitioner" has the meaning given in s. 450.01 (17).

(g) "Prescription" has the meaning given in s. 450.01 (19).

(h) "Prescription drug" has the meaning given in s. 450.01 (20).

(i) "Prescription order" has the meaning given in s. 450.01 (21).

(2) SUBSTITUTION OF DRUG PRODUCT EQUIVALENTS. (a) Except as provided in pars. (b) and (c), when a drug is prescribed to treat an injury for which an employer or insurer is liable under this chapter, the pharmacist or practitioner dispensing the drug shall substitute a drug product equivalent in place of the prescribed drug if all of the following apply:

1. In the professional judgment of the dispensing pharmacist or practitioner, the drug product equivalent is therapeutically equivalent to the prescribed drug.

2. The charge for the drug product equivalent is less than the charge for the prescribed drug.

(b) A pharmacist or practitioner may not substitute a drug product equivalent under par. (a) in place of a prescribed drug if any of the following apply:

1. The prescribed drug is a single-source patented drug for which there is no drug product equivalent.

2. The prescriber determines that the prescribed drug is medically necessary and indicates that no substitution may be made for that prescribed drug by writing on the face of the prescription order or, in the case of a prescription order that is transmitted electronically, by designating in electronic format the phrase "No substitutions" or "Dispense as written" or words of similar meaning or the initials "N.S." or "D.A.W."

(c) Unless par. (b) applies, if an injured employee requests that a specific brand name drug be used to treat the employee's injury, the pharmacist or practitioner dispensing the prescription shall dispense the specific brand name drug as requested. If a specific brand name

[186] 2005 Wis. Act 172, effective April 1, 2006, creates a pharmacy fee schedule that limits charges to the average wholesale price, plus a $3 dispensing fee and applicable state and federal taxes. This amendment encourages the use of generic drugs and prohibits balance billing employees for charges over fee schedule amounts.

drug is dispensed under this paragraph, the employer or insurer and the employee shall share the cost of the prescription as follows:

1. The employer or insurer shall be liable in an amount equal to the average wholesale price, as determined under sub. (3) (a) 1., of the lowest-priced drug product equivalent that the pharmacist or practitioner has in stock on the day on which the brand name drug is dispensed, plus the dispensing fee under sub. (3) (a) 2. and any applicable taxes under sub. (3) (a) 3. that would be payable for that drug product equivalent.

2. The employee shall be liable in an amount equal to the difference between the amount for which the employer or insurer is liable under subd. 1. and an amount equal to the average wholesale price, as determined under sub. (3) (a) 1., of the brand name drug on the day on which the brand name drug is dispensed, plus any applicable taxes under sub. (3) (a) 3. that are payable for that brand name drug.

(3) LIABILITY OF EMPLOYER OR INSURER. (a) The liability of an employer or insurer for the cost of a prescription drug dispensed under sub. (2) for outpatient use by an injured employee is limited to the sum of all of the following:

1. The average wholesale price of the prescription drug as of the date on which the prescription drug is dispensed, as quoted in the Drug Topics Red Book, published by Medical Economics Company, Inc. or its successor. [187]

2. A dispensing fee of $3 per prescription order, which shall be payable for all prescription drugs dispensed under sub. (2) regardless of the location from which the prescription drug is dispensed, but which shall be payable only to a pharmacist who dispenses the prescription drug.

3. Any state or federal taxes that may be applicable to the prescription drug dispensed.

(b) In addition to the liability under par. (a), an employer or insurer is also liable for reimbursement to an injured employee for all out-of-pocket expenses incurred by the injured employee in obtaining the prescription drug dispensed.

(c) A billing statement submitted to an employer or insurer for a prescription drug dispensed under sub. (2) shall include the national drug code number of the prescription as listed in the national drug code directory maintained by the federal food and drug administration and shall state separately the price of the prescription drug and the dispensing fee.

(4) LIABILITY OF EMPLOYEE. (a) Except as provided in par. (b), a pharmacist or practitioner who dispenses a prescription drug under sub. (2) to an injured employee may not collect, or bring an action to collect, from the injured employee any charge that is in excess of the liability of the injured employee under sub. (2) (c) 2. or the liability of the employer or insurer under sub. (3) (a).

(b) If an employer or insurer denies or disputes liability for the cost of a drug prescribed to an injured employee under sub. (2), the pharmacist or practitioner who dispensed the drug may collect, or bring an action to collect, from the injured employee the cost of the prescription drug dispensed, subject to the limitations specified in sub. (3) (a). If an employer or insurer concedes liability for the cost of a drug prescribed to an injured employee under sub. (2), but disputes the reasonableness of the amount charged for the prescription drug, the employer or insurer shall provide notice under sub. (4m) (b) to the pharmacist or practitioner that the reasonableness of the amount charged is in dispute and the pharmacist or practitioner who dispensed the drug may not collect, or bring an action to collect, from the injured employee the cost of the prescription drug dispensed after receiving that notice.

(4m) RESOLUTION OF PRESCRIPTION DRUG CHARGE DISPUTES. [188] (a) The department has jurisdiction under this subsection and s. 102.16 (1m) (c) and s. 102.17 to resolve a dispute between a pharmacist or practitioner and an employer or insurer over the reasonableness of the amount charged for a prescription drug dispensed under sub. (2) for outpatient use by an injured employee who claims benefits under this chapter.

[187] This amendment deleted the American Druggist Blue Book or its successor as a reference for determining average wholesale price of prescription drugs. 2007 Wis. Act 185, effective April 1, 2008.

[188] 2007 Wis. Act 185, effective April 1, 2008 creates a dispute resolution process for resolving disputes involving the pharmacy fee schedule that is similar to the process used for reasonableness of fee disputes.

(b) An employer or insurer that disputes the reasonableness of the amount charged for a prescription drug dispensed under sub. (2) for outpatient use by an injured employee or the department under sub. (4) (b) or s. 102.16 (1m) (c) or 102.18 (1) (bg) 3. shall provide, within 30 days after receiving a completed bill for the prescription drug, reasonable written notice to the pharmacist or practitioner that the charge is being disputed. [189] After receiving reasonable written notice under this paragraph or under sub. (4) (b) or s. 102.16 (1m) (c) or 102.18 (1) (bg) 1. that a prescription drug charge is being disputed, a pharmacist or practitioner may not collect the disputed charge from, or bring an action for collection of the disputed charge against, the employee who received the prescription drug.

(c) A pharmacist or practitioner that receives notice under par. (b) that the reasonableness of the amount charged for a prescription drug dispensed under sub. (2) for outpatient use by an injured employee is in dispute shall file the dispute with the department within 6 months after receiving that notice.

(d) The department shall deny payment of a prescription drug charge that the department determines under this subsection to be unreasonable. A pharmacist or practitioner and an employer or insurer that are parties to a dispute under this subsection over the reasonableness of a prescription drug charge are bound by the department's determination under this subsection on the reasonableness of the disputed charge, unless that determination is set aside on judicial review as provided in par. (e).

(e) Within 30 days after a determination under this subsection, the department may set aside, reverse, or modify the determination for any reason that the department considers sufficient. Within 60 days after a determination under this subsection, the department may set aside, reverse, or modify the determination on grounds of mistake. A pharmacist, practitioner, employer, or insurer that is aggrieved by a determination of the department under this subsection may seek judicial review of that determination in the same manner that compensation claims are reviewed under s. 102.23.

(5) NONPRESCRIPTION DRUG PRODUCTS. The liability of an employer or insurer for the cost of a nonprescription drug product used to treat an injured employee is limited to the usual and customary charge to the general public for the nonprescription drug product.

History: 2005 a. 172; 2007 a. 185; 2009 a. 206.

102.43 Weekly compensation schedule. If the injury causes disability, an indemnity shall be due as wages commencing the 4th calendar day from the commencement of the day the scheduled work shift began, exclusive of Sundays only, excepting where the employee works on Sunday, after the employee leaves work as the result of the injury, and shall be payable weekly thereafter, during such disability. If the disability exists after 7 calendar days from the date the employee leaves work as a result of the injury and only if it so exists, indemnity shall also be due and payable for the first 3 calendar days, exclusive of Sundays only, excepting where the employee works on Sunday. Said weekly indemnity shall be as follows:

(1) If the injury causes total disability, two-thirds of the average weekly earnings during such disability.

(2) If the injury causes partial disability, during the partial disability, such proportion of the weekly indemnity rate for total disability as the actual wage loss of the injured employee bears to the injured employee's average weekly wage at the time of the injury. [190]

(3) If the disability caused by the injury is at times total and at times partial, the weekly indemnity during each total or partial disability shall be in accordance with subs. (1) and (2), respectively.

[189] This amendment provides the requirement for written notice by an insurance carrier or self-insured employer to a health care provider that the reasonableness of the amount charged for a prescription drug is being disputed. 2009 Wis. Act 206, effective May 1, 2010.

[190] In case of partial disability occasioning a wage loss, proportionate compensation is paid. For example: If an employee earns 50 percent of his or her wage, the employee would also be entitled to 50 percent of the compensation due for temporary total disability.

(4) If the disability period involves a fractional week, indemnity shall be paid for each day of such week, except Sundays only, at the rate of one-sixth of the weekly indemnity.[191]

(5) Temporary disability, during which compensation shall be payable for loss of earnings, shall include such period as may be reasonably required for training in the use of artificial members and appliances. Except as provided in s. 102.61 (1g), temporary disability shall also include such period as the employee may be receiving instruction pursuant to s. 102.61 (1) or (1m). Temporary disability on account of receiving instruction of the latter nature, and not otherwise resulting from the injury, shall not be in excess of 80 weeks. Such 80-week limitation does not apply to temporary disability benefits under this section, travel or maintenance expense under s. 102.61 (1), or private rehabilitation counseling or rehabilitative training costs under s. 102.61 (1m) if the department determines that additional training is warranted. The necessity for additional training as authorized by the department for any employee shall be subject to periodic review and reevaluation.

(6) (a) Except as provided in par. (b), no sick leave benefits provided in connection with other employment or wages received from other employment held by the employee when the injury occurred may be considered in computing actual wage loss from the employer in whose employ the employee sustained injury.[192]

(b) In the case of an employee whose average weekly earnings are calculated under s. 102.11 (1) (a), wages received from other employment held by the employee when the injury occurred shall be considered in computing actual wage loss from the employer in whose employ the employee sustained the injury as provided in this paragraph. If an employee's average weekly earnings are calculated under s. 102.11 (1) (a), wages received from other employment held by the employee when the injury occurred shall be offset against those average weekly earnings and not against the employee's actual earnings in the employment in which the employee was engaged at the time of the injury.

(c) Wages received from the employer in whose employ the employee sustained injury or from other employment obtained after the injury occurred shall be considered in computing benefits for temporary disability.

[191] Compensation is to be paid for each day of disability except Sunday, regardless of whether or not the day of disability is a working day. Payment for each day is to be made uniformly at the rate of 1/6 of the weekly indemnity regardless of the number of days per week, which the employee works.

[192] With the enactment of Chapter 83, Laws of 1985, effective November 27, 1985 earnings from a second job in which the employee was also engaged at the time of injury are not considered in determining the temporary disability benefits due. However, a part-time employee who does not restrict his or her availability on the labor market does have his or her wage expanded for purposes of computing the weekly temporary total disability rate per s. 102.11(1)(a) to the wage of a full-time employee. The amendment in Chapter 79, Laws of 1987, effective April 1, 1988, provides that if this part-time employee with the expanded compensation wage is employed and returns to work for another employer while unable to work for the employer for whom he or she was working at the time of the injury, the wages earned from that second employer will be used to reduce the employee's compensation from temporary total disability to temporary partial disability. The wages paid by the second employer can again be factored into the computation made to determine the amount of compensation due for temporary partial disability. The amendment in 2001 Wis. Act 37, effective January 1, 2002, provides that the compensation for temporary disability will be offset by the expanded wage against the second employer rather than the actual wage.

(7) (a) If an employee has a renewed period of temporary disability commencing more than 2 years after the date of injury and, except as provided in par. (b), the employee returned to work for at least 10 days preceding the renewed period of disability, payment of compensation for the new period of disability shall be made as provided in par. (c).

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

(c) 1. If the employee was entitled to maximum weekly benefits at the time of injury, payment for the renewed temporary disability or the rehabilitative training shall be at the maximum rate in effect at the commencement of the new period. [193]

2. If the employee was entitled to less than the maximum rate, the employee shall receive the same proportion of the maximum which is in effect at the time of the commencement of the renewed period or the rehabilitative training as the employee's actual rate at the time of injury bore to the maximum rate in effect at that time. [194]

3. For an employee who is receiving rehabilitative training, a holiday break, semester break or other, similar scheduled interruption in a course of instruction does not commence a new period of rehabilitative training under this paragraph. [195]

(8) During a compulsory vacation period scheduled in accordance with a collective bargaining agreement:

(a) Regardless of whether the employee's healing period has ended, no employee at work immediately before the compulsory vacation period may receive a temporary total disability benefit for injury sustained while engaged in employment for that employer. [196]

(b) An employee receiving temporary partial disability benefits immediately before the compulsory vacation period for injury sustained while engaged in employment for that employer shall continue to receive those benefits. [197]

(9) Temporary disability, during which compensation shall be payable for loss of earnings, shall include the period during which an employee could return to a restricted type of work during the healing period, unless any of the following apply:

(a) Suitable employment that is within the physical and mental limitations of the employee is furnished to the employee by the employer or some other employer. For purposes of this paragraph, if the employer or some other employer makes a good faith offer of suitable employment that is within the physical and mental limitations of the employee and if the employee refuses without reasonable cause to accept that offer, the employee is considered to have returned to work as of the date of the offer at the earnings that the employee would have received but for the refusal. In case of a dispute as to the extent of an employee's physical or mental limitations or as to what employment is suitable within those limitations, the employee may file an application under s. 102.17 and ss. 102.17 to 102.26 shall apply.

[193] This clarifies that the escalated temporary total disability rate for renewed periods of temporary disability more than two years after the date of injury applies to temporary partial as well as temporary total disability.

[194] This is intended to correct the situation where the employee has one or more additional periods of disability more than two years after the date of injury. In such cases the new rate in effect at the time of the later disability will apply. Before the new rates apply, the employee must actually have returned to work for ten days.

[195] For example, the TTD rate established at the commencement of a multi-year course of instruction would not increase due to a semester or holiday break in the school calendar.

[196] This amendment clarifies that the employee must actually be working rather than just in employment status to be barred from receiving temporary total disability benefits during the defined compulsory vacation period.

[197] If the collective bargaining agreement provides a compulsory vacation shutdown an injured employee working within the healing period at the time of the shutdown is not entitled to temporary total disability benefits, but may be entitled to temporary partial disability benefits. For purposes of temporary partial disability compensation, wage loss will be based on the earnings in the week prior to the shutdown.

(b) The employee's employment with the employer has been suspended or terminated due to the employee's alleged commission of a crime, the circumstances of which are substantially related to that employment, and the employee has been charged with the commission of that crime. If the employee is not found guilty of the crime, compensation for temporary disability shall be payable in full.

(c) The employee's employment with the employer has been suspended or terminated due to the employee's violation of the employer's policy concerning employee drug use during the period when the employee could return to a restricted type of work during the healing period. Compensation for temporary disability may be denied under this paragraph only if prior to the date of injury the employer's policy concerning employee drug use was established in writing and regularly enforced by the employer.

(d) The employee has been convicted of a crime, is incarcerated, and is not available to return to a restricted type of work during the healing period. [198]

History: 1971 c. 148; 1973 c. 150; 1975 c. 147; 1977 c. 195; 1979 c. 278; 1983 a. 98; 1985 a. 83; 1987 a. 179; 1993 a. 370, 492; 1995 a. 225, 413; 2001 a. 37; 2005 a. 172; 2009 a. 206.

Committee Note, 1971: Employees who have two jobs who have been injured at one of them have in some cases been made totally disabled for work at either job. Sick leave benefits from the other employer has suspended eligibility for compensation or has reduced compensation even though the employee suffered a wage loss. This is considered to be inequitable. Sick leave benefits from the employer where injury occurred are to be considered, however, in determining eligibility for compensation from such employer. [Bill 371-A]

Under ss. 102.42 (9) (a), 102.43 (5), and 102.61, the department may extend temporary disability, travel expense, and maintenance costs beyond 40 weeks if additional training is warranted. Beloit Corp. v. State, 152 Wis. 2d 579, 449 N.W.2d 299 (Ct. App. 1989).

The phrase "if the injury causes disability" is interpreted in light of the "as is" rule that an employee's susceptibility to injury due to a pre-existing condition does not relieve the employer from liability. ITW Deltar v. LIRC, 226 Wis. 2d 11, 593 N.W.2d 908 (Ct. App. 1999), 98-2912.

