Learning Objectives

After reading this chapter, you will be able to:

- Identify the occupational health and safety (OHS) rights and obligations of workers and employers.
- Explain the internal responsibility system and identify the challenges that exist to its operation.
- Assess the effectiveness of state OHS enforcement and recommend improvements.
- Identify and explain the Meredith principles and relate them to the historic trade-off embodied in workers’ compensation.
- Explain how experience rating reintroduces the concept of fault to workers’ compensation and assess the impact of this change.
Legislative Framework of Injury Prevention and Compensation

Toronto gas station attendant Jayesh Prajapati, 44, was killed on September 15, 2012 trying to stop a customer who drove off without paying for his $112 fill-up. Prajapati’s widow claimed that her late husband’s employer previously required him to pay for gas-and-dash losses and that this is why he tried to stop the driver.

Only months before Prajapati’s death, Deborah Pommer was told by a gas station operator in southwestern Ontario that she’d have to cover a $65 gas-and-dash or she would be fired. With only five weeks on the job, this was the second gas-and-dash Pommer was expected to pay.

“I felt very manipulated,” said Pommer. “I felt fearful. I was shaking. To be put on the spot like that it’s very difficult especially when it’s your livelihood. You rely on your income. I felt really intimidated.” Pommer quit and filed a complaint with the provincial labour standards branch.¹

While docking workers’ pay for customer theft is illegal in Ontario, the practice is commonplace in gas stations and restaurants.

That employers can routinely (and illegally) force workers to cover the cost of customer theft reflects that workplace laws are often unenforced. Workers are reluctant to complain about violations for fear of employer retribution, says Deena Ladd of the Worker’s Action Centre. “People are desperate to hold on
to jobs. Many workers only make complaints to the ministry after they’ve lost their job because if they make a complaint while they’re in the job, there’s no way to do it anonymously.”

In 2007, British Columbia passed a law requiring motorists to pay before pumping, following the 2005 death of Grant De Patie in Maple Ridge, BC. De Patie was dragged several kilometres under a vehicle after he tried to stop a $12.30 gas-and-dash. De Patie’s parents fought hard for this law, which eliminates the circumstances that give rise to this workplace hazard.

Employers have resisted laws requiring prepayment. According to Dave Bryans, CEO of the Ontario Convenience Stores Association, many Ontario stations can’t afford prepay technology. He also notes that 40% of customers pay inside the store and, in BC, the prepay requirement has resulted in a 25% drop in in-store business.³

The ongoing debate about pay-before-you-pump laws highlights how the law mediates conflicting demands between workers, who prioritize safety, and employers, who are generally most concerned about profitability. This example also reveals that the way in which laws are enforced affects the degree of protection they provide to workers. The reluctance of governments to impose new regulations or enforce existing ones also suggests that the state takes action on safety issues only when, and to the degree that, it must.

This chapter engages these topics by introducing the legal framework that regulates injury prevention and compensation. We begin by examining occupational health and safety legislation—laws that grant rights to and impose duties upon workers and employers in order to reduce the level of workplace injury—in Canada’s 14 different jurisdictions. Box 2.1 provides a primer on the seemingly complicated issue of jurisdiction and legislation. We then discuss other laws that affect workplace safety and highlight the overlap between workplace hazards and environmental hazards. Finally, we turn our attention to the compensation of workplace injuries and assess the workers’ compensation system.

### Box 2.1 Jurisdiction and legislation

Beginning in the 1970s, the federal, provincial, and territorial governments all enacted legislation—laws—that regulate OHS. The
distribution of powers under the Canadian constitution means Canada has 14 **jurisdictions** (federal, 10 provincial, and 3 territorial) when it comes to health and safety laws.

This sounds complicated, but in practice most employers and workers are covered by the OHS law of the province or territory in which they work. For example, approximately 90% of workers and employers in Alberta are subject to the *Occupational Health and Safety Act*. Alberta’s legislation is enforced by the provincial Ministry of Labour.

About 10% of the workforce is, however, covered by the OHS provisions in the federal government’s *Canada Labour Code*. The *Canada Labour Code* covers employees of the federal government. It also covers workers in industries that are, by their nature, interprovincial, such as banking, telecommunications, interprovincial transport, and uranium mining.

