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COMMENTS ON THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES AMENDMENT BILL, B21-2020

Prepared for:

Quad Para Association of South Africa (QASA)

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1. INTRODUCTION

The Quad Para Association of South Africa (QASA) (NPO No: 000 881) is a voluntary association established in compliance with the requirements of the Non-profit Organisation Act 1997. Its aims and goals, among other things, include furthering the interests of quadriplegics and paraplegics by the formulation of national policy and strategy, in order to develop the full potential and quality of their lives. A number of its members receive benefits or have benefitted under the Compensation for Occupational Injuries and Diseases Act (COIDA or the Act).[1]

The Minister of Labour published the Compensation for Occupational Injuries and Diseases Amendment Bill, 2018 (Bill, 2018) for comment on 18 October 2018. QASA commented on the Bill, 2018 which has now been amended and introduced to the National Assembly for consideration as the Compensation for Occupational Injuries and Diseases Amendment Bill B21-2020 (the Bill).

Below we deal with the purpose of COIDA as it forms the basis for interpreting its provisions, before we comment and discuss the amendments to the definitions of section 1; the substitution of section 44 of COIDA; the implications of the National Minimum Wage Act in respect of the constant attendant allowance as it relates to domestic workers; medical aid; the re-opening of files especially in respect of permanently disabled beneficiaries who require on-going or emergency medical care as a direct or indirect result of their injuries; and provide concluding remarks.

QASA is pleased that some of its comments were into account by the drafters. However, QASA would nevertheless like an opportunity to submit these comments to Parliament in terms of its public participation procedures.

2. PURPOSE OF COIDA

It is trite that COIDA provides a system of no-fault compensation for employees injured at work and precludes a common law delictual claim against an employer.[2] In interpreting COIDA's provisions (or in proposing amendments), the following remarks made by the Constitutional Court must be considered:

[1] Act 130 of 1993.
[2] Section 35(1) of COIDA and *Minister of Defence and Military Veterans v Thomas* [2015] ZACC 26.

> "[COIDA] is important social legislation which has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large. The state has chosen to intervene in that relationship by legislation and to effect a particular balance which it considered appropriate".[3]

Furthermore, COIDA's provisions must be construed generously in favour of employees to assist them as far as possible and should not be interpreted restrictively so as to prejudice a worker if it is capable of being interpreted favourably.[4] This forms the basis against which COIDA and any proposed amendments to it must be interpreted, considered and implemented.

3. THE AMENDMENT OF SECTION 1

QASA is pleased that the drafters of the Bill took its comments into account as the Bill no longer attempts to define the meaning of "disability". As mentioned in our previous comments, the drafting convention is that the common meaning of a word should be preferred, unless an Act seeks to change that meaning.

We propose that the meaning of "**dependent of an employee**" in the Bill also be redrafted to make it clear who may be considered to be a dependent. The current meaning is drafted as a sandwich clause which becomes difficult to follow when read with the proviso at the end of the clause. The intention of the drafters may come across more clearly if the provision reads as follows:

> "'**dependent of an employee**' means any person who was wholly or partially financially dependent on the employee at the time of the employee's death and includes:
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> (a) an employee's widow or widower, a life partner of the employee who was married to the employee according to civil law, civil union or customary law, a person with whom the employee was at the time of the employee's death living with as husband or wife, or a person with whom the employee was living with in any marriage like union recognised in terms of any other law;
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> …; or
>
> (f) where there is no person as referred to at paragraphs (a), (b), (c) or (d), any other person who in the opinion of the Commissioner was wholly or partially financially dependent on the employee at the time of the employee's death.[5]"

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[3] *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 9 BCLR (E); 1999 2 SA 1 (CC) at 98.

[4] LAWSA, para 115 and the list of authorities cited.

[5] Although very unusual, it may be appropriate to footnote this in the law. The Municipal Financial Management Act uses footnotes to great effect to explain some of its provisions. It could be used here too to include the additional persons who may be regarded as dependents. Fn This person may be a child of the employee who is 25 years old or older, a parent, a brother, a sister, a half-brother or half-sister, a grandparent, a grandchild or any other relative of the employee or person known to the employee.

