

CHAPTER 102

WORKER'S COMPENSATION

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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) "Compensation" means worker's compensation.

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

(b) "Examiner" includes the administrator and deputy administrator of the worker's compensation division of the department.

(c) "Injury" means mental or physical harm to an employe 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 per-

sonal injury entitling the employe to compensation therefor either for disability or treatment.

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

(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.

(f) "Time of injury", "occurrence of injury", or "date of injury" means the date of the accident which caused the injury, or in the case of disease, the last day of work for the last employer whose employment caused disability, except that in case of occupational deafness the definition in s. 102.555 controls.

History: 1975 c. 147 ss. 7 to 13, 54; 1975 c. 200; 1979 c. 89, 278.

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

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

(a) Where the employe sustains an injury.

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

(c) 1. Where, at the time of the injury, the employe is performing service growing out of and incidental to his employment. Every employe going to and from his employment in the ordinary and usual way, while on the premises of his employer, or while in the immediate vicinity thereof if the injury results from an occurrence on the premises, shall be deemed to be performing service growing out of and incidental to his employment; so shall any employe 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; and so shall any fireman or municipal utility employe responding to a call for assistance outside the limits of his city or village, unless such response is in violation of law. The premises of his employer shall be deemed to include also the premises of any other person on whose premises service is being performed.

2. To enhance the morale and efficiency of public employes 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 employes 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 employes of persons, firms or private corporations. Accordingly, the same considerations, standards, and rules of decision shall apply in all cases in determining whether any employe under this chapter, at the time of the injury, was performing service growing out of and incidental to his 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 employes enumerated in s. 102.07; and no statutes, ordinances, or administrative regulations otherwise applicable to any employes 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 his employment.

(f) Every employe whose employment requires him to travel shall be deemed to be performing service growing out of and incidental to his 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 his employment.

(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 employe of the same employer and the worker's compensation insurance carrier. This section does not limit the right of an employe to bring action against any coemploye for an assault intended to cause bodily harm, or against a coemploye for negligent operation of a motor vehicle not owned or leased by the employer, or against a coemploye of the same employer to the extent that there would be liability of a governmental unit to pay judgments against employes under a collective bargaining agreement or a local ordinance.

(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 employes whose rate of compensation is changed as provided in ss. 102.43 (7) and 102.44 (1) and (5).

(5) If an employe, while working outside the territorial limits of this state, suffers an injury on account of which the employe, or in the event of the employe'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 employe, or in the event of the employe's death resulting from such injury, the dependents of the employe, 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.

History: 1971 c. 148, 307, 324; 1975 c. 147 ss. 15, 54; 1977 c. 195, 272, 418; 1979 c. 278.

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].

In a proceeding on a claim for death benefits of an office worker and receptionist caused by multiple stab wounds inflicted by an unknown assailant upon the employe at the close of her working day while she alone remained in the office portion of a factory building which had been vacated by all other factory and office employes, the ILHR Department correctly found 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 Mfg., Inc. v. ILHR Dept.* 45 W (2d) 563, 173 NW (2d) 690.

The holding in *Brown v. Ind. Comm.* 9 W (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 applicant's work efforts, was not intended to preclude a doctor, when determining medical causation, from considering whether the employe was engaged in his usual work at the time of injury, although the doctor should not automatically conclude each time one is injured while performing a task which he previously performed on a usual or regular basis that such injury was caused by preexisting condition rather than by his employment. *Pitsch v. ILHR Dept.* 47 W (2d) 55, 176 NW (2d) 390.

Where a herniated disc was diagnosed within a few days after the claimed injury, the evidence did not justify ILHR in finding that the employe did not meet his burden of proof. *Erickson v. ILHR Dept.* 49 W (2d) 114, 181 NW (2d) 495.

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 successive injuries; it can neither assess all the liability against one of several employers nor divide liability equally among each of several employers where there is no evidence to support a finding that the injury or injuries contributed to the disability in that manner. *Semons Department Store v. ILHR Dept.* 50 W (2d) 518, 184 NW (2d) 871.

While susceptibility to further injury does not necessarily establish a permanent disability under the "as is" doctrine, an employe's predisposition to injury does not relieve a present employer from liability for workmen's compensation benefits if the employe becomes injured due to his employment, even though the injury may not have been such as to have caused disability in a normal individual. *Semons Department Store v. ILHR Dept.* 50 W (2d) 518, 184 NW (2d) 871.

Where a salesman starts on a trip, even if he deviates to the extent of spending several hours in a tavern, and is killed on his ordinary route home, his estate is entitled to compensation. *Lager v. ILHR Dept.* 50 W (2d) 651, 185 NW (2d) 300.

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

Finding of commission that deceased was performing service sustained even though he was killed while walking on a street in Milwaukee at 3 in the morning and tests showed he was intoxicated. *Phillips v. ILHR Dept.* 56 W (2d) 569, 202 NW (2d) 249.

An employe cannot bring a 3rd party action against a member of the employing partnership. *Candler v. Hardware Dealers Mut. Ins. Co.* 57 W (2d) 85, 203 NW (2d) 659.

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

A salesman, employed on a part-salary and commission basis, whose duty and only employment was to travel each day from his home in the city, servicing and soliciting orders for the sale of pizzas within a prescribed territory commencing one mile outside the city, using a delivery truck furnished by his employer whose office was 193 miles away and to which he was not required to report, was performing services incidental to his employment when he sustained a back injury in a fall on the icy driveway in going from his home to his delivery truck, which he had intended to get into and start for his first call. *Black River Dairy Products, Inc. v. ILHR Dept.* 58 W (2d) 537, 207 NW (2d) 65.

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 employe met his death his working time in Wisconsin had been reduced to 10%. *Simonon v. ILHR Dept.* 62 W (2d) 112, 214 NW (2d) 302.

Only if the "fortuitous event unexpected and unforeseen" can be said to be so out of the ordinary from the countless emotional strains and differences that employes encounter daily without serious mental injury will liability under the workmen's compensation act be found. *School Dist. No. 1 v. ILHR Dept.* 62 W (2d) 370, 215 NW (2d) 373.

Under (1) (f), no purpose of the employer was in any way served by the extended westward highway testing related to either visiting a boyfriend or going on a hunting trip. *Hunter v. ILHR Dept.* 64 W (2d) 97, 218 NW (2d) 314.

Under the 4-element test consistently applied by the supreme court in deciding whether a workman was a loaned or special employe, the 1st element, actual or implied consent to work for the special employer, is negated here by the existence of a work order providing that 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, plaintiff was a business invitee and not an employe at the time of the accident. *Nelson v. L. & J. Press Corp.* 65 W (2d) 770, 223 NW (2d) 607.

Nontraumatically caused mental injury is compensable only if resulting from a situation of greater dimensions than the day-to-day mental stresses and tensions which all employes must experience. *Swiss Colony, Inc. v. DILHR.* 72 W (2d) 46, 240 NW (2d) 128.

Provider of medical services to employe does not have cause of action against employer under worker's compensation act where employer denied liability and compromised employe's claim. *La Crosse Lutheran Hospital v. Oldenburg.* 73 W (2d) 71, 241 NW (2d) 875.

Doctrines of required travel, dual purpose, personal comfort, and special mission discussed. *Sauerwein v. DILHR.* 82 W (2d) 294, 262 NW (2d) 126.

Personal comfort doctrine did not apply where employe was injured neither on employer's premises nor during specific working hours. Denial of benefits for injury received while eating lunch off employer's premises was not denial of equal protection. *Marmolejo v. ILHR Dept.* 92 W (2d) 674, 285 NW (2d) 650 (1979).

Presumption in favor of travelling employes does not modify requirements for employer liability. *Goranson v. DILHR.* 94 W (2d) 537, 289 NW (2d) 270 (1980).

Sub. (2) does not unconstitutionally deprive third party tortfeasor of property by barring contribution action against negligent employer. *Mulder v. Acme-Cleveland Corp.* 95 W (2d) 173, 290 NW (2d) 276 (1980).

Use of parking lot is prerequisite for coverage under (1) (c) 1. *Jaeger Baking Co. v. Kretschmann.* 96 W (2d) 590, 292 NW (2d) 622 (1980).

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

Under either Minnesota or Wisconsin law, airline which paid compensation benefits to stewardess under laws of Min-

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nesota was not liable to U S on theory of indemnity or contribution for any recovery by stewardess in her tort action against U S for same injury which occurred in Wisconsin *Herman v. U S*. 382 F Supp. 818

Third party was required to pay 95% of damages even though only 25% negligent because employer was shielded by (2). *Schuldies v. Service Mach. Co. Inc* 448 F Supp. 1196 (1978)

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 and other public or quasi-public corporations therein.

