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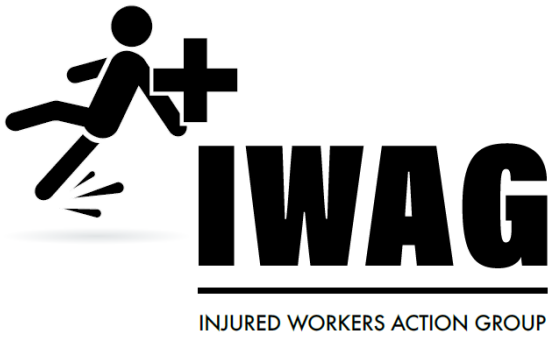

19 February 2021

Portfolio Committee on Employment and Labour

Per email: zsakasa@parliament.gov.za

coidabill@parliament.gov.za

Dear Sirs / Madame,

PUBLIC COMMENTS IN RELATION TO COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES AMENDMENT BILL [B21-2020]

The Injured Workers' Action Group (IWAG) is an alliance of stakeholders including labour, medical service providers and employers who are dissatisfied with the Compensation Fund and who seek to find sustainable solutions to ensure the Fund's proper conduct and operation.

IWAG appreciates the opportunity to make input to the Portfolio Committee on Employment and Labour ("the Committee") with respect to the Compensation for Occupational Injuries and Diseases Amendment Bill [B21-2020] ("the Bill").

While IWAG welcomes the introduction of domestic workers under the cover of the new COID Bill, we are deeply opposed to a provision of the Bill, Clause 43(4) which will undermine not just the hard-won rights of domestic workers, but holds the prospect of crippling the entire operation of the Fund to the detriment of workers, medical service providers, employers and the economy more broadly.

IWAG believes that the inclusion of subsection (4) in Clause 43 of the Bill (Section 73(4) of the principal Act) that:

- It will undermine the mandate and objective of the COID Act.
- It does not adequately consider or assess the multiple impacts and consequences associated with the proposed change; and
- It is a unilateral and irrational act by the Department and the Fund;
- The Department did not consult all the relevant stakeholders as specifically required in the formulation of the Socio-Economic Impact Assessment back in 2015 when it was hastily done – most notably the private medical sector and financial sector (Registered Credit Providers, Co-operative Financial Institutions, Registered Banks and Other Financial Institutions);
- It is based on unfounded, untested and undocumented allegations of fraud and corruption by third parties;
- It is based on an incorrect perception of over billing, fraud and add-on costs, which the Fund is already protected against;

Consequently, we are calling for its removal from the Amendment Bill.

VERBAL PRESENTATION

In addition to this written submission, IWAG's requests to make verbal presentations to the Committee.

ISSUES OF CONCERN TO IWAG

The COID Bill states: Section 73 of the principal Act is amended by the addition of the following sub-section, which appears within clause 43 of the Amendment Bill:

> *"(4) Any provision of an agreement existing at the commencement of this Act, or concluded thereafter, in terms of which a service provider cedes or purports to cede, or relinquishes or purports to relinquish, any rights to medical claim in terms of this Act, shall be void."*

This amendment to the Act prohibits the cession of medical invoices by MSPs to any third-party, which would include Registered Credit Providers ("RCP"), Co-operative Financial Institutions ("CFIs"), Registered Banks, factoring houses and other financial institutions.

This means that MSPs will be unable to utilise an asset, which their private practice has legally generated, to serve as security or collateral for any form of finance, working capital or financial transaction or arrangement within the Republic of South Africa.

IWAG believes that this unilateral act by the Department and the Fund, is unconstitutional in terms of section 22 (Freedom of Trade, Occupation and Profession) and section 25 (Property) of the Constitution of the Republic.

We also wish to draw the Committee's attention to the fact that the Socio-Economic Impact Assessment ("SEIA") was performed in May 2015, and that the assessment process, including consultative workshop and final report writing was completed hastily in only two months, without a single IWAG member from employees, to healthcare stakeholder, administrator or financial institution stakeholder being consulted.