In QASAs suggested version above there is a defined category of persons who may automatically be considered as such but it is not a closed list and the Commissioner retains the discretion to determine which other persons were also financially dependent on the employee, when there is no person from one of the preferred categories. However, we understand that the layout of the section is completely within the drafters' discretion.

4. **SUBSTITUTION OF SECTION 44 OF COIDA**

QASA does not support the way in which it is proposed that section 44 that deals with prescription is to be amended in the Bill. The proposed amendment increases the period within which the accident must be reported from 12 months to 3 years from the date of the accident. However, it states that the right to benefits shall lapse if the accident is not brought to the attention of the Commissioner. Currently, the accident could be brought to the attention of both the Commissioner or the employer. The lapsing of benefits if the accident is not brought to the attention of the Commissioner would be inconsistent with the broad social aims sought to be achieved by COIDA and the generous manner in which the courts stated that its provisions must be interpreted.

Although we understand the rationale for the proposed amendment, its consequences could be severe as an uninformed employee or their dependents may find themselves barred from submitting a claim under COIDA because they reported the accident to the employer and not to the Commissioner or simply failed to do so within the 3-year period.

COIDA is designed as a safety net for employees. It is mindful of the limited level of education that some employees might have and the serious consequences that could follow if employees were not allowed to receive benefits under the Act. Accordingly, the two and three-year prescription periods which may be suitable for road accidents and civil law claims, should not be applied in the context of an employee and employer relationship. Moreover, if an employee reports an accident to their employer, why should they be denied benefits under COIDA because they failed to report it to the Commissioner within three years. The proposed amendment would have a significant impact especially on persons who suffer permanent disability or impairment.

Paragraph 58 of the Bill that deals with the Amendment of section 91 of COIDA increases the period within which an objection may be lodged with the Commissioner from six to 12 months and allows for this period to

be extended by a further six months. This approach, which is for an objection, is in line with the generous way in which COIDAs provisions must be drafted.

Accordingly, QASA proposes that the period of three years from the date of the accident be retained but that the accident may be reported to either the employer or the Commissioner. Furthermore, a subsection must be added to provide the Commissioner with a discretion to allow claims to be submitted after this three-year period when it is appropriate to do so and especially when it relates to accidents that caused serious or permanent impairment.

It is not appropriate to punish employees or their dependents for their ignorance. COIDA seeks to provide a mechanism to ensure that neither the employee nor their dependents suffer undue hardship as a result of a workplace accident. The additional administration for the department of amending COIDA as suggested by QASA would be insignificant when compared with the significant adverse consequences for employees and their dependents if they were not able to claim benefits under the Act due to their ignorance or mistake and were permanently precluded from claiming.

5. THE NATIONAL MINIMUM WAGE ACT

QASA proposes that the National Minimum Wage Act (the Wage Act) be interpreted favourably in respect of: COIDA beneficiaries who at the time of their accident earned less than the minimum wage; and, also for the manner in which the Department calculates the constant attendant allowance under section 28 of COIDA. This is discussed below.

5.1 Minimum wage calculations for beneficiaries injured before the Wage Act came into effect

QASA is of the view that the monthly pensions of persons injured before the Wage Act came into effect must be adjusted upwards where those pensions are below the threshold for that sector. Accordingly, the Department must determine the number of workers that fall within the sectors in the Wage Act and whether their monthly COIDA pensions are less than the minimum wage. If it is below the threshold then the pension amounts must be increased.

The Wage Act makes it clear that it was enacted in recognition of the huge disparities in income and noting the need to eradicate poverty and inequality. It seeks to address these inequalities. It would be absurd for the Department, who enacted the Bill in order to advance economic development and social justice and to

protect workers from unreasonably low wages, if it were to continue to compensate disabled employees at a rate lower than the minimum wage.

QASA is well aware that the law does not operate retrospectively. However, this would not be a retrospective application or adjustment but would bring the pension in line with the law from the date that the Wage Act came into effect. It would indeed be absurd if the Department determines a minimum wage but then fails to compensate disabled persons who historically were paid less and presently receives compensation that is below the minimum wage for their sector. In these circumstances, an interpretation where the monthly pension is adjusted upward to be in-line with the minimum wage, would be consistent with COIDA.

5.2 **Constant attendant allowance**

QASA is of the view that the constant attendant allowance in section 28 of COIDA must, as a minimum, be increased to a rate commensurate with that of the proposed minimum hourly rate set in the Wage Act for the domestic worker sector.

