

## Claim Suppression of Occupational Injuries and Illnesses –

### A Literature Review September 2023

Employers often hinder the reporting of claims to workers' compensation, a phenomenon termed claim suppression.<sup>1,2</sup> Workers' compensation boards are provincial and territorial employer-funded systems that provide workers with benefits and services in the event of a work injury or illness.<sup>3</sup> When a claim is not reported to workers' compensation, the agency is blind to injury and illness rates, which impacts prevention actions and policy.<sup>4,5</sup> The costs of work injuries and illnesses are shifted from employers to the publicly-funded healthcare system and social assistance programs.<sup>6,7</sup> As well, workers do not receive income replacement and other supports, which negatively impacts their material, physical and mental well-being, and their ability to recover and return to work.<sup>6,8</sup>

While the magnitude of claim suppression is difficult to quantify, various reports identify it as a significant concern.<sup>1,9,10</sup> A review of the evidence in Ontario prepared for the workers' compensation board found that "claim suppression appears to be a real problem...*unlikely [to be] restricted to a small number of anecdotal cases*" (p.109, emphasis ours).<sup>1</sup> In response, a number of Canadian jurisdictions have introduced legislation to address claim suppression, such as Ontario in 2015;<sup>11,12</sup> yet, the changes appear to have been ineffective.<sup>8,13,14</sup> One challenge to developing appropriate, comprehensive responses is that claim suppression is not well understood. While studies have tried to estimate the frequency of claim suppression, few have directly investigated its mechanisms and solutions. And, while findings suggest that worker demographics, and type of work and injury affect claim suppression,<sup>15,16</sup> little research has focused on why and how inequities are produced, how they are lived across workers and contexts, and how they may be addressed.

Claim suppression takes several forms. It can involve failing to report, actively blocking a claim, or under-stating an injury or illness' severity or duration.<sup>1,2</sup> Others have defined claim suppression more narrowly as actions directed by employers towards workers to pressure them not to claim or under-claim.<sup>17,18</sup> Actions may be overt, such as making threats, or subtle, such as offering workers wages in lieu of benefits they would receive if they submitted a claim.<sup>1,16,17,19,20</sup> While the phrase "claim suppression" is commonly used in Canada and the United States, other terms are sometimes used as well including "concealment of claims",<sup>17</sup> "claims avoidance",<sup>6</sup> and "claims management".<sup>21</sup>

The lack of consistent conceptualization and terminology represents a barrier to establishing a body of evidence around this issue. The defining feature of claim suppression is the *intent* by employers to prevent appropriate reporting.<sup>2,17</sup> As such, claim suppression is distinct from worker under-claiming (non-claiming or abandoned claims) and employer under-reporting (non-reporting or misreporting claims), though there are overlaps. Without employer intent, these events are not typically considered claim suppression.<sup>2,17</sup> Intent, however, can be difficult to determine, and this has also hindered the development of knowledge on claim suppression.<sup>1,2</sup>

Employers engage in claim suppression to reduce or avoid increases in their workers' compensation premium costs. In the 1970s and 1980s, experience rated premium plans were introduced and expanded by compensation boards in Canada and other countries. These plans compared similar employers to each other and issued premium rebates or assessed surcharges for lower- or higher-than-average workers' compensation costs.<sup>21,22</sup> While this approach was intended to create an economic incentive for employers to make workplaces safer, critics have argued that experience rating instead resulted in aggressive claim suppression by employers to reduce premium costs.<sup>22-24</sup>

Employers are especially financially incentivized to suppress claims that involve a work absence (known as lost-time claims), which more significantly impact their premium costs. Concerns with perverse effects of experience rating of employer premiums have been expressed for decades by researchers,<sup>4, 17, 22</sup> labour unions,<sup>19, 20, 25</sup>, injured workers' advocates,<sup>13, 14</sup> and experts appointed to review workers' compensation systems. The 2012 "Funding Fairness" report to the Ontario Workplace Safety and Insurance Board (WSIB) stated that the organization was confronting a "moral crisis" by maintaining an experience rating system because it financially incentivised claim suppression (p.81).<sup>9</sup> Similarly, a 2019 WSIB operational review report expressed concerns that the new premium rate framework, which came into effect in 2020, would enhance the incentives for claim suppression.<sup>10</sup> A review of the literature on experience rating concluded that "the social and economic logic of experience rating, as well as the effects of its implementation, is an important and neglected subject in occupational safety and health research" (p.3).<sup>21</sup>

Data on under-claiming and under-reporting indicate that they are common occurrences. A 2008 U.S. House of Representatives report found that as much as 69% of work injuries and illnesses were unreported, calling it a hidden tragedy.<sup>26</sup> In Canada, high rates of non-claiming ranging from 40-54% have been found.<sup>15, 16, 18, 27</sup> A related issue is that of abandoned claims. In Ontario, the number of abandoned lost-time claims as a percentage of registered claims doubled from 1993 to 2020.<sup>13</sup> At the same time, two Canadian surveys have estimated the incidence of employer non-reporting at approximately 7-8% of compensable injuries and illnesses.<sup>28, 29</sup> Studies have also found that up to 35% of claims purporting to involve an injury but without a work absence (no-lost-time claims) may be reported as such by employers to minimize the premium surcharge costs.<sup>1, 16, 18</sup> These and related findings indicate that a large number of work-injuries and illnesses are under-claimed or under-reported.