Each jurisdiction has its own amalgam of acts, regulations, policies, and guidelines. Broadly speaking:

- An **act** is a federal, provincial, or territorial law that sets out the broad legal framework around OHS in each jurisdiction. This legislation is passed by the legislature that has the authority to regulate work in the jurisdiction.

- A **regulation** typically sets out how the general principles of the Act will be applied in specific circumstances. A regulation is authorized by the government cabinet and is easier to change than an act. There may be several regulations that flow from an act, each addressing a different facet of the act.

- Guidelines and policies are more specific rules about OHS. These may or may not be legally enforceable, depending on what the act or regulation(s) of the jurisdiction permit.

The exact arrangement within each jurisdiction differs. For example, in Alberta, the bulk of the OHS rules appear in the *Occupational Health and Safety Code*. This code is a Ministerial Order (an order that the Minister of Labour can amend without cabinet or legislature approval) rather than a regulation (which requires cabinet approval to change).
There are also codes and standards that are established by various non-governmental bodies. For example, the Canadian Standards Association (CSA) and the American Conference of Governmental Industrial Hygienists (ACGIH) set standards that may affect the design of work. These standards and codes may be incorporated into OHS acts and regulations.

**OCCUPATIONAL HEALTH AND SAFETY**

Canadian OHS is based upon the *internal responsibility system* (IRS). The IRS assumes that workers and employers have a shared responsibility for workplace health and safety. Employers are obligated to take steps to ensure that workplaces are as safe as reasonably practicable. Employers are also required to advise workers of hazards and to require workers to use mandated safety equipment. The decision by governments to give employers the power to determine how to address workplace hazards bolsters employers’ broader management rights to control and direct work.

It can be difficult for employers to know when they have met their duty to make work as safe as reasonably practicable. Meeting the *reasonably practicable* standard means taking precautions “that are not only possible but that are also suitable or rational, given the particular situation.” The generally accepted test is that of due diligence. *Due diligence* is taking reasonable precautions and steps to prevent injury, given the circumstances. It is assessed using a three-part test:

1. **Foreseeability:** Reasonable employers are expected to know about the hazards of their business. Injuries that arise from events that other operators in the industry expect might occur are foreseeable events.
2. **Preventability:** Reasonable employers are expected to take steps to prevent injury. The normal steps include identifying hazards, preparing and enforcing safe working procedures, training and monitoring worker safety, and ensuring compliance with safety procedures. Injuries that arise because an employer did not take these steps are preventable injuries.
3. Control: Reasonable employers are expected to take action on hazards that they can control. Injuries that arise from such hazards suggest the employer failed to control these hazards.6

Employers who have taken the steps to address the hazards within their control to prevent foreseeable injuries have exercised their due diligence. This matters for two reasons. First, due diligence prevents injuries by controlling hazards. Second, if an injury occurs, employers who have completed the steps can use this due diligence as a defence to avoid penalties under OHS legislation.

To offset the power of employers under the IRS, governments have granted workers three safety rights:

1. Right to know: Workers have a right to know about the hazards they face in their workplace. While many hazards are readily apparent, chemical and biological hazards may not be. The right to know has given rise to systems such as the Workplace Hazardous Materials Information System discussed below, which provides workers with information about hazards materials and their safe handling.

2. Right to participate: Workers have the right to participate in workplace health and safety activities. Participation most often occurs through joint health and safety committees (JHSCs) but can be through other means. Box 2.2 discusses the effectiveness of JHSCs.

3. Right to refuse: Workers have the right to refuse unsafe work. The right to refuse represents one of the few instances where workers can disobey their employer. A refusal requires employers to investigate and remedy unsafe work. As we’ll see in Chapter 11, although the right to refuse sounds like a powerful right, it is one workers rarely use.

Box 2.2 Joint Health and Safety Committees

Joint health and safety committees are an important mechanism by which workers exercise their right to participate in OHS matters. JHSCs comprise employer and worker representatives who regularly meet to discuss health and safety issues. The “logic” of these committees is that
they marry the job-specific knowledge of workers with the broader perspective of managers to identify and resolve OHS issues.

