Issues in Workers' Compensation Appeals: System Reform

Douglas Hyatt
*University of Toronto*

Chapter 5 (pp. 117-140) in:
*Workplace Injuries and Diseases: Prevention and Compensation: Essays in Honor of Terry Thomason*
Karen Roberts, John F. Burton, Jr., and Matthew M. Bodah, eds.
Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2005
DOI: 10.17848/9781429454919.ch5

Copyright ©2005. W.E. Upjohn Institute for Employment Research. All rights reserved.
The workers’ compensation system in North America is a result of discontent with tort litigation, an earlier mechanism used to resolve disputes between workers and their employers over workplace injuries and diseases. Legislators and other policymakers in the United States and Canada concluded that tort suits favored the “propertied class” by placing a number of legal barriers in front of workers who sought restitution for workplace injuries. While legislative interventions began to erode traditional common law defenses of employers, it was still a widely held belief that, in the interests of societal peace, a more automatic approach to compensating injured workers needed to evolve outside of the courts.¹

Workers’ compensation statutes sought to create a set of rules that would be applied to the assessment of work injury claims for cash and medical benefits. The result was a program that determined eligibility and benefit amounts based not on fault but on whether the injury was related to work, and on an assignment of cash benefits based on a schedule. This statutory approach was designed to reduce the cost, time, uncertainty, and adversarial proceedings that were hallmarks of tort compensation. One goal was to effectively remove litigation from the process.

Over time, however, litigation has been reintroduced into workers’ compensation, which, to some observers, has resulted in a replication of the woes of the tort system that workers’ compensation replaced. Discontent with the processes and, especially in Canada, with the outcomes of workers’ compensation appeals—which I will argue are often the result of other upheavals in the primary adjudication rather than prob-
lems with the appeals process itself—have resulted in calls for reform to which policymakers have responded.

This chapter is written at a time when discontent with appeals systems in workers’ compensation is at an ebb. This is partially due to the slow pace in Canada of fundamental reforms in the way injured workers’ are compensated, and therefore confusion and uncertainty are reduced. It is also the case that there are fewer injuries, or at least workers’ compensation claims, than there were in the past. However, there are always new compensation issues brewing, and if history is any guide, the current calm is unlikely to last.

When discontent does flare in Canadian provinces, a common response is the formation of a commission to investigate the problems and make recommendations for improvement. I have been involved in several such commissions, including directing the research for two, and benefited from the good counsel of my friend and colleague Terry Thomason in both instances. Often, the membership of the commission consists of people who have not been directly involved in workers’ compensation. There are two results: First, the commissioners quickly begin to appreciate the complexity of workers’ compensation, especially the interrelatedness of policies and procedures in various aspects of the program. It becomes evident very quickly that decisions taken to resolve one problem may very well undermine the foundation under other policies and procedures. The second reaction is that, given the obvious and serious failings in the jurisdiction’s program, every other workers’ compensation system “must be dealing with the vexatious issues better than we are!” The commissioners soon discover, however, that there are very few twenty dollar bills lying on the sidewalk of workers’ compensation.

This chapter draws together the experiences of two commissions of inquiry into workers’ compensation in Canada—one in Ontario in 1995 and the other in British Columbia in 1998. There are two main goals for the chapter: 1) to review what I believe emerged as the central drivers of the reintroduction of litigation into the workers’ compensation system, and 2) to set out some central policy issues in workers’ compensation appeals for which there has been little research. These policy issues were common to both inquiries and, as we discovered through our research, common to those confronted by workers’ compensation authorities around the globe.
REINTRODUCING LITIGATION TO WORK INJURY COMPENSATION

At its essence, a good workers’ compensation system delivers 1) a reasonably fair method of collecting funds for the purpose of providing medical and financial support to injured workers, and 2) a reasonably fair method of distributing those funds. Discontent with the workers’ compensation system arises when the “fairness” in either of these elements is breached. An initial expectation for the workers’ compensation system was that it would deliver fairness to workers and employers in a way that the courts could not—on a timely, cost-effective basis. Workers’ compensation claims adjudicators, armed with legislation, regulation, and operational policy, would make decisions based on the merits of each claim, without undue regard to precedence and with no regard to fault.

However, as the nature of work evolved over the last 100 years, and the nature and relative importance of various work injuries and diseases were transformed, the workers’ compensation system was slow to adapt. Discontent among the stakeholders with adjudication decisions grew with the perceptions that some decisions were being made with little consultation between the adjudicators and the stakeholders, and that accountability for explaining the basis of decisions was absent. In this section, I argue that the increasing complexity of work-related injuries, the stakeholder demands for due process that have resulted in the introduction and expansion of appeal rights, and the inconsistencies in the claims adjudication process brought to light by worker and employer appeals that give “economic value” to appeals, are intimately related to the growth of litigation involving work injury compensation.