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

2. Every person who usually employs less than 3 employes, 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 as of the first day of the calendar year 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 employes, 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 person to whom pars. (a), (b) and (c) 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 employe 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) Members of partnerships shall not be counted as employes. 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 (1961) shall not constitute an employer of any other person with respect to such service and such other person shall, with respect to such service, be deemed to be an employe only of such employer for whom the service is being performed.

(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.

History: 1975 c. 199.

When an employe 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 workmen's compensation. *Insurance Co. of N. A. v. ILHR* Dept. 45 W (2d) 361, 173 NW (2d) 192.

102.05 Election by employer, withdrawal.

(1) An employer who has had no employe at any time within a continuous period of 2 years shall be deemed to have effected withdrawal, which shall be effective on the last day of such period. An employer who has not usually employed 3 employes and who has not paid wages of at least \$500 for employment in this state in any 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.

(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 employes

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, providing he has not employed 6 or more employes 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 (d).

102.06 Joint liability of employer and contractor; loaned employes.

An employer shall be liable for compensation to an employe 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 employe 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 employe shall not recover compensation for the same injury from more than one party. In the same manner, under the same conditions, and with like right of recovery, as in the case of an employe of a contractor or subcontractor, described above, an employer shall also be liable for compensation to an employe who has been loaned by the employer to another employer. The employer who becomes liable for and pays such compensation may recover the same from such contractor, subcontractor or other employer for whom the employe was working at the time of the injury if such contractor, subcontractor or other employer was an employer as defined in s. 102.04.

History: 1975 c 147 s 54; 1975 c 199

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

Franchisee held to be "contractor under" franchisor within meaning of this section. *Maryland Cas. Co. v. DILHR*, 77 W (2d) 472, 253 NW (2d) 228.

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

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

(1) 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 it against compensation to employes of such contractor or employes of a subcontractor under him.

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

(3) Nothing herein contained shall prevent municipalities from paying teachers, policemen, firemen and other employes full salaries during disability, nor interfere with any pension funds, nor prevent payment to teachers, policemen or firemen therefrom.

(4) Every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employes, whether paid by the employer or employe, if employed with the knowledge, actual or constructive, of the employer, including minors (who shall have the same power of contracting as adult employes), but not including (a) domestic servants, (b) any person whose employment is not in the course of a trade, business, profession or occupation of his employer, unless as to any of said classes, such employer has elected to include them. Item (b) shall not operate to exclude an employe whose employment is in the course of any trade, business, profession or occupation of his employer, however casual, unusual, desultory or isolated any such trade, business, profession or occupation may be.

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

(a) Farmers or their employes working on an exchange basis shall not be deemed employes 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 his employes.

(c) A shareholder-employe of a family farm corporation shall be deemed a "farmer" for purposes of this chapter and shall not be deemed an employe 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, or as spouses, brothers, sisters, uncles, aunts, cousins, sons-in-law, daughters-in-law, fathers-in-law, mothers-

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in-law, brothers-in-law or sisters-in-law of such lineal ancestors or lineal descendants.

(6) Every person selling or distributing newspapers or magazines on the street or from house to house. Such a person shall be deemed an employe 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 he sells or distributes. Such a person shall not be counted in determining whether an intermediate agency or publisher is subject to this chapter.

(7) Every member of any volunteer fire company or fire department organized under ch. 213 or any legally organized rescue squad shall be deemed an employe of such company, department or squad. Every such member, while serving as an auxiliary policeman at an emergency, shall also be deemed an employe of said company, department or squad. If such company, department or squad has not insured its liability for compensation to its employes, the municipality or county within which such company, department or squad was organized shall be liable for such compensation.

(8) Every independent contractor who does not maintain a separate business and who does not hold himself out to and render service to the public, provided he is not himself an employer subject to this chapter or has not complied with the conditions of s. 102.28 (2), shall for the purpose of this chapter be an employe of any employer under this chapter for whom he is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

(9) Members of the national and state guards, when in state service performing official 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 employes 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 employes of persons, firms or private corporations; any question whether any person is an employe 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

employes enumerated in sub. (1) shall not be controlling in deciding whether any person is an employe 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 employes for the purposes of this chapter. Election shall be by endorsement upon the worker's compensation insurance policy with written notice to the department. In the case of an employer exempt from insuring liability, election shall be by written notice to the department. The department shall by rule prescribe the means and manner in which notice of election by the employer is to be provided to the volunteer workers.

History: 1975 c. 147 s. 54; 1975 c. 224; 1977 c. 29; 1979 c. 278.

Where the claimant, owner of a truck, working exclusively for a trucking company under a lease agreement, fell and sustained injuries in the company's truck parking area while in the process of repairing his truck, the department properly found that the claimant, although an independent contractor, was at the time of his injury a statutory employe of the company under sub. (8). *Employers Mut. L. Ins. Co. v. ILHR* Dept. 52 W (2d) 515, 190 NW (2d) 907.

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 W (2d) 175, 212 NW (2d) 97.

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

102.11 Earnings, method of computation.

(1) The average weekly earnings for temporary disability, permanent total disability or death benefits for injury on or after January 1, 1980, shall be taken at not less than \$30 nor more than such wage rate as will result in a maximum compensation rate of 100% of the state's average weekly earnings as determined under s. 108.05 as of June 30, 1979. The maximum weekly compensation rate after December 31, 1980, is 100% of the average weekly earnings determined as of June 30, 1980. The average weekly earnings for permanent partial disability for injuries after January 1, 1980, shall be taken at not less than \$30 nor more than \$105, resulting in a weekly maximum compensation rate of \$70. Between such limits the average weekly earnings shall be determined as follows:

(a) Daily earnings shall mean the daily earnings of the employe at the time of the injury in the employment in which he was then engaged. In determining daily earnings under this paragraph, overtime shall not be considered. If at the time of the injury the employe is working on part time for the day, his daily earnings shall be arrived at by dividing the amount received, or to be received by him 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 for the employment involved. The words "part time for the day" shall apply to Saturday half days and all other days upon which the employe works less than normal full-time working hours. The average weekly earnings shall be arrived at 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 employe was engaged at the time of his injury.

(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 working week shall be such hours and such days in similar service in the same or similar nonseasonal employment. Seasonal employment shall mean employment which 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 employe 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 earnings of the employe for the calendar weeks during the year before his or her injury within which the employe has been employed in the business, in the kind of employment and for the employer for whom the employe worked when injured. Calendar weeks within which no work was performed shall not be considered under this paragraph. This paragraph applies only if the employe has worked within each week of at least 6 calendar weeks during the year before his or her injury in the business, in the kind of employment and for the employer for whom the employe worked when injured. For purposes of this section, earnings for part-time services performed for a labor organization pursuant to a collective bargaining agreement between the employer and that labor organization shall be considered as part of the

total earnings in the preceding 52 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 employe.

(f) Average weekly earnings shall in no case be less than 30 times the normal hourly earnings at the time of injury. However, this section shall not apply to temporary disability benefits, if the part-time employe restricts his or her availability, on the labor market, to part-time work and is not actively employed full-time elsewhere. In such case the weekly temporary disability benefits shall not exceed the average weekly wages of the part-time employment.

(g) If an employe is under twenty-seven years of age, his 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 such employe, if not disabled, probably would earn after attaining the age of twenty-seven years. Unless otherwise established, said earnings 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 fifty times the employe'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 employe in the year immediately preceding his injury in the kind of employment in which he 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 employe computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he 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.

102.12 Notice of injury, exception, laches. No claim for compensation shall be maintained unless, within 30 days after the occurrence of the injury or within 30 days after the employe knew or ought to have known the nature of his disability and its relation to his employment, actual notice was received by the employer or by an officer, manager or desig-

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nated 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 shall be sufficient. Absence of notice shall 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 employe or his dependent knew or ought to have known the nature of the disability and its relation to the employment, the right to compensation therefor shall be barred, except that the right to compensation shall not be barred if the employer knew or should have known, within the 2-year period, that the employe had sustained the injury on which claim is based. Issuance of notice of a hearing on the department's own motion shall have the same effect for the purposes of this section as the filing of an application.

102.13 Examination by physician, chiropractor or podiatrist; competent witnesses; exclusion of evidence; autopsy.

(1) Except as provided in sub. (1m), whenever compensation is claimed by an employe, the employe shall, upon the written request of the employe's employer, submit to reasonable examination by a physician, chiropractor or podiatrist, provided and paid for by the employer, and shall submit to examination by any physician, chiropractor or podiatrist selected by the commission or an examiner. The employe shall be entitled to have a physician, chiropractor or podiatrist, provided by himself or herself, present at any such examination. So long as the employe, after such written request of the employer, refuses to submit to such examination, or in any way obstructs the examination, the employe's right to begin or maintain any proceeding for the collection of compensation shall be suspended, except as provided in sub. (1m). If the employe refuses to submit to such examination after direction by the department or an examiner, or in any way obstructs such examination, the employe's right to the weekly indemnity which accrues and becomes payable during the period of such refusal or obstruction, shall be barred, except as provided in sub. (1m). Any physician, chiropractor or podiatrist who is present at any such examination may be required to testify as to the results thereof. Any physician, chiropractor or podiatrist who attended an employe may be required to testify before the department when it so directs. Notwithstanding any other statutory provisions, any

physician, chiropractor or podiatrist attending a worker's compensation claimant may furnish to the employe, employer, worker's compensation insurer, or the department information and reports relative to a compensation claim. The testimony of any physician, chiropractor or podiatrist, who is licensed to practice where he or she resides or practices outside the state, may be received in evidence in compensation proceedings.

