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Compensating Work-Related Disability
The Theory, Politics, and History of the Commodification-Decommodification Dialectic

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In 2015, the last year for which we have complete Canadian data, workers' compensation boards recognized that 852 Canadian workers died from work-related injuries and diseases and 232,629 workers experienced disabling injuries requiring them to take time off work. About 13 percent of those injured will have permanent disabilities of varying severity.[1] These figures significantly underestimate the true burden of work-related disability for at least three reasons. First, the percentage of the paid Canadian workforce covered by workers' compensation has been shrinking. In 2008, it was estimated to stand at about 80 percent, although coverage bounced back to about 85 percent in 2015.[2] Second, there is widespread evidence of claims suppression and underreporting of lost-time injuries. A 2014 review estimated that workers do not claim 20 percent of their injuries and illnesses and that employers do not report 7–8 percent of injuries, misreport 3–9 percent of lost-time injuries as non-lost-time injuries, and actively suppress some inestimable number of eligible claims.[3] Finally, for a claim to be recorded it must be accepted by the compensation board, and there is evidence that compensation boards are rejecting claims more frequently. For example, in Ontario, the percentage of denied claims increased from 4 percent in 2001 to 8 percent in 2010.[4]

But even if the current official toll of death, disease, and injury significantly underestimates its true incidence, the situation today is likely as good as it has been since the rise of industrial capitalism, which has taken

a terrible toll on workers' bodies.[5] It is not surprising, therefore, that regulating hazardous working conditions and compensating workers who suffered disabling work-related injuries were among the earliest working-class demands and among the first to be addressed by protective labour laws. Yet despite widespread recognition that it is unacceptable for workers to be killed and injured because of dangerous work and that compensation must be paid to those who are, conflict over health and safety and workers' compensation laws regularly recurs. The goal of this chapter is to explore the theory and politics of recurring regulatory dilemmas in labour law and to examine a few key moments in the history of workers' compensation, which illustrate why these conflicts are endemic and so intractable.

The Theory and Politics of Regulatory Dilemmas in Labour Law

In capitalism, workers commodify their time and capacity to work by selling it on labour markets to employers. In theory, the terms and conditions of employment contracts are the product of negotiation and are mutually acceptable. From the perspective of capital, labour is an ordinary commodity, bought and sold in labour markets just as other commodities are bought and sold in other commodity markets. But labour power is not an ordinary commodity, as unlike, say, steel beams it cannot be separated from its seller, who retains agency over its use even after its sale. Moreover, labour power is not produced for the market in response to market demand but is socially reproduced outside the market. When the commodification of labour threatens the well-being of workers, materially or psychologically, or undermines the conditions of social reproduction, resistance is likely to ensue. The conflict between the drive to commodify workers' capacity to work and resistance to its dysfunctional and harmful consequences produces an enduring if uneven commodification-decommodification dialectic, which is a central insight of the work of both Marx and Polanyi.[6]

For Marx, problems arise principally after the transaction is complete. As he famously put it, workers, having freely sold their labour power (their "hide") in the labour market, follow the capitalist into the hidden abode of production, where they can expect nothing but a hiding.[7] Workers discover that the commodification of their labour power results in their legal subordination to their employers, who are driven to maximize their output in order to extract surplus value and maximize profits. For Marx, the retention of surplus value (the difference between the value of what is produced and what the worker is paid) by the employer constitutes exploitation. At certain points in time, workers view this exploitation of their labour power,

and the laws that enable or tolerate it, as normatively unfair, and they resist it at the point of production and/or through political action, producing a commodification-decommodification dialectic driven by the politics of class conflict.[8]

A variation of the Marxist account contemplates some situations in which class collaboration may emerge within this dialectic. Erik Olin Wright identifies situations in which worker organization reaches a sufficient level of strength that prevents employers from dominating the class-conflict game, imposes intolerably high costs of conflict, or actually assists employers in overcoming their own collective action problems that, if resolved, would leave employers better off as a class. Under these circumstances, a politics of class cooperation may develop in regard to particular issues. Such cooperation does not change the underlying structural conditions of the commodification-decommodification dialectic, but it does allow for a different kind of politics to emerge in response to it, a politics of class cooperation.[9]

From a Polanyian perspective, the fictive nature of labour as a commodity also arises from the fact that labour is not produced for the market. But for Polanyi, the dysfunctional consequences of labour's commodification do not emerge principally in the hidden abode of production but rather in the threat commodification poses to social reproduction, as norms of reciprocity and redistribution are replaced by the pursuit of self-interest without regard to others. In a similar vein, Nancy Fraser has recently discussed what she characterizes as the background conditions that make capitalism possible. These include social reproduction, the earth's ecology, and political power.[10] From a Polanyian/Fraser perspective, the unbridled commodification of labour and its subordination to market forces creates existential threats to society and, in Polanyi's famous formulation, produces a counter- or double-movement that, if successful, results in the partial decommodification of labour by re-embedding the market in the social. Although Polanyi does not have a clear theory of how this will occur, his theoretical framework suggests that a broader coalition of social forces, potentially including some employers, will emerge to produce this countermovement. Fraser writes of "boundary struggles" to defend human or social reproduction from economic production that are not only driven by functionalist imperatives but are also informed by norms and social practices indigenous to non-economic spheres. As a result, class is not the only level at which struggle over the commodification-decommodification dialectic occurs; rather, multiple sets of actors enter the fray under the banner of diverse norms.

Although there are important differences in Polanyi and Fraser's perspectives, their analyses lead to a common conclusion that the dialectic may be driven by a broader-based politics that draws on norms of social solidarity. For simplicity's sake, we will call this the politics of social protection.

