

Employment Injury Protection in Eastern and Southern African Countries

Lethokwa George Mpedi
Mathias Ashu Tako Nyenti



Centre for International
and Comparative Labour
and Social Security Law
(CICLASS)



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ACRONYMS AND ABBREVIATIONS

AfDB	African Development Bank
AIDS	Acquired immune deficiency syndrome
AU	African Union
COIDA	Compensation for Occupational Injuries and Diseases Act
DFID	The United Kingdom Department for International Development
DoL	Department of Labour, South Africa
EI	Employment injury
eKLR	Kenya Kaw Reports
EU	European Union
FAO	Food and Agricultural Organization
FES	Friedrich Ebert Stiftung
GDP	Gross domestic product
GNI	Gross national income
HDI	Human development index
HIV	Human immunodeficiency virus
HTC	HIV counselling and testing
ILO	International Labour Organisation
ISSA	International Social Security Association
LFPR	Labour force participation rate
LSLC	Lesotho Labour Court
MHSA	Mine Health and Safety Act
MOLSA	Ministry of Labour and Social Affairs, Ethiopia
MoLSS&S	Ministry of Labour, Social Security and Services, Republic of Kenya
NAOT	National Audit Office, United Republic of Tanzania
NCPWD	National Council for Persons with Disabilities, Republic of Kenya
NSSA	National Social Security Authority, Zimbabwe
NSSF	National Social Security Fund, United Republic of Tanzania
NSRNOD	National system for recording and notification of occupational diseases
OAU	Organisation of African Unity
ODMWA	Occupational Diseases in Mines and Works Act
OECD	Organisation for Economic Co-operation and Development
OHSA	Occupational Health and Safety Act
OSH	Occupational safety and health
POESSA	Private Organizations Employees Social Security Agency
PSSA	Public Servant Social Security Agency

PWAS	Public Welfare Assistance Scheme
PWDs	Persons with disabilities
PWSD-CT	Persons with Severe Disabilities Cash Transfer
RAF	Road Accident Fund
SADC	Southern African Development Community
SAMAT	South African Multidisciplinary advisory team
SASPEN	Southern African Social Protection Experts Network
SMEs	Small and medium enterprises
SNPF	Swaziland National Provident Fund
SSA	Social Security Administration, USA
SSC	Social Security Commission, Namibia
Stats SA	Statistics South Africa
TB	Tuberculosis
TEBA	The Employment Bureau of Africa
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UNTC	United Nations Treaty Collection
WCRC	Workers' Compensation Rehabilitation Centre
WIEGO	Women in Informal Employment: Globalizing and Organizing
ZWBHC	Zimbabwe Bulawayo High Court
ZWHHC	Zimbabwe Harare High Court

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The opinions expressed in this publication are essentially those of the authors. Therefore, they do not represent in any sense the views of the ILO, FES and the authors’ employer.

Authors

Johannesburg, March 2016

EXECUTIVE SUMMARY

The study seeks to review the provision of employment injury protection schemes in selected eastern and southern African countries. This is in order to fill the knowledge gap as regards the situation on employment injury and compensation in the eastern and southern African region.

Employment injury schemes have been established in all eastern and southern African countries to cover the risk of occupational injuries and diseases. These schemes should endeavour to prevent occupational injuries and diseases, rehabilitate and/or reintegrate the victims of occupational injuries and diseases into the labour market, and pay compensation to the injured worker or a worker who contracted an occupational disease or survivors' benefits.

There are three main types of employment injury systems in eastern and southern Africa. These are *social insurance schemes*, *employer liability schemes* and *mixed social insurance and employer liability systems*. In total there are five social insurance systems (Ethiopia, Namibia, South Africa, Zambia and Zimbabwe), two of which are separate employment injury schemes. There are five employer liability systems (Botswana, Kenya, Lesotho, Malawi and Swaziland). Tanzania has a mix social insurance and employer liability system.

The systems face many challenges which negatively impact on their ability to achieve their objectives. Some of the challenges include out-dated laws, fragmentation of laws and administering institutions, lack of coordination, narrow scope of coverage and exclusion of several categories of workers, non-reporting of accidents and diseases, institutional and administrative issues, poor compliance with occupational safety and health laws and weak enforcement of these laws, failure to provide necessary training, prevalence of employer-liability schemes, focus on compensation, and inadequacy of benefits and lack of awareness and of research on occupational safety and health.

These challenges indicate that there is a need for measures to improve the employment injury protection situation of the east and southern African countries. The following measures are thus recommended: review of occupational safety and health legislation, extension of scope of coverage of employment injury schemes, replacement of employer liability schemes with social insurance schemes, focus on prevention and rehabilitation/reintegration, improvement of monitoring and enforcement of occupational safety and health laws, enhancement of occupational accidents and diseases notification systems, and improvement of employment injury benefits.

ABOUT THE AUTHORS

Letlhokwa George Mpedi completed his B Juris degree (1996) and LLB degree (1998) at Vista University. In 2001, the LLM degree in Labour Law was conferred upon him by the then Rand Afrikaans University (now University of Johannesburg). He was twice the recipient of the *Deutscher Akademischer Austauschdienst* (DAAD) award (in 2000 and 2001), for purposes of doing research in Germany for his LLM dissertation and LLD thesis respectively. In 2002, a National Research Foundation doctoral research award was also granted to him. Upon completing his LLB he was employed as a Junior Lecturer in the Department of Mercantile Law at Vista University (Mamelodi Campus). He joined the Centre for International and Comparative Labour and Social Security Law (CICLASS) at the then Rand Afrikaans University as a researcher in 2000. In August 2003, Prof. Mpedi accepted a position as a Research Fellow at the Max Planck Institute for Foreign and International Social Law in Munich (Germany). Upon his return from Germany in 2006, he was employed as a Deputy Director at CICLASS. In the same year the LLD degree in Mercantile Law was conferred upon him by the University of Johannesburg. He is currently Executive Dean of the Faculty of Law, and Director at CICLASS in the Department of Mercantile Law at the University of Johannesburg. Prof. Mpedi has delivered papers at numerous national and international conferences and also regularly publishes on labour law and social security.

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GENERAL OVERVIEW

1.1 BACKGROUND AND PURPOSE OF STUDY

The purpose of the study was to review the provision of employment injury (EI) protection schemes in selected eastern and southern African countries. The eastern African countries covered in this study are the Federal Democratic Republic of Ethiopia and the Republic of Kenya; the southern African countries reviewed are the Republic of Botswana, Republic of Lesotho, Republic of Malawi, Republic of Namibia, Republic of South Africa, Kingdom of Swaziland, United Republic of Tanzania, Republic of Zambia and Republic of Zimbabwe. The study endeavoured to fill the knowledge gap as regards the situation on EI and compensation in eastern and southern Africa. In so doing, the study aimed to:

- shed some light on the various approaches to EI protection including, but not limited to, prevention, compensation and rehabilitation frameworks adopted in various countries within the eastern and southern Africa regions;
- promote learning between countries' experiences;
- encourage cooperation within the eastern and southern and African regions in the structuring and delivery of EI benefits;
- take into account labour migration in national legislation, including the need for case management and care continuation when workers return home;
- explore, where they exist, alternative instruments/measures, including non-contributory social protection programs to cater for disabled poor and vulnerable workers, at risk of extreme poverty, deprivation and social exclusion; and
- develop recommendations for the reform and future development of EI schemes in eastern and southern Africa.

1.2 CONCEPTUAL FRAMEWORK

The world of work is laden with risks for workers. These risks could take the forms of occupational injuries or diseases. Thus, it is hardly surprising that the common law imposes a duty on employers to protect employees from occupational injuries and diseases. This duty is largely codified in occupational health and safety (OHS) laws in many countries of the world inclusive of those under review in this study. Nevertheless, occupational injuries are not always preventable. When they occur, there is need to compensate the injured worker or a worker that contracted occupational diseases. In an unfortunate situation where a worker dies because of the disease, survivors' benefits need to be paid to the worker's dependants. Apart from the option of suing the employer

in delict, where such an option exists, schemes have been established in many countries to administer the collection of contributions and the payment of benefits to eligible beneficiaries. However, compensation is not an end in itself. It should be supported by measures to rehabilitate and/or reintegrate the victims of occupational injuries into the labour market. In a nutshell, occupational injuries and diseases prevention programmes, compensation schemes and rehabilitative measures are interconnected. For instance, effective accidents and diseases prevention programme is in the long-term key to the financial viability of any occupational injuries and diseases scheme.¹

Two types of employment injury schemes are identifiable, namely: social insurance and employer liability schemes. Social insurance-based schemes are described as follows:

Social insurance-based EI [employment injury] schemes involve the creation of a national fund for employment injury and disease. Such a scheme is usually held under public administration, and often administered by a tripartite board including the social partners. Contributions into the fund generally come from employers, sometimes from employees, and there may also be a contribution from general revenue i.e. taxes. It is a government agency which usually has responsibility for collecting the contributions, assessing claims, making compensation payments and generally overseeing the financial sustainability of the fund. An EI scheme may be specific or it may be a component of a broader system, with benefits payable in the event of unemployment, sickness, disability, maternity, retirement and health.²

Countries that have adopted a social insurance scheme in Africa include Mauritius, Mozambique, Namibia, South Africa (mining and construction: employer liability, private insurance), Tunisia and Zambia.³ Employers-liability systems, unlike the social insurance based schemes, are founded on the principle that employers are held liable in certain instances for disabilities suffered by their employees.⁴ As shown in Table 1.1, in spite of the differences, there are certain points of commonality between the two schemes. For instance, they both involve the pooling of risks and define the benefits to be disbursed.⁵

1 Giroud-Castiella V, Kim J & Maurice M. 2006. The linkage between employment injury scheme and occupational safety and health. ILO, *Social Protection*. [Retrieved 6 October 2014] <http://www.social-protection.org/gimi/gess/ShowTheme.do;jsessionid=5733c7d1b72e0e4c0a0fb8ed4cc48162b0c1c95e2e570e0c0b78637a0c810ffd.e3aTbhuLbNmSe34MchaRaheKbh90?tid=3705&lang=EN>.

2 ILO (International Labour Organization). 2013c. *Strengthening the role of employment injury schemes to help prevent occupational accidents and diseases*, 6. [Retrieved 6 October 2014] http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_214022.pdf

3 *Ibid.*

4 *Ibid.*

5 *Ibid.*

TABLE 1.1 The distinction between the social insurance-based employment injury systems and employment liability schemes

Social insurance- based employment injury schemes	Employer liability systems
Social insurance schemes involve the establishment of a national employment injury fund.	The government mandates that individual employers assume responsibility for compensating their workers for industrial accidents and diseases.
Employers are required to make regular contributions on behalf of their employees, and government uses these revenues to pay benefits.	Individual employers are required to cover this liability by purchasing an insurance policy or, less commonly, by placing a deposit with the government.
They are often administered by a tripartite board including social partners.	Government departments often supervise the payment of benefits.
They are based generally on statute rather than contractual law, and the right to benefits is statutory, as laid down by the government.	The right to receive benefits within a private insurance programme is contractual, based on the agreed insurance contract.
Social insurance programmes are not necessarily fully funded and fund shortfalls are met from general state funds.	Individual purchased private insurance generally must be fully funded, with employers' contributions being of a sufficient amount to cover the insurer's marketing costs and normal profit levels.
Social insurance is centred on a collective sense of solidarity and social justice within the society.	Private insurance adopts a more individualistic approach, focused on the individual claim process.

Source: Adapted from Fultz E & Pieris B. 1998, 2; and ILO (International Labour Organization). 2013c, 6.

The effectiveness of programmes in addressing the specific contingency of employment injury relies on a specific set of principles:

- 'No fault': a worker who is injured, or his/her survivor(s) in case of death, should qualify for benefits without any necessity to prove 'fault' on behalf of the employer.
- A collective sharing of liability.
- Neutral governance at some specified level of administration of the scheme, meaning that the right to benefit can be established outside the contractual relationship between a worker and her or his employer.

1.3 INTERNATIONAL AND REGIONAL STANDARDS: AN OVERVIEW

This overview of international and regional standards considers the United Nations Convention on the Rights of Persons with Disabilities, ILO standards, African Union (AU) standards and Southern African Development Community (SADC) standards.

1.3.1 United Nations Convention

The United Nations Convention on the Rights of Persons with Disabilities which entered into force on 3 May 2008 is relevant to the persons who become disabled as a result of employment injuries. The purpose of this 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.’⁶ Article 27 of the Convention focuses on work and employment. It requires State Parties to recognise the right of persons with disabilities to work.⁷ In addition, it enjoins state parties to safeguard and promote the realisation of the right to work.⁸ This they have to realise by taking appropriate steps, including through legislation to, among others, protect the rights of persons with disabilities to safe and healthy working conditions; promote employment opportunities and career advancement for persons with disabilities in the labour market and assist in finding, obtaining, maintaining and returning to employment; ensure that reasonable accommodation is provided to persons with disabilities in the workplace; and promote vocational and professional rehabilitation, job retention and return-to-work programme for persons with disabilities.⁹ Furthermore, the Convention directs state parties to recognise the right of persons with disabilities to adequate standard of living and social protection.¹⁰

Table 1.2 shows countries covered in this study that have signed and/or ratified the Convention.

TABLE 1.2 Countries that have ratified the United Nations Convention on the Rights of Persons with Disabilities (as at 9 October 2014)

Country	Convention on the Rights of Persons with Disabilities			
	Signature	Date	Formal confirmation c), Accession (a), Ratification	Date
Botswana	✗	–	✗	–
Ethiopia	✓	30 March 2007	✓	7 July 2010
Kenya	✓	30 March 2007	✓	19 May 2008
Lesotho	✗	–	✓	2 December 2009 c
Malawi	✓	27 September 2007	✓	27 August 2009
Namibia	✓	25 April 2007	✓	4 December 2007
South Africa	✓	30 March 2007	✓	30 November 2007
Swaziland	✓	25 September 2007	✓	24 September 2012

⁶ Article 1 of the Convention on the Rights of Persons with Disabilities.

⁷ Article 27(1) of the Convention on the Rights of Persons with Disabilities.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Article 28 of the Convention on the Rights of Persons with Disabilities.

Tanzania	✓	30 March 2007	✓	10 November 2009
Zambia	✓	9 May 2008	✓	1 February 2010
Zimbabwe	✗	–	✓	23 September 2013 a
✓ = Ratified ✗ = Not yet ratified				

Source: UNTC (United Nations Treaty Collection). n.d.

1.3.2 International Labour Organisation standards

This section considers the ILO standards for safety and health and for the compensation for occupational injuries.

1.3.2.1 Safety and health

The Occupational Safety and Health Convention 155 of 1981 makes provision for safety and health at work. Ethiopia (28 January 1991), Lesotho (1 November 2001), South Africa (18 February 2003), Zambia (23 December 2013),¹¹ and Zimbabwe (9 April 2003) have ratified the convention.

1.3.2.2 Compensation for occupational injuries

Pertinent conventions dealing with compensation for occupational injuries include the following:

- *Workmen's Compensation (Agriculture) Convention 12 of 1921*: This is an instrument with an interim status. It requires member states that have ratified it to extend the scope of coverage of all their laws and regulations which make provision for compensation of workers for personal injury by accident arising out of or in the course of their employment to all agricultural wage-earners.¹²
- *Equality of Treatment (Accident Compensation) Convention 19 of 1925*: This instrument requires member states that ratify it to provide non-nationals the same treatment in respect of workmen's compensation as it grants to its own nationals.¹³ The aforementioned equality of treatment must be guaranteed to foreign workers and their dependants without any condition as to residence.¹⁴
- *Social Security (Minimum Standards) Convention 102 of 1952*: This convention makes provision for employment injury.¹⁵ According to article 32 of the Convention: 'The contingencies covered shall include the following where due to accident or a prescribed disease resulting from employment: (a) a morbid condition; (b) incapacity for work resulting from such a condition and involving suspension of earnings, as

11 This instrument will enter into force for Zambia on 23 December 2014.

12 Article 1 of the Workmen's Compensation (Agriculture) Convention.

13 Article 1(1) of the Equality of Treatment (Accident Compensation) Convention.

14 Article 1(2) of the Equality of Treatment (Accident Compensation) Convention.

15 Part VI of the Social Security (Minimum Standards) Convention.

defined by national laws or regulations; (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 by the widow or child as the result of the death of the breadwinner; in the case of a widow, the right to benefit may be made conditional on her being presumed, in accordance with national laws or regulations, to be incapable of self-support.’

- *Employment Injury Benefits Convention 121 of 1964*: This convention prescribes the contingencies to be covered and such contingencies are as follows: ‘(a) a morbid condition; (b) incapacity for work resulting from such a condition and involving suspension of earnings, as defined by national legislation; (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.’¹⁶

Table 1.3 shows the ratification record of the abovementioned instrument by the countries under review.

TABLE 1.3 Ratification record of ILO Convention 12, 19, 102 and 121

Country	Pertinent social security conventions			
	Convention No. 12	Convention No. 19	Convention No. 102	Convention No. 121
Botswana	✗	✓	✗	✗
Ethiopia	✗	✗	✗	✗
Kenya	✓	✓	✗	✗
Lesotho	✗	✓	✗	✗
Malawi	✓	✓	✗	✗
Namibia	✗	✗	✗	✗
South Africa	✗	✓	✗	✗
Swaziland	✗	✓	✗	✗
Tanzania	✓	✓	✗	✗
Zambia	✓	✓	✗	✗
Zimbabwe	✗	✓	✗	✗
✓ = ratified ✗ = not yet ratified Status as at: 7 October 2014.				

Source: ILO (International Labour Organization). n.d.-b.

16 Article 6 of the Employment Injury Benefits Convention.

1.3.3 African Union

Article 15 of the African Charter on Human and Peoples' Rights (known as the Banjul Charter)¹⁷ provides every person with the right to work under equitable and satisfactory conditions.

1.3.4 Southern African Development Community

Provisions dealing with safety and health as well as compensation for occupational injuries and diseases can be found in SADC instruments. For example, the Charter of Fundamental Social Rights in SADC is aimed at, *inter alia*, the promotion of the establishment and harmonisation of social security schemes and the harmonisation of regulations relating to health and safety standards at workplaces across the region.¹⁸ Article 5(b) of the Charter requires member states to take appropriate steps to ratify and implement relevant ILO instruments and as a priority the core ILO conventions. In addition, Article 12 of the Charter requires member states to strive towards the creation of an enabling environment for the protection of safety and health.

In addition to the Charter of Fundamental Social Rights in SADC, Article 12 of the Code on Social Security in the SADC makes provision for occupational injuries and diseases as follows:

Member States should provide compulsory coverage, either through public or private mechanisms or through a combination of both. All modalities of disablement should be covered, irrespective of whether the disablement occurs in the formal or informal sector. All occupational-related injuries and diseases should be covered. To the extent that use is made of a list of occupational-related diseases, the range of diseases covered in such list should at least be in accordance with the list of diseases contained in the most recent ILO Convention on occupational health and safety. Occupational injury and diseases schemes should provide adequate medical care and appropriate benefits. Social Security schemes should provide for adequate rehabilitation and reintegration measures. Member States should ensure that appropriate preventative measures are in place.¹⁹

17 The African (Banjul) Charter on Human and Peoples' Rights was adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) and entered into force on 21 October 1986.

18 Articles 1(e) and (f) of the Charter of Fundamental Social Rights in SADC.

19 Article 12 of the Code on Social Security in the SADC.

COUNTRY EXPERIENCES

2.1 FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

2.1.1 Socio-economic context

Ethiopia has a population of 94.1 million, of which 17.5% reside in urban areas.²⁰ It has a gross domestic product (GDP) of US\$111.8 billion, with GDP per capita of US\$1 218 and gross national income (GNI) per capita of US\$1 303.²¹ The employment rate is about 84.1%; although up to 73.1% of the working population constitute the working poor (earning less than US\$2 a day).²² The informal sector accounts for up to 50.6% of employment.²³ In the formal sector, paid employees (employees of government, public enterprises, private organisations, non-governmental organisations and domestic employees) make up about 49% of the total working population; while unpaid family workers account for about 50.3%.²⁴

2.1.2 Occupational safety and health

Occupational health and safety in Ethiopia is regulated mainly in the Labour Proclamation and the Occupational Safety and Health Directive issued in terms of the Proclamation.²⁵

2.1.2.1 Scope of coverage

The Labour Proclamation applies to all employment relationships (employment relations based on a contract of employment that exist between a worker and an employer).²⁶ However, it excludes contracts for the purpose of upbringing, treatment, care and rehabilitation; for educating or training (except in case of an apprentice); for managerial employees; for non-profit personal services; for persons whose employment relations are governed by special laws (such as members of the armed force and police force, employees of state administration, judges of courts of law, prosecutors and others); and contracts of persons who perform acts for consideration at their own business or professional responsibility.²⁷

20 UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 218.

21 *Ibid.* 162 and 198.

22 *Ibid.* 202.

23 Kibru M. 2012. *Employment challenges in Ethiopia*, 5-6. [Retrieved 15 September 2014] <http://www.fes-kenya.org/media/publications/Employment%20Challenges%20-%20Ethiopia.pdf>

24 *Ibid.*

25 Labour Proclamation No. 377/2003 and Occupational Safety and Health Directive of 2008.

26 Section 3(1) of the Labour Proclamation.

27 Section 3(2) of the Labour Proclamation.

2.1.2.2 Rights and duties of employers and employees

The Labour Proclamation and the Occupational Safety and Health Directive lay down rights and duties of employers and employees.²⁸ In terms of the Proclamation, employers are compelled to take the necessary measures to safeguard the health and safety of the workers.²⁹ This requires that employers comply with the health and safety requirements of the Labour Proclamation; take appropriate steps to ensure that workers are properly instructed and notified about health hazards; assign a safety officer; establish an occupational health and safety committee; provide workers with protective equipment, clothing and other material and instruct them of their use; register occupational injuries and diseases and notify the labour inspection of these; arrange for the medical examination of newly-employed workers and those involved in hazardous work; ensure that the workplace is not a danger to the health and safety of workers; and implement all prescribed health and safety directives.

On their part, workers must cooperate in the formulation of health and safety rules and implement them; immediately report to the employer any defect in equipment and any injury to the health and safety of workers; report to the employer any situation that is a hazard; properly use all safeguards, safety devices and other appliances provided for the protection of his/her health and safety and that of other workers; and obey all health and safety instructions issued by the employer or other relevant authority.³⁰ Workers are also prohibited from interfering with, removing, displacing or destroying any provided safety devices or appliances; or obstructing any method or process adopted to minimise occupational hazard.³¹

2.1.2.3 Administrative and institutional framework

The Labour Inspection Service is charged with the responsibility of administering the Labour Proclamation as it ensures the implementation of the provisions of the Proclamation.³² To this end it prepares a list of occupational diseases and schedules of degrees of disablement, classifies dangerous trades and undertakings, conducts studies and compiles statistical data on working conditions, prepares training programmes for the prevention of employment injuries, supervises and ensures that undertakings are not dangerous to the health and safety of workers.

28 Articles 98(3), 102(1), 170(10 (a-e) of the Proclamation empower the Minister to issue directives. The Occupational Safety and Health Directive applies to all employers and employees. The duties of employers, general rights and duties of workers are provided in Parts 1 and 2 of the Directive.

29 Section 92 of the Labour Proclamation.

30 Section 93 of the Labour Proclamation.

31 Section 94 of the Labour Proclamation.

32 Section 177 of the Labour Proclamation.

2.1.2.4 Inspection and enforcement

The Labour Proclamation mandates the appointment of labour inspectors to undertake the follow-up and supervision duties of the Labour Inspection Service³³ and empowers them to enter any workplace to compel compliance with the Proclamation.³⁴ The Labour Inspection Service is empowered to take administrative measures to promote the implementation of the Proclamation and its regulations and directives; and to approach courts for appropriate measures in enforcing the Proclamation.³⁵ Penalties can also be meted out in the form of a fine of between 300 and 1 200 Birr (US\$17–60).³⁶ However, these are inapplicable where the penal code provides for more severe penalties.³⁷

2.1.3 Employment injury compensation

Employment injury and disease compensation in Ethiopia is provided by two separate schemes. The Public Servants' Pension Scheme provides benefits for public servants;³⁸ while the Private Organizations Employees Pension Fund provides benefits to permanent private sector employees.³⁹

2.1.3.1 Scope of coverage

Access to the Public Servants' Pension Scheme is restricted to public servants who are Ethiopian nationals. Proclamation 714/2011 states that:

Without prejudice to the appropriate provisions of Proclamation No. 270/2002 that provide pension coverage to foreign nationals of Ethiopian origin, and treaties to which the Country is a party, this Proclamation shall be applicable to public servants who are Ethiopian nationals.⁴⁰

A 'public servant' is defined as 'a person permanently employed in any public office, and includes government appointees, members of parliament, members of the defence force and the police'.⁴¹ The Proclamation also excludes from its scope of coverage senior

33 Section 178 of the Labour Proclamation.

34 Sections 178 and 179 of the Labour Proclamation.

35 Section 177 of the Labour Proclamation.

36 See Articles 184 and 185 of the Labour Proclamation.

37 See Articles 183 of the Labour Proclamation.

38 See Proclamation No. 714/2011 (Proclamation to Provide for Public Servants' Pension) and Council of Ministers Regulation No. 203/2011 (Council of Ministers Regulation to Provide for the Establishment of the Public Servants' Social Security Agency).

