

**Perspectives on determining permanent disablement in South African
occupational injury law**

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INDEX

List of abbreviations	iii
Abstract	iv
1. Introduction.....	1
2. The right to compensation for occupational injuries as a basic social security right.....	5
2.1 International standards	5
2.1.1 The ILO	5
2.1.1.1 The Social Security (Minimum Standards) Convention 102 of 1952.....	5
2.1.1.2 The Employment Injury Benefits Convention 121 of 1964.....	7
2.1.2 The United Nations.....	8
2.1.2.1 The UN Disability Convention	8
2.1.2.2 The ICESCR.....	9
2.2 Regional standards.....	10
2.2.1 The Social Charter of the SADC.....	10
2.2.2 The Code on Social Security	11
2.3 National standards.....	12
2.3.1 The Constitution of the Republic of South Africa, 1996	12
2.4 The meaning and nature of social insurance	16
3. COIDA as social insurance	18
3.1 COIDA: An overview.....	18
3.2 Relevant definitions for the right to compensation	22
3.2.1 The definition of an employee	22
3.2.2 The definition of an employer	23
3.2.3 The definition of an accident.....	24
3.2.4 The meaning of “arising out of” and “in the course of employment”.....	24
3.3 The failure of the employer to register himself with the Compensation Fund	28

4. Assessment of permanent disablements in terms of section 49 and Schedule 2 of COIDA.....	30
4.1 The determination of the degree of disablement	30
4.2 Compensation payable for permanent disablements.....	33
4.3 Special formulas for calculating compensation.....	35
4.4 Principles derived from case law	36
4.4.1 “Mechanical application of Schedule 2”	36
4.4.2 Permanent disablement due to pain	39
4.4.3 Post-traumatic stress as a permanent disablement.....	43
4.4.4 Pre-existing conditions	47
4.4.5 Non-COIDA cases.....	47
5. Conclusions and recommendations	50
Bibliography	55

LIST OF ABBREVIATIONS

CC – Constitutional Court

CF – Compensation Fund

COIDA – Compensation for Occupational Injuries and Diseases Act

DG – Director-General

GAF – Global Assessment of Functioning

ICESCR – International Covenant on Economic, Social and Cultural Rights

ILO – International Labour Organisation

LAWSA – Law of South Africa

ODMWA - Occupational Diseases in Mines and Works Act

OHSA – Occupational Health and Safety Act

PTSD – Post-traumatic Stress Disorder

SADC – Southern African Development Community

SANDF – South African National Defence Force

SAPS – South African Police Service

UN – United Nations

UNCESCR – United Nations Committee on Economic, Social and Cultural Rights

ABSTRACT

The right to be entitled to compensation for injuries sustained in the course of employment has always been an essential component of basic social security rights. Provision is made in the international sphere by the International Labour Organization and the United Nations. In the regional sphere there are standards that apply within the Southern African Development Community, and on a national level the rights are provided in terms of the *Constitution of the Republic of South Africa, 1996*, and the *Compensation for Occupational Injuries and Diseases Act, 103 of 1993 (COIDA)*.

COIDA provides for a system of no fault compensation for employees who have sustained injuries or contracted occupational diseases during the course of their employment. “No fault compensation” provides that an employee does not have to prove fault with the employer or any other party in to be entitled to claim compensation. COIDA’s main purpose is to provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by defined employees in the course of their employment.

Section 49 of COIDA provides for compensation for permanent disablements. In terms of section 49, the Commissioner must assess the permanent disablement of the employee by applying Schedule 2 of COIDA, which stipulates percentages of disablement for different injuries or mutilations. By “matching” the injury or mutilation from which the employee is suffering to the corresponding injury or mutilation provided for in Schedule 2, the Commissioner is then able to determine the degree of permanent disablement. Discretions are also granted to the Commissioner in terms of which he is allowed to determine the degree of disablement suffered by an employee under certain circumstances. The nature and amount of compensation awarded depend on the degree of disablement that the employee is afflicted with. Compensation for permanent disablement may be paid either in a lump sum or a monthly pension depending on the degree of disablement determined.

Problems arise with the application of both these approaches of determining the permanent disablement of an employee. The guidelines in Schedule 2 have been

previously described to be applied “mechanically” with no consideration being given to the individual circumstances of the employee. In practice the discretion granted to the Commissioner in terms of section 49 is often not applied judicially, which has led to numerous objections being lodged against the initial amount of compensation granted. The lack of medical expertise at the initial assessment of the disablement, and the “mechanical application” of Schedule 2, often lead to the incorrect determination of the degree of permanent disablement from which the employee is actually suffering. The determination of the degree of disablement is often not consistent with Schedule 2 of COIDA and results in an unjustifiable amount of compensation granted to the employee which holds no relation to the impairment suffered.

The core question that needs to be considered is whether and to what extent the employee is still useful for the labour market in the line of his or her employment, and the disablement should be assessed in the light thereof.

Key words:

Permanent disablement

Section 49 and Schedule 2 of COIDA

Employment injuries

Accidents in the workplace

Social security

1 Introduction

The *Compensation for Occupational Injuries and Diseases Act*¹ is the primary legislation in South Africa dealing with compensation for occupational injuries and diseases. The Act repealed the *Workmen's Compensation Act*² and numerous shortcomings of the latter were addressed.³ Some of these included the extension of the scope of application to include more employees therein; the coverage of both genders of surviving spouses as dependants of a deceased employee, and the recognition of an employment broker relationship.⁴

COIDA provides for a system of no fault compensation for employees who have sustained injuries or contracted occupational diseases during the course of their employment. "No fault compensation" provides that an employee does not have to prove fault with the employer or any other party to be entitled to claim compensation. However, if negligence can be proven, an employee may be entitled to additional compensation.⁵ The employee may, notwithstanding any provisions contrary contained in COIDA, apply for increased compensation if it can be proved that the employee met with an accident due to the negligence of his⁶ employer.⁷ The Act also provides for compensation and coverage for the dependants of an employee whose injury or disease results in his death.⁸

Section 49 of COIDA provides for compensation for permanent disablement. In terms of section 49 the Commissioner must assess the permanent disablement of the employee by applying Schedule 2 of COIDA, which stipulates percentages of disablement for different injuries or mutilations. By "matching" the injury or mutilation from which the employee is suffering to the corresponding injury or mutilation provided for in Schedule 2, the Commissioner is then able to determine the degree

1 103 of 1993. Hereafter referred to as COIDA or the Act.

2 30 of 1941.

3 Thompson and Benjamin *South African Labour Law* H1-1.

4 As above.

5 Section 56(1) of COIDA.

6 In the interpretation of this contribution, words importing one gender shall include all genders.

7 This includes an employee exercising a managing or controlling position; an employee who is authorised by the employer to engage or discharge employees; an engineer or his appointed assistant to be in charge of machinery in terms of the *Minerals Act* 50 of 1991; or a person appointed to be in charge of machinery in terms of the *Occupational Health and Safety Act* 85 of 1993.

8 Section 22(1) of COIDA.

of permanent disablement. Discretions are also granted to the Commissioner in terms of which he is allowed to determine the degree of disablement suffered by an employee in certain circumstances.⁹ The nature and amount of compensation awarded depends on the degree of disablement of which the employee is suffering. Compensation for permanent disablement may be paid either in a lump sum or in monthly pensions, depending on the degree of disablement determined.

Problems arise with the application of both these approaches¹⁰ of determining the permanent disablement of an employee. The guidelines in Schedule 2 have been previously described to be applied “mechanically” with no consideration being given to the individual circumstances of the employee.¹¹ In *Healy v Workmen’s Compensation Commissioner and another*¹² the court found that the guideline applied by the Commissioner did not adequately measure the degree of disablement of the employee in the light of his personal circumstances. In applying the guidelines mechanically, the Commissioner erred in his determination of the degree of disablement of the employee and the assessment was subsequently found to be inconsistent with Schedule 2. The court ruled that, for each case, an individual assessment was required. The core question that needs to be considered is whether and to what extent the employee is still useful for the labour market in the line of his employment, and the disablement should be assessed in the light thereof. This principle was illustrated in *McLean v Sasol Mine (Pty) Ltd Secunda Colliery*¹³ where it was held that the employee in question was found to be 100% disabled to perform underground work but only 20% disabled for above ground clerical work. This principle may especially be found in instances where the specific job description of the employee requires him to carry out physical work. If the employee suffers an injury and is unable to perform straining physical work, he might be rendered 100% disabled to do such work, whilst still being able to do less physical straining work such as administrative tasks.¹⁴

9 These discretions will be discussed in more detail in the subsequent chapters.

10 Being either the application of Schedule 2 or the determination of a permanent disablement by the discretion of the Commissioner.

11 *Healy v Workmen’s Compensation Commissioner* 2010 (2) SA 470 (E).

12 Hereafter referred to as *Healy*.

13 2003 (24) ILJ 2083 (W). Although this is a non-COIDA case, it is still highly relevant for this contribution. The case clearly illustrates that the degree of disablement suffered by the employee depends on the line of employment of the employee.

14 The implications hereof are specifically addressed in Chapter 4 of this contribution.

In practice the discretions granted to the Commissioner in terms of section 49 are often not applied judicially, which has led to numerous objections being lodged against the initial amount of compensation awarded. The lack of medical expertise at the initial assessment of the disablement and the “mechanical application” of Schedule 2 often lead to the incorrect determination of the degree of permanent disablement from which the employee is actually suffering. The determination of the degree of disablement, as was the case in *Healy*, is often not consistent with Schedule 2 of COIDA and results in an unjustifiable amount of compensation awarded which holds no connection to the impairment suffered by the employee.

Section 49 of COIDA and Schedule 2 are the point of departure for the assessment of disablements, but the discretion that is granted to the Commissioner, specifically in instances where the injury or mutilation is not provided for in Schedule 2, or where the injury has unusually serious consequences to the employee as a result of his occupation, must be exercised by assessing the individual case and circumstances of the employee and determining his disability in the light thereof.¹⁵

Apart from the assessment of a permanent disablement, there are other issues that need to be addressed. Thompson and Benjamin are especially concerned with the inadequate benefits that are provided for many categories of claimants.¹⁶

“Many employees with permanent disabilities who will never again find employment receive either a small lump sum or a pension as small as a quarter of their earnings in compensation; the failure to set any minimum benefits for temporary disablement and the setting of an unrealistically low minimum benefit for permanent disablement and the failure to adjust pension benefits for permanently disabled employees and the dependants of deceased employees in line with inflation.”

This contribution aims to investigate what shortcomings are experienced with the current determination of the degree of permanent disablement suffered by an employee in terms of COIDA. An analysis will be done of the problems that are experienced in practice with the assessment of permanent disablement. The

15 Presentation by Olivier held on 11 October 2011 *Selected legal perspectives on the COIDA Adjudication Process*.

16 Thompson and Benjamin *South African Labour Law* H1-44.

following chapter analyses the right to compensation for occupational injuries¹⁷ in the light of international and regional standards, the Constitution and generally in the field of social security. The subsequent chapters provide an overview of COIDA and a detailed discussion of the determination of a permanent disablement in terms of section 49 of COIDA, read with Schedule 2, whilst analysing relevant case law. Finally, the contribution aims to make some recommendations regarding the field of compensation for permanent disablements.

17 The determination of compensation for occupational diseases is done by a separate system and on a different basis.

2 The right to compensation for occupational injuries as a basic social security right

The right to be entitled to compensation for injuries sustained in the course of employment has always been an essential component of basic social security rights. Provision is made for a rights-based approach in the international sphere by the International Labour Organization¹⁸ and the United Nations.¹⁹ In the regional sphere, there are standards that apply in the Southern African Development Community²⁰ and, on a national level, the rights are provided in terms of the *Constitution of the Republic of South Africa, 1996*²¹ and COIDA.

Olivier emphasises the importance of considering international human rights law when interpreting the constitutional right to access to social security.²² The universal reasoning is that South Africa has indicated the intention to be bound by international treaties. Furthermore, section 39(1)(b) of the Constitution stipulates that the court must consider international law when interpreting the Bill of Rights.²³ To determine whether the “values that underlie an open and democratic society based on human dignity, equality and freedom” are being promoted, international standards must be considered, even if South Africa is not strictly bound by the treaty in question.²⁴ The court may also focus on the legal system of other countries by considering foreign law.²⁵

2.1 International standards

2.1.1 The ILO

2.1.1.1 The Social Security (Minimum Standards) Convention 102 of 1952

The *Social Security (Minimum Standards) Convention 102 of 1952*²⁶ was adopted in 1952 by the ILO to set basic minimum standards for social security rights, in

18 Hereafter referred to as the ILO.

19 Hereafter referred to as the UN.

20 Hereafter referred to as the SADC.

21 *Constitution of the Republic of South Africa, 1996*. Hereafter referred to as the Constitution.

