

# **A COMPARATIVE ANALYSIS OF THE PRESENT STATE OF EMPLOYEES COMPENSATION LAWS IN NIGERIA WITH GHANA, SOUTH AFRICA AND INDIA**

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## ***Abstract***

*Since the passage into law of the Employees Compensation Act in 2010, countless cases of workplace accidents have occurred in Nigeria. Yet there seems to be no succour for the Nigerian worker as many state governments have either refused to register with or do not have the will power to implement the legislation in their respective states. Some in the private sector continue to call for the review of the funding pattern of compensation for workers. With this scenario, it becomes increasingly difficult to implement the Act in the country and this means that countless of workplace injuries will not be compensated or properly handled as stipulated by the law. The aim of this paper is to examine the implementation of the Employees Compensation Act and like many other Acts that have come before it, to determine the implementation level. The primary objective of this paper is to find the various challenges that may be militating against the effective implementation of the Act with a comparative analysis of the implementation mechanism in other jurisdiction. This paper found that the expressions by employees indicate that the Employees Compensation Act 2010 is a welcome development and a timely intervention for the Nigerian workers. This paper therefore recommends that NSITF, the body saddled with the responsibility to manage the funds, should start to implement the Act immediately by updating their records and carry out public enlightenment campaigns to employees and employers in both the private and public services while paying compensation benefits to injured workers.*

## **Introduction**

In many parts of the world, once a Bill is assented to and it becomes a law, the effect is seen and sooner than later the implementation of such an Act is felt by all concerned. But the case in Nigeria seems to be somewhat

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different, as when bills are passed into laws, the effect is not easily visible unless such laws affect the political class or rich in the society.<sup>1</sup> Since the passage of the Employees` Compensation Act 2010 and the official commencement of the scheme in July 2011, the Nigerian Security Insurance Trust Fund (hereinafter NSITF), the agency saddled with the responsibility to manage compensation fund in Nigeria seems to have gone into a state of inactivity. NSITF seems to have too many challenges facing it that the implementation of the Act becomes a herculean task. According to Aibieyi,<sup>2</sup> any policy that is formulated but not fully implemented is not only useless but is of no significant value to anyone. Hence, it becomes crucial to evaluate the implementation level of public policies to ascertain if they have yielded the desired results or effects on society. The success or failure of any policy is predicated on the effective implementation of the programmes of such a policy.<sup>3</sup> No matter how good a policy or scheme is intended, the implementation tells its success or failure. According to Anderson,<sup>4</sup> a policy is evaluated by the recorded success of its implementation. With the recorded success so far one wonders how NSITF will be able to effectively implement the scheme.

To evaluate the success of the 2010 Employees Compensation Act, there will be need to examine its implementation, challenges, prospects and the success recorded so far. The commencement of Employees` Compensation Act 2010 should bring joy to Nigeria's teeming workforce, as a relief from the bottleneck involved in getting compensation for injuries in the workplace. But in a country such as Nigeria with a record of comatose policies and unimplemented ideas, the enthusiasm the new law has generated seems not to be gathering the momentum it had in 2010 when it was signed. The euphoria seems also to have been short-lived, as issues relating the Act is no longer making the air waves and the average Nigeria worker is not seeing the Act being translated into action. Cases of injuries at the work place without proper compensation still abound.

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<sup>1</sup> T Abolo, 'Managing Effective Transport Line' A paper delivered at a Seminar Organized for CEOs of Transport Companies in Benin July 8 & 9, 2005.

<sup>2</sup> S Aibieyi, *Public Policy-Making and Implementation in Nigeria* (Benin: Ethiope Publishing Corporation 2009).

<sup>3</sup> *Ibid.*

<sup>4</sup> J E Anderson, *Public Policy Making* (New York: Houghton Mifflin 1975).

This paper therefore examined the challenges of implementing Employee's Compensation Act 2010, which include: the inability of NSITF to reach the majority of Nigerian workers as many are not aware of the existence of NSITF; the non-compliance of many employers of labour and state governments to key into the scheme; and worker's lack of confidence in the scheme. This paper will also examine the successes recorded so far by the Nigeria Social Insurance Trust Fund (NSIFT), the agency saddled with the responsibility to administer the fund such as the registration of some key organisations and some state governments. This paper will also proffer suggestions on possible ways of improving the implementation of the Employees' Compensation Act 2010 and the efforts of NSIFT to attract other levels of government such as the local government into the scheme.

### **Scope of Workers' Compensation**

Workers compensation is a form of insurance providing wage replacement and medical benefits to employees injured in the course of employment in exchange for mandatory relinquishment of the employee's right to sue his or her employer for the tort of negligence.<sup>5</sup>

Workers compensation is not compulsory in Nigeria but it's surely of great benefits to those who have it. Generally, workers' compensation insurance is purchased through independent insurance companies, but recent development made the Federal Government of Nigeria, in its bid to improve the welfare of Nigerian employees enacted the ECA, which changed the status of workers compensation.<sup>6</sup>

Workers Compensation is a social insurance system falling under stated regulations that gives partial wage replacement for temporary or permanent loss of earnings for job related injuries and illnesses. It started in the 1800's in Germany and spread throughout the United States in the 1930's and 1940's. Workers' compensation provides workers with the knowledge that job related injuries are taken care of without the need to sue their employers.<sup>7</sup>

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<sup>5</sup> Worker's Compensation', Wikipedia, <<https://en.wikipedia.org/wiki/Workers'-Compensation>> Accessed on 14/4/2014.

