

Reflections on Workers' Compensation and Occupational Health & Safety

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This article is based primarily on knowledge derived from first-hand experience in several provinces and territories, and empirical research in Ontario and British Columbia. The article begins by explaining the damaging and overwhelming significance of experience rating. To enhance an understanding of current situations, the article explains the legal history of OH&S, and WC. The role of physicians is then discussed, particularly the difficulties they often have in distinguishing questions of law from questions of medicine.

The article deals with how decisions are made in the claims department of a WCB, and by appeals tribunals. The practice of actuaries is explained, including the problems that their role creates. The limited role of judicial review is mentioned, followed by the Charter of Rights, and finally the significance of NAFTA (the North American Free Trade Agreement) and the WTO (the World Trade Organization).

Le présent article se fonde principalement sur les connaissances découlant de l'expérience directe de plusieurs provinces et territoires, de même que sur une recherche empirique menée en Ontario et en Colombie-Britannique. Il débute par une explication de la portée préjudiciable et exigeante de la tarification personnalisée. Dans le but d'améliorer la compréhension du contexte actuel, l'article présente l'historique juridique de la santé et la sécurité au travail et de l'indemnisation des accidents du travail. Il traite ensuite du rôle des médecins, plus particulièrement des difficultés qu'ils éprouvent souvent à distinguer les questions de droit des questions de médecine.

L'article porte sur la façon dont les décisions sont prises par le service d'indemnisation d'une commission des accidents du travail et par les tribunaux d'appel. Il présente la pratique des actuaires, y compris les problèmes que soulève leur rôle. On y discute du rôle limité du contrôle judiciaire, de la Charte, et enfin,

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de l'importance de l'ALENA (Accord de libre-échange nord-américain) et de l'OMC (l'Organisation mondiale du commerce).

1. INTRODUCTION

The decline of Workers' Compensation ("WC"), and reasons for that decline, are explained below.¹ Reading court and tribunal decisions, reading relevant publications, attending conferences,² and discussions with relevant people, showed that most points mentioned in this article are relevant in all provinces and territories. My academic work includes writing four books, a chapter in each of four other books, four published reports for governments, and 33 articles in law reviews. Most of these publications have been relevant to WC, and many also to Occupational Health & Safety ("OH&S").

This article³ relates to the many current problems of WC and OH&S. As well as being of interest to many academic lawyers, and some physicians, this article may be useful to those who deal with proposed changes in legislation, or who work for, or appear at, a board or tribunal. The article may also be useful to those who deal with claims, or places of employment. Related to this, any consideration of a system change requires not just understanding change, but also understanding the *real* significance of adopting it.

A tragic example of this point occurred in the late 1980s, when one of the workers' organizations in Ontario asked for lifetime pensions for permanent disabilities to be replaced by compensation for actual loss of earnings. It should have been foreseen that if any government adopted that proposal, the calculation of benefits would be modified by "deeming" a worker to have any job that he could do, regardless of whether such a job was available to that worker.

In addition to my own research and experience, some of the views expressed in this article are reinforced by two earlier articles.⁴ Points in the recent literature on labour relations can also relate to WC and OH&S in some cases.⁵ Also, a good recent article⁶ includes a four-page list of other relevant publications.

¹ Some details of deterioration in the Workplace Safety and Insurance Board ("WSIB") are in "Views From the Trenches: Experienced Advocates Reflect on the Current Situation at the WSIB", Gary Newhouse and others in *The IAVGO Reporting Service*, Vol. 25, No.1, June 2012, pp. 1-13.

² The latest conference when I was a Keynote Speaker was the "International Symposium on the Challenges of Workplace Injury Prevention through Financial Incentives", Toronto, 29th/30th November 2012.

³ This is a revision and update of a presentation I made as a Primary Speaker at a conference of 500 in Toronto in 2010.

⁴ David K. Wilken, "Manufacturing Crisis In Workers' Compensation" (1998) 13 J L & Soc Pol'y 124; and *The IAVGO Reporting Service* Special Edition, July 2010, Vol.23, No.1.

⁵ A good example is Judy Fudge & Eric Tucker, eds, *Work On Trial — Canadian Labour Law Struggles*, (The Osgoode Society for Canadian Legal History, 2010).

⁶ Katherine Lippel, "Preserving Workers' Dignity in Workers' Compensation Systems: An International Perspective" (2012) 55 Am J Industrial Med 519 (online).

2. EXPERIENCE RATING⁷

For many years, the assessments paid by employers have been adjusted substantially by the costs of claims made for the disabilities and deaths of their workers. These adjustments are called "Experience Rating". This is a dominant cause of the unfortunate changes made to WC in Canada, and damaging changes that continue being made.

Experience rating can also explain why employers sometimes appeal a decision made in favour of a worker with a health problem, even if the appeal involves hiring another expert witness, and substantially more costs to the parties, and to the Tribunal.⁸ It would also be no surprise if the long proceedings of such an appeal cause more psychological harm to the worker.

Within a few years, experience rating led to many people, in some provinces hundreds, becoming "employers' representatives". The conflicts of interest in WC and OH&S became different from what they were, and what they are commonly assumed to be. It is often assumed that there is a conflict of interest between injured workers and employers. But since experience rating arrived, the most cogent conflict of interest has been between employers and "employers' representatives".

"Employers' representatives" are usually paid a proportion of what they reduce an employer's premiums, regardless of how much they increase an employer's costs in other ways. An example was a case in which a claim had been denied in the claims department of the WCB in British Columbia when I was Chairman of the Board. The worker was appealing the decision, and the "employer's representative" was opposing the appeal. I phoned the company accountant, and told him that, as a matter of academic curiosity, I wondered why the company was opposing the appeal. The accountant replied "why not?" I explained that according to my calculations, if the worker's appeal failed, the cost to the company in sick pay under their collective agreement would be about double the increase in workers' compensation assessments if the appeal succeeded. The accountant said he would look into it. An hour later, the accountant phoned back to say that the company was not opposing the appeal. It was clear that if the employer had remained in the hands of the "employers' representative", opposing the appeal would have continued, with the employer incurring greater costs.

Another example of the damaging effects of experience rating is that for a WCB to operate efficiently requires that its legislation should continue following the basic principle of *The Meredith Report*:⁹ that is "keep it simple". It would be in the best interests of employers and workers that a WC system be kept simple. But it is in the best interests of "employers' representatives" that WC systems become increasingly complicated, just as they have.

In the last few years, unions and the Ontario Network of Injured Workers Groups have several times asked the Ontario government to eliminate experience rating. But greater political power seems to lie with "employers' representatives",

⁷ Comments under this heading are a revised and updated version of my article, Terence G. Ison, "The Significance of Experience Rating" (1986) 24 Osgoode Hall LJ 721.

⁸ A likely example is *Decision No. 434/0912*, WSIAT 2011.