The "as is" rule applies to delays in treatment of a work-related injury caused by a pre-existing condition. It was reasonable to find that a woman was entitled to benefits for the period she was unable to undergo surgery to repair a work-related injury due to the threat that anesthesia would cause harm to her pre-existing pregnancy. ITW Deltar v. LIRC, 226 Wis. 2d 11, 593 N.W.2d 908 (Ct. App. 1999), 98-2912.

102.44 Maximum limitations. Section 102.43 shall be subject to the following limitations:

(1) (ag) Notwithstanding any other provision of this chapter, every employee who is receiving compensation under this chapter for permanent total disability or continuous temporary total disability more than 24 months after the date of injury resulting from an injury that occurred prior to January 1, 2001, shall receive supplemental benefits that shall be payable in the first instance by the employer or the employer's insurance carrier, or in the case of benefits payable to an employee under s. 102.66, shall be paid by the department out of the fund created under s. 102.65. Those supplemental benefits shall be paid only for weeks of disability occurring after January 1, 2003, and shall continue during the period of such total disability subsequent to that date.

[198] This subsection was created by 2005 Wis. Act 172, effective April 1, 2006 and codifies an employer's liability for benefits to an employee when the employee is released by his or her doctor to return to restricted work during the healing period, as formerly found in Rule DWD 80.47 and as interpreted in Brakebush Brothers, Inc. v. LIRC, 210 Wis. 2d 623 (1997). In general "misconduct" terminations of employment are not a defense to liability for temporary disability benefits. This subsection now sets forth 4 exceptions to that general rule: (1) an employee's refusal of suitable restricted duty employment without reasonable cause; (2) an employee's commission of a crime connected to the employment; (3) an employee's violation of the employer's previously established and enforced written drug policy; and (4) an employee's unavailability for restricted work due to incarceration following conviction of a crime. If there is a dispute as to which of competing medical limitations are applicable to an employee under par. (a), the department retains the current practice of determining the appropriate restrictions and liability for benefits resulting from the application of such restrictions. The amendment pertaining to unavailability for restrictive work because of incarceration due to conviction of a crime was created by 2009 Wis. Act 206, effective May 1, 2010. DWD 80.47 applies to injuries occurring before the effective dates of the amendments.

(am) If the employee is receiving the maximum weekly benefits in effect at the time of the injury, the supplemental benefit for a week of disability occurring after May 6, 2010, shall be an amount that, when added to the regular benefit established for the case, shall equal $582.[199]

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

(c) The employer or insurance carrier paying the supplemental benefits required under this subsection shall be entitled to reimbursement for each such case from the fund established by s. 102.65, commencing one year from the date of the first such payment and annually thereafter while such payments continue. Claims for such reimbursement shall be approved by the department.[200]

(2) In case of permanent total disability aggregate indemnity shall be weekly indemnity for the period that the employee may live. Total impairment for industrial use of both eyes, or the loss of both arms at or near the shoulder, or of both legs at or near the hip, or of one arm at the shoulder and one leg at the hip, constitutes permanent total disability. This enumeration is not exclusive, but in other cases the department shall find the facts.

(3) For permanent partial disability not covered by ss. 102.52 to 102.56, the aggregate number of weeks of indemnity shall bear such relation to 1,000 weeks as the nature of the injury bears to one causing permanent total disability and shall be payable at the rate of two-thirds of the average weekly earnings of the employee, the earnings to be computed as provided in s. 102.11.[201] The weekly indemnity shall be in addition to compensation for the healing period and shall be for the period that the employee may live, not to exceed 1,000 weeks.

(4) Where the permanent disability is covered by ss. 102.52, 102.53, and 102.55,[202] such sections shall govern; provided, that in no case shall the percentage of permanent total disability be taken as more than 100 percent.

(5) In cases where it is determined that periodic benefits granted by the federal social security act are paid to the employee because of disability, the benefits payable under this chapter shall be reduced as follows:[203]

(a) For each dollar that the total monthly benefits payable under this chapter, excluding attorney fees and costs, plus the monthly benefits payable under the social security act for disability exceed 80% of the employee's average current earnings as determined by the social security administration, the benefits payable under this chapter shall be reduced by the same amount so that the total benefits payable shall not exceed 80% of the employee's average current earnings. However, no total benefit payable under this chapter and under the federal social security act may be reduced to an amount less than the benefit payable under this chapter.

(b) No reduction under this section shall be made because of an increase granted by the social security administration as a cost of living adjustment.

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[199] Supplemental benefit rates for permanently and totally disabled persons are increased to a maximum benefit rate to $582 per week for injuries occurring before January 1, 2001 and payable for weeks of disability beginning May 1, 2010. This section was amended by 2009 Wis. Act 206, effective May 1, 2010. The effective date for the supplemental benefit rate increase is May 1, 2010. The Revisor of Statutes incorrectly inserted May 6, 2010 as the effective date and will correct this error in a later bill.

[200] Payments are made by the insurance carrier or exempt employer who are annually reimbursed by the state from the fund established by s. 102.65. This section was amended by 2001 Wis. Act 37, effective January 1, 2002.

[201] Compensation is to be paid at the full weekly rate but is to be proportioned to the total number of weeks provided for permanent partial disability. For example, 10 percent permanent partial disability because of a back injury entitles the injured employee to 100 weeks of compensation. The basis of weekly payment for all compensation cases is uniform.

[202] This provides for applications for the "multiple injury" feature of the law as between scheduled and non-scheduled injuries as well as merely between scheduled injuries.

[203] This provides that any offset is taken on the compensation benefits rather than on the social security benefits. The injured worker is to receive the same total amount from the combined benefits that he or she would have received before the offset was figured on the worker's compensation benefits but not less than the benefits payable under this chapter. Attorney fees and costs are not offset.

(c) Failure of the employee, except for excusable neglect, to report social security disability payments within 30 days after written request shall allow the employer or insurance carrier to reduce weekly compensation benefits payable under this chapter by 75%. Compensation benefits otherwise payable shall be reimbursed to the employee after reporting.

(d) The employer or insurance carrier making such reduction shall report to the department the reduction and as requested by the department, furnish to the department satisfactory proof of the basis for the reduction.

(e) The reduction prescribed by this section shall be allowed only as to payments made on or after July 1, 1980, and shall be computed on the basis of payments made for temporary total, temporary partial, permanent total and permanent partial disability.

(f) No reduction shall take into account payments made under the social security act to dependents of an employee.

(g) No reduction under this subsection shall be made on temporary disability benefits payable during a period in which an injured employee is receiving vocational rehabilitation services under s. 102.61 (1) or (1m). [204]

(6) (a) Where an injured employee claiming compensation for disability under sub. (2) or (3) has returned to work for the employer for whom he or she worked at the time of the injury, the permanent disability award shall be based upon the physical limitations resulting from the injury without regard to loss of earning capacity unless the actual wage loss in comparison with earnings at the time of injury equals or exceeds 15%.[205]

(b) If, during the period set forth in s. 102.17 (4) the employment relationship is terminated by the employer at the time of the injury, or by the employee because his or her physical or mental limitations prevent his or her continuing in such employment, or if during such period a wage loss of 15% or more occurs the department may reopen any award and make a redetermination taking into account loss of earning capacity.

(c) The determination of wage loss shall not take into account any period during which benefits are payable for temporary disability.

(d) The determination of wage loss shall not take into account any period during which benefits are paid under ch. 108.

(e) For the purpose of determining wage loss, payment of benefits for permanent partial disability shall not be considered payment of wages.

(f) Wage loss shall be determined on wages, as defined in s. 102.11. Percentage of wage loss shall be calculated on the basis of actual average wages over a period of at least 13 weeks.

(g) For purposes of this subsection, if the employer in good faith makes an offer of employment which is refused by the employee without reasonable cause, the employee is considered to have returned to work with the earnings the employee would have received had it not been for the refusal.

(h) In all cases of permanent partial disability not covered by ss. 102.52 to 102.56, whether or not the employee has returned to work, the permanent partial disability shall not be less than that imposed by the physical limitations.

History: 1971 c. 148; 1973 c. 150; 1975 c. 147 ss. 33, 54, 57; 1975 c. 199; 1977 c. 195; 1979 c. 278; 1981 c. 92; 1983 a. 98; 1991 a. 85; 1995 a. 117; 2001 a. 37; 2003 a. 144; 2005 a. 172; 2007 a. 185; 2009 a. 177, 206.

Cross-reference: See also ss. DWD 80.32, 80.34, and 80.50, Wis. adm. code.

Committee Note, 1971: Employees who are totally disabled receive compensation at the wage level and the compensation rate in effect as of the date of their injury. This is an average of approximately $45.90 per week for the employees who are injured previous to February 1, 1970. The intent is to provide for payment of supplemental benefits; for example, an employee who was injured in October 1951 and earning wages in excess of the maximum of $52.86 is receiving $37 a week for total disability. This employee will receive supplemental benefits of $42 a week to bring the total up to $79, which was the maximum February 1, 1970. An employee injured in October 1951 with a wage of $26.43 has been receiving $18.50 per week for total disability. This is 50% of the maximum in

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[204] This amendment provides that the social security reverse offset does not apply to compensation for vocational rehabilitation training payable on and after the effective date. 2009 Wis. Act 206, effective May 1, 2010.

[205] Section 102.44(6) provides that in cases of non-scheduled injury, permanent partial disability is to be determined on the basis of the physical limitations without regard to loss of earning capacity where the employee has returned to work for the same employer as at the time of injury at a wage loss of less than 15 percent. A good faith offer of employment refused by the employee without reasonable basis has the same effect as actual reemployment. The claims subject to this section including those upon which an award is issued remain open for the period of the statute of limitations in the event that there is a termination of the employment or a wage loss of 15% or more occurs.

effect in October 1951. Such employee will receive supplemental benefits of $21 a week to bring the total up to $39.50, which is 50% of the maximum in effect February 1, 1970. It is not intended that any death benefit payment be affected by this section. [Bill 371-A]

The department must disregard total loss of earning capacity in the case of a relative scheduled injury. Mednicoff v. DILHR, 54 Wis. 2d 7, 194 N.W.2d 670 (1972).

The "odd-lot" doctrine is a part of Wisconsin law. It provides that if a claimant makes a prima facie case that he or she was injured in an industrial accident and, because of injury, age, education, and capacity, is unable to secure continuing gainful employment, the burden of showing that the claimant is employable shifts to the employer. Balczewski v. DILHR, 76 Wis. 2d 487, 251 N.W.2d 794 (1977).

Sub. (6) (a) includes only wage loss suffered at the employment where the injury occurred and does not include wage loss from a second job. Ruff v. LIRC, 159 Wis. 2d 239, 464 N.W.2d 56 (Ct. App. 1990).

LIRC exceeded its authority when it ordered temporary total disability payments for an indefinite future period. Such payments are not authorized for the period after a medical condition has stabilized and before the employee undergoes surgery. GTC Auto Parts v. LIRC, 184 Wis. 2d 450, 516 N.W.2d 313 (Ct. App. 1993).

Sub. (4) requires apportionment between scheduled and unscheduled injuries when both contribute to permanent total disability. Loss of earning capacity may not be awarded for scheduled injuries. Langhus v. LIRC, 206 Wis. 2d 494, 557 N.W.2d 450 (Ct. App. 1996), 96-0622.

In order for sub. (6) (b) to apply, the physical limitations must be from an unscheduled injury. Mireles v. LIRC, 226 Wis. 2d 53, 593 N.W.2d 859 (Ct. App. 1999), 98-1607.

Sub. (2) governs the permanent total disability indemnity. "Other cases" of disability under sub. (2) may include a combination of scheduled and unscheduled injuries. Mireles v. LIRC, 2000 WI 96, 237 Wis. 2d 69, 613 N.W.2d 875, 98-1607.

Sub. (6) (b) allows the department to reopen an award to account for loss of earning capacity from an unscheduled injury, even if a scheduled injury causes the termination of employment. Mireles v. LIRC, 2000 WI 96, 237 Wis. 2d 69, 613 N.W.2d 875, 98-1607.

Sub. (2) allows the awarding of permanent total disability that results from a combination of scheduled and unscheduled injuries, provided that the applicant establishes that a clear, ascertainable portion of the disability is attributable to the unscheduled injury or injuries. Secura Insurance v. LIRC, 2000 WI App 237, 239 Wis. 2d 315, 620 N.W.2d 626, 00-0303.

A claimant is not required to present evidence of a job search as part of prima facie case of odd-lot unemployability, provided the claimant shows that because of the injury and other *Balczewski* factors such as age, education, capacity, and training, he or she is unable to secure continuing, gainful employment. If the claimant is within the odd-lot category, it falls to the employer to rebut the prima facie case by demonstrating that the claimant is employable and that jobs exist for him or her. Beecher v. LIRC, 2004 WI 88, 273 Wis. 2d 136, 682 N.W.2d 29, 02-1582.

The burden that shifts from the claimant to the employer under *Balczewski* is a burden of persuasion, but only as to the sub-issue of whether a job exists that the claimant can do. The burden of persuasion on the other aspects of the claimant's case for permanent total disability benefits remains, as always, with the claimant. Beecher v. LIRC, 2004 WI 88, 273 Wis. 2d 136, 682 N.W.2d 29, 02-1582.

The social security offset under sub. (5) may be used to reduce temporary disability benefits paid under s. 102.43 (5) during the period that the worker is engaged in a vocational rehabilitation program as described in s. 102.61. Michels Pipeline Construction v. LIRC, 2008 WI App 55, 309 Wis. 2d 470, 750 N.W.2d 485, 07-0607.

Sub. (6) (a) applies to persons "claiming compensation," which does not include persons already receiving compensation. Schreiber Foods, Inc. v. LIRC, 2009 WI App 40, 316 Wis. 2d 516, 765 N.W.2d 850, 08-1977.

Payment of the supplemental benefit of 102.44 (1) is not precluded to former state employees by Art. IV, s. 26. The second injury fund is not impressed with a constructive trust which prevents its use for payment of such supplemental benefits. 62 Atty. Gen. 69.

102.45 Benefits payable to minors; how paid. Compensation and death benefit payable to an employee or dependent who was a minor when the employee's or dependent's right began to accrue, may, in the discretion of the department, be ordered paid to a bank, trust company, trustee, parent or guardian, for the use of such employee or dependent as may be found best calculated to conserve the employee's or dependent's interests. Such employee or dependent shall be entitled to receive payments, in the aggregate, at a rate not less than that applicable to payments of primary compensation for total disability or death benefit as accruing from the employee's or dependent's 18th birthday. [206]

History: 1973 c. 150; 1993 a. 492.

102.46 Death benefit. Where death proximately results from the injury and the deceased leaves a person wholly dependent upon him or her for support, the death benefit shall equal 4 times his or her average annual earnings, but when added to the disability indemnity paid and due at the time of death, shall not exceed two-thirds of weekly wage for the number of weeks set out in s. 102.44 (3). [207]

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[206] The purpose is to conserve the substantial installment payments that may be due to youthful employees. This in no way affects payments by the employer or insurance carrier but merely provides a method by which the department can direct retention and assume supervision of principal in the manner provided and thus conserve compensation payments best to suit the needs of the minor.

[207] This provision is to be read in conjunction with s. 102.44(3), which provides for compensation of permanent total disability during the life of the employee instead of for a given number of weeks. Section 102.46 preserves the old limitation, so that payment of death benefit, following a period of total disability, when added to the amount paid for disability before death, shall not exceed the same number of weeks as was formerly provided for permanent total disability.

History: 1979 c. 278; 1981 c. 92.

Death benefits under the worker's compensation law. Fortune. WBB Apr. 1987.

102.47 Death benefit, continued. If death occurs to an injured employee other than as a proximate result of the injury, before disability indemnity ceases, death benefit and burial expense allowance shall be as follows:

(1) Where the injury proximately causes permanent total disability, they shall be the same as if the injury had caused death, except that the burial expense allowance shall be included in the items subject to the limitation stated in s. 102.46. The amount available shall be applied toward burial expense before any is applied toward death benefit. If there are no surviving dependents the amount payable to dependents shall be paid, as provided in s. 102.49 (5) (b), to the fund created under s. 102.65.

(2) Where the injury proximately causes permanent partial disability, the unaccrued compensation shall first be applied toward funeral expenses, not to exceed the amount specified in s. 102.50. Any remaining sum shall be paid to dependents, as provided in this section and ss. 102.46 and 102.48, and there is no liability for any other payments. All computations under this subsection shall take into consideration the present value of future payments. If there are no surviving dependents the amount payable to dependents shall be paid, as provided in s. 102.49 (5) (b), to the fund created under s. 102.65.

History: 1971 c. 148; 1977 c. 195; 1983 a. 98; 1987 a. 179.

