

1979 Senate Bill 570

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## CHAPTER 353, Laws of 1979

AN ACT to amend 107.001 (intro.) and 227.22 (2); and to create 20.445 (4), subchapters I (title) and II of chapter 107 and 893.207 of the statutes, relating to claims for certain mining damage, liability of mining companies, statutes of limitation for mining damage claims, providing rule-making authority and making an appropriation.

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

PREFATORY NOTE: This bill is a product of the Legislative Council Committee on Mining. It is intended to deal with several problems that arise when current law is applied to suits to recover damages for injuries which arise out of metallic mineral prospecting, mining, refining or smelting activities. Among the obstacles that may block or hamper recovery for mining-related damages are:

1. The cost and uncertainty of litigation as a means of recovering damages, especially if claims are small;
2. The necessity of proving fault ("negligence");
3. The inability to hold a parent corporation liable if the injury was caused by a subsidiary;
4. The possibility that an "operating subsidiary" corporation may be dissolved prior to the occurrence of an injury caused by the subsidiary's activities;
5. The principle that a person who creates a dangerous condition on land is not liable for harm caused by that condition subsequent to the land's sale or surrender; and
6. The general rule that the statute of limitation for bringing a suit to recover damages for injury begins to run when the injury occurs, rather than from the time it was, or could have been, discovered.

This bill defines "mining-related injuries" as death or injury to persons or property caused by either:

1. Environmental pollution from emissions, seepages, leakages or other discharges from mine excavations or mining wastes; or

2. Substantial surface subsidence from mine excavations.

This bill creates a mechanism to provide limited compensation for mining-related injuries and also creates certain specific rules which apply to lawsuits to recover damages for mining-related injuries.

*Compensation from Mining Damage Appropriation*

Within this bill, an appropriation is created to be used for compensation of mining-related injuries. The appropriation is initially funded from general purpose revenues, but also will receive 10% of the state's share of receipts from the net proceeds occupation tax on mining of metallic minerals under s. 70.375. [The state share of tax receipts is 40%; 10% of that amount equals 4% of total metallic mining tax receipts.]

Claims for compensation for mining-related injuries will be submitted to and acted upon by the department of industry, labor and human relations (DILHR). The DILHR is required to establish by rule procedures for the submission, review, settlement and determination of claims against the mining damage appropriation.

Claims against the mining damage appropriation must be brought within 3 years of the date on which death occurs or the injury was or should have been known (a so-called "discovery" statute of limitations). Any person who incurs mining-related injuries may make a claim against the mining damage appropriation to recover damages. A claimant may recover compensation from the mining damage appropriation without regard to fault, if, upon hearing, he or she demonstrates by a preponderance of the evidence that damages were incurred from mining-related injuries. Although proof of fault would not be necessary, a claimant would still be required to prove causation and actual damage and any award would be subject to reduction if contributory negligence was shown.

Awards to claimants from the mining damage appropriation are limited to \$150,000 for all injuries incurred by a claimant. While the bill allows "nonpecuniary" damages for loss of society and companionship, pain and suffering and mental anguish, awards for these damages may not exceed a total of \$20,000. The bill creates further limitations on awards for nonpecuniary damages: there must be a causal relationship between the injury causing pecuniary damage and the injury for which nonpecuniary damages are claimed, and nonpecuniary damages may not exceed 50% of the amount awarded for pecuniary damages.

Any party to a claim against the mining damage appropriation may appeal DILHR's decision to circuit court. If such an appeal is made, the court must conduct a full evidentiary hearing on the claim.

If a claimant succeeds in obtaining an award for damages, the state is subrogated to the rights of the claimant and may bring an action against the mining company, or join in an action by the claimant against the mining company, to recover the amount awarded the claimant. Any claimant against the mining damage appropriation also has the option to bring an action in circuit court against the mining company.

