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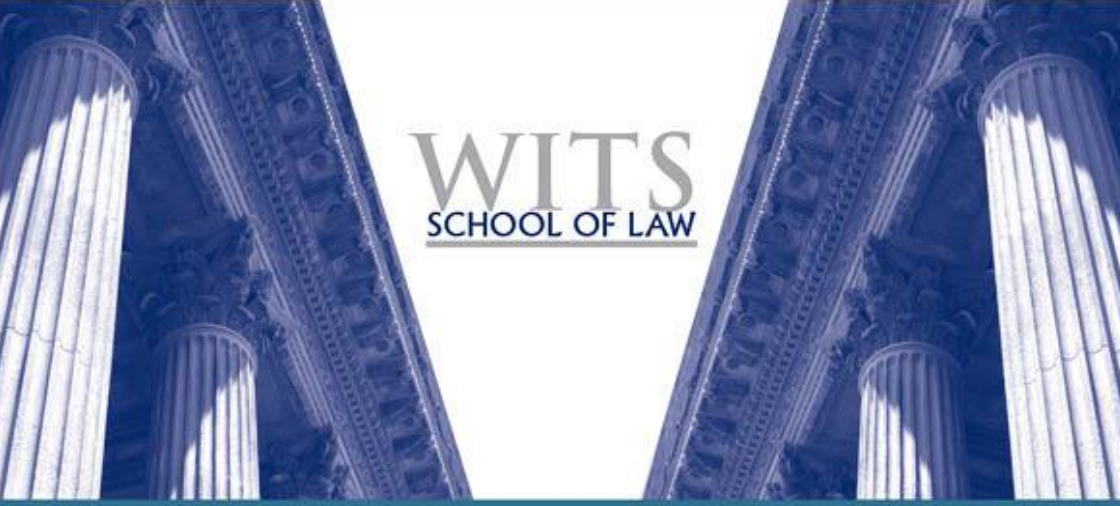

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THE REFORM OF THE WORKMEN'S COMPENSATION ACT: THE BEGINNING OF DEMOCRATIC SOCIAL SECURITY?

by

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INTRODUCTION

The last two years have seen a renewed focus on South Africa's rudimentary social security system. In 1991, the government's commitment to achieving parity in pensions paid in terms of the Social Pensions Act 37 of 1973 was hailed as a major move away from the era of apartheid. This year the ill-fated Social Assistance Bill which would undermine the right of many to a pension has attracted considerable although less favourable criticism. Regrettably, this attention has not extended to employment-related social security.

South Africa has three statutes that offer benefits to workers permanently or temporarily excluded from the active work-force. The Unemployment Insurance Act 30 of 1966 pays benefits for a maximum of six months to workers who lose their jobs. The Workmen's Compensation Act 30 of 1941 ("the WCA") compensates employees who are injured in accidents at work or suffer from scheduled occupational diseases. A separate Act, the Occupational Diseases in Mines and Works Act 78 of 1973, provides compensation

for mineworkers who suffer from certain respiratory and other diseases commonly associated with mining activity.[1]

The WCA (which despite its name compensates workers and their families regardless of gender) is expected to be the subject of deliberations at the National Manpower Commission soon. The present Workmen's Compensation Commissioner has prepared an amended Act which has been submitted to the Minister of Manpower and is expected to be considered by a specialist sub-committee appointed by the reconstituted National Manpower Commission soon. This process offers an opportunity to overhaul the present statutory structures as well as to debate the policy considerations that should underpin the creation of a social security framework in a democratic South Africa. The reform of the Act should be made with a view to the possible restructuring of social security as a whole in South Africa.

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[1] The Occupational Diseases in the Mines and Works Act which is administered by the Department of National Health provides lump sum compensation (ie no pensions) for miners suffering from certain occupational diseases prevalent in the mining industry. The Act remains racially discriminatory. The compensation white miners receive is as much as 13 times greater than that paid to black miners. It is an indication of the low regard paid to compensation for occupational disability that no move was made to redress this disparity during the 1991 Parliamentary session. Contrary to rumours, apartheid is not yet dead. The extent of the neglect can be gauged from the fact that the Nieuwenhuizen Commission recommended the abolition of these discriminatory practices in 1983. This recommendation was accepted by the Government in a White Paper the following year.

