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MANAGING WORKERS VIA INJURY COMPENSATION

On 21 October 2009, 38-year-old Patrick Clayton walked into the main Alberta Worker’s Compensation Building in Edmonton with a rifle, fired a single shot, and took nine hostages. Clayton was an injured construction worker with a long-running claim dispute. He had been on and off benefits for the previous six years and was cut off again the week prior to the hostage taking. Unable to work or gain compensation and allegedly further injured during a workers’ compensation board (WCB) medical exam, Clayton’s life unravelled: bankruptcy, welfare, living in social housing, drug addiction, domestic violence, and a custody dispute.

“I just got sick and tired of being treated like a piece of crap by WCB,” Clayton told an interviewer from jail. “I never knew where I was going to stand with them from one day to the next, all that uncertainty was nerve racking and constantly wearing me down. … I thought that I had already lost everything including [his son] Brandon, and that I didn’t have anything else to lose except my life. … I never had any intentions of hurting any of those people, I just wanted for someone to listen to my story and for someone to help me.”

This incident is the most recent in a series of incidents over
the years. In 1991, a brain-injured steel worker killed himself in a WCB parking lot. His death resulted in two inquiries, program changes, and a government apology to his family. Protestors smashed WCB windows in 1991 and 1992. In 1993, a disable construction worker used a shotgun to take hostages. Later in the 1990s, injured workers set up a small tent city on the lawn of the WCB. Staff derisively referred to them as “happy campers.” Two further government reviews followed.\(^3\) The lawn has since been re-landscaped with hills, boulders, and prickly bushes to discourage a repeat of this protest.

While it is tempting to dismiss these incidents as aberrant, the media coverage of the Clayton hostage taking caused many injured workers to speak out about their frustration. A recurring theme is that workers’ compensation is coercive and unfair—that employers and the WCB appear to conspire against them. These claims deserve consideration. Like all public programs, workers’ compensation is coercive—that is the point of regulation. Publicly funded medical programs mean you can’t jump the queue by paying out of your own pocket. Speed limits infringe upon your ability to drive as fast as you want. The coercive nature of these programs doesn’t mean they are necessarily bad. The important questions to ask are who is coerced, who benefits from the coercion, and in what ways?

Workers’ compensation is coercive in its decision-making and appeals processes. The discussion in Chapters 5 and 6 suggests that WCBs use claim adjudication and management to limit employer liability and the ability of workers to resist this agenda. This chapter further develops this analysis by examining how workers’ compensation decision-making and appeal processes contribute to managing worker resistance to limiting employer liability.

The chapter begins by examining how the private nature of decision-making makes it difficult for workers to know what hazards exist in the workplace and develop a shared understanding
of workplace injury as a class issue. We then examine how the operation of appeals pushes WCBs and employers together to counter worker opposition. These dynamics compound the effect that incentives to participate in the system and penalties for challenging it have on the ability of workers and labour to win safer workplaces or better compensation.

Worker resistance is further constrained by the discourse about privatizing or abolishing the workers’ compensation. These proposals are erroneously thought to result in a cheaper system. Yet, they create pressure on workers to limit their criticisms of workers’ compensation or even defend workers’ compensation or risk the loss of the benefits it provides. In the meantime, employers reorganize work in ways that make workers ineligible for coverage — thereby eroding the system out from underneath workers. The effect of these changes is disproportionately borne by women and racial minorities — groups that have less ability to resist such changes.

CLAIM ADJUDICATION AND ADMINISTRATION

Workers want safe workplaces. Historically, workers have sought safer workplaces by working together. For such efforts to be successful there has to be a political opportunity to challenge existing arrangements, some sort of group structure through which individuals can mobilize, and a process that allows individuals to form a collective understanding of the problem they face and see it as amenable to change. In the context of workers’ compensation, individual claim adjudication and administration makes administrative sense. At the same time, it also limits workers’ ability to develop a shared understanding around the political economy of claim adjudication and administration and mobilize themselves to seek changes.
**Impeding a shared understanding**

Workers’ compensation limits the ability of workers to know the hazards they face. Each claim is adjudicated individually and information about the injury is confidential. While workers may know about recent injuries within a workplace (or even small or regional industries), individual adjudication makes it hard to identify patterns of injury. Identifying patterns of injury is important because patterns are a good indicator of how the organization of work causes injury. While patterns may sometimes be self-evident, most of the time patterns are not evident because injuries are dispersed in geography and/or time. Injury causation may also be difficult to observe.

Further, individual adjudication and claims management also means injured workers have little opportunity to interact and develop a shared understanding of their injury and compensation experiences, unless they happen to meet in rehabilitation or are part of some other community. By making it hard for workers to recognize and discuss patterns of injury and compensation, the adjudication and management of claims impedes collective action. Employers are, of course, much more likely to know about patterns of injury and about who is injured, as well as to have the power to reduce or eliminate the hazards that cause these injuries. But reducing hazards and putting injured workers in contact may not be in employers’ best interests because it can undermine their ability to organize work in the most profitable way.

