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67

18 February 2021

Honourable Chairperson: Portfolio Committee: Employment and Labour: Ms M L Dunjwa
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Dear Sir/Ms

Sonder Benadeling van Regte / Without Prejudice of Rights

COMMENTS ON the COMPENSATION for OCCUPATIONAL INJURIES and DISEASES AMENDMENT BILL, 2018

Solidarity is a trade union duly registered in terms of the Labour Relations Act (66 of 1995) and has a vested interest in the provisions of the Compensation for Occupational Injuries and Diseases Act (130 of 1993), at all relevant times.

We refer to the Government Gazette No. 43658 published on 27 August 2020 on the Compensation for Occupational Injuries and Diseases Amendment Bill, 2020 [B 21-2020].

Solidarity wishes to make to following submissions pertaining to the Amendment Bill 2020 referred to above:

Background:

Compensation for occupational injuries and diseases are a special kind of legislation whereby the right of an employee to sue his employer for damages is removed and replaced with an administrative means. It forms part of social security law and true to social security law, aims to provide a safety net in circumstances when the need arise as was said by the honourable Justice Seriti in *Molefe v Compensation Commissioner and Another* (25579/05) [2007] ZAGPHC 365. At [5] it was held in this unreported case that:

> The Compensation for Occupational Injuries and Diseases Act supra, is a social legislation and according to section 39(2) of the Constitution, it must be interpreted in such a manner that the said interpretation promotes the spirit, purport and objects of the social security right as enshrined in section 27(1)(c) of the Constitution.

It is of the utmost importance that all employees who find themselves in the devastating position of being harmed by occupational injuries or diseases, are duly protected against financial distress and where appropriate, are compensated fairly, speedily and be treated in a dignified manner.

The Constitution of the Republic of South Africa, 1996, is the supreme law of the Republic and forms the basis of all law in the country. The Constitution includes the Bill of Rights which sets out and jealously protects the fundamental rights that protect life itself as well as human dignity and equality in various life situations. It determines how these rights should be promoted [Section 7(2)], interpreted [Section 39] and how it may be limited [Section 36] in "an open and democratic society based on human dignity, equality and freedom" [Section 36(1)].

From the viewpoint of an individual, social security is rights based and entails legislated "prescribed entitlements, qualifying conditions and procedural guarantees" (see the Molefe-ruling at [5]). Section 27[1] of the Constitution 1996, determines the rights pertaining to social security. Section

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[1] "27. Health care, food, water and social security.–
(1) Everyone has the right to have access to –
(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

27(1)(c) states that "everyone" has the right of access to social security in circumstances of inability to provide for themselves and their dependants and the state bears the responsibility in the progressive realisation of this right. Dignity and equality are of particularly important for purposes of occupational injuries and diseases.

The policy of the Compensation for Occupational Injuries and Diseases Act (130 of 1993) hereinafter referred to as "COIDA" or the "Act" has repeatedly been emphasised by our Courts by as in the well-known case of *Davis v Workmen's Compensation Commissioner* 1995 (3) SA 689 (C), at 694 E–G when the honourable Friedman JP cited from *Williams v Workmen's Compensation Commissioner* 1952 (3) SA 105 (C) and expressly gave preference to an interpretation most favourable to employees while renouncing any prejudice to employees. The Court emphasised the importance to assist to an employee "as far as possible" and held [at 694 E–G] that the Act is not to be:

> interpreted restrictively so as to prejudice a workman if it is capable of being interpreted in a manner more favourable to him. In my judgment the Act does not lend itself merely to the restricted interpretation placed upon it by respondent. It is equally capable of being interpreted as affording respondent, on facts such as those in the present case, a discretion to look beyond the amount applicant happened to be earning at the time of the accident.

This is supported by the rule that the legislature does not intend harsh, unjust or unreasonable legislative measures, (Burger, AJ. 2009. *A guide to legislative drafting in South Africa*. Cape Town: Juta Law at p 33.)

In light of the purpose and policy of the COID Act and the above-mentioned information, Solidarity makes the following submissions on the Amendment Bill. Comments follow the numbering as per the Amendment Bill unless reference is made to "COIDA" or the "Principal Act", both of which refers to the Compensation for Occupational Injuries and Diseases Act, Act No. 130 of 1993 as amended:

Section 1: Amendment of Definitions:

1.*(a)*: The meaning of "accident":

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(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

We oppose the removal of the word **"accident"** and substitution with **"incident or occurrence"** because no COIDA specific definition of "incident" or "occurrence" has been included in the COIDA Amendment Bill which leaves one with the definition of **"incident"** in Section 1(1) of the Occupational Health and Safety Act (85 of 1993) [hereinafter referred to as "OHSA"] read together with Section 24 of OHSA, that requires an **"incident"** only to be reported in very specific circumstances that differs significantly from the requirements for reporting in COIDA.