<sup>6</sup> 'The Brief', Workmanship Insurance. <<https://www.insured.ng/articles/the-brief>> accessed on 20 July 2021.

<sup>7</sup> *Ibid*

In line with The Workmen's Compensation Decree of 1987, all businesses must provide Workers' Compensation coverage for the benefit of their employees who may be injured or incapacitated while on the job. This is a requirement of the law in Nigeria. This requirement is said to satisfy by purchasing Workers' Compensation insurance, which is available from private insurance companies that are licensed by the National Insurance Commission (NAICOM). This law applies compensation to four types of mishap viz: Permanent partial incapacity, Permanent total incapacity, Temporary incapacity, Fatal accidents, where death results.<sup>8</sup>

The pricing for workers' compensation is based on rates per 100 of payroll and depend on the job classification an employee is included within. Throughout the years different premium modification factors have been devised to help offset the cost for an employer depending on the specific employer's loss history, premium size and type of work.<sup>9</sup> Workers compensation's sole purpose is to cover the medical expenses accumulated by the injury, as well as financial support for the employee while recovering. As an incentive to encourage businesses to accept full responsibility for the premium costs of workers compensation, the workers gave up the right to sue the employer for damages resulting from a job related injury. Many seem to think workers compensation should be treated as an employee benefit. However rather than a benefit, workers compensation is a legally mandated right of the worker. As a mandated right, all medical bills and loss wages relating to an on-the-job injury are covered by the workers compensation coverage.<sup>10</sup>

### **Employee's Compensation Act, 2010**

The President of the Federal Republic of Nigeria signed the Employee's Compensation Bill into law in 2010. The ECA 2010, which repeals the Workmen's Compensation Act (WCA) of 2004 and it is designed to provide an open and fair system of guaranteed and adequate compensation for employees or their dependents in the event of death, injury, disease or disability arising out of or in the course of employment. The ECA is also intended to provides safer working conditions for employees by ensuring

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<sup>8</sup> *Ibid*

<sup>9</sup> *Ibid*

<sup>10</sup> *Ibid*

that all relevant stakeholders contributes towards the prevention of workplace disabilities and other occupational hazards.<sup>11</sup>

ECA applies to all employees in both public and private sectors in Nigeria, which is an effort to bring Nigerian Labour law consistent and in conformity with International Best Governance Practices and relevant International Labour Organizations (ILO).<sup>12</sup>

### **Significance of the ECA**

ECA is significant in several aspects, but broadly it does two significant things. First, it abolishes the Workmen's Compensation Act, 2004 and second; it established a new Compensation Scheme for injuries sustained at work or to and from work. The NSITF is a trust fund set up to manage the funds of the worker's and to address all issues relating to worker's insecurity, safety and anxiety.<sup>13</sup> That the primary objective of the Scheme is the protection of citizens against problems associated with descriptions and changes in their income situation which could expose them to poverty, suffering and indignity.<sup>14</sup>

### **Analysis on some of the Sections of the ECA**

Section 1<sup>15</sup> provides that the objectives of the Act are to:-

- (a) Provide for an open and fair system of guaranteed and adequate compensation for all employees or their dependants for any death, injury, disease or disability arising out of or in the course of employment;
- (b) Provide rehabilitation to employees with work-related disabilities as provided in this Act;
- (c) Establish and maintain a solvent compensation fund managed in the interest of employees and employers;

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<sup>11</sup> *Ibid*

<sup>12</sup> KPMG, 'Newsletter on Employee's Compensation Act, 2011' <[www.resourcedat.com.ng/wp-content/uploads/2011/08/Newsletter-on-Employee-Compensation-Act-2011.pdf](http://www.resourcedat.com.ng/wp-content/uploads/2011/08/Newsletter-on-Employee-Compensation-Act-2011.pdf)> accessed 21 July 2021.

<sup>13</sup> O L Ifedayo, 'The Employee Compensation Act, 2010' (2012) <<http://greymile.wordpress.com/2012/03/22/>> accessed 21 July 2021.

<sup>14</sup> V Ahiuma-Young, 'Employee Compensation Act Designed to Address Insecurity' Vanguard Newspaper, April 29, 2011 <<http://www.vanguardngr.com/2011/04/employee-compensation-act-designed-to-address-insecurity/>> accessed 20 July 2021.

<sup>15</sup> *Ibid*

- (d) Provide for fair and adequate assessments for employers;
- (e) Provide an appeal procedure that is simple, fair and accessible, with minimal delays; and
- (f) Combine efforts and resources of relevant stakeholders for the prevention of workplace disabilities, including the enforcement of occupational safety and health standards.

Section 2,<sup>16</sup> this section discusses the scope and application of the Act:

- (1) Subject to the provisions of sections 3 and 70 of this Act, this Act shall apply to all employers and employees in the public and private sectors in the Federal Republic of Nigeria.
- (2) The Nigeria Social Insurance Trust Fund Management Board (in this Act referred to as "the Board") shall have power to implement this Act and the Fund established under section 56 of this Act.