⁹ This refers to the Report by The Hon. Sir William Meredith, C.J.O., Commissioner, published in October 1913.

whose earnings are created by experience rating. Officials of the boards also seem committed to experience rating. So the response of governments to complaints has been to preserve experience rating, sometimes with marginal adjustments made to seem like improvements.

The dominance of “employers’ representatives” was obvious to me in 2008 when attending a conference organized by the Association of Workers’ Compensation Boards of Canada. There were a few union officials present, but no real representatives of employers. Almost all the people present were “employers’ representatives”.

The political role of “employers’ representatives” is one explanation why, over the last few decades, legislative changes to WC have shifted from improving the benefits to reducing them. One example is the curtailment of benefits for mental disabilities. However, that curtailment creates a right to sue for damages. “Absent a right to claim no fault benefits under workers compensation legislation, workers are otherwise able to sue co-workers and employees for tortious conduct that occurs in the workplace. A proper understanding of the [*Workers’ Compensation Act*] (“WCA”) in its legislative context supports the view that workers who may not be entitled to claim under the WCA retain their right to sue for tortious conduct and the employer loses any entitlement to rely on S.10”.¹⁰

The demand for experience rating also failed to recognize that although WCB premiums were paid by employers, most of those costs were borne by workers, who pay those costs indirectly by wage reduction. The total amount that an employer was willing to pay for a worker was the same, regardless of how that amount was applied. So it was usually *workers who bore most of the costs of WC premiums*. This has become more complicated with experience rating.

Until about 1980, all amendments of the WCA in Ontario improved benefits, and it was similar in other jurisdictions. From about 1980 to 1995, some amendments improved benefits, some reduced them. Since 1995, with experience rating compounded by the North American Free Trade Agreement (“NAFTA”) and the World Trade Organization (“WTO”), all amendments seem to have reduced benefits.¹¹ Similarly, current board “policy” seems to make compensation for disabilities incredibly low.¹² The word “reform” is still used to describe changes to a WC system. But since 1995, “reform” means *deform*.

¹⁰ *Downs Construction Ltd. v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2011 BCSC 1129, 2011 CarswellBC 2165, ¶68 (B.C. S.C. [In Chambers]); reversed in part 2012 CarswellBC 3044 (B.C. C.A.).

¹¹ An example of difficulty that a board has nowadays to provide full compensation to someone permanently disabled from working at any available employment is *Decision No. 1484/11*, WSIAT 2011.

It may also be relevant that the number of lost time claims dropped from 104,154 in 2000, to 64,824 in 2009. The age range of workers with the largest volumes also changed from 30 to 44 in the year 2000, from 40 to 54 in 2009. *WSIB Annual Report for 2009, Table 5*.

¹² An example is when workers suffer chronic pain from work-related injuries. Under the “policy” of the WCB of British Columbia, those awards are only 2.5% of an award for total disability. In *British Columbia (Workers’ Compensation Board) v. British Columbia (Human Rights Tribunal)*, 2010 BCCA 77, 2010 CarswellBC 330 (B.C.

The political justification for experience rating is the assumption that it promotes OH&S. That appears in s. 83 of the *Workplace Safety and Insurance Act*¹³ of Ontario. But there is no evidence that experience rating has that effect, even slightly. In particular, disabled workers do not return to work on a reliable medical opinion. When a worker has not fully recovered from the accident or disease, a reliable medical opinion on the safety of returning to work could usually be given *only* by a doctor who knows the worker's medical history, has examined the worker, and *also seen the work done at the place of employment*. That rarely happens. So experience rating creates the risk of a disabled worker being coerced back to work, then sustaining a further injury, or causing an injury to another worker.

New words in WC legislation also cause confusion and damaging consequences. One is "stakeholders". This word creates the false impression that improvements can be made in a WC system by accepting demands of "employers' representatives", or by negotiations with employers and workers' representatives. But it is hard to find anyone who really understands WC and who *really* represents employers.

The role played by "employers' representatives" in recent years could explain other legislative changes. For example, the name of payments made by employers to a WCB changed from "assessments" to "premiums". That can create the impression that a board should now behave like an insurance company, rather than a government agency running a social insurance system. Reducing benefits can then seem like an achievement.

Because experience rating coerces disabled workers back to work before they are fit to, or appear to go back to work, it undermines the recognition of occupational disabilities.¹⁴ Thereby, it also undermines the statistics relating to the incidence and costs of occupational disabilities.

Cancer illustrates some of the problems of compensation by reference to the causes of disability or death. There is enough data to show that between 25% and 50% of all cancer is caused, wholly or partly, by occupation.¹⁵ Yet the proportion of cancer patients who receive workers' compensation is less than 2%.

C.A.); reversed 2011 CarswellBC 2702, 2011 CarswellBC 2703 (S.C.C.), victims of that incredibly low award alleged a violation of the *Human Rights Code*.

13 Section 83(1): "The Board may establish experience and merit rating programs to encourage employers to reduce injuries and occupational diseases and to encourage workers' return to work".

14 David Bruser, "Hiding injuries rewards companies", *Toronto Star* (29 June 2008): "The provincial government's highly touted campaign to improve workplace safety is rewarding companies for hiding injuries and rushing the wounded back to work".

15 This point reflects multiple sources of data, including the medical research summaries published monthly in the *Canadian Occupational Health & Safety News*. Also the *Health, Safety & Environment Newsletter* of the CAW, Vol.20, No.2, March/April 2012, explains, on p. 8, that "Accepted occupational cancer claims represent only a small fraction of the actual number of worker-related cancers. This is thought to be primarily the result of under-reporting and especially for mesothelioma, not filing a claim. The actual number of occupational cancers is therefore grossly under-represented by accepted claims statistics".

Because experience rating causes the under-reporting to a WCB of occupational disabilities, it creates false statistics that tend to diminish OH&S. Also, other factors can discourage an employer from reporting claims.¹⁶ Experience rating seems to make safety regulations and enforcement more flexible. This could explain why compensation is *terminated* in many cases because the worker felt it unsafe to return to work.

Experience rating also creates an incentive for employers *not* to report to a WCB disabilities sustained by a worker that employers have a statutory duty to report. In Ontario, many employers have been prosecuted for failing to report workers' accidents to the WSIB. But those prosecutions do nothing to solve the adverse effects of experience rating.

Related to this, the law of contract provides that a worker has the right to quit his or her job, and work for another employer. That right is the difference between employment and slavery. But experience rating creates a demand for the worker to return to, and remain with, the same employer.

Even when a disabled worker seeks a new employer, experience rating can still increase the risk of unemployment. An existing disability can mean that if the worker has any further accident with a new employer, that accident can create a more serious disability than it would to a worker who was not already disabled. So the second employer has a greater risk than the first of an increase in WC premiums. Thus experience rating impedes the hiring of disabled workers.¹⁷

More importantly, since experience rating, the WSIB terminates compensation when a worker is fit to return to work, even if *no* employment is available to the injured worker. Experience rating also encourages employers to exercise their right to have a disabled worker examined by a physician selected by the employer. That can obviously cause psychological harm. A disabled worker can assume, rightly or wrongly, that this physician is biased against the claim. These problems increased in Ontario recently when experience rating was extended from three to four years.

