DEPARTMENT OF
WORKFORCE DEVELOPMENT

WORKER'S COMPENSATION ACT

OF

WISCONSIN

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CHAPTER 102
WORKER'S COMPENSATION

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Cross-Reference: See definitions in s. 101.01

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 family 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).

(i) "Uninsured employer assessment" means the assessment imposed under s. 102.85 (4).

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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, Wis. Act 179, effective April 1, 1988, deleted this language. 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 that 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 leased employee from both the leasing agency and the worksite employer.

[4] An employee may recover compensation benefits for disability that 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 worked.

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

(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.

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).

"Temporary help agency" under sub. (2) (f) is not restricted to employers in the business of placing employees with other employers. Gansch v. Nekoosa Papers, Inc., 158 Wis. 2d 743, 463 N.W.2d 682 (1990).

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 Rivers Insurance Co. v. Manpower Temporary Services, 212 Wis. 2d 63, 568 N.W.2d 15 (Ct. App. 1997).

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).

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).

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.

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 thereof 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 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 participates voluntarily and the sole purpose of which is the mass transportation of employees to and from employment.[7] An employee is not performing service growing out of and incidental to employment while engaging in a program designed to improve the physical well-being of the employee, whether or not the program is located on the employer's premises, if participation in the program is voluntary and the employee receives no compensation for participation.[8]

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

[5] Chapter 37, Laws of 2001, effective January 1, 2002, created this subsection to define workweek as a calendar week starting on Sunday and ending on Saturday.

[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] 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.

[8] This excludes injuries to employees engaged in well-being programs if the participation is voluntary and uncompensated.

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.[9]

(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 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.[10]

(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).[11]

(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

[9] 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.

[10] 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.

[11] Employees who cannot be served by DVR may receive rehabilitative training under section 102.61(1m) regardless of the date of injury.

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.

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, when determining medical 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).

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 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 service 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 tort-feasor 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 as 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 for defamation against 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).

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).

If an employee of one employer is injured while attempting to rescue an employee of another employer, the rescuing employee becomes an employee of the injured employee's employer for purposes of worker's compensation liability. That no employee of the injured employee's employer specifically requested the other employer's employee to assist is immaterial. Michels Pipeline Construction, Inc. v. LIRC, 197 Wis. 2d 928, 541 N.W.2d 241 (Ct. App. 1995).

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 253, 556 N.W.2d 340 (Ct. App. 1996).

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).

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).

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).

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).

A work-related injury that plays any role in a second injury is properly considered a substantial factor in the re-injury. 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 558, 573 N.W.2d 856 (Ct. App. 1997).

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).

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 565, 579 N.W.2d 668 (1998).

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).

A compensable injury must arise out of employment, which refers to the casual 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. Die v. LIRC, 224 Wis. 2d 159, 589 N.W.2d 363 (1999).

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).

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).

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.

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.

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.

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. 449.

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.

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 of 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.

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, tort law, 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, family care district and other public or quasi-public corporations therein.

(b) 1. Every person who usually employs 3 or more employees, whether in one or more trades, businesses, professions or occupations, and whether in one or more locations.[12]

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

[12] 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 Ch. 102. Based on the holding in Stapleton, an employer is subject to Ch. 102 immediately upon the employment of three or more persons.

employees.[13] 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.[14]

(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 payable under this chapter 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.[15]

(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. 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.[16]

History: 1975 c. 199; 1983 a. 98; 1989 a. 64; 1993 a. 112; 1997 a. 38; 1999 a. 9; 2001 a. 37.

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).

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,[17] which shall be effective on the last day of such period. 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.[18]

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

[14] 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.

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

[16] 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.

[17] 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.

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

(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.

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 the injury if such contractor, subcontractor or other employer was an employer as defined in s. 102.04.[19] 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.[20]

(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.

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

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

(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.

(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[21] or a legally organized diving team 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.[22]

(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. 146.50 (1) (c), or a legally organized diving team is organized to assume full liability for the compensation provided

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[21] 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 her 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.

[22] Volunteer firefighters and members of rescue squads are employees and are 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.

under this chapter of all volunteer members of that company, department, squad, provider or team.[23]

(7m) An employee, volunteer, or member of an emergency management unit is an employee for purposes of this chapter as provided in s. 166.03 (8) (d), and a member of a regional emergency response team who is acting under a contract under s. 166.215 (1) is an employee for purposes of this chapter as provided in s. 166.215 (4).[24]

(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.[25]

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.[26]

(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.

(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 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

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

[24] Chapter 37, Laws of 2001, effective January 1, 2002, created this section to provide 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.

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

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

notice of election by the employer is to be provided to the volunteer workers.[27]

(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.[28]

(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.[29]

(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.[30]

(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.[31]

(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.[32]

(15) A sole proprietor or partner or member electing under s. 102.075 is an employee.[33]

(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

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27 To date no rule prescribes any class of volunteer to be deemed employees.

28 This keeps "volunteer" status for persons who receive items of minimal value.

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

30 This allows school districts to accept liability for certain work experience students and extends the exclusive remedy protection to the worksite employers. The sunset provision on this program was repealed by Chapter 37, Laws of 2001, effective January 1, 2002.

31 A juvenile ordered by a court to perform uncompensated community service work is an employee of the county where the court is located while doing such work. Benefits for temporary disability are not paid.

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

33 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.

worker's compensation coverage for the employees of the other state who provide services in Wisconsin.[34]

(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.

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.

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 Election by sole proprietor, partner or member.[35] (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.[36]

(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).[37]

(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.[38]

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

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[34] Chapter 118, Laws of 1997, effective May 1, 1998, created this section regarding leaves of absence for certain state employees in providing disaster relief services

[35] See s. 102.07(15).

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

[37] 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 re-elect for that period.

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

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 this subsection is effective 30 days after the department receives notice of that revocation.[39]

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.

[39] Chapter 37, Laws of 2001, effective January 1, 2002, repealed the sunset provision in this section.

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% of the state's average weekly earnings as determined under s. 108.05 as of June 30 of the previous year, except that the average weekly earnings for temporary disability, permanent total disability, or death benefits for injuries occurring on or after January 1, 2006, shall be not more than the wage rate that results in a maximum compensation rate of 100% of the state's average weekly earnings as determined under s. 108.05 as of June 30 of the previous year.[40] 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 January 1, 2002, and before January 1, 2003, not more than $318, resulting in a maximum compensation rate of $ $212, for permanent partial disability for injuries occurring on or after January 1, 2003, and before January 1, 2004, not more than $333, resulting in a maximum compensation rate of $222, for permanent partial disability for injuries occurring on or after January 1, 2004, and before January 1, 2005, not more than $348, resulting in a maximum compensation rate of $232, and, for permanent partial disability for injuries occurring on or after January 1, 2005, and before January 1, 2006, not more than $363, resulting in a maximum compensation rate of $242. Between such limits the average weekly earnings shall be determined as follows:[41] [42]

[40] Effective January 1, 2000, the maximum wage rate is determined by the state's average weekly earnings from the prior year. Effective January 1, 2000, the maximum rate is $549. For a four-year period beginning January 1, 2002, the maximum wage rate is determined by 110 percent of the state's average weekly earnings from the prior year. Effective January 1, 2002, the maximum wage rate is $647.00. This amendment was effected by Chapter 37, Laws of 2001, effective January 1, 2002.

[41] 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. The employer must report in the first report of injury (form WKC-12) any bonus, tip or premium as part of the wage.

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.

Seasonal employment is treated specially. Seasonal employment is defined as employment which can be conducted only during certain times of the year, and

(a)[43] 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.

2. If at the time of the injury the employee is working on 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 such 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. The words "part time for the day" shall apply to Saturday half days and all other days upon which the employee works less than normal full-time working hours.

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.[44]

(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.[45] An employee is a member of a regularly-scheduled class of part-time employees if all of the following conditions are met:

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.

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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.

[42] Permanent partial disability maximum weekly rates were $169 effective January 1, 1996; $174 on January 1, 1997; $179 on January 1, 1998; and $184.00 on January 1, 1999, 2000, and 2001. The maximum permanent partial disability weekly rates are increased for a four year period beginning January 1, 2002. The permanent partial disability maximum weekly rates are $212 effective January 1, 2002; $222 effective January 1, 2003; $232 effective January 1, 2004; and $242 effective January 1, 2005.

[43] Chapter 37, Laws of 2001, effective January 1, 2002, amended 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.

[44] Chapter 37, Laws of 2001, 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.

[45] Chapter 37, Laws of 2001, 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.

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.

(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.[46] 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 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.[47]

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, except under s. 102.60 (6), shall be such percentage of the average weekly earnings of the injured employee computed according to the provisions of this section, as shall fairly represent 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, the same to be fixed as of the time of the injury, but to be determined in view of the nature and extent of the injury.

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

[46] 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.

[47] 1987 Wis. Act 179, effective April 1, 1988, returned 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.

a. 64; 1991 a. 85; 1993 a. 81, 492; 1995 a. 117; 1997 a. 38, 253; 2001 a. 37.

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.

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.[48]

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 in which the alleged violation occurred for prosecution.[49]

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

[48] Chapter 37, Laws of 2001, effective January 1, 2002, created the requirement that when an 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

[49] Chapter 37, Laws of 2001, effective January 1, 2002, repealed the requirement for the department to file an annual report on fraud with the legislature and the governor.

physicians, chiropractors, psychologists, dentists[50] 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 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 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.[51]

(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.[52] The employee is entitled to have a physician, chiropractor, psychologist, dentist 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 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.[53] The employer's or insurer's written request[54] for examination shall notify the employee of all of the following:

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 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 or podiatrist present at the examination.

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 or vocational expert immediately upon receipt of these reports by the employer or worker's compensation insurer.[55]

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 or vocational expert who is present at any examination under par. (a) or (am) may be required to testify as to the results thereof.

2. Any physician, chiropractor, psychologist, dentist 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 it so directs.

3. Notwithstanding any statutory provisions except par. (e), any physician, chiropractor, psychologist, dentist 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

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[50] The employer or insurer may also request that a dentist examine an employee.

[51] 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.

[52] 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.

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

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

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

information and reports relative to a compensation claim.[56]

4. The testimony of any physician, chiropractor, psychologist, dentist 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).[57]

(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, psychologist, dentist, podiatrist, 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.[58]

(b) A physician, chiropractor, podiatrist, psychologist, dentist, 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.[59] 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).

(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,[60] 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.[61]

(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

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56 Practitioners under general statutory provisions are not allowed to disclose information that they may acquire while attending a patient in their professional character. 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 to all intents and purposes as the practitioner of the injured worker. Testimony before the department should be absolutely fair, factual and unbiased.

57 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).

58 Any doctor, 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.

59 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.

60 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.

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

has claimed compensation for treatment from a practitioner whose office is located 100 miles or 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.[62]

(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.

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.

102.16 Submission of disputes, contributions by employees. (1) Any controversy concerning compensation or a violation of sub. (3),[63] 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 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.[64]

(1m) (a) If an insurer or self-insured employer concedes by compromise under sub. (1) or stipulation

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[62] 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.

[63] 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.

[64] 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.

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.[65]

(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.

(2) (a) 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. The department shall deny payment of a health service fee that the department determines under this subsection, sub. (1m) (a) or s. 102.18 (1) (b) to be unreasonable. 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). A health service provider and an insurer or self-insured employer that are parties to a fee dispute under sub. (1m) (a) are bound by the department's determination under sub. (1m) (a) on the reasonableness of the disputed fee, unless that determination is set aside or modified by the department under sub. (1). An insurer or self-insured employer that is a party to a fee dispute under s. 102.17 and a health service provider are bound by the department's determination under s. 102.18 (1) (b) on the reasonableness of the disputed fee, unless that determination is set aside, reversed or modified by the department under s. 102.18 (3) or by the commission under s. 102.18 (3) or (4) or is set aside on judicial review under s. 102.23.

(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 notice to the health service provider that the fee is being disputed. After receiving reasonable 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.

(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.[66] The department shall determine that a disputed fee is reasonable and order that the 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 1.5 standard deviations from that mean, 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

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

[66] Chapter 37, Laws of 2001, effective January 1, 2002, repealed the sunset date for resolving disputes relating to the reasonableness of fees.

service procedure for which the disputed fee was charged, plus 1.5 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.[67]

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) The department may set aside, reverse or modify a determination under this subsection within 30 days after the date of the determination.[68] 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.[69]

(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.[70]

(2m) (a) 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. The department shall deny payment for any treatment that the department determines under this subsection, sub. (1m) (b) or s. 102.18 (1) (b) to be unnecessary. 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 that treatment, unless that determination is set aside on judicial review as provided in par. (e). A health service provider and an insurer or self-insured employer that are parties to a dispute under sub. (1m) (b) over the necessity of treatment are bound by the department's determination under sub. (1m) (b) on the necessity of that treatment, unless that determination is set aside or modified by the department under sub. (1). An insurer or self-insured employer that is a party to a dispute under s. 102.17 over the necessity of treatment and a health service provider are bound by the department's determination under s. 102.18 (1) (b) on the necessity of that treatment, unless that determination is set aside, reversed or modified by the department under s. 102.18 (3) or by the commission under s. 102.18 (3) or (4) or is set aside on judicial review under s. 102.23.

(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 notice to the health service provider that the necessity of that treatment is being disputed. After receiving reasonable 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.

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

68 The department can now modify its alternative dispute resolution orders.

69 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 circuit court.

70 This directs the department to develop a separate data base for use in disputes regarding the reasonableness of radiology fees charged by hospitals.

(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.[71] Before determining under sub. (1m) (b) or s. 102.18 (1) (bg) 2. the necessity of treatment provided for an injured employee who claims benefits under this chapter, the department may, but is not required to, obtain such an expert opinion. 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 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.[72]

(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.[73]

(e) The department may set aside, reverse or modify a determination under this subsection within 30 days after the date of the determination. 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.[74]

(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).

(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); nor may any such employer 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 which 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.[75] 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

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[71] The department is not required but has the option of obtaining an expert opinion on the necessity of treatment before resolving a case by a finding of fact order or by a compromise settlement. This amendment was effected by Chapter 37, Laws of 2001, effective January 1, 2002.

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

[73] 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.

[74] 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 circuit court.

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

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.

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).

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. McDonnough v. DWD, 227 Wis. 2d 271, 595 N.W.2d 686 (1999).

102.17 Procedure; notice of hearing; witnesses, contempt; testimony, medical examination.[76] **(1)** (a) 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, it shall mail a copy of such application to all other parties in interest and the insurance carrier shall be deemed a party in interest. The department may bring in additional parties by service of a copy of the application. The department shall cause notice of hearing on the application to be given to each party interested, by service of such notice on the interested party personally or by mailing a copy to the interested party's last-known address at least 10 days before such hearing. In case a party in interest is located without the 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 such party. Such filing and mailing shall constitute sufficient service, with the same effect as if served upon a party located within this state. 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 hearing 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.[77]

(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 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

[76] 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, Ch. DWD 80, adopted by the department in the administration of Ch. 102 is set forth at the back of this pamphlet.

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

before the department. Except as provided under pars.

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(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.[78]

(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 subunit of the department that obtains a social security number or a federal employer identification number under subd. 1. may not disclose the social security number or the federal employer identification number to any person except to the department of revenue for the sole purpose of requesting certifications under s. 73.0301 or on the request of the subunit of the department that administers the child and spousal support program under s. 49.22 (2m).

(cm) The department 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 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 memorandum of understanding entered into under s. 49.857 and not as provided in ch. 227.

(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

[78] 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.

paragraph is subject to review only as provided under s. 73.0301 (5) and not as provided in ch. 227.[79]

(d)[80] The contents of certified medical and surgical

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

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

reports by physicians, podiatrists, surgeons, dentists, psychologists 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 them, subject to any rules and limitations the department prescribes. Certified reports of physicians, podiatrists, surgeons, dentists, psychologists and chiropractors, wherever licensed and practicing, who have examined or treated the claimant, and of experts, if the practitioner or expert consents to subject himself or herself to cross-examination also constitute prima facie evidence as to the matter contained in them. 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 are admissible as evidence of the diagnosis and necessity for treatment but not of disability. Any physician, podiatrist, surgeon, dentist, psychologist, chiropractor 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. The record of a hospital or sanatorium in this state operated by any department or agency of the federal or state government or by any municipality, or of any other hospital or sanatorium in this state which is satisfactory to the department, established by certificate, affidavit or testimony of the supervising officer or other person having charge of such records, or of a physician, podiatrist, surgeon, dentist, psychologist or chiropractor to be the record of the patient in question, and made in the regular course of examination or treatment of such patient, constitutes prima facie evidence in any worker's compensation proceeding as to the matter contained in it, to the extent that it is otherwise competent and relevant.[81] 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.[82]

(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 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.[83]

(g) Whenever the testimony presented at any hearing indicates a dispute, or is such as to create doubt as to the extent or cause of disability or death, the department may direct that the injured employee be examined or autopsy be performed, or an opinion of a physician, chiropractor, dentist, psychologist or podiatrist be obtained without examination or autopsy, by an impartial, competent physician, chiropractor, dentist, psychologist or podiatrist designated by the

[81] 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.

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

[83] 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.

department who is not under contract with or regularly employed by a compensation insurance carrier or self-insured employer. The expense of such examination shall be paid by the employer or, if the employee claims compensation under s. 102.81, from the uninsured employers fund. The report of such examination shall be transmitted in writing to the department and a copy thereof 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.[84]

(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.[85]

(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.

(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 wilfully 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) The right of an employee, the employee's legal representative, or a dependent to proceed under this section shall not extend beyond 12 years from the date of the injury or death or from the date that compensation, other than treatment or burial expenses, was last paid, or would have been last payable if no advancement were made,[86] 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, any permanent brain injury, or any injury causing the need for a total or partial knee or hip replacement, there shall be no statute of limitations, except that benefits or treatment expense becoming due after 12 years from 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.[87] Payment of wages by the employer during disability or absence from work to obtain treatment shall be deemed 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

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[84] Chapter 37, Laws of 2001, effective January 1, 2002, amended this subsection to include certified reports of investigations made by industrial safety specialists who are contracted by or otherwise secured by the department.

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

[86] 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.

[87] 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 the Work Injury Supplemental Benefit Fund. Chapter 37, Laws of 2001, effective January 1, 2002, created this amendment.

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. [88] [89]

(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. [90]

(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. [91]

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.

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).

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

[89] 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.

[90] 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 has authority to waive the notice requirement for good cause where neither party is prejudiced.

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

LIRC's authority under sub. (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 s. 102.18 (1) (a). Baldwin v. LIRC, 228 Wis. 2d 601, 599 N.W.2d 8 (Ct. App. 1999).

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.

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.[92]

(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.[93]

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.[94]

(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.[95] 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.[96] 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 disability sustained after the date of the award.[97] [98] [99]

(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,

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92 This permits the department to apportion disability between two or more injuries according to proof of their relative contribution. Medical evidence on the exact percentage contribution by each injury is not necessarily required.

93 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.

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

95 The administrative law judge shall issue prompt orders. "Prompt" is clarified to mean within 90 days of the close of the hearing record.

96 Administrative law judges are now authorized to award payment for necessary medical treatment on a prospective basis. Chapter 37, Laws of 2001, effective January 1, 2002, amended this subsection.

97 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.

98 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.

99 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.

the health service provider under s. 102.16 (2) (b) that the reasonableness of the fee is in dispute.[100]

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.

(bp) The department may include a penalty in an award to an employee if it determines that the employer's or insurance carrier's suspension of, termination of or failure to make payments or failure to report injury resulted from malice or bad faith. This penalty is the exclusive remedy against an employer or insurance carrier for malice or bad faith. The department may award an amount which it considers just, not to exceed the lesser of 200% of total compensation due or $15,000. 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.[101]

(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.[102]

(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.[103]

(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.[104]

(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 a party files a petition for review under sub. (3). This paragraph applies to all 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.[105]

(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[106] shows probable

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

[101] "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 $15,000. See Rule DWD 80.70.

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

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

[104] 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.

[105] 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. This subsection was created by Chapter 37, Laws of 2001, effective January 1, 2002.

[106] The commision 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.

good cause that the reason for failure to timely file was beyond the petitioner's control. 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.[107]

(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 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.[108]

(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).

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.

Cross Reference: See also LIRC, 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).

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

[107] 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.

[108] 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.

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 which 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 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).

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 290, 565 N.W.2d 221 (Ct. App. 1997).

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).

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%. 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%.[109] 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.[110] [111]

(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.

(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.[112] 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

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

[110] 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.

[111] 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.

[112] 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.

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).

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.[113]

(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) The commission shall serve its answer within 45 days after the service of the complaint,[114] 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.

(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 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.[115] [116]

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

[114] The time for serving the answer is increased from 20 to 45 days.

[115] 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.

[116] 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.

(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 judgment.

(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) The commencement of action for review shall not relieve the employer from paying compensation as directed, when such action involves only the question of liability as between the employer and one or more insurance companies or as between several insurance companies.

(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.

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).

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).

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. McDonnough v. Department of Workforce Development, 227 Wis. 2d 271, 595 N.W.2d 686 (1999).

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 therefor be enforceable where such fee, inclusive of all taxable attorney fees paid or agreed to be paid for such enforcement or collection, exceeds 20% of the amount at which such claim is compromised or of the amount awarded, adjudged or collected, except that in cases of admitted liability where there is no dispute as to amount of compensation due and in which no hearing or appeal is necessary, the fee charged shall not exceed 10% but not to exceed $100, of the amount at which such claim is compromised or of the amount awarded, adjudged or collected. 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.[117]

(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.[118]

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[117] 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.

[118] The department can authorize insureds and self-insureds to pay compensation directly into the accounts of employees at financial institutions by direct deposit or electronic fund transfers when requested by employees. Chapter 37, Laws of 2001, effective January 1, 2002, created this subsection.

(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.

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.

(2) (a) A benefit under this chapter is assignable under s. 46.10 (14) (e), 301.12 (14) (e), 767.23 (1) (L), 767.25 (4m) (c) or 767.265 (1) or (2m).[119]

(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.[120]

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.

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),[121] 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.[122] 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.[123]

(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

[119] Effective July 31, 1981, benefits can be assigned for support. Upon receipt of executed copies of order of the court or family court commissioner and the assignment by the injured, 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.

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

[121] The language that 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.

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

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

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. (a).[124] 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.[125]

(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.[126] (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.

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.

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124 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.

125 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.

126 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.

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 state treasurer 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 state treasurer 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).[127]

(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

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

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.

(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).[128]

(8) Self-insured employers liability fund. The moneys paid into the state treasury under sub. (7), together with all accrued interest, shall constitute the "self-insured employers liability fund".

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.

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).

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

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

compensation.[129] 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 of increased compensation made or to be made under s. 102.18 (1) (bp), 102.22, 102.35 (3), 102.57 or 102.60.[130] 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 attorneys' 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 third party, the employer or insurer shall have a right of action against such third 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 he or she may be entitled to under it and also maintaining a civil action against any physician, chiropractor, psychologist, dentist or podiatrist for malpractice.[131]

(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

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129 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.

130 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.

131 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.

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 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.[132]

(6) 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 employer who compensates the temporary help agency for the employee's services.[133]

(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.[134]

(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.[135]

(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. 49.13 who, under s. 49.13 (2) (d), is provided worker's compensation coverage by the department or by a Wisconsin works agency, as defined in 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 employment and training from which the claim arose.

NOTE: Sub. (8r) is shown as amended eff. 7-1-02 by 2001 Wis. Act 16. Prior to 7-1-02 it reads:

(8r) No participant in a food stamp employment and training program under s. 49.124 (1m) who, under s. 49.124 (1m) (d), is provided worker's compensation coverage by the department or by a Wisconsin works agency, as defined in 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 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.

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.

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

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[132] 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.

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

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

[135] Chapter 37, Laws of 2001, effective January 1, 2002, repealed the sunset provision for this subsection.

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. 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 time of 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).

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).

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 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).

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).

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).

The factors listed in supreme court rules regarding reasonable attorney fees provide an appropriate basis for assessment of reasonable attorney fees awarded as costs of collection under sub. (1). Meyer v. Michigan Mutual Insurance Co. 2000 WI App 53, 233 Wis. 2d 493, 609 N.W.2d 167.

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 worker's 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.[136]

(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

[136] 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.

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).[137]

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

The prohition 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).

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.[138]

(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.[139]

(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.[140]

(e) An insurer who provides a contract under par. (a) shall file the contract as provided in s. 626.35.[141]

(2) (a) No party to a contract of insurance may cancel it within the contract period or terminate or not renew it 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

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137 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.

138 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.

139 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.

140 This treats the limited liability companies in the same manner as partnerships under s. 102.31(1)(d).

141 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.

the department.[142] 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 either by personal service of the notice upon the department at its office in Madison or by sending the notice by facsimile machine transmission or certified mail addressed to the department at its office in Madison. The department may provide by rule that the notice of cancellation or termination be given by certified mail or facsimile machine transmission to the Wisconsin compensation rating bureau rather than to the department. 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.[143]

(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.

(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 the department under this subsection may be made public by the department

[142] 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.

[143] 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.

except as authorized by the Wisconsin compensation rating bureau.[144]

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.

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).

102.32 Continuing liability; guarantee settlement, gross payment. In any case in which compensation payments have extended or will extend over 6 months or more from the date of the injury (or at any time in death benefit cases), any party in interest may, in the discretion of the department, be discharged from, or compelled to guarantee, future compensation payments as follows:

(1) By depositing the present value of the total unpaid compensation upon a 7% interest discount basis with a credit union, savings bank, savings and loan association, bank or trust company designated by the department; or

(2) By purchasing an annuity within the limitations provided by law, in such insurance company granting annuities and licensed in this state, as may be designated by the department; or

(3) By making payment in gross upon a 7% interest discount basis to be approved by the department; and

(4) In cases where the time for making payments or the amounts thereof cannot be definitely determined, by 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 thereof, 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 thereof, 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 sub. (1), (2) or (3); and

(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 this section and thereby release the employer from compensation liability in that case, but if for any reason a bond furnished or deposit made under sub. (4) 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) 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.[145] Compensation for permanent disability that results from an injury for which the employer or the employer's insurer concedes liability and that is based on a minimum permanent disability rating promulgated by the department by rule shall begin within 30 days after the end of the employee's healing period or within 30 days after the employer or the employer's insurer receives a medical report that provides a permanent disability rating, whichever is later. Compensation for permanent disability that results from an injury for which the employer or the employer's insurer does not concede liability or that is based on a permanent disability rating that is above a minimum permanent disability rating promulgated by the department by rule shall begin within the later of those 30-day periods unless within the later of those 30-day periods the employer or insurer notifies the employee that the employer or insurer is requesting an examination under s. 102.13 (1) (a), in which case compensation for permanent disability shall begin within 30 days after the employer or insurer receives the report of the examination or within 90 days after the date of the request for the examination, whichever is earlier.[146] Payments for permanent disability, including payments based on minimum permanent

[144] The department cannot make public any of the information specified in s. 102.31(8) except as authorized by the Wisconsin compensation rating bureau. Chapter 37, Laws of 2001, effective January 1, 2002, amended this section.

[145] This gives the department authority for its longstanding policy to have permanent disability and death benefits paid monthly.

[146] 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. For cases disputed on the extent of disability, insurance carriers and self-insured employers have 30 additional days to give notice of scheduling the employee for an examination under s. 102.13(1)(a) and a 90 day limit beyond that date to begin payment of any compensation for permanent partial disability which is due. Chapter 37, Laws of 2001, effective January 1, 2002, amended this section.

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 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 7%.

(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.

The interest credit under sub. (6) 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).

102.33 Department forms and records; public access. (1) The department shall print and furnish free to any employer or employee such blank forms as it shall deem requisite to facilitate efficient administration of this chapter; it shall keep such record books or records as it shall deem required for the proper and efficient administration of this chapter.

(2) (a) Except as provided in pars. (b) and (c), the records of the department related to the administration of this chapter are subject to inspection and copying under s. 19.35 (1).[147]

(b) Notwithstanding par. (a), a record maintained by the department 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, the amount, type or duration of benefits paid to the employee or any financial information provided to the department by a self-insured employer or by an applicant for exemption under s. 102.28 (2) (b) is confidential and not open to public inspection or copying under s. 19.35 (1). The department 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:[148]

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.

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 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 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.[149]

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.

[147] 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.

[148] This codifies the department's policy of not honoring subpoenas for claim records from parties to another legal proceeding.

[149] 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.

4. A court of competent jurisdiction in this state orders the department to release the record.[150]

5. The requester is the subunit of the department that administers child and spousal support 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.[151]

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.[152]

(c) Notwithstanding par. (a), a record maintained by the department 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.[153]

History: 1975 c. 147 s. 54; 1989 a. 64; 1991 a. 85; 1995 a. 117; 1997 a. 191, 237; 2001 a. 37.

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 forfeit to the state not less than $10 nor more than $100 for each offense.

(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.

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).

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).

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).

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150 The department will only honor court orders for release of records from Wisconsin courts.

151 This was created by 1997 Act 191 relating to support enforcement.

152 This was created by 1997 Act 237 concerning tax delinquencies.

153 Chapter 37, Laws of 2001, effective January 1, 2002, created this subsection relating to records maintained by the department containing employer or insurer information obtained from the Wisconsin compensation rating bureau.

