

## Client Services Policy Manual

Policy Number: **EN-08**  
Subject: **Third Party Actions**  
Chapter: **Entitlement**

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### Background

Third parties are individuals or bodies not protected by the *Workplace Health, Safety and Compensation Act* (the Act) who may be responsible for a work injury.

Since January 1, 1993 a worker who is injured in the course of employment as a result of someone else's negligence, or the worker's dependents where the injury results in death, must choose how they wish to be compensated. Their choice is to claim workers' compensation benefits and turn over the right to sue the negligent party to WorkplaceNL, or not claim workers' compensation benefits and sue the negligent party on their own without any involvement by WorkplaceNL.

If a worker or dependent elects to claim workers' compensation benefits, WorkplaceNL takes over the right to sue the person or persons responsible for the injury. If court action is taken and WorkplaceNL successfully recovers more money than is payable under the Act (plus an administration charge and legal expenses), the worker or dependent is entitled to the excess.

If a worker or dependent decides to sue on their own, they will not be entitled to receive workers' compensation benefits. This is so even if they receive less money from the person or persons responsible for the injury than they would have received in workers' compensation benefits.

### Policy Statement

WorkplaceNL believes that third parties who cause injuries to workers should be responsible for damages to the worker and for any resulting costs to the Injury Fund. It also believes that injured workers or their dependents have the right to choose whether they will take a court action or claim compensation.

To encourage informed decision making, WorkplaceNL promotes full disclosure of an injured worker's or dependents' options before they decide to sue or claim compensation. WorkplaceNL will provide all reasonable assistance to help workers/dependents understand the issues and consequences of their decisions.

Sometimes the existence of a right of action against a third party is not apparent to either the worker, dependents or WorkplaceNL at the time of injury (e.g. product liability cases). If the worker or dependent accepts compensation before the existence of a right of

## Client Services Policy Manual

Policy Number: **EN-08**  
Subject: **Third Party Actions**  
Chapter: **Entitlement**

---

action is realized, they will be considered as having elected not to sue and WorkplaceNL has the right to take court action.

Every reasonable effort will be taken to maximize recovery where WorkplaceNL takes a court action on behalf of a worker or dependent. The goal is to put workers/dependents in as good a position as if they had taken the action themselves.

### Part I – Rights of Action

#### A. Where Court Action Not Allowed

Section 44 of the Act prevents a worker or his or her dependents from suing another worker or an employer covered under the Act. Even though another worker or an employer may have been responsible for the injury, a worker or dependent has no choice other than to claim compensation.

Where another worker or an employer has caused an injury, it must be clearly established that they were in the course of their employment (and, therefore, covered under the Act) at the time of injury.

#### B. Where Court Action Is Allowed - Injury Involving Motor Vehicle or Other Modes of Transportation

The restrictions on rights of action in Section 44 do not apply where a worker is injured or killed in a motor vehicle accident or while being transported in a vehicle or craft for which public liability insurance is required to be carried. This is provided for in Section 44.1 of the Act.

Modes of transportation where public liability insurance is required to be carried include:

1. cars, trucks, vans
2. emergency vehicles - police cars, fire trucks, ambulances
3. buses, school buses
4. taxis
5. motorcycles, mopeds
6. tractors, backhoes, heavy equipment
7. commercial and private aircraft
8. snowmobiles, ATV's, dirt bikes (if used on a highway or to cross a highway)

## Client Services Policy Manual

Policy Number: **EN-08**  
Subject: **Third Party Actions**  
Chapter: **Entitlement**

---

The Section 44.1 exception applies even if it is the worker's employer or co-worker who is operating the vehicle or craft. Actions will also be possible where the worker is a pedestrian or bystander struck by a vehicle or craft in this category.

### **C. Where Court Action Possible Worker/Dependents Must Elect**

Where a right of action exists following a work injury, Section 45 of the Act states that a worker or dependent may claim compensation or may bring an action. Among other things, this section provides guidelines which direct a worker or dependent to elect one option or the other within 3 months of the injury.

Under Section 45, WorkplaceNL will consider whether an employer or worker from another jurisdiction can be sued. For example, a right of action may exist against a manufacturer or designer of an injury-causing product if that product was imported to the province.

In any case, a worker or dependents must elect to claim compensation or pursue an action.

## **Part II - Election**

### **A. To Sue or Claim Compensation?**

A worker or dependent cannot claim compensation and pursue a court action. Faced with the option to claim or sue they must elect to do one or the other. WorkplaceNL will not pay compensation while a party decides what to do, except where Section 45(4) applies.

