Presentation of

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INTRODUCTION

The other speakers, and probably most of you, are likely to know more than I do about the details of the current legislative changes in Ontario. So I will talk about the problems that are more familiar to me, and relevant to those changes.

I hope that some of my thoughts can be useful to those of you who deal with proposals for changes in the legislation, or at the Board, and that some of my thoughts can be useful to those of you who deal with individual claims, or places of employment.

Related to this, any consideration of a system change requires not just an understanding of the change, but also an understanding the significance of adopting it. What will **really** be the result of adopting the change?

A tragic example of this point occurred in the late 1980s, when one of the workers' organizations asked for lifetime pensions for permanent disabilities to be replaced by compensation for actual loss of earings. It should have been foreseen that if any government adopted that idea, it would be accompanied by "deeming" a worker to have any job that he was capable of doing, regardless of whether such a job was available to that worker.

My thoughts for today were reinforced by two excellent articles that I read. One was by David Wilken[1], and the other by IAVGO[2] (the Industrial Accident Victims' Group of Ontario).

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1. "MANUFACTURING CRISIS IN WORKERS' COMPENSATION", David K. Wilken, (1998) 13 Journal of Law and Social Policy pp. 124-165.

2. "The IAVGO Reporting Service" Special Edition, July 2010, Vol.23, No.1.

EXPERIENCE RATING

For many years now, 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 known as Experience Rating. In my view, this is the **most dominant cause** of the damaging changes that have been made to WC in Ontario, and the damaging changes that continue to be made.

Within a few years, experience rating led to several hundred people becoming known as "employers' representatives".

Related to this, the conflicts of interest in WC and OH&S are commonly different from what they are assumed to be. It is commonly assumed that there is a conflict of interest between injured workers and employers. But when experience rating is created, the most cogent conflict of interest is then between employers and those who call themselves "employers' representatives".

They are usually paid a proportion of how much they can cause an employer's WC premiums to be reduced, regardless of how much they increase an employer's costs in other ways.

An example from my own experience was a case in which a claim had been denied. The worker was appealing the decision, and the "employer's representative" was opposing the appeal. I phoned the company accountant. I told him that, as a matter of academic curiosity, I wondered why his company was opposing the appeal. He said "why not?" I explained that according to my calculations, if the worker's appeal failed, the cost to his company in sick pay would be about double the increase in workers' compensation assessments if the appeal succeeded. He said he would look into it. An hour later, the accountant phoned me back to say that there was a

misunderstanding. The company was not opposing the appeal.

It was clear that opposing the appeal would have continued if the employer had remained in the hands of the "employers' representative".

There is another example of the damaging effects of experience rating. For a WCB to operate efficiently requires that its legislation should continue to follow the basic principle on the Meredith Report. That is "**keep it simple**". It would be in the best interests of employers and workers that the WC system be kept simple. But it is in the best interests of "employers' representatives" that it should become increasingly complicated.

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 in the hands of "employers' representatives". They will lose those jobs if experience rating is abolished. Officials of the Board also seem committed to experience rating.

So the response of the government to complaints has been to preserve experience rating, but with marginal adjustments to seem like improvements.

The dominance of "employers' representatives" was obvious to me in 2008 when I attended a conference organized by the Association of Workers' Compensation Boards of Canada. There were only a few union officials present, and no real representatives of employers. Almost all of those present were people known as "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.

The demand for experience rating also failed to recognize that although premiums were paid to the Board by employers, most of their cost were shifted to workers by lowering their wages. The total amount that an employer was willing to pay for a worker was the same, regardless of what those costs were. 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 to the WC Act in Ontario improved the benefits. From about 1980 to 1995, some amendments improved the benefits, and some reduced them. Since 1995, all amendments seem to have reduced the benefits. The word "reform" is still used to describe changes to the WC system. But since 1995, the word "reform" really seems to mean **deform**.

Government representatives may not think in these terms. One of the difficulties they have with regard to WC is that legislative changes cannot be achieved efficiently by consulting interest groups. It is hard to find anyone who really understands WC and who **really** represents employers.

New words have also caused confusion and damaging consequences. One is the word "stakeholders". This word has been used to create the false impression that improvements can be made by accepting the demands of "employers' representatives", or by negotiations with employers and workers representatives.

As well as cutting benefits, the role played by "employers' representatives" in producing legislative changes in recent years could explain a range of other changes. For example, it might explain why the name of payments made by employers to the Board has been changed from "assessments" to "premiums". That can create the impression that the Board should now behave like an insurance company, rather than as a government body running

a social insurance system. Reducing the amount paid in benefits can then be seen as an achievement.

