

POLICY NUMBER: POL-87

Chapter:
CLAIMS

Subject:
THIRD PARTY ACTIONS

Effective Date:
April 1, 2002

Last Update:
June 6, 2017

PURPOSE STATEMENT:

The purpose of this policy is to describe third party actions and to explain when an injured worker has the option to either claim compensation from the Workers Compensation Board or sue a third party.

REFERENCE:

Workers Compensation Act R.S.P.E.I. 1988, Cap. W-7.1, Section(s) 1, 11-13, 29, 32(3)
Workers Compensation Board Policy, POL-74, Worker
Highway Traffic Act R.S.P.E.I. 1988, Cap. H-5

DEFINITION:

In this policy:

“Motor vehicle” means a motor vehicle as defined in the *Highway Traffic Act* that is required to be registered under that Act.

“Third party” means a person or entity that is not considered to be a worker or employer under the *Workers Compensation Act* R.S.P.E.I. 1988, Cap. W-7.1.

POLICY:

1. The workers compensation system provides a worker with compensation benefits resulting from an injury arising out of and in the course of employment.
2. A worker's injury or death may be caused, in whole or in part, by the actions of another person. In this situation, the worker or the worker's dependants, may want to seek compensation or the injuries or death by bringing an action against (sue) that person.
3. Under the *Workers Compensation Act (the Act)*, a worker or dependant is not permitted to sue the worker's employer or co-worker if the accident occurred in the course of employment.
4. A worker or dependant is not permitted to sue another employer covered by the *Act* or by a worker of that employer where the worker of that employer was acting in the course of employment, unless the work-related accident occurred as a result of the use of a motor vehicle.
5. In addition to the situation involving the use of a motor vehicle under paragraph 4, a worker or dependant may sue any other person who may be responsible for the worker's injury (a third party).
6. Where a worker or dependant is entitled to sue a third party, the worker or dependant has to choose (elect) either:
 - to claim compensation from the Workers Compensation Board; or
 - to sue the third party.

The worker or dependant cannot both claim compensation from the Workers Compensation Board and sue the third party.

7. A worker or dependant must indicate their choice by completing an **Election to Claim** (CL-31) or **Election to Claim by Dependants** (CL-33) form provided by the Workers Compensation Board. The election must be made within six months of the date of accident unless the time period is extended by the Workers Compensation Board.

Worker or Dependant Claims Compensation Benefits

8. Where a worker or dependant chooses to claim compensation from the Workers Compensation Board, the worker or dependant will receive compensation benefits from the Board, and the right to sue the third party is transferred to the Board.
9. Where a worker or dependant chooses to receive compensation, the worker or dependant cannot change the election once the worker or dependant accepts a compensation payment unless the change is agreed to by the Workers Compensation Board and all monies paid on the claim are repaid to the Board.

Action Against the Third Party

10. The Workers Compensation Board is not obligated to sue a third party. The Board will evaluate the claim against the third party and determine whether to proceed with a lawsuit. The Workers Compensation Board has the full power to compromise the lawsuit or release its claim if, in its discretion, it is inadvisable to sue the third party.
11. The worker or dependant will be notified in writing by the Workers Compensation Board if it decides not to sue the third party.
12. If the Workers Compensation Board decides to sue the third party, the Board may do so in the name of the worker or dependant or in its own name.
13. A worker or dependant is required to cooperate with the Workers Compensation Board with respect to a lawsuit against a third party. If a worker or dependant fails to do so, the Board may suspend, reduce or terminate benefits.

Payment of Excess Settlement Amount

14. Where the Workers Compensation Board proceeds with a lawsuit and more money is received through the courts or through a settlement than is payable under the *Act*, the worker or dependant is entitled to the excess.

If the worker's claim is closed, the excess is calculated by subtracting the following from the amount received:

- the cost of compensation to the date of settlement or recovery; and
- legal costs.

If the worker's claim remains open, the excess is calculated by subtracting the following from the amount received:

- the cost of compensation to the date of settlement or recovery;
- the present value of any anticipated future costs of compensation; and
- legal costs.

If a worker's claim is ever re-opened, compensation will not be paid to the worker until the amount due surpasses the amount of excess monies previously awarded.

Option for Lump Sum Payment of Excess

15. However, in situations where the worker's claim remains open or may in future be re-opened, the worker may elect, after the cost of compensation to the date of settlement or recovery and legal costs have been recovered by the Board, to receive the excess by way of a lump sum payment.