The Growing Complexity of Workplace Injuries

As has been well-documented, the definitions of a worker, the workplace and an injury or a disease, as well as the guidelines that workers’ compensation claims adjudicators have at their disposal to guide them in determining whether an injury or disease arose out of, or in the course of, employment have become more ambiguous as the nature of work and employment relationships have evolved. Thomason, Hyatt, and Roberts (1998, pp. 269–270) summarized these developments:
workers’ compensation programs have become increasingly litigious, adding substantially to costs. In part, these perceptions have been fueled by an expansion of the definition of disability. The scope of compensable conditions has broadened to include soft tissue injuries, repetitive strain syndromes, psychological disorders, and a variety of occupational diseases. Accurate diagnosis of these conditions is problematic so that it is difficult to establish the extent of disability. For soft tissue injuries, repetitive trauma syndromes, and psychological ailments, diagnosis is primarily based on subjective symptoms. For all these conditions, it is also difficult to determine whether or not and to what extent the condition is work-related.

The traditional model of a worker employed in a manufacturing facility or on a construction site has represented fewer workers in each decade dating back to the advent of workers’ compensation. Workers are now more likely to suffer disabilities that did not have an immediate onset, such as repetitive strain and other soft-tissue injuries. Increasingly, injuries and disease occur for which work may have been only one of many contributing factors. And, workers are now more likely to work outside of a traditional workplace, such as in their homes or out of their vehicles. Indeed, it may even be the case that some of the changes in the workplace (for example, hiring independent contractors for whom the employer may not be responsible for providing workers’ compensation coverage) have been driven to a degree by the costs to the employer of workers’ compensation.

Workers’ compensation legislation and policy have lagged behind the evolution of work and work-related injuries. To a large extent, the statutory language and legal doctrines used to determine which workers are covered and which injuries and diseases are work-related are remnants of the early twentieth century.

Policy vacuums in workers’ compensation often result in denials of claims that are unfamiliar, which then draws appeals from the injured workers, or by the acceptance of unfamiliar claims, which then draws appeals by employers (particularly experience-rated employers). Until the 1970s, access to appeals bodies was largely missing from Canadian workers’ compensation programs.
The “Due Process Revolution”

Appeals bodies are relatively recent additions to Canadian workers’ compensation systems. While formal appeals processes had been sought by injured workers and employers almost since the inception of workers’ compensation, such demands were resisted and rejected by workers’ compensation administrators, commissions of inquiry, and legislators. This changed most dramatically in the 1970s during what Law (2000) has termed the “due process revolution” in workers’ compensation.

It seems odd that workers’ compensation was largely without serious appeals mechanisms, given that the system has now become so used to them, and in fact come to rely upon them. The central reason for the absence of an appeals structure during the pre-1970s period was that it ran contrary to what workers’ compensation was supposed to be—a purely administrative decision-making process in which the facts are collected, eligibility determined, and compensation paid based on legislations, policies, and procedures. As the Sloan Commission (1942) in British Columbia, Canada, concluded, opening up avenues for appeal would impair the system’s delivery of “quick, summary and final decisions.”

When workers’ compensation authorities began to consider the structure of the appeals process, they were confronted with the same questions that are faced by policymakers today. How many levels of appeals should there be? Should higher levels of appeal be restricted to reviewing previous decisions and evidence, or should they be de novo hearings? In addition to the increasing complexity of claims resulting from changes in the workplace, the appeals structure brought a new level of procedural complexity, which required specialized knowledge in order to process claims.

Many Canadian workers’ compensation authorities responded in part to the need for specialized knowledge by introducing representation into the workers’ compensation system. The innovation this time (compared to the use of attorneys in tort suits prior to the introduction of workers’ compensation) was that the representation was largely free of charge. “Worker advisors” and “employer advisors” became common forms of representation provided by workers’ compensation systems to assist with the claims process and to provide representation at appeals
proceedings. Hyatt and Kralj (2000) found empirical support for what many participants in the Ontario workers’ compensation system conjectured to be the case—that worker advisors were good at what they did. Hyatt and Kralj found that representation from the worker advisors not only increased the likelihood that workers’ appeals were granted, but worker advisors also achieved better results for injured workers than lawyers, union representatives, or any other form of representation.

The influence of worker and employer representation is not felt just at the stage of appealing an adjudicator’s decision. Indeed, advocacy can start from square one, the filing of a claim. Anecdotal evidence from claims adjudicators in Canada suggests that both worker and employer advocates have become more active in trying to influence decisions at the primary adjudication level. This can take the form of calling adjudicators to follow up on claims, and ensuring that adjudicators have all relevant information to adjudicate the claim.

