

Making Sense of Law Reform-

A Case Study of Workers' Compensation Law Reform in Ontario 1980 to 2012

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Abstract

This thesis is a case study from 1980 to 2012 of law reform applied to workers' compensation in Ontario. It aims to understand the promise of law reform and its implementation from the standpoint of injured workers. The study is structured in three parts.

Part One constructs an analytical framework drawing on legal theories and principles of adjudication. It provides a brief history of the Ontario Workers' Compensation Board, its powers and adjudicative practices prior to the reforms.

Part Two summarizes reform in Ontario's workers' compensation law from 1980 to 2012. The description is organized into five periods reflecting significant shifts in direction. It focuses on government recommendations for reform, identifies and describes key legislative changes, and explores changes to governance, appeals and adjudication. Legislation, case law, policy and practice are reviewed.

Part Three reviews the evidence of the impact of the Ontario reforms on a particular group: unemployed, permanently disabled workers. While the Board refuses to track the economic status of injured workers, research suggests poverty and stigma face many.

Conclusions suggest that Ontario's workers' compensation system was transformed from one established to address the interests of workers and employers separately to one that balances those interests and now into one that privileges the interests of employers. Workers' interests are a cost to be reduced. The prospect of law reform as an empirically driven

process to address injustice has been corrupted by a focus on correctness with fairness as an afterthought.

Résumé

Cette thèse étudie les réformes de la législation ontarienne en matière d'indemnisation pour les accidents du travail apportées entre 1980 et 2012. Elle vise à comprendre, du point de vue des travailleurs accidentés, les promesses des réformes et leur mise en oeuvre. L'étude est structurée en trois parties.

La première partie fournit un cadre théorique ancré sur certaines théories juridiques et sur les principes régissant la prise de décision. Elle fournit une courte historique de la Commission des accidents du travail de l'Ontario, en regard de ses pouvoirs et pratiques décisionnelles avant les réformes.

La deuxième partie fait la synthèse de la réforme de la législation ontarienne en matière d'accidents du travail de 1980 à 2012. Elle se divise en cinq périodes reflétant les réorientations importantes. Elle aborde les recommandations gouvernementales, décrit les modifications législatives et explore les changements apportés au niveau de la gouvernance, des appels et des modalités de prise de décision. La législation, la jurisprudence, les directives et les pratiques sont étudiées.

La troisième partie analyse, à la lumière des statistiques et les recherches scientifiques sur le sujet, l'impact des réformes ontariennes sur un groupe particulier: les travailleurs porteurs d'atteintes permanentes et qui sont sans emploi. Alors que la Commission refuse de documenter le statut économique des travailleurs accidentés, la recherche suggère que plusieurs font face à la pauvreté et la stigmatisation.

Les conclusions de la thèse suggèrent que le système d'indemnisation des accidentés du travail de l'Ontario est passé d'un système conçu pour répondre aux intérêts des travailleurs et des employeurs de manière séparée à un système qui a cherché l'équilibre entre ces intérêts, pour, maintenant, privilégier les intérêts des employeurs. Les intérêts des travailleurs sont des coûts à être réduits. La perspective de la réforme du droit en tant que processus fondé sur les données scientifiques pour répondre à l'injustice a été corrompue par un focus sur le caractère correct des décisions, et l'équité est devenue une considération qui vient en dernier lieu.

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Acronyms

ALT means Allowed Lost Time

AP means Artificial Person

BoD means Board of Directors

FEL means Future Earnings Loss

FL means Front Line

FPC means Fair Practices Commission

IWC means Injured Workers' Consultants

IWH means Institute for Work and Health

LAD means Longitudinal Administrative Databank

LOE means Loss of Earnings

LMR means Labour Market Re-entry

MOU means Memorandum of Understanding

MPP means Member of Provincial Parliament

NDP means New Democratic Party

NEL means Non Economic Loss

NOC means National Occupational Classification

NP means Natural Person

OHS means Occupational Health and Safety

OLRB means Ontario Labour Relations Board

ONIWG means Ontario Network of Injured Workers Groups

OS means One Shoter

OWA means Office of the Worker Advisor

RAACWI means Research Action Alliance on the Consequences of Work Injury

RAC means Research Advisory Council

RP means Repeat Player

RTW means Return To Work

SIEF means Second Injury and Enhancement Fund

VFM means Value for Money

WCAT means Workers' Compensation Appeal Tribunal

WCB means Workmen's Compensation Board from 1914 to 1985 and Workers' Compensation Board after 1985.

WSIAT means Workplace Safety and Insurance Appeal Tribunal

WSIB means Workplace Safety and Insurance Board

Introduction

Over the past 30 years, significant changes have been made to a legal system that hundreds of thousands of people rely on to keep them out of poverty when they have no income because of injury, illness and disability caused by their employment. The stated purpose of these reforms was to prevent work related accidents and illness, improve the employment of permanently disabled workers and reduce costs to employers. Many who have become permanently disabled after a work related accident or illness complain that their circumstances have worsened, not improved, after these changes.

Workers' compensation was originally established by legislation in Ontario (and many other common law jurisdictions) around the turn of the Twentieth Century as an independent legal system removed from the courts as a result of the failure of the courts to provide justice to workers and their families who were injured or killed in the course of their employment. The system remained remarkably unchanged until the 1980s when a process of law reform began which has continued up to today. This law reform and its implementation transformed the benefits to which workers and their families were entitled and the principles by which decisions were made. A system designed initially to protect worker and employer interests separately was transformed first into one which tried to balance worker and employer interests and then into one which privileged employer interests. Through this process, the legal system which originated as a compromise of legal rules and rights to protect workers has become one in which those rights are being stunted to reduce costs and protect employers' interests.

How and why this has happened is not, on its face, immediately clear. Despite the testimony from the experience of many injured workers and independent research, continuing claims are made from the highest levels that this law reform is good for permanently disabled workers.

Despite a wealth of available data which could be used to explain results and improve services, no systematic examination has ever been provided by those implementing the reforms or by those who advocate for further reforms. The possibility of law reform as an evidence driven process to fairly address the problems of workers has been corrupted by a relentless, ideologically driven and biased agenda implemented through direct government interference in the operation of the system.

How do we explain these apparent contradictions? This thesis seeks to provide a road map through the transformation in three parts: 1) by creating a theoretical and analytical framework within which to examine the changes that took place; 2) by examining the key substantive, governance and decision making impacts of reforms and 3) by considering the evidence of the impacts of these reforms on injured workers.

Two aspects of law reform were focused on. The first aspect was the policy objectives described by official government reviews, legislation and its implementation by the Board in its role as administrator of the system. The second aspect was the decision making processes used to apply policies in individual claims, adjudication and appeals.

In the first section of Part One, four legal theories were reviewed to provide a foundation for evaluating the promise of law reform and a measures of its impacts. In the second section of Part One, an analytical framework of adjudication principles was developed to assess the

quality of decision making in individual claims. These principles are derived from two sources. The first was drawn from statutory interpretation as it has developed with regards to workers' compensation in Ontario. The second was drawn from administrative law principles applied to decision making by tribunals and boards.

Part Two is a detailed review of the changes made to workers' compensation in Ontario from 1985 to the present. This part attempts to describe more than thirty years of law reform by focusing on how the process of decision making was marshalled to deliver on the promise of each reform, particularly with respect to permanently disabled workers. It is divided into five periods for analytical purposes reflecting changes in government and direction. Each period summarizes the government recommendations for reform, identifies and describes key legislative changes, explores key changes to governance, appeals, policy and adjudication. Attention is paid to the effect of the reform process on decision making.

Part Three examines the evidence of the impacts of these reforms on the employment and economic well being of permanently disabled workers in two respects. The first respect is the evidence whether the reforms delivered on their promises to provide permanently disabled workers with either re-employment or wage loss benefits. The second respect is the evidence whether the integrity of the decision making process of individual worker claims was affected.

Although an initial attempt was made in 1989 to establish a baseline of the employment of permanently disabled workers, no systematic effort has been made by the Board during the period under examination to follow employment outcomes. Despite the fact that every claimant is asked about their employment status on every occasion that they are contacted by

the Board, only benefit payments were recorded. This thesis examines the work of independent academic researchers that address different aspects of injured workers' experience with the reforms. This research provides a picture of a system failing to deliver on its law reform promise to support permanently disabled workers' return to employment or to pay wage loss when their post accident income is less than their pre-accident income.

The examination of the evidence with respect to decision making was much less helpful.

The Tribunal ceased to be a significant factor in reform after 1997. Information regarding internal standards for adjudication was not available on a systematic basis.

The Conclusion revisits the different periods of reform within the legal frameworks of theory and adjudication to provide some insight into this disjuncture between promise and consequence. A process of reform originally propelled by concerns about inadequate access to justice and social injustice now privileges the interests of business, in word and deed. For a brief moment, in 2008, this bias became visible and its anti therapeutic impacts on injured workers acknowledged. The acknowledgment ran headlong into the economic crisis of 2008 and, in 2009, the authority of the Auditor General. By the end of the period studied, concern about stigmatizing injured workers was replaced with overriding concerns for efficiency and effectiveness focused on reducing the recognition of permanent disability and payment of wage loss benefits to reduce costs.

The Experience of Permanently Disabled Workers as a Starting Point

A central objective of this paper is to examine law reform from the standpoint of unemployed permanently disabled workers. Reducing the poverty of this group of workers was central to the law reform agenda being studied and a key element of its justification.

A workers' standpoint was proposed by Eakin to ensure that their perspectives and rights are fully considered along with those of employers in addressing occupational health and safety.¹ She argued that the analytic integration and theorisation of multiple standpoints and their interrelations was critical to understanding occupational health and safety (OHS) at an organisational level of analysis.² Lippel built on this premise and, in her article comparing different compensation systems, described key issues that should be addressed in a compensation system designed to meet the needs of those who are injured while respecting their right to be treated with dignity.³ Separately, in the context of economic evaluations of OHS prevention investments, Culyer et al argued that full and transparent consideration of all possible stakeholders is necessary in order to determine whether an intervention should be adopted. As they summarized, workers should not be treated like "carthorses".⁴

A standpoint of permanently disabled workers reminds us that the purpose is to address their needs. It begins the inquiry from their experiences and focuses the analysis on how the system reconstructs their lives. Building on the work of Dorothy Smith,⁵ laws, regulations, programs and policies are understood as frames through which institutions organize front line decision makers to reconstruct the lives of permanently disabled workers as claimants of the workers' compensation system. The resulting decisions turn the worker's experiences into a discrete number of acceptable actionable categories. The disjuncture between the experience lived by the worker and her or his treatment by the Board is made apparent in the

¹ Joan M. Eakin, "Towards a 'standpoint' perspective: health and safety in small workplaces from the perspective of the workers" (2010) 8:2 Policy and Practice in Health and Safety 113.

² Ibid., at 126.

³ Katherine Lippel, "Preserving Workers' Dignity in Workers' Compensation Systems: An International Perspective" (2012) 55:6 American Journal of Industrial Medicine 1.

⁴ Anthony Culyer, Benjamin Amick III & Audrey Laporte, "What is a little more health and safety worth?" in Emile Tompa, Anthony Culyer & Roman Dolinski, eds., *Economic Evaluation of Interventions in Occupational Health and Safety: Developing Good Practice* (Oxford University Press, 2008) at 30-31.

⁵ Dorothy E. Smith, *Institutional Ethnography A Sociology for People* (U.K.: AltaMira Press, 2005).

contrast. A textual examination from the standpoint of workers of the principal documents used internally by the Board provides an explanation of how the system works for them.

This last element – how the system works for them – is for me, the author, the primary concern. In 1976, as a law student for the first time, I went to work in student legal aid providing legal assistance to injured workers with compensation claims at the Union of Injured Workers' Clinic. I subsequently worked at Injured Workers Consultants, a community legal clinic, as a community legal worker. In private practice from 1980-1989, I represented many injured workers before the Board and Tribunal. In 1989, I joined the United Steelworkers Union as director of health and safety. Injured workers and workers' compensation remained a major part of my work. Although my direct involvement in the reforms described in this thesis came to an end in 1994, I remained indirectly involved in many ways including training worker advocates, promoting research on return to work and as a member of the Research Advisory Committee, the research funding arm of the Board.

Methodology

The primary subject of this thesis is the institution created to administer workers' compensation in Ontario. I am trying to tell the story of how the government via a body corporate implemented a series of law reforms from 1980 to 2012. This public corporation was known as the Workmen's Compensation Board (WCB) from 1914 to 1985, the Workers' Compensation Board from 1985-1997 and has been known as the Workplace Safety and Insurance Board (WSIB) since. Or, simply put, the Board. The Board is the generic term used to describe the institution as a single entity. However, the Board is not a monolith. Like all corporations it is a complex network of differentiated responsibilities all of which emanate from the body with the legal responsibility for its decisions. Prior to 1985,

the governing body was called the Board. After 1985, it became the Board of Directors (BoD), hence, a potential for confusion in terminology. Throughout this paper, I have tried to use these terms consistently with these meanings. The Board is the generic name of the institution throughout this study and also the name of the governing body prior to 1985.

A similar confusion can exist when discussing the Tribunal. From 1985 to 1997, the Tribunal was called the Workers' Compensation Appeal Tribunal (WCAT). From 1997 to present, the name is Workplace Safety and Insurance Appeal Tribunal (WSIAT). The term "Tribunal" is used when generally discussing its role and responsibilities.

Utilizing the resources of the WSIB library and with the assistance of its staff, a review was conducted of legislative amendments, Annual Reports and Statistical Supplements of the Ontario Workers' Compensation Board (WCB)/ Workplace Safety and Insurance Board (WSIB) from 1915 to the present. Corporate reports on the implementation of new legislation after 1980 and in particular its impact on adjudication were reviewed. Records and reviews respecting internal appeals were sought. Unfortunately few Corporate records are filed with the library after 1997. In addition to Board records made public through the WSIB library, two FIPPA⁶ requests were made for access to Corporate records in two parts. A data request was made for statistical information available about permanently disabled workers' economic status. A document request was made for records relating to matters referred to in Annual Reports and Value for Money Audits regarding the Board's attempts to measure the quality of its decisions making from 1997 to 2012.

⁶ *Freedom of Information and Protection of Privacy Act*, RSO 1990, F.3. See Appendix 3 for results of data request. Appendix 4 contains two letters from the WSIB in response to request for documentation.

Documents were reviewed to create a narrative of the Board's efforts to implement its new mandate through decision making and its efforts to influence the standards by which decisions were made.

An examination of the records at the Ontario Workplace Tribunals Library was conducted to determine the Tribunal's role in law reform. Annual Reports from 1985 to 2012 were reviewed with specific attention to the description of the Tribunal's relationship to the Board, key decisions, and caseload. A search was conducted of the Decision Data base with assistance of a WSIAT librarian for decisions which raised issues of Board policy, section 93(86n), section 126⁷, or "merits and justice." Legal literature was searched for contemporary articles addressing the role of the Tribunal as well as similarly affected administrative tribunals. A search of the WSIB library for documents on its relationship with the Tribunal produced limited results. Legislation and decisions were reviewed to produce a description of the relationship between the Board and the Tribunal.

A search was conducted to locate relevant empirical data regarding the impact of the law reforms on permanently disabled workers in Ontario. Board reports, statistics and public research was examined. Research funded by the WCB/WSIB either through the Institute for Work and Health, Research Advisory Committee (RAC) Research grants or directly was reviewed.

⁷ These are the two provisions which allow the Board's BoD to review a Tribunal decision. *Workers' Compensation Act*, RSO 1990 c. 47, s 93 and the *Workplace Safety and Insurance Act* SO 1997 c 16, s 126 [Bill 99].

Part One. A Legal Framework for Understanding Law Reform

This chapter develops a legal framework for evaluating the law reform under study. The first part explores four legal theories about law reform that could be applied to evaluating workers' compensation law reform in Ontario. The second part reviews principles of adjudication derived from the statutory interpretation of workers' compensation law and from administrative law to develop a basis for evaluating decision making.

1(a). Legal Theory

In this section four legal theories were reviewed- Access to Justice, Law and Social Movements, Economic Analysis of Law and Therapeutic Jurisprudence. Each theory was examined to identify the underlying values relevant to law reform and how each theory proposed that these values could or should be achieved. This review will be referred to in the subsequent analysis of the changes that were made and in the evaluation of what resulted.

Access to Justice

Access to justice is one of the fundamental underpinnings of the rule of law. Rule of law implies that everyone should have access to the institutions of justice and equality in representation within a system that treats everyone impartially.⁸ By the 1970's the access to justice movement was actively engaged with the goals of redistributive justice targeting needs of the disadvantaged to additional assistance.⁹

Access to justice theory moved through the 1960's and 1970's into the 21st century in three waves – the creation of legal aid, the recognition of representation of diffuse interests and,

⁸ Brian Z. Tamanaha, *On the rule of law: history, politics, theory* (Cambridge ; New York Cambridge University Press, 2004).

⁹ Ab Currie, "Riding the Third Wave – Notes on the future of Access to Justice", in Department of Justice Canada, *Proceedings from Expanding Horizons Rethinking Access to Justice in Canada, March 31, 2000* (March, 2000) 37.

more recently, considerations of system change.¹⁰ Programs such as legal aid, public interest advocacy, legal clinics and court workers *inter alia* were created and have operated for many years. In this last sense, the impact of access to justice can be identified and its effects examined.

In 1974 Marc Galanter published a paper to explore the potential and the limitations of redistributive legal change through litigation.¹¹ He focused on the system as a whole and not just on an increase in legal services. His paper proposed that the way a legal system works can be described through the relationships of four components: rules, institutional facilities, lawyers and parties. The system functions within certain norms or assumptions. In the case of the courts, those assumptions include inequality among parties, impartiality of judges, complex procedural rules, the use of intermediaries, incomplete system resources, and hierarchical decision making.¹²

While most legal analysis begins with rules, Galanter began by examining how differences between parties affect the way the system works. He divided parties into two groups based on their utilization of the system. There are the repeat players (RP's) who are engaged in many similar litigations over time and there are those who use the system only once or very occasionally, one Shoters (OS's). RP's would be expected to use the system differently from OS's and have advantages such as experience, expertise, facilitative relationships, and credibility. RP's would have a longer-term perspective and see advantages in system changes around rules and rule making. To be a RP and to utilize these advantages requires resources. While Galanter did not equate RP's with the rich and powerful, most RP's are

¹⁰ *Ibid.*, at 38.

¹¹ Marc Gallanter, "Why the "Haves" come out ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law and Society Review* 95.

¹² *Ibid.*, at 96.

larger, richer and more powerful, that is to say, in his terms, “Haves”. This position translated into advantages in representation (lawyers) in quality as well as the status of the representatives that result.¹³

These strategic advantages translate into advantages with regards to the institutional facilities. The system that Galanter described was characterized by two basic features: passivity and overload. The institutions were passive in the sense of being reactive. They are mobilized by the claimants and defendants. Judges sit as impartial umpires. The resources of the “Haves” gave them an advantage which was then accentuated by overload as there were more claims than there were institutional resources to address them. Delays and costs encouraged settlement while restrictive procedural rules made it more difficult for the party that was pressing the claim and gave advantage to the more organized and attentive RPs.¹⁴

Rules themselves tend to favour older, culturally dominant interests. Even when applied even-handedly, rules generally protect and promote the interests of organized and influential groups. OSs' interests are such that the efforts needed to promote rule change over time are often not consistent with their individual goals.¹⁵

Galanter's model legal system was the courts. While he did consider alternative legal systems such as private systems of mediation and arbitration, he gave little consideration to administrative tribunals. When considering proposed reforms, he suggested that one could imagine institutions with authority to conduct investigations, secure proof, and undertake other activities on behalf of a claimant. Under those circumstances, greater “institutional

¹³ Ibid., at 103.

¹⁴ Ibid., at 119-124.

¹⁵ Ibid., at 123-124.

activism” might be expected to reduce advantages of party expertise and differences of legal services. His supporting citation was from research studying the industrial accident boards, an early U.S. equivalent of the workers’ compensation boards.¹⁶ Galanter pursued this further in a paper focused on improving how society delivers its legal services, using the evidence developed in the first article described to identify possible system reforms¹⁷. Under institutional reform, he identified a series of possible changes including making institutions more active and investigative and providing advocacy for unrepresented interests. This was the case with the early American workers’ compensation boards. In a footnote Galanter remarked that, in the American setting at least, such institutional activism seemed unstable and over time institutions tended to become more passive.¹⁸ In his view, reform of the organization of parties and improving party capability was the key law reform to achieve.¹⁹

Thirty years later, Galanter revisited the legal system to find that it had evolved differently than he had hoped.²⁰ The “Haves” still mostly win. However, the advantage of organization that he had identified as a key to party success had been taken over by corporations. “Haves,” Galanter discovered, are now more and more frequently AP’s or Artificial Persons, i.e. corporations and not NP’s or Natural Persons. AP’s have many advantages over NP’s. AP’s use the legal system more frequently while accumulating advantages. The increase in complexity of laws and use of law correlates with the increase uses and needs of AP’s.²¹ Corporate lawyers are more prestigious than others. Cultural

¹⁶ *Ibid.*, at 140.

¹⁷ Marc Galanter, "Delivering Legality: Some Proposals for the Direction of Research" (1976-1977) 11 *Law and Society Review* 225.

¹⁸ *Ibid.*, at 230. footnote 13.

¹⁹ *Ibid.*, at 231.

²⁰ Marc Galanter, "Planet of the APs: Reflections on the Scale of Law and its Users" (2006) 53:5 *Buffalo Law Review* 1369.

²¹ *Ibid.*, at 1378.

advantages have developed between corporations and courts that support a shift away from trials and judicial adoption of a more managerial approach to resolving claims. Non-economic claims are being de-legitimated.

Concurrently, and often funded by corporations, is a widespread “jaundiced view” towards trials and “litigiousness” which is contradicted by empirical evidence but still persuasive and prevalent in society.²² The tendency of law to ignore empirical evidence was taken up by Galanter as the “predicament of law” in a subsequent paper.²³ On the one hand, despite accumulating a great deal of data over the last 40 years, analysis of how the system works was scanty. On the other hand, the incentive and opportunity to produce knowledge to support corporate positions was enlarged.²⁴ Galanter attributed this to a dominant view in the practice of law that a lawyer’s relationship to the truth was only instrumental.²⁵ The future of law and social science were questioned in the face of the greater interpenetration of law, lawyers and law schools by corporations.

Galanter identified a partial dissociation of everyday practices from authoritative institutional and normative commitments.

The unreformed features of the legal system then appear as a device for maintaining the partial dissociation of everyday practice from these authoritative institutional and normative commitments. Structurally (by cost and institutional overload) and culturally (by ambiguity and normative overload) the unreformed system masks a massive covert delegation from the authoritative rule makers to field level officials.²⁶

²² *Ibid.*, at 1412.

²³ Marc Galanter, "In the Winter of our Discontent: Law, Anti-Law, and Social Science" (2006) 2 Annual Review of Law and Social Science 1.

²⁴ *Ibid.*, at 12-13 citing examples of Bankruptcy reform and Exxon's support of independent scholars to support its advocacy.

²⁵ *Ibid.*, at 8.

²⁶ Galanter “Haves” *supra* note 11 at 147.

This dichotomy between the appellate level and the front line decision makers is important to remember when exploring law reform.

Law and Social Movements

To understand the role and impact of social movements on law reform requires a definition of social movements and an assessment of their relationship to law reform. A definition suggested by Charles Tilly captures with some accuracy both the passion and the purpose of what is meant by the term social movement:

By the turn of the twenty-first century, people all over the world recognized the term “social movement” as a trumpet call, as a counterweight to oppressive power, as a summons to popular action against a wide range of scourges.²⁷

Tilly described social movements as a distinctive form of contentious politics, contentious in the sense that social movements involve collective making of claims that, if realized, conflict with someone else’s interests; and politics in the sense that government is challenged by the claims made to act in response. These movements developed in the west after 1750 and involved a synthesis of three elements:

1. a sustained, organized public effort making collective claims on target authorities;
2. employment of combinations from among the following forms of political action: creation of special-purpose associations and coalitions, public meetings, solemn processions, vigils, rallies, demonstrations, petition drives, statements to and in public media, and pamphleteering (call the variable ensemble of performances the social movement repertoire); and
3. participants’ concerted public representations of worthiness, unity, numbers, and commitment on the part of themselves and/or their constituencies.²⁸

²⁷ Charles Tilly, *Social Movements 1768-2004* (London: Paradigm Publishers, 2005) at 3.

²⁸ *Ibid.*, at 3-4.

Implicit in the reference to government was the expectation of law reform. Unclear from these statements is the social orientation of the movement. McCann²⁹, for example, in his review of the study of law and social movements focused on progressive social movements, those formed to address inequity, injustice and poverty, for example. Stryker, on the other hand, in her study of law and social change, promoted a progressive agenda but acknowledged that counter mobilization by opposing forces also resulted in law reform.³⁰

Stryker began by making the case for law reform that addressed inequality and contributed to social change. She located herself between Marx and Weber acknowledging that the dominant classes seek to perpetuate their dominance and use the law to that purpose. At the same time, the law has some autonomy to mitigate inequality.³¹ Labour law was a paradigmatic example. Empirical evidence showed that initially courts were routinely utilized to repress unionizing and striking. This de-radicalized the labour movement while mobilizing its resources for law reform. Federal U.S. legislation from 1935-47 made the federal government an active promoter of the labour movement and gains can be measured. This was reversed in 1947 when Congress enacted the Labour Management Relations Act.³² Similarly, in the 1980's gender pay equity movement, legal strategies and law reform played a central role leading to important gains for women.³³ Other examples were explored. As she summarized,

Paradigmatically illustrated by research findings in labor law and rights discourse, half empty/half full is an appropriate approximate

²⁹ Michael McCann, "Law and Social Movements: Contemporary Perspectives" (2006) 2 Annual Review of Law and Social Science 17.

³⁰ Robin Stryker, "Half Empty, Half Full, or Neither: Law, Inequality and Social Change in Capitalist Democracies" (2007) 3 Annual Review of Law and Social Science 69.

³¹ *Ibid.*, at 71.

³² *Ibid.*, at 73-75.

³³ *Ibid.*, at 87.

image of law's capacity to reduce inequality in democratic capitalism.³⁴

Changing a law is only one part of the process. The kind of law and how organizational behaviour change will be accomplished is also important. Achieving these objectives and maximizing social impact required combining litigation with sustained political mobilization from below, both in society at large and in the public and private agencies and organizations that mediated between formal law and its social impact.³⁵

McCann focused on the role which law plays in and for social movements.³⁶ Although social science scholarship on social movements documents many cases in which law plays a key role, there has been little direct analysis of when law is or is not effective. On the flip side, while legal scholars have written about legal strategies in support of social movement goals, the link to social movements was not explored. This disconnect could be exacerbated by the different cultures from which lawyers and social movement leaders arise. McCann linked the two perspectives through a legal mobilization approach looking at social disputing strategies as processes that involved different moments or stages of development and conflict.³⁷ Typically this meant challenging existing social relations when the law significantly supported them. Within these constraints, legal strategies such as litigation play a key role for social movements in the initial agenda setting (naming, framing, etc.), as a threat or action as part of mobilizing to bring political pressure for reform, or to generate policy reform through "legal leveraging." Law can play a role in policy implementation and enforcement. McCann acknowledged there is less experience here reflecting a weakness in

³⁴ Ibid., at 91.

³⁵ Ibid.

³⁶ McCann, *supra* note 279.

³⁷ Ibid., at 24.

social movements.³⁸ Finally, he identified a legacy effect which continues to influence people and policy for some time afterwards. Several Canadian scholars have also examined the use of strategic litigation as part of social movement strategies.³⁹

Both Stryker and McCann reviewed the U.S. experience. Both used a broader understanding of law rather than simply doing an inventory of court decisions and legislation. McCann argued for an interpretive, process oriented approach rejecting conventional positivist understandings. The assessment of specific legal mobilization practices by social movements must reference the larger context of multiple legal and extralegal norms or discourses that structure social relations.⁴⁰ To describe how law contributes to social change in different ways, Stryker canvassed examples from enforcement, how organizations implement legal reforms, and how statutory frameworks and government institutions can reinforce distributive rights. Citing Weber, she explored intersecting, reciprocally constructed domains for legal and other social institutions.⁴¹

In Ontario, Sheldrick focused on community legal clinics and the potential of new forms of representation to support social movements. He argued that the relationship between law and social movements in Canada had been too focused on strategies related to the Charter and the nature of “rights.” Relying to some extent on McCann’s analysis that the hegemonic nature of law is partial and incomplete, Sheldrick argued for a space for creative use of law

³⁸ *Ibid.*, at 32.

³⁹ Lisa Vanhala, "Disability Rights Activists in the Supreme Court of Canada: Legal Mobilization Theory and Accommodating Social Movements" (2009) 42:4 *Canadian Journal of Political Science* 981. Miriam Smith, "Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada" (2005) 33:2 *Politics and Society* 327.

⁴⁰ McCann.*supra* note 279 at 23.

⁴¹ Stryker.*supra* note 2830 at 71.

within broader political strategies.⁴² He acknowledged the challenge that legal mobilization faces around the issue of expertise and the difficulty of integrating a legal campaign into a broader political agenda. He critiqued the failure of social movement analysis to identify organizational challenges in its emphasis on democratization and politicization rather than achievement of state power. Sheldrick argued for a democratic conception of legal representation and a reorganization of legal resources, describing a case study of the community legal clinics' role in welfare reform as an example.

In the workers' compensation context, Sheldrick's analysis has considerable resonance given the role that community legal clinics have played in Ontario workers' compensation reform. Storey in his analysis of the injured workers' movement in Toronto acknowledged that the clinics are an important contributor to the movement. The creation of the Injured Workers' Consultants (IWC) clinic arose out of the dramatic act of an injured worker, Al Baldwin, who threw himself encased in a full body cast onto the floor of the Ontario legislature in the 1970's.⁴³ IWC along with progressive activists in the Italian community played a key role in the founding of the Union of Injured Workers. Today IWC is one of two clinics that specialize in workers' compensation and part of a larger network of clinics funded by Legal Aid Ontario, some of which include a workers' compensation mandate.⁴⁴ IWC's role in law reform is public record. While challenges to the legal clinic system have been documented

⁴² Byron Sheldrick, "Law, Representation, and Political Activism: Community-based Practice and the Mobilization of Legal Resources" (1995) 10:2 Canadian Journal of Law and Society 155 at 162.

⁴³ Robert Storey, "'Their only power was moral': The Injured Workers' Movement in Toronto, 1970-1985" (2008) 41:81 Social History 99 at 105.

⁴⁴ See Legal Aid Ontario web site <http://www.legalaid.on.ca> accessed August 17, 2013. The other legal aid clinic specializing in workers' compensation law is Industrial Accidents Victims Group of Ontario (IAVGO).

both in terms of political opposition, institutional restrictions and underfunding,⁴⁵ to date there is no threat to its continued existence or role.

The role of a social movement in the initial creation of workers' compensation systems is well documented.⁴⁶ The final report of Chief Justice Meredith that provided the foundation of the Ontario system concluded with the words,

In these days of social and industrial unrest it is, in my judgment, of the gravest importance to the community that every proved injustice to any section or class resulting from bad or unfair laws should be promptly removed by the enactment of remedial legislation and I do not doubt that the country whose Legislature is quick to discern and prompt to remove injustice will enjoy, and that deservedly, the blessing of industrial peace and freedom from social unrest.⁴⁷

More recently and in a time period more relevant to this case study, Storey has written about the injured workers movement in Ontario. His research documents the formation of the movement in Toronto⁴⁸ and its collaboration with progressive politicians, unions and others in the 1970's and 1980's to influence change in the Ontario workers' compensation system.⁴⁹

To a great extent, the modern interest in law and social movements came out of their successes in the 1970-1980s. In more recent times, progressive movements have fewer successes to count and have lost ground and influence in increasingly neo liberal political

⁴⁵ See Vera Chouinard, "Challenging Law's Empire: Rebellion, Incorporation, and Changing Geographies of Power in Ontario's Legal Clinic System" (1998) 55 *Studies in Political Economy* 65; Lenny Abramowicz, "The Critical Characteristics of Community Legal Aid Clinics in Ontario" (2004) 19 *Journal of Law and Social Policy* 70.

⁴⁶ For the Ontario experience see R. C. B Risk, "This Nuisance of Litigation: the origins of workers' compensation in Ontario" in David H. Flaherty, ed., *Essays in the History of Canadian Law*. (University of Toronto Press, 1983) p. 418 – 491; Michael J. Piva, "The workmen's compensation movement in Ontario" (1975) 67:1 *Ontario History* 39.

⁴⁷ Final Report of the Laws relating to the liability of employers to make compensation to their employees for injuries received in the course of their employment which are in force in other countries, and as to how far such laws are found to work satisfactorily (Toronto: L.K. Cameron, 1913)[Meredith Report].

⁴⁸ Storey., "Moral", *supra* note 43.

⁴⁹ Robert Storey, "Social Assistance or a Worker's Right: Workmen's Compensation and the Struggle of Injured Workers in Ontario, 1970-1985" (2006) 78:Autumn *Studies in Political Economy* 67.

environments. Conservative movements have been more successful. Storey suggested that the high point of success for the Ontario injured workers movement was the mid 1980's. The reforms of 1990 marked the success of another agenda, the counter-movement of business.⁵⁰ Law suggested that workers' successes continued into the 1990's, not coming to an end until legislative reforms in 1997.⁵¹

Shifting fortunes have significant impacts on a social movement's success and survival.

Marshall Ganz, in his history of the organizing of farm workers in California, identified three distinct movement efforts in the 20th century. The success of the third one was related to the conditions (tight) of the labour market at the time as much as the characteristics of the movement and its legal strategies.⁵² The successful movement that became the United Farmworkers Union itself became transformed in later years and now operates primarily as a benefits administrator.⁵³ As with Stryker's use of the labour paradigm, struggle must be seen in a timeline of generations in order to get the full picture.

Economic Analysis of Law

Historically, as Stryker put it, "Law, polity and economy intertwined in the concept of legal personhood."⁵⁴ Along with other key legal concepts, legal personhood of corporations facilitated the development of capitalism in common law countries. Despite this close relationship, the economic analysis of the law as an explicit legal theory is of more recent

⁵⁰ Ibid., at 86.

⁵¹ David Law, "Appeals Litigation: Pricing the Workplace Injury" in M. Gunderson, Hyatt, D., ed., *Workers' Compensation: Foundations of Reform* (Toronto: University of Toronto Press, 2000) 299-326 at 320.

