1 Introduction

Workers' compensation - and particularly the workers' compensation system in British Columbia - is a closely studied and oft-criticized model of providing disability insurance and liability containment. Yet amidst the torrent of words spoken and written on the topic, the position and concern of the employer is often marginalized, stereotyped or misconstrued.

That state of affairs is as much the responsibility of employers, and especially their representatives, as it is of other stakeholders or system administrators. The focus of the system has tended to shift towards those who receive benefits from the system, rather than those who receive protection from liability. Where the employer has returned as a player, it is typically viewed first as a "payer" into the system, rather than as a recipient.

This study seeks to illuminate the role of the employer in the BC workers' compensation system by examining the intersection of the employer with the appeals structure in place since 1991. It is as much a look at who the employer is, as how the appeals system works. The study attempts to show the employer as it truly is - a complex entity with a mix of roles, values and interests, but is not an apologia.

2. The employer's roles

It is standard practice to consider the employer primarily as the "payer" in the WC system - the source of funds for the collective liability insurance scheme which provides benefits to workers, the self-funding entity among employers who self-
insure. This is a basic, obvious truth - one that is so ubiquitous in considerations of the employer that, like the full moon, its enormity obscures the rest of the stars in the sky.

A very brief review of the employer's other roles, both in society at-large and in the context of workers' compensation, may be helpful in appreciating its unique situation.

The employer is, first and foremost, the supplier of goods and services to the community. Whether public or private, corporation or proprietorship, the employer is an enterprise offering its wares in the market.\(^1\) The term "enterprise" is a helpful one, for as old-hat as it may sound the word captures better than any other the dominant reality of organized economic activity - it is enterprise that builds, ships, sells and employs.

Immersed in academic study, we sometimes forget that public and private enterprises capture the time, passion and intelligence of their owners, managers and employees alike. Many have a driving single purpose, whether it be to provide supervision of child foster care, or better frisbees. It is important to remember that very often the single-minded, intensely personal devotion of enterprise owners and managers to their business goals will, naturally enough, shape their values and decisions in many contexts.

That said, the concern of the enterprise is not simply a calculus of money. For most participants in modern enterprise, in fact, the amount of money personally

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\(^1\) The author is thankful to the American Law Institute's Reporter's study on Enterprise Responsibility for Personal Injury, ALI Philadelphia 1991, for encouraging the use of this term in this context.
at-stake is circumscribed within the limits of salary. While making, or saving money, is instrumental to the survival and prospects of any enterprise (particularly private ones), there is a mix of personal and other values at-work in the decision-making of employers - be it in how they manage their activities, or how they conduct their relationship with the workers’ compensation system.

Having established that the employer is an enterprise wherein people pursue their own (or others’) goals and deal in the market of personal and social products, what else do we need to know?

The employer enterprise has several other dominant characteristics in society:

- it employs people, and thus gives those people work, a reasonably predictable livelihood and some use for their talents. Even today, when traditional degrees of loyalty and inter-dependence between employers and employees are believed to have frayed, there is a sharp level of mutual need in this relationship. Employers enable most people to make something of their lives, be it while working or while spending the paycheque. This fact is sometimes less obvious to employers than it is to their employees; it is particularly obvious to the unemployed.

- it organizes resources, human, material and otherwise, into a seemingly coherent use and strategy. Whether selling hotdogs on the sidewalk or making silicon chips in a hermetically-sealed factory, enterprises form a continually changing and impossibly intricate lattice-work of transactional relationships, all mutually dependent and useful. What is unique about these relationships, typically, is that they exist only to be useful to the participants, and when no longer productive, are hastily abandoned in favour of some other party.
• the employer enterprise either either pays-into, or spends out-of, the treasury (the Workers' Compensation Board is a rarity in this regard, doing neither).

• it shapes, and controls, the physical environment where most working people spend a high proportion of their waking time. This, clearly, is particularly pertinent to understanding the employer's relationship to the system of insuring against work-related disabilities. British Columbia is notable, among North American jurisdictions, for a tighter integration of regulations touching-upon both the employer's control of the workplace environment and the provision of insurance against hazards in that space.²

• The employer enterprise, already described as the repository and engine of its governing parties' values and interests, translates those concerns not only into business decisions, but also into political statements (by funding political groups viewed as sympathetic to its aims, for example). Public enterprise is uniquely situated to exercise this muscle, having in its hands the levers of the state - enabling it to shape, direct or sometimes thwart the will of the Legislature.

