THE SOUTH AFRICAN MEDICAL ASSOCIATION

Submission to:

The Parliamentary Portfolio Committee on Employment and Labour

In respect of:

Compensation for Occupational Injuries and Diseases Amendment Bill [B21-2020]

19 February 2021

The functions and role of the South African Medical Association (SAMA)

Role in the healthcare sector: The South African Medical Association NPC (SAMA) is a professional association for public and private sector medical practitioners. SAMA is a registered independent, non-profit company. SAMA membership is voluntary, and the organisation is the largest representative body for doctors in South Africa with a membership of ± 16,000 registered doctors practising in the public and private sectors.

Relationship with its members: SAMA acts as a voice for its members, represents the interest of doctors at local, regional and national levels, and ensures that the professional expertise and voice of the medical profession has an effective expression in national debates that shape healthcare in South Africa.

SAMA's role in Health Policy in South Africa: SAMA aims to unite doctors for the health of the nation and is a major player in influencing health policy in South Africa and beyond. SAMA supports legislative and policy measures aimed at protecting and promoting public health, and enhancing access to comprehensive, affordable, and quality healthcare in South Africa through both the public and private sectors.

1. Introduction

The South African Medical Association welcomes the opportunity to submit comments on the Compensation for Occupational Injuries and Diseases Amendment Bill [B21-2020] (COIDA Bill) on behalf of our membership of medical doctors.

On 17 January 2021, the Parliamentary Portfolio Committee on Employment and Labour issued a public call for submissions on the proposed *COIDA Bill.* While it is encouraging that under the Bill domestic workers will be included as beneficiaries for the first time, there is a proposed Amendment – *Clause 43, amending Section 73 of the Act* – that will have a catastrophic impact on injured workers and the doctors, surgeons, hospitals, physiotherapists, and other healthcare professionals who provide for their treatment.

SAMA has been and remains supportive of the objective of providing quality medical care to people injured on duty. However, SAMA cannot support the Amendment of Section 73 (by Clause 43 of the Amendment Bill) in the form that it has been proposed.

SAMA is opposed to this amendment on the grounds that it will place excruciating administrative, financial and legal pressure on the healthcare sector and disadvantage injured workers, and their right to quality medical care.

2. Current state of the Compensation Fund

While the Compensation Fund has assets of over R60bn, and more than R26bn in reserves, both employers and medical service providers find it extremely difficult to access the Fund's systems. It is widely recognised that the Fund is dysfunctional. In October 2019, in an effort to simplify and expedite its claims process, the Fund replaced its previous IT system with a new SAP-based IT system called CompEasy at a cost of R285m. This is the fifth IT system that the Fund has invested hundreds of millions of Rands in over the past 20 years. However, the new system is equally dysfunctional, continuing the delays in the registration and adjudication of claims, and payments to medical practitioners.

3. Clause 43 of the COIDA Bill

The purpose of the COIDA is to provide compensation to employees who sustain injuries, diseases, or die in the workplace, while performing their duties. The preamble of COIDA states its objective as: "*To provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases; and to provide for matters connected therewith.*"

For more than 21 years, COIDA has allowed for licensed mutual associations, under section 30[1], to operate as claim administrators, whereby employers or service providers hand over their claims or invoices for compensation to be received from the Compensation Fund, as surety, to the mutual associations, who would then accept same and issue payments to the employer or service provider. In turn, they would submit the claim to the Compensation Fund for processing and eventual payment. This ensured that employers or service provider would receive their payments related to the clams without any delays from the mutual association, who would only receive payments from the Compensation Fund after 24 (twenty-four) months of having submitted and administered the claims to the Compensation Fund.

Currently, section 73 of COID reads as follows:

> "Medical expenses:-
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> *73.* *(1) The commissioner or the employer individually liable or mutual association concerned, as the case may be, shall for a period of not more than two years from the date of an accident or the commencement of a disease referred to in section 65(1) pay the reasonable cost incurred by or on behalf of an employee in respect of medical aid necessitated by such accident or disease.*
>
> *(2) If, in the opinion of the commissioner, further medical aid in addition to that referred to in subsection (1) will reduce the disablement from which the employee is suffering, he may pay the cost incurred in respect of such further*

[1] Section 30.(1) of the *Compensation for Occupational Injuries and* Diseases Act 130 of 1993 provides: "*The Minister may, for such period and subject to such conditions as he may determine, issue a licence to carry on the business of insurance of employers against their liabilities to employees in terms of this Act to a mutual association which was licensed on the date of commencement of this Act in terms of section 95(1) of the Workmen's Compensation Act…*"

aid or direct the employer individually liable or the mutual association concerned, as the case may be, to pay it."