⁵² Marshall Ganz, *Why David Sometimes Wins - Leadership, Organization, and Strategy in the California Farm Workers Movement* (New York: Oxford University Press, 2009).

⁵³ Ibid., at 248.

⁵⁴ Stryker, supra note 2830 at 71.

vintage. Its modern beginning is associated with the work of Ronald Coase, Guido Calabresi and Richard Posner in the 1960's and 1970's.⁵⁵

Shavell in his introduction to the economic analysis of law described three differences that set it apart from other legal theories which study the impact of law on behaviour,

First, economic analysis emphasizes the use of stylized models and of statistical, empirical tests of theory, whereas other approaches usually do neither. Second, in describing behavior, economic analysis gives much greater weight than other approaches to the view that actors are rational, acting with a view toward the possible consequences of their choices. And third, in normative evaluation, economic analysis makes explicit the measure of social welfare considered, whereas other approaches often leave the criterion of the social good unclear or substantially implicit.⁵⁶

Several qualifications are needed. While it may be true that some other legal theories are unlikely to use the same stylized models, the other theories considered in this paper do ground themselves in empirical evidence. Extra attention also needs to be paid to the details of the third difference, making explicit the measure of social welfare. Although Shavell argued that the economic view of social welfare – the aggregate sum of all individual utilities -- was not just about goods and services and could include aesthetic tastes, altruistic feelings etc., he excluded as irrelevant considerations of the relative distribution of utilities or fairness.⁵⁷

Deweese et al. brought together economic analysis of law and empirical evidence in their 1996 analysis of the adequacy of accident law.⁵⁸ The context of the book was “The Tort

⁵⁵ Louis Kaplow, Steven Shavell, "Economic Analysis of Law" in Alan J. Auerbach, Feldstein, Martin S., ed., *Handbook of Public Economics* Elsevier, 2002) 1661-1784 at 1661.

⁵⁶ Steven Shavell, "Economic Analysis of Accident Law" (2002) 396 Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series at 3. http://lsr.nellco.org/harvard_olin/396 accessed August 17, 2013.

⁵⁷ *Ibid.*, at 2-3.

⁵⁸ D.N. Dewees, Duff, D., Trebilcock, M.J., *Exploring the domain of accident law: taking the facts seriously* (New York: Oxford University Press, 1996).

System under Stress”, a perceived crisis in the mid-1980’s in liability insurance. Attention to class action claims had caused political, judicial and academic debate on the goals and future of the tort system, especially with respect to personal injuries.⁵⁹ Dewees et al. analyzed empirical evidence in five areas of accident law – automobile, medical, product-related, environmental, and workplace accidents. The format was an input analysis of the applicable structure and rules and an output analysis of system performance to evaluate the degree to which the empirical evidence supported three normative goals: deterrence, compensation and corrective justice. The optimal for each normative goal was defined in economic terms. The principal purpose of tort for economic analysis was deterrence. Optimally the system should discourage socially undesirable conduct or activities. The goal was being met to the degree empirical evidence confirmed that liability and damages encouraged efficient care and activity levels; barriers to recourse were few; claims resolution was accurate; and insurance premiums preserved incentives. On the output side, empirical evidence confirmed an increase in care and reduction of accidents.⁶⁰ Optimal compensation is based on a model of optimum insurance - coverage for all injury associated with risky activity, exclusions for self injury (gross negligence, reckless and intentional behavior), benefits were coordinated with other sources of compensation with deductibles to counter moral hazard; benefits were paid promptly; and insurance was provided by efficient risk spreaders. The output measure would be the proportion of victims who actually received compensation, whether the measure was adequate or excessive, and the administrative costs and delays.⁶¹ For the purposes of this thesis, corrective justice considerations will not be

⁵⁹ Ibid., at 3.

⁶⁰ Ibid., at 10-11.

⁶¹ Ibid., at 11.

considered as it was advanced primarily as a critique of tort law, not workers' compensation.⁶²

The chapter on workplace injuries explored the efficacy of tort while acknowledging that no fault insurance has generally replaced it. Through its assessment of historical studies, the studies of the one exception where tort liability had been retained (U.S. railway workers) and studies of product liability related workplace accidents the research provided little support for the efficacy of tort in either deterrence or compensation.

According to Dewees et al., deterrence of workplace injuries was the result of the interaction of a number of factors both internal and external to the workplace. Workers and employers made decisions influencing health and safety either as part of routine daily tasks or in negotiation over terms and conditions of employment. The market played a central role as workers demand higher pay for facing known risks or leave to accept a job with less risk.⁶³ The central instrument of deterrence was therefore the wage premium. Empirical studies were equivocal, some supportive and some not. The extent to which workplace risk was not compensated by wages at an efficient level was explained by market failures – information asymmetries (not all risk information was disclosed before and could change without disclosure after employment by the employer), externalities (workers had social costs that were not necessarily part of the private bargain) and imperfect competition (efficient allocation of risk in this context presumed an equality of bargaining power). Addressing imperfect competition, Dewees et al. asserted that while North America was closer to a perfectly competitive labour market, the costs of exit by the worker in response to increased risk or perception of risk were substantial. By comparison, an investor could alter her

⁶² Ibid., at 9.

⁶³ Ibid., at 347.

portfolio with relative ease to adjust for even subtle changes in the riskiness of given investments.⁶⁴

Examining tort rules as they existed before workers' compensation was introduced, Dewees et al. questioned other economic analysis of law theorists who suggested that restrictions such as the fellow servant rule (an employer will not be liable for the injury of an employee attributable to the negligence of other employees) were economically efficient.

Acknowledging that the least cost avoider (the test for who should be responsible) will vary from situation to situation, over a large range of situations it made no sense to remove the incentive from the employer to monitor and discipline employee behavior. Intuitively, the range of situations in which the employer would more efficiently prevent accidents was greater.⁶⁵

Dewees et al. concluded that workers' compensation was more efficient than tort in both deterrence and compensation of workplace injuries.⁶⁶

As a deterrent, the major input that Dewees et al. discuss was premium setting to address employer incentives. Industry rating where everyone in the same industry paid the same was, to them, the least efficient as it allowed unsafe firms to spread their costs. Experience rating, when the amount of the premium was influenced by the number of accepted claims, was promoted but the empirical evidence that it worked was unclear. Small firms and

⁶⁴ Ibid., at 348.

⁶⁵ Ibid., at 349.

⁶⁶ Ibid., at 382, 396.

diseases with long latency were identified as problematic. They suggested occupational health and safety regulations made only a small difference and are expensive.⁶⁷

The unintended side effect of no fault insurance was moral hazard. While increasing benefits would increase the incentive for employers to invest in safety, it could also induce employees to take less care to avoid accidents. More importantly employees might be induced to falsely report injuries or to extend the duration of minor injuries.⁶⁸ On the output side, some U.S. studies were seen as supportive of experience rating although subject to many limitations. The only unequivocal study was one that used fatality rates and its main finding was that increasing benefits led to a decrease in injury rates.⁶⁹ Overall they concluded that the evidence that experience rating reduced injuries was mixed but positive subject to enormous uncertainty.

In their assessment of the compensation function of workers' compensation, in the input analysis, Dewees et al. considered eligibility conditions, victim knowledge of entitlements, financial contributions and benefits. Under eligibility, the qualification "arose out of or in the course of employment" was identified as the central precondition. Provisions that deny workers benefits if they used drugs or alcohol or acted with wilful misconduct protect against moral hazard were discussed.

Workers under a no fault workers' compensation scheme were subject to two moral hazards according to Dewees et al: higher *ex ante* benefits induce workers to take more risks on the

⁶⁷ Ibid., at 362-378.

⁶⁸ Dewees, at 381.

⁶⁹ Ibid., at 382.

job than they otherwise would, and as *ex post* benefits increase, workers face incentives to file more claims and perhaps exaggerate claims.⁷⁰

Another problem area related to benefits for permanently disabled workers is that of determining the benefit based on a schedule and a medical assessment of impairment (the pre-Weiler reform model of compensation in the Ontario case). The authors acknowledged it had been criticized for its failure to differentiate how the same injury affected individuals differently, overcompensated those who return to work and undercompensated those who do not, and was thought to lead to litigation in the U.S. They suggested the alternative of a dual award system would more adequately and equitably deal with the worker's loss.⁷¹ No empirical evidence was offered.

On the output side, workers' compensation covered most workers and was seen to pay adequate benefits at reasonable administrative costs with minimal delay.

This relatively impressive performance of the workers' compensation system, and its considerable advantages and modest disadvantages relative to tort, may explain why criticism of workers' compensation over many decades has consistently led to recommendations for reform and adjustment rather than for abolition.⁷²

Some scholars, such as Martha T. McCluskey, challenged the neutrality of tone adopted by economic analysis. She argued that although efficiency principles were used to describe reforms as neutral economic measures aimed at maximizing good for all, these efficiency principles inevitably incorporated political and moral judgments about the proper redistribution of resources. According to her, the rhetoric of restoring an "efficient" balance

⁷⁰ Ibid., at 388.

⁷¹ Ibid., at 391.

⁷² Ibid. *supra* note 56 at 396.

between workers and employers through workers' compensation instead masked the fact that the reforms redistributed resources from injured workers to employers and insurers.⁷³

The key components of economic analysis – wage premium, moral hazard and experience rating - have been subjected to critique. There is substantial evidence that inequality of bargaining power between workers and employers has grown substantially since the 1980's with increasing globalization, restructuring and neo liberal government economic agendas.⁷⁴

Although moral hazard was presented as value neutral, it often included pejorative connotations that disparaged the motives of workers. Dembe and Boden explored the merging of the value neutral economic assumption that individuals would maximize their opportunities and the value-laden stereotype that workers are more inclined to fraud.⁷⁵

Deweese et al. comment, for example, that as benefits increase, “workers *could* face incentives to file more claims and *perhaps exaggerate* injuries [emphasis added]⁷⁶ as opposed to, as benefits increase, a worker was more like to stay home and recover more fully.⁷⁷ Baker in his review of the genealogy of moral hazard questioned key underlying assumptions of economics, especially that money compensated for loss and that people with insurance have control over themselves and the places where they are employees.⁷⁸

The critique by Dewees et al. of those who promote the efficacy of the fellow servant rule because of the incentive it created for co-workers to report unsafe behaviours is *a propos* here. Why only focus on the individual when, in most cases, the employer has more

⁷³ Martha T. McCluskey, "The Illusion of Efficiency in Workers' Compensation "Reform"" (1998) 50:3 Rutgers Law Review 657 at 658.

⁷⁴ Wayne Lewchuk, Clarke, Marlea, de Wolff, Alice, *Working Without Commitments - The Health Effects of Precarious Employment* (Montreal & Kingston: McGill-Queen's University Press, 2011).

⁷⁵ Allard E. Dembe, Boden, Leslie I., "Moral Hazard: A Question of Morality" (2000) 10:3 New Solutions 257.

⁷⁶ Dewees.supra note 56 at 388

⁷⁷ Dembe.supra note 73 at 273

⁷⁸ Tom Baker, "On the Genealogy of Moral Hazard" (December 1996) 75:2 Texas Law Review 237 at 277-280.

influence? One might also add, has better knowledge, ability to plan, and authority to make changes.

That being said, Dewees et al.'s review was remarkably supportive of the workers' compensation system's achievement pre reform. With the exception of two key areas, the challenges facing workers' compensation were around the edges and not central to its design. The two key problems in compensation of workers identified by Dewees et al. – entitlement for victims of occupational disease and benefits for permanently disabled workers – deserve further consideration.

As they were writing their book, the transformation of Ontario Workers' compensation to the dual award benefit structure had just begun.

Hyatt and Law, when considering the impact of later reforms in 1997, raised the question of reopening tort liability. By that time, both Ontario workers and employers were questioning the ongoing benefit of a system that was giving less and less to workers and demanding more and more from employers. In their assessment comparing settlements for back injuries with compensation benefits in British Columbia and Ontario, Ontario's workers' compensation still provided better benefits to workers than the tort system.⁷⁹

Senior judicial consideration of the economic elements of the workers' compensation trade off is brief and found in the judgements of the Newfoundland Court of Appeal in the *Nfld Reference*⁸⁰ and in the Supreme Court of Canada decision in *Martin and Laseur*.⁸¹ A rough

⁷⁹ D. E. Hyatt, Law, David, "Should Work Injury Compensation Continue to Imbibe at the Tort Bar?" in M. Gunderson, Hyatt, D., ed., *Workers' Compensation: Foundations for Reform* (Toronto: University of Toronto Press, 2000).

⁸⁰ *Reference re: Workers' Compensation Act, 1983 (Nfld.)*, ss. 32, 34, 1987 CanLII 118 (NL CA) at 135. Affirmed *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922.

adequacy was formulated recognizing the biggest difference to be the loss of non pecuniary damages. Income replacement, medical and other benefits provided in workers' compensation were considered to be probably superior.

Therapeutic Jurisprudence

Therapeutic jurisprudence is a perspective that regards the law as a social force that produces behaviors and consequences. Sometimes these consequences fall within the realm of what we call therapeutic; other times anti-therapeutic consequences are produced.⁸²

The objective of this theoretical approach is to promote ways in which the law can be made or applied in a more therapeutic way in conjunction with other values, such as justice and due process. It is a relatively recent jurisprudential perspective in North America in a formal sense first emerging in mental health law in the 1990's in response to serious abuses in civil commitment procedures.⁸³ Wexler, one of the original proponents of the approach, proposed a model based on "law as action, not simply the law on the books" dividing it into three categories: legal rules, legal procedures and legal actors. Drawing on examples such as the impact of the "Don't ask, Don't tell" legal rule on gay and lesbian soldiers, of adversarial processes in child custody cases on the child, and approaches of lawyers and judges in dealing with personal injury victims, therapeutic jurisprudence raised concerns about unintended adverse health consequences for the subjects of the law.⁸⁴ Mental health outcomes such as distress, anxiety and depression were an original focus. The question was posed, if current rules, procedures, and roles were causing this damage, how could we modify them in a way consistent with the rule of law and produce healthier consequences?

⁸¹ *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504 at 574 [*Martin and Laseur*].

⁸² David Wexler, "Therapeutic Jurisprudence: An Overview" (2000) 17 *Thomas M. Cooley Journal Law Review* 125.

⁸³ David Wexler, "Two Decades of Therapeutic Jurisprudence" (2008) 24 *Touro Law Review* 17 at 23.

⁸⁴ Wexler "Overview", *supra* note 82 at 129.

As Wexler noted, the answers to the questions could be determined with empirical study.⁸⁵

Insights were drawn from psychology, clinical behavioral sciences, psychiatry, criminology and social work.

Lippel reviewed the possibility of a therapeutic jurisprudence approach to workers' compensation in 1999.⁸⁶ Drawing inspiration from the experience of many injured workers' advocates and practitioners that their clientele were "belligerent, frustrated and highly demanding," Lippel examined how the workers' compensation system could be playing a role in generating those reactions and how it could be changed to reduce them.⁸⁷

Drawing on the original goals of workers' compensation to remedy deficiencies in tort and to achieve social harmony,⁸⁸ Lippel demonstrated how blaming workers remained central to the system. In addition to having to prove causation and repeatedly submit to litigation related medical exams, workers were subjected to stereotypes that are demeaning and negative.⁸⁹ Malingering and hysteria of injured workers were often raised. Research showed these medical diagnoses to reflect deep-seated cultural and social biases.⁹⁰ Often these labels were used by those not qualified to make the diagnosis and who had a vested interest in the outcome. The system institutionalized this "skepticism" towards the worker through "mass adjudication".⁹¹ Experience rating encouraged employer contestation.⁹²

As Lippel summarized:

⁸⁵ *Ibid.*, at 127.

⁸⁶ Katherine Lippel, "Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation" (1999) 22:5-6 *International Journal of Law and Psychiatry* 521.

⁸⁷ *Ibid.*, at 522.

⁸⁸ *Ibid.*, at 527.

⁸⁹ *Ibid.*, at 528.

⁹⁰ *Ibid.*, at 528-531.

⁹¹ *Ibid.*, at 538.

⁹² *Ibid.*, at 539.

The current system is imbalanced. Claimants can not discuss the reasons why they blame the employer yet many workers' compensation systems allow evidence of claimant's negligence and encourage blaming behavior on the part of employers, evaluating physicians and adjudicators. When a claimant exaggerates symptoms to maximize compensation he is labeled a malingerer. When employers or insurers indiscriminately contest or refuse claims to reduce costs they are labeled as effective managers. Behavior designed to maximize institutional profit is not considered to be pathological.⁹³

On the therapeutic side, the system provided, in many cases, for rapid payment and income replacement. This reduced the burden on injured workers and could minimize negative consequences. On the non-therapeutic side, contestation and stigmatization lead to perverse outcomes that lengthen claims and increase costs. System-generated depression was probably being ignored by most compensation systems. When depression delayed return to work, it was more costly for the system as well as the worker.⁹⁴

Simplifying access to benefits was recommended as an overall goal. Disability systems that were not causation-based eliminated much complexity and avoid many pitfalls. In the short term, smaller changes could be made. Experience rating provided strong economic incentive for employers to contest claims without economic sanction for unjust contestation.⁹⁵

Stigmatization should be avoided. Support for injured workers and administration improvements would help.

Lippel et al. revisited many of these concerns in a subsequent study of injured workers and their experiences dealing with the Quebec compensation board.⁹⁶ Using a participatory action research approach, Lippel et al. undertook a qualitative study to better understand the specific steps in the compensation process and the specific actors who affected, either

⁹³ Ibid., at 540.

⁹⁴ Ibid., at 542.

⁹⁵ Ibid., at 543.

⁹⁶ Katherine Lippel, "Workers describe the effect of the workers' compensation process on their health: A Québec Study" (2007) 30 *International Journal of Law and Psychiatry* 427.

positively or negatively, the self reported health of worker-claimants. They conducted 85 face-to-face semi structured interviews with injured workers in Quebec and a group interview with 25 injured workers. This was further informed by five other group interviews of injured workers' representatives in Quebec, Ontario and British Columbia.⁹⁷ The results confirmed many of her predictions from the earlier study. Negative health outcomes predominated, particularly in mental health. Stigma and an imbalance of power dealing with others in the system were reported.⁹⁸ Access to social support from a person or persons who was/were knowledgeable about the system was significant in reducing adverse health effects.⁹⁹ The process through which these negative outcomes evolved were described and consistent with prediction. Increased contestation by employers, the Board and doctors increased stigmatization.¹⁰⁰

Although the results cannot be generalized beyond its participants, other researchers have reported similar findings, including those who studied injured workers in Ontario.¹⁰¹ The perceptions of the process by workers allowed a better understanding of the dynamics that contributed to disability in injured workers who develop long term disability after experiencing a work injury.¹⁰² A more refined research approach to access to compensation, litigation and lawyers was needed to better predict health outcomes. Potentially perverse effects of employer incentives needed to be considered and stereotyping injured workers

⁹⁷ Ibid., at 429.

⁹⁸ Ibid., at 434-435.

⁹⁹ Ibid., at 436.

¹⁰⁰ Ibid., at 436-438.

¹⁰¹ Ibid., at 439. See also Sharon Dale Stone, "Workers without Work: Injured Workers and Well Being" (2003) 10:1 Journal of Occupational Science 7.; Ellen MacEachen *et al.*, "The "Toxic Dose" of System Problems: Why Some Injured Workers Don't Return to Work as Expected" (2010) 20:3 Journal of Occupational Rehabilitation 349.; Barbara A. Beardwood, Bonnie Kirsh & Nancy J. Clark, "Victims Twice Over: Perceptions and Experiences of Injured Workers" (2005) 15:1 Qualitative Health Research 30; Bonnie McKee Kirsh, Pat, "The needs and experiences of injured workers: A participatory research study" (2003) 21 Work 221.

¹⁰² Lippel "Quebec Study", *supra* note 96 at 440.

needed to stop in order to reduce stigma associated with claiming workers' compensation. Promoting stigma as a cost containment tool undermined the credibility of the system while generating new sources of ill health and harming those that the system was designed to protect.¹⁰³

1(b). Adjudication Principles

This section explores the underlying principles of decision making in individual cases that have evolved specifically in workers' compensation law and generally with respect to administrative law.

Statutory Interpretation

In Canadian common law, the objective of statutory interpretation is to discern the intention of the legislature that passed the law. The most frequently quoted example in Supreme Court of Canada decisions¹⁰⁴ is "Driedger's modern principle",

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.¹⁰⁵

This passage brought together the three main common law traditions of interpretation – the Mischief Rule, the Literal Rule and the Golden Rule.¹⁰⁶ In particular, it preserved the importance of understanding the purpose of the legislation and the "mischief" it was trying to correct, as a consideration in interpretation. Pierre-Andre Côté in his book on the interpretation of statutes suggested that the codification of the purposive principles in the

¹⁰³ Ibid., at 441.

¹⁰⁴ Stéphane Beaulac, Côté, Pierre-André, "Driedger's "Modern Principle" at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006) 40 *Revue juridique Thémis* 131 at 133.

¹⁰⁵ Elmer A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87.

¹⁰⁶ Beaulac, *supra* note 102 at 136.

Interpretation Act strengthened the proposition that parliament expects a liberal as opposed to restrictive interpretation.¹⁰⁷ Section 11 of the Ontario *Interpretation Act* reads,

Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.¹⁰⁸

Purpose is always relevant. The issue often is the weight which is given to it.¹⁰⁹

“That Nuisance Litigation”

Workers’ compensation law emerged in the latter part of the Nineteenth Century. Its evolution from common law beginnings as employer liability law is well documented.¹¹⁰

The time period saw both a significant increase in industrialization and in injuries and deaths to workers. In this time, before health and safety laws or social assistance, the only remedy which injured workers or their families had to mitigate a life of poverty was to sue the employer for damages. Drawing on decisions from Britain, Ontario courts applied a very restrictive legal view of a worker’s right to sue. The Courts presumed from the start that the worker knew and accepted the risk of the hazards of the job. An employer was not liable if the worker or a co-worker in some way contributed to what caused the injury. As Tucker wrote,

¹⁰⁷ Pierre-Andre Côté, Beaulac, Stéphane, Devinat, Mathieu, *The Interpretation of Legislation in Canada*, 4th ed. Carswell, 2011) at 412.

¹⁰⁸ Interpretation Act, RSO 1990 Chapter I.11, s 11.

¹⁰⁹ Côté. *supra* note 105 at 415.

¹¹⁰ This historical overview is taken from four sources: Eric Tucker, "The Law Of Employers' Liability In Ontario 1861-1900: The Search For A Theory " (1984) 22 Osgoode Hall Law Journal 213; Eric Tucker, *Administering Danger in the Workplace: The Law and Politics of Occupational health and Safety Regulations in Ontario 1850-1914* (Toronto: University of Toronto Press, 1990); R.C.B. Risk, " 'This Nuisance of Litigation': The Origins of Workers' Compensation in Ontario." in David Flaherty, ed., *Essays in the History of Canadian Law* (Toronto University of Toronto Press, 1983); Michael J. Piva, "The Workmen's Compensation Movement in Ontario" (1975) 67:1 Ontario History 39.

in effect, the court was adopting a *per se* rule based on the view that workers were normally in the best position to control the technology and each other at the very moment when their ability to do so was being diminished. As a result, the evidence of actual conditions under which labour was performed was not to be brought to the court's attention. It was deemed legally irrelevant.¹¹¹

The unfairness of this approach was obvious to many. Procedural rules were used by judges to remove the decision from the jury who tended to decide for the worker. Unions organized political and popular support for change. In Ontario in 1886 legislation was passed to mitigate the impact of some common law defences and lead to an improvement in the success of worker litigation.¹¹² This success was not sufficient as the numbers of injuries increased, the costs and delays of legal action mounted and labour continued to lobby.¹¹³ Even business representatives like the Canadian Manufacturing Association supported creating an alternative system, in part because of the costs to employers associated with successful litigation.¹¹⁴ In 1910 a Royal Commission was established under Chief Justice Meredith to study workers' compensation.

From the outset of the hearings, Meredith heard a consensus from both organized labour and organized manufacturing that a new compensation system was needed.¹¹⁵ In his Final Report Meredith set out a number of key features which the Ontario workers' compensation system should have.¹¹⁶ These key features, referred to as the "Meredith Principles," became and remain central to workers' compensation to the present. These principles were cited in

¹¹¹ Tucker, "Administering Danger", *supra* note 110 at 45.

¹¹² Tucker, "Employers Liability", *supra* note 110 at 252; Risk, *supra* note 108 at 432.

¹¹³ According to Piva, *supra* note 110 at 40, the number of reported accidents increased 300% from 1900 to 1904.

¹¹⁴ *Ibid.*, at 40; Risk, *supra* note 110 at 448.

¹¹⁵ *Ibid.*, at 458.

¹¹⁶ Meredith Report, *supra* note 47.

Supreme Court judgements and by Compensation Boards . This often cited example is taken from *Medwid v. Ontario* per Montgomery J.,

The Workers' Compensation Act is based on four fundamental principles:

- (a) compensation paid to injured workers without regard to fault;
- (b) injured workers should enjoy security of payment;
- (c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
- (d) compensation to injured workers provided quickly without court proceedings.¹¹⁷

In *Martin and Laseur*, Gonthier J, for a unanimous Supreme Court, adopted a similar summary in support of his analysis that the *Charter of Rights and Freedoms* applied to a new statutory provision in the Nova Scotia workers' compensation legislation that would treat injured workers with chronic pain differently from those with other disabilities. In explaining the importance of the entitlement of injured workers, he wrote,

As explained in *Pasiechnyk, supra*, the scheme embodies a historical trade-off between employers and workers. While the former are protected by s. 28 of the Act against the possibility of being sued in tort for work-related injuries, the latter are guaranteed a reasonable amount of compensation for such injuries without being subject to the costs, delays and uncertainties of an action before the courts.¹¹⁸

In the 2012-2016 Strategic Plan of the Ontario WSIB, Meredith principles were referred to in the vision statement and were listed as the foundation of the strategic framework: No-fault Compensation, Collective Liability, Security of Payment, Exclusive Jurisdiction and an

¹¹⁷ *Medwid v. Ontario*, 1988 CanLII 193 (ON SC) at 198-9.

¹¹⁸ *Martin and Laseur, supra* note 81 at 569. See also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 at 911 at 143 "The Board occupies the central position in the workers' compensation system. The system has three main aspects: (1) compensation and rehabilitation of injured workers, (2) the bar to actions, and (3) the injury fund. As seen above, all three are essential to the system as it was conceived by Meredith and implemented by each provincial legislature."

Independent Board.¹¹⁹ The Association of Workers' Compensation Boards of Canada, the national organization of all provincial boards in Canada, summarized the principles in more detail as follows,

There were five basic cornerstones to the original workers' compensation laws; cornerstones which have survived, to a greater or lesser extent, as follows:

1. No-fault compensation: Workplace injuries are compensated regardless of fault. The worker and employer waive the right to sue. There is no argument over responsibility or liability for an injury. Fault becomes irrelevant, and providing compensation becomes the focus.
2. Collective liability: The total cost of the compensation system is shared by all employers. All employers contribute to a common fund. Financial liability becomes their collective responsibility.
3. Security of payment: A fund is established to guarantee that compensation monies will be available. Injured workers are assured of prompt compensation and future benefits.
4. Exclusive jurisdiction: All compensation claims are directed solely to the compensation board. The board is the decision-maker and final authority for all claims. The board is not bound by legal precedent; it has the power and authority to judge each case on its individual merits.
5. Independent board: The governing board is both autonomous and non-political. The board is financially independent of government or any special interest group. The administration of the system is focused on the needs of its employer and worker clients, providing service with efficiency and impartiality¹²⁰.

At the centre of these principles and what holds them together was summarized by the phrase, "historic compromise." The phrase specifically refers to the legal compromise of tort rights. Workers gave up their right to sue in exchange for the benefits provided and employers gained protection from that right by paying premiums to the system. This notion

¹¹⁹ Workplace Safety and Insurance Board 2012-2016 Strategic Plan
<http://www.wsib.on.ca/en/community/WSIB/ArticleDetail?vnextoid=039171346daa5310VgnVCM100000469c710aRCRD> accessed November 11, 2012.

¹²⁰ Association of Workers' Compensation Boards of Canada, "History of Workers' Compensation."
<http://www.awcbc.org/en/historyofworkerscompensation.asp> accessed November 10, 2012.

of a compromise played a key role in court decisions as a reason not to allow any renewal of the right to sue by workers as a result of the *Charter of Rights and Freedoms*. For example, per Sopinka, J for the majority of the Supreme Court in *Pasiechnyk*¹²¹:

The bar to actions against employers is central to the workers' compensation scheme as Meredith conceived of it: it is the other half of the trade-off. It would be unfair to allow actions to proceed against employers where there was a chance of the injured worker's obtaining greater compensation, and yet still to force employers to contribute to a no-fault insurance scheme.

The Meredith principles articulated the purpose of the legislation and coloured all statutory interpretation.

Administrative Law

This section examines the historical organizational and legal characteristics of the Board and their implications for decision making.

A public corporation, not the courts or a tribunal, was given the exclusive jurisdiction to administer and decide everything regarding workers' compensation. According to Risk,

The immediate reasons for the choice (of a Board) were the apparent implications of group liability, and the strong determination to escape courts and lawyers, and these reasons were supported by the Canadian tradition of using the state to promote private business activity.¹²²

He went on to say,

Problems of procedure, especially the need to deal humanely and efficiently with large numbers of claims and the need for continuing lawmaking about entitlement, were virtually ignored.¹²³

¹²¹ *Pasiechnyk*, *supra* note 118 at 911.

¹²² Risk.*supra* note 108 at 466

¹²³ *Ibid.*, at 467.

Justice Meredith's own defence of the Board was rhetorical, defending against the accusation that such a Board would be influenced by partisan political considerations in practically all its doings,

I have no such fear. Whatever else may be doubtful as to the workings of the act there is no doubt, I think, that the members of the Board appointed by the Crown will impartially and according to the best of their ability discharge the important duties which will devolve upon them in the event of the draft bill becoming law.¹²⁴

For Justice Meredith, the critical question was to insure that the Board had the final say,

A compensation law should, in my opinion, render it impossible for a wealthy employer to harass an employee by compelling him to litigate his claim in a court of law after he has established it to the satisfaction of a Board such as that which is to be constituted, and which will be probably quite as competent to reach a proper conclusion as to the matters involved, whether of fact or law, as a court of law.¹²⁵

Justice Meredith opposed any resort to the courts. The statute creating the Board conveyed that grant of jurisdiction. This is not to say that Justice Meredith had no model that he was drawing from. He was heavily influenced by the German system of collective liability and framed the compensation law on the main lines of the German law with modifications.¹²⁶

He had contemporary examples in Canada, referring to two Provincial Commissions, the Ontario Railway and Municipal Board and the Hydro-Electric Power Commission; and one Federal, the Railway Commission of Canada.¹²⁷

The initial Act constituted a Commission to be called "The Workmen's Compensation Board" consisting of three members appointed by the Lieutenant - Governor in Council and

¹²⁴ Meredith Report, *supra* note 47 at 6-7.

¹²⁵ *Ibid.*, at 12-13.

¹²⁶ *Ibid.*, at 3.

¹²⁷ *Ibid.*, at 7.

to be a body corporate.¹²⁸ One Commissioner was appointed Chair.¹²⁹ Section 55 provided that the Board have like powers as the Supreme Court for compelling the attendance of witnesses and of examining them under oath, and compelling the production of books, papers, documents and things¹³⁰. The jurisdiction of the Board was set out in one section with three parts.

Firstly,

The Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect of which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon is final and conclusive and is not open to question or review in any court and no proceeding by or before the Board shall be restrained by injunction, prohibition or other process or procedure in any court or be removable by application for judicial review or otherwise into any court.¹³¹

Subsection 2 expressly covered the Board's jurisdiction to determine how an industry was scheduled. Subsection 3 was an explicit grant to allow the Board to reconsider any decision and rescind, alter or amend it. The section was amended in 1917 to add a fourth subsection, that the Board's decisions be made on the real merits and justice of the case; it was not bound by legal precedent.¹³²

With few additions, the Board remained the same until 1974 when a number of changes were made. The number of Board members was expanded. A vice chairman of appeals was added along with "not less than two or more than four" commissioners of appeals¹³³. A

¹²⁸ *Workmen's Compensation Act* 1914 c25, s45 [WCA1914].

¹²⁹ *Ibid.*, s 46(1).

¹³⁰ *Ibid.*, s 55.

¹³¹ *Ibid.*, s 60(1).

¹³² *Workmen's Compensation Act* 1917 c34, s11.

¹³³ See *Workmen's Compensation Act* RSO 1980 c539, s 56.

power to review the Act and recommend amendments was added.¹³⁴ The general grant of “powers of a Supreme Court judge” was replaced with a section specifying the Board had the power to summon witnesses, accept oral or written evidence, allow travelling and other expenses for injured workers and witnesses, post notices, enter a workplace to inspect and view any work and authorize any person to do anything the Board could do.¹³⁵ The jurisdiction of the Board remained unchanged, expanded by a list of specific inclusions¹³⁶.

The power to reconsider was retained in s. 75. The merits and justice provision was maintained in a separate section and the words “but shall give full opportunity of a hearing” were added.¹³⁷

From earliest times, most decisions including initial entitlement were delegated to staff. This decision making was framed by the forms that the law required be filled out as part of the claims making or premium paying process and by policy from the Board. The earliest written policy was found inserted in the 1916 Annual Report and titled “Rulings and Guiding Principles in Dealing with Claims.”¹³⁸ It is three typed pages long with advice on computing time and compensation, communication and cheques, and the right to compensation. Supervision and training provided the rest of the guidance. The statute made no statement about policy making. Policy documents were not publically available or systematically collected prior to the reforms studied in this paper.

Two other aspects of decision making by the Board differed from those of the courts and were not specified in the legislation prior to reforms. In his 1971 Law Society Special

¹³⁴ Ibid., s70(3)(b).

¹³⁵ Ibid., s80(a)-(f).

¹³⁶ Ibid., s 74(2).

¹³⁷ Ibid., s 79(1).

¹³⁸ Ontario Workmen’s Compensation Board Annual Report (Toronto: WCB, 1916).