**Mobilizing workers**

When workers develop a collective awareness of shared interests or problems, workers’ compensation can also impede their mobilization. Receipt of compensation can, for example, reduce workers’ collective interest in pursuing safer workplaces by lowering the cost of injury to workers. Similarly, compensation robs workplace injuries of much of their political verve by
mitigating the financial consequences of them. Finally, workers may be disinclined to mobilize for fear of being subject to administrative harassment or losing their compensation.7

Where workers do act collectively (e.g., by forming an injured worker group), they face two challenges. First, such groups have limited policy capacity (the ability to participate meaningfully in policy discussions) and limited policy salience (the ability to generate consequences if their demands are ignored) over the long-term. A small cadre of organizers with few resources or allies often sustains such groups.

The second challenge faced by such groups is that, by their nature, they are non-representative. That is to say, they represent the interests of their members but not a larger group (such as “all injured workers” or “all unionized workers in a province”). They may also lack the formal organizational structure found in sophisticated worker groups such as trade unions. Consequently, injured worker groups may have little legitimacy in the eyes of the state and employers— which is convenient, because they tend to carry messages that the state and employers don’t want to hear.

This lack of representative capacity often results in injured worker groups being dismissed as “special interest groups.” Such terminology is an interesting example of the political economy of capitalism. Employer advocacy groups are generally viewed positively (i.e., as legitimate lobbyists) while groups concerned with worker, health, or environmental issues have the negative “special interest group” label applied to them. The fundamental difference between the two groups is whom they lobby on behalf of and the implications their policy prescriptions have for the capital accumulation process.

**Role of trade unions**

Trade unions are another structure through which injured workers may mobilize. The ability of unions to identify patterns
and to pressure the state or employers for safer workplaces is constrained by relatively low union density (although this varies by sector and province) and the availability of resources. Some labour resources are used to assist members with their individual claims and some are directed at defending the system from proposals to alter it against the interests of workers. This reduces the resources available to seek structural change in workplaces or to workers’ compensation. Further, the availability of workers’ compensation to many workers may limit the willingness of unions to risk existing compensation to achieve safer workplaces or more broadly distributed compensation.8

Should unions desire significant change, the opportunities available to them are limited. Collectively bargaining changes one unit at a time, is slow, and employers can resist it. Whether the majority of workers will sacrifice wages or risk a strike to advance the interests of the injured is unclear.9 The ability of unions to bring political pressure on the state is limited by the existence of a compensation system and difficulty in getting reliable injury data. Should this data be available, unions must still face resistance in the political arena and the special interest group label.10 In this way, workers’ compensation diffuses worker resistance to managerial practices that result in work-related injury.

**APPEALS**

Every jurisdiction in Canada allows workers and employers to appeal WCB decisions. In the 1980s and 1990s, workers heralded gaining an appeal process as a victory. Yet, like other worker “victories” over the years, the appeal process has paradoxical elements. On the one hand, it allows workers access to their own workers’ compensation information and gives them an opportunity to contest WCB decisions. On the other hand, the nature of the process aligns the interests of the WCB and
the employer against workers. In doing so, the appeals process reintroduces an adversarial process to workers’ compensation. In some jurisdictions, it can also pit workers against the combined resources of both the WCB and the employer. When this dynamic is combined with the WCB tendency to minimize employer liability by rejecting claims and limiting worker benefits, appeals clearly contribute to a pattern of behaviour that disadvantages workers.

**Internal reviews and external appeals**

When dissatisfied with a WCB decision, workers or employers can ask for an internal review of a decision. Anyone with a direct interest in the decision is eligible to make such a request. Internal reviews typically see the decision(s) in question being re-examined, often first by the original decision maker and then by an internal review body. This might entail collecting more data, performing a documentary review of the decision, and/or holding a conference with the interested parties. Eventually, an internal review decision is generated. Most workers and employers will choose to represent themselves during these proceedings, although some hire lawyers, seek help from their union, or bring other advocates into the process.

A worker or employer who is dissatisfied with the outcome of an internal review can normally file an appeal. This process varies by jurisdiction. In Alberta, this application goes to the external and independent Appeals Commission for Alberta Workers’ Compensation. By contrast, in Saskatchewan, the Board of Directors of the WCB is the final level of appeal. A hearing conducted in-person or by teleconference usually follows, although a hearing based solely on documents may also be possible. In an in-person or teleconference hearing, a panel hears the argument made by each party. This usually means the worker and the employer. In some jurisdictions, such as...
Alberta, the WCB may also be a party. Following the hearing, the appeals body normally issues a written decision of the panel’s decision.