Experience rating undermines rehabilitation in other ways too. For example, the number of rehabilitation officers at the boards has diminished. In the 1970s, Ontario had several rehabilitation specialists. An excellent one specialized in workers who had brain injuries. That range and quality of rehabilitation has gone with experience rating. An officer of the WSIB recently said that the Board is trying to improve vocational rehabilitation. But no significant improvement is apparent, and *non*-vocational rehabilitation seems to have been abandoned, except for a few standard measures.

An attempt to justify experience rating was accompanied by what is sometimes called the "right" of an injured worker to return to work with the same employer. The reality tends to be an obligation that is not accompanied by any solid

¹⁶ For example, in *Halifax Herald Ltd. v. Nova Scotia (Workers' Compensation Board)*, 2008 NSSC 369, 2008 CarswellNS 676 (N.S. S.C.), the court required the WCB to disclose to the media the names of the 25 employers reporting the highest number of injuries over a three-year period.

¹⁷ For example, Mark Harcourt, "The Impact of Workers' Compensation Experience Rating on Discriminatory Hiring Practices" (2007) *Journal of Economic Issues*.

right. The slogan “rehabilitation is better than compensation” means, all too often, that a disabled worker ends up without rehabilitation *or* compensation.

Experience rating can also result in a serious lack of compensation for a worker with a partial, but substantial, permanent disability. That worker may be able to work for the same employer over a few years. But often, a substantial permanent disability becomes an increasing impediment to work as the years pass. That problem was addressed for decades when a disabled worker was paid a partial pension for life, regardless of what he was doing for work. That pension could be increased if the gravity of the disability increased. Those payments could help a disabled worker to relax, and suffer less harm from the permanent disability. This is one of the many benefits that have been removed, at least in practice, since experience rating.

Another example of the damaging consequences of experience rating was received from a well informed lawyer in British Columbia¹⁸, representing injured workers. This example involved three cases in which the workers could, under a collective agreement, receive for a year 100% of any wage loss. The three workers filed WC claims, just in case their problems became more significant later. The employer hired a major law firm that made demands “. . . that you authorize all health care providers to release to us all medical records, chart notes, clinical records, test results, and any other clinical information which they may have in their possession with respect to this worker for the past 7 years”. The workers’ lawyer explained that this was just one example of many costs and other problems that the clients of her firm have as a result of experience rating.

In 2003, I spoke at a conference of the Canadian Auto Workers in Ontario. Delegates discussed their complaints about WC. As I listened, I put to myself this question: “Would anyone be making this complaint if there was no experience rating?” The answer was “no” with regard to every one of those complaints.

To avoid the damaging consequences of experience rating, including the negative changes to the legislation, and to have any hope of restoring the benefits that have been curtailed, the priority should be the *abolition* of experience rating. Any attempt to improve experience rating would simply continue its harmful consequences. The recent “*Funding Fairness — A Report on Ontario’s Workplace Safety and Insurance System*”¹⁹ recommends that experience rating should only be retained if three conditions are met to ensure its proper use. I see no possibility of those conditions being successfully met.

3. LEGAL HISTORY

This can be seen as the next most significant cause of current problems with OH&S and WC. OH&S never seems to have been administered well in Ontario.

¹⁸ Sarah O’Leary, of Rush Crane Guenther, Barristers & Solicitors, Vancouver. The references to her report and her name in this footnote have her permission.

¹⁹ Prepared by Harry Arthurs for the WSIB, at p. 81. That report does not recognize the distinction between “employers’ representatives” and anyone who really represents employers. A detailed analyses of the proposals of Harry Arthurs is in *A Report to the Ontario Federation of Labour*, by David Wilken in The IAVGO Reporting Service, Vol. 25, No. 1, June 2012, pp.14–41.

Unlike some other provinces, OH&S was never enforced by inspectors on the staff of a WCB who could initiate penalty assessments when hazardous conditions were found. In Ontario, the enforcement of safety regulations has always been the responsibility of a government department. So a penalty has only been obtainable by prosecution. The *Occupational Health and Safety Act*, as amended in 2011, itemizes many things that should be done, the rights of workers, and various procedures for interaction. But it leaves prosecution as the only way of imposing penalties. In 2010, an employer was sentenced to imprisonment for the first time in Ontario for causing a worker's death. That could warn other employers of a personal risk in creating dangers. But it can only achieve that in some situations.

When a new system, known as the "Internal Responsibility System", was introduced in Ontario, I never understood why it was supposed to be better than a joint committee of employers' and workers' representatives on OH&S. The only difference seemed to be the legislative requirement of an "Internal Responsibility System" used by the government department to justify limiting the duties of inspectors. While a discussion between workers' and employers' representatives can help, it cannot be relied upon at all places of employment to protect OH&S. Nor can it be expected that representatives anywhere will recognize all the same dangers as might be recognized by a trained and experienced inspector, or an industrial hygienist. At least some of the current inspectors in Ontario are very knowledgeable and efficient, but their lack of any power to impose a penalty limits what they can achieve.

When an inspector finds that health or safety orders are appropriate, usually they should be made on the spot, with a copy to workers as well as management. When prosecutions are appropriate, they should be commenced within a few days. But generally, prosecutions are very slow, and costly. Also, prosecutions only seem to work after a worker has been disabled or killed. OH&S should be enforced *without waiting* for that to happen. To achieve that requires enforcement sanctions that do not need a prosecution, though in an exceptional case, a prosecution may result in an employer going to prison.²⁰

A few days after becoming Chairman of the WCB in British Columbia, I learned about workers losing their teeth from chemical pollution. They worked in part of a large factory run by a major corporation in a small town. The industrial hygiene department of the Board had been discussing the problem with officials of the employer, but that was getting nowhere. We had a right to order the closing of the factory; but that would have been opposed by the company, the union, and all the workers, including those who were losing their teeth, and many other people and companies. So I had to think of another way to solve the problem.

First, we levied a penalty assessment. Then we levied monthly penalty assessments. Then we increased those every month, and at increasing rates. Then we discovered that increasing the penalty assessments monthly resulted in attention within the company moving from the lower administration to top management. Eventually, a solution was found. The damaging chemical was no longer used, the workers were no longer losing their teeth, and the penalty assessments were ended.

²⁰ See for example, *British Columbia (Workers' Compensation Board) v. Moore*, 2010 BCSC 109, 2011 CarswellBC 3649, 2012 CarswellBC 2416 (B.C. S.C.).

But that way of enforcing OH&S is only possible if a WCB is also responsible for OH&S.