Moreover, at the time of compiling the SEIA in May 2015, the Fund was approximately 10 months into the previous RMA uMehluko System, which has since been replaced by the CompEasy Fund system. The SEIA is thus completely outdated in relation to its operational and affected stakeholder engagement mechanisms and IT systems.

REASONS FOR THE REMOVAL OF CLAUSE 43.4

No reasonable rationale for the clause

If a government proposes changing a law, it requires a reasonable and justifiable rationale to do so. Neither the Minister nor the Department of Employment and Labour, much less the Fund, have provided any reasonable rationale or justification, in any publicly available documentation for the inclusion of clause 43(4) (amendment to Section 73(4) of the Principal Act).

This is further compounded by the fact that when the Bill was introduced to the Committee on 4 November 2020, the Department did not present, nor did it make any reference to Clause 43(4) in its discussion or presentation to the Committee. The Committee has thus not received a complete briefing on the Bill from the Department, with no context, rationale or justification provided by the Department in relation to Clause 43(4).

CONSTITUTIONALITY AND LEGALITY

IWAG believes that clause 43(4) violates the following legal rights enshrined in Chapter Two of the SA Constitution:

- Right to property (section 25)
- Freedom of trade, occupation, and profession (section 22)
- Right of access to courts (section 34)

Right to property

The removal of the right to cede medical accounts infringes on MSPs rights to property. In many instances, the IOD medical services rendered by an MSP comprises a material portion of its practice turn-over.

Hospitals, doctors and all other MSPs, including those in historically disadvantaged areas will be prevented from applying their medical accounts as collateral for business, practice, or personal financing with any financial institution.

The prohibition of cession of medical accounts is also vague. The concept "relinquish" (as per wording of Clause 43(4)) is not defined, and bears no recognised legal meaning. This renders the prohibition impermissibly indeterminate, overbroad, and vague. It, therefore, appears to violate the rule of law.

Furthermore, the proposed clause 43(4) purports to even abolish the cession of medical service providers' claims against the Compensation Fund with **r**etrospective effect. Thus, claims which would have been ceded to a third-party – after medical services were extended to workers in good faith, and which third-party would accordingly have been obliged to pay to medical service providers – become unenforceable against the Compensation Fund in the hands of the third-party immediately upon the amendment's operation.

The removal of the right to cede medical accounts therefore also infringes third parties' rights as the claims ceded to them would be considered as property as defined in section 25 of the Constitution.

Freedom of trade, occupation, and profession

The proposed clause 43(4) infringes on section 22 of the Constitution, which notes:

> *Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.*

While the Constitution notes that a trade, occupation, or profession may be regulated by law, this regulation may only be done in a manner which is consistent with section 36 of the Constitution as noted below:

> ***Limitation of rights***
>
> *36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*
>
> *(a) the nature of the right;*
>
> *(b) the importance of the purpose of the limitation;*
>
> *(c) the nature and extent of the limitation;*
>
> *(d) the relation between the limitation and its purpose; and*
>
> *(e) less restrictive means to achieve the purpose.*

The purpose of the proposed amendment, through Clause 43(4) of the Bill, is not clear at all when considering the position of an MSP or medical account cessionaries.

The limitation imposed by Clause 43(4) is one which is neither reasonable nor justifiable, and no comparative example in a free, open and democratic society has been identified in support of clause 43(4) of the Bill. It is not reasonable to limit the normal economic rights that an MSP can choose and practice his or her profession in the manner contemplated by the proposed Clause 43(4).

It is IWAG's view that the proposed amendment will not survive scrutiny under section 36 of the Constitution of the Republic of South Africa for at least the following reasons:

- Many MSPs (established and start-up practices) obtain finance for their practices or for personal use through cession of their debtors' books as security to institutions such as banks, registered credit providers and other financial institutions;

There is no need or justification for the COID Act to dictate the commercial rights of an MSP in respect to COID medical accounts. The purpose of the legislation should not go so far as to determine what an MSP can do with the accounts for services already rendered and that form part of his or her assets.

