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## **Feature**

### **Regulating health and safety and workers' compensation in Canada for the mobile workforce: Now you see them, now you don't**

**Katherine Lippel and David Walters**

#### **Abstract**

While much research has examined the occupational health and safety (OHS) and workers' compensation (WC) implications of precarious employment and temporary international labor migration, little is known about the implications of diverse types of employment-related geographic mobility (E-RGM) for regulatory effectiveness of OHS and WC. This article examines different types of extended mobility to determine regulatory effectiveness of OHS and WC protections. Based on classic legal analysis in seven Canadian jurisdictions, and interviews with key informants, we found that the invisibility of the internally mobile workforce, as well as the alternating visibility and invisibility of temporary foreign workers, contribute to reduced effectiveness of the OHS and WC regulation. Results point to the need for better protections to address working conditions, but also the hazards and challenges associated with mobility itself including: getting to and from work, living at work, and maintaining work-life balance while living at the worksite.

**Keywords:** Employment-related geographical mobility, Occupational health and safety, Workers' compensation, Canada, Regulatory effectiveness

## Introduction

Workers have always engaged in mobility to, from, and often within work. More recently, the promotion of flexibility to meet the demands of the employer, as well as the externalization of production and services, urbanization, and poor urban planning have contributed to both an increase in non-standard employment and the complexity and diversity of employment-related geographical mobility (E-RGM). This concept was theorized in the context of research undertaken by the On the Move research team and is more fully described by Neis and Lippel<sup>1</sup> who found that millions of people who work in Canada are engaged in some form of extended E-RGM as defined below.

While much research has examined the occupational health and safety (OHS) and social security implications of non-standard or precarious employment (i.e. temporary, part-time, and triangular employment relationships),<sup>2, 3</sup> and to a lesser extent OHS experiences and challenges of temporary foreign workers,<sup>4-6</sup> the relationship between E-RGM and non-standard employment is understudied, as are the implications of E-RGM associated with standard employment for regulatory effectiveness of OHS and social protections such as workers' compensation (WC). Further complicating our understanding of these dynamics is the lack of systematic collection of national statistics in relation to all forms of E-RGM; statistics specific to each province and territory are not always available.

This article documents the implications of extended E-RGM for regulatory effectiveness related to OHS and WC protections. We use the term E-RGM to mean the spectrum of mobility that encompasses extended daily commutes taking more than sixty minutes each way through to more prolonged travel for work to regions, provinces, or countries different from place of residence. We include mobility within work as in transportation and in occupations like home-care, cleaning, and some sales occupations where work takes place in multiple locations.<sup>1</sup> We refer to those who engage in these types of mobility as 'the mobile workforce.'

Based on a classic legal analysis of regulatory frameworks and administrative tribunal decisions in seven Canadian jurisdictions, combined with information provided from interviews with key

informants, we found that the invisibility of the internally (within country) mobile workforce, as well as the alternating visibility and invisibility of the temporary foreign workforce, contribute to reduced effectiveness of the OHS and WC regulatory frameworks, a finding also identified by Cedillo et al.<sup>4</sup> and Hill et al..<sup>5</sup> As we shall see, the OHS regulatory challenges vary and can be complex depending on the nature of employment, on time and distance considerations, as well as on the worker's status and particular circumstances (gender, language proficiency, nature of migration) which can increase their vulnerability. Challenges for effective application of WC legislation also exist, although their sources are different.

## **Methods**

We focused on six provincial jurisdictions: British Columbia, Alberta, Ontario, Quebec, Nova Scotia, and Newfoundland and Labrador and the federal jurisdiction when relevant. These jurisdictions were chosen among the fourteen different regulatory regimes in Canada because they include the three largest jurisdictions, British Columbia, Ontario, and Quebec, and they also include two jurisdictions that are likely to import workers from out of province (British Columbia and Alberta), as well as two provinces where a substantial proportion of the labor force works inter-provincially (Newfoundland, Labrador and Nova Scotia). The federal regulator has jurisdiction on OHS legislation applicable to inter-provincial and international transportation, although provincial WC legislation applies to these sectors.

Classic legal analysis involves identifying all relevant regulatory frameworks governing OHS and WC in these jurisdictions, analyzing the content available in the laws, regulations, and policy manuals and then studying the relevant administrative tribunal decisions that apply the legislation over a period of time, in this case between 2010 and 2018. Before completing a publication, we then revisit the legislation to ensure that the law has not changed since the initial research was completed. Given the number of jurisdictions studied here we have not undertaken an exhaustive analysis of the relevant cases, of which there are thousands, but have focused on selected issues that emerged as being most

relevant to the mobile workforce. We analyzed several hundred decisions over the course of this study. The choice of issues to study more exhaustively was also informed by consultation with key informants.

We identified key categories of regulatory provisions that either present challenges when applied to the mobile workforce or that appear to address their needs. To do so, and parallel to the legal research, we explored issues related to the application of the regulatory provisions through a qualitative study based on key informant interviews in the same jurisdictions; a study undertaken in two stages. At the outset, in order to identify the issues to be studied, we held a two-day consultation meeting in Toronto in June 2013, where we invited five key informants who specialized in Canadian OHS law and policy to discuss the challenges, remedies, and success stories related to the protection of the OHS of mobile workers. The proceedings were audio-recorded and consensus as to the main issues identified in the discussion was obtained by noting these on screen as the discussion unfolded. This consultation was complemented by analysis of the literature and legislative frameworks in order to illustrate the issues raised. The WC research first focused on analysis of legislation and administrative tribunal decisions involving mobile workers in the six provinces of interest. We then explored the priority issues in both OHS and WC with regulators and other key informants in order to identify challenges and solutions in light of the literature and the results of our interviews. In total twenty key informant interviews took place between 2015 and 2018; several were group interviews. Key informants included representatives of employers and unions, practicing lawyers, medical practitioners, as well as senior staff from WC boards (WCBs) and regulators responsible for OHS for a total of forty-seven people. Aside from the interviews, some organizations preferred to answer questions in writing. The process was iterative, and we revisited some jurisdictions during the course of the study in light of regulatory changes and changes in government that affected the legislation and policy we were studying. Further information was gathered from observing public meetings with specialists in WC or work disability prevention,

particularly with regard to WC and return to work. Ethics approval was provided by the Office of Research Ethics and Integrity of the University of Ottawa.

### **Regulatory background**

A broad range of international instruments have been adopted by the International Labour Organization (ILO) and United Nations governing both international and national migration and working conditions, however Canada has ratified very few of these instruments, and, with the exception of the *Maritime Labour Convention 2006*,<sup>7</sup> international law has had very little direct influence on the Canadian legal frameworks governing OHS and WC that apply to the mobile workforce. For protections from international conventions to have legal force in Canada, provisions must be adopted by the federal or provincial governments in domestic legislation. We therefore focus here on domestic legislation, looking at federal and provincial legislation of relevance, although we underline the international context in which this legislation has developed, when useful.

Workers' OHS entitlements are supported in domestic legislation through a set of provisions that aim to protect workers' health, safety, and well-being by imposing requirements on certain classes of duty-holders (usually employers) to ensure that the work under their control does not harm the workers employed to undertake it. At both national and international levels, the recent history of these regulatory developments in OHS, briefly summarized, demonstrates a growing focus on process-based regulatory standards over more traditional prescriptive standards. Thus, general requirements on duty holders to manage the risks to which workers (and sometimes others) may be exposed have increasingly come to provide over-arching regulatory principles that ascribe general duties to employers and others having control over work to evaluate and take the necessary steps to reduce occupational risks to workers to acceptable levels.<sup>8 (p378)–10</sup> In theory, these broad principles should allow greater scope for addressing what is widely recognized as a rapidly changing structure and organization of work and provide adequate protection of the safety and health of a diversified range of

workers. Moreover, the framework should be sufficiently flexible to be responsive to challenges associated with mobility.