Workers' compensation is an excellent case for exploring the politics of the commodification-decommodification dialectic and how that politics has unfolded over time. From the beginning of industrial capitalism, work injuries have proven to be particularly problematic, as they illustrate in the most dramatic way possible the inability to separate labour power from the worker who sold it; when a worker is injured or killed at work, it is not just the worker's labour power that is damaged or destroyed but the human being. Moreover, in a social formation in which unwaged dependants rely on the income of a waged worker, those dependants also suffer the consequences of work-related disabilities and deaths, both economically (the loss of access to the wage and the increased cost of care) and personally. These devastating losses explain why struggles to prevent work injuries and to compensate injured workers began with the rise of industrial capitalism, which set the dialectic in motion and has kept it in play.

Because the commodification-decommodification dialectic is a structural feature of capitalist relations of production, it is endemic as long as those relations exist. However, conflict is not constant, and its development and the forms it takes are contingent on a wide range of historically specific factors, which we will look at more closely when we turn from theory to history. However, it will be helpful first to distinguish between two ideal types of conflict. The first challenges the commodity status of labour and is typically based on normative claims grounded outside the market. "Our health is not for sale" is a slogan that captures this ethos. The second accepts the commodity status of labour and draws on norms rooted within the market. Claims from within labour market norms might take the form of a demand for higher wages or a higher wage replacement rate for injured workers. Of course, these are ideal types, and in the messy reality of workers' compensation struggles the lines between the two kinds of claims are often blurred. For example, from one perspective a claim for full compensation for a partially disabled worker to continue until the worker is able to find employment might be viewed as a purely economic demand, which employers resist because of its cost. However, the demand may also be fuelled by a deep sense of injustice about being treated as a disposable commodity, and employer resistance may be driven by a concern that full compensation would partially decommodify labour by enabling injured workers to remain

out of the labour market. Despite these complications, the distinction is analytically useful for understanding and interpreting the history and politics of workers' compensation struggles.

History of the Commodification-Decommodification Dialectic in Workers' Compensation

A full history of this dialectic in workers' compensation is beyond the scope of this chapter and so instead it focuses on a few key moments and issues: the creation of a contract-based compensation regime and the shift to the tort regime and then the no-fault regime, followed by an overview of the recurring conflict over the compensation of workers with permanent disabilities within the no-fault regime.

It was not until the nineteenth century that workers and their families first began suing their employers for work-related disabilities and fatalities. While the earliest case concerned a boy employed in a mercantile setting, soon thereafter the litigation was dominated by adult male workers employed in industries at the core of the first Industrial Revolution, including railways and factories. Because there was no legal precedent for these claims, common law judges were left to develop the guiding principles and in so doing opted for a contract regime rooted in market liberalism. In a string of cases, beginning with *Priestly v Fowler* in 1837 and crisscrossing the Atlantic, judges fashioned the legal presumption that workers voluntarily assumed the risk of injury from hazards that were known or ought to have been known to be present in the workplace, including the risk of injury from the negligence of fellow servants.[11] The reason for adopting this presumption was market economics. Workers would "naturally" demand higher wages to incur risks and so it was legally presumed that in their contracts of employment they agreed to incur the risk of injuries from hazards known to be present in the workplace in exchange for the wages they were paid. Therefore, they were not entitled to further compensation if those risks materialized in disabling injuries. The same result was reached even if the court acknowledged that the old master and servant law implied a duty of care on the part of employers. In a liberal market economy, the implied terms of employment contracts washed away older duties arising from status relations.[12]

The creation of this regime can be understood through the lens of the politics of class conflict, although it was a pretty one-sided affair, skewed heavily towards employers, occurring at a time when workers generally had little organizational or political power. Although the judges responsible for selecting the model might not have seen themselves as acting in class terms,

they were not naive about what they were doing. They were ideologically committed to the individualistic or laissez-faire outlook that predominated among men of their class at the time. They embraced the view that labour should be treated as a commodity, no different in principle than any other.[13] Canadian common law judges slavishly followed English precedent, giving it full effect while revealing little of their own thoughts on the law.[14]

The contract model served employers' interests well; it made the cost of hazardous working conditions low and fairly certain by effectively relieving employers of any legal obligation to compensate injured workers. Workers were ill served by the model, which deprived them of access to post-injury compensation. Moreover, because most workers lacked the bargaining power to command significant risk premiums, employers had little incentive to reduce hazards. However, the certainties that the model produced helped to concentrate and make visible the respective and contradictory interests of workers and employers and also attracted the attention of some reformers who became concerned about its impact on child and female labour in factories and its adverse effects on social reproduction. Such concerns created space for the politics of class conflict and social protection.

The widespread perception among reformers and workers that it was unfair to expose workers to hazardous conditions and to not compensate them when injuries materialized led them to demand reforms soon after the contract model was entrenched. Both class and social protection politics drove occupational health and safety (OHS) reform. For workers, the rosy image of the labour market as a realm of freedom was, in this regard, a lie; they experienced hazardous work as an imposition rather than as a choice. Social reformers, on the other hand, were much more concerned that the unrestrained pursuit of profit was creating physical and moral dangers that were interfering with the reproduction of the next generation. Darcy Bergin, a Conservative member of Parliament, spoke to these concerns in support of protective factory legislation he introduced in 1885: "The future of the children is in our hands ... their health, their life, their faith and their morals are at stake ... that they may not become holocausts on the altar of mammon – these are among the objects of this Bill."[15]