The legislative requirements for JHSCs vary by jurisdiction and organization size. Unions may also negotiate mandatory JHSCs into their collective agreements. Among the tasks JHSCs perform are conducting hazard assessments, providing education and training, and investigating incidents. While a JHSC can propose hazard mitigation strategies, OHS legislation empowers the employer to determine how to control such hazards. In this way, JHSCs are advisory committees rather than decision-making committees.

Research suggests that worker participation in OHS tends to be more effective in larger workplaces and in the presence of trade unions. Workers in smaller firms and in workplaces reliant upon various subcontracting and outsourcing arrangements are less likely to have access to JHSCs.

How workers behave on JHSCs can influence the effectiveness of worker participation. Worker representatives who collect their own information about OHS, assert their knowledge about hazardous conditions, mobilize their co-workers to support demands for improvements, and propose alternative solutions appear to be more effective than more passive representatives. The effectiveness of this more activist orientation suggests employer OHS behaviours can be shaped by workers’ behaviour in the workplace, as well as by external enforcement by the state.

The role of the state in the IRS is primarily one of education and enforcement. Governments often run safety awareness campaigns aimed at workers (see Chapter 8). Governments also employ OHS officers who perform work-site inspections in order to identify health and safety violations and ensure their remediation. Inspections may be random or targeted (e.g., focusing on high-injury industries, such as residential construction). Inspections may also be triggered by worker complaints. Inspectors will also investigate serious workplace injuries and fatalities. Where inspectors find violations of OHS rules, they may order employers to remedy the situation. This is the most common response of OHS inspectors and can sometimes include issuing a
stop-work order, which halts operations at the worksite until an unsafe situation is resolved. Some jurisdictions also give OHS inspectors the power to issue tickets or other financial penalties to workers and employers who are in contravention of OHS rules. The government can also seek to prosecute those who violate the law. This most often occurs when there has been a serious injury or fatality or a pattern of non-compliance with the law. Conviction can result in fines, jail time, or other penalties. Prosecutions are relatively rare in Canada.

Finally, Canada’s Criminal Code was amended in 2004 to allow for the criminal prosecution of individuals and organizations that direct the work of others when a worker is injured and the employer failed to meet its due diligence requirements. Criminal prosecution is designed to address cases of profound moral failings, such as the wanton disregard for safety that cost 26 workers their lives in 1992 at the Westray Mine in Nova Scotia. Only a handful of prosecutions under the Criminal Code have occurred, with few resulting in convictions. As set out in Box 2.3, governments’ tendency to educate and remediate OHS violators (rather than prosecute them) reflects the view that injuries are regulatory offences, not crimes.

Box 2.3 Safety crimes?

If you ran someone down in a parking lot, you would most likely face criminal prosecution and jail time—even if your action was unintentional. Yet, if you did the same thing on a worksite, you would mostly likely not be charged with a crime. Instead you (or your employer) might face prosecution under OHS legislation (although probably not) and the penalty most likely would be a fine, even if the violation resulted in a worker’s death.

That we treat workplace injuries differently from injuries that happen elsewhere shows that we socially construct workplace injuries differently from injuries that are the result of so-called criminal acts. In effect, safety violations are viewed as regulatory offences: offences that are wrong because they violate a law rather than being inherently immoral (i.e., a crime). For this reason, governments generally choose to regulate corporate misbehaviour through persuasion and education rather than through punishment.
This framing of safety violations as regulatory offences is itself premised on the notion that employers and workers are “reasonable, of good faith, and motivated to heed advice.” The view of corporate activities as generally desirable combined with the widely adopted employer view that the risk of workplace injury is minimal, unavoidable, and acceptable (and likely the fault of workers anyhow) may help explain why corporate behaviour that injures workers is constructed as a regulatory violation rather than as a crime.