In analyzing the scope of the ECA, it is important to states that it saddles the Board with the responsibility of coordinating and implementing its provisions, managing the Fund and compensating the employees (or their dependents) out of the Fund, in the event of any injury, disability or death. The Fund is to be finance with a take-off grant from the Federal Government and through mandatory contribution by employers, gifts and grants from national and international organizations and proceeds derived from investment by the Board.<sup>17</sup>

Section 3<sup>18</sup> discussed exemptions of members, Where it provides Without prejudice to the generality of the provisions of section 2 of this Act, this Act shall not apply to any member of the armed forces of the Federal Republic of Nigeria other than a person employed in a civilian capacity.

Section 4<sup>19</sup> discusses Employee's Notification of Injury and the sub-section:

- 1) In every case of an injury or disabling occupational disease to an employee in a workplace within the scope of this Act, the employee, or in case of death the dependant, shall within 14 days of the occurrence or

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<sup>16</sup> Employees Compensation Act 2010, Act No 13, An Act to Repeal the Workmen's Compensation Act Cap. W6 LFN, 2004.

<sup>17</sup> *Ibid*

<sup>18</sup> KPMG (n 12)

<sup>19</sup> ECA (n 16)

receipt of the information of the occurrence, inform the employer by giving information of the disease or injury to a manager, supervisor, first-aid attendant, agent in charge of the work where the injury occurred or other appropriate representative of the employer, and the information shall include-...

Section 5<sup>20</sup> discuss Employer's obligation to report death, injury or disease of an employee and further provides in

- (2) Subject to sub-section (6) of this section, employer shall report to the Board and the nearest office of the National Council for Occupational Safety and Health in the State within 7 days of its occurrence every injury to an employee that is or is claimed to be one arising out of and in the course of employment.
- (3) Subject to sub-section (6) of this section, an employer shall report to the Board, within 7 days of receiving information under section 4 of this Act, every disabling occupational disease or claim for or allegation of an occupational disease.

Section 6<sup>21</sup> it discuss the Application for compensation and provides in

- (1) An application for compensation shall be made on the form prescribed by the Board and shall be signed by the employee or the deceased employee's dependant.
- (2) Unless an application is filed or a determination is made within one year after the date of death, injury or disability arising from an occupational accident or disease, no compensation shall be payable, except as otherwise provided in sub-section (3) of this section.
- (3) If the Board is satisfied that there existed special circumstances which precluded the filing of an application within one year after the date of the occurrence, the Board may pay the compensation provided by this Act if the application is filed within 3 years after that date.

Section 7<sup>22</sup> discuss the compensation for injury and provides in

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<sup>20</sup> *Ibid*

<sup>21</sup> *Ibid*

<sup>22</sup> *Ibid*

- 1) Any employee, whether or not in a workplace, who suffer any disabling injury arising out of or in the course of employment shall be entitled to payment of compensation in accordance with Part IV of this Act.

Compensation is payable only in respect of personal injury. Compensation is not payable in respect of damage or loss of property. However, personal injury is not limited to wounds, cuts or bruises which are visible to the eye but includes any other trauma such as nervous shock which produces a psychological injury.<sup>23</sup>

Section 8<sup>24</sup> also discuss compensation for mental stress and in 1) Subject to sub-section (2) of this section, an employee shall be entitled to compensation for mental stress not resulting from an injury for which the employee is otherwise entitled to compensation, only if the mental stress is...

Section 9<sup>25</sup> discusses compensation for occupational diseases and in sub-section

- (1) Where-
  - (a) an employee suffers from an occupational disease and is disabled from earning full remuneration at the workplace;
  - (b) the death of an employee is caused by an occupational disease;
  - (c) the disease is shown to be due to the nature of any employment in which the employee was employed, whether under one or more employments; or
  - (d) an employee suffers from any occupational disease listed in the First Schedule to this Act, compensation and health care benefits shall be payable under this Act.

Section 10<sup>26</sup> discusses compensation for hearing impairment and further provides that sub-section:

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<sup>23</sup> *Ibid*

<sup>24</sup> *Yates v South Kirkby Collieries Ltd* (1910) 2 KB 538

<sup>25</sup> *Ibid*

<sup>26</sup> *Ibid*

1) Where an employee suffers from hearing impairment of non traumatic origin, but arising out of or in the course of employment under this Act, the employee shall be entitled to compensation under this Act.

Section 11<sup>27</sup> provides that:

Where the injury to an employee occurs while the employee is working outside the normal workplace which would otherwise entitle the employee to compensation under this Act if the injury occurred in the workplace, compensation shall be paid to the employee under this Act if...

Also there is established the Employee's Compensation Fund (in this Act referred as 'the Fund') into which shall be credited all moneys, funds or contributions by employers for adequate compensation to employees or their dependents for any death, injury, disability or disease arising out of or in the course of employment.<sup>28</sup>

An independent Investment Committee ('the Investment Committee') will act in an advisory capacity to the Board.<sup>29</sup>

### **Employees' Compensation Fund**

Every employer is required to keep complete and accurate particulars of its payroll. The employer is required, within the first two years of commencement of the ECA<sup>30</sup> to make a minimum monthly contribution of 1.0 percent (1%) of its total monthly payroll into the Fund.

However, the Board may, by regulations, determine the actual contribution or rate of contribution to be made by each employer, which will vary based on the categorization of the risk factors of the particular class or sub-class of industry to which the employer belongs.<sup>31</sup>

The ECA<sup>32</sup> also provides that the Board shall assess employers, in the first instance, based upon estimates of their payroll for the year or as determined by the Board. The payment of the said assessment shall be due on 1st

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<sup>27</sup> *Ibid*

<sup>28</sup> *Ibid*

<sup>29</sup> Section 56 (1) ECA (n 16)

<sup>30</sup> Section 62 (1) *Ibid*

<sup>31</sup> Section 33 (1) *Ibid*

<sup>32</sup> KPMG (n 12)

January in the year for which it relates.<sup>33</sup> The Board may also approve payment of the contribution in instalments.