This paper does not deal with the technical reform of the Act. It concentrates on a discussion of reforms that would allow the social partners most interested in compensation (labour and capital) to participate in the direction, administration and monitoring of the scheme and empower groups receiving compensation under the Act to insist that they receive their full entitlement. It proposes a series of legislative innovations that could contribute to making the compensation system more accountable and accessible.

THE CONTEXT OF WORKERS' COMPENSATION

The Workmen's Compensation Act has existed, virtually unchanged for 50 years. It establishes an Accident Fund to which employers contribute and from which workers are compensated for illness and injury at work. The fund is administered by the Workmen's Compensation Commissioner (WCC) whose office forms part of the Department of Manpower. All expenses of the WCC's office are paid by employer contributions to the Accident Fund. In addition the WCA allows the operation of mutual associations to underwrite employers' liabilities in terms of the Act. There are two of these organisations, Rand Mutual Assurance Company Limited, the insurer for most of the mining industry and Federated Employers' Mutual.

Workers' compensation occupies a somewhat ambivalent position in our legal framework; it is a legitimate and important but overlooked concern of a number of distinct areas of law. As an aspect of labour law, it is regarded as one of two types of laws dealing with occupational safety. Statutes such as the Machinery and Occupational Safety Act 6 of 1983 and Chapter V of the

Minerals Act 50 of 1991[2] are designed to promote safe working conditions and prevent accidents; compensatory legislation on the other hand compensates the victims of accidents in a manner that is more efficient and equitable than the common law delictual system. It is also an important aspect of the social security and health care systems offering support to those who are either temporarily or permanently unable to earn a living because of accidents at work or occupational diseases (or in the event of fatal accidents or diseases their dependants) as well as providing for the costs of medical aid.[3] It is also part of a group of statutes that regulate the compensation of victims of accidents in society. In South Africa, the only other such law is the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989. (Many other societies also have schemes to compensate the victims of crime.) These statutes are designed to remedy the shortcomings of the common law delictual system but retain a number of similarities with the common law.

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[2] The Minerals Act came into operation on 1 January 1992. Chapter V incorporates, with some revisions, the provisions of the Mines and Works Act 27 of 1956.

[3] The Accident Fund's liability to pay the costs of medical aid illustrates the extent of the inter-connection between accident compensation and a country's social security system. The recent rapid increase in the costs of medicines and medical treatment, caused in part by the privatisation of medical services, has resulted in an increasing proportion of the Fund's resources being spent on medicines and medical treatment. According to the Accident Fund Annual Report for 1990, medical costs rose from 40% of total costs in 1988 to 48% in 1990. In the same period total costs rose by approximately 65%.

THE "TRADE OFF" IN WORKERS' COMPENSATION

Historically, workers' compensation legislation represents a "trade-off" between the interests of employees and employers. For workers there are three benefits: first, they can receive compensation for the consequences of work-place accidents without having to prove that the accident was caused by the fault of their employer or any other person and without having to institute legal proceedings in the civil courts. Secondly, workers are ensured that they will not be deprived of benefits because their employer has no assets - a "person of straw". This is of particular importance for employees of small businesses.[4] Thirdly, the employee's own negligence does not (except in limited circumstances)[5] deprive employees of the right to benefits; there is no division of liability between employee and employer as in a common law damages action. For the employer, the advantage is protection against costly damages claims by employers. This protection extends to claims for both economic and non-economic losses. In return for this benefit, the employer makes a financial contribution to the Accident Fund: safety is reduced to regular and predictable payment.

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[4] Compensation is paid to employees covered by the Act regardless of whether or not their employer has registered with the Accident Fund or paid their assessments.

[5] An employee is entitled to compensation unless the accident was caused by his or her "wilful misconduct". This limitation does not apply where the accident causes serious disablement or death (S. 27(1)(c)).