• The employer enterprise typically funds, or acts as a conduit for funds, supporting social enterprise. Examples include contributions to the provincial health insurance schemes on behalf of employees, Canada Pension Plan contributions, employment insurance and, of course, workers' compensation premiums. (There is important evidence, however, that the employer's role here is more of a collector of these payments from their workers than an
actual payer, but there is no question the employer is legally liable for these payments into the systems named).

- The employer frequently organizes resources to provide benefits to employees such as group insurance for disability, dental, drug coverage, etc, and to provide funding for activities (training, tuition assistance) and of course pensions (CPP and, just as important, private pension plans).

- The employer is, finally, a focal point of efforts to attribute liability. Whether the enterprise be responsible for product defects, inadequate work, vicarious liability for its employees acts or culpable for damages suffered by those in its employ, the employer enterprise is a catch-basin of complaint, claims and costs. This is not to suggest that these responsibilities are misplaced, but simply to note that a high degree of societal liability hangs on the hook of employer enterprise.

Narrowing our view to the employer enterprise as actor in the workers' compensation system, these roles predominate:

- as noted earlier, experience-rated payer of premiums for collective liability;
- rate group member;
- or, as also noted above, directly liable payer of benefit and administrative costs in cases of self-insuring employers;
- reporter of most accidents and claims;
- provider of evidence in respect of almost all claims;

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2 BC's legislation has, since its inception following the 1916 Pineo Report, held these functions under the Workers' Compensation Board.
• primary provider of re-employment opportunities, both to recovered and permanently partially disabled workers;
• tacit supporter, or opponent, of accident claims;
• appellant against claims, benefits and services decisions made by the Board or Review Board;
• object of investigations and penalties for violations of occupational safety regulations;
• the recipient of protection from liability in any instance of work-related injury or disease producing damage or cost to an employee;

3. The historic compromise

No look at workers' compensation can omit mention of the historic compromise, a classic trade-off of rights and obligations wrought by legislatures across the western world at the outset of this century. As the industrial age accelerated the pace of production and change, increasing numbers of working people were injured and disabled by their methods of work. With the courts viewing these cases through the traditional prism of tort law, workers were unable to seek full redress without clearing such legal barriers as contributory negligence and co-workers' liability.

Confronting the moral, political and social injustice of this situation, legislators ultimately peeled away these defences from employers, a process which shifted employers' focus from defeating liability case-by-case to escaping liability altogether. Thus was born "collective liability", a pooling of risk among enterprises, asking each to share in the cost and offering all immunity from the consequences of how they managed their workplaces.
The scheme had, and retains, a wonderful simplicity: workers abandoned their common law rights of redress from tortfeasor employers, and in return were granted a simple and accessible (but limited) insurance. Employers accepted group responsibility for the cost of the system, with no support from the Treasury, and in return were granted absolute immunity from liability to their employees.

Yet the historic compromise may not have been the balanced trade-off that some historians describe. It is pivotal that the employer's situation in the workers' compensation regime always be understood to be immunity from liability (or, in the case of self-funding employers under the scheme, severely curtailed direct liability). This provides enormous benefits to the employer, including:

- delegation of the entire question of employee injury and disability to a third party;
- freedom from the cost and distraction of litigation;
- freedom from the cost and market risks of providing private insurance benefits to workers;
- extremely limited cost, confined to a premium payment which did not, for most of the century, greatly reflect actual safety or accident histories in the workplace;
- automatic exculpation from any "moral" accountability for workplace injury (a side effect of the "no fault" approach to compensation);
- perhaps most significant (but impossible to measure) is that the employer, no longer accountable financially for injury costs (and to a certain degree unburdened of the moral taint once associated with being a tortfeasor) could now alter and adapt its productive processes with, perhaps, less regard to
the issue of health and safety in the workplace. The great benefit of this, to employer enterprise and the economy as a whole, was that efficiency-inducing change could occur perhaps at a faster pace. The hazards for the people in the workplace, of course, hardly need stating.