22 Olivier ea *Introduction to Social Security* 164.

23 This applies even if South Africa has not signed or ratified the specific treaty.

24 Olivier ea *Introduction to Social Security* 164. The reasoning here is especially applied in instances where South Africa has not ratified an applicable treaty. The ratification thereof should be considered by comparing the local situation with that of other open democratic states in order to determine whether such ratification or adoption of a treaty is necessary.

25 Section 39(1)(c) of the Constitution.

26 Hereafter referred to as Convention 102.

particular for employees and their dependants. Although the Convention has not been ratified by the Republic of South Africa, it is essential to at least quote some of the Convention's objectives.²⁷ Convention 102 identifies nine risks which, if realised, may threaten the ability of an employee to earn income. The Convention promotes basic social security rights such as medical care, unemployment benefits and survivor's benefits. The nine risks identified by Convention 102 are classified to what has become known as the nine branches of social security. These branches are recognised as the core of social security in the traditional or classical sense of the word and provide for core protection that should be granted to an employee. The contingencies that are covered under Convention 102, part 6 (being employment injuries) that arise due to an accident or a prescribed disease resulting from employment are:²⁸

- a) a morbid condition;²⁹
- b) incapacity for work involving suspension of earnings;³⁰
- c) total loss of earning capacity or partial loss, likely to be permanent, or corresponding loss of faculty;³¹ and
- d) loss of support suffered by the widow/widower or child as the result of the death of the breadwinner.³²

The contingencies described in (c) and (d)³³ above are provided by COIDA for employment injuries, as COIDA provides for compensation for permanent and temporary disablements, and for benefits to dependants who have suffered the loss of their breadwinner due to an accident in the workplace.

27 Specifically in the light of the constitutional obligation to consider international law.

28 Part VI of Convention 102.

29 "Morbid condition" is not specifically defined in the Convention, but the phrase is generally understood to refer to an unhealthy condition.

30 A suspension of earnings due to the incapacity for work may be as a result of any reason.

31 Total loss of earning capacity, or the partial loss thereof, is usually only in regard of employment injuries and is present if the employee's physical ability to earn income and perform work is impaired due to an employment injury or an occupational disease.

32 Benefits are also payable in instances where the breadwinner of a family dies, leaving behind dependants who were supported by his income.

33 Other benefits are also provided by COIDA, such as medical benefits.

2.1.1.2 The Employment Injury Benefits Convention 121 of 1964

The *Employment Injury Benefits Convention 121 of 1964*³⁴ was adopted by the ILO in 1964 to address benefits provided to employees who have sustained injuries or contracted diseases in their workplace. Despite the fact that the Republic of South Africa has not ratified the Convention, it is important to at least quote some of the Convention's objectives as there rests a constitutional obligation on the courts to consider international law.

There is a binding overlap between Convention 121 and Convention 102. Article 29 explains the effect of ratification of Convention 121 for members who have ratified Convention 102:

“In conformity with Article 75 of the Social Security (Minimum Standards) Convention, 1952, Part VI of that Convention and the relevant provisions of other Parts thereof shall cease to apply to any Member having ratified this Convention as from the date at which this Convention comes into force for that Member, but acceptance of the obligations of this Convention shall be deemed to constitute acceptance of the obligations of Part VI of the Social Security (Minimum Standards) Convention, 1952, and the relevant provisions of other Parts thereof, for the purpose of Article 2 of the said Convention.”

Convention 121 requires that the national legislation of ratifying members must protect all employees, including apprentices, in both the public and the private sectors including cooperatives.³⁵ In the case of a fatal injury or disease prescribed categories of beneficiaries shall be protected.³⁶ Casual employees, out-workers, members of the employer's family living in his house in respect of their work for him, and other categories of employees,³⁷ may be excluded from such protection as deemed necessary by each country.³⁸

The following contingencies are covered due to an employment injury:³⁹

- a) “a morbid” condition;
- b) incapacity for work resulting from such a condition as defined by national legislation and involving suspension of earnings;

34 Hereafter referred to as Convention 121.

35 Article 4(1) of Convention 121.

36 As above.

37 Not more than 10% of all employees other than the aforementioned.

38 Article 4(2) of Convention 121.

39 Article 6 of Convention 121.

- c) total loss of earning capacity, or partial loss thereof in excess of a prescribed degree, likely to be permanent, or corresponding loss of faculty; and
- d) the loss of support suffered as the result of the death of the breadwinner by prescribed categories of beneficiaries.”

COIDA provides for compensation in line with the contingencies described by Convention 121 as compensation is provided for temporary and permanent disablements, and death benefits are provided for dependants who have suffered the loss of a breadwinner due to an accident in the workplace.

2.1.2 *The United Nations*

2.1.2.1 The UN Disability Convention

An essential convention that was adopted by the United Nations, and ratified by South Africa, is the *UN Convention on the Rights of Persons with Disabilities*.⁴⁰ The purpose of the UN Disability Convention is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”⁴¹ “Persons with disabilities” in terms of the UN Convention are persons who have long-term physical, mental, intellectual and sensory impairments, limiting their full and effective participation in society.⁴² The scope of the UN Convention is extensive and promotes the integration of persons with disabilities at all levels of society. The UN Convention also specifically deals with work and employment in respect of people with disabilities. In terms of article 27 of the UN Convention State Parties recognise the right of persons with disabilities to work on an equal basis with others. The article makes specific reference for State Parties to safeguard and promote the right to work for persons who have suffered a disability during the course of employment. State Parties who have ratified the UN Convention undertake to take the appropriate steps, including appropriate legislative measures, to realise this right.⁴³

The UN Convention does not make specific reference for the provision of benefits to employees who have met with an accident in the course of their employment, leading to their incapacity for work.

40 Hereafter referred to as the UN Disability Convention or the UN Convention.

41 Article 1 of the UN Disability Convention.

42 As above.

43 Article 27(1) of the UN Disability Convention.

In terms of article 27(k), State Parties must take appropriate steps to promote vocational and professional rehabilitation, job retention and return-to-work for persons with disabilities. This is an issue which needs to be given appropriate attention in South Africa, in particular in relation to workers who suffered an occupational injury or disease, as there is but a limited legal framework in place to actively promote the (re)integration of such disabled persons in the labour market.⁴⁴ Section 4(2)(b) of COIDA, however, provides that the Director-General may found, establish or subsidize a body, organisation or scheme whose objectives are the following:

- i. “The prevention of accidents or of any disease which is due to the nature of a particular activity;
- ii. The promotion of health or safety of employees;
- iii. The provision of facilities designed to assist injured employees and employees suffering from occupational diseases to return to their work or to reduce or remove any disability resulting from their injuries or diseases;
- iv. The carrying out of any activity which will contribute to the attainment of any of the objects referred to in subparagraphs (i), (ii), and (iii).”

2.1.2.2 The ICESCR

An essential Convention for the purposes of this contribution is the *United Nations International Covenant on Economic, Social and Cultural Rights* or the *International Covenant on Economic, Social and Cultural Rights*.⁴⁵ The ICESCR was signed by the Republic of South Africa in 1994. Ratification has now apparently become imminent, following the decision by the cabinet to approve the ratification of the ICESCR.⁴⁶ Article 9 of the ICESCR provides for the following:

“The State Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”

The ICESCR has been interpreted to provide that State Parties are obliged to protect workers who are injured in the course of their employment, and that the social security system should ensure that the costs and loss of earnings due to the injury are covered. Furthermore, the loss of support by a breadwinner due to his death

44 An in-depth discussion of this topic does not fall within the scope of this contribution.

45 Hereafter referred to as the ICESCR.

46 Mangena 2012 www.sahrc.org.za.

should also be covered.⁴⁷ The importance of providing adequate income support to persons who suffered a reduction or loss of income due to a permanent disability is also emphasised by the United Nations Committee on Economic, Social and Cultural Rights.⁴⁸

2.2 Regional Standards

2.2.1 Social Charter of the SADC

At a regional level the *Charter of Fundamental Social Rights in the SADC*⁴⁹ (also known as the *Social Charter of the SADC*) provides for the promotion and protection of persons with disabilities. Article 9(1) of the Charter stipulates the following:

“Member States shall create an enabling environment such that all persons with disabilities, whatever the origin and nature of their disability, shall be entitled to additional concrete measures aimed at improving their social and professional integration.”

With regard to employment, the measures implemented should take into account the needs of the disabled persons and provide for appropriate organisation of work and workplaces. The measures shall also relate to the capacity of the beneficiaries.⁵⁰

Member States are also obliged to create an enabling environment in which all workers may enjoy adequate social protection and adequate social security benefits.⁵¹ Those who have been unable to be employed or re-employed should receive sufficient resources and social assistance if they have no other means of subsistence.⁵²

The Charter also promotes a safe and healthy working environment for employees.⁵³ Specific provision for the compensation for work-related illness or injuries is also made. Article 12(h) of the Charter reads as follows:

47 Economic and Social Council 2008 *General Comment No.19* p.6 par.17.

48 Economic and Social Council 2008 *General Comment No.19* p.7 par.20.

49 Anon 2009 www.sadc.int. Hereafter referred to as the Charter.

50 Article 9(2) of the Charter.

51 Article 10(1) of the Charter.

52 Article 10(2) of the Charter.

53 Article 12 of the Charter.

“Member States shall endeavour to create an enabling environment so that workers have the right to services that provide for the prevention, recognition, detection and compensation of work related illness or injury, including emergency care, with rehabilitation and reasonable job security after injury and adequate inflation adjusted compensation.”

The enforcement of the Charter is explained in the contribution by van Niekerk.⁵⁴

“The Charter cannot be directly enforced and, unlike ILO conventions, there is no independent supervisory mechanism to call members to accounting for any breach of the Charter. Responsibility for the implementation of the Charter lies with national tripartite institutions and regional structures that are specifically required to promote social legislation and equitable growth in the region. Member states are required to submit regular reports to the SADC secretariat. The most representative national employers’ and workers’ organisations must be consulted in the preparation of the reports.”

2.2.2 Code on Social Security

The *Code on Social Security in the SADC*⁵⁵ comprehensively provides for the accommodation and promotion of persons with disabilities and injured employees in the broader framework of the basic right to social security. The Code provides that everyone in the SADC has the right to social security,⁵⁶ and that the social security system of each Member State should at least be equivalent to the standards set by ILO Convention 102.⁵⁷ Every Member State is obliged to progressively improve their social security system, which envisages the meaningful coverage of everyone under the social security system, taking into consideration the level of development of the particular Member State.⁵⁸

The Code contains specific provisions to promote the establishment and expansion⁵⁹ of social insurance schemes of each Member State. Member States are required to adopt legislative and other measures to properly manage and administer these schemes.⁶⁰ Member States are further required to provide fair and adequate social

54 Van Niekerk “International Labour Standards” 30.

55 Hereafter referred to as the Code. Adopted in 2007.

56 Article 4.1 of the Code.

57 Article 4.3 of the Code.

58 Article 4.4 of the Code.

59 Article 6.1 of the Code.

60 Article 6.2 of the Code.

insurance benefits, corresponding to the contingencies covered and the nature and extent of the specific loss.⁶¹

The Code furthermore has specific provisions for the coverage of occupational injuries and diseases that result in disablement for employment. Member States are required to provide compulsory coverage through either public or private mechanisms or a combination of both.⁶² Coverage should be provided for in the formal and informal sectors⁶³ for occupational-related injuries and diseases.⁶⁴ Member States should establish schemes that are able to provide adequate medical care and appropriate benefits.⁶⁵

The Code also addresses the issue of the professional integration of persons with general disabilities in the labour market and creating an enabling environment for such persons.⁶⁶

2.3 National Standards

2.3.1 The Constitution of the Republic of South Africa, 1996

The Constitution of the Republic of South Africa is the supreme law of the country and any obligation contained therein must be fulfilled.⁶⁷ The Constitution is characterised by two prevailing conceptual approaches: constitutionalism and the entrenchment of fundamental rights.⁶⁸ The fundamental rights are contained in Chapter 2 of the Constitution, known as the Bill of Rights. The state has an obligation to respect, protect, promote and fulfil the rights contained in the Bill of Rights,⁶⁹ while the courts are obliged to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation.⁷⁰ It is thus clear that the promotion of the rights contained in the Bill of Rights forms an essential part of present day South Africa.