For many years now, British Columbia has been the only province left in which OH&S is enforced by penalty assessments. New Brunswick is considering the revival of penalty assessments (“demerits”), but limited to when an employer is violating the *OHS Act*.²¹

With regard to the history of WC, what courts did in London in the 17th century could be a major cause of current problems of WC in Canada, and in the United States. Most court decisions in London in the 16th and 17th centuries were made by one of two procedures.

One was *the Adversary System*. The judge played a passive role. As this system evolved, the parties and their lawyers initiated and presented the evidence and arguments. The second procedure was *the Inquisitorial System*. The judge used initiative. Lawyers and the parties might be allowed some initiating role, but the judge would be the leading initiator of evidence and arguments. This method was used in the Court of Star Chamber and the Court of High Commission. To extract confessions before those courts were abolished in 1641, they used *torture*. When those courts were abolished, no high courts in London remained using an inquisitorial system.

The other courts expanded and further developed the adversary system. So when English lawyers came to Canada in the 19th century, they were dedicated to the adversary system; and that has prevailed ever since. Legal education in Canada usually makes no mention of the inquisitorial system, and it's common nowadays for a practising lawyer never to have heard of it. A crucial difference between the two systems is that the adversary system always places a *burden of proof* on the claimant. An inquisitorial system is usually designed to avoid that.

Until 1913, disabled workers and dependants could only recover compensation by suing for damages, usually suing the employer. The system weighed heavily against employers, against workers, and against the public interest, particularly the interests of taxpayers, in ways that are relevant today. The adversary system was also damaging to medical care and rehabilitation, it did nothing for OH&S, it was damaging to labour relations, and it was very wasteful. The combined costs to employers and taxpayers of the adversary system made the costs of claims more than double the net benefits to workers.

When Chief Justice Meredith created WC in Ontario, he had had years of experience with the adversary system. Conducting his commission of enquiry, Meredith held hearings, he visited places of employment, he spoke to workers and employers, and he spent time overseas, particularly in Germany, where he found the modern European version of the inquisitorial system. The use of torture was long gone. When Meredith found how much more efficient the inquisitorial system was than any adversary system could possibly be for workers' compensation, he was determined that the adversary system should not apply to workers' compensation. He rejected all proposals for adjudication in courts, and for appeals to courts.

²¹ Stakeholder Consultation: Occupational Health and Safety Demerits. A letter of Jan. 2012 from WorkSafeNB to each “WorkSafeNB Stakeholder”.

As well as a new system to serve the interests of employers and workers, Meredith wanted to protect the public interest by internalizing much of the costs of disabilities and deaths resulting from employment, and so protect tax payers from having to support disabled workers and dependants by welfare. An inquisitorial system would achieve those goals better than any adversary system.

Meredith proposed a WC system in which administration and adjudication would be by a government board. But his report never used the word “inquisitorial”, probably because of the reputation that inquisitorial systems still had among some lawyers. This could explain why the system he recommended became known as “the enquiry system”. His “Workmen’s Compensation Board” would receive reports from employers, workers, and attending physicians. If those reports did not provide all the information needed to decide a case, the Board would use its own initiative to obtain further evidence.

Unfortunately, Meredith never explained how he thought decisions should be made, and they have not been made well. A key feature in the system created by Meredith was the classification of employers into categories of business. But the type of business conducted by companies, and the techniques and equipment used in the construction of products, change nowadays much faster than in Meredith’s time. So nowadays, money can be wasted in applications by employers to be classified in a different category.²² There never seems to have been any serious consideration of what the advantages would be of charging all employers the same assessment rates.²³

4. DOCTORS

The primary reason why decision-making at WCBs never worked well for decades was that the only professionals employed in a claims department were the doctors. Ontario, British Columbia, and some other provinces, had a legal department, but the lawyers did other types of work. They were not usually involved in claims decisions. Adjudicators would refer a case file to a board doctor, not necessarily because it involved a medical issue, but because it had some kind of difficulty, and the doctor was the only professional person close to hand.

The result was that board doctors did not provide expert advice. Except in simple cases, they became the *decision-makers*. They decided questions of medicine, non-medical facts, and questions of law. One relevant problem is that while legal education usually distinguishes questions of law from questions of medicine, medical education does not. So when doctors decide a question of law, they almost always seem to get it wrong. This was aggravated when the same board doctor was the effective decision-maker at all levels, including the final level of appeal. Creating the independent Appeals Tribunal in Ontario in 1985 solved this problem, but only at the final level of appeal. In Alberta, however, that problem has not been solved at all by having an independent Appeals Commission.²⁴

²² For example, *Decision No. 1428/08*, WSIAT 2011.

²³ In my view, it would benefit workers, employers and taxpayers to have one standard rate for all employers. But it would take another article to explain why.

²⁴ For example, *Johnson v. Alberta (Workers’ Compensation Board Appeals Commission)*, 2011 ABCA 345, 2011 CarswellAlta 2046 (Alta. C.A.).

In the context of a medical opinion, board doctors, and sometimes other physicians, often assume that employment cannot be considered a cause unless there is “scientific proof” of diagnosis and cause. A related and sometimes alternative phrase is “*objective* medical evidence”. It is sometimes asserted that any positive medical opinion, usually from a worker’s doctor, should be rejected because it is not “*objective*”.

Using these rules of exclusion²⁵ is clearly illegal. *It follows that any board doctor’s report based only on the lack of “objective” medical evidence is not a medical opinion at all.* It is an erroneous opinion on a question of law. The other meaning of “objective medical evidence” is synonymous with “scientific proof”. Again, there is a duty to reach a conclusion by weighing the balance of probabilities. It is a breach of that duty to presume the negative because there is no “scientific proof” of the positive. The bulk of claims in which the negative is presumed because of no “scientific proof” of the positive are cases in which no “scientific proof” is available.

During a long career, I have read hundreds of medical opinions provided in the context of controversy or uncertainty about legal entitlement. The controversial medical questions are generally those for which no “scientific proof” is available. The most thoughtful and deeply analytical medical opinions, the most cogent, and commonly the only ones that are legally relevant, are the opinions that made little or no mention of “scientific proof”, or of statistics.

If symptoms or other facts described by a worker to a physician cannot be corroborated by the physician, and if the credibility of the worker is doubted, the adjudicator has a legal duty to resolve that doubt. Usually, an efficient way of doing so would be for the adjudicator to question the worker, either by an oral hearing, or an informal sit-down discussion. This has been one of the major problems in Ontario, and some other jurisdictions. Adjudicators who make the initial decisions have generally *not* been chosen for being able to conduct an oral hearing, or a sit-down discussion with the worker. It does not compensate for this if a request for reconsideration is referred to someone who has that capacity.

Disabilities and deaths commonly result from the interaction of multiple causes. If an employment event, exposure, or other circumstance had causative significance, a claim is not barred because there are also other causes unrelated to employment. The relevant question is: *Is it more likely than not that the worker would be suffering from the disability if there had been no employment event, exposure, or circumstance?* It’s not necessary that the worker’s employment be the *most* significant cause. It’s sufficient that the employment was one of the causes. It’s improper to classify one cause as primary and another as secondary, and it’s improper to screen out contributing causes by seeking “*the* cause”. If employment contributed in a material degree, or that is seen just as likely as not, the disability or death is compensable.