When a deceased worker dies before the level of permanent partial disability is established, the dependent's death benefit is not wiped out. "Unaccrued compensation" under sub. (2) is compensation that has not become due, or compensation for which a claim is not yet enforceable. It is not limited to compensation awarded but not yet paid. Edward Brothers, Inc. v. LIRC, 2007 WI App 128, 300 Wis. 2d 638, 731 N.W.2d 302, 06-2398.

102.475 Death benefit; law enforcement and correctional officers, fire fighters, rescue squad members, diving team members, national or state guard members and emergency management personnel. (1) SPECIAL BENEFIT. If the deceased employee is a law enforcement officer, correctional officer, fire fighter, rescue squad member, diving team member, national guard member or state defense force member on state active duty as described in s. 102.07 (9) or if a deceased person is an employee or volunteer performing emergency management activities under ch. 323 during a state of emergency or a circumstance described in s. 323.12 (2) (c), who sustained an accidental injury while performing services growing out of and incidental to that employment or volunteer activity so that benefits are payable under s. 102.46 or 102.47 (1), the department shall voucher and pay from the appropriation under s. 20.445 (1) (aa) a sum equal to 75% of the primary death benefit as of the date of death, but not less than $50,000 to the persons wholly dependent upon the deceased. For purposes of this subsection, dependency shall be determined under ss. 102.49 and 102.51.

(2) PAYMENTS TO DEPENDENTS. (a) If there are more than 4 persons who are wholly dependent upon the deceased employee an additional benefit of $2,000 shall be paid for each dependent in excess of 4.

(b) If there is more than one person who is wholly dependent upon the deceased employee, the benefits under this section shall be apportioned between such dependents on the same proportional basis as the primary death benefit.

(c) Notwithstanding sub. (1), if there are partial dependents of the deceased employee who are entitled to benefits under s. 102.48, they shall be entitled to such portion of the benefit determined under sub. (1) that their partial dependency benefit bears to the primary benefit payable to one wholly dependent upon the deceased. No payment to a partial dependent shall be less than $1,000.

(3) DISPUTES. In case of dispute, dependents may file applications as provided in s. 102.17, and ss. 102.17 to 102.27 shall apply. In such case, if the claim for a primary death benefit is compromised, any claim under this section shall be compromised on the same proportional basis. The attorney general shall represent the interests of the state in case of such dispute.

(5) MINORS. Benefits due to minors under this section may be paid as provided in s. 102.45.

(6) PROOF. In administering this section the department may require reasonable proof of birth, marriage, domestic partnership under ch. 770, relationship, or dependency. [208]

(7) NOT TO AFFECT OTHER RIGHTS, BENEFITS OR COMPENSATION. The compensation provided for in this section is in addition to, and not exclusive of, any pension rights, death benefits or other compensation otherwise payable by law.

(8) DEFINITIONS. As used in this section:

(a) "Correctional officer" means any person employed by the state or any political subdivision as a guard or officer whose principal duties are supervision and discipline of inmates at a penal institution, prison, jail, house of correction or other place of penal detention.

(am) "Diving team member" means a member of a legally organized diving team. [209]

(b) "Fire fighter" means any person employed by the state or any political subdivision as a member or officer of a fire department or a member of a volunteer department, including the state fire marshal and deputies.

(c) "Law enforcement officer" means any person employed by the state or any political subdivision for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances the person is employed to enforce, whether that enforcement authority extends to all laws or ordinances or is limited to specific laws or ordinances.

(d) "Political subdivision" includes counties, municipalities and municipal corporations.

(dm) "Rescue squad member" means a member of a legally organized rescue squad.

(e) "State" means the state of Wisconsin and its departments, divisions, boards, bureaus, commissions, authorities and colleges and universities.

[208] The amendment to this subsection provides that a domestic partner under ch. 770 is a dependent eligible to receive special death benefits. 2009 Wis. Act 28, effective July 1, 2009.

[209] See s. 102.07(7)(a) and the footnote to that section.

History: 1975 c. 274, 421; 1977 c. 29 ss. 1029m to 1029s, 1650; 1977 c. 48, 203, 418; 1979 c. 110 s. 60 (11); 1979 c. 221; 1981 c. 325; 1983 a. 98, 189; 1985 a. 29; 1987 a. 63; 1991 a. 85; 1993 a. 81; 1995 a. 247; 1999 a. 14; 2009 a. 28, 42.

102.48 Death benefit, continued. If no person who survives the deceased employee is wholly dependent upon the deceased employee for support, partial dependency and death benefits therefor shall be as follows:

(1) An unestranged surviving parent or parents to whose support the deceased has contributed less than $500 in the 52 weeks next preceding the injury causing death shall receive a death benefit of $6,500. If the parents are not living together, the department shall divide this sum in such proportion as it deems to be just, considering their ages and other facts bearing on dependency.

(2) In all other cases the death benefit shall be such sum as the department shall determine to represent fairly and justly the aid to support which the dependent might reasonably have anticipated from the deceased employee but for the injury. To establish anticipation of support and dependency, it shall not be essential that the deceased employee made any contribution to support. The aggregate benefits in such case shall not exceed twice the average annual earnings of the deceased; or 4 times the contributions of the deceased to the support of such dependents during the year immediately preceding the deceased employee's death, whichever amount is the greater. In no event shall the aggregate benefits in such case exceed the amount which would accrue to a person solely and wholly dependent. Where there is more than one partial dependent the weekly benefit shall be apportioned according to their relative dependency. The term "support" as used in ss. 102.42 to 102.63 shall include contributions to the capital fund of the dependents, for their necessary comfort.

(3) A death benefit, other than burial expenses, except as otherwise provided, shall be paid in weekly installments corresponding in amount to two-thirds of the weekly earnings of the employee, until otherwise ordered by the department.

History: 1975 c. 147; 1979 c. 278; 1989 a. 64; 1993 a. 492.
Cross-reference: See also s. DWD 80.46, Wis. adm. code.

102.49 Additional death benefit for children, state fund. (1) When the beneficiary under s.

102.46 or 102.47 (1) is the spouse or domestic partner under ch. 770 of the deceased employee and is wholly dependent for support, an additional death benefit shall be paid from the funds provided by sub. (5) for each child by their marriage or domestic partnership under ch. 770 who is living at the time of the death of the employee, and who is likewise wholly dependent upon the employee for support. That payment shall commence at the time that primary death benefit payments are completed or, if advancement of compensation has been paid, at the time when payments would normally have been completed. Payments shall continue at the rate of 10% of the surviving parent's weekly indemnity until the child's 18th birthday. If the child is physically or mentally incapacitated, payments may be continued beyond the child's 18th birthday but the payments may not continue for more than a total of 15 years. [210] [211]

(2) A child lawfully adopted by the deceased employee and the surviving spouse or domestic partner under ch. 770, prior to the time of the injury, and a child not the deceased employee's own by birth or adoption but living with the deceased employee as a member of the deceased employee's family at the time of the injury shall for the purpose of this section be taken as a child by their marriage or domestic partnership under ch. 770.

(3) If the employee leaves a spouse or domestic partner under ch. 770 wholly dependent and also a child by a former marriage, domestic partnership under ch. 770, or adoption, likewise wholly dependent, aggregate benefits shall be the same in amount as if the child were the child of the surviving spouse or partner, and the entire benefit shall be apportioned to the dependents in the amounts that the department determines to be just, considering the ages of the dependents and other factors bearing on dependency. The benefit awarded to the surviving spouse or partner shall not exceed 4 times the average annual earnings of the deceased employee.

(4) Dependency of any child for the purposes of this section shall be determined according to s. 102.51 (1), in like manner as would be done if there was no surviving dependent parent.

(5) (a) In each case of injury resulting in death, the employer or insurer shall pay into the state treasury the sum of $20,000. [212]

(b) In addition to the payment required under par. (a), in each case of injury resulting in death leaving no person dependent for support, the employer or insurer shall pay into the state treasury the amount of the death benefit otherwise payable, minus any payment made under s. 102.48 (1), in 5 equal annual installments with the first installment due as of the date of death.

(c) In addition to the payment required under par. (a), in each case of injury resulting in death, leaving one or more persons partially dependent for support, the employer or insurer shall pay into the state treasury an amount which, when added to the sums paid or to be paid on account of partial dependency and under s. 102.48 (1), shall equal the death benefit payable to a person wholly dependent.

(d) The payment into the state treasury shall be made in all such cases regardless of whether the dependents or personal representatives of the deceased employee commence action against a 3rd party under s. 102.29. If the payment is not made within 20 days after the department makes request therefor, any sum payable shall bear interest at the rate of 7% per year.

(e) The adjustments in liability provided in ss. 102.57, 102.58, and 102.60 do not apply to payments made under this section.

(6) The department may award the additional benefits payable under this section to the surviving parent of the child, to the child's guardian or to such other person, bank or trust company for the child's use as may be found best calculated to conserve the interest of the child. In the case of death of a child while benefits are still payable there shall be paid the reasonable expense for burial, not exceeding $1,500.

[210] The amendment to this section provides that a domestic partner under ch. 770 and a child of a domestic partnership are dependents and are eligible to receive death benefits under this chapter. 2009 Wis. Act 28, effective July 1, 2009.

[211] Payments will commence at the time primary death benefits are completed and will continue until the child's 18th birthday.

[212] 2005 Wis. Act 172, effective April 1, 2006, increases from $10,000 to $20,000 the payment to the work injury supplemental benefit fund by employers and insurers for injuries resulting in death.

(7) All payments received under this section shall be deposited in the fund established by s. 102.65.

History: 1971 c. 260 s. 92 (4); 1975 c. 147, 199; 1977 c. 195; 1979 c. 110 s. 60 (13); 1979 c. 278, 355; 1985 a. 83; 1991 a. 85; 1993 a. 492; 1997 a. 253; 2003 a. 144; 2005 a. 172; 2009 a. 28.

Cross-reference: See also s. DWD 80.48, Wis. adm. code.

Death benefits for dependent children are not increased by s. 102.57. Schwartz v. DILHR, 72 Wis. 2d 217, 240 N.W.2d 173 (1976).

102.50 Burial expenses. In all cases in which the death of an employee proximately results from the injury, the employer or insurer shall pay the actual expense for burial, not exceeding $10,000.[213]

History: 1971 c. 148; 1977 c. 195; 1985 a. 83; 1991 a. 85; 1995 a. 117; 2009 a. 206.

102.51 Dependents. (1) WHO ARE. (a) The following persons are entitled to death benefits as if they are solely and wholly dependent for support upon a deceased employee:

1. A wife upon a husband with whom she is living at the time of his death.

2. A husband upon a wife with whom he is living at the time of her death.

2m. A domestic partner under ch. 770 upon his or her partner with whom he or she is living at the time of the partner's death.[214]

3. A child under the age of 18 years upon the parent with whom he or she is living at the time of the death of the parent, there being no surviving dependent parent.

4. A child over the age of 18 years, but physically or mentally incapacitated from earning, upon the parent with whom he or she is living at the time of the death of the parent, there being no surviving dependent parent.

(b) Where a dependent who is entitled to death benefits under this subsection survives the deceased employee, all other dependents shall be excluded.[215] The charging of any portion of the support and maintenance of a child upon one of the parents, or any voluntary contribution toward the support of a child by a parent, or an obligation to support a child by a parent constitutes living with any such parent within the meaning of this subsection.[216]

(2) WHO ARE NOT. (a) No person shall be considered a dependent unless that person is a spouse, a domestic partner under ch. 770, a divorced spouse who has not remarried, or a lineal descendant, lineal ancestor, brother, sister, or other member of the family, whether by blood or by adoption, of the deceased employee.

(b) If for 8 years or more prior to the date of injury a deceased employee has been a resident of the United States, it shall be conclusively presumed that no person who has remained a nonresident alien during that period is either totally or partially dependent upon the deceased employee for support.

(c) No person who is a nonresident alien shall be found to be either totally or partially dependent on a deceased employee for support who cannot establish dependency by proving contributions from the deceased employee by written evidence or tokens of the transfer of money, such as drafts, letters of credit, microfilm or other copies of paid share drafts, canceled checks, or receipts for the payment to any bank, express company, United States post office, or other agency commercially engaged in the transfer of funds from one country to another, for transmission of funds on behalf of said deceased employee to such nonresident alien claiming dependency. This provision shall not be applicable unless the employee has been continuously in the United States for at least one year prior to his or her injury, and has been

[213] This amendment increased the amount payable for burial expense to the lesser of the actual expense up to a maximum of $10,000. 2009 Wis. Act 206, effective May 1, 2010.

[214] This amendment provides that a domestic partner under ch. 770 is defined as a dependent entitled to receive death benefits under this chapter. 2009 Wis. Act 28, effective July 1, 2009.

[215] This provision excludes all other dependents from consideration when there are persons who are solely and wholly dependent.

[216] Where there is no surviving dependent parent, children up to the age of 18 "living with" the deceased at the time of death arbitrarily become entitled to the death benefit based on total dependency. The law formerly provided that in case of divorce the charging of any portion of support and maintenance or voluntary contribution toward support or an obligation to support a child by a parent should constitute a "living with" the parent and thus entitle the child to the presumption of total dependency. There appears no reason why the child should not be equally protected where divorce is pending but no decree entered, or where the parents live apart without divorce pending, or where for any other reason a child may not be factually or physically living with its parent.

remuneratively employed therein for at least 6 months.[217]

(3) DIVISION AMONG DEPENDENTS. If there is more than one person wholly or partially dependent, the death benefit shall be divided between such dependents in such proportion as the department shall determine to be just, considering their ages and other facts bearing on such dependency.

(4) DEPENDENCY AS OF THE DATE OF DEATH. Questions as to who is a dependent and the extent of his or her dependency shall be determined as of the date of the death of the employee, and the dependent's right to any death benefit becomes fixed at that time, regardless of any subsequent change in conditions[218]. The death benefit shall be directly recoverable by and payable to the dependents entitled thereto or their legal guardians or trustees. In case of the death of a dependent whose right to a death benefit has thus become fixed, so much of the benefit as is then unpaid is payable to the dependent's personal representatives in gross, unless the department determines that the unpaid benefit shall be reassigned, under sub. (6), and paid to any other dependent who is physically or mentally incapacitated or a minor.[219] A posthumous child is for the purpose of this subsection a dependent as of the date of death.[220]

(5) WHEN NOT INTERESTED. No dependent of an injured employee shall be deemed a party in interest to any proceeding by the employee for the enforcement of the employee's claim for compensation, nor with respect to the compromise thereof by such employee. A compromise of all liability entered into by an employee is binding upon the employee's dependents, except that any dependent of a deceased employee may submit the compromise for review under s. 102.16 (1).

(6) DIVISION AMONG DEPENDENTS. Benefits accruing to a minor dependent child may be awarded to either parent in the discretion of the department. Notwithstanding sub. (1), the department may reassign the death benefit, in accordance with their respective needs for the death benefit as between a surviving spouse or a domestic partner under ch. 770 and children designated in sub. (1) and s. 102.49.

(7) CERTAIN DEFENSE BARRED. In proceedings for the collection of primary death benefit or burial expense it shall not be a defense that the applicant, either individually or as a partner or member, was an employer of the deceased.

History: 1975 c. 94, 147; 1977 c. 195; 1981 c. 92; 1983 a. 98, 368; 1993 a. 112, 492; 1995 a. 225; 1997 a. 253; 1999 a. 162; 2009 a. 28.

Cross-reference: See also s. DWD 80.48, Wis. adm. code.

A posthumously born illegitimate child does not qualify as a dependent under sub. (4). Claimants not falling within one of the classifications under sub. (2) (a) will not qualify for benefits, regardless of dependency in fact. Larson v. DILHR, 76 Wis. 2d 595, 252 N.W.2d 33 (1977).

Sub. (5) has no application to a claim for a death benefit because a death benefit claim is not an "employee's claim for compensation." While sub. (5) prohibits a dependent from being a party to a worker's claim for disability benefits, a dependent claiming a death benefit is prosecuting only his or her own claim. Edward Brothers, Inc. v. LIRC, 2007 WI App 128, 300 Wis. 2d 638, 731 N.W.2d 302, 06-2398.

102.52 Permanent partial disability schedule. In cases included in the following schedule of permanent partial disabilities indemnity shall be paid for the healing period, and in addition, for the period specified, at the rate of two-thirds of the average weekly earnings of the employee, to be computed as provided in s. 102.11:

(1) The loss of an arm at the shoulder, 500 weeks;

(2) The loss of an arm at the elbow, 450 weeks;

(3) The loss of a hand, 400 weeks;

[217] A nonresident alien is barred from receiving benefits where the deceased employee, because of whose death claim is being made, has been a resident of the United States for eight years or more prior to the date of injury. This section formerly provided that no person who is a nonresident alien should be found either totally or partially dependent who could not establish contributions from the deceased employee by written evidence or tokens of the transfer of money such as drafts, letters of credit, cancelled checks or certain other documentary evidence. In some cases, aliens who come to this country to work may be fatally injured before they have had opportunity to make contributions to their dependents. This provision allows proof of contributions other than by written evidence provided the deceased has not been in the United States for one year, or remuneratively employed for at least six months.