**How appeal processes advantage employers**

Injured workers and their employers do not normally participate in decision-making about claims, although both provide WCBs with information used to render a decision. This is consistent with the non-adversarial approach to workers’ compensation. When a worker or employer disagrees with the decision, they must appeal it—often while living with the consequences. The consequences of an unfavourable decision are, however, of different magnitudes for workers and employers.

A decision unfavourable to an employer may affect the employer’s future premiums, but the overall effect is small and is usually easily reversible. By contrast, a decision unfavourable to a worker often results in a reduction or loss of wage-loss or other benefits. As we saw with Patrick Clayton, the financial consequence of having no income is often immediate and dire. Further, the effects of being unable to make a mortgage payment or provide food for a family are difficult to reverse, particularly if the reversal comes significantly after the original decision.

In this way, workers have much more at stake in an appeal than an employer. Further, the delays inherent in appeal processes do not impact workers and employers equally. In this way, workers’ compensation appeals have an effect broadly analogous to the “work now, grieve later” principle of grievance arbitration: workers who resist modified work, intrusive medical examinations, or other WCB demands and thus have their earnings deemed to benefits cut off must bear the significant costs while awaiting remedy. The remedy for such a decision cannot help but affect workers’ decision-making about whether to co-operate with a WCB.
Adversarialism in appeals
The appeals process can subtly align the interests of WCB adjudicators and employers against the interests of workers. When a worker disputes a claim decision, the original WCB adjudicator typically seeks to have the decision upheld during an internal review. Decisions that workers appeal typically financially benefit their employer. In the internal review process, then, we see the employer’s interests (i.e., minimizing claim costs) align with the adjudicator’s interests (i.e., upholding a decision limiting or precluding benefits). It is often difficult for workers to pinpoint why it appears that the WCB is conspiring with their employer against them. This dynamic is at least partially responsible for that experience. This recurring alignment cannot help shape the mindset of frontline adjudicators towards employers (often allies) and injured workers (usually opponents).

When disputes come before an external appeals body, the WCB itself has an interest in ensuring its interpretation of fact and policy is upheld. Where the WCB can participate in the appeals process (or, indeed, the WCB is the appeals body), the WCB and employer can act in concert against the appellant. Where the WCB cannot (or does not) participate, the WCB’s original decision still frames the debate and provides a compelling body of evidence. In these ways, multiple voices argue against the worker’s appeal. Further, the employer (and the WCB, if present) is more likely to have or employ knowledgeable advocates who will make full use of the procedural and factual information available to them. And the employer (and the WCB, if present) are also more likely to hold positions of significant social stature and are able to make appeals to “maintaining the integrity of the system,” whereas an injured employer is essentially arguing in his or her own interest. That said, an injured worker can make a most sympathetic appellant.
This is not to suggest that appeals processes are necessarily or entirely a bad thing for workers. Appeals provide workers with a means by which to remedy erroneous decisions about their claims. Yet, the alignment of interests created by the internal and external appeal processes appear to run against workers, both in the immediate appeals outcomes and perhaps in the broader orientation of adjudicators towards injured workers. When combined with the tendency of WCB legislation and policy to limit employer liability (as shown in Chapters 5 and 6), a disturbing pattern of bias against workers emerges. This bias is a function of the structure of workers’ compensation and may be reinforced (or mitigated) by the beliefs and behaviours of individual adjudicators.

*Political economy of appeals*

Independent appeal systems were developed during the 1980s in response to widespread worker dissatisfaction with seemingly arbitrary conduct by WCBs. This has resulted in significant growth in the number of appeals. There are three reasons employers appeal worker claims. First, employers may be legitimately skeptical about the validity of claims. Second, claims costs directly affect an employer’s premiums via the experience-rating mechanism. Appealing these claims can reduce premiums and, if the employer can find an advocate who works on a contingency basis, the appeal costs the employer nothing. Third, employers who face significant pressure to reduce accident levels (e.g., because bids on construction job may be affected by time-loss claim records) may be seeking to send a message to their workforce about how workers making claims will be treated. By subjecting claimants to repeated and stressful appeals, employers may be able to increase worker attention to safety and/or decrease injury reporting.

Appeal systems have both costs and benefits for major stakeholder groups: employers, workers, and the state. An independent
appeals process works against employers by giving workers an opportunity to seek further or higher benefits from the WCB. This can increase employer premiums, although the additional costs of losing an appeal are usually small. Depending upon the jurisdiction, employers may be able to rely upon the WCB to essentially fight an appeal for them, because the WCB will seek to have its decision upheld.

An independent appeals process gives workers an opportunity to have a disinterested third party review decisions made by the WCB in light of policy and legislation. In establishing this process (which also gives workers access to their WCB files), workers gained a significant procedural improvement. Whatever the actual outcome of an appeal, this process also gives the workers a sense that they’ve had their “day in court.”

