
Law

The *Workplace Safety and Insurance Act* (the Act) provides:

s.26(2)

Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.

s.28(1)

In respect of the worker's injury or disease, a worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against

1. Any Schedule 1 employer.
2. A director, executive officer or worker employed by any Schedule 1 employer.

s.28(2)

In respect of the worker's injury or disease, a worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against

1. The worker's Schedule 2 employer.
2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

s.28(3)

If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, s.28(1) applies only if the workers were acting in the course of their employment.

s.30(1)

This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan with respect to an injury or disease and is also entitled to commence an action against a person in respect of the injury or disease.

s.30(2)

The worker or survivor shall elect whether to claim the benefits or to commence the action and shall notify the WSIB of the option elected.

s.30(4)

The election must be made within three months after the accident occurs or, if the accident results in death, within three months after the date of death.

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s.30(6)

If an election is not made or if notice of election is not given, the worker or survivor shall be deemed, in the absence of evidence to the contrary, to have elected not to receive benefits under the insurance plan.

s.30(14)

The following rules apply if the worker or survivor elects to commence the action instead of claiming benefits under the insurance plan

1. The worker or survivor is entitled to receive benefits under the insurance plan to the extent that, in a judgment in the action, the worker or survivor is awarded less than the amount described in paragraph three below.
2. If the worker or survivor settles the action and the WSIB approves the settlement before it is made, the worker or survivor is entitled to receive benefits under the insurance plan to the extent that the amount of the settlement is less than the amount described in paragraph three below.
3. The amount is the cost of the benefits that would have been provided under the insurance plan to the worker or survivor, if the worker or survivor had elected to claim benefits under the plan instead of commencing the action.

s.31(1)

A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Workplace Safety Insurance Appeals Tribunal (WSIAT) to determine whether,

- a) because of this Act, the right to commence an action is taken away;
- b) the amount that a person may be liable to pay in an action is limited by this Act;
- c) the plaintiff is entitled to claim benefits under the insurance plan.

s.31(2)

The WSIAT has exclusive jurisdiction to determine a matter described in subsection (1).

Policy

The Act provides no fault loss of earnings benefits for injuries arising out of and in the course of employment in lieu of all rights of action that a worker or survivor may have against the worker's employer. In most cases any right of action is taken away by the Act. However, there are circumstances where a worker or survivor may have a right of action against a third party.

Guidelines**Definitions**

Right of action – means workers have a right to sue if their injury or disease results from the negligence of a third party, i.e., someone other than the worker or the employer, and that

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person is not covered under Schedule 1.

Third party – means someone other than the worker or the employer, and that person is not covered under Schedule 1.

NOTE

For the purposes of this policy **worker** refers to workers, survivors, dependants.

Election

Where a worker is entitled to claim benefits and is also entitled to commence an action, the worker must elect to either claim benefits or to commence an action.

The worker must elect to claim benefits by signing an election form, and returning it within three months of the date of the death or the accident. The WSIB determines the type of election form to be sent depending on the type of accident and whether the employer belongs to Schedule 1 or Schedule 2. See 15-01-03, Workers' Requirement to Claim and Consent.

The WSIB can extend the three month time limit to return the election form. Requests for an extension are made in writing to Legal Services.

Schedule 1 rights of action

When all parties involved in the accident were in the course of their employment, the worker has no right of action against any Schedule 1

- employer
- director
- executive officer, or
- worker.

If a worker signs the election form, the WSIB determines whether a legal action will be commenced.

If an action is brought by the WSIB and the WSIB receives money greater than the cost of pursuing the action and the amount of benefits paid to the worker, the WSIB pays this surplus amount to the worker. Any future benefits are reduced by this amount.

A worker who elects to commence an action instead of claiming benefits, may still be entitled to receive benefits in the future if the action

- proceeds to judgment, or
- is settled with the prior approval of the WSIB.

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The worker must apply in writing to the WSIB for approval. If the worker is entitled to benefits, the WSIB deducts the amount of the judgment or the settlement from the amount owing.

If the legal action was successful, the WSIB uses the court award to provide cost relief to the accident employer by adjusting the employer's experience rating record by the amount of the award.

Schedule 2 rights of action

When all parties involved in the accident were in the course of their employment, a Schedule 2 worker has no right of action against the worker's

- own Schedule 2 employer
- own executive officers
- own directors, or
- workers of the same Schedule 2 employer.

If a worker signs the Schedule 2 election form, the Schedule 2 employer determines whether a legal action will be commenced.

If an action is brought and the employer receives an amount of money greater than the cost of pursuing the action and the amount of the benefits paid to the worker, the employer pays this surplus amount to the worker. Any future benefits are reduced by this amount. The Schedule 2 employer must give written notice to the WSIB where a surplus has been paid to a worker.

A worker who elects to commence an action instead of claiming benefits, may still be entitled to receive benefits in the future if the action

- proceeds to judgment, or
- is settled with the prior approval of the WSIB.

The worker must apply in writing to the WSIB for approval with the consent of the Schedule 2 employer. If the worker is entitled to benefits, the WSIB deducts the amount of the judgment or the settlement from the amount owing.

Certificate of Costs

A Certificate of Costs is a summary of the total benefits paid in a claim, and is provided by claims adjudication, at the request of Legal Services. Schedule 2 employers should make requests for certificates in writing to Legal Services.

Withdrawal of election

If the worker signs an election form and receives benefits from the WSIB, there is no statutory right to withdraw the claim and proceed with a right of action. The WSIB exercises

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its discretion to permit the withdrawal of an election. Requests to withdraw election should be made in writing to Legal Services.

Motor vehicle accidents

If a worker of a Schedule 1 or Schedule 2 employer signs an election form to receive benefits as a result of a motor vehicle accident that occurred after October 31, 1996, the WSIB and the Schedule 2 employer have no right to bring an action on behalf of the worker.

If a worker proceeds with an action, the worker may be required to provide an assignment of benefits from the WSIB to their automobile insurer (see 18-01-06, Redirected Benefit Payments). Requests for these assignments are made in writing to Legal Services.

Federal government employees

If a federal government employee has a right of action, Human Resources and Social Development Canada (HRSDC) will forward the election form to the worker for completion and approve the completed election form before forwarding them to the claim. The rights of the worker and the employer regarding legal actions are governed by the *Government Employees Compensation Act*.

Appeal

The WSIAT does not have jurisdiction to hear an appeal of any final decision made regarding rights of action in sections 26 to 30. Any appeal is made by application for judicial review to the Divisional Court.

Application date

This policy applies to all decisions made on or after January 1, 2002, for all accidents.

Document history

This document replaces 15-01-05 dated February 20, 2006

This document was previously published as:

15-01-05 dated October 12, 2004

11-01-15 dated March 1, 2002.

References**Legislative authority**

Workplace Safety and Insurance Act, 1997, as amended
Sections 26, 27, 28, 29, 30, 31, 123(2)

Workers' Compensation Act, R.S.O. 1990, as amended

Sections 10(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (17), (19), 14, 16, 17

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