While it is broadly accepted that the IRS has improved workplace safety, there are a number of criticisms of the system:

1. Declining employee participation: The IRS is premised upon workers being willing to speak up about health and safety issues. The right to refuse requires workers to speak out. Government inspections of workplaces—which are often based upon worker complaints—require workers to give voice to their concerns. As shown in Box 2.2, workers also must be willing to speak out if JHSCs are to be effective. Yet workers are often reluctant to speak out because they fear employer retribution—retribution that is illegal but commonplace. The growth in precarious employment has also decreased the willingness of the growing number of insecurely employed workers to speak out. Decreasing employee participation fundamentally undermines the effectiveness of the system at identifying hazards and compelling employers to remediate them.

2. Inadequate enforcement: The role of the state in the IRS is to ensure employers follow the OHS rules via inspections and penalties. There is significant variation in enforcement activity between jurisdictions. For example, Alberta workplaces are inspected, on average, once every 14 years and it can take inspectors up to 18 days to respond to a complaint. Further, the rate of prosecution in Alberta is very low. This means employers face little risk of being caught violating OHS rules and no penalty if they are caught. Not surprisingly, Alberta has an abnormally high rate of workplace injury. While Alberta may be a stark example, all jurisdictions provide inadequate resources to allow
effective enforcement. The dominant approach to OHS enforcement in Canada is to respond to complaints with occasional targeted “spot checks” on poor-performing employers or industries. Given the high rates of injury, prosecutions in Canada are rare.

3. Fracturing of employment: The growth in small and medium enterprises (SMEs) is problematic from a safety perspective. In 2013, there were 1,160,977 small enterprises (1–99 employees) and 20,356 medium-sized enterprises (100–499 employees) in Canada. The majority of small enterprises had only 1–4 employees, and all SMEs together comprised 99.8% of all enterprises. The sheer number of SMEs compounds the problems of under-inspection by the state. Further, SMEs are frequently part of complex subcontracting chains where it is unclear who is responsible for OHS. SMEs also have a higher injury rate than larger firms.

These concerns about the effectiveness of the IRS suggest that the state has attempted to mediate the conflicting demands of workers (who want safety) and employers (who want flexibility to organize work in maximally profitable way). The result is a system that somewhat reduces, but does not eliminate, workplace injuries. Further, this system tends to benefit the decreasing proportion of workers in stable, full-time employment in large organizations more than the growing number of workers in SMEs and those who are employed precariously. In practice, it also means that workers represented by a union are more likely to experience the benefits of the system, for reasons explained in Box 2.4.

Box 2.4 IRS in a unionized workplace

The IRS was designed to facilitate employers and workers working together to improve safety. In practice, as outlined above, the system lacks key elements needed to work effectively. A possible exception may be unionized workplaces. Key union functions are to give voice to workers and their interests and to construct formal mechanisms for resolving disputes. Union interventions in the workplace have the potential to strengthen and enhance the structures and rights established through IRS.
Unions can improve health and safety in the following ways:

- They can negotiate provisions in the collective agreement that strengthen worker safety rights and require safety standards that exceed legislative minimums.
- Workers may gain increased knowledge of hazards and their legal rights through union education programs (see Chapter 8).
- Workers may be more likely to exercise their rights knowing that they are protected from reprisal by the grievance processes.
- Worker participation on JHSCs can be more effective due to union training and a more active membership.
- Unions have their own health and safety experts who can offer information and insight independent of the employer.

Do unions make workplaces safer? For a period, the research into the so-called “union safety effect”—the degree to which unions lower workplace injuries—was mixed, showing that sometimes injury rates dropped and other times they were higher. The most recent literature suggests the mixed findings result from questionable empirical assumptions and the difficulty in isolating union effects. The current assessment is that unions do make workplaces safer due to their role in training, formalizing worker participation, and protecting workers who speak out.

IRS is built on an assumption that there is a mutual interest in safety. From that logic an interesting (but likely false) axiom that has developed over the past 20 years is that safety somehow pays. This idea sits uneasily with the millions of work-related injuries experienced by Canadian workers each year. Box 2.5 takes up the question of whether (and for whom) safety pays.