(1m) The rights of employes 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 employe refuses to submit to a physical examination, upon the request of the employer or at the direction of the department or an examiner, which would require the employe to travel a distance of 100 miles or more from his or her place of residence.

(2) The department may refuse to receive testimony as to conditions determined from an autopsy if it appears a) 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 said autopsy of the time and place it would be performed, or b) that the autopsy was performed by or at the direction of the coroner or medical examiner 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.

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 or recorded by a recording machine.

History: 1977 c. 418.

102.16 Submission of disputes, contributions by employes.

(1) Any controversy concerning compensation, including any 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 such compromise is filed with the department, or from the date an award has been entered, based thereon, or the department may take such action upon application made within such year. Unless the word "compromise" appears in a stipulation of settlement, the settlement shall not be deemed a compromise, and further claim shall not be barred except as provided in s. 102.17 (4) irrespective of whether award is made. The employer or insurer shall have equal rights with the employe to have review of a compromise. Upon petition filed by the employer or insurer with the department within one year from any award upon a stipulation of settlement the department shall have power to set aside said award or otherwise determine the rights of the parties.

(2) The department has jurisdiction to pass upon the reasonableness of health service bills in all cases of dispute where compensation is paid, in the same manner and to the same effect as it passes upon compensation.

(3) No employer subject to this chapter may solicit, receive or collect any money from his or her employes or make any deduction from their wages, either directly or indirectly, for the purpose of discharging any liability under this chapter; nor may any such employer sell to an employe, or solicit or require the employe to purchase, medical, chiropractic, podiatric or hospital tickets or contracts for medical, surgical, or hospital treatment which is required to be furnished by such employer.

(4) Any employer violating sub. (3) shall be subject to the penalties provided in s. 102.28 (3), and, in addition thereto, shall be liable to an injured employe for the reasonable value of the necessary services rendered to such employe pursuant to any arrangement made in violation of sub. (3) without regard to said employe's actual disbursements for the same.

(5) No agreement by an employe to waive the right to compensation is valid.

History: 1975 c. 147, 200; 1977 c. 195.

102.17 Procedure; notice of hearing; witness, contempt; testimony, medical examination.

(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 in the office of the secretary of state 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.

(c) Either 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.

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before the department. No person, firm or corporation other than an attorney at law, duly licensed to practice law in the state, shall appear on behalf of any party in interest before the department or any member or employe of the department assigned to conduct any hearing, investigation or inquiry relative to a claim for compensation or benefits under this chapter, unless a citizen of the United States, of full age, of good moral character and otherwise qualified, and has obtained from the department a license with authorization to appear in matters or proceedings before the department. Such license shall be issued by the department under rules to be adopted by it. In such rules the department may prescribe such reasonable tests of character and fitness as it may deem necessary. There shall be maintained in the office of the department a registry or list of persons to whom licenses have been issued as provided herein, which list shall be corrected as often as licenses are issued or revoked. Any such license may be suspended or revoked by the department for fraud or serious misconduct on the part of any such agent. Before suspending or revoking the license of any such agent, the department shall give notice in writing to such agent of the charges of fraud or misconduct, and shall give such agent full opportunity to be heard in relation to the same. Such license and certificate of authority shall, unless otherwise suspended or revoked, be in force from and after the date of issuance until the 30th day of June following such date of issuance and may be renewed by the department from time to time, but each renewed license shall expire on the 30th day of June following the issuance thereof.

(d) The contents of verified medical and surgical reports, by physicians, podiatrists, surgeons and chiropractors licensed in and practicing in this state, presented by a party for compensation shall constitute prima facie evidence as to the matter contained therein, subject to such rules and limitations as the department prescribes. Verified reports of physicians, podiatrists, surgeons and chiropractors, wherever licensed and practicing, who have examined or treated the claimant, if such practitioner consents to subject himself or herself to cross-examination shall also constitute prima facie evidence as to the matter contained therein and verified reports by doctors of dentistry shall be admissible as evidence of the diagnosis and necessity for treatment but not of disability. Physicians, podiatrists, surgeons, dentists and chiropractors licensed in and practicing in this state may certify instead of verify such reports, and such certification shall be equivalent to verification; and any physician, podiatrist, surgeon, dentist or chiropractor who knowingly

makes a false statement of fact or opinion in such 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 or surgeon, to be such record of the patient in question, and made in the regular course of examination or treatment of such patient, shall constitute prima facie evidence in any worker's compensation proceeding as to the matter contained therein, insofar as it is otherwise competent and relevant.

(e) The department may, with or without notice to either party, cause testimony to be taken, or 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 employe claiming compensation to be examined by a physician, chiropractor 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 either party shall have opportunity to rebut such 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.

(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 employe be examined or autopsy be performed, or an opinion of a physician, chiropractor or podiatrist be obtained without examination or autopsy, by an impartial, competent physician, chiropractor or podiatrist designated by the department who is not under contract with or regularly employed by a compensation insurance carrier or self-insured employer. The expense of such examination shall be paid by the

employer. 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 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 therein.

(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 had 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.

(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 or subpoena duces tecum upon the person along with a tender of witness fees as provided in ss. 885.05 and 885.06. The subpoena shall be on a form provided by the department and shall give the name and address of the party requesting the subpoena.

(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 employe, the employe's legal representative or 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, whichever date is latest. In the case of occupational disease 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. 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

employe'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 employe or dependent shall, at the time of injury, or at the time his right accrues, be under 18 years of age, the limitations of time within which he may file application or proceed under this chapter, if they would otherwise sooner expire, shall be extended to one year after he attains the age of 18 years. If, within any part of the last year of any such period of limitation, an employe, his 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.

History: 1971 c. 148; 1971 c. 213 s. 5; 1973 c. 150, 282; Sup. Ct. Order, 67 W (2d) 774; 1975 c. 147 ss. 20, 54; 1975 c. 199, 200; 1977 c. 29, 195, 273; 1979 c. 278.

Committee Note, 1971: This change [as to sub. (1) (h)] is proposed to clarify the interpretation of the statute without changing it. [Bill 371-A]

Plaintiff-employe was not deprived of any substantial due process rights by the department's refusal to invoke its rule requiring inspection of opposing parties' medical reports where plaintiff had ample notice of the nature of the employe's claim. *Theodore Fleisner, Inc. v. ILHR Dept. 65 W (2d) 317, 222 NW (2d) 600*

See note to 102.18, citing *Kohler Co. v. DILHR*, 81 W (2d) 11, 259 NW (2d) 695.

102.175 Apportionment of liability. 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.

History: 1979 c. 278.

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.

(b) After final hearing 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. 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

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final awards. The department may include in its final award, as a penalty for noncompliance with any such interlocutory order or award, if it finds that noncompliance was not in good faith, not exceeding 25% of each amount which shall not have been paid as directed thereby. Where there is a finding that the employe 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 such application upon the ground that the applicant has suffered no disability from said disease shall not bar any claim he may thereafter have for disability sustained after the date of the award.

(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.

(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.

(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. These examiners may make findings and orders, and approve, review, set aside, modify or confirm stipulations of settlement or compromises of claims for compensation. Any party who is dissatisfied with the findings and order of an examiner may file a written petition with the department for review by the commission of the findings or order.

(3) If no petition is filed within 20 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, such findings or order shall be considered final, unless set aside, reversed or modified by such examiner within such 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 petition with the department shall run from the date that notice of such 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 such findings or order in whole or in part, or direct the taking of additional evidence. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing petition with the department.

(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) On motion, the commission may set aside, modify or change any order, findings or award, whether made by an examiner or by the commission, at any time within 20 days from the date thereof if it discovers any mistake therein, or upon the grounds of newly discovered evidence. Unless an order granting or denying a motion based upon the grounds of newly discovered evidence is made by the commission within such 20 day period, the motion is deemed denied. The commission may on its own motion, for reasons it deems sufficient, set aside any final order or award of the commission or examiner within one year from the date thereof upon grounds of mistake or newly discovered evidence, and after extending an opportunity for hearing may make new findings and order, or it may reinstate the previous findings and order or award or remand the case to the department for further proceedings.

(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 employe 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 employe is suffering from disease arising out of the employment, make new findings and award, or it may reinstate the previous findings, order or award.

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

affect the application of the limitation in s. 102.17 (4).

