

CHAPTER 16

THIRD PARTY/OUT-OF-PROVINCE CLAIMS

#110.00 INTRODUCTION

A worker who suffers injury or disease as a result of employment may be entitled to compensation from sources other than the Workers' Compensation Board. The *Act* makes special provision in section 10 for injuries or diseases which occur in circumstances entitling the worker to pursue an action for damages against a third party.

Injuries occurring outside the province are not generally compensable. Where they are compensable, the *Act* makes special provision for cases where the worker is also entitled to claim compensation in the place of injury.

#111.00 THIRD PARTY CLAIMS

#111.10 Injury Caused by Worker or Employer

Section 10(1) of the *Act* provides that "The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, the employer's servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part."

This provision prohibits a law suit by an injured worker or a dependant of an injured worker against the employer of the worker or against any employer within the scope of Part 1 of the *Act*, or against any worker in respect of any personal injury, disablement, or death arising out of and in the course of the employment. The worker or dependant has no choice but to claim compensation. In situations where the third party on a claim is reported to be a worker, it must also be established that the activities of this "worker" were arising out of and in the course of his or her employment.

#111.11 *Employer or Worker Partly at Fault*

If, in any action brought by a worker or dependant of a worker or by the Board, it is found that the injury, disablement, or death, as the case may be, was due partly to a breach of duty of care of one or more employers or workers under the *Act*, no damages, contributions, or indemnity are recoverable for the portion of the loss or damage caused by the negligence of such employer or worker; but the portion of the loss or damage caused by that negligence shall be determined although the employer or worker is not a party to the action. (1)

#111.20 **Injury Not Caused by Worker or Employer**

Section 10(2) provides that “Where the cause of the injury, disablement or death of a worker is such that an action lies against some person, other than an employer or worker within the scope of this Part, the worker or dependant may claim compensation or may bring an action. If the worker or dependant elects to claim compensation, he or she must do so within 3 months of the occurrence of the injury or any longer period that the board allows.”

Section 86 of the *Motor Vehicle Act* gives a right of action to a person injured in a motor vehicle accident against the owner of the vehicle in question where it was being driven by a member of the owner’s family living under the same roof or any other person driving with the owner’s consent. Even though an action against the driver is barred under section 10(1), the action against the owner may still lie, with the result that the claimant must make an election under section 10(2). This could occur, for example, where the owner takes her or his vehicle to a garage for repair and the accident occurs while it is being test driven by a mechanic.

In determining whether there must be an election under section 10(2), consideration is given to whether there is a right of action against the manufacturer, designer, etc. of a product which caused the injury. The action against such a person will be barred under section 10(1) if she or he is an employer covered by the *Act*, but not if she or he is located outside the province.

#111.21 *Competence to Make Election*

Where the Board is satisfied that due to a physical or mental disability a worker is unable to exercise the right of election, and undue hardship will result, it may pay compensation until the worker is able to make an election. If the worker then elects not to claim compensation, no further compensation may be paid, but the compensation so paid is a first charge against any sum recovered. (2)

An application filed by a parent, guardian, or the official guardian for compensation for the infant child of a deceased worker is a valid election on behalf of that child. (3)

A worker under the age of 19 years can make a valid election. (4)

#111.22 *Form of Election*

Any signed notification from a worker or dependant outlining her or his decision is a valid election. A Form 6 Application for Compensation (5) could constitute an election. However, to ensure that the worker is fully aware of the implications of making the election, the Board also forwards an explanatory brochure entitled "Legal Actions and the Right to Choose". Enclosed with the brochure is the Board's Form 25W79, "Appendix "A" – Personal injury claims election – Non-motor vehicle accident", or a Form 25W78, "Appendix "B" – Personal injury claims election – Motor vehicle accident".

#111.23 *Election Not to Claim Compensation*

If an injured worker decides to proceed with a law suit, no action is taken on the claim by the Board. The worker simply retains a lawyer to prosecute the case.

If, after trial, or after settlement out of court with the written approval of the Board, less is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under the *Act*, the worker or dependant is entitled to compensation to the extent of the amount of the difference. (6) Therefore, if a worker fails in the law suit or is only partially successful, the worker is able to claim the difference from the Board and thereby end up with at least as much as he or she would have received if compensation had been claimed from the Board initially. A question arises as to the meaning of the word "difference". For the purpose of section 10(5), it will be the actual amount of the judgment or settlement in the claimant's action with no deduction being made for the costs of obtaining the judgment.