[218] This was amended effective January 1, 1984, to provide that for injuries after that date dependency is determined as of the date of death of an employee rather than as of the date of injury as was formerly the case.

[219] Section 102.51(4) gives the department discretion to reassign benefits payable to a dependent who dies to other minor or incapacitated dependents rather than paying the benefits to the deceased dependent's estate.

[220] Larson v. ILHR Department, 76 Wis.2d 595 (1977) no longer applies since the amendment to s. 102.52(4) including posthumous children became effective January 1, 1978.

(4) The loss of a palm where the thumb remains, 325 weeks;

(5) The loss of a thumb and the metacarpal bone thereof, 160 weeks;

(6) The loss of a thumb at the proximal joint, 120 weeks;

(7) The loss of a thumb at the distal joint, 50 weeks;

(8) The loss of all fingers on one hand at their proximal joints, 225 weeks;

(9) Losses of fingers on each hand as follows:

(a) An index finger and the metacarpal bone thereof, 60 weeks;

(b) An index finger at the proximal joint, 50 weeks;

(c) An index finger at the second joint, 30 weeks;

(d) An index finger at the distal joint, 12 weeks;

(e) A middle finger and the metacarpal bone thereof, 45 weeks;

(f) A middle finger at the proximal joint, 35 weeks;

(g) A middle finger at the second joint, 20 weeks;

(h) A middle finger at the distal joint, 8 weeks;

(i) A ring finger and the metacarpal bone thereof, 26 weeks;

(j) A ring finger at the proximal joint, 20 weeks;

(k) A ring finger at the second joint, 15 weeks;

(L) A ring finger at the distal joint, 6 weeks;

(m) A little finger and the metacarpal bone thereof, 28 weeks;

(n) A little finger at the proximal joint, 22 weeks;

(o) A little finger at the second joint, 16 weeks;

(p) A little finger at the distal joint, 6 weeks;

(10) The loss of a leg at the hip joint, 500 weeks;

(11) The loss of a leg at the knee, 425 weeks;

(12) The loss of a foot at the ankle, 250 weeks;

(13) The loss of the great toe with the metatarsal bone thereof, 83 1/3 weeks;

(14) Losses of toes on each foot as follows:

(a) A great toe at the proximal joint, 25 weeks;

(b) A great toe at the distal joint, 12 weeks;

(c) The second toe with the metatarsal bone thereof, 25 weeks;

(d) The second toe at the proximal joint, 8 weeks;

(e) The second toe at the second joint, 6 weeks;

(f) The second toe at the distal joint, 4 weeks;

(g) The third, fourth or little toe with the metatarsal bone thereof, 20 weeks;

(h) The third, fourth or little toe at the proximal joint, 6 weeks;

(i) The third, fourth or little toe at the second or distal joint, 4 weeks;

(15) The loss of an eye by enucleation or evisceration, 275 weeks;

(16) Total impairment of one eye for industrial use, 250 weeks; [221]

(17) Total deafness from accident or sudden trauma, 330 weeks; [222]

(18) Total deafness of one ear from accident or sudden trauma, 55 weeks. [223]

History: 1973 c. 150; 1975 c. 147; 1979 c. 278.

Cross-reference: See also ss. DWD 80.32 and 80.50, Wis. adm. code.

In a proceeding brought by an employee who suffered total deafness in one ear, a skull fracture, loss of taste and smell, facial paralysis, and periods of intermittent headaches and dizziness, the department did not err in determining that the hearing loss was a scheduled disability under sub. (18), with a separate award for the additional physical effects of the deafness, rather than considering the entire range of disabilities as a whole. When a loss is recognized by and compensable under this section, the schedule therein is exclusive. Vande Zande v. ILHR Dept. 70 Wis. 2d 1086, 236 N.W.2d 255 (1975).

The "loss of an arm at the shoulder" under sub. (1) includes injuries to the shoulder. Hagen v. LIRC, 210 Wis. 2d 12, 563 N.W.2d 454 (1997), 94-0374.

[221] See Rule DWD 80.26 for determining loss of visual efficiency.

[222] See Rule DWD 80.25 for determining loss or impairment of hearing.

[223] See s. 102.555 for occupational deafness schedule.

102.53 Multiple injury variations. In case an injury causes more than one permanent disability specified in ss. 102.44 (3), 102.52 and 102.55, the period for which indemnity shall be payable for each additional equal or lesser disability shall be increased as follows:[224]

(1) In the case of impairment of both eyes, by 200%.

(2) In the case of disabilities on the same hand covered by s. 102.52 (9), by 100% for the first equal or lesser disability and by 150% for the 2nd and 3rd equal or lesser disabilities.

(3) In the case of disabilities on the same foot covered by s. 102.52 (14), by 20%.

(4) In all other cases, by 20%.

(5) The aggregate result as computed by applying sub. (1), and the aggregate result for members on the same hand or foot as computed by applying subs. (2) and (3), shall each be taken as a unit for applying sub. (4) as between such units, and as between such units and each other disability.

History: 1973 c. 150; 1979 c. 278.

102.54 Injury to dominant hand. If an injury to an employee's dominant hand causes a disability specified in s. 102.52 (1) to (9) or amputation of more than two-thirds of the distal joint of a finger, the period for which indemnity is payable for that disability or amputation is increased by 25%. This increase is in addition to any other increase payable under s. 102.53 but, for cases in which an injury causes more than one permanent disability, the increase under this section shall be based on the periods specified in s. 102.52 (1) to (9) for each disability and not on any increased period specified in s. 102.53.[225]

History: 1993 a. 81.

102.55 Application of schedules. (1) Whenever amputation of a member is made between any 2 joints mentioned in the schedule in s. 102.52 the determined loss and resultant indemnity therefor shall bear such relation to the loss and indemnity applicable in case of amputation at the joint next nearer the body as such injury bears to one of amputation at the joint nearer the body.[226]

(2) For the purposes of this schedule permanent and complete paralysis of any member shall be deemed equivalent to the loss thereof.

(3) For all other injuries to the members of the body or its faculties which are specified in this schedule resulting in permanent disability, though the member be not actually severed or the faculty totally lost, compensation shall bear such relation to that named in this schedule as disabilities bear to the disabilities named in this schedule. Indemnity in such cases shall be determined by allowing weekly indemnity during the healing period resulting from the injury and the percentage of permanent disability resulting thereafter as found by the department.

102.555 Occupational deafness; definitions.[227] **(1)** In this section:

(a) "Noise" means sound capable of producing occupational deafness.

(b) "Noisy employment" means employment in the performance of which an employee is subjected to noise.

(c) "Occupational deafness" means permanent partial or permanent total loss of hearing of one or both ears due to prolonged exposure to noise in employment.

[224] This provides for "stepping up" the value of disabilities to two or more fingers or portions of them so that in case of disabilities to fingers on one hand the increase is an additional 100 percent for the first equal or lesser disability and 150 percent for the second and third equal or lesser disabilities. In case of toes on one foot the corresponding increase is 20 percent as it is in all other cases of multiple injury except for impairment of both eyes, where the increase is 200 percent. When the aggregate result for members on the same hand or foot or for the eyes has been computed, it is taken as a unit and there is increase as between that and other units by 20 percent for each equal or lesser injury unit (except as between both eyes or both ears).

[225] This provides an increase for injuries to the dominant hand that result in any amputation beyond 2/3 of a distal phalanx or 100 percent loss of use of any joint on the hand or arm. This multiple is in addition to the multiples in ss. 102.53(2), (4) and (5) but is not applied on those multiples. This multiple will be treated the same as those in s. 102.53 for computing permanent disabilities per Rule DWD 80.50.

[226] See Rule DWD 80.33 for fingertip amputations.

[227] See Rule DWD 80.25 for determining loss or impairment of hearing. See s. 102.52(17) and (18) for deafness due to trauma or accident.

(2) No benefits shall be payable for temporary total or temporary partial disability under this chapter for loss of hearing due to prolonged exposure to noise.

(3) An employee who because of occupational deafness is transferred by his or her employer to other noisy employment and thereby sustains actual wage loss shall be compensated at the rate provided in s. 102.43 (2), not exceeding $7,000 in the aggregate from all employers. "Time of injury", "occurrence of injury", and "date of injury" in such case mean the date of wage loss.

(4) Subject to the limitations provided in this section, there shall be payable for total occupational deafness of one ear, 36 weeks of compensation; for total occupational deafness of both ears, 216 weeks of compensation; and for partial occupational deafness, compensation shall bear such relation to that named in this section as disabilities bear to the maximum disabilities provided in this section. In cases covered by this subsection, "time of injury", "occurrence of injury", or "date of injury" shall, at the option of the employee, be the date of occurrence of any of the following events to an employee:

(a) Transfer to nonnoisy employment by an employer whose employment has caused occupational deafness;

(b) The last day actually worked before retiring, regardless of vacation pay or time, sick leave or any other benefit to which the employee is entitled; [228]

(c) Termination of the employer-employee relationship; or

(d) Layoff, provided the layoff is complete and continuous for 6 months.

(5) No claim under sub. (4) may be filed until 7 consecutive days of removal from noisy employment after the time of injury except that under sub. (4) (d) the 7 consecutive days' period may commence within the last 2 months of layoff.

(6) The limitation provisions in this chapter shall control claims arising under this section. Such provisions shall run from the first date upon which claim may be filed, or from the date of subsequent death, provided that no claim shall accrue to any dependent unless an award has been issued or hearing tests have been conducted by a competent medical specialist after the employee has been removed from the noisy environment for a period of 2 months.

(7) No payment shall be made to an employee under this section unless the employee shall have worked in noisy employment for a total period of at least 90 days for the employer from whom the employee claims compensation.

(8) An employer is liable for the entire occupational deafness to which his or her employment has contributed; but if previous deafness is established by a hearing test or other competent evidence, whether or not the employee was exposed to noise within the 2 months preceding such test, the employer is not liable for previous loss so established nor is the employer liable for any loss for which compensation has previously been paid or awarded.

(9) Any amount paid to an employee under this section by any employer shall be credited against compensation payable by any employer to such employee for occupational deafness under subs. (3) and (4). No employee shall in the aggregate receive greater compensation from any or all employers for occupational deafness than that provided in this section for total occupational deafness.

(10) No compensation may be paid for tinnitus unless a hearing test demonstrates a compensable hearing loss other than tinnitus. For injuries occurring on or after January 1, 1992, no compensation may be paid for tinnitus. [229]

(11) Compensation under s. 102.66 for permanent partial disability due to occupational deafness may be paid only if the loss of hearing exceeds 20% of binaural hearing loss.

(12) (a) An employer or the department is not liable for the expense of any examination or test for hearing loss, any evaluation of such an exam or test, any medical treatment for improving or restoring hearing, or any hearing aid to relieve the

[228] The date of injury is the last day of actual work rather than an official retirement date.

[229] Payment of any compensation for tinnitus is eliminated from occupational hearing loss claims.

effect of hearing loss unless it is determined that compensation for occupational deafness is payable under sub. (3), (4), or (11).

(b) For a case of occupational deafness in which the date of injury is on or after April 1, 2008, this subsection applies beginning on that date. Notwithstanding ss. 102.03 (4) and 102.17 (4), for a case of occupational deafness in which the date of injury is before April 1, 2008, this subsection applies beginning on January 1, 2012.[230]

History: 1971 c. 148; 1973 c. 150; 1975 c. 147, 199, 200; 1977 c. 195; 1979 c. 278; 1981 c. 92; 1983 a. 98; 1985 a. 83; 1991 a. 85; 2007 a. 185; 2009 a. 206.

Cross-reference: See also s. DWD 80.25, Wis. adm. code.

Committee Note, 1971: Where an employer discontinues a noisy operation and transfers the employees to nonnoisy employment, they have been unable to make claim for occupational deafness until the conditions of sub. (b), (c) or (d) were met. The employee will now have the option of filing a claim at the time of transfer at the current rate of compensation with a 2-1/2% reduction for each year of age over 50 or waiting until he meets the conditions of sub. (b), (c) or (d) when he may file claim at the then-current rate of compensation with a 1/2% reduction for each year of age over 50. [Bill 371-A]

It is a prerequisite for an award of benefits under sub. (10) that the employee must have suffered some compensable hearing loss other than tinnitus; sub. (10) does not require a compensable hearing loss in both ears or in a particular ear. General Castings Corporation v. LIRC, 152 Wis. 2d 631, 449 N.W.2d 619 (Ct. App. 1989).

Agency interpretation and application of sub. (8) is discussed. Harnischfeger Corporation v. LIRC, 196 Wis. 2d 650, 539 N.W.2d 335 (1995), 93-0947.

102.56 Disfigurement. (1) If an employee is so permanently disfigured as to occasion potential wage loss, the department may allow such sum as it deems just as compensation therefor, not exceeding the employee's average annual earnings as defined in s. 102.11. In determining the potential for wage loss and the sum awarded, the department shall take into account the age, education, training and previous experience and earnings of the employee, the employee's present occupation and earnings and likelihood of future suitable occupational change. Consideration for disfigurement allowance is confined to those areas of the body that are exposed in the normal course of employment. The department shall also take into account the appearance of the disfigurement, its location, and the likelihood of its exposure in occupations for which the employee is suited.

(2) Notwithstanding sub. (1), if an employee who claims compensation under this section returns to work for the employer who employed the employee at the time of the injury at the same or a higher wage, the employee may not be compensated unless the employee shows that he or she probably has lost or will lose wages due to the disfigurement.[231]

History: 1971 c. 148; 1977 c. 195; 1987 a. 179.

LIRC's allowance of a disfigurement award based on a limp was a reasonable interpretation of this section. Nothing in sub. (1) limits disfigurement to amputations, scars, and burns. County of Dane v. Labor and Industry Review Commission, 2009 WI 9, 315 Wis. 2d 293, 759 N.W.2d 571, 06-2695.

102.565 Toxic or hazardous exposure; medical examination; conditions of liability.[232] **(1)** When an employee working subject to this chapter, as a result of exposure in the course of his or her employment over a period of time to toxic or hazardous substances or conditions, develops any clinically observable abnormality or condition which, on competent medical opinion, predisposes or renders the employ in any manner differentially susceptible to disability to such an extent that it is inadvisable for the employee to continue employment involving such exposure and the employee is discharged from or ceases to continue the employment, and suffers wage loss by reason of such discharge, or such cessation, the department may allow such sum as it deems just as compensation therefor, not exceeding $13,000.

[230] This amendment eliminates the liability for expenses for examinations and tests, treatment for hearing loss, evaluation of examination or testing, medical treatment for hearing loss, restoring hearing and hearing aids for occupational hearing loss claims that do not reach the level of hearing loss to qualify for payment of permanent partial disability. 2009 Wis. Act 206, effective May 1, 2010. This amendment applies beginning January 1, 2012.

[231] This amendment provides that if an injured employee returns to work for that employer for whom he or she worked at the time of the injury without any wage loss, then the employee is not entitled to compensation for disfigurement. However, the employee may show that he or she has or will sustain a wage loss because the disfigurement has impaired his or her ability to obtain other employment. The standard of proof at this level is "probable" rather than "potential".

[232] Section 102.565 was amended to include exposure to toxic or hazardous substances and conditions where further exposure has the risk of creating a disability. If the employee changes employers, he or she becomes entitled to payment of compensation benefits on a wage loss basis. Benefits under this section are for nondisabling conditions. In the event that there is lost time from work or there is permanent disability, there is a date of injury and benefits are paid as they would be for any injury. This section applies to nondisabling conditions occurring after May 13, 1980. It does not apply to occupational hearing loss since termination or transfer to non-noisy employment creates a date of injury under s. 102.555.

In the event a nondisabling condition may also be caused by toxic or hazardous exposure not related to employment, and the employee has a history of such exposure, compensation as provided by this section shall not be allowed nor shall any other remedy for loss of earning capacity. In case of such discharge prior to a finding by the department that it is inadvisable for the employee to continue in such employment and if it is reasonably probable that continued exposure would result in disability, the liability of the employer who so discharges the employee is primary, and the liability of the employer's insurer is secondary, under the same procedure and to the same effect as provided by s. 102.62.

(2) Upon application of any employer or employee the department may direct any employee of the employer or an employee who, in the course of his or her employment, has been exposed to toxic or hazardous substances or conditions, to submit to examination by a physician or physicians to be appointed by the department to determine whether the employee has developed any abnormality or condition under sub. (1), and the degree thereof. The cost of the medical examination shall be borne by the person making application. The results of the examination shall be submitted by the physician to the department, which shall submit copies of the reports to the employer and employee, who shall have opportunity to rebut the reports provided request therefor is made to the department within 10 days from the mailing of the report to the parties. The department shall make its findings as to whether or not it is inadvisable for the employee to continue in his or her employment.