Experience rating also created an incentive for employers to apply for the costs of a claim to be transferred to the Second Injury and Enhancement Fund. If that request is denied by the Board, more time and money is wasted when employers appeal that request to the Appeals Tribunal.

Another consequence of experience rating is that some of the costs of compensation for the workers of major companies are shifted to the premiums paid by smaller companies.

Because experience rating coerces disabled workers to go back to work before they are fit to do so, or appear to go back to work, it undermines the recognition of occupational disabilities.[3] 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 know that somewhere between 25% and 50% of all cancer is caused, wholly or partly, by occupation. Yet the proportion of cancer patients who receive workers' compensation is less that 1%.

The political justification for experience rating is the assumption that it promotes OH&S. That assumption is written in s. 83 of the *Workplace Safety and Insurance Act*[4]. But there is no evidence that experience rating

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3. "The provincial government's highly touted campaign to improve workplace safety is rewarding companies for hiding injuries and rushing the wounded back to work". *Hiding injuries rewards companies.* Investigation by Colin McConnell, reported by David Bruser in the Toronto Star, June 29, 2008.

4. S. 83 (1) provides that "The Board may establish experience and merit rating

has that effect, even slightly.

There is abundant evidence that experience rating has damaging effects on OH&S. 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 examined 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 and then sustaining a further injury himself, or causing an injury to another worker.

Because experience rating causes the under-reporting to the Board of occupational disabilities, it also creates false statistics that also tend to diminish OH&S.

Experience rating also seems to make safety regulations and enforcement more flexible. This could explain why we see so many cases in which compensation was **terminated** because the worker felt it unsafe to return to work.

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

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programs to encourage employers to reduce injuries and occupational diseases and to encourage workers' return to work".

Experience rating undermines rehabilitation in other ways too. For example, the rehabilitation officers at the Board have been shrunk. In the 1970s, the Board had several rehabilitation specialists. I remember an excellent one who specialized in the rehabilitation of workers who had brain injuries. That range and quality of rehabilitation has gone with experience rating.

An officer of the Board was heard to say that the Board is now trying to improve vocational rehabilitation. But non-vocational rehabilitation seems to have been abandoned, except for a few standard measures.

More importantly, since experience rating, the Board terminates the benefits when a worker is fit to return to work, even if no employment is available that the injured worker can return to.

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 be a cause of psychological harm. A disabled worker is likely to assume, rightly or wrongly, that this physician is biassed against the claim.

An attempt to justify experience rating was to accompany it by what is sometimes called a “right” for an injured worker to go back to work with the same employer. The reality tends to be an obligation that is not accompanied by any solid right.

The slogan “Rehabilitation is better than compensation” is sometimes used. But it means, all too often, that the 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 return to employment with the same employer over a few years.

But often, a substantial permanent disability becomes an increasing impediment to work as the years go by.

That problem was addressed for decades when a disabled worker was paid a partial pension for life, regardless of what that worker was doing for work. The level of that pension could be increased if the gravity of the disability increased. Those payments could help a disabled worker to relax, and thereby suffer less harm from the permanent disability. This is one of the many benefits that have been **removed** since the arrival of experience rating.

In 2003, I was invited to speak at a conference of the CAW (Canadian Auto Workers) in Ontario. At that event, there was a discussion one evening in which the delegates were itemizing their complaints about the WC system. As I listened to each of those complaints, 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 their 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 **top priority** and the **most important** political demand should be for the **abolition** of experience rating. Any attempt to improve experience rating would simply continue its harmful consequences.

LEGAL HISTORY

Legal history seems the next most significant cause of the current problems with WC and OH&S in Ontario.

I doubt if there was ever a time when OH&S was administered well in Ontario. Unlike some other provinces, the responsibility for OH&S was never with the WCB. So OH&S was never enforced by inspectors on the

staff of the Board, and charging a penalty assessment 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 a prosecution. I understand that this year, an employer was sentenced to imprisonment for the first time for causing the death of a worker.

That is a noteworthy achievement, and it can warn other employers of a personal risk in creating dangers. But it can only achieve that in some situations.

When the "Internal Responsibility System" was introduced, 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 that I noticed was that the legislative requirement of an "Internal Responsibility System" seemed to be used by the government department as a justification for limiting the duties of inspectors.

Of course a discussion between workers' and employers' representatives can be good. But it cannot be relied upon at all places of employment to protect OH&S. Nor can it be expected that the representatives at any place of employment will recognize all the same dangers as might be recognized by a trained and experienced inspector, or an industrial hygienist.

Perhaps the best thing to ask for with regard to OH&S could be a proper system of inspections, covering all places of employment, though of course some more often than others.

At least some of the current inspectors in Ontario strike me as very knowledgeable and efficient, but there are limitations on what they can

achieve.