The proposed amendment amounts to over legislation. It seeks to govern the economic rights of a medical practitioner and there is no justification for doing so in the Bill or in the COID Act.

- The true purpose of Clause 43(4) is unclear and we are not aware of any plausible reason why the interests of MSPs should be limited in the manner that is intended by the proposed legislation.

It is IWAG's understanding that during the public consultation process in 2018, in respect of the Bill and during public participation meetings, the public was led to believe that the purpose of this amendment was to "*eliminate having to deal with third-parties in future*".

If this is, in fact, the purpose of the proposed amendment, we believe it to be unconstitutional and unlawful to outlaw a party's right to access to the court.

Since the purpose of the proposed amendment is unclear, speculative and in our view baseless, there is no relation between the limitation and its purpose.

- The nature and extent of the proposed amendment goes far beyond what is necessary to expand the operation of the COID Act and to make the COID Act and its benefits more accessible.

Rather, the opposite will be achieved. It will result in countless MSPs having to review existing finance arrangements and will exclude MSPs from using COID accounts (which are substantial in many cases) to obtain any further finance or improved cash flow.

Economically, the effect of this amendment will be catastrophic for many MSPs and will have the opposite effect from what the Bill purports to do. It will limit the rights of ordinary South Africans to access medical care, because the impact of the proposed amendment will be that many MSPs will either not be able to survive in the current economic environment, or they will not be able to treat COID patients as the administration and accounts process will make it impossible for the MSP to administer its own medical accounts.

Notably, substantial delays in payment of COID accounts have already led to many MSPs choosing not to treat COID patients. This is contrary to what the COID Act intends to achieve and consequently there can be no objective justification for the proposed amendment.

- There are other much less restrictive measures that could be put in place if the true purpose of the legislation is known and communicated.

A contention raised by the Director General is that Clause 43.4 will help eliminate fraud and corruption in relation to the Fund. In IWAG's view it is, in fact, more probable that fraudulent transactions would occur in the case where medical account cessionaries are not involved, as medical account cessionaries have specialist systems in place to prevent fraudulent and duplicate submissions that pose a substantial business and commercial risk to these financial institutions and leakage consequences for the Fund.

As noted above, the purchase of non-compliant accounts would generally result in financial losses and negative cash flow implications for the cession holder / lender, thus all cessionaries have a vested interest in ensuring fully compliant claims in a manner that is easiest and quickest for the Fund to adjudicate claims and assess medical accounts.

Failure by medical account cessionaries to adequately vet IOD claims and medical accounts would result in high rejection rates from the Fund, heightened business risk, loss of monies advanced to MSPs, dissatisfied MSP clients and ultimately, failure of these financial institutions.

Adopting these proposed alternatives and deleting Clause 43(4) will avoid the regressive impact on workers' constitutional right to healthcare and simultaneously comply with the State's constitutional duty to respect, protect, promote, and fulfil those and the other human rights.

Clause 43(4) also goes beyond what is permitted as a rational exercise of regulating a trade, occupation, and profession, as there is no legitimate connection between the purposes identified in the Bill (or anywhere else) and the prohibition of cession of medical accounts.

Indeed, the prohibition of cession is altogether irrational.

By excluding claim cession from the COIDA system, no money is being saved by the Fund and no additional medical services are being generated (or existing services preserved) for workers.

Instead, additional administration and costs are necessitated; additional dysfunction is risked; MSPs are being disincentivised from treating IOD patients; and the availability of medical treatment to workers is diluted and legal cost will skyrocket.

By abolishing the current system through the prohibition of cession, the Bill fails to provide a reasonable legislative measure to achieve the progressive realisation of the access to healthcare by injured workers. Therefore, the Bill simultaneously violates section 27(1) and section 27(2) of the Constitution.

