

West's Wisconsin Statutes Annotated
Employment, Compensation and Mining (Ch. 101 to 109)
Chapter 102. Worker's Compensation (Refs & Annos)

Wisconsin formula and
insurer's right to bring action

W S A . 102 . 29

102.29. Third party liability

Effective: April 17, 2012

Currentness

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

(b) If a party entitled to notice cannot be found, the department shall become the agent of that party for the giving of a notice as required in par. (a) and the notice, when given to the department, shall include an affidavit setting forth the facts, including the steps taken to locate that party. Each shall have an equal voice in the prosecution of the 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 par. (a), 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 the claim, the proceeds of the claim shall be divided as follows:

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

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

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

(c) If both the employee or the employee's personal representative or other person entitled to bring action, and the employer, compensation insurer, or department, join in the pressing of said claim and are represented by counsel, the attorney fees allowed

as a part of the costs of collection shall be, unless otherwise agreed upon, divided between the attorneys for those parties as directed by the court or by the department.

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

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

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

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

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

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

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

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

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

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

1. The temporary help agency.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Credits

<<For credits, see Historical Note field.>>

Notes of Decisions (167)

W. S. A. 102.29, WI ST 102.29

Current through 2013 Wisconsin Act 45, published 8/06/2013.