



Workers Compensation Assistance

Welcome everyone





Workers Compensation Assistance

Workers Compensation Act Amendments

April 2023

Presentation to Clients of
WCA Workers Compensation Assistance

22 May 2023



Workers Compensation Assistance

Presenters

Mr Julian Soupen Compensation Fund Chief Director
Compensation Benefits

Mr Bheki Ncgobo Compensation Fund Director
Compensation Benefits

Mr George Kahn Director at Richard Spoor Inc.
A prominent (and often controversial) champion for workers compensation rights



Presentation Conventions

The amended text shows as

Bold **Text that has been deleted from the Act**

Outlined **Text that has been added to the Act**



Commencement

Short title and commencement 64.

- (1) This Act is called the Compensation for Occupational Injuries and Diseases Amendment Act, 2022, and takes effect on a date fixed by the President by proclamation in the Gazette.
- (2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act



Question

Which provisions come into effect from when?

WCA Workers Compensation Assistance will keep clients informed of the effective dates for the various provisions.

Clients should be especially attentive of the following sources of information:

Your monthly progress reports

Our website, specifically the new Amended COLD Act page



Penalty for non payment

Section 87(3): An employer who refuses or fails to pay any assessment, installment or **fine penalty** referred to in this section or any other money payable in terms of this Act, shall be **guilty of an offence liable to a penalty of 10% of actual or estimated earnings of that year.**

Question

10% of earnings is extremely onerous.
Will this extent of penalty be permitted?

The use on the word “shall” is concerning. It means that the Compensation Fund must impose the penalty in the event of an employer failing to make payment.

A penalty of 10% is extremely high and could amount to 10 times the annual assessment (or more), depending on the employer’s subclass.

The importance of complying cannot be over-stressed.

Private Workers Compensation Insurance

Section 30 “(1) The Minister may, for such period and subject to such conditions as he **or she** may determine, issue a license to carry on the business of insurance of employers against their liabilities to employees in terms of this Act to ... **a licensee**: Provided that the Minister may order that the ... **licensee deposit** securities considered by the Director-General to be sufficient to cover the liabilities of the **licensee** in terms of this Act”.



Definition of 'Licensee'

'licensee' means a legal person to whom a license has been issued in terms of section 30 of this Act.

Question

How does the Compensation Fund foresee this will unfold?
Can all the clients of **WCA Workers Compensation Assistance** group together and take their insurance to Hollard, for example, if they were to become a licensee?

The Compensation Fund has indicated that the German model of private workers compensation insurance will be followed.
Exactly how this will unfold remains to be seen.

Merit Rebates for Rehabilitation

Section 85(3): If the accident record of an employer during a particular period is in the opinion of the Director-General **Commissioner** more favorable than those of employers in comparable businesses, **or if the employer is participating in the rehabilitation of employees as prescribed**, the Director-General **Commissioner** may give such employer a rebate on any assessment paid or payable by him **or her.**”

Question

How is this section going to be applied: what rebates can be expected, what rehabilitation programmes will be prescribed?

Whilst the effective date for this amendment is not yet determined, **WCA Workers Compensation Assistance** believes benefits can be gained by employers who take proactive steps to plan, document and implement rehabilitation (and return to work) programs for employees injured on duty.

WCA Workers Compensation Assistance is exploring the introduction and approval of off-the-shelf plans and will present them to employer clients in due course.

Definition of 'earnings'

'earnings' means the remuneration of an employee at the time of the accident or commencement of an occupational disease as calculated in terms of this as defined in paragraph 1 of the Fourth Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962), but does not include any amount paid or payable to an employee —

- by way of any pension, superannuation, allowance or retiring allowance; and
- which constitutes an amount contemplated in paragraphs (a), (cA), (d), (e) or (eA) of the definition of 'gross income' in section 1 of the Income Tax Act, 1962;

Question

How does the amended definition of “Earnings” affect the determination of earnings for purposes of:

- Declaring earnings on the Return of Earnings

- Declaring earnings on the Employers’ Reports of Accident and Disease

- Paying the employee periodical payments (section 47) – by the Employer and by the Compensation Fund

Key elements of the *outgoing* definition of earnings are: it includes all remuneration (in cash or in kind) of a regular nature and it excludes intermittent overtime and expense reimbursements (section 63(1)).

Whilst some of these elements are carried over, employers are encouraged to consult with their financial experts to quantify the effects that the new definition will have on earnings calculations.

Adjustments for Incorrect Earnings

Section 83

“(5) If earnings actually paid by an employer in respect of a particular period differ from the **current estimated** earnings shown in respect of that period in the return concerned, the **Director-General** Commissioner shall adjust his **or her** assessment accordingly.

Question

What is the significance of the added phrase “current estimated”?