Where an employer is not assessed by the Board, the employer shall be liable for the amount for which it should have been assessed, or as much as the Board considers reasonable, and payment of that amount may be enforced as if the employer had been assessed for that amount. The payments made by each employer are to be credited to each employer's "Experience Account" (EA), maintained by the Board.

The EA will indicate the assessments levied on the employer and the cost of all claims chargeable in respect of the employer. An employee is not permitted to agree with his employer to waive or forgo any benefit or right to compensation to which he or his dependants is, or are or may become entitled to, under the ECA. Any agreement in respect of such waiver shall be void and unenforceable.<sup>34</sup>

### **Challenges of Implementation of the ECA**

The implementation of the ECA is not without its own challenges. Currently, the effective implementation of the scheme is being threatened by the refusal of some state governments and private sector employers to comply with the ECA. As of 2012, only 804 private sector employers have registered with the NSITF, one year after the take-off of the scheme. Of greater concern is the fact that large number that registered with the scheme is not complying fully with the provisions of the ECA. Also some state governments are yet to key into the scheme.<sup>35</sup>

Further investigation revealed that over 60 per cent of employers in the construction and manufacturing sector, where the highest level of workplace accidents occur, are not complying with the ECA in terms of remitting their contributions to the fund. Rather, employers are limiting the definition of "total payroll" to the basic salary, housing allowance and transport allowance, and have also set certain conditions which the NSITF must meet for them to key into the scheme.

One of the greatest challenges is getting employers to key into the scheme. The NSITF director, who spoke at enlightenment forum on employees'

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<sup>33</sup> Section 35 (2) ECA (n 23)

<sup>34</sup> Section 35 (1) *Ibid*

<sup>35</sup> KPMG (n 12)

compensation in Lagos, said 804 employers registered with the fund as at June ending, 2012, when the scheme has a year old, but noted that not all of them are complying fully with the provisions of the ECA. This, he said, has been a major challenge for the fund. He revealed that all categories of employers in the public and private sectors have been formally notified of the take-off of the Employees' Compensation Scheme (ECS) with effect from July 1, 2011.<sup>36</sup>

He further acknowledged that some employers had been remitting their contributions to the fund and appealed to those who are yet to register and remit their contributions to do so for effective management of the scheme. He explained that though emphasis is still on voluntary compliance with the ECA by employers, however, reminded those defaulting in the payment of their contributions of the legal implications of their action.<sup>37</sup> He further stressed that NSITF had received request from employers calling for a review of the rate of contribution but was swift to add that no action can be taken until after June 2013, two years into the implementation of the scheme as provided in the ECA.<sup>38</sup>

He pointed that 11 banks have been appointed as contribution banks, from which an employer can make a choice. He listed the banks to include Skye Bank Plc, FCMB Plc, Zenith Bank, GT Bank and UBA. Others include Fidelity Bank Plc, Unity Bank Plc, First Bank Plc, Diamond Bank Plc, Enterprise Bank and Union Bank Plc. He reiterated that the management of NSITF was doing everything possible to ensure that the administrative cost of managing the scheme does not exceed ILO's benchmark for the Social Insurance Scheme.<sup>39</sup>

And he finally noted that incomplete documentation by those applying for claims has been another challenge for the NSITF. He observed that the claims applications received were not fully completed by the beneficiaries before submission.<sup>40</sup>

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<sup>36</sup> 'Employees Compensation Scheme under Threat' (2012) Thisday Live Articles, 8 <<http://www.thisdaylive.com/articles/employees-compensation-scheme-under-threat>> accessed 20 July 2021.

<sup>37</sup> V Ahiuma-Young (n 14)

<sup>38</sup> *Ibid*

<sup>39</sup> *Ibid*

<sup>40</sup> *Ibid*

## **Lessons from Other Jurisdiction**

### **Ghana**

Ghana is gradually becoming an industrialized nation, and this change is exposing a large percentage of the workforce to various health and safety hazards at the workplace. The Labour Department of Ghana Annual Report (2000) gave a total of 8,692 work-related accidents reported to the Department for compensation claims, while the 1999 figure stood at 4,088. These figures represent only those occurring at the formal sector. The preamble of the International Labour Organisation (ILO) constitution highlights that the protection of the worker against sickness, diseases and injury arising out of employment is fundamental element of social justice. Occupational safety and health is human right and decent work eventually is safe work.<sup>41</sup>

The Constitutional provisions for occupational health and safety of persons employed at workplaces in Ghana are guaranteed by Article 24(1) of the 1992 Constitution of Ghana. Article 24(1) provides, among others that ... “every person has the right to work under satisfactory, safe and healthy conditions ...” It covers those who are engaged in both the formal and informal sectors, as well as those who are self-employed. The aim is to ensure that all workers work under safe conditions devoid of significant adverse effects on their health.

