

Client Services Procedure Manual

Procedure: 7.00
Subject: Third Party Actions

7.01 Introduction

It is very important that “Third Party” cases are identified as early as possible when they enter our system, as these cases must be handled differently from other compensation cases. Amendments effective January 1, 1993 require that workers who are injured by a third party must choose to either claim compensation or take court action against that third party. It is also important that the injured worker is well informed of his/her options before making the decision to claim compensation or take an action.

7.02 Identifying a Third Party Case

The decision-maker must review the Form 6 and/or 7 to determine whether a person (an individual or corporation) other than the worker may be responsible for the injury. Then the decision-maker must determine whether that person or persons is a worker or an employer under the Act and whether they were in the course of their employment.

A third-party action is not allowed where the person responsible for the injury is a worker or an employer covered by the Act, except where section 44.1 of the Act applies, which states:

Section 44 shall not apply where the worker is injured or killed

- (a) while being transported in the course of the worker’s employment by a mode of transportation in respect of which public liability insurance is required to be carried; or**
- (b) as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker’s employment.**

(Refer to Policy EN-08 Part I Section B for more details)

If the decision-maker is unable to determine whether the person involved is covered by the Act and therefore cannot be sued, then he/she must consult with the Legal Division. Where the decision maker is satisfied that the third party did not have the mental capacity to form intent to harm the worker, then it should not be treated as a third party case. Any questions regarding such claims can be referred to Legal Counsel.

Examples of Potential Third Party Cases:

Motor Vehicle Accident – These are the most common third party claims and will generally be pursued, provided the third party is at fault or contributed to the accident.

Occupier’s Liability – The occupier of premises owes a duty of care to those persons entering upon the premises to have the premises reasonably safe. Typical claims in this area include falls due to icy stairways; foreign substances on the floor; faulty construction of a dwelling.

Assault – These are cases where there is an intentional physical contact by one person or another or the threat of physical violence. Typical cases of assault would involve a police officer while trying to arrest someone, or a health care provider assaulted by a mentally ill patient. It is unlikely that we would pursue an action against a mentally incapacitated person or a child.

Product Liability – These cases may arise due to the malfunctioning of a piece of equipment or the faulty manufacturing of a product. Examples would include a malfunctioning seatbelt in an airplane or an explosion of gas or other substance. While these cases are fairly rare, they can arise in a wide variety of circumstances.

Medical Malpractice – Third party liability in these cases generally arise from malpractice by a doctor in the treatment of a work injury. There may be a failure to diagnose a problem, misdiagnoses, failure to prescribe appropriate treatment or follow-up. As these types of actions may be difficult to identify and may not surface for some time, Legal Counsel should be consulted where any doubt exists.

Once the claim has been identified as a potential Third Party claim, a determination of entitlement to compensation must be made.

The provisions of Section 44 and Policy EN-08 do not apply to employees falling under the **Government Employees Compensation Act (Canada)**. [see section 7.14(m) of these procedures]

7.03 Facilitating Election by the Worker

When it has been determined that the worker is entitled to compensation **and** there is a possibility of taking action, the decision-maker must:

- i) flag the case as “Third Party” on the system;
- ii) send the third party information package to the worker, which includes the third party letter (copied to the employer and the Legal Counsel), election form, brochure, and a copy of sections 44 – 46;
- iii) send written notification to all health care providers that medical aid will not be paid until the worker elects compensation unless otherwise specified in the Memorandum of Agreement between WorkplaceNL and the applicable health care providers;
- iv) in the case of a motor vehicle accident, request the motor vehicle accident report under the **Highway Traffic Act** from Motor Vehicle Registration (Government Services). Once requested, the Legal Division will follow up to ensure receipt;
- v) provide Case Worksheet notification to the Administrative Assistant, Legal Services and the Legal Counsel that “Election Form sent – Potential Third Party.” (refer to Section 7.07).

An election form must be completed even in the cases where the Legal Division had decided that WorkplaceNL will not be pursuing an action. The worker will be notified by the Legal Division of our decision not to take an action.