In our experience, employers do not always report accidents as required by the law and introducing a limiting definition, may increase such challenges. The mentioned Sections in OHSA require reporting *inter alia*: if the employee died, became unconscious, loss of a limb and to be off duty for more than 14 days.[2]

Furthermore, the definition of **"accident"** in the OHSA, is exactly the same as the current definition of an **"accident"** in COIDA and reads as follows:

> "**accident**" means an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee; (xxiv)

The proposed Amendment will create confusion and the reporting of occupational accidents and occupational diseases will be measured against the provisions of Section 24 of OHSA. It is a well-known fact that not all occupational injuries and occupational diseases are duly reported, and it will be detrimental to employees, if further obstacles are to be encountered in the reporting of occupational injuries and diseases.

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[2] The relevant definition and Section read as follows:

> "**incident**" means an incident as contemplated in section 24 (1);
>
> 24(1). Each incident occurring at work or arising out of or in connection with the activities of persons at work, or in connection with the use of plant or machinery, in which, or in consequence of which-
>
> (a) any person dies, becomes unconscious, suffers the loss of a limb or part of a limb or is otherwise injured or becomes ill to such a degree that he is likely either to die or to suffer a permanent physical defect or likely to be unable for a period of at least 14 days either to work or to continue with the activity for which he was employed or is usually employed;
>
> (b) a major incident occurred; or
>
> (c) the health or safety of any person was endangered and where-
>
> (i) a dangerous substance was spilled;
>
> (ii) the uncontrolled release of any substance under pressure took place;
>
> (iii) machinery or any part thereof fractured or failed resulting in flying, falling or uncontrolled moving objects; or
>
> (iv) machinery ran out of control, shall, within the prescribed period and in the prescribed manner, be reported to an inspector by the employer or the user of the plant or machinery concerned, as the case may be.

Recommendation: However, we strongly recommend the amendment of the current three folded test contained in the definition of **"accident"** by substituting the word **"and"** with the word **"or"** in the definition; and furthermore, to improve certainty on pre-existing conditions, inclusion of the words: **"recurrence, relapse or aggravation"**:

> "an accident arising out of **and** in the course of an employee's employment **and resulting** in a personal injury, illness or the death of the employee"

to read as follows:

> **"**an accident arising out of **or** in the course of an employee's employment **and resulting** in a personal injury, illness or the death of the employee **and includes a recurrence, relapse or aggravation".**

It is important to note that the last part of our proposal is incorporated by some jurisdictions in Canada and the disjunctive first part, by most jurisdictions in Australian compensatory laws.

Furthermore, it is proposed that a similar presumption be included in COIDA, to the Canadian Compensation Laws, which all contain a rebuttable presumption with the working that if a person was injured or died **in the course of** his employment, it is presumed to arise **out of** employment and *vice versa* unless the contrary is proved.

1.*(c):* The meaning of "assessment":

We do support the inclusion of clinical and vocational rehabilitation and the provision of assistive devices as envisaged in Section 70A, however the definition of **"assessment"** as it is proposed creates confusion as it refers to rehabilitation in terms of Section 70A, however Section 70A does not refer to any **"assessment".** It is unclear and vague what the relationship will be between the "assessment" and the envisaged rehabilitation in Section 70A.

1.*(f)(d)* and *(f)(f)*: The meaning of "dependant of an employee":

Solidarity supports that any member of a person's family who was wholly or partially financially dependent upon such employee at the time of the death on duty, to be entitled to institute a claim similar to the definition of a **"dependant"** as defined the Western Australia: Workers' Compensation and Injury Management Act 44 of 1981 at Section 5(1) which reads as follows:

> dependants means such members of the worker's family as were wholly or in part dependent upon the earnings of the worker at the time of his death, or would, but for the injury, have been so dependent;

It is a known fact that in the current economic circumstances, more people are dependent upon the earnings of a person and children remain longer dependent upon parents.

However, should there be an age limit enacted, Solidarity supports the increase of the age limit of dependent children, to 25 years for eligibility to claim, however the proposed wording in the Bill is vague and it is unclear what the position of a child between the age of 18 and 25 will be, Solidarity proposes that the age limit be 25 irrespective of the financial dependence of the child upon the deceased parent between the ages of 18 and 25 years because the current situation is often detrimental to children over 18 years of age but still at school or not yet qualified.