39 See Proclamation No. 715/2011 (A Proclamation to Provide for Pension of Private Organization Employees) and Council of Ministers Regulation No. 202/2011 (Private Organizations Employees Social Security Agency Establishment Regulation).

40 Article 3(1) of Proclamation 714/2011.

41 Article 2 of Proclamation 714/2011.

government officials and members of parliament who have been deprived of their rights and benefits pursuant to Article 54 of Proclamation No. 653/2009.⁴²

The Private Organizations Employees Pension Scheme is also only open to permanent employees of private organisations who are Ethiopian nationals.⁴³ Employees who were members of a pension or provident fund before the establishment of the scheme may opt to continue in the pension or provident fund or join the scheme.⁴⁴ In addition, employees of religious and political organisations and informal sector workers can voluntarily belong to the scheme. However, domestic workers and employees of governmental international organisations and foreign diplomatic missions are excluded.⁴⁵

Employment injury pension and gratuity are provided to a worker who has an employment injury. Employment injury is defined to mean an occupational accident or occupational disease.⁴⁶ However, no benefits will be provided where an employment injury is self-inflicted.⁴⁷

42 Article 3(2) of Proclamation 714/2011.

43 Article 3(1) of Proclamation No. 715/2011. The Proclamation in Article 2 defines 'private organization employee' as a salaried person permanently employed in any private organisation. 'Permanent employee' is defined as an employee hired for an indefinite period in accordance with the definition assigned to it under the Labour Proclamation 377/2003.

44 Article 3(2) of Proclamation No. 715/2011.

45 Article 3(3) of Proclamation No. 715/2011.

46 See Article 28 of Proclamation No. 714/2011 and Article 27 of Proclamation No. 715/2011. Occupational accident means any organic injury or functional disorder suddenly sustained by a public servant during or in connection with the performance of his work and includes: (a) any injury sustained by a public servant while carrying out orders given by a competent authority outside of his regular work or working place or working hours; (b) any injury sustained by a public servant during or outside of working hours while attempting to protect the public office from accident or destruction irrespective of an order given by a competent authority; (c) any injury sustained by a public servant while he is proceeding to or from his place of work in a transport service vehicle provided by the public office which is available for the common use of its employees or in a vehicle hired and expressly destined by the public office for the same purpose; (d) any injury sustained by a public servant before or after his work or during any interruption of work, if he is present in the workplace or the premises of the public office by reason of his duties in connection with his work; (e) any injury sustained by a public servant as a result of an action of the public office or a third person during the performance of his work. An occupational disease is defined as any pathological condition of a public servant which arises as a consequence of being exposed to the agent that cause the disease for a certain period prior to the date in which the disease became evident due to the kind of work he performs or because of the surrounding in which he works; provided, however, that it does not include endemic or epidemic diseases which are prevalent and contracted in the area where the work is done.

47 Article 29 of Proclamation No. 714/2011 and Article 28 of Proclamation 715/2011 state that 'the provisions of Article 28 (Article 27) of this Proclamation shall apply only where the public servant has not inflicted the injury upon himself intentionally. Any injury resulting from, in particular, the following acts shall be deemed to be intentionally caused by the public servant: 1. non-observance of safety instructions or preventive rules specifically issued by the public office; or 2. reporting to work in a state of intoxication that prevents him from properly regulating his conduct or understanding' (See also Article 28 of Proclamation No. 715/2011 for a similar provision in relation to private organisation employees).

Both the Public Servants' Social Security Agency (PSSSA) and the Private Organizations Employees Social Security Agency (POESSA) are required to each issue a schedule that lists the degrees of incapacity; and with respect to each occupational disease, the symptoms; the kind of work or surrounding that gives rise to the disease; and the minimum duration of exposure to the agent causing the disease.⁴⁸ They must also periodically revise the schedules as necessary.

A disease will be presumed to be an occupational disease where a disease listed in the schedule is contracted by a worker engaged in the corresponding workplace or kind of work.⁴⁹ In addition, where a worker who had recovered from an occupational disease is re-infected due to continued placement in the occupation corresponding to the disease listed in the schedule, it is presumed that he/she has contracted the occupational disease afresh. Where a worker engaged in the eradication of an endemic or epidemic disease contracts the disease, it is also presumed to be an occupational disease.

2.1.3.2 Administration and institutional framework

The Public Servants' Pension Scheme (Civil Service Pension Fund and the Military and Police Service Pension Fund) is administered by the PSSSA.⁵⁰ The Private Organisations Employees Pension Fund is administered by the POESSA.⁵¹

Medical boards assess the extent of employment injury sustained by a worker (in accordance with the schedule of occupational diseases). However, both the PSSSA and the POESSA can refer the employment injury assessment to another medical board for further evaluation.⁵²

2.1.3.3 Benefits and eligibility conditions

Both the Public Servants' Pension Scheme and the Private Organizations Employees Pension Fund pay out an EI pension and a survivor's pension or gratuity (in addition to a retirement pension or gratuity and an invalidity pension or gratuity).⁵³

An incapacity pension for life or an incapacity gratuity is paid to a worker who sustains an employment injury of not less than 10% and is unable to work due to permanent incapacity.⁵⁴ The incapacity pension is 47% of the worker's salary which he/she was

⁴⁸ See Article 30 of Proclamation No. 714/2011 and Article 29 of Proclamation 715/2011.

⁴⁹ Article 31 of Proclamation No. 714/2011 and Article 30 of Proclamation No. 715/2011.

⁵⁰ See Articles 8 and 9 of Proclamation No. 714/2011 and Council of Ministers Regulation No. 203/2011.

⁵¹ See Articles 7 and 8 of Proclamation No. 715/2011 and Council of Ministers Regulation No. 202/2011.

⁵² Article 34 of Proclamation No. 714/2011 and Article 33 of Proclamation No. 715/2011.

⁵³ See, respectively, Parts 5, 6, 7 and 8 of Proclamation No. 714/2011 as well as Parts 5, 6, 7 and 8 of Proclamation No. 715/2011.

⁵⁴ Articles 35 and 36 of Proclamation No. 714/2011 and Articles 34 and 35 of Proclamation No. 715/2011.

receiving during the month prior to the occurrence of the injury.⁵⁵ However, a worker will receive a retirement pension if the retirement pension is higher than the incapacity pension due.

A worker who sustains employment injury of not less than 10% but who is able to work is eligible for incapacity gratuity in the form of a lump sum.⁵⁶ However, that worker will not receive the incapacity gratuity if, in accordance with the appropriate law or collective agreement, he/she is entitled to compensation for damage from the employer or insurance. The incapacity gratuity is also equal to 47% of the monthly salary the public servant was receiving during the month preceding the occurrence of the injury multiplied by 60 and the percentage of injury sustained.⁵⁷

A survivor's pension is paid to the survivors of a worker who dies due to employment injury (or while receiving retirement or invalidity or incapacity pension; or while in service but who has completed at least ten years of service).⁵⁸ Where a public servant dies in service without completing ten years of service his/her survivors receive gratuity.⁵⁹ Persons who are considered as survivors are a widow or widower; children of the deceased who are under the age of 18 years or (in the case of incapacitated child or a child with mental health problem) under the age of 21 years; and parents who were wholly or mainly supported by the deceased preceding his/her death.⁶⁰

A widow or widower is entitled to 50% of the pension to which the deceased would have received;⁶¹ while each surviving child receives 20%.⁶² However, if both parents are dead, the share for each surviving is 30 or 20% of the pension to which each of the deceased parent was or would have been entitled (whichever is higher). Each parent receives 15% of the pension due; although if there are no survivors other than the parents, each parent receives 20%.⁶³ A survivors' gratuity equal to the amount of gratuity to which the deceased would have been entitled is paid; and is calculated in the same way as the survivor's pension.⁶⁴

2.1.3.4 Funding

The Public Servants' Pension Scheme consists of the Civil Service Pension Fund and the Military and Police Service Pension Fund. For the Civil Service Pension Fund, the

55 Article 37 of Proclamation No. 714/2011 and Article 36 of Proclamation No. 715/2011.

56 Article 38 of Proclamation No. 714/2011 and Article 37 of Proclamation No. 715/2011.

57 Article 39 of Proclamation No. 714/2011 and Article 38 of Proclamation No. 715/2011.

58 Article 40 (1) of Proclamation No. 714/2011 and Article 39(1) of Proclamation No. 715/2011.

59 Article 40 (2) of Proclamation No. 714/2011 and Article 39(2) of Proclamation No. 715/2011.

60 Article 40 (3) of Proclamation No. 714/2011 and Article 39(3) of Proclamation No. 715/2011.

61 Article 41 of Proclamation No. 714/2011 and Article 40 of Proclamation No. 715/2011.

62 Article 42 of Proclamation No. 714/2011 and Article 41 of Proclamation No. 715/2011.

63 Article 43 of Proclamation No. 714/2011 and Article 42 of Proclamation No. 715/2011.

64 Article 44 of Proclamation No. 714/2011 and Article 43 of Proclamation No. 715/2011.

employer contributes 11% while the worker contributes 7%.⁶⁵ For the Military and Police Service Pension Fund, the employer contributes 25% while workers contribute 7%.⁶⁶

Contributions to the Private Organization Employees Pension Fund are 7% of monthly salary for workers while employers contribute 11% (the contribution rates for employees were 5% for the period July 2011–June 2012, 6% for the period July 2012–June 2013 and 7% for the period July 2013–June 2014. For employers, the rate for the respective periods was 7%, 8% and 9%).⁶⁷

2.1.4 Other employment injury-related schemes and initiatives

Ethiopia has adopted a National Plan of Action of Persons with Disabilities 2012–2021 to address the needs of persons with disabilities for (amongst others) comprehensive rehabilitation services, skills training and work.⁶⁸ Some of the objectives of the plan are to provide community-based rehabilitation, specialised medical rehabilitation services and technical aids; and the best education and vocational training skills. Other objectives are to create opportunities for work and employment; provide social protection for the poor, marginalised and vulnerable sectors of society; and support accessible living and transport in the community.

Employment promotion (especially youth empowerment) is one of the pillars of the five-year Growth and Transformation Plan.⁶⁹ This is to be achieved through the expansion of technical and vocational education and training and promotion of employment opportunities through the development of micro- and small- scale enterprises to create employment up to three million jobs for the youth.

2.1.5 Gaps and challenges

Current labour laws cover only undertakings where there is formal employment relationship. Therefore, occupational safety and health (OSH) protection is only extended to certain categories of employees. This implies that even persons that fall within the definition of an employee are expressly excluded. In addition, the atypically-employed (including informal sector workers) are not covered. The high informal sector employment rate means that a sizeable majority of Ethiopian workers do not enjoy OSH protection.

⁶⁵ See Article 10 of Proclamation No. 714/2011.

⁶⁶ See Article 11 of Proclamation No. 714/2011.

⁶⁷ Articles 10 and 57 of Proclamation No. 715/2011.

⁶⁸ MOLSA (Ministry of Labour and Social Affairs, Ethiopia). 2012. *National plan of action of persons with disabilities (2012-2021)*, iv-v. [Retrieved 7 October 2014] http://www.molsa.gov.et/English/SWD/Documents/National%20plan%20of%20action%20on%20Persons%20With%20Diability_.pdf

⁶⁹ AfDB/OECD/UNDP/UNECA (African Development Bank/Organisation for Economic Co-operation and Development/United Nations Development Programme/United Nations Economic Commission for Africa). 2012. *African economic outlook 2012: Ethiopia*, 12.

The EI compensation system is fragmented, with separate schemes for both public and private sector employees. The administration of EI compensation is also undertaken by different institutions. Both schemes are only open to permanent employees, and also expressly exclude some categories of employees from their scope of coverage.

Inspection and enforcement of OSH is inadequate due to the unavailability of skilled manpower and resources in the ministry, which has also led to most of the provisions of the Labour Proclamation not being implemented.⁷⁰ According to commentators:

The amount of resources and number of staff in Ethiopia devoted to labour inspections is very limited compared to the scope of their responsibilities, the increasing number of employers and workers, and the hazards workers face.⁷¹

The framework is also plagued by limited and incomplete data collection systems, difficulties in information sharing and administrative coordination; and lack of policy direction due to the absence of a strategic plan.⁷²

There are also challenges in educating employers and workers on OSH (due to lack of personnel and other resources in the Labour Inspection Service and employers/trade unions; and limited depth, quality and range of available educational material on OSH).⁷³

The inspectors' lack of the knowledge, skills and time to bring cases to court hampers the enforcement of compliance with OSH regulations. They are also barred from bringing proceedings to court for lack of legal authority.⁷⁴ The low penalties set in the Labour Proclamation for non-compliance do not provide an effective deterrent, thereby hampering the enforcement of the Proclamation.⁷⁵

The Labour Inspection Service is unable to carry out its inspection activities due to the various factors such as the lack of qualified personnel and material resources;⁷⁶ and the absence of strong and effective enforcement machinery for monitoring regulations and standards governing OSH.⁷⁷

70 Seblework D. 2006. *Occupational safety and health profile for Ethiopia*. Addis Ababa: Ministry of Labour and Social Affairs (MOLSA), 40.

71 Wheeler J and Goddard K. 2013. *Assessment of Ethiopia's labor inspection system*, 16. [Retrieved 15 September 2014] <https://www.dol.gov/ilab/reports/pdf/2013AssessmentEthiopiaLaborInspection.pdf>.

72 *Ibid.*

73 *Ibid.* 23.

74 *Ibid.* 27-28.

75 Seblework D. 2006. *Occupational safety and health profile for Ethiopia*. Addis Ababa: Ministry of Labour and Social Affairs (MOLSA), 10 and 46; and Wheeler J and Goddard K. 2013. *Assessment of Ethiopia's labor inspection system*, 27-28. [Retrieved 15 September 2014] <https://www.dol.gov/ilab/reports/pdf/2013AssessmentEthiopiaLaborInspection.pdf>

76 Seblework D. 2006. *Occupational safety and health profile for Ethiopia*. Addis Ababa: Ministry of Labour and Social Affairs (MOLSA), 46.

77 *Ibid.*

Other impediments to an effective OSH system are a lack of strong and effective national OSH policy and programme; lack of a streamlined system for addressing the existing low awareness of OSH; absence of strong and effective research institutions for effective development of OSH; absence of co-operation and coordinating mechanisms among the relevant bodies to put in place strong OSH networking and cooperation systems; and the absence of comprehensive and validated information on OSH at all levels.⁷⁸

2.1.6 Concluding observations

The Ethiopian occupational safety and health as well as the employment injury compensation systems are limited in terms of personal scope of coverage and in their administration. This has led to a majority of workers being not being able to enjoy the benefits of such as system. Enforcement of compliance is also problematic, due to a range of challenges facing the system

2.2 REPUBLIC OF KENYA

2.2.1 Socio-economic context

Kenya has a population of 44.4 million, with a working age population of 36.2 million and 24.8% of the people living in urban areas.⁷⁹ The country has an employment rate of 75.6% of the population, with 33.6% of the employed population constituting the working poor (earning less than US\$2 per day).⁸⁰ As a result, up to 47% of the population lives in multidimensional poverty and 15.7% in severe poverty.⁸¹ The informal sector accounts for up to 61% of employment while the formal sector constitutes about 34% (4% of employment undistinguishable).⁸² There are gender disparities in employment, with 77% of women being self-employed but not employers, compared to 57% of men.⁸³

2.2.2 Occupational safety and health

2.2.2.1 Scope of coverage

The Occupational Safety and Health Act 15 of 2007 binds all workplaces where persons work, whether temporarily or permanently.

⁷⁸ *Ibid.* 75-76.

⁷⁹ UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 218.

⁸⁰ *Ibid.* 202.

⁸¹ *Ibid.* 180.

⁸² Budlender D. 2011. *Statistics on informal employment in Kenya*. Women in Informal Employment: Globalizing and Organizing (WIEGO) Statistical Brief No 5, 2.

⁸³ *Ibid.*

2.2.2.2 Rights and duties of employers and employees

The 2007 Act lays down obligations for employers/occupiers, employees and self-employed persons in relation to safety and health. Each employer occupier must ensure the safety, health and welfare at work of all persons working in his workplace.⁸⁴ Specific activities to be undertaken in this regard include:

- providing and maintaining plant and systems and procedures of work that are safe and without risks to health;
- making arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
- providing necessary information, instruction, training and supervision to ensure the safety and health at work of every worker;
- maintaining any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;
- providing and maintaining a working environment for every person employed that is safe, without risks to health and adequate in relation to facilities and arrangements for the employees' welfare at work;
- informing all workers of any risks from new technologies; and imminent danger; and
- ensuring that every worker participates in the application and review of safety and health measures.

Every occupier must also carry out appropriate risk assessments in relation to the safety and health of persons employed and adopt preventive and protective measures to ensure that chemicals, machinery, equipment, tools and process under the control of the occupier are safe and without risk to health and comply with the requirements of safety and health provisions in the Act.⁸⁵ Every occupier must also take immediate steps to stop any operation or activity where there is an imminent and serious danger to safety and health and to evacuate all persons employed as appropriate.

Occupiers are also required to adopt a safety and health policy statement;⁸⁶ to establish a safety and health committee at the workplace where there are twenty or more persons employed at the workplace or where instructed by the Director for such a committee to be established at any other workplace;⁸⁷ and ensure that a thorough safety and health audit of the workplace is carried out at least once in every period of twelve months by a safety and health advisor.⁸⁸

84 Section 6 of the Occupational Safety and Health Act 15 of 2007. An 'occupier' is the person or persons in actual occupation of a workplace, whether as the owner or not and includes an employer (Section 2 of the Occupational Safety and Health Act).

85 *Ibid.*

86 Section 7 of the Occupational Safety and Health Act.

87 Section 9 of the Occupational Safety and Health Act.

88 Section 11 of the Occupational Safety and Health Act.

Self-employed persons must take all necessary precautions to ensure their own safety and health and that of any other person in their workplace or within the environs of their workplace; use appropriate safe systems of work, preventive and control measures and where not feasible, use suitable personal protective appliances and clothing required under the Act; comply with any safety and health rules, regulations instructions and procedures issued under the Act; report to the Director of Occupational Safety and Health Services any situation which they have reason to believe would present imminent danger or hazard and which they cannot correct, and any incident or injury that arises in the course of or in connection with their work, as required under the Act.⁸⁹

Every employee is expected to ensure his or her own safety and health and that of other persons who may be affected by his/her acts or omissions at the workplace; co-operate with his/her employer or any other person in the discharge of any duty or requirement imposed on the employer or that other person by the Act or any regulation made under it; wear or use any protective equipment or clothing provided by the employer to prevent risks to his/her safety and health; comply with the safety and health procedures, requirements and instructions given by a person having authority over him for his own or any other person's safety; report to his/her supervisor any situation that he/she believes would present a hazard and which he/she cannot correct; report to his supervisor any accident or injury that arises in the course of or in connection with his/her work; and co-operate with the employer or another person to enable the employer or other person to comply with a duty or requirement.⁹⁰ An employee must further report any dangerous situation;⁹¹ and not interfere with or misuse an appliance, convenience or other thing provided for the safety, health and welfare of workers.⁹²

Occupiers and self-employed persons also have obligations in relation to the safety and health of persons who are not their employees. They must conduct their undertaking in a manner that ensures that a person who is not their employee who may be affected by their work is not exposed to risks to safety or health. They must also to give relevant safety and health information to a person who is not their employee and who may be affected by the way the business is conducted.⁹³ In addition, an occupier of non-domestic premises which is made available to persons who are not employees must take such measures to ensure that the premises, all means of access are safe and without risks to health.⁹⁴

2.2.2.3 Administrative and institutional framework

The Director of Occupational Safety and Health Services (in the Ministry of Labour Social, Security and Services) is responsible for the administration of the Occupational

89 Section 12 of the Occupational Safety and Health Act.

90 Section 13 of the Occupational Safety and Health Act.

91 Section 14 of the Occupational Safety and Health Act.

92 Section 15 of the Occupational Safety and Health Act.

93 Section 17 of the Occupational Safety and Health Act.

94 Section 18 of the Occupational Safety and Health Act.

Safety and Health Act.⁹⁵ Some of the duties of the Director are to ensure adequate consultations on proposed OSH standards, regulations, and codes of practice; develop a five-year strategic plan for improving occupational safety and health, and ensure that the plan meets the existing and future needs of industry and the community; issue certificates of approval; promote education and training in occupational safety and health; collect and disseminate information on occupational safety and health; promote occupational safety and health in all workplaces and in the community to encourage a safety and health culture in workplaces; conduct training for enterprises, self-employed persons, individuals and occupational safety and health officers; and approve training institutions providing occupational safety and health training.⁹⁶ He/she must also conduct research, experiments and demonstrations on occupational safety and health;⁹⁷ and develop and maintain an effective programme of collection, compilation and analysis of occupational safety and health statistics.⁹⁸

2.2.2.4 Inspection and enforcement

The Occupational Safety and Health Act requires the appointment of OSH officers and affords them wide powers to enforce the Act.⁹⁹ These include the power to issue improvement and prohibition notices;¹⁰⁰ and to prosecute, conduct or defend any charge, information, complaint or other proceeding arising under the Act, or in the discharge of his duty as OSH officer before a magistrate's court¹⁰¹

Contravention of the 2007 Act is an offence, punishable with a fine not exceeding three hundred thousand shillings (about US\$3 388) or imprisonment for a term not exceeding three months or both such fine and imprisonment.¹⁰² Magistrate's courts are also empowered to order a person or company to remedy a contravention, in addition to or instead of imposing any penalty.¹⁰³

2.2.3 Employment injury compensation

According to the Work Injury Benefits Act of 2007, Kenyan employers are liable to pay compensation to an employee who is injured at work or contract an occupational

95 Section 23 of the Occupational Safety and Health Act.

96 Section 23 of the Occupational Safety and Health Act.

97 Section 24 of the Occupational Safety and Health Act.

98 Section 25 of the Occupational Safety and Health Act.

99 Sections 26 and 32 of the Occupational Safety and Health Act.

100 Sections 36 and 37 of the Occupational Safety and Health Act. An improvement notice is a notice requiring a person to remedy a contravention of the Act within a prescribed period; while a prohibition notice is a notice prohibiting any activities being or about to be carried out by or under the control of any person to which the Act or its regulations apply or will apply.

101 Section 33 of the Occupational Safety and Health Act.

102 Sections 108, 109 and 111 of the Occupational Safety and Health Act.

103 Section 110 of the Occupational Safety and Health Act.

disease.¹⁰⁴ In addition, both an employee and an employer or insurer can also claim damages or the recovery of compensation that the employer or insurer is obliged to pay from a third party where the third party caused or contributed to the occupational accident or disease.¹⁰⁵ Unfortunately, several sections of the 2007 Act have been nullified by the court because they were found to be unconstitutional.¹⁰⁶

2.2.3.1 Scope of coverage

An employee who is involved in an accident resulting in his/her disablement or death or who contract an occupational disease is entitled to the work injury benefits.¹⁰⁷

104 Section 10(1) of the Work Injury Benefits Act, 2007.

105 Section 17 of the Work Injury Benefits Act.

106 See *Law Society of Kenya v Attorney-General* [2008] eKLR. The nullified parts are Sections 4 (definition of an employer), 7(1) and (4) (respectively the obligation to obtain and maintain an insurance policy from an insurer approved by the Minister, in respect of such liability as an employer may incur towards employees; and a criminal offence for failure to obtain and maintain such an insurance cover), 10(4) (employer's liability to pay compensation to an injured employee even though the employee was at the time of the accident not carrying out his employer's instructions or even when his acts contravened the law), 16 (substitution of compensation for other legal remedies), 23(1) (power of the Director of Occupational Safety and Health Services to make inquiries as are necessary to decide upon any claim or liability), 25(1) and (3) (requirement of an employee claiming compensation to be examined by a medical practitioner designated by the director or the employer with the approval of the director) and 52(1) and (2) (permitting the Director of Occupational Safety and Medical Services to review, vary or uphold his initial decision on a matter and make provision for the filing of appeals to the industrial courts by only the objector and not any affected party to the case).

107 Sections 10 (1) of the Work Injury Benefits Act. An 'accident' means an accident arising out of and in the course and scope of an employee's employment and resulting in personal injury (Section 2 of the Work Injury Benefits Act). An occupational accident or disease that results in serious disablement (i.e. >40per cent disablement) of an employee or death is deemed to arise out of and in the course of employment if the accident was due to an act done by the employee for the purpose of, in the interests of or in connection with, the business of the employer even where the employee was acting in contravention of any law or any instructions by or on behalf of his employer; or without any instructions from his employer (Sections 10(4) and (6) of the Work Injury Benefits Act). The law also considers an employee to be in the course of employment where he or she is conveyed to or from the place of employment for the purpose of his or her employment by means of a vehicle provided by the employer for the purpose of conveying employees (Section 10(5) of the Work Injury Benefits Act). Where an employee is injured in an occupational accident or contracts an occupational disease while engaged in any organised first aid, ambulance or rescue work, fire-fighting or other emergency service, the accident or disease is deemed to have arisen out of and in the course of his or her employment (Section 12 of the Work Injury Benefits Act). However, compensation may be refused if an employee gave false information to the employer that he or she was not suffering from or had not previously suffered from a serious injury or occupational disease or any other serious disease, and the accident or occupational disease was caused by, or the death resulted from or the disablement resulted from or was aggravated by injury or disease (Section 13 of the Work Injury Benefits Act). This would also be the case where the Director is of the opinion that the death of the employee was caused, or the disablement was caused, prolonged or aggravated by the unreasonable refusal or wilful neglect of the employee to submit to medical aid for any injury or disease, whether caused by the accident or existing before the accident.

