



Improving the Workers' Compensation System in Malawi

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EXECUTIVE SUMMARY

Workers' compensation in Malawi has faced challenges since its creation in 2000. This policy brief intends to propose 10 recommendations in making the workers compensation regime more efficient and effective. The Ombudsman's 2018 report following an investigation into delays in processing of workers' compensation claims provided the basis from which policy can be enhanced to address the pitfalls in the process. At the pinnacle of the recommendations is the fact that processing must be done by a Workers' Compensation Commission that is well equipped and modernised with an established fund that is solely dedicated to processing of injury and/or death claims.

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KEYWORDS

Workers' compensation system, Malawi

Introduction

Workers and employers are key stakeholders to the legal regime of Workers' Compensation. Workers' compensation systems must therefore balance the interests of both in order to be sustainable.ⁱ Social security benefits must at all times be 'sustainable, adequate and affordable benefits in line with the dynamic realities of the world of work.'ⁱⁱ In Malawi, the governing law that provides for Workers Compensation is the Workers Compensation Act (WCA).ⁱⁱⁱ

Since its enactment in 2000, the fund has never been established and neither has the Workers' Compensation Board ever been operational. This has led to employers taking out insurance on behalf of their workers to cover risk associated with workplace injuries and death. The coverage lifts the financial burden on the employer for injuries sustained or death during and out of the course of employment. Despite the fact that there is no fund, the Workers' Compensation Commissioner's office has been operational. To this end, workplace injuries and/or deaths are reported by the employer in the prescribed forms via the Commissioner's office who determines the claim.^{iv}

The system has, however, been met with serious challenges. According to the Ombudsman's^v report of 2018, 119 complaints from five districts had been registered, but not dealt with. Of specific importance was the fact that a greater number (68%) of the complaints had emanated from private companies. According to the report, the undue delays are diverse from private entities complaining to the Workers' Compensation Commission, workers complaining to private entities and reminders being submitted to insurance companies as well as private entities to settle claims.^{vi} To highlight these issues, the following systematic challenges were highlighted:

- i. Failure by the Ministry of Labour and Vocational Training in general and Workers' Compensation Commission in particular to establish the Workers Compensation fund and

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- the Workers Compensation Tribunal, 16 years after the Workers Compensation Act was enacted;
- ii. Failure by Workers Compensation Commission to pay injured workers in time even after their respective employers have made a payment to Workers' Compensation Commission;
 - iii. Failure and unwillingness by Workers' Compensation Commission to ensure compliance of its determinations amounts to an unreasonable and unfair omission of duty and therefore maladministration;
 - iv. Poor communication by Workers' Compensation Commission as regards to the reduction of degree of incapacity to injured workers and thus depriving the injured worker the opportunity to be heard which is unfair, illegal and irregular and;
 - v. A poor communication system between District Labour Offices and Workers Compensation Commission Headquarters leading to poor record keeping, which is maladministration.^{vii}

Besides these documented challenges, there are allegations of fraudulent claims made by the private sector, employers and the insurance industry. More recently these concerns have been taken further by the Ministry of Labour. According to the Ministry, there is an alleged scheme aimed at defrauding employers and insurance companies.^{viii} It involves the use of agents around workplaces who check and report cases to lawyers to commence proceedings in court without any instructions from the purported affected employees.^{ix} The alleged scheme is further supported by assessments made by medics resulting in unsubstantiated hefty claims that are fraudulent. In 2019 alone the insurance industry posted losses of over 6 million United States Dollars as a result of these schemes.^x Consequently, the insurance industry has begun to avoid covering employers. Given the lack of coordination under the regime,^{xi} it is likely that it will not be sustainable, and this has the potential of affecting workers' legitimate claims in future, especially if the fund is not fully and effectively operational.^{xii}

Background

The right to protection against employment injury is enshrined in the Universal Declaration of Human Rights (UDHR), 1948, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, which Malawi has ratified.^{xiii}

In Malawi these obligations are cemented under the Constitution, WCA and Occupational, Safety, Health and Welfare Act as well as the Employment Act. Under the Constitution, Fair and safe labour practices are a prerequisite in any employment contract.^{xiv} To this end, provisions that guide workplaces with respect to safety and health, the procedures to claim for compensation in the unfortunate event of injury or death during the course of employment and labour inspection are well founded under Malawian Law.

According to the Global Programme Employment Injury Insurance and Protection (GEIP), the Workers Compensation legal regime in Malawi was supposed to be reviewed in 2007.^{xv} However, this exercise has not been fully undertaken yet. Despite there being a series of meetings, the legal regime on Workers Compensation is yet to be addressed. One of the proposals is to establish a Workers' Compensation Fund^{xvi} which echoes the findings of the Ombudsman's report.