Another result, which burdened some employers and benefitted others, was the historic tendency of lower-risk and lower-cost employments to subsidize more hazardous enterprises. This has been examined in Ontario (Gunderson and Hyatt 1997) but British Columbia research on the issue of rate-group cross-subsidization is not available to this writer.

In addition, where wages have been reduced to account for the cost of workers' compensation premiums (as has been described in a number of studies) the employer's contribution to the system is less that of "payer" than of "relayer" of funds from the worker's pocket to the collective liability pool. In this model, the employer is little more than an administrative actor in the system (and perhaps not the best choice).

In summary, the historic compromise effectively wiped elements of workplace safety, employee health and insurance cost from the cultural, financial and moral radar of the employer enterprise. In doing so it freed enterprise to focus more on its productive goals, rather than its injurious by-products. This is the foundation upon-which Canadian workers' compensation regimes are built, a truth reflected in how employers have adapted to recent changes designed to invite them into the system more actively.

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3 Intergenerational Considerations of Workers' Compensation Unfunded Liabilities, Miles Corak ed.
4 Changes to the BC Workers’ Compensation System

The British Columbia workers’ compensation regime has undergone a series of reviews and statutory changes (the 1966 Tysoe report, the 1974 alterations to the appeal system, the 1988 Munroe report, the 1991 reforms and the 1995 adjustments thereto) intended to reflect and respond to the chorus of complaint which tends to surround any workers’ compensation board.

Of concern to this study are the changes which affect employer interests and which have attracted employers to participate more fully in the Board’s decision-making systems (particularly the appeals structure). There is an increasing sense among administrators that employers are playing a greater role in each claim, and in matters of assessment, classification and penalty orders. It is useful to trace (a) what may have motivated employers to become more involved and (b) how that increased involvement has truly manifested itself.

A series of key developments have affected employer enterprise in British Columbia so as to induce their participation in the WC system.

Perhaps most significant, in 1986 the Board adopted a comprehensive Experience-Rated Assessment (ERA) method of calculating premiums. While employers remained in classification rate groups, and assessments continued to be charged against payroll, the assessment rate within a rate group was changed from a fixed charge to a range. Depending upon incidence of disabling injury (and extent of cost related thereto) an employer’s assessment rate would be adjusted annually.
from a minimum of 66% of the average, to as much as 133% of that average. For smaller employers (those with a payroll less than twice the maximum wage rate) the experience rated adjustments are halved under ERA.

Another development, noted in various studies, is that from the 1980s onwards, the costs of benefits, services and administration of vocational rehabilitation (VR) services "exploded." This is significant not only because it produced increased cost to the system (and its payers) but also because the Board's attempts to involve employers in the VR process put a spotlight on this particular issue. Also, employers are generally more deferential in matters of medical ability than in job-related issues, where they have not only expertise but also the power to accommodate.

Further, competitive pressures on employer enterprise in the early 1990s meant that profit depended increasingly upon utilization and margin, rather than upon increasing product prices. This in turn shifted attention to cost-reduction as a management tool (and even as a growth mechanism) which inevitably drew interest to previously ignored cost-centres (i.e. workers' compensation). This occurred in concert with the widening reach of ERA, a program which increased costs by as much as 33 percent (and which offered employers something new, the chance to reduce costs by just as much through claim cost reduction).

It is important to note the impact of the 1991 amendments to the statute as they affected the appeal system. Prior to those changes workers and employers took their claim-related appeals to the Manager for review, and then to the external Workers' Compensation Review Board (WCRB). Final appeals could be taken to a
quorum of Appeal Commissioners. The 1991 amendments, driven by the Munroe Report recommendations\(^5\) appear to have focussed largely upon the grievances of workers:

Claims for compensation have the greatest consequence to the most people coming into contact with the system; for obvious reasons, claims for compensation are also more emotionally charged than practically all other areas of the Workers' Compensation Board's work. Certainly, it is the claims process -- including appeals -- which produces the greatest controversy.\(^6\)

This concern was reflected in the key provisions of the Munroe Report, as enacted by the legislature in effective 1991:

- an internal Appeals Division, with an independent Chief Appeals Commissioner, was established within the Board. Reporting to the new governance body, the Board of Governors, the Chief Appeal Commission held a level of hierarchical authority and autonomy analagous to that of the Board's CEO and President.