It is crucial for the decision-maker to follow up promptly on the election form, as WorkplaceNL must operate within a specific limitation period should it decide to take an action. The Administrative Assistant, Legal Services must be notified as soon as the election form is received through the Case Worksheet by a message which states "Election Form received-worker elects/does not elect compensation".

A Form 6 and an Election Form must be filed on **all** lost time third party claims before compensation benefits are processed; except that upon the expiration of 3 months, the Form 6 is deemed a valid election of compensation benefits.

The decision-maker must make every effort to obtain the completed election form within 30 days from the date of injury. If it is not returned within 30 days, the decision maker must send a reminder in writing, advising the worker of the 3 month statutory time limit to elect.

If the election form is not received within 60 days of the date of injury and written reminders were sent to the worker, the decision maker (or designate) must contact the worker to determine the reason for the delay. It is important that these timeframes are followed so that the WorkplaceNL can commence an action within the existing limitation period should it decide to do so. **Note: The 3 month statutory time limit begins from the date of injury, not from the date the claim is reported to WorkplaceNL.**

At 60 days post injury, the following action must be taken by the decision-maker for cases where the Election Form is not yet received.

If the worker has not filed a Form 6:

- send a final request for the Form 6 and the Election Form, advising the worker that the Form 6 and the Election must be submitted within the 3 month time limit (reference section 45 and 53 of the Act), or he/she will lose the right to elect and may not be entitled to compensation.

If it is beyond three months from the date of injury when the Form 6 is completed by the worker, the decision maker must:

- review the late claim in accordance with section 53 and 54 of the Act to decide if any prejudice would arise if the late claim is accepted;
- refer the matter to the Administrative Assistant, Legal Division and Legal Counsel via the Case Worksheet, Legal Counsel will then confirm with the worker that no other legal action has been maintained or settlement accepted and that there is no prejudice to any third party action which may be maintained. Legal Counsel will document their findings and refer the matter back to the decision maker for further action via the Case Worksheet.

Once a claim has been flagged as a potential third party case and WorkplaceNL is waiting on the return of an election form:

- no earning loss benefits will be paid;

- with the exception of payments in accordance with the physiotherapy and chiropractic policy and Memorandum of Agreements with these health care providers, no medical aid payment will be issued on the claim.

In accordance with subsection 45(4) of the Act, compensation may be paid while awaiting an election where WorkplaceNL is satisfied that the worker is unable to exercise his or her right of election due to a physical or mental disability and that undue hardship will result if benefits are withheld. However, in the circumstances where the worker is later able to exercise his or her right of election, the decision-maker must obtain the signed election form from the worker as soon as he or she is able to elect.

7.04 When Compensation is Elected

When a worker has filed a Form 6 and an Election Form, the claim is processed in the regular manner. The election cannot be changed once the worker accepts a compensation payment, unless the change is agreed to by WorkplaceNL **and** all monies expended on the claim (plus an administration fee on benefits and services) are repaid to WorkplaceNL (refer to Policy EN-08 Part II B).

7.05 When Court Action is Elected

When an election form is received indicating the worker is taking an action rather than compensation, the decision-maker must:

- i) close the claim, coded as “Worker Elected To Take Action” (Code 81);
- ii) refer a case worksheet to the Health Care Benefits Adjudicator so that the medical aid bills can be returned to the medical care provider; and,
- iii) refer a case worksheet to the Legal Division to record the election decision.

Once the worker elects to take an action, the election cannot be changed, even if less money (or no money) is recovered through an action or a settlement, unless the matter is revealed to be statute barred.

7.06 Reinstatement of Benefits

Where the worker has received excess monies from a settlement (in accordance with section 7.13 – SETTLEMENT) and afterwards suffers a worsening of his/her condition, then he/she will not be entitled to any further benefits from the WorkplaceNL until the excess from the third party settlement has been exhausted. Calculations in relation to any further entitlement will be made on a case-by-case basis by the decision-maker with input from the Legal Division.