History: 1971 c. 148; 1973 c. 150; 1975 c. 147; 1977 c. 29, 195; 1979 c. 89, 278, 355.

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 of the ILHR department in workmen's compensation cases are not res judicata. *Worsch v. ILHR Dept. 46 W (2d) 504, 175 NW (2d) 201*

Where in a workmen's compensation case 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 reasons for reaching a different result or conclusion—this particularly where credibility of witnesses is involved. *Transamerica Ins. Co. v. ILHR Dept. 54 W (2d) 272, 195 NW (2d) 656*

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 where doctors testified that there might be future effects. *Vernon County v. ILHR Dept. 60 W (2d) 736, 211 NW (2d) 441*

Where the department in a workmen's compensation case involving conflicting testimony reverses an examiner's findings, fundamental fairness requires a separate statement by it explaining the reasons 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. ILHR Dept. 62 W (2d) 112, 214 NW (2d) 302*

Where department increased examiner's award, resort to AMA standards to interpret rule was proper and its validity properly could be predicated on the department's uniform administrative interpretation of its rule to mean that a contact lens does not afford a "useful" correction. *Employers Mut. Liability Ins. Co. v. ILHR Dept. 62 W (2d) 327, 214 NW (2d) 587*

Sub. (5) is inapplicable where 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. ILHR Dept. 63 W (2d) 248, 217 NW (2d) 370*

It is not disputed that the shoveling, though unusual, was part of defendant's employment activities. The doctor's testimony is thus sufficient evidence to support a conclusion that the heart attack was caused by employment-related exertion. *Theodore Fleisner, Inc. v. ILHR Dept. 65 W (2d) 317, 222 NW (2d) 600*

Authority granted under (3), to modify the findings of a hearing examiner in a workmen's compensation proceeding does not extend to the making of findings and order on an alternative basis of liability neither tried by the parties nor ruled on by the examiner, and where other basis of liability is applicable, it is required to set aside the examiner's findings and order and direct the taking of additional testimony, with the examiner to make new findings as to the substituted basis. *Jos. Schlitz Brewing Co v. ILHR Dept. 67 W (2d) 185, 226 NW (2d) 492*

Where dismissal of application was neither based upon stipulation or compromise nor after a hearing, dismissal is void and limitation under 102.17 does not bar claim brought 12 years later. *Kohler Co. v. DILHR, 81 W (2d) 11, 259 NW (2d) 695*

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

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

General finding by DILHR implies all facts necessary to support it. *Vaiadzic v. Briggs & Stratton Corp. 92 W (2d) 583, 286 NW (2d) 540 (1979)*

102.19 Alien dependents; payments through consular officers. In case a deceased employe, 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 employe 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 Employes confined in institutions; payment of benefits. In case an employe is adjudged insane or incompetent, or convicted of a felony, and is confined in a public institution and has wholly dependent upon him for support a person, whose dependency is determined as if the employe were deceased, compensation payable during the period of his confinement may be paid to the employe and his dependents, in such manner, for such time and in such amount as the department by order provides.

102.20 Judgment on award. Either party may present a certified copy of the award to the circuit court for any county, whereupon said court shall, without notice, render judgment in accordance therewith; such judgment shall have the same effect as though rendered in an action tried and determined by said court, and shall, with like effect, be entered and docketed.

102.21 Payment of awards by municipalities. Whenever an award is made by the department under this chapter or s. 66.191 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,

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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.

102.22 Penalty for delayed payments. (1)

Where the employer or his or her insurer is guilty of inexcusable delay in making payments, the payments as to which the delay is found shall be increased by 10%. Where the delay is chargeable to the employer and not to the insurer s. 102.62 shall apply and the relative liability of the parties shall be fixed and discharged as therein provided. The department may also order the employer or insurance carrier to reimburse the employe for any finance charges, collection charges or interest which the employe paid as a result of the inexcusable delay by the employer or insurance carrier.

(2) If the sum ordered by the department to be paid is not paid when due, such sum shall bear interest at the rate of 7% 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 within one year after final court determination.

History: 1977 c. 195; 1979 c. 110 s. 60 (13); 1979 c. 278.

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. ILHR Dept. 48 W (2d) 392, 180 NW (2d) 513*.

Penalty under (1) does not bar action for bad faith failure to pay claim. *Coleman v. American Universal Ins. Co. 86 W (2d) 615, 273 NW (2d) 220 (1979)*.

102.23 Judicial review. (1) 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 thereon or not, is subject to review only in the manner and upon the grounds following and not under ch. 227 or s. 801.02: Within 30 days from the date of an order or award made by the commission either originally or following the filing of a petition for review with the department under s. 102.18 any party aggrieved thereby may by service as provided in par. (a) 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 petitioner resides, except that if the petitioner is a state agency, the proceedings shall be in the circuit court of the county where the respondent resides. The proceedings may be brought in any circuit court if all parties stipulate and that court agrees. The judicial review provisions of ch. 227 do not apply to the review proceedings under this subsection.

(a) In such action a complaint shall be served with 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 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, and the department shall mail one copy to each other defendant. If the summons and complaint are not filed within 6 months from date of service, such service is void.

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

(c) The commission shall make return to the court of all documents and papers on file in the matter, and of all testimony which has been taken, and of 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 mentioned in supreme court Rule 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 either 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.

(d) 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.

(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 W (2d) xxxi; 1977 c. 29; 1977 c. 187 ss. 59, 135; 1977 c. 195, 272, 447; Sup. Ct. Order, 83 W (2d) xiii; 1979 c. 278.

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 an order of ILHR as to unemployment compensation labeled his petition "under 227.15", is immaterial since the circuit court had subject matter jurisdiction. An answer by the department that 227.15 gave no jurisdiction amounted to an appearance and the department could not later claim that the court had no personal jurisdiction because appellant had not served a summons and complaint. *Lees v. ILHR Dept. 49 W (2d) 491, 182 NW (2d) 245.*

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

Challenge to the constitutionality of (1) is 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. ILHR Dept. 64 W (2d) 97, 218 NW (2d) 314.*

See note to 807.07, citing *Cruz v. DILHR, 81 W (2d) 442, 260 NW (2d) 692.*

Employer whose unemployment compensation account is not affected by commission's determination has no standing

to seek judicial review. *Cornwell Personnel Associates v. ILHR Dept. 92 W (2d) 53, 284 NW (2d) 706 (Ct. App. 1979)*

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 the court upon the docket entry of any judgment which may have been rendered upon the order or award, and transcripts of the abstract may be obtained for like entry upon the 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

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 30 days from the date of service by either party upon the other of notice of entry of judgment. 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. All such appeals shall be placed on the calendar of the court of appeals and brought to a hearing in the same manner as state causes on the calendar. The state is deemed a party aggrieved, within the meaning of this subsection, whenever a judgment is entered upon such a 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

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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 W (2d) 774; 1977 c. 29, 187, 195, 418; 1979 c. 278

Committee Note, 1971: This is a mere procedural change [Bill 371-A]

269 36 applies to appeals to the supreme court; when service of an entry of judgment by the circuit court is served by mail, the time for appeal is extended to 35 days. The time runs from the date of mailing. *Chequamegon Telephone Cooperative v ILHR Dept. 55 W (2d) 507, 200 NW (2d) 441*

An appeal to the supreme court by a party who has unsuccessfully sought judicial review in the circuit court of an order or award in a workmen's compensation case, must be taken, under (1), within 30 days from the date of service of the notice of entry of the circuit court judgment or within 35 days if service is effected by mail. *Beloit Corp. v ILHR Dept. 63 W (2d) 23, 216 NW (2d) 233.*

102.26 Fees and costs. (1) No fees may be charged by the clerk of any court for the performance of any service required by this chapter, except for the docketing of judgments and for certified transcripts thereof. 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's 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.

(2m) In any action for the recovery of costs of hospitalization in a tuberculosis sanatorium, where such cost was incurred by a patient whose tuberculosis entitled the patient to worker's compensation, no attorney fee for the recovery of such cost shall be allowed to the attorney for such patient in such worker's compensation action, unless, by express agreement with the governing board of such institution the attorney has been retained by such governing board to also act as its attorney.

(3) Compensation in favor of any claimant, which exceeds \$100, shall be made payable to such claimant in person; however, in any award the department may upon application of any interested party and subject to the provisions of sub. (2) fix the fee of his attorney or representative and provide in the award for payment of such fee direct to the person entitled thereto. 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. Payment according to the directions of the award shall protect the employer and his insurer 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 him, 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.

Committee Note, 1971: This is to clarify present procedure. [Bill 371-A]

102.27 Claims unassignable, and exempt. 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.

102.28 Preference of claims; worker's compensation insurance. (1) PREFERENCE. The whole claim for compensation for the injury or death of any employe 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, every employer which is liable to pay compensation under this chapter shall insure payment for that compensation in an insurer authorized to do business in this state.