**Box 2.5 Does safety pay?**

Many safety professionals assert that “safety pays.” More specifically, they assert that organizations can increase their profitability by reducing the rate of workplace injury. Yet, rather oddly, there is no good evidence that this statement is true.
But you don’t need to be a researcher to know that. We know, from Chapter 1, that employers in capitalist economies are driven by the profit imperative. Essentially, employers generally seek to maximize profitability and organize work accordingly. If safety paid (i.e., was profitable), we would expect to see very few injuries because employers would eliminate injuries.

Yet what we see is, in fact, millions of workplace injuries each year. This strongly suggests that it is not safety that pays but rather a lack of safety. Basically, organizing work unsafely—using dangerous materials, failing to take safety precautions, or asking workers to work as quickly as possible—may be highly profitable. While there certainly are costs associated with workplace injury, employers can externalize many of these costs—pass them off—onto workers, their families, and taxpayers.

Injured workers may just “suck it up” and carry on. Their families may support them while they are injured. Workers and other taxpayers may pay for medical treatments and social assistance costs if the injury is not reported or accepted through workers’ compensation. As we’ll see, when workers do report injuries to the workers’ compensation system, the costs of those injuries are (mostly) spread across all employers in an industry group.

Andrew Hopkins examined the question of who benefits from injury reduction in Australia. Of the $20 billion of estimated injury costs, 70% of the benefits of eliminating injuries accrued to workers and the state. This distribution of benefits creates very little incentive for employers to reduce injuries.\textsuperscript{21}

Hopkins goes on to note that employers may not be significantly affected by large-scale accidents. For example, the death of 3000 and the injury of 300,000 people following a 1984 gas leak in Bhopal, India, resulted in large short-term costs to Union Carbide. Nevertheless, corporate restructuring led to record earnings per share in 1988.\textsuperscript{22}

One of the less obvious effects of the “safety pays” narrative is that it downplays the need for more stringent government enforcement of OHS laws. If safety pays, the logic goes, why would the state need to check to see if employers had acted in what is (allegedly) the employers’ best interest?
OTHER LEGISLATION

Occupational health and safety laws are part of a broader web of rules that regulate employment. Other laws passed by legislatures that impact OHS include fire and building codes, occupational-specific regulations, laws regulating hazardous materials (both in the workplace and the broader environment), employment (or labour) standards, human rights, and workers’ compensation schemes.

Fire and building codes were among the earliest forms of occupational health and safety, many following from the deaths of 146 workers in New York’s Triangle Shirtwaist Factory fire of 1911. Governments subsequently required employers to provide for basic sanitation on worksites (e.g., sinks and toilets). More recently, the federal Hazardous Products Act established the Workplace Hazardous Materials Information System (WHMIS). WHMIS protects workers by requiring employers to label hazardous materials and provide material safety data sheets (MSDS) which outline the hazards of the substance. This information assists workers in exercising their right to know about workplace hazards. Each of Canada’s 14 jurisdictions have included aspects of WHMIS in their own OHS systems.

Governments also regulate aspects of certain occupations. For example, workers whose job requires them to handle or use explosives may be required to undertake specific training and hold a permit. Governments have also enacted environmental laws that regulate air, water, and soil pollution, waste management, and climate change. While environmental regulations are not normally considered a part of occupational health and safety, there is no clear boundary between environmental hazards and workplace hazards. As set out in Box 2.6, workers are often the first group exposed to so-called environmental hazards, and their exposures are often the most intense.

Box 2.6 Lead poisoning

Lead is a significant health hazard. The accumulation of this heavy metal in the body interferes with a variety of processes, including the development of the nervous system. Among the chief sources of lead pollution is leaded gasoline, which was introduced in the 1920s to
improve the performance of vehicle engines. Lead in car exhaust, as well as residue that settled in soils, resulted in widespread lead poisoning in North America, and lead was eventually phased out of gasoline. Globally, the elimination of leaded gasoline is expected to result in 1.2 million fewer premature deaths each year, unknown but significant reductions in other negative health effects, and $2.4 trillion in annual benefits.\textsuperscript{25}

While the 1970s is generally seen as the beginning of concern over lead, research by David Rosner and Gerald Markowitz found that governments, scientists, and corporations knew of many of these dangers in the 1920s. For example, on October 26, 1924, five workers died due to lead poisoning and another 35 exhibited severe neurological symptoms as a result of occupational exposures in the Standard Oil experimental labs in Elizabeth, New Jersey. This was one of many workplace incidents related to lead exposure.

