

Unacceptable face of Department of Labour Workers' Compensation

For most people, someone who is struggling with a disease or injury should be treated with compassion. Not so the compensation office of the Department of Labour.

Paula Howell tells a hair-raising story of neglect and indifference to workers who suffer occupational illnesses and disabilities.

In South Africa provisions for compensating workers for injuries and occupational diseases are among the most enlightened in the world. Unfortunately, many of these are paper provisions only. In practice, workers are confronted by barriers to access. Failure to remove these barriers means that a crisis has developed in workers' compensation.

Employees are entitled to claim and receive compensation if they are injured in work accidents or they develop occupational diseases. The primary legislation governing compensation to injured workers is the Compensation for Occupational Injuries and Diseases Act 1993 (COIDA), which came into force in March 1994 and replaced the Workmen's Compensation Act of 1941. The compensation scheme falls under the control of the Department of Labour (DoL).

The purpose of COIDA is to deliver speedy benefits to injured workers, regardless of whether or not there was fault on the part of either the employer or employee. In return, employees have to forfeit their common law right to sue the employer for damages, which are generally higher than COIDA benefits, on the understanding that compensation is guaranteed.

The process of claiming compensation is straightforward. The injured employee reports the accident to the employer who, in turn, reports the matter to the Compensation Commissioner. The claim is assessed by the Commissioner and, if the application is successful, the employee is compensated within three months from the date of the accident.

So why is it that claimants, unemployed, and often disabled as a result of work accidents, wait years for compensation? The answer is quite simple: first, inefficient administration and, second, a pathological mistrust, on the part of the Commissioner's staff, of workers who claim compensation. Mistrust or scepticism is not a bad thing in administering funds of this type, but coupled with bad management and illegal policies, the recovery of compensation can be a formidable task for many who apply.

SADIKI CASE

The Sadiki and Molefe cases below show the kinds of hurdles that claimants face when applying for compensation.

The Sadiki case, which was launched by the Legal Resources Centre (LRC) in 2004, concerned the failure of the Commissioner to

process over 250 000 claims where employers had failed to report accidents to the Commissioner. Some of the cases were over 10 years old.

COIDA imposes a duty on the administrators of the scheme to investigate all claims and penalise employers and employees who fail to comply with the legislation. The failure to report accidents by employers was a massive problem but, instead of forcing employers to comply with the terms of COIDA, the Commissioner simply created a 'temporary claims' section. All claims without employers' reports were dumped and the burden of providing information was transferred to employees who were powerless to progress their claims.

In their affidavit the respondents in the Sadiki case who were the Commissioner and the director-general of the DoL claimed that there was no duty on the administrators of the scheme to process these cases. They further claimed that the files could only be processed once employees provided the relevant documents, including the employer's report.

The idea that employees should take responsibility for the wrongs of employers was regarded as a perfectly reasonable solution to the

problem. The fact that employees with valid claims were simply left to rot was never regarded as a problem because staff felt that claimants in general could not be trusted.

The Sadiki matter was settled by agreement that the administrators of the scheme, and in particular, the Commissioner was acting unlawfully by failing to process temporary claims. As a result, the investigation functions of the Commissioner were transferred to DoL inspectors and administered through COIDA offices, within the provincial departments of labour.

Needless to say, this new system is also failing, primarily, because staff at the COIDA offices operate in much the same way as the Commissioner's staff, prior to the Sadiki challenge. Unfortunately, victims have now become invisible as their claims hover between labour centres and COIDA offices and never reach the Commissioner's office.

MOLEFE CASE

The Molefe case, was heard in the Pretoria High Court in September 2007 and concerned the failure of the Commissioner to award temporary total disability (TTD) compensation and was also brought to court by the LRC.

Mr Molefe was shot in the right arm in an attempted hijack and, as a result, was unable to return to his job as a truck driver because his arm became severely disabled after initial treatment. His disability claim was rejected twice because the Commissioner without examining the contractual obligations of the employee decided to accept the employer's view that the employee was not on duty at the time of the accident.

