

# WorkplaceNL

Health | Safety | Compensation

March 29, 2018

Newfoundland and Labrador  
Board of Commissioners of Public Utilities  
120 Torbay Road  
P.O. Box 21040  
St. John's, NL A1A 5B2

**Attention: Cheryl Blundon, Director of Corporate Services and Board Secretary**

Dear Ms. Blundon:

**Re: 2017 Automobile Insurance Review**

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Further to the above-noted matter, WorkplaceNL is an interested party in your study and requests that the enclosed submission be considered in relation to your review of the following issues:

- The impact on rates of a monetary cap on claims for non-economic loss for minor/mild injuries and the implications of such cap for claimants; and
- The impact on rates of continuing with the current deductible or increasing the deductible.

## **Background**

The *Workplace Health, Safety and Compensation Act*, RSNL 1990, c. W-11, as amended, (the "Act") provides for the payment of compensation benefits for workplace injuries. In exchange for the right to compensation, there is a general rule that a worker or his or her dependants cannot sue an employer or another worker for damages arising from a workplace injury. This general rule is often referred to as the statutory bar.

The current Act contains an exception to the statutory bar in section 44.1 for accidents involving the use of a motor vehicle. Specifically, an action may be pursued in a workplace accident for the damages resulting from an accident involving the use of a motor vehicle.

A worker or his or her dependants who is involved in a motor vehicle accident may choose to elect to receive compensation benefits or pursue legal action. If the worker/dependent elects to pursue legal action, WorkplaceNL will not pay any compensation benefits. If the worker/dependant elects to receive compensation benefits, WorkplaceNL is subrogated to the rights of the worker/dependant and may pursue the legal action.

When WorkplaceNL pursues the legal action and receives a settlement or judgement; the past claims costs, projected future claims costs (if any), an administrative fee, and legal disbursements are paid from the funds. The excess remaining funds are then paid to the worker/dependants.

### **Legislative History**

A review of the history of the motor vehicle exception will highlight its importance to the worker's compensation system and the injury fund in this province.

Prior to 1992, an action could be taken in relation to a workplace injury in two circumstances, namely:

- 1) against a person who was not a registered employer or a worker under the Act; or
- 2) against an employer or worker where the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer.

Therefore, the legislation only permitted legal actions for workplace motor vehicle accidents if they were being pursued in these limited circumstances. In these situations, prior to 1992, the worker or his or her dependents could elect to claim compensation and also bring an action.

For those workers/dependants who elected to claim compensation and bring an action, upon resolution of the legal action, WorkplaceNL was tasked with collecting the claims costs from the worker/dependants. Due to issues with collection, this system was not ideal.

Under this system, if the worker/dependants had not commenced an action within a reasonable time, WorkplaceNL had the option of pursuing the legal action.

According to the 1991 Workers' Compensation Statutory Review, Majority Report, the worker's compensation system in this province had serious financial problems. The report noted that, if this trend continues, the organization will not be able to operate from its cash flow in less than five years. As a result of the financial crisis, various measures and amendments to the legislation were undertaken to improve the financial position of the worker's compensation system.

In 1992, the *Workers' Compensation Act*, RSN 1990 c. W-11, section 45 of the Act was amended and section 44.1 was added<sup>1</sup>. These changes introduced an exception to the statutory bar and allowed a worker or his or her dependents to sue an employer

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<sup>1</sup> *An Act to Amend the Workers' Compensation Act*, SN 1992, c. 29

or another worker for damages arising from an accident involving the use of a motor vehicle. This significantly broadened the number of legal actions for motor vehicle accidents for workplace injuries.

Another significant change was introduced in 1992, namely, section 45 was amended to allow a worker, or his or her dependants, who was involved in a motor vehicle accident to choose to elect to receive compensation benefits or pursue a legal action. This eliminated the necessity for WorkplaceNL to collect reimbursement of the claims costs from the worker because, under this new system, if the worker elected to receive benefits, WorkplaceNL pursued the legal action. This change also reduced the number of worker's compensation claims because when a worker chose to pursue a legal action, he/she was not entitled to any compensation benefits.

Under this system, the cost of workplace motor vehicle accidents was shifted to the automobile insurance industry and away from the injury fund. A worker who is driving a motor vehicle on a highway is at the same risk as all other drivers on the highway. Therefore, the cost of these motor vehicle accidents is rightly born by the automobile insurance industry as opposed to the injury fund.

This system remains in place today.

#### **Impact of Reform on the Injury Fund**

Under the current worker's compensation system, when a worker is involved in a motor vehicle accident, the worker or his or her dependants may elect to receive compensation benefits or may pursue a legal action. In the last three years, the number of workers and dependants who elected to pursue a legal action, instead of claiming compensation benefits are as follows:

- 2015 – 66 elected to pursue legal action
- 2016 – 65 elected to pursue legal action
- 2017 – 71 elected to pursue legal action

If a cap or deductible is introduced, electing to pursue legal action will likely no longer be an attractive option for the worker/dependant. Therefore, we can expect that a significant number of these workers will elect to receive compensation benefits instead of pursuing their own action. This will be an additional burden on the injury fund due to additional claims cost and administration costs.

If the worker or dependant elects to receive compensation benefits, WorkplaceNL is subrogated to the rights of the worker or dependants and pursues viable legal actions against the party who caused the accident. These legal actions are generally paid under an automobile insurance policy. At the time of settlement or judgment,

WorkplaceNL is reimbursed for the past and projected future claims costs, an administrative fee and legal fees.

In the last three years, WorkplaceNL has collected the following amounts as a result of legal actions in relation to workplace motor vehicle accidents:

- 2015 - \$1,820,880.27
- 2016 - \$2,140,203.38
- 2017 - \$2,933,057.02

If a cap or deductible is introduced, WorkplaceNL's ability to collect these funds will be significantly impaired, thereby, negatively impacting the injury fund.

### Summary

If a deductible or cap is implemented, more workers and dependants will elect to receive benefits, instead of pursuing their own legal action. As a result, claims costs and administrative costs will increase. Further, for those workers who elect to receive compensation benefits, WorkplaceNL's reimbursement for claims and administrative costs in motor vehicle accidents will be significantly reduced. This will negatively impact WorkplaceNL's ability to restore the injury fund through recoveries from legal actions. As such, any potential change to the automobile insurance legislation which limits legal action will ultimately shift the burden of these accidents from the automobile insurers to the employers of this province.

It is clear that the implementation of a deductible or cap will have a negative impact on the injury fund which will ultimately impact employer's assessments. Therefore, WorkplaceNL objects to the imposition of a deductible or cap for non-economic loss for minor/mild injuries. WorkplaceNL request that the Board of Commissioners of Public Utilities consider this submission in its review of these issues.

Please do not hesitate to contact me should you have any questions. I may be reached directly at 709.778.1222, toll free at 1.800.563.9000, extension 1222 or by email at [ann.martin@workplacenc.ca](mailto:ann.martin@workplacenc.ca).

Yours truly,

  
Krista L. Gillam  
Legal Counsel

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