- the external WCRB was retained, essentially untouched - leaving in-place a body perceived to be more flexible and open-minded towards workers and their claims than the Board or its former Appeals Commissioners;

\(^5\) Report and Recommendations to the Minister of Labour and Consumer Services by the Advisory Committee on the Structures of the Workers' Compensation System of British Columbia, October 31, 1988 ("the Munroe Report") pp 14-24
• the previous final review mechanism, the quorum of Appeal Commissioners, was apparently perceived as being narrower and less generous in its view of cases than the WCRB;

• the WCRB seems to share the view that the new Appeals Division is more worker-friendly, as the proportion of worker appeals allowed at the Review Board declined in the early 1990s.\(^7\) This could well reflect that the Review Board, recognizing that there was now a slightly more open-minded court of last resort, felt comfortable in tightening its approach to certain types of claims that it previously might have allowed;

• this view of the post-1991 Appeals Division appears to have been correct, as its early years showed a significantly higher degree of worker appeals allowed than the predecessor body.\(^8\)

• another important innovation from the Munroe Report was the virtual elimination of Board referrals for review of WCRB rulings. Where previously the Board was quite aggressive in asking for scrutiny of Review Board findings (effectively appealing those rulings), the Munroe-inspired changes required the signature of the President/CEO to trigger such a review. Further, the review went to the new semi-autonomous Appeal Division. The result of this was the near-elimination of this method of challenging WCRB decisions.

• finally, the Munroe Report queried the Board’s practice of delaying or deferring its implementation of WCRB findings.\(^9\) The Munroe Commission

\(^6\) Ibid, p.17  
\(^7\) Still in Transition, p.72  
\(^8\) ibid
recommended a number of changes to practice designed to motivate the Board to respect WCRB findings. The WCRB itself adopted the practice of giving priority to appeals related to how the Board had implemented prior Review Board rulings. ¹⁰

What was the cumulative effect upon employers of these changes to the appeal system in the early 1990s? First, the final round of appeal was shifted to a body within the Board, but one with pronounced autonomy; the collapse of the Board of Governors system in 1995 only highlighted the independent nature of the Appeals Division.

Second, that new final appeal body showed a marked inclination to give broader consideration to worker appeals than had its predecessor. This meant that employers had a slightly less “friendly” final appeal entity than before 1991.

Third, the WCRB was left completely intact and with its strong sense of individuality and independence untouched; this continued its pattern of more expansive interpretation of the law and policy, its inclination to pronounce upon the legality of policy and its disinclination to retire from the field of policy-making. The virtual elimination of Board-driven reviews and pressure to implement WCRB rulings could only heighten this sense of autonomy and authority.

Fourth, while the Munroe report spoke at length about the evils of multiple engines of policy-making and the hazards of "external" final appeal bodies, it would appear that the system now in place replicates and magnifies those

⁹ Munroe Report, pp. 28-29
"problems." The Panel of Administrators owns ultimate responsibility for policy, having inherited that mantel from the Board of Governors in 1995. On the other hand, the Appeals Division (AD) is the final arbiter of case decisions, and thus tacitly of how the law and policy are to be interpreted. One internal study quoted the stakeholder community as holding the view that the Chief Appeals Commissioner, and by extension the entire Appeal Division apparatus, was palpably "pro-worker."¹¹ That doesn't prove the point anymore than the same stakeholders who allegedly held the President to be "pro-employer" but it does suggest that the tenor of appeals seemed to change in the 1990s following the Munroe-inspired amendments.

At the same time, the external WCRB continues to apply intellectual effort to forging and enhancing its own "quasi-judicial" role, going so far as to recently give itself jurisdiction in matters of Charter interpretation.

Finally, there is "the reality on the ground" - the way in which Board adjudicators and managers apply policy to facts on a daily basis, far from the commanding heights of policy-making but right where it counts - in the claims. Given the 1995 deletion of the Manager Review policy¹² there is arguably less formal coherence in decision-making and a more disparate approach taken to decisions than in the years when Managers spent up to a fifth of their time reviewing files and altering decisions.

