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Workers' Comp
Legal Right or Social Welfare?

It is felt, and very properly, that in many cases the imperfect protection afforded to workmen is simply a question of money, and there is no reason why the employer's profit should prevail against the employees' injury.
Editorial, Toronto Globe and Mail, *February 25, 1886.*

On December 19, 1979, Minister of Labour Robert Elgie tabled a report in the Ontario Legislature. The report, which was written by the Workmen's Compensation Board administrators and has become known as the Grey Paper, followed a trend, which first appeared in Saskatchewan, towards fundamentally altering the workers' compensation systems of Canada. Underlying the recommendations of the Grey Paper is an attack on workers' compensation as a worker's right.

Early in 1980, Paul Weiler, former chairperson of the British Columbia Labour Relations Board and currently law professor at Harvard, was appointed to study and make recommendations on changes in workers' compensation in Ontario. His interim report was made public on November 18, 1980. In it is justification for all the recommendations of the Grey Paper. With minor exceptions, none of the recommendations of labour and injured workers were adopted. With the publication of the Weiler Report the dismantling of workers' compensation in Ontario, as a worker's right, has begun. In its place is being erected a far inferior system justified in the name of social welfare and based on exculpating capital for the injuries it inflicts on labour.

Despite the 'human interest' horror stories which crop up in the media from time to time, workers' compensation is not just a moral or humanitarian issue. It is a legal issue, and, at its base, a political and economic issue. Just as any other owner of a commodity is entitled to restitution, by legal right, if someone damages or destroys that commodity before its sale, so too a worker's commodity of labour power has to be protected *as a right*, from damage or destruction. This principle is based on the recognition of the responsibility of one class, employers, for injuries done to another, employees.

In order to understand the present struggle, it is necessary to review the historical roots of workers' compensation. Workers' compensation is firmly based on the concept that an employer is responsible for injuries or disease suffered by workers on the job. This concept has been a growing source of embarrassment to employers, the government and the Workmen's Compensation Boards. As the state, in the current era of social service cutbacks, turns its fiscal scissors on the WCB, the concept of employer responsibility is being moved quietly to the background. Employers are being let off easy — no penalties, little supervision and the prospect of eliminating assessments altogether. Employer's responsibility is being replaced with the belief that injuries to workers are the responsibility of society at large and should be covered by the general social welfare system. At the same time, action on much needed improvements to workers' compensation plans is being replaced by fuzzy and confused proposals about social responsibility.

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An Historical Compromise

The present system of workers' compensation is the result of a Commission of Enquiry held during the years 1910 - 1913 by the Chief Justice of Ontario, Sir William R. Meredith. His recommendations formed the basis of the *Workmen's Compensation Act* which received royal assent on, ironically, Mayday of 1914. Since that time, workers' compensation has changed remarkably little. The principles Meredith worked with clearly recognized that he was dealing with two antagonistic classes. He designed the system as a compromise — workers got certain benefits by giving up certain rights; employers got certain protections but were forced to take financial responsibility.

Prior to 1910, workers occupied an anomalous position with regard to the 'right' to recover damages from an employer. While common law principles generally held that one person should be held financially responsible for an injury inflicted upon another, this principle did not apply to the worker/boss relationship. In 1886, the *Workmen's Compensation for Injuries Act* attempted to solve this contradiction. But, rather than alleviating it, the Act emphasized the class basis of common law rights and, far from allowing *equal* access to those rights, the Act entrenched the discrimination against injured workers. Section 3 of the Act stated that a worker would 'have the same right of compensation and remedies against the employer *as if* the workman had *not* been a workman of, nor in the service of the employer, nor engaged in his work.' A suc-