England enacted protective labour law before Canada did, and that often set a precedent followed in this country. In the area of work-injury compensation, workers in England successfully lobbied for legislation in 1880 that provided workers with a statutory claim for compensation from their employers if they could establish that their injuries were the result of employer negligence, making tort rather than contract the underlying basis for

compensation. However, if the worker pursued a statutory claim, recovery was limited to a maximum of three years' wages, even in the case of a fatality.[16] Developments in Ontario took a slightly different route, but reached the same result. In 1881, the Ontario legislature enacted the *Railway Accidents Act* (RAA). The preamble signalled dissatisfaction with the results of the contractual model: "Whereas frequent accidents to railway servants and others are occasioned by the neglect of railway companies to provide reasonable measures of protection against their occurrence." The Act then went on to set standards for railway construction and maintenance and allowed workers injured as a result of violations to sue as if they were not employees. The effect was that workers could make tort-like claims for these injuries because the contractual presumption of voluntary assumption of risk was removed.[17] Five years later, under pressure from a revived trade union movement led by the Knights of Labor and facing more workers at the polls as a result of amended election laws, the Ontario government followed England's lead and enacted the *Workman's Compensation for Injuries Act* (WCIA), bringing in the negligence model of liability for work injuries.[18]

The creation of a tort-based regime of compensation was a departure from market voluntarism insofar as it gave workers a nonwaivable right to sue for injuries resulting from employer negligence, but it did little to decommodify labour power. Damages were measured by the injured worker's lost income, capped by a three-year limit, if the worker chose to sue under the statute, but without a minimum entitlement independent of income level.[19] In short, the change affected how labour power was priced and compensated but hardly touched its commodity status.

While the creation of the WCIA/tort regime can be understood chiefly as the product of class conflict, the shift from tort to no-fault workers' compensation is better explained by a politics of class cooperation, with class conflict playing a secondary role. The starting point of the story is the failure of the tort regime to stabilize the regulatory dilemmas of market liberalism. Although the tort model allowed some workers to obtain some compensation some of the time, numerous problems remained. For the majority of injured workers, who did not have access to private benefit plans,[20] their first recourse was to seek compensation directly from their employer. While some employers may have paid compensation voluntarily, benevolence was in limited supply and workers would have to sue and prove negligence in order to recover damages. Where employers purchased employer liability insurance, as a number of large employers did, any claims would have been referred to the insurer, who had a direct pecuniary interest in minimizing

payouts. Here workers often faced delay or received settlement offers significantly below their legal entitlement, which might be accepted because of economic duress. If no settlement were reached, the employee might sue, but this was risky because the downside could be crushing; if the suit failed, not only would the worker be left without compensation, but he or she would be liable to pay the legal costs of the employer as well as his or her own. Even if the worker were successful in the initial action, the employer/insurer might appeal, resulting in further delay and more legal costs. As a result, many workers were left dependent on scarce family resources or on the community at large through charity or municipal welfare where it was available. Thus, compensation for work-related disability remained highly uncertain even after the WCIA.

The tort model also had considerable drawbacks for employers. While the outcome of litigation was less certain than it had been under the contract model, Ontario judges seemed almost relieved not to administer the contract regime, and they implemented the WCIA in the spirit in which it was enacted.[21] The effect was to increase employers' liability for work injuries, making their cost a greater concern. Some employers purchased employer liability insurance, but it is doubtful that insurance markets were sufficiently developed to provide coverage for small employers and, in any event, the practices of insurance companies in resisting claims created ill-will between injured workers and employers. This concern increased in the first decade of the twentieth century as a result of deepening class divisions and the growing popularity of socialist and radical ideology. In addition, employers were unhappy about the perceived inefficiency of private insurance because the proportion of premiums paid in benefits to injured workers was low relative to the high commissions paid to brokers and the large costs of defending claims.[22]

As a result, employers had a collective interest in an alternative to the tort model, one that compensated injured workers regardless of fault, provided that it would neither significantly increase their costs nor put them at a competitive disadvantage. A public insurance scheme based on mandatory participation and collective employer liability, at least within industry groups, could go a long way towards meeting these concerns by taking compensation costs out of competition and allowing them to be passed on to the consumer. This was certainly the view of William Meredith, who headed the commission appointed by the Ontario government to study the problem and whose report proposed something along these lines. Employers would be "simply tax gatherers" from the public, who would pay the cost

of workers' compensation through higher prices.[23] This made the no-fault alternative to tort tolerable.

However, a public insurance scheme did not resolve employer concerns completely. First, an insurance scheme with standardized premiums created its own collective action problems, in particular the possibility of free-riding employers seeking to gain a competitive advantage by underinvesting in safety, as they would not have to bear the full cost of their accidents. The problem of policing free riders was partly addressed by health and safety legislation that required employers to meet public standards, but enforcement was generally lax. So other steps were taken. Some provision was made for premiums to be adjusted through merit rating, although these powers were little used initially because of their inconsistency with the principle of collective liability.[24] The other legislative measure provided for the creation of German-style industry safety associations funded by workers' compensation premiums. These associations were given the authority to promulgate and enforce rules, as well as to educate their members, thereby lowering information costs about risk reduction and providing a mechanism to police employers whose hazardous practices threatened to increase everyone's premiums.[25]

But the politics of class compromise do not tell the whole story. Employer acceptance of no-fault workers' compensation insurance can also be traced to a more general change in thinking about the causes of workplace injuries. While nineteenth-century market liberalism embraced notions of individual responsibility, increasingly in the twentieth century statistical thinking about accidents began to predominate. Work injuries were seen as a predictable result of engaging in productive activity. As I.M. Rubinow noted in his early treatise on social insurance, "'an industrial accident is not an accident at all.' Rather, it is a definite and constant characteristic of modern industry, subject to definite rules and laws."[26] As such, the search for individual fault seemed misguided as a basis on which to award compensation to workers who predictably suffered disabling injuries.