Based on the Compensation Fund’s reluctance to adjust assessments declared in error, as evidenced in the government notices that have been published in this regard, **WCA Workers Compensation Assistance** views any amendment to section 83(5) with suspicion.

However, from a plain reading of the amendment, we cannot see that it affects the meaning of section 83(5) (other than to correct the English since, in hindsight, earnings reported incorrectly are not strictly “earnings” as defined).



Penalty for Late Accident Reporting

Section 39 of the principal Act is hereby amended —

“(6) An employer... who fails to comply with subsection (1) shall be guilty of an offense **liable to a penalty of 10 per cent of the actual or estimated annual earnings of that particular year.**”;

“(8) If an employer... fails to report in the prescribed manner an accident which has happened to an employee in his, her or its service within seven days after having received notice thereof or having learned thereof in some other manner, the Director-General **Commissioner** may impose a fine of ... **penalty equal to the full amount of compensation payable plus interest from the date of the accident.**

Question

Does the above mean that a fine *shall* be imposed for late reporting of accidents?
Does 10% of earnings penalty pertain to the earnings declared for the employee concerned?
From when will this provision come into effect?

The Compensation Fund has been plagued with late accident reporting and the Fund is therefore taking additional steps to penalise failure to report.

Employers should take into account that, for the purposes of section 39 an accident includes an injury reported by an employee who alleges that it arose out of and in the course of employment.

Registration of “Third Parties”

To section 73 is added:

(4)(a) No third party will be allowed to transact with the Compensation Fund unless they are registered with the Compensation Fund in the manner as prescribed.

(b) All third parties that are already transacting with the Compensation Fund must register with the Compensation Fund within six months (of this Act)...

(5)... a third party means any entity... assisting either the employee, employer, medical service provider... with the processing of claims at the Compensation Fund.”.

Question

From when will registration be possible?
What criteria will apply?

Clients of **WCA Workers Compensation Assistance** should be assured that we will take all necessary steps to ensure that we are and remain duly registered with the Compensation Fund as a Third Party.

We foresee that we will meet and exceed all requirements that the Compensation Fund will set down, be they in terms of governance, compliance, skills or systems.

Richard Spoor Inc section Presented by Mr George Kahn



Definition of “Occupational Disease”

‘occupational disease’ means any disease contemplated in section 65(1)(a) or (b),
and includes post-traumatic stress disorder;”;

Question

Why is PTSD included this way in the definition of “disease”?
Is it to exclude PTSD as an accident?
Is it to ensure the Compensation Fund does not ignore it?

The reason for the singling out post-traumatic stress disorder in the definition appears unusual and **WCA Workers Compensation Assistance** cannot state with certainty the reason.



Definition of “Financial Year”

‘financial year’ means the period between the first day of **March** **April** in any year and the last day of **February** **March** in the following year, both dates included.

Question

What is the significance of this change?

Will it now be required that Employers must report Earnings for the corresponding period (it is currently March to February)?

If the financial year extends by one month, employers will be faced with a reporting period in one year of 13 months (thus an additional 8,33% in earnings and assessments) in one year and another of 11 months (thus a reduction of 8,33% in earnings and assessments) in the next.

The effective date for this provision has not yet been published (as at 22 May 2023).

Insurer To Provide Rehabilitation

- 70A. (1) Subject to the provisions of this Act, the Compensation Fund, ..., must provide facilities, (etc) aimed at rehabilitating employees suffering from occupational injuries or diseases to return to their work or to reduce any disability
- (2) The rehabilitation benefits provided in subsection (1) may consist of —
 - (a) clinical rehabilitation...;
 - (b) vocational rehabilitation...; and
 - (c) social rehabilitation ...”.

Question

When will this take shape and what will the involvement be of the insurers: will they subcontract or must they operate the facilities and employ the staff?

The Fund's increased focus on rehabilitation is evident in this amendment (and reminds employers to devise and implement rehabilitation programs for their injured employees).

It is doubtful that all employers (individually liable) will be able to provide their own rehabilitation facilities.

Objections To The Compensation Commissioner's Decisions

Section 91 Objections

“(1) Any person affected by a decision of the ... Commissioner may, within **180 days** **12 months** after such decision, lodge an objection against that decision with the Commissioner in the prescribed manner.”



Question

Does this apply to decisions that take place after the amendments come into effect?

When will this come into effect?

On Mr George Kahn's advice, this provision will affect all decisions that are made up to 12 months prior to the date of enactment.



The Compensation Commissioner Replaces The Director General

by the substitution for the expression “Director-General”, wherever it occurs, of the word “Commissioner”, except where it occurs in the definition of “Director-General” in section 1 and section 18, section 30, section 50, section 55 and section 69;

Question

Will matters that were the responsibility of the Director General remain with him or will they de facto be reverted to the Compensation Commissioner?
To whom does one now escalate issues?