### *Overview of Canadian regulatory arrangements*

Each Canadian province, and the federal regulator, have their own OHS legislation applicable only to their own jurisdiction. In Canada, federal law does not override provincial law; each regulator is equally sovereign. The Canadian constitution determines that regulation of work is of provincial jurisdiction except in fields that fall under federal competence and the Canada Labour Code,<sup>a</sup> which governs OHS for federally regulated work, defines a “federal work, undertaking or business” as:

- (a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,
- (b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,
- (c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,
- (d) a ferry between any province and any other province or between any province and any country other than Canada,
- (e) aerodromes, aircraft or a line of air transportation,
- (f) a radio broadcasting station,
- (g) a bank or an authorized foreign bank within the meaning of section 2 of the *Bank Act*,
- (h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,
- (i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces, and

(j) a work, undertaking or activity in respect of which federal laws within the meaning of section 2 of the *Oceans Act* apply pursuant to section 20 of that Act and any regulations made pursuant to paragraph 26(1)(k) of that Act.

Federal OHS legislation governs a variety of sectors, and while their jurisdiction applies to six percent of all Canadian workers,<sup>11</sup> they regulate many of the sectors involving E-RGM, particularly in relation to transportation. Constitutionally, the federal Parliament has the right to adopt extra-territorial provisions, unlike provinces which can only regulate within their territorial jurisdiction, an issue that raises problems, as we shall see, when hazards to which provincially regulated workers are exposed occur outside the regulator's jurisdiction.

The vast majority of workers and workplaces are governed by provincial health and safety legislation, and there are important differences between provinces. To illustrate, Quebec's health and safety legislation explicitly addresses work organization in its general duty clause, while Ontario makes no mention of work organization.<sup>12</sup> On the other hand, occupational violence is explicitly addressed in health and safety legislation in Ontario, and many other jurisdictions, but not in Quebec.

13, 14

WC legislation is essentially of provincial jurisdiction in Canada and applies to federally regulated enterprises including interprovincial trucking, the airline industry, and shipping.<sup>12</sup> The right to WC of employees of the federal government is also governed by provincial legislation, Parliament having delegated by reference the determination of coverage for government employees.<sup>12</sup>

The six provincial jurisdictions represented in our study all provide for access to compensation on a no-fault basis, for both injury arising out of and in the course of employment and occupational disease. There are, however, numerous specificities with regard to scope, coverage, benefit levels, and adjudication that differ from one province to the next; we will refer to the most important of these differences for the mobile workforce in our findings. One key difference between the provincial regulatory frameworks is that coverage for mental health problems related to exposure to chronic



workplace stress was legislatively excluded from workers' compensation coverage in most Canadian provinces, but was always available in Quebec, Alberta, Saskatchewan, the Northwest Territories, and Nunavut.<sup>15</sup> Some of these exclusions still exist while others have been repealed. More recently, several provincial jurisdictions have adopted presumptive legislation to facilitate access to workers' compensation for first-responders who suffer from post-traumatic stress injuries.<sup>16</sup> In contexts where workers travel between provinces for work, the choice of jurisdiction for a mental health problem will determine eligibility for benefits in many cases and it is unclear how regulators react when workers are exposed to stressors in several provinces, some that provide coverage and some that don't.

## **Results**

We first examine issues related to regulatory effectiveness of OHS legislation, looking also at gaps in regulation. We then turn to issues related to WC.

### *Challenges for effective application of OHS regulatory frameworks*

The policy challenges with regard to E-RGM and OHS affect four facets of the life of mobile workers: getting to work, being at work, living at work, and living at home.

*Getting to work.* Getting to work presents a variety of health and safety challenges associated with commuting hazards. For those who drive or are driven to work, these include the quality and maintenance of vehicles, the road conditions, the abilities of the driver, and the challenges of the road. There are also hazards associated with other means of transportation. Issues that compromise the effectiveness and level of protection are related to the status of the commute, which we will examine in more detail in the section relating to WC. At issue is whether the commuting conditions are considered to be an integral part of working conditions, in which case OHS provisions as well as employment standards would apply,<sup>17</sup> or whether they are considered to fall within the worker's private life, outside of the sphere of work. There are also questions relating to ownership and responsibility for the road and the vehicle used for transportation. Finally, there are jurisdictional considerations both within

provinces, and between provinces/countries, that must be taken into account, along with various related communication issues that can impede oversight of the conditions of the commute.

Commuting accidents are not usually considered compensable in Canadian jurisdictions although annual deaths from these accidents (466) are estimated to exceed the number of occupational fatalities (332, excluding occupational diseases).<sup>18</sup> As a result, these injuries and fatalities are invisible to OSH regulators in Canadian provinces. In contrast, in many European and Asian countries,<sup>19, 20</sup> commuting accidents are compensable. Spain,<sup>21</sup> France,<sup>22</sup> and Germany<sup>23</sup> all provide coverage for commuting accidents. The European Agency for Safety and Health at Work tracks commuting accidents in those European countries that provide coverage for these accidents. It notes that women are more often implicated in commuting accidents than men, possibly because their modes of commuting are different, women being more likely to commute as pedestrians or on bicycles and therefore being more likely to be injured during the course of their commute to work. Their commuting trajectories differ as well because women may more often take children to school on their way to work.<sup>24 (p 395)</sup>

In jurisdictions such as those in Canada where commuting accidents are not generally covered, statistics relating to injuries occurring while commuting to and from work are not gathered. As a result, the health and safety effects of organizing work in a way that depends on long commutes, including potential issues such as work and commute schedules that fail to take account of hazards such as bad weather or fatigue, are not visible to regulators or employers and, therefore, the business case for prevention is not made.

The exclusion of commuting accidents from the purview of WC (and by extension from OHS) regulation has repercussions not only for the invisibility of injuries but also with regard to the prevention of work injuries related to fatigue. One informant described the link between drive-in/drive-out work organization and fatigue in a situation where the employer provided transit to the worksite from the closest municipality:

Union Rep: *Fatigue is a giant issue. It's incredible how fatigue is a massive issue, especially in any of the resource extraction industries, [...] Quite often, you know, with the serious fatalities and serious incidents, when we take a look at the investigations, fatigue is always a factor, you know?*

Interviewer: *What part of that fatigue is attributable to commuting, if any?*

Union Rep: *Well, I mean that is contingent upon the job, right? And a lot of people always be sleeping on the buses. You know, when I was talking about [name of mine destination three hours from the municipality] everybody sleeps on that bus. That's good sleep time, right? And most people will try and sleep on the commute, as long as they're not the one who has to drive or something. But that's not always possible, right?*

He then described a typical scenario for job rotations and the pre-shift commute:

Union Rep: *Three and a half days. So three work days in and three out. But they'll get in a car and drive over night into [municipality], get on the bus, and then the company does the rest of the driving all the way up to the mine [...].*

Interviewer: *Okay, so they'll get in the car and they'll drive overnight.*

Union Rep: *Yeah.*

Interviewer: *On their own dime. So if they're injured in that drive...*

Union Rep: *They're not covered, no.*

Interviewer: *And then the company picks them up at [municipality]?*

Union Rep: *Yeah, and they get on a bus, yeah.*

Interviewer: *And do they start right away, or?*

Union Rep: *Oh yeah, you get off the bus and you're pretty much on shift, right? You drop your stuff off and, uh, there you go.*

Seafarers who report for duty at ports distant from their homes have also been found to start work in a state of fatigue because of the commuting conditions that precede meeting the ship.<sup>7</sup> Fatigue has

also been identified as an OHS issue for E-RGM workers in home care. Fitzpatrick and Neis<sup>25</sup> found that some workers reported feeling drowsy driving home after the last shift of the day, an important risk factor particularly in Newfoundland where roads and weather often make driving hazardous in itself.

