**Choosing if WSIB benefits are right for you**

When a third party caused your workplace incident[[1]](#footnote-2), you may have to decide whether to accept WSIB benefits or seek compensation through your own lawsuit. This document helps to explain this important decision that workers and survivors might have to make.

1. **What is a “third party”?**

A third party is generally a person or business that is not covered by the workers’ compensation system and who may be responsible for the incident.

Examples of third parties include members of the general public, the owner of a residential property or the manufacturer of a defective product. Your employer and co-workers are usually not third parties.

1. **Why does it matter that a third party was involved in my incident?**

When a third party is responsible for your incident, you have the right to sue them for your injuries. You will normally be asked to choose between accepting WSIB benefits or suing the third party. If no third party was involved, you have no election to make.

1. **Can other employers or workers be considered third parties?**

As mentioned above, your employer and co-workers are not usually third parties. In Ontario, whether you can sue another employer or worker depends on the type of business you work for. The *Workplace Safety and Insurance Act* classifies business activities under two large groups of industries, referred to as “Schedule 1” and “Schedule 2”. Some examples of Schedule 1 industries include construction, transportation, forestry, manufacturing, mining, retail sales and restaurants. Some examples of Schedule 2 industries include provincial and federal governments and Crown agencies, municipalities, school boards, police and firefighting services, airlines and railway companies. The Schedule of the business that employed the injured/deceased worker is marked on the election form that is included in this package.

1. ***Employees of Schedule 1 businesses***

Employees of a Schedule 1 workplace cannot sue any Schedule 1 employer or any of their employees. That means they cannot sue their employer or co-workers, or any other Schedule 1 employer or their employee that was acting in the course of their employment at the time of the accident. There is one exception: they may be able to sue a Schedule 1 manufacturer of a product, equipment or machinery that failed and caused the incident.

1. ***Employees of Schedule 2 businesses***

Employees of a Schedule 2 workplace cannot sue their own employer or co-workers. This means that a Schedule 2 employee can sue another Schedule 2 business or employee, or any Schedule 1 business or employee.

1. **How can I find out if the third party was Schedule 1 or Schedule 2?**

If you believe that the person who caused the incident may also have been working at the time of the incident, and if you know the name of the business that person worked for, you may contact our Employer Service Centre at employeraccounts@wsib.on.ca to find out if the business is part of Schedule 1 or Schedule 2.

1. **How do I find out how much WSIB benefits I would be eligible for, if I choose to continue my claim?**

You may be able to receive an estimate of your potential WSIB benefits by contacting the WSIB Case Manager assigned to your claim. It is important to remember that any estimate provided may change as more claim information becomes available.

1. **How do I communicate my decision?**

Once you have made your decision about whether you will accept WSIB benefits or not, you must complete and submit the election form attached to this package to us within three months from the date of the incident.

While you make your decision, the WSIB will continue to pay any benefits you are entitled to, for up to three months from the date of the incident. The WSIB will collect information to make a decision about your claim and pay any benefits you may be entitled to.

If you choose to bring a lawsuit, your WSIB benefits will stop. The same applies if you do not submit the form within three months from the date of the incident. In those cases, we will assume that you have chosen to sue and we will take no further action on your claim.

1. **How much time do I have to submit my form?**

You have three months from the date of the incident to submit your election form.

1. **What if I need more time to complete my form?**

If you need more time to complete your form, please email **[Adjustment\_Services@wsib.on.ca](mailto:Adjustment_Services@wsib.on.ca)** explaining why you need more time and how much time you need. The WSIB will respond to your request in writing. Please be mindful that the WSIB will not pay benefits beyond the first three months following the accident.

1. **What happens if I am under the age of 18 or medically unable to complete the form?**

If you are under 18 years old, your parent or legal guardian must sign the form. For people who are unconscious or medically incapable of completing the form themselves, a person with a Power of Attorney, the person’s spouse or the Office of the Public Guardian and Trustee can submit the form.