The retreat from individual fault paralleled and complemented an ideological shift away from laissez-faire principles and practices. One of the most striking examples of this change comes from an unsigned article published in 1910 in the *Labour Gazette*, a monthly publication of the federal Department of Labour, on the topic of workmen's compensation:

> The basic fact from which legislation of the class specifically designated as "Labour Legislation" proceeds is that labour, though bought and sold,

> is not a "commodity" in the ordinary sense of the term, inasmuch as its purchase and sale always involve in the most intimate way the welfare of a human being ... The securing of the comprehensive body of legislation of this class ... marks the overthrow of the economic doctrine of *laissez faire* ... the effect of which was to minimize or abolish the distinction between labour and other commodities and to leave the condition of the labourer to be determined almost wholly by competition and the law of supply and demand.[27]

Karl Polanyi could not have said it better. Clearly, one of the most dysfunctional consequences of unchecked commodification was the adverse effect of work injuries and disability on the family wage system.

But to what extent did workers' compensation decommodify labour? Here we need to return to the distinction between conflict over the price of work-related disability and conflict over labour's commodity status. Employers were deeply concerned about both issues. In regard to price, even though the no-fault regime took compensation costs out of competition, employers still had a collective interest in holding down the system's costs. Employers understood that even if, in principle, the public would pay, consumer demand for most products was elastic and at some point higher prices would noticeably reduce consumption levels. Moreover, even in the early twentieth century Ontario producers in some sectors were competing with out-of-province and international producers, who were not covered by the provincial scheme and whose compensation costs could be lower. Thus, compensation costs were not fully taken out of competition. It was also crucial to employers that the boundaries of the system be maintained so that only costs associated with work injuries would be compensated, otherwise employers and consumers would be "unfairly" burdened with the cost of benefits that should be paid out of general revenues if they were to be provided at all.[28]

Measures to address these concerns included a wage-replacement rate of 55 percent, capping insurable earnings at $2,000, and imposing a seven-day waiting period before benefits were payable. Employers also pushed for employees to pay part of the premium, but Meredith held firm, arguing that workers already contributed by the restrictions placed on the amount of their compensation.

Employers were equally concerned about anything in the system that might weaken labour's commodity status or the work incentive. Therefore, injured workers should be given neither the permission nor the means to stay out of the labour market longer than was absolutely necessary for them to recover. Thus, benefit levels were not just a cost issue but also went to employers' interest in maintaining workers' labour market dependency.[29]

Disagreements over price and commodification sometimes played themselves out in debates about whether workers' compensation was "social legislation." For example, workers argued for minimum compensation levels regardless of income in order to keep workers and their families out of poverty, something that previous regimes had failed to do.[30] Meredith was sympathetic to this concern: "I suppose everybody recognizes, at least I certainly do, that this Bill is more than a mere compensation to workmen Bill. It is social legislation and it is intended to provide for the workman and save the community from bearing the burden of his impairment."[31] However, apart from funeral expenses in the case of fatal accidents, Meredith was adamantly opposed to minimum entitlements, even for dependent spouses and children.[32]

Common interests coalesced around the basic principle of a public, compulsory, no-fault workers' compensation (WC) system. The benefit to workers was the certainty of a modest entitlement to compensation, even though they lost the right to sue employers for potentially greater sums where employer negligence caused the injury. For employers, the WC system promised to remove a source of worker discontent, standardize the cost of workplace injuries within industries at modest levels, and make insurance more efficient by increasing the percentage of premiums that went to injured workers.

But the system also built in conflicts that could only be managed, not resolved. One endemic conflict was over the level of compensation. Workers had an interest in increasing benefit levels to improve their standard of living after a disabling injury, while employers had an interest in limiting them to contain costs. The scheme set out a replacement rate and capped insurable earnings, but there was nothing sacred about these determinations. Inflation would inevitably eat away at the earnings cap, so that over time workers would demand that the cap be increased just to retain the value of the coverage. Employer resistance to more generous benefits went beyond their economic cost and reflected a concern that higher compensation levels would weaken workers' incentive to return to the labour market.

Another structural conflict revolved around how workers with permanent disabilities would be compensated. The scheme was based on the

principle that workers were to be partially compensated for their lost earning capacity. But how was that loss to be calculated? From the employers' perspective, permanently disabled workers should be compensated only for the percentage of lost earning capacity directly caused by the injury. This portion could be permanently retired and excused from the labour market. The remaining capacity, however, had to remain commodified and active in the labour market. Therefore, any additional problems the worker experienced in selling his or her residual labour power was non-compensable, as it could be affected by factors such as the unemployment rate, a problem outside the scheme. Workers regarded the distinction between the retired and the active portion of labour power as entirely artificial, as it overlooked the reality that the worker was still a whole human being and that the damaged portion of his or her capacity could not be neatly severed without affecting residual earning power. Regardless of the prevailing labour market conditions, workers with disabilities attributed their difficulty in finding employment to the work injury and demanded full compensation for their wage loss until they found work that, with their compensation, returned them to their pre-injury income.

We can see that workers with permanent impairments grasped intuitively that disability was socially constructed by political economic relations – that, under capitalism, a worker with an impairment was disadvantaged when seeking to find employment, as a result of employers' expectations that workers with impairments would be less productive than able-bodied workers, that they would be more prone to re-injury, or that they would require some accommodation to be able to perform their jobs. Workers with impairments knew from experience that, even at marginally lower wage rates, they faced discrimination in the capitalist labour market because employers anticipated that less surplus value could be extracted from them.[33]

The no-fault compensation system coalesced workers' and employers' distinct collective interests but the strength of those collective interests, as well as the capacity to act collectively, varied over time.[34] Space does not permit a more comprehensive historical examination of how these contradictions played out in the Ontario WC regime; however, a focus on the compensation of workers with permanent disabilities provides a good lens through which to view the recurring dilemmas within the regime.