To the extent that this more aggressive form of advocacy puts useful information in the hands of the adjudicator, it can be enormously helpful, and may even further the timeliness of the process, if the adjudicator is not required to gather the information on his or her own. However, it was common in the commissions of inquiries in which I have participated to hear concerns that in many cases an advocate puts pressure on an adjudicator to expedite the decision process. Furthermore, an advocate may suggest that a decision contrary to the result he or she is advancing will result in complaints to the adjudicator’s supervisor or an appeal of the decision, and that these pressures and suggestions may cause the adjudicator to pay the claim (or not), and leave it to the appeals structure to mop up the mess left by a misjudicated claim.

The due process revolution gave employers and workers recourse for adjudicative decisions that were either faulty or perceived as faulty. Further, the outcomes of the appeals process illuminated shortcomings in policy and adjudication processes that needed to be addressed by workers’ compensation authorities, including the need for remedial action on previously mishandled claims. The availability of advocates well-versed in workers’ compensation matters gave the parties the necessary expertise to realize the “economic value” of uncertainty that had been growing in the workers’ compensation system.
The Impact of Inconsistencies in Adjudication and Appeals Outcomes

The due process revolution resulted in appeals bodies, which, like most other administrative law tribunals in Canada, are independent in the sense that panels of the tribunal are not bound by precedence and are mandated to decide appeals based on the merits of the case. Coupled with the changing nature of workers’ compensation claims (the uncertainty with respect to benefit entitlement—“no” does not necessarily mean “no” and “yes” does not necessarily mean “yes” when initial decisions can be appealed) the stakes to the parties of disputing adjudicators’ decisions were raised.

The absence of policy and legislation in the face of a changing compensation environment means that primary claims adjudicators are often on their own in the claims decision process when claims involving unfamiliar fact patterns are filed. A consequence is that different adjudicators may reach very different results on whether similar claims should be accepted for payment, as well as the type and duration of the awards. This variability in claims adjudication and appeals outcomes creates an “economic value” to contesting decisions. Variations in the outcomes of otherwise similar claims are rapidly disseminated in the worker and employer communities, and encourage appeals, in contrast to the absence of economic value of appealing a decision that is consistent with legislation, policy, and previous decisions so that an appeal is certain to be denied. Empirical evidence of the influence of uncertainty on appeals has been advanced by Thomason (1991), Roberts (1992), and Thomason and Burton (1993). These studies demonstrated that measures of award variability and the time between the date of the injury and receipt of payment (a proxy for uncertainty) were associated with an increased likelihood of a dispute (or a decrease in the likelihood of a settlement).

Uncertainty that encourages claims and appeals from initial decisions can also arise from attention, or lack of attention, to cost considerations. As described by Spieler and Burton (1998), recent decades have been characterized by a pendulum of workers’ compensation reform efforts in North America which have swung between an emphasis on adequacy of benefits at one end and affordability at the other. From the perspective of the incentive to appeal, the issue is not whether it is inappropriate to make adjustments in the relative importance of adequacy
and affordability, but rather that these types of pendulum swings simply cannot help but encourage appeals.

Spieler and Burton (1998, p. 236) describe the focus on workers’ compensation costs and affordability that emerged in the 1990s.

The combination of rapidly increasing costs to employers and unprofitability for carriers beginning in the mid-1980s resulted in a backlash: affordability became the dominating criterion for reform during the 1990s. Employers and insurers mounted successful political campaigns to reduce costs. We have documented the consequences in terms of cutbacks in benefits, tougher eligibility standards, and new approaches to medical care and disability management.

Spieler and Burton (1998, p. 238) put the 1990s into a broader historical context that highlights the pendulum swings in workers’ compensation legislation and policy, as follows:4

The history of the workers’ compensation program since 1960, in terms of achieving the compensation goal, has shown variation through time in the relative importance of the adequacy and affordability criteria. Adequacy received the most attention in the 1970s, and concerns for adequacy and affordability were roughly in balance during most of the 1980s. The 1990s have been dominated by efforts to achieve affordability.

In recent times, the ability of workers’ compensation administrators to respond quickly to changes in financial performance of the system was furthered with technology. The use of broadcast voicemail and electronic mail has made it very easy to transmit subtle changes to policy that may be induced by financial considerations. Electronic monitoring of adjudicator decisions, and the ability to produce up-to-the-minute financial reporting, means that pressure to more carefully consider certain types of claims at some times, or ease up at other times, is more easily implemented within shorter time frames than in the past.5

Experience Rating and the Economic Value of Employer Appeals

A factor that has encouraged increased appeals volumes in Canadian workers’ compensation has been the broader application of experience rating, which increases or decreases the workers’ compensation premiums paid by employers on the basis of the benefits paid to injured work-
ers. Canadian workers’ compensation jurisdictions were much slower to embrace experience rating than were their American counterparts. While experience rating furthers the role of the workers’ compensation system as a reasonably fair method of collecting funds from employers to be distributed among injured workers by ensuring that employers responsible for the highest benefit payments pay the highest rates, it focuses employer attention on claims costs, especially relative to those of industry competitors.