Lecture, Bruce Legge, Q.C., then chairman of the WCB, described how compensation was awarded under an enquiry system and not after a trial between the parties as adversaries¹³⁹. It was the practice, in adjudicating a claim, that benefit of any reasonable doubt was given to the worker.¹⁴⁰ These procedural elements were seen to facilitate decision making, make it unnecessary for claimants to hire counsel and, according to Legge, “eliminate the need of the disabled workman to magnify disability, and thereby worsen the hope of rehabilitation, in order to have the award set at as high a level as possible.”¹⁴¹

The amount of work of the Board grew steadily over the years. In 1915, there were 17,033 claims reported and \$893,321 paid out in total benefits. By 1936 there were 61,382 claims and \$5,643,798.79 paid in benefits.¹⁴² By 1966, 354,296 allowed claims were settled and a total of \$76,665,497 paid.

The legislation required the Board to make an annual report to the Legislature.¹⁴³ The Annual Report’s primary function was to present the financial statements of the corporation. The Chair provided an assessment of important past year accomplishments. A Statistical Supplement provided an overall number of claims, types of injuries and causes of accidents. Numbers of claimants receiving temporary and permanent benefits and duration of temporary benefits were listed. By the 1960s, a more detailed report on key activities was included as well.

¹³⁹ Bruce Legge, "Practices and Procedures before the Workmen's Compensation Board", *Law Society of Upper Canada Special Lectures* (Toronto: LSUC, 1971) at 155.

¹⁴⁰ *Ibid.*, at 154.

¹⁴¹ *Ibid.*, at 155.

¹⁴² Ontario Workmen’s Compensation Board Annual Report (Toronto: WCB, 1936).

¹⁴³ WCA1914, *supra* note 128, s 66. By 1968, the report went to the Minister of Labour and from Minister to Legislature.

In 1951, the Board's Annual Report began to report the number of rejected and abandoned claims for the first time. This continued until 1956 when the section headed "Rejected Claims" is expanded, adding the statement that, "The rejection of claims is considered an extremely serious matter;" and including a description of a WCB general policy that in all cases of reasonable doubt, the claimant is to receive the benefit. Claims were usually rejected because the condition for which the compensation is sought did not arise out of and in the course of employment.¹⁴⁴ In 1965 a new system of appeal was announced, replacing the Review Board with two new levels of appeals including an Appeal Tribunal which could hold hearings. These hearings were informal, allowed representation but no cross examination and the decision was rendered "upon the merits and justice of the case." Also announced was a reorganization of the claims department.¹⁴⁵ The 1967 Annual Report included a section on Appeals in which a statistical study of work reported that more than two million decisions were made in the Board in the year. The number of appeals totalled 4,572 or just one fifth of one per cent of the decisions made.¹⁴⁶

In December 1973, Bill 269 was passed reorganizing the structure of the Board and laying the ground work for the Board's new appeals system.¹⁴⁷ A separate position of "vice chairman of appeals" was created with additional Commissioners of Appeals to assist him.

The low number of rejected claims and appeals were put forward as an indicator that the system was functioning well. At the same time, a more formal appeal system evolved within the Board. By 1980, a clear differentiation of appeals from other decision making had emerged in a new organizational structure. During the same period, the Malton

¹⁴⁴ Ontario Workmen's Compensation Board Annual Report (Toronto: WCB,1956) at 13.

¹⁴⁵ Ontario Workmen's Compensation Board Annual Report (Toronto: WCB,1965) at 6.

¹⁴⁶ Ontario Workmen's Compensation Board Annual Report (Toronto: WCB,1967).

¹⁴⁷ Ontario Workmen's Compensation Board Annual Report (Toronto: WCB, 1973) at 4.

Convalescent Centre became the Downsview Rehabilitation Centre with a growing emphasis on helping injured workers and their employers with return to work. Vocational and medical rehabilitation became a focus of the Annual Reports in the 1970s and 80s, becoming separate departments in 1978.¹⁴⁸

The late emergence of appeals within the workers' compensation system as a separate subject of discussion in the annual reports raises questions about the legal character of decision making within a Board. Most of the concepts and principles relating to decision making are drawn from decisions of the Superior Courts. Their application to administrative bodies, and large comprehensive organizations like the Board in particular, is not entirely clear. In recent years there has been some discussion among academics about administrative decisions and the legal qualities and characteristics that they require or acquire.

Sara Slinn observed in her study of the behaviour of the British Columbia Labour Board in response to law reform,

Statutory interpretation and decision making by administrative tribunals differ distinctly from that of courts, arising from their different capacities for rule and policy-making and exercising discretion, the ongoing rather than episodic nature of tribunal decision making, different degrees of independence from political control and, as addressed in a subsequent section, the potential -- or perhaps inevitability -- of dynamic statutory interpretation.¹⁴⁹

Slinn examined the decision making of the Board in light of a series of ever more directive Purpose Clauses that succeeding governments imposed on it by statute.¹⁵⁰ In order to explain why the Board decision making seemed to ignore these directions of government, Slinn examined the role and decision making process of tribunals.

¹⁴⁸ Ontario Workmen's Compensation Board Annual Report (Toronto: WCB,1978) at 17.

¹⁴⁹ Sara Slinn, "Untamed Tribunal? Of Dynamic Interpretation and Purpose Clauses" (2009) 42 University of British Columbia Law Review 125 at 141.

¹⁵⁰ *Ibid.*, at 2-15..

She began with the principles of statutory interpretation developed by the courts, but argued that there are two significant differences between a tribunal and a court's decision making that influence the process of interpretation. Firstly, the legislature typically granted tribunals broad authority to exercise discretion in interpreting and applying legislation, which courts do not have.¹⁵¹ Tribunals needed to engage in ongoing rule or policy making to manage this discretion, to create consistency without foreclosing the decision. Secondly, tribunal decision making was an "experience of ongoing and integrated interpretation of relatively indeterminate, or intransitive, statutes". In many administrative settings, the particular matter before the tribunal was only a single episode in the parties' ongoing relationship. "Effective resolution of that matter may depend on taking the longer view into consideration."¹⁵² Independence though not guaranteed was important to sustaining the credibility of both decision making and the relationships. A tension existed between this need for independence on one hand and the obligation to carry out government policy. Slinn went on to argue that in order to carry out its responsibilities, the tribunal drew on different sources, its history and traditions, and its constituency in order to interpret the statute through a process of dynamic statutory interpretation. Remaining impartial and relevant in a highly politicized context was important to the tribunal which had to maintain relationships in order to sustain its credibility in ongoing decision making. Decisions were made in this context maintaining other parts of the Labour Board's history, practice and culture in its interpretation of the new purpose clauses and not as opposition to government.¹⁵³

¹⁵¹ Ibid., at 16.

¹⁵² Ibid., at 17.

¹⁵³ Ibid., at 27.

These decision making challenges get magnified in the workers' compensation context because of the scale of adjudication required. The WSIB posted on the website that there are 1 million decisions made annually.¹⁵⁴ This phenomenon of "mass adjudication" poses particular challenges in applying court based principles. Evans, in his article on the phenomenon, posed the objective thus, "how to satisfy the need for efficient and effective decision-making while ensuring that the authority in question remains responsive both to individual claimants' entitlement to essential procedural decencies and to the particularities of individual claims?"¹⁵⁵ He notes that recent reforms (1980s) had focused on creating an independent tribunal, improving disclosure and representation following court based experience. Essential procedural decency, fairness and efficacy must, according to Evans, take into account the dynamics of the system and will often best be achieved by arrangements that deviate significantly from the procedures followed, even by more adjudicative administrative tribunals.¹⁵⁶

Houle and Sossin in their study of tribunals' use of guidelines argue that fairness has emerged as the key principle used to legitimate administrative decision making and a tribunal's policy making and argue

When guidelines are considered to be creatures born out of the exercise of discretionary powers, values of the legal system are often the only parameter indicating the scope and the limit a public authority has when exercising that discretion.¹⁵⁷

¹⁵⁴ WSIB Facts at a Glance
<http://www.wsib.on.ca/en/community/WSIB/ArticleDetail?vnextoid=bcfcf3bff3d0c210VgnVCM100000469c710aRCRD> accessed November 10, 2012.

¹⁵⁵ John M. Evans, "Problems in Mass Adjudication: The Court's Contribution" (1990) 40:3 University of Toronto Law Journal 606.

¹⁵⁶ *Ibid.*, at 610.

¹⁵⁷ France Houle & Lorne Sossin, "Tribunals and guidelines: Exploring the relationship between fairness and legitimacy in administrative decision making " (2006) 49:3 (Fall) Canadian Public Administration 282 at 290.

Citing the Supreme Court, they argue the possibility of strengthening procedural guidelines without threatening fairness values and describe two important contexts for fairness in administrative decision making – procedural predictability and substantive consistency.¹⁵⁸ They argue that substantive consistency is most important for adjudicative decision making and in doing so integrate the use of reported decisions with guidelines as a fairness measure.

Some adjudicative principles are imbedded in workers' compensation law and have remained substantially unchanged and unchallenged over time. The current legislative statement is

119. (1) The Board shall make its decision based upon the merits and justice of a case and it is not bound by legal precedent.

(2) If, in connection with a claim for benefits under the insurance plan, it is not practicable to decide an issue because the evidence for or against it is approximately equal in weight, the issue shall be resolved in favour of the person claiming benefits.¹⁵⁹

These principles in themselves suggest a different quality of decision making, applicable to all stages of adjudication, something above the routine and formalistic application of rules.

The foundation of the guarantee of fairness and impartiality in decision making is independence. As Sossin and Smith observe in their review of the role of the Chair of the Alberta Labour Relations Board in law reform, “the right of institutional independence is not a right enjoyed by the tribunal but rather a right enjoyed by those whose claims and disputes are adjudicated by that tribunal.”¹⁶⁰ The contrary to fairness and impartiality is bias, the

¹⁵⁸ Ibid., at 291.

¹⁵⁹ Bill 99, *supra* note 7.

¹⁶⁰ Lorne Sossin and Charles Smith, The Independent Board and the Legislative Process (June 2006) online Alberta Federation of Labour <http://www.afl.org/index.php/View-document/134-2006-June-Independent-Board-and-the-Legislature-Process.html> at 3 accessed August 17, 2013.

perception that the decision maker is partial or unfair. The difference being that the protection of the tribunal's independence is at common law and can be overridden by the statute that created it unless protected by the *Charter*. The presumption against derogation of independence however is strong and courts will generally infer that the legislature intended the tribunal to conform with natural justice.¹⁶¹

The Board on the Edge of Reform

Ontario's workers' compensation system was created by legislation and came into force on January 1, 1915 after a very intense political battle and a Royal Commission report to address the plight of injured workers. For the next 45 years, the legislation and the system remained more or less the same. While there were royal commissions in 1932¹⁶², 1957¹⁶³ and 1967¹⁶⁴ there was no significant restructuring of the system. The Board collected premiums from employers based on their rate group in an equal share collective liability. The Board paid benefits to injured workers based on the medical status of their injury (temporary or permanent, partial or total) for life.

By the 1970's, the picture had become very different. A 1973 Task Force report proposed a major reorganization of the WCB, pointing out that its organization lacked sensitivity and effectiveness.¹⁶⁵ The 1975 provincial election that brought the New Democratic Party (NDP) to official opposition status was in part fueled by their focus on the treatment of injured workers. One campaign advertisement in particular showed injured workers

¹⁶¹ *Ibid.*, at 5.

¹⁶² Report of the Commissioner in the matter of the Workmen's Compensation Act of Ontario (Toronto: King's Printer, 1932).

¹⁶³ Report of the Commissioner appointed to inquire into and report upon, and to make recommendations regarding the Workmen's Compensation Act of Ontario (Toronto: Baptist Johnston, 1950).

¹⁶⁴ Report of the Royal Commission in the matter of the Workmen's Compensation Act of Ontario, (Toronto: Queen's Printer, 1967).

¹⁶⁵ Task Force on Workers' Compensation Board, *The Administration of Workmen's Compensation in Ontario* (Toronto: WCB Task Force, 1973).

drowning in a sea of WCB red tape.¹⁶⁶ At that point, red tape symbolized the bureaucratic rules of the Board that prevented workers from being compensated. A political movement composed of injured workers, activists and trade unionists became active and was effective in bringing attention to the problems of injured workers and their treatment by the WCB.¹⁶⁷

By 1980 injured workers' cases made up the second largest category of complaints to the Ombudsman.¹⁶⁸ Many injured workers were represented in making their case at the Board by MPP's constituency assistants, union representatives, and legal clinics, even some law students and lawyers. Injured workers were organizing. Front page stories were in the media.¹⁶⁹ The most compelling stories of poverty were contrasted against the monolithic and autocratic decision making Board.

The Davis Conservative government's response was two-fold.¹⁷⁰ First it made small but key additions to the legislation, empowering the Board to pay a temporary supplement to unemployed permanently disabled workers and cost of living increases to workers receiving permanent benefits. Secondly, in 1977, the government contracted with a private accounting and consulting firm, the Wyatt Company, to conduct a comprehensive study of the economic viability of the system. This in turn led to an internal Board review¹⁷¹ and ultimately in 1980 to the appointment of Paul Weiler to conduct an extensive review of the workers' compensation system.

¹⁶⁶ Personal recollection.

¹⁶⁷ Storey, *supra* note 473.

¹⁶⁸ See Butterworth Worker's Compensation in Ontario Service §24.161.

¹⁶⁹ Storey., "Social Assistance" *supra* note 49.

¹⁷⁰ *Ibid.*, at 73.

¹⁷¹ *Ibid.*

Part Two. A Description of Law Reform

This part summarizes more than thirty years of law reform by focusing on policy changes and decision making structures. The presentation of policy changes begins with the government recommendations for reform then identifies and describes the key legislative and substantive changes that result. Decision making is explored by the examination of changes to governance, appeals and adjudication. Particular attention is paid to how key decision makers – the Board of Directors, adjudicators, the appeal tribunal – understood the decisions that they were making.

The Ontario experience of workers' compensation reform will be described in five periods from 1980 to the Present. The divisions are artificial but reflect significant changes or shifts in direction that occurred in different time periods. In each division, governance and appeals, and issues related to substantive rights are discussed. Figure One is a chart of the five periods with a summary of changes to benefits, governance, appeals and adjudication made in each period.

The first period, 1984-1994, covers the implementation of the Weiler report. A major change in the structure and calculation of benefits for workers took place. Balancing employer and labour interests was a central theme of these reforms. Organized labour and employers become active stakeholders in governing the WCB. An independent appeal tribunal was created to hear final appeals. Adjudication was reorganized to address the delivery of services and benefits associated with the new scheme.

The second period, 1994-1997, represents a change in priorities. It is both the high point and low point of labour influence on governance of the Board and begins the move to a new more business friendly Board with greater government oversight.

The third period, 1997-2004, is dominated by the Jackson reforms which shifted reform to favour employers. A phrase from the time was “Turning to Face the Employer”. Reforms changed the name of workers’ compensation to workplace safety and insurance. Prevention became the first objective of the statute. Vocational rehabilitation was eliminated and services of return to work were contracted out in the name of self reliance. The Appeal Tribunal was bound to Board policy and correctness was promoted as a principle of adjudication.

In the fourth period, 2005-2009, after another change in government, the systemic failures of the key programs of the 1997 reforms are brought to light. Independent researchers identify that the percentage of long term unemployed permanently disabled workers receiving wage

Figure 1: Reform Timeline



loss benefits were increasing. Self reliance had failed. Experience rating failed. A unique collaboration between the Board, researchers and injured workers brought to light the stigma which injured workers suffered as a result of the implementation of Jackson reforms.

Prevention, the centre piece of the Jackson reforms, is removed from the mandate of WSIB in 2011.

These failures are acknowledged in the fifth and final period under review, 2010-2012. The intervention of the Provincial Auditor General in 2009 supports the objectives of the Jackson reforms and reframes the fundamental fairness issue of workers' compensation as unfairness to future generations of employers.

2(a). 1980-1994 Weiler Reforms – “Finding the Balance”

Our study of law reform in workers' compensation in Ontario begins with a report written by Paul Weiler at the request of the Minister of Labour in a Conservative government that had ruled Ontario for the previous forty years.

Paul C. Weiler had been the Mackenzie King Professor of Canadian Studies at Harvard Law School since 1978 and previously, from 1973-1978, the chairman of the British Columbia Labour Relations Board. He was appointed to review the system of workers' compensation in Ontario with a broad mandate. At that time, the Board's 3,000 employees processed 460,000 claims a year with a budget of nearly \$700 million.¹⁷²

From the beginning, his inquiry was embroiled in controversy. Instead of a Royal Commission to conduct a full fledged formal inquiry, he proceeded informally, considering issues and proposals on the agenda for reform in Canada, talking to interested groups and

¹⁷² Paul C. Weiler, *Reshaping Workers' Compensation for Ontario* (Ontario: Ministry of Labour, 1980) at 7.

parties and planning to report back by year's end to government with a package of proposals for statutory reform.¹⁷³ He neither undertook nor commissioned any empirical research.¹⁷⁴ Weiler outlined the reading and consulting that he did in one paragraph. No public hearings were held or transcripts released.¹⁷⁵

Weiler rooted his recommendations for reform in the principles of the historic compromise, reiterating the trade-off in rights between workers and employers. He understood workers' compensation was different from social assistance and tort law. "Any diminution from the full enjoyment of that right [*to full compensation*]," said Weiler, "should only result from cogent and compelling reasons."¹⁷⁶

Weiler initially rejected costs as a spurious argument. Society can and does pay the costs. If the costs are insured, they are distributed broadly in the community. If not, then individual workers and their families pay. It would be unjust to cut worker benefits simply because of costs. That being said, business should not have to absorb unduly onerous costs because of the impact on competitiveness and profitability of Ontario industries.¹⁷⁷ Weiler resolved this apparent conflict by arguing that workers pay the cost of workers' compensation benefits both as consumers and as wage earners in an increasingly competitive world. "Workers' compensation is a vehicle through which able bodied workers share their income with their disabled fellows."¹⁷⁸

¹⁷³ Ibid., at 8.

¹⁷⁴ Ibid., at 10.

¹⁷⁵ Ibid., at 9.

¹⁷⁶ Ibid., at 15.

¹⁷⁷ Ibid., at 16.

¹⁷⁸ Ibid., at 18.

This shifted his focus away from what workers had lost and toward an examination of possible inappropriate gains by injured workers. Weiler became concerned that the then current benefit levels provided more disposable income to some workers than they earned and that there were incentives for workers to remain on compensation benefits long after they were sufficiently recovered to return to work. He encouraged efforts by the Board's administration to terminate benefits to those who are not legitimately entitled. Weiler recommended reducing the percentage of earnings covered and eliminating any stacking with other benefits to improve workers' incentives to return to work. He separated injury and impairment from ability to work arguing that there was no necessary connection between them.¹⁷⁹ This laid the foundation for Weiler's most dramatic proposal – to change the benefits which permanently disabled workers received, from a fixed monthly pension paid for life based on a medical assessment to a dual award system paying a much smaller lump sum payment for residual impairment and providing eligibility for wage loss benefits when unemployed or underemployed. These wage loss benefits would be dependent on efforts to return to work. A worker who did not make sufficient efforts or refused suitable employment would experience a reduction in benefits.¹⁸⁰ These wage loss benefits would be available to the permanently disabled worker until age 65.

Weiler believed business should take a disabled employee back if it had suitable and available work. The system he proposed would not give a worker any legal right to return to work even if suitable work was available. He recommended that the Board be empowered to

¹⁷⁹ *Ibid.*, at 52.

¹⁸⁰ *Ibid.*, at 24.

continue to pay benefits to a worker where his or her employer refused to provide re-employment.¹⁸¹

While he attributed most complaints to an antiquated system, Weiler acknowledged the potential conflict between administrative efficiency and legal justice.¹⁸² In the final analysis an improved appeal structure would have to provide natural justice to injured workers and their employers. Weiler's recommendation was to create a Workers' Compensation Appeal Tribunal (WCAT) separate from the Board to be the final level of appeal for workers and employers.¹⁸³ The Offices of the Workers' Advisor (OWA) and Employer Advisors (OEA) paid for by the Board but housed in the Ministry of Labour would be created to provide free representation to injured workers and their employers respectively in appeals¹⁸⁴.

Weiler's key recommendation for employers was experience rating, modifying the amount of premium paid based on the number and length of claims in relation to an average. From the beginning of the workers' compensation system, all employers paid the same premium rate as the others in their class. Under experience rating, employers with more and longer claims paid a penalty and those who had fewer and shorter got a rebate.¹⁸⁵ This was justified for its potential to improve health and safety at work and thereby reduce claims. Although Weiler recognized it would not prevent individual claims, he believed that the incentive would improve overall employer efforts.¹⁸⁶

¹⁸¹ Ibid., at 65.

¹⁸² Ibid., at 92.

¹⁸³ Ibid., at 112-116.

¹⁸⁴ Ibid., at 123-125.

¹⁸⁵ Ibid., at 74.

¹⁸⁶ Ibid. in Chapter 3. Financing Workers' Compensation generally.

Weiler acknowledged that experience rating could generate contention and litigation by employers who would be more inclined to contest claims. In a footnote he stated he believed this concern was somewhat overdrawn. Weiler relied on an appeal to “intuitive common sense” and more on hunch than proof.¹⁸⁷ As with his other major recommendation – the dual award system- he specifically recommended ongoing monitoring to assess the success of what he had put forward.

Weiler’s recommendations became legislation in two stages. In 1984, the Conservative government brought in amendments to modify income coverage from 75% gross pre-accident wages to 90% net and revamped the corporate Board of the WCB. A separate workers’ compensation appeals tribunal was created. The Offices of Worker and Employer Advisors were established in the Ministry of Labour.¹⁸⁸ In 1990, a Liberal government implemented the dual award system for workers injured after that date. It included the right to vocational rehabilitation and an obligation on employers to re-employ injured workers in workplaces with twenty or more employees.¹⁸⁹

Substantive Change to Benefits

In this period, a key transformation of benefits for permanently disabled workers took place. The major statutory change to benefits for unemployed and underemployed permanently disabled was set out in the amendments that came into force in 1990. A dual award system was introduced. One award, the Non Economic Loss (NEL), was based on an impairment rating similar to that used to determine the previous pensions and produced a lump sum based upon a percentage of a fixed amount set out in the statute. The other award, the Future

¹⁸⁷ *Ibid.*, at 90.

¹⁸⁸ *Workers’ Compensation Amendment Act (No. 2)* SO 1984, c.58. [Bill 101]

¹⁸⁹ *Workers’ Compensation Amendment Act, 1989*, S.O. 1989, c. 47 , s 54[Bill 162].

Economic Loss(FEL), was a payment based on the difference between a percentage of what the worker was earning before the accident and what she or he was capable of earning after the accident in suitable and available employment. The legislation provided vocational rehabilitation as a right and under specific timelines. Wage loss protection was promised to age 65. Although the right to return to a pre-accident job was not guaranteed, if the employer failed to accommodate an injured worker, the Board was empowered to penalize the employer and to provide continuing benefits to the worker.

The central question affecting unemployed permanently disabled workers was the meaning of the phrase “ suitable and available employment.” If it meant that the worker had a job that she or he could do, then the legislation provided actual wage loss (subject to co-operation) as suggested by Weiler. An alternative practice is to attribute income from a job that the worker could do, a practice called deeming. Deeming is the fictitious attribution of income when a permanently disabled worker is unemployed but deemed capable of employment, and there is no specific job available.

The consequence for unemployed permanently disabled workers is clear. Some will be unemployed and yet receive substantially less than full wage loss benefits.

Governance

A Board of Directors of the Board (BoD) with representatives from some employers and unions was established headed by a government appointed Chair.¹⁹⁰ A new position of President was created to oversee the administration. These are the key leadership roles throughout the reform periods. A description of the changes in these positions during the reform periods is provided in Appendix 1.

¹⁹⁰ Ibid., s 56(1).

During this period, the practice of successive Conservative, Liberal and NDP governments was to seek nominations to the Board from major employers, employer organizations and the Ontario Federation of Labour. A representative of organized injured workers was appointed for the first time in 1991 on the recommendation of the Ontario Network of Injured Workers Groups (ONIWG), a coalition of injured workers groups.¹⁹¹

The amendments in this period left the mandate and powers of the Board virtually unchanged.

Throughout this period, the Board was focused on developing policy on two fronts. On the one hand, appeals to the new independent tribunal raised questions about the validity of Board policy, engaging the Board directly. On the other hand, the shift to the dual award system changed the nature of the adjudication of workers' entitlements.

Appeals

Weiler proposed the creation of a specialist administrative tribunal with investigative powers, which afforded parties an oral hearing and was independent of the Workers' Compensation Board.¹⁹² Using the British Columbia WCB's Board of Review and the Ontario Labour Relations Board as examples, the Report described a tripartite design in which the Ontario Federation of Labour (OFL) and Canadian Manufacturers Association (CMA) would be consulted on appointments. The decisions of this new Tribunal would be reported to help build a coherent jurisprudence to work out and refine "sensible principles and policies".¹⁹³ The decisions would be final except for the possibility of review by the BoD of the Board when the principles of the judgement of an appeal panel were

¹⁹¹ <http://www.injuredworkersonline.org/Organizations/oniwg.html> accessed August 17, 2013.

¹⁹² Weiler, at 112.

¹⁹³ Ibid., at 166 see note.

incompatible with the interpretation of statute or established policies of the BoD. The Board would have a final say.¹⁹⁴

Workers' Compensation Appeals Tribunal(WCAT)

The key elements of the statutory framework of the Appeals Tribunal in this reform period were three components. Firstly, there were those sections which created the Tribunal as an institution, addressing the appointment of the Chair and members, the role of the Chair as chief executive officer, the establishment of tripartite appeal panels and their remuneration.¹⁹⁵ The Tribunal is clearly a separate institution from the Board. A second section described its jurisdiction to hear appeals, requiring it to hear only appeals of final decisions of the Board, and provided that the Tribunal's decisions were final and conclusive and not opened to question or review in any court.¹⁹⁶ The description of the Appeal Tribunal's authority to hear appeals and the privative clause is identical to that of the Board.¹⁹⁷ Subsequent provisions addressed medical panels, the authority to make rules, the decisions the Tribunal could make, notice requirements and the release of written decisions.

The third component was section 93, the power of the Board to review a Tribunal decision,

Where a decision of the Appeals Tribunal turns upon an interpretation of the policy and general law of this Act, the board of directors of the Board may in its discretion review and determine the issue of interpretation of the policy and general law of this Act and may direct the Appeals Tribunal to reconsider the matter in light of the determination of the board of directors.¹⁹⁸

¹⁹⁴ Ibid., at 116.

¹⁹⁵ Bill 162, *supra* note 189, s 81-85.

¹⁹⁶ Ibid., s 86.

¹⁹⁷ Ibid., s 69(1).

¹⁹⁸ Ibid., s 93(1).

Where the Board decided a review was warranted, it was required to hold a hearing or receive submissions, give its decision in writing, and could stay the Tribunal's decision.¹⁹⁹

The meaning of this power and its role in influencing Tribunal decision making would be central to the relationship, by way of decision making, between WCAT and the Board in this period.

Ron Ellis was appointed the first Chair of WCAT. In the first WCAT Annual Report, Ellis set the standard by which the Board's decisions would be judged,

In cases where the Board decision under appeal is based on a directive or guidelines, assuming no disagreement on the factual or medical issues, the ultimate question for the Tribunal remains the same: Does the decision comply with the Act? The Tribunal is not intent on reviewing Board directives or guidelines from a policy perspective but it must, as a threshold matter, satisfy itself that the directive or guideline in question is not incompatible with the requirements of the Act.²⁰⁰

The former internal appeals system had developed an "unconscious intrinsic presumption of validity" regarding Board policy and the absence of significant court review had the practical consequence of allowing the WCB to "pursue its own common sense view of what the Act meant, free, to a large extent, from effective challenge. " This carried with it, said Ellis, "the seeds and appearance of arbitrariness." The Appeal Tribunal would correct this. The creation of the Appeals Tribunal represented, in effect, a deliberate choice in favour of more law and less discretion.²⁰¹

A number of significant decisions by WCAT during this time period were seen as a departure from Board Policy. Some examples are Decision 72²⁰² which addressed the breadth of

¹⁹⁹ Ibid., ss (2),(3) and (4).

²⁰⁰ Workers' Compensation Appeal Tribunal Annual Report (Toronto: WCAT, 1985-6) at 5.

²⁰¹ Ibid., at 6.

²⁰² Decision 72, 2 WCATR 28.

coverage of the statute's definition of accident; Decision 918²⁰³ recognizing entitlement for illness due to work related mental stress; Decision 206²⁰⁴ recognizing the authority to pay interest on late paid benefits to workers; and Decision 915²⁰⁵ which recognized entitlement for chronic pain. Decision 915 had exceptional importance because it was set up from the beginning as part of a "leading case strategy."²⁰⁶

WCAT decisions were reviewed twice by the Board exercising its authority under s 93 in Decisions 72 and 915. Decision 72 involved the definition of "accident" and whether a chance event was included. The facts in the case involved a worker who died of a heart attack alone in a remote area. The Tribunal held that since the worker had died in the course of his employment, a statutory presumption applied that the death had also arisen out of his employment even without evidence of what had caused the death. While the Board overruled the Tribunal's interpretation, it expanded the meaning of disablement to incorporate "chance events."²⁰⁷ By doing so, it became possible for workers with repetitive strain injuries and back injuries to be compensated but required proof that there was something about the work that contributed to the injury.

Decision 915²⁰⁸ and its subsequent review by the BoD²⁰⁹ provides insight into the views of both the WCAT and the Board on how decisions should be made. Decision 915 was the flagship case of the new Tribunal. Originally established by the Tribunal Chair as the "pensions leading case" to address the issue of pension assessment about which many

²⁰³ Decision 918, 9 WCATR 48.

²⁰⁴ Decision 206, 9 WCATR 4.

²⁰⁵ Decision 915, 7 WCATR 1.

²⁰⁶ Workers' Compensation Appeal Tribunal Practice Direction 2

²⁰⁷ Review of Decision No. 72, 12 W.C.A.T.R. 85.

²⁰⁸ *Supra* note 205.

²⁰⁹ Decision 915 R, 15WCATR 247.

appeals to WCAT were concerned, the strategy chose a “typical case” where the worker and employer were represented and then allowed interveners. Lengthy hearings were held with many expert witnesses including some employees of the Board. The decision upheld the method by which the Board calculated pensions. It went on to recognize chronic pain as a compensable disability.

The Board reviewed Decision 915 using its authority under s96²¹⁰. Drawing on Weiler’s report, the decision pointed out that corresponding to the creation of the independent tribunal was the creation of the BoD. The BoD included members representative of employers, workers, professional persons and the public.²¹¹ While the Tribunal was the judicial arm of the workers’ compensation system, the “new” BoD was vested with management and governance of the corporation. The BoD was, according to the BoD, the quasi legislative and administration branch of the workers’ compensation system.²¹²

In this scenario, the roles of the BoD and the Tribunal were complementary with potential conflict only when the Tribunal decision turned on an interpretation of general law and policy of the Act *as evidenced by Board policy*. There was a duty on the BoD to provide policy guidance. It was the duty of the BoD to consider the potential impact of decisions on their responsibility to administer the Act and govern the Board.²¹³

Reviewing WCAT decisions under s. 93 was seen as an onerous task by the BoD and to be reserved for exceptional cases. It should only be warranted when it in some way interfered with or was contrary to the manner that the BoD had determined that the Act should be

²¹⁰ Ibid.

²¹¹ Ibid., at 249.

²¹² Ibid., at 250.

²¹³ Ibid., at 252.

administered. On this point, the BoD agreed with the Chair of the Appeals Tribunal who wrote the original Decision 915.²¹⁴ The Board must reconsider seriously the policy in question so that, following the review, only one policy exists for the continuing administration of the Act. According to the BoD, the Tribunal's approach to a board of directors' policy that has been developed in accordance with principles in administrative fairness ought to be,

1. Is it illegal? That is, does it give the Act a patently unreasonable construction?
2. If it does not, then are there substantial reasons for not following the policy?²¹⁵

If the policy was the result of fair administrative practice and withstood these two questions, then the Tribunal should accept and follow the policy.²¹⁶

By the time this review was conducted, the BoD had released its own policy on compensation for chronic pain disability which was substantially in agreement with the Tribunal's judgment. The only remaining difference between the Tribunal and the BoD was respecting retroactivity of benefits. In the end the BoD agreed in the result and accepted the date selected by the Tribunal.²¹⁷

No further reviews of WCAT decisions were undertaken by the Board. Ellis displayed some frustration in the 1991-2 Annual report where he noted that the divergence between Tribunal interpretation of WCA and WCB policy was "widening." He discussed the failure of the Board to use s.93 despite significant differences. He was critical that this "distorts the system and undermines its integrity." A comparison to BC and Quebec was drawn where

²¹⁴ Ibid., at 253.

²¹⁵ Ibid., at 258.

²¹⁶ Ibid., at 259.

²¹⁷ Ibid., at 272.

failure to reconcile between decisions of the Board and the Tribunal had, in Ellis' view, lead to more appeals.²¹⁸ At this time the number of appeals to the Tribunal started to steadily increase.

By 1994 a protocol was developed between the Tribunal and the Board to identify differences and to put in place procedures to address them.²¹⁹ The Board would file generic submissions for consideration by the panel until the statute was changed in 1997. The Tribunal focus shifted to the dramatic increase in the number of appeals and the delays in producing decisions. By 1996, the number of incoming appeals had increased by 64% above 1994 levels and 128% above 1991 levels.²²⁰

Adjudication

Weiler knew, when he proposed the dual award system, that it would present a major problem for administrative decision making,

The administrative problem in turn has two sides to it. On the one hand, the need to establish and review the scope of actual wage loss adds another task, an onerous one, to a Board already burdened by an annual caseload which is nearing the half-million mark. From the point of view of the injured worker, he loses his automatic entitlement to a fixed pension which is independent of the bureaucratic favour of a Board already distrusted by many of these permanently disabled workers.²²¹

He agreed that adjudicating entitlement to wage loss benefits would expand the need for administrative judgement by the Board and the potential for human error and conflict. This was justified, in his view:

If such a change in substance of the program would produce major improvements in our ability to adequately compensate those workers – and

²¹⁸ Workers' Compensation Appeal Tribunal Annual Report (Toronto: WCAT, 1991-1992) at 11.

²¹⁹ Workers' Compensation Appeal Tribunal Annual Report (Toronto: WCAT, 1994).

²²⁰ Workers' Compensation Appeal Tribunal Annual Report (Toronto: WCAT, 1995-1996) at 6.