Thus, fatigue related to commuting to work increases the likelihood of injuries at work and fatigue attributable to long and irregular work shifts increases the likelihood of injuries during the commute home, injuries that are invisible to OHS regulators.<sup>18</sup> Fatigue and exposure to hazards occurring while commuting between worksites are also hazards invisible to regulators.<sup>25</sup>

When it is the commute itself that poses an immediate threat to the safety of the worker, the decision to refuse to commute is not protected under OHS legislation and a worker may be sanctioned for absenteeism, or economically disadvantaged by his or her refusal to undertake a very hazardous journey. For those whose job rotations are based on long rotations followed by time off, difficulties in getting to work may result in the worker losing several days or even weeks of work (a full rotation), so the economic incentive to take the risk, regardless of the commuting conditions, is strong. Yet, all of this takes place outside the regulatory frameworks designed to prevent risk-taking related to work. One regulator told us they counted on the police to close the roads if the conditions were too hazardous and didn't see the commuting conditions to fall within their jurisdiction.

In Canadian jurisdictions, where the commute is perceived to fall outside the mandate of regulators, other associated hazards such as exposure to violence when travelling to an isolated worksite at night, for example, may also fall outside the scope of OHS legislation. The regulatory frameworks may be revisited in light of the 2019 ILO Convention on Occupational Violence that includes commuting to and from work within the purview of the Convention.<sup>b</sup>

*At work.* Hazards related to work performed by the mobile workforce are sometimes associated with working in remote workplaces, including long shifts and rotations, remote (ineffective) supervision, and hazards associated with working in another country. There are also hazards specific to

workers who are regularly moving from one worksite to another, continually entering new workplaces and, in the process, being exposed to hazards with which they are unfamiliar.<sup>25</sup> WC decisions provide examples of the mechanisms by which remote work and associated long rotations lead to compensable injury because of the associated intensification of work. For example, an appeal tribunal in Quebec accepted the occupational disease claim of a construction worker who had worked ten hours per day over periods ranging from twenty five to thirty-three consecutive days and who developed various musculoskeletal problems including epicondylitis and carpal tunnel syndrome while building houses in the far north of Quebec.<sup>c</sup>

Key informants told us that some forms of mobility impede effective application of the right to information on hazards in the workplace, the right to participate in the identification and elimination of these hazards, and the right to refuse dangerous work. Sometimes this is attributable to the vulnerability of international migrants but in other cases it is attributable to conditions associated with the mobility itself.

The right to information can be undermined in situations where workers are moving from one workplace to another, as is the case of home care workers.<sup>25, 26</sup> Each home, each patient, can present specific hazards, rarely identified in advance by the employer. The same is true of truckers and other delivery personnel. For international migrants, language skills are not always sufficient to understand the safety training provided, and in many cases, safety training is not provided to temporary foreign workers, or is provided after workers have been exposed to hazards for weeks or months.<sup>4</sup>

In terms of prevention mechanisms, there is some evidence that mechanisms to ensure worker participation in prevention through health and safety committees and worker safety representatives are more difficult to effectively implement when workers are working in remote worksites or dispersed in multiple geographic locations. Working as an orderly in a long-term care facility, for example, is more conducive to collective governance than providing care individually in multiple private homes where workers rarely come into contact with colleagues, supervisors, or union representatives.

Refusing dangerous work is another challenge as mobile workers employed in mobile (truckers) and multiple workplaces (homecare, cleaners) often work alone with little guidance from their unions or supervisors, and may also work in remote workplaces (mining, construction, tree-planting) inaccessible to labor inspectors who have the final say on the right to refuse. Additional obstacles are encountered by seafarers, an isolated workforce whose right to refuse is subject to the orders of the captain.<sup>7</sup> While all forms of mobility can lead to difficulties in the implementation of these rights, an important body of literature has specifically documented the vulnerabilities of temporary foreign workers with regard to the exercise of their OHS rights, “deportability” and isolation clearly decreasing their ability to know and exercise them.<sup>4, 27, 28</sup>

For Canadians working in other countries, hazards may be specific to the political or geographical context of the country to which they are sent. Key informants in several provinces, some relying on case law,<sup>d</sup> provided examples in which provincially regulated workers had tried to invoke OHS legislation to refuse deployment in a war zone or to obtain support from inspectors because of hazards in their work, only to be told that provincial regulators do not have powers to address hazards outside their jurisdiction. The regulator’s jurisdiction stops at the border of their province, so this limitation applies when hazardous conditions arise in another Canadian province not just in another country.

Other jurisdictional issues arise in many mobile workplaces: seafarers, inter-provincial truckers, or those working on trains and airplanes are regulated federally in Canada, for some issues, while for others they fall within provincial jurisdiction. The delimitations are unclear, and we were told that multiple inspectorates, including police forces, often attend the scene of an accident and do multiple factual analyses to determine which regulation/regulator has jurisdiction over the incident. The following exchange with a provincial OSH regulator illustrates the type of confusion that may arise because of inter-jurisdictional issues:

Interviewer: *And with lots of our mobile workforce, many of the issues that we've been coming up with [involve] inter-jurisdictional issues. Like inter-provincial truckers. Are they ...*

Respondent 1: *Federal.*

Interviewer: *They're federal. And how can you tell they're federally regulated when an incident occurs?*

Respondent 1: *Well, we gather the facts, right? So ...*

Interviewer: *Everybody goes?*

Respondent 1: *Pretty much. [okay] So you'd have both regulatory bodies present [right] and we would determine, based on a series of questions, then determine jurisdiction. If it's not clear at the time, we both continue. We'll run our investigations concurrently until we're able to clarify who has jurisdiction.*

Interviewer: *Okay. And that for instance would be if there were an accident involving an injured provincial trucker or a truck that might or might not be interprovincial.*

Respondent 1: *Right. And that's only if the incident occurs at the workplace. It wouldn't be on the roadway. So we wouldn't ...*

Interviewer: *The worker's truck. The workplace is his truck?*

Respondent 1: *Well, we don't have jurisdiction over the highways, roadways, so that's under the Highway Traffic Act. But certainly if a truck has an incident at the workplace, we determine whether—whose—which party is provincially regulated, whether it be the truck driver or the trucking company or the warehouse. Once we've determined who has jurisdiction, who's the person who was injured, get clarity around who that person is, and then proceed with our investigation.*

Interviewer: *Okay, so if for instance brakes fail on a truck that is a clearly provincially regulated truck ...*

Respondent 1: *And it's ... But it doesn't ... At that point, if the incident occurs on the roadway, there's no ... In terms of the federal government or provincial government, it's under the Highway Traffic Act. [okay] And if it's a highway, the [provincial police]. If it's [other roads], I think [municipal] Police.*

*Living at work.* Our study of hazards and regulatory challenges related to living at work for those whose mobility requires overnight or off-shift accommodations away from home found unclear and inconsistent requirements regarding the provision of adequate housing to international and internally mobile workers in remote workplaces, with significant variations between provinces and variations between the situation of temporary foreign workers coming from different countries or involved in different immigration programs. Sometimes the consulates of labor-providing countries require that adequate housing be provided to the workers, and there may be some oversight in this regard. One informant related that an employer was required to provide housing to the foreign workers, while Canadian mobile workers employed by the same firm were expected to pay for their own housing. Disparity of conditions, which may favor domestic or foreign workers depending on the circumstances, does nothing to promote harmonious work relations, and may even promote violence and harassment between groups.

