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Update 2004 - 3

**TO: HOLDERS OF THE *REHABILITATION SERVICES & CLAIMS MANUAL* –
VOLUME I**

This update of the *Rehabilitation Services & Claims Manual* contains amendments to the *Manual* implemented since update 2004 - 2.

This amendment includes:

- Effective date statements to refer users of the *Manual* to Volume II for certain policies related to treatment injuries.

A summary of the amendment is attached and the amended pages are included as part of the package.

If you have any questions regarding subscription information for updates to the *Rehabilitation Services & Claims Manual*, please call WCB Customer Service provided by Benwell Atkins/Moore at 1-866-271-4879.

Margaret Eckenfelder
Vice-President
Policy and Research Division

Attachments

Rehabilitation Services & Claims Manual, Volume I

SUMMARY OF AMENDMENTS – Update 2004 – 3

Table of Contents	Pages i to iv	Updated.
Chapter 1 Addendum	Pages 9 to 14	Updated.
Chapter 3	Pages 51 to 58	#22.00, #22.10, #22.11, #22.15 & #22.21 Effective date statements added to refer users of the <i>Manual</i> to Volume II effective February 1, 2004.
Chapter 16	Pages 1 to 2	#111.10 Effective date statement added to refer users of <i>Manual</i> to Volume II effective February 1, 2004.

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ADDENDUM

AMENDMENTS TO VOLUME I ON OR AFTER JUNE 30, 2002

This Addendum lists the major amendments to the policies in Volume I of the *Rehabilitation Services & Claims Manual* on or after June 30, 2002. It has been inserted for convenience only and will be updated by the Vice-President of the Policy and Research Division as necessary. In some cases, the reader may be referred to the appropriate passages in Volume II.

The “resolutions” referenced in this Addendum are the “resolutions” of the former Panel of Administrators or Board of Directors, as the case may be.

Subject	Policy or Item #	Comments
CPI Adjustments	Various	Except for policy item #56.50, the dollar amounts in Volume I are not updated to reflect CPI adjustments. Readers should consult the corresponding policy item in Volume II for the current amount. (Policy item #56.50 does not appear in Volume II and is therefore updated in Volume I.)
Criteria for Commutations	#45.00 - #45.60	Policies amended effective October 1, 2002. Amendments apply to new claims received, all active claims awaiting an initial permanent disability award adjudication, and all active claims awaiting initial adjudication of periodic payments of compensation to a dependant of a deceased worker, on or after the effective date. See <u>resolution 2002/08/27-04</u> if more information is required.
Chronic Pain (or Subjective Complaints)	#22.33, #22.35, #39.01, #97.40	Policies amended effective January 1, 2003. Amendments apply to all new claims received and all active claims awaiting an initial adjudication on or after the effective date. See <u>resolution 2002/11/19-04</u> if more information is required.

Subject	Policy or Item #	Comments
Governance	Various consequential changes	<p>Policies amended effective February 11, 2003 to reflect January 2, 2003 changes to the WCB's governing structure. (None of the amendments affect worker benefits.)</p> <p>See <u>resolution 2003/02/11-05</u> if more information is required. These amendments resulted from the <i>Amendment Act, 2002</i> (Bill 49).</p>
New Review/ Appeal Structure	New Chapter 13 Various consequential changes	<p>Chapter 13 (Appeals) deleted and new Chapter 13 (Reviews and Appeals) adopted effective March 3, 2003. Certain policies continued for transitional purposes. Various consequential changes made throughout Volume I, as identified by March 3, 2003 effective date and the matters to which the effective date applies.</p> <p>See <u>resolution 2003/01/21-01</u> if more information is required. These amendments resulted from the <i>Amendment Act (No. 2), 2002</i> (Bill 63).</p>
Policy on Changing WCB Decisions	New Chapter 14 Various consequential changes	<p>Chapter 14 (Reopenings and Reconsiderations) deleted and new Chapter 13 (Changing Previous Decisions) adopted effective March 3, 2003. Chapter applies to all decisions on and after the effective date.</p> <p>Various consequential changes also made throughout Volume I, as identified by a March 3, 2003 effective date and the matters with respect to which the effective date applies.</p> <p>See <u>resolution 2002/12/17-02</u> if more information is required. These amendments resulted from the <i>Amendment Act (No. 2), 2002</i> (Bill 63).</p>