*Lawsuits to Recover Damages for Mining-Related Injuries*

This bill creates specific rules which apply to lawsuits against mining companies for damages from mining-related injuries resulting from prospecting, mining, refining or smelting of metallic minerals in this state. The specific rules that will apply to such actions are the following:

1. Parent-subsidiary. The bill defines a "mining company" as any person who either directly or indirectly engages in prospecting, mining, refining or smelting. Mining companies are liable for mining-related injuries regardless of any change in the nature of the ownership of the interest in the prospecting or mining site, refinery or smelter and regardless of any reorganization, merger, consolidation or liquidation affecting the mining company.

2. Statute of limitation. Actions to recover damages for mining-related injuries must be brought within 3 years of the date on which the death or injury occurs. However, if a claimant files a claim against the mining damage appropriation, and a written notice of that claim is given to the mining company by the department of industry, labor and human relations before the expiration of the 3-year period, the action against the mining company may be brought within one year after the final resolution, including appeal, of the claim.

This proposed statute defines the "date of injury" as the date on which the evidence of injury is sufficient to alert the injured party to the possibility of injury. The injury need not be of such magnitude as to identify the causal factor.

*Transitional Provisions*

The provisions of this bill, as they relate to both awards against the mining damage appropriation and actions against mining companies, do not apply to any prospecting or mining site upon which prospecting or mining has ceased prior to the effective date of the bill, unless prospecting or mining activity is commenced at the site after the effective date.

Mining-related injuries incurred from activities which have been undertaken prior to the effective date of the bill and which resulted from an activity by a company which was actively engaged in mining or prospecting on the effective date of the bill can be compensated from the mining damage appropriation only if:

1. The injured person has fully pursued all other judicial or administrative remedies against the mining company and has not received compensation; or
2. The person chooses to pursue, as the sole remedy, a claim against the mining damage appropriation.

All provisions of the bill apply to injuries resulting from prospecting or mining activity which commences after the effective date of the bill.

Additional explanation of specific portions of this bill is provided by SECTION NOTES within the body of the bill.

SECTION 1. At the appropriate place in the schedule in s. 20.005 of the statutes, insert the following amounts for the purposes indicated:

	<u>1979-80</u>	<u>1980-81</u>
<b>20.445 Industry, labor and human relations, department of</b>		
(4) ADJUDICATION OF CLAIMS		
(a) Administration of mining damage claims	-0-	-0-

SECTION 2. 20.445 (4) of the statutes is created to read:

20.445 (4) ADJUDICATION OF CLAIMS. (a) Administration of mining damage claims. The amounts in the schedule for administrative expenses related to the payment of mining damage claims under subch. II of ch. 107.

(b) Funding for mining damage claims. A sum sufficient to make mining damage awards authorized under subch. II of ch. 107.

NOTE: While a sum sufficient appropriation is provided to fund mining damage awards, in effect the appropriation is a sum sufficient with a "cap". Under s. 107.31 (4) (e), as created in the bill, no award may exceed an amount equal to the balance in the "mining damage reserve accumulation". The reserve accumulation is calculated by subtracting the total amount of all mining damage awards from the sum of:

1. 10% of that portion (40%) of the mining tax distributed to the general fund; and
2. \$500,000 (the \$500,000 is to ensure that there is an initial minimum amount for payment of awards; it in effect "lapses" after 10 years in anticipation of greater receipts from the mining tax).

In addition, when the mining damage reserve accumulation balance is less than \$500,000, payment of mining damage awards for the remainder of the fiscal year is to be delayed to determine if proration of the awards is necessary. Thus, the amount available for payment of awards is tied to receipts from the mining tax, even though the appropriation for the awards is designated a sum sufficient.

SECTION 3. Subchapter I (title) of chapter 107 of the statutes is created to read:

CHAPTER 107  
SUBCHAPTER I  
GENERAL REQUIREMENTS  
(to precede s. 107.001)

SECTION 4. 107.001 (intro.) of the statutes is amended to read:

**107.001 Definitions.** (intro.) ~~As used in~~ In this chapter subchapter:

SECTION 5. Subchapter II of chapter 107 of the statutes is created to read:

CHAPTER 107  
SUBCHAPTER II  
INJURIES TO PERSONS OR PROPERTY

**107.30 Definitions.** In this subchapter:

- (1) "Concentrates" means the mineral-rich, finished, primary products of a concentrator.
- (2) "Concentrator" means a plant where ore is separated into concentrates and tailings.
- (3) "Concentrator tailings" means waste material resulting from the washing, concentration or treatment of crushed ore.
- (4) "Department" means the department of industry, labor and human relations.
- (5) "Environmental pollution" means the physical, chemical or biological alteration of quality of any air, water or land resources of the state which makes the same injurious to public health, harmful to agriculture, commercial or recreational use or deleterious to fish, birds, animals or plant or human life.
- (6) "Materials in process" means those materials, other than salvageable by-products, which must be temporarily stored in a controlled manner. These materials include stockpiled development ore other than that in a mine or concentrator, mine backfill and reclaim water. The materials also include intermediate concentrates and intermediate refining and smelting products which require further processing, such as ore concentrates which must be agglomerated prior to marketing.
- (7) "Mine excavations" means either shaft or pit excavations from which minerals have been extracted in prospecting or mining.

(8) "Mining" or "mining operation" has the meaning set forth in s. 144.81 (5).

(9) "Mining company" means any person who, either directly or through subsidiaries, affiliates, contractors or other business arrangements, engages in prospecting, mining, refining or smelting.

(10) "Mining damage appropriation" means the appropriation under s. 20.445 (4) (b).

(11) "Mining site" means the surface or subsurface area disturbed by a mining operation, including the surface or subsurface area from which the minerals or refuse or both have been removed, the surface or subsurface area covered by the refuse, all lands disturbed by the construction or improvement of haulageways, and any surface or subsurface areas in which structures, equipment, materials and any other things used in the mining operation are situated.

(12) "Mining waste" means wastes directly resulting from or displaced by prospecting or mining and from the cleaning, preparation, separation or purification of minerals or metals during prospecting, mining, concentrating, refining or smelting operations and includes but is not limited to concentrator tailings, refinery and smelter residue, refining and smelting process emissions, mining overburden and waste treatment sludges, materials in process and salvageable by-products.

(13) "Mining-related injury" means death or injury to person or property caused by:

(a) Environmental pollution from emissions, seepages, leakages or other discharges from mine excavations in this state or of or from mining waste in this state; or

(b) Substantial surface subsidence from mine excavations in this state.

(14) "Ore" means a mineral which may be mined and processed for sale.

(15) "Prospecting" has the meaning set forth in s. 144.81 (12).

(16) "Prospecting site" has the meaning set forth in s. 144.81 (13n).

(17) "Refinery and smelter residue" means waste material resulting from the refining or smelting of concentrates.

(18) "Refining" means the process by which metal or valuable mineral is extracted and purified from an ore or concentrate and includes but is not limited to hydrometallurgical operations such as leaching and pyrometallurgical operations such as fire refining, roasting and cindering.

(19) "Salvageable by-products" includes but is not limited to coarse tailings and other materials, other than concentrates, resulting from the mining operation which are useful and for which a market or use exists or is anticipated to exist.

(20) "Smelting" means any metallurgical operation in which metal is separated by fusion from those impurities with which it may be chemically combined or physically mixed such as in ores.

(21) "Subsidence" means the sinking down of a part of the earth's crust, including the surface, due to underground excavations or workings.

**107.31 Claims against mining damage appropriation.** (1) **ADMINISTRATION.** The department shall establish by rule procedures for the submission, review, settlement and determination of claims against the mining damage appropriation under this section. The rules shall include procedures for the proration of awards made under this section when the awards exceed the balance in the mining damage appropriation.

(2) **WHO MAY FILE CLAIM; NOTICE.** (a) Any person may make a claim against the mining damage appropriation to recover damages for mining-related injuries.

(b) Within 10 days of receiving a claim submitted under par. (a), the department shall notify the mining company alleged to have caused the claimant's damages that the claim has been made. Any company alleged to have caused the claimant's damages may, at its sole discretion, become a party to the proceeding.

(3) **RECOVERY OF DAMAGES UNDER STRICT LIABILITY.** (a) When a claim under this section is not settled, an adjudicatory hearing shall be held. If after the hearing the department finds that the claimant has demonstrated by a preponderance of the evidence that claimant incurred damages from mining-related injuries, it shall make an award from the mining damage appropriation in an amount equal to the damages incurred, except as provided in sub. (4). Payment of the award shall not be delayed or limited in anticipation of any other recovery the claimant may receive by pursuing other remedies.