It has been suggested that the amendment reflects the status quo and that no significant changes will be observed after the implementation of this amendment.

WCA Workers Compensation Assistance concurs.

Inspection, Compliance, Enforcement

“CHAPTER XA INSPECTION, COMPLIANCE AND ENFORCEMENT:

Appointment of inspectors 93A.

Functions of inspectors 93B.

Powers of entry 93C.

Powers to question and inspect 93D

Co-operation with inspectors 93E.

Compliance orders 93F.”

Question

Do these sections materially alter the status quo (regarding inspection) and, if so, how?

It has been suggested that inspectors are given wider powers under this chapter of the amended COID Act than they enjoy under the Occupational Health and Safety legislation in that they may conduct their investigations in the homes of employer's officers.

TTD Payments and Refunds (Periodical Payments)

Section 47:

“(b) After the expiry of the said three months, compensation so paid by such employer shall be repaid to the employer by the Director-General **Compensation Commissioner** or mutual association **licensee** concerned, as the case may be.

(c) An employer who fails to comply with paragraph (a) shall be guilty of an offense **liable to a penalty equal to double the full amount of three months compensation payable plus interest.”**

Question

If the Compensation Fund establishes that an employer has failed to pay TTD, is the Compensation Commissioner compelled to impose the penalty (is that what the “shall” means)?

It is confirmed that employers who fail to pay compensation in place of the Compensation Fund during the first three months following an accident must be liable for a fine equal to double the compensation that should have been paid (plus interest).

The fine will only apply to the period of absence during the first three months.

Costs For Conveyancing an Employee

Section 72 of the principal Act is hereby amended — by the substitution for subsection (2) of the following subsection:

“(2) The Director-General **Commissioner** or the employer individually liable or [mutual association] **licensee** concerned, as the case may be, shall **may** pay the reasonable cost (as determined by the Director-General) incurred in respect of that conveyance.”;

and (c) by the substitution for subsection (3) of the following subsection:

“(3) Any employer who fails to comply with subsection (1) shall be guilty of an offense **liable to a penalty equal to the full cost of conveyance.**”

Question

Why is there a discrepancy: The Compensation Fund *may* refund an employer for costs of conveyancing an injured employee, but the Employer *shall* provide conveyancing?

It is believed that the discrepancy in the obligations (the employer must provide transport, but the Fund need not reimburse the employer) could be based on the possibility that cost the transport which the employer provides is disproportionate or excessive – or unrelated to the fee published in the Compensation Fund's fee schedule.

Further, it has been mentioned that the courts may see it as unfair that the employer is obliged to pay but the Compensation Fund is not obliged to reimburse.



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Commuting Now Covered

For the purposes of this Act the conveyance of an employee free of charge **by or on behalf of the employer** to or from his **or her** place of employment **or any place** for the purposes of his **or her** employment by means of a vehicle driven **by any mode of transportation in furtherance of the business of** the employer himself or one of his employees and specially provided by his employer for the purpose of such conveyance, shall be deemed to take place in the course of such employee's employment.'";

"(6) Conveyance shall be deemed to commence once an employee reaches the place designated by the employer for pick-up and cease on drop-off at the place as so designated by the employer.'

Question

What is meant by “by or on behalf of the employer”?

Whereas commuting was previously excluded except for special circumstances, it is now covered, provided that the conveyance is “by or on behalf of the employer... in furtherance of the business of the employer”.

The details of these new conditions will have be tested over time and may be the subject of further policies and notices.

It is doubtful that accidents occurring beyond the points of pick-up or drop-off will be covered under the amended COIDA since accidents must arise *in the course of employment* (as well as out of employment).

Prescription of Claims

Section 44

“Prescription 44. A **Notwithstanding any provision in this Act**, a right to benefits in terms of this Act shall lapse if the accident in question is not brought to the attention of the commissioner or of the employer or mutual association concerned, as the case may be, **Commissioner** within 12 months after **three years** from the date of such accident.”.

Question

From when does this come into effect?

Will the effective date apply to the date of accident (or date of diagnosis of a disease) or to the date from which an accident or disease is reported?

Extending the prescription period to coincide with the three-year prescription for civil claims is welcome.

However, it is noted that the defence that the accident was brought to the attention of the employer in the prescription period falls away.

Employers should be aware that the Compensation Fund's computer systems may be programmed to prevent reporting of accidents outside the prescription period and alternative methods may have to be used.

It was suggested that no prescription should apply to COIDA claims since they are, in effect, claims for social security benefits.



Deletion of Definition “Serious and Willful Misconduct”

the deletion of the definition of “serious and willful misconduct”

Question

Will this have an effect on claims costs?

Will the corresponding questions remain in the Employers' Reports?

Whilst the 1993 COIDA made provision for benefits to employees injured due to their own serious and wilful misconduct, it applied only in the event that the employee was seriously injured. This condition falls away under the amended COIDA.