The above section ensures that payment for medical costs be implemented within a period of 2 (two) years, by either the Commissioner, employer or the mutual association.

This section has been reviewed and amended by clause 43 of the Amendment Bill, which states:

"*43. Section 73 of the principal Act is hereby amended by the addition of the following subsections:*

''(3) Notwithstanding the provision of subsection (2) the medical practitioner may after the claim has been finalised or the period referred to in subsection (1) has lapsed, apply for reopening of the claim and payment of further medical costs.

(4) Any provision of any agreement existing at the commencement of this Act or concluded thereafter in terms of which a service provider cedes or purports to cede or relinquishes or purports to relinquish any rights to medical claim in terms of this Act, shall be void.''.

The amendment essentially means that medical practitioners who treat employees who qualify for compensation under COIDA can no longer use their medical claims as surety for payment in any manner, and will be compelled to attend to the administration of the claims themselves, without the assistance of third-party administrators.

The process of administration with the Compensation Fund is riddled with delays and has proven ineffective, which generally leads to medical practitioners only receiving compensation for their services after 2 (two) years of the clam being submitted (if at all).

The proposed amendment will lead to an untold number of medical practitioners dealing with COIDA issues and challenges; the redirection of resources to administration of COID matters; allowing limited time for attending to patients; not being able to approach financial and other institutions with a "promise to pay" based

on their Compensation Fund claims; commercial banks will no longer be allowed to accept a medical practices' debtors book as collateral for an overdraft facility to fund cash flow for working capital; loss of revenue; and possible closure of private practices.

The real-world impact of the proposed amendment will lead to a wholly unsustainable and untenable situation, which will only ensure that the objectives of the Act (and the laudable inclusion of domestic workers in the Bill) will be completely negated. In addition, apart from being generally unwise, detrimental and counter-productive, the amendment would also likely be considered unconstitutional (due to the direct infringement of rights without justification and/or the absence of a rational purpose).

4. Unconstitutional and Irrational

Unfortunately, the proposed amendment does little to address the actual structural and governance failures of the Compensation Fund. The historical weaknesses and poor performance of the dysfunctional and poorly managed Fund will perpetuate the harm that injured workers face and will continue to be a barrier to the substantive realisation of their rights to social security.

The proposed amendment is arguably also problematic from a constitutional point of view.. Should the amendment be enacted not only would it unjustifiably infringe on existing rights in the Bill of Rights, but it would also serve no rational purpose.

The proposed amendment will be an encumbrance to the medical profession, as it places unreasonable restrictions on medical practitioners, and is arguably an infringement of section 22 of the *Constitution of the Republic of South Africa* Act 108 of 1996 (Constitution), which stipulates:

> "*22. Freedom of trade, occupation and profession:*
> *Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."*

The amendment, as it infringes the Bill of Rights, will thus have to pass the limitation of rights test under section 36 of the Constitution, which reads:

> "*36. Limitation of rights:*
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> *(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*
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> *(a) the nature of the right;*
>
> *(b) the importance of the purpose of the limitation;*
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> *(c) the nature and extent of the limitation;*
>
> *(d) the relation between the limitation and its purpose; and*
>
> *(e) less restrictive means to achieve the purpose.*
>
> *(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights*."

From the above, the right being infringed is that in section 22 of the Constitution, which allows for anyone to follow a profession or trade of their choosing, and be able to make a living from their profession or trade.

This right will be limited by the amendment in Clause 43 of the Amendment Bill, as it will lead to medical practitioners being unable to practice their profession and earn a living, when they will be obliged to tend to the submission and administration of their own claims with the Compensation Fund, where payment from the Compensation Fund is not guaranteed or received after years of said claims having been submitted, and placing their livelihoods at risk.

The purpose and nature of the limitation has not been provided, and without the transparency into the reasons for the limitation, it cannot be deemed as being reasonable or justifiable "in an open and democratic society".

The proposed amendment will also negatively affect patients, who will be required to attend at public hospitals, as opposed to private hospitals, in order to receive treatment for their workplace injuries. South African public hospitals are, lamentably, overburdened, resource-constrained, often poorly managed, and under-staffed. Most

of the affected employees will be relegated to these facilities, where sub-par quality of care is unfortunately not uncommon.