However, an employee will not be entitled to compensation if an accident, not resulting in serious disablement or death, is caused by the deliberate and wilful misconduct of the employee.¹⁰⁸ An employee is also entitled to compensation if he or she contracts a disease specified in the Act that arose out of and in the course of his or her employment; or contracts any other disease that arose out of and in the course of his or her employment.¹⁰⁹ Where an employee who contracts an occupational disease specified in the Act was employed in any work mentioned in the Act in respect of the disease, it is presumed that the disease arose out of and in the course of his or her employment.¹¹⁰

An ‘employee’ is a person who is employed for wages or a salary under a contract of service (including an apprentice or indentured learner).¹¹¹ The definition of an employee includes the employee’s representative or dependants or any other person who is entitled to benefit compensations.¹¹² However, the following categories are excluded from the definition of employee: a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer’s trade or business; any person employed outside Kenya that is not ordinarily employed in Kenya; a member of the employer’s family dwelling in the employer’s house or part of it and not for the purpose of employment; and a member of the armed forces.¹¹³

2.2.3.2 Administration and institutional framework

The occupational injury scheme is managed by the Director of Work Injury Benefits, who registers employers; supervises the implementation of the Work Injury Benefits Act; ensures that all employers insure their employees; receives reports of accidents and carry out investigations into such accidents; and ensures that employees who are injured are compensated.¹¹⁴

¹⁰⁸ Section 10(3) of the Work Injury Benefits Act.

¹⁰⁹ Section 38 of the Work Injury Benefits Act.

¹¹⁰ Section 39 of the Work Injury Benefits Act.

¹¹¹ Section 2 of the Work Injury Benefits Act. Even where the contract of service apprenticeship or learnership of the employee declared to be invalid at the time of the accident, the Director may approve compensation for the claim as if the contract was valid (Section 14 of the Work Injury Benefits Act). Even where the contract of service apprenticeship or learnership of the employee declared to be invalid at the time of the accident, the Director may approve compensation for the claim as if the contract was valid (Section 14 of the Work Injury Benefits Act).

¹¹² Section 5(4) of the Work Injury Benefits Act. A ‘dependant’ means the widow(s) or widower of an employee; a child of the employee under the age of eighteen years including a posthumous child, a stepchild and an adopted child, (excluding a married or self-supporting child); a parent, step-parent or an adoptive parent; a brother, sister, half-brother, half-sister or parent, grandparent, or grandchild of an employee; and any other person who at the time of the accident was wholly dependent on the employee for the necessities of life (Section 6 of the Work Injury Benefits Act).

¹¹³ Section 5(3) of the Work Injury Benefits Act.

¹¹⁴ Section 53 of the Work Injury Benefits Act.

2.2.3.3 Benefits and eligibility conditions

Employers are obliged to provide and maintain appliances and services necessary to render first aid to injured employees.¹¹⁵ Employers must also transport an employee injured in an accident to a hospital or medical facility, or from a hospital or medical facility to the employee's residence.¹¹⁶ Employers are further compelled to defray any reasonable expenses incurred by an employee due to an occupational accident.¹¹⁷ Medical expenses to be defrayed include dental, medical, surgical or hospital treatment; skilled nursing services; the supply of medicine and surgical dressing; travelling and subsistence in connection with the employee's journey to and treatment in a place within Kenya where he was directed by his medical practitioner to go for treatment; and the supply, maintenance, repair and replacement of artificial limbs, crutches, and other appliances and apparatus used by persons who are physically disabled.

Employment injury benefits are provided to workers for temporary (total or partial) or permanent disablement. An employee who suffers temporary total disablement for three days or more receives periodical payment equivalent to his/her earnings, subject to the prescribed minimum and maximum.¹¹⁸ The periodical payments are made throughout the temporary disablement, but not for a period that exceeds twelve months. Where an injured worker receives full pay in terms of the Employment Act of 2007, or any other law or contract of service he/she is not entitled to temporary disability benefits. Benefits will also be reduced where a worker receives part payment of remuneration.

Benefits cease when the disablement ends or if the employee resumes work; if the employee resumes any other work at the same or greater earnings; or if the employee is awarded compensation for permanent disablement.¹¹⁹ However, a worker may be awarded additional compensation for temporary, total or partial disablement if the disablement recurs or his/her health deteriorates; or he or she receives further medical aid to reduce the disablement which requires necessitating further absence from work.

Compensation for permanent disablement is calculated on the basis of minimum and maximum amounts determined by the Minister, after consultation with the Board.¹²⁰ Where an apprentice or a person being trained is injured, his or her earnings are calculated on the basis of the earnings to which a worker would receive if that worker was performing the same work as a person in the same occupation, trade or profession with five years' experience.

Where an employee's disablement is of a nature that he or she is unable to perform the essential functions of life without the constant assistance of another person, an allowance

115 Section 45 of the Work Injury Benefits Act.

116 Section 46 of the Work Injury Benefits Act.

117 Section 47 of the Work Injury Benefits Act.

118 Section 28 of the Work Injury Benefits Act.

119 Section 29 of the Work Injury Benefits Act.

120 Section 30 of the Work Injury Benefits Act

can be provided towards the cost of the assistance, in addition to the work injury benefit.¹²¹

Compensation is paid to the dependants of a worker if the worker dies as a result of an injury caused by an accident.¹²² Compensation paid to a worker cannot be deducted from the compensation paid for the same or any other accident. Reasonable expenses for the funeral of a deceased employee are also paid.¹²³

2.2.3.4 Funding

Since the Kenyan EI compensation system is an employer-liability system, employers are obliged to get an occupational injury insurance policy with an approved insurer to cover the liability of employees being injured at work or contracting an occupational disease.¹²⁴ However, an employer is exempted from the requirement to obtain insurance cover if the employer provides a security which is in compliance with the requirements of an insurance policy (in the form of an undertaking by an approved surety to undertake the liability of the employer if there is a failure to discharge this). This requirement for employers to obtain and maintain an occupational injury insurance policy has been suspended as it was nullified by a court and is due to review.¹²⁵

2.2.4 Other employment injury-related schemes and initiatives

The National Council for Persons with Disabilities, established in terms of the Persons with Disabilities Act 14 of 2003,¹²⁶ is charged with encouraging and securing the rehabilitation of persons with disabilities within their own communities and social environment; coordinating services provided for the welfare and rehabilitation of persons with disabilities and to implement programmes for vocational guidance and counselling; putting in place schemes and projects for self-employment or regular or sheltered employment for the generation of income by persons with disabilities; and providing assistive devices, appliances and other equipment to persons with disabilities.¹²⁷

121 Section 15 of the Work Injury Benefits Act.

122 Section 34(1) of the Work Injury Benefits Act.

123 Section 34(4) of the Work Injury Benefits Act.

124 Section 7 of the Work Injury Benefits Act. An 'employer' is defined as any person who employs an employee and includes the legal personal representative of a deceased employer; any person controlling the business of an employer; and the Government (Section 4 of the Work Injury Benefits Act). An employer who temporarily lends or lets on hire an employee to another person is deemed to continue to be the employer of the employee; while the trustees of a club or association of persons are deemed to be the employer where the club or association employs a person.

125 ILO (International Labour Organization). 2013a. *National profile on occupational safety and health – Kenya*, 25. [Retrieved 20 September 2014] http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/policy/wcms_187632.pdf

126 Persons with Disabilities Act.

127 See Sections 3 and 7 of the Persons with Disabilities Act. See also NCPWD (National Council for Persons with Disabilities). n.d. *The council mandate*. [Retrieved 20 September 2014] http://ncpwd.go.ke/index.php?option=com_content&view=article&id=77&Itemid=530.

The Council also operates the Persons with Severe Disabilities Cash Transfer (PWSD-CT) programme.¹²⁸ The programme aims to enhance the capacities of the caregivers through cash transfers thereby improving the livelihoods of persons with severe disabilities through the provision of regular and predictable cash transfers to extremely poor households taking care of persons with severe disabilities; and strengthening capacities of the caregivers to improve the lives and livelihoods of persons with severe disabilities within their households.

The programme targets 70 households caring for persons with severe disabilities from each of the 210 constituencies with a monthly cash benefit of 2000 Kenya shillings (KSh2000) paid bi-monthly. The programme is currently benefiting 14,689 households caring for person(s) with severe disabilities. It has enabled the households to access improved nutrition, healthcare, housing and education.¹²⁹

2.2.5 Gaps and challenges

Kenya has attempted to extend occupational safety and health to all workers, including self-employed persons. However, the EI compensation system is an employer-liability system, which only covers employees. In addition, sections of the empowering legislation have been nullified, which means employers are not obliged to insure themselves against occupational injury and disease. This means employees who are injured or contract a disease may be unable to get compensation if the employer is insolvent.

The effectiveness of the OSH system is hampered by the lack of proper enforcement mechanisms, capacity challenges and emerging production techniques that create new risks.¹³⁰ The Occupational Safety and Health Act outlines duties in very broad terms and without an effective enforcement mechanism, which raises doubt as to whether the employers/occupiers and employees will fulfil their obligations.¹³¹ As an example, many industries are still to develop a health and safety policy as required. This has been blamed on a lack of adequate awareness on safety and health or on the heavy cost costs the Act's enforcement places on employers.¹³² Low awareness is due partly to high illiteracy levels

¹²⁸ Persons with severe disabilities are persons who need permanent care including feeding, toiletry, protection from danger or other persons, and support on full time basis by a caregiver to ensure their needs are attended to (NCPWD (National Council for Persons with Disabilities). n.d. *Cash transfer for PWDs*. [Retrieved 20 September 2014] http://ncpwd.go.ke/index.php?option=com_content&view=article&id=97&Itemid=597).

¹²⁹ NCPWD (National Council for Persons with Disabilities). n.d. *Cash transfer for PWDs*. [Retrieved 20 September 2014] http://ncpwd.go.ke/index.php?option=com_content&view=article&id=97&Itemid=597

¹³⁰ Muigua DK. 2012. Realising occupational safety and health as a fundamental human right in Kenya. *Mount Kenya University Law Journal*: 47-74.

¹³¹ *Ibid.*

¹³² *Ibid.*

in rural areas, worsened by the absence of Directorate of Occupational Safety and Health Services officers in these areas.¹³³

The Directorate of Occupational Safety and Health Services and employers are unable to ensure occupational health and safety. Evidence of this is the failure of the Directorate to carry out its functions in terms of the act (e.g. failure to undertake research on occupational safety and health and missing its targets on workplace inspections). This has been attributed in part to lack of capacity resulting from limited funding and human resources (the Directorate has only 71 professional safety and health officers, which makes it incapable of effectively inspecting the estimated 140,000 workplaces. It is also only present in 29 out of Kenya's 47 counties);¹³⁴ and of infrastructure for reporting occupational accidents and diseases.¹³⁵

The enforcement mechanisms provided for in the Occupational Safety and Health Act (punishment of a fine not exceeding three hundred thousand shillings or imprisonment for a term not exceeding three months or both such fine and imprisonment) are not sufficient to force compliance with the Act.

There is insufficient awareness amongst workers and employers on occupational safety and health. This is due to inadequate funding for OSH awareness programmes, poor linkages between OSH promotion and work injury compensation as well as inadequate research on occupational safety and health.¹³⁶

Poor statistics on occupational accidents and diseases as accident statistics from individual insurance companies are not used for analysing or reporting statistics on occupational accidents and diseases.¹³⁷

Occupational health services are not adequately integrated into all levels of the country's healthcare system, and this makes it difficult to recognise or manage occupational health-related conditions, diseases and ill health.¹³⁸

133 ILO (International Labour Organization). 2013a. *National profile on occupational safety and health – Kenya*, viii. [Retrieved 20 September 2014] http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/policy/wcms_187632.pdf

134 ILO (International Labour Organization). 2013a. *National profile on occupational safety and health – Kenya*, viii. [Retrieved 20 September 2014] http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/policy/wcms_187632.pdf; and Muigua DK. 2012. Realising occupational safety and health as a fundamental human right in Kenya. *Mount Kenya University Law Journal*: 47-74.

135 Muigua DK. 2012. Realising occupational safety and health as a fundamental human right in Kenya. *Mount Kenya University Law Journal*: 47-74.

136 *Ibid.*

137 ILO (International Labour Organization). 2013a. *National profile on occupational safety and health – Kenya*, 25. [Retrieved 20 September 2014] http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/policy/wcms_187632.pdf.

138 *Ibid.* 21.

Since the Directorate of Occupational Safety and Health Services currently operating at only 29% of technical capacity as a result of understaffing, only limited action is taken on reported accidents and only those that are very serious or within easy reach by the officers are acted upon. There are also no guidelines for enterprise owners on recording occupational accidents where the cause, agency, type etc. of the accident are usually indistinguishable.¹³⁹ Understaffing of the Directorate has also negatively affected the level of inspection and enforcement systems.¹⁴⁰

It is reported that there is presently no system in place for the comparative analysis and production of annual statistics as the Directorate of Occupational Safety and Health Services records only the total number of accidents occurring each year.¹⁴¹ In addition, due to staff shortages the data entry is not carried out uniformly throughout the country, which means it cannot be used for compiling and analysing the statistics using the international classification systems. Statistics are also not comprehensive, and cannot be used for computing frequency, incidence or severity rates. Although an OSH database management (system was developed in 2010 for collecting, classifying and analysing accident data, it has not been used because of technical and financial constraints).¹⁴²

The nullification of sections of the Work Injury Benefits Act implies that the protection provided to employees insofar as their compensation claims being protected by insurers covering the employer's liability is no longer available. In addition, it creates confusion in the legal framework for OSH, as claims can now be filed under common law or any other applicable law in Kenya in addition to the Work Injury Benefits Act.¹⁴³

Reforms are currently underway to establish a Work Injury Compensation Fund. The Work Injury Compensation Bill, 2013 once enacted will replace the Work Injury Benefits Act of 2007. The envisaged fund is to be administered by a Board to compensate all employees for work-related injuries and diseases contracted in the course of their employment and for connected purposes. However, an employer that can show that it has insurance cover will not be required to contribute to the fund.¹⁴⁴

¹³⁹ *Ibid.* 56.

¹⁴⁰ *Ibid.* 59.

¹⁴¹ *Ibid.* 60.

¹⁴² *Ibid.*

¹⁴³ See 'Kenya: Repealed sections of the Work Injury Benefits Act a win for lawyers'. n.d. [Retrieved 20 September 2014] <http://www.wap.ratio-magazine.com/inner.php?id=497>.

¹⁴⁴ See ILO (International Labour Organization). 2013a. *National profile on occupational safety and health – Kenya*. [Retrieved 20 September 2014] http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/policy/wcms_187632.pdf; and MoLSS&S (Ministry of Labour, Social Security and Services, Republic of Kenya). n.d. *Strategic plan 2013-2017*. [Retrieved 20 September 2014] <http://www.labour.go.ke/downloads/Ministry%20of%20Labour%20Strategic%20Plan%20201-2014.pdf>.

2.2.6 Concluding observations

The Kenyan occupational safety and health system endeavours to extend protection to as many workers as possible. However, it still uses the employer-liability system for employment injury and disease compensation. In addition, the nullification of sections of the empowering law means the effectiveness of the system is compromised. The occupational safety and health framework is also limited by challenges faced in its administration and enforcement.

3.1 REPUBLIC OF BOTSWANA

3.1.1 Socio-economic context

Botswana is a medium human development country (ranked at number 109 on the HDI) with a population of two million, 62.9% of which is urbanised.¹⁴⁵ The country has a GDP of US\$28.9 billion and a labour force participation rate (LFPR)¹⁴⁶ of 81.5% (percentage of persons aged 15 and older).¹⁴⁷ The employment to population ratio is 74.5% and the unemployment rate is 17.8%.¹⁴⁸ About 14.4% of the country's total labour force is employed in the informal sector, although these are mostly females (60.5%), urban dwellers (55.3%) and younger workers (73% of the informally-employed are aged between 15 and 44 years).¹⁴⁹

3.1.2 Occupational safety and health

Botswana does not have a uniform occupational health and safety law, as occupational health and safety regulations can be found in various statutes. The Factories Act is the main statute in this regard,¹⁵⁰ but the Radiation Protection Act,¹⁵¹ Public Health Act¹⁵² and Waste management Act¹⁵³ also have occupational safety and health provisions.

3.1.2.1 Scope of coverage

The provisions of the Factories Act apply to all factories, including those of the government.¹⁵⁴ A factory is defined as any premises in which persons (including

¹⁴⁵ UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 161 and 217.

¹⁴⁶ The labour force participation rate (LFPR) is the percentage of working-age persons in an economy who are employed or who are unemployed but looking for a job

¹⁴⁷ *Ibid.* 173 and 197.

¹⁴⁸ *Ibid.* 201. See also Buhlebenkosi F, Sibanda N, Chaurura P & Chiwira O. 2013. Occupational safety in the urban informal sector of Gaborone, Botswana: A situational analysis. *International Journal of Scientific & Technology Research* 2(12):293-297 at 293.

¹⁴⁹ Republic of Botswana/ILO (International Labour Organization). 2011. *Decent work country programme for Botswana 2011 to 2015*, 13. [Retrieved 22 September 2014]. <http://www.ilo.org/public/english/bureau/program/dwcp/download/botswana.pdf>.

¹⁵⁰ Factories Act of 1978 (Chapter 44:01).

¹⁵¹ Radiation Protection Act of 2006.

¹⁵² Public Health Act of 1981 (Chapter 63:1).

¹⁵³ Waste management Act of 1998(65:06).

¹⁵⁴ Sections 2 and 3 of the Factories Act.

apprentices) are employed in manual labour in any process for or incidental to the making of any article or part of any article; the altering, repairing, ornamenting, finishing, cleaning, washing, breaking up or demolition of any article; or the adapting of any article for sale.¹⁵⁵ This means it covers all workers, irrespective of whether they are employees or self-employed.¹⁵⁶

3.1.2.2 Rights and duties of employers and employees

The Factories Act and the Worker's Compensation Act 23 of 1998 contain duties of employers and employees in relation to occupational safety and health. Employer duties include the duty to register a factory;¹⁵⁷ to keep factory in a clean state, and free from effluvia arising from any drain, sanitary convenience or nuisance;¹⁵⁸ check the workplace and machinery regularly for hazards and any hazardous materials and if possible remove them completely or mitigate their effect;¹⁵⁹ train workers in safe working procedures, safe use of machinery and equipment and be supervised during operations;¹⁶⁰ take all practical measures to protect the persons employed in factories where harmful dust or fume or any other impurity of such a character and to such an extent as to be likely to be injurious or offensive to the person employed;¹⁶¹ provide and maintain suitable protective clothing and appliances, including where necessary, suitable gloves, footwear, goggles, head or face coverings or any other necessary clothing or appliance where workers are employed in any process involving excessive exposure to wet or to any injurious or offensive substance;¹⁶² report injuries and occupational diseases¹⁶³ etc.

Employees are prohibited from wilfully interfering with or misusing any means, appliance, convenience or other thing provided in pursuance of the Factories Act for securing the safety, health and welfare of the persons employed in the factory.¹⁶⁴ They are compelled to use any means or appliance provided for securing safety or health. They may also not wilfully and without reasonable cause do anything likely to endanger themselves or any other person.

3.1.2.3 Administrative and institutional framework

The administration of OSH regulations in Botswana is divided between two institutions.

¹⁵⁵ Sections 5 and 6 of the Factories Act

¹⁵⁶ See Regoeng KG. 2003. Safety and health in the informal sector and small-scale industries: The experience of Botswana. *African Newsletter on Occupational Health and Safety* 13(1):10-12 at 12.

¹⁵⁷ Sections 8 and 9 of the Factories Act.

¹⁵⁸ Section 13 of the Factories Act.

¹⁵⁹ Part V of the Factories Act.

¹⁶⁰ Section 29 Factories Act.

¹⁶¹ Section 51 Factories Act.

¹⁶² Section 53 Factories Act.

¹⁶³ Sections 57 and 58 of the Factories Act and Section 9 of the Worker's Compensation Act 23 of 1998.

¹⁶⁴ Section 66 of the Factories Act.

- The Department of Labour and Social Security in the Ministry of Labour and Home Affairs, which is under the leadership of the Labour Commissioner, administers various laws regulating employment, such as the Employment Act of 1981, Employment of Non-Citizens Act 11 of 1981 (CAP 47:02), Trade Disputes Act, Workers' Compensation Act 15 of 2004, and the Wages Regulation Order.¹⁶⁵
- The Division of Occupational Health and Safety deals with matters of occupational health and safety in all enterprises as required by the Factories Act. It is responsible for registration of workplaces, inspection of workplaces, inspection of plant and machinery, accidents and dangerous occurrences, occupational health services and information dissemination.¹⁶⁶

3.1.2.4 Inspection and enforcement

Inspection and enforcement responsibilities are performed by inspectors from different institutions as mandated in different laws. The Labour Inspection Unit in the Department of Labour and Social Security in the Ministry of Labour and Home Affairs undertakes labour inspection (including inspection of any workplace, housing arrangement, sanitary facility and food preparation facility) in terms of the Employment Act.¹⁶⁷ The Division of Occupational Health and Safety, also in the Ministry of Labour and Home Affairs, carries out factory inspections in relation to occupational safety and health under the Factories Act.¹⁶⁸

The laws grant wide powers to inspectors in the enforcement of the laws.¹⁶⁹ Labour officers, under the Labour Inspectorate may demand (in writing to the employer) the suspension of the use of hazardous materials and equipment until the item is repaired or replaced. The labour officer may also, in writing, request the employer to meet him in the public office to discuss matters that fall under the provisions of the acts. Employers are allowed to appeal the decisions (directive or prohibition) of the labour officers in writing to the Minister within 21 days.¹⁷⁰

The Employment Act and the Factories Act declare contraventions of their provisions to be offences; and lay down penalties for their contravention. In terms of the Employment Act, anyone who wilfully delays or obstructs the labour officer in the delivery of his duties is guilty of an offence and liable to fines from P500 to P2 000 or imprisonment of up to 18 months.¹⁷¹ Obstruction of inspectors from the Factory Inspectorate from

¹⁶⁵ See Republic of Botswana. n.d. *Ministry of Labour & Home Affairs (MLHA)*. [Retrieved 22 September 2014] <http://www.gov.bw/en/Ministries--Authorities/Ministries/Ministry-of-Labour--Home-Affairs-MLHA/Department--Units/>

¹⁶⁶ *Ibid.*

¹⁶⁷ See ILO (International Labour Organization). n.d.-a. *Botswana*. [Retrieved 22 September 2014] http://www.ilo.org/labadmin/info/WCMS_114934/lang-en/index.htm.

¹⁶⁸ *Ibid.*

¹⁶⁹ Employment Act, Section 11; Factories Act (S.I. 159 of 1978), Sections 56 and 69.

¹⁷⁰ *Ibid.*

¹⁷¹ See Sections 12 and 172 of the Employment Act; and ILO (International Labour Organization). n.d.-a. *Botswana*. [Retrieved 22 September 2014] http://www.ilo.org/labadmin/info/WCMS_114934/lang-en/index.htm

fulfilling their duties is also an offence and liable to a fine of P50 and to imprisonment for two years or both fine and imprisonment.¹⁷² Where a person contravenes a provision in the Factories Act where no penalty is specified, he/she will be liable to a fine of P100 or two months imprisonment or both.¹⁷³ If the contravention continues after the person is fined and/or imprisoned, a further fine of P20 for each day of contravention is levied. However, where the contravention of the Factories Act results in a person being killed, or dies, or suffers any bodily injury the occupier or owner of the factory is liable to a fine of not more than P400 or to six months imprisonment or to both.¹⁷⁴ The injured worker or the dependants of the diseased worker may also receive the whole or a part of any fine, irrespective of whether the injured worker or the diseased person's dependants have received compensation from another source.

The court has the power to order the owner of the factory to take further steps for remedying the contravention (power to make orders as to dangerous conditions and practice and power to prohibit the use of a factory that is deemed to be detrimental to the safety and health of workers).¹⁷⁵

3.1.3 Employment injury compensation

According to Section 22 of Workmen's Compensation Act 23 of 1998, the liability to pay compensation for an occupational disease lies with the employer who last employed the worker during the period preceding the date of incapacity or death, unless the last employer proves that the disease was not contracted while the worker was employed by him.¹⁷⁶ Workers are required to furnish to the employer from whom compensation is claimed such information as he or they possess as to the names and address of all other employers who during the prescribed period employed the worker in the occupation to the nature of which the disease is due. Where the employer alleges that the disease was in fact contracted while the worker was employed by some other employer and not while employed by him, he may join such other employer as a party to the proceedings in such manner as may be prescribed, and, if the allegation is proved, that employer shall be the employer from whom the compensation shall be recoverable. If the disease is of such a nature as to be contracted by a gradual process, any other employers who, during the prescribed period, employed the worker in the occupation to the nature of which the disease is due, may be required by the Commissioner to make to the employer from whom compensation is recoverable such contributions as in default of agreement may seem to him to be appropriate.