¹⁰ Workers’ Compensation Review Board, Chair’s Annual Report 1995
What employers face, no less than workers, is a confusing amalgam of decision-trees, rules of procedure, competing authorities and differing interpretations of policy. It is simpler for employers than workers in one way - employers may appeal matters of classification, assessment and penalty directly from the Board to the AD, bypassing the WCRB. In matters of claims issues, which the Munroe Commission rightly noted is the overwhelming bulk of matters to be adjudicated at the Board and in appeals, employers must go through the same process as workers (whether as appellant or respondent):

1. an initial decision by the Adjudicator
2. a reconsideration process, and/or Manager Review
3. appeal to the WCRB
4. appeal to the Appeal Division
5. worker appeals to the Medical Review Panel, from initial, WCRB or AD - results of which are binding on all bodies.

With the greatest respect to the authors of this system, it seems designed to produce the greatest number of appeals to the most bodies, each with intersecting or overlapping measures of their own authority, each with their own reading of the law, and each with some degree of autonomy.\textsuperscript{13} Even if the goal was to clarify the facts and offer maximum quality adjudication to the parties, the result appears to the outside observer to be a system where the interested party always has a reason, and a forum, to challenge a decision. It is thus striking to note that at least one study quoted employers (or their representatives) as

\textsuperscript{13} The February 16, 1998 revised flowcharts (Claims Adjudication & Appeals: First and Second Set of Flow Charts) by S.Samuels, K.Ryan and S.Pape is an admirable documentation of an extraordinarily complicated chain of processes for appeal. These charts alone are a good evocation of the procedural maze awaiting the appellant and respondent in the BC workers' compensation system.
complaining that they were unfairly treated in respect of assessment, penalty and classification issues insofar as having only one level of appeal. It might not be surprising to hear that argument from representatives, but informed employers might understand the situation differently.\textsuperscript{14}

5. Incidence of employer appeals

As described above, the combined effects of competitive business pressure, the ERA, escalating costs (primarily related to VR, although loss of earnings pensions costs also increased in the 1990s) would seem to give employers increased incentive to participate in claims at all levels, particularly in appealing the classification and assessment issues which affect their premiums and in appealing claims decisions which increase the employer’s ERA costs.

While all of that was drawing the employer enterprise into closer contact with claims issues, the appeals structure became markedly more sympathetic to workers, with a deliberate shift in emphasis towards enforcing greater respect for Review Board rulings and more liberal interpretations of the law and policy.

All of this would logically lead to one result: a sharp increase in employer participation in the appeals system.

But it didn’t. A review of Appeal Division and Review Board statistics show some increase in employer-driven appeals, but arguably less than one would expect in the circumstances:

\textsuperscript{14} The Workers’ Compensation Appeal System, report to the Royal Commission by R.W. McGinn of
What is important to note is that there is an employer in about 100% of cases;

Of appeals from the Review Board to the Appeals Division in 1996, employers lodged 127 of 1482 objections (8.5%);  
Appeal Division statistics should show a significantly higher level of employer participation than do figures from the Review Board, as employers can only take their first (and final) objection to the AD in matters of assessment, classification and penalty. This is the case - 38.5% of 1996 appeals were based on "employer issues." Yet given that this is the employer's only avenue of appeal, this is hardly a startling statistic.

What is startling is the 500% increase between 1995 and 1996 in employer requests for "relief of cost" decisions at the Appeal Division (a finding that prior conditions caused or aggravated the worker's compensable condition, so as to warrant removal of some or all of the cost from the employer's accident cost record.)  
While some observers attributed this phenomenon to a small clique of employer representatives at work fomenting objections among employers there are two important facts to note about these relief of cost objections. First, they are the one way an employer can shrink its accident cost record.
costs without taking benefits from the worker; second, almost all of these appeals were withdrawn, abandoned or denied at the AD. The significance of these points is that employers have recently targeted only an issue with minimal impact on employees, and have had so little success that a sharp decline in these objections is predictable.

Looking farther back in time than 1995-96, we see that there was a long flat period of predictable employer appeals (between 30 and 50 a year at the Review Board between 1981 and 1994) and a spike in 1995 to over 100. Yet while this is a significant increase, in the context of the system it is miniscule (remember that in 1994, for example, paid lost time claims exceeded 80,000, typical of every year since the late 80s).

Even employer appeals of occupational health and safety penalties, which peaked in 1992-93 at the Appeal Division, barely exceeded 300 cases. In these instances, workers do not benefit directly from the penalties paid, and are not dependent upon the decisions for their income. Thus, employers are under no moral obligation to accept penalty decisions they might otherwise disagree with. In these circumstances, where the employer can appeal without risk to the welfare of the worker, one might expect a higher incidence of appeals. Yet we don't see it in penalties, just as we don't see it among claims decisions.