²²¹ Weiler, at 59.

only those workers - who suffer real economic losses because of industrial injuries, the additional administrative burden and bureaucratic discretion would be a small price to pay.²²²

In 1988, as part of the much larger restructuring, the Board undertook a major review of adjudication.²²³ The strategy report identified the increase in claims, the complexity and range of disabilities in claims, changes in legislation and the shift in focus to rehabilitation and early return to work as major challenges.²²⁴ Two principle duties were established – decision making and maintaining effective contact with “worker clients and employer clients.”²²⁵ The objective, taken from the mission statement, was “efficient, effective and equitable decision making”. Human resources issues were considered, noting the number, experience and turnover of adjudicators.²²⁶ In addition to training,

Adjudicators need performance standards and quality assurance that reflect the Board’s Mission Statement in terms of speed, accuracy and justice.²²⁷

Various processes including specialized adjudication, case review and case co-ordination were adopted.

By 1991, there were sufficient complaints about decision making at the Board, that a Standing Committee of the Legislature recommended that WCB immediately undertake an operational review of service performance; appeals should be monitored and relevant decisions communicated to adjudication staff; and the Board should develop a client satisfaction survey²²⁸. The new administration undertook an Operational Review and

²²² Ibid.

²²³ Alan Wolfson, “Organizational Change at the WCB,” Paper presented at Workers’ Compensation 75th Anniversary Symposium (September 21, 1989) at 44.

²²⁴ Workers’ Compensation Board Adjudication Strategy Report (May 8, 1989) at 10.

²²⁵ Ibid., at 24.

²²⁶ Ibid., at 14-15.

²²⁷ Ibid., at 65.

²²⁸ Workers’ Compensation Board Operational Review of Service Performance Final Report (May 18, 1992) at 5.

established a bi-partite task force with representatives of employers and workers. A decline in service was seen as relating to “too much change too fast” in the previous ten years, externally and internally.²²⁹

The primary complaint about adjudication related to delays in decision making.²³⁰

Recommendations were made for improvement. The Board committed to an ongoing service improvement program anchored in performance standards, ongoing evaluation and formal feedback from clients and staff. An annual client satisfaction survey was to be conducted “in order to elicit client feedback concerning the ongoing improvement efforts of the WCB.”²³¹ The need for a quality improvement program had been identified and steps were already underway.²³² Performance indicators were being developed but appeared to focus solely on timeliness issues.²³³

The report of the Task Force was similar in its tone. Service was the primary focus.

Recognizing the major changes that had taken place, the Task Force placed some responsibility on the failure of the Board to have a strategic plan.²³⁴ Quality assurance was recommended for the appeals process.²³⁵

Overall both reports focused on the human resources dimension of the Board emphasizing improvements to morale, standards, communications and service.

²²⁹ Ibid., at 27-36.

²³⁰ Ibid., at 37.

²³¹ Ibid., at 160

²³² Ibid., at 170-

²³³ Ibid., at 174.

²³⁴ Workers' Compensation Board, Report of the Chairman's Task Force On Service Delivery and Vocational Rehabilitation (July, 1992) at 15.

²³⁵ Ibid., at 80.

2(b). 1994-1997 Changing Priorities

This period covers from the New Democratic Party government amendments in 1994 to the initial response in 1995 of the newly elected Conservative government. It represents both the high point and low point of stakeholder influence. Both sets of legislative amendments asserted greater government direction over what the BoD did, especially in its planning.

Governance

NDP amendments in 1994 modified the composition of the Board of Directors by formally recognizing the role of two vice chairs, one labour and one employer. The Chair was to be appointed on recommendation of the directors.²³⁶ In addition, a “good faith” provision was added,

The members of the board of directors shall act in good faith with a view to the best interests of the Board and shall exercise the care, diligence and skill of a reasonably prudent person.²³⁷

A purpose clause and provisions requiring the Board to enter into a memorandum of understanding with the Government were added beginning in this time period. The evolution of these provisions are explored in more detail in Appendix 2.

The government changed hands on June 26, 1995. The initial Conservative amendments shortly after they were elected addressed key elements of the 1994 amendments – the co-chairs were eliminated, the chair and board were temporarily suspended and a government appointed president ran the Board.²³⁸ The order of the purpose clause was rearranged to give precedence to financial considerations.

²³⁶ *Workers’ Compensation Amendment Act*, SO 1994 c24, s56(1) [Bill 165].

²³⁷ *Ibid.*, s 58.

²³⁸ *Workers’ Compensation Amendment Act*, SO 1995 c 5, s 6(1) [Bill 15].

The initial Conservative amendments also introduced a new provision requiring an injured worker to report any “material change in circumstances” or face prosecution. A “snitch line” and special prosecutions group was set up within the Board. Public exposure of flagrant non reporting by many employers led to investigations of some employers. The requirements for the MOU were enhanced.²³⁹

Appeals

While there were no legislative changes made to the Tribunal in this period, the new Conservative government in 1995 refused to re-appoint certain vice chairs that the WCAT chair had recommended and appointed some who were not. Ellis himself was advised that he would not be reappointed and negotiated an earlier leaving time. Although nothing about this, other than the Ellis departure, is acknowledged in the WCAT Annual Report, Ellis himself made the issue public in a speech to the Canadian Bar Association – Ontario Workers' Compensation Section on September 24, 1997. Ellis asserts that never before had a government failed to reappoint members of Tribunals or appointed members in this way without explanation. Ellis framed the discussion starkly in the context of tribunal independence:

it is my submission that, in an agency environment where re-appointments are a necessary and integral part of the system, a government's assertion of the right to use its re-appointments power selectively for the purpose of screening-out individual adjudicators for undisclosed reasons apparently personal to them is - must be – fundamentally incompatible with the principles of natural justice²⁴⁰.

²³⁹ Ibid. See Appendix 2 for detailed description.

²⁴⁰ S. Ronald Ellis, "An Administrative Justice System in Jeopardy: Ontario's Appointment Policies" (1998) 6 Canadian Labour and Employment Law Journal 53 at 60.

Ontario adjudicators no longer have reason to be confident that they can make their decisions without fear of personal consequences.²⁴¹

A debate arose at the time among political scientists as to whether or not these and similar actions by the Harris government were a matter of the government insuring appropriate accountability to the elected political agenda. Should Governments appoint chairs, for example, who are sympathetic to their direction?²⁴² Haddow and Klassen suggest, using the example of the OLRB, that Harris was rebalancing the system back to the Ontario status quo before the excesses of the NDP from 1990-1995. Ontario, they would argue, was a liberal, competitive pro business state. The NDP with its emphasis on the interests of labour and equity ran against the grain of institutional legacies from an earlier era. “Conservative policy, by contrast, has created a stable equilibrium, not opposed by sufficiently powerful political and societal forces to be overturned any time soon”.²⁴³

None of the WCAT vice chairs who were not reappointed challenged the government’s decision. Several Labour Relations Board vice chairs whose appointments were revoked by the Conservative government at the same time, and without explanation or cause, appealed to the courts. The Court of Appeal, focusing on the quasi judicial functions of the OLRB, said

The image of independence is undermined when government commitments to fixed appointments are breached. The court should not, by its orders, encourage repetition of this conduct. Reinstatement at this stage, with one appointment expired, another about to expire, and the third position undoubtedly filled, is inappropriate. Therefore, it is my view that we should accede to the appellants' request that the sole order of this court be a

²⁴¹ Ibid., at 61.

²⁴² David Johnson, "Regulatory agencies and accountability: an Ontario perspective" 34:3 Canadian Public Administration 417.

²⁴³ Rodney Haddow, Klassen, Thomas R., "Partisanship, Institutions and Public Policy: The Case of Labour Market Policy in Ontario, 1990-2000." (2004) 37:1 Canadian Journal of Political Science 137.

declaration that the Order-in-Council dated October 2, 1996 was null and void at its inception.²⁴⁴

2(c). 1997-2004 Jackson Reforms “Turning to Face the Employer”

A discussion paper about workers’ compensation reform was released by the Conservative government in 1995. A government Minister was appointed specifically to oversee the reforms. In 1996 the Minister Cam Jackson published the New Directions Report (Jackson Report). This report identified three major problems with the system: a growing unfunded liability threatened the long term viability of the system; payments of enriched benefits and rehabilitation services to workers without improvements in return to work outcomes and without additional premiums to pay the costs were allegedly driving up costs; and the Board was a bureaucracy unresponsive to employers, workers and the needs of the economy.²⁴⁵

The principle reason motivating the need for restructuring workers’ compensation in the Jackson Report was the Board’s unfunded liability. The unfunded liability was related to the financial resources that the Board had on hand to pay out all claims including future costs. At the time of the Weiler report, the unfunded liability was said to be 50%. Weiler did not think this was significant but believed it should not be allowed to grow larger. In fact it did grow and by 1997 had become a major concern of employers, their consultants and politicians who said it threatened the financial viability of the system.

²⁴⁴ *Hewat et. Al. v. Ontario* 1998 CanLII 3393 (ON CA) at 10.

²⁴⁵ Cam Jackson, *New Directions for Workers Compensation Reform – Report of the Honourable Cam Jackson Minister Without Portfolio Responsible for Workers’ Compensation Reform*. (Toronto: Ontario Government, 1996).[Jackson Report].

The principles underlying the Jackson Report were bulleted:

- The order of priority for the workers' compensation system should be prevention first, return to pre-accident work next, rehabilitation when needed and compensation if required.
- Workers' compensation should insure workers only against injuries caused by work
- Workers' compensation should be administered to serve workers and employers efficiently and effectively.
- The workers' compensation system should maintain a fair and affordable level of compensation for all benefit recipients today and in the future.
- The workers' compensation system should include incentives that encourage timely return to suitable work; and no worker should receive more on compensation than the worker would from working.
- All employers benefiting from a collective liability system should pay their fair share of its costs.²⁴⁶

The Report proposed that fostering self reliance of employers and workers and focusing the Board's mandate on workplace accidents, along with financial reforms, would lead to a more streamlined and efficient Board that would focus on prevention.

Under the heading "Refocusing the System: Worker and Employer Self-Reliance", the Jackson Report dealt with major criticisms involving claims management and return to work. In the Report's view, there was too much dependence on the Board. Workers were too focused on their claims and employers too focused on avoiding and transferring costs.

On return to work, the Report asserted that early return-to-work must be the primary objective of the workers' compensation system. According to the report, despite paying almost half a billion dollars on vocational rehabilitation, wage loss benefits, and the obligation on employers to re-employ and accommodate, the Report found that "the system's performance in this area remains poor." The diagnosis was that there was insufficient co-operative involvement of the injured worker, employer and health care provider.

²⁴⁶ Ibid., at p 6.

Availability of vocational rehabilitation supplements and services encouraged the injured worker to remain on benefits. The incentives to return to work were inadequate.²⁴⁷

The recommendation of the Jackson report was to eliminate vocational rehabilitation and replace it with a responsibility on the employer to come up with a return to work plan within 20 days. If the worker could not return, he or she would be eligible for one labour market re-entry plan (LMR), an assessment of skills and plan to mitigate effects of injury. This would be reinforced by increasing the incentive on the worker by reducing the percentage of earnings covered further and requiring the worker to co-operate.²⁴⁸

The Workplace Safety and Insurance Act 1997(Bill 99)²⁴⁹ was passed to implement the Jackson Report. The Workers' Compensation Board became the Workplace Safety and Insurance Board (WSIB) and WCAT became the Workplace Safety and Insurance Tribunal (WSIAT).

The Jackson reforms rearranged the priorities of the Act beginning with the prevention mandate, followed by health care, return to work and then finally, if necessary, payments to injured workers.

Substantive Changes to Benefits

The percentage of income that benefits replaced was further reduced from 90 % to 85% of net income. The Non-Economic Loss (NEL) award was retained. The different categories of short and long term benefits (FEL) were replaced by one Loss of Earnings (LOE) benefit which retained the wage loss character with one significant difference: the Board now only

²⁴⁷ Ibid., at p 17.

²⁴⁸ Ibid., at p 25.

²⁴⁹ *Bill 99, supra* note 7, s 119.

had to consider whether there was a “suitable” job for the worker. "Available" was removed. This gave the Board adjudicators greater discretion to deem unemployed permanently disabled workers to be able to earn income.

The Jackson reforms removed the right to vocational rehabilitation and replaced it with a more limited opportunity for what became known as LMR, the Labour Market Re-entry plan. These services would be carried out by external providers. The Vocational Rehabilitation Branch was eliminated and those capable of delivering the service laid off or relocated. WSIB staff became contract supervisors, only becoming involved at decision time. In keeping with the overall reordering of priorities, the LMR services were only provided as a last resort.

Employers were expected to take more responsibility for providing “early and safe return to work.” Workers were required to co-operate regardless of their condition. In keeping with its restructured priorities, the Board focused its attentions in this period on integrating the prevention mandate and improving the delivery of health care.

The Jackson reforms required the Board to consider only whether there was suitable employment in determining the post accident earnings of unemployed injured workers and not whether it actually was available. From 1997 – 2007, this process involved using the Federal Ministry of Human Resources and Social Development’s National Occupational Classification (NOC).²⁵⁰ The decision maker simply used this system to identify jobs for which the worker possessed the skill and experience. The NOC would then be used under the Payment of Loss of Earnings Benefits Policy with current wage guide information to

²⁵⁰ WSIB Operational Policy 19-03-03 (15 June 1999). For more information about NOC see <http://www5.hrsdc.gc.ca/noc/english/noc/2011/Welcome.aspx> accessed August 17, 2013.

identify deemed earnings in suitable employment.²⁵¹ The worker's benefits would be then reduced by that amount.

Governance

The Jackson reforms did not formally change the structure of the BoD very much. The BoD was smaller and now included representatives from insurance and banking even though neither was covered by the Act. Representatives from labour were appointed by government without consultation with the Ontario Federation of Labour. There is a clear shift from public service to private sector influence.

At the same time, the Board's obligation to decide matters in accordance with legal principles, including fairness, was restated:

- (1) The Board shall make its decision based upon the merits and justice of a case and it is not bound by legal precedent.
- (2) If, in connection with a claim for benefits under the insurance plan, it is not practicable to decide an issue because the evidence for or against it is approximately equal in weight, the issue shall be resolved in favour of the person claiming benefits.
- (3) The Board shall give an opportunity for a hearing.
- (4) The Board may conduct hearings orally, electronically or in writing.²⁵²

Introduced first in the 1995 amendments, the Board became obligated to ensure a review of the cost, efficiency and effectiveness of at least one of its programs annually by public accountants.²⁵³

²⁵¹ WSIB Operational Policy 18-03-02 (15 June 1999) at 2.

²⁵² *Bill 99*, *supra* note 7, s 119

²⁵³ See current Workplace Safety and Insurance Act 1997 SO 1997, c 16, sch A, s168(1) [*WSIA1997*].

Value for money audits are in widespread use across Canada and internationally as a means for evaluating public programs.²⁵⁴ The Auditor General of Ontario described their role as follows:

In 1978, new amendments to the Audit Act marked a radical shift in the work of the Provincial Auditor by giving the Office for the first time a clear mandate to conduct value-for-money audits. Up to this time, the Provincial Auditor's work had focused on verifying that money spent was accounted for correctly and that adequate accounting procedures and controls existed. A value-for-money auditing mandate provided the Auditor with much greater scope to look beyond the numbers. Value-for-money auditing involves assessing whether government programs are being well managed and whether they provide good value for the taxpayer.

We also examine the level of service that is being provided to the public and, where possible, compare it to the best practices of other jurisdictions that deliver similar services.

According to its 2011 Annual Report, about two thirds of the Office's work relates to value for money audits on various programs which since 2004 included the broader public services of hospitals, schools etc.

The words "Value for Money" do not appear in the words of either the *Auditor General Act* or *Workplace Safety and Insurance Act*.²⁵⁵ What defines a value for money audit (VFM) are three key features, here as set out in the *Auditor General Act* :

- Money should be spent with due regard for economy.
- Money should be spent with due regard for efficiency.
- Appropriate procedures should be in place to measure and report on the effectiveness of programs.²⁵⁶

²⁵⁴ J.J. Glynn, "Value for Money Auditing - An International Review and Comparison" (1985) 1:2 Winter Financial Accountability and Management 113.

²⁵⁵ In *WSIA* 1997, supra note 253, the words appear as a heading which is not considered to be part of the Act. See *Interpretation Act* RSO 1990 cI.11, s9.

²⁵⁶ *Auditor General Act* RSO 1990 cA.35, s 12(2)(f)(iv) and (v).

In addition to financial controls, the VFM audit includes elements of compliance, in particular

- identifying the key provisions in legislation and the authorities that govern the auditee or the auditee's programs and activities as well as those that the auditee's management is responsible for administering;
- and performing the tests and procedures we deem necessary to obtain reasonable assurance that the auditee's management has complied with these key legislation and authority requirements.²⁵⁷

Acknowledging that value-for-money audits focus on how well management is administering and executing government policy decisions, the Auditor General in theory draws a line at the merits of government policy. It is the Legislative Assembly, not the Auditor, that holds the government accountable for policy matters.²⁵⁸

Questions remain about whether value for money audits make a difference in public administration.²⁵⁹ VFM audits have replaced all other forms of publically reported internal review by the WSIB. The initial audits were focused on particular programs - Special Investigations Branch; Partnership and Accountabilities between WSIB and the Health and Safety Associations; Early and Safe Return to Work Project; and Workwell Audits. As described above, the Labour Market Re-entry Program was reviewed in 2003 and 2009, reporting on administration and program changes but unable to identify the significant deficiencies which lead to the complete reorganizing of the program.

Concerns have been raised when the VFM approach is used to evaluate decision making functions around entitlement under social welfare legislation. Ellis and Laird on behalf of the Ontario Administrative Justice Working Group responded to the 2007 report of the

²⁵⁷ The Office of the Auditor General of Ontario Annual Report (Toronto: AG,2011) at 432.

²⁵⁸ Ibid.

²⁵⁹ See Danielle Morin, "Influence of Value for Money Audit on Public Administrations: Looking beyond Appearances" (2001) 17:2 May Financial Accountability and Management 99.

Ontario Provincial Auditor on its value for money audit of the Ontario Disability Support Program, in particular its comments on the role and efficacy of the Social Benefits Tribunal.²⁶⁰ The authors' main concern was the failure of the Provincial Auditor to appreciate the role of an adjudicative body in relation to the Ministry to which it reports and the first level government decision maker whose decisions it reviews. The Auditor General's report appeared to hold the appeal body at fault for the number of successful appeals that were allowed.

Central to the authors' concern was the standard of proof and policy perspective that the Provincial Auditor was using. The Provincial Auditor was concerned that policies and procedures were adequate to *ensure* that *only* eligible individuals receive benefits. This, according to Ellis and Laird, was the opposite of the goal of the legislation to *ensure* that no person who is eligible for the assistance *failed* to receive it.²⁶¹

Secondly, the authors maintain that, from a legal rights perspective, a standard of proof that would *ensure* that *only* eligible individuals received benefits was closer to the criminal standard of "beyond a reasonable doubt," a stricter standard than the law required. If indeed the Ministry was requiring front line decision makers to follow such a standard,

a stricter standard of proof [*is*] being applied by the DAU [*Disability Adjudication Unit*] than what the law requires the Tribunal to apply, that difference would by itself go some way to explaining the inordinate percentage of overturns on appeal.²⁶²

²⁶⁰ S. Ronald Ellis, Laird Kathy, "The Provincial Auditor and the Administrative Justice System" (2010) 23 Canadian Journal of Administrative Law and Practice 237.

²⁶¹ *Ibid.*, at 243.

²⁶² *Ibid.*

In their view, there are two flaws that need to be corrected. The first is that the Provincial Auditor needed to assiduously respect the foundational principle of adjudicative independence. Second, the criteria of “value” must include an appreciation of the legal context, including the overall policy goal of the legislative scheme at issue, and the operative adjudicative principles which circumscribe decision making including standard of proof, standard of judicial or court review, and reasonable apprehension of bias.²⁶³

Appeals

Jackson's "New Direction" proposals specifically targeted the Appeal Tribunal. The original discussion paper floated the question whether or not an independent Tribunal is needed given its \$11.4 million in direct costs to the compensation system and the uncertainty and unpredictability it has created by allowing appeals where the work connection is suspect. The disagreement between Board policy and Tribunal decisions was cited along with the growth of a "lucrative advocacy industry" which took advantage of inherent uncertainties, frequent exercise of discretion and openness of appeal process.²⁶⁴ The Office of the Worker Advisor was targeted because of its advocacy on policy issues.

The Jackson Report recommended restrictions on the Tribunal,

- Time limits should be imposed on the right to appeal within the Board and to the Tribunal. This is justified because the needs of a “mass adjudication” process which serves the greatest number of workers and employers effectively and efficiently must be balanced against the need for fairness.²⁶⁵
- The roles of WCB and WCAT should be clarified. The WCB as administrator sets the policy parameters within which WCAT must decide appeals. WCAT should be required to adhere to WCB policy in adjudicating appeals, whatever its views on the policy in question.

²⁶³ Ibid., at 244.

²⁶⁴ Jackson Report, *supra* note 245 at 21-23.

²⁶⁵ Ibid., at 39.

- The number of issues appealable to WCAT should be reduced by removing “minor matters,” such as employer access to files and requests for worker medical examinations, and imposing a 60 day time limit to appeal.
- The WCAT process should be streamlined to reduce cost and improve efficiency by a statutory preference for single adjudicator (not tripartite panels) and hearings within 120 days.²⁶⁶

Workplace Safety and Insurance Tribunal (WSIAT)

Three structural changes were made to the Appeal Tribunal by the Jackson reforms:

- 1) tribunal hearings would be heard by a single vice-chair with tripartite panels an exception.²⁶⁷
- 2) the Tribunal would continue to have the exclusive jurisdiction to hear appeals but some issues no longer provided for an appeal to the Tribunal, such as employer requests for medical examinations and access to a worker’s file.²⁶⁸
- 3) section 93 review by the Board was replaced with section 126 that directed the Tribunal to apply applicable Board policy with respect to the subject matter of any appeal.²⁶⁹

In the event that the Tribunal in an individual case concluded that a Board policy was inconsistent with, or not authorized by, the Act or does not apply to the case, the Tribunal was required to notify the Board.²⁷⁰ The Board would then review the matter, provide an opportunity for submissions and, within 60 days, issue a written direction, with reasons, to the Tribunal that determined the issue raised in the Tribunal’s referral.²⁷¹

The WSIAT continued to face increases in the number of appeals as a consequence of new legislation and two attempts by the Board to eliminate a backlog. According to the 2000 Annual Report,

²⁶⁶ Ibid., at 41.

²⁶⁷ *Bill 99*, *supra* note 7, ss174(2) and (3).

²⁶⁸ Ibid., s123(2).

²⁶⁹ Ibid., s126(1).

²⁷⁰ Ibid., s126(4).

²⁷¹ Ibid., s126(7).

“Caseload intake first showed a significant increase in 1996 when it grew by 56% from the previous year. In comparison, during the first half of the 1990s, incoming cases grew by an average annual rate of 11.6%. The number of incoming cases continued to rise in 1997 and 1998 until it peaked at over 10,000 cases in 1998, up from about 5,000 cases in the previous year.”²⁷²

In the 1998 Annual Report, the impact of the amendments to the jurisdiction of the Tribunal and the requirements under s.126 were laid out. This became a formula that was repeated in every subsequent Annual Report along with a description of the decisions that related to Board policy. The practical problems of identifying Board policy were identified when there are differing statements at different times by the Board.²⁷³

At the time of this study, there were four areas reported where the Tribunal requested a s.126(4) review by the Board.

Tribunal formal requests for the Board to review policy under s.126(4) occurred in four different circumstances, each of which was represented by more than one decision by the Tribunal.

The first example addressed compensating injured workers with mental illness due to chronic stress prior to the 1998 amendment that precluded this. Decision No. 809/98 and 1233/99 drew from other WCAT decisions that determined this was included within the definition of “accident.” Decision 809/98 was referred to the Board for review in a decision dated December 1, 1999. No response is reported.

²⁷² Workplace Safety and Insurance Appeal Tribunal Annual Report (Toronto: WSIAT, 2000) at 13.

²⁷³ Workplace Safety and Insurance Appeal Tribunal Annual Report (Toronto: WSIAT, 1998) at 6-7.

The second example involved employer requests for a transfer between the two Schedules.²⁷⁴ These are eight (originally ten but two were withdrawn) identical claims by a municipality to be able to move their nursing homes from Schedule 1 to Schedule 2 along with all the other municipal functions. The original decision of the Board was that all nursing homes had to be in Schedule 1. The original Vice Chair hearing the appeal concluded that this was not correct and referred the policy for a 126(4) review. The Board review decision suggested that the policy was discretionary. The final decision accepted the Board change and exercised its discretion to allow the transfer.²⁷⁵

The third example addressed the requirement of notice to an injured worker that her or his Loss of Earnings (LOE) benefits would be terminated. While other WSIAT decisions also addressed this issue,²⁷⁶ it is Decision 2474/00 which made the matter a subject of a 126(4) review. At issue was a Board *Operational Policy* that stated that a worker should be notified before his or her LOE benefits were cut. The requirement for notification was not in the Act. The Jackson reforms had changed the responsibilities of injured workers. Before the reforms, the Board took an active role in the claim, assessing the disability and facilitating the return to work. After the reforms, responsibility shifted onto the workplace parties through “self reliance.” In this world, the Board was not involved until something went wrong, i.e. an injured worker had not accepted suitable work. The Tribunal’s interpretation was that the new law required the worker to co-operate even when s/he was totally disabled. In the final decision, after the Board’s review, it was found that notice was limited to circumstances where the Board made a decision to terminate benefits at a date in the future.

²⁷⁴ The employers covered by Ontario workers’ compensation legislation are distributed between two Schedules. Schedule 1 employers pay a premium based on the rate group in which they have been classified. Schedule 2 employers pay the full cost of each claim and an administration fee.

²⁷⁵ Decision 1943/98F.

²⁷⁶ Decision 609/02; Decision 623/03.

Most remarkable about this decision is its concern about workers not co-operating and the negative impact on employers at a time when LOE awards were increasing because of the failure of employers to provide suitable employment.²⁷⁷ The concern about Board notice was focused on workers being able to avoid co-operating until formally notified. No consideration was given to the impact on a worker on finding out his benefits were cut without any notice.

The fourth example involved the clothing allowance provided to permanently injured workers whose clothing was damaged by a brace or other assistive device worn because of their or his disability. Decision 1057/09 is one of a number of appeals concerning clothing allowance.²⁷⁸ The clothing allowance provision reads,

If the Board pays for an assistive device or prosthesis, the Board may upon request give the worker an annual allowance to repair or replace clothing that is worn or damaged because of it.²⁷⁹

For some time prior to November 1996, the Board paid the same amount to injured workers who wore back braces. Between Nov 1, 1996 to Jan 1, 2006 the Board changed its policy and paid a different amount to an injured worker for damaged clothing based on the type of brace the worker was wearing, whether a Harris brace or a “soft brace.” The wearer of the “soft brace” received significantly less. After December 31, 2005, the policy was changed again and paid the same amount again. The Board claimed the different payments were supported by medical and scientific evidence. No medical or scientific evidence was ever provided to support differentiation. There was evidence that the Board had researched financial savings. In an interim decision, the panel ruled,

²⁷⁷ See Sheila Hogg-Johnson et al., *Are changes in workers' compensation policy driving increasing long duration of claims?* (2011) Unpublished. Provided by author.

²⁷⁸ Others are Decision 1058/09, 1059/09, 1060/09, and 1061/09.

²⁷⁹ *Bill 99, supra* note 7, s 39(3)

While the financial analysis of the clothing allowance issues was comprehensive, and the literature review on the efficacy of back braces/supports was extensive, medical evidence or research studies as to the damage caused was, practically speaking, non-existent.²⁸⁰

The panel then ruled,

the Board cannot make policy for an improper purpose or for a purpose that is outside the scope of the Act. We find that the 1996 CAP was not authorized based on the lack of evidence available and provided (when requested) to support the stated reasons for changing the 1996 CAP. It was effectively an exercise of discretion based on irrelevant, extraneous or collateral factors. Such a policy change cannot reasonably be said to be in accordance with the legislation.²⁸¹

A review by the Board under s 126(4) was requested by the WCAT vice chair in a decision dated July 10, 2012. No results have yet been reported.

The flexibility towards employers claims compared to workers claims is also apparent in other circumstances where the Tribunal was able to carve out a significant discretion in the application of Board policy when it found “exceptional circumstances” and “manifest unfairness” to employers, an approach prior to 1997 used to address unfairness to injured workers. This approach was used to allow employers’ interest on rebates and money owed by the Board prior to January 1, 1997 when the amount of money owing was large and there were unique circumstances.²⁸² It was used when interest on retroactive Second Injury Enhancement Fund (SIEF) relief was claimed along with the Tribunal’s “inherent jurisdiction” in a “policy vacuum”.²⁸³ It was used to ensure that a fundamental unfairness did not result from a rigid application of a strict policy.²⁸⁴

²⁸⁰ Decision 1057/09 I2 at 17.

²⁸¹ *Ibid.*, at 21.

²⁸² Decision 652/93R

²⁸³ Decision 503/98

²⁸⁴ Decision 085/98

On the other hand, the Tribunal was not willing to consider an unfair application of the Act “manifestly unfair” when it applied to a worker’s benefits. Decision 1306/02 was one in a series of cases to consider whether and how much of a CPP disability benefit should be offset when a worker receives a partial wage loss benefit. Rather than address the contradiction between the Board projecting the worker to have some income and CPP disability benefit declaring the worker is unemployable, Tribunal focused narrowly on the words of section 43. In interim Decision 1306/02 I2, which provided the legal interpretation, the Vice Chair simply stated

the language of the Act does not speak of deducting CPP benefits. Rather, CPP benefits are deemed to be future earnings for the purpose of determining a worker’s likely future earnings.²⁸⁵

The Role of Policy

The role of policy was to support the administration of decision making. Policy formally became the Board’s central vehicle for directing decision making after 1985 through its relationship with the Tribunal. Driven by the demands of responding to the Tribunal, to a growing sophisticated employer and worker “bar” of representatives and the implications of mass adjudication, the policy process evolved into the central vehicle of decision making guidance. The process was finally formalized in 2001 through the adoption by the BoD of a policy on “what is a policy?”²⁸⁶ after considerable debate.²⁸⁷ The policy manuals are available on line and policy is regularly under review²⁸⁸.

²⁸⁵ Decision 1306/02 I2 at 11.

²⁸⁶ WSIB Board of Director’s Minute #8 (June 7, 2001) Page 6353.

²⁸⁷ Garth Dee, "Dealing With The Aftermath Of The Workplace Safety And Insurance Act, 1997," (1999) 14 Journal of Law and Social Policy 169 at 180.

²⁸⁸ See

<http://www.wsib.on.ca/en/community/WSIB/230/ArticleDetail/24338?vnextoid=7fb1e35c819d7210VgnVCM100000449c710aRCRD> accessed August 17, 2013.

The role of policy in decision making in administrative law has duality to it. On the one hand, the courts have viewed policy with some distain, as a fetter on the discretion of the decision maker.²⁸⁹ On the other hand, the courts recognized the important role which policy plays in guiding decision making.²⁹⁰ Houle and Sossin make a strong case to recognize the importance of consistency in decision making especially for adjudicative decision making.²⁹¹ Policy and other forms of guidelines are designed to achieve consistency in decision making. Consistency in and for itself, however, is not the standard. The standard is to consistently meet the purposes of the statute in a fair and impartial manner. As Houle and Sossin point out, repeating an error is not the right path to follow either. The new concern about “correctness” brought in with the Jackson reforms suggest a shift in focus from fairness in decision making to the compliance of decision making with the strategic decisions of the Board.

In the courts and most tribunals, the protection against repeated error derives from two sources - the publication of decisions and judicial remedy (appeal or review). Administrative tribunals, including WSIAT, have developed internal processes to promote internal consistency in decision making. While there are many references to “quality assurance” in Board reports, no organized and documented process used by the BoD was found.²⁹²

Where it is possible to see this dilemma most clearly is in the policy interpretation of the statutory requirements related to “merits and justice” and “benefit of the doubt.”

²⁸⁹ *Ainsley Financial Corporation et al v Ontario Securities et al* (1994) 21 OR (3d) 104(CA).

²⁹⁰ *Thamotharem v. Canada (Minister of Citizenship and Immigration)* (2007) FCA 198; [2008] 1 FCR 385

²⁹¹ Houle & Sossin, at 297.

²⁹² See Appendix 4 for details.

The statute has always contained the provision that decisions of the Board will be made based upon the merits and justice of the case and not bound by legal precedent. In the Board's policy on this section, it is emphasized that decision makers must take into account relevant policy. With **bolded** emphasis, the policy states that

The obligation to decide each case on the basis of merits and justice does **not** authorize a decision maker to disregard the relevant provisions of the Act or WSIB policies. The Act and the policies must be taken into consideration and cannot be ignored if they apply to a particular case.²⁹³

Policy similarly restricts the benefit of the doubt.

This policy is not to be used as a substitute for evidence. It is applied when the facts of the case are so evenly balanced that a clear decision is impossible.²⁹⁴

Policy does suggest, with regards to merits and justice, that there may be exceptional circumstances, rare cases where the application of the policy would lead to an absurd or unfair result that the WSIB never intended. These circumstances must be justified.²⁹⁵

Adjudication

In 1997, at the request of the Chair, a private management corporation, KPMG,²⁹⁶ working closely with senior management, undertook a 6 month organizational review of the Board to assist in the restructuring involved with the implementation of Jackson reforms. The stated objective was to design a new structure to implement the new ordering of purposes set out in the new legislation. Prevention was the first objective followed by improvement in efficiency, effectiveness and consistency of claims adjudication, then service quality, and

²⁹³ WSIB Operational Policy 11-01-03 (06 April 2001).

²⁹⁴ WSIB Operational Policy 11-01-13 (12 Dec 2001).

²⁹⁵ WSIB Operational Policy 11-01-03 (06 April 2001) at 2.

²⁹⁶ <http://www.kpmg.com> accessed August 17, 2013.

ultimately a more effective and efficient organization.²⁹⁷ The report recommended, among other reorganizations, consolidated adjudication, employer friendly customer service representatives, and the centralization and automation of initial adjudication. The presentation made to the Board recommended, as a matter of policy, reorienting the Board's operations to bring it much closer to employers.²⁹⁸

Adjudication, quality assurance and internal appeals were to be centralized while asserting that all decision makers are independent and accountable. "Decision making will be monitored by the quality assurance function to insure program and procedural compliance and to insure policy is applied correctly and consistently through the system."²⁹⁹ Only employers were consulted in this review which made a strong recommendation for automation of initial adjudication.