Experience rating raises the economic value (or marginal costs) of workers’ compensation claims outcomes to individual employers. Costs can be controlled by reducing the incidence and severity of workplace injuries and diseases, but also by claims management practices, which includes efforts to limit the number of claims that are approved by adjudicators and appeals bodies. This is not to suggest that employer monitoring of workers’ compensation claims induced by experience rating is necessarily inappropriate. In fact, experience rating may induce vigilance on the part of employers that improve the long-run viability of the workers’ compensation system. Hyatt and Kralj (1995) show, using data from the province of Ontario, Canada, that experience-rated employers are more likely to appeal workers’ compensation claims, and that the likelihood of employer appeals increases with the size of the experience rating incentive. A recent study by Thomason and Pozzebon (2002) also found that high-wage firms were also more likely than low-wage firms to respond to experience rating by increasing their accident prevention efforts relative to their claims management efforts.

The Importance of an Efficient Appeals Structure

As the appeals apparatus has grown and become more widely used, and while those in workers’ compensation advocacy roles have reportedly become more aggressive at intervening at the primary adjudication level, the stakes to adjudicators of making faulty decisions have diminished. An efficient appeals structure will fix any errors. This reliance on the appeals structure allows busy claims adjudicators the opportunity to pass along difficult files to the appeals system, especially those requiring time-consuming investigation. The Royal Commission on Workers’ Compensation in British Columbia (1999, p. 20) observed
The commission is deeply concerned that the current appeal system appears to have become a substitute for quality decision making at the claims adjudication level. Rather than ensuring that all the relevant information is gathered and that the resulting claims adjudication decision is correct, accurate and fair, the current appeal system appears to provide the board with an opportunity to make insufficiently informed, inaccurate or incorrect decisions in the expectation that eventually the right decision will be made.

This observation highlights an important reality—what seems to be a problem with the appeals system may be reflecting a fundamental problem upstream in the adjudication process.

**Summary**

Law (2000, p. 304) provides a summary of the factors that have contributed to the litigiousness of work injury compensation.

Yet any observer of North American workers’ compensation today knows that the non-litigious adjudicative model is at best a ‘first step’ in the life of a workers’ compensation claim. What has happened? In short, the following: workers enter a host of claims never envisioned at the outset of the twentieth century; employers vigorously defend the insurance funds against claims; insurers, public and private, have developed elaborate multi-stage decision-making systems that include formal hearings. The result is a litigation-laden web of adjudicative and tribunal-based decision-making, with radically reduced degrees of certainty and predictability in conjunction with increasing administration and party costs.

Uncertainty is a key factor that drives appeals. The causes of uncertainty in the workers’ compensation system are legion but are frequently driven by inconsistencies in the adjudication process, the absence of policy with respect to “nontraditional” injuries or diseases, and major legislative or policy reforms that are not well understood by the parties or the adjudicators. The result is inconsistent adjudicator decisions. The potential to exploit this inconsistency gives economic value to appeals, and the use of representation by the parties—lawyers, advisors, and consultants (some of which may be paid for by the workers’ compensation system itself)—give the parties an informed advocate to capture this economic value. The result is an overwhelmed appeals system and the appearance that the problem is with the appeals structure.
However, the problems with the appeals structure may often be more appropriately cast as reflecting problems throughout the adjudication process. Looking at the kinds of appeals and the issues raised therein provides a snapshot of the problems the system is facing as a whole, and the volume of appeals at a point in time is a good indicator of the magnitude of the problems in the system. Neither of these, however, is a particularly instructive indicator of the health of the appeals process itself. Indeed, paradoxically, an efficient appeals structure may well reduce the incentives provided by the adjudicative process to reform in the basic design of the workers’ compensation program if mistakes or gaps in policy are efficiently handled through the appeals process.

**CENTRAL ISSUES STILL FACING POLICYMAKERS:**
**A RESEARCH AGENDA**

Even though my view is that problems in primary adjudication caused by faults in the basic design of the workers’ compensation program are the key source of deficiencies in the appeals system, nonetheless there are many direct changes that can be made to improve the appeals process. Of course, answers to what constitutes “improving” the appeals process, like so many issues in workers’ compensation, depend on whom one asks the questions.