Looking at these appeal statistics, in the context of a system which receives about 200,000 claims a year and pays disability benefits in over 40% of those cases, employer-initiated appeal activity can fairly be described as insignificant.

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20 WCB Annual Report of the Appeal Division, p.17 - some 85% of employer appeals for relief of cost were not processed by the AD in 1996, and another 14% were denied.
As a participant in the system (and as a source of cost, which Board administrators often claim) the employer is almost a non-player.

This seems remarkable, particularly when we recall that employers are (a) the only financial supporter of the system (b) have experienced a serious increase in putative responsibilities as a source of employment and VR participation (c) have become subject to the ERA and (d) have lost ground in terms of influence over the appeals structure since 1991.

6. Tracing and accounting for employer participation rates

Where employers may be more active, and this is not statistically documented to the author’s knowledge, is in two realms:

- day to day claims management - by being in more regular contact with claims adjudication staff, management, the worker and the trade union;
- as a respondent in the appeals system, offering evidence and argument in cases in opposition to the claims of their employees.

Anecdotal evidence would suggest both of these phenomena have occurred, which suggests by inference that employers are enjoying a great enough degree of success (or a satisfactory experience) in these roles so as to negate interest in formal appeals.

Appeal bodies’ rule changes requiring appellants (mainly workers) to offer better pre-hearing disclosure of evidence and arguments may have reduced the entry
rate of workers into the WCRB, for example, and by doing so reduced employer's sense of peril in the appeal system.

Yet these factors, as important as they may be in individual decisions by employer enterprises in relation to the WCB, do not seem significant enough to account for the still remarkably low level of employer participation in the system. While speculative, the author's review of the literature and statistics suggests certain other factors may account for this fact.

The first, and often-overlooked, element is that workers' compensation has traditionally not been a concern of employers, and despite their recent heavy investment in administrative personnel to manage claims and paperwork, WC is still viewed as a marginal issue for employer enterprises. As described above, the historic compromise lifted the burden of these issues from employers, and this remains part of the psychological landscape for employers.

Second, and most important, employer enterprises focus on what most affects the success of their efforts. Workers' compensation does not have a strong impact. The main reason, of course, is that WC insurance is still not very expensive. It is subsidized by competing employers in the rate group, and many rate groups are in-turn subsidized by other rate groups whose superior safety records make them "net losers" in the collective liability scheme.

While employers have vocalized their loathing of the Board's assessment policies and practices21 those complaints have been quieted somewhat by aggressive

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public relations tactics.\textsuperscript{22} While the Upjohn Institute found a "troubling" antipathy of employers towards the WCB, this is hardly surprising in the circumstance of the employer’s primary and most painful encounter with the Board - paying the premiums. What is surprising is how that antipathy, "suspicion and distrust"\textsuperscript{23} dissipates so quickly and is not found to be widespread in the claims context.

As stated above, a reason for this is that workers’ compensation costs for most employers are still small in comparison with other costs of production. While some predicted that ERA would inspire increased employer activity after its 1986-88 introduction, the fact that the top rate is only 33% higher than the rate group average means that an employer enterprise does not face a strikingly high financial penalty for being nonchalant towards claims costs.

This system, described as "moderate" by Allan Hunt\textsuperscript{24} is, to use workers’ compensation parlance, really quite "mild." While the system does provide a respectable reward-margin for top performers (the worst assessment rate is twice the best available rate under ERA) the fact is that employers’ efforts at cost-curtailment are probably best spent elsewhere than at the WCB. The most important factor, doubtless, is that claims costs are only included in ERA determinations for the first 2.5 years of the claim. While many expensive events can occur in that timeframe, the fact is that longterm permanent partial disability awards extend far longer, as do many cases of "temporary" disability. This limitation on the extent of claims costs counted towards ERA puts an

\textsuperscript{22} Still in Transition, p.253.
\textsuperscript{23} Ibid
\textsuperscript{24} Ibid, p. 184
absolute outer limit on when an employer can afford to be interested in the particulars of a case.