The Bill, 2018 stated that one of its proposed amendments is to provide coverage for domestic employees. Some of QASA's members use the services of domestic workers but they may also be required to assist members with the essential actions of life, which those members can no longer do without help. This may include assistance with ablution services, getting dressed and undressed, transferring to and from the wheelchair, pressure relief, discharge of urine bags and numerous other tasks. In other words, these domestic workers render services beyond that which are ordinarily required of such workers. However, if these essential services are not done, it may result or increase the risk of death to the member.

QASA has no objection to domestic workers qualifying for COIDA benefits. However, it means that its members who use domestic workers are now employers for the purposes of COIDA and must comply with the obligations set out under it.

Furthermore, the Wage Act also applies to domestic workers and sets minimum hourly rates. The Wage Act expressly states that the meaning of "domestic worker" includes a "person who takes care of … the sick, the frail or the disabled".[6] This means that QASA's members who use constant attendants must, as a minimum, pay them in accordance with the hourly rates set in the Wage Act. Some members require 24-hour assistance.

[6] Item 3 of Schedule 1.

It is QASA's understanding that the Department calculates the constant attendant allowance as a percentage of the monthly pension benefit that a COIDA beneficiary receives. In our view, for the reasons set-out below, the Director-General must re-consider this approach.

First, compliance with COIDA for the benefit of domestic workers imposes increased financial obligations on our members which would have to be paid out of their monthly pensions.

Second, the costs for a constant attendant are now "set" by the Wage Act irrespective of the constant attendant allowance paid by the Director-General. As mentioned above, the constant attendant allowance to be paid to an attendant of a severely disabled member who needs assistance with the essential actions of life, is determined by the injured worker's pension. However, if such allowance is so low that no-one is prepared to assist the member, the need for assistance with the essential actions of life does not go away. This places the member at considerable risk of adverse health consequences and even death.

Differently put, the need for assistance with the essential actions of life, and the costs of that service has no rational connection to the percentage of the member's COIDA pension. What happens in circumstances where the member's monthly pension is low but he needs 24-hour constant attendants? This means that the member and her family must either pay the attendant from her monthly pension or find alternative ways to remunerate the attendant.

QASA proposes that the constant attendant allowance must be adjusted at least to be in line with the minimum wage determination for the sector with due regard that severely disabled workers may require 24-hour care. Each matter must be considered on a case-by-case basis to determine the level of assistance and number of hours that a member may require assistance. There must also be a mechanism to allow for the review and decision on the assessment within a short period of time to deal with changing circumstances.

Such an interpretation is in line with the approach set-out by the courts when interpreting COIDA's provisions. It is also in line with the Wage Act, particularly section 4(6), which states that the minimum wage takes precedence over any contrary provision in any contract or law. If interpreted in this way, it would bring welcomed relief to our severely disabled members who are not able to perform the essentials actions of life for themselves, but have to pay someone from their monthly pensions because the constant attendant allowance amount paid by the Director-General is insufficient. We look forward to hear the Department's views on this.

6. **MEDICAL AID**

The manner of how medical aid is determined and the parties to be consulted in terms of section 76 (2) of the COIDA Amendment Bill, 2018 are problematic for the reason set-out below.

"**Medical aid**" is widely defined in COIDA to include "any device necessitated by disablement".[7] This means that wheelchairs and other devices required as a result of disablement fall within the meaning of medical aid. However, in determining the "tariff of fees for medical aid" only the Health Professions Council of South Africa and registered Medical Associations are to be consulted. These associations are not well placed to provide input on the fees for "any device necessitated by disablement".

QASA is of the view that the clients of the service (i.e. the disabled workers) and service providers of the above devices should also be consulted and the list must be an open list so the Department can make an informed decision when determining the tariff of fees. This is so as a tariff of fees that is inconsistent with the actual costs of "any device necessitated by disablement" may severely affect the level of independence or the extent to which a worker may be rehabilitated.

Furthermore, it is important that services or items on the tariff of fees are described in general terms and a price range provided for that service or item. Different prices may be proved for items that differ depending on the characteristics of that service or item. The names of the service or item provider are irrelevant and ought not to be provided.