¹⁷² Section 69 of the Factories Act.

¹⁷³ See Sections 70 and 71 of the Factories Act.

¹⁷⁴ Section 73 of the Factories Act.

¹⁷⁵ See Section 43, 44 and 72 of the Factories Act; and ILO (International Labour Organization). n.d.-a. *Botswana*. [Retrieved 22 September 2014] http://www.ilo.org/labadmin/info/WCMS_114934/lang-en/index.htm

¹⁷⁶ Section 22 of the Worker's Compensation Act.

Compensation must be recovered from any employer who employed the worker during the prescribed period referred to in Section 21 of the Workmen's Compensation Act, if the employer who last employed the worker during that period proves that the disease was not contracted while the worker was employed by him, in which case section 22(3) shall apply.¹⁷⁷

3.1.3.1 Scope of coverage

The Worker's Compensation Act requires an 'employer' to pay compensation to a 'worker' who suffers personal injury or an occupational disease arising out of and in the course of the worker's employment.¹⁷⁸ However, no compensation is to be paid in the following circumstances:¹⁷⁹

- where an injury or occupational disease which does not incapacitate the worker to an extent that he is unable to work and earn full wages for a length of time;
- for an injury or occupational disease that has been deliberately self-inflicted;
- where it can be proved that an injury or occupational disease was caused by the worker's wilful misconduct such as being under the influence of intoxicating or narcotic drink, drugs or other substance; deliberate contravention of any law, regulation or order, whether statutory or otherwise, expressly made to safeguard the health and well-being of workers; the wilful removal or disregard of any safety measures or other device which the worker knew to have been provided to secure the safety of workers; or

¹⁷⁷ Section 25 of the Worker's Compensation Act.

¹⁷⁸ Section 11(1) of the Worker's Compensation. In terms of Section 2, 'employer' is defined to include the Government, a local authority, a statutory corporation and anybody or association of persons, and the legal personal representative of a deceased employer. In addition, where the services of a worker are temporarily lent or let on hire to another person by the person with whom the worker has entered into a contract of employment or apprenticeship, the other person is deemed to be the employer of the worker whilst he is working for him/her. A person employed for the purposes of a game or recreation and engaged or paid through a club, the manager or members of the managing committee of the club are deemed to be the employer. 'Worker' is defined as any person who has entered into or works under a contract of employment or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed orally, is in writing or is implied (Section 2 of the Worker's Compensation Act). However, the definition excludes a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired or adapted for sale in his own home or on other premises not under the control or management of the person who gave out the materials or articles; a person who is given permission to win minerals, receiving a portion of the minerals won by him or the value thereof; a person who contracts to carry out works and who engages other persons to perform the work; a member of the employer's family living in the employer's house or the cartilage thereof; or a member of the class of persons declared in the regulations not to be workers for the purposes of the Act. The Act extends protection to workers ordinarily resident in Botswana but temporarily employed abroad; workers ordinarily resident abroad but temporarily employed in Botswana; and workers ordinarily resident in Botswana but on transit to a temporary assignment abroad (Section 12).

¹⁷⁹ Section 11(2) of the Worker's Compensation Act.

- any other act or omission deliberately done contrary to given instructions; or that can be proved to have been caused due to a health problem the worker has had and known about, but has not disclosed to the employer.

Where an injury results in death or permanent incapacity, compensation may also be awarded.¹⁸⁰ Benefits are paid to the worker or (where death results from the injury or occupational disease) to his/her dependants.¹⁸¹

3.1.3.2 Administration and institutional framework

The workers compensation scheme is administered by the Commissioner of Worker's Compensation.¹⁸² In addition, a medical board determines medical disputes on degrees of incapacity and such other medical questions arising in relation to any claim for compensation.¹⁸³

3.1.3.3 Benefits and eligibility conditions

EI compensation includes cash payment in case of the death of a worker (survivors' benefits),¹⁸⁴ where a worker is presumed dead,¹⁸⁵ and in the cases of permanent total incapacity,¹⁸⁶ permanent partial incapacity,¹⁸⁷ and temporary (partial or total) incapacity,¹⁸⁸ as well as the provision of medical aid.¹⁸⁹

¹⁸⁰ Section 11(3) of the Worker's Compensation Act.

¹⁸¹ Section 19 of the Worker's Compensation Act. Section 2 defines 'dependant' of a worker to mean a widow or widower who at the time of the accident was married to the worker in terms of either customary or statutory law; a woman or man with whom the worker was living as wife or husband at the time of the accident (where there is no widow or widower); a child of the worker or of his spouse and includes a posthumous child, a step child, an adopted child and a child born out of wedlock; a parent of the worker or any person who was acting in the place of a parent; and a brother or sister, grandparent or grandchild; who was wholly or partly financially dependent upon the worker at the time of the accident.

¹⁸² Sections 4 and 5 of the Worker's Compensation Act.

¹⁸³ Sections 4 and 5 of the Worker's Compensation Act.

¹⁸⁴ In this case compensation is paid where a worker leaves dependants that were partially or wholly dependent on him/her; or where there are reasonable expenses for his/her burial (Section 13 of the Worker's Compensation Act).

¹⁸⁵ Section 14 of the Worker's Compensation Act.

¹⁸⁶ Section 15 of the Worker's Compensation Act. Additional compensation of up to a quarter of the compensation may be paid to a recipient of permanent incapacity compensation where the person requires the constant help of another person.

¹⁸⁷ Section 16 of the Worker's Compensation Act.

¹⁸⁸ Section 17 of the Worker's Compensation Act. The compensation can be in the form of periodic payments or a lump sum. Periodic payments cannot be for longer than six months, although it can be extended for up to three months at a time but without exceeding a total of 24 months.

¹⁸⁹ Section 26 of the Worker's Compensation Act. In addition to paying compensation, the employer must defray the reasonable expenses incurred by a worker within or outside Botswana as a result of an injury or occupational disease that entitles him/her worker to compensation. Such costs are for medical, surgical, dental and hospital treatment, skilled nursing services and the supply of medicines; for the supply, fitting, maintenance, repair and normal renewal of any artificial

3.1.3.4 Funding

Since worker's compensation in Botswana is an employer-liability system, employers fund the system by acquiring EI compensation liability insurance with insurers approved by the Commissioner for Worker's Compensation.¹⁹⁰ Employers are also permitted to either deposit a sum of money with the Commissioner or another approved security. In order to ensure that employers comply with their funding obligations, it is an offence for an employer not to acquire insurance. Such contravention is punishable with a fine not exceeding P5 000 or to imprisonment for a term not exceeding three years, or to both.

3.1.4 Other employment injury-related schemes and initiatives

Some social security and/or employment benefits, although not directly related to employment injury and disease compensation, play a role in protecting persons who may be injured or contract a disease at work. In terms of the Employment Act, employees with 60 months of continuous employment are entitled to a severance benefit from their employer.¹⁹¹ In addition, in case of termination of the employment contract before an employee has served a continuous period of 60 months, employees are entitled to a severance benefit that is proportionate to the length of service.¹⁹²

Social assistance benefits in the form of an old age pension and a disability benefit are also available. The old age pension is P250 paid to every person aged 65 and above.¹⁹³ The disability benefit is both a monthly cash benefit of P90 and a food basket worth P450–P750. It is provided to registered destitute and disabled persons under the destitute programme.¹⁹⁴

3.1.5 Gaps and challenges

Occupational safety and health as well as worker's compensation are regulated in several laws and enforced by different institutions, leading to fragmentation in the system. This is compounded by the absence of a national system that specifies the infrastructure which would provide the main framework for implementing national OSH policy and programmes.¹⁹⁵

appliance, limb, apparatus or mechanical aid; or for costs necessary for the transportation of the worker to and from examination and treatment or assessment facilities (Section 28 of the Worker's Compensation Act).

190 Section 31 of the Worker's Compensation Act.

191 Section 28 of the Employment Act.

192 SSA/ISSA (Social Security Administration, USA/International Social Security Association). 2013. *Social security programs throughout the world: Africa, 2013*, 38. [Retrieved 22 September 2014] <https://www.ssa.gov/policy/docs/progdsc/ssptw/2012-2013/africa/ssptw13africa.pdf>

193 *Ibid.*

194 *Ibid.*

195 Buhlebenkosi F, Sibanda N, Chaurura P & Chiwira O. 2013. Occupational safety in the urban informal sector of Gaborone, Botswana: A situational analysis. *International Journal of Scientific & Technology Research* 2(12):293-297 at 296.

There is also no comprehensive information on occupational accidents and injuries due to the lack of a proper recording and notification system. This is mainly a consequence of the fragmented national OSH framework, the ignorance of workers and employers,¹⁹⁶ and passive notification of accidents which leads to under-reporting of accidents.¹⁹⁷

Few employers make efforts to comply with their obligations towards employees to ensure as far as practically possible a healthy and safe work environment.¹⁹⁸ This is facilitated by limited or non-existent inspections as required by law to enforce compliance as well as reporting systems. This has led to occupational safety and health conditions in the workplaces not being investigated; and the extent of accidents, injuries and the prevalence of work diseases also not measured.¹⁹⁹ The promotion of occupational accidents and diseases prevention is generally weak.²⁰⁰

Compliance with OSH laws is not promoted by the lenient penalties that can be imposed to defaulting employers and employees. The imposition of fines of between P50 and P5 000 and imprisonment not exceeding three years is not enough motivation for employers and employees to abide by OSH regulations.

There is currently a lack of communication between the Factory Inspectorate, the Workers' Compensation Unit and the Labour Inspection Unit,²⁰¹ as well as lack of support from the ministries of Health and of Mines.²⁰²

The Factories Inspectorate is generally under-staffed, which means priority is always given to enterprises located in industrial zones unless there is a serious complaint from a member of the public.²⁰³ There has also been a decrease in the number of inspections due to the lack of an in-house mechanism to plan, monitor and evaluate the general inspection system. In addition, there is a lack of monitoring tools and factory inspectors in the regions.²⁰⁴

Target settings and performance appraisals to monitor the quantity and quality of inspections are absent. Policy-design, monitoring and evaluation at headquarters are

196 Tau S & Seoke S. 2013. An assessment of the implemented occupational health and safety practices in Botswana construction industry. *African Newsletter on Occupational Health and Safety* 23(3):55-58 at 55.

197 *Ibid.*

198 Gabe SG. 2010. *Occupational health and safety survey in small-scale clothing enterprises in Gaborone, Botswana*. Polokwane, South Africa: University of Limpopo (Medunsa Campus), 63.

199 *Ibid.* 66-67.

200 See ILO (International Labour Organization). n.d.-a. *Botswana*. [Retrieved 22 September 2014] http://www.ilo.org/labadmin/info/WCMS_114934/lang-en/index.htm

201 *Ibid.*

202 *Ibid.*

203 Regoeng KG. 2003. Safety and health in the informal sector and small-scale industries: The experience of Botswana. *African Newsletter on Occupational Health and Safety* 13(1):10-12 at 12.

204 See ILO (International Labour Organization). n.d.-a. *Botswana*. [Retrieved 22 September 2014] http://www.ilo.org/labadmin/info/WCMS_114934/lang-en/index.htm

clearly separated from service delivery at the field level.²⁰⁵ There are also no OSH reporting systems in place making it difficult to quantify and monitor accidents, injuries and the prevalence of work-related diseases that occur in these workplaces.²⁰⁶

3.1.6 Concluding observations

Botswana is in need of an inclusive national policy. In addition, it needs to harness concerted institutional support to develop a framework for the sustainable development of occupational health and safety.²⁰⁷ The Department of Occupational Health and Safety is in the process of developing an occupational health and safety policy that will pave way for a review of the legislation to address current challenges.²⁰⁸ Occupational safety and health standards have also been developed to serve as guidelines for the review of legislation in the area.²⁰⁹

3.2 KINGDOM OF LESOTHO

3.2.1 Socio-economic context

Lesotho is ranked at number 162 on the 2014 Human Development Index.²¹⁰ It has a total population of 2.1 million; a GDP of US\$4.9 billion and GNI per capita of US\$2,798.²¹¹ Seventy-seven per cent and 23% of the population live in rural and urban areas respectively.²¹²

The LFPR for persons aged 15 and above is 73.3%; while the employment to population ratio for persons aged 25 and above is 59.9%.²¹³ The private sector is the largest source of formal employment contributing to 30% of total employment, with private household

205 *Ibid.*

206 Zungu LI & Gabe SG. 2011. *A survey of work, health and safety conditions in small-scale garment enterprises in Gaborone, Botswana. Occupational Health Southern Africa, January/February: 13-19* at 13.

207 Buhlebenkosi F, Sibanda N, Chaurura P & Chiwira O. 2013. Occupational safety in the urban informal sector of Gaborone, Botswana: A situational analysis. *International Journal of Scientific & Technology Research* 2(12):293-297 at 296.

208 Mosanawe JO. 2013. Construction safety and occupational safety and health in Botswana. *African Newsletter on Occupational Health and Safety* 23(3): 66-67 at 67.

209 *Ibid.*

210 United Nations Development Programme *Human Development Report 2014* (United Nations Development Programme (2014)) 159.

211 *Ibid.* 162, 198 and 218.

212 Government of Lesotho/ILO (International Labour Organization). 2012. *Lesotho decent work country programme: Phase II 2012 to 2017*, 12. [Retrieved 30 September 2014] <http://www.ilo.org/public/english/bureau/program/dwcp/download/lesotho.pdf> Government of Lesotho *Lesotho Decent Work Country Programme Phase II: 2012 to 2017* (February 2012) 12.

213 UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 174 and 202.

employment estimated at 22.2%; the public sector accounts for 5.5%, parastatals account for 1.6% with 22% of the labour force employed in the informal sector. Subsistence agriculture continues to be the mainstay of the country's livelihoods, with 40.6% of the economically active population.²¹⁴

The unemployment rate for persons aged 15 and above is 24.4%, implying that informal sector workers and subsistence farmers are not counted.²¹⁵ This may explain why 51.2% of the working people are poor (earning less than US\$2 a day). In addition, 45.9% of the population is in multidimensional poverty, 20.4% is near multidimensional poverty and 18.2% is in severe poverty.²¹⁶

3.2.2 Occupational safety and health

Occupational safety and health is regulated by the Labour Code (Order 24 of 1992).²¹⁷

3.2.2.1 Scope of coverage

The Labour Code applies to all employees and apprentices of the private and public sectors (including public authorities). However, employees of the Royal Lesotho Defence Force, Royal Lesotho Mounted Police and members of all other disciplined forces within the meaning of Chapter II of the Lesotho Independence Order of 1966 are excluded (these categories have special social security schemes).²¹⁸ It also excludes employees and apprentices of mines who are covered by the Mine Safety Act 4 of 1981. In addition the Minister of Labour can exclude a category or class of public officers or employees of a public authority from the protection of the Code.²¹⁹

3.2.2.2 Rights and duties of employers and employees

The Labour Code stipulates duties for employers and employees. Some of the duties of the employer are to keep records, books, accounts and statistics of employees and to produce these for examination and making of certified copies whenever required by a labour officer,²²⁰ and to ensure the safety, health and welfare at work of all of their employees as far as is reasonably practicable.²²¹ This involves the provision and

214 Government of Lesotho/ILO (International Labour Organization). 2012. *Lesotho decent work country programme: Phase II 2012 to 2017*, 13. [Retrieved 30 September 2014] <http://www.ilo.org/public/english/bureau/program/dwcp/download/lesotho.pdf>

215 UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 202.

216 *Ibid.* 180.

217 Labour Code Order 24 of 1992.

218 SSA/ISSA (Social Security Administration, USA/International Social Security Association). 2013. *Social security programs throughout the world: Africa, 2013*, 108. [Retrieved 22 September 2014] <https://www.ssa.gov/policy/docs/progdesc/ssptw/2012-2013/africa/ssptw13africa.pdf>

219 Section 2 of the Labour Code.

220 Section 17 of the Labour Code.

221 Section 93 of the Labour Code.

maintenance of a working environment that is clean, safe, without risks to health and that has adequate sanitary facilities and arrangements for the welfare of employees; the provision and maintenance of plant and systems of work that are safe and without risks to health; arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances; the provision of information, instruction, training and supervision necessary to ensure the safety and health of employees; and the maintenance of the place of work (including means of access) in a condition that is safe and without risks to health. Employers must also consult employee representatives on the safety and health committee to make and maintain arrangements to effectively promote measures to ensure the safety and health, and in check the effectiveness of these measures; and furnish and maintain at his/her own expense equipment and facilities for rendering first aid to employees. They must keep documents relevant to safety and health at the workplace or a place accessible to a labour officer;²²² appoint a registered safety and health officer and establish a safety and health committee.²²³ They must notify the Labour Commissioner of industrial accidents and dangerous occurrences and occupational diseases²²⁴ and provide employees and maintain personal protective equipment, protective clothing and accessories.²²⁵ Employers must also conduct their business in a way that persons who are not employees are not exposed to risks to their safety or health.

Employers have the duty to take reasonable care for the safety and health of themselves and of other persons who may be affected by their acts or omissions at work; to co-operate with the employer in the discharge of any duty or requirement placed upon the employer by the Labour Code; to wear any protective equipment or clothing provided by the at all times when there is a risk of bodily injury against which the equipment or clothing affords protection; report to his or her employer the loss, destruction or other defect in the protective equipment or clothing; and not smoke at the place of work, except at specific areas demarcated for that purpose.²²⁶

3.2.2.3 Administrative and institutional framework

The Occupational Health and Safety Section of the Labour Department in the Ministry of Labour and Employment is responsible for the administration of occupational safety and health. It conducts workplace inspections, surveys and investigation of accidents, dangerous occurrences and work-related diseases; monitors adherence to OSH legislation; provides relevant training to social partners to enhance the understanding of their duties and obligations in promoting safety and health; promotes and implements the national HIV and AIDS policy at workplaces; compiles and analyses statistics on

222 Section 96 of the Labour Code.

223 Sections 97 and 98 of the Labour Code.

224 Sections 101 and 102 of the Labour Act and Section 14 1 of the Workmen's Compensation Act 13 of 1977.

225 Section 109 of the Labour Code.

226 Section 94 of the Labour Code.

occupational safety and health; and disseminates information on occupational safety and health.²²⁷

3.2.2.4 Inspection and enforcement

Inspectors (labour officers) are appointed in terms of the Labour Code to enforce provisions of the Code and any other written law relating to labour, employment, industrial relations, working conditions or workers' compensation.²²⁸ Labour inspectors are empowered to enter freely, inspect and examine places and objects; take samples of material and substances used or handled by employees for analysis; carry out examinations, tests or inquiries; and institute and carry on court proceedings in his/her own name or on behalf of an employee, or the employee's family or representative against any employer.²²⁹

The Labour Commissioner has the power to make an order prohibiting the use of the place of work or the carrying out of the activities (prohibition order).²³⁰ In addition, there are penalties for contravening the OSH regulations in the Labour Code. It is also an offence for a person to wilfully delay or obstruct a labour officer or another officer who exercising any power or performing any duty conferred or imposed by the code; to fail without just cause to comply with a lawful direction, requirement or demand or to answer any question of a labour officer which was made or given in accordance with the Code; to conceal or prevent a person from appearing before or being examined by a labour officer, or attempt to conceal or prevent a person from appearing or being examined; or to furnish false information.²³¹ In addition, it is an offence for an employer to fail to comply with OSH regulations. He/she is liable on conviction to a fine of up to six hundred Maloti (M600) or to imprisonment for a period up to six months or both fine and imprisonment.²³² Furthermore, it is an offence if a person wilfully or recklessly damages, interferes with or misuses anything provided in the interests of safety, health or welfare.²³³

3.2.3 Employment injury compensation

Employment injury compensation is regulated by the Workmen's Compensation Act 13 of 1997 and the Public Officers' Defined Contribution Pension Fund Act 8 of 2008.²³⁴ The Public Officers' Defined Contribution Pension Fund is open to government

227 ILO (International Labour Organization). n.d.-d. *Occupational safety and health country profile: Lesotho*. [Retrieved 30 September 2014] <http://www.ilo.org/safework/countries/africa/lesotho/lang--en/index.htm>

228 Sections 12 and 14 of the Labour Code.

229 Section 14 of the Labour Code.

230 Section 99 of the Labour Code.

231 Sections 18 of the Labour Code.

232 Section 116(1) of the Labour Code

233 Section 116(2) of the Labour Code

234 Workmen's Compensation Act and the Public Officers' Defined Contribution Pension Fund Act.

employees employed on permanent and pensionable terms.²³⁵ It is not an employment injury scheme but provides benefits for (amongst others) retirement due to ill-health and disability.

3.2.3.1 Scope of coverage

The Workmen's Compensation Act covers all persons who have entered into a contract of employment with an employer (employees and apprentices) including persons employed by government on temporary and non-pensionable terms.²³⁶ However, it excludes casual employees; sub-contractors; domestic workers; persons whose services are rewarded in kind and not in cash; members of the employer's family living in the employer's house; members of His Majesty's Armed Forces, the Lesotho Royal Mounted Police and Prison Service; a government employee who is receiving pension or gratuity or whose survivors are receiving a pension or gratuity; and any other category of workers excluded by the Minister of Labour and Employment.

3.2.3.2 Administration and institutional framework

The Workmen's Compensation Section of the Ministry of Labour and Employment is responsible for the management of worker's compensation. The section is under the supervision of the Labour Commissioner.²³⁷ The Workmen's Compensation Medical Board assists the Labour Commissioner in determining the degree and duration of disability; medical examination and treatment that is provided; the necessity for or the character or sufficiency of medical aid provided or to be provided; or an assessment made by a medical practitioner.²³⁸

3.2.3.3 Benefits and eligibility conditions

A worker or his/her dependants are eligible for compensation from the employer where the worker is injured or dies in an accident arising out of and in the course of his/her employment; or if the worker gets on industrial disease or dies from such a disease.²³⁹ However, benefits will not be paid where the injury does not incapacitate the worker for not more than three days from earning full wages at work; where claims are made more than six months after the accident; where the industrial disease is reported more than six months after diagnosis; where the worker's own misconduct caused the accident; where incapacity or death resulted from deliberate self-injury; or where a worker had represented to the employer that he was not suffering from that or a similar injury knowing that the representation was false. In addition, the employer is liable for an occupational disease if the worker is suffering from or died from a disease listed in the Workmen's Compensation Act, the disease is due to work that falls under the Act, and for which the worker was

235 Section 5 of the Public Officers' Defined Contribution Pension Fund Act.

236 Sections 2 and 4 of the Workmen's Compensation Act.

237 Section 14 of the Workmen's Compensation Act.

238 Sections 17 and 18 of the Workmen's Compensation Act.

239 Sections 5 and 37 of the Workmen's Compensation Act.

employed within 24 months of the issue of a medical certificate attesting to his/her illness or of his/her death.²⁴⁰

Benefits are provided for permanent total incapacity, permanent partial incapacity, temporary incapacity and death (survivors' benefits). The employer also pays reasonable expenses for the medical attention of the employee (for medical, surgical and hospital treatment, skilled nursing services and the supply of medicine); for supply, maintenance, repair and renewal of articulated artificial limbs or any other artificial appliances; and for transport costs incurred in transferring the worker to and from a place of treatment; and reasonable expenses for the burial of a worker who dies.²⁴¹

3.2.3.4 Funding

The Lesotho EI compensation system is an employer liability system since the Workmen's Compensation Act states that an employer must insure himself and his workers for occupational injury and disease compensation liability.²⁴² The 1977 Act requires an employer to purchase compulsory insurance with a private carrier, subject to approval by the Minister. In order to ensure compliance with his obligations, an employer who fails to insure is guilty of an offence and liable to a fine of M300 or 12 months imprisonment or both fine and imprisonment.

3.2.4 Other employment injury-related schemes and initiatives

An old-age pension is paid to all residents of Lesotho aged 70 and over as well as to their dependants. Eligible survivors include a widow or a dependent widower and children younger than age 18.²⁴³ There is also a 'disability allowance': 'The Department of Social Welfare administers a monthly disability allowance which is usually paid in cash. Coverage is national and the allowances are funded from public coffers. There is however no statutory framework governing its operations.'²⁴⁴

3.2.5 Gaps and challenges

Lesotho's employment injury compensation system is fragmented; with a defined contribution pension fund for permanent and pensionable public sector workers and an employer-liability system for all other employees. There is thus no national social insurance scheme for EI compensation. Due to the absence of a social insurance scheme, employment injury compensation victims receive benefits in the form of a lump sum.