²⁵ For a more detailed explanation of these points see: Terence G. Ison, “Administrative Law — The Operational Realities” (2009) 22 Can J Admin L & Prac 315. Also, the contexts in which these points are relevant in Australia are in: Terence G. Ison, “Medico-legal interaction in disability and fatal claims” (2010) 17 JLM 633.

Deciding claims was further aggravated when the opinion of a board doctor, who might never have examined the patient, became entrenched as the position of the board. This problem was mitigated in Ontario by creating the external Appeals Tribunal. But some claims are still thought to be denied at the board because of no “scientific proof”, or “objective medical evidence” to support the claim, or because some other causes are regarded as more substantial than employment.

These problems can be aggravated, and sometimes created, when an “independent medical expert” is retained for an opinion. In this context, “independent” usually means dependent. “Independent medical expert” is *not* a title of physicians qualified in some way. Usually that phrase relates to physicians who depend on being selected and continuously retained by insurance companies, large business corporations, workers’ compensation boards, or some combination of these. “Independent medical experts” normally see a patient only once or twice, often without having received a statement of the non-medical facts, or the legally relevant medical question.

Specialists who have been treating a worker have a different background. They usually depend for their incomes on being selected by a large and ever changing number of people, and they commonly see a patient several times over a longer period. They may well be *genuinely* independent. But they never seem to use that word about themselves.

These problems might be avoided if board doctors are never asked for an opinion without putting to them the relevant facts, and the legally relevant medical question; such as “Do you think it more likely than not, or just as likely as not, that the employment of the worker was a contributing cause of his (or her) disability (or death)?”. That might help to ensure that the adjudicator does not leave the board doctor to decide what is the legally relevant medical question. Also, it should be checked that the board has whatever evidence is available to indicate whether the employment was a significant contributing cause. If not, can further evidence be obtained?

With regard to the treatment of patients, a contemporary problem for physicians is the limitations imposed by the provincial health authorities on the choices of treatment.²⁶ Those limitations are not directly relevant to WC, but they may indirectly limit the treatment of disabled workers.

Another problem in the medical profession seems to be a widespread and perhaps universal belief that a medical report for legal use should never conclude that “I don’t know”. But if a physician does not know the answer to the relevant question, that would be the only correct conclusion. This problem is discussed in two articles.²⁷

When someone dies, a Medical Certificate of Death is produced by a physician, usually the last one to see the deceased. Statistics on the causes of death are

²⁶ For example, letter of 14 November 2011, from the President of the Alberta Medical Association to its members.

²⁷ Terence G. Ison, “Statistical Significance and the Distraction of ‘Scientific Proof’” (2008), 18, *Can Bar Rev* 119 at 147, and Terence G. Ison, “Medico-legal interaction in disability and fatal claims” (2010) 17 *Journal of Law and Medicine* 833 at 839 (Australia).

produced by Statistics Canada from those certificates. The questions in death certificates deal with multiple *consecutive* causes of a death, but not multiple *concurrent* causes. The published mortality statistics show figures for only *one* cause of a death, coded as the “underlying cause”. This process can damage WC in at least two ways. Because the Medical Certificates of Death show only one cause, this might give the impression that, when advising on a worker’s disability or death, physicians should select one cause, without recognizing that in the context of WC, they should refer to all contributing causes.

A second effect of death certificates is that if any physician uses statistics produced by Statistics Canada to advise on the likely causes of a death, the physician is using misleading statistics.

The definition of “underlying cause”, published by the World Health Organization (“WHO”), is “the disease or injury which initiated the train of morbid events leading to death, or the circumstances of the accident or violence which produced the fatal injury”.²⁸ That definition raises more questions than it answers. For example, with regard to deaths by accident, that definition seems to refer to immediate causes, rather than all contributing causes. With regard to deaths from disease, that definition assumes that all such deaths result from multiple consecutive causes, and none from multiple concurrent causes.

An aggravating factor is the old saying that someone who decides what statistics to record plays a key role in policy-making. It could be added that such a person might also play a key role in the creation of medical opinions, and WC decisions.

5. DECISIONS IN A CLAIMS DEPARTMENT

In WC, there is no burden of proof on any party to a claim. A conclusion must be reached, even if there is no firm basis for a conclusion either way. If conflicting evidence appears about evenly balanced, all jurisdictions in Canada, except Quebec, provide that the worker be given the benefit of the doubt.

Primary adjudication in Ontario focuses on getting the worker back to work. For many older workers who have a permanent disability, it could be better for their health, and for the safety of others, to help them retire.

Most unjust decisions at a board can be expected in primary adjudication, where the law may sometimes be seen as decorative literature, or a statement of aspiration. Another cause of decisions being wrong is that a decision can be made by someone who has not enquired into the relevant facts. When a return to work is not expected soon, claims may have to be referred to more senior staff, who do not receive the evidence by first-hand communications. As well as some of these decisions being made by board doctors, some might be made by a “Nurse Consultant”, or a “Return to Work Specialist”.

These causes of many initial decisions being wrong are aggravated by the lack of first-hand communication between the decision-maker and those with first-hand knowledge of the facts. For example, if the worker phones the board before a decision is made, she may only be able to speak to the decision-maker’s assistant. Similarly, if the Board is seeking more information from the employer, a phone call

²⁸ This is on the WHO page headed “About the WHO Mortality Data”.

might be made by the decision-maker's assistant to someone in the company office. If the claimant worked in a factory, more accurate and relevant information might be obtained if the actual decision-maker phones a supervisor in the factory area where the accident occurred.

A reason expressed for not having hearings in primary adjudication is that adjudicators are not capable of holding a hearing. But only a small minority of claims are likely to need an oral hearing, or another form of sophisticated processing. For that small minority, neither of these needs usually arises for the first time on a request for reconsideration, or on an appeal. The needs were there in the first place. But if a case is one for which a hearing is needed, any adjudicator who is incapable of holding a hearing is certainly incapable of deciding that case correctly without one. Also, when procedural fairness is important, it is probably more important in primary adjudication than on appeal to a Tribunal.

A related reason for the common inadequacy of primary adjudication is that when a complaint is received about a decision, it is reconsidered, rather than being moved on appeal. A system of reconsideration before an appeal can proceed is usually demanded or supported by political and bureaucratic pressures. The goal of justice according to law is then replaced by the principle that the squeaky wheel gets the grease.

Requiring reconsideration can reduce premiums by causing injustice to workers who do not seek reconsideration, perhaps because they have no union, or they belong to a union that does not have the resources to train workers' representatives. Another reason why the practice of reconsideration perpetuates inadequate processing in primary adjudication may be that the appeal statistics do not show the volume of errors made in primary adjudication.