1. **If I elect to receive WSIB benefits, what happens next?**

When you elect to receive WSIB benefits, you give up your right to sue any third party for the incident. If you are an employee of a Schedule 1 business, your right to sue is transferred to the WSIB. If you are an employee of a Schedule 2 business, your right to sue is transferred to your employer.

Once you elect to receive WSIB benefits, the WSIB or your employer (as the case may be) makes all decisions about any lawsuit, including whether to sue, whether to settle the lawsuit and for what amount. They will pay for all litigation expenses, lawyers’ fees and court costs. In exchange you will be asked to participate in the lawsuit, mainly by providing information, attending medical assessments and testifying under oath.

1. **Will I receive any money that the WSIB or my employer recovers from the lawsuit?**

If the WSIB or the Schedule 2 employer recovers money from a lawsuit, the funds are first used to reimburse the costs of the lawsuit (lawyers’ fees and expenses) and the amount of WSIB benefits already paid. Any amount remaining is called a surplus and will be paid to you.

If you receive a surplus, we will put the payment of any future benefits on hold, until the total amount of benefits withheld equals the amount of the surplus. After that, we resume paying you benefits, if you continue to be entitled to them.

1. **If I choose to receive WSIB benefits, can I change my mind?**

Once you make your choice, you cannot change it without the WSIB’s consent. If the WSIB consents, you will have to repay the WSIB benefits that you received.

If you wish to change your election, please contact the WSIB’s Adjustment Services Branch as soon as possible. The longer you wait, the more difficult it may be to change your election.

For Schedule 2 employees, you must contact your employer, as they decide whether to let you change your election.

1. **What happens if I choose to sue?**

If you choose to sue the persons responsible for the incident, you will have full control over the lawsuit. You will make all decisions about the lawsuit, including choosing a lawyer, whether to settle the case and for how much. You will also be responsible for all costs associated with the lawsuit, including lawyers’ fees. You will no longer be entitled to any WSIB benefits. You will have to make arrangements to repay any benefits you received. To discuss repayment options, you or your legal representative may send an email to the Adjustment Services Branch.

***a) If I settle the lawsuit, can I still receive WSIB benefits?***

You may be eligible for WSIB benefits if the proposed settlement is for an amount lower than the benefits that you would have received from the WSIB. You must get the WSIB’s written approval of the settlement in advance, by contacting the WSIB’s Adjustment Services Branch.

***b) If my lawsuit is terminated, can I still receive WSIB benefits?***

There are situations where the Workplace Safety and Insurance Appeals Tribunal (WSIAT) may decide that you are not entitled to continue with your lawsuit. If that occurs, you have six months from the date of the WSIAT’s decision to apply for WSIB benefits.

1. **What happens in cases of motor vehicle accidents?**

If your injury was due to a motor vehicle accident in Ontario, the right to sue the third party cannot transfer to the WSIB (or your employer, if you work for a Schedule 2 business). Therefore, if you choose to receive benefits, the WSIB or your employer cannot sue or recover any settlement on your behalf. You will receive the WSIB benefits, but no surplus (described in item 10, above).

Also, you cannot claim benefits from both the WSIB and an auto insurer.

**This information sheet provides general information about choosing to claim WSIB benefits and third-party rights of legal action. It is not legal advice and does not replace or supersede the *Workplace Safety and Insurance Act, 1997*, its regulations, or WSIB policy. We encourage you to get independent legal advice before making any decisions on this matter.**

For more information, please email [Adjustment\_Services@wsib.on.ca](mailto:Adjustment_Services@wsib.on.ca)

1. All references to, “incident” includes a workplace accident leading to injury, illness or death. Note that a WSIB claim can be made by a person injured in a workplace incident or by a surviving spouse, child or other dependent of a worker who has died as result of a workplace incident. [↑](#footnote-ref-2)