The submission of an application to the Board must have been made within the time limits laid down for applications for compensation in order that a subsequent request for the difference can be considered. (7)

#111.24 Election to Claim Compensation

If an injured worker or dependant elects to claim compensation from the Board rather than take their own action, the claim is processed in the usual way and they receive the usual compensation benefits from the Board. They cannot revoke the election after any payment has been made, except by immediate repayment of all monies paid out under the claim.

Section 10(6) provides in part that "If the worker or dependant applies to the board claiming compensation under this Part, neither the making of the application nor the payment of compensation under it restricts or impairs any right of action against the party liable, but as to every such claim the board is subrogated to the rights of the worker or dependant and may maintain an action in the name of the worker or dependant or in the name of the board; . . ."

A person cannot therefore claim both compensation benefits and pursue a court action. If the person claims compensation, the Board is subrogated to the action. If the person chooses to sue, no compensation benefits are received. There is no right to receive compensation on a temporary basis while pursuing a court action on the understanding that the benefits will be repaid following that action. If, pursuant to policy item #111.21, a claimant receives compensation prior to making an election, the compensation is terminated immediately that an election is made not to claim compensation.

Pre-conditions also exist in the case of an emergency service worker's ability to receive compensation. No compensation is payable to the Emergency Services Worker or legal representative or dependant, as the case may be, unless he or she:

- (a) assigns and subrogates or assign and subrogate to the Workers' Compensation Board his or her rights against any person against whom any action may lie with respect to the said accident; and
- (b) releases or release Canada and B.C. and all its or their officers, servants, agents and employees of Her Majesty's Armed Forces from any and all liability arising out of or connected with the said accident.

#111.25 Pursuing of Subrogated Actions by the Board

Where the Board is subrogated to an action following a claimant's election to claim compensation, it has exclusive jurisdiction to determine whether it shall maintain or compromise the right of action, and the decision of the Board is final and conclusive. (8) The Legal Services Division of the Board determines whether there is a cause of action against a third party, and whether it is one that is worth pursuing.

Where the Legal Services Division decides to pursue the claim, conduct of the action is carried within the Legal Services Division, except where an outside counsel is more practicable. Where an outside counsel is retained, the Legal Services Division will carry out the selection and provide written instruction.

The Legal Services Division will not select a lawyer proposed by the claimant. It will be made clear in the written instructions that the outside counsel is acting on behalf of the Board, and that the full recovery is to be paid to the Board, subject to recognition of the lawyer's lien for fees and disbursements. The Board will account to the claimant for any excess.

If the Legal Services Division concludes that there is no claim worth pursuing, but the claimant or the claimant's lawyer disagrees, the claimant may be permitted to select a lawyer to conduct an action and the lawyer will be advised:

- (a) that the action is one the Legal Services Division does not consider worth pursuing;
- (b) that if the lawyer is of a different opinion, he or she may be authorized to pursue an action on behalf of the Board and the claimant on the terms that if there is a successful recovery, the full recovery is to be paid to the Board, subject to recognition of a lien for fees and disbursements; Further, that if the action is not successful, the Board will not be responsible for fees and disbursements;
- (c) of the amount of the Board's claim or, if that is not possible, of an indication that the amount of the Board's claim remains to be determined.

This procedure will not be followed where it is felt that the risk of liability for costs clearly exceeds any likelihood of recovery.

Where action is taken by the Board, a claim is advanced which includes not only the disbursements paid out on the claim by the Board, but all items or damages which the claimant could have recovered if action had been taken on his or her own. It is expressly provided in section 10(10) that "In an action brought under this section, an award for damages is to include

- (a) health care provided under this Part; and
- (b) wages and salary paid by an employer during the period of disability for which regard has been had by the board, or would have been had if the worker had elected to claim compensation, in fixing the amount of a periodical payment of compensation."

The mere fact that in a court action the Board has claimed damages for a particular item does not mean that that item has been accepted as part of the claimant's compensation claim.