One starting point is to offer a model of what a workers’ compensation appeals system should deliver. After extensive consultation with stakeholders, literature reviews, and deliberations, the Royal Commission on Workers’ Compensation in British Columbia concluded that an independent appeals structure should have five “intimately connected” features. The appeals process must

1) apply legislation, rules and policy in a fair and equitable fashion;

2) make decisions based on all the relevant information, including new information only recently discovered or determined to be important;

3) be an active participant in making inquiries and not the passive recipient of information;
4) have the capacity to revoke or vary an adjudication decision and substitute a new decision; and
5) be able to monitor the implementation of its decisions and not be limited to simply referring the matter back with instructions.

The question that faced the Royal Commission, and which faces all workers’ compensation policymakers, is what design features should be built into the appeals process that would best ensure that these features will be present? While there has been considerable research on many aspects of the workers’ compensation appeals, there remain a number of gaps in the research. Some of the key questions necessary to address include: How many steps should there be in the appeals structure? What is the role of appeals jurisprudence in decision making? What is the role of alternative dispute resolution in workers’ compensation? And, is there a role for the courts?

**How Many Steps Are Required in the Appeals Process?**

Workers’ compensation must, as it has always done, balance the costs and the benefits of providing due process. A central question is, how many levels of appeal are necessary to deliver due process but still be timely and cost efficient?

To many of the policymakers who designed the first of workers’ compensation programs, an elaborate appeals structure was believed not to be warranted. While some adjudication decisions, and the communication of the decisions and their justifications, were considered necessary, the prescribed “minimalist” solution involved a two-pronged response: require that written decisions be given to the parties that adequately delineate how the decisions were reached, and provide a means by which files could be reviewed by someone whose only responsibility was to conduct such reviews (preferably by someone who was not involved in the original decision).

On its face, there is no obvious reason why this relatively simple approach to appeals could not deliver the “intimately connected” elements of an effective appeals system as outlined by the British Columbia Royal Commission. Lind et al. (1993) showed that workers who perceive the process as fair are less likely to pursue appeals, independent of the outcome of the process. Roberts (1996) found that when injured
workers felt that the information decision makers had about their claims was accurate, they are also less likely to appeal. Clearly, however, this relatively simple approach failed to satisfy the perceptions of workers’ compensation system stakeholders of the procedural rules needed to assure fairness and justice, and has given way to more elaborate multi-tiered appeals apparatus. It merits emphasis that, with all that researchers have learned about procedural justice, what has yet to flow from that research is any specificity on the optimal number of steps in an appeals process, and the degree of separation from the original decision makers necessary to achieve independence.

The Royal Commission on Workers’ Compensation in British Columbia recommended a two-step appeals structure. The first step, the “internal review process,” would consist of a readjudication of the workers’ compensation claim to take into account any new information. The term *internal* means that the review would be conducted by workers’ compensation board staff. The decision arising from the internal review could then be appealed to an independent appeals tribunal. In recommending a two-step appeals process, the Royal Commission on Workers’ Compensation in British Columbia (1999, p. 27) concluded that “. . . fewer appeals levels could reduce jurisdictional disputes (between the various appeals bodies), enhance the speed and consistency of decision making, and eliminate administrative duplication.”

An ancillary issue that arises as the number of levels of appeal grows is the relationship between the levels of appeal themselves. To what extent should lower levels of appeal be bound to the decisions of higher levels of appeal? This is part of a broader issue, which is the extent to which appeals systems should have the latitude to set policy where it is absent, and in so doing open or close access to benefits, or to find workers’ compensation legislation or policy to be illegal.

**What Is the Role of Appeals Jurisprudence in Decision Making?**

A common feature of Canadian legal systems involving administrative agencies, like workers’ compensation, is that decision makers are not bound by precedence, but rather should consider each case on its merits. While this approach asserts the independence of the decision maker, it can be a source of frustration to workers’ compensation system stakeholders when this freedom from precedence causes deci-
sions to look less like they were independent and more like they are inconsistent.

That workers’ compensation appeals structures should not be bound by precedence has led to problems, not only between levels of the appeals structure, but also back to the primary adjudication process. If, at the appeals level, an adjudicator’s decision was found to be, for example, a faulty interpretation of policy, it has frequently been the case that while the adjudicator’s decision might be overturned in that specific instance, the adjudicator may feel free to make the same faulty (in the eyes of the appellate structure) decision again. In other words, the jurisprudence that arises from appeals may have no impact on the adjudication of future claims with similar fact situations. What is left, then, is for the worker or employer to appeal in every instance of the same type of claim.

The Royal Commission on Workers’ Compensation (1999, p. 41) expressed a concern they frequently heard from stakeholders: “(t)his freedom from precedent has tended to promote inconsistent decisions throughout the claims adjudication and appeal process with the result that it is difficult, if not impossible, to predict how decisions will be made in the future or to use prior decisions to assert that subsequent decisions are unfair.”