Living arrangements in the oil sands of Alberta in contexts where collective agreements address housing conditions <sup>29</sup> are undoubtedly better than those provided to agricultural workers under the seasonal agricultural worker program, <sup>30</sup> (pp 111-123) but as presented in the section on WC, even in the Alberta oil sands, injuries occur because of hazards in the housing provided to the workers. Temporary foreign workers outside of the agricultural sector have also complained about the housing provided to them, although in remote areas the housing provided to Canadian workers may be equally inappropriate as illustrated by a complaint filed by tree-planters of African origin working in British Columbia who alleged the Africans were provided with inferior accommodation and were thus victims



of discrimination. The complaint was rejected by the tribunal because the housing provided to all workers was found to be inadequate. In the words of the court, "neither mode of accommodation remotely began to meet the requirements of accommodation under the Employment Standards Act, the Silviculture Contract Camp Standards or WorkSafeBC's Occupational Health and Safety Regulations."

<sup>e</sup> OHS regulation of worker housing is non-existent in some provinces, leading agencies to rely on legislation designed to protect the health of the public rather than the health of workers. For example, Alberta Health Services intervened in 2018 because their inspectors "found evidence of 'sleeping/living accommodations for foreign workers' in the premises of the Burger King where they worked. The concern of the authorities related to violations of the health code as 'food-handling services must be separated from living quarters and other areas that may be incompatible with the safe and sanitary handling of food.'" <sup>31</sup>

*Living at home.* Work-family balance can be particularly difficult for mobile workers. Long shifts and rotations combined with lengthy commutes imply long absences from home on a daily or more prolonged basis. Mechanisms to ensure workers' ability to communicate with their families are sometimes not easily available. Some workplaces provide good Internet access to supervisors, but not to the rank and file, <sup>32</sup> and nowhere were communication issues with family and home addressed in the regulatory frameworks. Other issues of work-family balance arose in cases in which a family member was ill or when the worker had difficulties with child-care. While some provinces provide for leave in the event of family emergencies, these provisions may be difficult to apply to the mobile workforce. <sup>33</sup>

(p 105) Although maintaining contact with families while in remote workplaces was usually seen as desirable, informants in one study on mining in the Yukon told of increased stress associated with regular contact with home, particularly if distance prevented them from acting upon the deterioration of relationships. <sup>34</sup>

*Challenges for effective application of WC regulatory frameworks*

*Overview of Canadian workers' compensation systems.* Workers' compensation is one of the oldest social programs in Canada, dating back to the early twentieth century.<sup>35</sup> All Canadian WC regimes are no-fault systems guaranteeing the right to compensation for workers injured out of and/or in the course of employment, regardless of fault of the employer or of the worker, although some provinces have exceptions to this principle. These regimes curtail workers' rights to sue under tort law, so even criminally negligent employers are protected from civil liability if the injury incurred is potentially covered under the provincial WC legislation, whether or not the worker or the worker's estate has actually filed for WC, and this exclusion includes violation of constitutional rights such as discriminatory harassment.<sup>36</sup> Public, not-for-profit compensation boards are mandated to implement the law by collecting premiums from employers and paying out compensation to workers according to the regulatory and policy principles in force at the time of the injury and no private insurers play a role in any Canadian provincial WC system. Definitions of compensable injuries and diseases differ between provinces, and levels of benefits may also differ. These are complex regulatory systems that are not easy to navigate even for specialists. When workers are mobile, complexity can be exponential as there are inter-jurisdictional issues that potentially compound the problems raised by a given claim.

When workers reside in a province or country other than that in which they work, or even in cases where their home is within the same province but far from their worksite, several aspects of the compensation process may work less smoothly. Here we examine rules relating to WC coverage, assignment of modified work after injury and before maximum medical recovery, determination of benefits, access to social and vocational rehabilitation, and access to justice issues. All themes are inter-related, for example failure to take up proposed modified work will compromise the right to benefits; for the sake of clarity, we describe them separately. Some challenges are only applicable to inter-jurisdictional mobility while others apply to all mobile workers.

*Coverage.* The question of coverage determines whether a claim for compensation will be accepted. We examine a series of issues affecting coverage: inter-jurisdictional rules determine where

workers may file a claim; proof of exposures for occupational disease claims are particularly difficult for mobile workers; when asking if an accident occurred “out of and in the course of employment” the legal requirement in WC in Canada, commuting accidents and accidents occurring where workers are living away from home, are also contentious.

*Inter-jurisdictional challenges:* Of particular importance for this study is the existence of an Inter-jurisdictional Agreement<sup>f</sup> on WC that is designed to ensure that inter-provincial mobility in the course of employment does not undermine the right to WC. Each province has legislation that determines where a claim should be made and, in some cases, workers may choose between the compensation board where the injury occurred or that in their home province, for instance if they are working for a sub-contracting company from their home province that has taken a crew of workers to another province. Not all provinces studied provide for the opportunity to choose in this situation and conditions determining the right to opt vary from one province to the next.

Although this agreement between provincial compensation boards governs cases where workers live in one province and sustain a work injury or illness in the course of their employment in another, it does not always protect workers from falling through the cracks when jurisdictional conflicts arise. Because of differing rules on the scope of legislation in the worker's home province and that in the province of injury, some may have difficulty in accessing compensation coverage. The interprovincial aspects of the worker's employment injury muddy the waters and impede smooth application of the law. We found several examples of work injuries that would have clearly been covered if they had occurred in a given jurisdiction, but where access to compensation was delayed and sometimes denied because compensation authorities had no jurisdiction to adjudicate the claim. One example involved a worker from Quebec injured at a worksite in Quebec where he had been placed by a temporary employment agency situated in Ontario. The fact that the client employer had a place of business in Quebec did not justify compensation by the Quebec regulator, nor did it justify compensation by the Ontario regulator that covers injuries sustained on its territory. <sup>g</sup> A final decision can take years and

sometimes no compensation will be paid; the worker may then be entitled to sue the employer who will not benefit from WC protection when the claim falls through the jurisdictional cracks (although by the time a final decision is made alternative recourse may be barred by statutes of limitations).<sup>h</sup>

Occupational disease claims: Occupational disease usually involves exposures over time. When workers are exposed to a substance or a process in a large number of workplaces, it becomes more difficult to document exposures and to determine causation. It is even more difficult when those exposures occur in different provinces. Employees of the federal government frequently work in multiple provinces, and in the case of a claim for industrial deafness, the claim was denied by the Quebec tribunal, because the exposure to noise occurred primarily in Nova Scotia.<sup>i</sup>

As another example, compensation legislation and policy governing asbestos-related disease, in several provinces, requires evidence of significant exposure in the specific province.<sup>37 (p 17)</sup> In a claim for carpal tunnel syndrome filed by a construction worker who had worked in Quebec after having worked for several years in Ontario, the Quebec WCB accepted the claim, but the appeal tribunal reversed that decision because exposure in Quebec was insufficient when compared to exposure in Ontario. That decision was, in turn, reversed on a procedural technicality, but the final decision came over four years after the worker's initial claim.<sup>j</sup> Although the Inter-jurisdictional agreement applies to claims for occupational disease, Quebec opted out of the provision on occupational disease in 2005, so that questions regarding coverage for workers who have exposures in multiple Canadian jurisdictions that include Quebec are complex.