Costs may, notwithstanding that a salaried employee of the Board acts as its solicitor or counsel, be awarded to and collected by the Board in any action taken by the Board. (9)

Section 10(6) provides in part that ". . . if more is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under this Part, the amount of the excess, less costs and administration charges, must be paid to the worker or dependant." Thus, if the action is successful, the Board's disbursements, i.e. the amounts it has paid for wage-loss compensation and health care benefits together with administration costs, are deducted from the amount recovered and the excess is then paid to the claimant or dependant. If the action is not successful, all costs are paid by the Board.

When the excess has been paid to the claimant, and the claim is reopened at a future date, the excess paid will be taken into consideration before any further payment of compensation is made on the claim.

There are particular rules applicable when an action that is pursued arises out of an accident suffered by an Emergency Services Worker. The Provincial Emergency Program agreement states, "Where compensation or health care (hereinafter "compensation") is paid or provided and the Workers' Compensation Board has, pursuant to subrogation from the person claiming compensation as an Emergency Services Worker or from his legal representative or his dependents, (sic) as the case may be, to whom compensation is paid, recovered an amount from any person with respect to the said accident, the Workers' Compensation Board shall reimburse Canada and B.C. in an amount that bears the same relation to the amount so recovered, less reasonable costs and reasonable administration expenses, as the amount paid by Canada and B.C. bears to the amount of the compensation determined."

#111.26 *Failure to Recover Damages*

Where the Board is unsuccessful either in total or in part in recovering damages from a third party and the third party has an entitlement to benefits from the Board, the recovery will be made from such benefits. If there is no existing entitlement to benefits, a record of the indebtedness will be made by the Board and should any future entitlement to benefits accrue, a recovery will be made from that entitlement. As a general guideline, this recovery will follow the limits set out in the *Court Order Enforcement Act*. Such limitations would not apply in the case of a permanent disability award where the indebtedness may be recovered from the permanent disability award capital reserve.

#111.30 **Meaning of "Worker" and "Employer" under Section 10**

In the provisions discussed in policy items #111.10 to #111.24, "worker" and "employer" have the meaning given to them in Chapter 2.

For the purpose of section 10, "worker" includes an employer entitled to personal optional protection. (10) However, this does not affect status as an employer under this section in regard to other workers.

The meanings of "employer", "worker", and "employment" for the purpose of section 10 in claims concerning commercial fishers are discussed in section 14 of the *Fishing Industry Regulations*.

EFFECTIVE DATE: March 18, 2003 (as to the deletion of reference to the *Workers' Compensation Reporter Decision No. 223*)

APPLICATION: Not applicable.

#111.50 **Federal Government Employees**

The provisions discussed in policy items #111.00 – #111.30 above have no application to employees entitled under the *Government Employees Compensation Act*.

Rules similar to those set out in policy items #111.00 – #111.30 are set out in section 9 of that *Act*. In general, the claimant is precluded from suing the government in respect of an employment accident, but must claim compensation. Where the circumstances of the accident give rise to a right of action against someone other than the government, the claimant must elect either to sue that other person or claim compensation. If the claimant does the latter, the government is subrogated to the right of action. These subrogated actions are administered by the Federal Government directly. The Board is not concerned in them.

#112.00 INJURIES OCCURRING OUTSIDE THE PROVINCE

Section 5(1) provides in part that compensation is payable where “. . . personal injury or death arising out of and in the course of the employment is caused to a worker . . .” It places no limitation on the place of injury. On the face of it, it might be held to apply to all employment injuries, whether they occur inside or outside the province. The Board has, however, concluded that the section could not be intended to have such a broad effect. The Act only applies to injuries occurring outside the province where its provisions expressly provide for this, or do so by necessary implication. There are two main situations that have to be considered which are discussed in policy items #112.10 and #112.20.

The payment of health care benefits for costs incurred outside the province is discussed in policy item #73.50.

#112.10 Claimant is Working Elsewhere than in the Province

Section 8(1) provides that “Where the injury of a worker occurs while the worker is working elsewhere than in the Province which would entitle the worker or the worker's dependants to compensation under this Part if it occurred in the Province, the board must pay compensation under this Part if

- (a) a place of business of the employer is situated in the Province;
- (b) the residence and usual place of employment of the worker are in the Province;
- (c) the employment is such that the worker is required to work both in and out of the Province; and
- (d) the employment of the worker out of the Province has immediately followed the worker's employment by the same employer within the Province and has lasted less than 6 months,

but not otherwise.”

Section 8 does not apply to commercial fishers.