240 Section 37 read with the First Schedule of the Workmen's Compensation Act.

241 Sections 6, 7, 8, 9 and 33 of the Workmen's Compensation Act.

242 Section 28 of the Workmen's Compensation Act.

243 SSA/ISSA (Social Security Administration, USA/International Social Security Association). 2013. *Social security programs throughout the world: Africa, 2013*, 108. [Retrieved 22 September 2014] <https://www.ssa.gov/policy/docs/progdesc/ssptw/2012-2013/africa/ssptw13africa.pdf>

244 See Mosito KE. 2014. A panoramic view of the social security and social protection provisioning in Lesotho. *Pothchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* (17)4:1571-1629..

This may be detrimental to them as they may not be in a position to effectively manage these benefits. The employer-liability has also led to delays in the finalisation of benefit claims, due to reluctance/inability of employers to pay or the 'lax and dilatory conduct' of officials of the Labour Department.²⁴⁵

The personal scope of coverage of OSH and EI compensation in Lesotho is narrow as the Labour Code and the Workmen's Compensation Act extend coverage only to employees and apprentices (and the Public Officers' Defined Contribution Pension Fund covers permanent pensionable public workers). Considering that private sector accounts for 30% of total employment, with the public sector employing 5.5% and state-owned enterprises employing 1.6% (a total of 37.1%); a vast majority of the working population (up to 63% of the working population) is without any coverage in relation to OSH and EI compensation. The scope of occupational diseases covered is also narrow, limited to diseases listed in the First Schedule of the Workmen's Compensation Act.

The occupational safety and health situation is further aggravated by the failure to properly enforce OSH regulations, which leads to non-compliance by employers. As an example, it has been reported that:

There is ... violation of health and safety standards such that emergency exits are sometimes locked with padlocks. Factories have no temperature regulations therefore; they are very hot in summer and very cold in winter. There is hardly any safety equipment in the factories, wherever existent employers rarely condone such equipment use, except when they are sure of the usually communicated visits of labo[u]r inspection officers.²⁴⁶

In addition, the obligation to ensure safety, health and welfare as far as practicable is only nominally undertaken as the safety, health and welfare of workers are not guaranteed (especially in textile factories).²⁴⁷

The Lesotho OSH framework focuses on the compensation of injured workers and the dependants of deceased workers, with little effort in promoting the prevention of occupational accidents and diseases.²⁴⁸ Apart from the requirement to report an accident to the Labour Commissioner as a condition for receiving compensation of occupational injury or disease, there is no link between the employer's liability to pay compensation and his/her obligation to promote occupational safety and health (such as determining employer's compensation liabilities also with regard to efforts to prevent accidents/

245 See *Labour Commissioner (obo deceased Motlalepula Charles Rakhoba's family) v Leta Security Services (Pty) Ltd* [2006] LSLC 12 and *Labour Commissioner (obo) Pheello Lepekola v Lesotho Electricity Corporation* [2010] LSLC 25.

246 Daemane MMM. 2014. The critical exposure of Lesotho's labor law effectiveness: Industrial relations' calamity of textile industry workers in Lesotho. *Journal of Social and Development Sciences* 5(2):58-72 at 60.

247 *Ibid.*

248 ILO (International Labour Organization). n.d.-d. *Occupational safety and health country profile: Lesotho*. [Retrieved 30 September 2014] <http://www.ilo.org/safework/countries/africa/lesotho/lang--en/index.htm>

diseases in the workplace). Rehabilitation and/or reintegration measures are lacking, with no provisions or initiatives in the Workmen's Compensation Act.

Although the Labour Code and the Workmen's Compensation Act contain penalties for non-compliance, these are out-dated as they are low in terms of today's economic situation (the Labour Code provides for a fine of M300 or 12 months imprisonment or both; while the Workmen's Compensation Act provides for no more than M200 or no more than 12 months imprisonment).²⁴⁹ It is argued that these penalties reflect the economic situation of the times the laws were passed and as such they serve no deterrent purpose by today's economic standards.²⁵⁰

The enforcement of the Labour Code and its OSH requirements are hampered by limited numbers of trained inspectors to enforce compliance with these standards.²⁵¹

3.2.6 Concluding observations

The occupational safety and health as well as employment injury compensation systems in Lesotho are inadequate, due to fragmentation, limited coverage, poor administration and enforcement and lack of compliance. However, there are current initiatives aimed at improving these systems. As examples, the Ministry of Labour and Employment has taken positive steps to integrate labour and OSH inspection systems.²⁵² There is also high political will to promote greater awareness of the importance of occupational safety and health in the workplace to ensure compliance with laws concerning working conditions at all levels.²⁵³

3.3 REPUBLIC OF MALAWI

3.3.1 Socio-economic context

In 2013, Malawi was ranked at number 174 on the HDI with a GDP of US\$11.8 billion and GNI per capita of US\$715.²⁵⁴ The country has a total population of 16.4 million of which 16% live in urban areas.²⁵⁵ The employment to population ratio of persons over

²⁴⁹ Sections 14(4) and 45(3) of the Workmen's Compensation Act.

²⁵⁰ Africa Institute/Lesotho Ministry of Tourism, Environment and Culture. 2012. *Assessment of the legal and institutional gaps and needs analysis in the management of chemicals in Lesotho*, 16.

²⁵¹ *Ibid.* 24.

²⁵² ILO (International Labour Organization). n.d.-d. *Occupational safety and health country profile: Lesotho*. [Retrieved 30 September 2014] <http://www.ilo.org/safework/countries/africa/lesotho/lang-en/index.htm>.

²⁵³ Government of Lesotho/ILO (International Labour Organization). 2012. *Lesotho decent work country programme: Phase II 2012 to 2017*, 16. [Retrieved 30 September 2014] <http://www.ilo.org/public/english/bureau/program/dwcp/download/lesotho.pdf>

²⁵⁴ UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 159 and 199.

²⁵⁵ *Ibid.* 218.

the age of 25 years is 91.1%.²⁵⁶ However, 80% of the population is engaged in subsistence agriculture, which may account for the up to 82% of the working population being classified as poor (earning less than US\$2 a day).²⁵⁷ There is also high underemployment, especially in rural areas. Employment is mostly in the informal sector, which employs up to 88% of the working population.²⁵⁸

Malawi's poverty rates are as follows: 49.8% of the population is in multidimensional poverty, 24.5% of the population is near multidimensional poverty and 29.8% of the population is in severe poverty.²⁵⁹ About 61.64% of the population is living below US\$1.25 a day while 50.7% live below the national poverty line.²⁶⁰

3.3.2 Occupational safety and health

Occupational safety and health in Malawi is regulated by the Occupational Safety, Health and Welfare Act 21 of 1997. The Act provides for the regulation of employee safety, health and welfare in the workplace; inspection of plants and machinery; and prevention and regulation of accidents in the workplace. The adoption of the 1997 Act was influenced by various factors, such as lobbying by trade unions and civil society organisations for better regulation of industrial relations and occupational safety and health (trade unions had been enabled by political reforms in the early 1990s which promoted trade union and civil society involvement in policy formulation); signing of several ILO conventions and recommendations on occupational safety and health.²⁶¹

3.3.2.1 Scope of coverage

The Occupational Safety, Health and Welfare Act applies to every workplace unless otherwise provided. The Act defines a workplace as any premises in which or within the closed space or precincts of which, one or more persons are employed.²⁶² The 1997 Act contains a list of activities within the definition of a workplace, which are also the

²⁵⁶ *Ibid.* 203.

²⁵⁷ *Ibid.* See also Durevall D & Mussa R. 2010. *Employment diagnostic analysis on Malawi*. [Retrieved 30 September 2014] http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_policy/---cepol/documents/publication/wcms_143247.pdf, ix; and Ulandssekretariatet, LO/FTF Council. 2015. *Malawi – labour market profile 2015*, 15 [Retrieved 4 June 2016] <http://www.Ulandssekretariatet.dk/content/landeanalyser>

²⁵⁸ See Ulandssekretariatet, LO/FTF Council. 2015. *Malawi – labour market profile 2015*, 20 [Retrieved 4 June 2016] <http://www.Ulandssekretariatet.dk/content/landeanalyser> and Durevall D & Mussa R. 2010. *Employment diagnostic analysis on Malawi*. [Retrieved 30 September 2014] http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_policy/---cepol/documents/publication/wcms_143247.pdf, 14

²⁵⁹ UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 180.

²⁶⁰ *Ibid.* 180.

²⁶¹ Nkowane Z. 2008. Injury unto death: occupational health and safety regulation: A window on Malawi. *The Comparative and International Law Journal of South Africa* 41(1):49-79 at 50 and 75.

²⁶² Section 3(1) of the Occupational Safety, Health and Welfare Act.

workplaces eligible for inspection by the Directorate for Occupational Safety, Health and Welfare. However, its closed list leaves out some occupations such as banking, teaching and health care providers. It also excludes employees of the military and the police.²⁶³

3.3.2.2 Rights and duties of employers and employees

The Occupational Safety, Health and Welfare Act has duties of employers to their employees;²⁶⁴ duties for employees;²⁶⁵ duties of employers and self-employed persons to persons who are not their employees;²⁶⁶ duties of other persons who have control of workplaces;²⁶⁷ and duties of manufacturers or suppliers.²⁶⁸ Employers have the general duty of ensuring the safety, health and welfare at work of employees. This includes the provision and maintenance of plant and systems of work that are safe and without risks to health; making arrangements for ensuring safety and absence of risks to health in connexion with the use, handling, storage and transportation of articles and substances; provision of information, instruction, training and supervision to ensure the safety and health at work of his employees; provision of maintenance in a manner that is safe and without risks to health; provision and maintenance of safe means of access; and provision and maintenance of a working environment that is safe, without risks to health and adequate. Every employer must also prepare and regularly revise a safety and health policy; request information from manufacturers or designers on products to be used in workplaces;²⁶⁹ establish a safety committee if employing more than fifty employees;²⁷⁰ and record all work-related injuries and illnesses.²⁷¹

Every employee must take reasonable care for the safety and health of himself and that of other persons who may be affected by his acts or omissions; and cooperate with the employer or any other person in performing any duty or complying with any requirement imposed by the 1997 Act.

3.3.2.3 Administrative and institutional framework

The Labour Commissioner appointed in terms of the Employment Act 6 of 2000 is responsible for the effective administration and application of the Act, which includes

263 ILO/EU (International Labour Organization/European Union). 2009. *Malawi country profile on occupational safety and health 2009*, 2. [Retrieved 30 September 2014] http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/policy/wcms_187633.pdf

264 Section 13 of the Occupational Safety, Health and Welfare Act.

265 Section 18 of the Occupational Safety, Health and Welfare Act.

266 Section 14 of the Occupational Safety, Health and Welfare Act.

267 Section 15 of the Occupational Safety, Health and Welfare Act.

268 Section 17 of the Occupational Safety, Health and Welfare Act.

269 Section 17 of the Occupational Safety, Health and Welfare Act.

270 Section 21 of the Occupational Safety, Health and Welfare Act.

271 Section 70 of the Occupational Safety, Health and Welfare Act.

provisions on occupational safety and health.²⁷² One of the functions of the Labour Commissioner is inspection of places of work. The Directorate for Occupational Safety and Health is also mandated by the Occupational Safety, Health and Welfare Act to undertake the administration of occupational safety and health (including the prevention, recording, investigating and reporting of occupational health injuries and diseases; provision of inspection and advisory services).²⁷³

3.3.2.4 Inspection and enforcement

Inspectors (labour officers) are appointed to ensure the application of occupational safety and health as provided in terms of the Occupational Safety, Health and Welfare Act and the Employment Act.²⁷⁴ Labour officers have wide powers in the enforcement of OSH laws (e.g. entry into a workplace, examination of records, collection of samples for analysis, remedying of defects etc.).²⁷⁵

3.3.3 Employment injury compensation

The Workers' Compensation Act 7 of 2000 makes provisions for the establishment of a Workers' Compensation Fund to administer the compensation of workers and dependants for work-related injuries and diseases.²⁷⁶ However, the fund is still to be created and the obligation to compensate workers for occupational injuries or diseases still vests with employers.²⁷⁷

Employers are liable to pay compensation to a worker who sustains an injury out of and in the course of his or her employment,²⁷⁸ except in the case of the contraction of

²⁷² See Section 8(1) of the Employment Act.

²⁷³ Section 72 of the Occupational Safety, Health and Welfare Act.

²⁷⁴ Section 72 of the Occupational Safety, Health and Welfare Act and Section 8 of the Employment Act.

²⁷⁵ Sections 73 and 74 of the Occupational Safety, Health and Welfare Act and Section 9 of the Employment Act.

²⁷⁶ Section 31 of the Workers' Compensation Act.

²⁷⁷ FAO (Food and Agricultural Organization). 2011. *Gender inequalities in rural employment in Malawi: Policy context*. [Retrieved 30 September 2014] <http://www.fao.org/docrep/016/ap093e/ap093e00.pdf>

²⁷⁸ Unless the contrary is proved, an injury that arises in the course of a worker's employment is presumed to also have arisen out of that employment (Section 4(3) of the Workers' Compensation Act). In addition, where a worker suffers an injury that results in his/her death or serious permanent incapacity while acting for the purpose of and in connexion with his employer's business, it is deemed to have arisen out of and in the course of his employment, notwithstanding that at the time of the injury, he/she was acting in contravention of any statutory or other regulation applicable to his employment or any orders or instructions given by or on behalf of his employer, or that he was acting without orders or instructions from his employer (Section 4(4) of the Workers' Compensation Act). Where a worker sustains an injury in or about any premises he is employed for the purposes of his employer's business, it is deemed to have arisen out of and during the course of his employment if he/she sustains the injury while taking steps in an actual or supposed emergency in or about those premises to rescue, succour or protect persons who

a scheduled disease.²⁷⁹ However, an employer is not liable to pay compensation for an injury which prevents a worker from earning full wages or salary at the work he/she was employed for less than seven days; where the incapacity or death is due to deliberate self-injury; where the injury can be attributed to the serious and wilful misconduct of that worker, or if the worker falsely claims to the employer that he/she was not suffering or had not previously suffered from that or a similar injury.²⁸⁰ Compensation can still be awarded where the injury results in death or serious permanent incapacity.

3.3.3.1 Scope of coverage

According to Section 1(2) of the Workers Compensation Act, compensation for occupational injury or disease is provided 'to or for the benefit of the worker or (where death results from the injury) to or for the benefit of his/her dependents'. A 'worker' means a person who enters into, or works under, a contract of service or apprenticeship with an employer in any employment, whether the contract is expressed orally or in writing or is implied.²⁸¹ However, excluded from the definition of 'worker' are casual workers employed for purposes other than for the employer's business and who are not employed for the purposes of a game or recreation and engaged or paid through a club;

are, or are thought to be, injured or imperilled or to avert or minimise damage to property owned or utilised by the employer or for which the employer was responsible to the owner (Section 4(5) of the Workers' Compensation Act). Where a worker is injured while travelling to or from his/her place of employment, it is presumed that the injury arose out of and in the course of his employment if, with the express or implied permission of the employer he is travelling on or by means of transport provided by the employer for carrying workers employed by him; or the transport is under the control of the employer or accepted by the employer for use by a worker and the employer has expressly or by implication authorised the use of the transport for carrying a worker or workers (Section 4(6) of the Workers' Compensation Act).

279 Section 4(1) of the Workers' Compensation Act. The term 'employer' includes the government (with the exception of the armed forces of Malawi), a local authority, a body or association of persons, corporate or unincorporated, and the personal representative of a deceased employer, and a person to whom the services of a worker are temporarily lent or let on hire (Section 2 of the Workers' Compensation Act).

280 Section 4(2) of the Workers' Compensation Act.

281 Section 2 of the Workers' Compensation Act. Where the Commissioner is of the opinion that an injured worker's contract of service or apprenticeship was not legally valid or otherwise legally unenforceable at the time of the injury, the Commissioner may deal with the matter as if the injured worker had been a person working under a legally valid and enforceable contract of service or apprenticeship (Section 2(3) of the Workers' Compensation Act). Except in the case of medical examination and treatment (Section 25), reference to an injured and dead worker includes reference to his/her personal representative, his/her dependents or the Administrator General or such other public officer as the Minister may appoint to act on behalf of the dependents of the worker (Section 3(5) of the Workers' Compensation Act). 'Dependents' are the members of the family of a worker (including an illegitimate child of a worker and the parent or grandparent of an illegitimate child who is a worker) who were wholly or partly dependent upon his/her earnings at the time of his/her death, and would still be dependent if not of the incapacity. However, a person will not be deemed to have been partially dependent on another person unless he/she was dependent partially on contributions from that other person for the provision of the ordinary necessities of life suitable for persons in his/her class and position (Section 3(1) of the Workers' Compensation Act).

outworkers;²⁸² tributers;²⁸³ members of an employer's family living in the employer's house; members of the armed forces of Malawi; and any other class of persons declared not to be workers for the purposes of the Worker's Compensation Act.

A worker or his/her dependants are also entitled to compensation in the event that a worker is certified to be suffering from a scheduled disease that leads to incapacity or death; and the disease is attributable to the worker's employment and was contracted within the prescribed period preceding the incapacity or death.²⁸⁴ However, a worker or his/her dependants will not be entitled to compensation where the disease was caused or aggravated due to employment outside Malawi, except for a worker from Malawi employed abroad by his/her employer within Malawi. A workers who is incapacitated by or dies from a scheduled disease may still be provided compensation even if the worker had falsely represented to the employer that he/she was not suffering or had not previously suffered from that or a similar scheduled disease.²⁸⁵

In relation to occupational diseases, the employer who last employed the worker during the prescribed period is liable to pay compensation, unless it is proved that the disease was not contracted while the worker was employed by that employer and has not been aggravated by the conditions in his employment.²⁸⁶ An employer who claims that an occupational disease was contracted while the worker was employed by another employer may be joined to the proceedings. If the claim is proved, the other employer becomes liable for compensation.²⁸⁷

If a disease is contracted gradually over a period of time, any other employers who employed the worker in the occupation that causes the disease during the prescribed period may be required to contribute towards the compensation of the worker.²⁸⁸

Where a worker, who normally works in Malawi but is temporarily employed abroad by the same employer, is injured he/she will be compensated in the same way as if the injury occurred during employment in Malawi.²⁸⁹ The same is true of a worker employed outside Malawi who suffers injury while temporarily employed inside Malawi, although the employer must have agreed to be assessed and had paid his assessment prior to

282 An outworker is a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale in his own home or on other premises not under the control or management of the person who gave out the materials or articles (Section 3 of the Workers' Compensation Act).

283 A tributer is a person who is granted permission to win minerals and receives a proportion of the minerals won or their value (Section 3 of the Workers' Compensation Act).

284 Section 16(1) of the Workers' Compensation Act.

285 Section 16(2) of the Workers' Compensation Act.

286 Section 17(1) of the Workers' Compensation Act.

287 Section 17(3) of the Workers' Compensation Act.

288 Section 17(4) of the Workers' Compensation Act.

289 Section 6(1) of the Workers' Compensation Act.

the injury.²⁹⁰ In case the worker is entitled to compensation in Malawi and another country and elects to receive compensation in Malawi, the Commissioner for Workers' Compensation ensures that the worker has not already claimed under the law of the other country; and also notifies the other country of the payment of compensation in Malawi.²⁹¹ A worker who is employed in Malawi for work in another country who is injured while on his or her way to commence employment or the way back to Malawi, he or she will be entitled to compensation as if the injury was a worker commuting injury. This is the case whether the injury was incurred in Malawi or outside Malawi.²⁹²

3.3.3.2 Administration and institutional framework

Since the Worker's Compensation Fund is still to be created, the Workers Compensation Department of the Ministry of Labour is responsible for the administration of workers compensation.²⁹³

3.3.3.3 Benefits and eligibility conditions

The Workers' Compensation Act provides for the payment of cash benefits in the event of partial incapacity (temporary or permanent),²⁹⁴ total incapacity (temporary or permanent)²⁹⁵ and death (survivors' benefits).²⁹⁶ In addition, employers must defray the reasonable medical expenses incurred by a worker within or outside Malawi as a result of a compensatable injury.²⁹⁷

The Workers' Compensation Fund is envisaged so that compensation will in future be paid periodically and during the period of contingency out of the fund, unlike the present system of individual employer liability which pays a lump sum regardless of the extent of permanent incapacity one suffers.²⁹⁸

²⁹⁰ Section 6(2) of the Workers' Compensation Act.

²⁹¹ Section 6(3) of the Workers' Compensation Act.

²⁹² Section 6(4) read with Section 4(6) of the Workers' Compensation Act.

²⁹³ See FAO (Food and Agriculture Organisation). 2011. *Gender inequalities in rural employment in Malawi: Policy context* [Retrieved 30 September 2014] <http://www.fao.org/docrep/016/ap093e/ap093e00.pdf>; and Ministry of Labour (Malawi) 'Departments of the Ministry of Labour' [Retrieved 5 June 2016] <http://www.Malawi.gov.mw/>

²⁹⁴ See Section 9 of the Workers' Compensation Act.

²⁹⁵ See Section 8 of the Workers' Compensation Act.

²⁹⁶ See Section 7 of the Workers' Compensation Act.

²⁹⁷ Section 14 of the Workers' Compensation Act. This is for medical, surgical, dental and hospital treatment, skilled nursing services and the supply of medicines; the supply, fitting, maintenance, repair and normal renewal of any artificial appliance, limb, apparatus or mechanical aid; and for reasonable transport charges incurred in transporting the worker to and from prescribed examination and treatment or assessment facilities.

²⁹⁸ Ministry of Labour. n.d. *Workers compensation*. [Retrieved 12 August 2014] <http://www.labourmw.com/?q=content/workers-compensation>

3.3.3.4 Funding

The Workers' Compensation Act envisages the establishment of a Workers' Compensation Fund that would be financed by workers through contributions determined on the basis of assessments.²⁹⁹ With the failure to establish the fund, employers are directly liable to pay compensation to employees who are injured or contract a disease (employer liability scheme).³⁰⁰ However, the 2000 Act is silent on the need for employers to get an occupational injury insurance policy with an approved insurer to cover the liability of employees being injured at work or contracting an occupational disease.

3.3.4 Other employment injury-related schemes and initiatives

Health care services in public facilities are free, which means employees injured at work or who contract an occupational disease can receive health care services in these facilities.

Social assistance is available in the form of food support programmes for prescribed categories of vulnerable people (the elderly, the chronically sick, orphans and other vulnerable children, persons with disabilities, and destitute families).³⁰¹ Benefits are provided for about 20% of households, for only up to eight months. A very small proportion of the population (0.2–0.4%) receives cash transfer benefits.³⁰²

3.3.5 Gaps and challenges

Although a Workers' Compensation Fund to administer the compensation of workers and dependants for work-related injuries and diseases is envisaged, this is yet to be created. Therefore, Malawi still operates an employer liability system, with the obligation to compensate workers for occupational injuries or diseases still on individual employers and benefits paid in the form of a lump sum. This is detrimental to the protection of Malawian workers.

The personal scope of occupational safety and health protection is very narrow, since it is not only restricted to employees and apprentices but excludes various categories of employees. The up to 90% informal sector employment implies a small proportion of Malawian workers enjoy OSH protection.

299 Section 57 of the Act states that “there shall be established and maintained for the purposes of this Act, a fund to be known as the Workers' Compensation Fund, herein referred to as the Fund ... There shall be paid into the Fund any assessments payable by employers including the Government under this Act; any moneys paid by employers, including the Government, to the Commissioner under this Act ...”

300 Shaba WG. 2013. Social protection and informal workers in Malawi. Paper presented at the FES/SASPEN Social Protection for the Informal Economy Conference, Johannesburg (16-17 September).

301 Republic of Malawi. 2012. *Integrated household survey 2010-2011: Household socio-economic characteristics report*, 172. [Retrieved 12 August 2014] http://siteresources.worldbank.org/INTLSMS/Resources/3358986-1233781970982/5800988-1271185595871/IHS3_Report.pdf

302 *Ibid.* 177.

Occupational safety and health activities are fragmented to different departments in the country (leading to the division of resources for OSH activities among different institutions and the absence of a central database on occupational accidents and work-related deaths and diseases).³⁰³

Occupational safety and health also faces problems of resource constraints (financial and social) and skill limitations.³⁰⁴ This may be because of the low status accorded to the Directorate of Safety and Health within the Ministry of Labour, reflected by its small and declining budgetary allocation (2.3–8.3% of the Ministry of Labour's budget). This prevents the Directorate from carrying out its activities; including the provision of laboratory services and acquiring well-trained staff.³⁰⁵

Most primary health care providers have no training in occupational safety and health, meaning that occupational injuries and diseases are not recognised and recorded as such.³⁰⁶

The OSH and worker's compensation systems focus on the treatment for injuries or diseases without preventive interventions.³⁰⁷ The OSH system is further weakened by (among others) limited data on accidents, diseases and fatalities arising from and out of workplaces; limited knowledge on current and emerging issues on occupational safety and health; weak institutional policy and legislation; inadequate equipment for OSH monitoring; limited research capacity; limited institutional-based occupational safety and health skills development; limited ratification of international labour standards; and limited knowledge exchange with national and international institutions; inadequate national regulatory framework; inadequate information documentation and dissemination; poor OSH management systems; inadequate enforcement capacity; and weak stakeholder cooperation.³⁰⁸

3.3.6 Concluding observations

Malawi's occupational safety and health system is inadequate. This results in workers being exposed to hazards leading to loss of life and various degrees of injuries and diseases

303 ILO/EU (International Labour Organization/European Union). 2103. *Malawi national occupational safety and health programme 2011-2016: Moving towards zero accidents and diseases at work*. Lusaka: ILO, 5-6.