There is no entitlement to compensation benefits when a worker or dependent decides to sue.

WorkplaceNL has control over available court actions when a worker or dependent chooses compensation. The legal term for this process is "subrogation". It means WorkplaceNL can stand in the place of an injured worker or dependent and recover any money it pays out to the worker or dependent in the form of workers' compensation benefits, with the possibility of additional money being paid to the worker or dependents. WorkplaceNL will take all reasonable measures in its opinion to maximize recovery through court action. [see PART III - SUBROGATION]

## Client Services Policy Manual

Policy Number: **EN-08**  
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Chapter: **Entitlement**

---

### B. How to Elect

Any signed document from a worker or dependent, including a Form 6 (Worker's Report of Injury), may indicate their election to sue or claim compensation.

When WorkplaceNL is aware of the possibility of third party action it will provide a brochure and detailed election form. The election form must be completed by the worker or dependent and returned to WorkplaceNL.

**An election will be considered definite when the detailed election form is completed, signed and on file.**

A claim is processed in the regular way if there is a definite election to claim compensation. Once a payment has been accepted the election will not be revoked unless WorkplaceNL consents and all monies paid out under the claim, including the applicable administration charge, are repaid.

If a worker or dependent decides to proceed with a law suit, they simply confirm their choice with WorkplaceNL and retain legal counsel to prosecute the case. The file will be closed at WorkplaceNL and the worker or dependent will not be entitled to compensation from WorkplaceNL, even if less money is recovered through court action or settlement than would have been paid under the Act. There is no right to re-elect at that stage.

### Part III – Subrogation by WorkplaceNL

*Definition: Subrogation means WorkplaceNL can stand in the place of an injured worker or dependent and recover money it pays out to the worker or dependent, with the possibility of additional money being paid to the worker or dependent.*

When a worker or dependent elects to claim compensation WorkplaceNL is subrogated to the court action. WorkplaceNL will sue if, pursuant to Section 45(9) of the Act, its legal department determines there is a worthwhile cause of action against a third party.

When WorkplaceNL sues in the place of an injured worker or dependent it will seek all types of damages (i.e. general and

## Client Services Policy Manual

Policy Number: **EN-08**  
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Chapter: **Entitlement**

---

special), as if the worker or dependents were taking the court action on their own. This does not mean that the worker or dependent is entitled to receive compensation for these damages from WorkplaceNL.

If more money is received through the courts or through settlement than is payable under the Act, the worker or dependent is entitled to the excess. Excess monies shall be calculated by subtracting the following from the amount recovered: the cost of the compensation claim to the date of settlement; the present value of any anticipated future costs of compensation; administrative and legal costs. If the claim is ever reopened compensation benefits will not be paid until the amount due surpasses the amount of excess monies previously awarded.

If WorkplaceNL takes an unsuccessful action it pays all costs.

If a worker or dependent disagrees with a WorkplaceNL decision not to sue, WorkplaceNL may consent to their selecting a lawyer in order to conduct the action. The retained legal counsel will be informed of WorkplaceNL's reasons for not pursuing the action. The legal counsel will be given the full or estimated cost of WorkplaceNL's claim and shall agree that full recovery (if successful) must be paid to WorkplaceNL subject to recognition of a lien for fees and disbursements. WorkplaceNL will not be responsible for fees or disbursements if the action fails.

### **Part IV – Determination of Right of Action**

Section 46 of the Act gives WorkplaceNL jurisdiction to adjudicate and determine whether an action is prohibited by the Act.

Where an action has been brought and a party to the action applies for a determination, the Internal Review Division will decide whether the action is prohibited by the Act. The process of determination will, as far as possible, be agreeable to all parties to the action and conducted within the bounds of natural justice.

### **Scope**

The provisions of this policy do not apply to employees falling under the *Government Employees' Compensation Act* (Canada).

## Client Services Policy Manual

Policy Number: **EN-08**  
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Chapter: **Entitlement**

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**Reference:** *Workplace Health, Safety and Compensation Act, Sections 44-46*  
*Policies: EN-19 Arising out of and in the Course of Employment*  
*EN-20 Weighing Evidence*

### **Amendment History**

<i>Original Effective Date</i>	1982 09 16
<i>Revision #1</i>	1995 04 24
<i>Revision #2</i>	2001 05 31
<i>Revision #3</i>	2013 04 04