

## WORKMENS COMPENSATION - WHO PAYS THE PRICE ?

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The Workmens Compensation Act (WCA) and its administration in South Africa have been shown by both studies\* and experience to be inadequate and unjust. Not only does the WCA exclude many workers, deny satisfactory compensation to those who have been injured or had their health impaired in the workplace and ignore the pain and suffering endured, it also makes the compensation procedure a long and difficult obstacle course.

Initially the Act focused on compensation for industrial accidents, as these were more easily shown to be work-related than diseases. Winning compensation for occupational diseases is proving very difficult. In a country where workers are exposed to many uncontrolled health hazards, only a handful of industrial diseases are compensable, compared with other countries. One gross omission is lung cancer, well documented as caused by a number of industrial carcinogens, including asbestos.

The WCA Amendment of February this year contains, amongst other things, a new statute of limitations. Although other population groups had to submit a claim for compensation within 12 months of diagnosis of occupational disease, africans were previously exempt from this requirement. Already disadvantaged by the migrant labour system and other political and social forces, these workers are to be further disadvantaged by the Act. The Progressive Federal Party attempted to remove this section of the bill and the debate makes interesting reading. Concern

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\*See: D. Rosengarten, "Workmens Compensation - South Africa, a case study", DSG/Critical Health Dissertation Series, No 3 ;D. Budlender, "The Workmens Compensation Act", SALB 9.4 (Feb 1984), pp22-41.

was expressed that "as the Act stands at present, even after 20 years of notice a claim can still be lodged" and that "This could be to the detriment of both the employer and the fund in that... witnesses of the nature and circumstances of the injury... would no longer be available." \*

A case of asbestos cancer.....

A recent claim vividly shows the difficulties experienced in winning compensation for occupational disease. The worker in question is a 42 year old man who was employed for three years in an asbestos mill in the Northern Cape while in his teens. His work was to scoop milled asbestos with his bare hands and take it for testing. He was not provided with protective clothing or a respirator and at the end of each day his clothes were covered in a fine layer of asbestos dust. Later he worked as a pump attendant in a garage and then as a gardener. In August 1983, he was referred to a hospital in Cape Town complaining of mild pain and progressive swelling of the abdomen. He had diagnostic surgery the following month and the biopsy showed mesothelioma.

It is well known that exposure to asbestos fibres can cause mesothelioma, a cancer of the tissue that lines body spaces like the chest or abdomen. It is specific to asbestos exposure, severely painful and debilitating, and incurable. Victims rarely survive longer than two years from the time of diagnosis. It became compensable only in 1980, despite the fact that it was first described in 1956 in South Africa, and has been known for a long time to be related specifically to asbestos exposure.

At the beginning of October 1983, a compensation claim was filed with the Commissioner in Pretoria. Priority for the case was requested in view of the worker's short life expectancy and his obvious

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\*Hansard, 27-28 Feb 1984, col 1835ff, 1917ff.

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qualification for compensation. The worker was treated with pain-killers and he returned to his family in the Northern Cape with the assurance that his case for compensation was straight-forward.

Five months later, in February 1984, the Commissioner acknowledged receipt of the claim, but explained that the asbestos mill in question was a controlled works in terms of the Occupational Disease in Mines and Works Act of 1973, and that the matter had therefore been referred to the Compensation Commissioner at the Medical Bureau for Occupational Diseases (MBOD) in Johannesburg.

By that stage, the sick man had returned to hospital in Cape Town complaining of shortness of breath, severe continuous pain and tremendous loss of weight. On examination it was clear that he would not live longer than a few months. At this stage, we discovered that compensation monies could not form part of an estate. Consequently, if he died before the compensation came through, we would have to re-apply for compensation for his dependants, who would not receive as much in total as the worker would have been paid out while alive.

We contacted the MBOD to stress the urgency of the case and to object to the unwarranted delay, only to be told that they had lost the claim, and all the associated documentation. We then had to re-submit the claim to them.

