

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-1216-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

CHRISTINE WHITING,

PLAINTIFF-APPELLANT,

**JOHN WHITING AND EROS WHITING, A MINOR, BY HIS
GUARDIAN AD LITEM, RAYMOND E. SCHRANK, II,**

PLAINTIFFS,

CONTINENTAL CASUALTY Co.,

**INVOLUNTARY-PLAINTIFF-
RESPONDENT,**

EMPLOYERS HEALTH INS. Co.,

INVOLUNTARY-PLAINTIFF,

v.

**HARTFORD CASUALTY INS. Co., OTIS ELEVATOR
COMPANY, ZURICH INSURANCE COMPANY AND
EXECUTIVE CLUB LIMITED PARTNERSHIP,**

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN J. DiMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Christine Whiting appeals from an order declaring that a settlement of \$80,000.00 she accepted as a complete resolution of her personal injury claim against her employer, Executive Club Limited and Otis Elevator, was subject to distribution under § 102.29(1), STATS., to satisfy a claim from the employer's worker's compensation carrier, Continental Casualty Company, for its payment to her of \$10,272.32 for medical expenses caused by her accident at work. Whiting contends that the circuit court erred by denying her motion to restrict Continental's claim against her settlement under § 102.29(1) to that part of the settlement attributable to the underlying jury award of \$10,000.00 allocated for past medical and hospital expenses. Statutory interpretation and case law compel the conclusion that the whole of Whiting's settlement is subject to distribution. Accordingly, we affirm the circuit court's order.¹

I.

The relevant facts are undisputed. Whiting was injured at work while dragging mail bags onto an elevator. Whiting filed a worker's compensation claim, and Continental paid \$10,272.32 in medical benefits. Continental did not make any payments for temporary or permanent disability and refused to make any payments for future medical expenses. Whiting subsequently filed a third-party tort action, and the jury returned a verdict awarding Whiting

¹ This is an expedited appeal under RULE 809.17, STATS.

\$10,000.00 for past medical expenses, \$4,000.00 for future medical expenses, \$35,000.00 for past pain, suffering and disability, and \$70,000.00 for future pain, suffering and disability. The jury found Whiting, the employer and Otis Elevator each one-third causally negligent. Whiting accepted \$80,000.00 in settlement of her claim and then moved the court to identify that portion of the settlement subject to recovery by Continental under § 102.29(1), STATS.² The trial court concluded that the whole of Whiting's settlement was subject to distribution.

II.

This case involves the application of § 102.29(1), STATS., to a set of undisputed facts, and thus presents a question of law that we decide without deference to the conclusions of the trial court. *See Nichols v. Bennett*, 199 Wis.2d 268, 272-73, 544 N.W.2d 428, 430 (1996).

Section 102.29(1), STATS., provides in pertinent part:

If notice is given as provided in this subsection, the liability of the tort-feasor shall be determined as to all parties having a right to make claim, and irrespective of whether or not all parties join in prosecuting such claim, the proceeds of such claim shall be divided as follows: After deducting the reasonable cost of collection, one-third of the remainder shall in any event be paid to the injured employee or the employee's personal representative or other person entitled to bring action. Out of the balance remaining, the employer, insurance carrier or, if applicable, uninsured employers fund shall be reimbursed for all payments made by it, or which it may be obligated to make in the future, under this chapter, except that it shall not be reimbursed for any payments of increased compensation made or to be made under s. 102.18 (1) (bp), 102.22, 102.35 (3), 102.57 or 102.60. Any balance remaining shall be paid to the

² The \$80,000.00 settlement equals two-thirds of the total jury award.

employee or the employee's personal representative or other person entitled to bring action.

This section governs worker's compensation claims where a third party, in this case Otis Elevator and its insurer, is sued for tortious conduct. *See Gerth v. American Star Ins. Co.*, 166 Wis.2d 1000, 1012, 480 N.W.2d 836, 841 (Ct. App. 1992). An insurer filing a claim under § 102.29(1), STATS., like Continental, "does not even have to participate in the action to be entitled to the proceeds of the action as long as it gives notice of its claim." *Id.* at 1012, 480 N.W.2d at 841-42. A worker's compensation insurer's right of recovery under § 102.29(1) "is unconditionally conferred and assured by the statute." *Elliott v. Employers Mut. Cas. Co.*, 176 Wis.2d 410, 415, 500 N.W.2d 397, 399-400 (Ct. App. 1993).

Furthermore, competent authority compels a trial court to divide the proceeds as § 102.29(1), STATS., directs "unless the parties agree to an alternative allocation." *See Kottka v. PPG Indus., Inc.*, 130 Wis.2d 499, 510, 388 N.W.2d 160, 165 (1986). The statutory distribution formula set forth in § 102.29(1) applies to the entire recovery, so long as the entire award stems from the same accident or injury and the worker's compensation carrier has paid benefits, for which it had statutory liability, for at least a portion of the resulting injuries. *See Nelson v. Rothering*, 174 Wis.2d 296, 303, 496 N.W.2d 87, 90 (1993). "Specifically, sec. 102.29(1), Stats., ensures that the employee receive at least one-third of any third-party proceeds after costs and collection fees and that the compensation insurer be reimbursed as fully as possible from the remainder of the sum collected, with any balance going to the employee." *Id.* Despite Whiting's central claim that a different result would be more fair and equitable, a circuit court is powerless to divide the proceeds in any manner other than the manner

legislatively mandated without the consent of the parties. *See id.* at 304-06, 496 N.W.2d at 91-92.

Here, the trial court ordered a mathematical application of the legislative formula for apportioning Whiting's settlement. We conclude, therefore, that the circuit court properly applied the legislative directive of § 102.29(1), STATS., to the facts of this case.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

