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Citation for final published version:

Lippel, Katherine and Walters, David 2019. Regulating health and safety and workers' compensation in Canada for the mobile workforce: Now you see them, now you don't. *New Solutions: A Journal of Environmental and Occupational Health Policy* 29 (3) , pp. 317-348. 10.1177/1048291119868805 file

Publishers page: <http://dx.doi.org/10.1177/1048291119868805>  
<<http://dx.doi.org/10.1177/1048291119868805>>

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

3 **Katherine Lippel and David Walters**

4 **Abstract**

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

17

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

20

21

## 22 **Introduction**

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

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

40 This article documents the implications of extended E-RGM for regulatory effectiveness  
41 related to OHS and WC protections. We use the term E-RGM to mean the spectrum of mobility  
42 that encompasses extended daily commutes taking more than sixty minutes each way through to  
43 more prolonged travel for work to regions, provinces, or countries different from place of

44 residence. We include mobility within work as in transportation and in occupations like home-  
45 care, cleaning, and some sales occupations where work takes place in multiple locations.<sup>1</sup> We  
46 refer to those who engage in these types of mobility as ‘the mobile workforce.’

47 Based on a classic legal analysis of regulatory frameworks and administrative tribunal  
48 decisions in seven Canadian jurisdictions, combined with information provided from interviews  
49 with key informants, we found that the invisibility of the internally (within country) mobile  
50 workforce, as well as the alternating visibility and invisibility of the temporary foreign  
51 workforce, contribute to reduced effectiveness of the OHS and WC regulatory frameworks, a  
52 finding also identified by Cedillo et al.<sup>4</sup> and Hill et al..<sup>5</sup> As we shall see, the OHS regulatory  
53 challenges vary and can be complex depending on the nature of employment, on time and  
54 distance considerations, as well as on the worker's status and particular circumstances (gender,  
55 language proficiency, nature of migration) which can increase their vulnerability. Challenges for  
56 effective application of WC legislation also exist, although their sources are different.

## 57 **Methods**

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

67 Classic legal analysis involves identifying all relevant regulatory frameworks governing OHS  
68 and WC in these jurisdictions, analyzing the content available in the laws, regulations, and policy  
69 manuals and then studying the relevant administrative tribunal decisions that apply the  
70 legislation over a period of time, in this case between 2010 and 2018. Before completing a  
71 publication, we then revisit the legislation to ensure that the law has not changed since the initial  
72 research was completed. Given the number of jurisdictions studied here we have not undertaken  
73 an exhaustive analysis of the relevant cases, of which there are thousands, but have focused on  
74 selected issues that emerged as being most relevant to the mobile workforce. We analyzed  
75 several hundred decisions over the course of this study. The choice of issues to study more  
76 exhaustively was also informed by consultation with key informants.

77 We identified key categories of regulatory provisions that either present challenges when  
78 applied to the mobile workforce or that appear to address their needs. To do so, and parallel to  
79 the legal research, we explored issues related to the application of the regulatory provisions  
80 through a qualitative study based on key informant interviews in the same jurisdictions; a study  
81 undertaken in two stages. At the outset, in order to identify the issues to be studied, we held a  
82 two-day consultation meeting in Toronto in June 2013, where we invited five key informants  
83 specialized in Canadian OHS law and policy to discuss the challenges, remedies, and success  
84 stories related to the protection of the OHS of mobile workers. The proceedings were audio-  
85 recorded and consensus as to the main issues identified in the discussion was obtained by noting  
86 these on screen as the discussion unfolded. This consultation was complemented by analysis of  
87 the literature and legislative frameworks in order to illustrate the issues raised. The WC research  
88 first focused on analysis of legislation and administrative tribunal decisions involving mobile  
89 workers in the six provinces of interest. We then explored the priority issues in both OHS and

90 WC with regulators and other key informants in order to identify challenges and solutions in  
91 light of the literature and the results of our interviews. In total twenty key informant interviews  
92 took place between 2015 and 2018; several were group interviews. Key informants included  
93 representatives of employers and unions, practicing lawyers, medical practitioners, as well as  
94 senior staff from WC boards (WCBs) and regulators responsible for OHS for a total of forty-  
95 seven people. Aside from the interviews, some organizations preferred to answer questions in  
96 writing. The process was iterative, and we revisited some jurisdictions during the course of the  
97 study in light of regulatory changes and changes in government that affected the legislation and  
98 policies we were studying. Further information was gathered from observing public meetings  
99 with specialists in WC or work disability prevention, particularly with regard to WC and return  
100 to work. Ethics approval was provided by the Office of Research Ethics and Integrity of the  
101 University of Ottawa.