The threat of endless appeals also places pressure on WCBs to develop more consistent and rigorous internal decision-making and review procedures. This benefits workers by yielding more consistent and timely decisions. The downside of an independent appeals body for workers is that this process effectively forecloses political lobbying to get compensation. Legislators (who hear a significant amount about workers’ compensation claims from constituents) are able to direct workers to the appeals process. Workers dissatisfied with the outcome of their appeal can be characterized as having unrealistic expectations.

Finally, the state benefits in two ways from independent appeals commissions. First, legislators can direct dissatisfied claimants and employers into the appeals process rather than having to take up constituents’ issues themselves. The value of this should not be underestimated. Injured workers can be very sympathetic spokespeople and no elected official wants to be seen as unresponsive to them. Further, legislators must be careful not to be seen as exerting undue influence over the workings of an independent agency such as a WCB. This constraint
makes it difficult for legislators to get action (even when they want to) that will satisfy their constituents.

The second benefit independent appeals commissions provide the state is that they reinforce the legitimacy of the workers' compensation process. Dissatisfied claimants and employers have a viable and notionally neutral appeal option. This may reduce the pressure that dissatisfaction places upon the fundamental compromise: the parties may be less politically able to and likely to seek significant change to workers' compensation if it appears there is the prospect of fair treatment. Instead, disputes are channelled into a legalistic and bureaucratic process, not unlike grievance arbitration.23

Impact on workers
Before leaving this topic, we should consider the impact of the compensation and appeals process on workers. There is some evidence that it can retard recovery and rehabilitation. Where the work-relatedness of an injury or disability or the degree of disability is contested, determining causation can require multiple non-therapeutic medical examinations, including invasive testing that provides no medical benefit to the worker but can be emotionally taxing and delay treatment.24 Disputes over causation may also result in stressful litigation and can negatively impact doctor–patient relationships.25 Further, injured workers may face surveillance, which can negatively affect the quality of their life and impede their recovery.26

A Quebec study by Katherine Lippel identified how the compensation process (and the action of specific actors) affected the self-reported health of injured workers.27 The process of compensation was found to have a negative effect on workers' mental health in the majority of cases. Among the effects reported were depression and suicidal thoughts. Among the causes of this negative effect was the stigmatization of injured workers, based the belief that injured workers were defrauding the
system. Also important was the worker perception that an imbalance of power characterized the compensation process. Workers noted that they often felt like they were fighting the compensation board, doctors, their employer, and even their union. More specifically:

Filing a claim with the (compensation board) leads to the intervention of a number of parties, setting in motion a series of “big machines” that seek to control the injured worker, control his future, control costs, control his body, control his appeal, control the return to work process, control his behaviour at work, or at occupational therapy, or at the doctor’s office, and, in the case of clandestine surveillance, control his personal life and that of his family.

Many of these parties have much greater resources and access to information than the worker. Some, such as employers, also have greater power than the worker by virtue of the employment relationship. This imbalance became particularly evident when workers were denied benefits and were forced to enter the appeals process. Workers having support from a knowledgeable advocate mitigated the effects of this dynamic. Where compensation board workers were suspicious or disrespectful, workers experienced additional mental distress. These findings were broadly similar to work done in Australia.

**PRIVATIZATION AND ABOLISHMENT**

While disputes about individual claims and the operation of the system often command our attention, lurking just offstage is the threat of privatizing or abolishing workers’ compensation. This discourse is premised on the erroneous belief that privatization or abolishment will result in a cheaper system. Despite this flawed premise, the presence of this discourse may exert pressure on workers and unions to defend workers’ compensation.
(or limit demands for change) in order to protect the rights they have gained through it. 31 In the meantime, employers have been reorganizing work in ways that make workers ineligible for coverage — thereby eroding the system out from underneath workers. The effect of these changes is disproportionately borne by women and racial minorities — groups that have less ability to resist such changes.

**Argument for returning to tort**

Rising claims costs are often cited as a reason for governments to abandon or radically alter workers’ compensation. One option is to return to compensating injury using the tort system. This has some advantages for the state and employers. Abolishing workers’ compensation would eliminate complaints to government about the operation of such systems. Investors would be able to evade most costs associated with workplace injuries because of the legal barriers to successful civil suits outlined in Chapter 5 and the liability protection offered by the corporation form. 32 Some workers may also benefit. For example, the severely injured may reasonably expect higher settlements in court than through workers’ compensation. 33

Yet there are also significant drawbacks to a return to tort. Tort-based compensation has historically resulted in the social instability and disruption, in part because it did not provide immediate, stable, and predictable compensation for injured workers. Further, it creates the potential for unpredictable injury costs and unlimited liability for employers. These political and practical benefits augur against a return to tort. A fuller consideration of the operation of a tort system reinforces this perception.