A 2022 report by the Institute for Work & Health determined that 35-40% of emergency department visits for work injuries and illnesses in Ontario do not show up as WSIB claims, amounting to approximately 50,000 injuries or illnesses that are not claimed or reported each year.<sup>30</sup> The magnitude of claim suppression and its contribution to under-claiming and under-reporting are difficult to assess due to the fact that it is intended by employers to be hidden.<sup>1, 2</sup> A 2020 British Columbia study based on a survey of 699 workers with a self-reported work injury or illness within the past three years estimated the incidence of claim suppression to be between 3.7-13%.<sup>18</sup> In Manitoba, a survey of 200 workers found that 11.5% had experienced or were aware of overt claim suppression practices by employers.<sup>16</sup>

Claim suppression as a phenomenon is not well understood. For decades, occupational health research in Canada and the United States has documented the pressure on workers from employers to not report injuries or illnesses to workers' compensation.<sup>31-36</sup> Other research has outlined more specific employer strategies, both overt (terminating employment, threatening repercussions, etc.)<sup>8, 19, 26, 37-39</sup> and subtle (paying wages in lieu of filing a claim, using return-to-work schemes to avoid claims or reduce costs, etc.).<sup>8, 17, 19, 26, 34, 40, 41</sup> Studies have also identified "gaming the system" employment strategies, such as hiring workers through temporary employment agencies, which are considered the employer and therefore responsible for workers' compensation premiums,<sup>8, 42</sup> and the misclassification of workers as independent contractors, as forms of claim suppression.<sup>26</sup>

Despite these findings, little qualitative research anywhere has focused directly on the issue of claim suppression,<sup>17</sup> with the existing research largely quantitative.<sup>18, 27</sup> Indeed, the qualitative literature has largely documented claim suppression as one factor in broader investigations,<sup>26, 36, 43-45</sup> with few studies focused on claim suppression itself. This limited direct attention on claim suppression has curtailed the development of a more fulsome conceptualisation of its mechanisms, which is necessary to develop inclusive solutions. Several solutions have been proposed by labour unions,<sup>19</sup> injured workers'

advocates,<sup>13</sup> and experts tasked with reviewing the workers' compensation system,<sup>10</sup> such as rethinking the experience rating system, conducting a significant number of employer audits, and imposing large penalties on employers as disincentives. While these solutions are based on important on-the-ground knowledge and experience, they may not properly address the complex challenges present in intersecting contexts of vulnerability, such as those of language barriers, precarious work, or migration.

Claim suppression has important equity dimensions, as evidence suggests that underclaiming/reporting are commonly or disproportionately experienced by workers with less power and fewer resources. These include new and young workers, immigrant and migrant workers, workers who experience language barriers, and workers with a high school education or less.<sup>2, 15, 16, 26, 41, 43, 46-49</sup> These workers are also at higher risk of work-related injury or illness,<sup>49, 50</sup> perpetuating a cycle of unsafe working conditions, poor health, and financial insecurity.

For example, in a qualitative study of injured workers who experience language barriers in Ontario and Quebec, we documented the pervasive use of strategies by employers to persuade, manipulate, coerce, intimidate, and threaten workers to not formally report their work injuries and illnesses.<sup>43</sup> Some evidence also suggests that gender may shape responses to injuries and illnesses by employers and workers.<sup>8, 49</sup> Ideals of masculinity, for instance, may play a role in discouraging reporting among young men.<sup>49</sup>

Claim suppression may also be more common in certain industries such as manufacturing, road transportation, food services and construction,<sup>1</sup> as well as in non-unionized workplaces<sup>15</sup> and in precarious, temporary, or part-time employment.<sup>15, 18, 51</sup> These experiences may also be more widespread for certain types of injuries and illnesses, such as those that are “invisible” (e.g. back pain) or that involve work absence.<sup>2</sup> However, while there are indications that inequities exist, little research has focused on why and how these are produced, how they are lived across workers and contexts, and how they may be addressed.

***The Ontario Context:*** In 2015, the Ontario Government introduced Bill 109, amending the *Workplace Safety and Insurance Act* to make claim suppression an offense for which penalties could be levied against employers. Specifically, Section 22.1 states that “no employer shall take any action...in respect of a worker with the intent of discouraging or preventing the worker from filing a claim for benefits or influencing or inducing the worker to withdraw or abandon a claim ...”<sup>52</sup>

Despite this, the injured worker community has continued to express concerns about claim suppression and the system that motivates it.<sup>13, 14</sup> The new rate framework that came into effect in 2020 has been argued to retain the key flaws of experience rating, namely that safety is still measured by claim costs which begin to accrue the day after the injury.<sup>53</sup> Other concerns relate to the scope and interpretation of the 2015 law, as only overt actions are explicitly described in the *Act*, despite evidence suggesting that most claim suppression is subtle.<sup>16</sup>

There are also concerns about what constitutes intent and evidence thereof, with a recent reversal of a claim suppression penalty on appeal over this question<sup>54</sup> indicating the need for further guidance (currently, no policy exists in Ontario beyond that provided in the *Act*). Due to difficulties proving intent, suspected claim suppression cases are typically handled as late or non-reporting, which commands lower fines that have thus far been waived by the WSIB in favour of educating employers, an approach also taken in other jurisdictions.<sup>55</sup>

Furthermore, concerns exist with regards to case detection and enforcement. Since 2018, the WSIB has conducted audits of employers identified through a risk matrix. It has been argued that the objective of 300 audits per year, out of approximately 300,000 employers,<sup>56</sup> is insufficient.<sup>10, 13</sup> In 2022, only 15 claim suppression penalties were assessed against 8 employers.

Current measures have thus far been ineffective at curbing claim suppression, indicating that in Ontario *the scope of claim suppression may be broader than that contemplated by the legislation*. This points to the need to better understand the lived experiences of claim suppression for different workers and contexts, to ensure that laws, policies, practices, and interventions are grounded in and reflective of those experiences.<sup>57</sup>

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