## 102 **Regulatory background**

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

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

127 *Overview of Canadian regulatory arrangements*

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

- 134 (a) a work, undertaking or business operated or carried on for or in connection with  
135 navigation and shipping, whether inland or maritime, including the operation of ships and  
136 transportation by ship anywhere in Canada,
- 137 (b) a railway, canal, telegraph or other work or undertaking connecting any province with  
138 any other province, or extending beyond the limits of a province,
- 139 (c) a line of ships connecting a province with any other province, or extending beyond the  
140 limits of a province,
- 141 (d) a ferry between any province and any other province or between any province and any  
142 country other than Canada,
- 143 (e) aerodromes, aircraft or a line of air transportation,
- 144 (f) a radio broadcasting station,
- 145 (g) a bank or an authorized foreign bank within the meaning of section 2 of the *Bank Act*,
- 146 (h) a work or undertaking that, although wholly situated within a province, is before or  
147 after its execution declared by Parliament to be for the general advantage of Canada or  
148 for the advantage of two or more of the provinces,
- 149 (i) a work, undertaking or business outside the exclusive legislative authority of the  
150 legislatures of the provinces, and
- 151 (j) a work, undertaking or activity in respect of which federal laws within the meaning of  
152 section 2 of the *Oceans Act* apply pursuant to section 20 of that Act and any regulations  
153 made pursuant to paragraph 26(1)(k) of that Act.

154 Federal OHS legislation governs a variety of sectors, and while their jurisdiction applies to  
155 six percent of all Canadian workers,<sup>11</sup> they regulate many of the sectors involving E-RGM,  
156 particularly in relation to transportation. Constitutionally, the federal Parliament has the right to



157 adopt extra-territorial provisions, unlike provinces which can only regulate within their territorial  
158 jurisdiction, an issue that raises problems, as we shall see, when hazards to which provincially  
159 regulated workers are exposed occur outside the regulator's jurisdiction.

160 The vast majority of workers and workplaces are governed by provincial health and safety  
161 legislation, and there are important differences between provinces. To illustrate, Quebec's health  
162 and safety legislation explicitly addresses work organization in its general duty clause, while  
163 Ontario makes no mention of work organization.<sup>12</sup> On the other hand, occupational violence is  
164 explicitly addressed in health and safety legislation in Ontario, and many other jurisdictions, but  
165 not in Quebec.<sup>13,14</sup>

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

171 The six provincial jurisdictions represented in our study all provide for access to  
172 compensation on a no-fault basis, for both injury arising out of and in the course of employment  
173 and occupational disease. There are, however, numerous specificities with regard to scope,  
174 coverage, benefit levels, and adjudication that differ from one province to the next; we will refer  
175 to the most important of these differences for the mobile workforce in our findings. One key  
176 difference between the provincial regulatory frameworks is that coverage for mental health  
177 problems related to exposure to chronic workplace stress was legislatively excluded from  
178 workers' compensation coverage in most Canadian provinces, but was always available in  
179 Quebec, Alberta, Saskatchewan, the Northwest Territories, and Nunavut.<sup>15</sup> Some of these

180 exclusions still exist while others have been repealed. More recently, several provincial  
181 jurisdictions have adopted presumptive legislation to facilitate access to workers' compensation  
182 for first-responders who suffer from post-traumatic stress injuries.<sup>16</sup> In contexts where workers  
183 travel between provinces for work, the choice of jurisdiction for a mental health problem will  
184 determine eligibility for benefits in many cases and it is unclear how regulators react when  
185 workers are exposed to stressors in several provinces, some that provide coverage and some that  
186 don't.

## 187 **Results**

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

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

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

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

203 transportation. Finally, there are jurisdictional considerations both within provinces, and between  
204 provinces/countries, that must be taken into account, along with various related communication  
205 issues that can impede oversight of the conditions of the commute.

206 Commuting accidents are not usually considered compensable in Canadian jurisdictions  
207 although annual deaths from these accidents (466) are estimated to exceed the number of  
208 occupational fatalities (332, excluding occupational diseases).<sup>18</sup> As a result, these injuries and  
209 fatalities are invisible to OSH regulators in Canadian provinces. In contrast, in many European  
210 and Asian countries,<sup>19,20</sup> commuting accidents are compensable. Spain,<sup>21</sup> France,<sup>22</sup> and  
211 Germany<sup>23</sup> all provide coverage for commuting accidents. The European Agency for Safety and  
212 Health at Work tracks commuting accidents in those European countries that provide coverage  
213 for these accidents. It notes that women are more often implicated in commuting accidents than  
214 men, possibly because their modes of commuting are different, women being more likely to  
215 commute as pedestrians or on bicycles and therefore being more likely to be injured during the  
216 course of their commute to work. Their commuting trajectories differ as well because women  
217 may more often take children to school on their way to work.<sup>24(p395)</sup>

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

224 The exclusion of commuting accidents from the purview of WC (and by extension from  
225 OHS) regulation has repercussions not only for the invisibility of injuries but also with regard to

226 the prevention of work injuries related to fatigue. One informant described the link between  
227 drive-in/ drive-out work organization and fatigue in a situation where the employer provided  
228 transit to the worksite from the closest municipality:

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

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

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

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

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

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

245 Union Rep: *Yeah.*

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

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

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

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

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

251 Union Rep: *Oh yeah, you get off the bus and you're pretty much on shift, right?*

252 *You drop your stuff off and, uh, there you go.*

253 Seafarers who report for duty at ports distant from their homes have also been found to start  
254 work in a state of fatigue because of the commuting conditions that precede meeting the ship.<sup>7</sup>  
255 Fatigue has also been identified as an OHS issue for E-RGM workers in home care. Fitzpatrick  
256 and Neis<sup>25</sup> found that some workers reported feeling drowsy driving home after the last shift of  
257 the day, an important risk factor particularly in Newfoundland where roads and weather often  
258 make driving hazardous in itself.