Beginning in 1999, the Board reported on the customer satisfaction survey in its Annual Reports. It was announced by President David Williams,

As part of our commitment to listen to our customers/clients, we initiated a major Angus Reid study in 1999 involving injured workers and employers. The results will serve as the baseline for future surveys on the needs and views of our stakeholders. By listening, we can improve our relationships with workers, injured workers and employers.³⁰⁰

It was mentioned in Service Delivery as "benchmarks for future surveys and to assist the WSIB in improving the services it provides."³⁰¹

²⁹⁷ KPMG, *Restructuring the Workers' Compensation Board* (February 12, 1997).

²⁹⁸ KPMG, *New Directions for the Workers' Compensation Board of Ontario – Organizational Strategies and Structures*, presentation to WCB (February 12, 1997) slides 14-15 [1997KPMG].

²⁹⁹ *Ibid.*, at 3.

³⁰⁰ Workplace Safety and Insurance Board Annual Report (Toronto: WSIB, 1999) at 4.

³⁰¹ *Ibid.*, at 12.

In 2000, this was formalized into three key measures added to the Financial Statement, with the introductory statement that

In 2001, the WSIB's focus and challenge will be to continue to transform the organization while, at the same time, improving outcomes for customers and clients. This objective is expressed in three imperatives.³⁰²

The Three Imperatives were 1) to make Ontario workplaces among the safest in the world – measured by the lost time injury rate; 2) to provide quality service that meets needs of workers and employers – measured by employer and worker satisfaction surveys; and 3) to ensure the financial security of the workplace safety and insurance system – measured by the funding ratio. The Three Imperatives continued to be reported at the end of the Financial Report until 2011 as the WSIB's measures of success.

Fair Practices Commission

An organizational ombudsman was established in September 2003 as a result of a consultation of injured workers tour undertaken by two worker members of the Board of Directors in 2002. A charter of the Fair Practices Commission (FPC) was approved by the WSIB in March 2004. The mission of the FPC was

to facilitate fair, equitable and timely resolutions in individual complaints brought by workers, employers and service providers and to identify and recommend system- wide improvements to Workplace Safety and Insurance Board (WSIB) services. In carrying out its mission, the Commission will contribute to the WSIB's goals of achieving greater openness, better relationships and improved services.³⁰³

The mandate included the responsibility to receive, investigate and resolve complaints about alleged acts, omissions and unfair practices by the WSIB. In carrying out its mandate, the FPC can identify complaint trends, policy matters and systemic issues and make

³⁰² Workplace Safety and Insurance Board Annual Report (Toronto: WSIB, 2000)

³⁰³ Fair Practices Commission Annual Report (Toronto: WSIB, 2004-2005) at 1.

recommendations for improvements to the BoD. This mandate was subject to limitations. The FPC did not have the authority to make or change decisions or determine rights under the *Workplace Safety and Insurance Act* or to make, change or set aside a law or policy; or to investigate any matter involving a right of appeal under the *Workplace Safety and Insurance Act*.³⁰⁴

By the time of the FPC first annual report, the WSIB had itself started on a series of self styled “fairness initiatives” which included a “best practices working group” and “fairness awareness training” to be provided by the FPC.³⁰⁵ An administrative fairness checklist was developed for decision makers.³⁰⁶ Problems of delay form the largest group of complaints consistently over the lifetime of the FPC. The other primary categories are communications, behaviour and decision making. The focus, as in the name, is whether the process and practice is fair.

2(d). 2004-2009 System Failures

In 2003, a new Liberal government was elected. In February 2004, the Minister of Labour ordered an independent audit of the WSIB to be carried out by Grant Thornton, a private Canadian accounting and business advisory firm, providing audit, tax and advisory services.³⁰⁷ In March, 2004 the WSIB Chair, Glen Wright, abruptly resigned amid allegations of excessive expenses. In May, Grant Thornton reported,

Within the scope of our audit, we identified the requirement to improve the efficiency and effectiveness with which WSIB undertakes its administrative, investment, corporate project and information technology processes.

³⁰⁴ Ibid., at 53-54.

³⁰⁵ Ibid., at 33.

³⁰⁶ Ibid., at 50-51.

³⁰⁷ http://www.grantthornton.ca/about_us accessed August 17, 2013.

Improvements are required in the definition of and rigor with which processes are performed and the monitoring of those processes to ensure they are meeting stated objectives and performance criteria. In certain areas, processes were defined and documented but the degree of compliance requires improvement in order for the WSIB to effectively discharge its stewardship responsibility in the use of premium funds for administrative purposes. While our audit focused on efficiency and effectiveness of management practices, we also identified opportunities to improve internal controls during the course of our field work.³⁰⁸

Legislative amendments were limited in this period. A new President and Chair was installed but no legislative changes were made to governance, appeals or adjudication. Most significant was the resurgence of research to examine the consequences of reform. This research brought to light systemic failures of the Jackson reform which are the focus of this period.

Substantive Changes to Benefits

The most significant change, for permanently disabled workers, was that benefits were increased by a small cost of living percent for two years and the word “available” was added back with “suitable” for determining wage loss in 2007. The resulting new policy required a number of additional factors to be considered:

- The existence and location of potential employment opportunities in the worker’s local labour market as evidenced by job vacancy rates (e.g. employers have undertaken some specific recruiting action, jobs are available immediately and/or in the future)
- The likelihood of the worker securing employment
- Shortages of specific types of workers (e.g. skilled trade workers)

³⁰⁸ Grant Thornton, *Executive Summary*, Third Party Audit of the Workplace Safety and Insurance Board on behalf of the Internal Audit Division of Management Board Secretariat serving the Minister of Labour (May 28, 2004) at p 2.

- Any mobility constraints or barriers to employment that may result from the permanent impairment.³⁰⁹

The policy went on to consider other labour market information, revisions, determining hours etc. In the end, the National Occupational Classification (NOC) was still relied upon to determine suitable employment and as the wage guide for determining likely wages.³¹⁰ Co-operative permanently disabled workers were still deemed to have income and their benefits reduced even when unemployed.

System Failures

LMR and the Failure of Self Reliance

In 2005, there is a sudden return of workers' benefits and return to work to central stage of the Annual Report. As Jill Hutcheon, Chair and President, described,

The most daunting challenge is economic. Like all agencies that provide health services, we face rising costs in delivering that care. Delivering health care has a double impact on the costs to the workplace insurance system. We pay more to support workers with existing claims and more to support workers with new claims. And we face increased liability costs for future payments. We face financial pressures also from the growing persistency of some claims. While there are fewer injuries in total, there is an increase in the complex nature of some of them, requiring longer periods of care and recovery. The aging workforce and the emergence of occupational diseases with long latency periods are two more factors driving the increase in benefit costs. Finally, we have a significant unfunded liability. We remain committed to its elimination by 2014, creating a fully funded system in Ontario.³¹¹

This “growing persistency” of some claims became marked throughout this period leading ultimately to a complete reversal of the strategy of the earlier period. What the previous administration had done by contracting out the services and relying on employers to take the

³⁰⁹ WSIB Operational Policy 19-03-03 (3 July 2007) at 2.

³¹⁰ *Ibid.*, at 5.

³¹¹ Workplace Safety and Insurance Board Annual Report (Toronto: WSIB, 2005) at 5.

lead on employment had resulted in an increasing number of permanently disabled workers who were under or unemployed and in need of ongoing wage loss benefits.

The problem was brought to light not by value for money audits although two were conducted. The problem was brought to light through a collaboration of senior managers at the WSIB and researchers at the Institute for Work and Health (IWH), an independent academic based research body. Their study of WSIB administrative data from 1990 to 2000 showed a clear decline in long term claimants – those who needed ongoing wage loss benefits- until 1997 when the number started to climb.³¹² Subsequently, a VFM audit on adjudication in 2010, described what went wrong,

There was a high correlation between longer duration outcomes and the changes made by Bill 99 to the legislation and the Board's service delivery model (for example, Bill 99's elimination of mandatory reviews and checkpoints, along with the Board's vocational rehabilitation programs).³¹³

In addition, a number of qualitative research studies by independent researchers highlighted problems associated with self reliance and the Board's approach.³¹⁴

The replacement "Work Reintegration Policy" was not finally adopted until December 1, 2012. On the WSIB Website, the following explanation was given for the new policy:

- The former Labour Market Re-entry Program was not working
- The number and level of locked-in LOE awards has been rising

³¹² This report is discussed in Part Three at 117-118 below.

³¹³ KPMG, WSIB Adjudication & Claims Administration (ACA) Program Value for Money Audit Report (2011) at p10 [2011 KPMG].

³¹⁴ Joan M. Eakin, Ellen MacEachen & Judy Clarke, "Playing it smart' with return to work: small workplace experience under Ontario's policy of self-reliance and early return" (2003) 1:2 Policy and Practice in Health and Safety; Ellen MacEachen *et al.*, "A deliberation on 'hurt versus harm' logic in early-return-to-work policy" (2007) 5:2 Policy and Practice in Health and Safety 41; E. MacEachen *et al.*, "The 'Ability' Paradigm in Vocational Rehabilitation: Challenges in an Ontario Injured Worker Retraining Program" (2012) 22:1 Journal of Occupational Rehabilitation 105.

- Workers have raised numerous and persistent complaints about the quality of training and education programs and their lack of credibility with employers
- Workers feel they are funnelled into programs they don't want and which don't result in jobs
- Retraining programs over the past decade through external vendors have not produced desired results
- Every year, the WSIB refers an average of 8,000 workers to the current LMR program - that's 22 new workers each and every day - but only five of those 22 workers will be employed following an average 21-month program
- Seventy-five per cent of the training and education expenditure goes to just 10 secondary service providers that are all privately owned, most of whom are not registered with the Ministry of Training, Colleges and Universities, and none under contract with the WSIB³¹⁵

Experience Rating Exposed

A number of attempts had been made to demonstrate a link between experience rating and prevention of injury and disability with little success. Most success stories are individual case studies. A systematic review of research on prevention interventions included experience rating in its review and concluded that it was premature to put faith in the effectiveness of experience rating.³¹⁶ Critics focused on the adversarial behaviour towards injured workers that it encouraged in employers and its negative impact on therapeutic elements of the system³¹⁷. Empirical evidence suggests workers are stigmatized and marginalized by constant challenges to the validity of their claims by their employer and by the Board, and experience worsening health as a result.³¹⁸

The Jackson Report identified another problem with experience rating. Although the program was to be cost neutral, i.e. premiums and rebates are supposed to be in balance with

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<http://www.wsib.on.ca/en/community/WSIB/ArticleDetail?vnextoid=8c9520f09ec1c210VgnVCM100000469c710aRCRD> accessed August 17, 2013.

³¹⁶ E. Tompa E, Trevithick S & McLeod C., "Systematic review of the prevention incentives of insurance and regulatory mechanisms for occupational health and safety." (2007) 33:2 Scandinavian Journal of Work, Environment and Health.

³¹⁷ T. Ison, "Significance of Experience Rating" (1986) 24 Osgoode Hall Law Journal 723.

³¹⁸ Lippel.(Therapeutic) supra note 846.

each other, there had been an imbalance in favour of rebates from inception. Although characterized as a technical problem, the phenomenon adds yet another reason to question the efficacy of the program.

On April 5, 2008, the front page of the *Toronto Star* newspaper reported on an investigation showing that the Board's experience rating program had given tens of millions of dollars in rebates to companies that had been prosecuted by the provincial government and found guilty of safety violations leading to deaths, amputations and other gruesome injuries.³¹⁹ The Board responded by retaining a human resource and outsourcing company, Morneau Sobeco(MS) now Morneau Shepell,³²⁰ to do a review of the program. The focus of the MS review was to strengthen, not question, incentives. In that regard its principal recommendation was to create a new system of experience rating. Since that would take years to carry out, in the meantime, the MS review recommended requiring the CEO of each covered employer to sign an annual declaration of compliance with the health and safety legislation before a rebate could be paid, greater policing of employer practices especially claims suppression, and restricting some of the worst practices while continuing with the existing program.³²¹

³¹⁹ Dave Bruser and Mora Welsh, ““When companies get rewarded for mistakes. Flaw in worksite safety system allows big rebates even when a death occurs,” *Toronto Star* (April 5, 2008).

³²⁰ Morneau Shepell <http://www.morneaushepell.com/> accessed August 17, 2013.

³²¹ Morneau Sobeco, Recommendations for Experience Rating - For Discussion with Stakeholders, (April 28,2008).

The Acknowledgement of Stigma

In the 2008 Annual Report, President of the Board, Jill Hutcheon, acknowledged that Board policy and practice was creating stigma and promoted the Board's collaboration with an injured workers' research group to launch

a new initiative to eliminate any potentially stigmatizing language, behaviours, and attitudes from WSIB communications, frontline staff training, and service delivery.³²²

An internal forum was created involving senior WSIB staff, researchers and injured worker representatives who met to discuss the problem, a pamphlet was produced and changes to practices recommended.

The stigma initiative was the result of a unique research collaboration between researchers and injured workers called the Research Action Alliance on the Consequences of Work Injury (RAACWI). Funded by a Federal Social Sciences and Humanities Research Council grant under the Community-University Research Alliance program, the project supported a wide range of research studies related to the workers' compensation system and its role in the economic, social and health consequences of work injury.³²³ A number of those studies focused on the experience of injured workers dealing with the workers' compensation board and how they were treated. The meetings between representatives of RAACWI and senior management of the WSIB produced a pamphlet and a framework. Information can still be found on the WSIB website.³²⁴

³²² Workplace Safety and Insurance Board Annual Report (Toronto: WSIB, 2008) at p 8.

³²³ <http://www.consequencesofworkinjury.ca/> accessed August 17, 2013.

³²⁴ See WSIB website "Stigma"

<http://www.wsib.on.ca/en/community/WSIB/230/ArticleDetail/24338?vnextoid=92b75779bdc6e210VgnVCM100000469c710aRCRD&vnextchannel=cc4548db92e0c210VgnVCM100000469c710aRCRD> accessed August 17, 2013.

The Transfer of Prevention

Although the formal removal of prevention from the WSIB did not occur until 2011, it represents further evidence of the overall failure of the Jackson reforms. It comes to a head on Christmas Eve, 2009 when all of Ontario was shocked by pictures and stories of five workers who had fallen 13 stories after the swing stage they were working on broke³²⁵. Four of the men were killed. The fifth survived with substantial injuries. In January, 2010 an Expert Panel was established with former Principal Secretary and Ministry of Labour Deputy Minister Tony Deanas chair to review the failure of prevention in Ontario. The report in December documented the failure of the WSIB's prevention strategy and recommended that prevention be removed from its mandate.³²⁶ On June 1, 2011, Bill 160 was passed creating a new position of Chief Prevention Officer and removing prevention from the WSIB³²⁷.

2(e). 2010-2012 Auditors' Efficiency: "Correctness"

By 2008, the evidence that the Jackson reforms had failed to improve prevention of accidents or employment of permanently disabled workers or reduce costs was well known. The 2008 economic crash brought on the intervention of the Auditor General who, in his 2009 Annual Report, refocused attention back on the Board's unfunded liability. Raising the spectre of the WSIB defaulting on existing and future financial commitments in 2005, the Auditor General decided in 2009 to revisit and provide a more detailed commentary "given the recent turmoil in the global financial markets."³²⁸

³²⁵ Rasheena Aulakh, "4 migrant workers die in plunge from highrise," *Toronto Star* (December 25, 2009).

³²⁶ Expert Advisory Panel on Occupational Health and Safety, *Report and Recommendations to the Minister of Labour*, (December 2010) http://www.labour.gov.on.ca/english/hs/pdf/eap_report.pdf accessed August 17, 2013.

³²⁷ *Occupational Health and Safety Statute Law Amendment Act*, SO 2011, c11.

³²⁸ Office of the Auditor General Annual Report (Toronto: AG, 2009) c3, s 14 at 314.

The unfunded liability is the difference between the Board's assets and its future liabilities. Identified as an issue in the early 1980s, the unfunded liability was the major reason in the Jackson report for the 1997 reforms. By 2009, it is put forward by the Auditor General as the most significant problem facing the WSIB. The report acknowledged the counter-argument that because the workers' compensation system is a perpetually ongoing operation, the unfunded liability is meaningless, merely an amount that would become due only in the highly unlikely event that the WSIB was to wind up its operations tomorrow. The Auditor General report simply states it does not agree with this argument.³²⁹

While recognizing that the economic crisis precipitated the current size of the problem, failure of the WSIB to achieve full funding over the last two decades was compounded by "the desire to satisfy all the stakeholders."³³⁰ The analysis given by the Auditor General belies this statement. The repeated intervention of government to prevent the Board from raising premiums is acknowledged,

In 1996, the average premium rate was \$3 per \$100 of payroll—a decrease from the 1991 average premium of \$3.20. Despite the WSIB's apparent authority to set premium rates, the government's May 7, 1996, Budget Speech announced a planned 5% reduction in the average premium rate (to \$2.85) effective January 1, 1997. Since then, notwithstanding the unfunded liability's upward trend, the average premium rate has been reduced multiple times, levelling out in 2006 at \$2.26, where it has remained through 2009.

In the first quarter of 2009, the WSIB concluded that, had the 1996 average premium of \$3.00 been maintained from 1997 until the end of 2008, the unfunded liability would have been \$3.7 billion instead of \$11.5 billion. This analysis clearly illustrates the sensitivity of the unfunded liability to premium rates.³³¹

³²⁹ *Ibid.*, at 322

³³⁰ *Ibid.*, at 315.

³³¹ *Ibid.*, at 324-325.

In contrast, given that both the 1990 and 1997 amendments substantially reduced benefits to workers, the so called increase in benefits workers received in 2007 was tiny (2.5% cost of living amendments for 3 years) and added only \$750 million to future liabilities.³³²

The Auditor General confirmed the failure of the Jackson reforms by eliminating the right to vocational rehabilitation, contracting out return to work services and promoting self reliance.³³³ The focus of the Auditor General report, however, was the increase in long term costs and not the impact on injured workers. The failure of experience rating to improve prevention is noted in passing. Its cost to the system is ignored.³³⁴

The key concern is highlighted by the title of the last section of the Auditor General’s report, “Tomorrow’s Employers Paying for Costs of Today”,

Given the government’s legislated role in determining benefit levels and employees to be covered by the system, addressing this section of the Act is not entirely within the Board’s purview. However, we urge both the government and the WSIB to keep the intent of *this section* [emphasis added] of the legislation in mind when making future premium and benefit decisions.³³⁵

The section referred to in the above quote is section 96 in the current legislation, the section that requires the Board to maintain a Fund to pay claims. In it is the subsection that the Auditor General identifies as the most serious question of equity to be addressed,

The Board has a duty to maintain the insurance fund so as not to burden unduly or unfairly any class of Schedule 1 employers in future years with payments under the insurance plan in respect of accidents in previous years.³³⁶

³³² Ibid., at 330.

³³³ Ibid., at 330.

³³⁴ Ibid., at 332.

³³⁵ Ibid., at 335.

³³⁶ *WSIA1997 supra* note 253, s96(5).

Two significant consequences flow from the Auditor General's report . Firstly, the government passed legislation and a regulation to amend s 96 and require the Board to meet financial objectives. Secondly, it inspired a value for money audit of adjudication which raised serious issues about how decisions affecting unemployed permanently disabled workers were made.

Governance

The amendments in this period put the final say on how the Board was managing the accident/insurance funds in the hands of an auditor appointed by the Minister of Labour.³³⁷

The alignment of the Board with the direction of the Auditor General was found in the WSIB management commentary on the Auditor General's 2009 report,³³⁸ in a follow up chapter in the 2011 Auditor General's Annual report³³⁹ and in the 2010 WSIB annual report³⁴⁰.

The WSIB utilized value for money audits on appeals and adjudication to align them with the strategic plan to reduce costs.

Appeals

In 2008 KPMG was asked to provide a Value for Money Audit of the WSIB Internal Appeals Program. The objective of this audit was to assess the extent to which internal appeal processes were designed to attain their objectives economically, result in efficient

³³⁷ *Helping Ontario Families and Managing Responsibly Act* SO 2010, c 26 Schedule 21, ss (7) and (8) [Bill 135]; Ontario Regulation 141/12.

³³⁸ 2009 AG *supra* note 328 at 317-318.

³³⁹ Office of the Auditor General Annual Report (Toronto: AG, 2011) c 4, s 4.1.

³⁴⁰ Workplace Safety and Insurance Board Annual Report (Toronto: WSIB, 2010) at 21.

resolutions and in a manner consistent with fairness and transparency.³⁴¹ The only report provided is a power point presentation.

The audit covered the process from registration of an appeal to the communication of a decision or outcome. It does not include occupational disease appeals or appeals to WSIAT. The investigation included interviews with managers, workshops with staff, job shadowing Appeals Resolution Officers, and review of processes, procedures, reports, assessments and documentation, and jurisdictional review. The period of the audit is 2005-2007³⁴².

The findings were generally positive. The report concluded that the Appeals program was delivering value-for-money. In particular,

The Program creates value-for-money for the WSIB by providing workers and employers with a cost effective and flexible process to present their objections to WSIB adjudicative decisions by:

- Providing an effective, quasi-independent and quasi-judicial dispute resolution mechanism that addresses worker and employer objections in a flexible, timely and fair manner.

... The Program processes effectively support Program objectives according to the principle of fairness and transparency.

- Program processes provide transparency, accessibility and procedural fairness consistent with the mission of rendering final resolutions to objections that are timely, fair and comprehensive.³⁴³

The report recommended more WSIB direction on appeals requiring non oral appeal hearings (rather than allowing the appellant to choose) seemingly on the sole basis that they are decided more quickly.³⁴⁴

³⁴¹ KPMG, *Value for Money Audit of the WSIB Appeal Program* (March, 10, 2009). [2009KPMG]

³⁴² *Ibid.*, at 6.

³⁴³ *Ibid.*, at 13.

³⁴⁴ *Ibid.*, at 23, 29 and 30.

Alignment of the appeal program with WSIB strategic objectives is presented as the final element of the effectiveness section. This is measured against the corporate strategic plan.³⁴⁵ This, in turn, suggests an alignment with the overriding financial goals. One would have thought that the primary responsibility of the Appeals branch was to decide cases fairly, on the balance of probabilities, considering the merits and justice of the case as set out in the legislation. These principles are neither acknowledged or considered.

Adjudication

In 2011 the WSIB asked KPMG to conduct a Value for Money Audit of adjudication.³⁴⁶ This VFM audit report was also just a PowerPoint style presentation and very similar in outline to the previous one. This presentation was much longer as the adjudication function and process was much larger and more complex than appeals. It was also very different in the extent to which it was willing to raise what it described as “cultural issues” and to critique policies that, in the auditor’s views, expanded entitlement beyond what was intended. Key statutory and policy changes were recommended to address this.

The focus of the audit was 2008-2010, at a time when a new service delivery model was being introduced. The new service delivery model shaped much of the subsequent assessment especially in relation to what was described as the failure of the prior delivery model and more broadly of the Jackson reforms. The fact that KPMG was a proponent of the previous service delivery model in 1997 was not mentioned.

The KPMG mandate included assessing the

³⁴⁵ Ibid., at 33.

³⁴⁶ 2011KPMG, *supra* note 313.

Effectiveness of WSIB operational policies and guidelines in particular as to whether they provide adequate guidance to help ensure accurate, consistent and timely decisions are made in a financially responsible and accountable manner.³⁴⁷

Fair had disappeared. Five key decision making points were chosen with management advice because of their “complexity, associated cost factors and critical importance to the adjudication process.”³⁴⁸ The five key decision points were Initial Entitlement Decisions, Non Economic Loss (NEL Decisions), Loss of Earnings 72 month Lock-in Decisions (Locked –In LOE), Second Injury Enhancement Fund (SIEF) Decisions, and Recurrence Decisions. All were targeted with the intention of reducing costs.

Initial entitlement decisions, i.e. those which determine whether the claim fits within the statutory definitions, were addressed as a failure by the WSIB to optimize its use of automated adjudication. “The number of claims auto adjudicated has been considerably less than the target 70% set by the WSIB for no-lost-time claims”.³⁴⁹ This was because of rules established by a WSIB risk assessment that the report recommended be revisited. Those rules, the assessment and why they are considered necessary is not explained. It should be noted that KPMG in its 1997 report had previously strongly urged automated primary adjudication³⁵⁰.

The four decision points - NEL, Locked-in LOE, SIEF and Recurrence Decisions – are significant for workers with permanent disabilities. A NEL provides a permanently disabled worker with access to wage loss. The Locked-in LOE are benefits that a permanently disabled worker was entitled by the statute to receive without further review until age 65.

³⁴⁷ Ibid., at 4.

³⁴⁸ Ibid., at 20.

³⁴⁹ Ibid., at 24.

³⁵⁰ 1997KPMG *supra* note 298.

Recurrence Decisions address how the Board dealt with a worker's claim because of a recurrence of a compensable injury.

In each case, the Audit Report alleged problems with current policy which resulted in more benefits being paid to workers than should be. The one exception was SIEF policy which relieved an employer of costs in an individual claim when the worker's compensable injury is made worse by a prior disability or "underlying condition." It was known and referenced in the report that SIEF created perverse incentives with respect to return to work, the opposite of what was intended.³⁵¹

In addressing NELs, the audits raised concerns that too many NELs are being granted, a conclusion based on comparison with two other Canadian Boards, Alberta and British Columbia. No explanation is given for these two comparators. It proposed improving access to electronic medical records to improve paper reviews (where determinations about entitlement to a NEL award are made by an adjudicator and not an external independent doctor) and to use a more "relevant" rating schedule. With respect to locked in loss of earnings benefits, it recommended eliminating the statutory protection so benefits of long standing unemployed injured workers could always be reviewed. The unstated sub text is that many of these workers are over compensated.

Recurrence policies provided benefits to a permanently disabled worker because of a flare up or other worsening related to the disability for any time up to age 65. This policy functioned along with the Work Disruption Policy which allowed benefits when a permanently injured worker lost his or her job and needed help finding employment. These policies were critically important to all permanently disabled workers and particularly those with low back

³⁵¹ 2011KPMG *supra* note 313 at 32

disabilities. Earlier studies of Ontario permanently disabled workers showed that a third of those who return to work will subsequently lose work and have difficulty finding work because of disability related reasons.³⁵²

After reviewing the history of change since 1980 and the 2009 Auditor General's comments, the report identified the aging workforce as an important External Contextual Factor.

Between 2003 and 2010 there had been a 47% increase in injuries to workers age 51 or older. The report referenced US research that identified that, while older workers suffer fewer traumatic injuries, they have “ a greater propensity for impairments associated with aging, such as back conditions.”

This theme of older workers and their propensities returned later in the report when assessing policies dealing with aggravation of injuries and recurrences. The report suggested, for example, that the problem with the current policy on aggravation of an underlying injury is that it is compensating people for age related reasons and therefore should be revised.³⁵³

The policy on recurrences was criticized,

Similar to the challenges with the Aggravation Basis Policy, this policy can give rise to an expansion of entitlement by covering increased symptoms related to the aging process.³⁵⁴

A third, Work Disruptions Policy, needed revision because, “in practice, these policies can act to the advantage of an injured worker over a non-injured worker.”³⁵⁵

The report attributed problems to what it calls a “litigious culture,”

³⁵² R. J. Butler, W. G. Johnson & M. L. Baldwin, "Managing Work Disability: Why First Return to Work is not a Measure of Success" (1995) 48:3 Industrial and Labour Relations Review 452.

³⁵³ *Ibid.*, at 23.

³⁵⁴ *Ibid.*, at 28.

³⁵⁵ *Ibid.*

What has become increasingly apparent is the shift in focus and resources to securing benefits or minimizing cost liability through inefficient means. This has given rise to multiple stakeholders representing both employers and workers whose economic interests are in direct competition and detract from achieving the principles of recovery and return to work³⁵⁶.

It concluded,

This subsequently led to policies and decisions being applied or designed to balance stakeholder interests, but ultimately with adverse impacts on the achievement of recovery and return to work objectives³⁵⁷.

One must suggest that KPMG had a certain amount of “cheek” to make this observation given that they recommended to the WSIB in 1997 that the business model should align to better understand employers’ concerns but not worker concerns.³⁵⁸ In 2011 KPMG had made an about face, and suggested representatives created two problems. Some policies were too complex, giving rise to multiple opportunities for dispute and creating a “faint hope” moral hazard. This has led to a broadening of the Board’s mandate,

to address limitations in other areas of public policy, such as employment and disability policy, and the broader labour policy challenges associated with an aging workforce.³⁵⁹

The report goes outside of the legislation and the province to cite the American College of Occupational and Environmental Medicine as authority for fundamental principles and objectives about return to work because it emphasizes the small fraction of medically excused days that are medically required, early intervention and preventing unnecessary prolonged work absence.³⁶⁰

³⁵⁶ Ibid., at 13.

³⁵⁷ Ibid.

³⁵⁸ See above pages 87-88 for discussion.

³⁵⁹ 2011KPMG *supra* note 313 at 14.

³⁶⁰ Ibid., at 15.

Fairness was mentioned on one slide under fundamental principles and objectives. It was mentioned, as a fundamental system level objective:

Ensuring the fairness and equity of benefits as defined by the legislation.

It was mentioned in relation to return to work as the optimal outcome for workers

Fair and equitable outcome for all parties is for the worker to recover as fully as possible, and an early and safe return to his or her pre-injury job at full wage as quickly as possible³⁶¹.

Fair and equitable did not apparently apply to those workers who do not return to their pre-injury job.

Fairness was mentioned in relationship to decision making as part of a Leading Practice. As in all other references, it is constrained:

The vision for a leading practice ACA Program would be to optimize recovery and early and safe return to work opportunities for injured workers and to ensure timely, consistent, fair and accurate decision making within a structure of processes and procedures that maximize program efficiency and minimize program costs.³⁶²

The addition of “accurate” to decision making and its confinement by “program efficiency and program costs” reminds us of Ellis and Laird’s concerns about the standard of proof being used.³⁶³ The assertion that policies are too complex and outside the scope of the legislation were not based on any legal analysis, only on ideological assertions. The agenda of the Auditor General is consistent with the objectives of Jackson reforms and was only critical that the methods that were originally adopted did not reduce benefits.

A performance measure was designed by the Audit to evaluate decision making:

³⁶¹ Ibid., at 16.

³⁶² Ibid., at 10.

³⁶³ Ellis & Laird, *supra* note 260 at 243.

A second key performance measure is the quality of adjudication decision making – i.e. the extent to which decisions are made fairly, accurately, and consistently within the scope of legislation and policy. To monitor this performance measure, the EB has instituted a Manager Quality Assurance Program under which managers review a sample of decisions each month and provide feedback and direction to EAs.

The report provided an example of this with regards to decision making about recurrences:

Team performance objectives focus on the decision making process and include specific key performance indicators related to the timeliness of decisions (rendering decisions within 14 days of referral to the team) and the accuracy and consistency of decisions (90% of decisions are 100% correct).³⁶⁴

The results are described:

The number of active re-opened claims has fallen from 5,082 in December 2009 to 3,475 in December 2010, reflecting in part greater consistency and quality in the application of allowance criteria for recurrences.³⁶⁵

The success of the new business model was measured in relation to the reduction in payment or eligibility of the workers.³⁶⁶ What was meant by the measure of 100% accuracy in 90% of cases and consistency of decisions is not explained. It resulted in a reduction of claims. No evidence was given regarding the employment or income status of the workers who were rejected.

What the report made invisible, as Weiler and others did before, was the reality of workers' experience of disability. Like the slogan "All accidents are preventable", this report proposed, in essence, that all injured workers return to work. But they don't, not all of them. Some initially return to work and experience subsequent work disruption because of their disability. Some never return to work.

³⁶⁴ 2011 KPMG *supra* note 313, at 26.

³⁶⁵ *Ibid.*, at 27.

³⁶⁶ *Ibid.*, at 22.

In this case, the report goes beyond the imposition on adjudicators of a different standard of decision making than the law requires. The report proposed to rewrite the policy so that the law was interpreted more restrictively to achieve cost cutting ends. The new restrictions were then reinforced by a quality assurance system administered by a superior and evaluated for correctness.

Part Three. The Impact of Ontario Reforms on Permanently Disabled Workers

This part reviews evidence of the impact of the Ontario reforms on a particular group of workers, unemployed permanently disabled workers. The first section examines the policy promise of employment or wage loss compensation for permanently disabled workers - What do we know about this group of workers and their experiences? What income do these workers make after their injury? What portion of loss if any is replaced by wage loss benefits from the Board?

This section will focus on those workers whose permanent disability was recognized by the Board, and more specifically, on those who received a Non-economic Loss (NEL) award during the period 1990 to 2012 and long term wage loss benefits.

The second section attempts to examine the evidence regarding the decision making processes. It was not possible to get any data that related directly to decision making affecting only permanently disabled workers. What little is available speaks generally to all workers who make claims and appeals.

As reviewed in Appendix 2 and discussed below, beginning with the amendments in 1985, sections were added to the legislation which authorized the Board to conduct research.³⁶⁷

3(a). Economic Status of Permanently Disabled Workers

There are no provisions in the legislation that explicitly required the Board to collect and report statistics. Prior to the reforms studied here, employment outcomes for permanently disabled workers were not the focus of the workers' compensation system. The Board paid the worker a pension for life based on the measure of impairment. A survey of the employment of permanently disabled workers was published in 1919-20.³⁶⁸ Although mentioned in 1937, nothing further is reported about the extent of unemployment among injured workers prior to reform. As noted above,³⁶⁹ activities and changes related to rehabilitation were reported with increasing frequency in the decade before reform in the Board's Annual Reports suggesting increasing awareness of unemployment concerns.

An amendment in 1985 gave the BoD the explicit power to,

undertake and carry on such investigations, research and training and make grants to individuals, institutions and organizations for investigations, research and training in such amounts and upon such terms and conditions as the Board considers acceptable.³⁷⁰

The content of this provision remains today although the exact wording has changed.³⁷¹

Weiler recommended repeatedly that empirical study be conducted of the impact of his reforms, especially on the employment of permanently injured workers³⁷² and experience

³⁶⁷ See Appendix 2 Governance at p. 161.

³⁶⁸ Workers' Compensation Board Annual Report (Toronto: WCB, 1919); Workers' Compensation Board Annual Report (Toronto: WCB, 1921).

³⁶⁹ See discussion at page 43-44 above.

³⁷⁰ *Bill 101*, *supra* note 188, s 71(3)(j).