For it is in evaluating the opportunity-cost of a WCB appeal that the employer enterprise finds the real value of seeking to minimize costs. While "virtually costless to workers" who are afforded legal aid or worker adviser assistance, the appeal system typically exacts real costs from employers. Even those who are fortunate enough to secure the aid of an employer adviser must still invest hours of management and staff time in the production of a case; those who pay for representation feel an additional cost.

The myriad routes of appeal open to workers means that an employer dedicated to defending a denial, or even to challenging an allowance itself, faces high and repeated costs in an appeal. Add to this the decreasing chance of success for an employer in the early 1990s, and the cost-benefit analysis makes it remarkable that any employers initiate or heavily participate in the roundelay of hearings, "read and reviews" and procedural requirements.

Why do employers participate in claims appeals? Some of course are driven by cost, especially high accident and assessment classifications such as the forestry industry. A long-term strategy of challenging claims may reduce costs and keep assessments from exploding, and for some firms with multi-million dollar payrolls the sums available are too attractive to resist taking the chance.

Another rationale for appealing is suggested earlier in this paper, where the "enterprise" culture is described. Owners and managers often adopt a zealous,
single-minded focus on enterprise success; workers considered to be malingering are a slap in the face to this ethos and often rile a manager to action before the WCB. Part of this is a sense of repugnance at the worker’s perceived insult-to, and active assault on, the values of the enterprise.

Another part of it is the desire to communicate that repugnance to others, so that co-workers don’t begin to slide into casual claiming and prolonged subsidized absences on disability leave. It is important to distinguish this “cultural” rationale from the “cost” logic of advancing or responding to an appeal. The common experience of many employers is that they are driven by these values to combat the claim, and finally give up only when they realize that the administrative and/or representation costs have outstripped potential savings. By that point, the worker is often long-gone from the company and the sense of outrage among the managers has subsided. Typically the case will be abandoned, often with regret that the “system failed.”

The key point is that employer appeals are not always motivated by a concern for costs, but driven by other values, including fairness in the workplace and the longterm survival of the business upon which the entire workforce depends.

7. Summary of Findings

When this brief study was initiated, it was with the expectation that recent legal, policy and economic changes would have created conditions inspiring employers to increased rates of participation in the appeals system. There have been some increases in employer activity, but it is truly marginal in the overall context of the system - especially considering all the apparent incentives. The suspected
reasons, as stated above, are that workers' compensation costs do not exact a high enough cost to warrant a higher degree of employer participation. Related to that is that participation itself is very costly - in fact, by the time a claim reaches its peak costs (after 2 or 3 years of benefits and services - just when those costs no longer apply to experience rating) the active employer will have had countless encounters with decision-makers at various levels. It would seem feasible to guess that participation costs will ultimately outstrip any savings available.

Other reasons are related to the history and culture of workers' compensation, which has separated the employer from substantial legal, financial and moral liability for the cost and insuring of work-related injury. The focus of the system remains on workers and the Board, while employers have only lately been roped-into providing forms of vocational rehabilitation in the shape of accommodated employment, etc.

8. Implications of these Findings

The hazard of stating this analysis is that it will be taken to say "workers' compensation doesn't cost enough." That is not what this paper says; in fact, it says nothing about that topic at all. What is being said here is that employers do not seem particularly motivated to participate, and given the cost-benefit analysis typical to most enterprise culture, that must mean that participation simply doesn't pay.

One reason may be that assessment rates under ERA, particularly in the way they are contained by the merit/de-merit caps and time limits, do not adequately reflect the true cost of a claim.
Another reason may be that assessment rates do adequate reflect and fund claim costs, but that claim costs are inherently low enough so as not to impose a burden on most enterprises. This is not unlike the view, quoted earlier, that workers’ compensation costs are in fact passed onto employees in the form of wage reduction. That is seldom a consciously-considered factor in employers’ thinking, however, and may also be less true in jurisdictions with significant labour movements such as British Columbia.

It is equally possible that the cost of participation, in terms of effort, time and money, outstrip any savings that might be gained through more active participation. The author is particularly confident of this assumption, as it is difficult to conceive of an appeals system that could be less friendly to parties trying to achieve quick, consistent and dependable decision-making. This is not a criticism of management at the Appeals Division or WCRB - they appear to be doing a remarkably good job of steering participants through the turnstiles and mazes - but the system itself merits critique.

