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The Chairperson

Ms Mary-Ann Lindelwa Dunjwa

**Portfolio Committee on Employment and Labour**

National Assembly

Parliament of the Republic of South Africa

For attention: Mr Zolani Sakasa;

Email:coidbill@parliment.gov.za

19 February 2021, 16:00

**RE: COMMENTARY** COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES AMENDMENT BILL 2020

Please find herewith commentary from the Occupational Therapy Association of South Africa (OTASA) on the Compensation for Occupational Injuries and Disease Amendment Bill 2020 (B21-2020).

**Introduction to OTASA and Occupational Therapy**

OTASA is a non-profit professional association representing the interests of Occupational Therapists, Occupational Therapy Technicians/Assistants and Occupational Therapy students across South Africa. OTASA supports, promotes and represents the profession of occupational therapy (OT) as a key element of the health service provision in South Africa and positions itself as an integral, evidence-based and relevant force meeting society’s health and occupational needs in partnership with key stakeholders and the public.

Occupational therapy (OT) is a person-centred health profession concerned with promoting health and well-being through engagement in occupation. The primary goal of occupational therapy for a person with a health condition/injury or disability is to enable them to participate in the activities of everyday life, including employment. Occupational therapists achieve this outcome by working with people and communities to enhance their ability to engage in the occupations or by modifying the occupation or the environment to better support their occupational engagement (World Federation of Occupational Therapists, 2012).

In occupational therapy, “occupations” refer to the everyday activities that people do as individuals, in families and with communities to occupy time and bring meaning and purpose to life. Occupations include things people need to, want to and are expected to do. Occupational therapists work with all age groups and in a wide range of physical and psychosocial areas.

Many occupational therapists employed in the public and private health sectors provide essential services amongst others to those workers injured on duty or suffering from an occupational disease. They play a key role in interventions to prevent disability and enable early return to work through our unique skills in vocational rehabilitation.

Below we refer to the sections in the existing Act and as they are to be amended by the clauses in the Bill.

A **OTASA welcomes, and supports, with specific comments on those sections, the following**:

1. **The inclusion of domestic workers** (Section 1).

OTASA welcomes the inclusion of domestic workers, as ordered by the court, into the range of employees that may receive benefits form the Compensation fund if injured on duty and the removal from the part of the definition of “employee” that lists exclusions.

1. **The introduction of a system to secure better compliance** (Section 99 / clause 61) in various specific sections of the Act, namely:

Section 39 (notice of accident), where a failure to notify is the proposed 10 per percent.

Section 40 (employer to cooperate in inquiry by Commission), where the proposed penalty is 10 percent of earnings plus interest.

Section 47 (calculation of temporary disablement), where the penalty is proposed to be double the full amount of three months compensation payable, plus interest.

Section 64 (prohibition on deduction from earnings), where the penalty is equal to the extent of such prohibited deduction.

Section 68 (notice of occupational disease) is not up for amendment and therefore is not proposed to include any penalty – in the Act it states that non-compliance is an offence.

Section 81(3) of penalty for not keeping records as prescribed at 10 per cent of earnings.

Section 82 (return of earnings) does not contain any penalty as it proposes to be amended as indicated in section 99 and is not up for amendment.

Section 83(6), the employer for not furnishing a return, at 10 per cent of earnings

The process through which penalties are awarded must comply with the constitutional dispensation, including the principle of the separation of powers, and that of administrative justice. It does appear that the Commission would become a quasi-judicial body, and the new penalties could be severe, in particular if there is more than one contravention. It is recommended that the Portfolio Committee obtains expert constitutional- and administrative law advice on this matter.

The penalties, cumulatively, could have a significant impact on an employer (at 40% of payroll, if sections 39, 40, 81 and 83 are contravened). We have also noted that in some instances interest will be levied, and in others not.

OTASA welcomes these developments, as the non-registration of the persons injured or diseased on duty in the CompEasy system has created considerable difficulties for health care providers, like occupational therapists, in having their professional service claims settled. However, the size of the penalties require that the CompEasy system is user friendly for external users allowing for easy and efficient registration of cases by employers. By all accounts from patients this does not seem to be the case. We strongly believe that accountability must be ensured by both parties.

1. We welcome the **multi-disciplinary employee-based approach** and the encouragement of the employer to employ all means to reintegrate employees back into the workplace following an occupational injury or disease:

The inclusion of a definition of “rehabilitation” in section 1 (clause 1(r)

Section 16 on how the Fund is to be used.

OTASA requests that the provision in 16(1)(i) be formulated in the past tense as for instance continued rehabilitation and life enhancement may be needed after a serious or complex occupational injury or disease, i.e., someone who HAD and not only HAS an injury or illness?

Section 26 where compensation could be refused where the employee did not comply with a rehabilitation programme.