Workers’ compensation systems in Canada have struggled to find some sort of middle ground on the issue of precedence. An influential decision of the Supreme Court of Canada, Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69, [1990] 1 S.C.R. 282, concluded that while administrative bodies may not be bound to slavishly follow precedence and should therefore remain independent, they must find acceptable ways of achieving consistency. To balance independence and consistency, the court proposed a three-pronged model for administrative law bodies in which 1) the decision-making panel must be free of outside interference; 2) while legal and policy issues can be discussed within the tribunal, the decision in a specific case must be entirely in the hands of the panel that heard the evidence and can assess the facts; and 3) a clear distinction must be made between discussions on legal and policy matters within a tribunal and discussions of factual matters in a particular case. Discussions within the tribunal on legal and policy matters are not to be used to decide the appeals, but rather to delineate and assess standards which
could be adopted by the panel members hearing the matter. While reasonable on the face of it, the approach suggested by the Supreme Court of Canada has not been followed by all workers’ compensation appeals bodies. One reason for this is the practical problem that consultative meetings between members of different panels of an appeals tribunal proposed by the Supreme Court are difficult to schedule, especially in an environment of growing case loads.

As a consequence, alternative approaches have been adopted or proposed to deal with the issue of precedence. These include requiring panels to give reasons for decisions that depart from earlier decisions involving similar matters; having leading cases decided by panels made up of neutral members (that is, none of the members is a worker or employer representative) whose decision would set out the key considerations for subsequent decisions to follow; and having a member of the appeals tribunal who did not hear the matter review a panel’s preliminary decision, and if appropriate, outline in writing where the panel has diverged from previous decisions (the panel would still ultimately make the final decision). Another approach encouraging the reliance on precedence is to require that all decisions be published and/or all appeals hearings are open to the public. This latter approach adds transparency, but at the potential cost of compromising the privacy of injured workers and employers. Many of these approaches are being employed, providing useful variation necessary for fertile research on which approach achieves more consistent decision making, while maintaining independence.

The issue of the independence of workers’ compensation appeals bodies extends further. A question with which policymakers constantly grapple is the role of the appeals body in refining, or redefining, workers’ compensation policy. It is usually the case that legislation gives the provincial workers’ compensation agency the authority to determine policy for which it is, in turn, accountable. Appeals bodies are supposed to interpret policy and determine whether it has been applied properly. However, appeals bodies may also determine that a policy adopted by the agency is illegal because it is inconsistent with the provincial workers’ compensation statute. The central issue is whether the appeals bodies should be able to reject and replace workers’ compensation board policies that may be legal under the provincial statute but considered
inappropriate by the appeals board, or to create new policy where none exists?

This issue exposes an important paradox in workers’ compensation. Appeals bodies frequently assert that their decisions should be binding, not only on lower level appeals bodies, but also on primary adjudication process. Yet, because the decisions of the appeals bodies, which are supposed to be based on the merits of individual cases and are not supposed to be overly burdened by precedence, are by definition case specific, workers’ compensation authorities rarely wish to be bound by the decisions of appeals bodies. Moreover, workers’ compensation administrators believe their authority is enshrined in legislation, and it is to the legislature that they are accountable, not to appeals bodies.

The tensions that arise as appeals bodies breach the border between policy interpretation and policy making have caused policymakers to try to more clearly define the roles of the workers’ compensation authority and the appeals bodies. Approaches that have been followed include altering workers’ compensation legislation to reinforce the primacy of the workers’ compensation authority to develop policy (and the role of the appeals bodies to interpret policy and assess its application in specific instances); where an appeals body has determined that a policy is illegal, the policy must be reviewed by the workers’ compensation board on a timely basis in consultation with stakeholders, and a revised policy substituted (or the initial policy reissued); and referring questions of law to the court.

What Is the Role of Alternative Dispute Resolution in a Purely Adjudicative System?

It is hard to argue there is no room in workers’ compensation for processes, such as alternative dispute resolution (ADR), that seek to help parties understand the nature of their disputes and resolve them. Surely in workers’ compensation, where there are many opportunities for disputes, particularly after periods of significant reform, when the actors are uncertain about the new rules and how they apply to their matter, ADR techniques have a natural home.

ADR has become more popular, both because the primary adjudication has become more complicated and the appeals process has become more accessible (and complicated). As a consequence, dealing with dis-
_issues in workers’ compensation appeals system reform  133

putes takes a probably increasing share of real resources (though this is difficult to measure). To the extent that ADR can reduce dispute costs and satisfy the parties, its attractiveness is obvious.