Employers, including General Motors, DuPont, and Standard Oil, sought to quell growing public concern by linking leaded gasoline to industrial progress, noting that innovation entails risk and suggesting the workplace injuries and fatalities were the result of worker carelessness.\textsuperscript{26} Herein we see the traditional employer perspective at work: the risk of injury is minimal, unavoidable, and acceptable. Never mind that the facts show the risk of injury was significant (80% of workers were poisoned!) and could have been avoided by not using lead.

While public concern over the health effects of lead slowed its adoption, the absence of definitive proof that lead in gasoline was hazardous limited the willingness of governments to prevent its use. This case shows how the lack of \textit{scientific certainty} can impede harm prevention. Scientific certainty means researchers are 95% certain that cause and effect have been correctly identified. As we’ll see in Chapter 5, the rigour associated with scientific certainty is frequently a barrier to protecting workers from hazardous substances.

Requiring high-quality proof that a substance will cause harm (proof which would be available only after the introduction of the hazardous material . . . ) is often used to postpone regulation. This approach stands in contrast to the \textit{precautionary principle}. The precautionary
principle suggests that it falls to the proponent of an activity to establish that the activity will not (or is very unlikely to) cause harm. The precautionary principle recognizes that the world is a complex place and the absence of scientific certainty should not preclude regulating potentially hazardous materials or activities.

All Canadian jurisdictions have enacted laws setting out the minimum terms and conditions of work. These *employment standards* (or labour standards) acts often outline maximum hours of work and required rest breaks. As we’ll see in Chapter 7, these requirements prevent workers from becoming overly tired, which increases the risk of injury. Employment standards legislation also usually contains limits on the employment of minors, reflecting their greater vulnerability to occupational injury due to their physical and intellectual immaturity. Finally, such laws preclude employers from recovering the cost of customer theft from workers’ wages. As the vignette at the beginning of this chapter suggests, though, employment standards laws are unevenly enforced, thereby reducing their contribution to injury prevention.

Finally, it is necessary to consider the impact of *human rights legislation* on OHS. Human rights acts preclude discrimination on various grounds, such as gender, family status, age, sexual orientation, and disability. In Chapter 10, we will explore the *duty to accommodate* injured workers that flows from human rights legislation. In short, employers are expected to modify work and workplaces, up to the point of undue hardship for the employer, so as not to discriminate against workers with temporary or permanent disabilities.

In addition to the duty to accommodate workers, employers must also be mindful of the potential for OHS activities to discriminate against women on the basis of their gender. In theory, women face the same workplace hazards as men. In practice, occupational segregation by gender means women and men often face different hazards. Further, the *male norm* often means that equipment, work process, workplace norms, and safety standards are designed for male workers. Women’s physiology and the greater role women typically shoulder in *social reproduction* are often ignored.

The one exception to this is *reproductive hazards*. There is significant research about how workplace hazards can affect fetuses. The most common response to such risks is to remove the female worker from the workplace
(to control exposure), rather than removing the hazard from the workplace (which would likely benefit all workers). This response is likely economically efficient for employers: redeploying pregnant workers is less costly than redesigning work. Yet reassignment effectively penalizes women for bearing children.\(^a\)

**Workers’ Compensation**

Being injured on the job affects workers in many ways. Historically, injury has often meant poverty, because injured workers frequently can’t work. At the beginning of the 20th century, provincial governments enacted *workers’ compensation* systems to provide injured workers with wage-loss benefits, medical treatment, and vocational rehabilitation. Prior to the creation of workers’ compensation, workers injured on the job were forced to sue their employers for compensation. Workers often could not afford to sue, and if they did sue they rarely won, which meant injured workers often ended up financially dependent upon their families or charity. The unfairness of this system was a source of significant social instability, and governments enacted workers’ compensation laws to partly address workers’ needs and thereby stave off industrial and social conflict.\(^b\) In exchange for immediate, predictable, and stable compensation, injured workers gave up their right to sue their employer for workplace injury. This exchange is often called the historic compromise.