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, if the employer has not filed notice as provided in sub. (4), 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. Where 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.[154]

(1m) 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.[155] This

[154] 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).

[155] Chapter 37, Laws of 2001, effective January 1, 2002, created this subsection. The intent is to modify the holding in Spencer v. ILHR Department, 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-

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) Where 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 or podiatrist licensed to practice and practicing in this state for treatment of the injury.[156] 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 deemed to be one practitioner. Treatment by a practitioner on referral from another practitioner is deemed to be treatment by one practitioner.[157]

(b) The employer is not liable for the expense of unreasonable travel to obtain treatment.

(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 choose the attending practitioner is not restricted and the employer is liable for the reasonable and necessary expense thereof.[158]

(4) *Christian Science.* Any employer may elect not to be subject to the provisions for Christian Science treatment provided for in this section by filing written notice of such election with the department.

(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.

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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).

[156] Dentists are now included in the listing of practitioners.

[157] 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.

[158] The intent is to allow complete free choice of practitioner rather than using restrictive panels, which had been allowed in the past.

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.

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).

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. Lisney v. LIRC, 171 Wis. 2d 499, 493 N.W.2d 14 (1992).

Sub. (2) (a) does not require employer to consent to out-of-state health care expenses that result from 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).

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).

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).

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).

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.

Continuing Payments for Medical Expenses in Worker's Compensation Proceedings. Carnell & Woog. Wis. Law. Nov. 1993.

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.[159]

(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.

(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.[160]

(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

[159] 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.

[160] 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.

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.[161] 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.

(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.[162]

(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.

(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.[163]

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.[164]

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.[165]

(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

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161 The prior 40-week limit is raised to 80.

162 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 Chapter 37, Laws of 2001, effective January 1, 2002, provides that the compensation for temporary disability will be offset by the expanded wage of the second employer rather than the actual wage.

163 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.

164 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.

165 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.

temporary total disability benefit for injury sustained while engaged in employment for that employer.[166]

(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.[167]

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.

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).

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 to her pre-existing pregnancy. ITW Deltar v. LIRC, 226 Wis. 2d 11, 593 N.W.2d 908 (Ct. App. 1999).

102.44 Maximum limitations. Section 102.43 shall be subject to the following limitations:

(1) 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 which occurred prior to January 1, 1978, shall receive supplemental benefits which 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. These supplemental benefits shall be paid only for weeks of disability occurring after January 1, 1980, and shall continue during the period of such total disability subsequent to that date.

(a) If such 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 January 1, 2002, shall be an amount which, when added to the regular benefit established for the case, shall equal $202.[168]

(b) If such employee is receiving a weekly benefit which is less than the maximum benefit which was in effect on the date of the injury, the supplemental benefit for a week of disability occurring after January 1, 2002, shall be an amount sufficient to bring the total weekly benefits to the same proportion of $202 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.[169]

(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.

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166 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.

167 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.

168 Supplemental benefits are increased to give permanently and totally disabled persons injured prior to January 1, 1978, up to $202 per week for disability starting January 1, 2002. Chapter 37, Laws of 2001, effective January 1, 2002, amended this section.

169 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.

102.11.[170] 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,[171] such sections shall govern; provided, that in no case shall the percentage of permanent total disability be taken as more than 100 per cent.

(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:[172]

(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.

(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.

(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%.[173]

(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.

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170 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.

171 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.

172 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.

173 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.

(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.

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 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 493, 557 N.W.2d 450 (Ct. App. 1996).

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).

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.

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.

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.

Payment of the supplemental benefit of s. 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.[174]

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).[175]

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[174] 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.

[175] This provision is to be read in conjunction with s. 102.44(2) 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.

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. 166 during a state of emergency or a circumstance described in s. 166.04, 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, relationship or dependency.

(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.[176]

[176] See s. 102.07(7)(a) and the footnote to that section.

(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.

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.

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 instalments 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.

102.49 Additional death benefit for children, state fund. (1) Where the beneficiary under s. 102.46 or 102.47 (1) is the wife or husband 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 who is living at the time of the death of the employee, and who is likewise wholly dependent upon the employee for support. Such 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, such payments may be continued beyond the 18th birthday but the payments may not continue for more than a total of 15 years.[177]

(2) A child lawfully adopted by the deceased employee and the surviving spouse, 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.

(3) If the employee leaves a spouse wholly dependent and also a child by a former marriage or adoption, likewise wholly dependent, aggregate benefits shall be the same in amount as if the child were the child of the surviving spouse, and the entire benefit shall be apportioned to the dependents in the

[177] Payments will commence at the time primary death benefits are completed and will continue until the child's 18th birthday.

amounts that the department shall determine to be just, considering the ages of the dependents and other factors bearing on dependency. The benefit awarded to the surviving spouse 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 $5,000.

(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 instalments with the first instalment 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 compensation 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.

(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.

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 where death of an employee proximately results from the injury the employer or insurer shall pay the reasonable expense for burial, not exceeding $6,000.

History: 1971 c. 148; 1977 c. 195; 1985 a. 83; 1991 a. 85; 1995 a. 117.

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.

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.[178] 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.[179]

(2) *Who are not.* (a) No person shall be considered a dependent unless that person is a spouse, a divorced spouse who has not remarried or a lineal descendant, lineal ancestor, brother, sister or other member of the

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[178] This provision excludes all other dependents from consideration when there are persons who are solely and wholly dependent.

[179] 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 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 his or her parent.

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 remuneratively employed therein for at least 6 months.[180]

(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.[181] 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.[182] A posthumous child is for the purpose of this subsection a dependent as of the date of death.[183]

(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 therefor as between a surviving spouse 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.

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).

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:

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180 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.

181 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.

182 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.

183 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.

(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;
(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;[184]
(17) Total deafness from accident or sudden trauma, 330 weeks;[185]
(18) Total deafness of one ear from accident or sudden trauma, 55 weeks.[186]

History: 1973 c. 150; 1975 c. 147; 1979 c. 278.

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).

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:[187]

(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)

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184 See Rule DWD 80.26 for determining loss of visual efficiency.

185 See Rule DWD 80.25 for determining loss or impairment of hearing.

186 See s. 102.555 for occupational deafness schedule.

187 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).

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.[188]

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.[189]

(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. (1) "Occupational deafness" means permanent partial or permanent total loss of hearing of one or both ears due to prolonged exposure to noise in employment. "Noise" means sound capable of producing occupational deafness. "Noisy employment" means employment in the performance of which an employee is subjected to noise.[190]

(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;[191]

(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

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188 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.

189 See Rule DWD 80.33 for fingertip amputations.

190 See Rule DWD 80.25 for determining loss or impairment of hearing. See ss. 102.52(17) and (18) for deafness due to trauma or accident.

191 The date of injury is the last day of actual work rather than an official retirement date.

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.[192]

(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.

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.

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 employees 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 they meet the conditions of sub. (b), (c) or (d) when they may file a 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).

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.[193]

History: 1971 c. 148; 1977 c. 195; 1987 a. 179.

102.565 Toxic or hazardous exposure; medical examination; conditions of liability.[194] (1) When an

[192] Payment of any compensation for tinnitus is eliminated from occupational hearing loss claims.

[193] 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."

[194] 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

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. 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.

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.

(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.[195]

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

[195] 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.

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 chapter shall be reduced 15% but the total reduction may not exceed $15,000. [196] [197]

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.

102.59 Preexisting disability, indemnity.[198] **(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.[199] 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.[200]

(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 $7,000 into the state treasury. The payment shall be made in all such cases regardless of whether the employee, the employee's dependent or personal representative commences action against a 3rd party as provided in s. 102.29.

(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.

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).

102.60 Minor illegally employed, compensation. When the injury is sustained by a minor illegally employed, compensation and death benefits shall be as follows:

(1) Double the amount otherwise recoverable, if the injured employee is a minor of permit age, and at the

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[196] 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.

[197] 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 it 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.

[198] 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 $7,000 to the fund is insurable. Payments to the work injury supplemental benefit fund were suspended for injuries occuring in calendar years 1994 through 1998.

[199] 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.

[200] 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.

time of the injury is employed, required, suffered or permitted to work without a written permit issued pursuant to ch. 103, except as provided in sub. (2).

(2) Treble the amount otherwise recoverable, 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 authority of ch. 103, has adopted a written resolution providing that permits shall not be issued.

(3) Treble the amount otherwise recoverable 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.

(4) Treble the amount otherwise recoverable, if the injured employee is a minor under permit age and illegally employed.

(5) (a) A permit or certificate of age unlawfully issued by an officer specified in ch. 103, or unlawfully altered after issuance, without fraud on the part of the employer, shall be deemed a permit within the provisions 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 increased compensation provided by this section shall not be paid to the employee, but shall be paid into the fund established by s. 102.65.[201]

(6) If the amount recoverable under this section for temporary disability shall be less than the actual loss of wage sustained by the minor employee, then liability shall exist for such loss of wage.

(7) Subsections (1) to (6) shall not apply to employees as defined in s. 102.07 (6) if the agency or publisher shall establish by affirmative proof that at the time of the injury the employee was not employed with the actual or constructive knowledge of such agency or publisher.

(8) This section shall 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.

(9) The increased compensation or increased death benefits recoverable under sub. (1) may not exceed $7,500. The increased compensation or increased death benefits recoverable under subs. (2), (3) or (4) may not exceed $15,000.

History: 1975 c. 147 s. 57; 1975 c. 199; 1977 c. 29, 195.

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 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).

(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 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:[202]

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

[201] The intent was to prevent an employee from receiving increased compensation where the employee fraudulently alters evidence of age, such as a birth certificate or baptismal certificate. Giving a false age on a work application is not to be considered fraudulent written evidence of age.

[202] An insurer or self-insurer is not liable for retraining if an employer offers the employee suitable employment. For employees who receive services from DVR, 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 the offered work pays not less than 90 percent of the employee's preinjury average weekly earnings. Chapter 37, Laws of 2001, effective January 1, 2002, created this amendment. For employees who cannot receive services from DVR, suitable employment remains defined as a job which pays at least 85 percent of the employee's preinjury average weekly wage as provided in rule DWD 80.49(4)(d) and (5).

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 certified[203] 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[204] to restore as nearly as possible the employee to his or her preinjury earning capacity and potential.

(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).[205]

(c) The employer or insurance carrier shall pay the reasonable cost[206] 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 tuition, fees, books, and maintenance and travel expenses. 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.[207]

(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.

(e) Nothing in this subsection prevents an employer or insurance carrier from providing an employee with the services of a private rehabilitation counselor or

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[203] See Rule DWD 80.49(6) for rules establishing the certification process.

[204] "Training program" is defined by rule to mean a course of instruction on a regular basis that provides an employee with marketable job skills or enhances existing job skills to make them marketable. See Rule DWD 80.49(4)(b).

[205] This is necessary to allow employees who cannot be served by the department, to receive rehabilitative training regardless of the date of injury.

[206] 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, not to exceed $1169 for 2001, and $1193.20 for 2002. The department adjusts this limit annually based on the average annual percentage change in the US consumer price index for all urban consumers.

[207] The presumption of reasonableness is intended to be rebuttable.

with rehabilitative training under sub. (3) before the department makes its determination under par. (a).[208]

(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).[209]

(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 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).[210]

(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.

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 for the increased compensation or increased death benefits provided for by s. 102.57, or included in s. 102.60, the liability of the employer shall be primary and the liability of the insurance carrier shall be secondary. In case proceedings are had before the department for the recovery of such increased compensation or increased death benefits the department shall set forth in its award the amount and order of liability as herein provided. Execution shall not be issued against the insurance carrier to satisfy any judgment covering such increased compensation or increased death benefits until execution has first been issued against the employer and has been returned unsatisfied as to any part thereof. Any provision in any insurance policy undertaking to guarantee primary liability or to avoid secondary liability for such increased compensation or increased death benefits shall be void. In case the employer shall have been adjudged bankrupt, or have made an assignment for the benefit of creditors, or if the employer, other than an individual, have gone out of business or have been dissolved, or if a corporation, its charter have been forfeited or revoked, the insurer shall be liable for the payment of increased compensation and death benefits without judgment or execution against the employer, but without altering the primary liability of the employer.

102.63 Refunds by state. Whenever the department shall certify to the state treasurer that excess payment has been made under s. 102.59 or under s. 102.49 (5) either because of mistake or otherwise, the state treasurer shall within 5 days after receipt of such certificate draw an order against the fund in the state

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[208] 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.

[209] The 40-week period is increased to 80 weeks.

[210] 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.

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.

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 such payments but such compromises shall be subject to review by the department of workforce development. If the spouse of the deceased employee compromises his or her claim for a primary death benefit, the claim of the children of such 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.[211]

(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 or 102.66. The department of justice may compromise claims in such 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.

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. 102.47, 102.49 and 102.59, together with all accrued interest, shall constitute a fund to be known as the "Work Injury Supplemental Benefit Fund".

(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).

(3) If the balance in the fund on any June 30 exceeds 3 times the amount paid out of such fund during the fiscal year ending on such date, the department shall, by order, direct an appropriate proportional reduction of the payments into such fund under ss. 102.47, 102.49 and 102.59 so that the balance in the fund will remain at 3 times the payments made in the preceding fiscal year.

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.

102.66 Payment of certain barred claims. (1) In the event that there is an otherwise meritorious claim for 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, any permanent brain injury, or any injury causing the need for a total or partial knee or hip replacement,[212] 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

[211] 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.

[212] The amendment eliminating the 12-year statute of limitations for specified traumatic injuries was created by Chapter 37, Laws of 2002, effective January 1, 2002.

otherwise be due, based on the date of injury, to or on behalf of the injured employee. 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, 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, any permanent brain injury, or any injury causing the need for a total or partial knee or hip replacement, 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).

History: 1975 c. 147; 1979 c. 278; 2001 a. 37.

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).

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.

(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.

(4) From the appropriation under s. 20.445 (1) (ha), 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.

102.80 Uninsured employers fund.[213] **(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 assessments collected under s. 102.85 (4).

(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.

(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.[214]

[213] 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.

[214] The $4,000,000 cash balance was reached early in 1996.

(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 and on incurred, but not reported, claims exceed 85% of the cash balance in the uninsured employers fund, the secretary shall consult with the council on worker's compensation. 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.[215]

(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).[216]

(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 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.[217]

History: 1989 a. 64; 1991 a. 85; 1993 a. 81; 1995 a. 117.

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 the injured employee or 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.[218]

(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

[215] This provides for a procedure to stop accepting new claims if the department determines the fund is likely to become insolvent.

[216] This authorized the department to activate the fund on July 1, 1996, and to reinsure its liability.

[217] This applies successorship principles to determine liability for penalties incurred by the prior business.

[218] The department will pay the basic compensation owed but not penalties.

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 20.918 and subch. IV of ch. 16 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) (hp). 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) (ag) this section does not apply to claims filed on or after the date specified in that certificate.[219]

History: 1989 a. 64; 1995 a. 117.

102.82 Uninsured employer payments. (1) An uninsured employer shall reimburse the department for any payment made under s. 102.81 (1) to an employee of the uninsured employer or to an employee's 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.[220]

(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.[221]

(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.[222]

(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

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[219] Only injuries occurring after the quarter when the fund activates are paid.

[220] A 30-day deadline is created within which the employer must reimburse the department.

[221] The minimum payment owed under this paragraph is $750.

[222] 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.

employer has elected to become subject to this chapter under s. 102.05 (2) or 102.28 (2).[223]

(ar) The department may waive any payment owed under par. (a) or (ag) 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.[224]

(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.

(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.[225]

(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.

102.83[226] Collection of uninsured employer payments. (1) (a) 1. If an uninsured employer 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 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 uninsured employer's right, title and interest in all of the uninsured employer's real and personal property located in the county where the warrant is entered.

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 is found, commanding the sheriff to levy upon and sell sufficient real and personal property of the uninsured employer 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 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 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.

(3) If a warrant is returned not satisfied in full, the department shall have the same remedies to enforce the

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[223] 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.

[224] 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.

[225] This change allows the department to bring actions against uninsured employers to circuit court with the consent of the department of justice.

[226] 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.

amount due for payments, interest, costs and other fees as if the department had recovered judgment against the uninsured employer 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.

(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 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.[227]

History: 1993 a. 81; 1995 a. 117, 224; 1997 a. 35, 38.

102.835 [228] **Levy for delinquent payments. (1)** *Definitions.* In this section:

(a) "Debt" means a delinquent payment.

(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 uninsured employer who is liable for any debt fails to pay that 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 uninsured employer. 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 uninsured employer 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 uninsured employer who fails to surrender any

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227 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.

228 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.

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 uninsured employer 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 uninsured employer 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 uninsured employer.

(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 may be fined not more than $5,000 or imprisoned for not more than 4 years and 6 months or both, 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 uninsured employer 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 uninsured employer. 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 uninsured employer 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 uninsured employer who is liable for the debt. The uninsured employer'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 uninsured employer 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 uninsured employer 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 uninsured employer or 3rd party personally; by leaving a copy of the levy at the uninsured employer'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 uninsured employer with an officer or employee of the uninsured employer; 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 uninsured employer's or 3rd party's failure to accept or receive service of the levy does not invalidate the levy.

(14) *Answer by 3rd party.* Within 45 days[229] 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 uninsured employer, including a description of the property or the rights to property and the nature and dollar amount of any such obligation.

(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 wilfully violates this subsection may be fined not more than $1,000 or imprisoned for not more than 2 years or both.

(19) *Hearing.* Any uninsured employer 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 uninsured employer. 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.

History: 1993 a. 81; 1995 a. 117; 1997 a. 187, 283.

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.[230]

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

229 The time to file an answer is increased from 20 to 45 days. Chapter 187, Laws of 1997, effective May 12, 1998, effected this amendment.

230 This gives the department's claim for payments owed preference over general creditors.

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) may be fined not more than $10,000 or imprisoned for not more than 3 years or both.

(4) (a) If a court imposes a fine or forfeiture under subs. (1) to (3), the court shall impose an uninsured employer assessment 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 assessment 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 assessment prescribed in this section. If the deposit is forfeited, the amount of the uninsured employer assessment shall be transmitted to the state treasurer under par. (d). If the deposit is returned, the uninsured employer assessment shall also be returned.

(d) The clerk of the court shall collect and transmit to the county treasurer the uninsured employer assessment and other amounts required under s. 59.40 (2) (m). The county treasurer shall then make payment to the state treasurer as provided in s. 59.25 (3) (f) 2. The state treasurer shall deposit the amount of the uninsured employer assessment, 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 102.28 (2). In cases where a deposit has been made, any forfeitures, penalty assessments, jail assessments, uninsured employer assessments and costs 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.

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, penalty assessment, jail assessment, crime laboratories and drug law enforcement assessment and any applicable uninsured employer assessment 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, penalty assessment, jail assessment, crime laboratories and drug law enforcement assessment and any applicable uninsured employer assessment plus costs 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, penalty assessment, jail assessment, crime laboratories and drug law enforcement assessment and any applicable uninsured employer assessment plus costs 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 penalty assessment, jail assessment, crime laboratories and drug law enforcement assessment, any applicable uninsured employer assessment and costs.

(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 penalty assessment, jail assessment, crime laboratories and drug law enforcement assessment, any applicable uninsured employers assessment and costs 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, penalty assessment, jail assessment, crime laboratories and drug law enforcement assessment and any applicable uninsured employer assessment plus costs 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, penalty assessment, jail assessment, crime laboratories and drug law enforcement assessment and applicable uninsured employer assessment plus costs 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, penalty assessment, jail assessment, crime laboratories and drug law enforcement assessment and any applicable uninsured employer assessment plus costs 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, penalty assessment, jail assessment, crime laboratories and drug law enforcement assessment and any applicable uninsured employer assessment plus costs 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, penalty assessment, jail assessment, crime laboratories and drug law enforcement assessment, applicable uninsured employer assessment and costs 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.

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.

OTHER STATUTES AFFECTING WORKER'S COMPENSATION

CHAPTER 15
STRUCTURE OF THE EXECUTIVE BRANCH

15.227 Same: Councils. **(4)** Council on worker's compensation. There is created in the department of workforce development a council on worker's compensation appointed by the secretary of workforce development to consist of a designated employee of the department of workforce development as chairperson, 5 representatives of employers, and 5 representatives of employees. The secretary of workforce development shall also appoint 3 representatives of insurers authorized to do worker's compensation insurance business in this state as nonvoting members of the council.

(11) Self-insurers council. There is created in the department of workforce development a self-insurers council consisting of 5 members appointed by the secretary of workforce development for 3-year terms.

CHAPTER 19
GENERAL DUTIES OF PUBLIC OFFICIALS

19.85 Exemptions. **(1)** Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. No motion to convene in closed session may be adopted unless the chief presiding officer announces to those present at the meeting at which such motion is made, the nature of the business to be considered at such closed session, and the specific exemption or exemptions under this subsection by which such closed session is claimed to be authorized. Such announcement shall become part of the record of the meeting. No business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer's announcement of the closed session. A closed session may be held for any of the following purposes:

(eg) Deliberating by the council on worker's compensation in a meeting at which all employer members of the council or all employee members of the council are excluded.

CHAPTER 20
APPROPRIATIONS AND BUDGET MANAGEMENT

20.445 Workforce development, department of. There is appropriated to the department of workforce development for the following programs:

(1) Workforce development. (a) General program operations. The amounts in the schedule for general program operations.

(aa) Special death benefit. A sum sufficient for the payment of death benefits under s. 102.475.

(f) Death and disability benefit payments; public insurrections. A sum sufficient for the payment of death and disability benefits under s. 106.25.

(ga) Auxiliary services. All moneys received from fees collected under ss. 102.16 (2m) (d), 103.005 (15) and 106.09 (7) for the delivery of services under ss. 102.16 (2m) (f), 103.005 (15) and 106.09 and ch. 108.

(ha) Worker's compensation operations. The amounts in the schedule for the administration of the worker's compensation program by the department. All moneys received under ss. 102.28 (2) (b) and 102.75 for the department's activities and not appropriated under par. (hp) shall be credited to this appropriation. From this appropriation, an amount not to exceed $5,000 may be expended each fiscal year for payment of expenses for travel and research by the council on worker's compensation.

(hb) Worker's compensation contracts. All moneys received in connection with contracts entered into under s. 102.31 (7) for the purpose of carrying out those contracts.

(hp) Uninsured employers program; administration. From the moneys received under s. 102.75, the amounts in the schedule for the administration of ss. 102.28 (4) and 102.80 to 102.89.

(s) Self-insured employers liability fund. All moneys paid into the self-insured employers liability fund under s. 102.28 (7), to be used for the discharge of liability and claims service authorized under such subsection.

(sm) Uninsured employers fund; payments. From the uninsured employers fund, a sum sufficient to make the payments under s. 102.81 (1) and to obtain reinsurance under s. 102.81 (2). No moneys may be expended or encumbered under this paragraph until the first day of the first July beginning after the day that

the secretary of workforce development files the certificate under s. 102.80 (3) (a).

(t) Work injury supplemental benefit fund. All moneys paid into the work injury supplemental benefit fund under ss. 102.49 and 102.59, to be used for the discharge of liabilities payable under ss. 102.44 (1), 102.49, 102.59, 102.63, 102.64 (2) and 102.66.

CHAPTER 40
PUBLIC EMPLOYEE TRUST FUND

40.02 Definitions. In this chapter, unless the context requires otherwise:

(41m) "Monthly salary" means the gross amount paid to a participant making a claim under s. 40.65, at the time he or she becomes disabled within the meaning of s. 40.65 (4), by the employer in whose employ the injury occurred or the disease was contracted. Overtime pay may not be considered part of an employee's monthly salary unless the employee received it on a regular and dependable basis.

(48) (a) "Protective occupation participant" means any participant whose principal duties are determined by the participating employer, or, subject to s. 40.06 (1) (dm), by the department head in the case of a state employee, to involve active law enforcement or active fire suppression or prevention, provided the duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning.

(48) (am) "Protective occupation participant" includes any participant whose name is certified to the fund as provided in s. 40.06 (1) (d) and (dm) and who is a conservation warden, conservation patrol boat captain, conservation patrol boat engineer, conservation pilot, conservation patrol officer, forest fire control assistant, member of the state traffic patrol, state motor vehicle inspector, police officer, fire fighter, sheriff, undersheriff, deputy sheriff, state probation and parole officer, county traffic police officer, state forest ranger, fire watcher employed at Wisconsin veterans facilities, state correctional-psychiatric officer, excise tax investigator employed by the department of revenue, special criminal investigation agent in the department of justice, assistant or deputy fire marshal, or person employed under s. 61.66 (1).

40.65 Duty disability and death benefits; protective occupation participants.

(2) (a) This paragraph applies to participants who first apply for benefits before May 3, 1988. Any person desiring a benefit under this section must apply to the department of workforce development, which department shall determine whether the applicant is eligible to receive the benefit and the participant's monthly salary. Appeals from the eligibility decision shall follow the procedures under ss. 102.16 to 102.26. If it is determined that an applicant is eligible, the department of workforce development shall notify the department of employee trust funds and shall certify the applicant's monthly salary. If at the time of application for benefits an applicant is still employed in any capacity by the employer in whose employ the disabling injury occurred or disease was contracted, that continued employment shall not affect that applicant's right to have his or her eligibility to receive those benefits determined in proceedings before the department of workforce development or the labor and industry review commission or in proceedings in the courts. The department of workforce development may promulgate rules needed to administer this paragraph.

40.65(2)(b)1.

1. This paragraph applies to participants who first apply for benefits under this section on or after May 3, 1988.

2. An applicant for benefits under this section shall submit or have submitted to the department an application that includes written certification of the applicant's disability under sub. (4) by at least 2 physicians, as defined in s. 448.01 (5), who practice in this state and one of whom is approved or appointed by the department, and a statement from the applicant's employer that the injury or disease leading to the disability was duty-related.

3. The department shall determine whether or not the applicant is eligible for benefits under this section on the basis of the evidence in subd. 2. An applicant may appeal a determination under this subdivision to the department of workforce development.

4. In hearing an appeal under subd. 3., the department of workforce development shall follow the procedures under ss. 102.16 to 102.26.

5. The department shall be an interested party in an appeal under subd. 3., and the department shall receive legal assistance from the department of justice, as provided under s. 165.25 (4).

40.65(3) The Wisconsin retirement board shall determine the amount of each monthly benefit payable under this section and its effective date. The board

shall periodically review the dollar amount of each monthly benefit and adjust it to conform with the provisions of this section. The board may request any income or benefit information, or any information concerning a person's marital status, which it considers to be necessary to implement this subsection and shall require a participant to submit a certified copy of his or her most recent state or federal income tax return. The board may terminate the monthly benefit of any person who refuses to submit information requested by the board or who submits false information to the board.

(4) A protective occupation participant is entitled to a duty disability benefit as provided in this section if:

(a) The employee is injured while performing his or her duty or contracts a disease due to his or her occupation;

(b) The disability is likely to be permanent; and

(c)1. The disability causes the employee to retire from his or her job;

2. The employee's pay or position is reduced or he or she is assigned to light duty; or

3. The employee's promotional opportunities within the service are adversely affected if state or local employer rules, ordinances, policies or written agreements specifically prohibit promotion because of the disability.

(4m) A protective occupation participant who is a state motor vehicle inspector hired on or after January 1, 1968, is not entitled to a duty disability benefit under this section for an injury or disease occurring before May 1, 1990.

(4r) A protective occupation participant who is an emergency medical technician is not entitled to a duty disability benefit under this section for an injury or disease occurring before the date on which the department receives notification of the participant's name as provided in s. 40.06 (1) (d) and (dm).

(4v) A state probation and parole officer who becomes a protective occupation participant on or after January 1, 1999, is not entitled to a duty disability benefit under this section for an injury or disease occurring before January 1, 1999.

(5) (a) The monthly benefit payable to participants who qualify for benefits under s. 40.63 or disability benefits under OASDHI is 80% of the participant's monthly salary adjusted under par. (b) and sub. (6), except that the 80% shall be reduced by 0.5% for each month of creditable service over 30 years or over 25 years for persons who are eligible for benefits under subch. II at the date of application, but not to less than 50% of the participant's monthly salary. For participants who do not qualify for benefits under s. 40.63 or disability benefits under OASDHI, the monthly benefit under this section is 75% of the participant's monthly salary adjusted under par. (b) and sub. (6), except that the 75% shall be reduced by 0.5% for each month of creditable service over 30 years or over 25 years for persons who are eligible for benefits under subch. II on the date of application.

(b) The Wisconsin retirement board shall reduce the amount of a participant's monthly benefit under this section by the amounts under subds. 1. to 6., except that the board may determine not to reduce a participant's benefit because of income related to therapy or rehabilitation. The Wisconsin retirement board may assume that any benefit or amount listed under subds. 1. to 6. is payable to a participant until it is determined to the board's satisfaction that the participant is ineligible to receive the benefit or amount, except that the department shall withhold an amount equal to 5% of the monthly benefit under this section until the amount payable under subd. 3. is determined.

1. Any OASDHI benefit payable to the participant or the participant's spouse or a dependent because of the participant's work record.

2. Any unemployment insurance benefit payable to the participant because of his or her work record.

3. Any worker's compensation benefit payable to the participant, including payments made pursuant to a compromise settlement under s. 102.16 (1). A lump sum worker's compensation payment or compromise settlement shall reduce the participant's benefit under this section in monthly amounts equal to 4.3 times the maximum benefit which would otherwise be payable under ch. 102 for the participant's disability until the lump sum amount is exhausted.

