

CHAPTER 406

LABOR AND INDUSTRY

SENATE BILL 03-106

BY SENATOR(S) Jones, May R., and Andrews;
also REPRESENTATIVE(S) Larson, Hall, Hoppe, King, Lundberg, Schultheis, Stengel, and Williams T.

AN ACT

CONCERNING THIRD-PARTY DAMAGES SUBJECT TO SUBROGATION IN CLAIMS THAT ARE PAID PURSUANT TO THE "WORKERS' COMPENSATION ACT OF COLORADO".

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 8-41-203, Colorado Revised Statutes, is amended to read:

8-41-203. Negligence of stranger - remedies - subrogation - actions - compromise. (1) (a) If any employee entitled to compensation under articles 40 to 47 of this title is injured or killed by the negligence or wrong of another not in the same employ, such injured employee or, in case of death, such employee's dependents, ~~before filing any claim under this article, shall elect in writing whether to~~ MAY take compensation under said articles ~~or to~~ AND MAY ALSO pursue a remedy against the other person TO RECOVER ANY DAMAGES IN EXCESS OF THE COMPENSATION AVAILABLE UNDER SAID ARTICLES.

(b) ~~Such election shall be evidenced in such manner as the director may by rule prescribe. If such injured employee or, in case of death, such employee's dependents elect to take compensation under said articles;~~ The payment of compensation PURSUANT TO ARTICLES 40 TO 47 OF THIS TITLE shall operate as and be an assignment of the cause of action against such other person to Pinnacol Assurance, the medical disaster insurance fund, the major medical insurance fund, or the subsequent injury fund, if compensation is payable from said funds, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. Said insurance carrier shall not be entitled to recover any sum in excess of the amount of compensation for which said carrier is liable under said articles to the injured employee, but to that extent said carrier shall be subrogated to the rights of the injured employee against said third party causing the injury. If the injured employee ~~elects to proceed~~ PROCEEDS against such other person, then

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

Pinnacol Assurance, the medical disaster insurance fund, the major medical insurance fund, the subsequent injury fund, or such other person, association, corporation, or insurance carrier, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected and the compensation provided by said articles in such case.

(c) The right of subrogation provided by this section shall apply to and include all compensation and all medical, hospital, dental, funeral, and other benefits and expenses to which the employee or, IF THE EMPLOYEE IS DECEASED, the employee's dependents are entitled under the provisions of said articles, including parts 2 and 3 of article 46 of this title, or for which the employee's employer or insurance carrier is liable or has assumed liability.

(d) THE ASSIGNED AND SUBROGATED CAUSE OF ACTION PROVIDED BY THIS SECTION, TOGETHER WITH THE RIGHT TO RECOVER FUTURE BENEFITS:

(I) SHALL EXTEND TO ALL MONEYS COLLECTED FROM THE THIRD PARTY CAUSING THE INJURY FOR ALL:

(A) ECONOMIC DAMAGES; AND

(B) PHYSICAL IMPAIRMENT AND DISFIGUREMENT DAMAGES; EXCEPT THAT, TO THE EXTENT THE TRIER OF FACT MAKES A SEPARATE AWARD FOR DISFIGUREMENT DAMAGES, THE RIGHT OF THE BENEFICIARY OF THE ASSIGNED INTEREST TO RECOVER FROM SUCH DISFIGUREMENT DAMAGES SHALL BE LIMITED TO THE AMOUNT THE BENEFICIARY OF THE ASSIGNED INTEREST PAID, OR IS OBLIGATED TO PAY, IN DISFIGUREMENT DAMAGES PURSUANT TO ARTICLES 40 TO 47 OF THIS TITLE; AND

(II) SHALL NOT EXTEND TO MONEYS COLLECTED FOR NONECONOMIC DAMAGES AWARDED FOR PAIN AND SUFFERING, INCONVENIENCE, EMOTIONAL STRESS, OR IMPAIRMENT OF QUALITY OF LIFE.

(e) (I) EXCEPT AS OTHERWISE PROVIDED IN SUBPARAGRAPH (II) OF THIS PARAGRAPH (e), THE AMOUNT OF THE ASSIGNED AND SUBROGATED CAUSE OF ACTION SHALL BE REDUCED BY AN AMOUNT EQUAL TO THE REASONABLE ATTORNEY FEES AND COSTS PAID BY THE INJURED EMPLOYEE OR, IF THE EMPLOYEE IS DECEASED, THE EMPLOYEE'S DEPENDENTS, IN PURSUING THE RECOVERY OF THE ASSIGNED AND SUBROGATED CAUSE OF ACTION AND THE COLLECTION OF SUCH RECOVERY.