It was suggested that there is a possibility that, in removing reference to serious and wilful misconduct, such claims will all fail. **WCA Workers Compensation Assistance** does not share that view and believes that serious and wilful misconduct will not be grounds for repudiating claims.



Commencement of a Monthly Pension

Commencement of monthly pension 49A. **Notwithstanding any provision in this Act, monthly pension shall commence from the date on which a medical practitioner certifies that an employee has reached the maximum medical intervention."**

Question

Why is this significant?

Traditionally, monthly pensions have commenced from the date on which the determination of the pension is made.

Under the amended provision, monthly pensions will commence and be effective from the date on which maximum medical intervention is reached. This is likely to be somewhat sooner than the date from which the pension is decided and TTD benefits are likely to have been paid in this overlapping/intervening period.

Monies thus paid to the employee may have to be reversed – an additional administrative step which is bound to retard the (already very slow) process, especially in its early implementation.



Decriminalisation of The Act

Section 99. Any person who is convicted of an offense in terms **does not comply with the provisions of sections 39, 40, 47, 64, 68, 81, 82 and 83** of this Act shall be liable to a fine, or to imprisonment for a period not exceeding one year **penalty or penalties** as specified in the said sections

Question

Which offenses remain (if any)?

Decriminalising the Act is welcome for the following reasons

The process of imposing penalties is an administrative one and is not delayed by court processes.

Transgressions do not carry criminal sanction.

It has been suggested that imposing of penalties may be a more effective deterrent than criminal sanction.



Payment For Medical Reports

Section 41: “(3) If the employee independently obtained a medical report in terms of this section at his or her own costs, the Commissioner must reimburse such medical expenses in full, where the Commissioner has received and accepted the report.”.

Question

What is the significance of the term “accepted” above?
Is this a material deviation from the status quo?

The notion of an accepted medical report seems unusual but, in practice, as matters stand, this is largely how the process functions.

At present, if the medical report leads to the Compensation Commissioner’s decision to pay for medical treatment (or awarding of other benefits), the Compensation Fund generally pays for the associated examination fees (certain medical diagnostic procedures excluded). This position is reduced to writing in the amendment.



Domestic Workers (For Interest)

63. (1) Domestic employees and employers must report or submit a claim in the prescribed manner within three years from the date of the commencement of the Compensation for Occupational Injuries and Diseases Amendment Act, 2022, for any accident that had occurred prior to the commencement of this Act.

Variation of The Compensation Commissioner's Decision

Section 90: "Review **Variation** of decisions by Director-General **Commissioner**";

"The Director-General Commissioner may after notice, if possible, to the party concerned **on his or her own accord**, and after giving him an opportunity to submit representations **notice to the affected party or on application by such party**, at any time review **vary** any decision in connection with a claim...

Question

Despite the changes, does this deviate from the status quo in any meaningful way?

This is an important section and not well-known.

The Amendment Act gives it a more modern flavour in that:

- It no longer refers to “review” which has a particular meaning in law.

- It brings in a party’s right to request a variation (which has been permitted in the past but not explicitly so).

- The Compensation Commissioner is expected to notify the affected party.

Road Accident Fund is no Longer a “Third Party”

Section 36... is hereby amended by the addition of the following subsections:

“(5) For the purposes of this section, the Road Accident Fund shall not be a third party from which the Compensation Fund or licensee can recover damages or compensation paid in terms of this Act.

(6) In the event where an employee is involved in an accident on a road not arising out of and in the course of an employee’s employment at the time of the accident, the employee shall not be entitled to compensation in terms of this Act.”.

Question

Will this mean that Road Accident Fund attorneys will no longer be required to obtain final settlements from the Compensation Fund?
Why has this been changed?

The Compensation Fund (or exempted employer, such as a “self-insured” municipality) may recover some or all of the costs of a claim from a liable third party (e.g. an owner whose dog bites and injures a meter reader). However they will no longer be able to recover from the Road Accident Fund.

Road Accident Fund attorneys will still require final settlement statements.





Questions From Delegates

Must I report an accident even if the employee insists otherwise and signs a waiver?

Refer section 39: all accidents as defined in section 39 must be reported in the prescribed manner within seven days of becoming aware of them. The employee does not decide what should not be reported.



Questions From Delegates

Must the employer report an accident if the employee is posted to a site that is a controlled mine or works?

Refer section 39: all accidents must be reported by the employer, not the employer's client.



Workers Compensation Assistance

This has been a presentation of salient amendments to the Compensation Act, 130 of 1993 (COIDA).

The amendments span 64 sections and represent a significant overhaul of the COIDA.

For further information on the full scope of the amendments, feel free to contact **WCA Workers Compensation Assistance**.

Heartfelt thanks to our presenters and participants.

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Workers Compensation Assistance

Thank you for your time.