4. Any disability and retirement benefit payable to the participant under this chapter, or under any other retirement system, that is based upon the participant's earnings record and years of service. A reduction under this subdivision may not be greater in amount than the amount of disability or retirement benefit received by the participant. If the participant is not eligible for a retirement benefit because he or she received a lump sum payment or withdrew his or her contributions on or after the date the participant became eligible to receive a benefit under this section, the amount received or withdrawn shall reduce the participant's benefit under this section in the amount of benefit that would be payable if, on the date the amount was received or withdrawn, the full amount received or withdrawn was applied under s. 40.23 (2m)

(d) as additional employee contributions credited to the participant's account.

5. All earnings payable to the participant from the employer under whom the duty disability occurred.

6. All earnings payable to the participant from an employer, other than the employer under whom the duty disability occurred, and all income from self-employment, the total of such earnings and income shall reduce the participant's benefit as follows:

a. For the amount of the total that is less than 40% of the participant's monthly salary, one-third of such amount;

b. For the amount of the total that is from 40% to 80% of the participant's monthly salary, one-half of such amount; and

c. For the amount of the total that is more than 80% of the participant's monthly salary, two-thirds of such amount.

(c) The Wisconsin retirement board may not reduce a participant's benefit because of income or benefits that are attributable to the earnings or work record of the participant's spouse or other member of the participant's family, or because of income or benefits attributable to an insurance contract, including income continuation programs.

(6) The Wisconsin retirement board shall adjust the monthly salary of every participant receiving a benefit under this section using the salary index for the previous calendar year as follows:

(a) For the purposes of sub. (5) (b) 6., annually on January 1 until the participant's death;

(b) For the purposes of sub. (5) (a), if the participant is receiving an annuity under s. 40.63 (1), annually on January 1 until the participant's death; and

(c) For the purposes of sub. (5) (a), if the participant is not receiving an annuity under s. 40.63 (1), annually on January 1 until the first January 1 after the participant's 60th birthday. Beginning on the January 1 after the participant's 60th birthday the participant's monthly salary shall be increased annually in a percentage amount equal to the percentage amount of dividend awarded under s. 40.27 (2) until the participant's death. Notwithstanding s. 40.27 (2), any benefits payable under this section are not subject to distribution of annuity reserve surpluses.

(7) (a) This paragraph applies to benefits based on applications filed before May 3, 1988. If a protective occupation participant dies as a result of an injury or a disease for which a benefit is paid or would be payable under sub. (4), and the participant is survived by a spouse or an unmarried child under age 18, a monthly benefit shall be paid as follows:

1. To the surviving spouse, if the spouse was married to the participant on the date the participant was disabled within the meaning of sub. (4), one-third of the participant's monthly salary as reflected at the time of death until the surviving spouse marries again.

2. To the guardian of a surviving unmarried child under age 18, $15 per child until the child marries, dies or reaches 18 years of age.

3. The total monthly amount paid under subds. 1. and 2. may not exceed 65% of the participant's monthly salary as reflected at the time of death. Any reduction of benefits caused by such limitation shall be done on a proportional basis.

(am) This paragraph applies to benefits based on applications filed on or after May 3, 1988. If a protective occupation participant dies as a result of an injury or a disease for which a benefit is paid or would be payable under sub. (4), and the participant is survived by a spouse or an unmarried child under the age of 18, a monthly benefit shall be paid as follows:

1. To the surviving spouse until the surviving spouse remarries, if the spouse was married to the participant on the date that the participant was disabled under sub. (4), 50% of the participant's monthly salary at the time of death, but reduced by any amount payable under sub. (5) (b) 1. to 6.

2. To a guardian for each of that guardian's wards who is an unmarried surviving child under the age of 18, 10% of the participant's monthly salary at the time of death, payable until the child marries, dies or reaches the age of 18, whichever occurs first. The marital status of the surviving spouse shall have no effect on the payments under this subdivision.

3. The total monthly amount paid under subds. 1. and 2. may not exceed 70% of the participant's monthly salary at the time of death reduced by any amounts under sub. (5) (b) 1. to 6. that relate to the participant's work record.

4. Benefits payable under this paragraph shall be increased each January 1 by the salary index determined for the prior year.

(ar) 1. This paragraph applies to benefits based on applications filed on or after May 12, 1998. If a protective occupation participant, who is covered by the presumption under s. 891.455, dies as a result of an injury or a disease for which a benefit is paid or would be payable under sub. (4), and the participant is survived by a spouse or an unmarried child under the age of 18, a monthly benefit shall be paid as follows:

a. To the surviving spouse until the surviving spouse remarries, if the surviving spouse was married to the participant on the date that the participant was disabled under sub. (4), 70% of the participant's monthly salary at the time of death, but reduced by any amount payable under sub. (5) (b) 1. to 6.

b. If there is no surviving spouse or the surviving spouse subsequently dies, to a guardian for each of that guardian's wards who is an unmarried surviving child under the age of 18, 10% of the participant's monthly salary at the time of death, payable until the child marries, dies or reaches the age of 18, whichever occurs first.

2. Benefits payable under this paragraph shall be increased each January 1 by the salary index determined for the prior year.

(b) Any person entitled to a benefit under both this subsection and ch. 102 because of the death of the same participant, shall have his or her benefit under this subsection reduced in an amount equal to the death benefit payable under ch. 102.

(9) This section is applicable to protective occupation participants who apply for a benefit under this section on or after July 1, 1982. A participant may not apply for a benefit under this section if he or she is receiving a benefit under s. 66.191, 1981 Stats., on July 1, 1982.

History: 1981 c. 278; 1983 a. 9; 1983 a. 141 s. 20; 1983 a. 191 s. 6; 1983 a. 255; 1985 a. 332 s. 251 (1); 1987 a. 363; 1989 a. 240, 357; 1995 a. 27 s. 9130 (4); 1997 a. 3, 39, 173, 237.

Cross-reference: See s. 891.45 for provision as to presumption of employment-connected disease for certain municipal fire fighters.

Cross Reference: See also LIRC and s. ETF 52.01, Wis. adm. code.

The Wisconsin Retirement Board may not reduce duty disability benefits under sub. (5) (b) 3. for worker's compensation benefits that are paid to a participant before the duty disability payments commence, and may do so only for worker's compensation not yet paid. Coutts v. Wisconsin Retirement Board, 209 Wis. 2d 655, 563 N.W.2d 917 (1997).

CHAPTER 46
SOCIAL SERVICES

46.10 Cost of care and maintenance, liability; collection and deportation counsel; collections; court actions; recovery. (1) Liability and the collection and enforcement of such liability for the care, maintenance, services and supplies specified in this section is governed exclusively by this section, except in cases of child support ordered by a court under s. 48.355 (2) (b) 4., 48.357 (5m) (a) or 48.363 (2) or ch. 767.

(2) Except as provided in subs. (2m) and (14) (b) and (c), any person, including but not limited to a person admitted, committed or placed under s. 975.01, 1977 Stats., s. 975.02, 1977 Stats., and s. 975.17, 1977 Stats., and ss. 51.10, 51.13, 51.15, 51.20, 51.35 (3), 51.37 (5), 51.45 (10), (11), (12) and (13), 55.05, 55.06, 971.14 (2) and (5), 971.17 (1), 975.06 and 980.06, receiving care, maintenance, services and supplies provided by any institution in this state including University of Wisconsin Hospitals and Clinics, in which the state is chargeable with all or part of the person's care, maintenance, services and supplies, any person receiving care and services from a county department established under s. 51.42 or 51.437 or from a facility established under s. 49.73, and any person receiving treatment and services from a public or private agency under s. 980.06 (2) (c), 1997 Stats., or s. 971.17 (3) (d) or (4) (e) or 980.08 (5) and the person's property and estate, including the homestead, and the spouse of the person, and the spouse's property and estate, including the homestead, and, in the case of a minor child, the parents of the person, and their property and estates, including their homestead, and, in the case of a foreign child described in s. 48.839 (1) who became dependent on public funds for his or her primary support before an order granting his or her adoption, the resident of this state appointed guardian of the child by a foreign court who brought the child into this state for the purpose of adoption, and his or her property and estate, including his or her homestead, shall be liable for the cost of the care, maintenance, services and supplies in accordance with the fee schedule established by the department under s. 46.03 (18). If a spouse, widow or minor, or an incapacitated person may be lawfully dependent upon the property for their support, the court shall release all or such part of the property and estate from the charges that may be necessary to provide for those persons. The department shall make every reasonable effort to notify the liable persons as soon as possible after the beginning of the maintenance, but the notice or the receipt thereof is not a condition of liability.

(3) After investigation of the liable persons' ability to pay, the department shall make collection from the person who in the opinion of the department under all of the circumstances is best able to pay, giving due regard to relationship and the present needs of the person or of the lawful dependents. However, the liability of relatives for maintenance shall be in the

following order: first, the spouse of the patient; then, in the case of a minor, the parent or parents.

(4) (a) If a person liable under sub. (2) fails to make payment or enter into or comply with an agreement for payment, the department may bring an action to enforce the liability or may issue an order to compel payment of the liability. Any person aggrieved by an order issued by the department under this paragraph may appeal the order as a contested case under ch. 227 by filing with the department a request for a hearing within 30 days after the date of the order.

(b) If judgment is rendered in an action brought under par. (a) for any balance that is 90 or more days past due, interest at the rate of 12% per year shall be computed by the clerk and added to the liable person's costs. That interest shall begin on the date on which payment was due and shall end on the day before the date of any interest that is computed under s. 814.04 (4).

(c) If the department issues an order to compel payment under par. (a), interest at the rate of 12% per year shall be computed by the department and added at the time of payment to the person's liability. That interest shall begin on the date on which payment was due and shall end on the day before the date of final payment.

(5) If any person named in an order to compel payment issued under sub. (4) (a) fails to pay the department any amount due under the terms of the order and no contested case to review the order is pending and the time for filing for a contested case review has expired, the department may present a certified copy of the order to the circuit court for any county. The circuit court shall, without notice, render judgment in accordance with the order. A judgment rendered under this subsection shall have the same effect and shall be entered in the judgment and lien docket and may be enforced in the same manner as if the judgment had been rendered in an action tried and determined by the circuit court.

CHAPTER 49
PUBLIC ASSISTANCE

49.36 Work Experience program for noncustodial parents. (3) (a) Except as provided in par. (f), a person ordered to register under s. 767.295 (2) (a) shall participate in a work experience program if services are available.

(b) A person may not be required to participate for more than 32 hours per week in the program under this section.

(c) A person may not be required to participate for more than 16 weeks during each 12-month period in a program under this section.

(d) If a person is required by a governmental entity to participate in another work or training program, the person may not be required to participate in a program under this section in a week for more than 32 hours minus the number of hours he or she is required to participate in the other work or training program in that week.

(e) If a person is employed, the person may not be required to participate in a program under this section in a week for more than 80% of the difference between 40 hours and the number of hours actually worked in the unsubsidized job during that week.

(f) A person who works, on average, 32 hours or more per week in an unsubsidized job is not required to participate in a program under this section.

(4) When a person completes 16 weeks of participation in a program under this section, the county, tribal governing body, or Wisconsin works agency operating the program shall inform the clerk of courts, by affidavit, of that completion.

(5) A person participating in work experience as part of the program under this section is considered an employee of the county, tribal governing body, or Wisconsin works agency administering the program under this section for purposes of worker's compensation benefits only.

(6) A county, tribal governing body, or Wisconsin works agency administering the program under this section shall reimburse a person for reasonable transportation costs incurred because of participation in a program under this section up to a maximum of $25 per month.

(7) The department shall pay a county, tribal governing body, or Wisconsin works agency not more than $400 for each person who participates in the program under this section in the region in which the county, tribal governing body, or Wisconsin works agency administers the program under this section. The county, tribal governing body, or Wisconsin works agency shall pay any additional costs of the program.

History: 1987 a. 413; 1989 a. 31; 1991 a. 39; 1993 a. 16; 1995 a. 27 ss. 2135 to 2142; 1995 a. 289; 1997 a. 27; 1999 a. 9; 2001 a. 16.

CHAPTER 101
SAFE EMPLOYMENT

101.11 Employer's duty to furnish safe employment and place. (1) Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.

(2) (a) No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees and frequenters; and no employer or owner, or other person shall hereafter construct or occupy or maintain any place of employment, or public building, that is not safe, nor prepare plans which shall fail to provide for making the same safe.

(b) No employee shall remove, displace, damage, destroy or carry off any safety device or safeguard furnished and provided for use in any employment or place of employment, nor interfere in any way with the use thereof by any other person, nor shall any such employee interfere with the use of any method or process adopted for the protection of any employee in such employment or place of employment or frequenter of such place of employment, nor fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees or frequenters.

(3) This section applies to community-based residential facilities as defined in s. 50.01 (1g).

History: 1971 c. 185; Stats. 1971 s. 101.11; 1975 c. 413; 1987 a. 161 s. 13m.

Cross Reference: See also chs. Comm 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, and Wis. adm. code.

Ordinary negligence can be compared with negligence founded upon the safe place statute. In making the comparison, a violation of the statute is not to be considered necessarily as contributing more than the common-law contributory negligence. Lovesee v. Allied Development Corp. 45 Wis. 2d 340, 173 N.W.2d 196 (1970).

When an apartment complex was managed for a fee by a management company, the company was carrying on a business there. Reduction of rent to one of the tenants for caretaking services constituted employment on the premises. A tenant who fell on the icy parking lot after the caretaker knew of the condition need only prove negligence in maintaining the premises. Wittka v. Hartnell, 46 Wis. 2d 374, 175 N.W.2d 248 (1970).

A public sidewalk is not made a place of employment merely because an employer constructed it and kept it free of ice and snow. Petroski v. Eaton Yale & Towne, Inc. 47 Wis. 2d 617, 178 N.W.2d 53 (1970).

The fact that a violation of the safe place statute is found puts the burden on the owner to rebut the presumption of causation but does not establish as a matter of law that the defendant's negligence was greater than the plaintiff's. Frederick v. Hotel Investments, Inc. 48 Wis. 2d 429, 180 N.W.2d 562 (1970).

A store must be held to have had constructive notice of a dangerous condition when it displayed shaving cream in spray cans on a counter and a 70-year old woman fell in cream sprayed on the white floor. Steinhorst v. H. C. Prange Co. 48 Wis. 2d 679, 180 N.W.2d 525 (1970).

The mere existence of a step up into a hospital lavatory was not an unsafe condition. Prelipp v. Wausau Memorial Hospital, 50 Wis. 2d 27, 183 N.W.2d 24 (1971).

Failure to light a parking lot can support a safe place action, but the evidence must show how long the light was burned out to constitute constructive notice. Low v. Siewert, 54 Wis. 2d 251, 195 N.W.2d 451 (1972).

A parking lot owned by a city that is a continuation of a store parking lot used by the public for attending the city zoo and the store, even though maintained by the private property owner, is not a place of employment. Gordon v. Schultz Savo Stores, Inc. 54 Wis. 2d 692, 196 N.W.2d 633 (1972).

Detailed construction specifications and the presence of engineers to insure compliance does not manifest control over the project so as to make the commission liable. Berger v. Metropolitan Sewerage Commission of Milwaukee, 56 Wis. 2d 741, 203 N.W.2d 87 (1973).

In a safe place action the employee's contributory negligence is less when his or her act or omission has been committed in the performance of job duties. McCrossen v. Nekoosa-Edwards Paper Co. 59 Wis. 2d 245, 208 N.W.2d 148 (1973).

A pier at a beach open to the public for a fee constitutes a place of employment. Any distinction between licensees and invitees is irrelevant, and the statute imposes a higher duty as to safety than the common law. Gould v. Allstar Insurance Co. 59 Wis. 2d 355, 208 N.W.2d 388 (1973).

A private road on the ground of a private racetrack that connected the track and a parking lot was subject to this section as to frequenters. Gross v. Denow, 61 Wis. 2d 40, 212 N.W.2d 2 (1973).

A one-eighth inch variance in elevation between the sides of a ramp joint was too slight, as a matter of law, to constitute a violation of the safe place statute. Balas v. St. Sebastian's Congregation, 66 Wis. 2d 421, 225 N.W.2d 428 (1975).

An employer may be held liable under the safe place statute not only for failing to construct or maintain safety structures such as fences, but also for knowingly permitting employees or frequenters to venture into a dangerous area. Kaiser v. Cook, 67 Wis. 2d 460, 227 N.W.2d 50 (1975).

The safe place statute applies only to unsafe physical conditions, not to activities conducted on a premises. Korenak v. Curative Workshop Adult Rehabilitation Center, 71 Wis. 2d 77, 237 N.W.2d 43 (1976).

The duty to furnish a safe place of employment to employees does not impose a duty on a contractor for subcontractor's employees. A contractor can owe a duty to a frequenter, but only when a hazardous condition is under the supervision or control of the contractor. Barth v. Downey Co., Inc. 71 Wis. 2d 775, 239 N.W.2d 92 (1976).

Retention of control and supervision is required for recovery against a general contractor by a subcontractor's employee. Lemacher v. Circle Construction Co., Inc. 72 Wis. 2d 245, 240 N.W.2d 179 (1976).

The length of time a safe place defect must exist, in order to impose constructive notice of it on an owner, varies according to the nature of the business, the nature of the defect, and the public policy involved. May v. Skelley Oil Co. 83 Wis. 2d 30, 264 N.W.2d 574 (1978).

In safe place cases, comparative negligence instructions need not direct the jury to consider the defendant's higher duty of care. Brons v. Bischoff, 89 Wis. 2d 80, 277 N.W.2d 854 (1979).

Indemnity in a safe place action creates an effect identical to that of contribution. Barrons v. J. H. Findorff & Sons, Inc. 89 Wis. 2d 444, 278 N.W.2d 827 (1979).

A non-negligent indemnitor was liable to an indemnitee whose breach of a safe place duty was solely responsible for damages under the circumstances of the case. Dykstra v. Arthur G. McKee & Co. 92 Wis. 2d 17, 284 N.W.2d 692 (Ct. App. 1979); (aff'd) 100 Wis. 2d 120, 301 N.W.2d 201 (1981).

Architects have liability under the safe place statute only if they have a right of supervision and control, which must be determined from the agreement between the owner and the architect. If the duty exists, it is nondelegable. Hortman v. Becker Construction Co., Inc. 92 Wis. 2d 210, 284 N.W.2d 621 (1979).

"Safe employment" and "safe place of employment" are distinguished. There is a duty to provide safe employment to employees that does not extend to frequenters, while the duty to provide a safe place of employment does. Leitner v. Milwaukee County, 94 Wis. 2d 186, 287 N.W.2d 803 (1980).

Evidence of a prior accident was admissible to prove notice of an unsafe condition. Callan v. Peters Construction Co. 94 Wis. 2d 225, 288 N.W.2d 146 (Ct. App. 1979).

That a lease allocates safe place duties between an owner and an employer/tenant does not nullify mutually shared statutory duties. Hannebaum v. Dirienzo & Bomier, 162 Wis. 2d 488, 469 N.W.2d 900 (Ct. App. 1991).

The safe place duty to keep a swimming pool in a condition to protect customers from injury was overcome when a person unreasonably dove into a pool of unknown depth. Wisnicky v. Fox Hills Inn, 163 Wis. 2d 1023, 473 N.W.2d 523 (Ct. App. 1991).

A county house of correction is subject to the safe place statute. Henderson v. Milwaukee County, 198 Wis. 2d 748, 543 N.W.2d 544 (Ct. App. 1995).

An alarm system does not relate to the structure of a building and therefore does not relate to a safe place of employment. It is a safety device that is the responsibility of the employer and not the building owner. Naaj v. Aetna Insurance Co. 218 Wis. 2d 121, 579 N.W.2d 875 (Ct. App. 1998).

The obligation of a lessor of a building is limited to structural or physical defects. A temporary condition maintained by the lessee does not impose safe place liability on the lessor. Powell v. Milwaukee Area Technical College District Bd. 225 Wis. 2d 794, 594 N.W.2d 403 (Ct. App. 1999).

A defect is "structural" if it resulted from materials used in its construction or from improper layout or construction. Conditions "associated with the structure" are those that involve the structure being out of repair or not being maintained in a safe manner. An owner sustains safe place liability for a structural defect regardless of knowledge of the defect, but with conditions related to the structure, no liability attaches without actual or constructive notice. Barry v. Employers Mutual Casualty Co. 2001 WI 101, 245 Wis. 2d 560, 630 N.W.2d 517.

The duties imposed on employers and property owners under this section are nondelegable. Barry v. Employers Mutual Casualty Co. 2001 WI 101, 245 Wis. 2d 560, 630 N.W.2d 517.

The safe place statute does not extend to vehicles. Hopkins v. Ros Stores, Inc. 750 F. Supp. 379 (1990).

CHAPTER 106
PUBLIC INSURRECTION

106.25 Public insurrection; death and disability benefits. (1) Definitions. In this section:

(a) "Public insurrection" means a civil disturbance in which a group or groups of persons are simultaneously engaged in acts of violence against persons or property by the illegal use of weapons, by burning, pillaging or looting or by committing any other illegal acts, and which is of such a magnitude as to result in any of the following:

1. Extraordinary utilization of off-duty local law enforcement personnel.

2. Declaration of a public emergency by the governor.

3. The calling of the national guard or other troops.

(2) Death and disability benefits. If the department finds that the injury or death of a state or local government officer or employee arose out of the performance of duties in connection with a public insurrection, and finds that death or disability benefits are payable under ch. 102, a supplemental award equal to the amount of the benefits, other than medical expense, payable under ch. 102 shall be made to the persons and in the same manner provided by ch. 102, except that when benefits are payable under s. 102.49,

a supplemental award equal to one-half the benefits payable under that section shall be made.

(3) Payments. All payments under this section shall be made from the general fund.

(4) Benefits additional to all others. Death and disability benefits under this section are in addition to all other benefits provided by state law or by action of any municipality or public agency.

History: 1971 c. 40; 1975 c. 199; 1975 c. 404 s. 7; 1975 c. 405 s. 7; Stats. 1975 s. 101.47; 1977 c. 29 s. 1651; 1995 a. 27 s. 3726; Stats. 1995 s. 106.25; 1995 a. 225.

CHAPTER 108
UNEMPLOYMENT INSURANCE AND RESERVES

108.101 Effect of finding, determination, decision or judgment. **(1)** No finding of fact or law, determination, decision or judgment made with respect to rights or liabilities under this chapter is admissible or binding in any action or administrative or judicial proceeding in law or in equity not arising under this chapter, unless the department is a party or has an interest in the action or proceeding because of the discharge of its duties under this chapter.

History: 1989 a. 77; 1991 a. 89.

CHAPTER 303
PRISON LABOR

303.07 County Reforestation Camps. (7) If any inmate of a reforestation camp, in the performance of work in connection with the maintenance of the camp, is injured so as to be permanently incapacitated, or to have materially reduced earning power, the inmate may upon discharge be allowed and paid such compensation as the department of workforce development finds the inmate entitled to. The inmate shall be compensated on the same basis as if the injury had been covered by ch. 102, except that the total paid to any such inmate shall not exceed $1,000 and may be paid in instalments. If the inmate is from an adjoining county such county shall pay such compensation. In case of dispute the procedure for hearing, award and appeal shall be as set forth in ss. 102.16 to 102.26.

Cross Reference: See also LIRC, Wis. adm. code.

303.21 Compensation to injured prisoners. (1) (a) If an inmate of a state institution, in the performance of assigned work is injured so as to be permanently incapacitated or to have materially reduced earning power, the inmate may, upon being released from such institution, either upon release on parole or extended supervision or upon final discharge, be allowed and paid such compensation as the department of workforce development finds the inmate entitled to. The inmate shall be compensated on the same basis as if the injury had been covered by ch. 102, except that the total paid to any inmate may not exceed $10,000 and may be paid in instalments. If the injury results from employment in a prison industry, the payment shall be made from the revolving appropriation for its operation. If there is no revolving appropriation, payment shall be made from the general fund. In case of dispute, the procedure for hearing, award and appeal shall be as set forth in ss. 102.16 to 102.26.

(b) Inmates are included under par. (a) if they are participating in a structured work program away from the institution grounds under s. 302.15 or a secure work program under s. 303.063. Inmates are not included under par. (a) if they are employed in a prison industry under s. 303.06 (2), participating in a work release program under s. 303.065 (2), participating in employment with a private business under s. 303.01 (2) (em) or participating in the transitional employment program, but they are eligible for worker's compensation benefits under ch. 102. Residents subject to s. 303.01 (1) (b) are not included under par. (a) but they are eligible for worker's compensation benefits under ch. 102.

(2) Section 102.29 applies to compensation paid under this section.

(3) This section does not apply if the inmate has made a recovery against an officer, employee or agent of the state, arising out of the same incident under s. 895.46. If recovery has already been made under this section at the time that a recovery is made under s. 895.46, the state is entitled to a credit in the amount of the recovery against any obligation it has under s. 895.46 arising out of the same incident.

History: 1975 c. 147 s. 54; 1975 c. 199; 1977 c. 29, 195; 1981 c. 20; 1985 a. 29; 1989 a. 31 s. 1696; Stats. 1989 s. 303.21; 1993 a. 81; 1995 a. 27 ss. 6400, 6401, 9130 (4); 1995 a. 416; 1997 a. 3, 283.

Cross Reference: See also LIRC, Wis. adm. code.

To receive worker's compensation, a prisoner must have been injured in the performance of assigned work. The rules followed under s. 102.03 do not apply. Kopacka v. DILHR, 49 Wis. 2d 255, 181 N.W.2d 487 (1970).

CHAPTER 626
WORKER'S COMPENSATION INSURANCE RATES

626.12 Rating methods. In determining whether rates comply with the standards under s. 626.11, the following criteria shall be applied:

(1) Basic factors in rates. Due consideration shall be given to past and prospective loss and expense experience within and outside this state, to catastrophe hazards and contingencies, to a reasonable margin for profit, to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers, and to all other relevant factors.

(2) Classification. Risks may be classified in any reasonable way for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions, or both. Such standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses.

(3) Physical impairment. Rates or rating plans may not take into account the physical impairment of employees. Any employer who applies or promotes any oppressive plan of physical examination and rejection of employees or applicants for employment shall forfeit the right to experience rating. If the department of workforce development determines that grounds exist for such forfeiture it shall file with the commissioner a certified copy of its findings, which shall automatically suspend any experience rating credit for the employer. The department shall make the determination as prescribed in ss. 103.005 (5) (b) to (f), (6) to (11), (13) (b) to (d) and (16), so far as such subsections are applicable, subject to review under ch. 227. Restoration of an employer to the advantages of experience rating shall be by the same procedure.

History: 1975 c. 148; 1995 a. 27 ss. 7037, 9130 (4); 1997 a. 3.

CHAPTER 814
COURT COSTS AND FEES

814.67 Fees of witnesses and interpreters. (1) The fees of witnesses and interpreters shall be as follows:

(am) For witnesses attending before a circuit court, $16 per day.

NOTE: Par. (am) is created eff. 7-1-02 by 2001 Wis. Act 16.

History: 1981 c. 317; 1987 a. 27; 1995 a. 27; 2001 a. 16.

CHAPTER 891
PRESUMPTIONS

891.45 Presumption of employment-connected disease; heart or respiratory impairment or disease. (1) In this section: (a) "County fire fighter" means any person employed by a county whose duties primarily include active fire suppression or prevention.

(b) "Municipal fire fighter" includes any person designated as primarily a fire fighter under s. 61.66 (2) and any person under s. 61.66 whose duties as a fire fighter during the 5-year qualifying period took up at least two-thirds of his or her working hours.

(c) "State fire fighter" means any person employed by the state whose duties primarily include active fire suppression or prevention and who is a protective occupation participant, as defined in s. 40.02 (48).

(2) In any proceeding involving the application by a state, county, or municipal fire fighter or his or her beneficiary for disability or death benefits under s. 40.65 (2) or any pension or retirement system applicable to fire fighters, where at the time of death or filing of application for disability benefits the deceased or disabled fire fighter had served a total of 5 years as a state, county, or municipal fire fighter and a qualifying medical examination given prior to the time of his or her becoming a state, county, or municipal fire fighter showed no evidence of heart or respiratory impairment or disease, and where the disability or death is found to be caused by heart or respiratory impairment or disease, such finding shall be presumptive evidence that such impairment or disease was caused by such employment.

History: 1977 c. 83; 1981 c. 278 s. 6; 1983 a. 191 s. 6; 1987 a. 399; 1987 a. 403 s. 256; 1997 a. 173; 2001 a. 16.

891.455 Presumption of employment-connected disease; cancer. (1) In this section, "state, county, or municipal fire fighter" means a fire fighter who is covered under s. 891.45 and any person under s. 61.66 whose duties as a fire fighter during the 10-year qualifying period specified in sub. (2) took up at least two-thirds of his or her working hours.