Furthermore, it is necessary to describe the type of studies to make provision for different types such as academic, vocational training, in person or electronic studies, etc. as well as the duration and number of qualifications that will be acceptable to enable the continuation of pension payments because there are different interpretations between the Compensation Fund and the mutual associations. Claimants need to be informed of these because children form part of the most vulnerable group in South Africa and children (claimants) who have lost a parent due to a death on duty, much more so.

Furthermore, the Compensation Fund and Mutual Associations should be placed under an obligation to inform a dependant of a deceased employee of the intention to stop a pension and the right to make representations and the applicable steps to take to re-institute such pension.

We note with gratitude the bursaries offered for further education to the dependants of COIDA pensioners. It will be good if bursaries can be extended to include claimants themselves in programmes of rehabilitation and re-integration as envisaged in Section 73A of the Amendment Bill.

Better compensation and assistance to the dependants of a person who dies on duty, will be in line with the requirements of Section 27(1)(c) of the Constitution, cited above.

***(h)*: The meaning of "employee":**

***(d)(iv)*:** It is proposed that a person **"who contracts for the carrying out of work and himself engages other persons to perform such work"** who are currently excluded from the ambit of the

Act, be **included** in the definition of an "employee" to enable this category of people to obtain optional but affordable coverage and to extend the safety net to them as this will give effect to Section 27(1)(c) of the South African Constitution and to prevent any discrimination against people in informal employment.

Cognisance should taken of the High Court ruling in *Boer v Momo Development CC en 'n Ander* 2004 (5) SA 291 (T) at 294 F–I, that held that the definitions of **"employer"** and **"employee"** do not require an employee to be in the employment of a registered and paid up employer, for an employee to have a rightful claim. The definition **"employer"** does not refer to a **"registered employer"** but rather the employment relationship with an employee. According to the Court, **"employer"** and **"employee"** has its respective plain language meanings because the purpose of the Act (as in the long title), is compensation to employees who sustained occupational injuries or contracted occupational diseases.

***1.(p)*: The meaning of "occupational disease":**
The proposed amendment is strongly supported, and we would prefer it also to include the words **"or other mental illness"** after **"post-traumatic stress disorder"**.

***1.(r)*: The meaning of "remuneration":** The proposed amendment should be aligned to the definitions and use of **"earnings"** in the Act to prevent vagueness and conflicting interpretations.

Section 3, (Section 11 of COIDA): "Amendment of Composition of the Board" –
Solidarity does not support the limitation of representation on behalf of employees on the Board by only NEDLAC affiliated unions because not all unions are affiliated to a labour federation that is affiliated to NEDLAC and not all employees are unionised. Further to the proposed five members nominated by NEDLAC to represent the organised labour stakeholders, a further five members representing organised labour stakeholders who are **not affiliated** to NEDLAC, be appointed on merit in order to ensure broad labour representation on the Board.

The removal of COIDA Section **11(1)(f)**, that provides for two representatives nominated by the Health Professions Council of South Africa (South African Medical and Dental Council) is not supported as Solidarity is of the view that compensation cannot be properly addressed without the input of appropriately qualified medical practitioners. Solidarity further recommends that the

capacity of the Board be expanded by the inclusion of a variety of medical practitioners such as neurologists, orthopaedic surgeons, psychiatrists, occupational therapists, physiotherapists, to ensure just, fair and equitable compensation and appropriate rehabilitation.

Section 8 (Section 16 of the Principal Act): "Application of compensation fund" -

Section 16(a)(i): The inclusion of the proposed section on rehabilitation, is strongly supported however it is important the new concepts like **"life enhancement assistance"** be defined to prevent possible confusion or misunderstanding or misinterpretation of the Act.

Furthermore, terminology should be used consistently throughout the Act to prevent uncertainty and inconsistent interpretation, the use of the term **"work-related"** is therefore not advisable as it will create confusion. Wording should be used exactly as in the Definition Section and therefore, it should be defined or reworded to be aligned with defined concepts. See also Solidarity's comment on the definition of an **"accident".**

Section 10; (Section 18(2) of the Principal Act): "Accounting"-

We are of the opinion that it is not wise to invest all monies from either of the two funds administered by the Compensation Fund, in one basket and therefore we propose that not more than a third of the actuarial value of either the Compensation Fund or the Reserve Fund be transferred to the Public Investment Corporation.

Section 12; (Section 22 of the Principal Act): "Right of employee to compensation":-

Section 22(2) of the Principal Act: Although no amendments have been proposed to Section 22(2), Solidarity proposes that the periodical payments shall be made in respect of temporary total disablement from day one. It is unacceptable that employees have to sacrifice up to and inclusive of three days of their limited number of allocated sick leave [in terms of the Basic Conditions of Employment Act (75 of 1997)] for an injury on duty.