The original 1914 *Workmen's Compensation Act* mandated a wage-loss system for compensating workers with permanent disabilities. According to that model, a Workmen's Compensation Board (WCB; the name was

changed to the Workers' Compensation Board in 1981 and to the Workplace Safety and Insurance Board [WSIB] in 1998) determined a compensation benefit solely by calculating the wage loss caused by the injury, not taking into account any "social" factors that might make the worker less employable and result in additional wage losses. This approach was consistent with insurance and commodification principles, but it was difficult to administer: it required not only isolating the portion of the loss due exclusively to the injury, which was difficult, but also ongoing monitoring of workers' future earnings to determine whether the wage loss was continuing. In 1917 the statute was amended to permit the board to adopt a rating system based on a "meat chart" that established the percentage of wage loss associated with the loss of a body part or a capacity. This too was a way of commodifying the loss suffered by the worker, but it was administratively simpler and provided rough justice in that it ignored the fact the same loss of capacity did not affect the wage earnings of all workers equally as the "meat chart" provided.[35]

Standardized calculations of wage loss did not satisfactorily resolve the issue for labour, which continued to demand full compensation for the *actual* wages lost. Labour movement pressure during the Great Depression in the 1930s led a number of provincial governments to appoint commissions to investigate WC and make recommendations.[36] In Ontario, the commission was headed by Justice W.E. Middleton, who made his perspective clear: "The whole scheme of the Act and the principle underlying it is in the nature of insurance." Thus any proposal inconsistent with insurance principles was rejected. This sealed the fate of labour's demand that workers with permanent partial disabilities be fully compensated, despite Middleton's recognition that workers with permanent disabilities were disadvantaged in the labour market: "[T]oo frequently this condition is accentuated by general industrial conditions and it seems inequitable to place any burden of unemployment insurance upon the industries concerned under the guise of workmen's compensation."[37]

Middleton's report did not satisfy the labour movement, but it was not until the Second World War when labour militancy reached unprecedented levels that it gained the political clout necessary to get the government to enact legislation partially responsive to its concerns. In 1942, the Ontario government amended the Act to empower the compensation board to award additional benefits to permanently injured workers if the board believed that would be more equitable than the rating system.[38] However, the board was not required to award additional benefits, and so the labour

movement continued to press the issue in the postwar era, albeit with limited success. The Roach Commission, appointed in 1950, reiterated the position of the Middleton Commission, as did the McGillvray Commission report seventeen years later. Both reports took the position that high unemployment among disabled workers was a problem for the welfare system to address, not for WC.[39]

In the late 1960s, the rise of a militant injured workers' movement, centred among Italian immigrants in Toronto, altered the political context of the commodification-decommodification dialectic, giving workers' compensation issues unprecedented political traction.[40] Initially, the board expanded rehabilitation services in an effort to address the serious problems workers with disabilities experienced re-entering the labour market, but this strategy met with limited success. In the face of this reality, it became increasingly difficult to uphold the distinction between compensating only for the functional loss and not for the real labour market impact of the impairment. Under growing pressure, in 1974 the Ontario government amended the Act to give the board the power to award benefit supplements to injured workers who returned to work for less than their pre-injury earnings. As well, those who did not return to work could continue to receive full benefits unless they failed to cooperate in a medical or vocational rehabilitation program or did not accept suitable work that was available.[41] The legislation was amended one year later to permit the board to provide supplemental benefits to workers with permanent partial disabilities when the impairment of earning capacity was significantly greater than normal, provided the worker participated in a program of medical or vocational rehabilitation or accepted or was willing to take an available job that the board deemed suitable.[42]

In the years that followed, injured workers fought with the board to be awarded these new supplemental benefits and met with some success. Improved benefits for injured workers, however, increased the costs of compensation and raised employer premiums, which attracted the attention of employers, who mobilized and pressed their concerns before the board and the government. In response to these pressures, the compensation board commissioned a report from private consultants, which found that more generous benefits were reducing the incentive to return to work. The WCB followed up with its own paper, which valorized employers' concerns that rising compensation costs were making Ontario industry uncompetitive. The politics of decommodification and price were clearly engaged. As a solution, the WCB paper proposed a dual award system that would more

accurately compensate permanently injured workers for their "real" wage loss. Robert Elgie, the minister of labour, then commissioned Harvard law professor and former chair of the British Columbia Labour Relations Board Paul Weiler to undertake a system review.[43]

Weiler stepped into an "unhappily polarized" environment marked by "incipient class struggle" over workers' compensation.[44] In his 1980 report, he made a number of recommendations that workers supported, but the recommendation that attracted the most attention and antipathy from injured workers was the dual award system, which would see permanently injured workers receive a lump-sum payment that acknowledged their non-economic losses and an ongoing payment tied to actual wage loss. This approach would replace the rating system, which had only recently been amended to enable more disabled workers to get supplemental benefits. Workers feared that a return to the wage-loss system, abandoned by the board in 1917, would lead to benefits being reduced if the WCB deemed that a worker could earn an income from a suitable job, even if a suitable job was not available. Employers were more favourably inclined towards the proposal, but they were worried that the board might not take into account labour market conditions in calculating actual wage loss, especially in the context of a recession.

The twisted politics that followed cannot be fully recounted here but, in a nutshell, while the Ontario government did not immediately implement the wage-loss plan, it did make other changes, including higher wage replacement levels, more vocational rehabilitation, and an independent appeal tribunal. Employers became even more alarmed that the workers' compensation system was being incrementally transformed into a social welfare program that enabled injured workers to remain outside the labour market and gave them access to generous social services, driving up the cost of the system.[45] They were supported by a 1987 KPMG report, which found that real claim costs had indeed increased and singled out supplemental benefits as the most significant contributor to the rising cost per claim.[46] In June 1988, the government introduced Bill 162, which would implement the dual award system recommended by Weiler but which also would provide injured workers with a limited right to be reinstated to their old jobs. In announcing the Bill, the minister emphasized that its goal was to tie compensation more closely to economic losses and help injured workers return to the workforce.[47] Both workers and employers were wary of how it would be implemented, but eventually the employers were won over and the Bill was enacted in 1989.[48]