(2) In any proceeding involving an application by a state, county, or municipal fire fighter or his or her beneficiary for disability or death benefits under s. 40.65 (2) or any pension or retirement system

applicable to fire fighters, where at the time of death or filing of application for disability benefits the deceased or disabled fire fighter had served a total of 10 years as a state, county, or municipal fire fighter and a qualifying medical examination given prior to the time of his or her becoming a state, county, or municipal fire fighter showed no evidence of cancer, and where the disability or death is found to be caused by cancer, such finding shall be presumptive evidence that the cancer was caused by such employment.

(3) The presumption under sub. (2) shall only apply to cancers affecting the skin, breasts, central nervous system or lymphatic, digestive, hematological, urinary, skeletal, oral or reproductive systems.

(4) The presumption under sub. (2) for cancers caused by smoking or tobacco product use shall not apply to any municipal fire fighter who smokes cigarettes, as defined in s. 139.30 (1), or who uses a tobacco product, as defined in s. 139.75 (12), after January 1, 2001.

History: 1997 a. 173; 1999 a. 9; 2001 a. 16.

CHAPTER 943
MISAPPROPRIATION

943.395 Fraudulent insurance and employee benefit program claims. (1) Whoever, knowing it to be false or fraudulent, does any of the following may be penalized as provided in sub. (2):

(a) Presents or causes to be presented a false or fraudulent claim, or any proof in support of such claim, to be paid under any contract or certificate of insurance; or

(b) Prepares, makes or subscribes to a false or fraudulent account, certificate, affidavit, proof of loss or other document or writing, with knowledge that the same may be presented or used in support of a claim for payment under a policy of insurance.

(c) Presents or causes to be presented a false or fraudulent claim or benefit application, or any false or fraudulent proof in support of such a claim or benefit application, or false or fraudulent information which would affect a future claim or benefit application, to be paid under any employee benefit program created by ch. 40.

(d) Makes any misrepresentation in or with reference to any application for membership or documentary or other proof for the purpose of obtaining membership in or noninsurance benefit from any fraternal subject to chs. 600 to 646, for himself or herself or any other person.

(2) Whoever violates this section:

(a) Is guilty of a Class A misdemeanor if the value of the claim or benefit does not exceed $2,500.

(b) Is guilty of a Class E felony if the value of the claim or benefit exceeds $2,500.

History: 1971 c. 214; 1975 c. 373, 421; 1977 c. 173; 1979 c. 89; 1981 c. 96; 1987 a. 349; 1991 a. 39; 2001 a. 16.

The "value of the claim" under sub. (2) refers to the amount of the entire claim and not the fraudulent portion. State v. Briggs, 214 Wis. 2d 281, 571 N.W.2d 881 (Ct. App. 1997).

CHAPTER DWD 80: WORKER'S COMPENSATION

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Note: Chapter Ind 80 was renumbered chapter DWD 80 under s. 13.93 (2m) (b) 1., Stats., Register, July, 1996, No. 487.

DWD 80.01 Definitions. (1) "Act," "compensation act" or "worker's compensation act" means ch. 102, Stats.

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

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

History: 1-2-56; am. Register, April, 1975, No. 232, eff. 5-1-75; r. and recr. Register, September, 1982, No. 321, eff. 10-1-82; correction in (2) made under s. 13.93 (2m) (b) 6., Stats., July, 1996, No. 487.

DWD 80.02 Reports. (1) EMPLOYERS. An employer covered by the provisions of ch. 102, Stats., shall, within one day after the death of an employee due to a compensable injury, report the death to the department and the employer's insurance carrier by telegraph, telephone, letter, facsimile transmission or other means authorized by the department on a case-by-case basis as communication technologies change. An insured employer shall also notify its insurance carrier of a compensable injury within 7 days after the accident or beginning of a disability from occupational

disease related to the employee's compensable injury if any of the following occurs:

(a) Disability exists beyond the 3rd day after the employee leaves work as a result of the accident or disease. In counting the days on which disability exists, include Sunday only if the employee usually works on Sunday.

(b) An employer's insurance carrier has primary liability for unpaid medical treatment.

(2) SELF-INSURED EMPLOYERS AND INSURANCE COMPANIES. Except as provided in sub. (3m), for injuries under sub. (1) (a) self-insured employers and insurance companies shall submit all of the following reports to the department:

(a) A first report of injury with the information required by a completed form WKC-12 on or before the 14th day after an accident or the beginning of a disability from occupational disease. If an employer does not notify the insurance carrier of the injury until after the 14th day, the insurance carrier shall submit the WKC-12 to the department within 7 days of receiving notice of the injury from any source.

(b) A supplementary report with the information required by form WKC-13 on or before the 30th day following the day on which the injury in par. (a) occurred.

(c) The wage information required by form WKC-13-A if the wage is less than the maximum wage as defined by s. 102.11 (1), Stats. The WKC-13 required in par. (b) and the WKC-13-A shall be submitted together, except that if the wage information required by form WKC-13-A is not available at the time the WKC-13 is submitted, the insurance carrier or self-insured employer shall estimate on the WKC-13 the date by which the WKC-13-A will be submitted.

(d) If applicable, a signed statement from the employee verifying that the employee restricts his or her availability on the labor market to part-time employment, and is not actively employed elsewhere. The employee's statement shall accompany the WKC-13-A, but no statement is required if the employee is under the age of 16.

(e) A report within 30 days after each of the following events occurs, with a copy to the employee, using form WKC-13 indicating all worker's compensation payments to date and the periods of time for which these payments were made:

1. Payment of compensation is changed from temporary disability to permanent disability.

2. Temporary disability benefits are reinstated.

3. Temporary partial disability is paid. The insurance carrier or self-insured employer shall also include the information required by form WKC-7359.

4. Final payment of compensation is made. If there are more than 3 weeks of temporary disability or any permanent disability, the insurance carrier or self-insured employer shall submit a final treating practitioner's report together with the final WKC-13 or shall explain why the report is not being submitted and shall estimate when the final practitioner's report will be submitted.

(f) When submitting a stipulation or compromise, and at the time of hearing, a current form WKC-13 indicating all worker's compensation payments to date and the periods of time for which these payments were made.

(g) Written notice within 7 days, with a copy to the employee, after each of the following:

1. Payments are stopped for any reason. If any payments are stopped for a reason other than the employee's return to work, the self-insured employer or insurance carrier shall explain why it stopped payments and shall advise the employee what to do to reinstate payments.

2. A decision to deny liability for payment of compensation is made, giving the reason for the denial and advising the employee of the right to a hearing before the department.

3. Amputation will require an artificial member or appliance.

(h) Within 14 days of the date of an alleged injury under sub. (1) (a), if the claim is not paid or denied because the insurance carrier or self-insured employer is still investigating the claim, a written explanation giving the reason for further investigation, with a copy to the employee. If notice from an insured employer to its insurance carrier under sub. (1) is not timely, the insurance carrier shall comply within 14 days of receiving notice of the alleged injury from any source.

(i) If increased compensation is due, a final receipt within 30 days of the final payment to the employee, as proof of payment of that increased compensation.

(j) If the employee fails to return to a practitioner for a final examination, written notice within 30 days, with a copy to the employee,

advising the employee that in order to determine permanent disability, if any, the final examination is necessary.

Note: All of the forms referred to in this rule can be obtained from the Department of Workforce Development, Worker's Compensation Division, 201 East Washington Avenue, P.O. Box 7901, Madison, Wisconsin 53707-7901.

(3) EVALUATION. In evaluating whether payments of compensation and reports made by insurance carriers and self-insured employers were prompt and proper under the provisions of ss. 102.28 (2) and 102.31 (3), Stats., and before undertaking to revoke the exemption from insurance under s. 102.28 (2) (c), Stats., or before recommending under s. 102.31 (3), Stats., to the commissioner of insurance that enforcement proceedings under s. 601.64, Stats., be invoked the department will consider all of the following performance standards together with all other factors bearing on the performance and activities of the insurance carrier or self-insured employer:

(a) Payment of first indemnity. Whether 80% or more of first indemnity payments are mailed to the injured employee in 14 days or less following the date of injury or the last day worked after the injury before the first day of compensable lost time.

(b) First report of injury. Whether 70% or more of reports required under sub. (2) (a) are received by the department within 14 days of the date of injury or the last day worked after injury before the first day of compensable lost time.

(c) Correct and complete names. Names of self-insured employers on reports filed with the department must be correct and complete. The name of an insurance group is not a substitute for the name of the individual company insuring the risk. The name of an insurance service company is not a substitute.

(d) Penalty frequency and severity. The number and amount of penalties assessed for violations of ss. 102.18 (1) (bp), 102.22 (1), 102.57, and 102.60, Stats.

(3m) REPORTING BY ELECTRONIC, MAGNETIC OR OTHER MEDIA. (a) An employer, self-insured employer or insurer may make a written request to the department to submit the information in reports or amendments to reports required to be filed with the department in sub. (1) or (2) via electronic, magnetic or other media satisfactory to the department. The department may authorize an employer, self-insured employer or insurer to use electronic, magnetic or other reporting media after considering the extent to which it will help the employer, self-insured employer or insurer meet or exceed the applicable reporting requirements and performance standards in subs. (1) to (3).

(b) The authorization shall be in writing and shall state the terms and conditions for granting and revoking the privilege to use electronic, magnetic or other reporting media, including any terms and conditions relating to reporting requirements or performance standards in subs. (1) to (3). The written authorization shall specify what variations exist, if any, between the data required to be submitted on forms WKC-12, WKC-13, WKC-13-A, or other forms that are used by the department and the data required to be submitted via electronic, magnetic or other media.

History: 1-2-56; am. (1) and (2), Register, October, 1965, No. 118, eff. 11-1-66; am. Register, April, 1975, No. 232, eff. 5-1-75; am. (1), r. and recr. (2), Register, September, 1982, No. 321, eff. 10-1-82; am. (2) (intro.) and cr. (3), Register, September, 1986, No. 369, eff. 10-1-86; renum. (1) to be (1) (a) and am., cr. (1) (b) and (3m), am. (2) (intro.), Register, November, 1993, No. 455, eff. 12-1-.93; r. and recr. (1) and (2), am. (3) (intro.), (a), (b), (3m) (b) and r. (3m) (c), Register, December, 1997, No. 504, eff. 1-1-98.

DWD 80.025 Inspection and copying of records. (1) The policy of the state on public access to records is set forth in ss. 19.31 to 19.37, Stats. The policy of the department is to provide, to the greatest extent possible, ready and open access to public records. In the worker's compensation division, access may be limited in particular cases only when consideration of the information in a file leads to the conclusion that the public interest served by nondisclosure is greater than the public interest served by disclosure. The inspection and copying of worker's compensation records shall be subject to the conditions specified in this section.

(2) The requester shall provide sufficient information on each individual file requested to permit identification and location of the specific file. Desirable information on claim files includes:

(a) The correct name of the individual who has claimed a work-related disability;

(b) The claimant's social security number;

(c) The date the claimed injury or illness occurred;

(d) The name of the employing firm or firms at the time of the claimed injury or illness;

(e) The name of the employing firm's insurance carrier.

(3) Requesters may inspect claim files only in the division's Madison office and under the supervision of division staff. Requesters shall direct requests to inspect files to the receptionist between the hours of 7:45 a.m. and 4:30 p.m. Requesters shall return all files by 4:30 p.m.

(4) Requesters may not remove files from the division offices without written authorization from the administrator of the division.

(5) Requesters wishing to make copies of all or a part of a file may do so under the supervision of division staff on the coin-operated copy machine provided for that purpose.

(6) The division shall provide transcripts of testimony taken or proceedings had before the division only in accordance with s. DWD 80.14.

(7) The division shall furnish copies of documents from worker's compensation claim files as requested, with the following limits:

(a) At least one week must be allowed before copies can be delivered or mailed.

(b) Advance payment shall not be required except as provided in par. (e). The division shall send an invoice to the requester for the necessary costs as set forth in par. (c).

(c) The following fees shall apply:

1. 20 cents per page for photocopying.
2. $2.00 for certifying copies.
3. $3.00 per request for postage and handling when copies are to be mailed.

(d) Upon a proper showing of inability to pay, the division shall furnish the requested copies upon such terms as may be agreed.

(e) If the requester has unpaid copying fees from prior requests outstanding in an amount that exceeds $5.00, the division shall require the requester to pay the amount owed before providing more copies.

History: Cr. Register, March, 1986, No. 363, eff. 4-1-86.

DWD 80.03 Compromise. (1) Whenever an employer and an employee enter into a compromise agreement concerning the employer's liability under ch. 102, Stats., for a particular injury to that employee, the following conditions shall be fulfilled:

(a) The compromise agreement shall be in writing, or in the alternative, oral on the record at the time of scheduled hearing;

(b) The compromise agreement shall be mailed to the department unless made on the record;

(c) The compromise agreement must be approved by the department; and

(d) No compromise agreement may provide for a lump sum payment of more than the incurred medical expenses plus sums accrued as compensation or death benefits to the date of the agreement and $5,000 in unaccrued benefits where the compromise settlement in a claim other than for death benefits involves a dispute as to the extent of permanent disability. Lump sum payments will be considered after approval of the compromise in accordance with s. DWD 80.39.

(e) Compromise agreements which provide for payment of a lump sum into an account in a bank, trust company or other financial institution, which account is subject to release as the department directs, will be authorized.

(f) Appropriate structured settlements will be approved.

(g) All written compromise agreements submitted to the department shall contain the following:

The employee has the right to petition the department of industry, labor and human relations to set aside or modify this compromise agreement within one year of its approval by the department. The department may set aside or modify the compromise agreement. The right to request the department to set aside or modify the compromise agreement does not guarantee that the compromise will in fact be reopened.

(2) If the department approves the compromise agreement, an order shall be issued by the department directing payment in accordance with the terms of the compromise agreement. No compromise agreement is valid without an order of the department approving the agreement.

(3) Section 102.16 (1), Stats., places upon the department the responsibility for reviewing, approving, modifying, setting aside and issuing awards on compromise agreements. The action that is taken on any individual claim is dependent upon the facts, circumstances and judgment of the merits of compromise in that specific case. In arriving at a judgment of the merits the department will take into account the following general considerations:

(a) Medical reports, statements or other information submitted by the parties to show that

there is a genuine and significant basis for a dispute between the parties.

(b) Estimates of the disability by the physicians, chiropractors or podiatrists which do not vary significantly in estimates of the scheduled or nonscheduled disability will not be presumed to demonstrate a basis for dispute.

(c) The length of time since active treatment has been necessary. The presumption is that the longer the interval the less likely that treatment will be required in the future.

(d) Scientific knowledge or experience indicating that there may be further progression of the disability or that future treatment may be required. Examples of such conditions are: skull fractures with laceration of the dura, sub-capitol fractures of the femur, silicosis and asbestosis.

(e) The length of time since the date of injury.

(f) Any and all other factors that bear on the equity of the proposed compromise.

History: 1-2-56; am., Register, April, 1975, No. 232, eff. 5-1-75; r. and recr. Register, September, 1982, No. 321, eff. 10-1-82; am. (1) (d), cr. (1) (f) and (g) and (3), Register, September, 1986, No. 369, eff. 10-1-86.

DWD 80.05 Procedure on claim. (1) In cases of disputes in matters coming under the jurisdiction of ch. 102, s. 101.47, 56.21 or 40.65, Stats., any party to the dispute may apply to the department for relief and the department shall make such order or award as shall be lawful and just under the circumstances.

(2) In all such cases under sub. (1), the party complaining shall file his or her application with the department, along with sufficient copies of the application for service on the adverse parties. The department shall thereupon serve the adverse parties with a copy of the application and the adverse parties shall file an answer to the application with the department within 20 days after the service and likewise serve a copy of the answer on the party making application. The department shall thereupon notify the parties of the time and place of hearing, at least 10 days prior to the hearing. If no answer is mailed by the respondent within 20 days of mailing by the department, the department may issue an order by default, without hearing, in accordance with the application, as provided by s. 102.18 (1) (a), Stats.

Note: See s. 102.17, Stats.

History: 1-2-56; am., Register, April, 1975, No. 232, eff. 5-1-75; am. Register, September, 1982, No. 321, eff. 10-1-82; am. (1), Register, September, 1986, No. 369, eff. 10-1-86.

DWD 80.06 Parties. The parties to the controversy shall be known as the applicant and the respondent. The party filing the application for relief shall be known as the applicant and an adverse party as the respondent. Any party may appear in person or by an attorney or agent.

History: 1-2-56; am. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.07 Service. All service of papers, unless otherwise directed by the department or by law, may be made by mail and proof of such mailing shall be prima facie proof of such service. Time within which service shall be made shall be the same as in courts of record unless otherwise specified by rule or order of the department.

History: 1-2-56; am. Register, April, 1975, No. 232, eff. 5-1-75.

DWD 80.08 Amendments. Amendment may be made to the application or answer by letter mailed to the department prior to the date the notice of hearing is mailed. Copies of the letter shall be sent directly to the other parties. The letter shall state reasons for the amendment.

History: 1-2-56; am. Register, April, 1975, No. 232, eff. 5-1-75; r. and recr. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.09 Witness attendance; extension of time and postponement. (1) Upon receipt of the notice of hearing, it is the responsibility of each party to contact any witnesses necessary for that party's case and to make arrangements to have them attend the hearing.

(2) Requests for postponements and continuances shall be considered by the department only if such requests are received within a reasonable time before the date of the hearing.

(3) The department shall grant postponements and continuances only because of extraordinary circumstances. Neither the scheduling problems nor the convenience of the parties shall be considered extraordinary circumstances.

(4) A postponement, continuance or extension of time may not be granted upon the mutual agreement of the parties without the consent of the department.

History: 1-2-56; am. Register, April, 1975, No. 232, eff. 5-1-75; r. and recr. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.10 Stipulations. Parties to a controversy may stipulate the facts in writing, and the

department may thereupon make its order or award. Stipulations must set forth in detail the manner of computing the compensation due and must be accompanied by a report from a physician stating the extent of the disability.

History: 1-2-56; am. Register, April, 1975, No. 232, eff. 5-1-75.

DWD 80.11 Depositions. Depositions may be taken and used in any hearing only in accordance with s. 102.17 (1) (f), Stats. These depositions shall be taken in the same manner as in courts of record. Depositions for the purpose of discovery before the hearing are specifically prohibited.

History: 1-2-56; am. Register, April, 1975, No. 232, eff. 5-1-75; am. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.12 Rules of practice; selection of hearing site. (1) (a) The rules of practice before the department shall be such as to secure the facts in as direct and simple a manner as possible.

(b) The examiner may limit testimony to only those matters which are disputed.

(c) The examiner may not allow into the record, either on direct or cross-examination, redundant, irrelevant or repetitive testimony. Hearsay testimony may be admitted at the discretion of the examiner provided such testimony has probative value.

(2) The department may select places for a hearing after considering the geographical location and volume of claims in an area. A list of sites will be furnished upon request to interested parties by the department. From this list, a hearing site shall be selected at the discretion of the department. The department, in determining the site of the hearing, shall consider the following:

(a) The location choice of the applicant;

(b) The location of the office of the treating practitioner or practitioner appointed by the department under the provisions of s. 102.17 or 102.13 (3), Stats.; and

(c) The location where the injury occurred.

History: Cr. Register, August, 1976, No. 248, eff. 9-1-76; r. and recr. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.14 Transcripts. (1) Transcripts of testimony taken or proceedings had before the department will be furnished to the applicant or respondent or their attorneys in accordance with the following provisions:

(a) After the commencement of an action to review an order of the commission in circuit court, a copy of the hearing record will be furnished to the plaintiff or other parties upon payment to the department of the reporter's fees set forth in s. 757.57 (5), Stats., and not as set forth in s. 757.57 (2), Stats.

(b) Transcripts of the hearing may not be provided until after commencement of an action in circuit court.

(c) Upon proper showing of financial inability to pay for copies of such testimony or proceedings, the department in its discretion will furnish copies of the same on such terms as may be agreed upon.

History: 1-2-56; am. (1) (a) and (b), Register, October, 1965, No. 118, eff. 11-1-65; am. Register, November, 1970, No. 179, eff. 12-1-70; am. (1) (a), Register, April, 1971, No. 184, eff. 5-1-71; r. and recr. (1) (a) and (b), Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.15 Payments after an order. Except for a stipulation or compromise, unless a party has filed a petition for review under s. 102.18 (3), Stats., that party shall pay an administrative law judge's order awarding compensation within 21 days after the department mails a copy of the administrative law judge's finding and order to that party's last known address. For payments ordered by stipulation or compromise, a party shall pay within 10 days after the department mails a copy of the order to that party's last known address.

History: Cr. Register, July, 1996, No. 487, eff. 8-1-96.

DWD 80.20 License to appear. **(1)** The following rules shall govern the issuance, suspension, or revocation of licenses to appear before the department in compensation matters under the provisions of s. 102.17 (1) (c), Stats.

(a) Permission to appear at a single hearing may be issued by the department through any examiner upon application evidencing qualifications provided by statute and the department's rules. Such permission may be given to appear in 3 cases before the issuing of license. When appearance has been made in 3 cases, license shall be required, which shall be issued only upon execution and filing with the department of application upon form prescribed by the department.

(b) Before license shall be issued applicant shall have appeared in representation of a party before the department on at least 3 formal hearings.

(c) The following conditions shall operate as grounds for refusal, suspension, or revocation of license.

1. Charging of excessive or unconscionable fees, misrepresentation of clients, dishonesty, fraud, sharp practice, neglect of duty, or other improper conduct in the representation of a party before the department, unless satisfactorily explained or excused by the department on the grounds of subsequent good conduct.

2. Disbarment from the practice of law, or resignation by request of properly constituted authorities, unless there has been subsequent reinstatement and continuance in good standing.

3. Contumacious conduct in hearing, gross discourtesy toward department representatives, or failure to conform to rulings or instructions of the department or its representatives.

4. Intentional or repeated failure to observe provisions of the compensation act or rules of procedure adopted by the department.

5. Any other gross evidence of lack of good moral character, fitness or act of fraud, or serious misconduct.

History: 1-2-56; am. Register, April, 1975, No. 232, eff. 5-1-75; am. (1) (intro.), Register, September, 1986, No. 369, eff. 10-1-86.

DWD 80.21 Reports by practitioners and expert witnesses. (1) Upon the request of the department, any party in interest to a claim under ch. 102, Stats., shall furnish to the department and to all parties in interest copies of all reports by practitioners and expert witnesses in their possession or procurable by them.

(2) In cases involving nonscheduled injuries under s. 102.44 (2) or (3), Stats., any party in interest to a claim under the act shall, upon the request of the department, also furnish to the department and to all parties in interest any reports in their possession or reasonably available to them relating to the loss of earning capacity as set forth in s. DWD 80.34.

(3) Any party who does not comply with the request of the department under sub. (1) or (2) shall be barred from presenting the reports or the testimony contained therein at the hearing.

(4) No testimony concerning wage earning impairment shall be received unless the party offering such testimony has notified the department and the other parties in interest of the intent to produce such testimony. The names of the witnesses who are going to testify as to wage earning impairment shall also be furnished to the department and the parties in interest. Such notification shall be given at least 30 days prior to a scheduled hearing.

History: 1-2-56; am. Register, April, 1975, No. 232, eff. 5-1-75; am. (1), cr. (2), (3) and (4), Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.22 Use of physicians' reports as evidence. (1) Matters stated in or material evidence if given as oral testimony shall not be competent or material evidence if given as oral testimony shall not be competent or material as prima facie evidence if objection is made, except as corroborated by competent and material oral testimony.

Note: See s. 102.17 (1) (d), Stats.

(2) Use of reports shall be permitted in any case in which claim for compensation is made, provided the reporting doctor is available for cross examination.

(3) An applicant shall be informed of the provisions of s. 102.17 (1) (d), Stats., and the department's rules and also that a form for reporting will be supplied to the applicant upon request.

(4) Report shall be submitted to the department upon a form prescribed by the department and shall be verified or certified. The department may require additional or supplementary reports. Upon failure of the applicant to submit such reports within the time specified prior to hearing, all reports previously filed may, in the discretion of the department, be excluded as evidence.

(5) Reports shall be filed with the application for adjustment of claim or as soon thereafter as possible. Reports not filed with the department 15 days prior to the date of hearing shall not be acceptable as evidence except upon good cause for failure so to file, established to the satisfaction of the department.

(6) Simultaneously with the filing of a WKC-16B form or a verified report of a vocational expert with the department, a party shall serve copies upon all other parties in interest. Service upon the designated representative of a party shall be deemed service upon the party. Service upon the insurance carrier for an employer shall be deemed service upon the employer. However, if a party does not

have a representative, the department may elect to make service upon other parties.

History: 1-2-56; am. (intro. par.), (7) and (4), Register, October, 1965, No. 118, eff. 11-1-65; am. Register, April, 1975, No. 232, eff. 5-1-75; am. (3) and r. and recr. (6), Register, September, 1982, No. 321, eff. 10-1-82; am. (intro.), Register, September, 1986, No. 369, eff. 10-1-86.

DWD 80.23 Common insurance of employer and third party. In all cases where compensation becomes payable and the insurance carrier of an employer and of a third party shall be the same, or if there is common control of the insurer of each, the insurance carrier of the employer shall promptly notify the parties in interest and the department of that fact.

History: 1-2-56; am. Register, April, 1975, No. 232, eff. 5-1-75.

DWD 80.24 Statement of employee. When an employee gives a statement signed by him, which in any way concerns his claim, a copy of such statement must be given to the employee. When such statement is taken by a recording device and is not immediately reduced to writing, a copy of the entire statement must be given to the employee or to his attorney within a reasonable time after application for hearing is filed, and the actual recording must be available as an exhibit if formal hearing is held. Failure on the part of the employer or insurance carrier to comply with the above will preclude the use of such statement in any manner in connection with that claim.

History: Cr. Register, March, 1956, No. 3, eff. 4-1-56; am. Register, October, 1965, No. 118, eff. 11-1-65.

DWD 80.25 Loss of hearing. The department adopts the following standards for the determination and evaluation of noise induced hearing loss, other occupational hearing loss and accidental hearing loss:

(1) HARMFUL NOISE. Hearing loss resulting from hazardous noise exposure depends upon several factors, namely, the overall intensity (sound pressure level), the daily exposure, the frequency characteristic of the noise spectrum and the total lifetime exposure. Noise exposure level of 90 decibels or more as measured on the A scale of a sound level meter for 8 hours a day is considered to be harmful.

(2) MEASUREMENT OF NOISE. Noise shall be measured with a sound level meter which meets ANSI standard 1983 and shall be measured on the "A" weighted network for "slow response." Noise levels reaching maxima at intervals of one second or less shall be classified as being continuous. The measurement of noise is primarily the function of acoustical engineers and properly trained personnel. Noise should be scientifically measured by properly trained individuals using approved calibrated instruments which at the present time include sound level meters, octave band analyzers and oscilloscopes, the latter particularly for impact-type noises.

(3) MEASURE OF HEARING ACUITY. The use of pure tone air and bone conduction audiometry performed under proper testing conditions is recommended for establishing the hearing acuity of workers. The audiometer should be one which meets the specifications of ANSI standard 53.6-1969 (4). The audiometer should be periodically calibrated. Preemployment records should include a satisfactory personal and occupational history as they may pertain to hearing status. Otological examination should be made where indicated.

(4) FORMULA FOR MEASURING HEARING IMPAIRMENT. For the purpose of determining the hearing impairment, pure tone air conduction audiometry is used, measuring all frequencies between 500 and 6,000 Hz. This formula uses the average of the 4 speech frequencies of 500, 1,000, 2,000, and 3,000 Hz. Audiometric measurement for these 4 frequencies averaging 30 decibels or less on the ANSI calibration does not constitute any practical hearing impairment. A table for evaluating hearing impairment based upon the average readings of these 4 frequencies follows below. No deduction is made for presbycusis.

(5) DIAGNOSIS AND EVALUATION. The diagnosis of occupational hearing loss is based upon the occupational and medical history, the results of the otological and audiometric examinations and their evaluation.

(6) TREATMENT. There is no known medical or surgical treatment for improving or restoring hearing loss due to hazardous noise exposure. Hearing loss will be improved in non-occupational settings with the use of a hearing aid. Since a hearing aid relieves from the effect of injury the cost is compensable where prescribed by a physician.

(7) ALLOWANCE FOR TINNITUS. In addition to the above impairment, if tinnitus has permanently resulted due to work exposure, an allowance of 5% loss of hearing impairment for the affected ear or ears shall be computed.

(8) HEARING IMPAIRMENT TABLE.

Average Decibel Loss ANSI	Percent of Compensable Hearing Impairment	Average Decibel Loss ANSI	Percent of Compensable Hearing Impairment
30	0.0	62	51.2
31	1.6	63	52.8
32	3.2	64	54.4
33	4.8	65	56.0
34	6.4	66	57.6
35	8.0	67	59.2
36	9.6	68	60.8
37	11.2	69	62.4
38	12.8	70	64.0
39	14.4	71	65.6
40	16.0	72	67.2
41	17.6	73	68.8
42	19.2	74	70.4
43	20.8	75	72.0
44	22.4	76	73.6
45	24.0	77	75.2
46	25.6	78	76.8
47	27.2	79	78.4
48	28.8	80	80.0
49	30.4	81	81.6
50	32.0	82	83.2
51	33.6	83	84.8
52	35.2	84	86.4
53	36.8	85	88.0
54	38.4	86	89.6
55	40.0	87	91.2
56	41.6	88	92.8
57	43.2	89	94.4
58	44.8	90	96.0
59	46.4	91	97.6
60	48.0	92	99.2
61	49.6	93	100.0

(9) METHOD FOR DETERMINING PERCENT OF HEARING IMPAIRMENT.