Finally, there is the issue of whether the current rates of employer participation are a concern at all; is it inherently good, bad or irrelevant that employers initiate less than 10% of all appeals in claims cases, or that their appeal decisions in instances of penalties and assessments are still remarkably low?

One possibility is that employers are actually satisfied with the way the system works. This would not be our first guess, especially listening to employer representatives and advocacy groups, but there is truth in the view that most injured workers are genuine, recover, return to work and in no way illicit disgruntlement (or worse) from their employers. Employers, just like workers,
have complaints about the system, but those complaints have to be weighed in the context of what appears to be an overall very high acceptance rate of Board decisions.

The writer's view is that the founders of workers' compensation in British Columbia meant to lift the burden of liability and claim management from employers, and did so very successfully. Where employers remained involved, particularly at the reporting stage, was to act as a collector of information (and money) for the Board, and to some degree as a "moral circuit breaker" on inappropriate claims. This very limited role has not really changed in British Columbia, VR policy and ERA notwithstanding.

The cost to the system, the writer submits, is that the employer's reluctance to participate denies information and analytic intelligence which might be useful to the decision-makers. It is the particular conceit of workers' compensation boards everywhere to dismiss the value of external input (even that of senior appeal bodies, if the Munroe report was right about the BC Board's approach to implementing WCRB findings) and there will be few in the system clamoring for more employer involvement. If they stay relatively uninvolved, as they are, this will pose a continuing cost to the system, and ultimately to employers collectively.

The question this leaves us with is whether the relatively low level of employer participation is reflective of their satisfaction with a system that imposes fairly low costs and demands, or whether there is pent-up demand for an appeals system which is less elaborate, complex and expensive. The author concludes that there is truth in both assertions, meaning that the appeal system imposes burdens which outweigh the value of participation to most employers.
This suggests that attempts to simplify the appeal system, and/or to increase the cost burden upon individual employers (through higher assessment rates, an altered ERA system or some new form of cost) will produce a corresponding increase in employer appeal activity.

Many Board administrators (and worker representatives, and most employers very likely) would view all these results as unwarranted and negative. The administrators' view, typically, is that the increased interest of the parties in their cases means greater time and effort spent on claim management, appeal processing and appeal adjudication. There is truth in this, although the writer again emphasizes that the involvement of the parties also brings more information, earlier, to the table as well.

Worker representatives would naturally object to changes which inspire employer activity in claims matters; workers are not looking for more obstacles to their claims being allowed. There has always been a remarkably sanguine attitude of most worker representatives (in other areas, if not BC) to the question of funding and cost control; increased spending and continuous expansion of the system are seen as natural costs of a fair regime.

Employers would also object, one would expect, to any effort to increase costs. Changing assessments is only one technique. An increasing number of Canadian jurisdictions are adopting a tacit form of "privatization" of vocational rehabilitation through worker re-employment programs and that, in the context of an earning-loss pension system, is shifting cost out of the collective liability
system and onto the employer directly. If such action is contemplated in BC, this will promote more appeals activity.

If a goal is to contain employer appeal participation, the best course would be to do nothing, or if increasing collective or direct liability, ensure that the appeal system remains as complex and difficult as it now is.

On the other hand, if changes are likely to inspire more employer participation, and there is value seen in that development, the better plan would be to move towards a simpler and faster form of appeal adjudication than currently exists. This could include these elements:

- alternative dispute resolution (discussed in another paper);
- a reduction in the number of appeal levels, perhaps through integration of the two existing bodies;
- a simplification of the appeal system, moving towards single person adjudicative panels rather than 3-member groups with their ostensible "sidesmen";
- "safety valve" entitlements whereby the worker regains certain rights to causes of action againsts the employer directly, leaving the current benefit regime and collective cost structure intact (discussed in another paper).

The clear signal from the facts on-hand is that employers will not participate in significant numbers if they are reasonably satisfied with the system and without cost advantage to appeal. Changes in the delicate balance could trigger small tremors such as those felt during the "relief of cost" explosion in the mid-90s, and

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26 Ontario is the obvious leader in this regard; Nova Scotia has adopted the approach less
significant change could have more seismic effects than that. The lesson appears to be that benefit and structural changes can alter stakeholder behaviour, and this lesson should be weighed in any adjustments to the current scheme.

aggressively.