(b) Damages under this section shall be awarded without regard to fault, except as provided in par. (c).

(c) Contributorily negligent causation shall not bar recovery for a claim filed under this section by any person or his or her legal representative if such negligent causation was not greater than the causation of the mining company, but any award shall be diminished in proportion to the amount of negligent causation attributable to the person recovering.

(d) No award of nonpecuniary damages may be made for a claim under this section unless the claimant demonstrates by a preponderance of the evidence that the claimant is entitled to nonpecuniary damages and that there is a causal relationship between the injury for which pecuniary damages have been awarded and the injury for which nonpecuniary damages are claimed.

(4) **LIMITATIONS ON AWARD.** (a) Any amount otherwise recovered for the mining-related injury for which a claim is filed under this section shall reduce the amount awarded under this section by the amount otherwise recovered.

(b) No award for a claim under this section may exceed \$150,000 for all injuries less any amount subtracted under par. (a) or sub. (3) (c).

(c) No award for loss of society and companionship, pain and suffering or mental anguish may exceed a total of \$20,000 and, in any event, no award for nonpecuniary damages may exceed 50% of the amount awarded for pecuniary damages.

(d) No award may be made for punitive purposes.

(e) No award for a claim under this section may exceed an amount equal to the balance in the mining damage reserve accumulation.

(5) **MINING DAMAGE RESERVE ACCUMULATION.** (a) Calculation. The mining damage reserve accumulation is calculated by subtracting the total amount of all mining damages awards paid from the appropriation under s. 20.445 (4) (a) beginning on the effective date of this act (1979) from the sum of:

1. Ten percent of all moneys distributed under s. 70.395 (1) (a) beginning on the effective date of this act (1979); and

2. Prior to 10 years after the effective date of this act (1979), \$500,000.

(b) Proration. If the balance of the mining damage reserve accumulation is less than \$500,000 at the beginning of a fiscal year or falls below that amount at any time, the department shall delay the payment of all mining damage awards during that fiscal year until after the close of the fiscal year to determine the sufficiency of the mining damage reserve accumulation.

**NOTE:** See the NOTE following SECTION 2 of the bill for information regarding the mining damage reserve accumulation.

(6) **STATE SUBROGATED TO CLAIMANT'S RIGHTS.** The state is subrogated to the rights of a claimant who obtains an award under this section in an amount equal to the award and may bring an action under s. 107.32 against a mining company or join in an action

brought by a claimant under s. 107.32 to recover the amount awarded the claimant. A claimant who receives an award under this section shall cooperate with the state in any action under this subsection. The department may withhold 5% of the total award to which a claimant is entitled under this section until the state decides whether to commence an action under this subsection or, if commenced, until the action is resolved.

(7) **ADMISSIBILITY OF FINDINGS AND CONCLUSIONS.** The findings and conclusions under this section are not admissible in any civil action brought against a mining company.

(8) **APPEAL.** Any party to a claim under this section may appeal a decision of the department to circuit court which shall conduct a full evidentiary hearing on the claim.

**107.32 Liability of mining companies.** A mining company is liable for damages for mining-related injuries resulting from its prospecting, mining, refining or smelting in this state if, and to the degree that, the elements of liability are established in accordance with law, regardless of any change in the nature of the ownership of the interests in the prospecting or mining site, refinery or smelter held by the mining company and regardless of any reorganization, merger, consolidation or liquidation affecting the mining company.

**107.33 Limitations on claims and actions for mining-related injuries.** The periods of limitation under s. 893.207 apply to all claims and actions for damages arising under or governed by this subchapter.

**107.34 Application to sites where activities have ceased.** This subchapter does not apply to any prospecting or mining site on which prospecting or mining has ceased prior to the effective date of this act (1979) unless prospecting or mining activities are commenced at the site after the effective date of this act (1979), in which case any mining-related injury is within the scope of this subchapter.