Commuting accidents: Although all Canadian compensation boards will affirm that commuting accidents are not normally considered as compensable accidents, when we ask informants about specific cases or analyze appeal tribunal decisions, the situation is far from cut and dried. In every province, determination of compensability of transit accidents has proved to be contentious, despite explicit policy. It is difficult to anticipate which circumstances will give rise to WC coverage and which will not given the broad range of criteria that are considered in determining, in a given case,

whether the accident occurred out of and (or, in Quebec) in the course of employment. Each province, except Quebec, has explicit, often binding WCB policy on this issue and there are hundreds of tribunal decisions, some recognizing compensability of an accident occurring during transit, others declining coverage, often in similar circumstances. Further complications arise because it is sometimes in the interest of the worker that the WC legislation not apply so that the worker can sue those responsible for the injury, including the employer. Compensability as an issue is thus sometimes raised by defendants,<sup>k</sup> notably employers, who seek to include transit accidents in the purview of the definition of “work accident” to protect themselves from tort liability, while in other cases it is the worker who seeks compensation under the WC legislation after their claims have been denied or disputed.

In general, if the worker is injured while traveling to work from home, going home after work, or going home for lunch, the injury will not be found to arise out of or in the course of employment, whether the worker is working for a temp agency<sup>l</sup> or providing home care service.<sup>m</sup> However, if the worker is traveling between home and a work camp and traveling on a private road owned by the employer, the accident could well be compensable.<sup>n</sup>

Some criteria used in decision-making can allow workplace parties to facilitate access to coverage and avoid litigation. For example, when a worker is unionized, decision makers look to the collective agreement to see if the workplace parties intended for travel to be considered as part of the job,<sup>17</sup> as when provisions require that the employer pay for transit to the worker’s home if she finishes work late at night.<sup>o</sup>

There are circumstances where a transit accident is clearly covered by WC legislation in most provinces, for example, an accident occurring while the worker is on an overseas mission prescribed by the employer.<sup>p</sup> Other circumstances will rarely, if ever, be considered to be a compensable accident by any Canadian WCB, such as an accident occurring while the worker stopped on her way to or from work for personal reasons,<sup>q</sup> although in one case an employer who wanted to escape liability by

including such an accident within the purview of the compensation legislation was successful. <sup>r</sup> In between, there is a broad spectrum of circumstances that are sometimes covered, sometimes not.

*Accidents in work camps and in temporary housing:* Mobile workers often live away from home for periods of time and injuries that occur in or around the living facilities may or may not be covered. Policies of the compensation boards treat injuries occurring in living facilities during a business trip separately from those incurred in living facilities provided to industrial workers. This distinguishes regimes governing gold-collar mobility from those applicable to blue-collar mobility, yet we see no legal justification for these distinctions which systematically favor gold-collar workers who benefit from a broader interpretation of the concept “arising out of and in the course of employment.” Distinctions appear to be arbitrary and the boundaries between compensable and non-compensable injuries shift according to circumstances and sometimes depending on type of mobile work.

Shifting policy boundaries with regard to coverage also arise when workers are injured in work camps or other living facilities provided by the employer. In some provinces, policy is explicit with regard to injuries in work camps. British Columbia, for example, has policy that will consider injuries sustained in an employer-provided facility to be compensable if the worker had no reasonable alternative accommodation because of the remoteness of the worksite. <sup>s</sup>

In neighboring Alberta, WC policy <sup>38</sup> dictates that an injury in a camp will be covered if the worker is a "captive worker" with no alternative but to live in the employer-provided housing. However, the policy also requires that the worker's injury be attributable to a hazard in the facility. S. 6 of that policy <sup>38</sup> specifies that:

Injuries are compensable when a worker is making reasonable and permitted use of the provided facilities and the injury arises from a hazard of the premises or equipment provided. Hazards include any employer-provided equipment such as furniture, utensils, etc. and any food or drink provided by or purchased from the employer or employer's agent and consumed

on the premises. Food, equipment, or other hazards introduced by the worker are not considered to be employment hazards.

If the worker is considered to be a 'captive worker' in a residential facility in Alberta, the WCB may include other hazards based on the individual merits of the claim. 'Captive workers' are workers who, because of the circumstances and nature of their employment have no reasonable alternative to living in a bunkhouse or campsite (for example, a remote campsite in the wilderness). This policy was applied in a case where the worker slipped in the shower, and after debate as to the quality of the shower curtain, reminiscent of arguments arising in a fault-based system, it was decided that the worker was indeed captive and that the shower was indeed a potential hazard. He received coverage for his injury. <sup>t</sup> A similar result was arrived at in a case where a "captive worker" fell after receiving an electrical shock in the residential facility. <sup>u</sup> In another case where two workers were obliged to share a room, the violent and unprovoked assault of the claimant by the other occupant of the room was held to be a compensable incident, the violent co-worker being the "hazard."<sup>v</sup> Several Alberta cases relating to the "captive worker" policy involve workers developing musculoskeletal injuries upon arrival in the camp after traveling long distances with heavy luggage to reach the camp, but outcomes are inconsistent; some claims are accepted, others not, in quite similar circumstances. <sup>w</sup>

Reading Alberta WC policy and cases, one is left with the impression that coverage will be provided if the employer could be sued for having exposed the worker to a hazard in the residential facility. The policy thus shields the employer from lawsuits that could otherwise be filed without providing coverage when the worker could otherwise take no legal action. The policy is applied and interpreted by the decision-makers and it is sometimes interpreted narrowly. For example, in one case it was suggested that the worker would not be "captive" if accommodation was available eighty-five km from the worksite. However, because the worker had a temporary contract and was from outside Alberta, the tribunal accepted his claim: "Given that the contract in question was for only an approximate four-month period, it seems unrealistic to think, or to expect, that a worker whose home

was in another province, and who was working twenty-one days in and eight days out, would set up residence in [name of city].”<sup>x</sup>

Business trips are governed by separate policies, and coverage seems broader than with regard to accidents occurring in remote worksites. For example, British Columbia policy provides that "injuries or death that result from a hazard of the environment into which the worker has been put by the business trip, including hazards of any overnight accommodation itself, are generally considered to arise out of and in the course of employment."<sup>y</sup> This coverage is broader than that reserved for accidents in hotels near a remote worksite. This is true in other provinces as well. Although decisions on this issue are contradictory in their results, some Quebec cases are very restrictive with regard to coverage for accidents occurring in work camps<sup>z</sup> while providing a generous interpretation of coverage for accidents occurring on business trips.<sup>aa</sup>

In summary, when determining whether a claimant engaged in E-RGM has workers' compensation coverage for an injury, we need to think about complexities related to jurisdiction and unclear concepts for determining whether an injury arises out of and in the course of employment. In the case of coverage for occupational diseases, exposure in multiple jurisdictions muddies the waters and may lead to denial of a claim even if work was the cause of the disease. Finally, because some jurisdictions cover mental health problems associated with exposure to chronic workplace stress while others do not,<sup>15</sup> inter-provincial exposures would make it more difficult to file a successful claim, a problem that might be particularly acute for employees of the federal government who work in multiple provinces.