(3) If an employee refuses to submit to the examination after direction by the commission, or any member thereof or the department or an examiner thereof, or in any way obstructs the same, the employee's right to compensation under this section shall be barred.

(4) No payment shall be made to an employee under this section unless he or she shall have worked for a reasonable period of time for the employer from whom he or she claims compensation for exposing him or her to toxic or hazardous conditions.

(5) Payment of a benefit under this section to an employee shall stop such employee from any further recovery whatsoever from any employer under this section.

History: 1977 c. 29, 195; 1979 c. 278.

Sub. (1) requires that an employee's termination be connected to the employment that caused the susceptibility to disease. General Castings Corp. v. Winstead, 156 Wis. 2d 752, 457 N.W.2d 557 (Ct. App. 1990).

102.57 Violations of safety provisions, penalty. If injury is caused by the failure of the employer to comply with any statute, rule, or order of the department, compensation and death benefits provided in this chapter shall be increased 15% but the total increase may not exceed $15,000. Failure of an employer reasonably to enforce compliance by employees with any statute, rule, or order of the department constitutes failure by the employer to comply with that statute, rule, or order. [233]

History: 1981 c. 92; 1983 a. 98; 2001 a. 37.

This section and s. 102.58 may be applicable in the same case if the negligence of both the employer and employee are causes of the employee's injury. Milwaukee Forge v. DILHR, 66 Wis. 2d 428, 225 N.W.2d 476 (1975).

102.58 Decreased compensation. If injury is caused by the failure of the employee to use safety devices that are provided in accordance with any statute, rule, or order of the department and that are adequately maintained, and the use of which is reasonably enforced by the employer, if injury results from the employee's failure to obey any reasonable rule adopted and reasonably enforced by the employer for the safety of the employee and of which the employee has notice, or if injury results from the intoxication of the employee by alcohol beverages, as defined in s. 125.02 (1), or use of a controlled substance, as defined in s. 961.01 (4), or a controlled substance analog, as defined in s. 961.01 (4m), the compensation and death benefit provided in this

[233] Where an employer fails to enforce compliance with safety orders, the effect is often the same as though safety devices and safe places of work were not provided. This results in increase in the number of injuries. The provision will hold liable the employer who may provide safety devices and then by acquiescence in non-use fail to accomplish the desired result as to safety.

chapter shall be reduced 15% but the total reduction may not exceed $15,000.[234] [235]

History: 1971 c. 148; 1981 c. 92; 1983 a. 98; 1987 a. 179; 1995 a. 448; 2001 a. 37.

The burden of proof is on the employer to establish not only the fact of intoxication, but also a causal connection between the condition and the injury or accident. Haller Beverage Corporation v. DILHR, 49 Wis. 2d 233, 181 N.W.2d 418 (1970).

This section and s. 102.57 may be applicable in the same case if the negligence of both the employer and employee are causes of the employee's injury. Milwaukee Forge v. DILHR, 66 Wis. 2d 428, 225 N.W.2d 476 (1975).

Whether a traveling employee's multiple drinks at a tavern was a deviation was irrelevant when the employee was injured while engaged in a later act reasonably necessary to living. Under this section, intoxication does not defeat a worker's compensation claim but only decreases the benefits. Heritage Mutual Insurance Co. v. Larsen, 2001 WI 30, 242 Wis. 2d 47, 624 N.W.2d 129, 98-3577.

102.59 Preexisting disability, indemnity.[236] **(1)** If an employee has at the time of injury permanent disability which if it had resulted from such injury would have entitled him or her to indemnity for 200 weeks and, as a result of such injury, incurs further permanent disability which entitles him or her to indemnity for 200 weeks, the employee shall be paid from the funds provided in this section additional compensation equivalent to the amount which would be payable for said previous disability if it had resulted from such injury or the amount which is payable for said further disability, whichever is the lesser.[237] If said disabilities result in permanent total disability the additional compensation shall be in such amount as will complete the payments which would have been due had said permanent total disability resulted from such injury. This additional compensation accrues from, and may not be paid to any person before, the end of the period for which compensation for permanent disability resulting from such injury is payable by the employer, and shall be subject to s. 102.32 (6), (6m), and (7). No compromise agreement of liability for this additional compensation may provide for any lump sum payment.[238]

(1m) A compromise order issued under s. 102.16 (1) may not be admitted as evidence in any action or proceeding for benefits compensable under this section.

(2) In the case of the loss or of the total impairment of a hand, arm, foot, leg, or eye, the employer shall pay $20,000 into the state treasury. The payment shall be made in all such cases regardless of whether the employee or the employee's dependent or personal representative commences action against a 3rd party as provided in s. 102.29.[239]

(3) All payments received under this section shall be deposited in the fund established by s. 102.65.

History: 1971 c. 148; 1971 c. 260 s. 92 (4); 1973 c. 150; 1975 c. 147; 1977 c. 195; 1981 c. 92; 1985 a. 83, 173; 1987 a. 179; 2001 a. 37; 2003 a. 144; 2005 a. 172.

Cross-reference: See also s. DWD 80.68, Wis. adm. code.

The fund was not liable for disability benefits when an employer was liable for permanent total disability. Green Bay Soap Co. v. DILHR, 87 Wis. 2d 561, 275 N.W.2d 190 (Ct. App. 1979).

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[234] This amendment clarifies the department's right to decrease compensation to an injured employee where the injury results from his or her intoxication when such intoxication is caused by either alcohol or controlled substances.

[235] Compensation cannot be reduced 15 percent for failure of the employee to use safety devices where provided and adequately maintained except as their use is reasonably enforced. It was felt unfair to permit a reduction of compensation in cases where the employer acquiesced in failure of the employee to make use of a guard or where by failure to enforce use the employer has virtually consented that the employee should be allowed not to use the safety device. It is necessary for the employer to show that he or she made a reasonable effort to enforce such rules. The safety device must be one which is provided in accordance with a statute or lawful order of the department and not merely one adopted but not required. Reduction for failure to obey a reasonable rule adopted by the employer can be made only (1) where a definite order is shown and (2) where the employee had notice of the rule.

[236] This subsection has a two-fold purpose: First, to eliminate any incentive for discrimination against the employee who has serious previous disability when he or she comes to seek re-employment because of the employer's fear, real or otherwise, that the loss of another member may subject the employer to very large indemnities on the ground that such loss would cause total or near total disability; second, to secure to the employee sustaining the loss or total impairment of a second member such amount of indemnity as the seriousness of the combined disabilities calls for. Direct liability of the employer in case of the loss of the second member is made the same as for the loss of the first member, and the injured employee's rights are conserved by orders drawn on the fund for the balance of the indemnity. Primary liability of the employer for payment of $20,000 to the fund is insurable. Payments to the work injury supplemental benefit fund were suspended for injuries occurring in calendar years 1994 through 1998.

[237] To illustrate, one who has previously lost an arm at the shoulder would have been entitled to 500 weeks compensation. By second injury he or she loses the hand at the wrist and becomes entitled to 400 weeks compensation. Over and above payment for second injury, the employee may receive an additional 400 weeks for compensation from the fund.

[238] This amendment clarifies that the benefits are to be paid monthly as they accrue after primary benefits are accrued rather than in lump sum or advancement.

[239] 2005 Wis. Act 172, effective April 1, 2006, increases from $10,000 to $20,000 the payment to the work injury supplemental benefit fund from insurers and employers for injuries resulting in dismemberment.

102.60 Minor illegally employed.[240] **(1m)** When the injury is sustained by a minor who is illegally employed, the employer, in addition to paying compensation to the minor and death benefits to the dependents of the minor, shall pay the following amounts into the state treasury, for deposit in the fund established under s. 102.65.[241]

(a) An amount equal to the amount recoverable by the injured employee, but not to exceed $7,500, if the injured employee is a minor of permit age and at the time of the injury is employed, required, suffered, or permitted to work without a written permit issued under ch. 103, except as provided in pars. (b) to (d).

(b) An amount equal to double the amount recoverable by the injured employee, but not to exceed $15,000, if the injured employee is a minor of permit age and at the time of the injury is employed, required, suffered, or permitted to work without a permit in any place of employment or at any employment in or for which the department acting under ch. 103, has adopted a written resolution providing that permits shall not be issued.

(c) An amount equal to double the amount recoverable by the injured employee, but not to exceed $15,000, if the injured employee is a minor of permit age and at the time of the injury is employed, required, suffered, or permitted to work at prohibited employment.

(d) An amount equal to double the amount recoverable by the injured employee, but not to exceed $15,000, if the injured employee is a minor under permit age and is illegally employed.

(5) (a) A permit or certificate of age that is unlawfully issued by an officer specified in ch. 103, or that is unlawfully altered after issuance, without fraud on the part of the employer, shall be considered a permit for purposes of this section.

(b) If the employer is misled in employing a minor illegally because of fraudulent written evidence of age presented by the minor, the employer is not required to pay the amounts specified in sub. (1m).

(7) This section does not apply to an employee, as defined in s. 102.07 (6), if the agency or publisher establishes by affirmative proof that at the time of the injury the employee was not employed with the actual or constructive knowledge of the agency or publisher.

(8) This section does not apply to liability arising under s. 102.06 unless the employer sought to be charged knew or should have known that the minor was illegally employed by the contractor or subcontractor.

History: 1975 c. 147 s. 57; 1975 c. 199; 1977 c. 29, 195; 2005 a. 172; 2009 a. 206.

102.61 Indemnity under rehabilitation law. (1) Subject to subs. (1g) and (1m), an employee who is entitled to receive and has received compensation under this chapter, and who is entitled to and is receiving instructions under 29 USC 701 to 797b, as administered by the state in which the employee resides or in which the employee resided at the time of becoming physically disabled, shall, in addition to other indemnity, be paid the actual and necessary expenses of travel at the same rate as is provided for state officers and employees under s. 20.916 (8) and, if the employee receives instructions elsewhere than at the place of residence, the actual and necessary costs of maintenance, during rehabilitation, subject to the conditions and limitations specified in sub. (1r).[242]

(1g) (a) In this subsection, "suitable employment" means employment that is within an employee's permanent work restrictions, that the employee has the necessary physical capacity, knowledge, transferable skills, and ability to perform, and that pays not less than 90% of the

[240] 2005 Wis. Act 172, effective April 1, 2006, redirects payments by employers for double and treble compensation for the illegal employment of minors from the minors to the Work Injury Supplemental Benefit Fund. This amendment also provides that an employer is no longer required to make any payment if the employer is misled in hiring the minor because of fraudulent written evidence of age presented by the minor. Giving a false age on a work application is not to be considered fraudulent written evidence of age.

[241] The amendment to sub. (1m) and repeal of sub. (6) eliminates the requirement for employers to pay minors additional compensation for wage loss. 2009 Wis. Act 206, effective May 1, 2010.

[242] This amendment codifies the department's policy of setting the mileage reimbursement rate that employees receive for travel to attend vocational rehabilitation training at the same rate state employees receive for business travel. 2005 Wis. Act 172, effective April 1, 2006. A listing of applicable mileage rates is set forth at the back of this publication.

employee's preinjury average weekly wage, except that employment that pays 90% or more of the employee's preinjury average weekly wage does not constitute suitable employment if any of the following apply[243]

1. The employee's education, training, or employment experience demonstrates that the employee is on a career or vocational path, the employee's average weekly wage on the date of injury does not reflect the average weekly wage that the employee reasonably could have been expected to earn in the demonstrated career or vocational path, and the permanent work restrictions caused by the injury impede the employee's ability to pursue the demonstrated career or vocational path.

2. The employee was performing part-time employment at the time of the injury, the employee's average weekly wage for compensation purposes is calculated under s. 102.11 (1) (f) 1. or 2., and that average weekly wage exceeds the employee's gross average weekly wage for the part-time employment.

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

(c) On receiving notice that he or she is eligible to receive vocational rehabilitation services under 29 USC 701 to 797a, an employee shall provide the employer with a written report from a physician, chiropractor, psychologist, or podiatrist stating the employee's permanent work restrictions. Within 60 days after receiving that report, the employer shall provide to the employee in writing an offer of suitable employment, a statement that the employer has no suitable employment for the employee, or a report from a physician, chiropractor, psychologist, or podiatrist showing that the permanent work restrictions provided by the employee's practitioner are in dispute and documentation showing that the difference in work restrictions would materially affect either the employer's ability to provide suitable employment or a vocational rehabilitation counselor's ability to recommend a rehabilitative training program. If the employer and employee cannot resolve the dispute within 30 days after the employee receives the employer's report and documentation, the employer or employee may request a hearing before the department to determine the employee's work restrictions. Within 30 days after the department determines the employee's work restrictions, the employer shall provide to the employee in writing an offer of suitable employment or a statement that the employer has no suitable employment for the employee.

(1m) (a) If the department has determined under sub. (1) that an employee is eligible for vocational rehabilitation services under 29 USC 701 to 797b, but that the department cannot provide those services for the employee, the employee may select a private rehabilitation counselor[244] certified by the department to determine whether the employee can return to suitable employment without rehabilitative training and, if that counselor determines that rehabilitative training is necessary, to develop a rehabilitative training program[245] to restore as nearly as possible the employee to his or her preinjury earning capacity and potential.

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[243] A carrier or self-insured employer is not liable for retraining if an employer offers suitable employment to the employee. For employees who receive services from the Division of Vocational Rehabilitation, suitable employment is defined as employment within the employee's permanent work restrictions, the employee has the necessary physical capacity, knowledge, transferable skills, ability to perform, and that pays not less than 90 percent of the employee's preinjury average weekly earnings. 2001 Wis. Act 37, effective January 1, 2002, created this amendment which defines suitable employment. For employees who cannot receive services from the Division of Vocational Rehabilitation, suitable employment remains defined as a job within the employee's permanent work restrictions for which the employee has the necessary physical capacity, knowledge, transferable skills, ability and which pays at least 85 percent of the employee's preinjury average weekly wage. See Rule DWD 80.49(4)(d) and (5).

[244] See Rule DWD 80.49(6) for rules establishing the certification process.

[245] "Training program" is defined by rule to mean a course of instruction on a regular basis which provides an employee with marketable job skills or enhances existing job skills to make them marketable. See Rule DWD 80.49(2)(c).

(b) Notwithstanding s. 102.03 (4), an employee whose date of injury is before May 4, 1994, may receive private rehabilitative counseling and rehabilitative training under par. (a).[246]

(c) The employer or insurance carrier shall pay the reasonable cost[247] of any services provided for an employee by a private rehabilitation counselor under par. (a) and, subject to the conditions and limitations specified in sub. (1r) (a) to (c) and by rule, if the private rehabilitation counselor determines that rehabilitative training is necessary, the reasonable cost of the rehabilitative training program recommended by that counselor, including the cost of tuition, fees, books, maintenance, and travel at the same rate as is provided for state officers and employees under s. 20.916 (8). Notwithstanding that the department may authorize under s. 102.43 (5) a rehabilitative training program that lasts longer than 80 weeks, a rehabilitative training program that lasts 80 weeks or less is presumed to be reasonable.[248]

(d) If an employee receives services from a private rehabilitation counselor under par. (a) and later receives similar services from the department under sub. (1) without the prior approval of the employer or insurance carrier, the employer or insurance carrier is not liable for temporary disability benefits under s. 102.43 (5) or for travel and maintenance expenses under sub. (1) that exceed what the employer or insurance carrier would have been liable for under the rehabilitative training program developed by the private rehabilitation counselor.[249]

(e) Nothing in this subsection prevents an employer or insurance carrier from providing an employee with the services of a private rehabilitation counselor or with rehabilitative training under sub. (3) before the department makes its determination under par. (a).

(f) The department shall promulgate rules establishing procedures and requirements for the private rehabilitation counseling and rehabilitative training process under this subsection. Those rules shall include rules specifying the procedure and requirements for certification of private rehabilitation counselors.

(1r) An employee who receives a course of instruction or other rehabilitative training under sub. (1) or (1m) is subject to the following conditions and limitations:

(a) The employee must undertake the course of instruction within 60 days from the date when the employee has sufficiently recovered from the injury to permit so doing, or as soon thereafter as the officer or agency having charge of the instruction shall provide opportunity for the rehabilitation.

(b) The employee must continue in rehabilitation training with such reasonable regularity as health and situation will permit.

(c) The employee may not have expenses of travel and costs of maintenance under sub. (1) or costs of private rehabilitation counseling and rehabilitative training under sub. (1m) on account of training for a period in excess of 80 weeks in all, except as provided in s. 102.43 (5).