61 Article 6.3 of the Code.

62 Article 12.1 of the Code.

63 Article 12.2 of the Code.

64 Article 12.3 of the Code.

65 Article 12.5 of the Code.

66 Article 14 of the Code.

67 Section 2 of the Constitution. Likewise, any law that is found to be inconsistent with the provisions of the Constitution is invalid.

68 Olivier "Social Security: Constitutional Framework" par.34.

69 Section 7(2) of the Constitution.

70 Section 39(2) of the Constitution.

The right to have access to social security is entrenched as a fundamental right in the Bill of Rights. As the right to compensation for occupational injuries is an important component of social security, this constitutional provision essentially lays the foundation of the enforcement and regulation of the rights contained in COIDA. Section 27(1)(c) of the Constitution provides for the following:

“Everyone has the right to have access to social security including, if they are unable to support themselves and their dependants, appropriate social assistance.”

Furthermore, section 27(2) provides that:

“The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”

Constitutional jurisprudence has made it clear that courts are able to enforce social security rights and can direct state organs to act positively in order to fulfil their constitutional obligation.⁷¹ The state may thus be ordered to achieve the progressive realisation of these rights (within its available resources) should they be found not to fulfil their constitutional obligation.

The right to social security, as entrenched in the Constitution, is a right to have “access to” social security and not “a right to” as it is provided for most other rights in the Constitution. This particular formulation, within the context of the right to access to adequate housing,⁷² was commonly regarded as a limitation. The court held in *The Government of the Republic of South Africa and Others v Grootboom and Others*⁷³ that the right to “access to adequate housing” differed from the “right to housing.”⁷⁴

“The right delineated in section 26(1) is a right of ‘access to adequate housing’ as distinct from the right to adequate housing...This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all these, including the building of the house itself.

71 Olivier “Social Security: Constitutional Framework” par.37. Some of these cases are discussed below.

72 Section 26 of the Constitution.

73 2000 11 BCLR 1169 (CC); 2000 JOL 7524 (CC). Hereafter referred to as *Grootboom*.

74 2000 11 BCLR 1169 (CC) par.35.

For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.”

In the *Grootboom* case, the right in question was the right to adequate access to housing. The principle could however also apply to the right to access to social security. In *Grootboom* the Constitutional Court emphasised that the rights contained in the Bill of Rights are “interrelated and mutually supporting.”⁷⁵ The rights can thus not be seen in isolation and it should be attempted to give effect to all the social security rights. For both these rights the state is expected to progressively realise the access to the right.

Furthermore, as is the case with all rights in the Bill of Rights, the right to have access to social security is subject to the limitations of section 36 in the Constitution.⁷⁶ Although the Constitution grants the right to access to social security to “everyone”, it does not mean that everyone has the unlimited right thereto. In the case of *In re Certification of the Constitution of the Republic of South Africa*⁷⁷ it was held that orders to enforce socio-economic rights may have budgetary implications. The court also indicated that intervention of this area may imply that the benefits are extended to categories of persons that were previously excluded.⁷⁸

But how should the phrases “progressive realisation” and “available resources” be interpreted and what do they require? Olivier⁷⁹ indicates that the court in *Grootboom* referred to the interpretation of the term “full realisation” as applied by the United Nations Committee on Economic, Social and Cultural Rights⁸⁰ in article 2(1) of the ICESCR. Accordingly, the court held that the term progressive realisation “imposes

75 Olivier “Social Security: Constitutional Framework” par.59, referring to *Government of the RSA v Grootboom* 2000 11 BCLR 1169 (CC), 2001 1 SA 46 (CC) par.53.

76 Section 7(3) of the Constitution.

77 1996 10 BCLR 1253 (CC).

78 Olivier “Social Security: Constitutional Framework” par.50.

79 Olivier “Social Security: Constitutional Framework” par.79.

80 Hereafter referred to as the UNCESCR.

an obligation to move expeditiously and effectively towards the goal”.⁸¹ The court further found in *Grootboom* that the right to have access to adequate housing could not be realised within a short period of time, but that the state was obliged to take steps towards achieving the objective of “everyone having the right to have access to social security”.⁸² Olivier summarises the requirement as follows:⁸³

“...an obligation to develop a realistic and comprehensive plan or programme as to how, when and by what means the fundamental right in question is to be given effect to in a progressive fashion.”

With regards to the phrase *available resources*, the meaning thereof was interpreted as follows in *Grootboom*:⁸⁴

“What is apparent from these provisions is that the obligations imposed on the state...and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.”

A corresponding factor to the progressive realisation of the right to have access to social security is thus the availability of resources to the state in order to achieve such progressive realisation. Access to social security therefore largely depends on the available resources of the state. In *Grootboom* the court emphasised that there was a balance between the goal of achieving the right and the means to do so: the availability of the resources of the state plays an important role in determining what could be reasonably expected from a state.⁸⁵

The compensation for occupational injuries forms part of social insurance and is an important part of the right to have access to social security. Thus the provision of compensation to an employee who is permanently disabled due to an employment injury has a constitutional basis, although the coverage and extent of the right may be limited in terms of the Constitution.

81 Olivier “Social Security: Constitutional Framework” par.79, referring to General Comment No.385 par.9.

82 Olivier “Social Security: Constitutional Framework” par.79.

83 As above.

84 Olivier “Social Security: Constitutional Framework” par.80. The court in *Grootboom* referred to the judgment of *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 12 BCLR 1696(CC), where this interpretation was used (par.11).

85 Olivier “Social Security: Constitutional Framework” par.80.

2.4 The meaning and nature of social insurance

As stated earlier social security comprises two categories, namely social assistance and social insurance. Social insurance is a system in terms of which individuals are entitled to benefits from a specific insurance- and risk-pooled based fund, provided that they have previously contributed to that fund.⁸⁶ COIDA is a system of social insurance although only employers contribute to the fund.⁸⁷ Smit explains the concept of social insurance as follows:⁸⁸

“The term ‘social insurance’ refers to (often employment-based) public schemes devised to achieve income-maintenance or -replacement by providing earnings-related benefits. Benefits are derived from employee and/or employer contributions and the state may also contribute to such schemes, or guarantee certain benefits. The ‘insurance’ is obligatory and aims to promote and achieve social solidarity.”

A well-explained definition of social insurance is found in the *Code on Social Security Rights in the SADC*.⁸⁹

“This is a form of social security designed to protect income-earners and their families against a reduction or loss of income as a result of exposure to risks. These risks impair one’s capacity to earn income. Social insurance is contributory with contributions being paid by employers, employees, self-employed persons, or other authors, depending on the nature of the specific scheme. Social insurance is aimed at achieving a reasonable level of income maintenance.”

Due to the shortcomings of common-law delictual claims for damages, statutory systems to claim compensation for occupational injuries have been developed by most countries. The statutory claim to which an employee is entitled substitutes the common law claim an employee or dependant would have to claim damages from his employer. Section 35(1) of COIDA provides that an employee may not institute a common law claim against his employer if he is entitled to a claim for compensation under COIDA.

86 Basson ea *Essential Labour Law* 396.

87 This is because the employer has a common-law duty to provide safe working conditions for employees and it is a way to provide a balance for the system of no-fault compensation.

88 Smit “Employment and Social Protection” 460.

89 Article 1.3 of the Code.

With this understanding of social insurance and social security rights in the regional and international sphere and bearing in mind the constitutional context, the following chapter will analyse COIDA as a system of social insurance on a national level.

3 COIDA as social insurance

3.1 COIDA: An overview

COIDA is an important tool in the progressive realisation of the right of access to social security and social insurance. COIDA's main purpose is to provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by defined employees in the course of their employment.⁹⁰ The Act further provides for the benefits to be paid to dependants in the event of death of a breadwinner as a result of an occupational injury or disease. Related matters are also provided for by COIDA.

COIDA has previously been described to be legislation that should be interpreted in favour of the employee. This, however, is common for social labour legislation which has always been known to be "designed to protect the interests of employees and safeguard their rights".⁹¹ The underlying policy of COIDA, as was the case with the previous compensation acts, is that the interpretation of the Act should be employee-friendly, if possible.⁹² Occupational injuries and diseases may leave employees exposed and vulnerable and COIDA serves to counter the exposure and vulnerability of the employees. Employers, on the other hand, are exempted from liability on account of the provisions of section 35 of COIDA, which prohibits the employee from instituting a delictual claim against the employer. The court held in *Jooste v Score Supermarket Trading (Pty) Ltd*⁹³ that the system of no fault compensation, as provided for by COIDA, brought a balance between employees and employers as employees may claim from the Compensation Fund⁹⁴ without having to bear the *onus* of proving that the employer has been negligent, whilst employers are protected from claims of employees in return for contributing to the Fund.⁹⁵

The Compensation Fund is established in terms of COIDA, from which the compensation payable to employees is financed.⁹⁶ As from the commencement of

90 Landman "Employment Injuries" 41.

91 Price J in *R v Canqan* 1956 3 SA 355 (E) at 357-358.

92 The relationship between an employer and his employees has previously been described to be inherently unbalanced. Although the main focus of COIDA is not to favour the employee, it may contribute to some extent in balancing this relationship.

93 1998 BCLR 1106 (CC).

94 Hereafter referred to as the Fund.

95 Olivier and Klink *Coverage against Employment Injuries and Diseases* 4.

96 Section 15(1) of COIDA.

the Act, the Accident Fund established in terms of section 64 of the *Workmen's Compensation Act* ceased to exist and the amounts credited to the Accident Fund vested in the Compensation Fund.⁹⁷ Employers are obliged to pay assessments to the Fund.⁹⁸ Employers are also obliged to register with the Fund, failing which constitutes an offence but does not affect the right of the employee to claim compensation from the Fund.⁹⁹

The right to compensation is provided for by section 22 of COIDA. To be entitled to compensation four criteria must be met:¹⁰⁰

- a) A worker must be deemed to be an employee;¹⁰¹
- b) he must have been injured or died in an accident or contracted a disease as defined by COIDA;
- c) the accident must have arisen out of and in the scope of employment; and
- d) there must be a causal connection between the accident, the employment and the injury.

The only instance where an employee will not be entitled to compensation under COIDA is if the accident was caused due to the "serious and wilful misconduct" of the employee, unless the accident results in the serious disablement of the employee concerned, or in his death, leaving behind a financial dependant.¹⁰² Even if an accident was caused due to the serious and wilful misconduct of an employee, the Director-General may order the employer individually liable or mutual association concerned to pay the costs of medical aid or a portion thereof, as determined by the Director-General.¹⁰³

The coverage of COIDA is limited in the event of persons who are employed outside of South Africa. An employer who mainly carries on his business in South Africa, and his employee that is ordinarily employed in South Africa, shall be entitled to compensation if he meets with an accident whilst temporarily being employed

97 Section 15(3) of COIDA.

98 Section 83 of COIDA.

99 *Boer v Momo Developments CC en 'n ander* 2004 (5) SA 291 (T) and section 80(6) of COIDA.

100 Derived from section 22 of COIDA.

101 Defined in 3.2.1 below.

102 Section 22(3)(a) of COIDA

103 Section 22(3)(b) of COIDA.

outside of the country.¹⁰⁴ This entitlement to compensation as if the accident happened in the Republic, ceases to exist if the employee has been employed outside of South Africa for a continuous period of 12 months, unless there was an arrangement made between the Director-General, the employer and the employee.¹⁰⁵ The compensation paid to an employee who qualifies for compensation whilst meeting with an accident outside of the Republic, shall be determined on the basis of the earnings which the employee would have received if he had remained in the Republic based on the opinion of the Director-General.¹⁰⁶ This provision may seem technical, but may find application very easily. Engineers and pilots, for example, may often be employed temporarily in different parts of Africa by South African firms. These employees are likely to be paid in US dollars or other foreign currencies and earn much more than they would have if they were employed permanently in South Africa. Should such employees meet with an accident whilst outside of the Republic, a calculation of their compensation, by taking into account their “foreign” remuneration, would be unrealistically high in comparison to what they would have received based on a related South African salary.