The Constitutional protections are broader than the Workmen’s Compensation Law 187. The constitution places the burden on the government to ensure that the safety, health and welfare of persons at work are safeguarded. This is additionally provided for under Article 36(10), that: The State shall safeguard the health, safety and welfare of all persons in employment, and shall establish the basis for the full deployment of the creative potential of all Ghanaians. Current legislations for the safety, health and wellbeing of persons are scattered in a number of public laws and policies such as the Factories, Offices and Shops Act, 1970, (ACT 328), the Mining Regulations, 1970, (LI 665), the Radiation Protection Instrument, 1993, (LI 1559), and the Workmen’s Compensation Act 1987 (PNDC 187) [1, 9] The day to day administration of these laws and policy are all under

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<sup>41</sup> S. Leka, A. Griffiths, & T. Cox, *Work Organization and Stress. Protecting Workers’ Health Series*, No. 3. Geneva: World Health Organization.

different Ministries and Agencies. The Factories, Offices and Shops Act (FOSA) is administered by the Department of Factories Inspectorate of the Ministry of Employment and Social Welfare but the provisions of the Mining Regulations, are enforced by the Mines Department, the enforcement wing of the Minerals Commission. The Radiation Protection Instrument, 1993 (LI 1559) is administered by the Radiation Protection Board, under the Ghana Atomic Energy Commission. The Workmen's Compensation Act is under the Labour Department of the Ministry of Employment and Social Welfare.<sup>42</sup>

The primary legal authority for Workmen's Compensation regime and administration in Ghana is the Workmen's Compensation Law of 1987. Section 1 and 2 of Law 187 provides:

- (1) This law shall apply to workmen employed by the Republic as well as by private persons, except in the case of persons in the Armed Services of the Republic.
- (2) An injured workman shall not suffer any diminution in his earnings while he undergoes treatment for injuries he has sustained through an accident arising out of, and in the course of, his employment.

The law appears to be addressing those engaged in the formal (public-private) sector, although those in the informal sector probably need such protection the most due to their limited bargaining power. This gap is incongruent to the goals of the WCL 187. The goals of WCL187, apart from its formal sector employee poverty reduction intent, are: to provide workers with insurance coverage against injury.

It also seeks to lessen or eliminate wasteful litigation for benefits for such injuries, and to provide policies that promote occupational health and safety as stated in the explanatory notes to WCL 187. Even before the promulgation of WCL187, employers had a general duty of care even if there were no specific performance or legal standards. They were still obligated to protect workers, where there was a recognizable hazard against health & safety, where employees were likely to be exposed to risk, or

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<sup>42</sup> W A Khan, T Mustak, and A Tabassum, 'Occupational Health, Safety and Risk Analysis' (2014) *International Journal of Science/Safety, Environment*; Ministry of Health/Ghana Health Service (2010). Occupational Health and Safety Policy and Guidelines for the Health Sector, Ghana, GHS.

where the work posed risk of death or serious injury. The overall goal of the WCL 187 is no different from the net effect of the labour act on the rights of workers

The Labour Act, 2003,<sup>43</sup> Section 118 states, inter alia, that, it is the duty of an employer to ensure that every worker employed by him or her works under satisfactory, safe and health conditions. (d) Takes steps to prevent contamination of the workplaces by, and protect the workers from, toxic gases, noxious substances, vapours, dust, fumes, mists, and other substances or materials likely to cause risk to safety or health. (h) Prevent accidents and injury to health arising out of, connected with, or occurring in the course of, work by minimizing the causes of hazards inherent in the working environment.<sup>44</sup>

Today, compliance with existing national occupational safety and health specific standards require the control of ventilation, air contaminants, noise as well as emergency exits, fire protection, sprinklers and evacuation plans, medical & first aid treatment. It also includes the handling and storage of explosives, hazardous waste, and toxic material. It provides for improved general working conditions such as waste disposal, toilets, showers, dressing rooms, ventilation, and food handling. The employer is duty bound to conduct examination of the workplace to ensure it is in conformity with health and safety standards, provide proper warnings to employees of potential hazards, provide training in hazard handling and maintain records concerning injuries, illness and fatalities. Despite the progressive intent of the Labour Act or the WCL 187, in the formal sector in Ghana, less than a fifth of all companies offer their workers with protection under either the WCL 187. This is not an optional choice but due to the lack of enforcement of the legal provisions for the protection of workers under both legislation the defaulting employers are not punished. Most of the workers do not even know that they are entitled to, for example, workmen's liability insurance and compensation in the event of an injury.

Although compliance is sparse, under the Ghana Workmen's Compensation law, all fatalities and injuries are to be reported to WC officials. The

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<sup>43</sup> Ghana Labour Act 2003 (Act 651)

<sup>44</sup> B B Pupilampu, S H Quartey, 'Key Issues in Occupational Health and Safety Practices in Ghana: A Review' (2012) (3)(19) *International Journal of Business and Social Science* p. 151-156.

abatement of violations is allowed and job safety and health protection posters are encouraged as positive contribution towards worker education. As additional preventive measure, risk assessment is demanded of employers that are in hazardous activities. They are required to conduct periodic testing if there is exposure to hazardous materials such as asbestos, vinyl chloride, or lead to determine presence and contamination and medical treatment. Despite the seemingly broad and progressive approaches of the national legislation, namely WCL 187, the bulk of the working population of Ghana are left unprotected, according to the Ghana Association of Occupational and Environmental Health.<sup>45</sup>

“Ghana with a population of over 24 million has agricultural employment taking up the largest share of total employment (55.8%), followed by trading (15.2%) and then manufacturing (10.9%). Informal employment makes up 91.3% of total employment, with the majority of informal workers in SMEs and 53.9% of this informal labour force working in the agricultural sector. As is generally acknowledged, most informal workers are exposed to a substantial level of risks to their health and safety. This is because the work environment in which many of them operate is rife with various hazards, coupled with inadequate labour protections. Though there is very little OHS data available nationwide, occupational injuries and diseases are common as it appears among the list of top 10 causes of outpatient attendance almost every year” [8,17].

