

Chapter 12

Coverage Against Employment Injuries and Diseases



12.1 Background

Compensation for occupational injuries and diseases is covered by the Compensation for Occupational Injuries and Diseases Act (COIDA). COIDA provides a system of no-fault compensation for employees who are injured in accidents that arise out of and in the course of their employment or who contract occupational diseases. Fault continues to play a role, however, since an employee is entitled to additional compensation if he/she can establish that negligence of the employer (or certain categories of managers and fellow employees) caused the injury or disease.

The main problems that currently exist as far as health and safety measures are concerned are:

- Large numbers of persons are excluded from the operation of COIDA, mainly domestic workers, and those involved in non-standard forms of work - such as the informally employed, the self-employed, and so-called dependant contractors.
- Labour market (re)integration is not a priority, as little general provision exists in this regard. Similarly, prevention in these cases does not seem to receive any particular attention from policy-makers.
- Finally, a lack of linkage with other social insurance and social assistance schemes leads to duplication of payments (double-dipping), thereby seriously eroding the financial soundness of the respective public insurance funds and the source from which social grants are paid. It does, of course, also serve as a disincentive to access or return to the labour market.

12.2 Fragmented statutory framework

There are several significant pieces of legislation in South Africa that provide for preventive safety measures. Apart from COIDA, these are the Occupational Health and Safety Act (OHSA), the Mines Health and Safety Act, and the Occupational Diseases in Mines and Works Act (ODMWA).

In addition, while COIDA requires employers to contribute to a centralised state fund (contra compulsory insurance policies with private insurers), there are two important exceptions. The Rand Mutual Assurance Company Limited that operates in the mining industry and the Federated Employer's Mutual Association, that operates in the building industry, are allowed to perform the same functions as COIDA.

There are major differences between COIDA and ODMWA as far as benefit structure and entitlements and other matters are concerned. Health and safety standards in mines are also dealt with differently from the same standards in other workplaces. The Mine Health and Safety (MHSA) Act, which is enforced by the Department of Minerals and Energy, requires of the owner of every worked mine to ensure, as far as reasonably practicable, that the mine is designed, constructed, equipped and operated in such a way that employees can perform their work without endangering the health and safety of employees or of any other person. The Occupational Health and Safety Act spells out the duties of employers and employees respectively in other workplaces and makes provision for a number of offences if the Act is

contravened. Major differences exist as far as these two laws are concerned.

There is a clear need for some degree of alignment of the different laws, and their integration within the broader occupational health and safety, and social security framework.

12.3 Employee protection and interests

It is recommended that appropriate departmental measures be adopted to ensure that COIDA and the officials employed there sufficiently appreciate the fact that employer and employee interests are to be respected alike. Furthermore, the protection of employee interests requires that significant steps be taken to enforce compliance by employers of their statutory duties, and that claims processing be streamlined in order to deal speedily and efficiently with claims by employees and their dependants.

12.4 International standards

A set of general principles can be deduced from the ILO Conventions passed on this subject:

- Financing of employment injury benefits must be by employers
- Periodic payments should be made available rather than lump-sum benefits
- Coverage: The appropriate scheme's scope must extend to at least half of the national workforce or 20 per cent of residents
- Minimum compensation levels must be provided for
- Migrant workers must receive equal treatment.

South Africa has not ratified Convention 121 of 1964 (the Employment Injury Benefits Convention) yet, but is in a position to do so. It is recommended that steps be taken to effect the ratification of this Convention, and that the ratification of the other Conventions in this field be seriously considered. By doing so, South Africa will be seen to adhere to basic international standards informing policy-making in an area fraught with problems.

12.5 Prevention

It is the view of the Committee that, unlike overwhelming precedent in this regard, no comprehensive strategy has yet been developed to incorporate prevention as part of the overall system of employment injury and disease protection. The recommendation made by the Report of the Committee of Inquiry into a National Health and Safety Council, namely that prevention policy must be developed as part of a national strategy, is supported. All compensation agencies, including the mutual associations, should participate in developing this policy.

12.6 Reintegration

COIDA is not strong on reintegration measures. In contrast with the position elsewhere, there is no provision in COIDA, which specifically attempts to enforce reintegration measures – such as compulsory rehabilitation or vocational training programmes.