(b) **Exemption from duty to insure.** The department may grant a written order of exemption to an employer who shows its financial ability to pay the amount of compensation, agrees to report faithfully all compensable injuries and agrees to comply with this chapter and

the rules of the department. The department may condition the granting of an exemption upon the employer's furnishing of satisfactory security to guarantee payment of all claims under compensation. The department may require that bonds or other personal guarantees be enforceable against sureties in the same manner as an award may be enforced. The department may from time to time require proof of financial ability of the employer to pay compensation. Any exemption shall be void if the application for it contains a financial statement which is false in any material respect.

(c) *Revocation of exemption.* Upon giving 10 days' notice in writing, the department may, after hearing, revoke the exemption for financial reasons or for the failure of the employer to discharge faithfully its obligations according to the agreement contained in the application for exemption. Upon revocation, the employer shall insure its liability immediately as provided in par. (a).

(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) **PENALTY FOR NONCOMPLIANCE.** An employer who fails to comply with sub. (2) shall be fined not less than \$10 nor more than \$100 or imprisoned not less than 30 days nor more than 6 months, or both. Each day's failure shall be a separate offense. In a separate action upon complaint of the department, the fines specified in this section may be collected by the state in an action in debt.

(4) **ENFORCEMENT.** If it appears by the complaint or by the affidavit of any person in behalf of the state that the employer's liability continues uninsured there shall forthwith be served on the employer an order to show cause why the employer should not be restrained from employing any person in the employer's business pending the proceedings or until the employer shall have satisfied the court in which the matter is pending that the employer has complied with sub. (2). Such order to show cause shall be returnable before the court or the judge thereof at a time to be fixed in the order not less than 24 hours nor more than 3 days after its issuance. Insofar as the same may be applicable and not herein otherwise provided, the provisions of ch. 813 relative to injunctions shall govern these proceedings. If the employer denies under oath that the employer is subject to this chapter, and furnishes bond with such sureties as the court

may require to protect all the employer's employes injured after the commencement of the action for such compensation claims as they may establish, then an injunction shall not issue. Every judgment or forfeiture against an employer, under sub. (3), shall perpetually enjoin the employer from employing any person in the employer's business at any time when the employer is not complying with sub. (2).

(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 employes 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 registered 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 make payment of an award and if judgment is rendered in accordance with s. 102.20 against such employer and if execution is levied and returned unsatisfied in whole or in part, then payments for such liabilities shall be made from the fund established by 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 by sub. (8).

(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

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insolvent exempt employer for a period of one year following the date of the order. 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 compensation 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.

(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 W (2d) 774; 1975 c. 147 ss. 23, 34; 1975 c. 199; 1977 c. 195

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 employe shall not affect the right of the employe, the employe'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 employe or the employe's dependents to recover compensation. 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. 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, in-

cluding 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 employe or the employe's personal representative or other person entitled to bring action. Out of the balance remaining, the employer or insurance carrier shall be reimbursed for all payments made by it, or which it may be obligated to make in the future, under this chapter, except that it shall not be reimbursed for any payments of increased compensation made or to be made under s. 102.22, 102.57 or 102.60. Any balance remaining shall be paid to the employe or the employe's personal representative or other person entitled to bring action. If both the employe or the employe's personal representative or other person entitled to bring action, and the employer or compensation insurer, 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 employe 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 employe. 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 employe from taking the compensation he or she may be entitled to under it and also maintaining a civil action against any physician, chiropractor or podiatrist for malpractice. The employer or compensation insurer shall have no interest in or right to share in the proceeds of any civil action against any physician, chiropractor or podiatrist for malpractice.

(4) If the employer and the 3rd party are insured by the same insurer, or by the insurers who are under common control, the employer's insurer shall promptly notify the parties in interest and the department. If the employer has assumed the liability of the 3rd party, it shall give similar notice, in default of which any settlement with an injured employe 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 employe 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 employe 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.

History: 1975 c. 147 ss. 24, 54; 1977 c. 195; 1979 c. 323 s. 33.

Revisor's Note: See cases annotated under 102.03 as to the right to bring a 3rd party action against a coemploye.

When an employe sues a coemploye, who was also president of the employer, he cannot impose on the defendant the increased burden of care of the safe-place statute. *Wasley v Kosmatka*, 50 W (2d) 738, 184 NW (2d) 821.

In a 3rd party action under 102.29 liability under 101.11 cannot be imposed on officers or employes of the employer. Their liability must be based on common law negligence. *Pitrowski v Taylor*, 55 W (2d) 615, 201 NW (2d) 52.

See note to 102.03, citing *Candler v. Hardware Dealers Mut. Ins. Co.* 57 W (2d) 85, 203 NW (2d) 659.

Liability of corporate officer and supervisory employe in a 3rd party action discussed. *Kruse v. Schieve*, 61 W (2d) 421, 213 NW (2d) 65.

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

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

Extra-hazardous activity exception did not apply where employe of general contractor was injured while doing routine

work, notwithstanding that employe was working in nuclear power plant. *Snider v. Northern States Power Co.* 81 W (2d) 224, 260 NW (2d) 260.

"Business pursuit" exclusion in defendant co-employe's homeowner's policy does not offend public policy. *Bertler v. Employers Insurance of Wausau*, 86 W (2d) 13, 271 NW (2d) 603 (1978).

See note to 102.03, citing *Mulder v. Acme-Cleveland Corp.* 95 W (2d) 173, 290 NW (2d) 176 (1980).

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

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

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

102.30. Other insurance not affected; liability of insured employer. (1)

This chapter shall not affect the organization of any mutual or other insurance company, nor 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, or to provide by mutual or other insurance, or by arrangement with the employes, or otherwise, for the payment to such employes, their families, dependents or representatives, of sick, accident or death benefits in addition to the compensation provided herein. But liability for compensation shall not be reduced or affected by any insurance, contribution or other benefit whatsoever, due to or received by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer; and in addition thereto, the right to enforce in the person's own name, in the manner provided in this chapter, the liability of any insurance company which may have insured the liability for such compensation, and the appearance, whether general or special, of any such insurance carrier by agent or attorney shall be a waiver of the service of copy of application and of notice of hearing required by s. 102.17; provided, however, that payment of such compensation by either the employer or the insurance company, shall, to the extent thereof, be a bar to recovery against the other of the amount so paid, and provided, further, that as between the employer and the insurance company, payment by either directly to the employe, or to the person entitled to compensation, shall be subject to the conditions of the policy.

(2) The failure of the assured to do or refrain from doing any act required by the policy shall not be available to the insurance carrier as a defense against the claim of the injured employe or his dependents.

(3) 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 disa-

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bility and medical, chiropractic or podiatric expense when the claimant consents, or when it is established that such payments under the nonindustrial insurance policy were improper and no attorney fee shall be due as to such reimbursement.

History: 1973 c. 150; 1975 c. 147 ss. 25, 54; 1975 c. 199.

102.31 Worker's compensation insurance; policy regulations. (1)

(a) Every contract for the insurance of the compensation provided for by this chapter, or against liability therefor, shall be made subject to this chapter, and provisions inconsistent with this chapter are void. The contract shall be construed to grant full coverage of all liability of the assured under this chapter except for liability under s. 102.35 (3) which is the sole liability of the employer, notwithstanding any agreement of the parties to the contrary unless the department has theretofore by written order specifically consented to the issuance of a policy on a part of such liability, except that an intermediate agency or publisher referred to in s. 102.07 (6) may, under its own policy, cover liability of employes as defined in s. 102.07 (6) for an intermediate or independent news agency, provided the policy of insurance of the publisher or intermediate agency is endorsed to cover such persons. If the publisher so covers it is not necessary for the intermediate or independent news agency to cover liability for such persons. No policy may be canceled by either party within the policy period nor terminated upon the expiration date until a notice in writing is given to the other party, fixing the date on which it is proposed to cancel it, or declaring that the party does not intend to renew the policy upon expiration. Such cancellation or termination is not effective until 30 days after written notice has been given to the department either by personal service of the notice upon the department at its office in Madison or by sending the notice by 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 to the Wisconsin compensation rating bureau, as defined in s. 626.02 (2), 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. However, the cancellation or termination is effective whether or not the notice has been given to the department 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).

(b) If the insured is a partnership, such contract of insurance shall not be construed to grant coverage of the individual liability of the members of such partnership in the course of a trade, business, profession or occupation conducted by them as individuals, nor shall a contract of insurance procured to cover individual liability be construed to grant coverage of a partnership of which the individual is a member, nor to grant coverage of the liability of the individual arising as a member of any partnership.

(2) 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. Any such insurer that refuses or fails to allow the department to examine its books and records is subject to enforcement proceedings under s. 601.64.

(3) If any insurer authorized to transact worker's compensation insurance in this state fails promptly to 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 thereupon 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 is satisfied that the insurer has failed to live up to all of its obligations under this chapter, the commissioner shall institute enforcement proceedings under s. 601.64; otherwise the commissioner shall dismiss the complaint.