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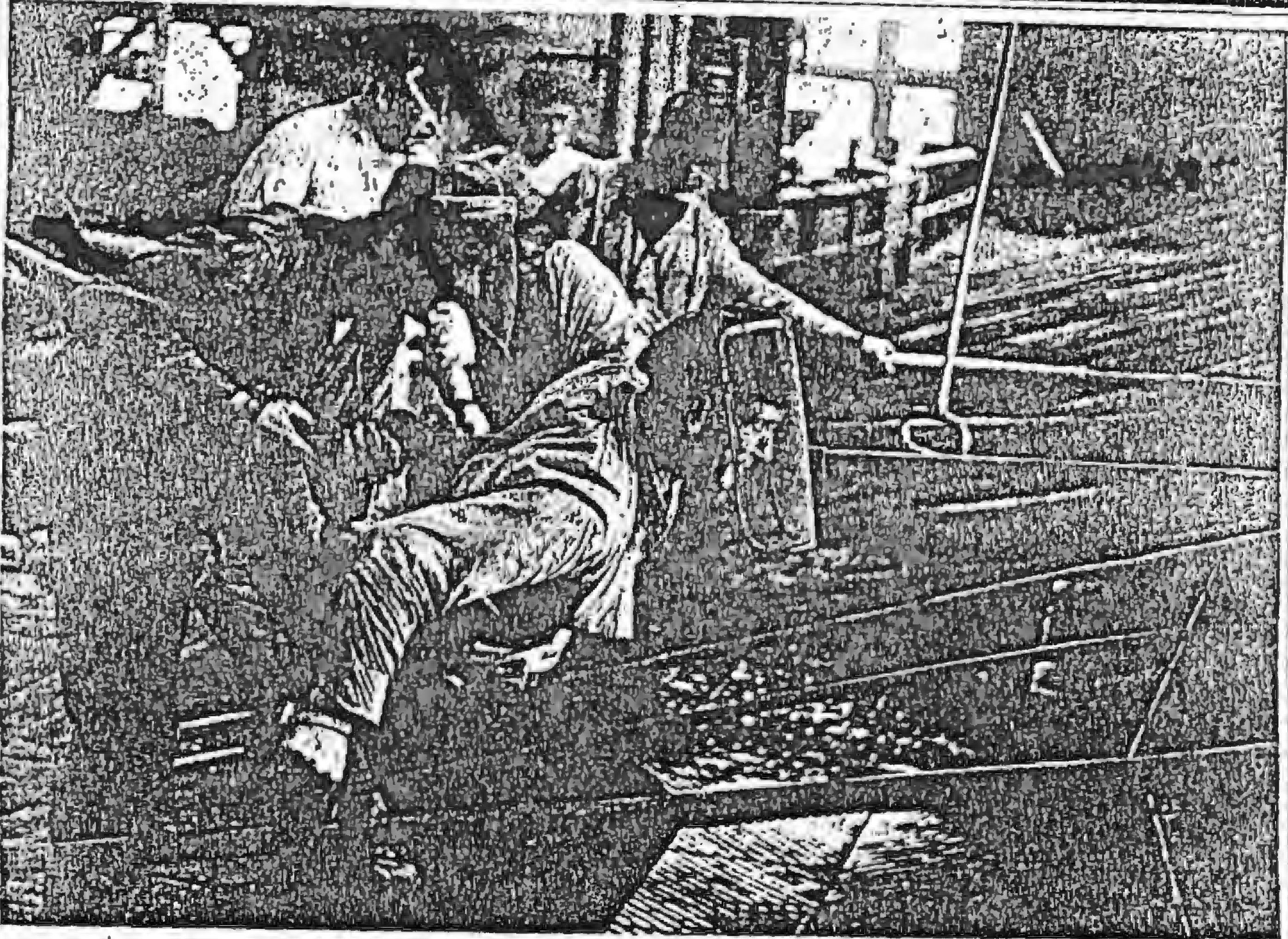


photo: from Ovo Magazine, 'Speak White', Volume 10, No 39

cessful application under the Act would be one which allowed a worker to transcend his/her class *as a worker.*

In addition to entrenching this contradiction, there were limitations of recovery extended to workers, plus a variety of potent defences available to employers. Nevertheless, as Ontario entered the twentieth century, *juries* began to decide more and more in the injured worker's favour (although often over-ruled by judges). It was at this point of crisis that the Meredith enquiry was established. It should be stressed, however, that while employers were becoming more and more unhappy with the limited but increasing success of workers under the '86 Act, it was workers and their organizations who were the main motivating force behind Meredith's appointment. The '86 Act, although providing some victories, was still extremely prohibitive.

