

Where action allowed

SECTIONS 45 - 46

45. (1) Where a worker sustains an injury in the course of his or her employment in circumstances which entitle him or her or his or her dependents to an action

- (a) against some person other than an employer or worker;
- (b) against an employer or against a worker of that employer where the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer; or
- (c) where section 44.1 applies,

the worker or his or her dependents, where they are entitled to compensation, may claim compensation or may bring an action.

(2) The worker or his or her dependents shall make an election under subsection (1) within 3 months of the injury and an application for compensation is a valid election for the purpose of this section.

(3) Where the worker or his or her dependents elect to bring an action, he or she or they shall immediately serve notice in writing of the election on the commission.

(4) Where the commission is satisfied that due to a physical or mental disability a worker is unable to exercise his or her right of election, and undue hardship will result, it may pay the compensation provided by this Act until the worker is able to make an election.

(5) Where the worker referred to in subsection (4) elects not to claim compensation, no further compensation shall be paid, but the compensation that has been paid shall be a 1st lien against a sum that may be recovered.

(6) Where a person who is required to make an election under this section is under the age of 18 years, his or her parent or guardian may make the election.

(7) Where a worker referred to in subsection (1) or the worker's dependents bring an action or settle out of court and less is recovered and collected than the amount of the compensation to which the worker or dependents would be entitled under this Act, the worker or dependents are not entitled to claim compensation under this Act.

(8) Where the worker or the worker's dependents apply to the commission claiming compensation under this Act, neither the making of the application nor the payment of compensation under it shall restrict or impair a right of action against the party liable, but in relation to those claims the commission is subrogated to the rights of the worker or his or her dependents and may maintain an action in his or her or their names or in the name of the commission against the person against whom the action lies for the whole or an outstanding part of the claim of the worker or his or her dependents.

(9) The commission has exclusive discretion to determine whether it shall take an action, release its claim for an action or compromise the right of action, and its decision is final.

(10) Where, in an action under subsection (1), a worker or the worker's dependents receive money as the result of a judgment given by a court of law and the commission is owed money under this section by the worker or his or her dependents, the judge shall order that the money owed be paid to the commission.

(11) Where the commission is subrogated to the rights of a worker or the worker's dependents and recovers and collects more than the amount of the compensation to which the worker or dependents would be entitled under this Act, the sum representing the amount of the excess, less costs and administration charges, shall be paid to the worker or dependents.

(12) Costs may, notwithstanding that a salaried employee of the commission acts as its solicitor or counsel, be awarded to and collected by the commission in an action taken by the commission under this section.

(13) The commission may, in an action brought under subsection (8), also recover amounts paid to or on behalf of a worker or his or her dependents by way of compensation, including amounts paid as medical expenses, rehabilitation expenses and other expenses paid by the commission to or on behalf of the worker or his or her dependents. *1983 c48 s33; 1985 c31 s2; 1992 c29 s9; 1994 c12 s8; 1999 c22 s29; 2009 c7 s4*

Commission decides if action prohibited

46. Where an action in respect of an injury is brought against an employer or a worker by a worker or his or her dependent, the commission has jurisdiction upon the application of a party to the action to adjudicate and determine whether the action is prohibited by this Act. *1983 c48 s34*