No evidence is provided to substantiate the rationale for the proposed amendment. The only likely outcomes that will follow from the prohibition are: Reduced accountability of the Compensation Fund to pay legitimate claims; a transfer of claims default risk to medical practices which will impact on their financial viability if they continue to see COIDA cases; a likely withdrawal of private medical services providers from treating COIDA patients, thereby further undermining workers' established rights to quality, affordable healthcare and social security

5. Detrimental Consequences[2]

It is clear that this amendment will undermine the intention of the Act, which is to provide access to quality healthcare for injured workers, who are some of the most vulnerable citizens in society.

SAMA aligns itself with many of the points raised by the Injured Workers' Action Group (IWAG) and others on why Clause 43 of the COID Amendment Bill is problematic for vulnerable workers and Medical Service Providers:

> There is no reasonable rationale for amending the Act. If a government proposes changing a law, it requires a reasonable rationale to do so. Neither the Minister nor the Department of Employment and Labour, much less the Compensation Fund, have provided any reasonable rationale or justification, in any presentation or Memorandum on the Objects to the Act, for the amendment.
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> The ban on cessions by MSPs is not addressed in a substantive manner in the Socio-Economic Impact Assessment (SEIA) of the Amendment Bill conducted by Government. IWAG believes this SEIA, which was hastily compiled in two months, contains limited exploration of the unintended consequences of the amendment. Equally concerning is

[2] SAMA wishes to express its appreciation for the advocacy efforts of IWAG, UDWSA and other stakeholders we have had the pleasure of engaging on the issue. We want to acknowledge the tremendous work done by Tim Hughes and the IWAG team, Pinky Mashiane of the United Domestic Workers of South Africa Union and all the SAMA members who provided their valuable comments, insights and inputs.

that no stakeholders in the private healthcare sector were canvassed or consulted for their input on the proposed Amendment Bill.

The SEIA contains a vague reference to reducing fraud and corruption by third parties; however, there is no evidence or history of any such activity by third parties. In fact, third parties eliminate the possibility of fraud and corruption in the claims process, evidenced by a 0.04% administrative rejection rate and a 0% fraud rate (statistics as per largest third-party administrator in SA).

A blunt instrument aimed at destroying an element of the Compensation Fund that works

Intermediaries exist because of the inefficiency and dysfunction of the Fund in carrying out its mandate.

Third-party cession, debtors as collateral, factoring of invoices, and administration outsourcing are not unique to COID and exist effectively and efficiently within the medical aid industry, private insurance (demarcation products), commercial banks, road accident fund and private healthcare sub-sectors.

Instead of eliminating what works for MSPs and IODs – third party administrator services, the Department of Employment and Labour should focus on fixing what does not work – i.e. the Fund's claims and administrative capabilities, and its ability to pay claims efficiently and on time. Section 43 undermines sustainability of MSPs.

Third party administrators help to alleviate the burden on MSPs of the extremely cumbersome and time intensive administration claims process. It is not simply a matter of submitting an invoice. The Fund requires a plethora of supporting documentation to establish the legitimacy of a claim. By taking over this process, third party administrators ensure MSPs have more time to focus on their core mandate of saving lives and providing access to quality healthcare to IOD patients.

Access to early finance (factoring) and resolution of claims by third party administrators also supports MSPs' financial sustainability, and their ability to continue to provide treatment to injured workers. MSPs need invoices to be paid timeously to secure the cash flow needed to run their practices, pay staff, and service other overhead costs associated with their practices.

The dysfunctionality of the Fund means that claimants often need to resort to legal action to resolve payments. By ceding their claims to third party administrators, MSPs are also relieved of the time consuming, resource intensive and expensive legal process often required to secure payment from the Fund. All engagements, follow up interventions and legal processes are managed by the third-party administrators once the claim is ceded to them and factored by them.

The amendments would result in the MSPs practices being unable to raise capital on the strength of the growing outstanding COID debtors' book, despite an ongoing requirement for working capital to fund operational or other requirements.

It is important to note that all fees payable by MSPs to third parties whether for administration or factoring services rendered does not increase the cost of medical treatment to the Compensation Fund by even one cent, as it is paid out of the normal Gazetted tariffs and not over and above the Gazetted tariffs. The proposed Amendment will, therefore, undermine ability of IOD patients to access quality healthcare and treatment.

The transfer of the administrative and financial risk back to MSPs will discourage many healthcare providers from treating IOD patients, thereby significantly reducing the pool of care, and placing additional pressure on an already strained public healthcare system, which is struggling with the additional burden of the COVID-19 pandemic.