Section 22(5) of the Principal Act: Solidarity supports the proposed amendment of Section 22(5).

Section 12(d) of the Amendment Bill [Proposed Section 22(6)]:

To enhance clarity and prevent vagueness and different interpretations, it is proposed that the employers are obliged to provide clarity in a travel policy on the "pick-up" and "drop-off" points referred to in the Amendment Bill.

Section 13 (Section 23 of the Principal Act): "Accidents outside Republic":-

Is this Section still in line with international trends and the globalisation of labour practices and the important part that the migration of the workforce plays in the economic development of Africa and SADC in particular? It is submitted that this is not in line with international trends and furthermore, provision need to be made for people who cannot return to the Republic due to unforeseen reasons or reason that are not in their control as was seen during the past year where people could not travel due to travel restrictions brought about by the COVID-pandemic.

The Department of Employment and Labour embarked on the roll out of social security to people from neighbouring countries working within our borders and the opposite should be true. The South African Government should ensure that South African citizens that work in other countries, are equally treated, and protected with enough social security measures to prevent those South Africans from becoming a burden on the South African society if they sustain occupational injuries or diseases abroad.

Section 14 (Section 25 of the Principal Act) "Accidents during training for or performance of emergency services":-

Solidarity supports the proposed amendment of Section 25 however would like to propose that clarity also be provided by the inclusion of a definition for the term **"work-related training"** to include situations relating to teams building excursions.

Section 15 (Section 26 of the Principal Act): "Special circumstances in which Commissioner may refuse award":-

This Section places an employee under an obligation to divulge confidential health conditions to employers to which an employer is not entitled, for instance, is it correct to expect an employee to divulge an illness such as HIV/AIDS when an occupational injury is sustained or an occupational disease, contracted. HIV/AIDS may influence medical treatment as well as rehabilitation protocols.

This Section requires an employee to divulge it to the employer and the Commissioner or Mutual Association and Employer Individually liable, (as the case may be) and may consequently be in contradiction to the provisions of the Protection of Personal Information Act (4 of 2013).

The element of **"unreasonably refusing"** in the Amendment Bill is unclear, for instance: who is to decide what **"medical aid"** or **"rehabilitation programs"** are acceptable? Medical aid treatment and rehabilitation programs differ from time to time due to the rapid change in scientific knowledge and treatment protocols. Some protocols which may at one time be acceptable, may become controversial very easily for example: sleep therapy and electrical shock therapy. Forcing employees to submit to specific treatment may constitute an infringement of the rights to privacy, dignity and even life as provided for in the Bill of Rights in the Constitution.

Furthermore, different interpretations made find its way due to the different Mutual Associations and the Compensation Fund (and proposed "licensees") interpreting this section differently.

Solidarity will only support this Section if the Human Rights (privacy) of injured or ill employees are respected and protected.

Section 16 (Section 30 of the Principal Act) Amendment of "Mutual associations":-

Section 30 of the Principal Act read together with Section 1 [paragraph *(m)* of the Amendment Bill]: Solidarity is in principle against the demutualisation of the mutual associations because it will not be in the interest of employees if compensation is paid by an ordinary insurance company that is primarily aimed at making a profit.

However, should the demutualisation proceed, we propose that strict terms and conditions are prescribed by law in the Act itself. The minimum requirement should be that such a company should be a non-profit organisation to prevent exploitation of employees who are dependent upon compensation. Furthermore, the requirement for the composition of each of the licensee's boards, should be similar to what the requirement of the composition of the Compensation Fund's Board is.

Furthermore, in a transparent and democratic country such as South Africa, it is important that all applications be published by notification in the Government Gazette together with the terms and

conditions of the Licence Agreement, sufficient time be allocated for public comment and that when a licence is awarded, it also be published by notification in the Government Gazette, inclusive of a copy of the Final Licence Agreement.

It is submitted that the movement between the different compensation institutions have the following practical challenges:

1. The Principal Act provides for a pension to be awarded once an employee's total permanent disablement reaches 31 percent. This means that all lumpsum awards made to the employee during his life-time needs to be added together and once it reached 31 percent, a pension needs to be paid to that employee. If it so happens that an employee is awarded a lumpsum for 30 percent or less permanent disablement by one of the institutions (the Compensation Fund, RMA or else) and subsequently another award is made by the other institution, the latter may not be aware of the first award and therefore the two awards are not added together. This means that employees that may be entitled to a pension, do not receive it. This happens irrespective of it being brought to the attention of both institutions and Solidarity has for example a member who died after waiting in vain for 10 years for the two different awards to be added together and a pension be paid to him, showing the very negative impact the transfer of employees from one institution to another.