7.07 Guidelines for Referring Third Party Claims

The Intake Adjudicator or Client Services Assistant is responsible for identifying all potential third party matters pursuant to section 7.03. At the time that the Intake Adjudicator or Client Services Assistant

identifies the matter as a potential third party and sends the third party information package to the worker, they must also send notification to the Administrative Assistant, Legal Division that the file is a potential third party. This notification must be placed on the worker's Case Worksheet and be directed to the Administrative Assistant, Legal Division and to the Legal Counsel. It should read: "Election Form Sent- Potential Third Party". The Administrative Assistant Legal Division will log each of these matters as a "Potential Third Party."

Follow-up on Election Forms is the responsibility of the Client Services Assistant. The Intake Adjudicator must make the decision whether or not benefits will be paid on the worker's claim pursuant to section 7.03.

Once the Election Form is received on a claim, the Intake Adjudicator or Client Services Assistant must forward a Case Worksheet on the file to the Legal Division. The Intake Adjudicator or Client Services Assistant must place a notification on the worker's Case Worksheet which reads: "Election Form Received – Worker elects/does not elect compensation". The Administrative Assistant, Legal Division will check the Case Worksheet Maintenance screen on a daily basis for third party referrals. If the worker has elected to take compensation benefits, the Administrative Assistant, Legal Division will open a third party file. Legal Services will continue to monitor these claims. In some cases the Intake Adjudicator may wish to send a memo to Legal Counsel providing pertinent background information on the third party matter.

If the worker has elected not to take compensation benefits, the Administrative Assistant, Legal Division will log the matter as being "closed" and send the appropriate correspondence to the worker.

No other method other than referral through the Case Worksheet as described above is an acceptable method of notifying the Legal Division of a potential third party or referring the third party file, once the Election Form is received. Strict compliance with these notification/referral guidelines is necessary for ensuring all matters which are potential third party claims come to the attention of Legal Counsel.

Once the file has been referred to the Legal Division as a third party matter, the Legal Division is responsible for follow-up.

7.08 Medical Aid Only Cases

WorkplaceNL will consider recovery on potential third party "Medical Aid Only" cases (i.e. claims with no lost time), since medical aid costs can become significant and/or the case may develop into a lost time claim.

Role of Health Care Benefits Adjudicator

When potential third party cases are identified by the Health Care Benefits Adjudicator, he/she will:

- Refer the case to the Intake Unit for further action and follow up.

The Legal Division will consider whether an action will be pursued on Medical Aid Only claims.

7.09 Fatalities

As soon as a fatality is reported (made known) to WorkplaceNL, the decision-maker must:

- Refer the case to the Legal Division. (This referral should be made *before* any forms/information are sent to the dependents and should be made through the Case Worksheet to the Administrative Assistant, Legal Division and Legal counsel that “Fatality – Potential Third Party”).
- Legal Counsel will review the matter and will advise the decision maker via Case Worksheet if a potential third party claim exists.

Once it has been determined that a potential third party case exists, the decision maker must:

- Make a determination of entitlement to compensation,
- “flag” the case as third party on the system,
- send the appropriate third party forms and information to the dependents along with the other dependency forms/information that are normally distributed,
- in the case of a motor vehicle accident, request the motor vehicle accident report under the **Highway Traffic Act** from Motor Vehicle Registration/Government Services.

Dependency benefits and/or medical aid will not be paid unless the dependent elects compensation.

It is crucial for the decision-maker to follow up promptly on the election form, as WorkplaceNL must operate within a specific limitation period should it decide to take an action. The Administrative Assistant, Legal Services must be notified as soon as the election form is received through the Case Worksheet by a message which states “Election Form received – worker elects compensation” or “Election Form received – worker does not elect compensation”.

Once the election form is received and the Legal Division has been notified, the same procedures are followed as in the case of a “Lost Time” claim.

If there is an Election Form filed after the expiry of the six-month period to claim compensation pursuant to s. 53 of the Act, the same procedure should be followed as in the case of a “Lost Time” claim (refer to Section 7.03).

7.10 Establishing Third Party Claim Costs

Third Party costs are generally determined on a Cash Basis (payments to date) or Full Cost Basis (cash payments and future liability excluding cash paid against the liability).