**Operation of tort-based compensation**

Under the tort system, workers are responsible for the cost of an injury unless they can prove someone else ought to bear the
cost and succeed in getting that someone else to pay. As we saw in Chapter 5, this remains a process fraught with risk for workers. Such a system ought to result in workers demanding hazard pay for the additional risk they are assuming. As we saw in Chapter 2, workers have always had difficulty adequately assessing hazards before taking the job, particularly as employers have an interest in hiding this information. Further, it is unclear whether workers, particularly non-unionized workers, have the necessary labour market power to compel a risk-based wage premium from employers. If workers did receive hazard pay, they might then use this to purchase insurance against the possibility of workplace injury. Or they might just pocket the difference and hope for the best.

Employers may also buy insurance to mitigate the risk of an injury-induced civil suit. Or they might not. In that case, an employer found responsible for an injury may simply declare bankruptcy, its investors protected by their limited liability for the actions of the corporation. This line of speculation could continue ad nauseam. For example, if workers do not know which employer is insured and which is not, they cannot ask for a wage premium from the uninsured to compensate them for the risk of employer bankruptcy.

In both cases, private insurers may find that the adverse selection effect makes offering disability insurance unprofitable. Adverse selection begins when an insurance company offers an insurance policy covering disability. Claims cause the premiums to go up in year two and each policyholder looks at whether the higher priced insurance remains worthwhile. If the employee or company expects to file a claim, they see the insurance as a bargain and buy it. Those who don’t expect to file a claim may well drop it. Consequently, the insurance company is now insuring a group that has a higher risk factor and will raise the following year’s premiums. As this cycle repeats, coverage becomes unaffordable and insurers stop offering it.
One solution is to have the state act as the insurer of last resort but, of course, that runs contrary to the whole idea of returning to tort.

**Comparing tort and workers’ compensation**

Setting aside the political and practical difficulties of tort, it is useful to consider how workers’ compensation stacks up against civil cases. Some researchers conclude that workers’ compensation awards are monetarily comparable to tort awards. Douglas Hyatt and David Law note, however, that the majority of civil actions are settled out of court and, moreover, that these settlements are generally lower than settlements imposed by the courts. Furthermore, workers receive only 48 percent of court awards. Fees and litigation costs consume the rest of the money. Workers’ compensation appears to provide compensation that is better and more reliable for workers without the risks involved in a civil suit. The exception may be for severely injured workers, who generally fare better under tort law.

Hyatt and Law recognize the cost of workers’ compensation premiums may be rising. Yet, they noted, such calculations often do not consider how the costs of such premiums are being borne by workers through wage rates that no longer fully compensate for the risks of an occupation. There is also some evidence that significant portions of increases in workers’ compensation premiums are passed along to workers over time by lower wage increases. And, as noted in the Introduction, social reproduction includes developing and maintaining the skills and well being of workers such that they can perform their role in the labour process. The state contributes to social reproduction mainly through labour and social policies, of which workers’ compensation is one facet. Abolishing workers’ compensation shifts significant costs associated with social reproduction onto families, the gendered nature of which means these costs are borne by women.
Privatization
A second set of proposals seeks to privatize workers’ compensation via the provision of some or all of workers’ compensation by for-profit insurance companies. What precisely is meant by “privatization” varies and can mean one or a mixture of the following:

- for-profit insurance companies competing with a non-profit WCB,
- for-profit companies assuming total responsibility for providing insurance within (or without) guidelines established by the state,
- for-profit companies providing insurance but a WCB remains as the insurer of last resort (for those companies no insurance company will take on), or
- for-profit companies performing some workers’ compensation functions under contract (e.g., claims management, rehabilitation).  

The first three approaches form the mainstay of American workers’ compensation systems, in which private companies manage claims, while the government determines such matters as eligibility for compensation and benefit levels, and provides the processes for appeals. It is commonly held that competition between insurers for customers would create an incentive for insurers to reduce the costs of workers’ compensation. This belief has particular appeal because of the widespread sentiment that public-sector institutions are somehow administratively inefficient (e.g., they comprise an overly large and ineffective bureaucracy). A leaner, private-sector company can be expected to avoid this, or so the argument goes.
Impact of privatization

Let’s begin by analyzing the argument for privatization from a theoretical perspective. Assume publicly provided workers’ compensation systems have administrative costs of approximately 15 percent. This means that a private-sector company operating even 10 percent more efficiently than a public sector WCB would only see a cost savings of 1.5 percent. Private-sector companies, however, must also generate a profit for their investors, something that is sure to negate some or all of the efficiency gains that are assumed to come with privatization. To avoid increasing rates in order to make a profit (and thus invalidating the key argument for privatization—that it will be cheaper), insurers will need to find some other way to reduce costs.