2. Institutions that do not share the same authority than the Department of Employment and Labour are unable to force employers to provide the necessary information and to comply with their respective legal obligations regarding the measurement of exposure to harmful substances and environmental hazards. This results in employees being denied compensation as the employee is dependent upon the employer for the provisions of the exposure measurements and medical surveillance. For a practical example see the footnote below which is extracted from an actual decision.[7]

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[7] "We have reviewed all information provided in respect of the adjudication of this claim. Kindly note that the claim is not acceptable as an occupational disease under Instruction 171 of Compensation for Occupational Diseases and Injuries Act 130 of 1993.

A formal noise survey document that confirms that the employee works in a noise zone, or the personalized dosimeter reading(s) for the employee was never submitted, in spite of requests to the employer.

The employer also did not perform baseline audiograms and annual screening audiograms.

Section 18 (Section 36 of the Principal Act) "Recovery of damages and compensation paid from third parties":-

The proposed Amendment will prohibit an employee from claiming for benefits as provided for in COIDA, is not supported because it is an infringement of the right of the employee to institute a claim in respect of an occupational injury in terms of COIDA. By prohibiting a claim in terms of the COID Act, the right to held and employer accountable in terms of Section 56 of the Principal Act which provides for a claim for "Increased Compensation due to the Negligence of the Employer", is then per implication, also removed.

Furthermore, the improved benefits provided for in the COIDA Amendment Bill of rehabilitation and re-integration, will also not be available to an employee.

Employees are to be protected by legislation which fall within the ambit of the Department of Employment and Labour and if the right to institute a claim in terms of COIDA, is removed, so are these claimants removed from the ambit the Department of Employment and Labour. Cognisance should be taken of the provisions of OHSA [Section 1] that includes a **"vehicle"** as a place of work in the definition of **"premises" includes any building, vehicle, vessel, train or aircraft; "prescribed" means prescribed by regulation**;

Contrary to the provisions of COIDA, the Road Accident Fund Amendment Act (19 of 2005) only allows an injured person to claim general damages if it is certified to be a **"serious injury"** by a medical practitioner. This will negatively impact upon employees who are not considered to be **"seriously injury"** but who may have a loss of earnings and less serious injuries that may need medical treatment as well as a loss of future earnings should further treatment be necessary at a later stage.

Furthermore, the two Acts will have to be aligned to prevent contradictory interpretation and implementation regarding compensation and other benefits.

There is no formal proof that the employee is exposed to excessive noise in the workplace, to the equivalent of 85 dB for 8 hours per day for 5 days per week."

However, should the proposal in the COIDA Amendment Bill proceed into law, it is proposed that employees at least be offered an opportunity to choose whether they want to claim in terms of COIDA or the RAF.

Section 19 (Sections 38, 39, 43 and 68 of the Principal Act): "Notification of accidents and claim for compensation":-

General comments on the Notification of accidents and claim for compensation":

Solidarity is gravely concerned by the lack of processes and procedures available to employees to report their own claims (a right recognised by our courts, see *Boer v Momo*) and the failure by some employers to report claims in respect of occupational injuries and occupational diseases. Therefore, it is respectfully requested that the Commissioner, set down rules and provide the necessary forms and processes as well as access to electronic means to assist **employees** to report claims themselves to the Commissioner.

Furthermore, the proposed penalties and interest should be levied, collected and paid over to the employee, and not be retained by the Commissioner or Mutual Association as the case may be, because it is the employee whose fate is left in the hands of the employer, Commissioner or Mutual Association.

If employees are allowed to in all instances report their own occupational injuries and diseases to the applicable authority, it will result in an improved system of control over the reporting of accidents because employers can then be held accountable.

Section 21(a) (Section 41(1) of the Principal Act) "Particulars in support of claim":-

Take note that according to the wording of the Amendment Bill, Section 41(1), will deny the right to request documentation to the Mutual Associations as only the Commissioner is allowed same in terms of the current proposed wording.

Section 21(b) (Section 41(3) of the Principal Act): Solidarity supports the inclusion of the Amendment as proposed by Section 41(3).

Recommendation: Solidarity strongly recommends that the right to claim compensation in respect of travelling to and from medical service providers for the purpose of medical treatment be pertinently included as a subsection to section 41.

Section 24 (Section 44 of the Principal Act): "Prescription":-

Solidarity strongly supports the proposed amendment.