A Third Party Cost Form has been developed to assist with compiling and calculating third party cost requests. The request will be initiated by the Legal Division.

i) **Cash Basis (payments to date)**

For a **Cash Payment to Date** only request, the Future Liability (Section B) of the **Third Party Cost Form** can be omitted.

The Administrative Assistant, Legal Division will initiate and co-ordinate the completion of the **Third Party Cost Form**. In doing so, cost summary information will be recorded, as well various divisions of Compensation Services will be contacted to identify outstanding bills and verify the claimant's status.

The Administrative Assistant, Legal Division will request a **Summary of Benefits Paid or Charged for Claimant by Payment Year** (Program Reporting, Employer Report Menu). This report will print overnight or Information Systems may be contacted to release the request for immediate processing and printing. The Summary of Benefits report will provide the amount of cash paid to date for TEL, Medical, Rehabilitation, Lump Sums, PFI, and Burial (items processed by the system as of the date the report was requested). This report does not include outstanding bills to be paid nor does it show the cash payments on previously established EEL or Dependency Award reserves. Outstanding bills and present/future status of the claims are identified through contact with various Compensation Services Divisions. Cash payments against the reserves can be identified through a Query Option on the AS-400. When the Third Party Cost Form (excluding Future Liability section) is completed, it is sent to the Accounting Analyst, Finance Department for verification.

- ii) **Full Cost Basis** (cash payments and future liability excluding cash payments against the liability).

The Administrative Assistant, Legal Division will initiate and coordinate completion of a **Third Party Cost Form**. This request is more in-depth as the Cash Payments to Date (Section A), Future Liability (Section B), and Appeals (Section C) of the Third Party Cost Form must be completed.

Completing the Cash Payments to Date section of the form is explained in item i) above.

To determine the future liability of a claim, the EEL Division (or Pensions), as appropriate, will be contacted to obtain particulars which will enable the Finance Department to provide Legal Services with the present value of the related reserve. **NOTE:** the EEL and Dependency Award reserve figures appearing on the Summary of Benefits Report are understated and should not be used.

If Item 1 and/or 3 on the Third Party Cost Form indicate a claimant may return or continue on TEL or Rehabilitation, each division will be asked to provide sufficient information (weekly allowance, number or weeks to completion, expected tuition cost, travel) for Finance to determine an adequate reserve.

7.11 Allocation of Claims Cost

Third Party claims' costs are not included in the calculation of base assessment rates under Policy ES-08, the calculation of experience rating rates under Policy ES-09, nor the calculation of an employer's experience refund or charge under the experience-incentive component of PRIME.

Self-Insured Employers

All benefit costs paid to injured workers on behalf of self-insured employers (mainly provincial and federal government departments) are billed to the employers on a monthly basis (plus an administration fee) and the WorkplaceNL must be reimbursed within 90 days. As a result of this arrangement (Pay-As-You-Go Approach), self-insured employers are not included in the annual rate setting process (Full-Funding Approach). Therefore, the process described above does not apply to the self-insured employers.

Third party recoveries on behalf of the self-insurer's injured worker(s) may be remitted to that employer as WorkplaceNL should be fully reimbursed through its monthly billing system.

7.12 Administrative and Legal Costs

Where WorkplaceNL takes an action on the worker's behalf and recovers more than the amount of compensation entitlement, the sum representing the excess, less an administrative fee and the costs of the legal action, is paid to the worker. The administrative fee is 12.5% of the claims cost and an additional 10% on the excess settlement to cover the cost of utilizing resources within WorkplaceNL necessary (in addition to the administration of the claim) to obtain the best possible settlement for the worker.