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

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

271 to close the roads if the conditions were too hazardous and didn't see the commuting conditions  
272 to fall within their jurisdiction.

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

278 *At work* Hazards related to work performed by the mobile workforce are sometimes  
279 associated with working in remote workplaces, including long shifts and rotations, remote  
280 (ineffective) supervision, and hazards associated with working in another country. There are also  
281 hazards specific to workers who are regularly moving from one worksite to another, continually  
282 entering new workplaces and, in the process, being exposed to hazards with which they are  
283 unfamiliar.<sup>25</sup> WC decisions provide examples of the mechanisms by which remote work and  
284 associated long rotations lead to compensable injury because of the associated intensification of  
285 work. For example, an appeal tribunal in Quebec accepted the occupational disease claim of a  
286 construction worker who had worked ten hours per day over periods ranging from twenty five to  
287 thirty three consecutive days and who developed various musculoskeletal problems including  
288 epicondylitis and carpal tunnel syndrome while building houses in the far North of Quebec.<sup>c</sup>

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

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

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

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

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

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

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

335 Respondent 1: *Federal.*

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

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

339 Interviewer: *Everybody goes?*



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

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

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

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

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

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

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

362

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

375        Living arrangements in the oil sands of Alberta in contexts where collective agreements  
376 address housing conditions<sup>29</sup> are undoubtedly better than those provided to agricultural workers  
377 under the seasonal agricultural worker program,<sup>30(pp111-123)</sup> but as presented in the section on WC,  
378 even in the Alberta oil sands, injuries occur because of hazards in the housing provided to the  
379 workers. Temporary foreign workers outside of the agricultural sector have also complained  
380 about the housing provided to them, although in remote areas the housing provided to Canadian  
381 workers may be equally inappropriate as illustrated by a complaint filed by tree-planters of  
382 African origin working in British Columbia who alleged the Africans were provided with  
383 inferior accommodation and were thus victims of discrimination. The complaint was rejected by  
384 the tribunal because the housing provided to all workers was found to be inadequate. In the  
385 words of the court, "neither mode of accommodation remotely began to meet the requirements of

386 accommodation under the Employment Standards Act, the Silviculture Contract Camp Standards  
387 or WorkSafeBC's Occupational Health and Safety Regulations."e OHS regulation of worker  
388 housing is non-existent in some provinces, leading agencies to rely on legislation designed to  
389 protect the health of the public rather than the health of workers. For example, Alberta Health  
390 Services intervened in 2018 because their inspectors "found evidence of 'sleeping/living  
391 accommodations for foreign workers' in the premises of the Burger King where they worked.  
392 The concern of the authorities related to violations of the health code as 'food-handling services  
393 must be separated from living quarters and other areas that may be incompatible with the safe  
394 and sanitary handling of food.'"<sup>31</sup>

395 *Living at home* Work-family balance can be particularly difficult for mobile  
396 workers. Long shifts and rotations combined with lengthy commutes imply long absences from  
397 home on a daily or more prolonged basis. Mechanisms to ensure workers' ability to  
398 communicate with their families are sometimes not easily available. Some workplaces provide  
399 good Internet access to supervisors, but not to the rank and file,<sup>32</sup> and nowhere were  
400 communication issues with family and home addressed in the regulatory frameworks. Other  
401 issues of work - family balance arose in cases in which a family member was ill or when the  
402 worker had difficulties with child-care. While some provinces provide for leave in the event of  
403 family emergencies, these provisions may be difficult to apply to the mobile workforce.<sup>33(p105)</sup>  
404 Although maintaining contact with families while in remote workplaces was usually seen as  
405 desirable, informants in one study on mining in the Yukon told of increased stress associated  
406 with regular contact with home, particularly if distance prevented them from acting upon the  
407 deterioration of relationships.<sup>34</sup>

408 *Challenges for effective application of WC regulatory frameworks*

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

426        When workers reside in a province or country other than that in which they work, or even in  
427 cases where their home is within the same province but far from their worksite, several aspects  
428 of the compensation process may work less smoothly. Here we examine rules relating to WC  
429 coverage, assignment of modified work after injury and before maximum medical recovery,  
430 determination of benefits, access to social and vocational rehabilitation, and access to justice  
431 issues. All themes are inter-related, for example failure to take up proposed modified work will

432 compromise the right to benefits; for the sake of clarity, we describe them separately. Some  
433 challenges are only applicable to inter-jurisdictional mobility while others apply to all mobile  
434 workers.

435 *Coverage* The question of coverage determines whether a claim for compensation  
436 will be accepted. We examine a series of issues affecting coverage: inter-jurisdictional rules  
437 determine where workers may file a claim; proof of exposures for occupational disease claims  
438 are particularly difficult for mobile workers; when asking if an accident occurred “out of and in  
439 the course of employment” the legal requirement in WC in Canada, commuting accidents and  
440 accidents occurring where workers are living away from home, are also contentious.