Prior to receipt of these monies, the worker must:

- Sign a settlement agreement at the time of approval. The settlement agreement requires the signature of the Chief Executive Officer;
- Agree that the settlement amount received is in lieu of any and all present and future wage loss benefits, medical benefits or any other form of compensation from the Board in respect of this accident;
- At the worker's own expense, consult a lawyer for advice prior to signing a settlement agreement with the Board. The worker must provide to the Board written confirmation of having received such advice. The confirmation must state that the worker understands and agrees to all of the terms set out in the settlement agreement.

Worker or Dependant Sues the Third Party

16. A worker or dependant may complete the **Election to Claim** (CL-31) or **Election to Claim by Dependents** (CL-33) form indicating that the worker or dependant is going to sue the third party.

17. The worker or dependant will also be deemed to have elected to sue where:
- the worker or dependant makes a claim against or receives any amount in settlement from a third party prior to making an election; or
 - the worker or dependant has not submitted an **Election to Claim** (CL-31) or **Election to Claim by Dependants** (CL-33) form to the Workers Compensation Board within the required time frame.
18. Where a worker or dependant elects to take action against the third party, the worker or dependant is not entitled to receive compensation benefits from the Workers Compensation Board. The worker or dependant is responsible to bring the action without any involvement from the Board and to pay for all costs associated with the action including legal fees.
19. If a worker or dependant elects to sue and receives less than the amount of compensation that would have been awarded under the *Act*, the Workers Compensation Board may approve payment of compensation to the worker or dependant in an amount not exceeding the difference between:
- the amount of compensation that would have been awarded under the *Act*; and
 - an amount that is, in the Workers Compensation Board's opinion, a reasonable amount of settlement or recovery for the action.
- The Workers Compensation Board will not approve the payment of compensation benefits in the case of a settlement of an action by the worker or dependants if it did not give prior written approval to the settlement.
20. Once a worker or dependant elects to take an action against a third party, the election cannot be changed even if less or no money is recovered through an action or a settlement.

Determination of Right of Action

21. Where an action in respect of an injury is brought against an employer or a worker of an employer by a worker or the worker's legal personal representative or dependant of the worker, the Workers Compensation Board has jurisdiction under subsection 32(3) of the *Act*, on the application of a party to the action, to adjudicate and determine whether the right of action is removed.

22. The Workers Compensation Board has no authority to consider an application to remove a right of action until a Statement of Claim has been filed with the court.
23. A party to the action may submit an application to remove a right of action in writing to the Workers Compensation Board. A copy of the Statement of Claim and of any other pleadings should be included with the request. The application should identify if a claim for compensation has been made with the Workers Compensation Board and the name of the other parties' legal counsel if not indicated by the pleadings.
24. The employer of the worker may be invited to participate in the determination of a removal of a right of action even if the employer is not a party to the legal action, where the employer has a direct interest in the matter.
25. The Workers Compensation Board will decide whether an action is removed by the *Act*. The authority to make this determination may be delegated to a person outside of the Board where, in the Board's opinion, it is advisable to do so.
26. The Workers Compensation Board will, in determining whether a right of action is removed, consider all the evidence and argument provided, irrespective of a prior decision on a relevant issue by a member of the Board's staff.
27. A right of action determination is usually considered on the basis of written evidence and submissions. The responsibility for providing evidence and submissions rests with the parties. The Workers Compensation Board may also make inquiries and/or investigate the status of the parties.
28. An oral hearing may be requested by a party to the application in which case written reasons should be provided to the Workers Compensation Board 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 the issues are complex and verbal presentations by the party's legal counsel, with the ability for questions and answers, would be of assistance in making its determination. The Board always has the discretion to convene an oral hearing on its own initiative.
29. The party who submitted the application will be asked to provide the first submission. The submission should identify the determination requested and provide all the evidence and argument necessary for the Workers Compensation Board's determination. This submission will be disclosed to the other party or parties, who will

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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.

30. The adjudication and determination by the Workers Compensation Board whether a right of action is removed by the *Act* is final and conclusive.

Federal Government Employees

31. This policy does not apply to workers who are employed by the federal government covered under the *Government Employees Compensation Act*.

HISTORY:

June 7, 2017 - Amended to clarify the process of third party actions, to allow for an option for a lump sum payment of an excess settlement, and to incorporate content from the related policy, POL-145, "Statutory Bar to Action" (rescinded).

May 27, 2010 - Amended to clarify that an election to claim benefits is final except under specific circumstances.

September 25, 2008 - The policy was updated as a result of the 60 month policy review process. The policy has been amended to ensure the wording in the policy is consistent with the Workers Compensation Act and to clarify how Federal government third party actions are managed.

Board of Directors Approval Date: March 28, 2002