Sample Breakdown of Administrative and Legal Costs

Total Recovery	\$28,000.00
Less Claims Cost	(8,946.71)
Less 12.5% charge on Claims Costs	<u>(1,118.34)</u>
	\$17,934.95

Deduct Legal Costs (Medical Report) (200.00)

Excess \$17,734.95

10% of Excess \$1,773.50

Total Administrative Fee \$2,891.84 (\$1,118.34 + 1,773.50)

Amount payable to worker \$15,961.45
[\$28,000 – (Claims Costs + Legal Costs + Administrative fee)]

7.13 Settlement

When a settlement has been reached on a third party claim, the Legal Division will:

- send the cheque to Finance, with a memo advising how the money is to disbursed; and,
- where there is excess money and the worker is not getting compensation benefits, send a letter to the worker advising that should the worker seek a reinstatement of benefits in the future for this particular worker injury, the excess monies received from the third party settlement will be offset from any future compensation entitlement (The cheque for excess money as prepared by Finance is enclosed with this letter to the worker.)

PART TWO

7.14 Third Party Determination

a) Initiating a Request

Section 46 begins “Where an action...is brought...”. It is therefore a prerequisite to a section 46 application that legal action has been started in a court. WorkplaceNL has no jurisdiction to consider the matter until a Statement of Claim has been filed.

Requests for a section 46 determination may be made in writing to the Internal Review Specialist who will make the decision. No form is required, but a copy of the issued Statement of Claim must be provided. Copies of any other pleadings filed should also be enclosed. The other parties’ legal counsel should be identified if not indicated by the pleadings.

b) Timing

A request for a section 46 determination may be made at any time after the action has been started. The request should be made far enough in advance of the anticipated trial date that there is adequate time for parties to file submissions and for WorkplaceNL to consider the matter.

A minimum period of 90 days should be allowed for obtaining a section 46 determination from WorkplaceNL following receipt of applicable submissions.

c) Submissions

Section 46 determinations are usually considered on the basis of written evidence and submissions. The responsibility for providing evidence and submissions rests with the parties. Although WorkplaceNL may make inquiries and/or investigate into the status of the parties, the parties should not assume this will be the case.

The party initiating the section 46 determination will be asked to provide the first submission. This submission should identify the determinations requested and provide all the evidence and argument necessary for WorkplaceNL’s consideration.

This submission will be disclosed to the other party or parties, who will be asked to provide their submissions. Their response will be disclosed to the first party, who will be given an opportunity to provide argument in response.

A three week time frame will normally be given for each submission, which may be extended upon request.

d) Evidence

It is essential that counsel provide to WorkplaceNL all the relevant factual information necessary to the consideration of the issues. This evidence may be submitted in any form, including: admissions of fact by counsel, handwritten statements by the parties themselves, business records, sworn affidavits, and transcripts of evidence from an Examination for Discovery.

e) Participants

The employer or alleged employer of the various parties will be invited to participate in the proceeding even if they are not a party to the legal action.

One of the possible outcomes of a section 46 determination is that the action will be barred and the plaintiff will proceed with a claim for workers' compensation benefits. The plaintiff's employer will then be charged with the cost of that claim. As well, it may be that an alleged employer who is not registered, may be found to be an employer and thus be required by the Assessment Services Department to pay assessments.

For these reasons these persons should have an opportunity for input.

f) Prior Decisions on Relevant Issues

WorkplaceNL will, in making a determination under section 46, consider all the evidence and argument provided, irrespective of a prior decision on a relevant issue by a member of WorkplaceNL's staff.

g) Agreed Statement of Facts

It is helpful, although not essential, if counsel prepare an agreed Statement of Facts.

h) Oral Hearings

An oral hearing may be requested, in which case written reasons should be provided to explain why an oral hearing is necessary. Oral hearings will generally only be granted where there is a significant dispute about the relevant facts or where credibility of one of the parties is the major issue. This request should be made at the time the section 46 determination is requested because if granted, the required written submissions may be dispensed with.

WorkplaceNL always has the discretion to convene an oral hearing on its own initiative.

i) Access to Claim File

If a claim file regarding the injury has been established by WorkplaceNL, disclosure of the relevant portions for the purposes of the legal action may be obtained by the worker or employer with written consent.

j) Decision

The determination is rendered by the Internal Review Specialist who will provide a certified copy of the determination for the purposes of the legal action, with written reasons for the decision.

k) Finality of the Decision

Section 46 Determinations are not subject to Internal Review and are not reviewable by the Review Division. Challenges to the decision must be pursued through the courts.

l) Apprehension of Bias

Where a worker claims compensation, WorkplaceNL is subrogated to their rights and may pursue the legal action against a third party. Either party may request a section 46 determination. The question may be raised as to whether there is a reasonable apprehension of bias in WorkplaceNL deciding the matter, in light of WorkplaceNL's financial interest in the outcome.