Private insurance companies may try to get employers to reduce accident rates by increasing premiums for unsafe employers. As noted in Chapter 3 and 6, this approach has not been particularly successful. Consequently, insurers may turn to decreasing benefit levels, reducing the duration of claims, or shifting costs to other programs, such as health care, welfare, or the workers’ families. These approaches create the appearance that private insurance is less expensive, but in fact, they represent a cost transfer from industry to workers and the state. So far, privatization doesn’t look too good.

Who chooses the insurer?

The question of who chooses the insurer in a privatized system with multiple potential carriers is an important one. It seems safe to assume that, in choosing an insurer, workers and employers would pursue their own interests. Furthermore, it appears fair to assert that the adjudication of claims is complex enough that each insurer must exercise some discretion in accepting and managing claims. Thus, if the employer selects the insurer, the employer would likely seek the insurer with the
lowest premiums. Low premiums most likely mean the insurer is shifting costs to the injured worker or the government. This may well jeopardize social reproduction.

By the same token, if the worker selects the insurer, the worker will likely seek the insurer with the most generous track record. This would increase employer costs and thus undermines the purpose of privatization—saving money. Unless that isn’t the purpose of privatization and the real intent is to open up a publicly managed system to profit-making activity. In any event, it appears that, even if privatization could be made profitable, privatization could well founder on the issue of who chooses the insurer.

It is also possible that the complexity of the tasks performed by a workers’ compensation system may render the regulation of privatization by the state so complex as to minimize or even eliminate the projected cost savings. With the questions about whether privatization can lower costs and maintain social stability in mind, it is useful to see what research comparing public and private systems says.

**Cost savings under privatization**

Terry Thomason compared the experience of per employee assessment of workers’ compensation in Canada and the U.S. between 1961 and 1989. Overall, the difference was small (between $2 and $50 per employee on no more than $349) with no particular pattern to the difference. This conclusion finds support in subsequent research that indicates that the costs of publicly provided workers’ compensation are no higher, and may even be lower, than privately provided workers’ compensation. This suggests that privatization does not result in cost savings.

Thomason notes two other interesting findings. Firstly, in 1990, 41 percent of total costs in the U.S. privatized system were for medical services, versus 14 percent in Canada.
Secondly, despite similar overall costs, Canadian programs offer more generous benefits and more extensive coverage than the American system. An earlier study by Thomason also indicates that American workers’ compensation systems result in much more litigation, and that administrative costs are twice as high.\textsuperscript{46} A third study in New York State found that claim management by private insurers, and in particular the cost of disputing claims, appears to reflect economic considerations, rather than genuine concern over causation and disability.\textsuperscript{47} Furthermore, certain claims were more likely to be disputed and/or adjusted by private insurers in this system. These included claims by non-English speakers, younger workers (whose greater life expectancy yields higher claim costs), and workers claiming occupational disease or internal injury. This also held true where the claim value was small, and not as likely to be pursued by the worker via litigation.

A further problem is that of “creaming.”\textsuperscript{48} Creaming occurs where insurers will only insure low-risk companies (i.e., the ones potentially most profitable to the insurer). Avoiding creaming requires a significant degree of government regulation. Publicly-provided workers’ compensation also better allows governments to harmonize workers’ compensation payments with other social programs such as taxation, the Canada and Quebec Pension Plans, welfare, and unemployment insurance, although the fragmentation of jurisdiction in Canada complicates this.\textsuperscript{49}

Most damaging to the notion of privatization is that there appears to be no significant research that supports the proposition that privately provided workers’ compensation is less expensive than its public counterpart. An analysis of workers’ compensation in 48 states from 1975 to 1995 designed to determine (in part) which set of arrangements (public, private, or mixed provision) provided the most effective form of delivery concluded there were no clear differences in costs between jurisdictions with exclusively public and exclusively private
Managing Workers via Injury Compensation

Economic globalization as an explanation

There is no evidence that a return to tort or privatization would result in significant cost savings. There is also good reason to believe such changes would make compensation for work-related injuries less equitable. So why do these proposals recur? Some advocates may have a personal financial interest. For example, insurance companies, injury lawyers, and companies with low risks of work-related accidents may all benefit. Other proponents may be incorrectly informed about the merits of their proposals. But other, more insightful explanations centre on the neo-liberal prescription for society.

Let’s begin with the role of neo-liberal beliefs about the value of a free market and the effectiveness of privatization. Workers’ compensation predates the substantial expansion of social rights and programs following the Second World War, which sought to address or ameliorate a variety of social problems by transferring income within society. Yet workers’ compensation is fundamentally consistent with these programs in that they all served to maintain the social reproduction by reducing social instability.