Right of access to courts

Clause 43(4) of the Bill purports to undermine the right of medical account cessionaries to access the courts.

Clause 43(4) as mentioned above does not prohibit non-vested third-parties (administrative billing houses) from operating under the proposed amended COIDA, but only regulates the cession of medical accounts.

It is reasonable to conclude, therefore, that the real motivation for the relevant amendment is to prevent medical account cessionaries to enforce MSPs medical account claims against the Commissioner in a consolidated manner in court.

The Commissioner has a long-standing practice of non-compliance with his statutory obligations and the prohibition of the cession of medical accounts would prevent the third-party medical account cessionaries and financial institutions from being able to enforce the Commissioners' obligations in an aggregated and judicial manner. This is discussed further under paragraph 0 below.

No defensible rationale exists to justify the potential rights that will be violated by the inclusion of the Clause 43(4). With all new law and amendments of law, consideration must be given to the interested parties that will be affected, and although the rights per the Constitution are not absolute, it must be able to defend the reason for the violation. Nowhere is it proven or provided that the proposed amendment per clause 43(4) is in the public good and therefore no rationale exists for the potential violation of the Constitutional rights of medical account cessionaries or medical service providers as set out above

As such, Clause 43(4) should be removed from the Bill.

Clause 43(4) will not save costs

Unlike the private medical sector and RAF, the “reasonable costs” of medical aid are regulated per medical discipline and per procedure code by the Fund through the COIDA Medical Tariff Gazettes, which are published and updated annually by the Fund.

There are no additional costs or fees to employers nor for the injured workers who are treated by MSPs who makes use of third-party medical account cessionaries.

It is important to note that all fees payable by MSPs to third-party medical account cessionaries do not increase the cost of medical treatment to the Fund by even one cent, as all medical fees paid out by the Fund are paid out in terms of the normal gazetted tariffs and not over and above the Gazetted tariffs.

MSPs fund 100% of the cost (interest or factoring fees) of obtaining this working capital out of their own funds.

Amendment will undermine ability of IOD patients to access quality healthcare and treatment

The transfer of the administrative and financial risk back to MSPs will discourage many MSPs from treating IOD patients, thereby significantly reducing the pool of care, and placing additional pressure on an already strained public healthcare system, which is and has been struggling with the additional burden of the COVID-19 pandemic.

Cessionaries are there to protect vulnerable employees' ability and their right to treatment for injuries sustained at work. Clause 43(4) will remove third parties’ cessions, pass the burden of risk from the Fund to MSP’s, and therefore ultimately to vulnerable workers themselves. This will impact the care that IOD patients receive, and effectively undermine the purpose and objective of the COID Act being the “rehabilitation, re-integration and return to work of occupationally injured and diseased employees”.

It is particularly concerning to note that nothing in the Bill, SEIA or any other instrument or communication reflects any appreciation or concern regarding the effect on workers if cessions are indeed prohibited. The effect is, in short, that workers’ right of access to healthcare will be considerably impaired.

This is not only a violation of their rights, but also renders the amendment Bill irrational for failing to achieve its intended effect, as the Act is intended to provide the fullest possible protection to workers.

Many workers (particularly those at risk of workplace injuries: manual and industrial labourers) are economically marginalised wage-earners. Accordingly, they are personally unable to afford medical treatment. If they are to forego treatment, their rehabilitation and future employment opportunities may be compromised or even destroyed.

This would render otherwise trained and employable individuals an unemployment burden on the public social security system, which is already overburdened. This consequence would be contrary to the laudable intention of the Bill, namely, to broaden access to COIDA and rehabilitation back to work re-integration for injured workers.

This unconstitutional, undesirable, and unnecessary outcome would all be as a consequence of the adverse impact of Clause 43(4) of the Bill.