An employee who mainly works outside of South Africa, and who is employed by an employer who mainly carries on his business outside of South Africa, is not entitled to compensation should he meet with an accident whilst temporarily being employed in South Africa, unless he has previously agreed thereto with the Director-General and paid the applicable assessments.¹⁰⁷ Such an employee is deemed to be ordinarily employed in South Africa if he has been employed in the Republic temporarily for a continuous period of more than 12 months.¹⁰⁸

All employees are included in the protection under COIDA, irrespective of the salary they earn. Placing no salary limit may be seen as a method of subsidising persons earning less income, as white collar workers (professionals and office workers) are

104 Section 23(1)(a) of COIDA.

105 Section 23(1)(c) of COIDA. This arrangement is subject to the conditions as determined by the Director-General.

106 Section 23(1)(b) of COIDA.

107 Section 23(3)(a) of COIDA.

108 Section 23(3)(b) of COIDA.

less likely to sustain injuries as they do not perform manual labour.¹⁰⁹ By including white collar workers more funding is immediately available to the Fund to pay compensation to blue collar workers, i.e. workers that are employed in a higher risk line of employment. Although there is no salary limit for the inclusion of protection under COIDA, certain ceilings exist for the calculation of the benefits in terms of Schedule 4 of the Act.¹¹⁰ For temporary total disablements 75% of an employee's monthly earnings (up to the prescribed ceiling) at the time of the accident to a prescribed maximum per month can be compensated.¹¹¹ If an employee is fatally injured and leaves only a spouse as a dependant, a lump sum of twice the employee's monthly pension that would have been payable to the employee if he was permanently disabled,¹¹² is payable.¹¹³ If the employee leaves a spouse and a child as dependants, 40% of the monthly pension that would have been payable to the employee had he been 100% permanently disabled is payable to the dependants.¹¹⁴ If the employee leaves behind children that are unable to earn an income and no widow/widower, 20% of the pension that would have been payable had the employee been permanently disabled, is payable to each child.¹¹⁵ The same applies to a person that was financially dependent on the deceased employee.

The contribution paid by employers to the Fund is calculated as a percentage of the total amount paid to the employees of the company as remuneration. The amount is calculated by taking into account the risks to which the employees are exposed to in the specific sector or line of work in which the employee is involved.¹¹⁶ Compensation paid under COIDA includes payment for the loss of earnings, any travelling and medical expenses that were incurred, as well as the payment of

109 The assessments paid by employers to the Fund are however determined by taking into account the risk for occupational injury and/or disease in the specific industry.

110 Schedule 4 is discussed in Chapter 4 below.

111 Item 1 of Schedule 4 of COIDA. The thresholds in respect of permanent disablements are discussed later.

112 Being 75% of the employees monthly earnings subject to a minimum and maximum of R 48 615.00 and R 194 535.00 respectively.

113 Item 6 of Schedule 4 of COIDA.

114 Item 7 of Schedule 4 of COIDA. See footnote 112 for amount of benefit.

115 Item 8 of Schedule 4 of COIDA. See footnote 112 for amount of benefit.

116 Section 85 of COIDA.

pensions. Compensation is paid for temporary total disablements, permanent disablements, medical costs and death benefits.¹¹⁷

The Rand Mutual Assurance Company Limited and the Federated Employer's Mutual Association are two mutual associations that perform the same functions as the Fund for the mining and building industry respectively. Employees who are employed in these industries, and are eligible to be compensated for occupational injuries, are paid out by these institutions.¹¹⁸ Mutual associations are regulated by section 30 of COIDA.

3.2 Relevant definitions for the right to compensation

As discussed above, for an employee who met with an accident in his workplace to be able to claim compensation for an employment injury or illness, he must first be regarded as an *employee* and be employed by an *employer*; the injury must indeed have been caused by an *accident* that arose *out of and in the course of his employment*. These are the factors that must be present; thus it is very important to consider these requirements that have to be met before a claim can be adjudicated.

3.2.1 The definition of an employee

An employee, in terms of section 1(xix) of COIDA, is a person who works for an employer in terms of an implied or expressed written or oral contract of service, apprenticeship or learnership, and is remunerated by either cash or in kind for such work, either calculated by the time or work done. Casual employees, directors or members of a body corporate, labour brokers and the dependants of a deceased employee are also included in the definition, as is the case with the curator acting on behalf of a disabled person. Certain categories of workers are excluded as employment injuries suffered by them are regulated in terms of other legislation. These employees, however, may also have a common law claim for compensation, unless they are excluded from doing so in terms of the legislation providing for the compensation of employment injuries that is applicable to them. This is what the

117 Schedule 4 of COIDA determines the manner of calculating compensation. For each nature and degree of disablement, the nature of the benefits paid differs and the manner of calculating benefits differs as well.

118 Olivier and Klinck *Coverage against Employment Injuries and Diseases 2*.

Constitutional Court dealt with in *Mankayi v Anglogold Ashanti Limited*.¹¹⁹ The court had to decide whether section 35(1) of COIDA deprives mineworkers of their common-law right to recover damages for occupational injuries or diseases from negligent employers – even if they were only able to claim compensation under the *Occupational Diseases in Mines and Works Act*¹²⁰ and not under COIDA.¹²¹ The High Court and the Supreme Court of Appeal both held that section 35(1) of COIDA deprived the appellant of instituting a common law claim against the respondent. The appellant approached the Constitutional Court, alleging that the provisions of COIDA did not apply to him as he was not entitled to compensation under COIDA. The Constitutional Court found that section 35(1) of COIDA did not apply to a person who qualified for compensation for a “compensatable disease” under ODMWA. The exclusion of the liability only applies to “occupational diseases” under COIDA. Accordingly, the court found that the exception should have been dismissed and the appeal was upheld.¹²²

The categories of the workers that are excluded from the COIDA definition of an employee are:¹²³

- a) persons employed by the state;
- b) persons performing military service or training as referred to in the *Defence Act 44 of 2002*;
- c) members of the South African Defence Force;
- d) members of the South African Police Force;
- e) independent contractors; and
- f) domestic employees of private households.

3.2.2 *The definition of an employer*

In terms of section 1, an employer is any person who employs an employee as defined by COIDA. This includes the state,¹²⁴ as well as the following categories of persons and/or entities:¹²⁵

119 2011 (5) BCLR 453 (CC).

120 78 of 1973. Hereafter referred to as ODMWA.

121 The appellant contracted an occupational disease and was compensated under ODMWA. He instituted a common law claim against the respondent, alleging that the respondent did not provide him with a safe and healthy work environment as was his common law duty.

122 2011 (5) BCLR 453 (CC) at 114.

123 Section 1(xix) of COIDA.

- a) Any person who controls the business of an employer on his behalf.
- b) Any employer who makes his employees temporarily available or lets his employees to another person for a certain period, for that period which the employees work for the other person; and
- c) Labour brokers who provide workers to clients for the rendering of services against payment and for which such work or services carried out the person is in return being paid by the labour broker.¹²⁶

3.2.3 *The definition of an accident*

An accident is defined in section 1(i) of COIDA as:

“‘Accident’ means an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee.”

Although this definition is not very clear and has previously been the subject of extensive debate, it was held that the word “accident” should be used in its popular and ordinary sense. The definition identified for an accident in old, but still highly relevant, case law is “an unlooked-for mishap or an untoward event which is not expected or designed.”¹²⁷ This is the generally accepted definition for an accident.

3.2.4 *The meaning of “arising out of” and “in the course of employment”*

In terms of section 22(1) of COIDA, an employee is entitled to benefits under COIDA if he sustained an injury or suffered a disablement due to an accident that arose out of and in the course of his employment. The case that explains the interpretation of these phrases the best is *Minister of Justice v Khoza*.¹²⁸ The court held that “arising out of” generally means that the accident must occur while the employee is busy with his duties.¹²⁹ To prove that the accident arose out of an employee’s employment

124 Such employers are however exempted from paying assessments to the Compensation Fund in terms of section 84(1)(a) of COIDA.

125 Landman “Employment injuries” 44.

126 Van Eck “Who is an employee” 71.

127 Thompson and Benjamin *South African Labour Law* 2004 H1-16 par.13 referring to the cases *Innes v Johannesburg Municipality* 1911 TPD 12 at 16-17; *Briesch v Geduld Proprietary Mines* 1911 TDP 707 at 715 and *Nikosia v Workmen’s Compensation Commissioner* 1954 (3) SA 897 (T) at 900E-F.

128 1966 (1) SA 410 (A).

129 Landman “Employment Injuries” 50.

there must be a causal connection between the accident and the duties of the employee. The court identified three exceptions to the test, namely:¹³⁰

- a) If the employee would have been injured even if he was not at work.

An example of this is an employee suffering a heart attack, resulting in his disablement for work. A heart attack suffered by an employee with a critical heart condition can happen at any time and is usually not influenced by whether the employee was at work or at another place.

- b) If there is no causal link between the employment and the injury or the causal link was interrupted by another event.

This exception will be present if an employee has deviated completely from his task or job description whilst suffering an injury. An example is an employee travelling for work to a client by car and on his way back from the client he deviates from the route that he was supposed to take in to attend to personal matters and is involved in a car accident, resulting in his disablement for work.

- c) If the employee was intentionally injured by another employee due to reasons unrelated to their work.

This exception will be present if two employees are involved in an argument for personal reasons, resulting in one employee's disablement for work.

Furthermore section 22 provides for two presumptions which assist in determining whether or not an accident has arisen "out of and in the course of employment".

Section 22(4) reads as follows:

"For the purposes of this Act an accident shall be deemed to have arisen out of and in the course of the employment of an employee notwithstanding that the employee was at the time of the accident acting contrary to any law applicable to his employment or to any order by or on behalf of his employer, or that he was

¹³⁰ 1966 (1) SA 410 (A) at 417B-H.

acting without any order of his employer, if the employee was, in the opinion of the Director General, so acting for the purposes of or in the interests of or in connection with the business of his employer.”

Section 22(5) determines the circumstances under which the transport of employees to and from the workplace would be regarded as taking place in the course of the employees’ employment:

“For the purposes of this Act the conveyance of an employee free of charge to or from his place of employment for the purposes of his employment by means of a vehicle driven by 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.”

In *Ex parte Workmen’s Compensation Commissioner: In re Manthe*¹³¹ it was held that the accident was deemed to have occurred “in the course of employment” if it was found to be an actual fact that the employee was brought within the range of the hazard that led to his accident due to his work.¹³² “In the course of employment” is generally understood to mean “while an employee is busy with his work”.

In *Twalo v Minister of Safety & Security & another*¹³³ and *Urquhart v Compensation Commissioner*,¹³⁴ the court had to establish whether an “accident” had occurred out of and in the course of employment of the employee.

In *Twalo* the plaintiff claimed compensation as a dependant for the murder of her husband. Her husband was an employee of the South African Police Service and was shot dead intentionally and unlawfully by the second defendant who was also a member of the SAPS. She contended that the second defendant had acted in the course and scope of his employment when he shot her husband. This was opposed by the minister, who admitted that the second defendant was an employee but stated that he did not act in the course and scope of employment when he shot the plaintiff’s husband.

131 1979 (4) SA 812 (E).

132 Landman “Employment Injuries” 50.

133 [2009] 2 All SA 491 (E). Hereafter referred to as *Twalo*.

134 (2006) 27 ILJ 96 (E). Hereafter referred to as *Urquhart*.

The court did not regard the shooting as an accident as defined in COIDA and also held that the second defendant did not act in the course and scope of his employment when he shot the deceased. There was no causal link between the shooting and the death of the plaintiff's husband as the reasons for the murder were personal and unrelated to their work. The court clearly approached the matter the wrong way round. The question was not whether the perpetrator acted in the course and scope of his employment, but rather whether the shooting was an accident or a deliberate act, which arose out of and in the scope of the victim's employment.

In *Urquhart* the court was confronted with the question if the post-traumatic stress suffered by the appellant was as a result of an accident that arose out of and in the course of his employment. The appellant was a press photographer and suffered a breakdown due to exposure to many "stress-induced events" over numerous years. He was diagnosed with post-traumatic stress and was incapable to continue with his work. The appellant lodged a claim for compensation in terms of COIDA. His claim was rejected on the basis that his disorder was not due to an accident that arose out of and in the course of his employment. The court did not regard the series of events to which the appellant was exposed as an accident as defined in COIDA. The appellant then approached the High Court. The court indicated that, in order to claim compensation, a causal link between the injury/damages and the accident that caused it needed to be proved. The court furthermore indicated that the law commonly regarded a psychiatric disorder or psychological trauma as a personal injury and that such was included in the definition of an "accident" or "occupational injury;" even a series of events, such as the events to which the appellant had been exposed to during the years of his employment as a press photographer, in accordance with the definition of an accident in terms of COIDA. The court subsequently found that the commissioner interpreted COIDA too restrictively and that the post-traumatic stress suffered by the appellant was due to an accident that arose out of and in the course of the employment of the appellant.