However, the proper place of ADR in workers’ compensation is not so straightforward. ADR evolved from situations where adversarial parties owned a dispute and had conflicting interests in how the dispute was ultimately resolved. As Law (1998, p. 4) points out, this was not the situation envisioned for workers’ compensation, in which, “(t)he object of workers’ compensation was to lift the matter of injury compensation out of the lives of master and servant, converting what was a private dispute (before the advent of workers’ compensation) into a public service.” Canadian law contends that workers and employers are not “parties” to workers’ compensation disputes at all, and have no ownership of the adjudicative decision (although clearly they are not disinterested parties in the outcome). That is, workers’ compensation did not envision empowering employers and workers to substitute even a mutually agreed upon alternative outcome to the adjudicators’ decision, which was arrived upon by an application of legislation and established policy to the facts of the case.

Law (1998) identifies four classes of alternative dispute resolution approaches within workers’ compensation. The first class, case management, characterizes ADR as a way of expediting the collection of information to ensure timely decision making based on all of the information relevant for the matter at hand. Law (pp. 24–25) describes this approach as, “. . . at once a ‘customer service’ initiative (the case moves faster through the system) and an ‘administrative benefit’ (if it reduces the number of transactions and or resources required to be applied to the matter).”

The second class of ADR procedures is the “flexibility for the decision maker” approach, in which the limited discretion an adjudicator normally has is supplemented by other remedies that are consistent with the facts. Law gives the example of an injured worker who is receiving temporary total disability benefits, but for whom the weight of the evidence suggests that the worker is not mitigating his or her losses through sufficient participation in vocational rehabilitation initiatives. In this instance, the prescribed outcome of adjudication would be to discontinue benefits. However, the worker is likely to disagree with the adjudicator’s assessment of the mitigation efforts. An alternative ap-
A third ADR approach, decision endorsement, allows the parties (worker and employer) to make a decision within a range of specified outcomes, but the agreement reached by the parties must be approved by the adjudicator. The fourth approach goes one step further, empowering the parties to make decisions themselves on eligibility for and the quantum of benefits, with no supervisory review.

If ADR procedures offer the opportunity to achieve outcomes that more closely reflect the needs and wishes of the parties, then they merit consideration. If they instead weaken the parties’ ability to obtain the results promised by statute, then ADR serves only to undue one of the advantages, relative to tort proceedings, that workers’ compensation promised—predictable benefits for workers and predictable costs for employers.

Canadian and American workers’ compensation programs have come to different conclusions about which of the alternative dispute resolution approaches are appropriate in workers’ compensation. In reviewing ADR procedures in Washington State (which, like all Canadian workers’ compensation provinces, operates a monopoly fund), Law (1998, p. 21) aptly captures a flavor of the contrasting approaches and philosophies.

This is the fundamental distinction between the Washington State and Canadian systems—in Canada the statutorily prescribed benefit is technically the only benefit payable to the worker, and waivers or adjustments to that are prohibited. In the United States (and Washington specifically) the parties treat the insurance system as more of a menu, with a maximum number of choices.

The implication of this distinction is that ADR has a greater potential role in the U.S. because there are more opportunities to fashion solutions that do not precisely adhere to statutory prescriptions. This is a little studied point of departure in U.S. and Canadian workers’ compensation programs, and one that merits additional comparative research.
Is There a Role for the Courts?

As the nature of workplace injuries evolved and attribution to work or the workplace became, in some instance, much more difficult, some policymakers chose to simply exclude certain injuries and diseases from coverage, rather than to modify legal rules to accept such claims into workers’ compensation or apportion benefits based on the degree to which work contributed to the workers’ condition. In some instances, excluding injuries and diseases from coverage was at least partially motivated by the cost implications of doing otherwise (Spieler and Burton 1998; Hyatt 2001). However, precluding coverage for certain conditions under workers’ compensation threw open the question of whether workers could now sue their employers if they could establish that their excluded condition was linked to the workplace. Hyatt (2001) found that the courts in both Canada and the United States have generally been loath to disrupt the exclusive remedy doctrine of workers’ compensation, and have not granted workers and employers broad rights to sue. One exception is Oregon, where the Supreme Court held in Smothers v. Gresham Transfer, Inc., 23 P.3d 333 (Or. 2001) that an effort by the Oregon legislature to preclude a worker from obtaining workers’ compensation benefits because the workplace injury was not the major contributing cause of the worker’s disability while also denying the worker the right to sue the employer in a tort suit was unconstitutional.

The “historical compromise” that workers’ compensation represents, in which workers gave up the right to sue their employer in return for benefits paid with certainty and on a timely basis, came after ruinous tort litigation. Over time, employers, workers, and legislators were able to fashion some considerable degree of consensus for a major change in the legal remedies available for workplace injuries because the failure to compromise put at risk the sustainability of the industrial revolution (Hyatt and Law 2000).