Where orders are appropriate, they should usually be issued on the spot, with copies made available to workers, as well as to management. Where prosecutions are appropriate, they should be commenced within a few days.

Generally, prosecutions only work very slowly, and at high cost. Also, in practice, they only seem to work after a worker has been disabled or killed. OH&S should be enforced **without waiting** for that to happen.

A few days after I arrived as Chairman of the WCB in BC, I learned about workers who were losing their teeth from chemical pollution. They worked in a department of a large factory that was in a small town, and run by one of the biggest corporations in Canada. The industrial hygiene department of the Board had discussions of the problem with some officials of the employer, but that was getting nowhere.

We had a legal right to order the company to close the factory down. But that would have been vigorously opposed by the company, the union, and all the workers, including those who were losing their teeth. It would also have been opposed by many other people and companies.

So I felt that I had to think of another way of solving the problem.

First, we levied a penalty assessment. When that did not solve the problem, we levied monthly penalty assessments. When that did not solve the problem, we increased the monthly penalty assessments every month, and at increasing rates of increase.

Then I discovered that increasing the penalty assessments every month resulted in the attention of the problem within the company being moved up

from the lower level of administration to the top level of company management.

Eventually, a solution to the problem was found. The damaging chemical was no longer used, the workers were no longer losing their teeth, and the penalty assessments were ended.

But that way of enforcing OH&S is only possible if a WCB is also responsible for OH&S. So that method of enforcement has never been available in Ontario.

For this reason OH&S inspectors have comparatively little power in Ontario. If my recollection is correct, inspections in Ontario have not done well most of the time. The normal routine is to take some initiative after a crisis, but then allow the enforcement of safety regulations to drift back into decline.

With regard to WC, this may seem weird, but I believe that what the courts were doing in London in the 17th century is one of the major causes of the current problems in Ontario.

Most court decisions in the 16th and 17th centuries were made in one of two ways.

The first was: <u>The Adversary system</u>
The judge played a passive role. As this method evolved, the parties and their lawyers initiated and presented the evidence and arguments.

The second was: <u>The Inquisitorial system</u>
The judge used initiative. Lawyers and the parties might be allowed an initiating role, but the judge would be the leading initiator of evidence and arguments.

This method was used in London in the Court of Star Chamber and the Court of High Commission. To extract confessions in the years before they were abolished in 1641, these courts used **torture**.

When these courts were abolished, no high courts in London were left using an inquisitorial system. The other courts continued. They expanded and further developed the adversary system.

So when English lawyers arrived in Ontario in the 19th century, they came with a dedication to the adversary system; and that has prevailed in the legal profession here ever since.

Legal education in Canada usually makes no mention of the inquisitorial system, and it's normal for practising lawyers 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 in the courts for damages. Usually that meant suing the employer.

That system was heavily biased against employers, biased against workers, and biased against the public interest, particularly the interests of taxpayers, in ways that are very 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 costs of the adversary system to employers and taxpayers were

more than double the net benefits to workers.

When Chief Justice **Meredith** created the WC system in Ontario, he had had years of experience with the adversary system.

Meredith did not confine himself to hearings. He visited places of employment. He spoke to workers and to employers. He also spent time overseas, particularly in Germany, where he found the modern European version of the inquisitorial system. The use of torture had long since gone, and Meredith found how much more efficient the inquisitorial system was than any adversary system could possibly be for workers' compensation.

So Meredith was determined that the adversary system should not apply to workers' compensation. He rejected all proposals for adjudication in the courts, or even for appeals to the courts.

Meredith also aimed at another goal. As well as a new system to serve the interests of employers and workers, he 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 be a better structure to achieve those goals than any adversary system could possibly be.

Meredith proposed a workers' compensation 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 an inquisitorial system still had among lawyers. This could explain why the inquisitorial system that he recommended became known as "the enquiry system".

The Workmen's Compensation Board, as it was then called, would receive reports from employers, workers and attending physicians. But if those reports did not provide all the information that was needed to decide a case, the Board would use its own initiative to obtain any further evidence.

Unfortunately, Meredith never explained how he thought decisions should be made. So over the following years, the decision-making process didn't work well, and still doesn't work well. I will try to explain the reasons that strike me.

DOCTORS

The primary reason why the decision-making never worked well is that the only type of professional employed in the claims department of the Board was the board doctors. Ontario had a legal department, but the lawyers in that department were generally doing other types of work. They were not usually involved in claims decisions.

Adjudicators at the Board would refer a case file to a board doctor, not necessarily because it involved a medical issue, but simply because it had some kind of difficulty, and the board doctor was the only professional person close to hand.

The result was that board doctors did not provide expert advice. Except in the simple cases, they became the **decision-makers**. They decided not only questions of medicine, but also questions of non-medical fact, and questions of law.