The following principle can clearly be derived from the judgments of *Twalo* and *Urquhart*: if an employee meets with an accident that leads to his permanent disablement, a causal link must be present between the employment and the accident for the employee to be eligible to claim compensation. If the accident

occurred because of reasons *unrelated* to the work of the employee,¹³⁵ the employee would not be able to claim compensation for the injury suffered. In *Urquhart*, even though the employee did not suffer a single “physical” accident, he had been exposed to numerous scenarios in his employment which led to a condition which permanently incapacitated him for his work – these series of events were thus found to be related to his work, i.e. a causal link was proven between his employment and the accident and the employee was eligible to claim compensation.

3.3 The failure of the employer to register himself with the Compensation Fund

In *Boer v Momo Developments CC and Another*¹³⁶ the court found that the failure of an employer to register himself with the Compensation Fund as required by section 80(1), and to make the required payments as he is required in terms of the Act, constituted an offence in terms of section 80(6) of COIDA. However, this does not mean that the employee’s right to claim compensation from the Fund had lapsed. The only requirement is that the claim must be submitted within 12 months of the accident. Failure by the employer to report the accident of the employer within 7 days after receiving notice thereof¹³⁷ constitutes an offence in terms of section 39(6) of COIDA. This viewpoint was confirmed by Olivier and Smit:¹³⁸

“Any employee who falls within the definition of the Act and who meets with an accident resulting in his disablement or death is entitled to compensation subject to the provisions of the Act. This applies irrespective of whether the employee’s employer has registered or has paid contributions. ...The Act provides that the employee should notify the employer or the commissioner of an accident as soon as possible after the accident. The employer must in turn notify the commissioner of the accident. This should be done within seven days after having received the notice of an accident or having learned in some other way that an employee has met with an accident. The employee can then claim compensation. ...Should the employer fail to report an accident he can be held criminally liable. A fine not exceeding the compensation to be paid to the employee can be imposed. ...Should the employee fear that the employer will not report the accident the employee can do this by submitting a report on form WCL 3. Failure by the employee to notify the employer does not automatically lead to forfeiting of the right to compensation if the employer learns of the accident from another source during the time of the accident or shortly afterwards. Even if no information concerning an accident comes to the

135 I.e. the accident did not arise in the course of the employee’s employment.

136 2004 (5) SA 291 (T).

137 Section 39(1) of COIDA.

138 Oliver and Smit “Social Security Law” par.357.

employer's knowledge the failure to report the accident can be condoned if the failure was due to a reasonable cause. Should the employee fail to report the accident within 12 months the right to benefits will be forfeit. The employee can claim compensation even if the employer failed to submit a claim. The claim must be submitted within 12 months from the accident or, in the case of a fatal accident, within 12 months from the date of death..."

The above discussion again proves that COIDA is interpreted to be more beneficial in approach to the employee: the employer bears the *onus* of registering himself with the Fund. Failing to do so constitutes an offence. However, an employee is still eligible to claim compensation even if his employer is not registered with the Fund. The *onus* of reporting the accident again lies with the employer, and failing to do so within 7 days constitutes an offence, whilst the employee is granted 12 months to submit his claim for compensation from the date of accident.

4 Assessment of permanent disablement in terms of section 49 and Schedule 2 of COIDA

There are four categories of compensation that are paid by the Fund, namely compensation for temporary total disablement, permanent disablement, medical costs and death benefits. This research only focuses on compensation paid for permanent disablements.¹³⁹

4.1 The determination of the degree of permanent disablement

In terms of section 49 the Commissioner must assess the permanent disablement of the employee by applying Schedule 2 of COIDA, which stipulates percentages of disablement for different injuries or mutilations varying from the loss of all limbs up to the loss of one finger only. For example, Schedule 2 of COIDA recognises any mutilation that leads to an employee being bedridden or causing total incapacity of the employee as a 100% permanent disablement. Such injuries include the loss of all limbs or the total loss of sight. Likewise, the loss of an arm at the shoulder or the loss of an arm between the elbow and shoulder is rendered a 65% permanent disablement. By “matching” the injury or mutilation from which the employee is suffering to the corresponding injury or mutilation provided for in Schedule 2, the Commissioner is then able to determine the degree of permanent disablement. The nature and amount of compensation awarded depends on the degree of disablement from which the employee is suffering. Compensation for a permanent disablement may be paid either in a lump sum or in a monthly pension depending on the degree of disablement. Section 49(2)(a) of COIDA provides the following:

“If an employee has sustained an injury set out in Schedule 2, he shall for the purposes of this Act be deemed to be permanently disabled to the degree set out in the second column of the said Schedule.”

¹³⁹ Employees may be compensated for temporary disablement in terms of section 47 of COIDA. Periodical payments for temporary total disablement may be paid for a maximum period of 24 months. Any temporary total disablement continuing for more than 24 months may be deemed to be a permanent disablement. Hence, an employee will be entitled to compensation for the permanent disablement either since he has been assessed to suffer from a permanent disablement or if the employee has suffered from a temporary total disablement for a period of more than 24 months. In terms of section 47(3), in the instance where an employee has previously received compensation for a temporary total disablement, such payments shall not in any way be taken into consideration for the payment of benefits in relation to a permanent disablement. Section 47(4) of COIDA stipulates that “monthly pensions”, for the purposes of section 49, is a pension that is payable to the entitled employee until the end of the month in which he dies.

The Director-General thus has to identify the injury sustained by the employee on Schedule 2 of COIDA. If the employee has suffered any injury which is listed in Schedule 2, the Commissioner will be able to assess the degree of disability suffered by the employee by determining what degree of disability is stipulated for that specific injury. Consequently this, in theory, is only an identification and application process. Schedule 2 is discussed in more detail below.

The Director-General is granted a discretion in terms of section 49(2)(b) according to which he is able to determine the degree of disablement suffered by an employee for any injury which leads to the employee's permanent disablement but which is not provided for in Schedule 2. A ruling in terms of this discretion was made in *Healy v Workmen's Compensation Commissioner*. The provision reads:

"If an employee has sustained an injury or serious mutilation not mentioned in Schedule 2 which leads to permanent disablement, the Director-General shall determine such percentage of disablement in respect thereof as in his opinion will not lead to a result contrary to the guidelines of Schedule 2."

The key phrase here is "a result not contrary to the guidelines of Schedule 2." Problems are often experienced with the application of the discretion of the Director-General in practice, which has led to numerous appeals and objections being lodged against the initial amount of compensation granted to the employee.

A further discretion is provided to the Director-General in terms of section 49(2)(c), which provides the following:

"If an injury or serious mutilation contemplated in paragraph (a) or (b) has unusually serious consequence for an employee as a result of the special nature of the employee's occupation, the Director-General may determine such higher percentage he or she deems equitable."

This discretion allows the Director-General to take into account the specific line of employment of the employee and make an equitable assessment of his degree of permanent disablement in terms thereof. This principle was applied in *Johannes Lodewikus Pretorius v The Compensation Commissioner and the Compensation*

*Fund*¹⁴⁰, discussed below. Furthermore, for example, a typist who lost a finger will suffer a greater disablement in her line of employment than a truck driver would with the same injury. This is often a difficult assessment to make and an individual comprehensive investigation of each case is required. Such cases can also often present a problem for the classification of a disablement. For example, a teacher suffering from severe slurred speech or a speech impediment due to an accident or a trauma incident would be severely disabled for his work, although he may still be 100% physically fit and capable to carry out any other task that does not include speaking. Slurred speech or any speech impediment is not recognised as a permanent disablement, but the nature of the mutilation could certainly be described as “an injury permanently disabling an employee (the teacher) for his work.” The geographical location of the employee should also be taken into account when determining the degree of disablement. A farm worker who lost one arm would have difficulties to be reemployed in the farming community, whilst an employee in the city might still be of use for the urban labour market, depending on his line of employment.

Schedule 2 of COIDA also vests two discretions in the Director-General. If an employee has sustained an injury to his weaker hand or arm, the discretion is granted to the Director-General to not award the full percentage of the permanent disablement as stipulated in the Schedule. The provision reads:¹⁴¹

“Any injury to the left arm or hand and, in the case of a left-handed employee, the right arm or hand, may in the discretion of the Director-General be rated ninety per cent of the above percentage.”

The other discretion that is vested in the Director-General makes provision for employees who have suffered more than one injury. The provision provides the following:¹⁴²

“If there are two or more injuries the sum of the percentages for such injuries may be increased, in the discretion of the Director-General.”

140 [2007] SAFSHC 128. Hereafter referred to as *Pretorius*.

141 Schedule 2 of COIDA.

142 As above.

As Schedule 2 is used as a guideline for the determination of a permanent disablement in terms of section 49, it does not have the same legal status as the Act itself and is subject to the application by the Director-General. Schedule 2 may be amended in respect of the injuries or categories of injuries as well as the percentage stipulated for the disablement by the Minister.¹⁴³ Such an amendment may be recommended by the Director-General and notice of the intention to effect the amendment shall appear in the *Gazette* 60 days prior to the amendment, inviting comment from the public.¹⁴⁴

4.2. Compensation payable for permanent disablement

The compensation that is payable for permanent disablement is calculated on the basis set out in items 2,3,4 and 5 of Schedule 4, subject to minimum and maximum amounts¹⁴⁵ which are regulated by the Compensation Commissioner.

The general principle applied for the calculation of the disablement for 30% or less is that a lump sum is payable for the degree of disablement assessed, multiplied by 15 times the employee's monthly income at the time of the accident (subject to a ceiling).¹⁴⁶

It is the opinion of the author that these lump sums that are paid to employees suffering of a permanent disablement of up to 30% are unrealistically low. A permanent disablement of 30% or less could be as severe as losing the sight of one eye (30%), the loss of all toes (15%), the loss of a finger or more than one finger or its phalanxes (between 2-10%), the loss of a thumb (both phalanxes being 25% or one phalanx being 15%) or the loss of hearing in one ear (7%). Provision for adjustment of this determination of the degree of disablement is made by section 49(2)(c) of COIDA, which provides that the Director-General may determine a higher

143 Section 50 of COIDA.

144 Section 50(b) of COIDA.

145 Section 49(1) of COIDA.

146 In terms of Item 3 of Schedule 4 of COIDA, for a permanent disablement of less than 30%, the lump sum is calculated at a *pro rata* rate to the amount that would have been payable for a 30% disablement multiplied by 15 times the employee's income at the time of the accident. In terms of Item 2 of Schedule 4 of COIDA, for a permanent disablement of 30%, a lump sum calculated at a rate of 15 times the employee's monthly income at the time of the accident, is payable. This amount is subject to a minimum amount of compensation of R48 615,00 and a maximum amount of R194 535,00.

percentage of permanent disablement for an injury which has unusually serious consequences for an employee as a result of the special nature of the employee's occupation. Depending on the line of employment of the employee, any of the aforementioned disabilities may seriously impair the employee's earning capacity and his chances of realistically being reemployed in the South African labour market with a competitive salary would be rather slim. If, for example, a truck driver earns R12 000,00 per month and is involved in an accident resulting in the loss of sight of his one eye, he will be deemed to be 30% permanently disabled. Subsequently he will merely be paid out a lump sum of 15 times his monthly income, being R180 000,00. His "market value" as a truck driver will be substantially less and it is most likely that he could be dismissed as a result of his incapacity.

An employee earning a smaller income is faced with a similar dilemma. If a typist or secretary of a big commercial company lost three of her fingers (which may equal a permanent disablement of 30%) her ability to type would be seriously impaired. Say, for example, she was/is a single mother who earned R20 000,00 per month: in terms of COIDA, the maximum amount of compensation that is currently payable to her is a lump sum of R194 535,00. She will, in all likelihood, be dismissed due to her incapacity to carry out her work and be paid a lump sum that is not even equal to 10 months of her salary. It is impossible for such an employee to continue with her life as before after an incident like this as she will only receive a small lump sum for compensation and with no certainty of being reemployed, this will have serious consequences on her lifestyle and that of her dependants.¹⁴⁷

For permanent disablements assessed at 31-99%, compensation is calculated at 75% of the monthly earnings of the employee subject to prescribed minimum and maximum monthly earnings.¹⁴⁸ In cases where the employee is found to be 100% permanently disabled, the pension is calculated similar to that of a periodical

147 It is of course also possible that employees may regain their functionality due to the usage of prosthetics or technology. It is for instance possible for a partially deaf person to regain their hearing by an electronic hearing aid.