If a claim that was initially denied is allowed on reconsideration, it is usual to say that new evidence was received. But when reconsideration follows shortly after an initial decision, it's rarely true that any evidence was received that was not previously available. Almost always, what they call "new evidence" could have been obtained in the first place if the adjudicator had been selected, trained, and allowed the time, to use the initiative that should be used in seeking evidence before making the initial decision.

It can also be important to check any "policies" being applied. Because those are rules for internal use, promulgating them as regulations is avoided. If a lawyer's client is adversely affected by a "policy", it can be worth considering whether the "policy" is compatible with the legislation, any regulations, and the case law. In an exceptional case, it can also be relevant whether there is any constitutional objection to a "policy". In serious cases, it can sometimes help to check the training program of adjudicators, and to question the relevant adjudicator about any instructions which are not published in the "policies", but which adjudicators may follow in deciding claims.

6. THE SIGNIFICANCE OF DELAY

In 1973, the day after arriving as Chairman of the WCB in British Columbia, I was considering an appeal. It had taken four months from the accident to the claim reaching the final level of appeal. I asked the manager for a report on why it had taken so long. Nowadays, it can take years.

System changes have been made in recent decades with no apparent concern about delay. But delay in making decisions can be devastating, both in WC and in OH&S. In most disability cases, delay can cause stress to the worker, and family members, as well as planning problems. The stress of delay can be compounded by exhausting a worker's savings, followed by the costs of borrowing, or the psychological harm of having to seek welfare.

In disability cases, delay can mean that medical examinations become out-of-date. If further examinations are required *only* for adjudication, that can increase stress. Delay can also increase the number of adjudicators dealing with a claim, creating a risk of inconsistency in successive decisions. Having more adjudicators involved in primary adjudication of a case can then cause confusion in an appeal.

At least in Ontario, some claims were paid for psychological disabilities, and some for suicides, caused by the decision-making processes of the board. More recently, an appeal under the *Charter* might sometimes have some benefit; but raising a *Charter* issue can be another cause of delay.²⁹ For a system that was established in the first place to provide income continuity, delay in deciding claims defeats the very purpose for which WC was created.

As well as delay increasing a worker's procedural costs, the lack of adequate income can increase the impact of delay by damaging health in other ways; for example, preventing the purchase of healthy food, or attending events that would facilitate relaxation. In these and other ways, delay can increase the costs to taxpayers as well as being harmful to workers.

The impact on rehabilitation of delay in deciding a claim can be particularly damaging. This can be compounded if rehabilitation includes finding a job with a new employer. Success in vocational rehabilitation often depends on momentum. So delay may not mean simply delay in commencing rehabilitation. Delay can permanently damage rehabilitation prospects. The psychological harm and costs of delay, and the damaging impact on rehabilitation, can be the same whether the claim is eventually allowed or denied.

When reforms are focused on the upper levels of decision-making, rather than on primary adjudication, damaging delays, waste and injustice, can continue. With the volume of WC, no system of appeals can operate efficiently unless most cases are properly decided in primary adjudication. That may never happen unless the requirements for efficiency in primary adjudication³⁰ are prescribed by legislation.

Mediation can now be offered to settle a claim, instead of the causes of delay being solved. But disabled workers, or surviving spouses, do not usually have the resources, or the powers, of those negotiating against them. It seems forgotten that WC was created to avoid the injustice of negotiating settlements of claims for damages. The traditional view was that workers and dependants should not have to suffer any reduction of benefits by negotiation. A claim should be promptly allowed, or disallowed, and the claimant should receive all or nothing.

²⁹ For example, in *Decision No.2157/0912*, the WSIAT held a pre-hearing conference, followed by an interlocutory decision, stating near the end that "The Panel will provide further directions regarding the extent of disclosure to the additional interveners (the OWA and the OEA) as this matter progresses". (para. 36)

³⁰ Such as the qualifications of adjudicators, their roles, procedures and locations.

The problems of delay seem to be at least as bad in the eastern provinces, where the final level of appeal is to the courts. For example, a claim for health-related maladies was filed on 4 September 2003.³¹ The claim was denied by the Board, but allowed at the Appeal Tribunal. The WCB appealed to the court, which decided that the Tribunal decision reflected bias. It was declared void, and the matter returned to the Tribunal to be reheard by a panel composed of three new members. That was on 7 January 2011. So it had taken over seven years to process the claim, and it was still not decided.

Delay in OH&S, is also a problem in Ontario. Unlike in British Columbia, the WC system has not been used in Ontario for the enforcement of OH&S. The only type of enforcement is prosecution, which can be by people with other priorities. The many problems of this include the long delays, the high costs, and the pressures to avoid both by compromises.

Delay can be disastrous with regard to regulatory or quasi-regulatory decisions on the prevention of accidents or diseases. On one occasion, when I was Chairman of the WCB in British Columbia, workers were being killed almost daily. It was crucial for the prevention of further deaths that new regulations be made and enforced immediately. All on the same day, new regulations were written, promulgated, and sent to employers, unions, and the media. Procedural fairness could be considered on any question of whether the new regulations should be withdrawn or modified. This prompt creation of new regulations cannot be done now in British Columbia. I don't know if it was ever done elsewhere.

Similarly, when remedial orders are made on the spot by an inspector, or industrial hygienist, it usually makes sense that the orders be issued primarily in response to what is observed by the decision-maker, and while that observation is fresh in the mind of the decision-maker, with procedural fairness being considered only if a question arises of whether the order should be withdrawn or modified. Copies of the orders should also be posted *by the inspector* to be seen by the workers, as well as being provided to the employer, and to a union official if there is one.

7. APPEALS TRIBUNALS

Canadian jurisdictions now have appeals tribunals separate from the boards. The Appeals Tribunal in Ontario was established in 1985. It achieved one major improvement. The final level of appeal is no longer dominated by Board doctors. At last, Ontario achieved a system of justice according to law. Unfortunately, however, the decision to create an external Tribunal was made politically, rather than thoughtfully. There was no study of what the significance would be of this structural change. Nor did it appear seriously considered whether any other change might be better. So as well as beneficial effects, creating the Appeals Tribunal had damaging consequences.

The government appointed fine lawyers as chairman and vice-chairs, but none were familiar with workers' compensation. Almost certainly, they would have learned nothing about the inquisitorial system in their legal education, and most of

³¹ See, *Prince Edward Island (Workers' Compensation Board) v. Cormier*, 2011 PECA 1, 2011 CarswellPEI 2 (P.E.I. C.A.).

their experience would have been with the adversary system. So they introduced into workers' compensation the damaging significance of the adversary system. In particular, the Appeals Tribunal had no sense of urgency. It allowed, and still allows, appeals to take months or years to be heard, and then months to decide. This is aggravated further by granting adjournments, and taking even more months to decide the appeal. Such delays defeat several of the goals of WC.