*Assignment of modified work and medical evaluations.* Once coverage is granted, workers in the compensation system will be eligible for, and in some provinces, obliged to take up offers of modified work. While procedures differ between provinces, employers have economic incentives to offer modified work that allows claimants to remain active in the workplace without undermining their health. In Ontario, both the employer and the worker have a legal obligation to cooperate in the early return to work process, and doctors are not called upon to approve the work proposed. In contrast, in



Quebec, the employer may offer modified work but is not obliged to do so; workers are obliged to perform the modified work only if their treating physician approves the temporary assignment.<sup>39</sup>

Several problems arise when it comes time to offer modified work to a worker who lives far from the job site. First, the worker's ability to do the modified work in itself may not be problematic but getting to the workplace may jeopardize his health. Some decision-makers refuse to consider the health effects of travel between the worker's home and the new assignment and conclude that if the tasks assigned are safe, then the travelling arrangements are irrelevant.<sup>bb</sup> Others include the evaluation of travel in determining the legitimacy of the worker's refusal to take up the modified work.<sup>cc</sup> In Quebec, where the worker's doctor has to approve the modified work, there are cases where the doctor includes travel requirements and their impact on the worker's family responsibilities in refusing to approve an assignment.<sup>dd</sup> Assignment of modified work to temporary foreign workers is further complicated by immigration rules as work visas may not be compatible with the modified work assignment.<sup>ee</sup>

Another issue that arises in early return to work is that fly-in/fly-out or drive-in/drive-out workers are usually hired on rotations that require intensive work over, for example, seven, fourteen, or twenty-one days followed by several days off, allowing them to return home between rotations when feasible. When light work is offered, the worker's health may not permit intensive work so the alternative work may be only for a few hours a day, every day, potentially compelling the worker to stay in the remote location indefinitely. The worker must choose between remaining in the remote location or seeing benefits cut if he or she returns home.

Problems in medical evaluation arise particularly for temporary foreign workers when the worker returns home and can only access health care providers who are unknown to the WCB managing their claim. Credibility of medical opinions can be questioned particularly when the opinion is written in a language that is not the dominant language in the jurisdiction managing the claim. In other situations, specialists may not be available in the home locality, while they are available in the province managing the claim. Finally, as key informants in Alberta told us, the inter-provincially mobile workers in the oil

industry tended to work for sub-contractors who provided labor expected to be fit for work. This suggests that it is unlikely these sub-contractors would have light work available for these workers.

*Benefits.* Once a worker has coverage, mobility can affect the level and duration of benefits provided. Three issues arise: the amount of benefits payable in a given jurisdiction; the risk of suspension of benefits if a worker fails to take up an offer of modified work proposed by the employer; and, the calculation of the residual benefits once a worker has reached maximum medical recovery.

The first issue is straightforward. To illustrate, since September 2018, there is no maximum insurable earning ceiling in Alberta, as is the case in Manitoba, which means that a worker earning \$150,000 per year would receive ninety percent of his net earnings as compensation while unable to work.<sup>ff</sup> In Nova Scotia in 2018, the same worker would receive seventy-five percent of net earnings based on an annual salary of \$59,800 for the first twenty-six weeks of disability after which benefits would be equal to eighty-five percent of net earnings based on the same amount.<sup>gg</sup> A Nova Scotian offered the option of filing at home rather than Alberta would be severely under-compensated if he chose to file in his home province as he has demonstrated an earning capacity of \$150,000. By choosing to return home, he acquiesces to an earning capacity of \$59,800. A system that compensates for loss of earning capacity and that precludes evidence of a higher real earning capacity disadvantages the higher earner. Given that the purpose of WC is to support workers in maintaining their earning capacity, it is clear that Nova Scotian benefit levels hugely underestimate the loss of earning capacity of many Nova Scotian residents in the interprovincial mobile workforce.

The second issue, mentioned in the section on modified work, is that although mechanisms of imposing penalties differ, in all provinces a worker could be penalized for declining the offer of modified work even if the option for modified work implies long-term residence at the work site.

Thirdly, once a worker has achieved maximum medical recovery, in all provinces they are evaluated to determine capacity to return to pre-injury employment. If the impairments attributable to their injury preclude return to pre-injury employment, WCBs will determine what suitable work they

might be able to do. This will enable determination of the potential income that a worker could earn from this "suitable employment" and that amount will be deducted from their benefits. In some provinces the deduction is almost immediate, while in Quebec, up to one year of full benefits is provided to give them time to seek alternative employment.<sup>40</sup> Mobile workers are particularly disadvantaged by this mechanism called 'deeming,' as, with few exceptions, they will be deemed capable of earning a salary payable in the labor market in which they were injured even if they no longer live and will likely no longer work in that region. This can create extreme hardship as in the case of temporary foreign workers who are deemed capable of earning Canadian wages even if their health no longer allows them to access visas to work in Canada, a situation critiqued by Danielle Allen.<sup>41</sup> (p 151) Similar problems arise when Newfoundland residents are deemed capable of earning Ontario income levels, even though they are no longer in a position to travel to Ontario for work.<sup>hh</sup> Board policy in the provinces we studied usually followed this reasoning, as did some appeal decisions.<sup>ii</sup>

A 2017 Ontario appeal tribunal decision (one that deviates from previous decisions and policies in all provinces studied) took a different approach and may lead to fairer treatment for workers injured while working in a wealthy jurisdiction who reside in a less wealthy province or country. Nine years after the worker's injury, the appeal tribunal in Ontario overturned the board's decision in a case involving a temporary foreign agricultural worker who had returned to his home in Jamaica after he hurt his back. The board had deemed he was able to earn Ontario minimum wage as a cashier even though minimum wage in Jamaica was sixty-three dollars per week for a forty-hour week. In the words of the Appeal Tribunal, "work which must be performed in the Ontario labor market is not work which is available to the worker."<sup>jj</sup> It is too early to determine whether this decision will have an ongoing impact on policy in Ontario or in other provinces.

*Rehabilitation and return to work.* Workers who were mobile at the time of injury will be presumed to be able to continue to be mobile workers once their injury has healed, and sometimes the worker with a reduced earning capacity no longer wishes to travel for work. This may prove to be a

problem as refusal of alternative employment may also affect their benefits. The difficulties associated with "personal" travel to and from work are not always considered when evaluating the worker's ability to return to work after injury and those workers who decline opportunities offered may see their claims closed.

A study in the USA found that workers living in rural areas and small towns are more at risk for long-term work disability and the authors found that the impact of work commuting and residential location became more important as the duration of disability increased.<sup>42</sup> Similar results with regard to rural residency and disability duration were found in a study using Alberta WC data.<sup>43</sup> These results suggest that the rehabilitation mechanisms available in WC systems may not work as well when applied to mobile workers in these situations.

*Access to representation and appeals.* Temporary foreign workers, and to a lesser extent internally mobile workers who return to their home province after work injury, are disadvantaged when the time comes to exercise their rights in appeal, or in the event that the employer appeals the acceptance of their claim in their absence.<sup>kk</sup> In a province where tens of thousands of temporary foreign workers were engaged at the time of our interview, an informant whose mandate it was to provide support to injured workers in the appeal process told us that there were no temporary foreign workers in that province and that claims for injuries sustained by workers living out of province had never come up. In contrast, as we have seen in the previous section, important legal victories for temporary foreign workers who were under-compensated because of the deeming rules applied by the compensation board in Ontario have made a significant difference in the worker's benefits and his ability to survive after his injury. Reduced access to appeals, representation, and legal expertise are among the difficulties that arise when the province of injury is outside the worker's province or country of residence. Testifying at a hearing held thousands of miles away from a worker's home is not economically viable and, in the case of temporary foreign workers, it may also be impossible to obtain the required visa to attend the hearing in person.