³⁷¹ *Bill 99*, *supra* note 7, s159(5).

³⁷² Weiler, *supra* note 172 at 67.

rating.³⁷³ Central to his argument that the law should be changed was an abiding commitment to demonstrate empirically what was being accomplished.

No tracking was ever established for prospective injured workers – i.e. those entering the new wage loss system. Despite the fact that economic status, especially working or not working, was a question asked every time a case worker from the Board contacted an injured worker, none of this information was tracked in the Board's database.

Research was funded by the Board. The Board has provided annual funding for a university affiliated research centre, the Institute for Work and Health (IWH),³⁷⁴ since 1990.

Originally established to provide quality assurance for the Weiler reforms, it was transformed into an independent research centre. A major area of research of the IWH was return to work.

In 1997, after the Jackson Reforms eliminated the Occupational Disease Standards Panel, a Weiler reform to improve compensation of occupational disease, the Board set aside an additional \$3 million per year to fund research administered through an independent multipartite Research Advisory Council (RAC).³⁷⁵ This program produced independent peer reviewed research on return to work and the experience of injured workers, some of which is reviewed below.

Bill 160 which removed prevention from the WSIB in 2011 transferred the funding for the RAC to the Ministry of Labour. One impact has been to eliminate the study of workers' compensation from this source of funded research.

³⁷³ Ibid., at 90.

³⁷⁴ Institute for Work and Health <http://www.iwh.on.ca/a-brief-history> accessed July 21, 2013.

³⁷⁵ Research Advisory Council <http://www.wsib.on.ca/en/community/WSIB/230/ArticleDetail/24338?vnextoid=7de5e35c819d7210VgnVC.M100000449c710aRCRD> accessed December 5, 2011.

Public Sources

The Board has published a Statistical Supplement to its Annual Report since 1915. Information regarding claims, claims incidence, causes of claims and other data was reported. There was no direct report of employment status of permanently disabled workers. Prior to reform, payment of temporary and permanent benefits were reported. Post reforms, the number of workers receiving a NEL award annually was reported. During the Weiler period, short term duration and long term awards (as number and percentage of FEL awards and supplements) were reported. After the Jackson reforms, an overall average duration of benefits was reported and long term awards were not.

Reference to statistics are sometimes made in annual reports and VFM audits. In 2005, the President of the WSIB announced a decline in employment in the Annual Report.³⁷⁶ As mentioned above, VFM audits in 2004 and 2009 provide the number of workers assisted by Board programs who have employment when the program is finished.³⁷⁷

Research

Direct requests were made to the WSIB for relevant data and corporate records under Freedom of Information legislation.³⁷⁸ An attempt was made to examine the economic experiences of workers with NEL awards by requesting information on their economic status at the time of review by the Board. The only status recorded by the Board is benefit status. Only those NEL recipients in receipt of a wage loss benefit after 72 months (locked-in) could be compared across the entire reform period and only up to 2005. A request was made for the total number of NELs awarded per year, the percentage of workers who have a NEL who

³⁷⁶ *Supra* note 311.

³⁷⁷ Deloitte, *Value for Money Audit of the WSIB Labour Market Re-entry Program* (2004); KPMG, *WSIB Labour Market Re-entry (LMR) Program Value for Money Audit Report* (December 3, 2009).

³⁷⁸ *Supra* note 6.

subsequently receive benefits after a recurrence, and the numbers of locked-in long term claimants from 1990-2005. The data received from the Board is found in Appendix 3.

Four indicators drawn from the information in Appendix 3 are highlighted in Table 1 : the number of accepted lost time claimants (ALT); the number and percentage who receive a permanent impairment award (ALT/NEL); the number and percentage who receive a permanent impairment award (NEL/REO) and suffer a recurrence requiring the reopening of their claim; and the number and percentage who receive wage loss benefits after 72 months (ALT/LT). From 1990-1997 these were called Future Earnings Loss benefits (FEL). From 1998 to 2005, Loss of Earning Benefits (LOE).

The percentage of claimants who were recognized to have a permanent disability was relatively stable between 9 and 12% throughout the period. A third of these workers subsequently experienced a recurrence that required them to seek and obtain the assistance of the Board. This percentage climbed steadily until 2005 when it dropped slightly to 35.3%.

The percentage of claimants who required long term wage loss benefits after six years declined steadily to 1998 and then began to climb. Unfortunately, the WSIB did not provide a detailed breakdown of LOE benefits so it is not possible to see if there was any change in the distribution of the percentage of wage loss awarded during the period.

Table 1 Indicators Summary

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
ALT	187,652	159,169	141,407	129,178	130,292	123,137	106,956	106,084	101,508	105,258	109,036	103,132	100,226	97,861	95,158	94,264
ALT/NEL	19,430 10%	18,776 12%	15,785 11%	12,829 10%	12,266 9%	10,938 9%	9,654 9%	9,264 9%	9,351 9%	10,538 10%	11,337 10%	10,964 11%	11,061 11%	11,165 11%	11,114 12%	10,969 12%
NEL/REO	5,568 28.7%	5,464 29.1%	4,906 31.1%	4,136 32.2%	4,126 33.6%	3,630 33.2%	3,142 32.5%	3,081 33.3%	3,413 36.5%	3,973 37.7%	4,263 37.6%	4,062 37%	4,104 37.1%	4,000 35.8%	3,985 35.9%	3,871 35.3%
ALT/LT	13,593 7.2% FEL	12,052 7.6% FEL	7,877 5.6% FEL	5,951 4.6% FEL	5,360 4.1% FEL	4,580 3.7% FEL	3,921 3.7% FEL	3,887 3.7% FEL	2,613 2.6% LOE	3,072 2.9% LOE	3,662 3.4% LOE	3,557 3.4% LOE	3,726 3.7% LOE	3,841 3.9% LOE	3,795 4% LOE	3,438 3.6% LOE

ALT Accepted Lost Time Claimants

ALT/NEL Number and percentage of Accepted Lost Time claimants (ALT) who receive a permanent impairment award (NEL)

NEL/REO Number and percentage of NEL recipients who experience a recurrence requiring the reopening (REO) of their claim.

ALT/LT Number and percentage of accepted lost time claimants (ALT) who receive wage loss benefits after 72 months(LT). From 1990-1997 this was the Future Earnings Loss benefits (FEL). From 1998 to 2005, these were Loss of Earning Benefits (LOE).

The WCB commissioned the Ontario Survey of Workers with Permanent Impairments (Ontario Survey) in 1988. The Ontario Survey was a study of economic and non-economic losses among injured workers. US academic experts were brought in to design the surveys. The survey population was composed of those injured workers scheduled for examination for permanent disability by Board doctors between June 12, 1989 and June 30, 1990. Approximately 11,000 injured workers completed the survey. After excluding those whose accidents were before 1974 and those after 1987, the number was reduced to 3,317. Beginning in May 1993, this survey provided the basis for a number of reports to the WCB characterizing return to work experiences of permanently injured workers.³⁷⁹

According to the reports, the Ontario Survey was to provide a baseline from which improvement in employment and income could be demonstrated as well as profile characteristics of workers that could serve as a signal to WCB Administrators that an individual worker likely needed assistance returning to work. Over the three year period studied, about 70% of the survey population seemed to be employed, 15% were never re-employed, and 15% had marginal work experience. A marginal work experience was one where a worker initially went back to work but suffered subsequent periods of unemployment as a result of the injury. Chances of post-injury employment were better for men, persons with more than average education, and union members. It was worse for those over 50, with a low back injury and no union. Two thirds of the workers who returned to work were union members.³⁸⁰

³⁷⁹ William G. Johnson, Baldwin, Marjorie L. , *Returns to work by Ontario workers with permanent partial disabilities: A Report to the Workers' Compensation Board of Ontario*. (Toronto: 1993) at 69.

³⁸⁰ *Ibid.*, at 49.

In the following reports and journal articles, the significance of workers with marginal employment experiences would become clearer. At a conference proceeding in 1992, the authors reported “Only 24% of the workers in our sample return to work after an initial absence and stay at work... Thus 59 % of the sample experience at least one injury-related work interruption after an initial return to work... work histories of three out of five permanently partially disabled workers who initially return to work are not adequately described.”³⁸¹ In a 1995 journal article, the authors clarified the issue:

had we only considered single spells of work absences, we would conclude that 85% of the Ontario workers recovered from their injuries because they returned to work. In fact, almost 60% of those who returned to work had one or more injury-related work absences. Forty percent of the workers who initially returned to work were not employed in 1990 because of the effects of their injuries, demonstrating that only one-half of the injured workers returned to work.³⁸²

In terms of health outcomes, these workers showed similar challenges to those who never return to work.³⁸³ Subsequent analysis found the likelihood of a recurrence was higher in cumulative trauma disorders (CTD) of the upper extremities (26%) compared to back pain (18%) and fractures (12%). After five years, focusing on first returns underestimates work-loss days associated with CTD by 32%.³⁸⁴

Unfortunately the Ontario Survey was never continued. In 1994, as part of the consultation to determine criteria for continuing economic loss awards after one year and two year post injury, a review of 2,881 injured workers was conducted. Only 16.4% of these workers had

³⁸¹ R. J. Butler, W. G. Johnson & M. L. Baldwin, *Post Injury Employment Patterns in Ontario* (Queen's University School of Industrial Relations: 1993) at p 17.

³⁸² Butler, Johnson & Baldwin, at p 467.

³⁸³ Pierre Côté *et al.*, "Patterns of sick-leave and health outcomes in injured workers with back pain" (2008) 17 *European Spine Journal* 484.

³⁸⁴ M. L. Baldwin & R. J. Butler, "Upper extremity disorders in the workplace: Costs and outcomes beyond the first return to work" (2006) 16 *Journal of Occupational Rehabilitation* 303.

been employed at the end of one year and only 21.6% at the end of the second year. Only 10.3% of the group was employed at both times.³⁸⁵

In April 2003 the Institute for Work and Health published two working papers evaluating post accident income for permanently disabled workers injured pre 1990 and post 1990 but before 1995. The papers compared the post accident earnings of a representative sample of permanently injured workers relying on a data linkage between Statistics Canada Longitudinal Administrative Databank (LAD) of Canadian tax filers and WSIB claims data. The Pre 1990 Working Paper covered claimants with permanent impairments from January 1, 1986 to January 1, 1990.³⁸⁶ The Post 1990 Working Paper covered claimants with permanent impairments from January 2, 1990 to December 1994.³⁸⁷ Each worker's tax returns were followed for up to 9 years post accident. In the category of after tax labour earnings, only those workers at or under age 36 at the time of injury with impairment ratings of 10% or less achieved at or close to 90% net in either system.³⁸⁸ In the key comparison of total post accident earnings, the researchers created a reference year and compared total income including benefits at six years post accident. The post 1990 system seemed to produce on average an income recovery closer to the statutory goal of 90% of net income.³⁸⁹

Unfortunately a follow up was not conducted to compare the experience of permanently disabled workers since the 1997 reforms or since the 1997 reforms were reversed.

³⁸⁵ Research and Evaluation Branch, Workers' Compensation Board, Study of 12-Month Qualifying FEL Recipients: Employment, Occupation and Income Transitions (July 1994).

³⁸⁶ Emile Tompa et al, *Post-Accident earnings and benefits adequacy and equity. An Evaluation of the Pre-1990 Ontario Permanent Disability Program*, Institute for Work and Health Working Paper #210A (April, 2003).

³⁸⁷ Emile Tompa et al, *Post-Accident earnings and benefits adequacy and equity. An Evaluation of the Post-1990 Ontario Permanent Disability Program*, Institute for Work and Health Working Paper #210B (April, 2003).

³⁸⁸ See # 210A at 15; #210B at 16.

³⁸⁹ See #210A at Appendix IX; #210B at Appendix X.

A Long Term Claimants study was referenced in the 2010 KPMG Adjudication Report as evidence that the 1997 legislative reforms had the unanticipated effect of worsening return to work outcomes for permanently disabled workers.³⁹⁰ After the Jackson reforms, the duration of long term claims started to increase, contrary to what was expected from the increased emphasis on “early and safe return to work” in the statute. The WSIB worked with the IWH to examine the factors contributing to the increase. A random cohort of 111,655 claims from 1990 to 2001 was analyzed.³⁹¹ A considerable change in claims duration centered around 1998, the year of “system-level changes in policy and practices,”

The percentage of claimants being locked-in steadily decreased from 1990 up to the policy change from 4.1% to 1.7%, then steadily rose again from the date of policy change to the last year of accident of our study from 1.7% to 3.2% for 2001 claims.³⁹²

The largest variations in the prolonged duration are across age, nature of injury and industrial sector. While typical prognostic markers of claim duration such as age, gender, pre-injury wage, industrial mix and nature of injury were predictive, their changes over time typically were gradual and continued throughout the study period. The most plausible explanation for the increase in the longest of the long-duration claims is the policy change and the attendant practice changes due to the policy change.³⁹³ This was interpreted by the 2011 KPMG Report to be a result of the elimination of mandatory reviews by the Board and vocational rehabilitation initiated by Jackson Reforms.³⁹⁴

³⁹⁰ 2011KPMG *supra* note 313 at 8.

³⁹¹ S. Hogg-Johnson, Chen, Cynthia, Tolusso, David, Tompa, Emile, Davilmar, Arold, Amick III, Benjamin Charles "Did changes in workers' compensation policy and practice drive increasing long duration of claims? Findings from the Ontario Long Duration Claim Study" (2013) Submitted Manuscript.

³⁹² *Ibid.*, at 19.

³⁹³ *Ibid.*

³⁹⁴ 2011KPMG *supra* note 313 at 8.

Injured workers organizations have worked with researchers to conduct surveys of permanently disabled workers. On June 1, 2009, the Ontario Network of Injured Workers Groups released the results of a survey of 226 workers from across Ontario. Its report reviews other Ontario data. The results of this survey were that 89% of respondents were employed full time prior to their accident and only 61% were employed full time afterwards.³⁹⁵

The results experienced by workers who were assisted by vocational rehabilitation and labour market re-entry programme were not much better. An audit of the LMR program by an external auditor in 2003 found that of those injured workers who completed a program, 56% were deemed employable but were unemployed.³⁹⁶ In 2009 the program was reviewed by another external auditor who found that, in 2008, only 48% of workers were employed after their LMR program was completed.³⁹⁷

In addition to attempts to measure the level of unemployment directly, other researchers have followed the Ontario Survey's attempts to identify and test indicators, individual and systemic, that produce successful return to work outcomes. Studies focus on particular treatments, accommodations and programs demonstrating that a successful return to work was possible in some cases. What these studies do not show is how widely or consistently their recommendations were being followed or any evaluation over time of workers' experiences. For example, disability management programs where employers adopt systemic practices to support return to work have been shown to be effective under some

³⁹⁵ Ontario Network of Injured Workers Groups, *Impacts of Workplace Injury* (June 1st 2009) <http://www.injuredworkersonline.org/Documents/InjuredWorkerSurveyReportJune2009.pdf> accessed December 10, 2011.

³⁹⁶ Deloitte, *supra* note 376.

³⁹⁷ 2009 KPMG, *supra* note 376.

circumstances in larger workplaces and where workers were represented.³⁹⁸ On the other hand, interviews with return to work co-ordinators suggest that the bottom line in any return to work scenario was always the employer's perception of costs.³⁹⁹ In other words, successful return to work was possible under the right circumstances and ideal conditions, in larger unionized corporations, hospitals and schools.

The challenge of finding the right circumstances and ideal conditions surfaced in the qualitative research of a group of researchers who focused on the experiences of injured workers and employers in small business. This research cast a very different perspective on the problems that workers face. The administrative policies and practices that flowed from the shift in emphasis to early return to work and early intervention in 1997 were identified as highly problematic.

According to one study:

systemic challenges with RTW were buried in the bureaucratic, seemingly mundane, and social nature of problems: inappropriate modified work, injuries that are not reported, co-worker hostility, untimely and inappropriate referrals for retraining, physicians who are too busy for paperwork, workers' compensation decision-makers who communicate inadequately with workers by mail and telephone.⁴⁰⁰

This created a "toxic dose" of failed interactions that could cause further health problems.

Highly prejudicial discourses founded in Board policy were shown to organize many problematic practices carried out by adjudicators and employers and encountered by injured workers. One study identified a "discourse of abuse" that painted injured workers as abusing

³⁹⁸ R-L. Franche *et al.*, "Workplace-Based Return-to-Work Interventions: A Systematic Review of the Quantitative Literature" (2005) 15:4 *Journal of Occupational Rehabilitation* 607.

³⁹⁹ D. Bernhard, E. MacEachen & K. Lippel, "Disability management experts and the impact of jurisdiction on practice: an Ontario example" (2010) 2:1 *International Journal of Social Security and Workers Compensation*.

⁴⁰⁰ MacEachen *et al.* "Toxic Dose" *supra* note 101 at 350.

the system and permeated how adjudicators and employers manage the people they deal with.⁴⁰¹ Another critiqued a central premise of early return to work - that return to work can be therapeutic and safe - by demonstrating its limited justification in evidence, the lack of attention to the details of the particular disability, and the basic requirement that there be ideal working conditions.⁴⁰²

Taken together these studies demonstrated that Board policies developed to implement the Jackson reforms were based on limited evidence, relied on ideal communications and conditions and were managed with underlying negative stereotypes of injured workers who experienced any problems. A dominant discourse of abuse stigmatized injured workers. In problematic cases, especially smaller workplaces, they created toxic conditions that exacerbated problems, contributing to failed return to work and declining health.

A qualitative study of injured workers in labour market re-entry identified problems underlying the paradigm change from disability to ability. Acknowledging the limitations of the medical evaluation of disability, this study showed problematic outcomes when an uncritical reliance on “ability” replaced it.

...the shift in disability management paradigms to a focus on ability and return to work requires consideration of environmental conditions, including policies and programs and also implementation. It is important to recognize that work rehabilitation occurs within a network of workplaces, policies, programs, and professionals, which each play a role in worker outcomes. Therefore, a focus on the environments in which worker ability can be enacted might be as important as a focus on improving characteristics of the workers themselves.⁴⁰³

⁴⁰¹ Joan M. Eakin *et al.*, *The Logic of Practice: An Ethnographic Study of Front-line Service Work with Small Businesses in Ontario's Workplace Safety and Insurance Board* (Toronto: IWH, 2009).

⁴⁰² MacEachen *et al.* “Hurt v Harm” *supra* note 314.

⁴⁰³ MacEachen *et al.* “Ability Paradigm,” *supra* note 314 at 105.

Experience rating and other premium based incentives were shown to produce incentives for an employer to behave antagonistically towards the injured worker.

From 2007-2009, Peri Ballantyne and colleagues at RAACWI conducted a survey of a sample of Ontario permanently injured workers. With the assistance of the WSIB, a representative sampling frame was established and 494 people agreed to participate in telephone interviews. The survey involved the collection of self reported data on a range of health outcomes as well as employment. Although the survey is not yet published, data was presented at a RAACWI Community Forum on June 12, 2012. Using three different poverty measures based on household income, the study showed significant percentages of permanently disabled workers and their households live in or near poverty. Depending on the measure, 17, 25 or 12 % of the surveyed population lived in poverty.⁴⁰⁴

3(b). Appeals and Adjudication

This section reviews the evidence of the impact of law reform on decision making in workers' claims.

Public Sources

Statistical information on decision making by the Board is sparse. The allowed lost time, allowed no lost time, not allowed and pending claims are reported in the Statistical Supplement by year as a subset of the table reporting claims incidence. Not Allowed is subdivided into Abandoned and Denied. No appeal statistics are reported. The Annual Report in 2008 announced a 23% decline in appeals since 1999⁴⁰⁵ and, in 2010,⁴⁰⁶ reported

⁴⁰⁴ Peri Ballantyne, Becky Casey, Pat Vienneau, The Poverty of Injured Workers with Permanent Impairments: Findings from the 2008-2009 RAACWI Injured Worker Health Survey, presentation to RAACWI Community Forum (June 12, 2012) slide 5.

⁴⁰⁵ *Supra* note 322 at 8.

that appeals were tracked as an indicator of the overall approval of decision making.

Beginning in 1999, the Board began a regular customer service survey in order to benchmark service delivery. Although the survey had hundreds of questions, only a single indicator of employer and worker satisfaction was taken from this data and reported on an annual basis.⁴⁰⁷

The need for a quality assurance program to monitor adjudication was recognized in the initial restructuring of the Weiler reforms under Wolfson,⁴⁰⁸ the Task Force under Di Santo⁴⁰⁹ and the first KPMG report on restructuring of the Board in 1997.⁴¹⁰ This recommendation was reinforced by KPMG in the 2011 VFM Audit on Adjudication. It was linked to achieving the key performance indicators of consistency and correctness.⁴¹¹ No quality assurance data is published.

Research

The results of our FIPPA request for data on appeals were obscure. There are no records of appeals data prior to 1996. There was no break down available by either claim status or issue appealed. A request for data on appeals experience of workers in receipt of a NEL award was turned down because it is not collected by the WSIB. Only very high level data on overall outcomes⁴¹² and a count of objections by method⁴¹³ was available. This data does not allow us to examine the specific appeal experience of permanently disabled workers. It

⁴⁰⁶ *Supra* note 340 at 13.

⁴⁰⁷ See above page 88 for discussion.

⁴⁰⁸ *Adjudication Strategy*, *supra* note 224.

⁴⁰⁹ *Task Force*, *supra* note 234.

⁴¹⁰ 1997KPMG, *supra* note 298.

⁴¹¹ 2011KPMG, *supra* note 313.

⁴¹² Four categories only were provided - whether appeal was resolved by an agreement, a decision, the file was returned or withdrawn. See Appendix 3.

⁴¹³ By agreement, enquiry, hearing and review. See Appendix 3

does show that a large and increasing percentage of appeals was being denied without a hearing.

A second set of requests were made for corporate records relating to how the Board evaluated the quality of its decision making - consumer satisfaction measures, quality assurance in adjudication and appeals. No material was located that added to what has already been identified. The correspondence is found in appendix 4. Of particular note is the response regarding quality assurance. The initial response identified 40 Fair Practices Commission decisions and the VFM audit.⁴¹⁴ A supplemental request asked specifically regarding the correctness standard referred to in the KPMG reports. The response was simply,

At the WSIB, we strive for 100% correctness. This is monitored through the coaching and monitoring of staff at the individual case level.⁴¹⁵

A follow up email confirmed that there is no record that sets out a "correctness standard" (definition, implementation or monitoring).

The response advised there were no other records regarding appeals. In particular, the Appeal Branch does not track appeals by issue over time. Only individual caseloads are tracked for case management purposes.⁴¹⁶ No records regarding eAdjudication could be found without a considerable search.⁴¹⁷

The data that was provided by the FIPPA request covered the period 1996 to 2011. The Board was not able to provide data about appeals by workers in receipt of an impairment award (NEL) and/or wage loss benefits, nor the number or the issues. The Board was only

⁴¹⁴ Letter from WSIB FOI Access Specialist Dec 20, 2012. See Appendix 4.

⁴¹⁵ Letter from WSIB FOI Access Specialist May 3, 2013. See Appendix 4.

⁴¹⁶ Ibid., at p 2.

⁴¹⁷ Ibid.

able to provide 1) overall appeal outcomes (decision, returned or withdrawn) ; 2) issue outcome (allowed, allowed in part and denied); 3) denial outcomes (enquiry, hearing or review); and 4) allowed outcomes (enquiry, hearing or review) respecting all appeals. Issue, denial and allowed outcomes were subdivided by whether employer and worker initiated. The results are provided in Appendix 3.

Not surprisingly the majority of appeals are brought by workers and result in a decision. More surprisingly is that the majority of issues are denied on appeal, often two thirds or more. An increasing number of appeals are resolved without a hearing, either by the Board making further enquiries or by written review. A majority of the denied appeals occur without a hearing.

A deeper insight into WSIB decision making was gained in 2009 with the report of a study of WSIB front line (FL) service work by Eakin et al.⁴¹⁸ The study sought to describe the nature, logic and social relations of FL service work at Ontario's WSIB, specifically the work of adjudicators, nurse case managers and customer service representatives working with small business. Using interviews, observation and document analysis, the researchers were able to make a number of critical insights into the decision making process in 2005-7.

A central finding was that front line work was a professional assembly line.

Adjudicators... process a constant, high volume flow of client 'cases' and 'keep the system moving' by resolving and discharging cases to make room for the continuous intake of new ones.⁴¹⁹

The assembly line was framed by the role of the Board as decision maker on one hand and by its competing operating imperatives on the other.

⁴¹⁸ Eakin *et al.* "Front-Line" *supra* note 400.

⁴¹⁹ *Ibid.*, at 15.

Typically these imperatives are formally addressed and explicitly articulated mostly at the top administrative levels of the WSIB, but they are nonetheless present throughout the organization, embedded in operational structures, rules and procedures, and in patterns of thought and practice at the FLs.⁴²⁰

Three imperatives were identified – solvency, impartiality and productivity. At the front line, fiscal accountability conflicts with efforts to be non partisan.⁴²¹

Front line workers work within this framework utilizing strategic discretionary practices.

Some are discursive framings contrasting employers and workers. Employers' motivation to cut costs and seek best business advantage was understood and accepted. A worker who sought to maximize his or her benefit was more likely to be seen as trying to take advantage of the system.⁴²² Employers represented revenue while workers represented costs. The employer paid. As the authors noted,

Notable in this discourse is the apparent absence of recognition of the workers' contribution to the original compensation bargain – relinquishment of the individual right to sue the employer – and the idea that workers could be thought of as 'paying' into the system in non-monetary form.⁴²³

Although adjudication was highly systematized and front line workers adhere closely to WSIB policies, at the same time they experienced that there is no one right way to handle cases. Managers recognized that not everything could be formulaically administered and strict procedures were put in place to control discretion.⁴²⁴ The study found that discretionary activity went considerably beyond the issue of 'grey zones' and permeated the

⁴²⁰ Ibid., at 14.

⁴²¹ Ibid., at 15.

⁴²² Ibid., at 17.

⁴²³ Ibid., at 18-19.

⁴²⁴ Ibid., at 19.

everyday conduct of FL work.⁴²⁵ Discursive framing influenced how discretion was strategically exercised.

The exercise of discretion is central to the power that the FL has over clients and to their efforts to please clients with opposing interests and to manage the competing institutional demands identified earlier.⁴²⁶

The study documented evidence of how employers and injured workers were differently perceived and treated at the front lines. The results systematically privileged employer concerns and disadvantaged workers.⁴²⁷

The importance of representation for workers was originally identified in the Ontario survey. It was observed that two thirds of the permanently disabled workers who successfully returned to work were union members.⁴²⁸ Representation was found to be an important factor in assisting workers to deal with the Board,⁴²⁹ in dealing with return to work, negotiating with the employer and with health care providers. In addition to formal representation, peer helper programs have played an important role in providing injured workers with support to deal with the Board.⁴³⁰ The absence of unions and representation in small workplaces was identified as a problem in a recent study.⁴³¹

David Law in his chapter on “Appeal Litigation: Pricing the Workplace Injury” argued that during the 1990-1995 period, litigation was a vehicle for policy change in the Ontario workers’ compensation system.⁴³² This was attributed to the Weiler reforms. Prior to these

⁴²⁵ Ibid.

⁴²⁶ Ibid., at 21.

⁴²⁷ Ibid., at 26.

⁴²⁸ Johnson., *supra* note 378.

⁴²⁹ Lippel, at 543.

⁴³⁰ E. MacEachen, A. Kosny & S. Ferrier, "Unexpected barriers in return to work: lessons learned from injured worker peer support groups" (2007) 29:2 Work 155.

⁴³¹ Eakin, MacEachen & Clarke. “Playing It Smart” *supra* note 314.

⁴³² Law.*supra* note 4951.

reforms, both claims and appeals were suppressed by the design of the system.⁴³³ The Tribunal had an immediate impact creating a “due process revolution”. The tribunal welcomed appellants and rewarded their efforts by turning a spotlight on failures at the Board.

“A wave of newly allowable cases, with a more liberal interpretation of the statute, caught the attention of employers, who now found the system to be over-generous, unpredictable, and increasingly “unjust” in terms of permissiveness towards claimants. It is not coincidence that the first generation of advocates action on behalf of employers sprang up in this era, acting not only as litigators but also as policy lobbyists.⁴³⁴

Law argued that the greatest single reform in the Ontario system that changed the perspective of employers as a class was experience rating. The prospect of rebates spawned a new class of “WCB administrators” in benefit departments and ignited the growth of a private and public employer advocacy industry.

It is arguable that even if there had been no other changes to the system than the creation of the appeals tribunal and the introduction of NEER [experience rating], Ontario workers’ compensation would still have undergone a transformation into a litigation culture.⁴³⁵

Other changes also had an impact. Supplemental benefits, the dual award system and vocational rehabilitation entitlement increased litigation because of the range of decisions available to be made and the increase in value of the benefit to which one was eligible.⁴³⁶ Service delivery changed. Initial decision-making was decentralized and moved to the front line as policy change occurred. The brief adoption of bi-partism at the BoD, i.e. equal representation of labour and employers on the board of directors, in 1994 as the basis for

⁴³³ Ibid., at 307.

⁴³⁴ Ibid., at 308.

⁴³⁵ Ibid., at 310.

⁴³⁶ Ibid., at 312-315.

Board governance led to an internal paralysis in which stakeholders turned to the appeal system to achieve case specific changes.⁴³⁷

Law offered only limited data to support the litigation effect of the reforms. There was a steady increase in the number of appeals to WCAT from 1985 to the mid 1990's, with a 50% increase in caseload from 1579 cases in 1991 to 2300 in 1995, then to almost 3600 in 1996. The total number of WCB internal appeals tripled between 1990 and 1994.⁴³⁸ During the same period, the total number of claims dropped from 489,000 in 1988 to 337,000 in 1996. Law argues that the "best available conclusion" is that Ontario's experimentation with reform in the 1980's and 1990's lead to an "explosion in the frequency of parties challenging decisions to one level of appeal or another".⁴³⁹

To Law, litigation in workers' compensation is a pricing mechanism. As the value of benefit and experience rating to system participants went up, the improvements in due process encouraged resort to appeals. However, appeals are a very small percent of total claims, only one percent in 1996. This raised concerns that the system was suppressing the cost of injury.⁴⁴⁰ For Law, more litigation is the sign of a healthy system.

Hyatt and Kralj reported on results of WCAT appeals by workers between 1986 and 1989. Cases were categorized by representation, whether the employer was experience rated or not, length of hearing, issue under appeal and demographics of the claimant.⁴⁴¹ Representation of a worker by the OWA or a politician was associated with an increased likelihood that the

⁴³⁷ Ibid., at 316.

⁴³⁸ Ibid., at 317.

⁴³⁹ Ibid., at 318.

⁴⁴⁰ Ibid., at 323.

⁴⁴¹ D. E. Hyatt, Kralj, B., "The Impact of Representation and other Factors on the Outcomes of Employee-Initiated Workers' Compensation Appeals" (2000) 53:4 Industrial and Labor Relations Review 665.

appeal would be granted. Other forms of representation had little impact. An appeal raising the issue of compensability was more likely to be successful than appeal questioning the level of benefits. The authors concluded that errors in the claims adjudication process were not entirely random.⁴⁴²

This review of evidence does not support the idyllic official discourse of reform described in Part Two in which every injured worker would successfully return to work. Research suggests that the systemic failures of the Jackson reforms made the experience worse for injured workers, increasing poverty as well as stigma. The immediate future is bleak for injured workers given the Auditor General driven reforms emphasis on costs and terminating benefits.

Despite repeated statements in Annual reports, the Board does not systematically track its appeals, provide evidence of quality assurance or even follow up on its customer satisfaction surveys. Snap shots of appeals taken at particular periods in the life of the system suggest an adjudication group under considerable stress dealing with a range of difficult decisions while at the same time working under increasing pressure to increase automation of decision making.

3(c) Analysis

The incompleteness of the information makes it impossible to be definitive about the consequences of reform on permanently disabled workers. There is some evidence primarily from independent university based researchers to suggest that these workers fared better prior to 1997 than they have since then.

⁴⁴² Ibid., at 678.

Harry Arthurs, in the context of his review of the WSIB's Funding, criticized the Board for its failure to examine its assumptions and evaluate its policies:

it [the Board] has not been giving adequate attention to important issues that all institutions ought to be concerned about: are our policies producing the intended results? Are those policies based on sound assumptions? are those assumptions likely to change? Can the same results be achieved more humanely or efficiently by different means?⁴⁴³

The Board has an explicit legislative mandate to examine new developments and a practical one to ensure that its policies are achieving the stated objectives. Despite initial efforts to survey permanently disabled workers to obtain a baseline, no further efforts were made by the Board to empirically assess the impacts of its policies and practices on the employment of injured workers. Despite investments in both an independent research agency, the IWH, and the funding of a competitive grants research program, no systematic process was set up by the Board to examine and integrate the results.

Independent researchers supported by these and other sources developed the research which provided glimpses into the state of permanently disabled workers prior to Weiler reforms and after. As seen in previous sections, independent research showed that initial return to work after injury was not a good indicator of ongoing employment for many. Independent research exposed the failures of the Jackson reforms to increase employment of permanently disabled workers, the limitations of experience rating and the creation of stigma. An informal alliance between injured workers activist and researchers emerges not around political agendas but around a common principle that reforms should and could be subject to empirical evaluation as to whether they are achieving their goals. Acknowledging standpoint, and taking the standpoint of workers as well as employers into account, was

⁴⁴³ Arthurs, "Funding Fairness" *supra* note 446 at 115.

recognized as important to the legitimacy of research. The critique of the Jackson reforms which had taken neither into account was clear and devastating.

The apparent replacement by the Board of independent researchers by Value for Money audits does not bode well for injured workers. As suggested by its name, the VFM follows the money and was derived from principles about financial controls in large organizations. The original reason stated by the Auditor General was to reduce waste and corruption in government by requiring an accounting of spending. This has evolved in the last thirty years into much broader tests of the efficiency and effectiveness of programs used in government with a relentless addiction to cost cutting of benefits. In the context of workers' compensation, it seems to have evolved further into a revision of the principles of law.

While the production of research and VFM audits are different in many ways, a singular difference is the degree to which published results provide assurances of the credibility of the methods by which information was gathered and analysed. Research reports provide details of methods and sources, results are subject to peer review and studies are subject to ethics review.