In mid-April we received a telephone call from MBOD. We were told that it was felt that the claimant did not have sufficient exposure to asbestos during the three years at the mill to account for his disease. This is totally counter to internationally accepted scientific evidence which documents the development of mesothelioma after very short periods of exposure to asbestos. We were asked to supply the MBOD with further details. Following our request that these requirements be put in writing, we received a letter



asking us to ascertain:

1. His mining work number (He is expected to recall this some 20 years after the event, while the company that employed him has no mining service records dating back to this time!).
2. The names and addresses of any two of his former co-workers who can testify in written sworn statements confirming his previous asbestos sorting exposure (This is despite a sworn statement from the worker himself).
3. Whether he came into further contact with asbestos dust while working as a garage pump attendant, e.g. from worn brake linings in any nearby garage work-shops (He was not working inside the garage building but outside at the pumps).
4. Whether he was born in Prieska and how long he has resided and worked there (The environmental pollution in Prieska comes from the same source as the occupational exposure, but it is not compensable. This environmental exposure is clearly being used to exclude a workmen's compensation claim. This is the only context in which official concern is expressed about the hazards of such environmental exposure).
5. Whether he has lived in any house with a worn asbestos ceiling or roof (The same point as 4 above applies).

Who gets the benefit of the doubt?.....

This raises the question of which principles are being applied in the awarding of compensation. One can clearly discern in this case the application of unreasonably strict criteria for the establishment of causation of an occupational disease. This contrasts interestingly with the explicit principle in all legislation regulating the protection of workers from occupational hazards. The employers are subject to the duty of providing protection only as far as is "reasonably practicable". It is internationally accepted that claims of this nature should be

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subject to the principle of balance of reasonable probability. This is in recognition of the inexact nature of medical science and the general difficulty of establishing absolute proof of causation. In effect what this means is that establishment of causation should only be required as far as is "reasonably practicable".

The application of stringent criteria clearly tends to eliminate many claims for compensation and to cause undue delay even in successful claims. This worker's case is not atypical. Claims have been known to take more than two years to be processed. What, in these cases, is the cost to the worker? During the delay there is loss of earnings which is felt more keenly when there are dependants. There is the cost of treatment and of transport, which in this worker's case involved three trips to Cape Town, as management of his condition by the local hospital was inadequate. Workers are often lost to follow-up, and are unaware of their rights, so may never receive the money if it eventually comes through. And there is the emotional cost of pain, suffering and uncertainty. This man knows that he will die prematurely of an occupational disease and is unsure whether his family will be provided for.

What's wrong with the compensation bureaucracy?.....

Some interesting facts are to be found in the financial report of the Workmen's Compensation Commissioner for the year ending Feb 1983. Some 58 out of 465 authorised posts in the Department remained vacant, whilst the turnover of staff was 44% for that year. Nevertheless, we are reassured that:

In spite of staff shortages and the lack of experience among a large percentage of the workers, the work in all sections of the office was kept consistently up to date.

This was explained by a total of 48000 hours of overtime, and the fact that:

Procedures and methods are continually

scrutinised with a view to eliminating unnecessary work.

The report neglects to suggest possible causes for the high turnover of staff and large number of vacant posts. The problem is certainly not financial. The reserve fund is bulging at the seams, presumably partly because of the inefficiency of the whole compensation procedure. Unclaimed monies now total R5 121 916.32 and the total assets of the fund are R111 815 396,82.

The WCA provides only financial compensation for damage to health caused by unhealthy and unsafe working conditions. This financial compensation is totally inadequate, paying a maximum of 75% of basic wages, not counting overtime, shift allowances etc. Ultimately the real cost to the worker cannot be compensated, and an added burden of delay of a claim in financial and emotional terms undermines the ethical intentions of the act itself and discriminates against the already injured worker.

Conclusion.....

This worker's case shows that the onus is on the claimant to provide the evidence, and that the employer and the fund enjoy the benefit of any doubt. If a statute of limitations is imposed at all, it should bind the Workmens Compensation Commissioner, not the worker. The time lapse between the receipt of the claim, and the receipt of compensation should be controlled and drastically shortened.

Workmens Compensation should be a part of an integrated personal insurance system, on the Swedish model, which automatically pays benefits to injured or diseased workers without subjecting them to the burden of proof.

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