One problem with this is that while legal education usually includes teaching students to distinguish 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 of decision-making, including the final level of appeal.

When the independent Appeals Tribunal was created in Ontario in 1985, that solved this problem, but only at the final level of appeal.

In the context of a medical opinion for the adjudication of a compensation claim, 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, that they use 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"**.
This has two common meanings.

1. The conclusion in the medical opinion depends on symptoms or other facts described by the patient to the physician, and which the physician cannot corroborate: or

2. The conclusion of the opinion is not supported by "scientific proof".

When the first meaning is intended, any adjudicator who rejects a medical opinion because it is not "objective" has made three erroneous assumptions of law:

(1) Evidence of the worker should be considered inadequate unless it is corroborated, at least with regard to the symptoms of an injury, or other facts

necessary for a medical opinion,

(2) Any medical opinion that is based on such evidence of the worker should be discarded; and

(3) If any question relating to the existence, diagnosis or causes of a disability cannot be answered in the positive without evidence from the claimant, that question should be answered in the negative.

Using these rules of exclusion is clearly illegal. **It follows that any doctors 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 clearly 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 there is no "scientific proof" of the positive, are cases in which "scientific proof" is unavailable.

During a long career, I have read literally hundreds of medical opinions that were provided in the context of controversy or uncertainty about legal entitlement. Almost by definition, the controversial medical questions are those for which no "scientific proof" is available. The most superficial and the most commonly irrelevant "medical" opinions that I have read have been those that rely on the lack of "scientific proof". The most thoughtful and deeply analytical medical opinions that I have read, 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 with the worker.

This has been one of the major problems with WC in Ontario. The adjudicators who make the initial decisions have generally not been chosen for having a capacity 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 does have 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 the employment. The relevant question is this. **Is it more likely than not, or about just as likely as not, that the worker would be suffering from the disability if there had been no employment event, exposure, or circumstance?**

It is not necessary that the worker's employment should be the **most** significant cause. It is sufficient that the employment was one of the causes. It is irrelevant for anyone to classify one cause as primary and the other as secondary, and it is improper to screen out contributing causes by seeking to identify "**the** cause". If employment contributed in a material degree, the disablement or death is compensable.

The problem was aggravated when, as commonly happened, the opinion of a board doctor, who might never have examined the patient, became entrenched as the position of the Board. This problem has been mitigated by creating the

external Appeals Tribunal.

But I believe some claims are still denied at the Board because there was 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 to give an opinion. In this context, the word "independent" usually means dependent. "Independent medical expert" is **not** an official title of physicians qualified in some way. Usually that phrase is used by, or attributed to, physicians who depend for most of their incomes on being selected and continuously retained by a small number of insurance companies, large business corporations, workers' compensation boards, or some combination of these.

"Independent medical experts" commonly 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, though they never seem to use that word in relation to themselves.

In serious disability and fatal cases that are not obviously going to be allowed, one way of trying to avoid the problems I have just mentioned could be to help the worker complete the claim form. Then under heading K, "Additional Information", it could be a good idea to state "Please see also the attached letter from my union official".

The attached letter that you write could read as follows: “Would you please put the medical question to the Board doctor as follows: ‘Do you think it more likely than not, or about just as likely as not, that the employment of the worker was a significant contributing cause of his (or her) disability (or death)’ ”

That type of question might help to ensure that the adjudicator does not leave the Board doctor to decide what is the legally relevant medical question.

Also, of course, it should be checked that the Board has whatever evidence is available to indicate that the employment was a significant contributing cause. If not, can you make it available?

The aversion to “don’t know”

There seems to be a widespread and perhaps universal belief in the medical profession that a medico-legal report should never conclude that “I don’t know”. But if the medical author of the report does not know the answer to the relevant question, that would be the only correct conclusion to state.

I have read hundreds of “medical” reports, mostly in workers’ compensation cases, and mostly on questions of diagnosis or causes, in which a specialist clearly stated in an early paragraph of the report that he or she does not know the answer. But I have never read a single report in which any specialist or other physician ever concluded at the end of the report that “I don’t know”.

A common explanation for this is that the author of the report was never asked the legally correct medical question.

When a medical specialist consulted by the Board or Appeals Tribunal has stated early in the report that he or she does not know the answer, a common

practice is for the author to presume the negative, and conclude that the disability or death did not result from employment.

That conclusion is clearly illegal.

Misleading Statistics

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 produced by Statistics Canada from those certificates. The questions in the certificate deal with multiple **consecutive** causes of a death (a chain of events), but not multiple **concurrent** causes.

The published mortality statistics show figures for only **one** cause of a death; and that one is coded as the "underlying cause".