Subject	Policy or Item #	Comments
Binding Nature of Policy	#2.20, #96.10	<p>New policy item #2.20 adopted effective March 3, 2003. Amendments apply to all adjudication decisions made on or after the effective date.</p> <p>Material also deleted from policy item #96.10 to reflect the amendments.</p> <p>See <u>resolutions 2002/12/17-02</u> and <u>2003/01/21-01</u> if more information is required. These amendments resulted from the <i>Amendment Act (No. 2), 2002</i> (Bill 63).</p>
<p>Other Amendments Resulting from the <i>Amendment Act (No.2), 2002</i> (Bill 63)</p> <p>Pension Reviews</p> <p>Provisional Rates</p> <p>Penalties for Failure to Report</p> <p>Preliminary Determination (Formerly Interim Adjudication)</p>	<p>#40.30</p> <p>#66.12</p> <p>#94.15</p> <p>#96.21</p>	<p>Policies deleted effective March 3, 2003.</p> <p>Policies amended effective March 3, 2003. Policy applies to provisional rates set on or after the effective date.</p> <p>Policies amended effective March 3, 2003.</p> <p>Policies amended effective March 3, 2003. Amendments apply to all preliminary determinations made under the policy on or after the effective date.</p>

Subject	Policy or Item #	Comments
Miscellaneous	Various	<p>Other amendments, effective March 3, 2003, include:</p> <ul style="list-style-type: none"> • removal of references to former Part 3 administrative penalty process; • amendments to reflect new wording of section 99; • changes to disclosure provisions; • acknowledgement of WCAT authority to order the Board to pay expenses; • acknowledgement of WCAT authority to award costs; and • changes to reflect the payment of interest provisions under section 258. <p>See <u>resolutions 2002/12/17-02</u> and <u>2003/01/21-01</u> if more information is required. These amendments resulted from the <i>Amendment Act (No. 2), 2002</i> (Bill 63).</p>
Calculation of Lump-sum Payment or Commutation	#45.61	<p>Direction in policy on calculation of lump-sum payments or commutations after a review or appeal reinserted effective April 8, 2003, with appropriate changes to reflect new review/appeal structure.</p> <p>See <u>resolution 2003/04/08-01</u> if more information is required.</p>
Compensable Consequences of Work Injuries	#22.00	<p>For all decisions, including appellate decisions, on or after February 1, 2004 refer to policy item #22.00 of Volume II of this <i>Manual</i> regardless of the date of the original work injury or the further injury.</p>
Further Injury or Increased Disablement Resulting from Treatment	#22.10	<p>For all decisions, including appellate decisions, on or after February 1, 2004 refer to policy item #22.10 of Volume II of this <i>Manual</i> regardless of the date of the original work injury or the further injury.</p>

Disablement Caused by Surgery	#22.11	For all decisions, including appellate decisions, on or after February 1, 2004 refer to policy item #22.11 of Volume II of this <i>Manual</i> regardless of the date of the original work injury or the further injury.
Travelling To and From Treatment	#22.15	For all decisions, including appellate decisions, on or after February 1, 2004 refer to policy item #22.15 of Volume II of this <i>Manual</i> regardless of the date of the original work injury or the further injury.
Activities on Board Premises or at Other Premises under Board Sponsorship	#22.21	For all decisions, including appellate decisions, on or after February 1, 2004 refer to policy item #22.21 of Volume II of this <i>Manual</i> regardless of the date of the original work injury or the further injury.
Injury Caused by Worker or Employer	#111.10	For all decisions, including appellate decisions, on or after February 1, 2004 refer to policy item #111.10 of Volume II of this <i>Manual</i> regardless of the date of the original work injury or the further injury.