### **The Enactment of WCL 187**

Prior to the enactment of WCL187, injured workers had to fend for themselves, sometimes suing the employer for damages. Employer liability was based on negligence due to the general duty of care, proof of which was by circumstantial evidence to show that a breach had occurred, or there was notice of the possibility of the breach. The standard of proof was purposeful, knowing, reckless or negligence. In a purposeful act, it is not required that the employer should have had prior notice of the danger in order to prove negligence, and the same applies to reckless act. A reckless act presumes that the perpetrator had knowledge of the gravity of the consequences of his conduct on others but disregarded the duty of care he

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<sup>45</sup> I F Frokok, M A Asumeng, and K Nyarko, ‘Safety Climate as a Predictor of Quality of Work Life: An Empirical Study Among Miners in Ghana. (2014) (6)(18) *European Journal of Business and Management*. 107-116.

owed to his employees. In negligent cases, the notice requirement can be met with evidence through expert testimony or circumstantial evidence or both or through 'res ipsa loquitur' (the thing speaks for itself) doctrine. The burden is on the defendant to disprove the presumption of negligence. Employers' first defence to the employee's claim of negligence was contributory negligence on the part of the employee. That is to say the worker's own negligence contributed to his injury. The employer could also raise the fellow-servant doctrine. This meant that the accident was caused by the negligence of a fellow worker. There was also available to the employers the defence of the assumption of risk.

That is to say the employee knew or should have known of the inherent risks involved in the job he was hired to perform. The 'no fault' doctrine was promoted by central government in hopes of reducing litigation by workers against their employers so as to focus more on productivity and nation building. The 'no fault' approach was widely adopted in Workmen's Compensation legislation in Ghana and other jurisdictions to preclude litigation and advance national development. Different legal systems elsewhere responded to similar socio-economic problems with legal mechanisms which may look different, although they each served the same or similar purpose.

### **Challenges in the Legislative Framework**

The legislative framework for Workmen's Compensation in Ghana is fraught with challenges and gaps. The challenges include the confusion within which the Workmen's Compensation Law of 1987 was borne. The constitution places the burden on the government to ensure that the safety, health and welfare of persons at work are safeguarded as stated in Article 36(10) and previously quoted. It could have placed this burden as the collective or shared responsibility between the public-private partnerships engaged in job creation and retention. Instead, the obligation as stated in the constitution of 1992 is very general and does not have the specificity of demand for occupational risk assessment. There have been no serious efforts at the level of the Ministry of Social Welfare and Employment to develop the policy framework for occupational safety. Due to this lapse there are many workers in both the formal and informal sectors that are not protected under the law.

## South Africa

The first Workmen's Compensation Act (WCA) in South Africa was passed in 1914. Prior to the passing of the act employees injured at work had to institute a common law suit against the employer for negligence. However the difficulty of proving negligence and the high cost of litigation rendered the worker's common law right minimal. Compensation would only be paid if blame could be laid directly with the employer.<sup>46</sup> While the 1914 WCA only recognised injuries, amendments to the act in 1917 extended coverage to provide for specified industrial diseases. In its early form, the WCA was ineffective at providing adequate compensation because employers were not compelled to insure their workers against the risk of workplace injuries. At the same time, firms that did not have insurance could face insolvency from a serious incident, while the employee affected could face poverty. As a result, by 1930, workers, industry and government recognised the need for compulsory insurance.

As the mining industry faced a high accident rate, the Rand Mutual Assurance Company started in 1894. By 1914 half the mines belonged to this self-insurance scheme and by 1931 (when a new WC bill came into effect) all mining companies belonged to Rand Mutual. The member companies were exempted under the 1931 bill. The 1934 WCA made insurance compulsory, through private companies rather than a state fund favoured by workers and trade unions. While the 1934 WCA had increased benefits, organised labour was unhappy with the scheme as the premiums were too high. There were 57 insurance companies that were organised such that competition was limited. The Federated Employers Mutual Assurance Company started in 1936 in response to the situation.

In 1941, a new coalition government was formed which included the Labour Party. The political interest of industry favoured concessions to labour to gain support for the war effort. As a result the 1941 WCA was passed in which all accidents were to be reported to a WC Commissioner. There were to be no more private compensation agreements between employers and workers. Compensation would be paid from a state fund to which all employers would contribute on the basis of companies' wage

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<sup>46</sup> N Rankin, 'The Regulatory Environment and SMMEs. Evidence from South African Firm '(2006) Level Data Development Policy Research Unit working paper 06/113. University of Cape Town, Cape Town.

budgets. The 1941 Act aimed to institute a state scheme as well as increase benefits. While there have been subsequent amendments to the 1941 Act these amendments have not made significant changes to the fundamentals of the act.<sup>47</sup>

