

§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

(a) The right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the "third party." The respective rights and interests of the employee-beneficiary under this Article, the employer, and the employer's insurance carrier, if any, in respect of the common-law cause of action against such third party and the damages recovered shall be as set forth in this section.

(b) The employee, or his personal representative if he be dead, shall have the exclusive right to proceed to enforce the liability of the third party by appropriate proceedings if such proceedings are instituted not later than 12 months after the date of injury or death, whichever is later. During said 12-month period, and at any time thereafter if summons is issued against the third party during said 12-month period, the employee or his personal representative shall have the right to settle with the third party and to give a valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below.

(c) If settlement is not made and summons is not issued within said 12-month period, and if employer shall have filed with the Industrial Commission a written admission of liability for the benefits provided by this Chapter, then either the employee or the employer shall have the right to proceed to enforce the liability of the third party by appropriate proceedings; either shall have the right to settle with the third party and to give a valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below. Provided that 60 days before the expiration of the period fixed by the applicable statute of limitations if neither the employee nor the employer shall have settled with or instituted proceedings against the third party, all such rights shall revert to the employee or his personal representative.

(d) The person in whom the right to bring such proceeding or make settlement is vested shall, during the continuation thereof, also have the exclusive right to make settlement with the third party and the release of the person having the right shall fully acquit and discharge the third party except as provided by (h) below. A proceeding so instituted by the person having the right shall be brought in the name of the employee or his personal representative and the employer or the insurance carrier shall not be a necessary or proper party thereto. If the employee or his personal representative shall refuse to cooperate with the employer by being the party plaintiff, then the action shall be brought in the name of the employer and the employee or his personal representative shall be made a party plaintiff or party defendant by order of court.

(e) The amount of compensation and other benefits paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party. In the event that said amount of compensation and other benefits is introduced in such a proceeding the court shall instruct the jury that said amount will be deducted by the court from any amount of damages awarded to the plaintiff. If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of employer joined and concurred with the negligence of the third party in producing the injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding. Such issue shall be the last of the issues submitted to the jury. If the verdict shall be that actionable negligence of the

employer did join and concur with that of the third party in producing the injury or death, then the court shall reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation hereunder and the entire amount recovered, after such reduction, shall belong to the employee or his personal representative free of any claim by the employer and the third party shall have no further right by way of contribution or otherwise against the employer, except any right which may exist by reason of an express contract of indemnity between the employer and the third party, which was entered into prior to the injury to the employee. In the event that the court becomes aware that there is an express contract of indemnity between the employer and the third party the court may in the interest of justice exclude the employer from the trial of the claim against the third party and may meet the issue of the actionable negligence of the employer to the jury in a separate hearing.

(f) (1) If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:

- a. First to the payment of actual court costs taxed by judgment and/or reasonable expenses incurred by the employee in the litigation of the third-party claim.
- b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and except for the fee on the subrogation interest of the employer such fee shall not be subject to the provisions of G.S. 97-90 but shall not exceed one third of the amount obtained or recovered of the third party.
- c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.
- d. Fourth to the payment of any amount remaining to the employee or his personal representative.

(2) The attorney fee paid under (f)(1) shall be paid by the employee and the employer in direct proportion to the amount each shall receive under (f)(1)c and (f)(1)d hereof and shall be deducted from such payments when distribution is made.

(g) The insurance carrier affording coverage to the employer under this Chapter shall be subrogated to all rights and liabilities of the employer hereunder but this shall not be construed as conferring any other or further rights upon such insurance carrier than those herein conferred upon the employer, anything in the policy of insurance to the contrary notwithstanding.

(h) In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest under (f) hereof upon any payment made by the third party by reason of such injury or death, whether paid in settlement, in satisfaction of judgment, as consideration for covenant not to sue, or otherwise and such lien may be enforced against any person receiving such funds. Neither the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join therein; provided, that this sentence shall not apply:

(1) If the employer is made whole for all benefits paid or to be paid by him under this Chapter less attorney's fees as provided by (f)(1) and (2) hereof and the release to or agreement with the third party is executed by the employee; or

(2) If either party follows the provisions of subsection (j) of this section.

(i) Institution of proceedings against or settlement with the third party, or acceptance of benefits under this Chapter, shall not in any way or manner affect any other remedy which any party to the claim for compensation may have except as otherwise specifically provided in this Chapter, and the exercise of one remedy shall not in any way or manner be held to constitute an election of remedies so as to bar the other.

(j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien. If the matter is pending in the federal district court such determination may be made by a federal district court judge of that division. (1929, c. 120, s. 11; 1933, c. 449, s. 1; 1943, c. 622; 1959, c. 1324; 1963, c. 450, s. 1; 1971, c. 171, s. 1; 1979, c. 865, s. 1; 1983, c. 645, ss. 1, 2; 1991, c. 408, s. 1; c. 703, s. 2; 1999-194, s. 1; 2004-199, s. 13(b).)