#112.11 *Meaning of Working in Section 8*

Section 8(1) only applies “Where the injury of a worker occurs while the worker is working elsewhere than in the Province . . .”

In a Board decision, a claimant who lived in the province of Alberta was employed by an employer located in the province. Each day, he travelled into the province to come to work on a bus provided by his employer. He was injured in an accident in which this bus was involved while still on the Alberta side of the border. It was decided that he was at the time of his injury working in the province rather than the province of Alberta with the result that section 8 had no application.

The Board has on prior occasions, when discussing the meaning of the phrase “arising out of and in the course of the employment” in section 5(1), pointed out that compensation coverage was not limited to “work” in the sense of productive activities. The *Act* covers a much broader range of productive and non-productive activities which comprises the “employment”. (11) This distinction between “employment” and “work” activities is also material when interpreting section 8(1). The place where a person performs the productive, as opposed to the non-productive, activities of the person’s employment is generally the best indicator of where the person works. If someone were to ask the claimant in the example above where he worked, he would no doubt have stated that he worked at the person’s employer’s plant in British Columbia, because that is where his main job function was carried out. The answer would be no different just because part of his journey to work took place in Alberta or, in another case, because the claimant was required to perform some incidental job function outside the province. Under this interpretation, the concern is not with the particular activity being carried on at the moment of injury, but the place where the claimant performs the major job functions with which that activity is associated.

In other cases, the interpretation of section 8(1) adopted above may raise difficult questions as to whether a claimant’s main job function at the time in question is in the province or elsewhere. There will be less obvious cases where the claimant is performing significant amounts of productive work activity both inside and outside the province. Since section 8(1) clearly contemplates that there will be periods of work outside the province where the claimant does have to meet the criteria it lays down, it will be necessary to draw a line in these cases between productive activities which are merely incidental to “working” in this province and productive activities which are sufficient to constitute “working elsewhere”.

In making this judgment, regard will primarily have to be taken of the length of time for which the productive activity is performed outside the province. If the period of absence is less than one day, it will probably, in most cases, be safe to say that the activity is simply incidental to the work performed in the province. On the other hand, where the length of time is greater than a week, it would probably have to be concluded that the claimant was “working elsewhere than in the Province”. Periods of between a day and a week would probably have to be dealt with on the individual merits, having regard, in particular, to the nature and circumstances of the claimant’s employment.

Another factor that must be considered is the degree of regularity with which a claimant does productive work outside the province. The more regularly this is done, the shorter is the period of productive work outside the province which would be sufficient for the claimant to be considered as “working elsewhere”. For example, even though the period out of the province is less than a day, the claimant might be held to be working outside the province if this was done routinely.

#112.12 Residence and Usual Place of Employment

Section 8 of the *Act* was intended to provide a convenient and efficient form of coverage for industries which, although normally based in this province, may occasionally require assignment of workers to locations outside the province. Taken as a whole, the section contemplates the coverage of workers who live in British Columbia, who spend the greater part of their time performing a particular kind of work in British Columbia, but who are assigned for limited periods of time by the same employer and for the same work to other jurisdictions. It was not intended to cover situations where, although there is a place of business of the employer in the province, virtually all of that company’s work takes place outside of the province and is performed, for the most part, by employees who neither live nor work in British Columbia.

While it is impossible to lay down specific rules and guidelines for the words “residence and usual place of employment”, they must be defined in relation to the broader view of the section as outlined above.

For British Columbia to qualify as the residence and usual place of employment of a worker under section 8, the evidence must reveal more than short-term transient accommodation and must show that the work performed in British Columbia is more consistent and long-term than that performed in the other jurisdiction(s) in question.

In a Board decision, the claimant's employer had its head office and base of operations in this province. The claimant underwent a two-week training period at the head office, but all his work was outside of the province. The claimant lived primarily in Ontario and had rented no accommodation in this province during his two-week stay. He did, however, have a bank account here. He was injured in Washington State. His claim was denied because his "residence" and "usual place of employment" were not in British Columbia.

#112.13 *Employment of the Worker out of the Province has Immediately Followed Employment by the same Employer within the Province and has Lasted less than Six Months*

Upon first reading, section 8(1)(d) appears to require that the injury must occur in the jurisdiction to which the worker has gone directly from British Columbia. However, it does no more than recognize that there exists two classes of employment, those "in-province" and those "out-of-province". It requires that employment out-of-province must last less than six months and must immediately follow employment by the same employer within the province; but it makes no reference to where, outside the province, the employment may take the worker.