This will impact the care that IOD patients receive, and effectively undermine the purpose and objective of the COID Act – to get injured workers back to work.

Ultimately, intermediaries are there to protect vulnerable employees' ability and their right to treatment for injuries sustained at work. This amendment will effectively remove third parties and pass the burden of risk from the Fund to MSPs and, ultimately, to vulnerable workers. It will also increase burden on legal system, for both MSPs and the State.

Third party administrators are able to expedite and minimise the costs of legal claims against the Fund, as they manage numerous claims at once.

Without them taking on this role, MSPs would be isolated in their claims, having to fight the Fund in court for individual claims, taking up many hours of valuable consulting and

treatment time, creating substantial legal bills, and placing greater strain on our already overburdened legal system.

Domestic workers

The belated but important inclusion of over one million domestic workers as beneficiaries of the Fund is good news, but it is unclear as to how the levy payment, assessment and payments processes will work. The current processes and procedures of the Fund are not suitable to manage the domestic sector and employers need the correct information and representation. What is clear is that it will increase the pool of IOD patients needing medical care from MSPs.

If the amendment is promulgated, MSPs, who will have a greater number of IOD patients to treat, will have less time to do so, as their administrative burden will also increase through the prohibition of cessions.

Given the dysfunctionality of the Fund's administrative, management and technical systems, MSPs treating these patients will inevitably wait many months, if not years, for payment from the Fund. This places significant financial pressure on MSPs, placing their practices at risk.

It also has the unintended consequence of disincentivizing MSPs from treating these patients as the burden of risk increases. Injured workers cannot wait for a claim to be approved before going for medical treatment nor can the MSPs wait months and years before their invoices are paid.

Domestic workers injured on duty will have no choice but to continue to use public health services, which, as we have stated , are struggling. Is it possible that the real reason for Section 43 is to eliminate a party that holds the Fund to account?

Over the years, third party administrators have been forced to take the Fund to court to settle outstanding claims, which the Fund consistently loses. This has contributed to a difficult relationship between the parties.

Legal challenges are important as they create pressure on the Fund to fulfil its constitutional mandate and legal obligations. Without this pressure, there is a chance that

the Fund could become even more dysfunctional, depriving MSPs of funds for services rendered and undermining IOD patients' legal rights to care.

6. Examples of comments received from SAMA members:

"Section 43 is deeply problematic. Medical service providers treat patients injured on duty immediately, but have to wait up to two years to be paid by the Compensation Fund. This is because of the systemic failure of both the IT systems and administration of the Fund. It is unrealistic to expect a physiotherapist, doctor or small practice to wait this long for payment; they will simply go out of business."

"Besides this critical upfront payment, which is facilitated through the cession of invoices to third-party administrators or financial institutions, administrators also save us time. The process of claiming from the Fund is so time-consuming and in so many cases, impossible. The removal of cessions will mean that we will have to spend more time on administration and fighting with a Fund that is broken, and less time on treating our patients. It is quite unbelievable that the Department of Employment and Labour is proposing to remove the only cog in the wheel that actually functions."

"The purpose of the COIDA is to ensure that people injured on duty have access to quality medical care. The introduction of Section 43 is in direct opposition to this. If you make it so difficult for medical professionals to manage the process of registering and processing claims through the Fund, and then on top of that remove third-party cessions, it simply discourages medical service providers from treating these patients. As it is, not all medical professionals care for injured on duty patients, so by placing a massive, insurmountable obstacle in the way of those who do, the Department will only serve to further shrink the pool of care that workers are able to access. This will have the additional unintended consequence of forcing more people into the public healthcare system, which is already buckling under pressure. It simply does not make any sense."

"We will not have time to process COID claims hence if it were to be passed I will most likely not perform work for IOD patients."

"These cases drag on for years with the service provider rendering the medical care pending extensive payment delays. This would negatively impact on the willingness to actually render a service."

“If the CF is wholly responsible for ensuring the payment of service providers without assistance then very few providers will ever be paid, and I foresee that service providers will refuse to see CF patients in private practice. These patients will then totally overload the state health service. And the level of residual disability will increase significantly. If I am never paid the amount currently owing to me I will have to close my practice, which specializes in disabled patients, many of whom are injured on duty.”

“If 3rd party claims are forbidden then nobody will be able to assist injured workers as nobody would get paid due to obvious shortfalls of government structures.”

“X are handling our IODs. If we have to do it ourselves and have all those outstanding claims it will not be worth it to continue with IOD patients. We are a busy A&E unit and we are already struggling to get specialist doctors to help us with IOD. Will just get worse. Will stop seeing IOD.”