(2) The department, the commission, and the courts shall determine the rights and liabilities of the parties under this section in like manner and with like effect as the department, the commission, and the courts determine other issues

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[246] This is necessary to allow employees who cannot be served by the department, to receive rehabilitative training regardless of the date of injury.

[247] Rule DWD 80.49, as amended effective December 2, 1994, further defines the scope of counselor services for which the carrier or self-insured employer is liable, and the maximum cost for services by private rehabilitation counselors. The department adjusts the maximum cost annually based on the average annual percentage change in the US consumer price index for all urban consumers. A listing of the yearly maximum cost limits is set forth at the back of this publication.

[248] The presumption of reasonableness is intended to be rebuttable.

[249] The carrier's or self-insured employer's liability cannot exceed what it would have been if the private counselor's plan had been completed. For example, if the counselor recommended a 60-week plan and after 45 weeks the employee becomes eligible for and switches to a DVR program, without prior approval from the carrier, the carrier is responsible for only the remaining 15 weeks of TTD, maintenance and travel expenses even if DVR were to develop a new 40-week, 50-week or 100-week retraining program.

under this chapter. A determination under this subsection may include a determination based on the evidence regarding the cost or scope of the services provided by a private rehabilitation counselor under sub. (1m) (a) or the cost or reasonableness of a rehabilitative training program developed under sub. (1m) (a). [250]

(3) Nothing in this section prevents an employer or insurance carrier from providing an employee with the services of a private rehabilitation counselor or with rehabilitative training if the employee voluntarily accepts those services or that training.

History: 1975 c. 147; 1985 a. 83, 135; 1993 a. 370; 1995 a. 27 ss. 3745, 9126 (19), 9130 (4); 1997 a. 3, 112; 2001 a. 37; 2005 a. 172.

Cross-reference: See also s. DWD 80.49, Wis. adm. code.

Under ss. 102.42 (9) (a), 102.43 (5), and 102.61, the department may extend temporary disability, travel expense, and maintenance costs beyond 40 weeks if additional training is warranted. Beloit Corp. v. State, 152 Wis. 2d 579, 449 N.W.2d 299 (Ct. App. 1989).

The provisions of this section encompass formalized courses of instruction only. Johnson v. LIRC, 177 Wis. 2d 736, 503 N.W.2d 1 (Ct. App. 1993).

102.62 Primary and secondary liability; unchangeable. In case of liability under s. 102.57 or 102.60, the liability of the employer shall be primary and the liability of the insurance carrier shall be secondary. If proceedings are had before the department for the recovery of that liability, the department shall set forth in its award the amount and order of liability as provided in this section. Execution shall not be issued against the insurance carrier to satisfy any judgment covering that liability until execution has first been issued against the employer and has been returned unsatisfied as to any part of that liability. Any provision in any insurance policy undertaking to guarantee primary liability or to avoid secondary liability for a liability under s. 102.57 or 102.60 is void. If the employer has been adjudged bankrupt or has made an assignment for the benefit of creditors, or if the employer, other than an individual, has gone out of business or has been dissolved, or if the employer is a corporation and its charter has been forfeited or revoked, the insurer shall be liable for the payment of that liability without judgment or execution against the employer, but without altering the primary liability of the employer.

History: 2005 a. 172.

102.63 Refunds by state. Whenever the department shall certify to the secretary of administration that excess payment has been made under s. 102.59 or under s. 102.49 (5) either because of mistake or otherwise, the secretary of administration shall within 5 days after receipt of such certificate draw an order against the fund in the state treasury into which such excess was paid, reimbursing such payor of such excess payment, together with interest actually earned thereon if the excess payment has been on deposit for at least 6 months.

History: 1981 c. 92; 2003 a. 33.

102.64 Attorney general shall represent state and commission. (1) Upon request of the department of administration, a representative of the department of justice shall represent the state in cases involving payment into or out of the state treasury under s. 20.865 (1) (fm), (kr), or (ur) or 102.29. The department of justice, after giving notice to the department of administration, may compromise the amount of those payments but such compromises shall be subject to review by the department of workforce development. If the spouse or domestic partner under ch. 770 of the deceased employee compromises his or her claim for a primary death benefit, the claim of the children of the employee under s. 102.49 shall be compromised on the same proportional basis, subject to approval by the department. If the persons entitled to compensation on the basis of total dependency under s. 102.51 (1) compromise their claim, payments under s. 102.49 (5) (a) shall be compromised on the same proportional basis.[251]

[250] The limitations on the scope of review of department decisions as a result of Massachusetts Bonding & Ins. Co. v. Industrial Comm, 275 Wis. 505 (1957), and the line of cases following that decision, do not apply to a review of the cost, scope and reasonableness of services and programs developed by private rehabilitation counselors. The limitations still apply to determinations by the department.

[251] This eliminates the question of whether liability for children's benefits may be denied where compromise of a parent's claim has been made. Issues involved are the same in both cases so adjustment also is on a comparable basis. The same applies on payments into the fund.

(2) Upon request of the department of administration, the attorney general shall appear on behalf of the state in proceedings upon claims for compensation against the state. The department of justice shall represent the interests of the state in proceedings under s. 102.49, 102.59, 102.60, or 102.66.[252] The department of justice may compromise claims in those proceedings, but the compromises are subject to review by the department of workforce development. Costs incurred by the department of justice in prosecuting or defending any claim for payment into or out of the work injury supplemental benefit fund under s. 102.65, including expert witness and witness fees but not including attorney fees or attorney travel expenses for services performed under this subsection, shall be paid from the work injury supplemental benefit fund.

(3) In any action to review an order or award of the commission, and upon any appeal therein to the court of appeals, the attorney general shall appear on behalf of the commission, whether any other party defendant shall be represented or not, except that in actions brought by the state the governor shall appoint an attorney to appear on behalf of the commission.

History: 1975 c. 147; 1977 c. 187 s. 134; 1977 c. 195; 1979 c. 110 s. 60 (11); 1981 c. 20; 1983 a. 98; 1995 a. 27 ss. 3745g, 9130 (4); 1997 a. 3; 2007 a. 185; 2009 a. 28.

Sub. (3) does not result in providing public counsel for a private party litigant, because nowhere does the statute make the attorney general the claimant's attorney, but expressly states that the attorney general shall appear on behalf of the department. Hunter v. DILHR, 64 Wis. 2d 97, 218 N.W.2d 314 (1974).

102.65 Work injury supplemental benefit fund. (1) The moneys payable to the state treasury under ss. 102.35 (1), 102.47, 102.49, 102.59, and 102.60, together with all accrued interest on those moneys, and all interest payments received under s. 102.75 (2), shall constitute a separate nonlapsible fund designated as the work injury supplemental benefit fund. Moneys in the fund may be expended only as provided in s. 20.445 (1) (t) and may not be used for any other purpose of the state.[253]

(2) For proper administration of the moneys available in the fund the department shall by order, set aside in the state treasury suitable reserves to carry to maturity the liability for benefits under ss. 102.44, 102.49, 102.59 and 102.66. Such moneys shall be invested by the investment board in accordance with s. 25.14 (5).[254]

History: 1975 c. 147; 1977 c. 29; 1981 c. 20 s. 2202 (28) (a); 1983 a. 98 s. 31; 1989 a. 64; 1991 a. 174; 1995 a. 117; 2005 a. 172; 2007 a. 185.

102.66 Payment of certain barred claims. (1) In the event that there is an otherwise meritorious claim for occupational disease, and the claim is barred solely by the statute of limitations under s. 102.17 (4), the department may, in lieu of worker's compensation benefits, direct payment from the work injury supplemental benefit fund under s. 102.65 of such compensation and such medical expenses as would otherwise be due, based on the date of injury, to or on behalf of the injured employee.[255] The benefits shall be supplemental, to the extent of compensation liability, to any disability or medical benefits payable from any group insurance policy whose premium is paid in whole or in part by any employer, or under any federal insurance or benefit program providing disability or medical benefits. Death benefits payable under any such group policy do not limit the benefits payable under this section.

(2) In the case of occupational disease, appropriate benefits may be awarded from the work injury supplemental benefit fund when the status or existence of the employer or its insurance carrier cannot be determined or when there is otherwise no adequate remedy, subject to the limitations contained in sub. (1).

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[252] This amendment establishes authority for the Attorney General's Office to represent the Work Injury Supplemental Benefit Fund for collection of double and treble compensation payments due for the illegal employment of minors. 2007 Wis. Act 185, effective April 1, 2008.

[253] The Work Injury Supplemental Benefit Fund is made nonlapsible with this amendment and the money in the fund may only be used for statutory purposes and no other state purposes. 2005 Wis. Act 172, effective April 1, 2006.

[254] With this amendment the Work Injury Supplemental Benefit Fund no longer has a maximum balance limit of three times the amount of payments made in the preceding fiscal year. 2007 Wis. Act 185, effective April 1, 2008.

[255] The amendment eliminating the 12-year statute of limitations for specified traumatic injuries was created by 2001 Wis. Act 37, effective January 1, 2002. 2005 Wis. Act 172, effective April 1, 2006, transferred liability for payment for the specified traumatic injuries from the Work Injury Supplemental Benefit Fund to self-insured employers and insurance carriers.

History: 1975 c. 147; 1979 c. 278; 2001 a. 37; 2005 a. 172.

Cross-reference: See also s. DWD 80.06, Wis. adm. code.

This section authorizes the award of benefits for otherwise meritorious claims barred by the statute of limitations in effect at the time the claim arose. State v. DILHR, 101 Wis. 2d 396, 304 N.W.2d 758 (1981).

When a disabled worker could have claimed permanent total disability benefits under this section, but failed to do so before dying of causes unrelated to a compensable injury, a surviving dependent may not claim the disability benefits. State v. LIRC, 136 Wis. 2d 281, 401 N.W.2d 578 (1987).

The retroactive application of s. 102.17 (4) and sub. (1), as amended effective April 1, 2006, is unconstitutional as applied to the insurer in this case for two reasons: 1) it violated the insurer's due process rights guaranteed by the 14th amendment to the U.S. Constitution and Article I, Section 1 of the Wisconsin Constitution; and 2) it substantially impaired the insurer's contractual obligation in violation of Article I, Section 10 of the U.S. Constitution and Article I, Section 12 of the Wisconsin Constitution. Society Insurance v. LIRC, 2010 WI 68, ___ Wis. 2d ___, ___ N.W.2d ___, 08-3135.

102.75 Administrative expenses. (1) The department shall assess upon and collect from each licensed worker's compensation insurance carrier and from each employer exempted under s. 102.28 (2) by special order or by rule, the proportion of total costs and expenses incurred by the council on worker's compensation for travel and research and by the department and the commission in the administration of this chapter for the current fiscal year plus any deficiencies in collections and anticipated costs from the previous fiscal year, that the total indemnity paid or payable under this chapter by each such carrier and exempt employer in worker's compensation cases initially closed during the preceding calendar year, other than for increased, double or treble compensation bore to the total indemnity paid in cases closed the previous calendar year under this chapter by all carriers and exempt employers other than for increased, double or treble compensation. The council on worker's compensation and the commission shall annually certify any costs and expenses for worker's compensation activities to the department at such time as the secretary requires.

(1m) The moneys collected under sub. (1) and under ss. 102.28 (2) and 102.31 (7), together with all accrued interest, shall constitute a separate nonlapsible fund designated as the worker's compensation operations fund. Moneys in the fund may be expended only as provided in s. 20.445 (1) (ra), (rb), and (rp) and may not be used for any other purpose of the state. [256]

(2) The department shall require that payments for costs and expenses for each fiscal year shall be made on such dates as the department prescribes by each licensed worker's compensation insurance carrier and employer exempted under s. 102.28 (2). Each such payment shall be a sum equal to a proportionate share of the annual costs and expenses assessed upon each carrier and employer as estimated by the department. Interest shall accrue on amounts not paid within 30 days after the date prescribed by the department under this subsection at the rate of 1 percent per month. All interest payments received under this subsection shall be deposited in the fund established under s. 102.65. [257]

(4) From the appropriation under s. 20.445 (1) (ra), the department shall allocate the amounts that it collects in application fees from employers applying for exemption under s. 102.28 (2) and the annual amount that it collects from employers that have been exempted under s. 102.28 (2) to fund the activities of the department under s. 102.28 (2) (b) and (c).

History: 1975 c. 39; 1975 c. 147 s. 54; 1977 c. 195, 418; 1981 c. 20, 92; 1987 a. 27; 1991 a. 85; 1995 a. 117; 2005 a. 172; 2009 a. 206.

Cross-reference: See also s. DWD 80.38, Wis. adm. code.

102.80 Uninsured employers fund.[258] **(1)** There is established a separate, nonlapsible trust fund designated as the uninsured employers fund consisting of all the following:

(a) Amounts collected from uninsured employers under s. 102.82.

(b) Uninsured employer surcharges collected under s. 102.85 (4).

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[256] The worker's compensation operations fund is made a separate nonlapsible fund with this amendment and the money in the fund may only be used for statutory purposes and no other state purposes. This amendment also provides for interest on late assessment payments to be deposited in the Work Injury Supplemental Benefit Fund. 2005 Wis. Act 172, effective April 1, 2006.

[257] This amendment provides that interest on the assessment accrues 30 days after the due date. 2009 Wis. Act 106, effective May 1, 2010.

[258] This creates a fund from which the department will pay worker's compensation benefits to employees whose employers violate the requirement to obtain worker's compensation insurance coverage.

(d) Amounts collected from employees or dependents of employees under s. 102.81 (4) (b).

(e) All moneys received by the department for the uninsured employers fund from any other source.

(1m) The moneys collected or received under sub. (1), together with all accrued interest, shall constitute a separate nonlapsible fund designated as the uninsured employers fund. Moneys in the fund may be expended only as provided in s.

20.445 (1) (sm) and may not be used for any other purpose of the state.[259]

(3) (a) If the cash balance in the uninsured employers fund equals or exceeds $4,000,000, the secretary shall consult the council on worker's compensation within 45 days after that cash balance equals or exceeds $4,000,000. The secretary may file with the secretary of administration, within 15 days after consulting the council on worker's compensation, a certificate attesting that the cash balance in the uninsured employers fund equals or exceeds $4,000,000.[260]

(ag) The secretary shall monitor the cash balance in, and incurred losses to, the uninsured employers fund using generally accepted actuarial principles. If the secretary determines that the expected ultimate losses to the uninsured employers fund on known claims exceed 85 percent of the cash balance in the uninsured employers fund, the secretary shall consult with the council on worker's compensation.[261] If the secretary, after consulting with the council on worker's compensation, determines that there is a reasonable likelihood that the cash balance in the uninsured employers fund may become inadequate to fund all claims under s. 102.81 (1), the secretary shall file with the secretary of administration a certificate attesting that the cash balance in the uninsured employer's fund is likely to become inadequate to fund all claims under s. 102.81 (1) and specifying a date after which no new claims under s. 102.81 (1) will be paid.[262]

(am) If the secretary files the certificate under par. (a), the department may expend the moneys in the uninsured employers fund, beginning on the first day of the first July after the secretary files that certificate, to make payments under s. 102.81 (1) to employees of uninsured employers and to obtain reinsurance under s. 102.81 (2).[263]

(b) If the secretary does not file the certificate under par. (a), the department may not expend the moneys in the uninsured employers fund.

(c) If, after filing the certificate under par. (a), the secretary files the certificate under par. (ag), the department may expend the moneys in the uninsured employers fund only to make payments under s. 102.81 (1) to employees of uninsured employers on claims made before the date specified in that certificate and to obtain reinsurance under s. 102.81 (2) for the payment of those claims.

(4) (a) If an uninsured employer who owes to the department any amount under s. 102.82 or 102.85 (4) transfers his or her business assets or activities, the transferee is liable for the amounts owed by the uninsured employer under s. 102.82 or 102.85 (4) if the department determines that all of the following conditions are satisfied:

1. At the time of the transfer, the uninsured employer and the transferee are owned or controlled in whole or in substantial part, either directly or indirectly, by the same interest or interests. Without limitation by reason of enumeration, it is presumed unless shown to the contrary that the "same interest or interests" includes the spouse, child or parent of the individual who owned or controlled the business, or any combination of more than one of them.

2. The transferee has continued or resumed the business of the uninsured employer, either in the same establishment or elsewhere; or the transferee has employed substantially the same employees as those the uninsured employer

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[259] The Uninsured Employers Fund is made a separate nonlapsible fund with this amendment and the money in the fund may only be used only for statutory purposes and no other state purposes. 2005 Wis. Act 172, effective April 1, 2006.

[260] The $4,000,000 cash balance was reached early in 1996.

[261] This amendment deleted the requirement that incurred but not reported claims are to be used for calculating reserves in the Uninsured Employers Fund. 2007 Wis. Act 185, effective April 1, 2008.

[262] This provides for a procedure to stop accepting new claims if the department determines the fund is likely to become insolvent.