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

449 Although this agreement between provincial compensation boards governs cases where  
450 workers live in one province and sustain a work injury or illness in the course of their  
451 employment in another, it does not always protect workers from falling through the cracks when  
452 jurisdictional conflicts arise. Because of differing rules on the scope of legislation in the worker's  
453 home province and that in the province of injury, some may have difficulty in accessing  
454 compensation coverage. The interprovincial aspects of the worker's employment injury muddy

455 the waters and impede smooth application of the law. We found several examples of work  
456 injuries that would have clearly been covered if they had occurred in a given jurisdiction, but  
457 where access to compensation was delayed and sometimes denied because compensation  
458 authorities had no jurisdiction to adjudicate the claim. One example involved a worker from  
459 Quebec injured at a worksite in Quebec where he had been placed by a temporary employment  
460 agency situated in Ontario. The fact that the client employer had a place of business in Quebec  
461 did not justify compensation by the Quebec regulator, nor did it justify compensation by the  
462 Ontario regulator that covers injuries sustained on its territory.<sup>g</sup> A final decision can take years  
463 and sometimes no compensation will be paid; the worker may then be entitled to sue the  
464 employer who will not benefit from WC protection when the claim falls through the  
465 jurisdictional cracks (although by the time a final decision is made alternative recourse may be  
466 barred by statutes of limitations).<sup>h</sup>

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

474 As another example, compensation legislation and policy governing asbestos related disease,  
475 in several provinces, requires evidence of significant exposure in the specific province.<sup>37(p17)</sup> In a  
476 claim for carpal tunnel syndrome filed by a construction worker who had worked in Quebec after  
477 having worked for several years in Ontario, the Quebec WCB accepted the claim, but the appeal

478 tribunal reversed that decision because exposure in Quebec was insufficient when compared to  
479 exposure in Ontario. That decision was, in turn, reversed on a procedural technicality, but the  
480 final decision came over four years after the worker's initial claim.<sup>j</sup> Although the Inter-  
481 jurisdictional agreement applies to claims for occupational disease, Quebec opted out of the  
482 provision on occupational disease in 2005, so that questions regarding coverage for workers who  
483 have exposures in multiple Canadian jurisdictions that include Quebec are complex.

484 *Commuting accidents:* Although all Canadian compensation boards will affirm that  
485 commuting accidents are not normally considered as compensable accidents, when we ask  
486 informants about specific cases or analyze appeal tribunal decisions, the situation is far from cut  
487 and dried. In every province, determination of compensability of transit accidents has proved to  
488 be contentious, despite explicit policy. It is difficult to anticipate which circumstances will give  
489 rise to WC coverage and which will not given the broad range of criteria that are considered in  
490 determining, in a given case, whether the accident occurred out of and (or, in Quebec) in the  
491 course of employment. Each province, except Quebec, has explicit, often binding WCB policy  
492 on this issue and there are hundreds of tribunal decisions, some recognizing compensability of an  
493 accident occurring during transit, others declining coverage, often in similar circumstances.  
494 Further complications arise because it is sometimes in the interest of the worker that the WC  
495 legislation not apply so that the worker can sue those responsible for the injury, including the  
496 employer. Compensability as an issue is thus sometimes raised by defendants,<sup>k</sup> notably  
497 employers, who seek to include transit accidents in the purview of the definition of “work  
498 accident” to protect themselves from tort liability, while in other cases it is the worker who seeks  
499 compensation under the WC legislation after their claims have been denied or disputed.

500 In general, if the worker is injured while travelling to work from home, going home after  
501 work, or going home for lunch, the injury will not be found to arise out of or in the course of  
502 employment, whether the worker is working for a temp agency<sup>1</sup> or providing home care service.<sup>m</sup>  
503 However, if the worker is travelling between home and a work camp and travelling on a private  
504 road owned by the employer, the accident could well be compensable.<sup>n</sup>

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

510 There are circumstances where a transit accident is clearly covered by WC legislation in most  
511 provinces, for example, an accident occurring while the worker is on an overseas mission  
512 prescribed by the employer.<sup>p</sup> Other circumstances will rarely, if ever, be considered to be a  
513 compensable accident by any Canadian WCB, such as an accident occurring while the worker  
514 stopped on her way to or from work for personal reasons,<sup>q</sup> although in one case an employer who  
515 wanted to escape liability by including such an accident within the purview of the compensation  
516 legislation was successful.<sup>r</sup> In between, there is a broad spectrum of circumstances that are  
517 sometimes covered, sometimes not.

518 *Accidents in work camps and in temporary housing:* Mobile workers often live away  
519 from home for periods of time and injuries that occur in or around the living facilities may or  
520 may not be covered. Policies of the compensation boards treat injuries occurring in living  
521 facilities during a business trip separately from those incurred in living facilities provided to  
522 industrial workers. This distinguishes regimes governing gold collar mobility from those



523 applicable to blue collar mobility, yet we see no legal justification for these distinctions which  
524 systematically favor gold collar workers who benefit from a broader interpretation of the concept  
525 “arising out of and in the course of employment.” Distinctions appear to be arbitrary and the  
526 boundaries between compensable and non-compensable injuries shift according to circumstances  
527 and sometimes depending on type of mobile work.