An appreciation of this "trade-off" is essential to any evaluation of the adequacy of any scheme of workers' compensation. It distinguishes workers' compensation from other forms of social security such as unemployment insurance and social pensions which are not posited on the beneficiaries giving up their common law right to sue for damages.

The Accident Fund pays the medical costs of injured employees and compensates them for the injury they have suffered in terms of a statutorily determined tariff. Benefits paid are calculated in terms of a formula that (with two exceptions)[6] limits compensation to a percentage of the worker's financial loss. No compensation is paid for pain and suffering. The shift to a "no fault" system is subject to one important exception - the payment of increased compensation to employees who are able to establish that their injury was caused by the negligence of their employer or a fellow employee above a defined level in the managerial hierarchy.

This structure can be contrasted with that for motor vehicle accidents which bolsters a system of fault-based compensation by making the insurance of all drivers of vehicles compulsory. It therefore cures only one of the short comings that statutory compensation systems can address: victims of car accidents do not go without compensation because the driver whose negligence caused the accident

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[6] A worker who suffers a permanent disability receives compensation regardless of whether the injury impacts on his or her earning capacity. In addition, workers who suffer severe disfigurement may be compensated even though the disfigurement does not reduce their earning capacity.

does not have the means to pay an award of damages. It does not generally assist accident victims who cannot show that the accident was caused by the fault of another, or who cannot pay legal costs or, more commonly, does not have a sufficiently strong case for a lawyer to take his or her case on a speculative basis.

Do We Need a Workmen's Compensation Act?

The reform of the WCA raises fundamental questions about the future direction of compensation. Should a discrete, and hopefully improved, system of compensation for work-place disability be retained or should it be merged with a wider system of disability compensation that could ultimately form part of universal social security scheme. While there may be little prospect of a more comprehensive social security system being introduced in the immediate future, any reform should take account of the possible future incorporation of the scheme into a wider system.

The absence of comprehensive accident compensation creates enormous anomalies. This can be illustrated by a comparison of the position of the victims of accidents in different aspects of life. The victim of a motor accident who can get to court and prove negligence does best; workers who can lodge and win a case for additional compensation based on their employer's negligence do next best; then comes other victims of occupational accidents and diseases and finally (without compensation) we find motor accident victims where negligence cannot be proved (or who cannot get a lawyer to take on their case), workers who suffer a work-related disability not caused by an accident, self-employed persons and domestic workers who

are injured and the victims of violent crime. From a societal perspective these disparities make no sense.[7]

Besides levelling out these anomalies, the creation of a broader accident compensation fund would create a number of economies of scale and avoid a range of unnecessary bureaucratic activities. For instance, if a fund were to cover all accidents the inquiry as to whether or not it was work-related would no longer have to take place. Similarly, the removal of proof of negligence as a requirement for compensation (in the case of MVA) would result in vast savings on lawyers' fees.

At this stage little more can be said about this debate. Much more work needs to be done on its feasibility. However, the most important stepping stone to the overall improvement of social security is the creation of a workers' compensation scheme that is answerable to the constituents affected by its operation, accessible to those who require its benefits and offers sufficient benefits and protections to those entitled to claim compensation. The remainder of this paper looks at some legislative innovations that could achieve this effect as well as assessing the adequacy of current levels and forms of compensation.

Trade Union and Employee Involvement

The WCA, unlike most other labour laws, does not create an advisory council to advise the Minister on matters of policy

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[7] The system of motor vehicle insurance, including the feasibility of introducing a system of "no fault" compensation, is currently being investigated by the Melamed Commission of Inquiry.

and to perform other functions in terms of the Act. The structure, composition and functions of these boards vary. The functions of the National Manpower Commission, the National Training Board and the Advisory Council on Occupational Safety are primarily advisory and investigatory. The Unemployment Insurance Board on the other hand has relatively higher numbers of representatives of labour and capital (as opposed to state officials) than the other boards and its functions extend to the hearing of appeals against decisions refusing benefits.