(4) If any employer who has by the department been granted exemption from the carrying of compensation insurance shall arbitrarily or unreasonably refuse employment to or shall discharge employes because of a nondisabling physical condition, the department shall revoke the exemption of such employer.

(5) 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).

(6) Where the department by one or more written orders specifically consents to the issuance of one or more policies covering only the liability incurred on a construction project, and where the owner designates the insurance carrier and pays for each such policy, the owner shall reimburse the department for all of the costs incurred by the department in issuing such written orders and in ensuring minimum confu-

sion and maximum safety on the construction project.

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

102.31. (1) (b) does not apply to a joint venture and insurance written in the name of one adventurer is sufficient to cover his joint liability. *Insurance Co. of N. A. v. ILHR*, Dept. 45 W (2d) 361, 173 NW (2d) 192

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 3% interest discount basis with such bank or trust company as may be 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 payment in gross upon a 3% 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 such compensation as may be due or become due. The acceptance of such 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 such bond, then, in lieu thereof, deposit shall be made with such bank or trust company, as may be designated by the department, of the maximum amount that may reasonably become payable in such cases, to be determined by the department at amounts consistent with the extent of the injuries and the provisions of the law. Such bonds and deposits are to be reduced only to satisfy such 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 its liabilities in any such case under this section and thereby release himself from compensation liability therein, but if for any reason a bond furnished or deposit made under sub. (4) does not fully protect, the compensation insurer or

uninsured employer, as the case may be, shall still be liable to the beneficiary thereof.

(6) Any time after 6 months from the date of the injury, the department may direct payment in gross or in such manner as it may determine to the best interest of the injured employe or his or her dependents. In directing the payment, 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 employe will be conserved thereby.

History: 1977 c. 195; 1979 c. 278

102.33 Blanks and records. The department shall print and furnish free to any employer or employe 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.

History: 1975 c. 147 s. 54

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 employe 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 employe as to the employe'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 employe who is injured in the course of employment, where suitable employment is available within the employe's physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employe 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 provi-

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sions of any collective bargaining agreement with respect to seniority shall govern.

History: 1975 c 147; 1977 c 29, 195

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 employe while performing services growing out of and incidental to the employment, which record shall give the name, address, age and wages of the deceased or injured employe, the time and causes of the accident, the nature and extent of the injury, and such other information as the department may require by general order. Reports based upon this record shall be furnished to the department at such times and in such manner as it may require by general order, upon forms to be procured from the department.

History: 1975 c 147 s. 54

102.38 Records of payments; reports thereon. Every insurance company which transacts the business of compensation insurance, and every employer who is subject to this chapter, but who has not insured the employer's liability, shall keep a record of all payments made under this chapter and of the time and manner of making the payments, and shall furnish such reports based upon these records to the department as it may require by general order, upon forms to be procured from the department.

History: 1975 c 147 s. 54; 1975 c. 199; 1979 c. 89.

102.39 General orders; application of statutes. The provisions of chapter 101, relating to the adoption, publication, modification and court review of general orders of the department shall apply to all general orders adopted pursuant to this chapter.

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, podiatric 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 employe, 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 employe to give notice of injury, the employer shall be liable for the reasonable expense incurred by or on behalf of the employe 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 employe for necessary treatment to cure and relieve the employe from the effects of occupational disease prior to the time that the employe 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 employe or to maintain the existing status of such condition whether or not healing is completed.

(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 employe his or her choice of any physician, chiropractor or podiatrist licensed to practice and practicing in this state for treatment of the injury. By mutual agreement, the employe 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 employe shall be given his or her choice of attending practitioner at the earliest opportunity. The employe 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.

(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 employe's right to choose the attending practitioner is not restricted and the employer is liable for the reasonable and necessary expense thereof.

(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 employe shall have elected Christian Science treatment in lieu of medical, surgical, hospital or sanatorium treatment, no compensation shall be payable for the death or disability of an employe, if the death be caused, or insofar as the disability may be aggravated, caused or continued (a) by an unreasonable refusal or neglect to submit to or follow any competent and reasonable medical or surgical treatment, (b) or, in the case of tuberculosis, by refusal or neglect to submit to or follow hospital or sanatorium treatment when found by the department to be necessary. The right to compensation accruing during a period of refusal or neglect under (b) shall be barred, irrespective of whether disability was aggravated, caused or continued thereby.

(7) **MEDICAL EXPENSES OF STATE EMPLOYEE.** In the event of a claim by a state employe under the conditions enumerated in s. 102.03, involving only payment of medical, chiropractic or podiatric expense of not to exceed a gross of \$1,500, plus compensation for not to exceed 12 weeks of temporary disability, the employing department may approve payment of such reasonable expense for necessary treatment to whomsoever owing and compensation for not to exceed 12 weeks of temporary disability, subject to subsequent review by the department of industry, labor and human relations. If the employing department rejects the claim, the employe may make claim to the department of industry, labor and human relations. Payment shall be charged to the appropriate fund, as provided by s. 20.865 (1) (d).

(8) **AWARD TO STATE EMPLOYEE.** Whenever an award is made by the department in behalf of a state employe, duplicate copies of the award shall be filed with the employing constitutional office, department or independent agency. Upon receipt of the copies of the awards, the constitutional officer or head of the department or independent agency shall promptly issue a voucher in payment of the award from the proper state fund and appropriation, and shall transmit the voucher and one copy of the award to the department of administration.

(9) **REHABILITATION; PHYSICAL AND VOCATIONAL.** (a) One of the primary purposes of this chapter is restoration of an injured employe 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 of health and social services 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 employes.

(c) The specialist shall review and evaluate reported injuries for potential cases in which seriously injured employes may be in need of physical and medical rehabilitation and may confer with the injured employe, employer, insurance carrier or attending practitioner regarding treatment and rehabilitation.

History: 1971 c. 61; 1973 c. 150, 282; 1975 c. 147; 1977 c. 195 ss. 24 to 28, 45; 1977 c. 273; 1979 c. 278

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. ILHR Dept. 54 W (2d) 7, 194 NW (2d) 670*

In appropriate cases, the ILHR Department is warranted in, at the least, postponing a determination of permanent disability for a reasonable period of time 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 Ins. Co. v. ILHR Dept. 54 W (2d) 272, 195 NW (2d) 656*

An employe who wishes to consult a 2nd doctor on the panel after the first says no further treatment is needed may do so without notice or consent, and if the 2nd doctor prescribes an operation which increases disability, the employer is liable. *Spencer v. ILHR Dept. 55 W (2d) 525, 200 NW (2d) 611*

Unreasonable refusal of medical treatment not offered by employer is not a bar to compensation under (6). *Klein Industrial Salvage v. DILHR, 80 W (2d) 457, 259 NW (2d) 124*

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 employe works on Sunday, after the employe 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 employe 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 employe 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.

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(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 employe bears to his average weekly wage at the time of his injury.

(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.

(5) Temporary disability, during which compensation shall be payable for loss of earnings, shall include such period as may be reasonably required for training in the use of artificial members and appliances, and shall include such period as the employe may be receiving instruction pursuant to s. 102.61. Temporary disability on account of receiving instruction of the latter nature, and not otherwise resulting from the injury, shall not be in excess of 40 weeks. Such 40-week limitation does not apply to temporary disability or travel or maintenance expense under s. 102.61 if the department determines that additional training is warranted. The necessity for additional training as authorized by the department for any employe shall be subject to periodic review and reevaluation.

(6) Sick leave benefits in connection with other employment shall not be considered in computing actual wage loss from the employer in whose employ injury was sustained.

(7) If an employe has a renewed period of temporary total disability commencing more than 2 years after the date of injury, payment of compensation for the new period of disability shall be made as follows:

(a) If the employe was entitled to maximum weekly benefits at the time of injury, payment for the renewed temporary total disability shall be at the maximum rate in effect at the commencement of the new period.

(b) If the employe was entitled to less than the maximum rate, the employe shall receive the same proportion of the maximum which is in effect at the time of the commencement of the renewed period as the employe's actual rate at time of injury bore to the maximum rate in effect at that time.

History: 1971 c. 148; 1973 c. 150; 1975 c. 147; 1977 c. 195; 1979 c. 278.

Committee Note, 1971: Employes 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 employe suffered a wage loss. This is considered to be inequitable. Sick leave benefits from the employer where in-

jury occurred are to be considered, however, in determining eligibility for compensation from such employer. [Bill 371-A]

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

(1) Notwithstanding any other provision of this chapter, every employe 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, 1976, shall receive supplemental benefits which shall be payable in the first instance by the employer or the employer's insurance carrier. These supplemental benefits shall be paid only for weeks of disability occurring after January 1, 1978, and shall continue during the period of such total disability subsequent to that date.