This process can have a damaging effect on WC in at least two ways. Because the Medical Certificates of Death produce only one cause of each death, 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 be referring themselves to all contributing causes.

A second effect is that if any physician uses the 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.

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 the person who decides what statistics to record plays a key role in policy-making. It could be added that sometimes, such a person also plays a key role in the formation of medical opinions, and in WC decisions. Those roles are not widely recognized.

DECISIONS in the 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 to be about evenly balanced, the WSIA in Ontario provides that the worker be given the benefit of the doubt.

Most unjust decisions at the Board can be expected in primary adjudication, and they are not limited to medical decisions. In primary adjudication, the law sometimes seems to be seen as if it were decorative literature, or a statement of aspiration, not as law that an adjudicator has a duty to apply.

One cause of initial decisions being wrong can be the lack of first-hand communication between the person who makes the decision and those who have first-hand knowledge of the facts.

For example, if the worker phones the Board before a decision has been made and asks to speak to whoever is deciding her case, she may find that she can

only speak to the decision-maker's assistant.

Similarly, if the Board is seeking more information from the employer, a phone call 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 the person who supervises in the factory area where the accident occurred.

A reason that has been given for not having hearings in primary adjudication is that the adjudicators are not capable of holding a hearing.

Only a small minority of claims are likely to need an oral hearing, or another form of sophisticated processing. But 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 of a type for which a hearing is needed, any adjudicator who is incapable of holding a hearing will not be capable of deciding that case correctly without one.

Also, in cases in which procedural fairness is important, it is probably more important in primary adjudication than on an appeal to the Appeals 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.

Having 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 don't ask for reconsideration, probably because they did not belong to a union, or no longer belong to a union, or they belong to a union that does not have the resources to train workers' representatives.

Another reason why a routine practice of reconsideration tends to perpetuate 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 then allowed on reconsideration, it is usual to explain this on the ground that new evidence was received. But when reconsideration follows shortly after initial decisions, it is rarely true that any evidence was received that was not previously available. Almost always, what they call "new evidence" would have been obtained in the first place if the adjudicator had been selected, trained, and allowed the time, to use the initiative that should have been used in seeking evidence.

A possible way occurs to me in which the OFL, or one of the larger unions, might create a pressure on the government and the Board to solve this problem. This might be done by making an application to the court for Judicial Review (JR) after an initial decision, and before any request for reconsideration.

The normal routine is for a court to dismiss such an application because another remedy is available. So what would be needed is for a lawyer to explain to the court that dismissing the application on that ground would most likely perpetuate the illegality of decision-making in primary adjudication. Such an application for JR would best be made in a case of serious disability or death.

It can also be important to check the "policies" being applied. Because those

are rules for internal use, promulgating them as regulations can be, and usually is, avoided. The rules are produced under the misnomer "policies".

If a worker 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 to consider whether there is any constitutional objection to a "policy".

Also, in a serious case, 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 be following to decide claims.

THE SIGNIFICANCE OF DELAY

The day after I arrived as Chairman of the WCB in B C, I was considering the first appeal. I found that it had taken four months from the date of the accident to the date when the claim reached the final level of appeal.

I asked the head of administration to produce a report on why it had taken so long. Nowadays, it can take a year or longer.

System changes have been made in recent decades with no apparent concern about the significance of delay. But delay in making decisions can be devastating, both in WC and in OH&S.

In most disability cases, delay is a likely cause of stress for the worker, and often for the family. Delay in deciding a claim can also create planning problems for the claimant's family members. It can even create so much stress that it leads to divorce.

The stress of delay can be compounded by exhausting the worker's savings,

followed by the costs of borrowing, or the psychological harm of having to apply for welfare.

In disability cases, delay can also mean that medical examinations become out-of-date. If further medical examinations are then required **only** for adjudication, that can increase the 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 can also cause confusion in a subsequent appeal.

At least in Ontario, the health damage of delay was sometimes recognized. Some claims were paid for psychological disabilities caused by the decision-making processes of the Board, and sometimes benefits were paid for suicides resulting from those processes.

For a system that was established in the first place to provide income continuity, delay in deciding claims tends to defeat the very purpose for which WC was created.

As well as increasing procedural costs for the worker, the lack of any adequate income can compound the impact of delay by damaging health in other ways; for example, by preventing the purchase of healthy food, or attendance at events that would facilitate relaxation. In these and other ways, delay can increase the costs for tax-payers as well as being harmful to workers.

To avoid all the problems of delay, as well as to reduce overall costs, meeting those needs should be a part of the initial decision in primary adjudication.

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 a delay in the commencement of rehabilitation. Delay can cause permanent damage to rehabilitation prospects.
The psychological harm and financial costs of delay in deciding a claim, and the damaging impact on rehabilitation, can be the same regardless of whether the claim is eventually allowed or denied.