NOTES

- (1) Chapter 2
- (2) Chapter 8
- (3) Chapter 3
- (4) Chapter 4
- (5) Chapters 3 and 4
- (6) Chapter 3
- (7) Chapter 5
- (8) Chapter 6
- (9) Chapter 8
- (10) Chapter 10
- (11) Chapter 11
- (12) Chapter 17
- (13) S.1 S.80
- (14) S.1
- ~~(15)~~ ~~S.81~~ **Deleted**
- ~~(16)~~ ~~S.82~~ **Deleted**
- (17) S.96(1)
- ~~(18)~~ ~~Chapter 12~~ **Deleted**
- ~~(19)~~ ~~Chapter 13~~ **Deleted**

account. If the cashing or depositing of the cheque occurs in circumstances which, in some other respect, have a significant employment connection, compensation will normally be paid.

In a Board decision, a truck driver was driving his employer's truck back to the yard at the end of his shift when he decided to call in at the bank on his way and cash his pay cheque. While crossing the road to return to his truck after cashing the cheque the claimant was hit by a passing vehicle. It was decided that in so far as the claimant may have undertaken a diversion to attend to a matter of personal concern, this was so trivial compared with the continuing employment features of the situation that it would be wrong to treat the personal aspect as controlling.

#21.40 Acts for Personal Benefit of Principals of Business

In the case of independent operators with personal optional protection and active principals of small companies, it is necessary to distinguish between the activities of the claimant carried on in furtherance of the business for which he or she or the company is covered by the Act and independent, personal or business activities which are not so covered. Only injuries occurring while pursuing the former type of activity are covered by the Act. For example, in one claim, the principal of a small plumbing and heating company was injured while fogging mosquitoes on property belonging to himself and to other members of a property owners association. Although the claimant's company supplied the materials used, there was no evidence that the fogging was done as part of the business of that company. Rather, the evidence indicated that it was an independent personal enterprise carried on by the claimant on behalf of himself and the association. The facts of the case set out in #21.20 also illustrate the same principle.

On the other hand, in another Board decision, the claimant was employed by an auto body shop, a limited company of which Mr. "X" was President and part owner. After making a delivery to a customer with Mr. "X", the claimant was requested to assist Mr. "X" to pick up a bed and deliver it to his mother. The claimant injured his back while moving the bed. This took place within normal working hours. The claim was disallowed by the Adjudicator because moving the bed was not related to the employer's business as a body shop owner. This argument had merit vis-a-vis the fact that the claimant's legal employer was a limited company. However, the board of review felt that for practical purposes Mr. "X" was the employer. Moving the bed was for the benefit of Mr. "X", and at the same time Mr. "X" asked the claimant to assist him in moving the bed, he was being paid by him and was acting under his directions.

#22.00 COMPENSABLE CONSEQUENCES OF WORK INJURIES

Once it is established that an injury arose out of and in the course of employment, the question arises as to what consequences of that injury are compensable. The minimum requirement before one event can be considered as the consequence of another is that it would not have happened but for the other.

Not all consequences of work injuries are compensable. A claim will not be reopened merely because a later injury would not have occurred but for the original injury. Looking at the matter broadly and from a “common sense” point of view, it should be considered whether the previous injury was a significant cause of the later injury.

EFFECTIVE DATE: For all decisions, including appellate decisions, on or after February 1, 2004 refer to policy item #22.00 of Volume II of this *Manual* regardless of the date of the original work injury or the further injury.

#22.10 Further Injury or Increased Disablement Resulting from Treatment

Where a further injury arises as a direct consequence of treatment for a compensable injury, the further injury is also compensable.

Where a worker is undergoing treatment for a compensable injury, the place of treatment is analogous to a place of employment, and a further injury arising out of the place of treatment would also be compensable. For example, if a worker is undergoing treatment at a hospital for a compensable injury and sustains a further injury by stumbling down the stairs in the hospital, that is also compensable.

