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COVID-19 AND THE ROLE OF COIDA

The Compensation for Occupational Injuries and Diseases Act (Act 130 of 1993, as amended) ("COIDA") was promulgated to create a mechanism in terms of which compensation could be claimed from a specially designated fund ("the Compensation Fund") in respect of disablement caused by occupational injuries or diseases sustained or contracted by employees arising from an accident out of and in the course of their employment, or for death resulting from such injuries or diseases.

Traditionally, most COIDA claims have emanated from accidents that have occurred in the course of an employee's employment and resulting in personal injury. Think, for example, of the construction companies who employ people to climb tall ladders to install guttering systems or roof tiles. Even with the most stringent safety measures in place, accidents happen, and people fall and injure themselves; COIDA is the statutory mechanism that allows employees to claim for compensation, as a result of such accidents. Importantly, COIDA also stems the tide of litigation between employee and employer under the common law, which may otherwise ensue.

COIDA also provides that an employee shall be entitled to compensation provided for and prescribed by COIDA if it is proved to the satisfaction of the Compensation Commissioner that an employee has:

- contracted an occupational disease mentioned in Schedule 3; or
- contracted a disease other than a disease in Schedule 3 provided such disease has arisen out of and in the course of employment.

Needless to say, COVID-19 was not a disease contemplated by the draftsmen of COIDA when it was drafted more than twenty years ago. However, the Compensation Commissioner issued a notice in terms of Section 6A of COIDA on 20 March 2020, which was published on 23 March 2020 ("the Notice"), the nett effect of which was that COVID-19, or Novel Corona Virus Disease of 2019 was expressly recognised (to the extent that there was doubt) in terms of COIDA and directions were issued by the Compensation Fund as regards compensation claims resulting from *occupationally-acquired* COVID-19.

The Notice stipulates that *occupationally-acquired* COVID-19 must result from single or multiple exposures to confirmed case(s) of COVID-19 in the workplace or after an official trip to high risk countries or areas in a previously COVID-19 free individual.

The Notice also stipulates that a claim for *occupationally-acquired* COVID-19 shall be set out as contemplated in sections 65 and 66 of COIDA. According to the Notice, the diagnosis for *occupationally- acquired* COVID-19 relies upon the following:

1. Occupational exposure to a known source of COVID -19;

2. A reliable diagnosis of COVID -19 as per the World Health Organisations guidelines;

3. An approved official trip and travel history to countries and /or areas of high risk for COVID-19 on work assignment;

4. A presumed high -risk work environment where transmission of COVID -19 is inherently prevalent; and

5. A chronological sequence between the work exposure and the development of symptoms.

Section 66 of COIDA provides that if an employee who has contracted an occupational disease was employed in relation to any work mentioned in Schedule 3 of COIDA, it shall be *presumed*, unless the contrary is proved, that such disease arose out of and in the course of his employment.

Whilst the said presumption is a pragmatic and valuable mechanism in the ordinary course, COVID-19 is not listed as a disease in Schedule 3, and the prescripts contained in section 69 of COIDA, which allow Schedule 3 to be amended, have not been followed; hence the section 66 presumption does not appear to apply to *occupationally-acquired* COVID-19. That is not to say that the necessary amendment will not be affected, which may then be retrospective.

At this stage it is therefore unclear how an employee will go about establishing that his or her contraction of COVID-19 was *occupationally-acquired*, and what *evidence* the Director-General will require. An employer may go beyond the call of duty to ensure, *inter alia* a hygienic and properly sanitised workplace with appropriate protocols in place, only for employees to contract the virus en route to the office, or whilst shopping at the supermarket. That is, unrelated to employment. Establishing that the virus has been occupationally acquired will be challenging, if not impossible, and it remains to be seen how the Director-General will deal with this conundrum.

The Compensation Fund will provide compensation to qualifying employees who are temporarily and totally disabled from working as a result of Covid-19, and then for up to 30 days from the date of diagnosis. However, no compensation will be claimable in the absence of a diagnosis (as set out above) or where self-quarantine is recommended by a medical practitioner. In these circumstances, the sick leave in accordance with the Basic Conditions of Employment (Act 75 of 1997, as amended) will arise. It is important to note that if a valid COIDA claims arises, then any employee absence would not fall within sick leave such that the sick leave would be held in abeyance.

To the extent therefore that the rumour mill indicated that employers would, on a blanket basis, be held liable for their employees contracting COVID-19, this must be taken with a pinch of salt. The Compensation Fund, where it accepts liability, is obliged to make payment to the employee in question. The Commission would also compensate for reasonable burial expenses and, where applicable, would provide widow's and dependent's pensions.

This does not mean that the employer is freed from its payment responsibilities. The employer is required to pay the employee for the first three months after the illness or injury is contracted or sustained, as the case may be, whereafter the Compensation Fund reimburses the employer. If the employee is absent for longer than three months, then the Compensation Commissioner takes over the monthly payments. Where the employer has insurance against claims of this nature, then the insurer will pay the compensation, although the claims are still submitted to the Compensation Commissioner. The process to submit claims is intricate and the steps will need to be followed

carefully; furthermore there will inevitably be delays when it comes to payments being authorised and effected.

It must, for the sake of completeness, be noted that the employees' recourse to the Compensation Fund in no way absolves the employer from ensuring that it complies with its duties to ensure a safe working environment for employees, which would for example include the provision of adequate personal protection equipment, screening of employees and other people entering the work premises and enforcement of social distancing, to name a few. The Occupational Health and Safety Act (Act 85 of 1993, as amended) has always required employers to bring about and maintain, as far as reasonably practical, a work environment that is safe and without risk to the health of employees. Never before has this been more challenging, and clearly this can only be achieved through effective communication and cooperation, not to mention a sense of responsibility on the part of employers and employees alike.

The Notice is encouraging, and a degree of comfort should therefore be garnered by employees at risk of contracting COVID-19. It remains to be seen how the "*occupationally-acquired"* element is to be established, although in the absence of the section 66 presumption, the onus to establish same falls squarely on the shoulders of the employees.

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