## **What are the implications for our understanding of regulatory effectiveness?**

Several of the issues we encountered in this study have been documented in other jurisdictions. For example, OHS challenges for temporary foreign workers and migrant workers more generally have been documented both in Canada,<sup>6, 44, 45</sup> the USA,<sup>46, 47</sup> and the European Union.<sup>48</sup> They are known to be exposed to inferior working conditions and to have limited voice because of their precarious migration status. Despite decades old federal and state regulation on the issue in the USA,<sup>49</sup> the quality of the housing provided to migrant agricultural workers remains sub-standard and perilous for their health.<sup>50</sup> This is also true in France<sup>51</sup> and the issue has been raised in many Canadian studies as well, although few studies look at WC issues.<sup>41</sup>

On the other hand, regulatory effectiveness of OHS and WC legislation applied to the internally mobile workforce is rarely discussed in the literature. They are less visible than international migrants because freedom of movement between provinces, guaranteed in the Canadian constitution, implies that no particular permits need to be obtained when working in another province. Workers become visible once they're injured and compensated so if coverage is denied, they remain invisible. If coverage is granted, they may well be statistically visible in one province while living with a disability in another. This has repercussions for source communities and provinces that may bear the burden of health care and social security costs if compensation is not granted or proves inadequate.

In some provinces, selective strategies to address OHS challenges have been developed by unions, although we did not find any example of a systematic strategy to ensure protections for any specific category of the mobile workforce. Walters and colleagues<sup>52</sup> found in a related study that some unions have mobilized new technologies as tools to get workers involved in health and safety issues when they are the most available -- while being transported by the employer to and from the closest municipality. Health and safety information is more welcome when received in a text message while on a bus going to a mine site than it would be if sent during the very long work shifts, or during time while workers are at home with their families.<sup>52</sup>

Interviewed members of OHS inspectorates and regulators were aware of the OHS mobility-related challenges particularly with regard to temporary foreign workers, although it was much less evident with regard to other categories of the mobile workforce. While temporary foreign workers had reached the radar screen of some regulators, our informants did not often identify effective solutions for the protection of these workers. The challenges are significant and go beyond language barriers as the scenario described by a labor inspector interviewed in a study in Ontario by MacEachen and colleagues<sup>53</sup> illustrates, “I have been in some greenhouses where the offshore ... workers speak English, but were giving me the eye of, ‘Do not talk to me because I don’t need to go home because of you. As much as I can speak English, I don’t speak English, do not talk to me mister.’ (Inspector 12).”

If workers fail to claim compensation, or if they are undercompensated because they are no longer in the jurisdiction, the costs of their injuries will not be considered when it comes time to develop intervention priorities for inspectorates. In Canada, workers will have access to health care if they return to another Canadian province. The fact that that health care is attributable to a compensable injury may be eclipsed if the worker has lost his benefits because he quit his job rather than taking up modified work in another province. If benefits of last resort are paid to the family because the worker has lost WC benefits, these costs will also be invisible to the OHS regulator in the province where the injury occurred.

Similarly, in terms of priorities, the exclusion of travel to and from work from the purview of employer responsibilities, and by extension, from those of the labor inspectorates, is a key challenge for the protection of mobile workers' health. The costs of these injuries are not counted in the compensation costs of a given industry, nor will they be counted in Canada as costs relating to employment.<sup>18</sup> As a consequence, no economic incentive is provided to employers to prevent or mitigate the risks associated with commuting even when company policies around weather-related closures, and shift and rotation scheduling can exacerbate those risks. Nor do regulators feel the need to exercise oversight on commuting conditions – this responsibility generally falls to the federal,

provincial, or local police. Workers, on the other hand, may have huge economic incentives to undertake dangerous commutes as well as psychological incentives when human consequences result (as when a homecare worker or nurse does not take to the road to provide care to a housebound client).

<sup>25</sup> We need to look at protection from dangerous commuting conditions and bolster workers' right to refuse dangerous working conditions including commuting conditions. We specifically need to address the shifting status of the commute, a challenge that relates both to OHS and to WC coverage. This is an issue that is particularly important in North America.

Regulators also need to address medical surveillance and tracking of exposures and new strategies need to be developed with regard to the intensification of work and the extensive hours of work associated with certain categories of E-RGM. Fatigue is a major issue for many categories of mobile workers -- a visible hazard for transport workers whose fatigue is the object of regulation <sup>7</sup> but invisible for other E-RGM workers because of the invisibility of non-compensable commuting activities. In those cases, responsibility for prevention of that fatigue, which currently rests on the shoulders of the workforce, should be shifted to those who control the organization of work. The invisibility of mobile workers, as has been found with the invisibility of precariously employed workers and employees of sub-contractors, <sup>8, 54</sup> makes tracking of exposures to hazards particularly ineffective. Rehabilitation programs and policies are known to work poorly for precariously employed workers, including subcontractor employees, <sup>55</sup> and these challenges are exacerbated when the precariously employed are also mobile workers.

As we've seen there seems to be a particular challenge in Canada because of the distribution of powers between the provinces and the federal regulator and the variations between the regulatory frameworks. It is unlikely, and no doubt ill advised, to suggest that OHS and WC legislation should be standardized across the country. The Inter-jurisdictional Agreement between WCBs has sometimes failed to guarantee coverage to the mobile workforce particularly with regard to occupational disease

where exposures to contaminants, noise, or repetitive work have occurred in several Canadian provinces, but also in some cases of injuries sustained at work.

Increasing inspectorate resources must underpin the successful implementation of rights including the right to refuse dangerous work in remote workplaces. Perhaps new technologies can be harnessed to facilitate "access" despite the distance between the inspector and the remote worksite; we've seen little evidence of this in the current study.

Living at work and living at home are rarely addressed by regulators. Provision of adequate housing that is not only sanitary but designed to ensure workers' safety while living remotely, sometimes in isolation, should be required by explicit regulatory provisions and addressed by the workplace parties in those cases where workers are obliged or encouraged to live in accommodation provided by the employer. Adequate access to health care and other amenities in the community and adequate and accessible communication services allowing for contact with home should be ensured.

## **Conclusion**

Steps need to be taken to put an end to the invisibility of the mobile workforce, across the spectrum of mobility from extended daily commutes to -- and within -- work through interprovincial and international mobility for work involving often extended absences from home. This can be done by identifying and responding to their specific needs in the design of regulations and policy, and in the implementation of health and safety management and assessments of employers' general duties, so as to provide workers with a safe working environment, a safe living environment while they are at work, and safe conditions as they travel to and within work. As with precarious employment<sup>3</sup> and so-called non-standard employment,<sup>2</sup> drawing the attention of scholars and policy makers to E-RGM as a characteristic of employment that requires greater attention of regulators, employers, unions, and others responsible for OHS and WC would be a first step in ensuring that contemporary organizational restructuring and related E-RGM in its many facets does not produce passive deregulation of workplaces and working conditions.



While some workers are both precariously employed and engaged in E-RGM,<sup>7</sup> it is not the case for everyone. Gold-collar mobile workers,<sup>56</sup> while exposed to hazards similar to those of other mobile workers, may have far better support in dealing with these hazards than the precariously employed but equally mobile blue-collar<sup>57</sup> or white-collar workers. As discussed in a recent issue of *Industrial Relations/Relations Industrielles*,<sup>58</sup> a full inventory of similarities and distinctions between the OHS challenges raised by non-standard or precarious employment<sup>2</sup> and extended or complex E-RGM has yet to be completed but the issue of transferring risk to those least capable of absorbing its consequences appears to be common to both precarious employment and E-RGM. As posited:

Non-standard employment contracts are known to transfer the risk of 'down time' to the precariously employed workers. Regularly employed workers are paid whether or not they are with a client, while recruitment through temporary contracts and imposition of just-in-time schedules allows the employer to avoid paying a worker when demand is low, a strategy that allows the employer to remain competitive in a globalized market. The worker assumes the cost that was historically assumed by the employer. Similarly, when workers are continually 'on the move' going from one orchard to another, one household or worksite to another, and one employer or one contract to another, they are rarely fully compensated for the financial and other costs associated with accomplishing these often changing mobilities. They are rarely paid when they are commuting and are only compensated for travel when demand for their services is high. In many countries, they will not be compensated if they are injured during the commute. And in both precarious employment and with these kinds of E-RGM, the ability of workers to organize collectively and to resist exploitation is often undermined, as is the ability of the regulator to ensure practices are safe. Risks are transferred to individuals, and the ability to respond collectively, be it by organized labor or by the state, is thwarted.<sup>58</sup> (p

International conventions could provide guidance in improving the regulatory protections in Canada even though they may not be legally binding. In some cases, labor legislation in the individual jurisdictions complies with these conventions, however, there are many situations in which there is a regulatory vacuum either because of the inadequacy of inter-jurisdictional protections or because activities related to E-RGM do not fall under the purview of legislation (even though they would do so in other countries). As a federation, it is normal that regulatory protections differ from one provincial jurisdiction to the next as provinces are sovereign and determine protections in light of their socio-political and economic contexts. This said, revisiting legislation and contractual practices to ensure OHS and WC legislation applies fairly to the E-RGM workforce would lead to better protections for these workers who are often invisible to regulators.