Section 25 (Section 45 of the Principal Act): "Consideration of claim":-

We support the intended amendment however we are of the opinion that expert witness fees (medical experts) ought to be reviewed annually and the monetary value should be adequate to prevent a loss of income to the witness for the time spend at the formal hearing. Take note that time waiting for the tribunal to arrive at the venue should also be taken into consideration with regards to the determination of witness fees if the tribunal does not arrive on time and the hearing does not start on the time as indicated in the notification.

Section 28 (Section 47(4) of the Principal Act) "Compensation for temporary total or partial disablement":-

Section 47(4) of the Principal Act holds that payments in respect of temporary disablement should be done on a monthly basis. It is proposed that interest calculated according to the prime interest rate of the Reserve Bank at that time and be paid to an employee who has submitted al relevant documentation in respect of same if the Compensation Fund or Mutual Association fails to pay within the prescribed period of 30 days from the date of the submission of the relevant documents.

Section 30(b) (Section 49 of the Principal Act): "Compensation for permanent disablement":

The proposed amendment is strongly opposed because it may lead to the re-assessment of permanent disablement that may be detrimental to pensioners. It is unclear as to the necessity of this section in light of the right to review claims that is already provided for in terms of Section 90 of the Principal Act. It furthermore proposes the re-assessment of the most vulnerable group of employees, namely, **"pensioners"** i.e. employees with a permanent disablement of more than 30%. It furthermore may be seen as discriminatory because, it only identifies **"pensioners"** as the subject for review, however as the intention was explained at the public hearing in Pretoria on 4 December 2018, it is intended to improve the amount of compensation paid to **"pensioners"**, the wording of

the proposed section should be revised to exactly indicate that particular intention especially as the Mutual Associations made interpret it differently.

Section 49(1)(c) and 49(2)(c) of the Principal Act: "Compensation for permanent disablement" - unusually serious consequences:-

The provisions contained in Section 49(1)(c) and 49(2)(c) of the Principal Act, are not currently applied because it is unclear as to what **"unusually serious consequences"** as well as **"the special nature of the employee's occupation"** means. It is proposed that these two concepts be defined to provide clarity. Take note that it is clear from these two provisions that compensation should not always be calculated based on the so-called **"open labour market"** and it is respectfully submitted that the Commissioner be placed under an obligation to enquire to the nature of the employee's occupation and to inform employees of this right to compensation be calculated with regard to the special nature of the employee's occupation or with regard to the unusual serious consequences it may have.

Section 49(1)(a) of the Principal Act read together with Schedule 2: "Compensation for permanent disablement":

Schedule 2 only provides for compensation for functional impairment, however the High Court held in the unreported case of *Pretorius v Compensation Commissioner* 2007 (A17/2007) ZAFSHC, that pain is measurable [at 17] and in *Kirtley v Compensation Commissioner and Another* (2005) 26 ILJ 1593, it was held that according to "medical evidence [that] pain can be as debilitating as any physiological impairment thereby rendering a claimant 100% permanently disabled" at paragraph [11].

Solidarity therefor submits, that it is important that Section 49 and Schedule 2 of the Act be amended to give effect of the findings of the honourable High Courts in respect of compensation for pain rendering an employee disabled.

Section 32 (Section 54 read together with Schedule 4 of the Principal Act): Compensation for permanent disablement:-

It is incomprehensible that a widow's pension is limited to 40% of what the employee would have received had he/she been 100% disabled. Living costs such as housing does not suddenly reduce in a similar manner when a spouse or life partner dies. Furthermore, it is incomprehensible that only 3

children will be compensated at a rate of 20% each of what the employee would have received had he/she been 100% disabled.

Solidarity is of the view that a family who lost a parent due to an occupational injury or disease, should be compensated at the rate of what the employee would have received had he been 100% disabled without regard to dividing the percentages between the members of the family unless circumstances arise where a child is in need of a separate calculation. If a deceased person had more than one family, it is recommended that same principle be applied and the maximum compensation payable, be divided by the number of families affected by the death of the employee.

Section33 (Section 56 read together with section 35 of the Principal Act)"Increased compensation due to negligence of employer":-

Section 35 of the Principal Act should be read together with Section 56 of the Principal Act. Section 35 entails that the employee's right to common law redress is removed and to give an employee the opportunity to seek redress in cases of negligent conduct on the part of the employer, a claim in terms of Section 56 is allowed.