“As a solo practising GP who previously tried to do the admin in house I will not see IOD patients anymore if I can't send invoices through X.”

“I service a large number of WCA cases at X Hospital Trauma Unit. Should this go through, I will no longer be able to offer this facility.”

“The diabolical computer and remunerative systems of the Compensation Commission mandate the use of a third party to achieve successful timely remuneration for services rendered. Doing away with this will result in most private practitioners refusing to treat patients injured on duty.”

“The poor injured workers!! There are so few doctors AND hospitals who are prepared to see and treat COID patients that the injured are already battling to received adequate and appropriate help when injured. This Act will cause even fewer and possibly even NO doctors to treat COID patients. The only ones who will suffer are the injured workers!!!! Does the govt have ANY concern for them actually?”

“Without X’s assistance in paying our claims in time our practice will stop completely in treating injury on duty patients. Impossible to run a business and wait for Compensation Fund to pay because they never pay on time or never pay our claims at all!!!”

“Poor injured workers that will have to wait in long queues to receive medical attention. And all medical service providers that tries to still help these people by treating them will suffer heavy financial losses.”

“Patients and healthcare providers will suffer the consequences of maladministration at the Compensation Fund without recourse.”

“This covers up the ongoing massive inefficiency in processing COID claims and reinforces the attitude of many practitioners that workman's compensation patients are best avoided.”

“Must be revoked. No proper consultation was held with the industry.”

“I already don't want to do COIDA. I only get paid for about 1/5th of the patients I do. And this is with using a 3rd party. Will end up working for free if we are forced to do it ourselves. Time consuming and as an anaesthetist who doesn't have a receptionist I would have to do it by myself!”

“Compensation Commissioner must remain responsible to medical practitioners for all outstanding debts until settled. Much of delay in reimbursement of funds has been due to administrative challenges. Third party administrators are imperative to ensure settlement of claims – particularly those long-outstanding – until WCA administration has demonstrated a clear ability to process and manage practitioners’ claims.”

“I do not have the time to do all the admin and see that the patient gets well again.”

“I agree with the expressions of concern by SAMA and other bodies. I agree that the consequences of this amendment being allowed to pass will have the serious consequences foreseen by SAMA and others.”

“The service provider must be allowed the right to choose how their claims are submitted. Burdening them with disastrous administrative processes could hamper their ability to provide services. “

“Please don't make it any more difficult to get payment for medical practitioners because in the end there will be no medical service left.”

“While the online system to register a claim and subsequent undue delay of payment for services rendered persist, the medical practitioner has the right to use alternative options available for timeous payment.”

“The payments are so poor and so is their administration which stops completely every time they change computer systems. I am already the only doctor in a big area who is willing to see IOD cases. It is a massive administrative burden for a practice to do IOD claims and without a third party systems it would be impossible. I have tried this before and it was a financial disaster and I was getting paid for claims 5-10 years later if at all.”

“The Department of Labour has been up to now been incapable of paying doctors within a reasonable time for work done on WCA patients. We had no choice but to use a 3rd party to get our money. They must therefore first show us that they can pay us in time before changes are made to the current system.”

“I have completely stopped doing IOD work and claiming from the Compensation Fund. As a Solo GP Practice, I cannot wait 3 years plus to be paid! There is also no dedicated office or other means of contact for healthcare professionals with the Compensation Fund to follow up on claims, which means going there, sitting in a queue and waiting your turn. I will treat IOD cases, explain to the patient the situation and he/she can then process it through their Medical Aid and claim back from IOD, or pay cash and claim back. I have had instances where the employer then paid my bill, and claimed back from the Compensation Fund.”

Conclusion

SAMA believes that Clause 43 of the Amendment Bill, which seeks to ban the cession of medical invoices to financial institutions and third party administrators, if adopted, would have a disastrous impact on medical practitioners and injured workers. The Compensation Fund is wholly dysfunctional, poorly governed and mismanaged, removing the cession of invoices would do away with the only part of the Fund's value chain that works. Such an amendment would be unconstitutional and irrational. If enacted it would defeat the entire purpose of the COIDA by encumbering medical practitioners with insurmountable administrative burden, financial uncertainty and will undoubtedly further disincentivise healthcare professionals from engaging with the Fund.

The amendment proposed by Clause 43 must be reconsidered and abandoned.

Dr Angelique Coetzee
SAMA Chairperson
On behalf of the South African Medical Association
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