A variety of factors (e.g., trade agreements, changing technology) reduced the dependency of capital on the economic conditions in individual states. At the same time, public support for the interventionist welfare state weakened beginning in the 1970s because a growing body of evidence seemed to justify growing doubt about the state’s ability to secure both economic growth and continuous improvements in public services. The election of right-wing governments in the 1980s and 1990s has
resulted in a variety of economic and legislative reforms designed to reduce the scope and cost of the state. These changes have been justified by reference to the supposed imperatives of economic globalization wherein government should (and perhaps must) adjust the domestic economy in order to attract transnational capital.53

There is no universal agreement that globalization and neoliberal policies are new or inevitable.54 That said, Canadian government policy makers and bureaucrats appear to accept the globalization thesis and have adopted neo-liberal policies, including in labour relations.55 Workers’ compensation is an area of state activity that imposes costs on employers and has been largely protected from profit-making activity. This makes it an attractive target for market-based reform.

**Managing worker demands**

A second line of explanation for these proposals is that they help manage worker agitation for improved workplace safety and injury compensation. By creating the spectre of radical restructuring that imperils the existence of workers’ compensation—a system that provides significant benefits for workers—employers are able to contain demands for increased safety and compensation. Such threats can also be used to make marginal changes to workers’ compensation that reduce costs and/or open up parts of the system to private-sector activity.

This analysis is based on the dialectic of partial conquest.56 In short, workers are less likely to resist employer demands if the workers credibly believe they may lose something important. We see this in collective bargaining, where trade unions are reluctant to risk illegal strikes because they fear punishment and the loss of their security or bargaining rights. This threat helps ensure unions use the grievance-arbitration process to address instances where the employer violates the collective agreement, rather than taking the much more effective
(and disruptive) step of putting down their tools and stopping production.

Proposals for privatization and a return to tort have much the same effect. They require labour to spend resources defending workers’ compensation. This limits the practical and political ability of labour to challenge existing workers’ compensation practice: How can labour support and criticize workers’ compensation at the same time? And the existence of a viable threat to workers’ compensation may make labour more amenable to accepting smaller changes in the hope of preventing large ones. In this way, these proposals serve much the same purpose as the focus on moral hazard discussed in Chapter 6 — they are a way for capital and the state to advance changes that further limit employer liability without triggering widespread worker resistance.

**PRECARIOUS EMPLOYMENT**

Neither a return to tort nor increasing privatization appears to be a viable policy option. This suggests that they may be simply political threats that have the effect of partially constraining worker demands for safer workplaces and increased injury compensation. Is this the case? This possibility needs to be evaluated in light of the effects that growing job precariousness has on workers’ compensation coverage. The success of capital in evading statutory obligations linked to standard employment relations (as discussed in Chapter 4) is perhaps a much more significant threat to workers’ compensation than proposals for abolition — in part because of how effectively it can diffuse resistance by dividing workers.

*Precarious work*

As noted in Chapter 4, most government labour and social policies are based on a standard employment relationship (SER). Standard employment relationships entail full-time, continuing
employment for a single employer, with work conducted at the employer’s place of business and under the employer’s supervision. While many employees do have a standard employment relationship, 37 percent of the workforce in 2003 was engaged in non-standard work. This catchall category includes wildly diverging employment relationships, conditions, and forms of work: from movie stars to day labourers. Further, both SERs and non-standard employment relationships (NSERs) have faced significant downward pressures in terms of wages and working conditions as employers (with the assistance of government) have sought to reduce the cost of labour.

To reduce costs, employers have begun re-organizing employment so as to evade statutory obligations found in the floor of rights. For example, the conversion of employees into “independent” contractors may reduce an employer’s obligations under employment standards and workers’ compensation. This shift is often obscured and/or justified by reference to flexible forms of employment as an economic requirement and by viewing self-employment through the lens of entrepreneurship. This discourse posits that workers choose risk, autonomy, and independence over stability, but ignores that the element of choice may indeed be limited, the quality of work low, and the decision influenced by the state offloading aspects of social reproduction onto women.

Recent scholarship has focused on examining the issue of precarious employment. Precarious work includes standard and non-standard forms of employment characterized by varying degrees of limited social benefits and statutory entitlements, job insecurity, low wages, and high risks to health. This definition notes that workers bear the financial and social consequences of changes in the structure and organization of work. The growth of precarious forms of employment is one outcome of employer attempts to increase profitability.
Precarious work and work-related injuries
The consequences to work-related injuries of changing employment relationships, conditions, and forms of work are still emerging. The growth of small business (with less internal capacity to attend to workplace safety) and a contingent workforce (with less training on specific workplace hazards) may well increase injury rates. This outcome is a form of cost transfer, from capital to labour. Yet there are some contrary pressures here. Decreasing levels of unionization and pressure on government to reduce regulatory demands may be mitigated by corporations implementing new safety programs in order to reduce their workers’ compensation premiums. Yet employers’ response to experience rating, documented in Chapter 6, suggests aggressive claims management is an equally plausible choice for employers.