Meredith had been leader of the Ontario Conservatives. In 1885, while in opposition, he had introduced a bill which spurred the Liberal government to pass the Workmen's Compensation for Injuries Act in 1886. With his appointment to head the Commission of Enquiry in 1910, Meredith was faced with the task of reconciling the blatant class conflict surrounding responsibility for workplace injuries. His solution was to grant several major concessions to labour: worker's compensation became a legislated right, employers were required to pay *all* costs, there was no need to determine liability and payments were to be immediate and secure.

Employers' responsibility is being replaced with the belief that injuries to workers are the responsibility of society at large.

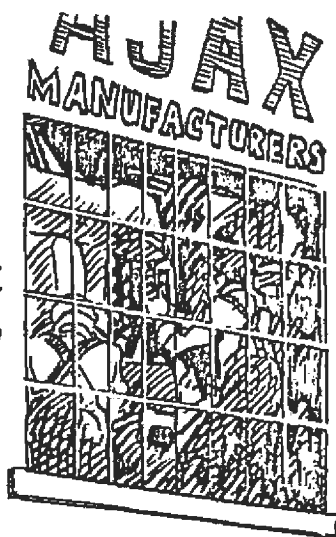
While much of this was strongly opposed by business (as might be imagined) these concessions were made at the expense of significant trade-offs. Workers lost completely their limited but growing access to the courts; the precedent was set that compensation would cover only 'impairment of earning capacity' (thereby excluding 'pain and suffering', income *potential*, punitive damages and other standard features of common-law suits) and administration was turned over to a body even less independent than the judiciary. The gains were significant for their times but have remained frozen now for over sixty-five years.

Meredith created a sophisticated piece of legislation. While the Act was a good deal more generous to labour than business would have liked, it was actually a piece of enlightened and far-sighted self-interest on the part of the ruling class. By separating workplace injury and disease from its drive for common law equality, and diverting it into an isolated cul-de-sac where it would stagnate for sixty-five years, Meredith effectively removed workers' compensation from the mainstream of demands made on capital by labour. But a corollary of this isolation has meant that, up to now, it has not been possible for business, and government representing business, to transform a *right* based on employers' responsibility won through bitter class struggle, into a social welfare benefit based on 'society's ability to pay.'

Nevertheless, the one aspect of Meredith's enquiry which it is

crucial to maintain, is the concept that workers' compensation was an implicit acknowledgment of the responsibility of business. Meredith found employers guilty of causing bodily harm to workers, and ordered that employers alone make restitution. Given the social condition of the day, this was a step forward and established an important principle. This principle is essential to maintain if we are to see significant improvements in the future. It is understandable that labour in 1910 was more concerned with fighting the attacks of business on the fronts of who would pay, how much would be paid, how long it would be paid, etc. than with worrying about the potential attacks of business in 1980. Nevertheless, this historical compromise agreed to by labour is one which must be seen as a *compromise*, and therefore short of what was, and is, needed. As one worker testified to Meredith, "We regard it (compensation), speaking as a union, as the thin edge of the wedge, and I have no hesitation right here in saying that we intend to demand . . . . . all we think we can possibly get."