The Ontario workers’ compensation system, which was Canada’s first, was based upon the recommendations of a 1913 Royal Commission on Workers’ Compensation headed by William Meredith.\(^c\) The Meredith principles underlying workers’ compensation remain the basis for workers’ compensation in Canada:

1. **No fault**: How the injury occurred is irrelevant. Compensation is paid on a no-fault basis and workers cannot sue their employer.
2. Accident fund: The WCB maintains an accident fund to guarantee the availability of benefits over time.
3. **Collective liability**: All employers pay premiums and thereby share the cost of injuries collectively.
4. Independent administration: The WCB—which operates independently of employers, workers, and the state—administers the workers’ compensation system.
5. Exclusivity: The WCB is the only provider of workers’ compensation. This differs from arrangements in some US states where multiple private insurers offer compensation. The WCB is also the final arbiter of all claims.

Every province and territory has established a WCB that operates under these principles. When workers experience a serious work-related injury (e.g., the worker requires medical aid or can’t go to work the next day), the worker, employer, and doctor are all required to report the injury to the WCB. In assessing whether an injured worker is eligible for benefits, the WCB uses the two-part “arises-and-occurs” test. To be compensable, an injury must be caused by an event arising out of, and occurring during the course of, employment. As noted in Chapter 1, it is easier to determine if some injuries arose and occurred than others. Box 2.7 unpacks the arises-and-occurs test.

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**Box 2.7 Did an injury arise and occur?**

Injuries *arise out of employment* when they are caused by the nature, conditions, or obligations of employment. That is to say, injuries arise from employment when they are caused by an employment hazard. Injuries that happen at times and places consistent with the obligations and expectations of employment *occur in the course of employment*. This can include injuries that occur outside of normal hours of work or off the employer’s premises (e.g., running an errand for your employer on your drive home) so long as there is some relationship between employment expectations and the time and place of the injury.

Acute physical injuries in the workplace with clear causal mechanisms are almost always accepted. When the facts of a claim are ambiguous, WCBs use the *balance of probabilities test* to assess compensability (i.e., is it more likely than not that the injury arose from and occurred in the course of employment). In cases where it is very hard to sort out whether an injury is caused by work, WCBs will often use the *but for standard*. If the injury would not have occurred but for the work, the injury is deemed to have arose and occurred. This means the work does not have to be the sole, predominant, or major cause of an injury, but work must be necessary for the injury to have occurred.
Where it is not possible to determine if an injury arose or occurred, workers’ compensation legislation generally gives the benefit of the doubt to the injured worker. Some workers’ compensation systems also grant presumptive status to certain types of injury. Certain diseases, for example, are so closely linked with certain kinds of work (e.g., farming and farmer’s lung) that claims are presumed to have arisen and occurred unless there is evidence otherwise.

Once an injury has been found to be compensable, workers are eligible to receive wage-loss, medical, and vocational rehabilitation benefits. **Wage-loss benefits** provide financial compensation to workers whose income is reduced by an injury. The level of wage-loss benefit and when wage-loss benefits commence varies by jurisdiction, although rates are set so that workers ordinarily receive less than their regular wage. Injured workers can also receive medical and vocational rehabilitation benefits. **Medical benefits** cover the costs of treating an injury, thereby relieving workers and the taxpayer-funded health care system of these costs. **Vocational rehabilitation benefits** include programs designed to increase the probability of a worker returning to employment. When a worker dies as the result of a workplace injury, the worker’s dependents are eligible to receive fatality benefits, including funeral costs and wage-loss benefits.

While workers’ compensation entails significant benefits to injured workers, the administration of these benefits has come under heavy criticism. Injured workers often report that their interactions with the WCB—wherein workers’ claims are often met with skepticism and workers are sometimes surveilled—can be psychologically damaging. Injured workers are also more likely to live in poverty. In some jurisdictions, workers face having their wage-loss benefits reduced because the WCB deems them to be employable, even though they have been unable to find a job. These concerns are often related to the way workers’ compensation is funded and, in particular, to the operation of experience-rating systems.