As noted earlier, two VFM studies done on the LMR Program implemented by the Jackson reforms to the return to work process did not make visible the problems that workers were having. They focused on the alignment of the program with the new business plan, itself the product of the same management consulting firms that do the VFM audits. It was senior WSIB staff turning to independent academic researchers at the IWH which brought the problem to light.

Where VFM audits have an advantage over independent research is that their design facilitates the implementation of their recommendations. The audit process involves management involvement in designing what the audit will and will not consider, its objectives, who will be involved and who will carry it out. A very high level of alignment with management direction is achieved. This is, perhaps, why one management company can recommend one process under one management at one time and then recommend its opposite some time later under another, as KPMG has done. The VFM audits are committed to the political objectives of cost cutting and place much less consideration on issues of adequacy and fairness.

Conclusions

This thesis has reviewed thirty years of reform in workers compensation law in Ontario and examined the evidence of its impact on the economic status of permanently disabled workers. Although incomplete, the evidence suggests that, despite the repeated promise that each reform made to improve return to work for these workers or pay wage loss, increasingly, and after the Jackson reforms in particular, this has not been the case. Furthermore, the underlying decision making process addressing claims of hundreds of thousands of injured workers has shifted. A system in which workers required little representation and few claims were denied become one which is litigious and with almost 20% of workers' claims denied at first instance.⁴⁴⁴

In this conclusion, the analytical framework developed in Part One is used to interpret the law reforms described in Part Two to identify factors which may have contributed to these

⁴⁴⁴ See Appendix 3 and discussion at p 125.

results. Presentation of the application of legal theory will be followed by considerations regarding adjudicative principles.

Legal Theory

This section examines the different periods of reform through the lens of four different legal theories examined in Part One – access to justice, law and social movements, economic analysis of the law and therapeutic jurisprudence.

Weiler Reforms

The driving force of reform in this period was an injured workers movement which made visible the poverty that they suffered despite the workers' compensation system that was supposed to protect them. The combination of demonstration and advocacy made change possible in a time when social justice was a widespread concern. The process of implementing the Weiler reforms took two legislative stages and a decade to a large extent as a result of the engagement by the injured workers movement. Although Weiler's reaction to the injured workers movement was often unsympathetic, he did recognize the interests at stake. The governance of the Board was modified to encourage representatives of labour and employers to be engaged in overseeing the system. Weiler's model for governance of the workers' compensation board was derived from the example of the labour relations board.

Weiler, and the period of reform he inspired, acknowledged the compromise of rights at the basis of workers' compensation. He transformed the historic compromise into an economic issue in three steps. Step one shifted the focus away from the behaviour of employers onto the behaviour of workers. It was because healthy workers, not employers, in Weiler's view, paid the cost of the system that it was important to make sure that only deserving injured

workers got benefits. Incentives and disincentives were needed. This allowed Weiler to reduce benefits to injured workers overall with the promise that they would increase for those who were deserving. Step two was to make disability disappear in a promise of a strategy to return every injured worker back to work. Instead of a guaranteed pension, compensation took the form of wage loss benefits for those who needed them and who co-operated. In step three he reversed the historic practice of keeping employer interests separate from workers in adjudicating individual cases and promoted employer experience rating as a vehicle to improve prevention.

The reforms that followed incorporated these views and made an economic analysis central to the system. In this period, as described by Dewees *et al.*,⁴⁴⁵ there was some attempt to achieve a balance of interests considering adequacy of compensation and costs through a frame of incentives for both workers and employers.

Mandatory vocational rehabilitation was provided to a worker when an employer failed to provide re-employment. There was a promise of actual wage loss replacement. Both can be seen as incentives for workers in a therapeutic sense, i.e. they would improve opportunities and support the deserving. Unemployment was seen in an anti therapeutic frame. It was assumed that it was bad for the worker to be off work and that early return to work would help recovery. Different from therapeutic jurisprudence, these assumptions were predominantly ideological and without empirical foundation.

Access to justice arguments can be seen in Weiler's review of the Board's decision making. Although asserting that the Board's mass adjudication was fair, he could not ignore the many complaints from injured workers, unions, lawyers and the Ombudsman. He recommended

⁴⁴⁵ *Supra note 58.*

that an independent tribunal provide the assurance of natural justice. This perspective was taken up by Ron Ellis, first chair of the Tribunal, who tried to transform appeals into a review of the Board decision making and policy based on law. The creation of the Offices of Worker and Employer Advisors to provide representation was also influenced by principles of access to justice.

The limits of Weiler's view of access to justice can be seen in his decision, adopted in legislation, to give the BoD the final say on policy. Ellis saw the WCAT as the final level of appeal and the final voice of law. While this itself was a restrictive view of the Tribunal's authority, it was not restrictive enough for a BoD who initially refused to accept some WCAT decisions by asserting its overriding responsibility to manage the system. Even so, the BoD during the Weiler reform period accepted albeit grudgingly that WCAT may have the final say on whether a policy was legal or not.

Access to justice discourse in the Weiler reforms turned out to be a double-edged sword. The implementation of experience rating and the creation of the WCAT encouraged employers to hire advocates. A system originally set up to operate without lawyers became litigious. In this period, because the WCAT challenged Board practice and policy, increased litigiousness may, as Law suggested,⁴⁴⁶ have initially improved benefits. However, since access to justice was understood strictly in a formal sense, the WCAT saw its role to be impartial, supporting neither the employer and the worker. This neutrality created a situation within which, with deference to Galanter⁴⁴⁷, employers were able to develop a lot of repeat players' expertise to intervene in individual worker entitlements as well as in appeals of premiums. The acceptance that an employer's interest could be balanced with that of an

⁴⁴⁶ Law, "Pricing" *supra* note 51 at 308.

⁴⁴⁷ Galanter, "Haves" *supra* note 11.

individual worker was a substantial shift away from access to justice as access to equity, an initial hallmark of workers' compensation systems.

Jackson Reforms

The Jackson reforms were justified on the basis of an increasing unfunded liability and an alleged failure of the prior reforms to successfully return injured workers to work. If the Weiler reforms can be seen to have been driven by the injured workers movement, the Jackson reforms were clearly driven by business interests. The reforms reduced benefits to injured workers overall by reducing the percentage of income protection. They enhanced the role of the employer to the disadvantage of workers. The Board's past role in return to work was seen as an interference and vocational rehabilitation an expensive waste of money. The way forward was self-reliance. The Board's vocational rehabilitation capacity was eliminated and services contracted out. Return to work was left to the market place. Restructuring in this time period focused on reducing costs by reducing claims and their duration. A worker could be deemed to be working even when suitable work was not available. Concerns for adequacy of compensation were subordinated to cost cutting.

The influence of the injured workers movement declined significantly in this period but did not disappear. The government rhetoric of concern for workers interests was retained. Some of the changes proposed by Jackson – benefit waiting periods, eliminating the independent tribunal and research – were not implemented to a great extent because of pressure from injured workers groups, labour and researchers who claimed that these changes would undermine any credibility that the reforms could have. The Research Advisory Council was created in this period to provide \$3million annually to fund research overseen by a multi stakeholder council including injured workers, labour, employers as well as researchers,

government representatives and others. Labour representatives were still appointed to the BoD but not those recommended by a central labour body or injured workers.

Access to justice suffered. As seen in Part Two, government interfered in the appointment of members to the Tribunal. The legislative restrictions of the Jackson reforms subordinated the Tribunal to the direction of the Board. A review of the WSIAT decisions show the new direction of the Jackson reforms was embraced in the logic of the Tribunal's decision making. The Tribunal deferred without protest to the bias introduced into the system.

System Failures

As we have seen, despite this realignment and rhetoric, within a relatively short period of time, key Jackson reforms failed. Most notably, eliminating Board supervision of return to work coincided with an increase in the number of unemployed permanently disabled workers in need of long term wage loss benefits. Independent researchers brought this and other practices to light showing the negative impacts on workers of the Jackson reforms and the stigma that these reforms produced. The recognition by the Board in 2008 that its practices were stigmatizing injured workers and its President's decision to engage with injured workers and researchers to address stigma embraced an awareness of therapeutic and non therapeutic consequences of law reform. Internal steps publically taken by the Board in cooperation with injured workers representatives and researchers to address the causes of stigma in Board adjudication marked an important shift in past practice. It also marked a significant addition to the injured workers movement's strategy by building relationships beyond demonstrations and advocacy.

The role of the organized injured workers movement in developing, administering and carrying out a research agenda with academic researchers made visible the ongoing role of the social justice movement in the reform process. As Storey pointed out, social justice for injured workers may not be driving the agenda for reform.⁴⁴⁸ The injured workers movement made it possible to bring to light abuses and problems created by the Jackson reforms with innovative ways of engagement.

Auditor General and Correctness

These initial steps to address and eliminate stigma within the Board came abruptly to an end when the Auditor General responded to the economic crisis in 2008 by targeting the Board's unfunded liability. During this period of reforms, a Board culture that focused on cutting benefits because they are costs was reinforced by business consultants and VFM audits. Although the failures of the Jackson reforms were recognized, its economic objectives were embraced. The AG transformed the unfunded liability into a sacred cow issue of fairness for employers. Reducing liability was necessary in order to prevent unfairly burdening future employers with past costs. Reducing premiums was sold as the only viable reality despite dissenting opinions and the authority of the Board to increase them.

The role of the injured workers movement and its representatives was disparaged.

Representation and advocacy were attacked by KPMG for creating "faint hopes" for injured workers and pushing the ambit of the law beyond what was intended.

Access to justice considerations gave way to the efficiency of electronic adjudication with more administrative decision making and fewer opportunities for a fair hearing.

⁴⁴⁸ Storey, "Moral" *supra* note 43 at 86.

Adjudication Principles

Our analytical framework sought to integrate an understanding of law reform with the adjudication principles of administrative justice. The impact of the reforms on these principles is assessed here in two ways – through the lenses of statutory interpretation and administrative law.

Statutory Interpretation: What became of the Meredith Principles?

All reformers prefaced their recommendations with a reference to the consistency of their actions with the Meredith principles. This study of reform suggests that only the principle eliminating the right to sue has been unaffected. This is not to suggest that Meredith principles have constitutional protection and cannot be altered. Nor should it be suggested that the understanding of these principles is uniform or static. As some academic commentators warn in regard to the courts' use of Driedger's modern principle,⁴⁴⁹ "Meredith principles" become a rhetorical device, referencing an important touchstone for authority without engaging its application to the situation at hand.

As Harry Arthurs pointed out in his review of funding, even though many provisions of the Act had not been fundamentally altered between 1914 and 2010, that does not mean that its principles have remained unchanged. Nor does it mean that the principles can be ignored.⁴⁵⁰ The subject that Arthurs was examining was how to fund the workplace safety and insurance system. It made no sense to him to remain committed to a funding arrangement designed for

⁴⁴⁹ See Beaulac. & Côté , *supra* note 104 and Ruth Sullivan, "Statutory Interpretation in the Supreme Court" (1998-1999) 30 *Ottawa Law Review* 175.

⁴⁵⁰ Harry Arthurs, *Funding Fairness: A Report On Ontario's Workplace Safety And Insurance System* (Toronto: Queen's Printer, 2012) at 13.

circumstances in 1914 or to utilize a private insurance model when it was inconsistent with principles embedded in the legislation and not fundamentally modified by law reform.⁴⁵¹

Despite the renaming of compensation as insurance, there have not been substantive changes to the mandate of the Board to pay claims and collect premiums. Enhancements would be a better way of describing the legislated changes that occurred. A purpose clause and memorandum of understanding promoted certain processes, standards and considerations without interfering directly with the Board's mandate. Value for Money Audits have become the principal form of evaluation of programs by the Board as a part of a larger practice to rely on management consultants to guide Board restructuring. Most recently, with the amendment to s 96 in 2010⁴⁵², the Board has been given extensive directions as to the level of funding that it must achieve. Its obligation to decide claims and ability to raise premiums has not been changed.

Does the Board Remain Independent of Government Interference?

After leaving the compensation system alone for six decades, direct political interference in the governance of the Board became a hallmark of reform. Initially, the decisions regarding implementation of reforms were left to the Board. By 1994 there was a significant shift. The addition of a purpose clause and the requirement of the MOU were attempts to direct BoD decision making. The leadership of the Board, its Chair and President appointed by government reflected the ideological changes being driven in the different periods. As the review in Appendix 1 shows, during the Weiler reform period and when the systemic failures of the Jackson reforms were exposed, the government appointed leadership with experience in public service. During the Jackson reform period and that dominated by the Auditor

⁴⁵¹ Ibid.

⁴⁵² *Bill 135*, supra note 337.

General, leadership came from the private sector. Throughout, the appointment of chairs reflected the aspirations of the party in power, even when the appointee was not a member of the governing party.⁴⁵³

Strategic plans came to the fore as the vehicle by which the BoD sought to align decision making within its economic goals. The first strategic plan (the only one prior to the Jackson reforms) spoke of fairness and justice for injured workers. After the Jackson reforms and after the Auditor General's intervention, the unfunded liability reigned supreme. Correctness in decision making and cost reduction were the focus. Through the VFM audits, the strategic plan became a means to align both appeals and adjudication with these goals.⁴⁵⁴

Government direction to the Board to suppress premium increases was documented in both Arthur's funding review and the Auditor General's report. Although this had also occurred prior to 1980, throughout the reform periods studied here, there was constant government pressure to suppress premium increases. Premium setting was the exclusive responsibility of the Board. Any increase in premiums during the reform period required, in practice, the permission of government, which was denied or limited. The reduction of premiums became, as with tax freezes, a sacred cow. After 2008, the Auditor General condemned the Board's past practice of relying on surpluses and investments for the short fall as poor management. It was said that the result would unfairly burden future employers.

It is notable that although government came closer and closer to direct control over the Board's funding, in the end it retained a distance. While the most recent amendments and

⁴⁵³ Robert Elgie, although a Conservative Minister of Labour when he appointed Weiler, was appointed Chair by a Liberal Government. Elizabeth Witmer, although a Conservative Minister of Labour when she implemented the Jackson Reforms, was appointed Chair by a Liberal government. See Appendix 1.

⁴⁵⁴ See Appendix 2 for a detailed description of this evolution.

the regulations impose the most explicit direction on funding on the Board, it remains up to the Board to produce a plan to achieve them. The power of the Minister was to appoint and impose an auditor. In this model, the final arbiter is not the government or the Board or the Tribunal. It is an accountant.

By any measure, the active interference by government in the operation of the Board is hard to square with the Meredith commitment to an “independent board.”

Administrative Law

The implementation of a dual award system required a revised approach to decision making. It was in the context of adjudication that the struggle took place to transform the system to deal systematically with a wide range of decisions involving very individualized considerations within the time limits that the reforms required. The pre dual award system for all its limitations guaranteed that workers with like disabilities would receive a like measure of award. The Weiler reforms required highly individualized considerations to address individual employment impacts. Not surprisingly preoccupations with timeliness of decision making dominated adjudication in this period. The internal reviews conducted by the Board during this period focused on procedural matters. Fairness in decision making had a strong presence reflecting the concern about access to justice considerations which the Board had been grappling with internally over the previous decades.

Weiler tried to exempt initial adjudication from full compliance with the principles of natural justice because of the demands of “mass adjudication,” the Board having to decide hundreds of thousands of claims. At the same time, he pointed to the small number of appeals as

evidence of its success. Efficiency and effectiveness, as observed by Evans,⁴⁵⁵ must be considered along with fairness in decision making in these circumstances. There was no question that the Board from initial adjudication on was deciding individual rights rooted in common law. If, as Ron Ellis suggests, rights determining is the hallmark of judicial decision making,⁴⁵⁶ the Board was and is clearly exercising quasi-judicial responsibilities.

The emergence of a new standard of decision making, correctness, with the restructuring of adjudication following Jackson reforms took the Board further in the new direction. As observed by Ellis and Laird, correctness injected a different standard into decision making. They drew the comparison between the civil standard and criminal standard of proof. Correctness in their view imposed the higher criminal standard “beyond a reasonable doubt.”⁴⁵⁷ This thesis suggests that this shift in direction also allowed policy to be constructed ideologically to impose formulaic outcomes for specific sub populations of workers. In short, older workers with recurring musculoskeletal injuries and intermittent periods of unemployment should be cut off benefits.

As we have shown, the systemic failures of the Jackson reforms were brought to light because of the influence by the work of independent researchers who were given access to Board data and personnel as well as to injured workers and employers. The Board’s acceptance that its policy implementation stigmatized injured workers and its steps to address this within its organization were concrete signs of willingness to insure that its decisions were based on evidence, not ideology.

⁴⁵⁵ Evans., *supra* note 155.

⁴⁵⁶ Ron Ellis, *Unjust by Design - Canada's Administrative Justice System* (Toronto: UBC Press, 2013).

⁴⁵⁷ Ellis and Laird, *supra* note 260 at 243.

This acceptance is lost and correctness as a decision making standard becomes fully implemented with the Auditor General's intervention in 2009. This may explain why the failure of the Jackson self reliance reforms resulted in an increase in permanently disabled workers receiving some wage loss benefits. Adjudication and appeals were still operating on an underlying principle of fairness even though administering less secure benefits. It was the VFM audit of adjudication at the Board which led to the implementation of correctness in decision making and the creation of specialized teams to target populations that had been predetermined to have unworthy claims, such as workers suffering recurrences or aggravations. Procedural changes meant that decision making was moved towards auto adjudication and paper review of appeals further reducing the need to consider the person. Access to oral hearings in appeals was restricted and the number of denied appeals increased. Credibility, a cornerstone of the individualization of benefits, interfered with efficient and routine consideration of claims.

Did the Independent Tribunal provide a Solution?

The ability of the independent tribunal to protect injured workers was impaired by its further subordination to the BoD by the Jackson reforms. The primary measure of quality of tribunal decision making used by the WSIAT is its record on judicial review. In 25 years, there have been 115 judicial review applications and only one successful judicial review of a Tribunal decision.⁴⁵⁸ The WSIAT Chair points to court decisions that refer to the tribunal as “deserving the highest degree of deference” as an experienced and expert panel.⁴⁵⁹

⁴⁵⁸ Ontario Workplace Safety and Insurance Tribunal Annual Report (Toronto: WSIAT, 2010) at 1.

⁴⁵⁹ *Supra* note 453.

The former Tribunal Chair Ellis, in his critique of administrative justice, focused on the lack of independence of tribunal members after the Jackson reforms.⁴⁶⁰ The critical issue for him was impartiality and treating like cases alike. Ellis made no further claim that WSIAT decision making has been impaired after the government intervention that he complained about. This may be because of Ellis' limited view of the issue, a view focused on "tribunal neutrality". The problem is that the issues are not alike as between employers and workers. They are very different. The Tribunal maintained a formal impartiality but failed or was unable to avoid or address the problem of bias against workers being built into both the processes and the structure of the system.

The impact of this impartiality has been exacerbated by the changes made to decision making under the Auditor General's influence. The Tribunal claims no authority to rule on how the Board makes its decisions. It only decides the merits of the individual case. The authority that it once claimed, that of the final arbiter of law, was abandoned after the Jackson reforms. Injured workers can still appeal many issues to WSIAT but find themselves subject to Board policy. And if denial rates of claims by the Board increase under the correctness standard, backlogs in appeals to WSIAT must surely follow.

What does this Mean for Injured Workers?

It is difficult to escape the conclusion that workers' compensation has failed many injured workers, especially those with permanent disabilities who are unemployed. This can be seen in both aspects of law reform studied in this thesis.

Broader considerations of social justice as seen through the principles of law and social movements, access to justice and therapeutic jurisprudence are subordinated to concerns of

⁴⁶⁰ Ellis, "Unjust by Design," *supra* note 450 especially chapter 1.

business, the prospect of injured workers receiving fair and adequate compensation has diminished. Increasingly one sided economic considerations shifted more and more of the burden of costs onto workers and away from employers. Ideological fictions of what is right or wrong replaced considerations of empirical evidence about what works and what does not.

There is a working man's song about miners from the days when a miner's wage was based on the weight of the ore that he delivered to the scales at the end of the shift. The refrain in the chorus is "Keep your hands upon the dollar and your eyes upon the scale."

There is nothing in this thesis that injured workers are not already aware of through their experience of these reforms. What this thesis tries to confirm is that they are right, "the pool has been rigged." Not only did these reforms take millions of dollars from injured workers by reducing the amount of wage protection and eliminating permanent pensions, they now limit the nature and frequency of services that will be provided.

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Research Advisory

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Workplace Safety and Insurance Board <http://www.wsib.on.ca>

Appendix 1 Leadership of the Board

Beginning in 1970s, a new tradition of appointing former politicians as Chair of the Board began.⁴⁶¹ In 1984, the Liberals appointed as chair the former Conservative MPP Robert Elgie who had been the Minister of Labour who appointed Weiler in 1980. He would be in charge of the initial implementation. His successor as chair, Odoardo Di Santo, was a former NDP MPP and an injured worker activist. Presidents were appointed from outside the Board starting in 1985 with the appointment Alan Wolfson, a health economist. In this period, both Presidents were from outside and from public service. Brian King became president under the NDP government. An injured worker, King had previously been chair of the workers' compensation appeal tribunal in Manitoba.

While the format of Chair, President and Board of Directors was maintained by Bill 99, the government's appointments changed. Glenn Wright was appointed Chair in 1997. Wright was a very active insider in the Conservative party and not a former MPP. He was a private business man with insurance experience. The new President, David Williams, had worked in senior management at Loblaws, a grocery chain. Towards the end of his time with the WSIB, Wright also became President. Neither had any prior experience of public service or workers' compensation.

From 2004-2006, the role of both Chair and President was assumed by Jill Hutcheon, a former Deputy Minister of Labour. In 2006, Steve Mahoney, a former Liberal MP and MPP, who in opposition to the NDP government lead a critical review of workers' compensation, was appointed Chair.

⁴⁶¹ Prior practice was to appoint long serving public servants.

Consistent with the intervention of the Auditor General and his recommended amendments was the appointment of an auditor, former banker and Federal deputy minister, David Marshall, President in 2009. In 2011 when Steve Mahoney stepped down as Chair, he was replaced by Elisabeth Witmer, a former conservative MPP who, as Minister of Labour, proposed and implemented Bill 99.

Appendix 2 Governance

This appendix examines the legislated changes made to the responsibilities of the Board of Directors from 1980 to 2012.

Prior to the reforms, there were few constraints on or directions to the Board on how to carry out its duties. The Board had been given a broad and general power to decide to all matters before it.⁴⁶² The Weiler reforms provided some additional guidance. Bill 101, for example, added the power to

undertake and carry on such investigations, research and training and make grants to individuals, institutions and organizations for investigations, research and training in such amounts and upon such terms and conditions as the Board considers acceptable.⁴⁶³

Bill 162 gave to the Board the power to make regulations with the approval of government about a range of issues related to implementation of new earnings calculations, impairment calculations and re-employment created by the amendments.⁴⁶⁴ No regulations were ever made.

A Purpose Clause was added to the beginning of the Act for the first time by Bill 165.

0.1 The purposes of this Act are

- (a) to provide fair compensation to workers who sustain personal injury arising out of and in the course of their employment or who suffer from occupational disease and to their survivors and dependents;
- (b) to provide health care benefits to those workers;
- (c) to provide for rehabilitation services and programs to facilitate the workers' return to work;

⁴⁶² *WCA1914*, *supra* note 128, s 60.

⁴⁶³ Bill 101, *supra* note 188, s 71(3)(j).

⁴⁶⁴ Bill 162, *supra* note 189, s63(3).

- (d) to provide for rehabilitation programs for their survivors;
- (e) to require the board of directors of the Workers' Compensation Board to act in a financially responsible and accountable manner in governing the Board.⁴⁶⁵

Section 65.1 gave the Minister of Labour the power to issue policy directives to the Board.

S65.2 required the Board to enter into a Memorandum of Understanding with the Minister and

- (2) The memorandum of understanding must address the following matters:
 1. The accountability of the Board to the Minister.
 2. The reporting requirements of the Board to the Minister and to such other persons as may be specified in the memorandum.
 3. Matters of government policy that the Board shall respect in the conduct of its affairs.
 4. Any other matter that may be required by order of the Lieutenant Governor in Council
 5. Any other matter agreed to by the Board and Minister.⁴⁶⁶

The purpose clause was continued by the Conservative government in Bill 15, modified to make the purposes of the Act subject to “a financially responsible and accountable manner” and adding two more subjections,

- 5. To prevent or reduce the occurrence of injuries and occupational diseases at work.
- 6. To promote health and safety in workplaces.⁴⁶⁷

The Jackson reforms reordered the purpose clause in Bill 99 to reflect its reordering of the legislation:

- 1. The purpose of this Act is to accomplish the following in a financially responsible and accountable manner:

⁴⁶⁵ *Bill 165, supra* note 236, s 1.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Bill 15 supra* note 239 at s 1

1. To promote health and safety in workplaces and to prevent and reduce the occurrence of workplace injuries and occupational diseases.
2. To facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease.
3. To facilitate the re-entry into the labour market of workers and spouses of deceased workers.
4. To provide compensation and other benefits to workers and to the survivors of deceased workers⁴⁶⁸

Prevention was removed from the Board by legislation in 2011 and the first subsection was modified to read simply,

1. To promote health and safety in workplaces.⁴⁶⁹

As a result of the Auditor General's intervention in 2009, an amendment to section 96 was in 2010 as part of an omnibus bill, Bill 135.⁴⁷⁰ The Act had one section and 21 schedules. The changes to section 96 were found in Schedule 21. The new sections set out how the Board was to maintain the sufficiency of its funds to provide for current and future benefit payments. Ontario Regulation 141/12 defined this sufficiency ratio as

1. 60 per cent on or before December 31, 2017.
2. 80 per cent on or before December 31, 2022.
3. 100 per cent on or before December 31, 2027.⁴⁷¹

Schedule 21 modified subsection 5,

The Board shall maintain the insurance fund so as not to burden unduly or unfairly any class of Schedule 1 employers with payments,

(a) in any year in respect of current benefits; or

⁴⁶⁸ Bill 99 *supra* note 7, s 1

⁴⁶⁹ *WSIA1997 supra* note 253 s 1.

⁴⁷⁰ *Supra* note 337.

⁴⁷¹ O. Reg. 141/12, s. 1 (2).

(b) in future years in respect of future benefits.

A search of current Board policy⁴⁷² and WSIAT decisions⁴⁷³ found only one reference to the purpose clause. In Decision 213/93, the Panel was asked to consider the application of the 1994 version of the purpose clause to restrict their interpretation of another section of the Act. The panel rejected the argument, limiting the role of the purpose clause as a tool in interpreting sections of the statute to circumstances of ambiguity.⁴⁷⁴ There is a mention of the purpose clause in the 1995 Annual Report but the principle focus is on the shift to prevention. There is no Board policy regarding the interpretation of the purpose clause.

MOUs signed in 1998 and 2004 were located in the WSIB library. The provisions cover roles and responsibilities and guiding principles as well as specific legislative requirements, costs, Ontario government management requirements and communications. They included a provision that the Board agreed to implement any policy direction approved by the Lieutenant Governor in Council and issued by the Minister. While the MOU tracked the language of the legislation when it described its requirements, it used its own words when describing the mandate of the Act. The opening wording spoke to what the Act required but did not quote section 1, the purpose clause. When it came to the joint commitment of the Board and Ministry, a new description not in the legislation was used,

The Ministry and the Board are committed to a workplace health, safety and insurance system predicated on sound insurance and business principles, including:

- i. The provision of benefits and services for fatalities and injuries occurring in the workplace and occupational diseases;

⁴⁷² WSIB Operational Policy <http://www.wsib.on.ca/en/community/WSIB/230/PolicyHome/24345?vgnextoid=cc08b411be12e110VgnVCM1000000e18120aRCRD> accessed August 17, 2013.

⁴⁷³ WSIAT Decision Search <http://www.wsiat.on.ca/ExtDec/default.asp> accessed December 9, 2012.

⁴⁷⁴ 34 WCATR 84.

- ii. A commitment to achieving and maintaining a financially sustainable workplace insurance plan;
- iii. A system with greater certainty, less complexity and litigation and simplified administration; and
- iv. A commitment to superior quality service to workers, employers and other stakeholders.⁴⁷⁵

Linked to the MOU but in a separate provision was the requirement that the Board conduct a value for money audit of one of its programs each year utilizing provincial auditors.

A key instrument of the memorandum of understanding was the strategic plan. Two strategic plans were reviewed. The first plan in 1994 took place under the NDP government. With a mission to “make the system work” its first goal was

Ensuring that workers, surviving dependents and employers received the benefits and services to which they are entitled in a fair, effective and timely manner.⁴⁷⁶

Other goals including ensuring financial viability and sustainability of the system follow. To achieve an objective of the highest quality claims management, a strategic action was to

Adjudicate claims fairly and promptly and pay compensation accurately and efficiently.

To provide fair, prompt and independent decisions on all objections.⁴⁷⁷

The post Bill 99 strategic plan was very different from its predecessor. This plan covers the period 1998 to 2002. Emblazoned on the front page with a starburst emblem, the central vision is “the elimination of all workplace injuries and illnesses.” Responding to the proclamation of Bill 99, the tone was triumphant. The primary focus of the plan was to integrate the new order into everything, even decision making. Nine Strategic Goals were

⁴⁷⁵ Memorandum of Understanding between Ministry of Labour and WSIB, Board of Directors’ Minute #4(c) (Sept. 24, 2009) page 7042 at 3.

⁴⁷⁶ Workers’ Compensation Board Strategic Plan (1994) at 17.

⁴⁷⁷ Ibid., at 18.

identified. Following the reordering of the statute, entitlement to benefits were covered in Strategic Goal D after prevention, health care and return to work. It read:

The WSIB will ensure fair, correct and timely compensation is provided to injured and ill workers. Injured and ill workers will receive all benefits to which they are entitled under the legislated provisions.⁴⁷⁸

There was a systematic emphasis throughout the discussion of this objective on correct decision making. Phrases such as “support doing what is right and correcting what is wrong” were repeated. A new service delivery model was adopted for implementation which will consolidate the adjudication function, eliminate the transfer of cases and support personalized, integrated service.⁴⁷⁹ The first step was to integrate support of workplace prevention in the day to day work of Operations.

Under “Respect for the Uniqueness of Individuals and Situations” the principle action was to complete the review of operational policies to assist staff in consistent decision making. The operating principle is “do what is right and correct what is wrong.”

The next section was *Cheating will be Eliminated* and it discussed a zero tolerance policy on cheating.

Training for staff is discussed but not any measures by which to evaluate if in fact the decision making does what is right and corrects what is wrong.

⁴⁷⁸ Five Year Strategic Plan for the Workplace Safety and Insurance Board of Ontario 1998 to 2002 at 29.

⁴⁷⁹ *Ibid.*, at 30.

Appendix 3 WSIB FIPPA Data

NEL Awards by Year of Injury / Illness

Request ID: 304

Request Date: April 5, 2013

Requested By: Andrew King

Prepared By: Corporate Business Information & Analytics, Strategy Cluster

Data Definitions/Notations:

- Data Source: Information Management Catalogue as at May 31, 2013. Data subject to further maturing.
- Excludes NEL Awards for no lost time claims.
- Recurrence defined as a return to LOE benefits after a gap of more than 30 days. Excludes 1 day authorization periods.

Year of Injury / Illness	Allowed Lost Time	NEL Award Percentage																				NEL Awards With Recurrence		
		0-9.99		10-19.99		20-29.99		30-39.99		40-49.99		50-59.99		60-69.99		70-79.99		80-89.99		90-100		Total	#	%
		#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%					
1990	187,652	6,517	33.5%	7,016	36.1%	3,977	20.5%	1,185	6.1%	363	1.9%	180	0.9%	84	0.4%	34	0.2%	21	0.1%	53	0.3%	19,430	5,568	28.7%
1991	159,169	6,691	35.6%	6,641	35.4%	3,600	19.2%	1,134	6.0%	372	2.0%	166	0.9%	71	0.4%	20	0.1%	15	0.1%	66	0.4%	18,776	5,464	29.1%
1992	141,407	6,007	38.1%	5,386	34.1%	2,818	17.9%	948	6.0%	311	2.0%	133	0.8%	66	0.4%	44	0.3%	12	0.1%	60	0.4%	15,785	4,906	31.1%
1993	129,178	4,811	37.5%	4,250	33.1%	2,310	18.0%	826	6.4%	314	2.4%	140	1.1%	67	0.5%	27	0.2%	15	0.1%	69	0.5%	12,829	4,136	32.2%
1994	130,292	4,335	35.3%	4,077	33.2%	2,425	19.8%	802	6.5%	290	2.4%	128	1.0%	78	0.6%	37	0.3%	21	0.2%	73	0.6%	12,266	4,126	33.6%
1995	123,137	3,788	34.6%	3,693	33.8%	2,102	19.2%	764	7.0%	260	2.4%	127	1.2%	75	0.7%	34	0.3%	14	0.1%	81	0.7%	10,938	3,630	33.2%
1996	106,956	3,380	35.0%	3,259	33.8%	1,783	18.5%	666	6.9%	247	2.6%	126	1.3%	68	0.7%	26	0.3%	22	0.2%	77	0.8%	9,654	3,142	32.5%
1997	106,084	2,897	31.3%	3,340	36.1%	1,801	19.4%	632	6.8%	264	2.8%	131	1.4%	90	1.0%	31	0.3%	10	0.1%	68	0.7%	9,264	3,081	33.3%
1998	101,508	2,817	30.1%	3,400	36.4%	1,752	18.7%	682	7.3%	290	3.1%	139	1.5%	103	1.1%	28	0.3%	24	0.3%	116	1.2%	9,351	3,413	36.5%
1999	105,258	3,002	28.5%	4,028	38.2%	1,921	18.2%	789	7.5%	305	2.9%	175	1.7%	115	1.1%	40	0.4%	22	0.2%	141	1.3%	10,538	3,973	37.7%
2000	109,036	3,207	28.3%	4,360	38.5%	2,126	18.8%	839	7.4%	346	3.1%	167	1.5%	123	1.1%	45	0.4%	15	0.1%	109	1.0%	11,337	4,263	37.6%
2001	103,132	3,055	27.9%	4,317	39.4%	2,074	18.9%	760	6.9%	320	2.9%	174	1.6%	102	0.9%	30	0.3%	16	0.1%	116	1.1%	10,964	4,062	37.0%
2002	100,226	3,165	28.6%	4,284	38.7%	2,059	18.6%	791	7.2%	316	2.9%	141	1.3%	116	1.0%	36	0.3%	12	0.1%	141	1.3%	11,061	4,104	37.1%
2003	97,861	3,127	28.0%	4,417	39.6%	2,065	18.5%	714	6.4%	357	3.2%	150	1.3%	109	1.0%	47	0.4%	13	0.1%	166	1.5%	11,165	4,000	35.8%
2004	95,198	3,058	27.5%	4,575	41.2%	2,001	18.0%	684	6.2%	306	2.8%	169	1.5%	124	1.1%	31	0.3%	15	0.1%	151	1.4%	11,114	3,985	35.9%
2005	94,264	3,233	29.5%	4,380	39.9%	1,939	17.7%	667	6.1%	322	2.9%	130	1.2%	75	0.7%	25	0.2%	17	0.2%	181	1.7%	10,969	3,871	35.3%

FEL Awards by Year of Injury / Illness

Request ID: 304

Request Date: April 5, 2013

Requested By: Andrew King

Prepared By: Corporate Business Information & Analytics, Strategy Cluster

Data Definitions/Notations:

- **Data Source:** Information Management Catalogue as at May 31, 2013. Data subject to further maturing.