When reforms are focussed on the upper levels of decision-making, rather than on primary adjudication, the damaging delays, waste and injustice, can be continued.

Also, in a system with the volume of WC, no system of appeals can operate efficiently unless the bulk of cases are properly decided in primary adjudication. That may not happen unless the requirements for efficiency in primary adjudication[5] are prescribed in the legislation.

An added problem in recent years is that instead of the causes of delay being solved, mediation can now be offered to settle a claim. But disabled workers, or the surviving spouses of killed workers, do not usually have the resources, or the powers, of those who would be negotiating against them.

It seems to have been forgotten that WC was created in Ontario in the first place to avoid the injustice of negotiating settlements of claims for damages in the courts.

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

In WC, 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.

Delay in OH&S, is also a problem in Ontario. Unlike in B.C., the WC system has not been used in Ontario for the enforcement of OH&S. The only form of enforcement is by prosecution, which can be in the hands of people who have 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 familiar to me in BC, workers were being killed almost daily. It was crucial for the prevention of further deaths that new regulations be made and enforced immediately. As soon as that was recognized, new regulations were written, promulgated, and sent to employers, unions, and the media. All of that was done on the same day. Procedural fairness could be considered only on a question of whether the new regulations should be withdrawn or modified.

That could not be done now in BC, and I don't think it was ever done in Ontario.

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** where they can be read by the workers, as well as being provided

to a union official if there is one.

THE APPEALS TRIBUNAL

The Appeals Tribunal was established in Ontario in 1985. It achieved one major improvement. The final level of appeal was 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 Appeals 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 to be seriously considered whether any other change might be better.

So creating the Appeals Tribunal also had damaging consequences.

The government appointed a fine lawyer as chairman, and some fine lawyers as 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 their experience would have been with the adversary system.

So they introduced into workers' compensation most of the damaging practices of the adversary system. In particular, the Appeals Tribunal had no sense of urgency. It allows appeals to take months, or even years, to decide. This is aggravated by granting adjournments. Such delays defeat several of the goals of the WSIB.

The delays of the Appeals Tribunal make the system useless in the provision of income continuity for a worker who needs to appeal. Such delays are also an impediment to medical recovery; damaging to labour relations, and in many cases, can inflict permanent damage on rehabilitation prospects.

Nor are these delays necessary. When I was Chairman of the WCB in BC, any hearings needed at the final level of appeal were generally held within 10 days of receiving the request for an appeal. The decisions and reasons were given at the hearing, or the following day.
Once the hearing date had been agreed, no adjournments were allowed.

In Ontario, the Tribunal writes long decisions, often citing as precedents court decisions on other subjects. This encourages parties to an appeal 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 that are based on nit-picking arguments, rather than the goals of workers' compensation.

The limited role of the Appeals Tribunal is also a cause of delay. The Tribunal only has jurisdiction to affirm, reverse or modify a decision that the Board has made. So if the Board has denied a claim, and the Appeals Tribunal decides that the claim should be allowed, the case then goes back to the Board to decide on the benefits.[6] Then there can be more delays as the same claim goes back and forth between the Board and the Appeals Tribunal.

In a recent case, for example, the Board had denied loss of earnings (LOE) benefits. The Appeals Tribunal decided that the worker was entitled to LOE benefits, but then referred the case back to the Board to decide whether the entitlement should be to full or only partial benefits.[7]

As well as compounding delay, the creation of the external Appeals Tribunal created other problems.

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6 For example, Decision no. 20100144, 8th Sept. 2010.

7 Decision No. 1999 10.

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 very 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 far more efficient to schedule a hearing as soon as one is requested. In most cases, the hearing can be completed without further preparation.

In the minority of cases in which some further evidence is needed, that evidence can be gathered after the hearing. The hearing could be resumed in any exceptional case in which that might be necessary.

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 was normal at the boards. The Tribunal in Ontario 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 should be exercised routinely.

The tribunal created obstacles to reconsidering one of its decisions, partly by dividing the request for reconsideration into a two-step process. After another delay, it 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 Tribunal did not, at least initially, have its own field staff for gathering further evidence.

The damaging effect of the final appeals being decided at the Board were recognized when the Tribunal was created. But it never seems to have been considered whether deciding 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 the quality of 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, its tendency to the adversary system, when combined with experience rating, created an incentive for employers to minimize claims, or to oppose claims, and so make procedures more adversarial.

The shift towards 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 that assumption is no longer true. Over the last 20 years, procedural costs have been going up, while benefits have been going down.

In speaking of costs here, I am not talking just about premium costs. I am referring to all procedural costs, including all costs to employers, to workers, and to third parties.