Employers fund workers’ compensation by paying premiums. Premiums are based upon an employer’s payroll multiplied by the assessment rate the WCB has set for the industry in which the employer operates. Typically premiums are expressed in the form of X dollars per $100 of payroll. Some
provinces further modify individual employer’s premiums based upon the employer’s claims record. These experience-rating systems reward employers that have low claim costs and penalize employers that have high claim costs. As we saw in Chapter 1, experience rating is a controversial system. Linking claim costs to premium rebates does reduce the number and duration of claims, but it is unclear if this means an actual reduction in the number or severity of injuries or reflects employer gaming of the experience-rating system. Gaming may include suppressing claims as well as disputing worker claims, thereby undermining the no-fault basis of workers’ compensation.

Many injured workers are able to perform productive work while they are recovering from injuries. Providing workers with an opportunity to return to work (RTW) by, for example, modifying their duties may help workers recover. The idea that return-to-work is rehabilitative is hotly contested, and we will read more about this controversy in Chapter 10. Less controversial is that RTW programs help employers minimize their claims costs. Such programs also ensure that employers meet the duty to accommodate workers found in human rights legislation.

**SUMMARY**

This chapter outlined the legal framework the state has enacted to prevent and compensate work-related injuries. The 2012 death of Jayesh Prajapati shows us that the state does not necessarily act to prevent every workplace injury or enforce every workplace law. To date, Ontario—facing opposition from employers—has not required gas station owners to adopt pay-before-you-pump systems, and wage theft remains an endemic issue. This example suggests that to fully appreciate how injury prevention and compensation laws operate we have to be prepared to understand both the technical requirements of the laws and the political economy of their enforcement.

Canadian governments have made employers and workers jointly, but not equally, responsible for OHS via the IRS. Growing precarity and a shift toward SMEs have undermined workers’ ability and willingness to effectively exercise their rights—rights that are designed to act as a check on management rights in the workplace. In addition to OHS laws, governments have passed other legislation that makes workplaces safer, including fire and building codes and hazardous materials and environment protection regulations. These laws have mostly been enacted after harm has occurred—when there is scientific
certainty—instead of beforehand. Again, we see how politics and the conflicting imperatives of production and legitimacy affect state regulation of OHS.

It is interesting to note that the Canadian government’s first major foray into OHS was around injury compensation rather than injury prevention. Governments acted to address injury compensation to avoid the social instability that was caused by injury-related poverty. Workers’ compensation alleviated much of the poverty wrought by workplace injury while shielding employers from liability. The benefits accrued by workers (compensation), employers (liability protection), and the state (social stability) likely play an important role in the long-term stability of the workers’ compensation system. That said, workers’ compensation has been marred by various employer efforts to roll back the benefits to workers and cost to employers.

DISCUSSION QUESTIONS

› What are the occupational health and safety (OHS) rights and obligations of workers and employers?
› How does the internal responsibility system (IRS) operate? What challenges does the IRS face?
› How effective are state OHS enforcement efforts? What might states do to make enforcement more effective?
› What are the Meredith principles? How are they related to the historic compromise embodied in workers’ compensation?
› How does experience rating reintroduce fault to workers’ compensation? What impact does experience rating have on the operation of the system?

EXERCISE

Go online and find your jurisdiction’s rules around the workers’ right to refuse. Write a 500-word answer to the following questions:

1. Explain the circumstances in which workers can refuse unsafe work or the tests applied to determine if work is unsafe.
2. Outline the process by which workers refuse unsafe work.
3. Explain what an employer must do when faced with a worker refusal.

4. Identify the consequences if an employer coerces an employee to perform unsafe work.

5. If you were a worker, why might you be reluctant to refuse unsafe work?

NOTES

1 CBC. (2012, September 20). Worker claims she was asked to pay for gas and dash. http://www.cbc.ca/news/canada/toronto/worker-claims-she-was-asked-to-pay-for-gas-and-dash-1.1128621


4 For example, Section 3-8(a) of the Saskatchewan Employment Act (2013) states: “3-8 Every employer shall:
   (a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer’s workers;”


24 You can learn more about WHMIS at http://whmis.org/


37 Tompa et al. (2013).