528         Shifting policy boundaries with regard to coverage also arise when workers are injured in  
529 work camps or other living facilities provided by the employer. In some provinces, policy is  
530 explicit with regard to injuries in work camps. British Columbia, for example, has policy that  
531 will consider injuries sustained in an employer-provided facility to be compensable if the worker  
532 had no reasonable alternative accommodation because of the remoteness of the worksite.<sup>5</sup>

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

537         Injuries are compensable when a worker is making reasonable and permitted use of the  
538 provided facilities and the injury arises from a hazard of the premises or equipment  
539 provided. Hazards include any employer-provided equipment such as furniture, utensils,  
540 etc. and any food or drink provided by or purchased from the employer or employer's  
541 agent and consumed on the premises. Food, equipment, or other hazards introduced by  
542 the worker are not considered to be employment hazards.

543 If the worker is considered to be a ‘captive worker’ in a residential facility in Alberta, the WCB  
544 may include other hazards based on the individual merits of the claim. 'Captive workers' are  
545 workers who, because of the circumstances and nature of their employment have no reasonable

546 alternative to living in a bunkhouse or campsite (for example, a remote campsite in the  
547 wilderness). This policy was applied in a case where the worker slipped in the shower, and after  
548 debate as to the quality of the shower curtain, reminiscent of arguments arising in a fault-based  
549 system, it was decided that the worker was indeed captive and that the shower was indeed a  
550 potential hazard. He received coverage for his injury.<sup>1</sup> A similar result was arrived at in a case  
551 where a "captive worker" fell after receiving an electrical shock in the residential facility.<sup>u</sup> In  
552 another case where two workers were obliged to share a room, the violent and unprovoked  
553 assault of the claimant by the other occupant of the room was held to be a compensable incident,  
554 the violent co-worker being the "hazard."<sup>v</sup> Several Alberta cases relating to the "captive worker"  
555 policy involve workers developing musculoskeletal injuries upon arrival in the camp after  
556 travelling long distances with heavy luggage to reach the camp, but outcomes are inconsistent;  
557 some claims are accepted, others not, in quite similar circumstances.<sup>w</sup>

558 Reading Alberta WC policy and cases, one is left with the impression that coverage will be  
559 provided if the employer could be sued for having exposed the worker to a hazard in the  
560 residential facility. The policy thus shields the employer from lawsuits that could otherwise be  
561 filed without providing coverage when the worker could otherwise take no legal action. The  
562 policy is applied and interpreted by the decision makers and it is sometimes interpreted narrowly.  
563 For example, in one case it was suggested that the worker would not be "captive" if  
564 accommodation was available eighty-five km from the worksite. However, because the worker  
565 had a temporary contract and was from outside Alberta, the tribunal accepted his claim: "Given  
566 that the contract in question was for only an approximate four month period, it seems unrealistic  
567 to think, or to expect, that a worker whose home was in another province, and who was working  
568 twenty-one days in and eight days out, would set up residence in [name of city]."<sup>x</sup>

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

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

587 *Assignment of modified work and medical evaluations* Once coverage is granted,  
588 workers in the compensation system will be eligible for, and in some provinces, obliged to take  
589 up offers of modified work. While procedures differ between provinces, employers have  
590 economic incentives to offer modified work that allows claimants to remain active in the  
591 workplace without undermining their health. In Ontario, both the employer and the worker have

592 a legal obligation to cooperate in the early return to work process, and doctors are not called  
593 upon to approve the work proposed. In contrast, in Quebec, the employer may offer modified  
594 work but is not obliged to do so; workers are obliged to perform the modified work only if their  
595 treating physician approves the temporary assignment.<sup>39</sup>

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

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

614 Problems in medical evaluation arise particularly for temporary foreign workers when the  
615 worker returns home and can only access health care providers who are unknown to the WCB  
616 managing their claim. Credibility of medical opinions can be questioned particularly when the  
617 opinion is written in a language that is not the dominant language in the jurisdiction managing  
618 the claim. In other situations, specialists may not be available in the home locality, while they are  
619 available in the province managing the claim. Finally, as key informants in Alberta told us, the  
620 inter-provincially mobile workers in the oil industry tended to work for sub-contractors who  
621 provided labor expected to be fit for work. This suggests that it is unlikely these sub-contractors  
622 would have light work available for these workers.