(a) Obtain for each ear the average hearing level in decibels at the 4 frequencies, 500, 1,000, 2,000 and 3,000 Hz.

(b) See Table for converting to percentage of hearing impairment in each ear.

(c) To determine the percentage of impairment for both ears, multiply the lesser loss by 5, add the greater loss and divide by 6.

Following are examples of the calculation of hearing loss:

A. Mild to Marked Bilateral Hearing Loss

	500 Hz	1,000 Hz	2,000 Hz	3,000 Hz
Right Ear	15	25	45	55
Left Ear	30	45	60	85

1. Calculation of average hearing threshold level

Right Ear: $\frac{15 + 25 + 45 + 55}{4} = \frac{140}{4}$ = 35 db = 8% loss

Left Ear: $\frac{30 + 45 + 60 + 85}{4} = \frac{220}{4}$ = 55 db = 40% loss

2. Calculation of hearing handicap:

Smaller number (better ear)
8% x 5 = 40
Larger number (poorer ear)
40% x 1 = 40

Total 80 ÷ 6 = 13.33% loss

Therefore, a person with the hearing threshold levels shown in this audiogram would have a 13.33% hearing handicap.

B. Slight Bilateral Hearing Loss

	500 Hz	1,000 Hz	2,000 Hz	3,000 Hz
Right Ear	15	15	20	30
Left Ear	25	30	35	40

1. Average hearing threshold level:

Right Ear: $\frac{15 + 15 + 20 + 30}{4} = \frac{80}{4}$ = 20 db = 0% loss

Left Ear: $\frac{25 + 30 + 35 + 40}{4} = \frac{130}{4}$ = 33.0 db = 4.8% loss

Therefore, the hearing loss is 4.8% left ear

C. Severe to Extreme Bilateral Hearing Loss

	500 Hz	1,000 Hz	2,000 Hz	3,000 Hz
Right Ear	80	90	100	110
Left Ear	75	80	90	95

1. Average hearing threshold level (use 93 db maximal value)

Right Ear: $\frac{80 + 90 + 100 + 110}{4} = \frac{380}{4}$ = 95 db = 100% loss

Left Ear: $\frac{75 + 80 + 90 + 95}{4} = \frac{340}{4}$ = 85 db = 88% loss

2. Hearing handicap:

Smaller number (better ear)
88% x 5 = 440

Larger number (poorer ear)
100% x 1 = 100%

Total 540 ÷ 6 = 90% loss

Therefore, the hearing handicap is 90%.

History: 1-2-56; am. Register, January, 1960, No. 49, eff. 2-1-60; am. Register, October, 1965, No. 118, eff. 11-1-65; r. and recr. Register, September, 1972, No. 201, eff. 10-1-72; am. (1) to (4), r. (5), renum. (6) and (7) to be (5) and (6), cr. (7) and am. (8), Register, September, 1975, No. 237, eff. 10-1-75; am. (intro.), (2) to (4), (6), (8) and (9), Register, September, 1986, No. 369, eff. 10-1-86.

DWD 80.26 Loss of vision; determination. The following rules for determining loss of visual efficiency shall be applicable to all cases settled after December 1, 1941, irrespective of the date of injury, except that, in the examples for computations of compensation payable and of the percentage of permanent total disability, the computation of the percentage of visual impairment must be applied to the provisions of the worker's compensation act as they existed at the date of the injury.

(1) MAXIMUM AND MINIMUM LIMITS OF THE PRIMARY COORDINATE FACTORS OF VISION. In order to determine the various degrees of visual efficiency, a) normal or maximum, and b) minimum, limits for each coordinate function must be established; i.e., the 100% point and the 0% point.

(a) Maximum limits. The maximum efficiency for each of these is established by existing and accepted standards.

1. Central visual acuity. The ability to recognize letters or characters which subtend an angle of 5 minutes, each unit part of which subtends a 1 minute angle at the distance viewed is accepted as standard. Therefore a 20/20 Snellen or A.M.A. and a 14/14 A.M.A. are employed as the maximum acuity of central vision, or 100% acuity for distance vision and near vision respectively.

2. Field vision. A visual field having an area which extends from the point of fixation outward 65, down and out 65, down 55, down and in 45, inward 45, in and up 45, upward 45, and up and out 55 is accepted as 100% industrial visual field efficiency.

3. Binocular vision. Maximum binocular vision is present if there is absence of diplopia in all parts of the field of binocular fixation, and if the 2 eyes give useful binocular vision.

(b) Minimum limits. The minimum limit, or the 0% of the coordinate functions of vision, is established at that degree of deficiency which reduces vision to a state of industrial uselessness.

1. Central visual acuity. The minimum limit of this function is established as the loss of light perception, light perception being qualitative vision. The practical minimum limit of quantitative visual acuity is established as the ability to distinguish form. Experience, experiment and authoritative opinion show that for distance vision 20/200 Snellen or A.M.A. Chart is 80% loss of visual efficiency, 20/380 is 96% loss, and 20/800 is 99.9% loss, and that for near vision 14/141 A.M.A. Reading Card is 80% loss of visual efficiency, 14/266 is 96% loss, and 14/560 is 99.9% loss. Table 1 shows the percentage loss of visual efficiency corresponding to the Snellen and other notations for distant and for near vision, for the measurable range of quantitative visual acuity.

2. Field vision. The minimum limit for this function is established as a concentric central contraction of the visual field to 5. This degree of contraction of the visual field of an eye reduces the visual efficiency to zero.

3. Binocular vision. The minimum limit is established by the presence of diplopia in all parts of the motor field, or by lack of useful binocular vision. This condition constitutes 50% motor field efficiency.

(c) Where distance vision is less than 20/200 and the A.M.A. Chart is used, readings will be at 10 feet. The percentage of efficiency and loss may be obtained from this table by comparison with corresponding readings on the basis of 20 feet, interpolating between readings if necessary. In view of the lack of uniform standards among the various near vision charts, readings for near vision, within the range of vision covered thereby, are to be

according to the American Medical Association Rating Reading Card of 1932.

(2) MEASUREMENT OF COORDINATE FACTORS OF VISION AND THE COMPUTATION OF THEIR PARTIAL LOSS. (a) Central visual acuity. 1. Central visual acuity shall be measured both for distance and for near, each eye being measured separately, both with and without correction. Where the purpose of the computation is to determine loss of vision resulting from injury, if correction is needed for a presbyopia due to age or for some other condition clearly not due to the injury (see section on miscellaneous regulations), the central visual acuity "without correction", as the term is used herein, shall be measured with a correction applied for such presbyopia or other preexisting condition but without correction for any condition which may have resulted from the injury. The central visual acuity "with correction" shall be measured with correction applied for all conditions present.

2. The percentage of central visual acuity efficiency of the eye for distance vision shall be based on the best percentage of central visual acuity between the percentage of central visual acuity with and without correction. However, in no case shall such subtraction for glasses be taken at more than 25%, or less than 5%, of total central visual acuity efficiency. If a subtraction of 5%, however, reduces the percentage of central visual acuity efficiency below that obtainable without correction, the percentage obtainable without correction shall be adopted unless correction is nevertheless necessary to prevent eye strain or for other reasons.

3. The percentage of central visual acuity efficiency of the eye for near vision shall be based on a similar computation from the near vision readings, with and without correction.

4. The percentage of central visual acuity efficiency of the eye in question shall be the result of the weighted values assigned to these 2 percentages for distance and for near. A onefold value is assigned to distance vision and a twofold value to near vision. Thus, if the central visual efficiency for distance is 70% and that for near is 40%, the percentage of central visual efficiency for the eye in question would be:

Distance (taken once)	**70%**
Near (taken twice)	**40%**
	150 ÷ 3 = 50% central visual acuity efficiency

5. The Snellen test letters or characters as published by the Committee on Compensation for Eye Injuries of the American Medical Association and designated "Industrial Vision Test Charts" subtend a 5 minute angle, and their component parts a 1 minute angle. These test letters or the equivalent are to be used at an examining distance of 20 feet for distant vision (except as otherwise noted on the Chart where vision is very poor), and of 14 inches for near vision, from the patient. The illumination is to be not less than three foot candles, nor more than ten foot candles on the surface of the chart.

6. Table 1 shows the percentage of central visual acuity efficiency and the percentage loss of such efficiency, both for distance and for near, for partial loss between 100% and zero vision for either eye.

(b) Field vision. 1. The extent of the field of vision shall be determined by the use of the usual perimetric test methods, a white target being employed which subtends a 1 degree angle under illumination of not less than 3 foot candles, and the result plotted on the industrial visual field chart. The readings should be taken, if possible, without restriction to the field covered by the correction worn.

2. The amount of radial contraction in the 8 principal meridians shall be determined. The sum of the degrees of field vision remaining on these meridians, divided by 420 (the sum of the 8 principal radii of the industrial visual field) will give the visual field efficiency of one eye in per cent, subject to the proviso stated in the section on "Minimum Limits" that a concentric central contraction of the field to a diameter of 5 degrees reduces the visual efficiency to zero.

3. Where the impairment of field is irregular and not fairly disclosed by the 8 radii, the impaired area should be sketched upon the diagram on the report blank, and the computation be based on a greater number of radii, or otherwise, as may be necessary to a fair determination.

(c) Binocular vision. 1. Binocular vision shall be measured in all parts of the motor field, recognized methods being used for testing. It shall be measured with any useful correction applied.

TABLE 1
Percentage of Central Visual Efficiency Corresponding to Specified Readings for Distant and for Near Vision for Measurable Range of Quantitative Visual Acuity

A.M.A. Test Chart or Snellen Reading for Distance	A.M.A. Card Reading for Near	Percentage of Visual Efficiency	Pecentage Loss of Vision	A.M.A. Test Chart or Snellen Reading for Distance	A.M.A. Card Reading for Near	Percentage of Visual Efficiency	Percentage Loss of Vision
20/20	14/14	100.0	0.0	20/122.5	-- --	40.0	60.0
20/25	14/17.5	95.7	4.3	20/137.3	-- --	35.0	65.0
20/25.7	-- --	95.0	5.0	20/140	14/98	34.2	65.8
20/30	14/21	91.5	8.5	20/155	-- --	30.0	70.0
20/32.1	-- --	90.0	10.0	20/160	14/112	28.6	71.4
20/35	14/24.5	87.5	12.5	20/175	-- --	25.0	75.0
20/38.4	-- --	85.0	15.0	20/180	14/126	23.9	76.1
20/40	14/28	83.6	16.4	20/200	14/141	20.0	80.0
20/44.9	14/31.5	80.0	20.0	20/220	14/154	16.7	83.3
20/50	14/35	76.5	23.5	20/240	14/168	14.0	86.0
20/52.1	-- --	75.0	25.0	-- --	14/178	12.3	87.7
20/60	14/42	69.9	30.1	20/260	14/182	11.7	88.3
20/60.2	-- --	70.0	30.0	20/280	14/196	9.7	90.3
20/68.2	-- --	65.0	35.0	20/300	14/210	8.2	91.8
20/70	14/49	64.0	36.0	20/320	14/224	6.8	93.2
20/77.5	-- --	60.0	40.0	20/340	14/238	5.7	94.3
20/80	14/56	58.5	41.5	20/360	14/252	4.8	95.2
20/86.8	-- --	55.0	45.0	20/380	14/266	4.0	96.0
20/90	14/63	53.4	46.6	20/400	14/280	3.3	96.7
20/97.5	-- --	50.0	50.0	20/450	14/315	2.1	97.9
20/100	14/70	48.9	51.1	20/500	14/350	1.4	98.6
20/109.4	-- --	45.0	55.0	20/600	14/420	0.6	99.4
20/120	14/84	40.9	59.1	20/700	14/490	0.3	99.7
-- --	14/89	38.4	61.6	20/800	14/560	0.1	99.9

2. Diplopia may involve the field of binocular fixation entirely or partially. When diplopia is present, this shall be plotted on the industrial motor field chart. This chart is divided into 20 rectangles, 4 by 5 degrees in size. The partial loss due to diplopia is that proportional area which shows diplopia as indicated on the plotted chart compared with the entire motor field area.

3. When diplopia involves the entire motor field, causing an irremediable diplopia, or when there is absence of useful binocular vision due to lack of accommodation or other reason, the loss of coordinate visual efficiency is equal to 50% loss of the vision existing in one eye (ordinarily the injured, or the more seriously injured, eye); and when the diplopia is partial, the loss in visual efficiency shall be proportional and based on the efficiency factor value of one eye as stated in table 2. When useful correction is applied to relieve diplopia, 5% of total motor field efficiency of one eye shall be deducted from the percent of such efficiency obtainable with the correction. A correction which does not improve motor field efficiency by at least 5% of total will not ordinarily be considered useful.

(3) INDUSTRIAL VISUAL EFFICIENCY OF ONE EYE. The industrial visual efficiency of one eye is determined by obtaining the product of the computed coordinate efficiency values of central visual acuity, of field of vision, and of binocular vision. Thus, if central visual acuity efficiency is 50%, visual field efficiency is 80% and the binocular vision efficiency is 100%, the resultant visual efficiency of the eye will be 50 x 80 x 100 = 40%. Should useful binocular vision be absent in all of the motor field so that binocular efficiency is reduced to 50%, the visual efficiency would be 50 x 80 x 50 = 20%.

(4) COMPUTATION OF COMPENSATION FOR IMPAIRMENT OF VISION. When the percentage of industrial visual efficiency of each eye has been thus determined, it is subtracted from

100%. The difference represents the percentage impairment of each eye for industrial use. These percentages are applied directly to the specific schedules of the Worker's Compensation Act.

(5) TYPES OF OCULAR INJURY NOT INCLUDED IN THE DISTURBANCE OF COORDINATE FACTORS. Certain types of ocular disturbance are not included in the foregoing computations and these may result in disabilities, the value of which cannot be computed by any scale as yet scientifically possible of deduction. Such are disturbances of accommodation not previously provided for in these rules, of color vision, of adaptation to light and dark, metamorphopsia, entropion, ectropion, lagophthalmos, epiphora, and muscle disturbances not included under diplopia. For such disabilities additional compensation shall be awarded, but in no case shall such additional award make the total compensation for loss in industrial visual efficiency greater than that provided by law for total permanent disability.

TABLE 2

Loss in Binocular Vision

No loss	equals	100.0%	Motor	Field	Efficiency
1/20	"	99.0	"	"	"
2/20	"	97.7	"	"	"
3/20	"	96.3	"	"	"
4/20	"	95.0	"	"	"
5/20	"	93.7	"	"	"
6/20	"	92.3	"	"	"
7/20	"	90.7	"	"	"
8/20	"	89.0	"	"	"
9/20	"	87.3	"	"	"
10/20	"	85.7	"	"	"
11/20	"	83.7	"	"	"
12/20	"	81.7	"	"	"
13/20	"	79.7	"	"	"
14/20	"	77.3	"	"	"
15/20	"	75.0	"	"	"
16/20	"	72.7	"	"	"
17/20	"	69.7	"	"	"
18/20	"	66.0	"	"	"
19/20	"	61.0	"	"	"
20/20	"	50.0	"	"	"

(6) MISCELLANEOUS RULES. (a) Compensation shall not be computed until all adequate and reasonable operations and treatment known to medical science have been attempted to correct the defect. Further, before there shall be made the final examination on which compensation is to be computed, at least 3 months shall have elapsed after the last trace of visible inflammation has disappeared, except in cases of disturbance of extrinsic ocular muscles, optic nerve atrophy, injury of the retina, sympathetic ophthalmia, and traumatic cataract; in such cases, at least 12 months and preferably not more than 16 months shall intervene before the examination shall be made on which final compensation is to be computed. In case the injury is one which may cause cataract, optic atrophy, disturbance of the retina, or other conditions, which may further impair vision after the time of the final examination, note thereof should be made by the examining physician on his report.

(b) In cases of additional loss in visual efficiency, when it is known that there was present a preexisting subnormal vision, compensation shall be based on the loss incurred as a result of eye injury or occupational condition specifically responsible for the additional loss. In case there exists no record or no adequate and positive evidence of preexisting subnormal vision, it shall be assumed that the visual efficiency prior to any injury was 100%. In order to effect the above purpose, the examining physician should carefully distinguish, in regard to each of the coordinate factors, between impairments resulting from the injury and impairments not so resulting as established by the type of proof here stated. Such other impairments should, however, be also reported, separately. Computation must occasionally also be made of impairment of vision not resulting from the injury, as, for instance, for the purpose of computing additional indemnity due under the provisions of the Worker's Compensation Act on account of preexisting disability of one or both eyes.

Note I: Example of computation covering partial disability to a single eye

A. Central Visual Acuity:

Distance -- Reading of 20/32.1 with glasses equals visual efficiency of 90.0%

Reading of 20/200 without glasses equals visual efficiency of 20.0%

Difference 70.0%

Rated efficiency is 90.0% minus 25% (Because one-half of 70.0% exceeds 25) or 65.0%

Near -- Reading of 14/21 with glasses equals visual efficiency of 91.5%

Reading of 14/35 without glasses (except that correction is applied for presbyopia due to age) equals visual efficiency of 76.5%
Difference 15.0%
Rated efficiency is 91.5% minus 7.5% (which is one-half of 15%) or 84.0%
Final Central Visual Acuity Efficiency is:
65.0 + 84.0 + 84.0 = 233.0 ÷ 3 =77.7%

B. Field Vision:
Sum of eight principal meridians of the field remaining divided by 420 is:

40
50
50
50
40
40
40
40
420)350 = 83.3%

C. Binocular Vision:
Diplopia in 3 rectangles (3/20) is 96.3% motor field efficiency.

D. Industrial Visual Efficiency of the one eye is:
77.7% x 83.3% x 96.3% or 62.3%

E. Impairment of the one eye for industrial use is:
100.0% -- 62.3% = 37.7%

F. Compensation payable is:
Total impairment of one eye 250 weeks.
250 weeks x 37.7% = 94.25 weeks

Note II: Example of computation covering partial disability to both eyes

1. Left Eye is 62.3% efficient, see Example I.

2. Right Eye:
A. Central Visual Acuity:
Distance-- Reading of 20/30 with correction equals visual efficiency of 91.5%
Reading of 20/35 without glasses equals visual efficiency of 87.5%
Difference 4.0%
Rated efficiency is the vision without correction (because correction gives improvement of less than the 5% minimum allowance for glasses, and is not necessary to prevent eye strain, etc.) 87.5%.

Near -- Reading of 14/14 with glasses equals visual efficiency of 100.0%
Reading of 14/21 without glasses equals visual efficiency of 91.5%
Difference 8.5%
Rated efficiency is 100.0% minus 5% (because 5% is the minimum allowance for glasses) or 95.0%
Final Central Visual Acuity Efficiency is:
87.5%+ 95% + 95% = 277.5 ÷ 3 = 92.5%

B. Field vision is 100%

C. Binocular vision is 100%

D. Industrial visual efficiency of the right eye is:
92.5% x100% x1005 or 92.5%

E. Impairment of right eye for industrial use is:
100.0% -- 92.5% = 7.5%

3. Compensation payable is:
Left eye (Example I): 94.25 weeks
Right eye: 250 weeks x 7.5% = 18.75 + 200% multiple 56.25 weeks
Total 150.50 weeks

Note III: Example of compensation covering enucleation of one eye and partial disability of the other eye

1. Left eye is 35.28% impaired (77.7% x 83.3% = 64.72%; 100% - 64.72% = 35.28%, as allowance for binocular vision is inapplicable when the other eye is enucleated or blind), in indemnity payable for 88.2 weeks
2. Right eye is enucleated, which, results in indemnity payable for 275 weeks
3. Total payable: 88.2 weeks x 3 (multiple injury) = 264.6 + 275 = 539.6 weeks

The number of weeks indemnity indicated as payable for impairment of vision or for enucleation is in addition to indemnity for temporary disability. All results are subject to the limitation that the total amount of indemnity payable, including that for temporary disability, shall not exceed the indemnity which would be payable for permanent total disability. The statutory and legal rules applicable to the determination of additional compensation payable out of the special state fund on account of preexisting disabilities are not here stated.

DWD 80.27 Forms. A sample copy of all forms referred to in these rules may be obtained upon a request to the Worker's Compensation Division, Department of Workforce Development, Post Office Box 7901, Madison, WI 53707.

History: Cr. Register, October, 1957, No. 22, eff. 11-1-57; am. (1), Register, October, 1965, No. 118, eff. 12-1-65; am. Register, April, 1975, No. 232, eff. 5-1-75; r. and recr.

Register, September, 1982, No. 321, eff. 10-1-82; correction made under s. 13.93 (2m) (b) 6., Stats., Register, July, 1996, No. 487, eff. 8-1-96.

DWD 80.29 Value of room or meals. For the purpose of determining the value of lodging and meals for wage purposes under ch. 102, Stats., the allowance provided under ch. DWD 272 shall apply.

History: Cr. Register, October, 1960, No. 58, eff. 11-1-60; am. (1) (a) and (b), Register, October, 1963, No. 94, eff. 11-1-63; r. and recr. Register, January, 1967, No. 133, eff. 2-1-67; am. Register, November, 1970, No. 179, eff. 12-1-70; r. and recr. Register, April, 1975, No. 232, eff. 5-1-75; correction made under s. 13.93 (2m) (b) 7., Stats., Register, July, 1996, No. 487, eff. 8-1-96; correction made under s. 13.93 (2m) (b) 7., Stats., Register, December, 1997, No. 504.

DWD 80.30 Average weekly earnings for members of volunteer fire companies or fire departments. The maximum average weekly earnings under the provisions of s. 102.11, Stats., which are in effect on the date of injury shall be used in computing the amount of compensation payable to an employee as defined by s. 102.07 (7), Stats., except as specific showing may be made in an individual case that such wage is not proper.

History: Cr. Register, June, 1961, No. 66, eff. 7-1-61.

DWD 80.31 Procedure and claims under ch. 40, Stats. The department shall observe the same rules and procedures and may use the same forms in processing and determining claims made under s. 40.65, Stats. as are used under ch. 102, Stats.

History: Cr. Register, October, 1965, No. 118, eff. 11-1-65; am. Register, April, 1975, No. 232, eff. 5-1-75; am. Register, September, 1986, No. 369, eff. 10-1-86.

DWD 80.32 Permanent disabilities. Minimum percentages of loss of use for amputation levels, losses of motion, sensory losses and surgical procedures.

(1) The disabilities set forth in this section are the minimums for the described conditions. However, findings of additional disabling elements shall result in an estimate higher than the minimum. The minimum also assumes that the member, the back, etc., was previously without disability. Appropriate reduction shall be made for any preexisting disability.

Note: An example would be where in addition to a described loss of motion, pain and circulatory disturbance further limits the use of an arm or a leg. A meniscectomy in a knee with less than a good result would call for an estimate higher than 5% loss of use of the leg at the knee. The same principle would apply to surgical procedures on the back. The schedule of minimum disabilities contained in this section was adopted upon the advice of a worker's compensation advisory council subcommittee after a survey of doctors experienced in treating industrial injuries.

(2) Amputations, upper or lower extremities

At functional level	Equivalent to amputation at midpoint
Stump unsuitable to accommodate prosthesis	Equivalent to amputation at next most proximal joint
Stump not functional	Grade upward

All ranges of joint motion or degrees of ankylosis not listed below are to be interpolated from existing percent of disability listed.

(3) Hip

Ankylosis, optimum position, generally 15º to 30º flexion	50%
Mal position	Grade upward

To compute disabilities for loss of motion relate % of motion lost to average range

Shortening of leg (no posterior or lateral angulation)

No disability for shortening less than 3/4 inch

3/4 inch	5%
1 inch	7%
1-1/2 inches	14%
2 inches	22%

Greater than 2 inches of shortening results in greater proportionate rating than above

Prosthesis	Total	Minimum of 40%
	Partial	35%

(4) Knee

Ankylosis, optimum position, 170°		40%
Remaining range, 180º - 135°		25%
Remaining range, 180º - 90°		10%
Prosthesis	Total	50%
	Partial	45%
Removal of patella	To be based on functional impairment	
Total or partial meniscectomy (open or closed procedure)	Excellent to good result	5%
Anterior cruciate ligament repair	Minimum of 10%	

(5) Ankle

Total ankylosis, optimum position, total loss of motion	40%
Ankylosis ankle joint Loss of dorsi and plantar flexion	30%
Subtalar ankylosis Loss of inversion and eversion	15%

(6) Toes

Ankylosis great toe at proximal joint	50%
All other toes at proximal	40%
Ankylosis great toe at distal joint	15%
All other toes at any interphalangeal joint	If no deformity, no disability
Mal position	On merits
Loss of motion	No disability

(7) Shoulder

Ankylosis, optimum position, scapula free	55%
In mal position	Grade upward
Limitation of active elevation in flexion and abduction to 45° but otherwise normal	30%
Limitation of active elevation in flexion and abduction to 90° but otherwise normal	20%
Limitation of active elevation in flexion and abduction to 135º but otherwise normal	5%
Prosthesis	50%

(8) Elbow

Ankylosis, optimum position, 45º angle	
With radio-ulnar motion destroyed	60%
With radio-ulnar motion in tact	45%
Rotational ankylosis in neutral position	20%
Any mal position	Grade upward
Limitation of motion elbow joint, radio-ulnar motion unaffected	
Remaining range 180º - 135°	35%
Remaining range 135º - 90°	20%
Remaining range 180º - 90°	10%
Rotation at elbow joint	
Neutral to full pronation	10%
Neutral to full supination	15%

(9) Wrist

Ankylosis, optimum position 30º dorsiflexion	30%
Mal position	Grade upward
Total loss dorsiflexion	12-1/2%
Total loss palmarflexion	7-1/2%
Total loss inversion	5%
Total loss eversion	5%

(10) Complete Sensory Loss

Any digit	50% Lesser involvement to be graded appropriately - 35% for palmar, 15% for dorsal surface

Total median sensory loss to hand	65-75%
Total ulnar sensory loss to hand	25%
Ulnar nerve paralysis Above elbow, sensory involvement	50% at wrist
Below elbow, motor and sensory involvement	45-50% at wrist
Below elbow, motor involvement only	35-45% at wrist
Below elbow, sensory involvement only	5-10% at wrist
Median nerve paralysis Above elbow, motor and sensory involvement	55-65% at wrist
Thenar paralysis with sensory loss	40-50% at wrist
Radial nerve paralysis Complete loss of extension, elbow, wrist and fingers	45-55% at shoulder
Complete loss of extension wrist and fingers	45-55% at wrist
Peroneal nerve paralysis At level below knee	25-30% at knee

(11) Back

Removal of disc material, no undue symptomatic complaints or any objective findings	5%
Chymopapain injection	To be rated by doctor
Spinal fusion, good results	5% minimum per level
Removal of disc material and fusion	10% per level
Cervical fusion, successful	5%

Compression fractures of vertebrae of such degree to cause permanent disability may be rated 5% and graded upward

Note: It is the subcommittee's intention that a separate minimum 5% allowance be given for every surgical procedure (open or closed, radical or partial) that is done to relieve from the effects of a disc lesion or spinal cord pressure. Each disc treated or surgical procedure performed will qualify for a 5% rating. Due to the fact a fusion involves 2 procedures a 1) laminectomy (discectomy) and a 2) fusion procedure, 10% permanent total disability will apply when the 2 surgical procedures are done at the same time or separately.

Examples:

Patient A

12/01/1990	Laminectomy	5% PTD
05/01/1992	Fusion	increases to 10% PTD

Patient B

12/01/1990	Laminectomy & Fusion	10% PTD
05/01/1992	Re-fusion	increases to 15% PTD
12/01/1992	Laminectomy at New Level	increases to 20% PTD
05/01/1993	Fusion at 12/1/92 Level	increases to 25% PTD
12/01/1993	Re-fusion at 5/1/93 Level	increases to 30% PTD

(12) Fingers

(a) Complete ankylosis

Thumb	Mid- position	Complete Extension
Distal joint only	25%	35%
Proximal joint only	15%	20%
Distal and proximal joints	35%	65%
Carpometacarpal joint only	20%	20%
Distal, proximal and carpometacarpal joints	85%	100%

Fingers

Distal joint only	25%	35%
Middle joint only	75%	85%
Proximal joint only	40%	50%
Distal and middle joints	85%	100%
Distal, middle and proximal joints	100%	100%

(b) Loss of Motion

	Loss of Flexion	Loss of Use	Loss of Extension	Loss of Use
Fingers				
Distal joint only				
	10% -	1%	10% -	2%
	20% -	2%	20% -	4%
	40% -	3%	30% -	6%
	40% -	5%	40% -	8%
	50% -	10%	50% -	15%
	60% -	15%	60% -	20%
	70% -	20%	70% -	30%
	80% -	25%	80% -	40%
			100% -	60%
Middle joint only				
	10% -	5%	10% -	2½%
	20% -	10%	20% -	5%
	30% -	15%	30% -	10%
	40% -	25%	40% -	15%
	50% -	40%	50% -	30%
	60% -	50%	60% -	50%
	70% -	60%	70% -	70%
	80% -	70%	80% -	90%
			100% -	100%
Proximal joint only				
	10% -	5%	10% -	2½%
	20% -	10%	20% -	5%
	30% -	15%	30% -	15%
	40% -	20%	40% -	20%
	50% -	25%	50% -	25%
	60% -	30%	60% -	40%
	70% -	35%	70% -	75%
	80% -	40%	80% -	85%
			90% -	100%

Thumb

Distal joint same as fingers

Proximal joint 40% of the loss of use indicated for fingers

(13) Kidney

Loss of one kidney 5% permanent total disability.