EFFECTIVE DATE: For all decisions, including appellate decisions, on or after February 1, 2004 refer to policy item #22.10 of Volume II of this *Manual* regardless of the date of the original work injury or the further injury.

#22.11 *Disablement Caused by Surgery*

Compensation is not limited to the direct consequences of work accidents. Ordinarily, when a claimant undertakes surgery for the injuries sustained, the consequences of the surgery are accepted as consequences of the accident, and any disablement resulting from the surgery is treated as compensable. No doubt an exception could be made if a claimant recklessly undertook surgery, knowing that it was likely to do more harm than good. In that case, a claimant might be viewed as having introduced a new cause of disablement. There may be other grounds for making an exception, but there is no rational ground on which an

exception can be made simply because the surgery was not authorized by the Board.

In a Board decision, the claimant had suffered a compensable injury at work, but had then become disabled following surgery carried out without the Board's authorization. The question was whether the disablement should be compensated as resulting from the injury or disallowed because it resulted from unauthorized surgery. Once it was determined that the claimant's conduct in undertaking the unauthorized surgery was not unreasonable, the surgery was treated as having resulted from the work injury, and pursuant to the general rule, the consequences of the surgery were accepted as the consequences of the work accident.

Virtually all patients place complete faith in their physicians and, if a physician merely suggests the remote possibility of improvement in a patient's condition through surgery, it cannot be said to be "clearly unreasonable" for the patient to go along with that suggestion. It is irrelevant whether unauthorized surgery was successful or unsuccessful, whether or not the claimant and/or the physician knew the Board was not prepared to authorize the surgery, nor that the surgery was purely exploratory in nature. The only situation where it is foreseeable that the Board could reasonably refuse payment of benefits for unauthorized surgery is where a claimant, in desperation and against the advise of every other physician consulted, deliberately seeks out surgery. Unless the claimant can be shown to have acted foolishly, the claimant should not be deprived of compensation because there happens to be a persuasive surgeon involved who has convinced the claimant that, on balance, surgery is the best course of action. (9)

The above rules only apply where the surgery resulted from the injury. The Board accepts no responsibility for the cost of surgery or any resulting disability where the surgery was not a consequence of the injury.

EFFECTIVE DATE: For all decisions, including appellate decisions, on or after February 1, 2004 refer to policy item #22.11 of Volume II of this *Manual* regardless of the date of the original work injury or the further injury.

#22.12 Acceleration of Treatment

The Board accepts responsibility for all the consequences of treatment where the need for it was accelerated by the injury, even where it would likely have been required at some point in the future in any event. The only exception is where the injury is superimposed on an already existing disability so that Proportionate Entitlement applies. (10)

#22.13 Activities at Home

While the Board does pay compensation for injuries arising out of and in the course of medical treatment for a work injury, this does not extend to ordinary exercises performed at home long after the worker has recovered, or the condition has stabilized and the worker is in receipt of a permanent disability pension. Such exercises are usually for the purpose of preventing further problems rather than for treating an existing condition. Compensation is not payable in respect of preventive measures.

#22.14 Treatment Unrelated to Injury

Where a worker has to undergo surgery, tests, or other treatment for a non-compensable condition or a non-compensable injury occurs prior to the worker's complete recovery from a compensable injury, and there is for that reason, a delay in recovery or an aggravation of the condition, there are two possible methods for the Claims Adjudicator to deal with the situation. The Adjudicator may, on the one hand, continue to pay wage-loss benefits after the occurrence of the non-compensable injury or treatment for a period which the Adjudicator estimates the worker would have taken to fully recover from the compensable injury if the non-compensable injury or treatment had not occurred. Alternatively, the Adjudicator might immediately terminate benefits on the occurrence of the non-compensable injury or treatment and recommence them when the worker's recovery is at the same stage as it was immediately before its occurrence. Either of these methods may be an appropriate way of dealing with the circumstances of a particular claim. However, in no situation could there be justification for applying both methods to the same claim at the same time, since this would, in effect, result in a double payment to the worker.