(a) If such employe is receiving the maximum weekly benefits in effect at the time of the injury, the supplemental benefit shall be an amount which, when added to the regular benefit established for the case, shall equal the maximum weekly benefit in effect for a totally disabled employe whose injury occurred on January 1, 1972.

(b) If such employe 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 shall be an amount sufficient to bring the total weekly benefits to the same proportion of the maximum weekly benefit payable on January 1, 1972, as the employe'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.

(2) In case of permanent total disability aggregate indemnity shall be weekly indemnity for the period that the employe 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 employe, the earnings to be computed as provided in s. 102.11. The weekly indemnity shall be in addition to compensation for the healing period and shall be for the period that the employe may live, not to exceed 1,000 weeks.

(4) Where the permanent disability is covered by ss. 102.52, 102.53 and 102.55, 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 employe because of disability, the benefits payable under this chapter shall be reduced as follows:

(a) For each dollar that the total monthly benefits payable under this chapter plus the monthly benefits payable under the social security act for disability exceed 80% of the employe'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 employe's average current earnings.

(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 employe, 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 employe 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 employe.

(6) (a) Where an injured employe 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%.

(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 employe because his or her physical or mental limitations prevent his or her continuing in such employment, or if during such period a wage loss of 15% or more occurs the department may reopen any award and make a redetermination taking into account loss of earning capacity.

(c) The determination of wage loss shall not take into account any period during which benefits are payable for temporary disability.

(d) The determination of wage loss shall not take into account any period during which benefits are paid under ch. 108.

(e) For the purpose of determining wage loss, payment of benefits for permanent partial disability shall not be considered payment of wages.

(f) Wage loss shall be determined on wages, as defined in s. 102.11. Percentage of wage loss shall be calculated on the basis of actual average wages over a period of at least 13 weeks.

(g) For purposes of this subsection, if the employer in good faith makes an offer of employment which is refused by the employe without reasonable cause, the employe is considered to have returned to work with the earnings the employe 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 employe 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.

Committee Note, 1971: Employes 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 employes who are injured previous to February 1, 1970. The intent is to provide for payment of supplemental benefits; for example, an employe 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 employe will receive supplemental benefits of \$42 a week to bring the total up to \$79, which was the maximum February 1, 1970. An employe 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 employe 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. ILHR* Dept. 54 W (2d) 7, 194 NW (2d) 670.

"Odd-lot" doctrine discussed. *Balczewski v. DILHR*, 76 W (2d) 487, 251 NW (2d) 794.

See note to art. IV, sec. 26 as to (1), citing 62 Atty. Gen. 69

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102.45 Benefits payable to minors; how paid. Compensation and death benefit payable to an employe or dependent who was a minor when his 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 employe or dependent as may be found best calculated to conserve his interests. Such employe 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 his 18th birthday.

History: 1973 c. 150.

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 70% of weekly wage for the number of weeks set out in s. 102.44 (3).

History: 1979 c. 278.

102.47 Death benefit, continued. If death occurs to an injured employe 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.

(2) Where the injury proximately causes permanent partial disability, the unaccrued compensation shall first be applied toward funeral expenses, not to exceed \$1,000, any remaining sum to be paid to dependents, as provided in this section and ss. 102.46 and 102.48, and there shall be no liability for any other payments. All computations under this subsection shall take into consideration the present value of future payments.

History: 1971 c. 148; 1977 c. 195.

102.475 Death benefit; law enforcement and correctional officers, fire fighters and rescue squad members. (1) **SPECIAL BENEFIT.** (a) If the deceased employe is a law enforcement officer, correctional officer, fire fighter or rescue squad member who sustained an accidental injury 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 \$25,000 to the persons wholly dependent upon the deceased. For purposes of this subsection, dependency shall be determined under ss. 102.49 and 102.51.

(b) The department shall reduce the amount of the special death benefit required to be paid under par. (a) by the amount received upon submittal of a claim under P.L. 94-430.

(2) **PAYMENTS TO DEPENDENTS.** (a) If there are more than 4 persons who are wholly dependent upon the deceased employe 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 employe, 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 employe 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) "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.

(b) "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, including central state hospital.

(c) "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 or a member of a legally organized rescue squad.

(d) "Political subdivision" includes counties, municipalities and municipal corporations.

(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.

102.48 Death benefit, continued. If the deceased employe leaves no one wholly dependent upon him 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 \$5,000. 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 employe but for the injury. To establish anticipation of support and dependency, it shall not be essential that the deceased employe 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 his 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 employe, until otherwise ordered by the department.

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

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 employe 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 employe, and who is likewise wholly dependent upon the employe 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.

(2) A child lawfully adopted by the deceased employe and the surviving spouse, prior to the time of the injury, and a child not his own by birth or adoption but living with him as a member of his family at the time of the injury shall for the purpose of this section be taken as a child by their marriage.

(3) Where the employe leaves a wife or husband wholly dependent and also a child or children by a former marriage or adoption, likewise wholly dependent, aggregate benefits shall be the same in amount as if the children were the children of such surviving spouse, and the entire benefit shall be apportioned to the dependents in such amounts as the department shall determine to be just, considering their ages and other facts bearing on dependency. The benefit awarded to the surviving spouse shall not exceed four times the average annual earnings of the deceased employe.

(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, leaving one or more persons wholly dependent for support, the employer or insurer shall pay into the state treasury the sum of \$2,500.

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(b) In each case of injury resulting in death leaving no person dependent for support, the employer or insurer shall pay into the state treasury 80% of the death benefit otherwise payable in 5 equal annual instalments with the first instalment due as of the date of death.

(c) 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, shall equal the death benefit payable to a person wholly dependent, plus the amount payable into the state treasury under this subsection where there is a person wholly dependent, such payment to the state treasury in no event to exceed 80% of the amount payable for total dependency.

(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 employe 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 \$300.

(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.

Death benefits for dependent children are not increased by 102.57. *Schwartz v. DILHR*, 72 W (2d) 217, 240 NW (2d) 173.

102.50 Burial expenses. In all cases where death of an employe proximately results from the injury the employer or insurer shall pay the reasonable expense for burial, not exceeding \$1,000.

History: 1971 c. 148; 1977 c. 195.

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 employe: A wife upon a husband with whom she is living at the time of his death; a husband upon a wife with whom he is living at the time of her death; a child under

the age of 18 years (or over that age, but physically or mentally incapacitated from earning), upon the parent with whom he or she is living at the time of the death of such parent, there being no surviving dependent parent.

(b) Where a dependent who is entitled to death benefits under this subsection survives the deceased employe, all other dependents shall be excluded. 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 constituting living with any such parent within the meaning of this subsection.

(2) WHO ARE NOT. (a) No person shall be considered a dependent unless a member of the family or a spouse, or a divorced spouse who has not remarried, or lineal descendant or ancestor, or brother or sister of the deceased employe.

(b) Where for eight years or more prior to the date of injury a deceased employe 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 him for support.

(c) No person who is a nonresident alien shall be found to be either totally or partially dependent on a deceased employe for support who cannot establish dependency by proving contributions from the deceased employe by written evidence or tokens of the transfer of money, such as drafts, letters of credit, 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 employe to such nonresident alien claiming dependency. This provision shall not be applicable unless the employe has been continuously in the United States for at least one year prior to his injury, and has been remuneratively employed therein for at least 6 months.

(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 DATE OF INJURY. Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the injury to the employe, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions; and the death bene-

fit 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 shall be payable to the dependent's personal representatives in gross. A posthumous child conceived prior to the date of injury is for the purpose of this subsection a dependent as of the date of injury.

(5) **WHEN NOT INTERESTED.** No dependent of an injured employe shall be deemed a party in interest to any proceeding by him for the enforcement of his claim for compensation, nor as respects the compromise thereof by such employe. Subject to s. 102.16 (1), a compromise of all liability entered into by an employe shall be binding upon his dependents.

(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, was an employer of the deceased.

History: 1975 c. 94, 147; 1977 c. 195.

Posthumously born illegitimate child does not qualify as a dependent under (4). Claimants not falling within one of classifications under (2) (a) will not qualify for benefits, regardless of dependency in fact. *Larson v. DILHR*, 76 W (2d) 595, 252 NW (2d) 33.

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 employe, to be computed as provided in s. 102.11:

(1) The loss of an arm at the shoulder, 500 weeks;

(2) The loss of an arm at the elbow, 450 weeks;

(3) The loss of a hand, 400 weeks;

(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;

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(16) Total impairment of one eye for industrial use, 250 weeks;

(17) Total deafness from accident or sudden trauma, 330 weeks;

(18) Total deafness of one ear from accident or sudden trauma, 55 weeks.

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

In a workmen's compensation proceeding brought by an employe 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 ILHR department did not err in determining that the hearing loss was a scheduled disability under (18), with a separate award for the additional physical effects of the deafness, rather than considering the entire range of disabilities as a whole, since where a loss is recognized by and compensated under this section, the schedule therein is exclusive. *Vande Zande v. ILHR Dept 70 W (2d) 1086, 236 NW (2d) 255*

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:

(1) In the case of impairment of both eyes, by 200%.