(14) Loss of Smell

Total loss of sense of smell 2-1/2% permanent total disability.

History: Cr. Register, October, 1965, No. 118, eff. 11-1-65; r. and recr. Register, April, 1975, No. 232, eff. 5-1-75; r. and recr. (1), Register, September, 1982, No. 321, eff. 10-1-82; cr. (13) and (14), Register, September, 1986, eff. 369, eff. 10-1-86; am. (intro.), (3) to (5), (7), (9), (11) and (12) (a) and (b), Register, June, 1994, No. 462, eff. 7-1-94; reprinted to restore dropped copy in (1), Register, March, 1995, No. 471.

DWD 80.33 Permanent disabilities; fingertip amputations. In estimating permanent disability as a result of fingertip amputations, amputation of the distal one-third or less shall be considered the equivalent of 45% loss of use of the distal phalanx, amputation of not more than the distal two-thirds but more than the distal one-third shall be considered the equivalent of 80% loss of use of the distal phalanx, and amputation of more than the distal two-thirds shall be considered as 100% loss of the distal phalanx, provided there is not added disability as a result of malformed nail or tissue. In no case shall the allowance be greater than it would have been for amputation of the entire distal phalanx.

History: Cr. Register, October, 1965, No. 118, eff. 11-1-65; am. Register, November, 1970, No. 179, eff. 12-1-70.

DWD 80.34 Loss of earning capacity. (1) Any department determinations as to loss of earning capacity for injuries arising under s. 102.44 (2) and (3), Stats., shall take into account the effect of the injured employee's permanent physical and mental limitations resulting from the injury upon present and potential earnings in view of the following factors:

(a) Age;
(b) Education;
(c) Training;
(d) Previous work experience;
(e) Previous earnings;
(f) Present occupation and earnings;
(g) Likelihood of future suitable occupational change;
(h) Efforts to obtain suitable employment;
(i) Willingness to make reasonable change in a residence to secure suitable employment;
(j) Success of and willingness to participate in reasonable physical and vocational rehabilitation program; and
(k) Other pertinent evidence.

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.38 Assessment of administrative expenses. (1) For purposes of determining assessment payments under s. 102.75, Stats., "indemnity paid or payable" excludes:

(a) Payments made for medical, hospital or related expenses.

(b) Additional payments for penalties and increased compensation.

(c) Payments made into the work injury supplemental benefit fund.

(d) Payments made from the work injury supplemental benefit fund other than those paid under s. 102.44 (1), Stats.

(e) Payments made under ss. 102.475, 102.35, and 102.18 (1) (bp), Stats.

(f) Payments made under statutory provisions other than those of ch. 102, Stats.

(g) Payments made pursuant to a compromise agreement to the extent that they cannot be determined to be indemnity paid or payable under sub. (2).

(2) For purposes of determining assessment payments under s. 102.75, Stats., "indemnity paid or payable" includes:

(a) Supplemental benefit payments made under s. 102.44 (1), Stats., from the work injury supplemental benefit fund if they were determined to be payable prior to the time the case is initially closed.

(b) Death benefits paid under ss. 102.46, 102.47, 102.48 and 102.50, Stats.

(c) Portions of social security benefits, sick leave, holiday pay, salary and other wage continuation payments which offset or are paid in lieu of the daily or weekly indemnity due.

History: Cr. Register, September, 1984, No. 345, eff. 10-1-84.

DWD 80.39 Advance payment of unaccrued compensation. (1) The department may order partial or full payment of unaccrued compensation to an employee or his or her dependents pursuant to s. 102.32 (6), Stats., upon consideration of the following factors:

(a) The length of time since the injury;

(b) The total income of the employee or the dependent;

(c) The income of others in the employee's or the dependent's household;

(d) The age of the employee or the dependent;

(e) The other available assets of the employee or the dependent;

(f) The loss of benefits because of interest credit due to self-insured employer or insurance carrier;

(g) The purpose for which the advancement is requested;

(h) The other financial obligations of the employee or the dependent;

(i) The employment status of the employee or the dependent;

(j) If the advancement is requested for the purchase of real estate, the cost of the real estate and availability of other necessary financing for the real estate;

(k) The employee's or the dependent's previous experience in and likelihood of success in a proposed business venture;

(L) The probable income and security of any proposed investment; and

(m) Other information indicating whether an advancement is in the best interest of the applicant.

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.40 Assessment for unpaid claims of insolvent self-insurer. If an employer currently or formerly exempted from the duty to insure by order of the department under s. 102.28 (7) (b), Stats., is unable to pay any award and if judgement against such employer is returned unsatisfied, the department shall determine payment into the fund established by s. 102.28 (8), Stats., as follows:

(1) The department shall prepare an estimate of the payments that should be made by the insolvent exempt employer for a period of one year. If the department elects to retain an insurance carrier or insurance service organization under s. 102.28 (7), Stats., the department will prepare an estimate of the charges that will be made by such carrier or organization to process, investigate and pay such claims for the same one year period. The sum of these 2 amounts shall be divided by the total number of employers exempted under s. 102.28 (2), Stats.

(2) The department shall assess and order payment within 30 days by each exempt employer the amount determined under sub. (1) to the state treasurer for deposit in the fund created by s. 102.28 (8), Stats.

(3) The department shall prepare an estimate of the total remaining liability of the insolvent exempt employer and an estimate of the amount that may be recovered from that employer, its receiver or trustee in bankruptcy. Such estimates shall be communicated to all exempt employers.

(4) At least annually following the original order the department shall estimate the amount due and payable during the following year and the charges expected from any insurance carrier or claims service for such year and assess and order payment by each exempt employer its pro rata share determined as provided by s. 102.28 (7) (b), Stats.

(5) At the time orders are issued under sub. (4) the department shall prepare an estimate of the remaining liability of the insolvent exempt employer and the amount that may reasonably be expected to be recovered from such employer, its receiver or trustee in bankruptcy. Such estimates will be communicated to all exempt employers.

(6) All money due and payable to injured employees which remain unpaid shall be considered money payable during the following year in making estimates.

(7) All money recovered by the attorney general and paid into the fund shall be used in the payment of unpaid claims and shall be taken into account in making estimates and assessments.

History: Cr. Register, September, 1986, No. 369, eff. 10-1-86.

DWD 80.41 Computation of monthly salary and reimbursement to retirement fund under s. 66.191, Stats. (1) Fringe benefits shall not be included in the computation of salary, earnings or wages under s. 66.191, Stats., unless such benefits are income for Wisconsin income tax purposes.

(2) An eligible employee under s. 66.191, Stats., shall file with the department before an award is entered, as provided in s. 66.191, Stats., a waiver of disability annuity payments which may be due under s. 40.63, Stats., and further shall consent to reimbursement to the Wisconsin retirement fund of all disability benefits recovered under the provisions of s. 40.63, Stats.

Note: 1983 Wis. Act 191 repealed s. 66.191, Stats.

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.42 Vocational rehabilitation; reporting requirement. In order to determine whether or not an employee should be referred to the division of vocational rehabilitation for services, the self-insured employer or insurance carrier shall notify

the department whenever temporary total disability will exceed 13 weeks. This report shall be made within 13 weeks from the date of the initial disability or when such disability can be determined, whichever is earlier, and shall include a current practitioner's report.

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.43 Fees and costs. Section 102.26, Stats., provides for a maximum attorney's fee of 20% of the amount in dispute. Section 102.26 (3), Stats., places upon the department the responsibilities for fixing the fee and providing for the direct payment of the fee. In the exercise of this responsibility, the department shall take into account the following considerations:

(1) The department shall balance the need to preserve the maximum amount of benefits for the injured employee and the need for fees which are sufficient to insure adequate representation for claimants under ch. 102, Stats.

(2) Fees shall not be allowed on medical expenses to the extent that other sources, such as group insurance, are available to pay such expenses.

(3) Fees for permanent total disability shall not be allowed on compensation awards due beyond 500 weeks.

(4) The existence of a dispute under s. 102.26 (2), Stats., is dependent upon a disagreement after the employer or insurer has had adequate time and information to take a position on liability. Neither the holding of a hearing nor the filing of an application for a hearing alone may determine the existence of a dispute. However, a finding that a dispute exists shall not be precluded by an employer's or insurer's purposeful inactivity on the issue of liability.

(5) Where representation is the result of the representative's employment by an insurance carrier, an employer, a union, a social service agency or a public agency, the representative may not charge a fee on a contingency basis.

(6) Where there has been successive representation by various representatives, the division of fees by the department shall take into account the relative value of the services performed

by each representative, any concessions of disability, offers of settlement and other matters.

(7) Where a claimant appears by an attorney of

record any fee shall be payable to such attorney regardless of the cooperation or involvement of agents or other non-attorneys. The division of such fee with agents or other non-attorneys shall be at the discretion of the attorney of record. If there is disagreement among successive attorneys the department will make appropriate apportionment of any or all fees for services.

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82; cr. (7), Register, September, 1986, No. 369, eff. 10-1-86.

DWD 80.44 Witness fees and travel reimbursement. The fees and travel reimbursement of witnesses and interpreters for attending a hearing before an examiner of the department, shall be the statewide rate currently paid under s. 814.67 (1) (b), Stats., notwithstanding any local county variations.

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82; correction made under s. 13.93 (2m) (b) 7., Stats.

DWD 80.46 Contribution to support of unestranged surviving parent. In assessing support under s. 102.48, Stats., the payment of room and board by a child to his or her parent shall not be considered as contribution to support of the parent.

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.47 Medical release of employee for restricted work in the healing period. Even though an employee could return to a restricted type of work during the healing period, unless suitable employment within the physical and mental limitations of the employee is furnished by the employer or some other employer, compensation for temporary disability shall continue during the healing period.

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.48 Reassignment of death benefits. When a spouse who is entitled to death benefits remarries, the department shall reassign the death benefits to the children designated in ss. 102.51 (1) and 102.49, Stats., unless a showing is made that undue hardship would result for the spouse because of the reassignment.

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.49 Vocational rehabilitation benefits. **(1)** PURPOSE. The primary purpose of vocational rehabilitation benefits is to provide a method to restore an injured worker as nearly as possible to the worker's preinjury earning capacity and potential.

(2) ELIGIBILITY. The determination of eligibility for vocational rehabilitation training and whether a person is a suitable subject for training is the responsibility of the department of health and family services. If the department of health and family services determines that an employee is eligible to receive services under 29 USC 701 to 797b, but that the department of health and family services cannot provide those services for the employee, the employee may select a private rehabilitation specialist certified by the department to determine whether the employee can return to suitable employment without rehabilitative training and whether rehabilitative training is necessary to develop a retraining program to restore as nearly as possible the employee to his or her preinjury earning capacity and potential.

(3) 80-WEEK RULE. Extension of vocational rehabilitation benefits beyond 80 weeks may not be authorized pursuant to s. 102.61 (1) or (1m), Stats., if the primary purpose of further training is to improve upon preinjury earning capacity rather than restoring it.

(4) DEFINITIONS. In subs. **(4) to (11)**:

(a) "IWRP" or "individualized written rehabilitation program" means a plan developed by a specialist which identifies the vocational goal of a retraining program, the intermediate objectives to reach that goal and the methods by which progress will be measured.

(b) "Retraining program" means 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.

(c) "Specialist" means a person certified by the department to provide vocational rehabilitation services to injured employees under s. 102.61 (1m), Stats.

(d) Except as provided in sub. (5), "suitable employment" means a job within the employee's

permanent work restrictions for which the employee has the necessary physical capacity, knowledge, transferable skills and ability and which pays at least 85 percent of the employee's preinjury average weekly wage.

(5) SUITABLE EMPLOYMENT EXCEPTIONS. (a) A job offer at or above 85% of the average weekly wage shall not constitute suitable employment if:

1. An employee's education, training or employment experience demonstrates a career or vocational path; the average weekly wage on the date of injury does not reflect the earnings which the employee could reasonably have expected 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; or,

2. The employee's average weekly wage is calculated pursuant to the part-time wage rules in s. 102.11 (1) (f), Stats., or s. DWD 80.51 (4) and the employee's average weekly wage for compensation purposes exceeds the gross average weekly wages of the part-time employment.

(b) The average weekly wage for purposes of determining suitable employment under par. (a) 1. shall be determined by expert vocational evidence regarding the average weekly wage that the employee may have reasonably expected in the demonstrated career or vocational path.

(c) The average weekly wage for purposes of determining suitable employment under par. (a) 2. shall be determined by expert vocational evidence regarding the employee's age, educational potential, past job experience, aptitude, proven abilities, and ambitions on the date of injury.

(6) SPECIALIST CERTIFICATION. (a) A person may apply to the department for certification as a specialist at any time. The department may require applicants to submit, and certified specialists to regularly report, information describing their services, including the geographic areas served by the specialist and the nature, cost and outcome of services provided to employees under this section.

(b) After evaluating the information submitted under par. (a), the department shall certify a person as a specialist if the person has a license or certificate which is current, valid and otherwise in good standing as one of the following, or may certify the person as provided in par. (c):

1. Certified professional counselor with specialty in vocational rehabilitation from the department of regulation and licensing;

2. Certified insurance rehabilitation specialist from the certification of insurance rehabilitation specialists commission;

3. Certified rehabilitation counselor from the commission on rehabilitation counselor certification;

4. Certified vocational evaluator from the commission on certification of work adjustment and vocational evaluation specialists.

Note: The Certification of Insurance Rehabilitation Specialists Commission (CIRSC) and Commission on Rehabilitation Counselor Certification (CRC) are located at 1835 Rohlwing Road, Suite E, Rolling Meadows, Illinois 60008. The Commission on Certification of Work Adjustment and Vocational Evaluation Specialists is located at 7910 Woodmont Avenue, Suite 1430, Bethesda, Maryland 20814-3015.

(c) The department may certify a person as a specialist if the person has state or national certification, licensing or accreditation in vocational rehabilitation other than that required in par. (b) which is acceptable to the department. The department may require a specialist certified under this paragraph to serve a period of probation up to 3 years as a condition of certification. The department shall specify the conditions of the probationary certification. The department may revoke the probationary certification at any time without a hearing for conduct which violated the conditions of probation established by the department or conduct sufficient to decertify the specialist under par. (e).

(d) Unless certification is suspended or revoked under par. (e), certification by the department under par. (b) is valid for 3 years. If a specialist applies to the department to renew his or her certification before the expiration of the certification period, the certification shall remain in effect until the department renews or denies the application to renew. A renewal is valid for three years.

(e) Only the department may initiate a proceeding to suspend or revoke a specialist's certification under this section. The department may suspend or revoke a specialist's certification, after providing the specialist with a hearing, when the department determines that the specialist did not maintain a current, valid certificate or license specified in par. (b) or the specialist intentionally or repeatedly:

1. Fails to comply with the provisions of ch. 102, Stats., or ch. DWD 80;

2. Fails to comply with the orders, rulings, reporting requirements or other instructions of the department or its representatives;

3. Charges excessive fees compared to the value of the services performed or ordered to be performed; or,

4. Misrepresents the employee's work history, age, education, medical history or condition, diagnostic test results or other factors significantly related to an employee's retraining program.

(f) The department shall maintain a current listing of all specialists certified by the department, including the areas they serve, and shall provide the list at no charge to employees, employers, insurers, and others.

(7) EMPLOYEE CHOICE. (a) At the end of the medical healing period, the self-insured employer or insurance carrier shall notify the employee, on a form provided by the department, of the employee's potential eligibility to receive rehabilitation services.

Note: Forms can be obtained from the Department of Workforce Development, Worker's Compensation Division, 201 E. Washington Ave. P.O. Box 7901, Madison, Wisconsin 53707-7901.

(b) The department shall arrange with the department of health and family services to receive timely notice whenever the department of health and family services determines under s. 102.61 (1m), Stats., that it cannot serve an eligible employee. When the department of health and family services notifies the department that it cannot serve an eligible employee, the department shall mail to the employee and the self-insured employer or insurance carrier a list of certified specialists serving the area where the employee resides.

(c) The employee may choose any certified specialist. The employee may choose a second certified specialist only by mutual agreement with the self-insured employer or insurance carrier or with the permission of the department. Partners are deemed to be one specialist.

(d) A specialist selected by an employee under par. (c) shall notify the department and the self-insured employer or insurance carrier within 7 days of that selection. The department may develop a form for this purpose.

Note: Forms can be obtained from the Department of Workforce Development, Worker's Compensation Division, 201 E. Washington Ave., P.O. Box 7901, Madison, Wisconsin 53707-7901.

(e) The self-insured employer or insurance carrier is liable for the reasonable and necessary cost of the specialist's services and the reasonable cost of the training program recommended by the specialist provided that the employee and the specialist substantially comply with the requirements in subs. (8) to (11). Except with the prior consent of the self-insured employer or insurance carrier, the reasonable cost of any specialist's services to the employee shall not exceed $1,000 for each date of injury as defined in s. 102.01 (2) (g), Stats. Effective on the first day of January each year after 1995, the department shall adjust the $1,000 limit by the same percentage change as the average annual percentage change in the U.S. consumer price index for all urban consumers, U.S. city average, as determined by the U.S. department of labor, for the 12 months ending on September 30 of the prior year. The department shall notify insurance carriers, self-insured employers and specialists likely to be affected by the annual change in the limit.

(8) EMPLOYER'S DUTIES UPON RECEIPT OF PERMANENT RESTRICTIONS. Upon receiving notice that the department of health and family services cannot serve the employee under s. 102.61 (1m), Stats. the employee or a person authorized to act on the employee's behalf shall provide the employer with a written report from a physician, podiatrist, psychologist or chiropractor stating the employee's permanent work restrictions. Within 60 days of receiving the practitioner's work restrictions, the employer shall provide to the employee or the employee's authorized representative, in writing:

(a) An offer of suitable employment for the employee;

(b) A statement that the employer has no suitable employment available for the employee; or,

(c) A medical report from a physician, podiatrist, psychologist or chiropractor showing that the permanent work restrictions provided by the employee's practitioner are in dispute, and medical or vocational documentation that the difference in work restrictions would materially affect either the employer's ability to provide suitable employment or a specialist's ability to recommend a retraining program. If after 30 days the employee and employer cannot resolve the dispute, either party may request a hearing before the department to determine the employee's work restrictions. Within 30 days after the department determines the restrictions, the employer shall provide the written notice required in par. (a) or (b).

(9) 90-DAY PLACEMENT EFFORT. (a) If the employer fails to respond as required in sub. (8), it shall be conclusively presumed for the purposes of

s. 102.61 (1m), Stats., that the employer has no suitable employment available and the employee is entitled to receive vocational rehabilitation services from a specialist.

(b) If the employer does not make a written offer of suitable employment under sub. (8), the specialist shall determine whether there is suitable employment available for the employee in the general labor market without retraining. If suitable employment is reasonably likely to be available, the specialist shall attempt to place the employee in alternative suitable employment for at least 90 days prior to developing a retraining program. The employee shall cooperate fully in the specialist's placement efforts and may not refuse an offer of suitable employment made within the 90-day period. In determining whether the offer is suitable the department shall consider age, education, training, previous work experience, previous earnings, present occupation and earnings, travel distance, goals of the employee, and the extent to which it would restore the employee's preinjury earning capacity and potential.

(c) If the employee is placed in or refuses to accept suitable employment, the self-insured employer or insurance carrier is not liable for any further costs of the specialist's services unless that suitable employment ends within the statute of limitations in s. 102.17 (4), Stats.

(10) RETRAINING. (a) If, after reasonably diligent effort by the employee and the specialist, the employee does not obtain suitable employment, then there is a rebuttable presumption that the employee needs retraining. The presumption is rebuttable by evidence that:

1. No retraining program can help restore as nearly as possible the employee's wage earning capacity;

2. The employee or the specialist did not make a reasonably diligent effort under sub. (9) (b) to obtain suitable employment for the employee; or

3. The employee or specialist withheld or misrepresented highly material facts.

(b) A retraining program of 80 weeks or less is presumed to be reasonable and the employer shall pay the cost of the program, mileage and maintenance benefits, and temporary total disability benefits.

(c) A retraining program more than 80 weeks may be reasonable, but there is no presumption that training over 80 weeks is required. Extension of vocational rehabilitation benefits beyond 80 weeks may not be authorized if the primary purpose of further training is to improve upon preinjury earning capacity rather than restoring it.

(d) If the retraining program developed by the specialist is for more than 80 weeks, the self-insured employer or the insurance carrier may offer an alternative retraining program which will restore the employee's preinjury earning capacity in less time than the retraining program developed by the specialist. An employee may not refuse a self-insured employer's or insurance carrier's timely, good-faith, written offer of an alternative retraining program without reasonable cause.

(11) SPECIALIST'S SERVICES. (a) A specialist shall develop an individualized written rehabilitation program for a retraining program for the employee, and may amend it to achieve suitable employment.

(b) A specialist shall make periodic written reports at reasonable intervals to the employee, employer and insurance carrier describing vocational rehabilitation activities which have occurred during that interval.

(c) Within a reasonable period of time after receiving a written request from an employee, employer, worker's compensation insurance carrier or department or their representatives, a specialist shall provide that person with any information or written material reasonably related to the specialist's services to the employee undertaken as a result of any injury for which the employee claims compensation.

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82; emerg. am. (2), r. (3), renum. (4) to be (3), cr. (4) to (11), eff. 11-7-94, am. (2), r. (3), renum. (3) to be (4) and am., cr. (4) to (11), Register, April, 1995, No. 472, eff. 5-1-95; corrections in (2) and (5) (a) 2. made under s. 13.93 (2m) (b) 7., Stats., Register, July, 1996, No. 487; eff. 8-1-96; corrections made under s. 13.93 (2m) (b) 6., Stats., Register, December, 1997, No. 504.

DWD 80.50 Computation of permanent disabilities. (1) In computing permanent partial disabilities, the number of weeks attributable to more distal disabilities shall be deducted from the number of weeks in the schedule for more proximal disabilities before applying the percentage of disability for the more proximal injury, except that:

(a) Such a deduction shall not include multiple injury factors under s. 102.53, Stats.; and

(b) Such a deduction shall include preexisting disabilities.

(2) The number of weeks attributable to scheduled disabilities shall be deducted from 1,000 weeks before computing the number of weeks due for a non-scheduled disability resulting from the same injury. This deduction shall not include multiple injury factors under s. 102.53, Stats.

(3) Multiple injury factors under s. 102.53, Stats., do not apply to compensation for disfigurement under s. 102.56, Stats.

History: Cr. Register, August, 1981, No. 308, eff. 9-1-81; r. and recr. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.51 Computation of weekly wage. Pursuant to s. 102.11, Stats.

(1) In determining daily earnings, if the number of hours a full-time employee worked had been either decreased or increased for a period of at least 90 total days prior to the injury, then this revised schedule worked during those 90 days shall be considered to be normal full-time employment.

(2) When an employee furnishes his or her truck to the employer and is paid by the employer in gross to include operating expenses, one-third of that gross sum is considered as wages except as a showing is made to the contrary.

(3) Prisoners injured in prison industries are considered to be earning the maximum average weekly earnings under the provisions of s. 102.11, Stats., except as a showing is made to the contrary.

(4) The 30 hour minimum workweek under s. 102.11 (1) (f), Stats., does not apply to a part-time employee unless the employee is a member of a regularly scheduled class of part-time employees. In all other cases part-time employment is on the basis of normal full-time employment in such job. However, this subsection does not apply to part-time employees defined in s. 102.11 (1) (f), Stats., who restrict availability on the labor market. As to the employees so defined, those wages will be expanded to the normal part-time or full-time wages unless the employer or insurance company complies with s. DWD 80.02 (2) (a).

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.60 Exemption from duty to insure (self-insurance). (1) DEFINITIONS. In this section:

(a) "Applicant" means a business entity applying for self-insurance.

(b) "Divided-insurance" means consent to the issuance of 2 or more policies, as provided in s. 102.31 (1), Stats.

(c) "Employer" means a business entity or its parent guaranteeing payments.

(d) "Excess insurance" means catastrophic insurance for employers granted self-insurance, and is not full-insurance, self-insurance, partial-insurance or divided-insurance.

(e) "Full-insurance" means the insurance of all liability by one policy, as required in s. 102.31 (1) (a), Stats.

(f) "Partial-insurance" means self-insurance of a part of the liability and consent to the issuance of one or more policies on the remainder of the liability, as provided in ss. 102.28 (2) (b) and 102.31 (1), Stats.

(g) "Self-insurance" means exemption from the duty to insure, as provided in s. 102.28 (2) (b), Stats.

(2) EXCESS INSURANCE. Excess insurance may be carried without further order of the department or may be required by order of the department as set forth in sub. (4) (d) 3. and 7.

(3) REQUIREMENTS FOR THE STATE AND ITS POLITICAL SUBDIVISIONS. (a) The state and its political subdivisions may self-insure without further order of the department, if they are not partially-insured or fully-insured, or to the extent they are not partially-insured by written order under s. 102.31 (1), Stats., under one or more policies, and if they agree to report faithfully all compensable injuries and agree to comply with ch. 102, Stats., and the rules of the department. However, any such employer desiring partial-insurance or divided-insurance must submit an application to the department and be given special consent as described in s. DWD 80.61.

(b) 1. Any political subdivision or taxing authority of the state electing to self-insure shall notify the department in writing of the election before undertaking self-insurance, every 3 years after the initial notice, and 30 days before withdrawing from the self-insurance program.

2. The notice of election to self-insure shall be accompanied by a resolution, adopted by the governing body and signed by the elected or appointed chief executive of the applying political subdivision or taxing authority, stating its intent and agreement by the governing body to self-insure its worker's compensation liability and an agreement to

faithfully report all compensable injuries and to comply with ch. 102, Stats., and the rules of the department in accordance with s. 102.28 (2) (b) and (c), Stats.

(c) Self-insurance granted under par. (a) is subject to revocation under s. 102.28 (2) (c), Stats. Once the privilege of self-insurance is revoked, further self-insurance may be authorized only under the procedures set forth in sub. (4).

(4) REQUIREMENTS FOR OTHER EMPLOYERS. (a) Employers other than those specified in sub. (3), but including those specified in sub. (3) (c), desiring self-insurance shall submit an application on a form available from the department. A non-refundable fee, determined by the department as described in par. (ag), per employer, shall accompany the initial application. If the application is approved, the department shall permit self-insurance by written order. Every 3 years, a self-insured employer shall submit an application to renew self-insurance at least 60 days before the expiration date specified in the department's order. Each quarter, or more often if requested by the department, a self-insured employer shall submit the most current financial statements to the department. Each year, a self-insured employer shall report work-injury claims payments to the department and other information related to worker's compensation liability requested by the department. A self-insured employer shall immediately report to the department in writing any change in organizational structure that differs from the information provided in the annual report submitted to the department, including mergers, acquisitions, company name changes, consolidation, sale, or divestiture of divisions or subsidiaries. After a change in organizational structure, the department may revoke or modify the exemption from the duty to insure by providing reasonable written notice to the self-insured employer. If these changes result in the creation of a new parent or subsidiary, the department may waive or modify the requirement in par. (b) 1. to submit 5 years of audited financial statements. A fee of $200, per employer, and the assessment surcharge described in par. (am) may be billed by the department at the same time as the annual assessment under s. 102.75 (1), Stats. Self-insurance shall expire on the day specified by the department in its order. Unless the context indicates otherwise, all information submitted to the department to comply with this section shall be submitted on the latest version of a department approved form.

Note: For information regarding forms contact the Department of Workforce Development, Worker's Compensation Division, Bureau of Insurance Programs, 201 East Washington Avenue, P.O. Box 7901, Madison, Wisconsin 53707-7901.

(ag) In addition to any fee-for-service costs under par. (ax), the department shall charge each initial applicant for self-insurance a flat fee which the department estimates is the average cost for department employees to review the application for self-insurance, including employee salary and fringe benefits, supplies, services and administrative costs, and information technology charges. The department shall review and, if necessary, modify the fee at least every 2 years.

(am) In addition to any fee-for-service costs under par. (ax), each year the department shall assess each self-insured employer except those specified in sub. (3), but including those specified in sub. (3) (c), a $200 fee and a proportionate share of the department's remaining costs to administer the self-insurance program after deducting the total amount estimated to be collected from the $200 fees and the fees charged under par. (ag) for initial applications. The department shall determine the assessment amount under this paragraph in the same manner as costs and expenses are apportioned in s. 102.75 (1), Stats.

(ax) To assist the department in evaluating an initial application or a renewal application for self-insurance, the department may contract for financial, loss control or other fee-for-service expertise or it may direct the applicant to provide the necessary information. The department shall charge the applicant for self-insurance the full cost of any fee-for-service expenses which the department incurs in evaluating the application for self-insurance. If these charges are related to an application for renewal of self-insurance, the department may bill the employer at the same time as the annual assessment under s. 102.75 (1), Stats.