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

628 The first issue is straightforward. To illustrate, since September 2018, there is no maximum  
629 insurable earning ceiling in Alberta, as is the case in Manitoba, which means that a worker  
630 earning \$150,000 per year would receive ninety percent of his net earnings as compensation  
631 while unable to work.<sup>ff</sup> In Nova Scotia in 2018, the same worker would receive seventy-five  
632 percent of net earnings based on an annual salary of \$59,800 for the first twenty-six weeks of  
633 disability after which benefits would be equal to eighty-five percent of net earnings based on the  
634 same amount.<sup>gg</sup> A Nova Scotian offered the option of filing at home rather than Alberta would be  
635 severely under-compensated if he chose to file in his home province as he has demonstrated an  
636 earning capacity of \$150,000. By choosing to return home, he acquiesces to an earning capacity

637 of \$59,800. A system that compensates for loss of earning capacity and that precludes evidence  
638 of a higher real earning capacity disadvantages the higher earner. Given that the purpose of WC  
639 is to support workers in maintaining their earning capacity, it is clear that Nova Scotian benefit  
640 levels hugely underestimate the loss of earning capacity of many Nova Scotian residents in the  
641 interprovincial mobile workforce.

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

645 Thirdly, once a worker has achieved maximum medical recovery, in all provinces they are  
646 evaluated to determine capacity to return to pre-injury employment. If the impairments  
647 attributable to their injury preclude return to pre-injury employment, WCBs will determine what  
648 suitable work they might be able to do. This will enable determination of the potential income  
649 that a worker could earn from this "suitable employment" and that amount will be deducted from  
650 their benefits. In some provinces the deduction is almost immediate, while in Quebec, up to one  
651 year of full benefits is provided to give them time to seek alternative employment.<sup>40</sup> Mobile  
652 workers are particularly disadvantaged by this mechanism called 'deeming,' as, with few  
653 exceptions, they will be deemed capable of earning a salary payable in the labor market in which  
654 they were injured even if they no longer live and will likely no longer work in that region. This  
655 can create extreme hardship as in the case of temporary foreign workers who are deemed capable  
656 of earning Canadian wages even if their health no longer allows them to access visas to work in  
657 Canada, a situation critiqued by Danielle Allen.<sup>41(p151)</sup> Similar problems arise when  
658 Newfoundland residents are deemed capable of earning Ontario income levels, even though they

659 are no longer in a position to travel to Ontario for work.<sup>hh</sup> Board policy in the provinces we  
660 studied usually followed this reasoning, as did some appeal decisions.<sup>ii</sup>

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

672 *Rehabilitation and return to work* Workers who were mobile at the time of  
673 injury will be presumed to be able to continue to be mobile workers once their injury has healed,  
674 and sometimes the worker with a reduced earning capacity no longer wishes to travel for work.  
675 This may prove to be a problem as refusal of alternative employment may also affect their  
676 benefits. The difficulties associated with "personal" travel to and from work are not always  
677 considered when evaluating the worker's ability to return to work after injury and those workers  
678 who decline opportunities offered may see their claims closed.

679 A study in the USA found that workers living in rural areas and small towns are more at risk  
680 for long term work disability and the authors found that the impact of work commuting and  
681 residential location became more important as the duration of disability increased.<sup>42</sup> Similar

682 results with regard to rural residency and disability duration were found in a study using Alberta  
683 WC data.<sup>43</sup> These results suggest that the rehabilitation mechanisms available in WC systems  
684 may not work as well when applied to mobile workers in these situations.

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

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

702        Several of the issues we encountered in this study have been documented in other  
703 jurisdictions. For example, OHS challenges for temporary foreign workers and migrant workers  
704 more generally have been documented both in Canada,<sup>6,44,45</sup> the USA,<sup>46,47</sup> and the European



705 Union.<sup>48</sup> They are known to be exposed to inferior working conditions and to have limited voice  
706 because of their precarious migration status. Despite decades old federal and state regulation on  
707 the issue in the USA,<sup>49</sup> the quality of the housing provided to migrant agricultural workers  
708 remains sub-standard and perilous for their health.<sup>50</sup> This is also true in France<sup>51</sup> and the issue  
709 has been raised in many Canadian studies as well, although few studies look at WC issues.<sup>41</sup>

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

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

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

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

745 Similarly, in terms of priorities, the exclusion of travel to and from work from the purview of  
746 employer responsibilities, and by extension, from those of the labor inspectorates, is a key  
747 challenge for the protection of mobile workers' health. The costs of these injuries are not counted  
748 in the compensation costs of a given industry, nor will they be counted in Canada as costs  
749 relating to employment.<sup>18</sup> As a consequence, no economic incentive is provided to employers to

750 prevent or mitigate the risks associated with commuting even when company policies around  
751 weather-related closures, and shift and rotation scheduling can exacerbate those risks. Nor do  
752 regulators feel the need to exercise oversight on commuting conditions – this responsibility  
753 generally falls to the federal, provincial, or local police. Workers, on the other hand, may have  
754 huge economic incentives to undertake dangerous commutes as well as psychological incentives  
755 when human consequences result (as when a homecare worker or nurse does not take to the road  
756 to provide care to a housebound client).<sup>25</sup> We need to look at protection from dangerous  
757 commuting conditions and bolster workers’ right to refuse dangerous working conditions  
758 including commuting conditions. We specifically need to address the shifting status of the  
759 commute, a challenge that relates both to OHS and to WC coverage. This is an issue that is  
760 particularly important in North America.

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

772 employees,<sup>55</sup> and these challenges are exacerbated when the precariously employed are also  
773 mobile workers.