There is relatively little research on the impact of the Bill 162 reforms on compensation costs, but there is some evidence that it failed to produce the cost savings employers wanted, largely because its implementation occurred under a New Democratic Party (NDP) government, which was elected in 1990.[49] As a result, the WCB was reluctant to reduce economic loss benefits by deeming workers able to earn a wage even though they were not employed.[50] The defeat of the NDP government in 1995 and its replacement by an ideologically right-leaning Conservative Party opened the door for change, especially given the strong employer demand for the costs of the system to be reined in.[51] The government enacted legislation in 1997 that prioritized returning injured workers to work, either with the employer where the injury occurred or through a labour market re-entry (LMR) plan.[52]

There were numerous problems with this approach, including an annual review of loss of earnings (LOE) benefits for six years after the injury, but one consequence was that, after workers completed the LMR program, they were deemed capable of earning a wage, and their loss of earnings compensation was reduced accordingly, even if no suitable job was available. Many disabled workers suffered benefit cuts as result, as LMR programs were often of poor quality, and only about half of all workers who completed these programs found employment.[53]

In 2004, a Liberal government took office. Legislative reform of workers' compensation was not high on its list of priorities, but in 2007 it removed the word "deem" from the Act and reinserted the requirement that a suitable job had to be "available" before workers could have their LOE benefits reduced.[54] Yet, despite this change, injured workers continue to have their LOE benefits cut.[55]

The WSIB (renamed from WCB) subsequently launched a Benefits Policy Review Consultation, chaired by Jim Thomas. In his 2013 report, he refers back to his earlier involvement in workers' compensation issues in the 1980s and 1990s:

> I recall it was impossible to find enough common ground within the stakeholder community to move forward with benefits policy reforms. It would appear that little has changed since then. Stakeholder opposition, stemming from the fact that what is a "win" for injured workers is an additional cost for employers, and vice versa, has thwarted attempts at reforming benefit policies.

He goes on to bemoan this state of affairs and express the belief that "a principle-based approach to benefits policy might be a key to unlock the paralysis that has occurred over decades of failed attempts at policy reform."[56]

Thomas's report did result in a policy change by the board, but one that was deeply controversial. Effective November 1, 2014, the board's policy on pre-existing conditions changed to give adjudicators greater scope to reduce benefits for permanently injured workers who had a pre-existing condition, even if that condition had not been adversely affecting their ability to work prior to the accident. Not surprisingly, injured worker advocates have denounced the policy change as a betrayal of a foundational principle of workers' compensation law: that all workers are entitled to the full benefit of the law without discrimination based on their physical condition.[57]

This brief history of workers' compensation in Ontario demonstrates the strength of the commodification-decommodification dialectic as a driving force in producing the recurring regulatory dilemmas that are endemic to this area of law. Workers' interests in challenging their commodity status or demanding a greater share of socially produced wealth, in this case by insisting on being fully compensated for their work injuries, runs into capital's interest in maintaining labour market discipline and maximizing profit by extracting surplus value. The politics of the commodification-decommodification dialectic vary, as does the intensity of conflict. There have been moments when workers successfully mobilized, sometimes attracting the support of reformers concerned about the dysfunctional consequences of gloves-off capitalism on social reproduction, but the current turn of governments towards austerity politics has penetrated the workers' compensation system, shifting the focus to cost containment at the expense of benefits for injured workers generally, and especially those with permanent work-related disabilities.

NOTES

1 Association of Workers' Compensation Boards of Canada, *Detailed Key Statistical Measures Report – 2015*, online: <http://awcbc.org/?page_id=9759>.

2 *Ibid* and Jaclyn Gilks & Ron Logan, "Occupational Illnesses and Diseases in Canada, 1996–2008" (Ottawa: Research and Analysis, Occupational Health and Safety Division, Labour Program, Department of Human Resources and Skill Development Canada, 2010). In Ontario, only 65.8 percent of the workforce was covered in 2015. Workplace Safety and Insurance Board, *By the Numbers: 2015 WSIB Statistical Report*, online: <http://www.wsibstatistics.ca/en/s1workplaces/>.

3 Institute for Work and Health, *Suppression of Workplace Injury and Illness Claims: Summary of Evidence in Canada* (Issue Briefing, October 2014).
4 Ontario, Workplace Safety and Insurance Board, *Statistical Supplement to the 2010 Annual Report* (Toronto: Workplace Safety and Insurance Board, 2011), Table 3. The WSIB stopped publishing these data in more recent reports.
5 There is no good quantitative study of work injuries in industrializing Canada. For the United States, see Mark Aldrich, *Safety First* (Baltimore, MD: Johns Hopkins University Press, 1997); for England, see PWJ Bartrip & SB Burman, *The Wounded Soldiers of Industry, 1833–1897* (Oxford: Clarendon Press, 1983).
6 Beverly J. Silver, *Forces of Labor* (Cambridge: Cambridge University Press, 2003) at 16–20.
7 Karl Marx, *Capital*, vol. 1 (New York City: International Press, [1867] 1967), c 6.
8 Kevin Purse, "The Evolution of Workers' Compensation Policy in Australia," (2004) 14 Health Sociology Rev 8, makes the argument that policy development is driven by the conflicting interests of business and organized labour.
9 Erik Olin Wright, "Working-Class Power, Capitalist-Class Interests, and Class Compromise," (2000) 105:4 Am J Sociology 957.
10 Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1957); Nancy Fraser, "Behind Marx's Hidden Abode" (2013) 86 New Left Rev 55.
11 *Priestly v Fowler* (1837), 3 M&W 1; *Farwell v The Boston and Worcester Rail Road Company* 45 Mass. (4 Met.) 49 (1842); *Bartonshill Coal Co v Reid* (1858), 3 Macq. 266.
12 In theory, an employee could still sue his or her employer if the injury were caused by a hazardous condition, personally created by the employer, not in the contemplation of the parties, and not partly caused by the worker's own negligence, an almost impossible task. See *Deverill v Grand Trunk Railway* (1866), 25 UCR 517 (UCQB).
13 For example, see Michael Ashley Stein, "Victorian Tort Liability for Workplace Injuries" [2008] Illinois L Rev 933 at 964–75; Leonard W Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge, MA: Harvard University Press, 1957) at 319.
14 Eric Tucker, "The Law of Employers' Liability in Ontario, 1861–1900: The Search for a Theory" (1984) 22 Osgoode Hall LJ 213; RCB Risk, "The Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective" (1984) 27 UTLJ 403; Bruce Ziff, "Warm Reception in a Cold Climate: English Property Law and the Suppression of the Canadian Legal Identity" in John McLaren, AR Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 103.
15 *House of Commons Debates*, 5th Parl, 3rd Sess, Vol 2 (1 April 1885) at 881 (Hon Darby Bergin).
16 Bartrip and Burman, *supra* note 5 at 126–57; *Employer's Liability Act, 1880*, 43 & 44 Vic, c 42.
17 *Railway Accidents Act*, SO 1881, c 22.
18 *Workman's Compensation for Injuries Act*, SO 1886, c 28. Gregory S Kealey, *Toronto Workers Respond to Industrial Capitalism* (Toronto: University of Toronto Press, 1980).