- Includes claims with FEL R2 decisions

Year of Injury / Illness	Allowed Lost Time	FEL Award Percentage																				Total
		0-9.99		10-19.99		20-29.99		30-39.99		40-49.99		50-59.99		60-69.99		70-79.99		80-89.99		90-100		
		#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	
1990	187,652	6,261	46.1%	915	6.7%	1,337	9.8%	1,217	9.0%	988	7.3%	573	4.2%	129	0.9%	30	0.2%	2	0.0%	2,141	15.8%	13,593
1991	159,169	5,719	47.5%	849	7.0%	1,083	9.0%	1,039	8.6%	847	7.0%	508	4.2%	100	0.8%	14	0.1%	4	0.0%	1,889	15.7%	12,052
1992	141,407	3,350	42.5%	607	7.7%	715	9.1%	729	9.3%	533	6.8%	299	3.8%	108	1.4%	14	0.2%	1	0.0%	1,521	19.3%	7,877
1993	129,178	2,534	42.6%	461	7.7%	495	8.3%	474	8.0%	399	6.7%	210	3.5%	83	1.4%	16	0.3%	2	0.0%	1,277	21.5%	5,951
1994	130,292	2,326	43.4%	407	7.6%	429	8.0%	426	7.9%	310	5.8%	182	3.4%	66	1.2%	4	0.1%	2	0.0%	1,208	22.5%	5,360
1995	123,137	1,825	39.8%	326	7.1%	359	7.8%	376	8.2%	326	7.1%	157	3.4%	68	1.5%	7	0.2%	1	0.0%	1,135	24.8%	4,580
1996	106,956	1,611	41.1%	276	7.0%	310	7.9%	289	7.4%	230	5.9%	146	3.7%	64	1.6%	8	0.2%	1	0.0%	986	25.1%	3,921
1997	106,084	1,532	39.4%	265	6.8%	282	7.3%	305	7.8%	231	5.9%	145	3.7%	59	1.5%	10	0.3%	0	0.0%	1,058	27.2%	3,887

Locked-in LOE Claims by Year of Injury / Illness

Request ID: 304

Request Date: April 5, 2013

Requested By: Andrew King

Prepared By: Corporate Business Information & Analytics, Strategy Cluster

Data Definitions/Notations:

- **Data Source:** Information Management Catalogue as at May 31, 2013. Data subject to further maturing.
- Includes all cases whose first LOE lock-in cheque was issued in the reporting period

Year of Injury / Illness	Allowed Lost Time	Locked-in LOE	
		#	%
1998	101,508	2,613	2.6%
1999	105,258	3,072	2.9%
2000	109,036	3,662	3.4%
2001	103,132	3,557	3.4%
2002	100,226	3,726	3.7%
2003	97,861	3,841	3.9%
2004	95,198	3,795	4.0%
2005	94,264	3,438	3.6%

RUN DATE: SEPTEMBER 18, 2012
 REPORT ID: ADHC1279B

INTEGRATED APPEALS SYSTEM

Appeal outcome count by objection origin where outcome end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011

Outcome Year	Dual	Employer+rep	Worker+rep	TOTAL
1996 Decision	22	1,244	6,966	8,232
Return	35	35	245	280
Withdrawn	6	335	1,971	2,312
Total 1996	28	1,614	9,182	10,824
1997 Agreement				
Decision	47	1,864	8,736	10,647
Return	42	42	395	437
Withdrawn	3	340	1,829	2,172
Total 1997	50	2,246	10,961	13,257
1998 Agreement				
Decision	1	24	336	361
Return	39	1,328	7,938	9,305
Withdrawn	12	237	1,741	2,172
Total 1998	53	1,629	10,346	12,028
1999 Agreement				
Decision	38	21	410	431
Return	77	967	7,252	8,257
Withdrawn	7	234	433	510
Total 1999	45	1,299	9,611	10,955
2000 Agreement				
Decision	1	14	266	281
Return	46	912	6,487	7,445
Withdrawn	10	215	450	543
Total 2000	58	1,233	8,978	10,269

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RUN DATE: SEPTEMBER 18, 2012
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INTEGRATED APPEALS SYSTEM

Appeal outcome count by objection origin where outcome end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011

Outcome Year	Outcome	Dual	Employer+rep	Worker+rep	TOTAL
2001	Agreement	1	17	230	248
	Decision	48	919	5,924	6,891
	Return	2	115	515	632
	Withdrawn	7	272	1,802	2,081
Total	2001	58	1,323	8,471	9,852
2002	Agreement	9	145	154	154
	Decision	44	927	5,813	6,784
	Return	3	93	520	616
	Withdrawn	6	261	1,689	1,956
Total	2002	53	1,290	8,167	9,510
2003	Agreement	1	7	70	78
	Decision	43	894	5,970	6,907
	Return	8	89	547	636
	Withdrawn	8	293	1,624	1,925
Total	2003	52	1,283	8,211	9,546
2004	Agreement	3	8	45	56
	Decision	44	928	5,892	6,864
	Return	6	98	540	644
	Withdrawn	9	253	1,715	1,977
Total	2004	62	1,287	8,192	9,541
2005	Agreement	1	6	43	50
	Decision	42	912	5,962	6,916
	Return	3	103	583	689
	Withdrawn	12	277	1,724	2,013
Total	2005	58	1,298	8,312	9,668

RUN DATE: SEPTEMBER 18, 2012
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INTEGRATED APPEALS SYSTEM

Appeal outcome count by objection origin where outcome end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011

Outcome Year	Outcome	Dual	Employer+rep	Worker+rep	TOTAL

2006	Agreement	2	8	51	61
	Decision	31	1,051	5,690	6,772
	Return	4	106	501	611
	Withdrawn	8	325	1,598	1,931
Total	2006	45	1,490	7,840	9,375

2007	Agreement	3	9	69	81
	Decision	43	1,118	5,505	6,666
	Return	4	106	489	599
	Withdrawn	11	303	1,600	1,914
Total	2007	61	1,536	7,663	9,260

2008	Agreement	1	9	61	71
	Decision	32	945	5,194	6,171
	Return	4	100	472	576
	Withdrawn	7	317	1,661	1,985
Total	2008	44	1,371	7,388	8,803

2009	Agreement				
	Decision	38	1,088	5,440	6,566
	Return	2	111	413	526
	Withdrawn	11	276	1,598	1,885
Total	2009	51	1,480	7,512	9,043

2010	Agreement	2	3	55	60
	Decision	33	1,095	5,513	6,641
	Return	2	93	456	551
	Withdrawn	4	310	1,554	1,868
Total	2010	41	1,501	7,578	9,120

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REPORT ID: ADHC1279B

INTEGRATED APPEALS SYSTEM

Appeal outcome count by objection origin where outcome end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011

Outcome Year	Dual	Employer+rep	Worker+rep	TOTAL
2011 Agreement	1	8	26	35
Decision	31	1,446	6,337	7,814
Return	1	82	481	564
Withdrawn	4	308	1,657	1,969
Total 2011	37	1,844	8,501	10,382

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RUN DATE: SEPTEMBER 16, 2012
 REPORT ID: ADHC1279A

INTEGRATED APPEALS SYSTEM

Issue outcome count by objection origin where decision end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011

Decision Year	Issue Outcome	Dual	Employer+rep	Worker+rep	TOTAL
1996	Allowed	11	388	3,242	3,641
	Allowed in Part	5	113	735	853
	Denied	45	959	6,572	7,576
Total 1996		61	1,460	10,549	12,070
1997	Allowed	32	580	4,227	4,839
	Allowed in Part	8	128	1,028	1,164
	Denied	74	1,536	9,355	10,965
Total 1997		114	2,244	14,610	16,968
1998	Allowed	34	364	3,588	3,986
	Allowed in Part	10	113	948	1,071
	Denied	68	1,192	8,161	9,421
Total 1998		112	1,669	12,697	14,478
1999	Allowed	37	249	3,536	3,822
	Allowed in Part	8	72	988	1,068
	Denied	49	919	7,248	8,216
Total 1999		94	1,240	11,772	13,106
2000	Allowed	32	214	3,296	3,542
	Allowed in Part	8	84	846	938
	Denied	82	833	6,090	7,005
Total 2000		122	1,131	10,232	11,485
2001	Allowed	40	228	2,920	3,188
	Allowed in Part	15	73	780	868
	Denied	72	847	5,223	6,142
Total 2001		127	1,148	8,923	10,198

RUN DATE: SEPTEMBER 16, 2012
 REPORT ID: ADHC1279A

INTEGRATED APPEALS SYSTEM

Issue outcome count by objection origin where decision end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011

Decision Year	Issue outcome	Dual	Employer+rep	Worker+rep	TOTAL
2002	Allowed	27	220	2,732	2,979
	Allowed in Part	9	105	801	915
	Denied	75	905	5,469	6,449
Total	2002	111	1,230	9,002	10,343
2003	Allowed	27	217	2,786	3,030
	Allowed in Part	12	83	773	868
	Denied	64	861	5,421	6,346
Total	2003	103	1,161	8,980	10,244
2004	Allowed	30	242	2,736	3,008
	Allowed in Part	17	79	782	878
	Denied	64	864	5,326	6,254
Total	2004	111	1,185	8,844	10,140
2005	Allowed	41	224	2,620	2,885
	Allowed in Part	6	86	813	905
	Denied	71	886	5,502	6,459
Total	2005	118	1,196	8,935	10,249
2006	Allowed	28	248	2,640	2,916
	Allowed in Part	7	80	735	822
	Denied	47	1,026	5,264	6,337
Total	2006	82	1,354	8,639	10,075
2007	Allowed	40	270	2,517	2,827
	Allowed in Part	15	93	756	864
	Denied	60	1,130	4,927	6,117
Total	2007	115	1,493	8,200	9,808

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INTEGRATED APPEALS SYSTEM

Issue outcome count by objection origin where decision end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011

Decision Year	Issue outcome	Dual	Employer+rep	Worker+rep	TOTAL
2008	Allowed	19	233	2,414	2,666
	Allowed in Part	12	74	668	754
	Denied	56	927	4,587	5,570
Total 2008		87	1,234	7,669	8,990
2009	Allowed	36	259	2,300	2,595
	Allowed in Part	12	62	713	787
	Denied	36	1,150	5,083	6,269
Total 2009		84	1,471	8,096	9,651
2010	Allowed	14	191	2,108	2,313
	Allowed in Part	10	97	688	795
	Denied	50	1,104	5,374	6,528
Total 2010		74	1,392	8,170	9,636
2011	Allowed	14	261	2,054	2,329
	Allowed in Part	8	119	753	880
	Denied	34	1,358	6,518	7,910
Total 2011		56	1,738	9,325	11,119

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RUN DATE: SEPTEMBER 16, 2012
 REPORT ID: ADHC1279C

INTEGRATED APPEALS SYSTEM

Decision outcome count by objection origin where outcome end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011
 and where Issue outcome is Denied

Decision Year	Decision Outcome	Dual	Employer+rep	Worker+rep	TOTAL
1996	Decision (Enquiry only)	15	178	1,413	1,606
	Decision (Hearing held)	24	103	2,044	2,171
	Decision (Review only)	6	678	3,115	3,799
	Total 1996	45	959	6,572	7,576
1997	Decision (Enquiry only)	7	288	2,252	2,547
	Decision (Hearing held)	54	182	2,805	3,041
	Decision (Review only)	13	1,066	4,298	5,377
	Total 1997	74	1,536	9,355	10,965
1998	Decision (Enquiry only)	13	229	2,153	2,395
	Decision (Hearing held)	52	205	2,838	3,095
	Decision (Review only)	3	758	3,170	3,931
	Total 1998	68	1,192	8,161	9,421
1999	Decision (Enquiry only)	12	202	1,739	1,953
	Decision (Enquiry only) (60 Day)			3	3
	Decision (Hearing held)	31	157	2,439	2,627
	Decision (Review only)	6	555	3,046	3,607
	Decision (Review only) (60 Day)		5	21	26
	Total 1999	49	919	7,248	8,216
2000	Decision (Enquiry only)	10	166	1,344	1,520
	Decision (Enquiry only) (60 Day)		17	75	92
	Decision (Hearing held)	56	127	2,111	2,294
	Decision (Review only)	13	214	1,665	1,892
	Decision (Review only) (60 Day)	3	309	895	1,207
	Total 2000	82	833	6,090	7,005

RUN DATE: SEPTEMBER 18, 2012
 REPORT ID: ADHC1279C

INTEGRATED APPEALS SYSTEM

Decision outcome count by objection origin where outcome end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011 and where Issue outcome is Denied

Decision Year	Decision Outcome	Dual	Employer+rep	Worker+rep	TOTAL
2001	Decision (Enquiry only)	4	96	1,015	1,115
	Decision (Enquiry only) (60 Day)		10	75	85
	Decision (Hearing held)	56	158	1,856	2,070
	Decision (Hearing held) (60 Day)		2		2
	Decision (Review only)	12	262	1,422	1,696
	Decision (Review only) (60 Day)		319	855	1,174
Total	2001	72	847	5,223	6,142
2002	Decision (Enquiry only)	7	129	895	1,031
	Decision (Enquiry only) (60 Day)		8	76	84
	Decision (Hearing held)	55	249	2,211	2,515
	Decision (Hearing held) (60 Day)		2	3	5
	Decision (Review only)	13	260	1,433	1,706
	Decision (Review only) (60 Day)		257	851	1,108
Total	2002	75	905	5,469	6,449
2003	Decision (Enquiry only)	15	142	782	939
	Decision (Enquiry only) (60 Day)		12	31	43
	Decision (Hearing held)	46	196	2,302	2,544
	Decision (Hearing held) (60 Day)			3	3
	Decision (Review only)	3	211	1,377	1,591
	Decision (Review only) (60 Day)		300	926	1,226
Total	2003	64	861	5,421	6,346

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INTEGRATED APPEALS SYSTEM

Decision outcome count by objection origin where outcome end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011
 and where Issue outcome is Denied

Decision Year	Decision Outcome	Dual	Employer+rep	Worker+rep	TOTAL
2004	Decision (Enquiry only)	7	149	750	906
	Decision (Enquiry only) (60 Day)	12	12	52	64
	Decision (Hearing held)	54	184	2,129	2,367
	Decision (Hearing held) (60 Day)	1	1	1	1
	Decision (Review only)	3	199	1,361	1,563
	Decision (Review only) (60 Day)	319	319	1,034	1,353
Total	2004	64	864	5,326	6,254
2005	Decision (Enquiry only)	13	151	909	1,073
	Decision (Enquiry only) (60 Day)	14	14	88	102
	Decision (Hearing held)	50	202	2,072	2,324
	Decision (Hearing held) (60 Day)	5	185	9	9
	Decision (Review only)	3	334	1,344	1,534
	Decision (Review only) (60 Day)	3	334	1,080	1,417
Total	2005	71	886	5,502	6,459
2006	Decision (Enquiry only)	4	160	902	1,066
	Decision (Enquiry only) (60 Day)	15	15	63	78
	Decision (Hearing held)	39	176	2,082	2,297
	Decision (Hearing held) (60 Day)	4	1	1	1
	Decision (Review only)	4	241	1,220	1,465
	Decision (Review only) (60 Day)	433	433	997	1,430
Total	2006	47	1,026	5,264	6,337

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INTEGRATED APPEALS SYSTEM

Decision outcome count by objection origin where outcome end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011
 and where Issue outcome is Denied

Decision Year	Decision Outcome	Dual	Employer+rep	Worker+rep	TOTAL
2007	Decision (Enquiry only)	6	173	869	1,048
	Decision (Enquiry only) (60 Day)		23	59	82
	Decision (Hearing held)	51	246	2,008	2,305
	Decision (Hearing held) (60 Day)		1		1
	Decision (Review only)	3	275	1,064	1,342
	Decision (Review only) (60 Day)		412	927	1,339
Total	2007	60	1,130	4,927	6,117
2008	Decision (Enquiry only)	9	166	930	1,105
	Decision (Enquiry only) (60 Day)		27	47	74
	Decision (Hearing held)	46	159	1,723	1,928
	Decision (Hearing held) (60 Day)			10	10
	Decision (Review only)	1	263	954	1,218
	Decision (Review only) (60 Day)		312	923	1,235
Total	2008	56	927	4,587	5,570
2009	Decision (Enquiry only)	6	206	1,105	1,317
	Decision (Enquiry only) (60 Day)		25	73	98
	Decision (Hearing held)	26	183	1,948	2,157
	Decision (Hearing held) (60 Day)		2	7	9
	Decision (Review only)	3	284	897	1,164
	Decision (Review only) (60 Day)	1	450	1,053	1,504
Total	2009	36	1,150	5,083	6,269

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INTEGRATED APPEALS SYSTEM

Decision outcome count by objection origin where outcome end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011 and where Issue outcome is Denied

Decision Year	Decision Outcome	Dual	Employer+rep	Worker+rep	TOTAL
2010	Decision (Enquiry only)	7	178	1,165	1,350
	Decision (Enquiry only) (60 Day)		19	71	90
	Decision (Hearing held)	35	197	1,918	2,150
	Decision (Hearing held) (60 Day)		3	2	5
	Decision (Review only)	4	249	977	1,230
	Decision (Review only) (60 Day)	4	458	1,241	1,703
Total	2010	50	1,104	5,374	6,528
2011	Decision (Enquiry only)	10	220	1,315	1,545
	Decision (Enquiry only) (60 Day)		18	72	90
	Decision (Hearing held)	22	130	1,848	2,000
	Decision (Hearing held) (60 Day)		3	1	4
	Decision (Review only)	2	432	1,651	2,085
	Decision (Review only) (60 Day)		555	1,631	2,186
Total	2011	34	1,356	6,516	7,910

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INTEGRATED APPEALS SYSTEM

Objection count for Decisions and Agreements where at least one issue outcome is allowed or allowed in part and where the outcome end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011

Outcome Year	Outcome	Objection Count
1996	Decision (Enquiry only)	911
	Decision (Hearing held)	1,060
	Decision (Review only)	1,422
Total	1996	3,393
1997	Agreement	1
	Decision (Enquiry only)	1,394
	Decision (Hearing held)	1,270
	Decision (Review only)	1,677
Total	1997	4,342
1998	Agreement	333
	Decision (Enquiry only)	1,194
	Decision (Hearing held)	1,366
	Decision (Review only)	1,166
Total	1998	4,059
1999	Agreement	398
	Decision (Enquiry only)	1,099
	Decision (Enquiry only) (60 Day)	3
	Decision (Hearing held)	1,255
	Decision (Review only)	1,187
	Decision (Review only) (60 Day)	3
Total	1999	3,945

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INTEGRATED APPEALS SYSTEM

Objection count for Decisions and Agreements where at least one issue outcome is allowed or allowed in part and where the outcome end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011

Outcome Year	Outcome	Objection Count
2000	Agreement	263
	Decision (Enquiry only)	951
	Decision (Enquiry only) (60 Day)	44
	Decision (Hearing held)	1,179
	Decision (Review only)	838
	Decision (Review only) (60 Day)	262
Total	2000	3,537
2001	Agreement	237
	Decision (Enquiry only)	762
	Decision (Enquiry only) (60 Day)	43
	Decision (Hearing held)	1,171
	Decision (Hearing held) (60 Day)	2
	Decision (Review only)	827
	Decision (Review only) (60 Day)	255
Total	2001	3,297
2002	Agreement	144
	Decision (Enquiry only)	645
	Decision (Enquiry only) (60 Day)	32
	Decision (Hearing held)	1,257
	Decision (Review only)	774
	Decision (Review only) (60 Day)	244
Total	2002	3,096

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INTEGRATED APPEALS SYSTEM

Objection count for Decisions and Agreements where at least one issue outcome is allowed or allowed in part and where the outcome end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011

Outcome Year	Outcome	Objection Count
-----	-----	-----
2003	Agreement	71
	Decision (Enquiry only)	637
	Decision (Enquiry only) (60 Day)	21
	Decision (Hearing held)	1,332
	Decision (Review only)	727
	Decision (Review only) (60 Day)	268
Total	2003	3,056
2004	Agreement	54
	Decision (Enquiry only)	627
	Decision (Enquiry only) (60 Day)	30
	Decision (Hearing held)	1,269
	Decision (Review only)	711
	Decision (Review only) (60 Day)	273
Total	2004	2,964
2005	Agreement	50
	Decision (Enquiry only)	646
	Decision (Enquiry only) (60 Day)	26
	Decision (Hearing held)	1,279
	Decision (Hearing held) (60 Day)	1
	Decision (Review only)	677
	Decision (Review only) (60 Day)	274
Total	2005	2,953

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INTEGRATED APPEALS SYSTEM

Objection count for Decisions and Agreements where at least one issue outcome is allowed or allowed in part and where the outcome end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011

Outcome Year	Outcome	Objection Count
2006	Agreement	54
	Decision (Enquiry only)	617
	Decision (Enquiry only) (60 Day)	23
	Decision (Hearing held)	1,272
	Decision (Review only)	665
	Decision (Review only) (60 Day)	233
Total	2006	2,864
2007	Agreement	75
	Decision (Enquiry only)	601
	Decision (Enquiry only) (60 Day)	26
	Decision (Hearing held)	1,312
	Decision (Review only)	575
	Decision (Review only) (60 Day)	271
Total	2007	2,860
2008	Agreement	62
	Decision (Enquiry only)	632
	Decision (Enquiry only) (60 Day)	28
	Decision (Hearing held)	1,161
	Decision (Hearing held) (60 Day)	5
	Decision (Review only)	513
	Decision (Review only) (60 Day)	251
Total	2008	2,652

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 REPORT ID: ADHC1279D

INTEGRATED APPEALS SYSTEM

Objection count for Decisions and Agreements where at least one issue outcome is allowed or allowed in part and where the outcome end date is from JANUARY 1, 1996 TO DECEMBER 31, 2011

Outcome Year	Outcome	Objection Count
2009	Agreement	
	Decision (Enquiry only)	62
	Decision (Enquiry only) (60 Day)	606
	Decision (Hearing held)	19
	Decision (Hearing held) (60 Day)	1,201
	Decision (Review only)	1
	Decision (Review only) (60 Day)	474
	Decision (Review only) (60 Day)	272
Total	2009	2,635
2010	Agreement	
	Decision (Enquiry only)	57
	Decision (Enquiry only) (60 Day)	578
	Decision (Hearing held)	24
	Decision (Hearing held) (60 Day)	1,074
	Decision (Review only)	2
	Decision (Review only) (60 Day)	404
	Decision (Review only) (60 Day)	306
Total	2010	2,445
2011	Agreement	
	Decision (Enquiry only)	34
	Decision (Enquiry only) (60 Day)	643
	Decision (Hearing held)	36
	Decision (Hearing held) (60 Day)	895
	Decision (Review only)	1
	Decision (Review only) (60 Day)	659
	Decision (Review only) (60 Day)	399
Total	2011	2,667

Appendix 4 WSIB FIPPA Document Requests



VIA REGULAR MAIL

December 20, 2012

Andrew King
 [REDACTED]
 [REDACTED]
 [REDACTED]

Workplace Safety
& Insurance Board

Commission de la sécurité
professionnelle et de l'assurance
contre les accidents du travail

Head Office:
200 Front Street West
Privacy Office, 21st Floor
Toronto, Ontario
Canada M5V 3J1

Siège social:
200, rue Front Ouest
Bureau de la protection de la vie privée,
21^{ème} étage
Toronto, Ontario M5V 3J1

Ashleigh Burnet,
FOI Access Specialist, Privacy Office
 [REDACTED]
 [REDACTED]
 [REDACTED]

www.wsib.on.ca

Dear Mr. King:

RE: FIPPA Access Request #12-084

Thank you for your access request under the *Freedom of Information and Protection of Privacy Act* (FIPPA), received on December 4, 2012, for corporate records (1995 to present) related to:

- 1) Strategic Plans;
- 2) Customer Satisfaction Surveys;
- 3) Quality Assurance in Adjudication; and
- 4) Appeals

Access is granted; my response follows the items in your request.

Strategic Plans

There are approximately 26 records that span 1998 to 2012, totalling approximately 800 pages and 12.5 hours of search and preparation time (30 minutes/report).

Customer Satisfaction Surveys

Access is denied to surveys for 1995, 1998, 2006, 2007, and 2010 because records do not exist. While there are digital files for 1996 and 1997 surveys completed by the WSIB, they are inaccessible, as the files cannot be opened because the software used is no longer supported. From 1999 to present, there are approximately 37 records, totalling approximately 1,860 pages and 3 hours of search and preparation time.

Quality Assurance in Adjudication

Access is granted to the corporate records within our custody and control that examine adjudication quality assurance. There are approximately 40 Fair Practices Commission and Value for Money Audit reports, totalling approximately 650 pages and a total of 2 hours of search and preparation time.

The WSIB is currently engaged in a transformation to modernize and improve the way we provide services. As part of our efforts, we are improving the way we share data and statistical information. Our goal is to provide more data in easier and more accessible formats and venues.

Through two new online tools, workers, employers, stakeholders, academics, and the general public can easily access, manipulate, and download comprehensive WSIB statistics. Both products are available at www.wsib.on.ca and include:

- *By the Numbers*: Is a new annual report that includes demographic information and analysis of historical trends, including: employer, worker, claim, and benefit payment data.

By the Numbers replaces the annual Statistical Supplement, offering enhanced functionality and improved insight into historical trends.

- *Measuring Results*: Is the quarterly report on WSIB Corporate Metrics and Outcomes. Released for the first time in September 2012, *Measuring Results* makes public the WSIB's quarterly financial results as well as operational trends and assessments.

Moreover, the Institute for Work and Health (www.iwh.on.ca) has carried out a number of studies on adjudication that might be useful to your research, and the WSIB's Research Advisory Council has a listing of projects funded from 1999 to 2011 on the WSIB's website that you might want to peruse, as well (http://www.wsib.on.ca/files/Content/Downloadable%20File/FundedRProjectsBooklet/Funded_Projcts.pdf). Finally, the Fair Practices Commission (www.fairpractices.on.ca) has published all of its Annual Reports and Newsletters on its website.

Appeals

Records are publically available:

- The 2008 Value for Money Audit of Appeals (it's on the WSIB's website under "Audits");
- The 2012 consultation proposal/consultation report (it's on the WSIB's website under "What's New"); and
- The Appeals System Practice and Procedures document (this can also be found on the WSIB's website by running a search for "The Appeals System Practice and Procedures document").

The Appeals Branch is not aware of any reports that reviewed the program in those earlier years.

Based on the above, the total fee to process your request is **\$1,202.00**. The fee is based on the following:

Search & Preparation Time (17.5 hours @ \$ 30.00/hr).....	\$525.00
Photocopies (3,310 pages @ \$0.20/pg).....	\$662.00
Postage.....	\$15.00
Total:	\$1,202.00

Section 7 of Regulation 460 to the Act states that where the fee estimate is \$100.00 or more, the WSIB may request a deposit equal to 50% of the estimated fee before taking further steps to respond to the request for access. Based on the fee estimate outlined above, we will wait until we receive the amount of \$601.00 from you in the form of a cheque made payable to the Workplace Safety and Insurance Board before we continue to process your request. Or, if you would like to narrow the scope of your request in order to reduce the cost, please indicate the records of interest so I can issue you a new fee estimate.

A request under the Act usually must be answered within 30 calendar days; however, section 27 of the Act allows for time extensions under certain circumstances. Given the volume of documents requested that require careful review, and the substantial amount of time required to prepare the records at a time when there are resource constraints, the time limit for answering your request has been extended to 90 days from the date I receive your 50% deposit.

I am responsible for the decision. You may ask for a review of this decision and fee estimate within thirty days of receiving this letter by writing to: Registrar, Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, ON M4W 1A8. If you decide to request a review of this decision, please provide the Commissioner's office with a copy of this

decision letter and your request. In addition, you must send an appeal fee of \$25.00 to the Commissioner's office. Please include the fee with your letter of appeal; appeal fees should be in the form of either a cheque or money order, payable to the Minister of Finance.

Please feel free to contact me if you have any questions.

Yours truly,

A signature that has been completely redacted with several thick, black horizontal strokes.

VIA REGULAR MAIL

May 3, 2013

Andrew King
[REDACTED]
[REDACTED]
[REDACTED]

Workplace Safety
& Insurance Board

Commission de la sécurité
professionnelle et de l'assurance
contre les accidents du travail

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21^{ème} étage
Toronto, Ontario M5V 3J1

Ashleigh Burnet,
FOI Access Specialist, Privacy Office
[REDACTED]
[REDACTED]
[REDACTED]

www.wsib.on.ca

Dear Mr. King:

RE: FIPPA Access Request #13-035

I am responding to your access request, dated March 28, 2013, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), for:

- 1) Corporate Records tracking of customer satisfaction measures from year to year;
- 2) Any Value for Money Audit report related to Quality Assurance in Adjudication, apart from the 2011 audit;
- 3) Fair Practice reports dealing with systemic problems in adjudication;
- 4) Records relating to the definition, implementation, and monitoring of the "correctness standard" in adjudication referred to in the 1997 KPMG report and in the 2011 VFMA report;
- 5) Any reports tracking internal appeals since 1996 (to present), including: numbers, issues, and appeals rates; and
- 6) Corporate records regarding automated adjudication (also referred to as "auto adjudication"), including: consideration, analysis, implementation, and evaluations.

My response follows the items in your request.

Customer Satisfaction Measures

In 2012, the WSIB began issuing its *Measuring Results* quarterly report¹ in which there is a section addressing customer satisfaction; these are posted on our website under "Corporate Reports." Apart from these reports, and what I referenced in my December 20, 2012 response letter to FIPPA Access Request 12-084, no other records exist that track customer satisfaction/services measures.

Adjudication Value for Money Audit Reports

Apart from the 2010 Value for Money Audit, no other VFM audits pertaining to adjudication were undertaken.

Fair Practice Commission Reports

As referenced in my 12-084 decision, from 2004 to 2012, there are approximately 35 Fair Practices Commission Quarterly Reports, totalling approximately 620 pages and 2.5 hours of search and preparation time. Please note the Fair Practices Commission also has an archive of all newsletters and annual reports dating back to 2004 on its website under the "Publication" tab.

¹ As noted in the December 20, 2012 decision letter, *Measuring Results* is the quarterly report that assesses the WSIB's performance against the objectives set out in its Strategic Plan. The report was released for the first time in September 2012.

"Correctness Standard"

At the WSIB, we strive for 100% correctness. This is monitored through the coaching and mentoring of staff at the individual case level.

Appeals

The Appeals Branch does not generate the reports you requested. Most of the reports generated are specific to claim numbers; Appeals generates reports of all of the particular cases (by claim number) assigned to the AROs. It is a tracking tool for the ARO and his/her manager to ensure that the cases move along according to the process and that they are resolved in a timely manner. This information is also viewed as "just-in-time" information, because it can change quickly as the AROs move the cases through the different stages of the appeals process.

However, documents prepared for a previous request for information address some of the information you seek. These reports are:

- a) Appeals Branch 1994-2011 Graph (dated June 26, 2011)
- b) Report 1: Appeal outcome by objection origin where outcome end date is from January 1, 1996 to December 31, 2011
- c) Report 2: Issue outcome count by objection origin where decision end date is from January 1, 1996 to December 31, 2011
- d) Report 3: Decision outcome count by objection origin where outcome end date is from January 1, 1996 to December 31, 2011
- e) Report 4: Objection count for decisions and agreements where at least one issue outcome is allowed or allowed in part and where the outcome end date is from January 1, 1996 to December 31, 2011

These reports total approximately 20 pages and 30 minutes of search and preparation time.

As you are likely aware, the WSIB's *Measuring Results* quarterly report also analyzes appeals data, and Appeals publishes some Appeals Resolution Officer decisions on the Canadian Legal Information Institute's website (www.canlii.org).

Auto Adjudication

eAdjudication allows for the efficient processing of straightforward, allowable claims. The WSIB was able to leverage and implement this system functionality through existing software and system capabilities within the claims system. As many of those individuals involved in eAdjudication projects have since left the Board, there would be significant search time required to try and locate any archived records. If you are interested in pursuing this avenue further, please let me know and I can issue a subsequent fee estimate.

Based on an approximation of 35 Fair Practices Commission Quarterly Reports, totalling approximately 620 pages and 6 Appeals reports, totalling approximately 20 pages, it is estimated to take 3 hours to search and prepare these records. The total fee for processing your request will be approximately **\$223.00**, broken down as follows:

Search & Preparation Time (3 hours @ \$ 30.00/hr)	\$90.00
Photocopies (640 pages @ \$0.20/pg)	\$128.00
Postage:	\$5.00
Total:	\$223.00

Section 7 of Regulation 460 of the Act says that where the fee estimate is \$100.00 or more, the WSIB may request a deposit equal to 50% of the estimated fee before taking further steps to


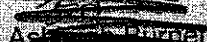
respond to the request for access. If you would like to proceed with your request, please make your cheque in the amount of \$1111.50 payable to the Workplace Safety and Insurance Board and then forward it to our office. Once your cheque has been received, we will begin to process your request.

I am responsible for the decision. Under section 50(2) of FIPPA, you may ask for a review of this fee estimate within thirty days of receiving this letter by writing to: Registrar, Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, ON M4W 1A8.

If you decide to request a review of this decision or fee estimate, please provide the Commissioner's office with a copy of this decision letter and your request. You should be aware that there is a \$25.00 appeal fee that should be in the form of either a cheque or a money order made payable to the Minister of Finance. Any questions about the appeal or the fee should be directed to the Information and Privacy Commissioner at (416) 326-3333.

Please feel free to contact me if you have any questions.

Yours truly,



Asst. Registrar