Despite the numerous amendments of the 1941 Workmen's Compensation Act, there remained a number of shortcomings. In 1993, the Compensation for Occupation Injuries and Diseases Act (COIDA) replaced the former WCA to address these issues. Thus, while the WCA had a pay ceiling and therefore did not cover employees of higher income groups, the 1993 Act covers all employees for compensation not just those classified as 'workmen'. A possible reason for this is that employees (such as professionals, office workers etc.) who do not do manual labour are less likely to claim for compensation but including them with the 'workmen' would increase the pool of funds available to pay compensation to those workers in higher risk categories i.e. there would be cross-subsidisation of lesser-paid workers by higher-paid. In addition, the COIDA also changed from only covering widows in the WCA to cover the surviving spouse irrespective of gender. Furthermore, new developments in the labour market, especially the casualisation of works through labour brokers, meant that significant numbers of workers were no longer covered under the WCA as they were no longer directly employed by the companies. Under COIDA, all types of work relationships are covered including works that have been brokered. Finally, occupational diseases under the WCA were compensated by calculating the last salary received while in employment. This meant that if a worker was diagnosed with a disease years after their employment, they would receive insufficient compensation given the inflation rate. Whereas under COIDA (Section 67:2), if the employee is no longer in employment at the time of the commencement of the disease, his calculated earnings will be based on the earnings he would most likely to be earning if still working.<sup>48</sup>

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<sup>47</sup> T I Rosenthal, G Macun, and R Standing 'South African Enterprise Labour Flexibility Survey- Report on Worker Representative Survey 1995' (1997) Presentation at the Labour Market and Enterprise Performance in South Africa Conference.

<sup>48</sup> I Macun, 'Evolving Practices in Industrial Relations and Collective Bargaining: The SALFS Results Sociology of Work Unit' (1997) University of Witwatersrand. Presentation at the Labour Market and Enterprise Performance in South Africa Conference.

Therefore if the employee is diagnosed with a work-related illness many years after their employment, their compensation will be in line with current prices unlike the compensation provided under the WCA. The COIDA provides a system of no-fault compensation for employees injured or who contract diseases during the course of their employment. “No-fault compensation” is a legal rule that an aggrieved party is entitled to compensation without having to prove any other party was at fault for the accident. The entire structure of the compensation scheme in South Africa is defined within the Act. Thus, who contributes to the fund, the amount of the contribution, who is covered by the fund, the type of injuries and diseases covered by the fund as well as the size of compensation are stipulated in the Act. Furthermore, it clearly defines the procedures, the agents and their responsibilities. Any recommended changes to the compensation scheme in South Africa would result in an amendment of the COIDA. While the COIDA is supposed to cover all workers in South Africa for work related accidents and diseases, it currently excludes domestic, informally employed, independent and self-employed workers from compensation.<sup>49</sup>

It has been argued by the Compensation Fund that the rationale for the exclusion of domestic workers and informally employed is that it is logistically impossible to administer. For domestic workers it is difficult to administer and monitor as there is potential for a single employee to have multiple employers. In case of an injury, the domestic worker has to take the civil route of claiming compensation from the employer. Self-employed are excluded from the act as there is no contract of employment. Military and police as well as correctional services are generally included, except in the case of war.<sup>50</sup>

## **India**

Injured workers and worker compensation are key liability issues for any business in India. This is particularly the case for companies with large labour forces, such as information technology and business process outsourcing (IT-BPO) or industrial companies, but small businesses are also

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<sup>49</sup> P Moll, ‘Black South African Unions: Relative Wage Effects in International Perspective’ (1993) (46)(2) *Industrial and Labour Relations Review* pp. 245-261.

<sup>50</sup> P Moll, ‘Compulsory Centralisation of Collective Bargaining in South Africa’ (1995) Mimeo, Chicago, December 17.

impacted by labour laws that mandate compensation for employees injured on the job.

### **What Laws Govern Compensation for Workplace Injuries?**

Compensation for workers in India varies depending on the size of the company. If the business employs more than 20 employees, the Employees' State Insurance Act, 1948 applies. Under this act, employees and the company pay toward an insurance benefit in case of injury. When a workplace injury occurs, the injured employee is able to avail of both medical and financial support.

If the business employs less than 20 people, the company must refer to the Employee's Compensation Act, 1923 (Previously, Workmen's Compensation Act, 1923). This act outlines methods for providing compensation to employees injured on the job. The Act is particularly pertinent to small office places and small-scale manufacturing operations. The 2017 amendment in the Employee's Compensation Act, 1923, makes it mandatory for employers/companies to inform its employees of their rights to compensation under the Act, either in writing or electronically, in a language understood by the employee. Failing to do this, the employer is liable to a penalty of INR 50,000 (US\$715), which may be extended to INR 100,000 (US\$1,431).

### **When do Employers need to Compensate an Injured Employee?**

The Act requires employers to compensate an employee who has suffered an accident while performing his/her duties during work hours, resulting into:

- Permanent total disability,
- Permanent partial disability,
- Temporary disability, or
- Death.

#### *Permanent Total Disability*

Permanent total disability is relevant when a worker can no longer perform any of their previous duties due to an on-the-job injury. This injury must be assessed to permanently affect the employee's ability to perform their duties.