However, it is often considered that Section 56 is an underutilised remedy and Solidarity submits that it is due to the complicated, archaic wording and highly technical requirements contained in this provision which is not serving the purpose of improvement of health and safety in the workplace. Cognisance should also take from the Constitutional Court's ruling in *Mankayi v Anglogold Ashanti Ltd* 2011 32 ILJ 545 (CC) where the right to claim damages from an employer in terms of the Occupational Diseases in Mines and Works Act 78 of 1973, has been approved. It follows that the highest Court in this country has acknowledged the right to redress in cases of negligent exposure of employees, by employers although not in terms of COIDA as COIDA provides for this redress in terms of Section 56.

Solidarity acknowledges the balancing of the interests of employers and employees by the removal of the right to claim damages in civil law.

However, employees can hardly be expected to institute a claim for Increased compensation due to the negligence of an employer (Section 56), on their own without the assistance of legal

representation due to the complicated nature of this Section and this Section is in dire need of a more balanced approach.

The current wording of the Act is archaic and outdated as it requires an employee not only to prove wrongfulness on the part of the employer on a **"balance of probabilities"** as required in civil trials, but the burden of proof is to prove 100% negligence on the part of the employer and any contributory negligence on the part of the employee, defeats the claim. It is respectfully submitted that this burden of proof is even higher than what is required in criminal matters in which the burden of proof is **"reasonable doubt".**

It is proposed that the burden of proof be brought in line with what is required in civil trials and if necessary, to implement such, compensation be apportioned according to the provisions of the Apportionment of Damages Act (34 of 1956). Therefor it is necessary to change the words **"due to the negligence of employer"**, to **"in respect of the negligence of employer".**

Furthermore, it is proposed that Section 56 contains a presumption that unless the contrary is proven, it is deemed that the employee had no contributory negligence on his/her part and that the employer is considered to have negligently exposed the employee.

It is furthermore proposed that in claims where an employee is awarded 100% permanent disablement, the Commissioner automatically proceeds with a claim for Increased compensation on behalf of the employee unless the employee elects not to proceed with such a claim.

It is furthermore submitted that calculation of benefits in successful claims in terms of Section 56, is unclear and in need of explanation. It ought to be spelled out precisely especially in the light of different possible interpretations by the Mutual Associations.

Insertion of CHAPTER VIIA in Act 130 of 1993
REHABILITATION AND RE-INTEGRATION

Section 70A(1): "Compensation Fund to provide rehabilitation":

Solidarity is in favour of the inclusion of **"rehabilitation"** into COIDA, however the obligation to provide rehabilitation should not only be that of the **"Compensation Fund"** as referred to in the

heading of Section 70A in the Amendment Bill. The current version of the Amendment Bill does not place the Mutual Associations under an obligation to provide **"rehabilitation"**. It only refers to "licensee" which is not recognised in terms of the Principal Act.

However, we do support the inclusion of clinical and vocational rehabilitation but **"social rehabilitation"** should be defined more comprehensively to ensure certainty.

The rolls and responsibilities of employers in all aspects of **"rehabilitation and re-integration"** of injured or ill employees have not been included in the Amendment Bill and needs to be clearly established.

It is furthermore proposed that the COID Act includes a prohibition on the termination of an injured employee or an employee who has contracted an occupational disease with a rebuttable presumption that if such an employee is dismissed within two years from the date of the accident, or diagnoses of an occupational disease, that the dismissal will be deemed to be due to the injury or disease and consequently automatically unfair.

Section 42 (Section72(1) of the Principal Act) "Conveyance of injured and diseased employee":-

The obligation on an employer to transport an ill person to a hospital or medical practitioner may be very dangerous as we have seen from the COVID-19 pandemic. An employer will not have the medical knowledge to determine whether an employee is suffering from an occupational disease and this proposed amendment should be reconsidered.

The current version of Section 72(1) of the Principal Act is a challenge with regard to the transportation of employees after the emergency phase has passed and an employee is in need of continued treatment such as physiotherapy and consultations at medical practitioners' rooms. The proposed amended version of the Act does equally not provide for the transportation of an injured employee for the purpose of medical treatment and rehabilitation. It is proposed that the Act be amended to specifically provide for the right of employees to be reimbursed by the Compensation Fund and the Mutual Associations or Employers Individually liable, as the case may be.

Section 73(1) and (2): of the Principal Act "Medical expenses" and "re-openings":-

No amendments have been proposed in terms of these section of the Principal Act. However, Solidarity is of the opinion that notice should be taken of the following aspects.

The rationale behind the limitation on **"reasonable medical treatment"** to a maximum of two years is unclear and it is Solidarity's experience that files are closed without regard to the need for medical treatment of the employee. Some conditions have serious complications which only surfaces at a later stage and if the claim has been closed, the employee needs to struggle to have it re-opened.