(b) The minimum requirements necessary for initial consideration for self-insurance are set forth in this paragraph. References in this paragraph to "board of directors" and "stockholders of the corporation" apply only to corporations but an equivalent requirement as determined by the department shall be applied to sole proprietorships, partnerships and other forms of business ownership.

1. The applicant, when submitting an initial request for self-insurance, shall submit audited financial statements (which includes the opinion of a certified public accountant) for a minimum of the latest five. Except as authorized by the department, employers self-insured under this subsection shall submit to the department audited or unaudited financial statements each quarter and audited financial statements each year.

2. If the employer is a corporation or a partnership which is a majority or wholly owned subsidiary, it shall submit to the department a guaranty of payments by the ultimate or top parent company on a department form and a certified copy of the resolution adopted by the board of directors of the parent corporation.

3. If the employer is a corporation, it shall submit a certified copy of the resolution adopted by the board of directors authorizing the execution of the initial application:

a. Applications by organizations other than corporations shall be signed by one or more persons possessing authority to execute such application.

b. Partnerships must submit a consent by all the partners that all individuals executing the application have the authority to act for the applicant partnership.

4. Corporations, limited partnerships and limited liability companies shall be registered in the office of the department of financial institutions.

5. The employer shall submit a copy of its current safety and loss control plan.

(c) The following criteria may be considered by the department in evaluating the qualifications of an applicant for the initial application or renewal of self-insurance status:

1. The financial strength and liquidity of the employer to include: profit and loss history; financial and performance ratios; characteristics and trends for the employer or the consolidated group of employers to which the employer belongs; characteristics and trends for other employers of the same or the most similar industry in which the employer or the employer's consolidated group is involved;

2. The employer's organizational structure, management background, kind of business, length of time in business, and any intended or newly implemented reorganization including but not limited to merger, consolidation, acquisition of new business, divesting or spinning off of assets or other changes;

3. The nature and extent of the employer's business operations and assets in the state of Wisconsin;

4. The employer's bond or other business ratings;

5. The number of employer's employees, payroll and hours worked in Wisconsin;

6. The employer's performance indicators under ch. 102, Stats., including, but not limited to, promptness or time taken in making first indemnity payments, promptness or time taken in submitting first reports, and injury and illness incidence and severity rates;

7. The existing or proposed claims administration, occupational health, safety, and loss control programs to be maintained by the employer. The department may require certification of the occupational safety and health program by state or independently qualified specialists;

8. The worker's compensation loss history, experience modification factor, reported losses, loss reserves and worker's compensation premium of the employer; and

9. Excess insurance, surety bond, cash deposit or pledges of the employer, guaranty by the parent company, or other guarantees or pledges acceptable to the department.

(d) The required minimum bond, minimum amount of cash, letter of credit or securities deposits, minimum acceptable excess insurance upper limit, maximum excess insurance retention, or other security satisfactory to the department, shall be determined after the application has been reviewed and analyzed by the department. The employer and the employer's surety or other agent providing security shall use the latest version of any forms required by the department. All surety bonds and excess policies shall be written on standard forms approved by the Wisconsin compensation rating bureau or the commissioner of insurance, or both. Any change in the language used in the approved standard form is not accepted unless the department approves it in writing. The following conditions shall also apply to self-insured employers:

1. Surety bonds shall be written by companies authorized to transact surety business in Wisconsin and acceptable to the department.

2. Cash or equivalent securities shall be deposited with banks or trust companies authorized to exercise trust powers in Wisconsin and acceptable to the department. These securities shall be negotiable and converted into cash at anytime by the depository at the request of the department.

3. If excess insurance is required by the department, it shall be procured from a licensed excess insurance carrier and written on the basis of rates and policy form filed with and approved by the state of Wisconsin commissioner of insurance. The policy for the required excess insurance shall be filed with and approved by the Wisconsin compensation rating bureau.

4. Each self-insured employer shall provide security of at least $500,000. The department may increase the minimum required security amount after considering the criteria in par. (c).

5. If the self-insured employer provides a surety bond, the surety company shall pay worker's compensation liabilities of the employer up to the aggregate amount of the bond without deducting any of its costs for investigating, paying, defending against, or providing other services related to the worker's compensation claims. If a self-insured employer has more than one surety bond, the surety company whose bond is in effect on the date of injury is liable for claims related to that injury.

6. If the self-insured employer provides security in any form other than a surety bond, the department shall add 30 percent to the minimum amount in subd. 4.

7. Each employer self-insured under this subsection shall obtain a specific per occurrence excess insurance policy with retention and maximum limits approved by the department and in a form approved by the Wisconsin compensation rating bureau under ch. 626, Stats. In determining the limits the department shall consider, among other things, the criteria in par. (c).

(dm) The department may call and use any security provided by an employer under par. (d) to pay that employer's worker's compensation liabilities and to administer that employer's worker's compensation claims if the department has a reasonable basis to believe that the employer is not able or will not be able to timely pay the worker's compensation liabilities incurred during the period for which that employer was authorized to be self-insured. The department may contract with a third-party administrator or other agent to administer payments. The employer is responsible for any unpaid liabilities. Within 2 working days of receiving written notice from the department, the employer whose security was called shall provide the department with the names and addresses of all present and former employees of the employer during the most recent 3 years in which the employer was self-insured. Within 30 days of receiving written notice from the department, the employer whose security was called shall provide the department with copies of any worker's compensation, medical or employment files requested by the department or summary information related to those files in a format requested by the department.

Note: In addition to a demonstrated failure to make timely worker's compensation payments, "a reasonable basis to believe that an employer...will not be able to timely pay worker's compensation liabilities" is intended to include such things as proceedings before bankruptcy court which may have an adverse financial impact on the employer or credible reports that an employer is preparing to seek some form of shelter in bankruptcy or receivership.

(dx) A surety or bonding company shall provide the department with a written plan acceptable to the department for the review and payment of any worker's compensation liability of the self-insured employer within 15 days after the department notifies the surety or bonding company that it is calling the bond. When the department approves the plan the surety or bonding company may contract with a third-party administrator or other agent to pay worker's compensation benefits and other liabilities.

(e) Whenever the department has reason to believe that an employer currently or previously granted self-insurance for its parent or subsidiary company is liquidating and distributing its assets to its owners, or is selling or is about to sell the tangible property it owns and maintains in Wisconsin and the employer or its parent or subsidiary company is moving or is about to move its operations out of Wisconsin, without providing for the payment under the terms of the agreement in the self-insurance application or guaranty form it has executed and submitted to the department, the department may, through the attorney general, cause a petition to be filed to enjoin and restrain the employer from engaging in such action until such time as all obligations of self-insurance meet the satisfaction of the department. Whenever an employer exits self-insurance status the department

may require such employer to provide all available information regarding past or outstanding worker's compensation claims or liability and may require securities sufficient to provide payment for those claims or liabilities.

(f) The department may require a self-insured employer to update the information provided in pars. (b) to (e) at any time.

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82; am. (3), (4) (a), (b) (intro.) and (c) (intro.), cr. (4) (b) 11., Register, September, 1986, No. 369, eff. 10-1-86; emerg. r. (4) (b) 1., renum. (4) (b) 2. to 11. to be 1. to 10., eff. 3-22-88; am, (4) (b) (intro), r. (4) (b) 1., renum. (4) (b) 2. to 11. to be 1. to 10., Register, August, 1988, No. 392, eff. 9-1-88; am. (1), (2), (3) (b) and (4), Register, April, 1990, No. 412, eff. 5-1-90; am. (4) (a), cr. (4) (ag) to (ax), (f), Register, July, 1996, No. 487, eff. 8-1-96; am. (2), (3) (b), (4) (a), (am), (4) (b) 1. and 4., (4) (d) (intro.), cr. (4) (d) 4. to 7., (dm) and (dx), Register, November, 1998, No. 515, eff. 12-1-98.

DWD 80.61 Divided-insurance and partial-insurance requirements under s. 102.31 (1) and (6), for all employers, including contractors working on a wrap-up project. (1) DEFINITIONS. In this section:

(a) "Divided-insurance" means consent to the issuance of 2 or more policies, as provided in s. 102.31 (1), Stats.

(b) "Partial-insurance" means self-insurance of a part of the liability and consent to the issuance of one or more policies on the remainder of the liability, as provided in ss. 102.28 (2) (b) and 102.31 (1), Stats.

(2) REQUIREMENTS.

(a) The requirements for partial-insurance and divided-insurance by 2 or more insurance companies are as follows:

1. Submission of an application on department forms available from the department. If the application is approved, the department shall permit partial-insurance or divided-insurance by written order. In the application, the employer shall agree to assume full responsibility to immediately make all payments of compensation and medical expense as the department may require, pending a final determination as to liability between the insurance carriers under divided-insurance or between the employer and the insurance carrier under partial-insurance, if a dispute should arise as to which insurance company or whether the employer or insurance company is responsible for a particular injury or illness sustained during the time the written order is in effect.

2. If the applicant is a political subdivision of the state, it shall submit a certified statement by an officer or the attorney for the political subdivision which cites the legal authority for executing the application and agreement when the initial application is submitted.

3. If the employer is a corporation, it shall submit a certified copy of the resolution adopted by the board of directors authorizing the execution of the initial application. Applications by organizations other than corporations shall be signed by person(s) possessing authority to execute such application. Partnerships must submit a consent by all the partners that the individual(s) executing the application has the authority to act for the applicant partnership.

4. Partial-insurance or divided insurance shall not be permitted when the portion of the entity to be insured is unable to obtain coverage under voluntary markets. Otherwise,

a. The department shall permit divided-insurance to municipalities which have ownership of nursing homes in order that the nursing homes may be separately insured and develop a separate experience rate.

b. Subdivision 4. a. does not apply after December 31, 1992.

(b) Renewal applications shall be submitted to the department on a department form no later than 3 months prior to the expiration date of the department's order. Partial-insurance and divided-insurance shall expire on the date specified in the order unless continued in force by further order, as the department deems necessary.

(3) DIVIDED-INSURANCE FOR DESIGNATED CARRIER WRAP-UP CONSTRUCTION PROJECTS. (a) Definitions. In this subsection:

1. "Bureau" means the Wisconsin compensation rating bureau.

2. "Designated wrap-up carrier" means the designated carrier or insurance company which insures the wrap-up project under ch. 102, Stats.

3. "Job site" means the premises and vicinity upon which the operations covered under the contract with the contractor or subcontractor are to be performed.

4. "Material supplier" means vendors, suppliers, material dealers, and others whose function is solely to supply or transport material, equipment, or parts to or from the construction site.

5. "Owner" means the person, firm, corporation or municipality having lawful possession of the construction project.

6. "Regular carrier" means the insurance company which insures all operations of a contractor or subcontractor under ch. 102, Stats., except for work done on the wrap-up project.

7. "Subcontractor" means a person who contracts with a contractor and also includes any subcontractor of a subcontractor.

8. "Wrap-up project" means a construction project wherein the owner selects a carrier, and this carrier issues a separate worker's compensation policy to each contractor and subcontractor scheduled to work on the project for work which will be done on the project, and where the owner pays for each such policy.

(b) Minimum wrap-up project requirements. Wrap-up projects shall comply with the following:

1. The estimated project cost of completion shall be equal to at least $25 million. The estimated project cost of completion shall be the estimate of the costs of the total construction contracts to be awarded by the owner on the wrap-up project.

2. The estimated standard worker's compensation manual premium shall be equal to $250,000 or more.

3. The project shall be confined to a single location except that in connection with the building of a road, bridge, pipeline, tunnel, waterway, or 2 or more concurrent wrap-up projects involving the same owner and the same insurance carrier the entire job or the concurrent projects are considered as a single project location.

4. The project shall have a definite completion date involving work to be performed continuously until completion and may not be extended to include maintenance work following completion.

5. All contractors and subcontractors shall be included under the wrap-up program.

6. All material suppliers shall be included in the safety program on the job site while unloading and handling material and performing other work, but material suppliers shall be excluded from the rest of the wrap-up program.

7. The submission of all bids and the letting of all contracts shall be on an ex-insurance basis.

(c) Minimum requirements for owner. The owner shall comply with the following requirements on a wrap-up project:

1. The wrap-up plan and application shall be submitted on department form WKC-7208 W-U to the department. If the application is approved, the department shall permit divided-insurance on the wrap-up project.

2. The owner shall comply with all conditions and agreements in the application, including, but not limited to:

a. The reimbursement of the department's costs incurred because of the wrap-up project;

b. The selection of a licensed and qualified designated wrap-up carrier having a record of compliance with the requirements of ch. 102, Stats., which is acceptable to the department;

c. Informing each contractor and subcontractor and each contractor's and subcontractor's insurance company either directly or through the bureau, at the bureau's discretion, of each one's responsibilities and the need for attaching a proper endorsement to the regular carrier's policy to exclude coverage for the wrap-up job site;

d. The submission of each contractor's and subcontractor's application form WKC-7213 W-U to the bureau prior to the time the contractor or subcontractor first starts work on the wrap-up project;

e. The notification of department and bureau of any entity status change resulting from ensuing reorganization;

f. The assumption of responsibility for immediately making direct compensation payments if a dispute arises over coverage; and

g. The payment of an employee's attorney's fees and lost wages resulting from a dispute.

3. If the owner is a corporation, it shall submit a certified copy of the resolution by the board of directors authorizing and directing the execution of the application and agreement.

4. If the owner is a subsidiary of a corporation, it shall submit a guaranty and agreement by the owner's ultimate or top parent company agreeing to promptly satisfy all of the requirements and obligations assumed by the owner on the wrap-up project in case of default by the owner.

(d) Minimum requirements for designated wrap-up carrier.

1. The designated wrap-up carrier shall submit an application on forms available from the department. If the application is approved, the department shall permit divided-insurance for each

contractor and subcontractor scheduled to work on the wrap-up project.

2. The designated wrap-up carrier shall comply with all conditions and agreements in the application, including, but not limited to:

a. Informing each contractor's and subcontractor's insurance company either directly or through the bureau, at the bureau's discretion, of each one's responsibilities and the need for attaching a proper endorsement to the regular carrier's policy to exclude coverage for the wrap-up job site;

b. The issuance of each individual contractor's and subcontractor's wrap-up policy prior to the time the contractor and subcontractor begin work on the job site;

c. The notification of department and bureau of any entity status change resulting from ensuing reorganization;

d. Becoming the full risk insurer for any contractor or subcontractor not having purchased a worker's compensation policy during the time the contractor or subcontractor is under contract on the wrap-up project, except as to an employer granted self-insurance; and

e. Becoming the full risk insurer for any contractor or subcontractor not insured or self-insured while working on the wrap-up project.

3. The designated wrap-up carrier shall submit a certified copy of a statement from an officer authorizing and directing the execution of the application and agreement.

(e) Application for contractors and subcontractors. The owner shall submit an application for divided insurance on forms available from the department for each contractor and subcontractor scheduled to work on the project.

(em) Waiver of requirements. The department may waive one or more requirements in pars. (b) to (e) if it determines that a waiver will not impair the construction owner's ability to ensure minimum confusion about insurance coverage and maximum safety on the construction project site.

(f) Reimbursement for expenses incurred by department. The department shall be reimbursed for those expenses incurred because of the designated carrier wrap-up program. Where the department specifically consents to divided-insurance or partial-insurance on a wrap-up project, the owner shall reimburse the department, within 30 days after the date of a written request by the department, a sum determined by the department not to exceed 2% of the total audited worker's compensation premium charged, with payment not to exceed 1% of the estimated worker's compensation premium upon initial request. If an additional levy is determined to be necessary, a request shall be made for a sum that results in a total charge not to exceed 2% of the total audited worker's compensation premium charged.

(g) Inapplicability to other employers. Subsection (3) does not apply to any group of employers other than those specified in this section on any other type of operations nor to any single contract or policy of insurance for any group or association of employers.

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82; am. (2) (a) 1., (3) (b) 3. and (3) (d) 3., r. and recr. (3) (e), Register, September, 1986, No. 369, eff. 10-1-86; am. (2) (a) 2. to (c), Register, April, 1990, No. 412, eff. 5-1-90; cr. (3) (em), Register, April, 1994, No. 460, eff. 5-1-94.

DWD 80.62 Uninsured employers fund. (1) PURPOSE. The purpose of this section is to clarify the department's procedures for handling claims for compensation to injured workers under s. 102.81 (1), Stats. This section also defines the financial standards and actuarial principles which the department will use to monitor the adequacy of the cash balance in the fund to pay both known claims and claims incurred but not reported under s. 102.81 (1), Stats.

(2) DEFINITIONS. In this section:

(a) "Agent" means a third-party administrator or other person selected by the department to assist in the administration of the uninsured employers fund program.

(b) "Case reserve" means the best estimate documented in the claim-loss file of all liability to pay compensation on a claim under s. 102.81 (1), Stats.

(c) "Claim" means an injury suffered by an employee of an uninsured employer for which the uninsured employer is liable under s. 102.03, Stats., and which is reported to the department on a form approved by the department for reporting work-related injuries.

(d) "Fund" means the uninsured employers fund in s. 102.80, Stats.

(e) "Incurred but not reported reserve" or "IBNR reserve" means the best actuarial estimate of liability to pay compensation under s. 102.81 (1), Stats., for injuries which occurred on or prior to the

current accounting date, for which there is no claim yet reported to the department.

(f) "Insolvent" means inadequate to fund all claims under s. 102.81 (1), Stats.

(g) "Solvent" means adequate to pay all claims under s. 102.81 (1), Stats.

(h) "Ultimate reserve" means the best actuarial estimate of aggregate case reserves from all claims, the expected future development of claims that have been reported, and IBNR reserve.

(i) "Uninsured employer" means an employer who is subject to ch. 102 under s. 102.04 (1), Stats., and who has not complied with the duty to insure or to obtain an exemption from the duty to insure under s. 102.28 (2) or (3), Stats.

(3) REPORTING A CLAIM. (a) In addition to the notice to an employer required under s. 102.12, Stats., an employee shall report a claim for compensation under s. 102.81, Stats., to the department on a form provided by the department within a reasonable time after the employee has reason to believe that an uninsured employer may be liable for the injury.

Note: For information regarding forms contact the Department of Workforce Development, Worker's Compensation Division, P.O. Box 7901, Madison, Wisconsin 53707-7901.

(b) After receiving a claim under par. (a), the department shall determine whether the employer is an uninsured employer by reviewing its own records and the records maintained by the Wisconsin compensation rating bureau. Within 14 days after receiving a claim under par. (a), the department shall send the employer written notice that a claim has been reported and that the department has made an initial determination that the employer is, or is not, an uninsured employer with respect to the claimed injury. The department shall send a copy of the notice to the employee who filed the claim. If the department later modifies its initial determination regarding the employer's insurance status with respect to a claim reported under this section, it shall promptly notify the employer and the employee of the reason for the modification and the likely impact of this change on the claim, if any. The employer shall notify its insurance carrier of any modification if the department determines that the employer is an insured employer.

(c) If the department determines that the employer is an uninsured employer it shall promptly seek reimbursement as provided in s. 102.82 (1), Stats., and additional payments to the fund as provided in s. 102.82 (2), Stats. The department may also initiate penalty proceedings under s. 102.85, Stats. If the department determines that the employer is not an uninsured employer it shall notify the parties and close the claim. Nothing in this section shall prevent the department from taking other appropriate action on a claim including 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, Stats.

(4) PAYING A CLAIM. Within 14 days after a claim is reported to the department, the department or its agent shall mail the first indemnity payment to the injured employee, deny the claim or explain to the employee who filed a claim the reason that the claim is still under review. The department or its agent shall report to the employee regarding the status of the claim at least once every 30 days from the date of the first notification that the claim is under review until the first indemnity payment is made or the claim is denied.

(5) EMPLOYEE COOPERATION. (a) An employee who makes a claim shall cooperate with the department or its agent in the investigation or payment of a claim.

(b) The department or its agent may deny compensation on a claim if an employee fails to provide reasonable assistance to the department or its agent, including recorded interviews, questionnaire responses, medical and other releases, copies of relevant payroll checks, check stubs, bank records, wage statements, tax returns or other similar documentation to identify the employer who may be liable for the injury under s. 102.03, Stats. The department or its agent may also require the employee to document any medical treatment, vocational rehabilitation services or other bills or expenses related to a claim. To verify information submitted in support of a claim for compensation the department or its agent may share information related to a claim with other governmental agencies, including those responsible for tax collection, unemployment insurance, medical assistance, vocational rehabilitation, family support or general relief. Any information obtained from a patient health care record or that may constitute a patient health care record will be shared only to the extent authorized by ss. 146.81 to 146.84, Stats.

(c) If an employee fails to cooperate as required by par. (b), the department may suspend action upon an application filed under s. 102.17 (1), Stats., or may issue an order to dismiss the application with or without prejudice.

(6) EMPLOYER COOPERATION. An employer who is alleged to be uninsured shall cooperate with the department or its agent in the investigation of a claim by providing any records related to payroll, personnel, taxes, ownership of the business or its assets or other documents which the department or its agent request from the employer to determine the employer's liability under s. 102.03, Stats. If an employer fails to provide information requested under this subsection, the department may presume the employer is an uninsured employer.

(7) DEPARTMENT AGENTS. (a) The department may select one or more agents to assist the department in its administration of the uninsured employers program, including agents selected for any of the following:

1. To receive, review, record, investigate, pay or deny a claim.

2. To represent the legal 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, Stats.

3. To seek reimbursement from employers under s. 102.82 (1), Stats., for payments made from the fund to or on behalf of employees or their dependents.

4. To seek additional payments to the fund under s. 102.82 (2), Stats.

5. To prepare reports, audits or other summary information related to the program.

6. To collect overpayments from employees or their dependents or from those to whom overpayments were made on behalf of employees or their dependents where benefits were improperly paid.

(b) Except as provided in this section, the department or its agent shall have the same rights and responsibilities in administering claims under ch. 102, Stats., as an insurer authorized to do business in this state. The department or its agent is not liable for 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, Stats.

(8) REPORTS. Within 45 days following the end of each calendar quarter, the department shall submit a report to the governor and the presiding officer of each house of the legislature summarizing all of the following:

(a) The claims activity related to the fund.

(b) The payments made from the fund.

(c) The net balance in the fund.

(d) The department's enforcement activities against uninsured employers.

(9) DETERMINING THE SOLVENCY OF THE FUND. (a) The department shall monitor the fund's net balance of assets and liabilities to determine if the fund is solvent using the following accounting principles:

1. In determining the fund's assets, the department shall not include recoveries under s. 102.29 (1), Stats., unless they are in process of payment and due within 30 days, or vouchers in the process of payment which are not fully credited to the fund's account.

2. In determining the fund's liabilities, the department shall estimate the ultimate reserves without discounting, and shall not include reinsurance recoveries that are less than 60 days overdue.

(b) If the secretary determines that ultimate liabilities to the fund on known and IBNR claims exceed 85% of the cash balance in the fund, the secretary shall consult with the council on worker's compensation. If the secretary determines that the fund's ultimate liabilities exceed the fund's ultimate assets, or that there is a reasonable likelihood that the fund's liabilities will exceed the fund's assets within 3 months, the secretary shall file the certificate of insolvency in s. 102.80 (3) (ag), Stats.

(10) TEMPORARY REDUCTION OR DELAY OF PAYMENTS FROM THE FUND. (a) If the secretary files a certificate under s. 102.80 (3) (ag), Stats., the department shall continue to pay compensation under s. 102.81 (1), Stats., on claims reported to the department prior to the date specified in that certificate after which no new claims under s. 102.81 (1), Stats., will be accepted or paid.

(b) If the cash balance in the fund is not sufficient to pay all compensation or other liabilities due in a timely manner, the department may temporarily reduce or delay payments on claims to employees, dependents of employees, health care providers, vocational rehabilitation specialists and others to whom the fund is liable. To manage the fund's cash flow, the department may adopt a

uniform, pro-rata reduction schedule or it may establish different payment schedules for different types of liabilities. The department may amend its payment schedule as necessary.

(c) The department shall provide written notice to each person who does not receive timely compensation from the fund which explains the reduced or delayed payment schedule adopted by the department to resolve the cash-flow problem.

History: Cr. Register, July, 1996, No. 487, eff. 8-1-96.

DWD 80.65 Notice of cancellation or termination. Notice of cancellation or termination of a policy under s. 102.31 (1) (a), Stats., shall be given by certified mail or personal service to the Wisconsin compensation rating bureau, as defined in s. 626.02 (2), Stats., rather than to the department. Whenever the Wisconsin compensation rating bureau receives notice of cancellation or termination pursuant to this section, it shall immediately notify the department of cancellation or termination.

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.67 Insurer name change. A worker's compensation insurer shall notify the department and the Wisconsin compensation rating bureau in writing 30 days before the effective date of a change in its name. The insurer shall comply with the name change requirements in its state of domicile and in the state of Wisconsin. On or before the effective date of an approved name change, the insurer shall notify each of its employers insured under ch. 102, Stats., that the insurer's name is changed. Insurers shall notify employers by an endorsement to the employer's existing policy that states the insurer's new name. The insurer shall file a copy of the endorsement with the Wisconsin compensation rating bureau by personal service, facsimile, or certified mail at the same time that it provides notice to its employers insured under ch. 102, Stats.

Note: The State of Wisconsin Office of the Commissioner of Insurance requires an advance notice of an insurer name change or reorganization. For further information, contact OCI at (608) 266-3585 or (800) 236-8517.

History: Cr. Register, September, 1986, No. 369, eff. 10-1-86; CR 00-181: r. and recr., Register July 2001, No. 547 eff. 8-1-01.

DWD 80.68 Payment of benefits under s. 102.59, Stats. (1) Payment of benefits under s. 102.59, Stats., shall initially be made to the individual entitled to the benefits at such time as payments of primary compensation by the employer cease to be made or would have been made had there been no payment under s. 102.32 (6), Stats., unless the preexisting disability and the disability for which primary compensation is being paid combine to result in permanent total disability.

(2) Payments received by an employee or dependent from an account in a financial institution or from an annuity policy where such account or annuity policy are established through settlement of the claim for primary compensation, shall be considered payments by the employer or insurance carrier.

(3) Payments under s. 102.59, Stats., shall be on a periodic basis but subject to ss. 102.32 (6) and (7), Stats.

Note: This rule is adopted to insure the solvency of the work injury supplemental benefit fund and to insure the protection of dependents as of the date of death of the employee with the preexisting disability.

History: Cr. Register, September, 1986, No. 369, eff. 10-1-86.

DWD 80.70 Malice or bad faith. (1) An employer who unreasonably refuses or unreasonably fails to report an alleged injury to its insurance company providing worker's compensation coverage, shall be deemed to have acted with malice or bad faith.

(2) An insurance company or self-insured employer who, without credible evidence which demonstrates that the claim for the payments is fairly debatable, unreasonably fails to make payment of compensation or reasonable and necessary medical expenses, or after having commenced those payments, unreasonably suspends or terminates them, shall be deemed to have acted with malice or in bad faith.

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82.

DWD 80.72 Health service fee dispute resolution process. (1) PURPOSE. The purpose of this section is to establish the procedures and requirements for resolving a dispute under s. 102.16 (2), Stats., between a health service provider and an insurer or self-insured employer over the reasonableness of a fee charged by the health service provider relating to the examination or treatment of an injured worker, and to specify the

standards that health service fee data bases must meet for certification by the department.

(2) DEFINITIONS. In this section:

(a) "ADA" means American dental association.

(b) "Applicant" means the person requesting certification of a data base.

(c) "Certified" means approved by the department for use in determining the reasonableness of fees.

(d) "CPT code" means the American medical association's 1992 physicians' current procedural terminology.

Note: This volume is on file in the offices of the secretary of state and the revisor of statutes, and in the Worker's Compensation Division, GEF I, room C100, 201 E. Washington Ave., Madison, Wisconsin. Copies can be obtained from local textbook stores or from the American Medical Association, order department: OP054192, P.O. Box 10950, Chicago, IL 60601.

(e) "Data base" means a list of fees for procedures compiled and sorted by CPT code, ICD-9-CM code, ADA code, DRG code, or other similar coding which is systematically collected, assembled, and updated, and which does not include procedures charged under medicare.

(f) "DRG" means a diagnostic related group established by the federal health care financing administration.

(g) "Dispute" means a disagreement between a health service provider and an insurer or self-insured employer over the reasonableness of a fee charged by a health service provider where the insurer or self-insured employer refuses to pay part or all of the fee.

(h) "Fee" or "health service fee" means the amount charged for a procedure by a health service provider.

(i) "Formula amount" means the mean fee for a procedure plus 1.5 standard deviations from that mean as shown by data from a certified data base.

(j) "ICD-9-CM" means the commission on professional and hospital activities' international classification of diseases, 9th revision, clinical modification.

Note: This volume is on file in the offices of the secretary of state and the revisor of statutes, and in the Worker's Compensation Division, GEF I, room C100, 201 E. Washington Ave., Madison, Wisconsin. Copies can be obtained from local textbook stores, or from superintendent of documents, U.S. government printing office, Washington, D.C., 20402, (stock number 917014000001).

(k) "Procedure" or "health service procedure" means any treatment of an injured worker under s. 102.42, Stats.

(L) "Provider" or "health service provider" includes a physician, podiatrist, psychologist, optometrist, chiropractor, dentist, physician's assistant, therapist, medical technician, or hospital.