The common explanation for the absence of a similar body under the WCA is that the Accident Fund (unlike the Unemployment Insurance Fund) is funded solely by employer contributions. While employees may not make a financial contribution to the Fund, they have given up their right to sue their employers for damages. In any event, there can no longer be any argument for continuing a situation in which labour, capital and other interested groups do not influence, if not determine, the way in which the Act is administered and the benefits paid.

The WCA is not entirely without bi-partite employer and trade union involvement. Objections against a decision on benefits are heard by a representative of the Commissioner sitting with employer and trade union assessors. This structure is discussed in the next section.

Three considerations should effect the development of a Workers' Compensation Board. First, its form will be heavily influenced by the restructuring of the National Manpower Commission. The entry of COSATU onto the NMC in late 1990 has created the potential for these institutions to become, for the first time, representative of employees. COSATU has proposed their transformation

from advisory bodies to labour market institutions where organised labour and capital endeavour to reach accommodation through negotiation. This process of restructuring is still underway.

Secondly, the creation of a labour market institution to regulate compensation cannot be seen in isolation from the creation of other structures to encourage employer and employee participation in the running of the compensation schemes. It would have to be accompanied by the creation of participative structures at an intermediate level such as review (and objection) boards and medical panels, and by structures at establishment level to encourage a more active approach to compensation. Innovative work-place structures could provide a cost-effective method of ensuring compliance with the Act and encourage greater participation by employers and employees in compensation and occupational safety.[8]

Thirdly, the structure of such a board will have to reflect an assessment of the respective roles and interests of labour, capital and the state. Our present system stresses the interests of the state at the expense of the social partners and for this reason it is useful to compare its operation with that of systems emphasising both the interests and responsibilities of labour and capital.

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[8] Another reform that should be considered to make the compensation system more accessible would be a greater development of regional services. For a discussion of the potential for the development of occupational health and safety services at a regional and local level see J Myers and I Macun 'Policy and Strategy for Occupational Health Services in South Africa' *S A Medical Journal* Vol 80 16 November 1991.

In a number of Canadian provinces the Workers' Compensation Board is a crown corporation - a para-statal body constituted on more or less the same lines as an organisation such as the SABC - controlled by a governing board with equal numbers of representatives of labour and capital with a chair appointed by the government.[9] The role of the state is generally limited to providing the legislative framework and appointing the chair of the Board. The Board determines the benefits paid and the level of assessments levied on employers. (Where labour and capital cannot reach consensus on the operation of workers compensation, the role of the state-appointed chair of the board becomes crucial.) In certain Canadian provinces a single board is responsible for both compensation and the enforcement of occupational safety and employers' contributions are used both to pay compensation and employ a safety inspectorate.

The provision of a social service such as a workers' compensation through a para-statal body, directed by the social partners who have the greatest interest in the matter, is foreign to the South African experience. However the Canadian experience bears close scrutiny precisely because it challenges the assumption that these schemes must be run by a department of state.

The present structure creates a number of anomalies. Why, for instance, should a scheme funded by employer contributions be subject to government employment policies. If capital collectively wishes to increase its contribution to offer more attractive employment

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[9] A variation on this theme is found in British Columbia where the representatives of labour and capital are supplemented by two representatives of the public interest - one of whom currently represents injured worker groupings.

packages, why should the Board not be able to give effect to this. The differing interests of the state, labour and capital are also seen in the question of access to the information acquired through the reporting of occupational accidents and diseases as well as information concerning employers' assessment rates. Currently the Commissioner's reports make public a small portion of the information collected by this office in the course of its activities.

The successful establishment and operation of an innovative structure such as this will depend in part on the maturity of the relationship between organised labour and capital and an acceptance by both parties of their responsibilities in regard to compensation.