In this case, the worker is entitled to a minimum compensation of INR 140,000 (US\$2,004) or 60 percent of his/her monthly wage multiplied by a factor based on the employee's potential future earnings. The total payment can be significantly larger based on the age of the injured employee.<sup>51</sup>

#### *Permanent Partial Disability*

When an employee has sustained an injury that renders them unable to perform their role at the same capacity for the rest of their career, the employee is entitled to permanent partial disablement compensation. For partial permanent disability, compensation is dependent upon the nature of the injury and the employee's loss of earning capacity. The Act includes a schedule of possible permanent disability injuries and lists the loss of earning capacity. For example, an arm amputated at the shoulder is assessed as a 90 percent loss of earning capacity, while the loss of an entire index finger is considered a 14 percent loss of earning capacity.<sup>52</sup>

In cases that the worker's injury is not included in the given schedule, employers must provide a medical doctor to perform an evaluation of the injured employee and calculate the loss of earning capacity. The compensation for the injured worker is then established based on the percent of lost earning capacity multiplied by the monthly wage multiplied by a factor based on the employee's potential future earnings.

#### *Temporary Disability*

Employees that sustain injuries that render them disabled, permanently or partially, for a temporary period are compensated through temporary disability. In cases of temporary disability, an injured worker will be paid 25 percent of their salary every two weeks, making monthly compensation fifty percent of total earned wages. In cases of temporary injury, a medical doctor is required to examine the injured employee and determine necessary leave. A worker on temporary disability leave must undergo a physical examination twice in the month following the injury and once during the following months if they are still claiming disability.

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<sup>51</sup> F A Bohlen, 'A Problem in Drafting of the Workmen's Compensation Act' (1911) 25 *Harvard Law Journal* p 328 – 329.

<sup>52</sup> J Smith, 'Sequel to Workmen's Compensation Acts' (1914) 27 *Harvard Law Review* p. 235.

### *Death*

In the unfortunate case of a death, the worker's immediate dependents are entitled to compensation. The compensation payable on death is INR 120,000 (US\$1,717), or half the worker's monthly wage multiplied by a factor based on the employee's potential future earnings. In all cases, it is the employer's duty to ensure that the workers receive these medical evaluations without incurring personal expenses.

The Act dictates that if the employer and injured employee do not come to an agreement on compensation, the dispute must be settled in a court of law.<sup>53</sup>

A court case involves testimony from the employee's family, co-workers, and workplace supervisors, and is mostly costly as well as time-consuming for both the employer and the injured employee. Such disputes often have a serious impact on morale within small businesses.

To avoid such burdens, employers must regularly audit human resource materials and policies to ensure that their business is in compliance with relevant health and safety laws. Small offices that do not maintain India-based human resource personnel, or use documents drafted for other international offices, should consider consulting local experts to audit their human resource materials and policies. This, combined with employee training, can help ensure that businesses are able to manage workplace injuries effectively.<sup>54</sup>

The Act is basically made for the employees so that when they incur expenses for the injury suffered during an accident, they can get compensation from the employers. The basic rule of vicarious liability applies in the act. The employer is the master and the employee is the servant. The employee gets compensation only when the injury takes place in the course of employment and in the workplace.

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<sup>53</sup> E Wambough, 'Workmen's Compensation Acts: Their theory and their Constitutionality' (1911) 25 *Harvard Law Journal* 129 – 139.

<sup>54</sup> R W Rideout, *Principles of Labour Law* (London; Sweets and Maxwell 1979) p 616 – 617.

## **Conclusion**

The passage and signing into law of the Employees Compensation Act 2010, for the first time in the history of Nigeria, has given the employees a sense of belonging, as they now have a law in their interest and favour. This Act was designed to provide remedy to the problems and inability of workers to get compensations even when they were injured at the work place. The expressions by employees indicate that the Employees Compensation Act 2010 is a welcome development and a timely intervention for the Nigerian workers. The Act is laudable but the problem will be the implementation because of the various problems militating against its operation.

One of such problems is the ability of Nigerian Social Insurance Trust Fund (NSITF) to be able to reach all nooks and crannies of the country to register organizations that have up to fifteen staff in their employ for the scheme, This is a big challenge because the NSITF will require skilled manpower, finance and all the logistics to attain this feat. Nigeria has over 48,000,000 persons as the working population.

The Act has so much to give to the Nigerian workers. Imagine compensation being paid for injuries that occur outside the workplace, this can motivate works to give their best thereby increasing productivity. Employers are not allowed to deduct (directly or indirectly) from the employees remuneration. In addition to payment of compensation, the Board is mandated to offer vocational, rehabilitation and counselling services to an injured employee with a view to getting such employee back to work or lessening or removing the resulting disability.

The data from the survey indicated major problems the Nigeria Social Insurance Trust Fund may be facing; that of acceptance, a majority of the respondents do not have confidence in the scheme. With as much as 66% of the respondents saying that they do not have confidence in the scheme may be a real challenge for the implementation of the scheme. The survey also clearly brought to the fore that majority of Nigerian workers are not aware of the existence of this laudable Act. NSIFT must as a matter of urgency change its modus operandi so as to reach out to workers and employers of labour to key into the scheme.

## **Recommendations**

- a. As a matter of urgency the Nigeria Social Insurance Trust Fund (NSIFT) should embark on update of its records of existing organizations.
- b. The management of Nigeria Social Insurance Trust Fund (NSIFT) should liaise with the Corporate Affairs Commission (CAC), state Boards of Inland Revenue, Federal Ministry of Labour and Productivity, Federal Inland Revenue Services to get a comprehensive data of registered companies in the country.
- c. NSIFT must put measures in place that can encourage the local governments to key into the scheme.
- d. NSIFT must endeavour to embark on enlightenment campaign to sensitize the Nigerian workers of their rights and how they could benefit from the provisions of the Employees Compensation Act 2011.