With regard to lobbying for legislative or administrative changes, it could be good to reverse the movement towards the adversary system. The extent to which it will be possible to achieve the goals of the WC legislation depends

on the extent to which the inquisitorial system is used.

ACTUARIES

It's normal for the staff of a WCB to include actuaries. This has created major problems.

One is that actuaries usually seem educated to work for insurance companies. They do not usually seem educated to work in a social insurance system, such as the WSIB. So they usually calculate the premium requirements by reference to the current calculation of all future costs of all past and current claims.

Meredith may have recognized that the employment of actuaries by the WCB could involve problems. He recommended a system in which actuaries would not be needed.

Meredith 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 as high as would be necessary to meet all future costs of current claims.

That seemed to work well in Ontario for several decades, and actuaries were almost redundant in WC. But political pressures arose to change the system, and require the Board to charge a level of assessments needed to provide all future costs of all past and current claims.

The Act was never amended to require that. Section 96 (3) provides that

> "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."

So the Board still has the legal option of not calculating premiums high enough to cover all future costs of past and current claims.

In practice, costs have exceeded premiums by 5% each year since 1999. Actuaries see that as a problem. But it's not really a problem at all.

This inappropriate use of actuaries created another major cause of the political plans to reduce benefits. The total unfunded liability is said to have grown to about 12 billion dollars. If this is seen as being to any extent a problem, it could be resolved more efficiently if actuaries are not in control.

The current Bill before the legislature in Ontario could make the role of actuaries even more damaging than it is now.

At a time of high inflation, actuaries show the required capital as having fallen. Predictably, the usual political response is then 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, the reserves did before . But 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 is 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 <u>expected future benefits of claims allowed in that year</u>.

The unfunded liability would they 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 that were caused in any earlier year.

This would result in the capital required in the reserves remaining stable, regardless of any inflation or deflation.

Another problem is the way actuaries assess the expectation of life. They do this for the purpose calculating some types of benefits. Their normal routine

is to use the mortality statistics produced by Statistics Canada. These show the average number of years that people will live from date of birth. But if a worker becomes disabled, at say 69, the expectation of life for people who have reached that age would be different from what it was at their time of birth.

In that situation, an actuary ought **not** to be using the standard mortality statistics produced by Statistics Canada. He or she should be using the average expectation of life of people who have already reached 69.

This illustrates another point on which actuaries should be treated in the same way as physicians when they are asked for an opinion in relation to a claim for WC. No official at the Board, and no-one representing a worker, should ask any actuary for an opinion unless the request identifies the legally relevant question.

JUDICIAL REVIEWS in WC and OH&S CASES

When a decision of the Appeals Tribunal is thought to be wrong, it can be very tempting to apply to the court for JR. But usually, that is not a good idea.

An application to the court to disturb a decision of the Appeals Tribunal will not normally succeed. Even when it does, the Tribunal usually seems to appeal the decision, and then the application for JR fails in the Court of Appeal.

Even if the 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.

THE CANADIAN CHARTER of RIGHTS and FREEDOMS

It might be tempting to consider whether current legislative changes, or decisions in particular cases, can be challenged under the Charter. The Appeals Tribunal has the right to apply the Charter, without anyone having to take the case to court.

My own view is that only in exceptional cases can an application under the

Charter be beneficial.

People are encouraged to assume that the Charter was a fine thing to create. My own study of the Charter concluded that it has done more harm than good.

About 12 years ago, I heard a radio program in which a reporter was asking people on a street what they thought of the Charter. The most interesting reply was from an industrial worker. He said "Well, I don't know. I've got so many rights now I can't figure out why I'm worse off than I was before".

I found a likely answer to that question in the spring of this year when I read a personal biography of Pierre Trudeau. He was the one who created the Charter.

Trudeau was aiming to eliminate discrimination by the majority against minorities. But he never seemed to realize that by **far the most extensive discrimination is by a minority against the majority**; and this has been so throughout most of history, the only exception being a period after the Second World War.

In the ways that our governments serve the big business minority, they discriminate against the majority.

Even with regard to issues that might not concern big business, the value of the Charter is questionable.

One example relates to sex equality. During the years before the Charter, almost all statutes that discriminated against women had been amended. Almost all of the statutes that retained separate provisions relating to women contained provisions that favoured the interests of women.

So it was no surprise to many of us that, about 10 years after the Charter had been in effect, one of my colleagues reviewed the decisions of the courts on sex discrimination and found about 95% of successful challenges to legislation on the ground of sex discrimination were cases brought by men.

To the extent that our law has contributed to sex equality, it has done so through human rights legislation, not through the Charter.

Objections to the Charter in relation to sex equality are not limited to its **lack** of achievement. The Charter **impedes** the achievement of sex equality.