OTASA requests clarity regarding this clause. Where the employee refuses to comply with an appropriate evidence-informed intervention programme, we need to be sure that the occupational therapy provider would not be penalized in this case. There is much literature that reports on compliance rates of patients to health-related and disability-related interventions and the factors that support and challenge compliance especially where health literacy is low.

Section 42 on employee submitting him/herself to rehabilitation. Here it must be noted, and OTASA recommends that the terminology be adopted to reflect this – not only medical practitioners, i.e., “medical examination” is at stake. For non-doctors such as occupational therapists who are also independent health practitioners, there are assessments, evaluations, investigations, etc. and these extend beyond what is narrowly understood as a “medical examination”. The inclusion of “rehabilitation” is therefore welcomed, but it must be understood that rehabilitation is a process that is continually based on assessments of changes in the patient’s condition etc.

Further to this we welcome the Inclusion of the new Chapter VIIA 70A which describes the nature of the rehabilitation and reintegration that will be expected:

OTASA has been advocating for this for many years and are delighted that this service can now be offered to persons under the Fund. We congratulate the Compensation Fund for this initiative which is consistent with achieving the Sustainable development Goals 3 (Good health and wellness) and Goal 9 (Decent work). Occupational therapists have a unique set of professional competencies that would enable us to be key role players in the provision of such services. We look forward to contributing to this endeavour. Such enhanced and increased participation, and the focus on getting persons back to work, or at least meaningfully occupied, would mean the involvement of higher numbers of occupational therapy professionals. This would also mean higher volumes of rehabilitation claims for the Fund, and the necessity to ensure appropriate personnel at the fund, to assess services rendered. OTASA is willing to partner with the Fund on this important aspect. It is vitally important, and would indeed by unlawful under the Health Professions Act not to do so, for the Fund to employ and to contract healthcare professionals (not medical professionals or medical practitioners) who are duly registered in the field of occupational therapy.

We would however request a definition of the term ‘Social rehabilitation’ for the purposes of clarity.

OTASA understands that social rehabilitation is rehabilitation of a psychosocial nature that deals with the planned transition of persons who have disabilities and diseases from an institution into the home and community. This is a term that is used predominantly in the field of substance abuse. OTASA is of the opinion that the transition to the community must be applied to all persons who have acquired a work-related injury /disability and disease. It may include critical accommodations and adjustments in the home to accommodate a wheelchair for example or assistive devices or technologies to enable independent or assistive living. This is much broader than the term social rehabilitation implies and requires a multidisciplinary approach that includes occupational therapists and not just social workers, which the term alludes to.

1. **The extension of issuing of licenses beyond ‘mutual associations’ (Section 30 / clause 16 of the Bill)**

OTASA welcomes any simplification of the system to provide consistent occupational therapy services to beneficiaries of the Fund.

B. OTASA has concerns regarding:

**1. The use of the phrase “medical aid” throughout the Act and Bill**

While OTASA support the amendment which seeks to expand the scope of consultation and service delivery to include a wider range or health care providers, the term “medical aid” is confusing. Whereas the origins of the Act is acknowledged, “medical aid” as referring to “medical support” it is now generally understood to refer to a “medical scheme”. We request that an alternate term be sought that cannot be confused with medical funders that fall under the regulation of the Council for Medical Schemes.

The use of the word “medical” and “**medical practitioner**” also limits the healthcare professionals who can, and should be involved in the treatment and rehabilitation of persons with occupational injuries and disease. A “medical practitioner”, is, in law, ONLY a doctor who is registered and has a specific degree (MB ChB). **Healthcare practitioner** would be a better word, and align with the Health Professions Act, 1974, and the numerous professionals involved in looking after beneficiaries of the Fund. This is a really important aspect, as the signing off of forms and the likes, in particular in so far as rehabilitation is concerned must be done by a healthcare practitioner duly registered within that field of treatment and care.

The same applies to the phrase “medical expenses”. In effect, the Fund covers “healthcare expenses” and not only “medical expenses”.

**2. OTASA has a concern about the naming of the Medical Advisory panel. (Section 70)**

The term/name “Medical advisory panel” suggests that the only a health care practitioner that can be on this panel is a “medical practitioner”, as our comment above explains. Although a medical practitioner may refer, they are unable to prescribe or make any pronouncements on the nature of the work of other health practitioners. Indeed, it would be unlawful in terms of sections 34 and 39 of the Health Professions Act, for a medical practitioner to do so, and also a contravention of Rule 21 of the HPCSA rules applicable to all practitioners (skills, training & experience).