As long as the other criteria of the section are met, no objection to a claim should be taken on the basis that a worker went from British Columbia to another jurisdiction and then on to a second or third jurisdiction before the injury occurred. As long as the injury was within the six months and employment was with the same employer, the provisions of the subsection are met.

The word "immediately" would, by normal reference to dictionary definitions, refer to considerations of time. However, because of the nature of the entire section, it is possible to view the term in relation to employment as well. For example, a worker may be employed by a particular employer in British Columbia, leave and go to work for another employer for a short period of time, and then return to the original employer but hiring on in another jurisdiction. In that case, the worker will not have been employed by the same employer within the province immediately prior to going to the other jurisdiction and would be barred from a claim for compensation by the subsection. On the other hand, if the worker were to work for an employer within the province and, due to the absence of any further employment prospects, be laid off and then hire on again within the province with the same employer and be assigned immediately to work in another jurisdiction, it could reasonably be concluded that by having worked for the same employer and no one else, and by having been hired in British Columbia, albeit to work only in another jurisdiction, the requirements of the subsection had been met.

#112.20 Claimant is Working in the Province

The decision discussed in policy item #112.11 provides an example of when a claimant might be working in the province but yet injured outside the province while in the course of his employment. Though the provisions of section 8(1) were not applicable to that claim, it was decided that the claim could be accepted under section 5(1).

Where there is an out-of-province injury, the first question that must be asked is where, at the time in question, the claimant was performing his main job functions. The concern will not be with the particular activity being engaged in at the moment of the injury. If the claimant's main job at the time is being performed outside of the province, the claim must satisfy the requirements of section 8(1), including the requirement that he be a resident of the province. If those functions are being performed in the province, he only has to meet the requirements of section 5(1) and section 8(1) has no application. Since the main job function of the claimant in this decision was in the province at the time of his injury and his injury did arise out of and in the course of his employment, his claim was an acceptable one even though he did not reside in the province.

#112.30 Workers Also Entitled to Compensation in Place of Injury

Section 9(1) provides in part that "Where by the law of the country or place in which the injury or occupational disease occurs the worker or the worker's dependants are entitled to compensation in respect of it, they must elect whether they will claim compensation under the law of that country or place or under this Part, and to give notice of the election. If the election is not made and notice given, it must be presumed that they have elected not to claim compensation under this Part; . . ."

The right of election is subject to the terms of any interjurisdictional agreement. (12)

Notice of the election must be given to the Board within three months after the occurrence of the injury or disablement from occupational disease, or, if it results in death, within three months after the death, or within any longer period that either before or after the expiration of the three months the Board allows. (13)

In addition to the election form noted above, a Form 6 Application for Compensation is also required. A claim for compensation, made to the Workers' Compensation Board of the place where the injury or exposure to the causes of an occupational disease occurs, constitutes an election to claim under the law of that place.

#112.31 Occupational Disease

It may happen that the occupational disease suffered by a worker is due to exposure in the course of employment both inside and outside the province. If the exposure within the province is not significant, the Board will not accept responsibility for the claim, subject to the terms of any interjurisdictional agreement. If the exposure within the province is significant, the Board will accept responsibility of the whole of the worker's problem. There will, in general, be no apportionment of liability. The worker may, however, be required to elect to claim in this province under section 9(1). Where the Board is accepting full responsibility for the condition, the worker cannot claim in both this province and another province or territory.

An exception exists for hearing-loss claims. As discussed in policy item #31.20, liability will be apportioned where more than 5% but under 90% of the claimant's exposure was outside the province.

#112.40 Federal Government Employees

Federal Government employees must claim compensation in the province where they are usually employed regardless of the place of injury. (14)

NOTES

- (1) S.10(7)
- (2) S.10(3)
- (3) S.10(4)
- (4) S.12; policy item #49.00
- (5) policy item #93.20
- (6) S.10(5)
- (7) policy item #93.20
- (8) S.10(6)
- (9) S.10(11)
- (10) S.10(9); S.3(3)
- (11) See policy item #14.00
- (12) See policy item #113.30
- (13) S.9(2)
- (14) policy item #24.00