Some brands have exclusive arrangements with service providers which means that only those service providers may supply or provide that brands' items. So, instead of referring to a specific brand and its price in the tariff of fees, it would be best to refer to the characteristic of the item or the generic term and then to list the price range for that item across the respective brands without mentioning the name of the brand. This would allow service providers, other than those on the list, to also be considered provided that their service or product meets the generic description and falls within the price range. Such an approach is in line with section 217 of the Constitution of the Republic of South Africa Act, 1996 which states that procurement by an organ of state for goods and services must be in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

[7] Section 1, (xxv).

7. RE-OPENING OF CLAIMS – AMENDMENT OF SECTION 73

QASA is of the view that claims for medical expenses in respect of permanently disabled workers must remain open. Alternatively, that a mechanism is created for such claims to be opened immediately in the case of emergency medical situations.

Permanently disabled workers generally require specialised and on-going medical care throughout their lives. This may include annual bladder and bowel check-ups and general health assessments to reduce the likelihood of long-term medical complications. These workers usually require on-gong medical supplies any way which are provided on a monthly basis – so their claims are open or active.

Unfortunately, specialised care is not readily available at state hospitals. The delay caused in applying for re-opening of a claim and waiting for it to be approved may cause the death of such worker. Even if the worker were to be hospitalised at a state institution, the lack of specialised knowledge by nursing staff and doctors or availability of resources, may cause the development of pressure sores, exacerbate the initial condition, increase the period required for hospitalisation and even result in the death of the worker.

Put differently, the Department's administration process of closing claims and having to apply for it to be re-opened has at best caused and continue to cause unnecessary anxiety and expense to QASA's members especially when dealing with an after-hours emergency situation. At worse, it has resulted in death or increased time spent in hospital and other complications.

Despite the Constitutional Court's ruling that persons should not be denied emergency medical care, the Newspapers are replete with stories where this is taking place on a continual basis. Private institutions are not amenable to first accepting patients and then applying for the claim to be re-opened. In fact, most private institutions do not want to deal with COIDA patients because of the historic challenges they faced in securing payment from the Department even though matters have improved recently.

The claim in respect of permanently disabled workers should remain open. Accordingly, the proposed amendment to section 73 should rather read as follows:

> "(3) Despite the provisions of subsections (1) and (2),
>
> (a) claims in respect of permanently disabled workers and payment of their medical costs remain open;
>
> (b) for workers who are not permanently disabled, a medical practitioner may apply for reopening of the claim and payment of further medical costs."

Even if the Department implements a system that deals with the opening of medical claims after hours, there is no guarantee that the system would be implemented or be available in future. Accordingly, the only way to deal with this, given the potential for life threatening situations to arise, is to amend the Act in such a way that those claims remain open. It may be that this is purely an administrative procedure but its consequences are very real for QASA's members where they are refused access to medical facilities for emergency medical treatment because their claims have to be re-opened.

8. **CONCLUDING REMARKS**

The Department is to be commended for the changes and improved services it has of late delivered to persons who qualify for benefits under COIDA. However, it must seek to provide the best services and medical aid to as many workers as possible and to reduce the negative impacts of temporary and permanent disablement on such workers.

COIDA and the provisions of the Bill must be applied and interpreted to give the maximum benefits possible to workers who rely on it. This is so as it is a statutory mechanism that limits the remedies available to employees. Any attempt to limit the number of beneficiaries, to affect the quality, range of services or devices to be provided must be avoided. It must be as inclusive as possible and seek to place the employee in as best a position as possible.

Accordingly:

- the time-period and persons to whom claims may be submitted must be as generous as possible so workers have every opportunity to apply for benefits and not fall foul of prescription;
- monthly pensions that are below the minimum wage must at least be in line with the wage for that sector;
- the allowance paid for constant attendants must be revised and brought in line with the requirements of the permanently disabled worker (who may require 24-hour attendance) and of the Wage Act;
- in determining the tariff of fees, the Department must consult widely and rather include generic terms instead of brand names and a range of prices for devices as this might make the process more competitive and cost effective; and

- the claims in respect of employees that are permanently disabled must remain open and in respect of other employees it must be decided with an hour of the application irrespective of the date or time.

Thank you for this opportunity to submit comments.

DATED at CAPE TOWN on this 18th day of February 2021.

GREGORY DANIELS on behalf of QASA