(II) IF THE BENEFICIARY OF THE ASSIGNED AND SUBROGATED CAUSE OF ACTION ELECTS TO INDEPENDENTLY PURSUE SUCH ASSIGNED CAUSE OF ACTION, ANY RECOVERY BY SUCH BENEFICIARY SHALL NOT BE REDUCED BY ANY ATTORNEY FEES AND COSTS INCURRED BY THE EMPLOYEE. IF THE BENEFICIARY OF THE ASSIGNED AND SUBROGATED CAUSE OF ACTION ELECTS TO INTERVENE WITHIN NINETY DAYS AFTER RECEIVING THE NOTICE REQUIRED BY PARAGRAPH (c) OF SUBSECTION (4) OF THIS SECTION, ANY RECOVERY BY SUCH BENEFICIARY SHALL NOT BE REDUCED BY ANY ATTORNEY FEES AND COSTS INCURRED BY THE EMPLOYEE. IF SUCH BENEFICIARY ELECTS TO INTERVENE AFTER THE EXPIRATION OF SUCH NINETY-DAY PERIOD, THE COURT MAY REDUCE THE BENEFICIARY'S RECOVERY BY A REASONABLE AMOUNT FOR ANY ATTORNEY FEES AND COSTS INCURRED BY THE EMPLOYEE AFTER THE END OF SUCH NINETY-DAY PERIOD AND BEFORE RECEIVING NOTICE THAT THE BENEFICIARY

INTENDS TO INTERVENE.

(f) Nothing in this section shall be construed as limiting in any way the right of the injured employee to ~~elect to~~ take compensation under articles 40 to 47 of this title and also proceed against the third party causing the injury to recover any damages in excess of the subrogation rights described in this section.

(2) Such a cause of action assigned to Pinnacol Assurance may be prosecuted or compromised by it. A compromise of any such cause of action by the employee or, IF THE EMPLOYEE IS DECEASED, the employee's dependents at an amount less than the compensation provided for by articles 40 to 47 of this title shall be made only with the written approval of the chief executive officer of Pinnacol Assurance, if the deficiency of compensation would be payable from the Pinnacol Assurance fund, and otherwise with the written approval of the person, association, corporation, or insurance carrier liable to pay the same. SUCH WRITTEN APPROVAL SHALL NOT BE UNREASONABLY WITHHELD. FAILURE TO OBTAIN SUCH WRITTEN APPROVAL SHALL ENTITLE THE PARTY RESPONSIBLE FOR PAYING WORKERS' COMPENSATION BENEFITS TO BE REIMBURSED FOR ALL BENEFITS PAID FROM, AND OFFSET ANY FUTURE LIABILITY UNDER ARTICLE 40 TO 47 OF THIS TITLE AGAINST, THE ENTIRE PROCEEDS RECOVERED WITHOUT ANY CREDIT FOR REASONABLE ATTORNEY FEES AND COSTS AS PROVIDED IN PARAGRAPH (e) OF SUBSECTION (1) OF THIS SECTION. IF SUCH APPROVAL IS NOT OBTAINED, THE EMPLOYEE OR, IF THE EMPLOYEE IS DECEASED, THE EMPLOYEE'S DEPENDENTS SHALL NOT BE LIABLE FOR ANY PLAINTIFF'S ATTORNEY FEES FOR THE THIRD-PARTY RECOVERY ON THAT PORTION OF ANY RECOVERY EQUAL TO THE ASSIGNED AND SUBROGATED INTEREST AND ARE NOT SUBJECT TO ANY ACTION FOR REFUSAL TO PAY SUCH PLAINTIFF'S ATTORNEY FEES RESULTING FROM THE THIRD-PARTY CASE.

(3) If an employee is killed by the negligence or wrong of another not in the same employ and the dependents of such employee WHO ARE entitled to compensation under articles 40 to 47 of this title are minors, ~~such election to take compensation and the assignment of the cause of action against such other person and such notice of election to pursue a remedy against such other person~~ THE DECISION TO PURSUE OR COMPROMISE ANY CLAIM AGAINST A THIRD PARTY shall be made by such minor or shall be made on the minor's behalf by a parent of such minor or by the minor's next friend or duly appointed guardian, as the director of the division of workers' compensation may determine by rule in each case. ONCE SUCH DECISION IS MADE, THE PERSON WHO MADE THE DECISION SHALL ALSO BEAR THE RESPONSIBILITY TO PROVIDE ALL NOTICES REQUIRED BY THIS SECTION.

(4) (a) IF THE EMPLOYEE OR, IF THE EMPLOYEE IS DECEASED, THE EMPLOYEE'S DEPENDENTS GIVE NOTICE TO A PERSON NOT IN THE SAME EMPLOY THAT THE EMPLOYEE OR DEPENDENTS MAY PURSUE A CLAIM AGAINST SUCH OTHER PERSON, THE EMPLOYEE OR DEPENDENTS SHALL ALSO GIVE WRITTEN NOTICE, WITHIN TEN DAYS, TO THE DIVISION OF WORKERS' COMPENSATION AND TO ALL PARTIES WHO MAY BE RESPONSIBLE FOR PAYING BENEFITS TO THE EMPLOYEE OR DEPENDENTS UNDER ARTICLES 40 TO 47 OF THIS TITLE.