The delays of the Tribunal make the system useless in providing income continuity for workers. The delays are also an impediment to medical recovery; damaging to labour relations, and in many cases, can inflict permanent impairment of rehabilitation. Nor are these delays necessary. When I was Chairman of the WCB in British Columbia, any hearings needed at the final level of appeal were generally held within 10 days of an appeal being requested. The decision and reasons were given at the hearing, or the following day. Once the hearing date had been agreed, no adjournment was allowed.

In Ontario, the Tribunal writes long decisions, often citing court decisions on other subjects. This encourages parties to be represented by lawyers, and it encourages those lawyers to cite as precedents court decisions on other subjects. This promotes interpretations of the Act based on nit-picking arguments, rather than the goals of workers' compensation.

The limited role of an Appeals Tribunal is another cause of delay. The Tribunal only has jurisdiction to affirm, reverse or modify a Board decision. So if the Board has denied a claim, and the Tribunal decides that the claim should be allowed, the case then goes back to the Board to decide the benefits. Then there can be more delays as the same claim goes back and forth between the Board and Tribunal. Recently, for example, the Board had denied loss of earnings ("LOE") benefits. The Tribunal decided that the worker was entitled to LOE benefits, but then referred the case back to the Board to decide several points, including whether the entitlement should be full or only partial benefits.³²

As well as compounding delay, creating the Appeals Tribunal created other problems. The Tribunal adopted the court procedure of a single-event trial, with everything prepared beforehand for the hearing. As well as causing incredible delay, this is wasteful. My experience of workers' compensation is that if *all* conceivable preparation is done before an appeal hearing, about 90% of that preparation will be a waste. It is more efficient to schedule a hearing as soon as one is requested. In most cases, the hearing can be completed on the preparation that was promptly made, including new evidence. In the minority of cases in which some further evidence is needed, that can be gathered after the hearing. The hearing can be resumed in exceptional cases in which that might be necessary.

Another Ontario example of a Tribunal preference for the adversary system is that "The Tribunal Notice of Appeal ("NOA") process places responsibility in the hands of the parties and their representatives to advance a case".³³ That is surely not a humane way of considering the legal rights and needs of a seriously disabled person, or a surviving spouse. It is exactly the process that WC was created in the first place to avoid.

³² WSIAT Decision No. 1999 10, 2010.

³³ WSIAT Quarterly Production and Activity Report, July 1 to Sept 30, 2011, p. 1.

The reconsideration of decisions is another problem. Under an efficient inquisitorial system, reconsideration of a case at the final level of appeal is normal routine. It used to be normal when the final appeals were at a board. The Tribunal in Ontario, as well as other jurisdictions, adopted a damaging change by making reconsideration a demanding process. Here again, the Tribunal adopted a position close to the adversary system, with no explanation for rejecting the prior routine of the WCB.

It was a paramount goal of establishing WC in 1914 that decisions should be made quickly and economically. To do that without injustice requires that the power to reconsider a decision be exercised routinely. Obstacles to reconsidering one of its decisions were created by the Tribunal, partly by dividing the request for reconsideration into a two-step process. After another delay, the Tribunal first decides whether to reconsider. If it decides to do so, then after yet another delay, it reconsiders its decision. It is difficult to think of a more harmful, costly or wasteful way of proceeding.

The damaging effects of the final appeals decided at the Board were recognized when the Tribunal was created. But it never seems to have been considered whether final appeals at the Board also had some good effects that should be continued. The functioning of the Tribunal was also impaired by the failure of the Board to improve primary adjudication. No system of appeals can work well unless primary adjudication is set up to reach the right answers in the first place.

When the Tribunal was created, the combination of its use of the adversary system and experience rating created an incentive for employers to minimize claims, or to oppose claims, and so make procedures more adversarial. Using the adversary system has also had a perverse impact on the ratio of costs to benefits. It used to be assumed that costs and benefits would go up or down together. But over the last 20 years, procedural costs have been going up, while benefits have been going down. The word "costs" here does not refer just to premium costs. It refers to all procedural costs, including all costs to employers, workers, and third parties.

It would be a major improvement to abandon the adversary system. The extent to which it is possible to achieve the goals of WC legislation partly depends on the extent to which the inquisitorial system is used.

While the points mentioned under this heading refer primarily to Ontario, many also apply elsewhere. But there are some differences. For example, in Alberta, the Appeals Commission for Alberta Workers' Compensation does not function independently of doctors employed or retained by the Board. The evidence of those doctors is, at least sometimes, accepted by the Commission without requiring them to appear at the appeal hearing so that they can be questioned or cross-examined by members of the Commission, or by an appellant or respondent, or a representative of one of them.³⁴

8. ACTUARIES

It's normal for a WCB staff to include actuaries. This has created major problems in most jurisdictions because nobody is now in charge of the board. In

³⁴ See for example, *Johnson v. Alberta (Workers' Compensation Board Appeals Commission)*, 2011 ABCA 345, 2011 CarswellAlta 2046 (Alta. C.A.).

Ontario, the President plays a role with the government, and attends meetings at the Board, but a group of Vice-Presidents are each in charge of a department. So nobody prevents an actuary from behaving as if in an insurance company. This failure has damaging consequences.³⁵ One is that actuaries seem educated to work only for insurance companies, and not for a social insurance system, such as WC. So they usually calculate the premium requirements by a current calculation of all future costs of all past and current claims.

Meredith recommended a system in which actuaries would not be needed. He recommended that for at least the first few years, assessments should exceed the capital required for the current costs of current claims, but should not be high enough to meet all future costs of current claims. That worked well in Ontario for decades. Actuaries were almost redundant. But political pressures rose to change the system, and require the Board to charge the level of assessments needed to provide all future costs of all past and current claims. The *Workplace Safety and Insurance Act, 1997* has now been amended to require that in s. 96(3).

Subject to the regulations, the Board shall maintain the insurance fund so that the amount of the fund is sufficient to allow the Board to meet its obligations under this Act to make payments under the insurance plan for current benefits as they become due and to provide for future benefits.

2010, c.26, Sched. 21, s.1(2)

Until 2010, the Board still had the legal option not to calculate premiums high enough to cover all future costs of past and current claims. In practice, costs had exceeded premiums by 5% each year since 1999. Actuaries saw that as a problem. But it was not really a problem at all.

The recent amendments in Ontario make the role of actuaries even more damaging by creating another major cause of political plans to reduce benefits. The total unfunded liability is said to be about \$12 billion. If that is seen as a problem, it could be resolved more efficiently if actuaries were not in control.

At a time of high inflation, actuaries show the required capital as having fallen. Predictably, the political response is to reduce the benefits payable to disabled workers. But when inflation is followed by deflation, the reserves then cover the costs of future benefits as well as, or better than, they did before. The political pressures then are commonly to use the reversal of inflation as a reason to reduce premiums.