The above rule applies though the treatment is carried out at the same time as the treatment for the compensable condition and might not have been carried out at the time if the claimant had not then sought treatment for the compensable condition.

If a compensable injury delays a worker's recovery from subsequent non-compensable surgery, wage-loss compensation may be paid for the period of the delay.

#22.15 Travelling To and From Treatment

Injuries arising in the course of normal travel for subsequential treatment are generally not compensable. For example, if a worker suffering from a compensable injury is subsequently injured in the course of travel in the following circumstances, it is not compensable:

- (a) attending the office of the attending physician for advice, examination or treatment;

- (b) attending for x-ray examinations or laboratory tests when associated with a visit to the office of the attending physician and not involving a special journey from home;
- (c) attending the office of a medical specialist in connection with a course of treatments by such a specialist;
- (d) attendances at the out-patient department of a hospital, the Board's Rehabilitation Centre or a private physiotherapist for a course of therapy treatments;
- (e) travel to a drugstore for the purchase of drugs or other medical supplies;
- (f) travel to an optician or optometrist, prosthetist, shoemaker or hearing aid dealer in connection with medical supplies or the fulfillment of prescriptions.

The heading also includes any other types of visits or attendances which are part of a routine (analogous to travelling to and from work) or which are analogous to personal shopping.

Apart from routine travel in connection with subsequential treatment, a worker may sometimes be injured in the course of a special and exceptional journey undertaken as a result of the compensable injury. The following headings illustrate the point.

1. Emergency Transportation

Where a compensable injury has just occurred and a worker is being transported to a hospital or other place of emergency treatment, and a further injury occurs in the course of such transportation, the further injury is also compensable. This is so whether the worker is travelling on foot, by ambulance, by automobile, by aircraft, or by any kind of vehicle; and it is so regardless of the ownership of the vehicle, and regardless of whether the worker is driving the vehicle or being carried as a passenger.

2. Treatment-Related Vehicles

If a worker is travelling to or from a place of treatment for a compensable injury and sustains a further injury while travelling in a vehicle that is provided for that purpose by an institution engaged in the provision of treatment, or in the provision of a vehicle for the conveyance of patients for treatment, the injury is compensable.

3. Exceptional Travel for Subsequent Treatment

This heading relates to situations where a worker is travelling by prearranged appointment to a place of exceptional medical treatment, or for an exceptional examination. In these cases, an injury arising out of travel to or from that place of treatment is compensable. The following situations illustrate this point.

- (a) Travelling to a hospital for admittance as an inpatient, or travelling home following discharge from hospital as an inpatient.
- (b) Travelling to Richmond from the Interior for a course of treatment at the Board's Rehabilitation Centre, with accommodation at the Board's Rehabilitation Residence.
- (c) Travelling to any other place of special treatment that involves living away from home for the duration of the treatment.
- (d) Travelling in relation to a referral by the attending physician to a specialist for a special examination or treatment.
- (e) Travelling for x-ray examination or laboratory tests where this involves a special journey separate from any attendance for routine treatment.
- (f) Travelling to a special place of paramedical attention, or a social or rehabilitation agency in connection with assistance in the diagnosis, handling, treatment or care of medical or rehabilitation problems related to the compensable injury on referral by the attending physician, or by the Board.
- (g) Travelling on referral by a physician or qualified practitioner to another physician or qualified practitioner for a second opinion.
- (h) Travelling for a medical examination at the Board by prearranged appointment with the Board, or for a medical examination elsewhere approved by the Board in connection with a compensable injury.

EFFECTIVE DATE: For all decisions, including appellate decisions, on or after February 1, 2004 refer to policy item #22.15 of Volume II of this *Manual* regardless of the date of the original work injury or the further injury.