Domestic workers

The inclusion of an estimated one domestic workers as beneficiaries of the Fund is welcome, but it is unclear as to how the levy payment, assessment and payments processes will work. The current processes and procedures of the Fund are not suitable to manage the domestic sector and employers need the correct information and representation.

However, the inclusion of domestic workers will considerably increase the pool of IOD patients needing medical care from MSP's.

If the amendment is promulgated, this means MSPs who will now have a greater number of IOD patients to treat, will have less time to do so, as their administrative burden will also increase through the prohibition of cessions.

Moreover, given the dysfunctionality of the Fund's administrative, management and technical systems, MSPs treating these patients will inevitably wait many months, if not years, for payment from the Fund. This results in significant financial pressure on MSP's, placing their practices at risk and reinforcing the pressures noted earlier.

It also has the unintended consequence of disincentivising MSPs from treating these patients and vulnerable members of society, as the burden of risk increases. Injured workers cannot wait for a claim to be approved before going for medical treatment, nor can the MSPs wait months and years before their invoices are paid.

Domestic workers injured on duty will thus, in all likelihood, have no choice but to continue to use public health services, which are under capacitated, over utilised and prone to healthcare treatment which does not promote the most efficient and effective "rehabilitation, reintegration and return to work" – one of the pillars of the Compensation's Funds strategic objectives and preamble to the Bill.

It is possible that the real reason for Clause 43(4) is to eliminate parties that hold the Fund to account

Over the last decade, third-party medical account cessionaries have been forced to take the Fund to court to settle outstanding claims, which the Fund consistently and regularly loses to the extent that several Judges from the North Gauteng high court have ruled that the Fund's legal behaviour: *"is a textbook example of the abuse of the court process"*. This has contributed to a difficult relationship between the parties.

Without this legal pressure, there is the prospect that the Fund could become even more dysfunctional, depriving MSPs of funds for services rendered in good faith and undermining IOD patient's legal right to care.

Conclusion

If passed into law by Parliament, Clause 43(4) of the Compensation for Occupational Injuries and Diseases Amendment Bill [B21-2020] ("the Bill") will have a wide-ranging and negative impact on workers, MSPs, employers, the Compensation Fund and the economy more broadly. The Clause is contrary to the entire spirit, ethos and purpose of the COIDA. More specifically, IWAG believes the clause to be unconstitutional, irrational, ill-conceived, misleading and

It is a grave concern for IWAG that the Department of Labour and the Compensation Fund would consider such a legislative change of this nature without specific and targeted consultation of all affected stakeholders, specifically in the private health and financial services sectors in order to understand its multitude of impacts.

The Department wrongly believes that third-party medical account cessionaries are the source of additional costs, over billing, corruption and fraud, when, in fact, the Fund's own employees are committing the fraud and the Fund is already protected against such exploitation by the provisions of the existing COID Act. Moreover, third-party medical account cessionaries have a vested interest in delivering legally compliant IOD claims and medical accounts to the Fund.

The private medical scheme sector has an effective and functional administrative, claims-handling and payment ecosystem, which includes global best practice and a variety of stakeholders including:

medical schemes, medical scheme administrators, third-party medical account cessionaries and MSPs operating in harmony.

It is IWAG's respectful submission that the amendment of Section 73 of the Act by Clause 43(4) as proposed in the Bill, has the potential to considerably limit or even nullify an injured worker's ability to obtain medical treatment, rehabilitation, including those of domestic workers now falling under the Act.

The inclusion of Clause 43(4) would negate the very rights of domestic workers intended to be created and enhanced by the COID Act and its amendments, given the far reaching and negative consequences that will result from its implementation, in both the medical services and financial services sectors.

In the light of all the above matters we humbly request that Clause 43(4) of the proposed Bill be deleted.

As noted at the beginning of this submission we respectfully request to be allowed to participate in the verbal presentation process of the Committee.

Sincerely,

IWAG SPOKESPERSON

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https://www.facebook.com/Injured-Workers-Action-Group-IWAG-110489443874780/