This whole problem would disappear if the Act was amended to provide that the role of actuaries is limited, so that they may only calculate the reserves to be created in each year to cover the expected future benefits of claims allowed in that year. The unfunded liability would then decline at a reasonable rate. Actuaries of the Board, or the government, should also be prohibited from ever attempting to estimate the total future benefits for all disabilities or deaths caused in any earlier year. This would result in the capital required in the reserves remaining stable, regardless of any inflation or deflation.

³⁵ Two articles that include critiques on the activities of actuaries are: The IAVGO Reporting Service, June 2012, Vol. 25 No. 1 and The *Ontario Legal Clinics'* pp. 44–68, and Phillip Chan, *The Origins of KPMG: The Legislative History of Value-for-Money Audits of the WSIB*, pp. 69–72.

Another problem is the way actuaries assess the expectation of life to calculate some types of benefits. They use the mortality statistics produced by Statistics Canada. These show the average years that people will live from birth. But if workers become disabled at, say 69, their expectation of life would be different from what it was at birth. In such cases, actuaries ought *not* to use the standard mortality statistics produced by Statistics Canada. They should use the average expectation of life of people who have reached 69.

This illustrates another point on which actuaries should be treated in the same way as physicians when asked for an opinion in relation to a WC claim. No official at a board, or anyone else, should ask an actuary for an opinion unless the request identifies the legally relevant question.

9. JUDICIAL REVIEWS IN WC AND OH&S CASES

When an appeals tribunal makes a decision that is thought wrong, a lawyer might apply to the court for JR (“Judicial Review”). Usually that is not a good idea. Asking a court to disturb the decision of an appeals tribunal does not usually succeed. Even when it succeeds in a trial court, the tribunal usually appeals that decision, and then the application for JR fails in the Court of Appeal. Even when an application for JR succeeds, it does not necessarily mean that the claim succeeds. Usually it means that the case must be reconsidered by the appeals tribunal. However, in a recent case in British Columbia, the worker succeeded in the trial court and the Court of Appeal, and may have long term benefits as a result.³⁶

10. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

In the 1980s, a group of lawyers took court action under the *Charter* to prevent the government from stopping disabled workers suing employers for damages.³⁷ That case went to the Supreme Court of Canada. It was opposed by the Ontario Federation of Labour (“OFL”) and others.³⁸ The court then agreed that WC provided a sufficient alternative to an action for damages, and therefore nothing needed to be changed.

But the benefits to injured workers, and surviving spouses, have been cut substantially over the last two decades, and are threatened with continuing cuts. As well as the obvious cuts, the value of ongoing payments declines in times of inflation. If an employer is now sued for damages for negligence causing the disability or death of an employee, it is possible that a court might be persuaded that the statutory prohibition of the claim violates the *Charter*.

³⁶ *Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2012 BCCA 174, 2012 CarswellBC 1156 (B.C. C.A.); leave to appeal refused 2012 CarswellBC 3479, 2012 CarswellBC 3480 (S.C.C.).

³⁷ *Reference re Workers' Compensation Act, 1983 (Newfoundland)*, 1987 CarswellNfld 219, (sub nom. *Reference re ss. 32 & 34 of the Workers' Compensation Act*) 67 Nfld. & P.E.I.R. 16 (Nfld. C.A.); affirmed 1989 CarswellNfld 224, 1989 CarswellNfld 224F (S.C.C.).

³⁸ I was retained by the OFL to provide expert evidence against the application of the *Charter*.

There are also more limited ways in which the *Charter* might be used. For example, in Ontario, s. 13(4) of the WSIA provides that “Except as provided in subsection (5) a worker is not entitled to benefits under the insurance plan for mental stress”. Under s. 13(5), a worker is entitled to benefits for mental stress arising from employment in some circumstances, but not other circumstances. In some cases, therefore, it might be argued that the right to sue an employer, or another worker, for damages for causing mental stress is not excluded in the WSIA.³⁹ Or it might be argued in some jurisdictions that a violation of the *Charter* means that the worker can succeed in claiming workers’ compensation for the mental disability. In British Columbia, prior to the most recent amendments of the WC Act, the Court of Appeal decided that, in a case of mental disability, s. 5.1(1)a, with Policy 13.30, breached s. 15(1) of the *Charter*, and were not saved by s. 1; so they could not prevent a worker from being entitled to compensation.⁴⁰

11. NAFTA AND THE WTO

Great impediments to WC now are the North American Free Trade Agreement (“NAFTA”), which began on January 1st, 1994, and the World Trade Organization (“WTO”), which began on January 1st, 1995. As many of us anticipated, NAFTA and the WTO created negative pressures on all of Canada’s social insurance and social security systems, including WC and rehabilitation. They also seem to stimulate experience rating. In effect, corporate America might now be seen, for financial matters, as the government of Canada, the provinces and territories. Thus as our governments increase the taxes payable by humans, they increase the contributions that our governments make to corporate America. NAFTA and the WTO seem to have had the same damaging impact on WC in the USA.⁴¹

NAFTA and the WTO were supposed to create “free trade”. This would tend to reduce the profits of employers, and reduce government tax revenues by eliminating most customs duty. It was predictable that this “free trade” would lead to a reduction in WC benefits, and would undermine the enforcement of OH&S. NAFTA and the WTO create economic pressures on employers that can promote hazardous conditions for workers, and unhealthy working hours.

Economic theory about the benefits of competition does not include any consideration of its effects on OH&S. NAFTA and the WTO seem to have increased the time that government representatives, employers and union officials spend on committee discussions, rather than on the enforcement of OH&S.

A background to this is the change that was made in the education of economists after new market theory was promoted in the 1980s by Milton Friedman at the Chicago School of Economics. Typically, students in our university depart-

³⁹ Lorne Sossin, *Continuum-Alumni Magazine*, Osgoode Hall Law School, March 2012, p. 22: “Those who live with mental illness . . . encounter stigma and discrimination at every turn”.

⁴⁰ *Plesner v. British Columbia Hydro & Power Authority*, 2009 BCCA 188, 2009 CarswellBC 1095 (B.C. C.A.).

⁴¹ This is reported in: Emily A. Spieler & John F. Burton, “The Lack of Correspondence Between Work-Related Disability and Receipt of Workers’ Compensation Benefits” (2012) 55 Am J Industrial Med 487.

ments of economics are now taught that a free market is good, and any damaging effects on the public interest are seen as secondary. Also students in economics do not usually receive any education on the damaging effects of a free market economy on OH&S, or on WC.

12. CONCLUSIONS

When workers' compensation systems were reviewed by a one-person Royal Commission, the results were always significant improvements. But recently, it has been normal to make changes after someone, or a team, has informal discussions in private with interest groups. The consequences of this procedure have always been damaging. There seems no hope now of a proper one-person Royal Commission being appointed.

Finally, as explained earlier, for WC benefits and OH&S to protect health, and to provide adequate compensation to disabled workers and surviving spouses, the most important reform needed is the abolition of experience rating. It would be an even greater reform if all of our WC systems could be restored to what they were 20 to 40 years ago.