#22.20 Subsequent Injuries Occurring Otherwise than in the Course of Treatment

Where a worker has a pre-existing non-compensable condition which is aggravated and rendered disabling by a work injury, the Board does not deny a claim for compensation just because the injury would have caused no significant problems if there had been no pre-existing condition. The Board accepts that it was the injury that rendered that condition disabling and pays compensation accordingly. The corollary of this is that, where a worker has a compensable condition which is rendered disabling by an aggravating incident occurring outside of work, the worker's claim for the compensable condition is not reopened just because the incident would not have been significant if that condition had not existed. The Board recognizes rather that it was the non-work incident that produced the disability for which compensation is claimed. The only exception to this is where the compensable condition actually causes the fall or other incident which brought about the aggravation.

Where the subsequent injury occurs at a time when the claimant is still recovering from a previous work injury, the principles set out in #22.14 apply.

#22.21 *Activities on Board Premises or at Other Premises under Board Sponsorship*

Where a worker is attending at the Board by prearranged appointment made with an officer of the Board for the purpose of an enquiry, interview or discussion in respect of a claim which has been accepted, or which is subsequently accepted, and where the worker suffers a further injury arising out of and in the course of travel to or from such an appointment, the further injury will be compensable.

The same rules apply where a worker is attending by prearranged appointment to meet with the Board's Review Division, the Workers' Compensation Appeal Tribunal or a Medical Review Panel.

Where an injured worker is reinjured while undergoing a course of rehabilitation training sponsored by the Board, the second injury may be regarded as a compensable consequence of the first injury. (11)

EFFECTIVE DATE: For all decisions, including appellate decisions, on or after February 1, 2004 refer to policy item #22.21 of Volume II of this *Manual* regardless of the date of the original work injury or the further injury.

#22.22 *Suicide*

In a case of suicide, death benefits are payable if it is established that the suicide resulted from a compensable injury.

In a Board decision, a claim was made by a widow that her husband had committed suicide because of a state of depression and despair resulting from a compensable injury occurring four years earlier. The claim was disallowed. It was possible that the accident might have had some significance. Any adverse work accident? On the facts, the suicide was something which might well have occurred in any event rather than something that would have been unlikely without the accident. Bearing in mind the deceased's history of mental disorder and the sparsity of other evidence of causal connections between the work injury and the suicide, it did not appear that the accident had a sufficient degree of causative significance to warrant the conclusion that the death resulted from the compensable injury.

#22.23 Criminal Proceedings

As an example, the claimant, a caretaker of an apartment building, became involved in a fight with a tenant and received injuries for which a compensation claim was accepted. The claimant suffered psychological problems as a result of criminal proceedings taken by the Crown for assault and his employer's suspension of him from his employment pending the outcome of the proceedings. If the charges had not been laid and the claimant had not been suspended, he would not have been disabled. While there was an undeniable link between the actions of the Crown and his employer with the compensable incident, it was too tenuous to make the disability which flows from these actions compensable. The reaction to the laying of charges did not arise out of and in the course of employment, but from the intervening decision of the Crown, a party extraneous to the employer/employee relationship, to proceed with criminal charges. The disability flowing from that decision was not compensable.

#22.30 Diseases or Other Conditions Resulting from Trauma

Compensation coverage extends not just to the immediate physical damage caused by the injury, but to any separate diseases or conditions which arise directly from it.

#22.31 Multiple Sclerosis

While the cause of multiple sclerosis is unknown, there has been much medical literature on factors which may precipitate the onset of the disease in an already predisposed person. One of these factors is a traumatic injury. There is a medical authority for the view that multiple sclerosis may be considered to have been precipitated by a traumatic injury if:

- (a) the symptoms and signs of the disease first appeared in the injured part of the body;

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.

Where an action is barred under Section 10(1) in respect of a work injury, the same applies to any subsequent injury occurring in the course of treatment or rehabilitation which is accepted as a compensable consequence of that injury.

EFFECTIVE DATE: For all decisions, including appellate decisions, on or after February 1, 2004 refer to policy item #111.10 of Volume II of this *Manual* regardless of the date of original work injury or the further injury.

#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 79(1) 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)