148 The minimum and maximum compensation payable for a 100% permanent disablement in terms of Item 4 of Schedule 4 is R 48 615.00 and R 194 535.00 respectively.

payment for temporary total disablements, i.e. at a rate of 75% of the monthly earnings.¹⁴⁹

Although a monthly pension equalling 75% of the employees' monthly income may pose life-altering consequences to employees earning more than the prescribed maximum of compensation that may be claimed, the monthly pension of 75% is more realistic and leaves employees in a better position than those receiving a mere lump sum payment.

4.3 Special formulas for calculating compensation

Under certain circumstances different formulas will be used to determine the compensation payable to the employee.

If the employee is under the age of 26 and working as an apprentice, or his employment is regarded as a learnership, the compensation payable for the permanent disablement will be calculated on his probable future earnings.¹⁵⁰

For employees who suffer from such a severe permanent disablement that they are dependent on other persons to fulfil daily tasks, a "constant attendance allowance" is payable.¹⁵¹

Although COIDA operates on a basis of no-fault compensation, additional compensation can be paid to the employee if he can prove negligence on the part of his employer.¹⁵²

If the employee suffers more than one accident, compensation may be calculated by taking into account the earnings which would be more favourable to the employee.¹⁵³

149 Olivier *ea Introduction to Social Security* 337-338 and Smit "Employment and social protection" 468.

150 Section 51 of COIDA.

151 Section 28 of COIDA.

152 Section 56 of COIDA.

153 Section 56(2) of COIDA. This of course only applies if the employee earned different salaries while he was involved in the respective accidents.

At no time may an employee receive a higher pension for a permanent disablement than 100%, even if he was involved in two accidents.¹⁵⁴

Should an employee thus meet with an accident resulting in his permanent disablement for work and any of the above factors are present, the Commissioner will then have to take those circumstances into consideration and use the applicable method stipulated to fairly calculate the compensation amount payable to the individual. Consequently this is a special form of compensation and an individual approach is required.

4.4 Principles derived from case law

4.4.1 “Mechanical application of Schedule 2”

As mentioned before, the “mechanical” application of Schedule 2 by the Commissioner has previously led to objections being lodged against the initial degree of disability determined and the subsequent compensation awarded to the employee. No case illustrates this better than the *Healy* matter. In this matter, the appellant, Michael Donald Healy, injured his knee in the course of his employment. The degree of disablement of which the appellant was suffering was assessed at 18%. The appellant attempted to have this assessment increased to 45% but his appeal was unsuccessful. He then appealed to the Eastern Cape High Court in terms of section 91 of COIDA to have the degree of his disability increased to 45%. In the objection evidence of a medical expert (an orthopaedic surgeon) who had previously examined the appellant was presented. The report drafted by the orthopaedic surgeon indicated that the appellant was unable to do any work; his injury was so severe that he could not do physical work and he had no qualifications that allowed him to do clerical work. The condition of the appellant was permanent and not even an operation or knee replacement would improve the functionality of his knee. Furthermore there were signs of degeneration of his knee. In his report, the medical expert stated the following:¹⁵⁵

“The patient suffers from frequent episodes of collapse of the right knee and he cannot do any gainful work due to the weakness of the knee and the frequent falls he had due to the collapse of the knee.

154 Section 56(3) of COIDA.

155 2010 (2) SA 470 (E) at p.473 par.6.

It is unlikely that any conservative therapy will bring any improvement to the knee function and the patient must be seen as permanently unfit to do any work where standing, walking, climbing up and down stairs or walking on uneven ground is a factor.

No form of rehabilitation will probably cause the function to return to such a way that the patient will be functionally able to do such kind of work.

It is my opinion that this [is] a direct result of the injury on duty that took place on the 27th of September 1990 and the patient should be compensated for this and the total loss of instability to return to any form of work in the future where walking etc as mentioned above is a factor.”

According to the orthopaedic surgeon he estimated the appellant’s percentage of disablement at 45% due to the total loss of function of the knee.¹⁵⁶ According to Schedule 2, the loss of a leg between the knee and the hip is deemed to be a 45-70% permanent disablement, whilst the loss of a leg below the knee is deemed to be a 35-45% permanent disablement. During cross-examination, the medical expert was asked why he alleged the permanent disablement to be 45%, as a person with a total knee replacement is awarded 20% permanent disablement, which is very close to 18%. He indicated that Healy was, in fact, more disabled than a person who had undergone an amputation below the knee as they do not suffer from pain and can run and jump. In Healy’s case he suffered from pain and his leg was unstable.

Schedule 2 does not specifically stipulate a degree of permanent disablement for the injury from which Healy suffered, but from the evidence of the orthopaedic surgeon it was clear that Healy was more disabled than a person who had a successful knee replacement (being a permanent disablement of 20%), while also being more disabled than a person who has lost his leg below the knee (being a permanent disablement of 35-45%).¹⁵⁷ The court indicated that the judge had previously held that the underlying policy of previous compensation legislation was that employees should be assisted as far as possible and that extensive interpretations should be given, so as to be to the benefit of and favourable to the employee, if possible.¹⁵⁸

156 2010 (2) SA 470 (E) at p.473 par.7.

157 At this stage it is important to remember that in terms of section 49(2)(b) the Commissioner may determine a percentage of permanent disablement for an employee who has suffered an injury that is not listed in Schedule 2 which in his opinion will not be contrary to the guidelines provided in Schedule 2.

158 Citing *Davis v Workmen’s Compensation Commissioner* 1995 (3) SA 689 (C) 694 F-G. The court also concurred with this view in *Urquhart v Compensation Commissioner* 2006 (1) SA 75 (E) par.17-18.

The court found that the Commissioner and his assessors had erred by assessing the injury of the appellant at a level of 18% permanent disablement. The manner in which the Commissioner applied the administrative guidelines led to a determination of the appellant's disablement that was inconsistent with the provisions of Schedule 2. The mechanical application of the guidelines did not justify the severity of the appellant's disablement. The court cited Hoexter¹⁵⁹ in respect of the application of guidelines by administrative tribunals to the effect that the "blind or rigid adherence to policies or guidelines is unacceptable in law" as this may lead to the person exercising his discretion to not taking into account the individual circumstances of the person involved. The court thus concurred with the view of the orthopaedic surgeon and found the permanent disablement that was suffered by the appellant to be 45%. The court ordered that the appropriate compensation should be awarded to the employee in respect of the permanent disablement. In this case the court's reasoning to not apply the guidelines as set out in Schedule 2 rigidly, effectively amounts to a "reading in" contextual interpretation of the Act in order to give effect to the Constitution. The court's order can be justified in the light thereof that it aimed to promote the constitutional right to fair labour practices and the right to have access to social security by applying a wider interpretation of Schedule 2 to the benefit of the employee.

The court made an order in accordance with section 49(2)(b) of COIDA. The initial degree of disablement determined and the concurrent compensation offered, lead to a result contrary to the guidelines of Schedule 2 and this was rectified by Judge Friedman, JP. According to the author the deviation from the mechanical application of Schedule 2 in *Healy*, and having an individual assessment conducted by supportive medical expertise, and by taking into account the individual circumstances of the employee, lays the benchmark for an assessment of a permanent disablement, whilst nonetheless at all times still using Schedule 2 as a guideline.

159 Hoexter *Administrative Law in South Africa* 285-286.

4.4.2 *Permanent disablement due to pain*

In *Kirtley v The Compensation Commissioner and The Minister of Labour*¹⁶⁰ the court decided that a claimant could be considered 100% permanently disabled due to the incapacity caused by pain suffered from the injury. Mr. Kirtley was employed by a university as a senior works inspector. He was involved in an accident in the course of his employment. While climbing down a ladder, it tilted and he fell onto the concrete floor, injuring his right side, his back, his shoulders and his face. The appellant was hospitalised for five days. Thereafter he lodged a claim for compensation against the Commissioner. The appellant was treated by his own general practitioner after his discharge from hospital for his continuous back pain whilst also receiving medication to control his blood pressure and diabetes. Subsequent treatment included physiotherapy and even a consultation with an orthopaedic surgeon, who further prescribed paid medication to the appellant. None of these, however, improved the condition of the appellant and he degenerated to such an extent that he was unable to return to work. On 29 February 2000, being 9 months after the accident, it was found by two independent medical specialists that the appellant was 100% permanently disabled and thus permanently incapacitated for the open labour market. The specialists also pointed to the fact that the appellant's condition would only worsen.

In June 2001 the Director-General of the Department of Labour informed the appellant in writing that he had suffered a temporary disablement for a period of three months and that compensation would be paid to him accordingly. Needless to say, the appellant objected to this decision. The Director-General had the appellant examined again by a medical expert. The objection did not succeed in respect of the payment of compensation for the temporary total disablement after 30 June 1999 and the medical costs incurred in this respect. With regards to the degree of disablement of the appellant, it was found that he suffered from a 45% permanent disablement. The written reasons submitted by the Director-General for his decision to determine the degree of disablement of the appellant at 45% were the following:¹⁶¹

160 (2005) 26 ILJ 1593 (E).

161 (2005) 26 ILJ 1593 (E) p1597 par.6 at A-D.

“As far as the employee’s degree of permanent disablement is concerned, the employee stated that he is not capable of performing any work. He claimed not to be able to walk for more than 30-50 meters with the assistance of crutches. His main complains were related to his numb knees, and pins and needles on the right leg...Dr. Joubert stated that the objector’s present condition is that of low back pain as a result of soft tissue injury in the whole lumbar spine. The objector’s only complaint was that of pain and that his capacity to work was limited by the pain alone. ...pain per se is not compassable. As far as his degree of disablement is concerned, Dr. Joubert stated that he is unfit to perform his occupation as a fitter and turner but he is not 100% unfit. Disablement is aimed at the open labour market and not necessarily for service in the employment of the employee at the time of the accident, see *Botha v Die Ongevallekommissaris [TPA][1969(2)]*.”

An appeal to the High Court of the Eastern Cape was brought against these findings. The appellant argued that the Commissioner either “ignored or improperly evaluated” the evidence at hand, as it seemed apparent from the written reasons which the Commissioner submitted that he was either confused concerning the date of the accident or did not revise the aforementioned reasons.¹⁶² A medical expert submitted a report in which he stated that the appellant’s disability was permanent and that he was incapacitated for employment – facts which were repeated by the expert during his cross-examination by the Compensation Fund’s legal representative. The Compensation Commissioner, however, disregarded this evidence.

It was found by the court that the reason why the Commissioner disregarded this evidence during the objection and assessed the appellant with a permanent disablement of 45% is that the chairperson of the tribunal was of the view that a claimant could only suffer from a 100% permanent disablement due to a loss of limbs.¹⁶³ However, Schedule 2 of COIDA stipulates that “injuries resulting in employees being bedridden” and “any other injury causing permanent disablement” may render an injured person 100% permanently disabled. The medical experts all rendered the appellant to be 100% permanently disabled. The court found that, by not determining the appellant as 100% permanently disabled, it made a finding contrary to that of the medical evidence provided which stated that “pain can be as debilitating as any physiological impairment, thereby rendering a claimant 100% permanently disabled.” It subsequently amounted to a “restrictive interpretation of the Act”, which was contrary to the purpose of the Act and discriminating against the

162 For the complete written reasons of the Commissioner see par.6 of the judgment.

163 (2005) 26 ILJ 1593 (E) p1598 par.11 at E.

appellant. The judge found the appellant's injury to accord with that of "any injury resulting in an employee being bedridden" in terms of Schedule 2, as the appellant was bedridden 80% of the time, had to use crutches, was unable to perform gainful work, and was only able to stay seated for 2 to 3 hours. The judge accordingly declared the appellant to be 100% permanently disabled.

The judge, in the author's opinion, applied Schedule 2 correctly by assessing the employee to be 100% permanently disabled. Irrespective of the type of injury suffered, the consequence thereof was that the employee was bedridden 80% of the time, rendering him to be 100% permanently disabled.