[263] This authorized the department to activate the fund on July 1, 1996, and to reinsure its liability.

had employed in connection with the business assets or activities transferred.

(b) The department may collect from a transferee described in par. (a) an amount owed under s. 102.82 or 102.85 (4) using the procedures specified in ss. 102.83, 102.835 and 102.87 and the preference specified in s. 102.84 in the same manner as the department may collect from an uninsured employer. [264]

History: 1989 a. 64; 1991 a. 85; 1993 a. 81; 1995 a. 117; 2003 a. 139; 2005 a. 172; 2007 a. 185.

102.81 Compensation for injured employee of uninsured employer. (1) (a) If an employee of an uninsured employer, other than an employee who is eligible to receive alternative benefits under s. 102.28 (3), suffers an injury for which the uninsured employer is liable under s. 102.03, the department or the department's reinsurer shall pay to or on behalf of the injured employee or to the employee's dependents an amount equal to the compensation owed them by the uninsured employer under this chapter except penalties and interest due under ss. 102.16 (3), 102.18 (1) (b) and (bp), 102.22 (1), 102.35 (3), 102.57, and 102.60. [265]

(b) The department shall make the payments required under par. (a) from the uninsured employers fund, except that if the department has obtained reinsurance under sub. (2) and is unable to make those payments from the uninsured employers fund, the department's reinsurer shall make those payments according to the terms of the contract of reinsurance.

(2) The department may retain an insurance carrier or insurance service organization to process, investigate and pay claims under this section and may obtain excess or stop-loss reinsurance with an insurance carrier authorized to do business in this state in an amount that the secretary determines is necessary for the sound operation of the uninsured employers fund. In cases involving disputed claims, the department may retain an attorney to represent the interests of the uninsured employers fund and to make appearances on behalf of the uninsured employers fund in proceedings under ss. 102.16 to 102.29. Section 20.930 and all provisions of subch. IV of ch. 16, except s. 16.753, do not apply to an attorney hired under this subsection. The charges for the services retained under this subsection shall be paid from the appropriation under s. 20.445 (1) (rp). The cost of any reinsurance obtained under this subsection shall be paid from the appropriation under s. 20.445 (1) (sm).

(3) An injured employee of an uninsured employer or his or her dependents may attempt to recover from the uninsured employer, or a 3rd party under s. 102.29, while receiving or attempting to receive payment under sub. (1).

(4) An injured employee, or the dependent of an injured employee, who received one or more payments under sub. (1) shall do all of the following:

(a) If the employee or dependent begins an action to recover compensation from the employee's employer or a 3rd party liable under s. 102.29, provide to the department a copy of all papers filed by any party in the action.

(b) If the employee or dependent receives compensation from the employee's employer or a 3rd party liable under s. 102.29, pay to the department the lesser of the following:

1. The amount after attorney fees and costs that the employee or dependent received under sub. (1).

2. The amount after attorney fees and costs that the employee or dependent received from the employer or 3rd party.

(5) The department of justice may bring an action to collect the payment under sub. (4).

(6) (a) Subject to par. (b), an employee, a dependent of an employee, an uninsured employer, a 3rd party who is liable under s. 102.29 or the department may enter into an agreement to settle liabilities under this chapter.

(b) A settlement under par. (a) is void without the department's written approval.

(7) This section first applies to injuries occurring on the first day of the first July beginning after the day that the secretary files a certificate under s. 102.80 (3) (a), except that if the secretary files a certificate under s. 102.80 (3)

[264] This applies successorship principles to determine liability for penalties incurred by the prior business.

[265] The Uninsured Employers Fund will pay the basic compensation owed but not penalties.

(ag) this section does not apply to claims filed on or after the date specified in that certificate.[266]

History: 1989 a. 64; 1995 a. 117; 2003 a. 144; 2005 a. 172, 253, 410; 2007 a. 97; 2009 a. 206.

Cross-reference: See also s. DWD 80.62, Wis. adm. code.

Section 102.18 (1) (bp) does not govern the conduct of the Department or its agent and does not impose any penalty on the department or its agent for bad faith conduct in administering the Uninsured Employers Fund. Section 102.18 (1) (bp) constitutes the exclusive remedy for the bad faith conduct of an employer or an insurance carrier. Because sub. (1) (bp) does not apply to the department's agent, it does not provide an exclusive remedy for the agent's bad faith. Moreover, sub. (1) (a) exempts the Department and its agent from paying an employee the statutory penalties and interest imposed on an employer or an insurance carrier for their misdeeds, but nothing in sub (1) (a) exempts the department or its agent from liability for its bad faith conduct in processing claims. Aslakson v. Gallagher Bassett Services, Inc. 2007 WI 39, 300 Wis. 2d 92, 729 N.W.2d 712, 04-2588.

102.82 Uninsured employer payments. (1) Except as provided in sub. (2) (ar), an uninsured employer shall reimburse the department for any payment made under s. 102.81 (1) to or on behalf of an employee of the uninsured employer or to an employee's dependents and for any expenses paid by the department in administering the claim[267] of the employee or dependents, less amounts repaid by the employee or dependents under s. 102.81 (4) (b). The reimbursement owed under this subsection is due within 30 days after the date on which the department notifies the uninsured employer that the reimbursement is owed. Interest shall accrue on amounts not paid when due at the rate of 1% per month.[268]

(2) (a) Except as provided in pars. (ag), (am) and (ar), all uninsured employers shall pay to the department the greater of the following:

1. Twice the amount determined by the department to equal what the uninsured employer would have paid during periods of illegal nonpayment for worker's compensation insurance in the preceding 3-year period based on the employer's payroll in the preceding 3 years.

2. Seven hundred and fifty dollars.[269]

(ag) An uninsured employer who is liable to the department under par. (a) 2 shall pay to the department, in lieu of the payment required under par. (a) 2., $100 per day for each day that the employer is uninsured if all of the following apply:

1. The employer is uninsured for 7 consecutive days or less.

2. The employer has not previously been uninsured.

3. No injury for which the employer is liable under s. 102.03 has occurred during the period in which the employer is uninsured.[270]

(am) The department may waive any payment owed under par. (a) by an uninsured employer if the department determines that the uninsured employer is subject to this chapter only because the uninsured employer has elected to become subject to this chapter under s. 102.05 (2) or 102.28 (2).[271]

(ar) The department may waive any payment owed under par. (a) or (ag) or sub. (1) if the department determines that the sole reason for the uninsured employer's failure to comply with s. 102.28 (2) is that the uninsured employer was a victim of fraud, misrepresentation or gross negligence by an insurance agent or insurance broker or by a person whom a reasonable person would believe is an insurance agent or insurance broker.[272]

(b) The payment owed under par. (a) or (ag) is due within 30 days after the date on which the employer is notified. Interest shall accrue on amounts not paid when due at the rate of 1% per month.

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[266] Only injuries occurring after the quarter when the fund activates are paid.

[267] 2003 Wis. Act 144, effective March 30, 2004, authorizes the department to claim reimbursement from uninsured employers for claims administration expenses paid by the department in addition to all payments made to or on behalf of employees or their dependents. With the amendment in 2009 Wis. Act 206, effective May 1, 2010 the department may also waive claim administration expenses in cases where the employer was a victim of fraud, misrepresentation or gross negligence by an insurance agent or by a person whom a reasonable person would believe is an insurance agent or insurance broker.

[268] A 30-day deadline is created within which the employer must reimburse the department.

[269] The minimum payment owed under this paragraph is $750.

[270] This reduces the payment for a one-time lapse in coverage when no compensable injury occurs during the lapse to $100 per day without coverage for up to seven consecutive days.

[271] This waives payments for failure to insure when the employer who has terminated coverage is subject to the act solely because of a voluntary decision to elect coverage in the first place.

[272] In determining whether to waive a payment, the department will rely on a finding of fraud, misrepresentation or gross negligence by the office of the commissioner of insurance.

(c) The department of justice or, if the department of justice consents, the department of workforce development may bring an action in circuit court to recover payments and interest owed to the department of workforce development under this section. [273]

(3) (a) When an employee dies as a result of an injury for which an uninsured employer is liable under s. 102.03, the uninsured employer shall pay $1,000 to the department.

(b) The payment under par. (a) is in addition to any benefits or other compensation paid to an employee or survivors or the work injury supplemental benefit fund under ss. 102.46 to 102.51.

History: 1989 a. 64, 359; 1991 a. 85; 1993 a. 81; 1995 a. 27 s. 9130 (4); 1997 a. 3, 38; 2003 a. 144; 2009 a. 206.

102.83 Collection of uninsured employer payments. [274] **(1)** (a) 1. If an uninsured employer or any individual who is found personally liable under sub. (8) fails to pay to the department any amount owed to the department under s. 102.82 and no proceeding for review is pending, the department or any authorized representative may issue a warrant directed to the clerk of circuit court for any county of the state.

2. The clerk of circuit court shall enter in the judgment and lien docket the name of the uninsured employer or the individual mentioned in the warrant and the amount of the payments, interest, costs, and other fees for which the warrant is issued and the date when the warrant is entered.

3. A warrant entered under subd. 2. shall be considered in all respects as a final judgment constituting a perfected lien on the right, title, and interest of the uninsured employer or the individual in all of that person's real and personal property located in the county where the warrant is entered. The lien is effective when the department issues the warrant under subd. 1. and shall continue until the amount owed, including interest, costs, and other fees to the date of payment, is paid.

4. After the warrant is entered in the judgment and lien docket, the department or any authorized representative may file an execution with the clerk of circuit court for filing by the clerk of circuit court with the sheriff of any county where real or personal property of the uninsured employer or the individual is found, commanding the sheriff to levy upon and sell sufficient real and personal property of the uninsured employer or the individual to pay the amount stated in the warrant in the same manner as upon an execution against property issued upon the judgment of a court of record, and to return the warrant to the department and pay to it the money collected by virtue of the warrant within 60 days after receipt of the warrant.

(b) The clerk of circuit court shall accept and enter the warrant in the judgment and lien docket without prepayment of any fee, but the clerk of circuit court shall submit a statement of the proper fee semiannually to the department covering the periods from January 1 to June 30 and July 1 to December 31 unless a different billing period is agreed to between the clerk and the department. The fees shall then be paid by the department, but the fees provided by s. 814.61 (5) for entering the warrants shall be added to the amount of the warrant and collected from the uninsured employer or the individual when satisfaction or release is presented for entry.

(2) The department may issue a warrant of like terms, force, and effect to any employee or other agent of the department, who may file a copy of the warrant with the clerk of circuit court of any county in the state, and thereupon the clerk of circuit court shall enter the warrant in the judgment and lien docket and the warrant shall become a lien in the same manner, and with the same force and effect, as provided in sub. (1). In the execution of the warrant, the employee or other agent shall have all the powers conferred by law upon a sheriff, but may not collect from the uninsured employer or the individual any fee or charge for the execution of the warrant in excess of the actual expenses paid in the performance of his or her duty.

[273] This change allows the department to bring actions against uninsured employers to circuit court with the consent of the department of justice.

[274] This allows the department to attach a lien on real or personal property and garnishee financial assets when an uninsured employer refuses to pay a penalty for failure to insure. The amendments in 2007 Wis. Act 185, effective April 1, 2008 increase the time limit that liens resulting from warrants remain in effect from 10 years to the date paid and also extend personal liability based on individual, joint and several liability until the date paid.

(3) If a warrant is returned not satisfied in full, the department shall have the same remedies to enforce the amount due for payments, interest, costs, and other fees as if the department had recovered judgment against the uninsured employer or the individual and an execution had been returned wholly or partially not satisfied.

(4) When the payments, interest, costs, and other fees specified in a warrant have been paid to the department, the department shall issue a satisfaction of the warrant and file it with the clerk of circuit court. The clerk of circuit court shall immediately enter the satisfaction of the judgment in the judgment and lien docket. The department shall send a copy of the satisfaction to the uninsured employer or the individual.

(5) The department, if it finds that the interests of the state will not be jeopardized, and upon such conditions as it may exact, may issue a release of any warrant with respect to any real or personal property upon which the warrant is a lien or cloud upon title. The clerk of circuit court shall enter the release upon presentation of the release to the clerk and payment of the fee for filing the release and the release shall be conclusive proof that the lien or cloud upon the title of the property covered by the release is extinguished.

(6) At any time after the filing of a warrant, the department may commence and maintain a garnishee action as provided by ch. 812 or may use the remedy of attachment as provided by ch. 811 for actions to enforce a judgment. The place of trial of an action under ch. 811 or 812 may be either in Dane County or the county where the debtor resides and may not be changed from the county in which the action is commenced, except upon consent of the parties.

(7) If the department issues an erroneous warrant, the department shall issue a notice of withdrawal of the warrant to the clerk of circuit court for the county in which the warrant is filed. The clerk shall void the warrant and any liens attached by it.

(8) Any officer or director of an uninsured employer that is a corporation and any member or manager of an uninsured employer that is a limited liability company may be found individually and jointly and severally liable for the payments, interest, costs and other fees specified in a warrant under this section if after proper proceedings for the collection of those amounts from the corporation or limited liability company, as provided in this section, the corporation or limited liability company is unable to pay those amounts to the department. The personal liability of the officers and directors of a corporation or of the members and managers of a limited liability company as provided in this subsection is an independent obligation, survives dissolution, reorganization, bankruptcy, receivership, assignment for the benefit of creditors, judicially confirmed extension or composition, or any analogous situation of the corporation or limited liability company, and shall be set forth in a determination or decision issued under s. 102.82. [275]

History: 1993 a. 81; 1995 a. 117, 224; 1997 a. 35, 38; 2007 a. 185.

102.835 Levy for delinquent payments. [276] **(1)** DEFINITIONS. In this section:

(a) "Debt" means a delinquent payment.

(ad) "Debtor" means an uninsured employer or an individual found personally liable under s. 102.83 (8) who owes the department a debt.

(d) "Levy" means all powers of distraint and seizure.

(e) "Payment" means a payment owed to the department under s. 102.82 and includes interest on that payment.

(f) "Property" includes all tangible and intangible personal property and rights to that property, including compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus or otherwise, amounts paid periodically pursuant to a pension or retirement program, rents, proceeds of insurance and amounts paid pursuant to a contract.

(2) POWERS OF LEVY AND DISTRAINT. If any debtor who is liable for any debt fails to pay that

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[275] Members of uninsured limited liability companies were added by Chapter 38, Laws of 1997, effective January 1, 1998. This allows the department to collect payments from officers and directors of uninsured corporations.

[276] This procedure for collecting payments from uninsured employers permits the department to levy upon the uninsured employer's personal property administratively without commencing an action in circuit court.

debt after the department has made demand for payment, the department may collect that debt and the expenses of the levy by levy upon any property belonging to the debtor. If the value of any property that has been levied upon under this section is not sufficient to satisfy the claim of the department, the department may levy upon any additional property of the debtor until the debt and expenses of the levy are fully paid.

(3) DUTIES TO SURRENDER. Any person in possession of or obligated with respect to property or rights to property that is subject to levy and upon which a levy has been made shall, upon demand of the department, surrender the property or rights or discharge the obligation to the department, except that part of the property or rights which is, at the time of the demand, subject to any prior attachment or execution under any judicial process.

(4) FAILURE TO SURRENDER; ENFORCEMENT OF LEVY. (a) Any debtor who fails to surrender any property or rights to property that is subject to levy, upon demand by the department, is subject to proceedings to enforce the amount of the levy.

(b) Any 3rd party who fails to surrender any property or rights to property subject to levy, upon demand of the department, is subject to proceedings to enforce the levy. The 3rd party is not liable to the department under this paragraph for more than 25% of the debt. The department shall serve a final demand as provided under sub. (13) on any 3rd party who fails to surrender property. Proceedings may not be initiated by the department until 5 days after service of the final demand. The department shall issue a determination under s. 102.82 to the 3rd party for the amount of the liability.

(c) When a 3rd party surrenders the property or rights to the property on demand of the department or discharges the obligation to the department for which the levy is made, the 3rd party is discharged from any obligation or liability to the debtor with respect to the property or rights to the property arising from the surrender or payment to the department.

(5) ACTIONS AGAINST THIS STATE. (a) If the department has levied upon property, any person, other than the debtor who is liable to pay the debt out of which the levy arose, who claims an interest in or lien on that property, and who claims that that property was wrongfully levied upon may bring a civil action against the state in the circuit court for Dane County. That action may be brought whether or not that property has been surrendered to the department. The court may grant only the relief under par. (b). No other action to question the validity of or to restrain or enjoin a levy by the department may be maintained.

(b) In an action under par. (a), if a levy would irreparably injure rights to property, the court may enjoin the enforcement of that levy. If the court determines that the property has been wrongfully levied upon, it may grant a judgment for the amount of money obtained by levy.