304 Nkowane Z. 2008. Injury unto death: occupational health and safety regulation: A window on Malawi. *The Comparative and International Law Journal of South Africa* 41 (1):49-79 at 50.

305 ILO/EU (International Labour Organization/European Union). 2009. *Malawi country profile on occupational safety and health 2009*, 11. [Retrieved 30 September 2014] http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/policy/wcms_187633.pdf

306 *Ibid.* 26.

307 *Ibid.* 26.

308 See ILO/EU (International Labour Organization/European Union). 2103. *Malawi national occupational safety and health programme 2011-2016: Moving towards zero accidents and diseases at work*. Lusaka: ILO, xiii and 5.

in the course of performing their duties. Worse still, very little effort is being made by the relevant authorities and stakeholders to address challenges to occupational safety and health.³⁰⁹

However, initiatives are either underway or planned to improve the OSH situation in the country. These include the following:³¹⁰

- capacity building including training of inspectors;
- creating an occupational safety and health national committee;
- formulation of a coherent national occupational safety and health policy;
- review and harmonisation of the occupational safety and health legislation;
- formulation of specific regulations for high risk sectors including the informal economy; establishment of a national occupational hygiene laboratory;
- strengthening of the capacity and operations of the national occupational safety and health information centre; formulation of inspection guidelines;
- formulation of an occupational safety and health communication, collaboration and networking strategy;
- mainstreaming of HIV and AIDS and occupational tuberculosis prevention at the workplace with the occupational safety and health services;
- strengthening of the occupational safety and health system at national and enterprise levels; occupational safety and health advocacy and awareness campaigns;
- scaling up occupational safety and health training in educational and vocational training institutions; and
- reviewing the current system of recording and reporting of occupational injuries.

3.4 REPUBLIC OF NAMIBIA

3.4.1 Socio-economic context

Namibia has a population of about 2.3 million persons³¹¹ and a GDP of US\$20.6 billion.³¹² Namibia's unemployment rate (percentage of persons 15 years of age and older) is reported to be in the region of 16.7%.³¹³ In 2013, the Namibian HDI rank was 127 and life expectancy at birth (in years) was 67.1 for women and 61.7 for males.³¹⁴

³⁰⁹ *Ibid.* x.

³¹⁰ *Ibid.* xiii-xiv.

³¹¹ UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 218.

³¹² *Ibid.* 198.

³¹³ *Ibid.* 202.

³¹⁴ *Ibid.* 178.

3.4.2 Occupational safety and health

3.4.2.1 Scope of coverage

Provisions concerning occupational safety, health and welfare in Namibia are catered for in Chapter 4 of the Labour Act 11 of 2007. Upon repeal of the Labour Act of 1992, certain regulations continued to remain in force under the newly adopted 2007 Act. These regulations were promulgated as Government Notice No. 156 of 1997 (Regulations relating to the health and safety of employees at work). The regulations govern OSH in combination with the 2007 Act. In addition, there are other safety and health provisions contained in regulations and codes promulgated under other laws.³¹⁵

Section 1(1) of the Labour Act of 2007 defines an ‘employee’ as an ‘individual, other than an independent contractor, who (a) works for another person and who receives, or is entitled to receive, remuneration for that work; or (b) in any manner assists in carrying on or conducting the business of an employer.’ It could be opined that this definition is broad enough to cover a wide array of workers inclusive of the migrant workers, domestic workers and home workers. The Labour Act defines an ‘employer’ as ‘any person, including the state who (a) employs or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or (b) permits an individual to assist that person in any manner in the carrying or, conducting of that person’s business.’³¹⁶

Provisions of the Labour Act, inclusive of provisions concerning safety, health and welfare, apply to all employees and employers.³¹⁷ However, the 2007 Act does not apply to members of the (a) Namibian Defence Force, unless the Defences Act 1 of 2002 provides otherwise; (b) Namibia Police Force and a municipal police service referred to in the Police Act 19 of 1990, unless the Police Act 19 of 1990 provides otherwise; (c) Namibian Central Intelligence Service, unless the Namibian Central Intelligence Service Act 10 of 1997 provides otherwise; and (d) Prison Service, unless the Prisons Service Act 17 of 1998 provides otherwise.³¹⁸

3.4.2.2 Rights and duties of employers and employees

Section 39(1) the Labour Act spells out the duties of an employer as follows:

Every employer or person in charge of premises where employees are employed must, without charge to the employees – (a) provide a working environment that – (i) is

³¹⁵ For instance, there are the Mine Health and Safety Regulations (10th Draft) issued by the Ministry of Mines and Energy. These regulations were made under Section 138A of the Minerals (Prospecting and Mining) Act 33 of 1992 as amended. In addition, there are Guidelines for the Implementation of the National Code on HIV/AIDS in Employment No. 78 of 1998 (the Code). The Code makes provision for, among others, risk management, first aid and compensation of occupational benefits in respect of the contraction of HIV/AIDS in the workplace.

³¹⁶ Section 1(1) of the Labour Act.

³¹⁷ Section 2(1) of the Labour Act.

³¹⁸ Section 2(2) of the Labour Act.

safe; (ii) is without risk to the health of employees; and (iii) has adequate facilities and arrangements for the welfare of employees; (b) provide and maintain plant, machinery and systems of work, and work processes, that are safe and without risk to the health of employees; (c) provide and maintain safe entry and exit from places of work; (d) provide employees with adequate personal protective clothing and equipment if reasonably necessary; (e) provide employees with the necessary information and training to work safely and without a risk to their health; (f) ensure that the use, handling, storage or transport of articles or substances is safe and without risk to the health of employees; (g) ensure that employees are given the necessary instructions and supervision to work safely and without a risk to their health; (h) ensure that the organisation of work, including hours of work and mealtimes, do not adversely affect the safety or health of employees; and (i) take any other prescribed steps to ensure the safety, health and welfare of employees at work.

An employee, on the other hand, has a duty to 'take reasonable care to ensure the employee's own safety and health in the workplace; and the safety and health of any individual who may be affected by the employee's activities at work; and co-operate with the employer to enable the employer to perform any duty imposed under this chapter or the regulations.'³¹⁹ In addition, an employee has a right to leave dangerous place of work.³²⁰

3.4.2.3 Administrative and institutional framework

The Labour Act makes provision for the establishment of the Labour Advisory Council.³²¹ One of the functions of the council is to investigate and advise the Minister on national policy in respect of health, safety and welfare at work.³²² In addition, it makes provision for the labour inspectorate.³²³ The Minister has the authority to appoint the labour inspectors to enforce the Labour Act or any decision, award or order made in terms of the Act.³²⁴

3.4.2.4 Inspection and enforcement

Labour inspectors have, among others, the power to 'at any reasonable time enter any premises and search for and examine any book, document or object or object relevant to the administration of this Act, seize, make a copy of any such book, document or object.'³²⁵ In addition, a labour inspector has the authority to issue a compliance order.³²⁶ Furthermore, any person, among others, who hinders or obstructs a labour inspector in the performance of his duties, refuses or fails to answer a labour inspector to the best

319 Section 41 of the Labour Act.

320 Section 42 of the Labour Act.

321 Section 92 of the Labour Act.

322 Section 93(1)(b)(ii) of the Labour Act.

323 Part F of the Labour Act.

324 Section 124(1) of the Labour Act.

325 Sections 125(2)(a)(ii)-(iii) of the Labour Act.

326 Section 126 of the Labour Act.

of his or her ability, or intentionally misleads a labour inspector commits a criminal offence.³²⁷ Moreover, any person who impersonates a labour inspector commits an offence.³²⁸ A person convicted of an offence as contemplated by the foregoing provisions is liable to a fine or to be imprisoned for a period not exceeding two years imprisonment or to both the fine and imprisonment.³²⁹

3.4.3 Employment injury compensation

3.4.3.1 Scope of coverage

The Employee's Compensation Act 30 of 1941 sets out the legislative framework for EI compensation in Namibia. This statute has been amended by the Employees Compensation Amendment Act 5 of 1995 and its objective is to provide compensation to employees who are disabled as a result of an accident or occupational disease during the course and scope of their employment. It also provides compensation to the survivors' of an employee who met his or her death as result of an occupational injury or disease during the course and scope of his or her employment. The Employee's Compensation Act applies to every employer who employs one or more employees.³³⁰ It defines an 'employer' as any person who employs an employee and it includes the state.³³¹ All employees conducting business in the Republic of Namibia have an obligation to register within fourteen days of the date of commencement of business.³³²

The concept of employee refers to a person who has entered into a contract of service with an employer and it includes domestic workers. However, it specifically excludes the following persons from its ambit of application: '(a) Persons earning more than N\$81 300 per annum. (b) Persons employed casually and not for the purpose of the employer's business. (c) Outworkers performing work on premises not under the control of the employer. (d) Seamen or airmen employed under a contract of service whose remuneration is fixed solely by a share in the takings. (e) Persons employed temporarily outside the Republic of Namibia for a continuous period of more than 12 months, unless their employers have made special arrangement with the Commission.'³³³

3.4.3.2 Administration and institutional framework

Employment injury compensation in Namibia is administered by the Namibian Social Security Commission. The Commission falls under the general supervision of the Ministry of Labour and Welfare.

³²⁷ Sections 127(1)(a)-(d) of the Labour Act.

³²⁸ Section 127(1)(e) of the Labour Act.

³²⁹ Section 127(2) of the Labour Act.

³³⁰ SSC (Social Security Commission, Namibia). n.d. *Employee's compensation fund*. [Retrieved 10 October 2014] <http://www.ssc.org.na/funds/Employees-Compensation-Fund/24/>

³³¹ *Ibid.*

³³² *Ibid.*

³³³ *Ibid.*

3.4.3.3 Benefits and eligibility conditions

Employment injury benefits are payable subsequent to an employee's injury during the course and scope of his or her employment are in respect of temporary disablement permanent disablement and death.³³⁴ In addition, an injured employee can be provided with reasonable medical expenses.³³⁵ These are for a period of two years or longer if further medical or surgical treatment may reduce the degree of the disablement.³³⁶ The Accident Fund is liable for the payment of benefits. This is the case irrespective of whether the employer contributed to the fund or not. However, the Commission has the power to impose a penalty on the defaulting employee.³³⁷

The following table shows the liabilities of the Accident Fund for the period 2010–2013.

TABLE 3.1 Liabilities of the Accident Fund for the period 2010–2013 (N\$)

Types of Benefits	28 February 2010	28 February 2011	29 February 2012	28 February 2013
Burial and transport expenses	409 000	335 000	357 000	406 000
Medical expenses	9 485 000	8 786 000	9 037 000	7 534 000
Permanent disability	2 862 000	2 657 000	1 973 000	2 542 000
Temporary disability	3 467 000	2 808 000	1 634 000	2 288 000
Total IBNR liability	16 223 000	14 586 000	13 001 000	12 770 000
Pension liability	64 091 000	67 106 000	67 950 000	69 583 000
Claims handling provision	19 967 000	17 953 000	16 002 000	17 878 000
Data integrity provision				
Merit rebates				
Total liability				

Source: Keendjele D. 2014.

3.4.3.4 Funding

The Accident Fund is financed by employers falling within the scope of coverage of the Employee's Compensation Act. They pay a percentage of the gross payroll in accordance with the applicable industry classification.³³⁸ The present-day assessment ceiling is reported to be N\$6 750 per employee per annum.³³⁹

³³⁴ *Ibid.*

³³⁵ *Ibid.*

³³⁶ *Ibid.*

³³⁷ *Ibid.*

³³⁸ SSA/ISSA (Social Security Administration, USA/International Social Security Association). 2013. *Social security programs throughout the world: Africa, 2013*, 140. [Retrieved 22 September 2014] <https://www.ssa.gov/policy/docs/progdesc/ssptw/2012-2013/africa/ssptw13africa.pdf>

³³⁹ Keendjele D. 2014. Namibian workers compensation scheme. Paper presented at the FES/ILO Consultative and Training Workshop on Employment Injury Protection in Southern and Eastern Africa, Harare, Zimbabwe (20-22 October).

3.4.4 Other employment injury-related schemes and initiatives

Section 37 of the Social Security Act 34 of 1994 makes provision for the establishment of a Development Fund. The main purpose of the fund is to, *inter alia*, '[C]onduct training schemes and employment scheme approved by the President of Namibia for the benefit of socio-economically disadvantaged persons who are unemployed.'³⁴⁰ It should be noted that this is not specifically established for persons who suffered occupational injuries or diseases. Nonetheless, it appears that they could still benefit under the fund if they comply with its eligibility conditions.

3.4.5 Gaps and challenges

One major point of criticism that can be levelled against the Namibian system is that the scope of coverage excludes certain groups or categories of persons who do not fall within the definition of employee, such as the informal sector workers. Further, pertinent pieces of legislation do specifically exclude certain categories of persons such as independent contractors. In the case of the EI and disease scheme it excludes workers posted abroad for a period in excess of twelve months. This may lead to an untenable situation where employees posted abroad are covered under the Namibian system as well as that of the country to which they have been posted. In the worst case scenario, it could result in workers posted abroad not covered at all. To put it differently, they may not be covered under the system of the sending country as well as that of the host country.

3.4.6 Concluding observations

The Namibian social security legislative framework makes provision for measures to ensure the safety and health of the workers in that country. To this end, there are duties that employers have to comply with, such as providing a safe working environment for their employees. In addition workers have a variety of duties to comply with (e.g. to ensure their safety and that of fellow workers) as well as rights to enjoy (e.g. the right to withdraw from an unsafe working environment). Considering that social risks are not always preventable, provision has been made for the compensation for occupational injuries and diseases. It is regrettable that this scheme's scope of coverage is limited as it excludes certain categories of person, such as the self-employed. It follows a narrow approach of restricting the reach of the scheme to those persons who are in an employer-employee relationship. Thus the informal sector workers are excluded and marginalised.

340 SSC (Social Security Commission, Namibia). n.d. *Development fund (SSC-DF)*. [Retrieved 10 October 2014] <http://www.ssc.org.na/funds/development-Fund-SSC-DF/25/>

3.5 REPUBLIC OF SOUTH AFRICA

3.5.1 Socio-economic context

The Republic of South Africa is ranked as a medium human development country on the HDI.³⁴¹ It has a population of about 53 million persons³⁴² and its nominal GDP in the second quarter of 2014 was estimated at R891 billion.³⁴³ Statistics South Africa (Stats SA) estimates the official unemployment rate in the second quarter of 2014 to be soaring at 25.5% and the labour force absorption rate at 57.3%.³⁴⁴ The labour force employed during the second quarter of 2014 was spread as follows: formal sector (non-agricultural) – 10 374 000, informal sector (non-agricultural) – 2 360 000, agriculture – 742 000 and private households – 1 215 000.³⁴⁵

3.5.2 Occupational safety and health

3.5.2.1 Scope of coverage

There are two key pieces of legislation that regulate safety and health in South Africa, namely, the Occupational Health and Safety Act 85 of 1993 (OHSA) and the Mine Health and Safety Act 29 of 1996 (MHSA). The OHSA, makes provision for, *inter alia*, to 'provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with activities of persons at work; to establish an advisory council for occupational health and safety; and to provide for matters connected therewith.'³⁴⁶ The definitions of employer,³⁴⁷ employee³⁴⁸ and work are broad enough to cover a wide range of employers and employees including domestic workers, migrant workers and self-employed persons. The OHSA does not apply in the case of the following: a mine, mining area or any works as defined in the Minerals Act 50 of 1991, except insofar as that act provides otherwise; certain vessels as defined in the Merchant Shipping Act 57 of 1951;

341 UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 177.

342 Stats SA (Statistics South Africa). 2014a. *General household survey 2013*. Pretoria: Statistics South Africa, 71.

343 Stats SA (Statistics South Africa). 2014b. *Gross domestic product, second quarter 2014*. Pretoria: Statistics South Africa, 4.

344 Stats SA (Statistics South Africa). 2014c. *Quarterly labour force survey, quarter 2, 2014*. Pretoria: Statistics South Africa, v.

345 *Ibid.*

346 The preamble of the OHSA.

347 Section 1 of OHSA defines 'employer' as 'any person who employs or provides work for any person and remunerates that person or expressly or tacitly undertakes to remunerate him, but excludes a labour broker.'

348 Section 1 of OHSA defines 'employee' as follows: 'any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person.'

and labour brokers.³⁴⁹ The MHSA, on the other hand, is enacted to protect the health and safety of employees and other persons at mines.³⁵⁰

3.5.2.2 Rights and duties of employers and employees

The OHSA protects workers from victimisation or unfair dismissal for exercising their rights are provided for in the Act.³⁵¹ According to the MHSA an employee has, inter alia, the right to information,³⁵² the right to dispute a finding of unfitness to perform work,³⁵³ the right to leave dangerous working place,³⁵⁴ and the right not to pay for safety measures.³⁵⁵

Every employer has a general duty to provide and maintain, as far as it is reasonably practicable, a working environment which is safe and without risk to the health of employees.³⁵⁶ This duty includes, among others:

- the provision and maintenance of systems of work, plant and machinery that, as far as is reasonably practicable are safe and without risks to health;³⁵⁷
- taking reasonable steps to eliminate or mitigate any hazards or potential hazard to the safety and health of employees before resorting to protective equipment;³⁵⁸
- making reasonable arrangements for safety and health in connection with production, processing, use, handling, storage or transport of articles or substances;³⁵⁹
- establishing the hazards, if any, to the health and safety of employees in the workplace and providing the necessary precautionary measures in this regard;³⁶⁰
- ensuring that work is performed and that plant or machinery is used under the supervision of a trained person;³⁶¹ and
- identifying and evaluating the hazards associated with listed work and, if possible, prevent the exposure of employees to such work.³⁶²

The MHSA requires employers to, as far as possible, “identify the relevant hazards and assess the related risks to which persons who are not employees may be exposed; and

349 Section 1(2) of the OHSA.

350 The preamble of the MHSA.

351 Section 26 of the OHSA.

352 Section 19 of the MHSA.

353 Section 20 of the MHSA.

354 Section 23 of the MHSA.

355 Section 24 of the MHSA.

356 Section 8(1) of the OHSA.

357 Section 8(2)(a) of the OHSA.

358 Section 8(2)(b) of the OHSA.

359 Section 8(2)(c) of the OHSA.

360 Section 8(2)(d) of the OHSA.

361 Section 8(2)(i) of the OHSA.

362 Section 11 of the OHSA.

ensure that persons who are not employees, but who may be directly affected by the activities at the mine, are not exposed to any hazards to their health and safety.”³⁶³

The OHSA imposes the following general duties on the employees at work: to take reasonable care for the health and safety of himself or herself and that of others; cooperate with the employer to ensure compliance with the duties imposed by OHSA; execute and comply with health and safety rules and procedures imposed by the employer; report unsafe and unhealthy situations to the employer or to the health and safety representative; and to report any incident that may affect his health or that has caused an injury to himself or herself to the employer or health and safety representative.³⁶⁴ As regards the MHSA, all employees have a duty to take reasonable care to protect their own health and safety.³⁶⁵ Furthermore, an employee has a duty to take reasonable care to protect the health and safety of other persons who may be affected by any act or omission of that employee.³⁶⁶

3.5.2.3 Administrative and institutional framework

The OHSA authorises the Minister of Labour to designate an officer serving with the Department of Labour as Chief Inspector.³⁶⁷ The Chief Inspector discharges his or her duties under the control and supervision of the Director-General of the Department of Labour.³⁶⁸ The Chief Inspector has the power to delegate his or her powers to any other officer.³⁶⁹ The MHSA, on the other hand, makes provision for the establishment of the Mines Health and Safety Inspectorate.³⁷⁰ It empowers the Minister to appoint a Chief Inspector of Mines³⁷¹ to perform the functions entrusted to such a person by the MHSA.³⁷²

3.5.2.4 Inspection and enforcement

According to Section 28 of the OHSA, the Minister may designate any person as an inspector to perform, subject to the control and direction of the chief inspector, any or all of the function assigned to an inspector by the OHSA. An inspector may enter any premises which are occupied or used by an employer or on or in which an employee performs any work or any plant or machinery is used, or which he suspects to be such premises.³⁷³ Furthermore, an inspector has the power to enter and examine a workplace

³⁶³ Section 5(2) of the MHSA.

³⁶⁴ Section 14 of the OHSA.

³⁶⁵ Section 22(a) of the MHSA.

³⁶⁶ Section 22(b) of the MHSA.

³⁶⁷ Section 27(1) of the OHSA.

³⁶⁸ Section 27(2) of the OHSA.

³⁶⁹ Section 27(3) of the OHSA.

³⁷⁰ Section 47 of the MHSA.

³⁷¹ Section 48(1) of the MHSA.

³⁷² Section 48(2) of the MHSA.

³⁷³ Section 29(1)(a) of the OHSA.

as well as collect evidence.³⁷⁴ In addition, an inspector has the power to investigate the circumstances of accidents which have occurred at or originated from a workplace.³⁷⁵ Following the completion of an investigation, the inspector has a duty to forward his written report together with all the supporting documents to the Director of Public Prosecutions.³⁷⁶ The Director of Public Prosecutions is then required to deal with the report and supporting documents in accordance with the provisions of the Inquest Act 58 of 1959 or the Criminal Procedure Act 51 of 1977.³⁷⁷

One of the duties imposed by the MHSA on the Chief Inspector of the Mines is to appoint officers (i.e. inspectors).³⁷⁸ Inspectors are, in their quest to monitor and enforce compliance, authorised to enter any mine,³⁷⁹ question any person on any matter related to the MHSA,³⁸⁰ and seize any document³⁸¹ or item.³⁸²

Both the OHSA and MHSA make provision for sanctions that may be imposed and they include a fine and/or imprisonment.³⁸³

3.5.3 Employment injury compensation

3.5.3.1 Scope of coverage

The legislative framework of the South African EI scheme is set out in two statutes, namely: the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) and the Occupational Diseases in Mines and Works Act 78 of 1973 (ODMWA). The COIDA, which provides for a 'no-fault' occupational injuries and diseases scheme, provides cover to:

- a casual employee employed for the purpose of the employer's business;
- a director or member of a body corporate who enter into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of that contract; and
- a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker.³⁸⁴

³⁷⁴ Section 29(1) of the OHSA.

³⁷⁵ Section 31 of the OHSA.

³⁷⁶ Section 31(2) of the OHSA.

³⁷⁷ Section 31(3) of the OHSA.

³⁷⁸ Section 49(1)(c) of the MHSA.

³⁷⁹ Section 50(1) of the MHSA.

³⁸⁰ Section 50(2) of the MHSA.

³⁸¹ Section 50(4) of the MHSA.

³⁸² Section 50(5) of the MHSA.

³⁸³ See, for instance, Section 38(2) of the OHSA and Section 92(6)(b) of the MHSA.

³⁸⁴ Sections 1(xix)(a)-(d) of the COIDA.

In addition, the dependants of a deceased employee and curator of a person under a disability are included within the definition of an employee.³⁸⁵ The implication of this provision is that the aforementioned dependants and a curator of a person under disability are enabled to file claims for compensation.

The following persons are expressly excluded from the scope of coverage of the COIDA:

- persons performing military service or undergoing training and who are not a members of the Permanent Force of the South African National Defence Force;
- members of the Permanent Force of the South African National Defence Force and the South African Police Service while on 'service in defence of the Republic';
- persons who contract for the carrying out of work and engage others to perform such work; and
- domestic employees employed as such in a private household.³⁸⁶

The COIDA defines an 'employer' as 'any person, including the State, who employs and employee, and includes (a) any person controlling the business of an employer; (b) if the services of an employee are lent or let or temporarily made available to some other person by his employer, such employer for such period as the employee works for that other person; (c) a labour broker who against payment provides a person to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker.'³⁸⁷

3.5.3.2 Administration and institutional framework

The COIDA is administered by the Director-General of the Department of Labour.³⁸⁸ The Director-General is assisted by the Compensation Commissioner as well as other officers and employees appointed by the Minister of Labour.³⁸⁹ The Director-General has the authority to delegate his or her powers and duties under COIDA.³⁹⁰ In practice these powers have been largely delegated to the Compensation Commissioner. The functions of the Director-General include: 'deciding any question relating to (i) a right to compensation the submission, (ii) consideration and adjudication of claims of compensation; (iii) the calculation of earnings; (iv) the degree of disablement; (v) the amount and manner of payment of compensation; (vi) the award, withholding, review, discontinuance, suspension, increase, or reduction of compensation; [and] (vii) the liability for payment of compensation.'³⁹¹

385 *Ibid.*

386 Section 1(xix)(d) of the COIDA.

387 Section 1(xx) of the COIDA.

388 Section 2(1) of the COIDA.

389 *Ibid.*

390 Section 3 of the COIDA.

391 Section 4(f) of the COIDA.

The COIDA makes provision for a Compensation Board.³⁹² The functions of the Compensation Board are to advise the Minister of Labour as regards matters of policy arising out of or in connection with the application of the COIDA; the nature and extent of the benefits that shall be payable to employees or dependants of employees, including the adjustment of existing pensions; the appointment of assessors; the amendment of the COIDA;³⁹³ and to, at the request of the Director-General, advise him or her as regards the performance of a particular aspect of his or her duties.³⁹⁴

Alongside the Compensation Fund, the COIDA does make provision for existence of two mutual associations, namely, the Rand Mutual Assurance Company Limited and the Federated Employers' Mutual Limited.³⁹⁵ The Rand Mutual Assurance Company Limited operates in the mining industry and the Federated Employers' Mutual Limited functions in the construction industry.