This issue has been considered in British Columbia, where similar provisions were in place. The British Columbia Supreme Court found that some degree of inherent statutory bias was contemplated by the Act and that the question was whether established procedures were free from a reasonable apprehension of bias and specifically whether the allegations of bias in the particular case were supported by sufficient evidence.

As the administration and adjudication of section 46 determinations are carried out by staff outside Legal Services, the process is as insulated as far as possible, given the legislation, from bias.

m) Federal Government Workers

Federal government workers receive compensation for work injuries pursuant to the **Government Employees Compensation Act (GECA)**. WorkplaceNL only has jurisdiction over matters which are necessary to the determination of compensation under section 4 of the **GECA**. The **GECA** has its own provisions with respect to actions which are prohibited under it.

7.15 When Third Party Not Pursued

The Legal Division will review all matters flagged as third party and referred to them and decide whether or not to pursue recovery from the third party.

There are some circumstances in which the Legal Division may decide not to pursue recovery from the third party. These decisions will be made by Legal Counsel in consultation with General Counsel where advisable. These circumstances are outlined below:

1. Third Party does not have Insurance and/or is Impecunious

Where we become aware that the third party does not carry insurance to cover the loss or has very little means to recover against we will not pursue the action as there will be nothing to recover even if we were successful. The worker will be advised in writing of our decision not to pursue the action. An example may include a situation where there has been a slip and fall incident but the occupier does not carry third party liability insurance and is a person of modest means.

2. Third Party is Difficult to Locate or Out of the Jurisdiction

In some cases the third party may be unidentified or has moved out of the jurisdiction. In these cases third party recovery will not be pursued either because no third party can be found, or the cost of pursuing the third party matter in another jurisdiction is prohibitive based upon the size of the claim. The worker will be advised in writing of our decision not to pursue against the third party.

3. Liability for Accident Uncertain and Cost of Pursuing Further Outweighs Potential Benefits to be Recovered

At times there is great uncertainty as to how the accident happened and it is unlikely that we can prove that the third party was responsible or to prove this would cost more than the claim is worth. In these cases, recovery will not be pursued and the worker will be advised in writing.

4. Worker is Responsible for Own injuries

Some files are flagged “Third Party” and come to the Legal Division, but in fact involve injuries where the worker was the cause of the accident. In these cases no further action is taken, and the worker is advised in writing.

5. Third Party is Mentally Incapacitated

There are a variety of claims mainly involving assaults upon health care providers or police officers, where the assailant third party lacks the mental capacity to form the intent legally required to pursue an action for assault against them. In clear cases involving mental incapacity, the decision maker can decide not to flag the file as a third party matter. Those matters which reach Legal Counsel will not be pursued and the worker will be advised of this in writing.

6. Low Cost Claims

Where the Legal Division determines that the matter is otherwise a claim where they would pursue third party recovery, but the total cost of the claim to WorkplaceNL is \$300.00 or less, the Legal Division may decide not to pursue recovery. Generally, these are cases where there is Medical Aid Only or a small amount of Lost Time paid and the claim is closed. In these cases, the Legal Division will send a letter to the worker indicating that unless the worker is having ongoing medical problems from his/her injury and notifies the WorkplaceNL prior to the expiry of the limitation period, no action will be taken.

7. Worker a Federal Government Employee and GECA Applies

Where the worker involved in a third party matter is a federal government employee the right to pursue third party action remains the Federal Government and is the responsibility of Human Resources and Social Development Canada.

Reference: *Workplace Health, Safety and Compensation Act*, Sections 44-46
Policy EN-08 Third Party Actions

Amendment History

<i>Original Effective Date</i>	1994 08 31
<i>Revision #1</i>	1995 07 25
<i>Revision #2</i>	1998 09 01
<i>Revision #3</i>	2007 05 23