774 As we've seen there seems to be a particular challenge in Canada because of the distribution  
775 of powers between the provinces and the federal regulator and the variations between the  
776 regulatory frameworks. It is unlikely, and no doubt ill advised, to suggest that OHS and WC  
777 legislation should be standardized across the country. The Inter-jurisdictional Agreement  
778 between WCBs has sometimes failed to guarantee coverage to the mobile workforce particularly  
779 with regard to occupational disease where exposures to contaminants, noise, or repetitive work  
780 have occurred in several Canadian provinces, but also in some cases of injuries sustained at  
781 work.

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

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

793 **Conclusion**

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

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

816 Non-standard employment contracts are known to transfer the risk of ‘down time’ to the  
817 precariously employed workers. Regularly employed workers are paid whether or not  
818 they are with a client, while recruitment through temporary contracts and imposition of  
819 just-in-time schedules allows the employer to avoid paying a worker when demand is  
820 low, a strategy that allows the employer to remain competitive in a globalized market.  
821 The worker assumes the cost that was historically assumed by the employer. Similarly,  
822 when workers are continually 'on the move' going from one orchard to another, one  
823 household or worksite to another, and one employer or one contract to another, they are  
824 rarely fully compensated for the financial and other costs associated with accomplishing  
825 these often changing mobilities. They are rarely paid when they are commuting and are  
826 only compensated for travel when demand for their services is high. In many countries,  
827 they will not be compensated if they are injured during the commute. And in both  
828 precarious employment and with these kinds of E-RGM, the ability of workers to  
829 organize collectively and to resist exploitation is often undermined, as is the ability of the  
830 regulator to ensure practices are safe. Risks are transferred to individuals, and the ability  
831 to respond collectively, be it by organized labor or by the state, is thwarted.<sup>58(p12)</sup>

832 International conventions could provide guidance in improving the regulatory protections in  
833 Canada even though they may not be legally binding. In some cases, labor legislation in the  
834 individual jurisdictions complies with these conventions, however, there are many situations in  
835 which there is a regulatory vacuum either because of the inadequacy of inter-jurisdictional  
836 protections or because activities related to E-RGM do not fall under the purview of legislation  
837 (even though they would do so in other countries). As a federation, it is normal that regulatory  
838 protections differ from one provincial jurisdiction to the next as provinces are sovereign and

839 determine protections in light of their socio-political and economic contexts. This said, revisiting  
840 legislation and contractual practices to ensure OHS and WC legislation applies fairly to the E-  
841 RGM workforce would lead to better protections for these workers who are often invisible to  
842 regulators.

843 While it is idealistic to believe that when made aware of the regulatory gaps identified in our  
844 study regulators in all jurisdictions will seek to fill those gaps, mobilization of workers and their  
845 organizations is essential to ensuring that the mobile workforce becomes more visible and  
846 receives better protections. Researchers, workers, and organizations serving the international  
847 mobile workforce have brought forward essential proposals to improve the voice of those  
848 workers by addressing their “deportability” in a way that will put an end to precarious migration  
849 and allow all international migrant workers to use their voice on OHS issues without fear of  
850 reprisals.<sup>4,5,7,27,28,59</sup> OHS and WC challenges for internally mobile workers must also be placed  
851 on the agenda of unions, workplaces, and regulators to guarantee their equal access to health and  
852 safety and fair workers’ compensation.

853

#### 854 **Acknowledgements**

855 This article reports on research undertaken as part of the On the Move research partnership  
856 funded by the Social Sciences and Humanities Research Council through its Partnership Grants  
857 funding opportunity (Appl ID 895-2011-1019) led by Dr. Barbara Neis. An overview of the full  
858 research program is available at <http://www.onthemovepartnership.ca/>. Many research assistants  
859 from the Faculty of Law at the University of Ottawa have contributed to the research  
860 underpinning this article including Geneviève Bernier-Gosselin, Pierre Brabant, Brendan  
861 Carruthers, Rita Dao, Camille Lanthier-Riopel, David Lecours and Caroline Soule. The authors

862 are also grateful for the very useful suggestions made by the anonymous reviewers and the  
863 editors. Finally, they are deeply indebted to Amanda Butt from Safety Net at Memorial  
864 University for her meticulous copy editing of the manuscript.

865

## 866 **Notes**

867 a. *Canada Labour Code*, R.S.C., 1985, c. L-2.

868 b. Article 3 f of the *Violence and Harassment Convention*, adopted by the General Conference  
869 of the International Labour Organization on June 10<sup>th</sup>, 2019.

870 c. *Hunt et 9185-9280 Québec inc.*, 2015 QCCLP 1714.

871 d. *Thibault et Shawinigan Lavallin inc.*, [1987] C.A.L.P. 703.

872 e. *Balikama on behalf of others v. Kahaira Enterprises and others*, 2014 BCHRT 107, par. 124.

873 f. *Interjurisdictional agreement on workers' compensation, consolidation*, document on file  
874 with the authors.

875 g. *Romaguer et Excel Human Resources*, 2009 QCCLP 3012; the worker was eventually  
876 compensated in 2009 for an injury sustained in 2005.

877 h. *Soucy v. P.G. Québec*, 2007 QCCA 1482.