(b) THE NOTICE REQUIRED BY THIS SUBSECTION (4) SHALL CONTAIN THE FOLLOWING:

(I) A DESCRIPTION OF THE CLAIM;

(II) THE NAMES AND ADDRESSES OF ANY AND ALL OTHER PERSONS BELIEVED TO BE NEGLIGENT;

(III) THE NAME AND ADDRESS OF ANY ATTORNEY REPRESENTING THE EMPLOYEE OR DEPENDENTS;

(IV) THE NAME AND ADDRESS OF ANY ATTORNEY REPRESENTING OTHER PERSONS BELIEVED TO BE NEGLIGENT; AND

(V) THE NAME, ADDRESS, AND TELEPHONE NUMBER OF THE INSURANCE COMPANY OR THIRD-PARTY ADMINISTRATOR.

(c) THE EMPLOYEE OR, IF THE EMPLOYEE IS DECEASED, THE EMPLOYEE'S DEPENDENTS SHALL GIVE WRITTEN NOTICE TO ALL PARTIES WHO MAY BE RESPONSIBLE FOR PAYING BENEFITS TO THE EMPLOYEE OR DEPENDENTS UNDER ARTICLES 40 TO 47 OF THIS TITLE AT LEAST TWENTY DAYS PRIOR TO FILING A LAWSUIT AGAINST SUCH OTHER PERSON; EXCEPT THAT IF ANY APPLICABLE STATUTORY LIMITATION PERIOD WOULD EXPIRE BEFORE SUCH TWENTY DAYS HAS PASSED, THE EMPLOYEE OR DEPENDENTS MAY FILE OR SERVE THE COMPLAINT, OR OTHERWISE ACT TO TOLL THE RUNNING OF SUCH LIMITATION PERIOD, BEFORE SUCH TWENTY DAYS HAS PASSED. SUCH NOTICE SHALL CONTAIN ALL OF THE INFORMATION SET OUT IN PARAGRAPH (b) OF THIS SUBSECTION (4) AND SHALL BE ACCOMPANIED BY A DRAFT COPY OF THE COMPLAINT.

(d) IF THE EMPLOYEE OR DEPENDENTS FAIL TO PROVIDE THE WRITTEN NOTICE REQUIRED PURSUANT TO PARAGRAPHS (a) AND (b) OF THIS SUBSECTION (4):

(I) THE PARTY RESPONSIBLE FOR PAYING WORKERS' COMPENSATION BENEFITS SHALL BE ENTITLED TO REIMBURSEMENT FROM ALL MONEYS COLLECTED FROM THE THIRDPARTY FOR ALL ECONOMIC DAMAGES AND FOR ALL PHYSICAL IMPAIRMENT AND DISFIGUREMENT DAMAGES, WITHOUT ANY CREDIT FOR REASONABLE ATTORNEY FEES AS PROVIDED IN PARAGRAPH (e) OF SUBSECTION (1) OF THIS SECTION. IF THE TRIER OF FACT MAKES A SEPARATE AWARD FOR DISFIGUREMENT DAMAGES, REIMBURSEMENT FROM SUCH DISFIGUREMENT DAMAGE AWARD SHALL BE LIMITED TO THE AMOUNT THE PARTY PAYING WORKERS' COMPENSATION BENEFITS PAID, OR IS OBLIGATED TO PAY, IN DISFIGUREMENT DAMAGES PURSUANT TO ARTICLES 40 TO 47 OF THIS TITLE. SUCH RIGHTS SHALL NOT EXTEND TO MONEYS COLLECTED FOR NONECONOMIC DAMAGES AWARDED FOR PAIN AND SUFFERING, INCONVENIENCE, EMOTIONAL STRESS, OR IMPAIRMENT OF QUALITY OF LIFE.

(II) THE EMPLOYEE OR DEPENDENTS SHALL NOT BE LIABLE FOR ANY PLAINTIFF'S ATTORNEY FEES FOR THE THIRD-PARTY RECOVERY ON THAT PORTION OF ANY RECOVERY EQUAL TO THE ASSIGNED AND SUBROGATED INTEREST AND ARE NOT SUBJECT TO ANY ACTION FOR REFUSAL TO PAY SUCH PLAINTIFF'S ATTORNEY FEES RESULTING FROM THE THIRD-PARTY CASE.

SECTION 2. Effective date - applicability. This act shall take effect July 1, 2003, and shall apply to injuries occurring on or after said date.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: June 5, 2003