What form should the Board take? Like the Unemployment Insurance Board, it should be dominated by representatives of labour and capital and be designed to allow for negotiation over improved and additional benefits and increased employer contributions. At the same time an innovation that could be introduced would be to require control of mutual associations to be transferred to boards consisting of the representatives of employers and employees in the industries they cover. The established industry-wide collective bargaining relationship in the mining industry, the successful creation of a provident fund and the developed approach of a trade union such as the National Union of Mineworkers to occupational health and safety and compensation could make the creation of these structures in the mining industry a model to be followed in due course in respect of the Accident Fund.

Should a single labour market institution cover both compensation and occupational safety. The importance of development of coordinated strategies to improve working

conditions indicate that a single body should perform both functions. This consolidation would have the additional advantage of allowing for rationalisation of employers' obligations - for instance, the WCA and the Machinery and Occupational Safety place different duties on employers to report accidents.

THE DECISION-MAKING PROCESS

The only part of the WCA decision-making process that currently involves bi-partite participation is the objection hearing. An objection may be lodged against any decision of the Commissioner within 60 days of the decision. The objection hearing is, in claims for ordinary compensation, the first formal opportunity the employee has to state his or her case. Claims are decided on documentation submitted by the employer (including the employer's assessment of the employee's earnings) and doctors.

The objection is heard by a representative of the Commissioner's office sitting with an employee and employer assessor. Assessors are appointed for particular industries and the system allows both for the interests of the social partners to be articulated and for the introduction of expertise on the industry concerned. The methods for resolving a situation where the panel cannot come to a unanimous decision interestingly illustrates the sensitive structure that is required to balance the interests of state, labour and capital. Currently, a decision by the Commissioner's representative and one of the assessors is a decision by the panel. Where the two assessors disagree with the Commissioners' representative the matter is referred to the Minister of Manpower to be resolved. This institutionalises a primacy for state interests even where

these may clash with an agreed position between labour and capital.

The central flaw of the objection process flows from the structural ambiguity of a representative of the Commissioner's office sitting on "appeal" from a decision of the Commissioner. The presiding official may not always be in a position to display the necessary independence to scrutinise a decision of his or her own department and, in practice, these officers seem unclear as to whether or not they are bound by the Commissioner's policies.

No decisions are published and the results of objection hearings do not create any guidance for claimants for compensation. This absence of certainty and the ad hoc approach to the assessment of claims deprives many of benefits or delays compensation awards while the initial decision is subject to an objection.[10]

The objection hearing has greater value as a forum for contesting factual aspects of a decision (did the accident occur at work? what was the employee earning at the time of the accident?) rather than as one for challenging the policies of the Commissioner's office. This will generally have to be done by means of an appeal to the Supreme Court where the presiding judge will not have the assistance

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[10] The absence of published criteria for evaluating compensation has a particularly severe impact on compensation for occupational diseases. White and Cheadle report that more than 50% of a number of claims lodged by workers suffering from byssinosis were adversely affected by inconsistent or arguable decisions, unfair refusals and unnecessary appeal proceedings (N White and H C Cheadle 'Compensating Byssinosis in South Africa' *South African Medical Journal* forthcoming).

of expert assessors and may have no particular expertise in this area of law.

A number of alternative approaches for resolving disputed decisions suggest themselves. The first is to combine the involvement of representatives of labour and capital with outside scrutiny. This could be done by making decisions on compensation subject to appeal to a specialist division of the industrial court in which a presiding officer would sit with assessors representing labour and capital. Such a court could ultimately expand into being a social security and health and safety division of the industrial court, dealing with unemployment insurance appeals and appeals against decisions of the Chief Inspector in terms of the Machinery and Occupational Safety Act. Advantages of this approach include the building up a body of case law on entitlement to benefits which would guide parties in the future. A prerequisite for the success of this approach is the development of a reservoir of sufficiently skilled personnel to staff the court. The recent experience of the industrial court shows this to be a real difficulty.[11]

Another approach would be to resist the temptation to create judicial or semi-judicial appeal bodies. Instead, the appeal function could be vested in the Worker's Compensation Board. This approach is found in the Unemployment Insurance Act where appeals against decisions on benefits are heard by the Unemployment Insurance Board (or a Committee appointed by it). While there may appear to be dangers in entrusting the appeal function to the body that determines policy, its adoption is

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[11] The ability of many of the members of the Industrial Court has been widely criticized by the legal profession, capital and labour (see (1989) 5 (6) *Employment Law* 97).

not without merit. The success of this approach requires the Board to be properly representative of the constituencies with an interest in compensation. If this is the case, decisions by the Board could enjoy a legitimacy that a court may not be able to achieve and could counteract excessive use of objection and appeal proceedings.