Spotlight on
LABOUR HISTORY



The Welfarisation Trend

In more recent times, the role of the government has been to place workers' compensation in a different category. By 1978, with the Wyatt Report, the thrust towards 'welfarisation' was clearly apparent. The focus has moved towards the evaluation of 'need' in terms of a vague concept of social responsibility. In the eyes of the authors of the Wyatt Report it is no longer a question of employer versus employee. We now have the triumvirate of employer, employee and society at large. So-called societal attitudes now become the justification for what is essentially support for restrictions in compensation. 'Society' is concerned that injured workers receive compensation for injury when there is no apparent wage loss. 'Society' is concerned that costs of business should not go up because of compensation costs. The analysis is a simplistic and mechanistic conception of society's 'self-interestedness' which is remarkably like that of employers' own self-interest. Lost in the shuffle is the worker's clear identification with the work process and of an injury arising from his/her participation in the reproduction of profit for someone else. Also lost is the idea, founded in the common law system, that a worker has a right to be compensated *by his/her employer*, the source of the injury. The responsibility which Meredith clearly identified as belonging to employers is placed in the background and decried as uneconomical.

Welfarism is based on the assumption that society at large has an obligation to provide for those who cannot provide for themselves. Programmes were developed through the state (because no legal remedy existed) to protect the sick, the handicapped and the aged. Fundamental to welfarism is the belief that the cause of the disadvantagement is not attributable to any person or person's actions, but is the product of society's inability to overcome social and economic disorders. This is not the situation with workers' compensation. An injured worker's inability to work is directly and clearly attributable to his/her work. Every aspect of workers' compensation is defined in relation to ability to work.

The employer's responsibility to the injured worker derives from the control he has over the workplace and from the profit he accumulated from the workers' labour. In fact, in discussions over Meredith's Bill, employers admitted to their 'obligation to the public in keeping the workman from dependence on charity.' It

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is not just a question of who can pay the shot. It is also a question of who can prevent accidents and for whose benefit was the work being done? The present arguments which try so hard to pin blame for injuries on the workers themselves, and which feed the so called societal attitudes, are a crude and selfserving expression of class bias. Not only are the arguments not true but, in addition, they mislead as to the relationship between employer and employee.

Recent amendments in Saskatchewan have been the first moves in Canada in the direction of welfarising compensation. While ostensibly reinforcing the income maintenance thrust of workers' compensation, the Saskatchewan Act gives a large discretion to the WCB. The legislation speaks of differences between wages before and wages after an accident, but permits the Saskatchewan WCB to determine whether the post accident-wages result from the injury, or from extraneous factors such as high unemployment, motivation problems, etc. Compensation pays only for that which is the narrow, immediate and obvious result of the injury and the WCB decides, depending on the prevalent economic situation, how liberally or conservatively this is interpreted. In terms of benefits, the employee/injured worker's responsibility is increased. He/she has to find the right job at the right time. No obligation is placed on employers to hire injured workers or even to make sure they rehire those workers whom they injure. Monetary disincentives such as reducing benefits are used to encourage injured workers to return to work but no disincentive is used to force the employer to hire.

The welfarisation of compensation is designed to remove workers' compensation from interfering with employer's profits by putting responsibility for injured workers on society at large.

The result of this approach is to emasculate workers' drive for improvements in compensation for injuries at work by masking the class contradictions which lie at the root of the problem. Throughout the last couple of decades there has been a growing awareness by labour of the incredible toll which the workplace is taking on the health and safety of those who work. There is an appreciation that thousands of the chemicals and substances used in work processes are toxic to those handling them and that employers are actively fighting against adequate regulation and control in keeping with the new business offensive under the catchword 'deregulation.' Workers know that employers, with the assistance of the state, have for years covered up this threat to workers' health and safety by suppressing information. They have seen employers viciously challenging attempts by workers to get compensation and to make the work place safer.

Employers and the state are set to compromise again. But, in contrast to 1914 when real gains were made by workers, this compromise is based on the false premise of social responsibility which is perverted to cover up the responsibility of capital. It shifts the responsibility to society at large, and, in doing so, justifies employers continuing as they always have done.

And the apologists of this compromise cover over this by devising arguments to show that the system cannot make employers pay; costs will only be transferred to workers and to consumers (because the state will do nothing to stop it) and so *we* must accept *their* 'social responsibility.'