In the appeal of *Pretorius* the facts were that the appellant was injured in the course of his employment on 20 October 2001. The appellant injured his neck during an accident in the course of his employment. Two operations were performed on his neck, but his condition did not improve and he suffered from headaches, visual impairment, neck and muscle spasms, pain, loss of memory, and a lame right hand.¹⁶⁴ He could not sit for periods longer than 20 minutes or walk more than 500 meters without resting. He was dismissed by his employer in February 2003 due to incapacity, and although he was suitable for other employment less straining on his neck, he was unable to find alternative suitable employment.¹⁶⁵ Initially he was assessed with a 10% permanent disablement, to which he successfully objected and the percentage was increased to 15%. He thereafter objected to the award that found him to be 15% permanently disabled, and the objection was heard before a presiding officer assisted by two assessors and a medical assessor. The objection was dismissed by the tribunal and the appellant subsequently brought an appeal to the High Court. According to a neurosurgeon that testified on behalf of the appellant, and who performed both operations on the appellant, the appellant was unable to return to the open labour market.¹⁶⁶ This viewpoint was echoed by a doctor in May 2005, who also saw the patient on numerous occasions. A report by an occupational therapist of January 2004 stated that the appellant was not able to return to the open labour market unless he was completely rehabilitated.

164 [2007] SAFSHC 128 par.5.

165 The appellant was a credit controller and often had to drive to clients in a bakkie, which caused pain to the appellant.

166 [2007] SAFSHC 128 par.7.

The High Court held that the tribunal had an inquisitorial role and not an adversarial role and should not follow a “mechanistic approach” to decide on an award granted. COIDA should not be interpreted in a manner that would be to the detriment of an employee if it is possible that the provision could be interpreted more beneficially to the employee.¹⁶⁷

It was argued on behalf of the respondent, and rightly so, that pain and suffering may not be claimed in terms of COIDA and a claim in terms of COIDA relates only to patrimonial loss.¹⁶⁸ A claim for pain and suffering, it was argued, would be subjective and would “open the flood gates.” The judge, however, found that this argument was insensible, as the accident suffered by the appellant led to the appellant suffering from fusions and extreme pain which caused him to be incapable of performing any work. He should thus not be compensated for the pain of which he suffered *per se*, but rather for his incapacity to work as a result of the pain.

On behalf of the appellant it was argued that he was 100% permanently disabled. The High Court was not in agreement with this as the appellant was, in fact, only disabled for his line of employment. He tried to find alternative employment but was unable to find any. Furthermore, the occupational therapist’s report indicated that the appellant could be rehabilitated. There were furthermore other issues for which there was no clear medical explanation, such as the apparent loss of memory and visual impairment suffered by the appellant.

The court held that the tribunal had not applied its discretion judicially and that it initially failed to call evidence which would enable it to make a just award. The judge found that the parties involved did not call relevant witnesses and that the evidence led was inconclusive. The neurosurgeon last saw the patient three years before he testified and the other reports were inconclusive. Accordingly, the court was not in a position to make an equitable award. The court, however, granted the appeal and the matter was referred back to the Commissioner for a determination for an

167 [2007] SAFSHC 128 par.5. *Davis v Workmen’s Compensation Commissioner* 1952 (3) SA 105 (C) at 109 C and *Workmen’s Compensation Commissioner v Van Zyl* 1996 (3) SA 757 (AD) at 764 E-F.

168 Par 16 *Senior Versekeringsmaatskappy BPK v Bezuidenhout* 1987 (2) SA 361 (A) at A-C.

“equitable and appropriate award... along the lines indicated in this judgment.” The decision of the tribunal was set aside.

The case of *Pretorius* illustrates numerous principles which are important to this contribution. The employer has an obligation to reasonably accommodate an employee who is in danger of dismissal due to his incapacity for work as a result of his disablement.¹⁶⁹ If an employee is physically impaired to carry out his tasks as expected due to his disablement, it should be attempted to find alternative employment for the employee to accommodate his disablement. Furthermore, COIDA should at all times be interpreted extensively, if possible, so as to be to the benefit of the employee. A mechanical application of Schedule 2 may easily lead to an unjust amount of compensation awarded,¹⁷⁰ and thus an individual assessment is required in each case by studying the personal circumstances of the employee; considering his line of employment and the consequences of the disablement for his ability to carry out his tasks as expected, and the possibility of the employee finding suitable alternative employment. This should be done by relying on evidence of medical experts.

It is important to have clarity on the fact that pain *per se* is not compassable, but if the pain itself suffered by the employee leads to the employee being bedridden or to him being incapacitated for work, such *incapacity* or *disablement* may be compensated, even if the employee does not have a mutilation (i.e. loss of limbs) resulting from the injury. An employee may be rendered up to 100% permanently disabled due to a disablement caused by pain.

4.4.3 *Post-traumatic stress as a permanent disablement*

In *Karel Petrus Jooste Mouton v The Compensation Commissioner*¹⁷¹ the court dealt with the relationship of the Global Assessment of Functioning¹⁷² scale and Schedule 2 of COIDA, whilst also assessing Post Traumatic Stress Disorder¹⁷³ as a permanent disablement. The appellant brought an application to the High Court in terms of

169 This obligation is discussed in 4.5.6 below.

170 Due to an incorrect degree of permanent disablement assessed.

171 [2008] JOL 22397 (C).

172 Hereinafter referred to as GAF.

173 Hereinafter referred to as PTSD.

section 91(5)(a) of COIDA after an objection against the decision of the Director-General in which he refused to increase the Appellant's permanent disablement from a rating of 26 to 32.5 according to the GAF scale. The Global Assessment of Functioning is a numeric scale that is used to determine the rate of social, occupational and psychological functioning of adults.¹⁷⁴ The GAF scale is, in other words, the overall degree of an employee's disability. The level of disability is adjusted in terms of notices in the Government Gazette. The notice of paragraph 4 of the Government Gazette No. 25132 of 27 June 2003, provided the following in respect of post-traumatic stress:

"The Compensation Commissioner shall calculate the permanent disablement and 100% impairment due to PTSD shall be equivalent to 65% permanent disablement..."

The appellant was employed by the Department of Correctional Services and suffered from PTSD. The appellant applied for compensation in terms of COIDA and his disability was assessed at a rating of 26 of the GAF scale, which equals a permanent disablement of 40% in terms of Schedule 2 of COIDA. On the basis of the score interpretation, a rating of 26 is described as an individual whose interaction is characterised by the following:¹⁷⁵

"Behaviour is considerably influenced by delusions or hallucinations OR serious impairment in communications or judgment OR inability to function in all areas."

The appellant objected to this determination of disability and his objection was subsequently heard by a tribunal. The appellant submitted evidence of a psychiatrist who assessed his disability between 60% and 69% (being a GAF rating of 39-44.85) and another assessment of a clinical psychologist who assessed his disablement between 65% and 75% (being a GAF rating of 42.25-48.75).

The Compensation Fund, on the other hand, led evidence of a doctor who assessed the disablement between 40% and 50% (being a GAF rating of 26-32.5).

174 Genria 2001 www.dpa.state.ky.us.

175 Genria 2001 www.dpa.state.ky.us.

The presiding officer of the tribunal subsequently calculated an average for the degree of disability based on the three expert witnesses' findings and came to the conclusion that the disability suffered by the appellant was 50%. The High Court found that the presiding officer erred by assessing the disability of the appellant by merely calculating a mathematical average of three expert witnesses' assessments. Paragraph 10 of the judgment reads:

“The consideration of expert evidence is not a mechanical process of adding up the scores arrived at by the various experts; it involves a critical analysis of the evidence of all the experts concerned with the view to assessing which, if any, can be relied upon. As the court in *Michael v Linkfield Park Clinic (Pty) Ltd* 2001 (3) SA 118 held “*the court must be satisfied that such an opinion has a logical basis, in other words the expert has considered comparative risks and benefits and reached a defensible conclusion.*” “

The experts shared the opinion that, in cases of post-traumatic stress, a “more longitudinal view” was needed – the assessment of the individual should thus be conducted over a longer period of time. The assessment of the doctor who appeared on behalf of the Compensation Fund was done during one consultation and was accordingly not deemed as a “longitudinal” assessment. She herself, however, admitted that the longitudinal approach was the prescribed approach for cases where individuals were suffering from post-traumatic stress. A psychiatrist and a clinical psychologist who appeared for the appellant, on the other hand, had consulted with the appellant on numerous occasions over the last few years and as a result their assessments were regarded to be longitudinal. It was also clear that the psychologist had the closest knowledge of the appellant's situation. Accordingly his assessment rested on a “logical basis” as required in terms of *Michael v Linkfield Park Clinic (Pty) Ltd*,¹⁷⁶ and the court held that the disability of the appellant should be assessed while taking the assessment of the psychologist into account. The court accordingly found that the appellant was 65-75% permanently disabled, which converted in terms of paragraph 4.2 of Government Gazette no. 25132 of 27 June 2003 to a GAF rating between 42.25 and 45.5.¹⁷⁷

176 2001 (3) SA 118.

177 GAF rating description to such an extent is described as: “Serious symptoms OR any serious impairment in social, occupational, or school functioning.”

This case of *Mouton* illustrates a determination that was made by taking into account experts that have an intimate knowledge of the facts of the individual case which, according to the author, should be the prescribed approach. It was found that the calculation of a mathematical average to determine the degree of disablement is insufficient and unacceptable – in essence this is regarded to be akin to a mechanical application of Schedule 2. Although the judgment of *Mouton* relates to disablement caused by PTSD, the findings thereof correspond to the principles confirmed in *Healy and Pretorius*.¹⁷⁸

In *Odayar v Compensation Commissioner*¹⁷⁹ Mr. Odayar suffered from PTSD as a result of his employment as a member of the SAPS. His claim in terms of COIDA for compensation and medical expenses incurred was dismissed by the tribunal and he appealed the decision. The tribunal rejected the claim of the appellant, ruling that he was not injured in an “accident” as defined in the Act. He alleged that the tribunal merely treated PTSD as an occupational injury and did not consider it to be an occupational disease and also that the tribunal incorrectly relied on a circular that had been issued by the Director-General of the Department of Labour. The circular identified PTSD as an occupational injury. The circular also provided that an employee may only claim compensation for PTSD if he had been exposed to an extreme, traumatic event or stressor; such an extreme event or stressor arising out of and in the course of his employment and the employee experiencing symptoms of PTSD within 6 months of the accident.¹⁸⁰ The court indicated that a circular was merely an internal memorandum to set out guidelines for the tribunal on how to deal with claims for compensation for PTSD. The court found that the provisions of the circular did not comply with section 65(1)(b) of the Act, which provides that an employee who claims compensation due to PTSD only had to prove that it arose out of in and in the course of employment. The employee did not need to prove that he

178 In other words, that an individual assessment is required by taking into account the personalised circumstances of the employee. The evidence that is relied on must be that of experts who have intimate knowledge of the circumstances in order to make an accurate and justified determination of the degree of disablement suffered by the employee. COIDA should be interpreted to the benefit of the employee if possible and a mere mechanical application of guidelines in order to assess the degree of disablement suffered by an employee does not suffice.

179 (2006) 27 ILJ 1477 (N). Hereafter referred to as the *Odayar* case.

180 GN 936 GG25132 of 27 June 2003.

had been exposed to an “extreme traumatic event or stressor.” The appeal was subsequently allowed and the matter was referred back to the tribunal.

Circular instructions have been developed to assist medical practitioners on what information to submit, which documentation to use and to clarify the criteria that are used for a specific occupational disease or injury. The circular instructions are then promulgated in the Government Gazette and are used as a guideline to assess the degree of permanent disablement suffered by the employee.¹⁸¹ These circulars provide specific guidelines for specific types of claims, for instance PTSD, and play an important role in the assessment of the disablement suffered by an employee. Although the circular instruction that was relied on in *Odayar* was found not to comply with the provisions of COIDA, the facts of the case prove how valuable such an assisting instruction can potentially be in the assessment of a permanent disablement. Circular instructions can be produced for each and every disability or mutilation where necessary, or which has proved to be challenging to assess in the past in order to provide guidelines to the assessors during the initial assessment. The circular instruction may stipulate what information should be requested from medical practitioners, what factors should be considered during assessment of the permanent disablement, and what degree of disability should subsequently be determined. It is the submission of the author that comprehensive and specific circular instructions may be utilised as a useful tool to assist the Commissioner in the assessment of a permanent disablement, but the statutory authority to do so must be in place.