Whatever appeal process is adopted, structures should be created to minimise the number of appeals lodged. A possible solution would be to institutionalise a process of internal administrative review where all decisions which are objected to or which concern particularly difficult cases are reconsidered by more senior officials with the parties being given the opportunity to make brief written representations.

An appeal process must ensure that claimants receive the compensation they are entitled to and that disputes over compensation are resolved. At the same time its design should not promote a culture of litigation and objection such as has occurred in certain American states and Canadian provinces. This development results in a delay in the settlement of claims and a misallocation of resources away from benefits to the fees of lawyers and the claims consultants who spring from the wood-work to exploit this potential.[12] The extensive use of legal representatives in

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[12] The growth of a litigation industry around workers compensation depends on a number of factors. These include whether coverage is through a central accident fund or private insurers with the latter tending to cause higher levels of objections awards; the credibility and acceptability of the governing body of the fund and the appeal tribunal; and, perhaps most importantly, the impact of a successful claim on an employer's future contributions to the Fund. (The greater the financial consequences for employers, the higher the level of objections and appeals by employers tend to be).

the industrial court which was created to resolve labour disputes quickly, expeditiously and cheaply highlights these dangers.

Empowering Workers

Adequate appeal procedures alone do not ensure that employees receive the benefits they are entitled to. In addition, institutional means must be created to ensure that employees receive competent advice and assistance in assessing and if necessary challenging awards of compensation and to promote a greater awareness of employees' entitlement to benefits. The extremely low number of objection hearings[13] stems from a general ignorance of rights in terms of the Act, the low level of public interest and the lack of expert agencies to assist workers in prosecuting objections.

There are a number of indicators of the ignorance of rights in terms of the Act. One of these is the low level of claims lodged in terms of section 43 of the Act for increased compensation based on managerial negligence. Despite the immense financial value of these claims, in the ten years up to February 1985, only 156 claims for additional compensation were made, of which 30 succeeded. In the two decades up to 1984, when the National Union of Mineworkers began to utilise the section on behalf of its

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[13] For instance in 1990 there were over 100 000 awards of compensation (excluding those which were only for medical costs). In the same year, only 331 objections were lodged.

members, no claims had been lodged in the mining industry.[14] Despite trade union use of the section, the increase in applications has not been that great and in the financial year ending 28 February 1990, 34 claims were lodged.[15] The explanations for this low level of claims include ignorance of the procedure and the inability to mount a case aimed at establishing employer negligence.

The extent to which employees are currently being deprived of their basic statutory entitlement is also illustrated by the operation of Rand Mutual, the mutual association that insures much of the mining industry, South Africa's most dangerous major industry. At a recent objection hearing a senior official of the Rand Mutual testified that his company processed some 30 000 claims each year.[16] These are dealt with by five claims officers, each of whom has one assistant. Assuming a working year of 240 days, the five claims officers have to process 25 claims every day. Because of their work load the claims officers do not verify the information received from mines. The mines do not employ officials who work full-time on compensation claims and the officials concerned change regularly and are generally not well-versed with the Act. The compensation paid by Rand Mutual is based on the unverified information supplied by the mine and in practice

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[14] See P Benjamin 'Additional Compensation for Injuries at Work: An Underutilized Remedy' (1987) 8 *Industrial Law Journal* 15 at 19.

[15] 1990 Annual Report of the Accident Fund at 22.

[16] M Ngwenya and Rand Mutual (iro Free State Geduld Mines Ltd).

is not scrutinised by the Commissioner's officer which in theory is required to confirm all awards of compensation made by Rand Mutual. In this particular case, Rand Mutual had to request the Commissioner's office to reach a decision so that the employee could lodge an objection.