It is, therefore, especially in the area of reintegration measures that the system is extremely deficient. One would have to suggest that policy-makers should, as a matter of priority, consider the introduction of measures which would give effect to the principle of labour market integration. Rehabilitation, vocational training and, where appropriate, linking entitlement to benefits payment to participation in such programmes, should serve as minimal mechanisms to attain this goal.

12.7 Benefits

The recommendation made by the Report of the Committee of Inquiry into a National Health and Safety Council is endorsed. In particular there is an urgent need for a thorough investigation of benefits provided by the compensation system. This includes concerns related to the type of benefit, the basis for awarding compensation, and access to benefits.

12.8 Exclusion

The exclusion of domestic workers, the self-employed, and dependent contractors may be found to constitute a violation of section 9(1) of the Constitution (equal protection and benefits of the law) and section 9(3) (indirect

discrimination against, for example black women (as domestic workers) as a particularly vulnerable group). An employee would also have a claim in terms of the Employment Equity Act of 1998 if the employer does not provide all employees with adequate protection in the event of employment injuries or diseases, especially bearing the definition of “employee” in the EEA in mind. Its definition of “employment practices and policies” in terms of which no unfair discrimination may take place and in terms of which barriers must be removed, includes literally all phases, stages and elements of the employment relationship.

As far as benefits to dependants are concerned, preference is given to a civil law wife at the expense of an indigenous law wife, a wife according to custom, and a cohabitant (if the spouse was married to more than one). This is constitutionally challengeable – also in view of the fact that no distinction is made between children born out of these relationships.

It is suggested that the possibility of voluntary registration in terms of COIDA should be considered, if compulsory coverage is not found to be feasible.

12.9 Commuting injuries

It is recommended that urgent attention be paid to enlarging the scope of accidents covered under COIDA so as to include commuting injuries on a wider basis than presently foreseen.

12.10 Defining accidents and diseases

Employees need to be made aware of their rights under COIDA, in particular as far as claiming in respect of occupational diseases is concerned. The Compensation Fund should be actively involved in broad public awareness campaigns.

12.11 Administration

The critical gaps and concerns mainly relate to:

- Responsibility for compensation being divided between different bodies with different administrative criteria for assessing claims and making awards, resulting in an inequitable system.

- The administrative backlogs of compensation systems in resolving compensation claims submitted by and on behalf of workers have resulted in inefficient compensation service provided by the state, which is prejudicial to workers affected by an occupational injury or disease.

It is suggested that these problems should be addressed within the framework of developing a comprehensive national occupational health and safety policy.

In the interim a more efficient administration of the current compensation system needs to be established, while indicators for the assessment of progress in this regard have to be determined.

12.12 Civil suits against employers

In *Jooste v Score Supermarket Trading (Pty) Ltd* the Constitutional Court found that section 35 of COIDA does not violate the right to equal protection and benefit of the law in section 9 of the Constitution. The question whether or not an employee ought to have retained the common law right to claim damages, either over and above or as an alternative to the advantages conferred by the Act, represents a highly debatable, controversial and complex matter of policy, according to the Court. The Court stated that such a contention represents an invitation to the court to make a policy choice under the guise of rationality review, an invitation that the court firmly declined.

Another alternative would be to allow tort-based civil claims to be brought in respect of the damages not covered in terms of the present compensation systems. The current dispensation operating on a no fault basis would then provide limited benefits, as is the case presently. In fact, workmen’s compensation schemes by their nature do not provide full coverage. In addition thereto, and only if fault can be established, employees and their dependants are allowed to sue employers directly (also for general damages, such as for pain and suffering). This combination of workmen’s compensation and employer (tort) liability is most common in Europe. Of course, if the employer is sued directly, any amount paid out by the compensation system should be

deducted from the damages award, as the principle should remain that the employee/dependant should not receive more than his/her actual damages.

12.13 Financial issues

An actuarial assessment of the entire compensation system should be undertaken to assess the feasibility of increasing (and/or individualising) employer premiums, abolishing the rebate system in order to improve benefits awarded to employees and fully cover all costs related to administration of COIDA.

The staff component of COIDA should be strengthened in order to be able to target non-complying firms sufficiently.

12.14 Conclusion

The Committee recommends that the issues discussed above be dealt with within the framework of a comprehensive national occupation health and safety policy. As with the earlier discussion of the Road Accident Fund, this should include consideration of the costs and benefits of amalgamating the different systems in a single comprehensive system that offers life, disability and health insurance cover to all employees for all accidents and diseases.