3.5.3.3 Benefits and eligibility conditions

An employee covered by the COIDA is entitled to claim compensation for occupational injuries or occupational diseases. No compensation is payable if an employee was injured as a result of serious and wilful misconduct of an employee.³⁹⁶ However, benefits will be disbursed in a situation where the accident results in serious disablement or the employee dies in consequence thereof leaving a dependant wholly financial dependent upon him.³⁹⁷

Table 3.2 shows a comparison of claims registered, accepted and repudiated for 1 April 2011 to 31 March 2014.

TABLE 3.2 Claims registered, accepted and repudiated (1 April 2011 to 31 March 2014)

Compensation Fund				
Period	Claims registered	Claims accepted	Claims repudiated	Claims with outstanding information
1 April 2011 to 31 March 2012	141 437	110 180	129	31 128
1 April 2012 to 31 March 2013	186 509	129 405	356	63 226
1 April 2013 to 31 March 2014	310 710	260 253	88	50 369

Source: DoL (Department of Labour, South Africa). 2014, 19.

The following benefits can be claimed in accordance with the COIDA:

³⁹² Section 10 of the COIDA.

³⁹³ Section 12(1) of the COIDA.

³⁹⁴ Section 12(2) (b) of the COIDA.

³⁹⁵ Section 30 of the COIDA.

³⁹⁶ Section 22(3) of the COIDA.

³⁹⁷ *Ibid.*

- *Temporary disablement benefits:* Temporary disablement can be total or partial.³⁹⁸ The right to compensation for temporary or partial disablement shall expire upon the termination of such disablement or in a situation where the employee concerned resumes the work or if the employee is awarded compensation for permanent disablement.³⁹⁹
- *Permanent disablement:* This benefit is paid to employees who suffer permanent disablement for employment or a permanent injury or serious disfigurement. The compensation payable depends on the employee's earnings at the time of the accident or occupational disease and the severity of the disablement.⁴⁰⁰
- *Dependants' benefits:* These benefits are payable to the dependants of a diseased employee who has passed on due to an accident or occupational diseases. These benefits can take the form of a lump sum, a monthly pension and a contribution to funeral costs.⁴⁰¹
- *Medical aid:* The benefit is directed at the payment of the medical expenses of employees for treatment for occupational accidents and diseases.⁴⁰² As part of the medical benefit, the COIDA provides for the conveyance of injured employee to a hospital or medical practitioner or from a hospital or medical practitioner to his or her residence.⁴⁰³

The series of tables that follow show compensation benefits paid during the 2011/2012, 2012/2013 and 2013/2014 financial years.

▪ Pension

TABLE 3.3 Compensation benefits paid during 2011/2012, 2012/2013 and 2013/2014 – pension

Year	Amount capitalised (rand)	Monthly pension payment (rand)
2011/2012	549 000 702	735 859 691
2012/2013	330 887 254	689 407 070
2014/2014	420 427 753	789 695 914

Source: DoL (Department of Labour, South Africa). 2014, 19.

▪ Temporary disability

TABLE 3.4 Compensation benefits paid during 2011/2012, 2012/2013 and 2013/2014 – temporary disability

Year	Amount paid during the year (rand)
2011/2012	94 330 529

³⁹⁸ Section 47 of the COIDA.

³⁹⁹ Section 48(1) of the COIDA.

⁴⁰⁰ See Section 49 of the COIDA.

⁴⁰¹ Section 54 of the COIDA.

⁴⁰² Chapter VIII of the COIDA.

⁴⁰³ Section 72 of the COIDA.

Year	Amount paid during the year (rand)
2012/2013	83 618 570
2013/2014	69 752 890

Source: DoL (Department of Labour, Republic of South Africa). 2014, 19.

■ Permanent disability

TABLE 3.5 Compensation benefits paid during 2011/2012, 2012/2013 and 2013/2014 – permanent disability

Year	Amount paid during the year (rand)
2011/2012	59 749 160
2012/2013	88 701 628
2013/2014	87 029 325

Source: DoL (Department of Labour, South Africa). 2014, 19.

■ Constant attendance allowance

TABLE 3.6 Compensation benefits paid during 2011/2012, 2012/2013 and 2013/2014 – constant attendance allowance

Year	Amount paid during the year (rand)
2011/2012	19 719 220
2012/2013	13 847 779
2013/2014	14 552 688

Source: DoL (Department of Labour, South Africa). 2014, 20.

3.5.3.4 Funding

The Compensation Fund consist of, *inter alia*, the assessments paid by the employers, penalties and fines imposed in terms of the COIDA or other than by a court of law; any interest on investments of the compensation fund and the reserve fund; any amounts transferred from the reserve fund and any other amounts to which the compensation fund may become entitled.⁴⁰⁴

3.5.4 Other employment injury-related schemes and initiatives

Alongside the compensation fund, the South African social security system makes provision for the Road Accident Fund (RAF).⁴⁰⁵ The RAF provides compensation to the victims of traffic accidents. Risks covered by the scheme include disability, survivors' benefits, medical expenses and funeral expenses. An employee that suffers injuries in a motor vehicle accident that arises out of and in the scope of employment may claim

⁴⁰⁴ Section 15(2) of the COIDA.

⁴⁰⁵ Road Accident Fund Act 56 of 1996. It should be noted that there is a proposal currently under consideration to introduce a no-fault road accident benefit system based on social security principles.

from the RAF.⁴⁰⁶ It should be noted that the value of any compensation payable in terms of COIDA is deductible from that received from the RAF to avert the so-called double dipping.

Although it is not a scheme aimed at the compensation of occupational injuries, the tax financed social assistance scheme does provide benefits that could be enjoyed by destitute victims of the occupational injuries and diseases. For instance Section 9 of the Social Assistance Act 13 of 2004 makes provision for a disability grant.

The disability grant has an impact in alleviating poverty for persons with disabilities. According to the *Study on Poverty and Disability in South Africa: Social Services and Disability*, 78% of people with disabilities fall below the lower bound of the poverty line. An additional 5% fall between the upper and lower bounds, and only 17% fall above the upper bound.⁴⁰⁷ When income from work and the disability grant are considered, 69% of people with disabilities fall below the lower bound for poverty, with 8% falling between the upper and lower bound. An additional 22% fall above the upper bound of the poverty line.⁴⁰⁸

Changes in poverty levels are more marked when all social grants as well as income from work is considered. In this case, 41% of people with disabilities fall below the lower bound. An additional 20% fall within the upper and lower bounds and 39% of people with disabilities fall above the upper bound. It is thus clear that social grants reduce the number of people with disabilities living in abject poverty.⁴⁰⁹ This is also beneficial to workers who suffered an occupational injury or contracted an occupational disease and have depleted their benefits.

Figure 3.1 shows the change in percentage of people living below and above the upper and lower bounds of the Foster-Greer-Thorbecke (FGT) poverty line when income from grants is taken into account.⁴¹⁰

⁴⁰⁶ Section 22(5) of the COIDA.

⁴⁰⁷ The estimates of the lower and upper bound for poverty in South Africa which when adjusted for inflation is at R502 and R924 per capita per month for 2008.

⁴⁰⁸ Moodley J, Graham L & Ismail Z. 2014. *Poverty and disability in South Africa: Social services and disability* (Summary of key findings), 2.

⁴⁰⁹ *Ibid*, 3.

⁴¹⁰ See SALDRU (Southern Africa Labour and Development Research Unit, University of Cape Town). 2008. *National income dynamic study 2008 (NIDS)*. [Retrieved 30 September 2014] <http://www.datafirst.uct.ac.za/dataportal/index.php/catalog/451>. The Foster-Greer-Thorbecke (FGT) poverty indices are a group of metrics for the measurement of poverty.

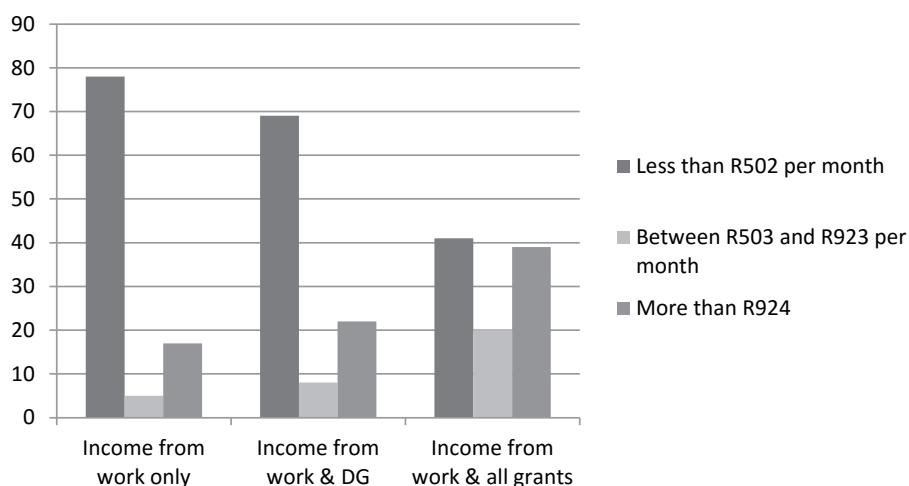


FIGURE 3.1 Change in percentage of people living below and above the upper and lower bounds of the FGT poverty line when income from grants is taken into account [Source: Moodley J, Graham L & Ismail Z. 2014.]

Section 3(1) of the Military Pensions Act 84 of 1976 makes provision for the payment of the pensions, gratuities or allowances to members who suffer from a pensionable disability; pensions to the widows, parents or children of deceased members; medical costs; and funeral expenses. Furthermore, the Special Pensions Act 69 of 1996 provides for three tax-financed benefits, namely: pension, survivors' benefits and funeral benefits.⁴¹¹ These benefits are provided as an acknowledgement of the contribution made by certain individuals in the public interest to bring about a democratic constitutional dispensation in South Africa.

3.5.5 Gaps and challenges

Several gaps and challenges are identifiable in the South African system. Firstly, a number of vulnerable persons are excluded from the scope of coverage of the COIDA. These persons include domestic workers, independent contractors, informal sector worker and self-employed. Secondly, the scheme is more focused on compensation much to the neglect of measures to rehabilitate and reintegrate victims of occupational injuries and diseases into the labour market. Furthermore, there are well documented problems related to the difficulties experienced by ex-mineworkers, particularly those from the neighbouring countries, to access their benefits in South Africa.⁴¹² It is estimated that there is about R5 billion in unpaid benefits held in South Africa owed to about 200 000

⁴¹¹ See Sections 1(1), 2(3), and 6 of the Special Pensions Act.

⁴¹² See Mpedi LG & Nyenti M. 2013. *Portability of social security benefits in mining sector*. [Retrieved 7 October 2014] http://www.southernafricatrust.org/docs/highlights_portability_of_social_security_benefits_in_mining_sector.pdf

ex-mine workers and their dependants.⁴¹³ Finally, the shortage of qualified labour inspectors hampers the proper functioning of the South African labour inspectorate.⁴¹⁴

3.5.6 Concluding observations

The South African system makes provision for measures to prevent occupational injuries as well as the compensation for occupational injuries and diseases where such injuries or diseases could not be prevented. There are different health and safety as well as injuries and diseases laws for the mining and other sectors. This results in the duplication of prevention and compensation institutions. It is worth noting that in 1999 the cabinet resolved that the various institutions be integrated. Nonetheless, that resolution is yet to be implemented.

3.6 KINGDOM OF SWAZILAND

3.6.1 Socio-economic context

The Kingdom of Swaziland has a population of 1.2 million, with 21.2% living in urban areas.⁴¹⁵ With the GDP of US\$7.3 billion, GDP per capita of US\$5 912 and per capita income US\$4 964, it is ranked at number 148 on the HDI.⁴¹⁶ The LFPR is 71.3% and the employment to population ratio for persons aged 25 and above is 56.1%. The unemployment rate for persons aged 15 and above is 28.2%.⁴¹⁷ Unemployment has geographic and gender differences, as it is higher in rural areas (51%) than in urban areas (24%), and higher among females (31%) than males (26%).⁴¹⁸

413 Creamer M. 2014. 25 000 ex-mineworkers come forward to claim unpaid benefits. *Mining Weekly*, 30 May 2014. [Retrieved 7 October 2014] <http://www.miningweekly.com/article/25-000-ex-mineworkers-come-forward-to-claim-unpaid-benefits-2014-05-29>

414 Republic of South Africa/ILO (International Labour Organization). 2010. *Republic of South Africa decent work country programme 2010 to 2014*, 16. [Retrieved 7 October 2014] <http://www.ilo.org/public/english/bureau/program/dwcp/download/southafrica.pdf>

415 UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 159 and 218.

416 *Ibid.* 198. See also UNDP (United Nations Development Programme). 2012. *About Swaziland*. [Retrieved 26 September 2014] <http://www.sz.undp.org/content/swaziland/en/home/countryinfo/>

417 UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 174 and 202.

418 Ulandssekretariatet, LO/FTF Council. n.d. *Swaziland – labour market profile 2013*, 9. [Retrieved 26 September 2014] <http://www.newunionism.net/library/national%20data/Swaziland%201-2013.pdf>

About 9% of the working age population is engaged in subsistence agriculture and 13% is employed in the public sector.⁴¹⁹ The informal sector employs 17.7% of the labour force, although this is predicted to grow in the near future.⁴²⁰

Swaziland faces considerable poverty, with 43.5% of the population in multi-dimensional poverty, 20.5% near multi-dimensional poverty and 0.4% suffering severe poverty. Up to 40.63% of the population lives below US\$1.25 per day, while 63% of the population lives below the national poverty line ⁴²¹

3.6.2 Occupational safety and health

Occupational safety and health in Swaziland is governed by the Occupational Safety and Health Act 9 of 2001 and the Factories, Machinery and Construction Works Act 17 of 1972.

3.6.2.1 Scope of coverage

The provisions of the Occupational Safety and Health Act bind all workplaces, including those owned or occupied by the government.⁴²² A 'workplace' is defined to include any premises or place where a person performs work in the course of that person's employment.⁴²³ Therefore, the 2001 Act is applicable to employees and self-employed persons.

3.6.2.2 Rights and duties of employers and employees

The Occupational Safety and Health Act contains general and specific duties for employers, self-employed persons, employees and other persons.⁴²⁴ In the first instance, they are prohibited from doing anything that endangers or is likely to endanger their safety, health or welfare of or of any other person. In addition, they must enable an inspector to effectively undertake his/her work.

According to the 2001 Act, an employer and self-employed person must, *inter alia*, ensure the safety and health of all employees by securing safe and healthy working conditions in the workplace; ensure by effective supervision that work is performed in a safe manner and without risks to health or exposure to danger; ensure there is a systematic way of identifying, evaluating and controlling hazards at the workplace and make sure such systematic ways are functional at all times; provide adequate and

419 *Ibid.* 10.

420 *Ibid.* 11.

421 UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 181; and UNDP (United Nations Development Programme). 2012. *About Swaziland*. [Retrieved 26 September 2014] <http://www.sz.undp.org/content/swaziland/en/home/countryinfo/>

422 Section 3 of the Occupational Safety and Health Act.

423 Section 2 of the Occupational Safety and Health Act.

424 Section 8 of the Occupational Safety and Health Act.

appropriate personal protective appliances, equipment and clothing; inform employees of any known hazards or diseases connected to their work; give the necessary training and instruction for employees to perform their work in a way that avoids any danger, or risk to danger, loss of health or injury; inform a safety and health representative or the safety and health committee or an employee of any directive or instruction from the Labour Commissioner or an inspector; conduct his/her/its activities in a manner that persons who are not employees are not exposed to hazards or dangers arising from the workplace; take reasonably practicable steps to mitigate the effects of any hazards or danger in the workplace; prepare a safety and health statement and policy; appoint a safety and health committee;⁴²⁵ and give notice of occupational accidents and diseases.⁴²⁶

Employees also have an obligation to cooperate and follow instructions given by the employer, Commissioner, inspector or any other authorised person to keep the workplace safe and without risk to health and injury.⁴²⁷ They must also properly use all means, appliance, equipment or other safety device provided to secure safety and health; and report any unsafe or unhealthy situation or an accident to the employer or a supervisor. Employees have the right to elect a safety and health representatives;⁴²⁸ and not to be victimised for fulfilling the obligations of the Occupational Safety and Health Act. They also have the right to leave a place of dangerous when they have reasonable justification to believe there is imminent and serious risk to their safety and health.⁴²⁹

3.6.2.3 Administrative and institutional framework

The Occupational Health and Safety Inspectorate Unit in the Ministry of Labour and Social Security is responsible for inspection and monitoring of occupational safety in workplaces. Its functions are conducting regular OSH inspections; educating, advising and counselling employers and workers on labour laws and their application; conducting boiler inspections; conducting pressure vessel inspections; conducting hoists and elevator inspections; and issuing factory permits, improvement notices and prohibition notices.⁴³⁰

3.6.2.4 Inspection and enforcement

Inspectors are appointed and given wide powers to enforce the implementation of the Occupational Safety and Health Act (e.g. power to enter any workplace; to demand any certificate, report, record, information or any other document required under the Act; to question relevant persons, carry out investigations; to take samples etc.).⁴³¹ They can also

425 Sections 9, 10, 13 and 16 of the Occupational Safety and Health Act.

426 Sections 28 and 32 of the Occupational Safety and Health Act.

427 Section 11 of the Occupational Safety and Health Act.

428 Section 14 of the Occupational Safety and Health Act.

429 Section 18 of the Occupational Safety and Health Act.

430 See Government of Swaziland. n.d. *Department of Labour*. [Retrieved 26 September 2014] http://www.gov.sz/index.php?option=com_content&view=article&catid=76:labour-a-social-security&id=380:department-of-labour

431 Sections 5 and 6 of the Occupational Safety and Health Act.

issue improvement and prohibition notices;⁴³² as well as a notice to remove a nuisance near a workplace or to remedy a defect;⁴³³ and investigate occupational accidents and diseases.⁴³⁴

The Labour Commissioner and inspectors can request the Director of Public Prosecutions to institute court proceedings against any person who contravenes the Occupational Safety and Health Act.⁴³⁵ The 2001 Act makes it an offence for contravening a provision of the Act. Such a contravention is punishable with a fine of E50 000 or imprisonment of up to ten years or both fine and imprisonment.⁴³⁶ However, courts are free to impose a higher sentence where death results from a contravention.

3.6.3 Employment injury compensation

The law governing EI protection in the Kingdom of Swaziland is provided by the Workmen's Compensation Act 7 of 1983. The Act provides for the compensation and medical treatment of workers who suffer injury or contract disease in the course of their employment. The type of scheme that is in place to compensate employees in the occurrence of employment injury or occupational disease is the employer-liability scheme, whereby every employer other than the government who employs a workman or workmen must insure itself in respect of all liability which it may incur under the Act with such insurer as the Minister may approve.⁴³⁷

3.6.3.1 Scope of coverage

The scope of coverage of the EI compensation scheme is limited to those who are in formal employment. To be deemed eligible for coverage, a worker must be an employee as defined by the Workmen's Compensation Act, which states that:

[T]his act applies to every workman who is employed in or outside Swaziland by such an employer except a workman who is employed outside Swaziland in employment to which any law of another country applies which provides compensation for employment accidents.⁴³⁸

A 'workman' therefore is defined as any person who has entered into or works under a contract of service or of apprenticeship or of traineeship whether the contract is express or implied, is oral in writing and whether the remuneration is calculated by time or work done.⁴³⁹

432 Sections 24 and 25 of the Occupational Safety and Health Act.

433 Sections 27 of the Occupational Safety and Health Act.

434 Sections 30 and 33 of the Occupational Safety and Health Act.

435 Sections 39 of the Occupational Safety and Health Act.

436 Section 40 of the Occupational Safety and Health Act.

437 Section 25(1) of the Workmen's Compensation Act.

438 Section 2 of the Workmen's Compensation Act.

439 Section 2(1) of the Workmen's Compensation Act.

Persons who do not fit the definition of a workman are excluded from coverage. These are those persons whose employment is of a casual nature, an outworker, a domestic servant, a member of the employer's family living in the employer's house; a member of Umbutfo Swaziland Defence Force as well as any class of persons whom the Minister declares not to be workmen for the purpose of the Occupational Safety and Health Act.⁴⁴⁰

Compensation for employment injury is provided to workers who suffer from an employment injury or occupational disease. 'Employment injury' is defined by the 1983 Act as an occurrence which causes personal injury to a workman by accident arising out of and in the course of his employment.⁴⁴¹ The employer shall not be liable (except an injury causing death) to compensate a workman if the injury does not incapacitate the workman for at least three days from earning full wages at the work at which he was employed.⁴⁴²

Before allocating compensation to an injured workman, notice of the accident must be given to the employer or foreman.⁴⁴³ In addition, the employer has a duty in the case of the occurrence of an accident that leads to the death or injury which will entitle him to compensation, to report to the Labour Commissioner within seven days of receiving notice of the accident.⁴⁴⁴

3.6.3.2 Administration and institutional framework

The Workmen's Compensation Act is administered by a medical board known as the Workmen's Compensation Medical Board.⁴⁴⁵ The Board, through its medical practitioners, assess the degree of injury of the workman.

The Labour Commissioner refers to the Board any dispute or matter with regard to the degree and duration of incapacity of disablement or the medical examination and

440 Sections 2(2)(a)-(f) of the Workmen's Compensation Act.

441 Section 4 of Workmen's Compensation Act defines an 'employment accident'. It includes: '(a) While travelling by any reasonable means and any reasonable route between a workman's place of residence for the time being and his place of work. (b) Notwithstanding that the workman is at the time acting in contravention of any statutory or other regulations applicable to his employment or any orders given to him by or on behalf of his employer or that he is acting without instructions from his employer if the act is done for the purposes of and in connection with his employer's trade or business. (c) In or about premises at which the workman is for the time being employed for the purposes of his employer's trade or business if the accident happens while he is taking his steps, on an actual or supposed emergency at those premises, to minimise serious damage to property. (d) In the course of the workman's employment which is caused by another person's misconduct, skylarking, or negligence, or by the behaviour or presence of an animal (including a bird, fish or insect) or is caused by or consist of the workman being struck by any object or lightning if the workman did not directly or indirectly induce or contribute to the accident by his conduct outside the employment or by any act not incidental to the employment: Provided that an accident arising in the course of the workman's employment shall be deemed to have arisen out of that employment in the absence of evidence to the contrary.'

442 Sections 5(2)(a)-(b) and (3) of the Workmen's Compensation Act.

443 Section 18(1) of the Workmen's Compensation Act.

444 Section 19 of the Workmen's Compensation Act.

445 Section 31(1) of the Workmen's Compensation Act.

treatment of the workman.⁴⁴⁶ The Board advises the Labour Commissioner on any matter or dispute referred to it by him/her and the decision is final and binding on the Labour Commissioner and on the parties concerned.⁴⁴⁷

3.6.3.3 Benefits and eligibility conditions

The Kingdom of Swaziland uses an employer liability based scheme, whereby individual employers, purchase insurance against various contingencies at the workplace. Thus an employer will be liable to pay compensation in case of death, permanent or partial disablement arising from both employment injury and occupational diseases.