878 i. *Hicks et Ressources humaines et développement des compétences Canada et R.H.D.C.C.*

879 *Direction travail*, 2013 QCCLP 5925.

880 j. *Gyptech Acoustique inc. et Intérieurs Protouch inc.*, 2010 QCCLP 4543, revised in *Gyptech*

881 *Acoustique inc. et Doyon*, 2011 QCCLP 3646.

882 k. *2004 ONSWSIAT 311*.

883 l. *Beauvais et Élix et Personnel Alter Ego inc & C.S.S.T. Richelieu* (2003) AZ-50175973

884 (CLP).



- 885 m. *Fortier et CLSC Basse Ville Limoilou Vanier*, (2002) AZ-01307640 (CLP); *Larivière et*  
886 *C.L.S.C. J-Octave Roussin*, (2000) AZ-00300348 (CLP); *Coop. Solid. Serv. Domicile Québec*  
887 *et Côté*, (2009) AZ-50588979 (CLP); *Martel et CSSS Lucille-Teasdale* 2010 QCCLP 7727  
888 (homecare worker involved in an accident 15 minutes before arriving at her first client’s  
889 home – claim denied); *Géronto + inc. et Joseph* 2015 QCCLP 2466 (homecare worker  
890 injured before arriving at her first client – her claim is denied, but she’s referred to the no-  
891 fault automobile insurer in Québec, the SAAQ, by the judge).
- 892 n. *MPI-Moulin à Papier Portneuf et Sylvestre*, 2014 QCCLP 2428.
- 893 o. *Roy c. Société canadienne de la Croix-Rouge*, (1998) AZ-98301452 (CLP).
- 894 p. International humanitarian missions have led to many injuries sustained by Canadian workers  
895 and covered under the Quebec workers’ compensation legislation: *M... B..., et S... A... et*  
896 *CSST*, (2006) AZ-50374590 (CLP), *Roche ltée (Groupe conseil)* (2004) AZ-50258118  
897 (CLP), *Vaillancourt et Agence Canadienne de Développement International*, (2001) AZ-  
898 01303585 (CLP), *Sicard et Communauté Urbaine de Montréal* (1999) AZ-99301709 (CLP),  
899 *Croteau et Ville de Montréal*, 2010 QCCLP 7244.
- 900 q. *Sergerie et Groupecho Canada* (2007) AZ-50449130 (CLP).
- 901 r. *WSIAT Decision No. 1572/16*.
- 902 s. RCSM II, “C3-20.00: Employer Provided facilities”. See for example *WCAT-2014-03717*  
903 *(Re)*, 2014 CanLII 91576 (BC WCAT), <http://canlii.ca/t/gk86z> (accessed on 11 February  
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- 905 t. *AB WCAC 2015 48909*.
- 906 u. *AB WCAC 2013 0703*.
- 907 v. *AB WCAC 2015 1175; AB WCAC 2015 0447*.

- 908 w. Compare *AB WCAC 2014 1107* with *AB WCAC 2016 0494*.
- 909 x. *AB WCAC 2014 0985*; *AB WCAC 75503*.
- 910 y. Compare RCSM II, C3-19.00D Business trips to “C3-20.00: Employer provided facilities.”
- 911 z. *Boudreau et Groupe Compass Ltée et CSST*, 2010 QCCLP 3313; *Demontigny et Groupe*
- 912 *Plombaction inc.*, 2014 QCCLP 3173
- 913 aa. *Zaheeruddin et Canada (Ministère de la Défense Nationale)*, [1991] C.A.L.P. 935; *Hrynskiw*
- 914 *et Alcan Aluminium Ltée*, [2006] C.L.P. 729; *Cégep Édouard-Montpetit et Fortier*, 2013
- 915 QCCLP 6329; *Tremblay et Société de transport de Montréal-Directions corporatives*, 2013
- 916 QCCLP 5735.
- 917 bb. *Bilodeau et Transport Doucet & fils et CSST*, 2013 QCCLP 5005; *Laliberté & associés inc.*
- 918 *et Roy*, (2005) AZ-50333314 (CLP).
- 919 cc. *WSIAT Decision No. 20159/11*, paragr. 82 (Ontario).
- 920 dd. *MC Forêt inc. et CNESTT*, 2016 QCTAT 3315.
- 921 ee. The employer pled unsuccessfully that the worker's deportation should justify the suspension
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- 928 [content/uploads/2013/12/Temporary\\_Disability.pdf](http://awcbc.org/wp-content/uploads/2013/12/Temporary_Disability.pdf), (2015, accessed 11 February 2019).
- 929 hh. There can be exceptions as discussed in *WSIAT Decision No. 1720/12*; *WSIAT No 1617/12*.

930 ii. *Gmzun et Cirque du Soleil*, 2015 QCCLP 1312; *Pépinière 55 inc. et Torres-Angel*, 2018  
931 QCTAT 2538.

932 jj. *WSIAT Decision No. 1773/17* (Ontario) paragr. 72.

933 kk. *Les Cochonnailles Champenoises et Petit Renaud*, 2012 QCCLP 5865.

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