The benefits of the workers’ compensation system compared to the tort approach are many. Those frequently cited among the most valued include timeliness of the adjudication process; reduced costs, due fundamentally to the elimination of the burden of adjudication in the regular court system to determine fault and to the reduction in legal and other related costs of pursuing a claim; relatively nonadversarial procedures, again due to the no-fault nature of workers’ compensation;
and decision making that, because it is based on legislation and policy and administered by professional adjudicators who specialize in work injuries and diseases, generates predictable compensation and costs.

In the instances where workers are denied access to the workers’ compensation for certain injuries/diseases/conditions, and are also denied access to the courts, potentially work-related injury claims are simply suppressed. This is not a situation that can persist in the long run, as the emergence of workers’ compensation some 100 years ago demonstrated.

While the virtues of the tort system are sometimes overlooked as a way of resolving some workplace disputes, such as charges that employers are discriminating against workers on the basis of race or gender, a return to the tort system to provide the remedy for workplace injuries and diseases is rarely seriously considered. However, the court may be a useful forum to adjudicate matters for which policy moves too slowly.

Although frequently maligned because of cost, lack of timeliness, and adversarial nature, the courts and the process of tort litigation remain good mechanisms for eliciting the best evidence available and making decisions on that evidence. This is partly because resources are devoted to providing evidence, and the process is adversarial and is not rushed. It should be emphasized that legislators have also been slow to react to an evolving workplace environment for workplace safety and health. While the workers’ compensation system is likely faster and cheaper for dealing with routine work injury matters, it cannot be said that legislators are necessarily faster than the courts for addressing emerging issues, such as the proliferating evidence on the relationships between workplace exposures to toxic substances and the diseases affecting workers.

It would appear, however, that given the general reluctance of courts to loosen the bar on tort suits for workplace injuries and diseases, legislators would have to enact legislation allowing workers to sue their employers in instances where their conditions have been excluded from workers’ compensation coverage. Litigation raises the stakes to all of the parties. Perhaps even the “threat” of loosening the tort bar may be enough to encourage modern workers and employers to update the historical compromise to better reflect modern conditions.
CONCLUSION

The due process revolution that introduced litigation into Canadian workers’ compensation programs reflects recognition that there can be legitimate differences of interpretation of the facts before a claims adjudicator and that mistakes can be made. Principles of natural justice require that a forum be available, even within an administrative law regime, to address these situations. Perhaps more importantly, attention to due process is an acknowledgment that some flexibility needed to be built into the workers’ compensation system to allow more timely reaction to constantly evolving environment of work and work injuries than is afforded by legislative and policy reform processes.

However, to the extent that workers’ compensation appeals increasingly becomes a substitute for quality decision making at the claims adjudication level, then the faith of injured workers and employers in the primary adjudication process will be compromised. Claims adjudicators and administrators reported to the provincial commissions of inquiry, referred to earlier, of instances in which employers and workers file the documentation to initiate an appeal of the adjudicator’s decision at the same time that the claim is filed (and before the adjudicator had made any decisions). If workers and employers believe in sufficient numbers that the only way to get the “right” decision is to appeal, then the advantages of workers’ compensation over tort are clearly diminished.

Policymakers, then, must continue to ensure that primary adjudication is maintained at a level such that the economic value of appeals is diminished, while still allowing an effective forum for legitimate difference to be considered and mistakes to be corrected.

Notes


2. This chapter does not provide a systematic review of past research on workers compensation appeals. Such reviews can be found in Thomason, Hyatt, and Roberts (1998), Law (2000), and Hyatt (2001).
3. For an excellent review of the history of appeals system, with particular reference to British Columbia, see Workers’ Compensation Board of British Columbia (1997).

4. Law (2000) provides a description of a similar pattern in the Canadian context.

5. Even more worrisome is that economic considerations may affect the claims of some workers differently from others. Thomason (1994, p.76) found that, “. . . decisions concerning both liability and compensation are partially based on economic considerations,” and that “insurers are more likely to adjust the claims of those most vulnerable to financial pressure: non-English speakers and claimants who are not represented by legal counsel.”


7. The problems associated with decisions based on inadequate investigation of the claims at the primary adjudication level are compounded when those decisions are not appealed.

8. Workers’ compensation policymakers have not warmed to trying to assess the relative contributions of work and nonwork factors, and provide partial benefits based on the work contribution. Shainblum, Sullivan, and Frank (2000) provide a review of the issues involved, the feasibility of instituting such an approach, as well as alternatives.

9. The issue of whether a state can preclude a worker from having any remedy against an employer for a workplace injury or disease is examined in Willborn, Schwab, and Burton (2002, pp. 978–985).

References


Workplace Injuries and Diseases
Prevention and Compensation

*Essays in Honor of Terry Thomason*

Karen Roberts
John F. Burton Jr.
Matthew M. Bodah
*Editors*

2005

W.E. Upjohn Institute for Employment Research
Kalamazoo, Michigan