(2) In the case of disabilities on the same hand covered by s. 102.52 (9), by 100% for the first equal or lesser disability and by 150% for the 2nd and 3rd equal or lesser disabilities.

(3) In the case of disabilities on the same foot covered by s. 102.52 (14), by 20%.

(4) In all other cases, by 20%.

(5) The aggregate result as computed by applying sub. (1), and the aggregate result for members on the same hand or foot as computed by applying subs. (2) and (3), shall each be taken as a unit for applying sub. (4) as between such units, and as between such units and each other disability.

History: 1973 c. 150; 1979 c. 278

102.55 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.

(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 employe is subjected to noise.

(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 employe 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 employe, be the date of occurrence of any of the following events to an employe:

(a) Transfer to nonnoisy employment by an employer whose employment has caused occupational deafness;

(b) Retirement;

(c) Termination of the employer-employe relationship; or

(d) Layoff, provided the layoff is complete and continuous for 6 months.

(5) No claim under sub. (4) may be filed until 14 consecutive days of removal from noisy employment after the time of injury except that under sub. (4) (d) the 14 consecutive days' period may commence within the last 2 months of layoff.

(6) The limitation provisions in this chapter shall control claims arising under this section. Such provisions shall run from the first date upon which claim may be filed, or from the date of subsequent death, provided that no claim

shall accrue to any dependent unless an award has been issued or hearing tests have been conducted by a competent medical specialist after the employe has been removed from the noisy environment for a period of 2 months.

(7) No payment shall be made to an employe under this section unless the employe shall have worked in noisy employment for a total period of at least 90 days for the employer from whom the employe 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 employe 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 employe under this section by any employer shall be credited against compensation payable by any employer to such employe for occupational deafness under subs. (3) and (4). No employe 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.

History: 1971 c. 148; 1973 c. 150; 1975 c. 147, 199, 200; 1977 c. 195; 1979 c. 278.

Committee Note, 1971: Where an employer discontinues a noisy operation and transfers the employes 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 employe will now have the option of filing a claim at the time of transfer at the current rate of compensation with a 2-1/2% reduction for each year of age over 50 or waiting until he meets the conditions of sub. (b), (c) or (d) when he may file claim at the then-current rate of compensation with a 1/2% reduction for each year of age over 50 [Bill 371-A]

102.56 Disfigurement. If an employe 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 employe'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 employe, the employe'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 employe is suited.

History: 1971 c. 148; 1977 c. 195.

102.565 Toxic or hazardous exposure; medical examination; conditions of liability. (1) When an employe 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 employe in any manner differentially susceptible to disability to such an extent that it is inadvisable for the employe to continue employment involving such exposure and the employe 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 employe 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 employe 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 employe 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 employe the department may direct any employee of the employer or an employe 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 employe 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 employe, 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 employe to continue in his or her employment.

(3) If an employe 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

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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 estop such employee from any further recovery whatsoever from any employer under this section.

History: 1977 c 29, 195; 1979 c 278.

102.57 Violations of safety provisions, penalty. Where injury is caused by the failure of the employer to comply with any statute or any lawful order of the department, compensation and death benefits as provided in this chapter shall be increased 15% but not more than a total increase of \$7,500. Failure of an employer reasonably to enforce compliance by employees with such statute or order of the department shall constitute failure by the employer to comply with such statute or order.

This section and 102.58 may be applicable in the same workmen's compensation case if the negligence of both are causes of the employee's injury. *Milwaukee Forge v. ILHR*, Dept. 66 W (2d) 428, 225 NW (2d) 476.

102.58 Decreased compensation. Where injury is caused by the failure of the employee to use safety devices where provided in accordance with any statute or lawful order of the department and adequately maintained, and their use is reasonably enforced by the employer, or where 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 where injury results from the intoxication of the employee, the compensation and death benefit provided herein shall be reduced 15% but the total reduction shall not exceed \$7,500.

History: 1971 c. 148.

The burden of proof is on the employer to establish not only the fact of intoxication, but a causal connection between such condition and the injury or accident. *Haller Beverage Corp. v. ILHR*, Dept. 49 W (2d) 233, 181 NW (2d) 418.

102.59 Preexisting disability, indemnity.

(1) If an employee has at the time of injury permanent disability which if it had resulted from such injury would have entitled him to indemnity for 200 weeks less 2-1/2% thereof for each year of age above 52 years with no reduction in excess of 50%, and, as a result of such injury, incurs further permanent disability, which entitles him to indemnity for 200 weeks less 2-1/2% thereof for each year of age above 52 years with no reduction in excess of 50%, he 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. 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. Such additional compensation shall accrue from 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) and (7).

(2) In the case of the loss or of the total impairment of a hand, arm, foot, leg or eye, the employer shall pay \$4,000 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.

The fund was not liable for disability benefits where employer was liable for permanent total disability. *Green Bay Soap Co. v. DILHR*, 87 W (2d) 561, 275 NW (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 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 employe, but shall be paid into the fund established by s. 102.65.

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

(7) Subsections (1) to (6) shall not apply to employes 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 employe 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. An employe who is entitled to receive and has received compensation pursuant to this chapter, and who is entitled to and is receiving instructions pursuant to the provisions of the act of congress known as the vocational rehabilitation act, and amendments thereto (Public Law 113-78th Congress) as administered by the state in which he holds residence or in which he resided at the time of becoming physically handicapped, shall, in addition to his other indemnity, be paid his actual and necessary expenses of travel and, if he receives such instructions elsewhere than at the place of his residence, his actual and necessary costs of maintenance, during rehabilitation, subject to the following conditions and limitations:

(1) He must undertake the course of instruction within 60 days from the date when he has sufficiently recovered from his injury to permit of his so doing, or as soon thereafter as the officer or agency having charge of his instruction shall provide opportunity for his rehabilitation.

(2) He must continue in rehabilitation training with such reasonable regularity as his health and situation will permit.

(3) He or she may not have expenses of travel and costs of maintenance on account of training for a period in excess of 40 weeks in all, except as provided in s. 102.43 (5).

(4) The department shall determine the rights and liabilities of the parties under this section in like manner and with like effect as it does other issues under compensation.

History: 1975 c. 147.

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 treasury into which such excess was paid, reimbursing such payor of such excess payment together with interest actually earned thereon.

102.64 Attorney general shall represent state and commission. (1) A representative of the department of justice designated by the

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attorney general shall represent the state in all cases involving payment into or out of the state treasury under s. 20.865 (1) (d), 102.49, 102.59 or 102.66. The department of justice may compromise the amount of such payments but such compromises shall be subject to review by the department of industry, labor and human relations. If the spouse of the deceased employe compromises his or her claim for a primary death benefit, the claim of the children of such employe 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.

(2) In all proceedings upon claims for compensation against the state, the attorney general may appear on behalf of the state.

(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).

Alleged invalidity of (3) cannot be grounded on claimant's contention that this results 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 he shall appear on behalf of the department. *Hunter v. ILHR* Dept. 64 W (2d) 97, 218 NW (2d) 314.

102.65 Work injury supplemental benefit fund. (1) The moneys payable to the state treasury under ss. 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 securities authorized in s. 206.34.

(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. 102.49 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

102.66 Payment of certain barred claims.

(1) In the event that there is an otherwise meritorious claim for occupational disease 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 such compensation and such medical expenses as would otherwise be due, based on the date of injury to or on behalf of the injured employe. The benefits shall be supplemental to the extent of compensation liability to any disability or medical benefits payable from any group insurance policy where the premium is paid in whole or in part by any employer, or under any federal insurance or benefit program providing disability or medical benefits. Death benefits payable under any such group policy do not limit the benefits payable under this section.

(2) In the case of occupational disease, appropriate benefits may be awarded from the work injury supplemental benefit fund where the status or existence of the employer or its insurance carrier cannot be determined or where there is otherwise no adequate remedy, subject to the limitations contained in sub. (1).

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

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 for administering 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.

(2) The department shall require that payments for costs and expenses of the fiscal year beginning July 1, 1975, and for each fiscal year thereafter, 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. The balance of assessments on hand at the end of each fiscal year shall be credited and applied toward the

costs and expenses incurred under this section during the subsequent fiscal year. Carriers and employers whose estimated annual assessment for the fiscal year is less than \$2,500 shall make a single payment of the estimated annual assessment on or before December 31 of the fiscal year in lieu of the proportion payments.

(3) The department may not assess the payments under this section for any year that the

assessment is not approved by the joint committee on finance. Requests for the approval of an assessment shall be considered as are requests for supplemental appropriations under s. 13.101 (5) and (6).

History: 1975 c. 39; 1975 c. 147 s. 54; 1977 c. 195, 418.