Key features of precarious work appear to correlate with poor health outcomes. This builds on the existing literature that suggests, worldwide, that workers in non-standard employment relationships (some of which are precarious) are at a higher risk of injury or illness. Garment workers who work from home, for example, have higher rates of injury than similar workers in factories, perhaps reflecting greater intensity of work (exacerbated by piecework payment structures) and poor working conditions. The regulation of homework has proven problematic in Canada, with no jurisdiction providing effective inspections and the administrative systems tracking injury and compensation making homework invisible as a distinct class of work. Home workers may also not know about their legislative rights or may be misled by their employers as to the rights and entitlements available to them, an issue exacerbated by the marginal social position of many home workers. Further, the type of work performed, the nature of the employment relationship, or the size of employer may affect whether the worker is eligible for workers’ compensation in the event of injury.
Precarious work and workers’ compensation

The impact of precarious work on workers’ compensation is well documented in Australia. Among the key outcomes are declining coverage rates due to exclusions and/or voluntary coverage requirements for some self-employed contractors. Exacerbating this decline was a reduction in effective coverage (where injured workers made claims) due to worker ignorance and fear of employer reprisal as well as frequent job and employment status changing. Overall, fewer than half of injured workers make workers’ compensation claims and part-time workers were less likely than full-time workers to make a claim.67

Complex work arrangements increase the administrative burden on WCBs to determine whether a claimant has workers’ compensation coverage and whether an injury occurred in the course of that work.68 The complexity of work arrangements also creates difficulties in premium collection, which is predicated upon employers registering for workers’ compensation coverage and accurately reporting their payroll. There is no reason to believe these same dynamics do not occur in Canada.

Contraction in workers’ compensation coverage externalizes the cost of work-related injuries to health care, unemployment insurance, and welfare systems. It also may seriously compromise “accident” statistics (which are normally based on workers’ compensation claim statistics), thereby understating the level of overall injury and the industries in which it is occurring. Job churning also impedes clinical diagnoses of work-related illnesses as well as cohort and epidemiological studies.69

Implications of precarious work for workers’ compensation

Precarious work affects a subset of all workers and has both gendered and racial aspects.70 By disadvantaging a small (but growing) and largely marginalized segment of the workforce,
employers are able to increase their profitability. The ability and willingness of other workers to oppose these changes is limited by their (un)awareness of the change, the appearance that these change are inevitable, workers’ sense of their own vulnerability, the (un)availability of mobilizing structures, and the ways in which collective resistance is channelled into manageable dispute resolution mechanisms that minimize the potential for mass resistance.

Historically, the regulation of employment has both provided workers with protection and disciplined them to accept the power and decisions of employers. The protection provided by workers’ compensation and the implicit threat of precarious employment reduces the likelihood that workers will resist reductions in benefits or limitations in coverage. The exclusion of precarious work from workers’ compensation retards our ability to know the full extent of workplace injuries. It also justifies offloading the cost of injury onto these workers by reference to the “choice” made by these workers to bear the consequences of work-related injuries themselves in exchange for whatever advantages allegedly accrue to independent contractors.

CONCLUSION

Decision-making is an exercise of power. As we saw in Chapters 5 and 6, WCBs use claims adjudication and management to limit the compensation that is paid out to injured workers. This process reinforces employer power. Individualized claims adjudication and management makes it difficult for workers to know what hazards exist and develop a shared understanding of workplace injury as a class issue. Workers also face an appeals process that can align the WCB and the employer against a worker. When these things are combined with the incentives to participate in the existing system of injury prevention and compensation as well as penalties for challenging it, the ability
of workers and labour to seek safer workplaces or better compensation is constrained.

Where workers do seek changes, they must consider proposals that privatization or simple abolition would result in a cheaper system. This is demonstrably untrue, but may pressure workers to limit their demands or defend the existing system (even thought it may run contrary to their interests) or risk the possibility of undesirable changes. Workers may even accede to reforms in the hope of maintaining the core of workers’ compensation—a system that does provide them with significant benefits.

In the meantime, employers seek to circumvent their statutory obligations to enrol in workers’ compensation by reorganizing work in precarious ways. The nature of precarious employment means the effect of this offloading is disproportionately borne by women and racial minorities. These workers frequently have little ability to resist such changes. And their exclusion from trade unionism means they have little ability to seek assistance from other workers, whose own “good” jobs may be predicated on the cost savings realized from precarious workers’ “bad” jobs. The overall effect of this tactic is to compel workers to defend the existing system while it is eroded beneath them to the benefit of employers.