19 The act did not preclude workers from suing under the common law, but if they did then they were back in the contract model.
20 We know relatively little about the operation of these plans in mid- to late nineteenth-century Ontario, but existing evidence suggests their coverage was limited and benefits were generally low. See Dustin Galer, "A Friend in Need or a Business Indeed? Disabled Bodies and Fraternalism in Victorian Ontario" (2010) 66:1 Labour/Le Travail 9. As well, a few employers (mostly railroads) provided mandatory insurance plans, funded largely by employee contribution, which required employees to waive any other claims against the company. The 1886 law provided limited space for employer insurance plans to displace statutory tort actions, provided they paid benefits at least as generous as those under the act.
21 Tucker, *supra* note 14; RCB Risk, "'This Nuisance of Litigation': The Origins of Workers' Compensation in Ontario" in David H Flaherty, ed, *Essays in the History of Canadian Law*, vol 2 (Toronto: Osgoode Society, University of Toronto Press, 1983) 418.
22 Michael Piva, "The Workmen's Compensation Movement in Ontario" (1975) 67 Ontario History 39 at 46–47; Risk, *supra* note 21 at 458–63. Also see FW Wegenast, *Workmen's Compensation for Injuries* (Toronto: Canadian Manufacturers Association, 1911) for comments on the inefficiencies of the insurance system. Robert Maton aptly described this system as one of variable benefits to workers and variable costs to employers. See Robert Maton, *The Emergence of Neo-Liberalism in Ontario's Workers' Compensation System* (PhD Thesis, University of Toronto, 1991) at 43–49 [unpublished].
23 Quoted in Risk, *supra* note 21 at 461.
24 Donald W Rogers, *Making Capitalism Safe* (Champaign: University of Illinois Press, 2009) at 140–41, cites a Canadian compensation official who warned his American colleagues about the danger severe merit rating posed to collective liability.
25 Javier Silvestre, "Improving Workplace Safety in the Ontario Manufacturing Industry, 1914–1939" (2010) 84 Business History Rev 527.
26 IM Rubinow, *Social Insurance* (New York: Henry Holt, 1913) at 49.
27 "Legislation with Respect to Workmen's Compensation in Canada," *Labour Gazette* (November 1910) 546 at 546. A similar view is expressed in another unsigned article, "Compensation for Injuries to Canadian Workingmen" (1918) 54 Can LJ 281 at 281–82:

> The tendency to look upon the laboring man as a mere chattel in industry is rapidly passing away; there is a general admission to-day not only that labour is a vital necessity in all industrial endeavour, but also that it must be conserved, protected and inspired to its best use. It is agreed that society is held together by the laws of social solidarity; the interests of all its classes are bound together in the general welfare of the community's life; ... it is impossible for society or one class of society to rise while one social group is held down by unjust and unnecessary limitations. It is further agreed that labour has made a vast and indispensable contribution to our industrial development; the products of industry are all composite structures and the labouring

man can look upon them and justly claim that not merely his muscle, but also his brain, his skill and his sagacity have entered into their creation. It is only to be expected, therefore, that the working man, when accidently injured or killed, should receive a large and increasing share of attention.

28 Grant Duncan, "Workers' Compensation and the Governance of Pain" (2003) 32 Economy and Society 449, makes a similar point from a Foucauldian perspective.

29 See Robert Storey, "From Invisibility to Equality? Women Workers and the Gendering of Workers' Compensation in Ontario, 1900–1925" (2009) 64 Labour/Le Travail 75 at 83–84, for a discussion of early concerns to avoid decommodification in the workers' compensation system.

30 *Ibid.* For the United States, see John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, MA: Harvard University Press, 2006) at 129–34.

31 Sir William Ralph Meredith, *Final Report on Laws Relating to the Liability of Employers to Make Compensation to Their Employees for Injuries Received in the Course of Their Employment which Are in Force in Other Countries* (Toronto: L.K. Cameron, 1913) Minutes of Evidence, vol 2, 577–78.

32 *Workmen's Compensation Act,* SO 1914, c 25, s 33(5). Meredith's support for insurance principles also led him to reject a proposal from employers that pensions for workers with permanent disabilities be limited in amount or duration. See, Meredith, *supra* note 31 at 464–71.