Policy process

The WCA provides for mandatory reporting of workplace injury and death during the course of employment. The Act further allows for commencement of legal proceedings when the injury is a result of negligence by the employer. According to the findings of the Ombudsman, there are delays in processing workplace injury claims. The frustrations from such delays have led to a strong incentive for employees, opting to commence proceedings against employers premised on negligence of the employer without, exhausting procedures under the WCA. This means that an employee can proceed both under the WCA and independently of the Act. This can create

administrative challenges for the employers as they must deal with the same or similar case on two fronts. Beyond this, these civil suits have been marred by fraudulent claims which are a result of schemes aimed at defrauding employers and insurers.

Notwithstanding this, delays on both fronts can lead to further frustrations on the part of both the worker and the employer. There has been an ever-growing increase in these cases and costs thereof proving to be financial burdens to employers and insurers. As explained earlier, the claims also have the potential to dissociate the Employment Injury Insurance that employers take out to cover workers because frequent claims are unsustainable for insurers. In the event that insurance companies reject covering workers, the burden of costs would significantly shift to employers.^{xvii}

Another challenge worth pointing out relates to the degree of incapacity under the WCA. This schedule is what is used by medics when conducting assessments, but it has never been reviewed. The 2018 Ombudsman's report highlights a frequent call from workers for them to have their injuries reassessed. In some cases, this is a result of the incapacity worsening therefore requiring a revision of the compensation and in other cases no satisfaction on the part of the worker of the actual assessment conducted and the compensation thereof.

It is evident that the current administration of the system has encountered a number of challenges ranging from; constant delays in reporting, processing and paying. From the point of view of an employer, these hurdles have often led to workers triggering other mechanisms of recovering 'damages' from loss as a result of injury. This takes time and resources especially in cases where huge sums have been computed in favour of the worker under a civil suit. In addition to this are the fraudulent claims that have the potential to i) result in insurers refusing to cover employers and ii) running employers out of business. Instead of focusing on the core business of the organisation, dealing with injury claims comprised of both genuine and fake ones is taxing.

Recommendations proposed

Given the inefficiencies of the Workers' Compensation regime in the past, ensuring that the Commission has adequate resources has the potential to improve processing of claims. **Based on the above discussions, this policy brief proposes 10 policy recommendations.**

The Ministry of Labour through the Workers' Compensation Commissioner should issue a policy guide. Such policy should clearly indicate the need to exhaust procedures under the WCA first before an employee can proceed to commence a civil claim against his/her employer. Exhausting this procedure must be certified by the Workers Compensation Commissioner.

Administrative action must be streamlined for a holistic approach to reduce the costs associated with injury claims. This will restore confidence between the insurer and the employer until the fund is established. They include:

- Making sure that workers and others are protected from anything that may cause harm, effectively controlling any risks to injury or health that could arise in the workplace.
- Assess risks in the workplace. Risk assessments should be carried out that address all risks that might cause harm in your workplace.
- Providing information about the risks at the workplace including how employees are protected, also
- Instruct and train employees on how to deal with the risks.
- Continuously consult employees on health and safety issues. Consultation must be either direct or through a safety representative that is either elected by the workforce or appointed by a trade union.^{xviii}

Workplaces must consider placing strict emphasis on the three pillars of occupational safety and health i.e., prevention, compensation and rehabilitation. Compliance should be enforced through both a carrot and stick approach by providing incentives and sanctions after inspections.

Employers should take note of the effect of changing insurers frequently. Such changes may result in complicating the processing of claims because of breakdown in communication under the client and service provider relationship. In addition, enterprises should consider consulting workers on the process of selecting an insurance provider.^{xix}

While at the reporting stage of injuries the employer must use a thorough approach by including pictures, statements and creating a record of the particular incident to help with the investigation. It is therefore necessary for the employers' body to develop a checklist containing some of these strategies for its members to utilise during the reporting stage of injuries.

In order to ensure certainty, there is need to review the regulations^{xx} particularly in respect to prescribed forms. This has the potential to reduce the time to process claims, but also flag fraudulent ones.

Once the Labour Market Information System is operational, the social partners should consult on the possibility of the platform having a database and exchange of information between Employers, Insurers, the Judiciary, the Labour offices and the Workers' Compensation Commission.

The process of determining a claim must be reviewed. The Workers Compensation Commissioner has quasi-judicial functions and may appoint assessors with requisite skill to sit with the Commissioner in an advisory capacity in formal inquiries on objections made under Workers Compensation claims.^{xxi} This process should not only be administered where objections have been made to his decision and a formal inquiry has been instituted, but it must also be brought back to the determination of a claim. The Commissioner must therefore sit with two independent assessors when determining a claim.

Not only is operationalising the Workers' Compensation Board essential, but so too the Workers' Compensation Tribunal. The Tribunal also has quasi-judicial functions and its decisions are final with appeals to the High Court only on a question of law and not fact. The Tribunal is drawn from a range of institutions including employers, trade unions, lawyers and those from the medical profession.