When the claim was eventually accepted five years later, as a result of the intervention of the LRC, Mr Molefe was still disabled because

without compensation he could not access treatment to correct his disability. When he requested backdated TTD compensation the Commissioner refused to pay on the basis that he was not receiving 'active medical treatment' during the period he was entitled to receive TTD payments.

TTD is paid, for a maximum of 24 months, to an employee who is recovering from an injury and cannot return to normal duties. It is calculated on the basis of 75% of the employee's gross monthly salary at the time of the accident and benefits are paid until the employee gets better, returns to work and is earning the same or a higher salary, or the Commissioner awards compensation for permanent disability.

Because the Commissioner is required to pay TTD compensation to the employee until one of the three events above has occurred, when claims are delayed, the right to TTD compensation can result in costly payouts for the Commissioner. If, for example, Mr Molefe's claim had been accepted at the time of his accident, the matter could have been finalised within four to six months. As it turned out, the Commissioner had to pay 14 months TTD compensation as well as a lump sum for permanent disability.

The requirement for active medical treatment is also applied to claimants whose claims have remained unresolved for months or years, for no particular reasons, except as a mechanism for reducing liability for TTD compensation.

The court accepted Mr Molefe's argument that active medical treatment is an unlawful requirement for receiving compensation. The judgment, delivered on 28 September 2007, directed the respondents to end the policy and compensate all those claimants who were adversely

affected by the policy within the past three years. Subsequently, the court denied the application of the Commissioner and the director-general of the DoL to appeal the judgment, but they refused to accept defeat and are in the process of appealing directly to the Supreme Court of Appeal.

The impact of the judgment is that the Commissioner's office must review some 170 000 claims and pay compensation to those affected by the policy. It also means that, in the future, delays in the processing of applications could prove costly and so this is a powerful incentive for tackling problems of delay.

In both the Sadiki and the Molefe cases, the Commissioner's office adopted policies without reference to COIDA in complete disregard of the rights of injured workers. It showed a willingness to deny liability whenever possible, regardless of any illegality or inequity that might result.

BAD MANAGEMENT CAUSES SUFFERING

There are a host of other problems that affect the rights of injured workers, but perhaps the most damaging are those related to inept management. These give rise to extensive delay and failure to pay compensation to those with valid claims.

The Commissioner's office receives about 300 000 claims annually. In order to process these applications promptly it should put proper procedures in place to facilitate the receipt of information, the investigation into missing documents, such as employers' reports and medical reports, and efficient communication with doctors, employees and employers. Due to inefficient processes, documents are lost over and over, files are passed from one person to

the next with no one having responsibility for their finalisation, and, to top it all, claimants are now barred from directly interacting with those who are dealing with their files.

So, even when employers report accidents promptly, there is no guarantee that the claims will be finalised within the statutory period of three months. For example, it is quite common for claimants to wait six months or longer just to get claim numbers.

The solution to all these problems requires, above all, an acceptance on the part of the administrators of the scheme that compensation must be delivered promptly and that the right of injured workers should be respected at all times.

In addition, the Commissioner and the DoL must develop policies

that are in line with the legislation and ensure that properly trained staff have a thorough understanding of the basic principles of the laws.

It is also important that claimants have access to proper legal advice because, ultimately, the DoL is responsible for maintaining the assets of the fund, a responsibility that puts it in direct conflict with the demands of injured workers.

In the US, for example, legal assistance to workers' compensation claimants is delivered in the same way as road accident compensation in South Africa. Here lawyer involvement ensures that administrators cannot disregard legislation. This has had a huge impact on the delivery of compensation in the US and on the development of the law. In South Africa the workers'

compensation scheme discourages lawyer support to applicants and only claimants who can afford lawyers' fees get help as most lawyers are not prepared to do pro bono cases.

The DoL needs to develop an organisational culture that regards workers' compensation as a right and recognises that the benefits claimants receive play an important role in the alleviation of poverty in South Africa. There can be no reasons why injured workers should lose their right to recover damages from negligent employers in return for a life of poverty and disability while employers continue to permit practices which can maim and kill. LB

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