33 Marta Russell & Ravi Malhotra, "Capitalism and Disability" (2002) 38 Socialist Register 211.

34 Nob Doran, "Maintaining the Simulation Model in the Era of the 'Social': The 'Inquiry' System of Canadian Workers' Compensation, 1914–1984" (1994) 31:4 Can Rev of Sociology & Anthropology 446, makes a similar point from a more Foucauldian perspective about the way in which the workers' compensation scheme involved the creation of a grammar of compensation that provided the dominant framework within which organized labour and workers operated, but that from time to time was contested by workers whose common sense experiences conflicted with the bureaucratic discourse within which they had to fit themselves. Jeffrey Hilgert, "Building a Human Rights Framework for Workers' Compensation in the United States: Opening the Debate on First Principles" (2010) 55 Am J Industrial Medicine 512, does not see the workers' compensation regime as containing a commodification-decommodification dialectic, but rather views it as another way of instantiating market liberalism and trumping social rights.

35 SO 1917, c 34. Maton, *supra* note 22 at 73–80 has an excellent discussion of this issue.

36 *Labour Gazette* (February 1931) 122 (ON); (March 1931) 267 (NB); (April 1931) 389 (AB). Nova Scotia, *Report of Workmen's Compensation Commission* (Halifax: King's Printer, 1937).

37 Ontario, *Report of the Commissioner in the Matter of the Workmen's Compensation Act* (Legislative Assembly, Sessional Paper 37, 1932) at 6, 7, 14.

38 SO 1942, c 41.

39 Ontario, *Report on the Workmen's Compensation Act* (Toronto: King's Printer, 1950); Ontario, *Report of the Royal Commission in the Matter of the Workmen's Compensation Act* (Toronto: Commission in the Matter of the Workmen's Compensation Act, 1967) at 36–51.

40 Robert Storey, "'Their Only Power Was Moral': The Injured Workers' Movement in Toronto, 1970–1985" (2008) 41 Histoire sociale/Social History 99; Robert Storey, "Social Assistance or a Worker's Right: Workmen's Compensation and the Struggle of Injured Workers in Ontario, 1970–1985" (2006) 78 Studies in Political Economy 67; Injured Workmen's Consultants, "Brief to the Resources and Development Committee of the Legislative Assembly of Ontario" (27 June 1972).

41 SO 1974, c 70.

42 SO 1975, c 47, s 6.

43 Maton, *supra* note 22; Storey, "Social Assistance," *supra* note 40; and Nick McCombie, "Justice for Injured Workers: A Community Responds to Government 'Reform'" (1984) 7 Can Community LJ 137.

44 Paul Weiler, *Reshaping Workers' Compensation for Ontario* (Toronto: Ministry of Labour, November 1980) at 17.

45 See, for example, J Edward Nixon, "Financial Status of Workers' Compensation, Current Trends and Bill 162" in Harold P Rolph, ed, *Workers' Compensation: New Costs, New Challenges, New Opportunities* (Toronto: Canadian Institute, 1988) A-1.

46 KPMG Peat Marwick, *Workers' Compensation Board Cost Study, Main Report* (Toronto: KPMG Peat Marwick, September 1987).

47 Ontario, Ministry of Labour, *Workers' Compensation Reform 1988* (Toronto: Ontario Ministry of Labour, 1988) at 7–8.

48 SO 1989, c 47.

49 E.g., Richard Allingham & Douglas Hyatt, "Measuring the Impact of Vocational Rehabilitation on the Probability of Post-Injury Return to Work" in Terry Thomason & Paul Chaykowski, eds, *Research in Canadian Workers' Compensation* (Kingston, ON: IRC Press, 1995) 158, focuses on return to work outcomes, not costs.

50 Tellingly, the NDP did not repeal the wage-loss system but rather appointed a former NDP member of the Legislative Assembly and injured worker activist, Odoardo Di Santo, as chair of the WCB. It subsequently created a bipartite governance structure but also modified the indexing formula in a manner that would reduce future benefit increases. SO 1994, c 24.

51 For a critique of the crisis claims, see David K Wilken, "Manufacturing Crisis in Workers' Compensation" (1998) 13 J L & Social Policy 124.

52 SO 1997, c 16.

53 Garth Dee, "Dealing with the Aftermath of the *Workplace Safety and Insurance Act, 1997*" (1990) 14 J L & Social Policy 169; Joan M Eakin, Ellen MacEachen & Judy Clarke, "'Playing It Smart' with Return to Work: Small Workplace Experience under Ontario's Policy of Self-Reliance and Early Return" (2003) 1:2 Policy and Practice in Health and Safety 19; Bonnie Kirsh & Pat McKee, "The Needs and Experiences of Injured Workers: A Participatory Research Study" (2003) 21 *Work* 221; Ellen MacEachen et al, "The 'Toxic Dose' of System Problems: Why Some Injured Workers Don't Return to Work as Expected" (2010) 20 J Occupational Rehabilitation 349;

KPMG, *WSIB Labour Market Re-entry (LMR) Program Value for Money Audit Report* (KPMG, 3 December 2009), online: <http://www.wsib.on.ca/WSIBPortal/faces/WSIBDetailPage?cGUID=WSIB014204&rDef=WSIB_RD_ARTICLE> at 19.

54 SO 2007, c 7, Sch 41, s 1(1).

55 Injured Workers' Consultants, "Deeming Adds Insult to Injury" (2007), online: <http://injuredworkersonline.org/documents/law-and-policy-submissions/Subm_IWC_20071107_Bill187_Deeming.pdf>.

56 Jim Thomas, *WSIB Benefits and Policy Review Consultation Process: Report to the President and CEO of the WSIB* (May 2013) at 3.

57 *WSIB Ontario Operational Policy*, 15-02-03 (03 November 2014); Sara Mojtehedzadeh, "Injured Workers Routinely Cut Off WSIB by Improper Rulings," *Toronto Star* (21 July 2016), online <www.thestar.com>.

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