For example, following the Charter, the departments of Attorneys-General, reviewed statutes that distinguished by sex. Without enquiry into the significance of what was being done, those statutes were repealed or amended to provide for sex equality in the wording of the statute, regardless of how much inequality that would produce in result.

The statutes that were treated in this cavalier way include some that had been carefully drafted in the first place to achieve sex equality by discriminating in favour of women. One example is the laws that required safe transport home for a female worker who completed her shift at night. The repeal of these laws was one example of the Charter being damaging to sex equality, and to OH&S.

About the only large groups in society that have clearly benefited from the Charter are constitutional and criminal lawyers, major corporations, and drug traffickers.

Similarly, the Charter has not prevented our governments from cutting the hygiene standards in hospitals, and serving unhealthy food to the patients.

The Charter has also been used by the provincial government to justify the failure to make changes that would be in the public interest.

For example, in 1990, the NDP was elected as the government of Ontario. The main promise in its election campaign was for the Ontario government to take over motor vehicle insurance. The governments had done that in three of the western provinces, and in Quebec.

But about a year after he was elected, the Premier announced that the new government would not be taking over motor vehicle insurance in Ontario, because any attempt to take it over would be challenged under the Charter,

and under the Free Trade Agreement with the US.

That announcement could be seen as a symptom of the end of democracy.

But there is one way in which the Charter could be useful in preventing the provincial government from continuing to reduce WC benefits. In the 1980s, a group of lawyers took a court action under the Charter to prevent the government from stopping disabled workers from suing employers for damages in the courts[8]. That case went to the Supreme Court of Canada. It was opposed by the OFL and others. I was retained by the OFL to provide expert evidence against that application of the Charter.

The courts agreed that WC at that time provided a sufficient alternative to a workers right to sue for damages in the courts, and therefore nothing needed to be changed.

But now things are very different. The benefits to injured workers, and the families of those who are killed, have been cut substantially over the last 2 decades, and they are threatened with continuing cuts. As well as the obvious cuts, the value of ongoing payments declines at times of inflation.

It might be worthwhile for the OFL to consider responding to the cuts in benefits by reversing its position on the Charter, and now claiming that prohibiting a worker from suing for damages is a violation of the Charter.

There are also some more limited ways in which the Charter might be used. For example, section 13 (4) provides, subject to some exceptions, that "a worker is not entitled to benefits under the insurance plan for mental stress".

It is arguable, therefore, that the right to sue an employer, or another worker, for damages for causing mental stress cannot be excluded in the WSIA.

NAFTA and the WTO

Greater impediments to improving WC are the NAFTA (the North American

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8. *Re. a Constitutional Reference on the Validity of Sections 32 and 34 of the Workers' Compensation Act,* (1987) 67 Nfld. & P.E.I.R. 16.

Free Trade Agreement) and the WTO (the World Trade Organization). As many of us anticipated, NAFTA and the WTO created negative pressures on all of Canada's social insurance and social security systems.

NAFTA and the WTO appear to have a negative influence on WC and rehabilitation. They also seem to stimulate experience rating.

NAFTA and the WTO were supposed to create what they called "free trade". This would tend to reduce the profits of employers. It would also reduce government tax revenues by almost eliminating customs duty.

It was predictable that this "free trade" would lead to a reduction in WC benefits, and that it 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.

The economic theory about the benefits of competition does not include any consideration of its effects on OH&S.

With regard to OH&S in particular, NAFTA and the WTO seem to have increased the amount of 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 produced in the 1980s by Milton Freedman at the Chicago School of Economics. Typically, students in our university departments of economics are now taught that a free market is good, and any damaging effects on the public interest are seen as secondary.

I have never heard of a student in economics receiving any education on the damaging effects of a free market economy on OH&S, or on WC.

FINAL COMMENTS

When workers' compensation systems were reviewed by a one-person Royal Commission, the result was always significant improvements. But in recent

decades, it has been normal to make changes after someone, or a team, has had informal discussions in private with interest groups. The consequences of this type of procedure have always been damaging.

While I see no hope now of having a proper Royal Commission appointed, some of you may know about that for Ontario better than I do. When I say proper, I mean a one-person Royal Commission, the commissioner being someone who is an older well qualified lawyer who has no wish for any future government or business appointment, or any other work that he or she is not currently doing.

Asking for a Royal Commission might be a good idea in any event. At least that would mean that the unions and workers representatives are not endorsing the other processes of system change.

One difficulty in obtaining any significant reform is that when a team decides what to ask for, the result is almost always a list. That makes it much easier for a government to ignore the request.

My inclination would be to ask for just one reform at a time. With regard to WC, I think that by far the most important thing to ask for is the abolition of experience rating.