Re-opening of claims do not resemble the no-fault principle that forms the basis of compensatory law because the employee bears the burden of proof for the need, relationship with the initial injury and expected reduction in permanent disablement as requirements to re-open a claim for further medical treatment. It is noteworthy that to proof the need for further medical treatment, special investigations are needed for example, X-rays and MRI radiology investigations which are expensive and which many employees cannot afford. It is proposed that this Section be amended to include a rebuttable presumption that favour further medical treatment should a medical practitioner recommend such treatment and put the Commissioner or mutual association to proof the contrary.

Section 43 (Section 73(4) of the Principal Act): Medical Expenses:-

This amendment is not supported because due to the Commissioner and some of the Mutual Associations' slow administration and reluctance in payment of medical bills, many medical practitioners prefer not to render services to employees who have been injured on duty or who has contracted an occupational disease. If medical practitioners are prohibited from the transfer of their medical bills to a third party, even more practitioners may decide to refrain from treating employees who have been injured on duty or contracted an occupational disease.

It should also be taken into consideration that the introduction of rehabilitation services will need appropriately qualified practitioners to provide the applicable services and these service providers should not be discouraged to provide services due to restrictive provisions such as the proposed amendment.

It may furthermore be contrary to the provisions of the Competition Act (89 of 1998) which has participation in the economy by everybody in South Africa as an objective.

It is furthermore unclear how the proposed amendment will affect the right to claim their expenses back by medical aid schemes that currently pay for services rendered in respect of some of their members for occupational injuries and diseases.

An alternative may be to introduce the payment of penalties by the Compensation Fund and Mutual Associations in respect of late payment of medical bills to medical service providers.

Section 44 (Section 74(1) of the Principal Act): "Submission of medical report":-

The proposed amendment is supported.

Section 50 (Section 81(1) of the Principal Act): "Employer to keep record":-

The proposed amendment is not supported because limiting recordkeeping pertaining to occupational injuries and diseases to five years is not practicable. It is furthermore contrary to the provisions contained in the Environmental Regulations for Workplaces, 1987, issued in terms of the OHSA in Regulation 7(11)(e) that deals with **"Noise and hearing conservation"**, that requires an employer to keep the records of noise monitoring for at least 40 years. It is thus recommended that all records relating to occupational injuries and diseases be kept for at least 40 years and should the "employer ceases activities all such records shall be forwarded to the regional director."

Section 57 (Section 90(1) of the Principal Act "Review of decisions by Director-General":

Solidarity supports replacing the word **"review"** with **"vary"** and the inclusion of an application for a variation of a decision, but we strongly oppose the removal of the words **"giving him an opportunity to submit representations"** as this will undermine the *Audi alteram partem*-rule.

Section 58(b) (Section 91(1) of the Principal Act: "Objections and appeal against decisions of Director-General":-

The proposed amendment is supported but Solidarity wishes to further recommend that should an objection not be concluded within 24 months from the date of lodging of the objection, it should be considered that the Commissioner silently accepted the objection in favour of the employee.

This is necessary to invigorate a culture of accountability by the Commissioner and the Mutual Associations.

Furthermore, it should be noted that the statutory obligation to take decisions cannot be delegated by an agreement to a mutual association or licensee and that the Amendment Bill in all instances places only the Commissioner under an obligation to make decisions.

The honourable Committee Members are requested to take note that the Act only confers the authority to take decisions upon the Commissioner and NOT upon the Mutual Associations as it is happening in practice by license.

Section58(c) (Section 91(2) of the Principal Act): "Objections and appeal against decisions of Director-General":

Section 39 of the Constitution places an obligation upon "a court, tribunal or forum" to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Decisions made by an administrative body like the Compensation Fund, should therefore be seen to be independent and if all the members of the tribunal are appointed by the same body that appoints the Commissioner, it can hardly be seen to be an independent structure. It is proposed that an independent body similar to the Commission for Conciliation, Mediation and Arbitration (CCMA) instituted by the Labour Relations Act (66 of 1995), be created by law, especially seen in the light of the notion to issue more "licences to do business of insurance of employers against their liabilities to employees in terms of this Act" as envisaged in Section 30.

Section 58(g) (Proposed Section 91(8) of the Principal Act): "Objections and appeal against decisions of Director-General":-

The proposed amendment is supported.

In case of any uncertainties, please do not hesitate to contact the writer hereof at Tel.: 012 644 4345, Cell: 079 496 0196 or email: hanlie@solidarity.co.za should there be any enquiries, clarifications or further information required.

Yours faithfully,

ADV. HANLIE VAN VUUREN

HEAD: OCCUPATIONAL HEALTH AND SAFETY

SOLIDARITY