The potential for workers to be deprived of benefits is enhanced by the complicated formula for calculating an employee's earnings involving not only an employee's basic earnings but all remuneration including the cash value of payments in kind such as food and accommodation, bonus payments, regular overtime earnings and remuneration of a constant character.[17] In the case discussed above, the forms circulated by Rand Mutual to the mines above did not alert the mine to the very wide definition of earnings used in the Act.

How can the lack of assistance available to employees be tackled? In some Canadian provinces the problem of employee access to representation is dealt with by the Workers' Compensation Board funding an independent Office of the Worker Advisor who represent employees in appeal and review proceedings. They also establish an Office of the Employer Advisor to advise employers on the Act. The expenses of both these offices are paid from the revenue of the compensation board with the office of the worker advisor receiving a higher budget than the employer equivalent. An indication of the size of these operations is that the office of the worker advisor in Ontario employs 140 persons (few of whom are lawyers) to handle cases.

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[17] Section 41.

The South African WCA allows the Commissioner to fund the activities of organisations engaged in areas of safety and compensation and this has been used to pay for rehabilitation organisations and for NOSA (National Occupational Safety Association). NOSA conducts safety audits, safety training and operates the 5-Star Safety and Health Management System. Trade unions have criticised it for being increasingly managerialist in its approach to occupational health and safety. In the financial year ending February 1990, R5 300 000 was paid from the Accident Fund to NOSA. It would be a worthwhile investment for the Commissioner to fund an organisation or organisations that could assist employees to ensure that they receive the statutory entitlement to compensation. A scheme of this nature would have other advantages. First, it could employ young legal graduates who are currently not able to obtain employment as candidate attorneys. The operation of such a system would ensure that a group of lawyers would in time develop expertise in compensation law. In time these people could be employed in the administration of compensation or in the courts or other bodies hearing compensation appeals.

An office advising employers, particularly small employers, of the requirements of the Act would similarly play a constructive role in informing the public of the operation of the Act.

An additional, and by no means alternative, method is to utilise representative trade union structures at work-place level to monitor compliance with the Act. This could be done through shop-steward or elected safety representative structures. The Act could require employers to supply copies of all documentation concerning a compensation claim to the trade union representing the

employee concerned. This would allow local trade union representatives to check the correctness of the information contained in the forms and if necessary make representations to the official deciding the claim. The use of employees and trade union structures to monitor compliance with the Act would impose no additional financial obligations on the Accident Fund.

Ultimately, this type of representative structure could encourage a more active approach to compensation among employees and employers, and ensure that at all levels labour and capital accept a greater degree of responsibility for the operation of the scheme.

Compensation Benefits

Finally, the test of any compensation scheme is the level of benefits it offers. The benefits paid in South Africa fall into two categories.

The first of these is the compensation for workers who are temporarily unable to work ("temporary total disability"). The compensation paid to these workers (75% of gross earnings) is not out of line with international standards although it can be argued that a higher percentage should be paid to very low wage earners who may spend their entire income on the necessities of life. In most Canadian provinces, the formula has been shifted to a percentage of net income - usually 90%. This is to avoid the situation that may occur with high wage earners in that 75% of their gross income is higher than their take home pay and thus they would be financially better off during a period of disability.

On the second form of compensation, the pensions paid to permanently disabled workers and the dependants of deceased workers, the prognosis is not so rosy. First, these payments are not indexed in line with inflation. During the 1980's, these pensions were increased at less than half the rate of inflation.[18] The question is one of economics - there is no suggestion that it is appropriate to reduce the pensions paid to the victims of occupational accidents and illnesses over time as the cost of living increases. What needs analysis is the impact that inflation-indexed pensions would have on employer's contributions and the resources of the accident fund.