Finally, the first schedule in the WCA should be submitted for review. Currently there is provision to investigate whether any disease should be added or deleted in the second schedule.^{xxii} The same should constantly apply to the first schedule.^{xxiii} This has the likelihood of accurately informing computation of the degree of incapacity and its corresponding compensation.

References

Michael D and Broten N, How Can Workers' Compensation Systems Promote Occupational Safety and Health? Stakeholder Views on Policy and Research Priorities. Santa Monica, CA: RAND Corporation, 2018. https://www.rand.org/pubs/research_reports/RR2566.html.

The Office of the Ombudsman is an independent institution established by the 1994 Constitution of the Republic of Malawi (the Constitution) and is complemented by the Ombudsman Act of 1996.

Office of the Ombudsman 2018 A Report on an investigation into allegations of maladministration in the compensation process of injured workers by the Workers Compensation Commission

Luhanga v CODA & Partiners High Court (2891of 2002) [2005] MWHC 7 (01 April 2005)

Justin Manda v Malawi Social Action Fund High Court Civil Cause No. 756 of 2003

Global Programme Employment Injury Insurance and Protection | GEIP Contributing to Decent Work and the Social Protection Floor Guarantee in the Workplace

Boden L.I and Spieler E.A, The Relationship Between Workplace Injuries And Workers' Compensation Claims: The Importance Of System Design

Employer's responsibilities <https://www.hse.gov.uk/workers/employers.htm> *Health and Safety Executive* accessed 10th November 2020

Frank Namangale Medics, lawyers implicated in bogus injury claims <https://www.mwnation.com/medics-lawyers-implicated-in-bogus-injury-claims/> *The Nation* (30th November 2020) accessed 2nd December 2020

Frank Namangale Fake injury claims soar <https://www.mwnation.com/fake-injury-claims-soar/> *The Nation* (19 January 2021) accessed 21st January 2021

Grace Phiri Government Sets up workers' compensation fund <https://www.mwnation.com/govt-sets-up-workers-compensation-fund/> *The Nation* (26th August 2020) accessed 25th November 2020

Dembe A.E, Himmelstein J.S, Stevens B.A, and Beachler M.P Program Report: Improving Workers' Compensation Health Care (1997), *Health Affairs* Vol 16 No.4 <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.16.4.253> accessed 30th November 2020

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- ⁱ Michael Dworsky, and Nicholas Broten, How Can Workers' Compensation Systems Promote Occupational Safety and Health? Stakeholder Views on Policy and Research Priorities. Santa Monica, CA: RAND Corporation, 2018. <https://www.rand.org/pubs/researchreports/RR2566.html>. Also available in print form.
- ⁱⁱ Global Programme Employment Injury Insurance and Protection | GEIP Contributing to Decent Work and the Social Protection Floor Guarantee in the Workplace.
- ⁱⁱⁱ An Act to provide for compensation for injuries suffered or diseases contracted by workers in the course of their employment or for death resulting from such injuries or diseases; to provide for the establishment and administration of a Workers' Compensation Fund; and to provide for matters connected therewith or incidental thereto. Cap 36:01.
- ^{iv} S36 (iii).
- ^v The Office of the Ombudsman is an independent institution established by the 1994 Constitution of the Republic of Malawi (the Constitution) and is complemented by the Ombudsman Act of 1996.
- ^{vi} Office of the Ombudsman 2018 A Report on an investigation into allegations of maladministration in the compensation process of injured workers by the Workers Compensation Commission 3.
- ^{vii} *ibid* n(vi) v.
- ^{viii} Frank Namangale Medics, lawyers implicated in bogus injury claims <https://www.mwnation.com/medics-lawyers-implicated-in-bogus-injury-claims/> *The Nation* (30th November 2020) accessed 2nd December 2020.
- ^{ix} *Ibid*.
- ^x Frank Namangale Fake injury claims soar <https://www.mwnation.com/fake-injury-claims-soar/> *The Nation* (19 January 2021) accessed 21st January 2021.
- ^{xi} *ibid* nv.
- ^{xii} Leslie I. Boden, Emily A. Spieler, The Relationship Between Workplace Injuries And Workers' Compensation Claims: The Importance Of System Design 2.
- ^{xiii} *ibid* (ii).
- ^{xiv} S31 (1).
- ^{xv} *ibid* n (ii) 13.
- ^{xvi} *ibid* n (viii).
- ^{xvii} *ibid* n (iii)S5.
- ^{xviii} Employer's responsibilities <https://www.hse.gov.uk/workers/employers.htm> *Health and Safety Executive* accessed 10th November 2020.
- ^{xix} Allard E. Dembe, Jay S. Himmelstein, Beth A. Stevens, and Michael P. Beachler Program Report: Improving Workers' Compensation Health Care (1997), *Health Affairs* Vol 16 No.4 <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.16.4.253> accessed 30th November 2020.
- ^{xx} WCA S34.
- ^{xxi} *ibid* n iii S48.
- ^{xxii} WCA S21 and S36.
- ^{xxiii} Schedule of percentage of incapacity.