**NOTE:** Where prospecting or mining has ceased on a prospecting or mining site prior to the effective date of the bill, a mining-related injury incurred in connection with such sites is not covered by the provisions of the bill unless prospecting or mining activities are subsequently commenced at the site.

**107.35 Application to current mining operations.** (1) If a person incurs a mining-related injury and the mining waste or mine excavation was present, in whole or in part, prior to the effective date of this act (1979) and the waste or excavation was from the prospecting, mining or other practice of a mining company that is actively engaged in mining or prospecting in this state on the effective date of this act (1979), then s. 107.31 applies only if:

(a) The person has fully pursued all other judicial or administrative remedies against the mining company to recover damages for the mining-related injury and the person or any party subrogated to the person's rights has not received compensation for the mining-related injury as a result of pursuing the other judicial or administrative remedies; or

(b) The person chooses to pursue, as his or her sole remedy, compensation from the mining damage appropriation. If a person chooses to pursue a claim under this paragraph, he or she may not pursue any other remedy for the mining-related injury.

(2) If a person makes a claim against the mining damage appropriation under the circumstances described in sub. (1) (a):

(a) The claimant may introduce into evidence any relevant findings of fact made in any prior administrative or judicial proceeding.

(b) The state is not subrogated under s. 107.31 (6) to the rights of the claimant and, in any case, shall be bound by any decision regarding elements of liability other than causation and injury-in-fact made in any prior administrative or judicial proceeding involving the claimant.

(3) If a person makes a claim against the mining damage appropriation under sub. (1) (b), the state may recover under s.107.31 (6) any payment received by the claimant from the mining damage appropriation only if, in addition to other elements of liability, the state proves that the mining-related injury was from mine excavations or mining wastes created after the effective date of this act (1979). The state's burden of persuasion with regard to the latter element of liability may not be shifted to the mining company.

NOTE: This section addresses the application of the mining damage award procedure to a mining-related injury that results from mining waste or a mine excavation which was present, wholly or partially, prior to the effective date of the bill and which resulted from the practices of a mining company actively engaged in prospecting or mining in this state on the effective date of the bill. A person who incurs a mining-related injury under these circumstances may make a claim against the mining damage appropriation only if he or she does not pursue any other remedy or, if other remedies are pursued, only if all other remedies have been exhausted and no compensation for the injury has been received as a result of pursuing other remedies. The state's subrogation rights are limited with respect to awards for mining-related injuries covered by this section.

SECTION 6. 227.22 (2) of the statutes is amended to read:

227.22 (2) Only the provisions of ss. 227.01 to 227.21 relative to rules are applicable to matters arising out of s. 56.07 (7), 56.21, 66.191 or 101.22 or, ch. 102, subch. II of ch. 107 or ch. 108 or 949.

NOTE: Section 227.22 (2) is amended to clarify that a claim against the mining damage appropriation under subch. II of ch. 107, as created by the bill, will not be conducted as a contested case under ch. 227, but rather according to procedures developed by the department of industry, labor and human relations by rule.

SECTION 7. 893.207 of the statutes is created to read:

**893.207 Action for certain damages related to mining.** (1) A claim against the mining damage appropriation under s. 107.31 to recover damages for mining-related injuries shall be brought within 3 years of the date on which the death occurs or the injury was or should have been known.

(2) (a) An action to recover damages for mining-related injuries under s. 107.32 shall be brought within 3 years of the date on which the death or injury occurs unless the department of industry, labor and human relations gives written notice within the time specified in this subsection that a claim has been filed with it under sub. (1), in which case an action based on the claim may be brought against the person to whom the notice is given within one year after the final resolution, including any appeal, of the claim or within the time specified in this subsection, whichever is longer.

(b) In this subsection "date of injury" means the date on which the evidence of injury, resulting from the act upon which the action is based, is sufficient to alert the injured party to the possibility of the injury. The injury need not be of such magnitude as to identify the causal factor.

SECTION 8. **Program responsibilities.** In the list of program responsibilities specified for the department of industry, labor and human relations in s. 15.221 (intro.) of the statutes, reference to section chapter "107" is inserted.