4.4.4 *Pre-existing conditions*

In *Basson v Ongevallekommissaris*¹⁸² it was indicated that it was not required in English law that the injury suffered by the employee should be exclusively the result of the accident in question. The accident may merely be a “contributing factor” provided that the incapacity was not created due to a new cause. In this matter the employee had a pre-existing back condition and was subsequently involved in an accident. The court held that there could be more than one *conditio sine qua non* and that both the pre-existing back condition and the accident could, in this matter,

181 Adams and Jeebhay Date Unknown www.equinetafrica.org.

182 [2000] 1 A11 SA 67 (C).

be regarded as such. The task of the court is then to establish whether the pre-existing condition or the accident is the direct cause of the injury suffered by the employee. In this case the court found that the employee's permanent disablement had resulted from the accident.

4.4.5 Non-COIDA cases

In the non-COIDA case of *McLean v Sasol Mine (Pty) Ltd Secunda Colliery*¹⁸³ the plaintiff worked for Sasol Mine. The relevancy of this case for COIDA is due to the principle that was clearly illustrated in this case, being that the degree of disablement of an employee depends on his line of work. In this instance, the plaintiff suffered an occupational injury and was found to be 100% disabled to work underground and 20% disabled to work as a clerk above ground. The plaintiff's disability was assessed in terms of the rules of the pension fund. The mine and the pension fund found that the plaintiff was not entitled to a disability pension according to the rules of the pension fund. The court held that a "close assessment" had to be made of each individual, as a disability in each person varied in the "degree of impairment due to differing stages in the infirmity."¹⁸⁴ The court further held that the plaintiff had suffered permanent functional limitations and subsequently the mine and the pension fund were ordered to make payment in favour of the employee.¹⁸⁵

For instances such as *McLean*, the *Code of Good Practice: Dismissal* determines that the employer must attempt to accommodate the employee with alternative employment in a case of permanent incapacity in relation to his current employment due to ill health or an injury.¹⁸⁶ It is furthermore stipulated that the employer bears the obligation to adapt the duties or work circumstances of the employee in order to accommodate a disabled employee. The degree of incapacity is of course relevant to the fairness of any dismissal.¹⁸⁷ The obligation that rests on the employer in cases where the employee has sustained an injury in the workplace leading to his incapacity to work is more onerous.¹⁸⁸

183 (2003) 24 ILJ 2083 (W). Hereafter referred to as *McLean*.

184 (2003) 24 ILJ 2083 (W) p2085 at A.

185 (2003) 24 ILJ 2083 (W) p2100 par.48 E-F.

186 Item 10(1) of the Code of Good Practice: Dismissal. Hereafter referred to as the Dismissal Code.

187 Item 10(3) of the Dismissal Code.

188 Item 10(4) of the Dismissal Code.

Guidelines are set out in terms of the Dismissal Code in order to determine the fairness of a dismissal due to injury. First of all, it should be considered if the employee is capable to perform the work for which he is employed.¹⁸⁹ In instances where the employee is not able to perform his work, the extent to which he is able to perform his work must be considered.¹⁹⁰ The extent to which the work circumstances of the disabled employee, or alternatively the extent to which the disabled employee's duties might be adapted in order to accommodate his disability in the workplace, should also be considered.¹⁹¹ Finally, the availability of any suitable alternative work for the disabled employee should be considered.¹⁹²

In the case of *McLean*, all parties agreed that the plaintiff was incapable to perform underground work in the mine and, although he could be transferred to the planning department of the mine above ground, he was not able to be employed in this sector permanently. The court held that there was a need for "individualised assessment" of the employee's condition. Subsequently, the plaintiff's claim succeeded and compensation was paid to him by the mine and the pension fund.

189 Item 11(a) of the Dismissal Code.

190 Item 11(b) (i) of the Dismissal Code.

191 Item 11(b) (ii) of the Dismissal Code.

192 Item 11(b) (iii) of the Dismissal Code.

5 Conclusions and recommendations

COIDA has brought about significant improvements in the field of occupational injury law and has addressed numerous shortcomings that existed under the previous legislation. However, several difficulties are still experienced in practice and there are a number of issues that still need to be addressed.¹⁹³

The lack of adequate benefits provided for by COIDA for permanent disablement remains a point of concern amongst some critics. Thompson and Benjamin criticise COIDA by arguing that many employees who are disabled to such a serious extent that they will never again be able to return to the open labour market, merely receive a small lump sum or a small pension equalling a quarter of their earnings for compensation.¹⁹⁴ They further state that the benefits for permanent disablement are “unrealistically low.” The viewpoint of Thompson and Benjamin is supported by the author.

Schedule 2 has been previously criticised for its classification of mutilations and the corresponding degree of disablement stipulated. For instance, the loss of an arm at the shoulder is rendered to be a 65% permanent disablement while the loss of an arm at the elbow is rendered to be a 55% permanent disablement. The question can be asked how an arm at the elbow is useful for employment and how it can be regarded as a “10% less” permanent disablement than an arm lost at the shoulder. The same question may be posed to the loss of a leg. The loss of a leg below the knee is regarded as a 35-45% permanent disablement, while the loss of a leg between the hip and the knee is a 45-70% permanent disablement – in practice, it is difficult to justify 10-25% less disablement for losing a leg below the knee, as that leg will still be useless to an employee without an artificial limb. It is the submission of

193 An issue that is identified by the author in need of appropriate attention that relates to COIDA as a whole and not specifically to the field of compensation for permanent disablements is the scope of application of COIDA. Large numbers of people are still excluded from the coverage of COIDA including domestic workers; persons employed in the informal sector; self-employed individuals as well as independent contractors. Although COIDA complies with many of the provisions stipulated in Convention 121, it has been recommended by Benjamin and Greef that South Africa should ratify Convention 121 of 1964 (The Employment Injury Benefit Convention). Although Convention 121 allows that casual employees, out-workers and other categories of workers may be excluded from the coverage provided as deemed necessary, it is strongly recommended that coverage of COIDA be at least extended to domestic workers. It is also the submission of the author that more ratification of relevant international instruments is required by South Africa.

194 Thompson and Benjamin *South African Labour Law* H1-44, referred to in chapter 1.

the author – and this is also clearly derived from the discussed case law – that a rigid application of Schedule 2 is inappropriate.

The “mechanical” application of Schedule 2 in the determination of the degree of disablement of which an employee is suffering proves to be one of the most serious concerns currently experienced in practice.

Furthermore, the discretions that are granted to the Director-General must be exercised fairly and judicially.¹⁹⁵ The case of *Healy v Workmen’s Compensation Commissioner*¹⁹⁶ clearly illustrated that every employee’s personal circumstances should be taken into account when assessing the degree of permanent disability of which he is suffering. An individual approach for each assessment is required in terms of which the employee’s disability is assessed in the light of his circumstances. The degree of disablement assessed must be relative to the usefulness of the employee in the open labour market considering his line of work. In the non-COIDA case of *McLean v Sasol Mine (Pty) Ltd Secunda Colliery*¹⁹⁷ it was held that the employee was 100% permanently disabled to perform underground mine work, but only 20% for clerical work. There is an obligation on the employer to accommodate the disabled employee in the workplace where possible, or to find suitable alternative employment for the employee. Provision for the adjustment of the determination of the degree of disablement is made by section 49(2)(c) of COIDA, which provides that the Director-General may determine a higher percentage of permanent disablement for an injury which has *unusually serious consequences* for an employee as a result of the *special nature* of the employee’s occupation. An easy example to illustrate this would be a truck driver who has lost his index finger (10% permanent disablement) and his middle finger (8% permanent disablement). Most probably, this employee will be found to be permanently disabled to the degree of 18%. A professional pianist who has suffered the same injury will, however, face unusually serious consequences due to the nature of his occupation. The Director-General will be allowed to determine a higher degree of permanent disablement which will correspond to the actual impairment suffered by the pianist.

195 The discretions that are granted to the Director-General are discussed in chapter 4.1.

196 2010 SA (2) 470 (E).

197 2003 (24) ILJ 2083 (W).

Although there is allowance for deviation from the stipulated degree of disability in terms of Schedule 2, the author submits that Schedule 2 remains the point of departure for any assessment of permanent disablement. The Schedule is an annexure to the Act and should be read with the provisions of section 49. In the instance where an employee has suffered a permanent disablement not provided for in Schedule 2, the Director General must determine a percentage of disablement which will not lead to “a result contrary to the guidelines set out in Schedule 2.”¹⁹⁸ This indicates that Schedule 2 remains the primary guideline in the assessment of a permanent disablement. It is however recommended that the guidelines set out in Schedule 2 be revised and updated continuously.

Another important principle derived from case law, and which proves to be a challenge to interpret, is that although employees may not be 100% permanently disabled due to an injury, the pain caused by such injury may render them to be totally incapacitated for work. However, pain *per se* may not be compensated.¹⁹⁹ In the unreported matter of *Kirtley v The Compensation Commissioner and The Minister of Labour*²⁰⁰ the court found pain of such severe nature leading to the incapacity to work may be categorised as “any other injury resulting in the employee being bedridden” or “any other injury causing permanent disablement” in terms of Schedule 2 and may thus be assessed as a 100% permanent disablement. In *Johannes Lodewikus Pretorius v The Compensation Commissioner and The Compensation Fund*²⁰¹ the judge dismissed the argument that, allowing a claim for pain and suffering would “open the flood gates”, by emphasising that claimants are not compensated for the pain which they are suffering *per se*, but rather for the incapacity to work due to the pain. The author concurs with the findings of the court in both instances and submits that employees should be appropriately compensated in instances where pain leads to their incapacity for work.

Permanent disablement due to post-traumatic stress is regulated in terms of the *Government Gazette* No. 25132 of 27 June 2003, which stipulates that the total impairment due to PTSD shall be equivalent to 65% permanent disablement. The

198 Section 49(2)(b).

199 (2005) 26 ILJ 1593 (E) p.1597 par.6 at D.

200 (2005) 26 ILJ 1593 (E).

201 [2007] SAFSHC 128.

challenge here is not determining the degree of permanent disablement, but rather to determine when PTSD is suffered as a result of the work of the employee, i.e. to determine whether or not the PTSD arose out of and in the course of employment. It was held in *Karel Jooste Mouton v The Compensation Commissioner*²⁰² that a “longitudinal view” was needed to assess the patient’s condition in order to determine whether or not the PTSD he suffered from arose out of and in the course of his employment. The author submits that in order to determine whether or not PTSD suffered by an employee arose out of and in the course of employment, a comprehensive investigation needs to be conducted on the employee’s previous work conditions. It is required to establish which incident, series of events, exposure to certain scenarios or environments or suchlike caused the condition of the employee and whether or not there is a causal connection between these events and the employee’s employment.

The lack of medical expertise at the initial assessment of the degree of disability is an additional factor that leads to the incorrect determination of the degree of impairment of which the employee is suffering. For the diagnosis of occupational diseases, a medical advisory panel is appointed on a regional basis to assist with the diagnosis in individual cases.²⁰³ It is the author’s submission that there is a need for a similar panel of experts who are able to assist the Commissioner when assessing the degree of disability suffered by an employee due to an injury.

According to Olivier regulations that are in accord with COIDA should be adopted to capture a more detailed classification of injuries and associated rates of compensation. These regulations can be produced in the form of circular instructions and the author submits that these instructions may be utilised as a useful guideline in the accurate and fair determination of permanent disablements. In view of the statutory ascribed status and role of Schedule 2, it is recommended that Schedule 2 be revised accordingly, to capture or incorporate a more detailed classification.

202 [2008] JOL 22397 (C).

203 Landman “Employment Injuries” 42. In terms of section 70(1) of COIDA, the medical advisory panel also advises the Director-General on which occupational diseases should be included in Schedule 3 of COIDA. Furthermore, they offer advice on general policies concerning the diagnosis of and disablement as a result of occupational diseases.

Alternatively, the Act could be amended to allow for other instruments which provides for a more detailed classification to be considered.

The author concludes by submitting that, although COIDA lays a comprehensive foundation for the compensation for occupational injuries, more emphasis should be placed on an individualised approach for the determination of permanent disablement of employees who have met with an accident which arose out of and in the course of their employment by taking into account the above factors, where applicable and possible.

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