(m) "Self-insurer" means an employer who has been granted an exemption from the duty to insure under s. 102.28 (2), Stats.

(3) JUSTIFICATION OF DISPUTED FEES. (a) In a case where liability or the extent of disability is not in issue, and a health care provider charges a fee which an insurer or self-insurer refuses to pay because it is more than the formula amount, the insurer or self-insurer shall, except as provided in sub. (6) (b), mail or deliver written notice to the provider within 30 days after receiving a completed bill which clearly identifies the provider's name, address and phone number; the patient-employee; the date of service; the health service procedure; and the amount charged for each procedure. The notice from the insurer or self-insurer to the provider shall specify:

1. The name of the patient-employee and the employer;
2. The date of the procedure in dispute;
3. The amount charged for the procedure;
4. The CPT code, ADA code, ICD-9-CM code, DRG code or other certified code for the procedure;
5. The formula amount for the procedure and the certified data base from which that amount was determined;
6. The amount of the fee that is in dispute beyond the formula amount;
7. The provider's obligation under par. (c), if the fee is beyond the formula amount, to provide the insurer or self-insurer with a written justification for the higher fee, at least 20 days prior to submitting the dispute to the department. The notice must clearly explain that the only justification for a fee more than the formula amount is that the service provided in this particular case is more difficult or more complicated than in the usual case; and
8. The insurer's or self-insurer's obligation under par. (d) to respond within 15 days of receiving the provider's written justification for charging a fee beyond the formula amount.
9. That pursuant to s. 102.16 (2) (b), Stats., once the notice required by this subsection is received by a provider, 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.

(b) If the provider and the insurer or self-insurer agree on the facts in sub. (3) (a) 1. to 6., the provider may submit the dispute to the department at any time. If the provider believes there is a factual error in the notice provided by the insurer or self-insurer, it must raise the issue as provided in par. (c).

(c) If, after receiving notice from the insurer or self-insurer, the provider believes a fee beyond the formula amount is justified, or if it does not agree with the factual information provided in the notice under par. (a), then, at least 20 days prior to submitting a dispute to the department, the provider must submit a written justification to the insurer or self-insurer noting the factual error or explaining the extent to which the service provided in the disputed case was more difficult or more complicated than in the usual case, or both.

(d) If the provider submits a written justification under par. (c), the insurer or self-insurer has 15 days after receiving the notice to notify the provider that it accepts the provider's explanation or to explain its continuing refusal to pay the fee. If the insurer or self-insurer accepts the provider's justification, the fee must be paid in full, or in an amount mutually agreed to by the provider and insurer or self-insurer, within 30 days from the date the insurer or self-insurer received written justification under par. (c).

(e) If only a portion of the fee is in dispute, the insurer or self-insurer shall, within the 30-day notice period specified in par. (a), pay the remainder of the fee which is not in dispute.

(4) SUBMITTING DISPUTED FEES. (a) For the department to determine whether or not a fee is reasonable under s. 102.16 (2), Stats., a provider shall file a written request to the department to resolve the dispute within 6 months after an insurer or self-insurer first refuses to pay as provided in sub. (3) (a), and provide a copy of the request and all attachments to the insurer or self-insured employer.

(b) A request by a provider shall include copies of all correspondence in its possession related to the fee dispute.

(c) The department shall notify the insurer or self-insurer when a request to settle the dispute is submitted that the insurer or self-insurer has 20 days to file an answer or a default judgment will be ordered.

(d) The insurer or self-insurer shall file an answer with the department, and send a copy to the provider, within 20 days from the date of the department's notice of dispute. The answer shall include:

1. Copies of any prior correspondence relating to the fee dispute which the provider has not already filed.

2. Information from a certified data base on fees charged by other providers for comparable services or procedures which clearly demonstrates that the fee in dispute is beyond the formula amount for the service or procedure.

3. An explanation of why the service provided in the disputed case is not more difficult or complicated than in the usual case.

(e) The department shall examine the material submitted by all parties and issue its order resolving the dispute within 90 days after receiving the material submitted under par. (d). The department shall send a copy of the order to the provider, the insurer or self-insurer and the employee. If the fee dispute involves a claim for which an application for hearing is filed under s. 102.17, Stats., or an injury for which the insurer or self-insurer disputes the cause of the injury, the extent of disability, or other issues which could result in an application for hearing being filed, the department may delay resolution of the fee dispute until a hearing is held or an order is issued resolving the dispute between the injured employee and the insurer or self-insurer.

(f) The department may develop and require the use of forms to facilitate the exchange of information.

(5) DEPARTMENT INITIATIVE. The department may initiate resolution of a fee dispute when requested to do so by an injured worker, an insurer or a self-insurer. The department shall direct the parties to follow the process provided for in subs. (3) and (4), except where the department specifically determines that extraordinary circumstances justify some modification to expedite or facilitate a fair resolution of the dispute.

(6) INTEREST ON LATE PAYMENT. (a) Except as provided in par. (b), in addition to any amount paid or awarded in a fee dispute, where an insurer or self-insurer fails to respond as required in subs. (3) and (4) or as directed under sub. (5), the

insurer or self-insurer shall pay simple interest on the payment or award to the provider at an annual rate of 12%, to be computed by the insurer or self-insurer, from the date that the insurer or self-insurer first missed a deadline for response, to the date of actual payment to the provider.

(b) If the insurer or self-insurer notifies the provider within 30 days of receiving a completed bill under sub. (3) (a), that it needs additional documentation from the provider regarding the bill or treatment, the insurer or self-insurer shall have 30 days from the date it receives the provider's response to this request for additional documentation to comply with the notice requirement in sub. (3) (a). Examples of additional documentation include requests for a narrative description of services provided or medical reports.

(c) For the purpose of calculating the extent to which any claim is overdue, the date of actual payment is the date on which a draft or other valid instrument which is equivalent to payment is postmarked in the U.S. mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

(7) CERTIFICATION OF DATA BASES. (a) Before the department may certify a data base under s. 102.16 (2), Stats., and sub. (8), it shall determine that all of the following apply:

1. The fees in the data base accurately reflect the amounts charged by providers for procedures rather than the amounts paid to or collected by providers, and do not include any medicare charges.

2. The information in the data base is compiled and sorted by CPT code, ICD-9-CM code, ADA code, DRG code or other similar coding accepted by the department.

3. The information in the data base is compiled and sorted into economically similar regions within the state, with the fee based on the location at which the service was provided.

4. The information in the data base can be presented in a way which clearly indicates the formula amount for each procedure.

5. The applicant authorizes and assists the department to audit or investigate the accuracy of any statements made in the application for certification by any reasonable method including, if the applicant did not collect or compile the data itself, providing a means for the department to audit or investigate the process used by the person who collected or compiled the data.

6. The information in the data base is up-dated and published or distributed by other methods at least every 6 months.

(b) Before the department may certify a data base under s. 102.16 (2), Stats., it shall consider all of the following:

1. The coverage of the data base, including the number of CPT codes, ICD-9-CM codes or DRGs for which there are data; the number of data entries for each code or DRG; the number of different providers contributing to a code or DRG entry; and the extent to which reliable data exist for injuries most commonly associated with worker's compensation claims;

2. The sources from which the data are collected, including the number of different providers, insurers or self-insurers;

3. The age of the data, and the frequency of the updates in the data;

4. The method by which the data are compiled, including the method by which mistakes in charges are identified and corrected prior to entry and the extent to which this occurs; and the conditions under which charges reported to the applicant may be excluded and the extent to which this occurs;

5. The extent to which the data are representative of the entire geographic area for which certification is sought;

6. The length of time the applicant has been in business and doing business in Wisconsin;

7. The length of time the data base has been in existence;

8. Whether the data base has been certified by any organization or government agency.

(8) APPLICATION FOR CERTIFICATION; DECERTIFICATION. (a) To obtain certification from the department, an applicant shall submit a complete description of the items covered in sub. (7) to the department. The department may require the submission of other information which it deems relevant.

(b) The applicant shall clearly identify any trade secrets under s. 19.36 (5), Stats. The department shall treat any information marked as trade secrets as confidential and shall use it solely for the purpose of certification and shall take appropriate steps to prevent its release.

(c) Notwithstanding par. (b), the department may create a technical advisory group consisting of individuals with special expertise from both the

public and private sectors to assist the department in reviewing and evaluating an application.

(d) The department shall certify a data base for one year at a time. The department may extend the one-year certification period while an application for renewal is under review by the department.

(e) If the department determines that an applicant has misrepresented a material fact in its application or that it no longer meets the requirements in sub. (7), the department may decertify a data base after providing the applicant with notice of the basis for decertification and an opportunity to respond.

(9) APPLICABILITY. This section first applies to health service procedures provided on July 1, 1992 and shall take effect on July 1, 1992.

History: Cr. Register, June, 1992, No. 438, eff. 7-1-92.

DWD 80.73 Health service necessity of treatment dispute resolution process. (1) PURPOSE. The purpose of this section is to establish the procedures and requirements for resolving a dispute under s. 102.16 (2m), Stats., between a health service provider and an insurer or self-insurer over the necessity of treatment rendered by a provider to an injured worker.

(2) DEFINITIONS. In this section:

(a) "Dispute" means a disagreement between a provider and an insurer or self-insurer over the necessity of treatment rendered to an injured worker where the insurer or self-insurer refuses to pay part or all of the provider's bill.

(b) "Expert" means a person licensed to practice in the same health care profession as the individual health service provider whose treatment is under review, and who provides an opinion on the necessity of treatment rendered to an injured worker for an impartial health care services review organization or as a member of an independent panel established by the department.

(c) "Licensed to practice in the same health care profession" means licensed to practice as a physician, psychologist, chiropractor, podiatrist or dentist.

(d) "Provider" includes a hospital, physician, psychologist, chiropractor, podiatrist, or dentist, or another licensed medical practitioner who provides treatment ordered by a physician, psychologist, chiropractor, podiatrist or dentist whose order of treatment is subject to review.

(e) "Review organization" or "impartial health care services review organization" means a public or private entity not owned or operated by, or regularly doing medical reviews for, any insurer, self-insurer, or provider, and which, for a fee, can provide expert opinions regarding the necessity of treatment provided to an injured worker.

(f) "Self-insurer" means an employer who has been granted an exemption from the duty to insure under s. 102.28 (2), Stats.

(g) "Treatment" means any procedure intended to cure and relieve an injured worker from the effects of an injury under s. 102.42, Stats.

(3) NOTICE TO THE PROVIDER. (a) An insurer or self-insurer which refuses to pay for treatment rendered to an injured worker because it disputes that the treatment is necessary shall, in a case where liability or the extent of liability is not an issue, give the provider written notice within 60 days of receiving a bill which documents the treatment provided to the worker. The notice shall specify:

1. The name of the patient-employee;
2. The name of the employer on the date of injury;
3. The date of the treatment in dispute;
4. The amount charged for the treatment and the amount in dispute;
5. The reason that the insurer or self-insurer believes the treatment was unnecessary, including the organization and credentials of any person who provides supporting medical documentation;
6. The provider's right to initiate an independent review by the department within 9 months under sub. (6), including a description of how costs will be assessed under sub.(8);
7. The address to use in directing correspondence to the insurer or self-insurer regarding the dispute; and
8. That pursuant to s. 102.16 (2m) (b), Stats., once the notice required by this subsection is received by a provider, the provider may not collect a fee for the disputed treatment from, or bring an action for collection of the fee for that disputed treatment against, the employee who received the treatment.

(b) At the request of an insurer or self-insurer, the department may extend the 60-day period in par. (a) where the insurer or self-insurer is unable to obtain the supporting medical documentation within the 60-day period, or where the department

determines other extraordinary circumstances justify an extension.

(c) Except as provided in par. (b), if an insurer or self-insurer provides the notice after the 60-day period, the provider may immediately request the department to issue a default order requiring the insurer or self-insurer to pay the full amount in dispute.

(4) NOTICE TO THE INSURER OR SELF-INSURER. After receiving notice from the insurer or self-insurer under sub. (3) and, except as provided in sub. (3) (b) and (c), at least 30 days prior to submitting a dispute to the department, the provider shall explain to the insurer or self-insurer in writing why the treatment was necessary to cure and relieve the effects of the injury, including a diagnosis of the condition for which treatment was provided.

(5) RESPONSE BY THE INSURER OR SELF-INSURER. (a) Within 30 days from the date on which the provider sent or delivered notice under sub. (4), an insurer or self-insurer shall notify the provider whether or not it accepts the provider's explanation regarding necessity of treatment.

(b) If the insurer or self-insurer accepts the provider's explanation, the provider's fee must be paid in full, or in an amount mutually agreed to by the provider and insurer or self-insurer, within the 30-day period specified in par. (a). In the case of late payment, the insurer or self-insurer shall pay simple interest on the amount mutually agreed upon at the annual rate of 12 percent, from the day after the 30-day period lapses to the date of actual payment to the provider.

(6) SUBMITTING DISPUTES TO THE DEPARTMENT. (a) For the department to determine whether or not treatment was necessary under s. 102.16 (2m), Stats., a provider shall, after the 30-day notice period in sub. (4) has elapsed, apply to the department in writing to resolve the dispute. The provider shall apply to the department within 9 months from the date it receives notice under sub. (3) from the insurer or self-insurer refusing to pay the provider's bill.

(b) The provider's application to the department shall include copies of all correspondence related to the dispute.

(c) At the time it files the application with the department, the provider shall send or deliver to the insurer or self-insurer which is refusing to pay for the treatment in dispute a copy of all materials submitted to the department.

(d) When an application to resolve a dispute is submitted, the department shall notify the insurer or self-insurer that it has 20 days to either pay the bill in full for the treatment in dispute or to file an answer under par. (e) for the department to use in the review process in sub. (7).

(e) The answer shall include copies of any prior correspondence relating to the dispute which the provider has not already filed, and any other material which responds to the provider's application. The answer shall include the name of the organization, and credentials of any individual, whose review of the case has been relied upon in reaching the decision to deny payment.

(f) The department may develop and require the use of forms to facilitate the exchange of information. For information regarding forms contact the worker's compensation division, medical cost dispute unit, 201 East Washington Avenue, P.O. Box 7901, Madison, Wisconsin 53707.

(7) REVIEW PROCESS. (a) After the 20-day period in sub. (6) (d) for the insurer or self-insurer to answer has passed, the department shall provide a copy of all materials in its possession relating to a dispute to an impartial health care services review organization, or to an expert from a panel of experts established by the department, to obtain an expert written opinion on the necessity of treatment in dispute.

(b) In all cases where the dispute involves a Wisconsin provider, the expert reviewer shall be licensed to practice in Wisconsin.

(c) When necessary to provide a fair and informed decision, the expert may contact the provider, insurer or self-insurer for clarification of issues raised in the written materials. Where the contact is in writing, the expert shall provide all parties to the dispute with a copy of the request for clarification and a copy of any responses received. Where the contact is by phone, the expert shall arrange a conference call giving all parties an opportunity to participate simultaneously.

(d) Within 90 days of receiving the material from the department under par. (a), the review organization or panel shall provide the department with the expert's written opinion regarding the necessity of treatment, including a recommendation regarding how much of the provider's bill the

insurer or self-insurer should pay, if any. At the same time that it provides an opinion to the department, the review organization or panel on which the expert serves shall send a copy of the opinion to the provider and the insurer or self-insurer which are parties to the dispute.

(e) The provider, insurer or self-insurer shall have 30 days from the date the expert's opinion is received by the department under par. (d) to present written evidence to the department that the expert's opinion is in error. Unless the department receives clear and convincing written evidence that the opinion is in error, the department shall adopt the written opinion of the expert as the department's determination on the issues covered in the written opinion.

(f) If the necessity of treatment dispute involves a claim for which an application for hearing is filed under s. 102.17, Stats., or an injury for which the insurer or self-insurer disputes the cause of the injury, the extent of the disability, or other issues which could result in an application for hearing being filed, the department may delay resolution of the necessity of treatment dispute until a hearing is held or an order is issued resolving the dispute between the injured employee and the insurer or self-insurer.

(8) PAYMENT OF COSTS. (a) The department shall charge the insurer or self-insurer the full cost of obtaining the written opinion of the expert for the first dispute involving the necessity of treatment rendered by an individual provider, unless the department determines the provider's position in the dispute is frivolous or based on fraudulent representations.

(b) In a subsequent dispute involving the same provider, the department shall charge the full cost of obtaining the expert's opinion to the losing party.

(c) Any time prior to the department's order determining the necessity of treatment, the department shall dismiss the application if the provider and insurer or self-insurer mutually agree on the necessity of treatment and the payment of any costs incurred by the department related to obtaining the expert opinion.

(9) DEPARTMENT INITIATIVE. In addition to the provider's right to submit a dispute to the department under sub. (6), the department may initiate resolution of a dispute on necessity of treatment when requested to do so by an injured worker, an insurer or a self-insurer. The department shall notify the insurer or self-insurer of its intention to initiate the dispute resolution process and shall direct them to provide information necessary to resolve the dispute. The department shall allow up to 60 days for the parties to respond, but may extend the response period at the request of either party.

(10) EXPERT PANELS. The department may establish one or more panels of experts in one or more treating disciplines, and may set the terms and conditions for membership on any panel. In making appointments to a panel the department shall consider:

(a) An individual's training and experience, including:

1. The number of years of practice in a particular discipline;

2. The extent to which the individual currently derives his or her income from an active practice in a particular discipline; and,

3. Certification by boards or other organizations;

(b) The recommendation of organizations that regulate or promote professional standards in the discipline for which the panel is being created; and,

(c) Any other factors that the department may determine are relevant to an individual's ability to serve fairly and impartially as a member of an expert panel.

(11) APPLICABILITY. This section first applies to health services provided on January 1, 1992, and shall take effect on July 1, 1992.

History: Emerg. cr. eff. 1-1-92; cr. Register, June, 1992, No. 438, eff. 7-1-92.

ADMINISTRATIVE CODE

Chapter LIRC 1

GENERAL

LIRC 1.01 General
LIRC 1.02 Petitions for commission review
LIRC 1.025 Faxed petitions
LIRC 1.026 Cross Petitions
LIRC 1.027 Answers
LIRC 1.03 Withdrawals
LIRC 1.04 Review
LIRC 1.045 Obtaining a Copy of Record
LIRC 1.05 Hearings
LIRC 1.06 Oral Argument
LIRC 1.07 Briefs

LIRC 1.01 General. The labor and industry review commission has jurisdiction for review of cases arising under ss. 40.65 (2), 102.18 (3) and (4), 106.52 (4), 108.09 (6), 108.10 (2) and (3), 111.39 (5) (a), 303.07 (7) and 303.21, Stats.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81; am. Register, August, 1982, No. 320, eff. 9-1-82; am. Register, January, 1985, No. 349, eff. 2-1-85; am. Register, May, 1997, No. 497, eff. 6-1-9; correction made under s. 13.93 (2m)(b)7., Stats., Register, September 2001, No. 549.

LIRC 1.02 Petitions for commission review. All petitions for commission review shall be received, or, in unemployment compensation, received or postmarked, within 21 days from the date of mailing of the administrative law judge's findings and decision or order, except as provided under this section. "Received" means physical receipt. A mailed petition postmarked on or prior to the last day of an appeal period, but received on a subsequent day is not a timely appeal, except in unemployment compensation. All petitions shall be in writing. The last day of an appeal period shall be on the next business day if the last day for filing falls on any of the following:

(1) January 1.
(1m) The third Monday in January.
(1r) The third Monday in February.
(3) The last Monday in May.
(4) July 4.
(5) The first Monday in September.
(5m) The second Monday in October.
(5r) November 11.
(6) The fourth Thursday in November.
(7) December 24, 25 or 31.
(8) The Monday following if January 1, July 4 or December 25 falls on Sunday.
(9) Any other day on which mail is not delivered by the postal authorities.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81; am. Register, August, 1982, No. 320, eff. 9-1-82; am. (intro.), (3), (5), (6) and (8), cr. (1m), (1r), (5m) and (5r), Register, January, 1985, No. 349, eff. 2-1-85; am. (intro.) and (1m), Register, May, 1988, No. 389, eff. 6-1-88; am. Register, May, 1997, No. 497, eff. 6-1-97.

LIRC 1.025 Faxed petitions. Petitions for review may be filed by facsimile transmission. The date of transmission recorded by the facsimile machine shall constitute the date of filing the petition.

History: Cr. Register, May, 1997, No. 497, eff. 6-1-97.

LIRC 1.026 Cross-petitions. Any party may file a petition for review, whether or not any other party has already filed a petition for review. The filing of a petition for review by one party does not extend the time within which any other party may file a petition for review. All petitions for review, including cross-petitions, are subject to the requirements of s. LIRC 1.02 concerning timeliness.

History: Cr. Register, May, 1997, No. 497, eff. 6-1-97.

LIRC 1.027 Answers. A party opposing a petition for commission review may file an answer with the commission within 21 days from the party's receipt of a copy of the petition. A party filing an answer with the commission shall furnish a copy to the opposing party.

History: Cr. Register, May, 1997, No. 497, eff. 6-1-97.

LIRC 1.03 Withdrawals. Requests to withdraw petitions shall be in writing. The commission may deny a request by any party to withdraw a petition if the commission has already reviewed and decided the case, but not yet issued its decision, or if the commission considers that withdrawal is not in the best interests of proper administration of the program involved. Denials of withdrawals shall be in writing, but may be included in the findings of the commission

History: Cr. Register, January, 1985, No. 349, eff 2-1-85; am. Register, May, 1988, No. 389, eff. 6-1-88.

LIRC 1.04 Review. Review by the commission is on the record of the case including the synopsis or summary of the testimony or other evidence presented at the hearing, as prepared by the department of workforce development, by the commission, or by an outside contractor, from a tape recording of the hearing or from notes taken at the hearing by the administrative law judge. The commission may also consider the hearing tapes or a transcript of the hearing testimony. Review shall be based on the transcript if a transcript was prepared prior to issuance of the administrative law judge's decision and the administrative law judge used the transcript in arriving at the decision, or if a party shows to the commission that a synopsis is not sufficiently complete and accurate to fairly reflect the relevant and material testimony and other evidence taken.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81; renum. from LIRC 1.03 and am., Register, January, 1982, No. 349, eff. 2-1-85; am. Register, May, 1988, No. 389, No. 6-1-88; r. and recr. Register, May, 1997, No. 497, eff. 6-1-97.

LIRC 1.045 Obtaining copy of record. A party in a case before the commission may request the commission to provide a copy of the synopsis of the testimony or other file materials. The commission shall furnish the materials upon request but may charge a fee for photocopying of 20 cents per page. Upon proper showing of financial inability to pay for photocopying, the commission may waive the fee.

History: Cr. Register, May, 1997, No. 497, eff. 6-1-97.

LIRC 1.05 Hearings. If the record in a case is inadequate for the commission to arrive at a decision, the commission shall remand the case to the department of workforce development to take additional evidence on behalf of the commission.

Note: The commission does not conduct hearings as part of its review.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81; renum. from LIRC 1.04, Register, January, 1985, No. 349, eff. 2-1-85; r. and recr. Register, May, 1997, No. 497, eff. 6-1-97.

LIRC 1.06 Oral argument. The commission may grant a written request for oral argument if it determines that an issue would be more clearly presented by oral argument.

Note: The commission does not consider oral argument to be necessary because review is on the basis of the record, the parties have the right to file briefs, and oral argument delays disposition of the petition.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81; renum. from LIRC 1.05, Register, January, 1985, No. 349, eff. 2-1-85; r. and recr. Register, May, 1997, No. 497, eff. 6-1-97.

LIRC 1.07 Briefs. Either party may request the commission to establish a briefing schedule. Requests to file briefs may be made in the petition for review, in an answer, or in writing after the petition and answer. The commission may deny a request to file a brief which is not made in a petition or answer if the commission has already reviewed the case but not yet issued its decision at the time the request is made. Each party may file with the commission briefs or memoranda within the time limits of the briefing schedule established by the commission. Requests for extensions of time for filing briefs shall be made in writing. Extensions may be approved in writing upon good cause shown. A party filing a brief or memorandum with the commission shall furnish a copy to the opposing party.

History: Cr. Register, January, 1985, No. 349, eff. 2-1-85; am. Register, May, 1997, No. 497, eff. 6-1-97.

ADMINISTRATIVE CODE

Chapter LIRC 3

WORKER'S COMPENSATION

LIRC 3.01 Petitions for commission review
LIRC 3.02 Transcripts.
LIRC 3.03 Other petitions.
LIRC 3.04 Compromise settlements.
LIRC 3.05 Actions for judicial review.

LIRC 3.01 Petitions for commission review. A petition for commission review of the findings or order of a department of workforce development administrative law judge under s. 102.18, Stats., shall be received within 21 days from the date of mailing of the findings and order to the parties by the worker's compensation division, or the commission at:

(1) The central administrative office of the worker's compensation division, 201 East Washington Avenue, P.O. Box 7901, Madison, Wisconsin 53707, or

(2) The worker's compensation division, 819 North Sixth Street, Milwaukee, Wisconsin 53203, or

(3) The worker's compensation division, Fidelity Bank Building, 1500 North Casaloma Drive, Suite 310, Appleton, Wisconsin 54915, or

(4) The office of the labor and industry review commission, 3319 West Beltline Highway, P.O. Box 8126, Madison, Wisconsin 53708.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81; am. (1) (intro.) and (a), r. (2), Register August, 1982, No. 320, eff. 9-1-82; am. Register, January, 1985, No. 349, eff. 2-1-85; am. Register, May, 1988, No. 389, eff. 6-1-88; am. Register, May, 1997, No. 497, eff. 6-1-97.

LIRC 3.02 Transcripts. Transcripts of testimony at hearings conducted by administrative law judges of the worker's compensation division, department of workforce development, may be requested and obtained from the worker's compensation division of the department, according to s. DWD 80.14, after the commencement of an action to review an order of the commission in circuit court. The commission may direct the preparation of a transcript for the purpose of commission review if a satisfactory showing is made by any party that the synopsis of testimony prepared by the worker's compensation division is not sufficiently complete and accurate to reflect the relevant and material testimony and other evidence taken.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81; am. Register, August, 1982, No. 320, eff. 9-1-82; renum. from LIRC 304, Register, January, 1984, No. 349, eff. 2-1-85; am. Register, May, 1988, No. 389, eff. 6-1-88; renum. from LIRC 3.03 and am., Register, May, 1997, No. 497, eff. 6-1-97.

LIRC 3.03 Other petitions. The provisions of s. 102.18, Stats., shall apply to all petitions to the commission under ss. 40.65 (2), 303.07 (7) and 303.21, Stats.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81; am. Register, August, 1982, No. 320, eff. 9-1-82; renum. from LIRC 3.05 and am. Register, January, 1985, No. 349, eff. 2-1-85; renum. from LIRC 3.04 and am., Register, May, 1997, No. 497, eff. 6-1-97.

LIRC 3.04 Compromise settlements. Compromise settlements of worker's compensation claims are solely within the jurisdiction of the worker's compensation division, department of workforce development, according to s. 102.16, Stats., and s. DWD 80.03. Under s. 102.18 (4) (d), Stats., if a compromise is reached while a case is pending commission review, the compromise shall be submitted to the commission, and the commission shall remand the case to the worker's compensation division for consideration of the compromise. If the compromise is not approved, the party who filed the petition for commission review may reinstate its petition by notifying the commission. Under s. 102.24 (2), Stats., if a compromise is reached while a case is pending court review of a commission order, remand shall be to the commission and the commission shall then remand the case to the department for consideration of the compromise.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81; renum. from LIRC 3.06, Register, January, 1985, No. 349, eff. 2-1-85; am. Register, May, 1988, No. 389, eff. 6-1-88; renum. from LIRC 3.05 and am., Register, May, 1997, No. 497, eff. 6-1-97; correction made under s. 13.93 (2m) (b) 7., Stats., Register, May, 1997, No. 497.

LIRC 3.05 Actions for judicial review. Judicial review of any commission decision shall be commenced in the manner and upon the grounds specified in s. 102.23, Stats., and not under ch. 227 or s. 801.02, Stats. Either party may commence a legal action for review of the commission decision in circuit court. The action must be commenced within 30 days

from the date of the decision. Such action is commenced only by filing a summons and complaint with the circuit court and serving an authenticated copy of the summons and the complaint upon the commission, all within 30 days. Service must be made upon a commissioner of the labor and industry review commission or an agent authorized by the commission to accept service only at the commission's office in Madison. Such service shall be deemed 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. Service made by mail is effective only if the pleadings are actually received by the commission within the appeal period. The complaint shall state the grounds upon which review is sought. The action shall be commenced against the commission, and the party in whose favor the order or award was made shall also be made a defendant. 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. If the plaintiff is a nonresident of Wisconsin, the proceedings shall be in the circuit court for Dane county. The proceedings may be brought in any circuit court if all parties stipulate and that court agrees. The appealing party shall arrange for preparation of the necessary legal documents.

History: Cr. Register, March 1981, No. 303, eff. 4-1-81; renum. from LIRC 3.07 and am., Register, January, 1985, No. 349, eff. 2-1-85; r. and recr. Register, May, 1988, No. 389, eff. 6-1-88; renum. from LIRC 3.06, Register, May, 1997, No. 497, eff. 6-1-97.

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