(c) For purposes of an adjudication under this subsection, the determination of the debt upon which the interest or lien of the department is based is conclusively presumed to be valid.

(6) DETERMINATION OF EXPENSES. The department shall determine its costs and expenses to be paid in all cases of levy.

(7) USE OF PROCEEDS. (a) The department shall apply all money obtained under this section first against the expenses of the proceedings and then against the liability in respect to which the levy was made and any other liability owed to the department by the debtor.

(b) The department may refund or credit any amount left after the applications under par. (a), upon submission of a claim for a refund or credit and satisfactory proof of the claim, to the person entitled to that amount.

(8) RELEASE OF LEVY. The department may release the levy upon all or part of property levied upon to facilitate the collection of the liability or to grant relief from a wrongful levy, but that release does not prevent any later levy.

(9) WRONGFUL LEVY. If the department determines that property has been wrongfully levied upon, the department may return the property at any time, or may return an amount of money equal to the amount of money levied upon.

(10) PRESERVATION OF REMEDIES. The availability of the remedy under this section does not abridge the right of the department to pursue other remedies.

(11) EVASION. Any person who removes, deposits or conceals or aids in removing, depositing or concealing any property upon which

a levy is authorized under this section with intent to evade or defeat the assessment or collection of any debt is guilty of a Class I felony and shall be liable to the state for the costs of prosecution.

(12) NOTICE BEFORE LEVY. If no proceeding for review permitted by law is pending, the department shall make a demand to the debtor for payment of the debt which is subject to levy and give notice that the department may pursue legal action for collection of the debt against the debtor. The department shall make the demand for payment and give the notice at least 10 days prior to the levy, personally or by any type of mail service which requires a signature of acceptance, at the address of the debtor as it appears on the records of the department. The demand for payment and notice shall include a statement of the amount of the debt, including costs and fees, and the name of the debtor who is liable for the debt. The debtor's failure to accept or receive the notice does not prevent the department from making the levy. Notice prior to levy is not required for a subsequent levy on any debt of the same debtor within one year after the date of service of the original levy.

(13) SERVICE OF LEVY. (a) The department shall serve the levy upon the debtor and 3rd party by personal service or by any type of mail service which requires a signature of acceptance.

(b) Personal service shall be made upon an individual, other than a minor or incapacitated person, by delivering a copy of the levy to the debtor or 3rd party personally; by leaving a copy of the levy at the debtor's dwelling or usual place of abode with some person of suitable age and discretion residing there; by leaving a copy of the levy at the business establishment of the debtor with an officer or employee of the debtor; or by delivering a copy of the levy to an agent authorized by law to receive service of process.

(c) The department representative who serves the levy shall certify service of process on the notice of levy form and the person served shall acknowledge receipt of the certification by signing and dating it. If service is made by mail, the return receipt is the certificate of service of the levy.

(d) The failure of a debtor or 3rd party to accept or receive service of the levy does not invalidate the levy.

(14) ANSWER BY 3RD PARTY. Within 20 days after the service of the levy upon a 3rd party, the 3rd party shall file an answer with the department stating whether the 3rd party is in possession of or obligated with respect to property or rights to property of the debtor, including a description of the property or the rights to property and the nature and dollar amount of any such obligation. If the 3rd party is an insurance company, the insurance company shall file an answer with the department within 45 days after the service of the levy.[277]

(15) DURATION OF LEVY. A levy is effective from the date on which the levy is first served on the 3rd party until the liability out of which the levy arose is satisfied, until the levy is released or until one year after the date of service, whichever occurs first.

(18) RESTRICTION ON EMPLOYMENT PENALTIES BY REASON OF LEVY. No employer may discharge or otherwise discriminate with respect to the terms and conditions of employment against any employee by reason of the fact that his or her earnings have been subject to levy for any one levy or because of compliance with any provision of this section. Whoever willfully violates this subsection may be fined not more than $10,000 or imprisoned for not more than 9 months or both.

(19) HEARING. Any debtor who is subject to a levy proceeding made by the department may request a hearing under s. 102.17 to review the levy proceeding. The hearing is limited to questions of prior payment of the debt that the department is proceeding against, and mistaken identity of the debtor. The levy is not stayed pending the hearing in any case in which property is secured through the levy.

(20) COST OF LEVY. Any 3rd party is entitled to a levy fee of $5 for each levy in any case where property is secured through the levy. The 3rd party shall deduct the fee from the proceeds of the levy.

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[277] The time to file an answer is decreased from 45 to 20 days except the time for filing an answer by insurance carriers remains 45 days. This amendment was effected by 2005 Wis. Act 442, effective November 1, 2006.

History: 1993 a. 81; 1995 a. 117; 1997 a. 187, 283; 2001 a. 109; 2005 a. 442; 2007 a. 185.

102.84 Preference of required payments. Subject to the federal bankruptcy laws, in the event of an uninsured employer's dissolution, reorganization, bankruptcy, receivership, assignment for benefit of creditors, judicially confirmed extension proposal or composition, or any analogous situation including the administration of estates in circuit courts, the payments required of the uninsured employer under s. 102.82 shall have preference over all claims of general creditors and shall be paid next after the payment of preferred claims for wages.[278]

History: 1993 a. 81.

102.85 Uninsured employers; penalties. (1) (a) An employer who fails to comply with s. 102.16 (3) or 102.28 (2) for less than 11 days shall forfeit not less than $100 nor more than $1,000.

(b) An employer who fails to comply with s. 102.16 (3) or 102.28 (2) for more than 10 days shall forfeit not less than $10 nor more than $100 for each day on which the employer fails to comply with s. 102.16 (3) or 102.28 (2).

(2) An employer who is required to provide worker's compensation insurance coverage under this chapter shall forfeit not less than $100 nor more than $1,000 if the employer does any of the following:

(a) Gives false information about the coverage to his or her employees, the department or any other person who contracts with the employer and who requests evidence of worker's compensation coverage in relation to that contract.

(b) Fails to notify a person who contracts with the employer that the coverage has been canceled in relation to that contract.

(2m) The court may waive a forfeiture imposed under sub. (1) or (2) if the court finds that the employer is subject to this chapter only because the employer elected to become subject to this chapter under s. 102.05 (2) or 102.28 (2).

(2p) The court may waive a forfeiture imposed under sub. (1) or (2) if the court finds that the sole reason for the uninsured employer's failure to comply with s. 102.82 (2) is that the uninsured employer was a victim of fraud, misrepresentation or gross negligence by an insurance agent or insurance broker or by a person whom a reasonable person would believe is an insurance agent or insurance broker.

(3) An employer who violates an order to cease operations under s. 102.28 (4) is guilty of a Class I felony.

(4) (a) If a court imposes a fine or forfeiture under subs. (1) to (3), the court shall impose under ch. 814 an uninsured employer surcharge equal to 75% of the amount of the fine or forfeiture.

(b) If a fine or forfeiture is suspended in whole or in part, the uninsured employer surcharge shall be reduced in proportion to the suspension.

(c) If any deposit is made for an offense to which this section applies, the person making the deposit shall also deposit a sufficient amount to include the uninsured employer surcharge under this section. If the deposit is forfeited, the amount of the uninsured employer surcharge shall be transmitted to the secretary of administration under par. (d). If the deposit is returned, the uninsured employer surcharge shall also be returned.

(d) The clerk of the court shall collect and transmit to the county treasurer the uninsured employer surcharge and other amounts required under s. 59.40 (2) (m). The county treasurer shall then make payment to the secretary of administration as provided in s. 59.25 (3) (f) 2. The secretary of administration shall deposit the amount of the uninsured employer surcharge, together with any interest thereon, in the uninsured employers fund as provided in s. 102.80 (1).

(5) (a) The payment of any judgment under this section may be suspended or deferred for not more than 90 days in the discretion of the court. The court shall suspend a judgment under this section upon the motion of the department, if the department is satisfied that the employer's violation of s. 102.16 (3) or 102.28 (2) was beyond the employer's control and that the employer no longer violates s. 102.16 (3) or

[278] This gives the department's claim for payments owed preference over general creditors.

102.28 (2). In cases where a deposit has been made, any forfeitures, surcharges, fees, and costs imposed under ch. 814 shall be taken out of the deposit and the balance, if any, returned to the employer.

(b) In addition to any monetary penalties, the court may order an employer to perform or refrain from performing such acts as may be necessary to fully protect and effectuate the public interest, including ceasing business operations.

(c) All civil remedies are available in order to enforce the judgment of the court, including the power of contempt under ch. 785.

History: 1989 a. 64; 1993 a. 81; 1995 a. 201; 1997 a. 283; 2001 a. 109; 2003 a. 33, 139, 326.

102.87 Citation procedure. (1) (a) The citation procedures established by this section shall be used only in an action to recover a forfeiture under s. 102.85 (1) or (2). The citation form provided by this section may serve as the initial pleading for the action and is adequate process to give a court jurisdiction over the person if the citation is filed with the circuit court.

(b) The citation may be served on the defendant by registered mail with a return receipt requested.

(2) A citation under this section shall be signed by a department deputy, or by an officer who has authority to make arrests for the violation, and shall contain substantially the following information:

(a) The name, address and date of birth of the defendant.

(b) The name and department of the issuing department deputy or officer.

(c) The violation alleged, the time and place of occurrence, a statement that the defendant committed the violation, the statute or rule violated and a designation of the violation in language which can be readily understood by a person making a reasonable effort to do so.

(d) A date, time and place for the court appearance, and a notice to appear.

(e) The maximum forfeiture, plus costs, fees, and surcharges imposed under ch. 814, for which the defendant is liable.

(f) Provisions for deposit and stipulation in lieu of a court appearance.

(g) Notice that if the defendant makes a deposit and fails to appear in court at the time specified in the citation, the failure to appear will be considered tender of a plea of no contest and submission to a forfeiture, plus costs, fees, and surcharges imposed under ch. 814, not to exceed the amount of the deposit. The notice shall also state that the court, instead of accepting the deposit and plea, may decide to summon the defendant or may issue an arrest warrant for the defendant upon failure to respond to a summons.

(h) Notice that if the defendant makes a deposit and signs the stipulation the stipulation will be treated as a plea of no contest and submission to a forfeiture, plus costs, fees, and surcharges imposed under ch. 814, not to exceed the amount of the deposit. The notice shall also state that the court, instead of accepting the deposit and stipulation, may decide to summon the defendant or issue an arrest warrant for the defendant upon failure to respond to a summons, and that the defendant may, at any time before or at the time of the court appearance date, move the court for relief from the effect of the stipulation.

(i) Notice that the defendant may, by mail before the court appearance, enter a plea of not guilty and request another date for a court appearance.

(j) Notice that if the defendant does not make a deposit and fails to appear in court at the time specified in the citation, the court may issue a summons or an arrest warrant.

(3) A defendant issued a citation under this section may deposit the amount of money that the issuing department deputy or officer directs by mailing or delivering the deposit and a copy of the citation before the court appearance date to the clerk of the circuit court in the county where the violation occurred, to the department, or to the sheriff's office or police headquarters of the officer who issued the citation. The basic amount of the deposit shall be determined under a deposit schedule established by the judicial conference. The judicial conference shall annually review and revise the schedule. In addition to the basic amount determined by the schedule, the deposit shall include the costs, fees, and surcharges imposed under ch. 814.

(4) A defendant may make a stipulation of no contest by submitting a deposit and a stipulation

in the manner provided by sub. (3) before the court appearance date. The signed stipulation is a plea of no contest and submission to a forfeiture, plus the costs, fees, and surcharges imposed under ch. 814, not to exceed the amount of the deposit.

(5) Except as provided by sub. (6), a person receiving a deposit shall prepare a receipt in triplicate showing the purpose for which the deposit is made, stating that the defendant may inquire at the office of the clerk of the circuit court regarding the disposition of the deposit, and notifying the defendant that if he or she fails to appear in court at the time specified in the citation he or she shall be considered to have tendered a plea of no contest and submitted to a forfeiture, plus costs, fees, and surcharges imposed under ch. 814, not to exceed the amount of the deposit and that the court may accept the plea. The original of the receipt shall be delivered to the defendant in person or by mail. If the defendant pays by check, the canceled check is the receipt.

(6) The person receiving a deposit and stipulation of no contest shall prepare a receipt in triplicate showing the purpose for which the deposit is made, stating that the defendant may inquire at the office of the clerk of the circuit court regarding the disposition of the deposit, and notifying the defendant that if the stipulation of no contest is accepted by the court the defendant will be considered to have submitted to a forfeiture, plus costs, fees, and surcharges imposed under ch. 814, not to exceed the amount of the deposit. Delivery of the receipt shall be made in the same manner as provided in sub. (5).

(7) If a defendant issued a citation under this section fails to appear in court at the time specified in the citation or by subsequent postponement, the following procedure applies:

(a) If the defendant has not made a deposit, the court may issue a summons or an arrest warrant.

(b) If the defendant has made a deposit, the citation may serve as the initial pleading and the defendant shall be considered to have tendered a plea of no contest and submitted to a forfeiture, plus costs, fees, and surcharges imposed under ch. 814, not to exceed the amount of the deposit. The court may either accept the plea of no contest and enter judgment accordingly, or reject the plea and issue a summons. If the defendant fails to appear in response to the summons, the court shall issue an arrest warrant. If the court accepts the plea of no contest, the defendant may, within 90 days after the date set for appearance, move to withdraw the plea of no contest, open the judgment, and enter a plea of not guilty if the defendant shows to the satisfaction of the court that failure to appear was due to mistake, inadvertence, surprise, or excusable neglect. If a defendant is relieved from the plea of no contest, the court may order a written complaint or petition to be filed. If on reopening the defendant is found not guilty, the court shall delete the record of conviction and shall order the defendant's deposit returned.

(c) If the defendant has made a deposit and stipulation of no contest, the citation serves as the initial pleading and the defendant shall be considered to have tendered a plea of no contest and submitted to a forfeiture, plus costs, fees, and surcharges imposed under ch. 814, not to exceed the amount of the deposit. The court may either accept the plea of no contest and enter judgment accordingly, or reject the plea and issue a summons or an arrest warrant. After signing a stipulation of no contest, the defendant may, at any time before or at the time of the court appearance date, move the court for relief from the effect of the stipulation. The court may act on the motion, with or without notice, for cause shown by affidavit and upon just terms, and relieve the defendant from the stipulation and the effects of the stipulation.

(8) If a citation or summons is issued to a defendant under this section and he or she is unable to appear in court on the day specified, the defendant may enter a plea of not guilty by mailing a letter stating that inability to the judge at the address indicated on the citation. The letter must show the defendant's return address. The letter may include a request for trial during normal daytime business hours. Upon receipt of the letter, the judge shall reply by letter to the defendant's address setting a time and place for trial. The time shall be during normal business hours if so requested. The date of the trial shall be at least 10 days from the date on which the letter was mailed by the judge. Nothing in this subsection forbids the setting of the trial at any time convenient to all parties concerned.

(9) A department deputy or an officer who collects a forfeiture and costs, fees, and surcharges imposed under ch. 814 under this section shall pay the money to the county treasurer within 20 days after its receipt. If the department deputy or officer fails to make timely payment, the county treasurer may collect the payment from the department deputy or officer by an action in the treasurer's name of office and upon the official bond of the department deputy or officer, with interest at the rate of 12% per year from the time when it should have been paid.

History: 1989 a. 64; 1997 a. 27; 1999 a. 14; 2003 a. 139; 2005 a. 172.

102.88 Penalties; repeaters. (1) When a person is convicted of any violation of this chapter or of any department rule or order, and it is alleged in the indictment, information or complaint, and proved or admitted on trial or ascertained by the court after conviction that the person was previously subjected to a fine or forfeiture within a period of 5 years under s. 102.85, the person may be fined not more than $2,000 or imprisoned for not more than 90 days or both.

(2) When any person is convicted and it is alleged in the indictment, information or complaint and proved or admitted on trial or ascertained by the court after conviction that such person had been before subjected to a fine or forfeiture 3 times within a period of 3 years under s. 102.85 and that those convictions remain of record and unreversed, the person may be fined not more than $10,000 or imprisoned for not more than 9 months or both.

History: 1989 a. 64; 1991 a. 85.

102.89 Parties to a violation. (1) Whoever is concerned in the commission of a violation of this chapter or of any department rule or order under this chapter for which a forfeiture is imposed is a principal and may be charged with and convicted of the violation although he or she did not directly commit it and although the person who directly committed it has not been convicted of the violation.

(2) A person is concerned in the commission of the violation if the person does any of the following:

(a) Directly commits the violation.

(b) Aids and abets the commission of the violation.

(c) Is a party to a conspiracy with another to commit the violation or advises, hires or counsels or otherwise procures another to commit it.

(3) No penalty for any violation of this chapter or rule or order of this chapter may be reduced or diminished by reason of this section.

History: 1989 a. 64.