The Demise of Employer Responsibility

How is the employer's responsibility for those injured at work being reduced? Traditionally employers pay for compensation through assessments based on payroll. As an added inducement, and in recognition of the employer's control over the workplace, compensation acts provide for penalties against those employers with bad safety records. Rather than increasing assessments or imposing stiff penalties, the recent history of WCB administrations shows that there is a growing trend towards financing compensation through investment income. Ontario's WCB is a major investor of capital—the thirty-first largest financial institution in Canada—and, excluding banks and insurance companies, operates one of the top half dozen investment funds in the coun-

Andrew Vaisius

responsible

who is responsible
for sadness
coming as it does
a crumb dropped from
a piece of bread
& laying on your knee
bottlecaps grinning on the table
washrag laughing in the sink
a timetable made by gulls
wheeling in riotous
scavenge

while pancakes are flipped
on the griddle in another house
cars stack-up on expressways
in new york
and the world wakes in stages
to radio jive
snow
heat
rats
hungry hungry rats

do you know
in berwyn illinois usa
the drunks file out
to the streets
for one hour
while the bars are closed
to mop the vomit
and on the curb
the drunks hold conference
& decide garbagemen
are responsible
for sunrise
the growling yellow truck
at five
is god

The attitude of the WCB is that compensation is cheap insurance for employers and the Board's role is to make it cheaper.

try. In September 1979, the investment portfolio was worth more than $1.3 billion and returned over $120 million in 1979 or 17.3 percent of all Board income. In 1971, only four percent of the Board's total income came from investments. This investment income is being used to reduce employers' payments and not to improve benefits or services to disabled workers. In 1978, there was an eight per cent reduction in employer assessments, even though there was no drop in claims. In addition, there are almost no penalties for employers with poor accident records. The attitude of the WCB is that compensation is cheap insurance for employers and the Board's role is to make it cheaper.

In the face of inadequate legislation to control the workplace from outside, the one incentive within industry—higher employer assessments—is being reduced to a licence fee. Instead of strengthening penalty provisions, the drive is to eliminate them.

Huge amounts are being spent by governments to promote 'Quality of Working Life' schemes but next to nothing is directed towards hiring the injured and disabled. Jobs are not modified for the injured; employers are notoriously unwilling—and have no responsibility—to hire the disabled and yet the amount an injured worker is compensated is tied to his or her ability to do suitable work—whether such work is available or not.

1981, the International Year of the Disabled, will no doubt see some token projects undertaken by governments to 'make work' for the disabled. In all the pious talk about the disabled, however, it is unlikely that those disabled in the production of profit for employers will receive even such lip service from the state in forcing meaningful re-employment by accident employers.

Where Are We Now?

The sophistication with which this welfarisation of workers' compensation is being carried out is frightening. The intense awareness of the struggle between clearly opposed interests is being attacked by people like Professor Weiler who advocates a classless analysis of the problems which, in the end, blatantly benefits only one class, capital. His study of the workers' compensation system in Ontario becomes an instrument to deflect dissent so that employers can continue, basically unhindered, in their ever-growing efforts to shift responsibility to 'society.'

If they take away employers' responsibility for the injuries inflicted on their workers, what remains is what the WCB has always told injured workers who are cut off benefits, 'Go on welfare'.

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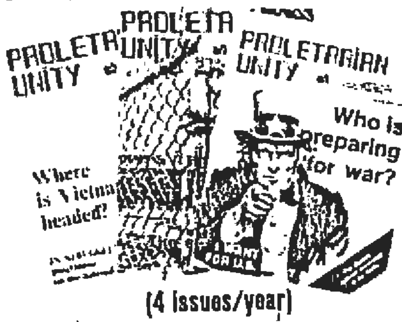

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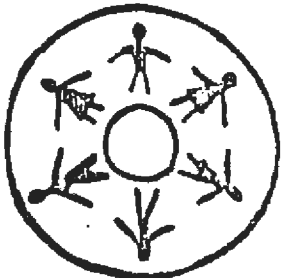

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