While it is idealistic to believe that when made aware of the regulatory gaps identified in our study regulators in all jurisdictions will seek to fill those gaps, mobilization of workers and their organizations is essential to ensuring that the mobile workforce becomes more visible and receives better protections. Researchers, workers, and organizations serving the international mobile workforce have brought forward essential proposals to improve the voice of those workers by addressing their “deportability” in a way that will put an end to precarious migration and allow all international migrant workers to use their voice on OHS issues without fear of reprisals.<sup>4, 5, 7, 27, 28, 58</sup> OHS and WC challenges for internally mobile workers must also be placed on the agenda of unions, workplaces, and regulators to guarantee their equal access to health and safety and fair workers’ compensation.

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We declare no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

## **Notes**

- a. *Canada Labour Code*, R.S.C., 1985, c. L-2.
- b. Article 3 f of the *Violence and Harassment Convention*, adopted by the General Conference of the International Labour Organization on June 10<sup>th</sup>, 2019.
- c. *Hunt et 9185-9280 Québec inc.*, 2015 QCCLP 1714.
- d. *Thibault et Shawinigan Lavallin inc.*, [1987] C.A.L.P. 703.
- e. *Balikama on behalf of others v. Kahaira Enterprises and others*, 2014 BCHRT 107, par. 124.
- f. *Interjurisdictional agreement on workers' compensation, consolidation*, document on file with the authors.

- g. *Romagner et Excel Human Resources*, 2009 QCCLP 3012; the worker was eventually compensated in 2009 for an injury sustained in 2005.
- h. *Soucy v. P.G. Québec*, 2007 QCCA 1482.
- i. *Hicks et Ressources humaines et développement des compétences Canada et R.H.D.C.C. Direction travail*, 2013 QCCLP 5925.
- j. *Gyptech Acoustique inc. et Intérieurs Protouch inc.*, 2010 QCCLP 4543, revised in *Gyptech Acoustique inc. et Doyon*, 2011 QCCLP 3646.
- k. 2004 ONSWSIAT 311.
- l. *Beauvais et Élix et Personnel Alter Ego inc & C.S.S.T. Richelieu* (2003) AZ-50175973 (CLP).
- m. *Fortier et CLSC Basse Ville Limoilou Vanier*, (2002) AZ-01307640 (CLP); *Larivière et C.L.S.C. J-Octave Roussin*, (2000) AZ-00300348 (CLP); *Coop. Solid. Serv. Domicile Québec et Côté*, (2009) AZ-50588979 (CLP); *Martel et CSSS Lucille-Teasdale* 2010 QCCLP 7727 (homecare worker involved in an accident 15 minutes before arriving at her first client's home – claim denied); *Géronto + inc. et Joseph* 2015 QCCLP 2466 (homecare worker injured before arriving at her first client – her claim is denied, but she's referred to the no-fault automobile insurer in Québec, the SAAQ, by the judge).
- n. *MPI-Moulin à Papier Portneuf et Sylvestre*, 2014 QCCLP 2428.
- o. *Roy c. Société canadienne de la Croix-Rouge*, (1998) AZ-98301452 (CLP).
- p. International humanitarian missions have led to many injuries sustained by Canadian workers and covered under the Quebec workers' compensation legislation: *M... B..., et S... A... et CSST*, (2006) AZ-50374590 (CLP), *Roche ltée (Groupe conseil)* (2004) AZ-50258118 (CLP), *Vaillancourt et Agence Canadienne de Développement International*, (2001) AZ-01303585 (CLP), *Sicard et Communauté Urbaine de Montréal* (1999) AZ-99301709 (CLP), *Croteau et Ville de Montréal*, 2010 QCCLP 7244.
- q. *Sergerie et Groupecho Canada* (2007) AZ-50449130 (CLP).

- r. *WSIAT Decision No. 1572/16*.
- s. RCSM II, “C3-20.00: Employer Provided facilities”. See for example *WCAT-2014-03717 (Re)*, 2014 CanLII 91576 (BC WCAT), <http://canlii.ca/t/gk86z> (accessed on 11 February 2019).
- t. *AB WCAC 2015 48909*.
- u. *AB WCAC 2013 0703*.
- v. *AB WCAC 2015 1175; AB WCAC 2015 0447*.
- w. Compare *AB WCAC 2014 1107* with *AB WCAC 2016 0494*.
- x. *AB WCAC 2014 0985; AB WCAC 75503*.
- y. Compare RCSM II, C3-19.00D Business trips to “C3-20.00: Employer provided facilities.”
- z. *Boudreau et Groupe Compass Ltée et CSST*, 2010 QCCLP 3313; *Demontigny et Groupe Plombaction inc.*, 2014 QCCLP 3173
- aa. *Zaheeruddin et Canada (Ministère de la Défense Nationale)*, [1991] C.A.L.P. 935; *Hrynkiw et Alcan Aluminium Ltée*, [2006] C.L.P. 729; *Cégep Édouard-Montpetit et Fortier*, 2013 QCCLP 6329; *Tremblay et Société de transport de Montréal-Directions corporatives*, 2013 QCCLP 5735.
- bb. *Bilodeau et Transport Doucet & fils et CSST*, 2013 QCCLP 5005; *Laliberté & associés inc. et Roy*, (2005) AZ-50333314 (CLP).
- cc. *WSIAT Decision No. 20159/11*, paragr. 82 (Ontario).
- dd. *MC Forêt inc. et CNESST*, 2016 QCTAT 3315.
- ee. The employer pled unsuccessfully that the worker's deportation should justify the suspension of his compensation benefits in *Salade Etcetera inc. et Mora Figueroa*, 2014 QCCLP 937.
- ff. Workers’ Compensation Board - Alberta. Changes to Maximum Insurable Earnings, [https://www.wcb.ab.ca/assets/pdfs/employers/EFS\\_Changes\\_to\\_Maximum\\_Insurable\\_Earnings.pdf](https://www.wcb.ab.ca/assets/pdfs/employers/EFS_Changes_to_Maximum_Insurable_Earnings.pdf) (2019, accessed 11 February 2019).
- f (2019, accessed 11 February 2019).

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- hh. There can be exceptions as discussed in *WSIAT Decision No. 1720/12*; *WSIAT No 1617/12*.
- ii. *Gmzun et Cirque du Soleil*, 2015 QCCLP 1312; *Pépinière 55 inc. et Torres-Angel*, 2018 QCTAT 2538.
- jj. *WSIAT Decision No. 1773/17* (Ontario) paragr. 72.
- kk. *Les Cochonnailles Champenoises et Petit Renaud*, 2012 QCCLP 5865.

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