An additional and considerably more complex issue arises in considering the compensation paid to permanently injured workers. The compensation paid is a factor of their earnings and the severity of the injury. The severity of the injury is assessed in terms of a schedule attached to the Act. If the disability is assessed at 30% or below, the workers receive a single lump sum payment; if it assessed at above 30% he or she is paid a pension. A worker with a 100% disability receives a pension equivalent to 75% of his earnings at the time of the accident. The pension is proportionately reduced where the injury is classified as being less severe. Thus a worker with a 50% disability will receive a pension equivalent to 37.5% of his or her earnings at the time of the accident. The effect is that many workers whose injuries make them unemployable receive a single lump sum payment as compensation or a pension equivalent to a small portion of their earnings at the time of the accident. This is particularly true for manual workers for

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[18] See: P Benjamin "Pensions for Occupational Injury and Illness. A New Era?" (1990) 11 *Industrial Law Journal* 950.

whom a relatively minor physical injury, particularly of the hand, may render them totally unemployable. For instance, a worker who loses his or her entire thumb will receive a lump-sum equivalent to 12½ months wages and no pension. A worker losing a hand at the wrist will only receive a pension equivalent to 37.5% of his or her earnings at the time of the accident.

The Canadian provinces have developed a number of solutions to this problem. In British Columbia, an injured worker is entitled to compensation calculated either on the severity of his or her injury as in South Africa or, if it is more favourable, his or her loss of earning capacity. In Ontario, a new system has been introduced in terms of which all employees who suffer a permanent injury receive a lump sum payment irrespective of their level of earnings and regardless of whether or not they suffer any loss of earnings. The only factor used to determine the amount of this payment is the severity of the injury. In addition, they can receive a pension to compensate for their loss of earning capacity.

The measurement of the lost earning capacity is more difficult, and more subjective, than the calculation of the severity of an injury. Is the fact that a worker does not get further employment an indicator of the extent of his or her loss of earning capacity? One very controversial approach to this is that of "deeming". The compensation board determines what type of employment the injured worker is capable of and, regardless of whether he or she is in or can find such employment, considers the earnings he or she would receive in that job as his or her earning capacity. The pension paid is then the difference between the worker's pre-accident earnings and his or her post-accident earning capacity.

Ultimately, discussions around improved forms of benefit revolve around the level of employer contributions to the Accident Fund. This should, in the long run, be a matter to be resolved on a Worker's Compensation Board or similar institution. South African employers on average pay approximately 1% of their wage bill in compensation assessments. This varies according to industry with dangerous industries paying higher rates of assessments than those where there is a lower risk of injury and illness. The highest rates are in the vicinity of 2%. In some Canadian provinces the most hazardous trades pay up to 15% of their wage bill in compensation assessments. The level of assessments need serious re-consideration but this can only be done after an informed discussion about the level and types of compensation that injured workers should receive.

The benefits that can be offered by a compensation scheme should not be seen as being limited to financial payments. Increasingly, compensation legislation establishes the right of injured workers to return to employment and the right to vocational rehabilitation. The former takes two forms. The first is the right of workers who suffer a temporary injury to return to work after recovery. The rights of permanently disabled workers to employment is linked closely to vocational rehabilitation. If compensation schemes provide rehabilitation designed at allowing employees to return to work they must ensure that rehabilitated workers do return to work.

In a compensation scheme in which economic loss is compensated, the return to work by rehabilitated workers reduces the fund's obligation to pay compensation. If, however rehabilitated workers are not able to obtain suitable employment the fund will have to meet a double financial

liability - vocational rehabilitation and compensation. For this reason, it is argued that a system of vocational rehabilitation can only work if employment equity legislation is introduced requiring employers to employ injured workers. The obligation can be placed either on the injured worker's former employer or on employers in general.

Conclusion

This paper takes a look at a few of the issues that will have to be tackled in reshaping workers' compensation law. There are many others that require attention such as the inadequate coverage of workers who contract occupational diseases. The process of reform can best take place against a backdrop of well-informed debate, not only on the details of the Act but on the policy objectives that should underlie its operation. For this to occur, information about the present scheme must be placed in the public domain, research must be encouraged and facilitated, and as a wide a constituency as possible must be drawn into the debate.