OTASA therefore recommends that section 70 be amended to read as follows (our proposed additions in bold and unlined text, deletions in square brackets):

“(1)  The Director-General may on a regional basis appoint **[medical]** **health care** advisory panels which shall consist of as many members **of registered and appropriately qualified- and experienced healthcare professionals** as he or she may deem necessary to—…

(2)  A member of a **[medical] health care** advisory panel shall be paid the prescribed remuneration and travelling and subsistence allowances out of the compensation fund.

(3)  The Director-General shall designate a member of a **[medical] health care** panel as chair**person[man]** thereof.

(4)  The members of **[medical] health care** panels …”

OTASA would also recommend that all Compensation Fund Documents that refer to “medical practitioner” or that require the signature of a health care practitioner be amended from medical practitioner to be more inclusive of the range of service providers, and rather refer to “health care practitioner”, which would then include professionals duly registered at the HPCSA, SA Nursing Council and Pharmacy Council, all of whom render services within their respective scope of their profession, to the beneficiaries of the Fund.

**3. Proposed prohibition on involvement of intermediaries in claims and compensation recovering processes (Section 73 proposed to be amended in clause 43 of the Bill)**

This amendment, although understood to protect the rights of beneficiaries will have grave practical repercussions for all healthcare professionals. Although cession (as a legal construct where the healthcare practitioner sells his/her accounts to a third party who then has the right to collect it) of healthcare accounts is in any event prohibited by the HPCSA, the phrase “purports to cede or relinquish or purports to relinquish” is problematic.

OTASA understands that this amendment will make it compulsory for health care providers to deal directly with the Compensation Fund. It has been indicated to us that this is a strategy to curb fraud and waste. Three points are relevant in this regard:

1. While OTASA supports the curbing of any fraud and wastage of public funds reserved for health care for workers. However, OTASA require an assurance that the person that decides what is wasteful in terms of service delivery is properly trained and has an in-depth knowledge of specific professional practices (in line with our comments above on the scopes of various healthcare professions) to make this judgement call which may be both a critical and ethical decision. Only an occupational therapist with in-depth, up-to-date evidence-informed knowledge in the field is truly able to make this judgement.
2. The Compensation Fund historically has a very poor track record in the efficient handling of claims and payment of health care providers, with some providers waiting not only many months but up to 5 years for payment. This results in financial hardship and seriously effects the cash flow and management of any service provider’s business.

This raises a critical question of how will be Compensation Fund be held accountable for payments within the 30-day prescribed time limit and what recourse service providers will have if this is not achieved. Without pre-funding arrangements, most practitioners cannot carry the burden of unpaid accounts for valid claims that are months, or in some cases, years, outstanding.

Entities who specialize in the Fund and the law underpinning it, are necessary service providers to healthcare practitioners who do not have the time and human resources to embark on the submission, queries and follow-up processes. It is strong recommended that the right to outsource these functions not be prohibited, as it would have severe implications for healthcare practices.

1. The CompEasy system, introduced in August 2019, is now proposed by this Bill to be the direct contact between health provider and the fund. OTASA has concerns around the CompEasy system as it has proved to be not very user-friendly to external users even if they have a high level of computer literacy. Those who have been able to register have difficulty in navigating the system to see the status of their claims as well as the pre-authorizations for treatment and the many reports that occupational therapists are required to submit. While we have been assured that there is assistance available remotely and at provincial offices, the experience of many of our members has been disappointing.

*A survey of the OTASA members that provide services to workers injured on duty in July 2020 indicated that*:

* Only 50% had been able to register on the CompEasy system.
* 78% reported difficulty in obtaining a claim number.
* 52% reported that over 70% of their claims were outstanding.
* 82% had difficulty submitting invoices on the system.
* 55% reported that they had stopped seeing WCA patient and only 48% planned to see them in the future.
* 48% reported having had to retrench staff due to non-payment of claims since the introduction of CompEasy.

If the contracting out the services currently rendered by intermediaries is prohibited, we urgently require assurances on what measures will be taken to prevent financial hardship caused by this prohibition, and statutory assurances of payment of claims within 30 days as well as the procedure for paying the many claims outstanding that predate the CompEasy system

We also require an assurance that this amendment will NOT negatively affect claims already submitted but not as yet paid by the Compensation Fund. In general, statutory provisions cannot apply retrospectively, where that would affect existing rights and processes. Cession and lawful relinquishment of rights cannot now be statutorily undone into the past.

2020 has been a very difficult year for medical service providers due to the COVID-19 pandemic and associated service delivery restrictions. We trust that the labour and financial implications of this Bill for health care providers will be given due consideration.

OTASA also requests to be able to make verbal submissions on the Bill to the Portfolio Committee. OTASA has a wealth of experience on these matters, and data it can share with Parliament in order to ensure a well-informed legislative amendment process.

Thank you for this opportunity to comment and look forward to a favorable response on verbal submissions (which we can make via an electronic medium of the choice of the Portfolio Committee).

Kind regards

Prof P.A. de Witt

President