In the case of permanent disablement, the compensation is a lump sum.⁴⁴⁸ Where the injury is not specified in the second schedule, the compensation shall be a percentage of 54 times the monthly earnings of the workman at the time of the accident as is assessed by a medical practitioner as being the disablement caused by the injury.⁴⁴⁹ However, where the disablement leads to total permanent disablement such that the workman will constantly need the help of another person, an additional compensation amounting to one quarter of the compensation otherwise payable under this section shall be paid.⁴⁵⁰

The Workmen's Compensation Act provides that in case of a temporary disablement, a lump sum is payable to the workman. Where the disablement has been certified as temporary for a period totalling 24 months, any disablement still persisting at the end of the said 24 months is deemed to be permanent and compensation is paid as such⁴⁵¹

3.6.3.4 Funding

Employers are required to purchase insurance in respect of all liability which they may incur under the Workmen's Compensation Act, and only the Swaziland Royal insurance Company. The insurance rate purchased by employers is determined by the Swaziland Royal Insurance Company, which ranges from 0.312 to 11.7%. Contribution for workmen's compensation is the sole responsibility of the employer and he is not supposed to require a workman to make such a contribution towards the cost of any medical aid for which the employer is liable to defray the cost.⁴⁵²

3.6.4 Other employment injury-related schemes and initiatives

Other social security programmes are available in Swaziland that will provide benefits to a person who is injured at work or contracts a disease, although these are not directly employment injury schemes. The Swaziland National Provident Fund provides social

446 Sections 32(1)(a)-(b) of the Workmen's Compensation Act.

447 Section 32(2) of the Workmen's Compensation Act.

448 Section 7(1)(a) of the Workmen's Compensation Act.

449 Section 7(1)(b) of the Workmen's Compensation Act.

450 Section 7(3) of the Workmen's Compensation Act.

451 Section 8 of the Workmen's Compensation Act..

452 Section 35 of the Workmen's Compensation Act..

insurance benefits such as old-age pensions at the age 50 (or retirement benefit at the age of 45 if a person retires from regular employment or becomes self-employed), invalidity, emigration and survivor benefits.⁴⁵³ The fund is open to all employed persons, with voluntary coverage for employees who are not compulsorily covered as well as for members of religious organisations. However, self-employed persons, household workers, casual employees, and foreign workers are excluded.⁴⁵⁴ The Public Service Pension is a special system for civil servants, which provides old age pensions to public servants from the age of 60.⁴⁵⁵

Available social assistance programmes are the old-age grant and the public assistance grant. The old-age grant is paid to poor persons over 60 years; while the public assistance grant is for persons who have no other source of income

3.6.5 Gaps and challenges

Swaziland's occupational safety and health system seeks to extend coverage to all workers, extending access to employees and informal sector workers. However, it faces the challenge of low OHS standards, because unions have little leverage to improve working conditions.⁴⁵⁶ This means enforcement of compliance with the Occupational Safety and Health Act is problematic, despite hefty penalties for non-compliance (E50 000 or imprisonment of up to ten years or both fine and imprisonment).

In relation to employment injury and disease compensation, the kingdom lacks a social insurance scheme. This implies that the burden of compensation is on individual employers. As a result, informal sector workers who are not employed under a contract of employment are left without coverage.

3.6.6 Concluding observations

Swaziland has made efforts to ensure occupational safety and health is enjoyed by every worker, including extension to the informal sector and stiff penalties for non-compliance with occupational safety and health regulations. However, the system is not functioning optimally due to ineffective stakeholder participation and enforcement. An employer-liability system for employment injury and disease compensation also means that workers who are injured or contract an occupational disease may be left without compensation.

453 See SNPF (Swaziland National Provident Fund). 2014. *Member benefits*. [Retrieved 27 September 2014] <http://www.snpf.co.sz/index.php/2014-04-15-09-50-43>

454 SSA/ISSA (Social Security Administration, USA/International Social Security Association). 2013. *Social security programs throughout the world: Africa, 2013*, 175. [Retrieved 22 September 2014] <https://www.ssa.gov/policy/docs/progdesc/ssptw/2012-2013/africa/ssptw13africa.pdf>

455 Ulandssekretariatet, LO/FTF Council. n.d. *Swaziland – labour market profile 2013*, 13. [Retrieved 26 September 2014] <http://www.newunionism.net/library/national%20data/Swaziland%201-2013.pdf>

456 *Ibid.* 1.

3.7 UNITED REPUBLIC OF TANZANIA

3.7.1 Socio-economic context

The United Republic of Tanzania (composed of Tanganyika and Zanzibar) has a population of about 49.3 million, 27.6% of which is urban.⁴⁵⁷ It has a GDP of US\$76.8 billion with a GDP per capita of US\$1 654.⁴⁵⁸ The employment rate is 91.9% and the unemployment rate is 4.3% (with youth unemployment at 7.1%).⁴⁵⁹ Despite the relatively high employment rate, up to 90% of employment is in the informal sector and in agriculture.⁴⁶⁰ This may explain why up to 87.7% are said to be in vulnerable employment; and 84.7% of workers are the working poor.⁴⁶¹ The LFPR is 88.1% for females and 90.2% for males.⁴⁶²

3.7.2 Occupational safety and health

The existing legal framework is composed of the Occupational Health and Safety Act 5 of 2003 (Mainland) and the Workers' Compensation Act 20 of 2008. There are separate laws regulating occupational safety and health as well as employment injury compensation for mainland Tanzania and for Zanzibar. In the mainland, the reporting of injuries and diseases is also mandated by several laws, including the Workmen's Compensation Ordinance, the Notification of Accidents and Occupational Diseases Ordinance and the Occupational Health and Safety Act.⁴⁶³ In Zanzibar, the Occupational Safety and Health Act 8 of 2005 regulates the notification of accidents and diseases.⁴⁶⁴

3.7.2.1 Scope of coverage

The Workmen's Compensation Ordinance covers persons who work under a contract of service or apprenticeship.⁴⁶⁵ It excludes workers who are not employed to perform manual labour, persons earning above a specified amount, casual employees, out-workers, tributers, members of the employee's family, and any other class of persons that the

⁴⁵⁷ UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 218.

⁴⁵⁸ *Ibid.* 198.

⁴⁵⁹ *Ibid.* 202.

⁴⁶⁰ Ackson T & Masabo J. 2013. Social protection and informal workers in Tanzania. Paper presented at the FES/SASPEN Social Protection for the Informal Economy Conference, Johannesburg (16-17 September); and Matiko J. 2010. Injury and disease reporting in Tanzania. *African Newsletter on Occupational Health and Safety* 20(3): 48-50 at 49.

⁴⁶¹ UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 202.

⁴⁶² *Ibid.* 174.

⁴⁶³ Workmen's Compensation Ordinance of 1949 (Cap 263), Notification of Accidents and Occupational Diseases Ordinance of 1953 (Cap 330) and Occupational Health and Safety Act 5 of 2003 (Mainland).

⁴⁶⁴ Occupational Safety and Health Act 8 of 2005 (Zanzibar).

⁴⁶⁵ See Section 2(1) of the Workmen's Compensation Ordinance.

President may exclude.⁴⁶⁶ The Occupational Health and Safety Act applies to factories and all other workplaces except those exempted by the Minister.⁴⁶⁷ It thus applies to all establishments in the private and public sector, local government services and public authorities.⁴⁶⁸

The Zanzibar Occupational Safety and Health Act applies to all workplaces, excluding merchant shipping and workplaces specifically excluded by the Minister (of Labour, Youth, Women and Children Development).⁴⁶⁹

3.7.2.2 Rights and duties of employers and employees

Under the 2003 Occupational Health and Safety Act (Mainland), a worker is required to take reasonable care for the health and safety of him or herself and any other persons who may be affected by his other actions or omissions at work;⁴⁷⁰ to cooperate with the employer to enable the duty or requirement imposed by the employer to be performed or complied with;⁴⁷¹ to carry out any lawful order given to him or her and to obey the health and safety rules and procedures laid down by employer or an authorised person in the interest of health and safety;⁴⁷² to report to his or her employer or health and safety representative any unsafe or unhealthy situation coming to their attention;⁴⁷³ and to report to his or her employer or health and safety representative any incident or accident which may cause injury to their health as soon as practicable (not later than the end of a shift unless circumstances prevent so).⁴⁷⁴

Employers have a duty to choose health and safety representatives in a workplace with four or more workers;⁴⁷⁵ to establish one or more health and safety committees and consult with the committee(s) to initiate, develop, promote, maintain and review measures to ensure the health and safety of employees;⁴⁷⁶ to register his or her factory or workplace or business with the Occupational Health and Safety Authority;⁴⁷⁷ to conduct regular medical examinations of his or her employees in accordance with the Act;⁴⁷⁸ to make sure that the workplace is safe and healthy, and not to allow any worker to do

466 *Ibid.*

467 Section 2 of the Occupational Health and Safety Act (Mainland).

468 NAOT (National Audit Office, United Republic of Tanzania). 2013. *A performance audit report on the management of occupational health and safety in Tanzania*, 10. [Retrieved 27 September 2014] http://www.nao.go.tz/?wpfb_dl=98.

469 Section 2 of the Occupational Safety and Health Act (Zanzibar).

470 Section 99(1)(a) of the Occupational Health and Safety Act (Mainland).

471 Section 99(1)(b) of the Occupational Health and Safety Act (Mainland).

472 Section 99(1)(c) of the Occupational Health and Safety Act (Mainland).

473 Section 99(1)(d) of the Occupational Health and Safety Act (Mainland).

474 Section 99(1)(e) of the Occupational Health and Safety Act (Mainland).

475 Section 11 of the Occupational Health and Safety Act Mainland).

476 Section 13 of the Occupational Health and Safety Act Mainland).

477 Section 16 of the Occupational Health and Safety Act Mainland).

478 Section 24 of the Occupational Health and Safety Act Mainland).

work that is potentially dangerous;⁴⁷⁹ to inform workers of any possible dangers in the workplace; to reduce any dangers to a minimum before issuing protective clothing; to issue protective clothing where necessary;⁴⁸⁰ to give necessary training to workers who use dangerous machines and materials, to make sure they know the safety precautions;⁴⁸¹ to prevent workers from using or working with dangerous materials or machines, unless all safety rules have been followed; to ensure that dangerous machines are in good working order and are safe to work with; to make sure that dangerous machinery carries warnings and notices; to make sure that somebody who knows the work is supervising the operations to ensure the safety of workers; and to keep the workplace open so that workers can escape from danger if necessary.

The employer is further required to report to the Chief Inspector within twenty four hours any incident or accident at the workplace that results in death, body injury, loss of consciousness, occupational illness or has permanently incapacitated a worker; and if a major incident occurred, or the health or safety of any person was endangered.⁴⁸² A medical practitioner who examines or treats a person for an occupational disease or any other disease which he/she believes is employment-related is also compelled to report to the Chief Inspector within 14 days.⁴⁸³

Under the Zanzibar Occupational Safety and Health Act, some of the duties of employees are to take care of the health and safety of themselves and other persons in the workplace; to cooperate with the employer and other persons in complying with or performing any statutory duty;⁴⁸⁴ and to report any situation that is believed to present an imminent and serious danger to their lives or health or that of others.⁴⁸⁵ Employees have the right to leave a workplace where there is reasonable believe of an imminent and serious danger to their lives or health or that of others.⁴⁸⁶

Some of the employers' duties are to undertake risk assessment;⁴⁸⁷ to remove dust and fumes;⁴⁸⁸ to provide protective equipment;⁴⁸⁹ to ensure workers are not exposed to risks to the safety and health;⁴⁹⁰ to provide guide safety precautions to workers and other

479 Section 43 of the Occupational Health and Safety Act Mainland).

480 Section 62 of the Occupational Health and Safety Act Mainland).

481 Section 34 of the Occupational Health and Safety Act Mainland).

482 Section 101(1) of the Occupational Health and Safety Act Mainland).

483 Section 101(2) of the Occupational Health and Safety Act Mainland).

484 Section 52 of the Occupational Safety and Health Act (Zanzibar).

485 Section 53 of the Occupational Safety and Health Act (Zanzibar).

486 *Ibid.*

487 Section 34 of the Occupational Safety and Health Act (Zanzibar).

488 Section 35 of the Occupational Safety and Health Act (Zanzibar).

489 Section 36 of the Occupational Safety and Health Act (Zanzibar).

490 Section 40 of the Occupational Safety and Health Act (Zanzibar).

persons;⁴⁹¹ and to provide safe working premises.⁴⁹² Self-employed persons are also required to ensure that he/she and other persons are not exposed to risks to the safety and health.⁴⁹³

3.7.2.3 Administrative and institutional framework

Both the Accidents and Occupational Diseases Notification Ordinance and the Workmen's Compensation Ordinance are administered by the Labour Commissioner in the Ministry of Labour, Youth and Employment Development.⁴⁹⁴ The Occupational Health and Safety Act is administered by the Chief Inspector of the Occupational Safety and Health Authority. The primary objective of Occupational Safety and Health Authority is to ensure creation and maintenance of ideal work environments which are free from occupational hazards that may cause injuries or illness to all employees in work environment. This is to be achieved by promoting occupational health and safety practices in order to reduce accidents and occupational diseases, and ultimately achieve better productivity.⁴⁹⁵

In Zanzibar, the Occupational Safety and Health Directorate of the Labour Commission is responsible for the administration of occupational safety and health.⁴⁹⁶

3.7.2.4 Inspection and enforcement

The Occupational Safety and Health Authority, created under the 2003 Act, under the Ministry of Labour Employment and Youth Development, conducts its own factory inspections. The Occupational Health and Safety Act (Mainland) requires the appointment of a Chief Inspector and inspectors.⁴⁹⁷ Inspectors have wide powers, which include the power to enter, inspect and examine workplaces, to request documents; and to carry out investigations.⁴⁹⁸ An inspector can also prosecute, conduct or defend a charge, complaint or other proceeding under the Occupational Health and Safety Act in the Magistrates Court.⁴⁹⁹ The Act makes it an offence where its provisions are not complied with and provides for penalties. These include a fine of not less than 10 million shillings or to imprisonment of not less than two years or both for the offence of death or

491 Section 42 of the Occupational Safety and Health Act (Zanzibar).

492 Section 43 of the Occupational Safety and Health Act (Zanzibar).

493 Section 41 of the Occupational Safety and Health Act (Zanzibar).

494 See Matiko J. 2010. Injury and disease reporting in Tanzania. *African Newsletter on Occupational Health and Safety* 20(3):48-50 at 49.

495 OSHA (Occupational Health and Safety Authority, United Republic of Tanzania). n. d. *Welcome to OSHA*. [Retrieved 19 September 2014] <http://www.healthportal.or.tz/index.php/2014-09-19-12-00-19>

496 Section 4 of the Occupational Safety and Health Act (Zanzibar).

497 Sections 4 and 5 of the Occupational Health and Safety Act (Zanzibar).

498 Section 6 of the Occupational Health and Safety Act (Zanzibar).

499 Section 10 of the Occupational Health and Safety Act (Zanzibar).

bodily injury of a worker.⁵⁰⁰ A court can also make an order for the owner or occupier of a workplace to remedy any contravention of the Act.⁵⁰¹

The Workmen's Compensation Ordinance also makes it an offence if an employer fails to comply with any compensation order without reasonable cause.⁵⁰² The penalty for such contravention is a fine not exceeding 40 000 shillings. A labour officer (above the rank of Labour Officer, Grade III) can institute proceedings against an employer who fails to comply with any compensation order without reasonable cause.⁵⁰³

The Occupational Health and Safety Act (Zanzibar) also provides for the appointment of a Director of the Occupational Safety and Health Directorate and for inspectors.⁵⁰⁴ It also gives the inspector wide powers similar to those exercised by inspectors in the mainland.⁵⁰⁵ The Act also declares the violation of some of its provisions to be an offence, and imposes penalties.⁵⁰⁶

3.7.3 Employment injury compensation

Various statutes provide employment injury and disease compensation in Tanzania. According to the National Social Security Fund Act 28 of 1997 (NSSF Act), workers who are members of the National Social Security Fund (NSSF) receive benefits from the fund. A dedicated social insurance fund is envisaged in the Workman Compensation Act of 2008 and is reportedly to come to existence during the financial year 2014/2015. Workers not registered with the NSSF are to be covered by the Workers Compensation Fund envisaged under the 2008 Act. However, since the Workers Compensation Fund is yet to be established⁵⁰⁷ EI and disease compensation for non-NSSF members is still in terms of the Workmen's Compensation Ordinance.⁵⁰⁸ In addition, the Merchant Shipping Act 43 of 1967 provides for the employment injury and disease compensation of seafarers. The NSSF is a social insurance scheme, while the Workmen's Compensation Ordinance system is an employer-liability system which involves compulsory insurance with private

500 Section 81 of the Occupational Health and Safety Act (Mainland). There are also penalties for the offence for forging a certificate or pretending to be an inspector (Section 82).

501 Section 80 of the Occupational Health and Safety Act (Mainland).

502 Section 42A(1) of the Workmen's Compensation Ordinance.

503 Section 42A(2) of the Workmen's Compensation Ordinance.

504 Sections 5 and 6 of the Occupational Safety and Health Act (Zanzibar).

505 Sections 9, 10 and 17 of the Occupational Safety and Health Act (Zanzibar).

506 These include an offence in case of death or bodily injury with a fine or imprisonment (or both) (Section 100), an offence for a worker to wilfully or recklessly endanger his health and safety or that of another person or the safety of the workplace (Section 101), an offence for doing or omitting to do something in contravention of the Act (Section 103), an offence for forging a certificate or pretending to be an inspector (Section 104).

507 See Machira P. n.d. Injured workers compensation fund set to start. *IPPMedia*, 25 May 2014. [Retrieved 3 September 2014] www.ippmedia.com

508 Workmen's Compensation Ordinance of 1949 as amended by the Workmen's Compensation Ordinance 20 of 1966 and Workmen's Compensation Ordinance 17 of 1983 (Workmen's Compensation Ordinance).

carriers.⁵⁰⁹ Compensation in terms of Section 139 of the Merchant Shipping Act is also an employer-liability system, but with no requirement for compulsory insurance against liabilities.

3.7.3.1 Scope of coverage

The Workmen's Compensation Ordinance covers persons who work under a contract of service or apprenticeship.⁵¹⁰ It excludes workers who are not employed to perform manual labour, persons earning above a specified amount, casual employees, out-workers, tributers, members of the employee's family, and any other class of persons that the President may exclude.

Participation in the NSSF is open to all those who were members of the previous National Provident Fund; self-employed persons; those employed in the private sector (excluding employees in parastatal organisations); non-pensionable state and parastatal employees; and employees of religious organisations.⁵¹¹ In addition, the relevant Minister can declare any employees or category of employees as members of the Fund. However, temporary workers are excluded unless included by the Minister.⁵¹²

3.7.3.2 Administration and institutional framework

The NSSF Board is responsible for the management and the administration of Fund.⁵¹³ It is headed by the Director General who is appointed by the President to be the Chief Executive Officer of the Board to oversee the daily operations of the Fund. The Workmen's Compensation Ordinance is administered by the Labour Commissioner in the Ministry of Labour, Youth and Employment Development.⁵¹⁴

3.7.3.3 Benefits and eligibility conditions

Under the Workmen's Compensation Ordinance, a worker who is injured or contracts a disease out of and in the scope of his or her employment is entitled to compensation. The employer pays compensation for total temporary incapacity, partial temporary incapacity and permanent partial total incapacity. The employer also takes charge of all the worker's medical expenses until his or her full recovery.⁵¹⁵ However, an employer is permitted to defray some of the worker's medical expenses where he is unable to pay for all of them and where the payments are for surgical and hospital treatment, nursing treatment, supply

509 Section 25 of the Workmen's Compensation Ordinance

510 See Section 2(1) of the Workmen's Compensation Ordinance.

511 Sections 6 and 7 of the NSSF Act.

512 Section 8 of the NSSF Act.

513 Section 4 of the NSSF Act.

514 See Matiko J. 2010. Injury and disease reporting in Tanzania. *African Newsletter on Occupational Health and Safety* 20(3):48-50 at 49.

515 Section 31(1) of the Workmen's Compensation Ordinance. See also Gulamali S. 2014. Point of law: Workmen's compensation policy and practice. *Aspire*, issue 8, February–April 2012. [Retrieved 10 September 2014] <http://www.peoplepower.co.tz/aspire/article/?id=87>

of medicine and supply, maintenance and repair of artificial appliances and reasonable transport charges.⁵¹⁶

The NSSF awards workmen's compensation (occupational injury and disease) benefits to a person who sustains an occupational injury or contracts an occupational disease.⁵¹⁷ For a worker to receive benefits he or she must have been registered by the Fund as an insured person even if no contribution was remitted; and he or she must have been incapacitated or disabled as a result of his or her employment in the course of his or her employment.⁵¹⁸ For temporary disability, the benefit payable is 60% of the average insurable daily earnings determined from the last six months' contributions prior to the month of accident or disease.⁵¹⁹ The benefit is paid for a maximum period of 26 weeks from the date of the accident or disease. However, no payment is made for the first three days of any incapacity.

A permanent disability benefit at a rate of 100% is paid where a member has suffered a permanent disability.⁵²⁰ Benefits are to the value of 70% of the average insurable monthly earning determined from the last six months' of contribution prior to the month of accident or disease. If a permanent disability benefit recipient requires constant attendance by another person, an attendance allowance of 25% of the benefit is paid.⁵²¹

Survivors' benefits are paid to the dependant(s) of an employee where he or she dies as a result of an employment injury.⁵²² The disability is assumed to have been 100% and survivors will be paid a pension equal to 60% of the deceased person's average insurable

516 Section 31(1) of the Workmen's Compensation Ordinance.

517 See NSSF (National Social Security Fund, United Republic of Tanzania). 2015. *Employment injury*. [Retrieved 14 August 2014] <https://www.nssf.or.tz/index.php/benefits/english/employment-injury>. Section 39 of the NSSF Act defines 'employment injury' to include commuting accidents, accidents sustained during working hours; at the workplace; or at a place where one would not have been except for his employment. 'Occupational diseases' means the diseases occurring in connection with specific activity in a specific occupation, or the diseases that are in causal relationship to specific agents or exposure.

518 See NSSF (National Social Security Fund, United Republic of Tanzania). 2015. *Employment injury*. [Retrieved 14 August 2014] <https://www.nssf.or.tz/index.php/benefits/english/employment-injury>

519 See NSSF (National Social Security Fund, United Republic of Tanzania). 2015. *Employment injury*. [Retrieved 14 August 2014] <https://www.nssf.or.tz/index.php/benefits/english/employment-injury>; and Section 40(1)(b)(i) of the NSSF Act.

520 See NSSF (National Social Security Fund, United Republic of Tanzania). 2015. *Employment injury*. [Retrieved 14 August 2014] <https://www.nssf.or.tz/index.php/benefits/english/employment-injury>; and Section 40(1)(b)(ii) of the NSSF Act.

521 See Section 40(2) of the NSSF Act.

522 See NSSF (National Social Security Fund, United Republic of Tanzania). 2015. *Employment injury*. [Retrieved 14 August 2014] <https://www.nssf.or.tz/index.php/benefits/english/employment-injury>; and Section 33 of the NSSF Act. A 'dependant' means a member of the family of an employee who was wholly or in part dependent upon his/her earnings at the time of his/her death, or would have been dependent if not for the illness of the employee. However, a person will not be deemed to be a partially dependant on another person unless he was dependant partially on assistance from that other person for the provision of the ordinary necessities of life suitable for person of his station (Section 2 of the NSSF Act).

monthly earnings. NSSF survivors' benefits are paid to a spouse and/or child(ren) of the deceased insured person under 18 or 21 years if in full time education.⁵²³ If a deceased insured person had no surviving spouse and children, the pension shall be paid to parents and if all are not around a family member will be paid in accordance with the inheritance law of Tanzania.⁵²⁴ If the survivors are eligible to another survivors' benefit under the NSSF Act, they shall be entitled to receive a benefit that is higher of the two or more. Where a worker fails to satisfy the conditions for survivors' pension, his or her dependants are paid a special survivors' lump sum benefit.

The Fund also provides medical care that is prescribed by a qualified medical practitioner which consists of general practitioner care at hospitals, essential pharmaceuticals or hospitalisation.⁵²⁵ Assistive devices (e.g. artificial limbs) are also provided if deemed necessary to enable an affected member to resume work or gain improved rehabilitation.⁵²⁶

The Merchant provides for the medical care of injured or sick seamen who are not covered under any other EI legislation.⁵²⁷ The owner of a ship is responsible for the transportation to the port of origin or country of residence, proper medical care or burial of a seaman who is injured or contracts a disease or dies at sea.⁵²⁸ The injury or illness must not be one that was wilfully sustained or concealed at the time of employment.

3.7.3.4 Funding

The NSSF is funded through employer and employee contributions. The employer is required to deduct from employee's gross salary the amount of contribution not exceeding 10% of the employee's salary. The employer adds the remaining balance to make the required contribution rate of 20%.⁵²⁹

Employers fund the compensation under both the Workmen's Compensation Ordinance and the Merchant Shipping Act since these establish employer-liability systems (in the

523 See NSSF (National Social Security Fund, United Republic of Tanzania). 2015. *Employment injury*. [Retrieved 14 August 2014] <https://www.nssf.or.tz/index.php/benefits/english/employment-injury>; and Section 35 of the NSSF Act.

524 See generally NSSF (National Social Security Fund, United Republic of Tanzania). 2015. *Employment injury*. [Retrieved 14 August 2014] <https://www.nssf.or.tz/index.php/benefits/english/employment-injury>; and Section 34 of the NSSF Act.

525 See NSSF (National Social Security Fund, United Republic of Tanzania). 2015. *Employment injury*. [Retrieved 14 August 2014] <https://www.nssf.or.tz/index.php/benefits/english/employment-injury>; and Section 40(1)(a) of the NSSF Act.

526 See NSSF (National Social Security Fund, United Republic of Tanzania). 2015. *Employment injury*. [Retrieved 14 August 2014] <https://www.nssf.or.tz/index.php/benefits/english/employment-injury>; and Section 40(1)(c) of the NSSF Act.

527 Section 139(3) of the Merchant Shipping Act.

528 Section 139(1) of the Merchant Shipping Act. Proper medical care entails medical treatment and the supply of proper and sufficient medicines and therapeutical appliances; and hospitalisation or board and lodging (Section 139(2)).

529 See <https://www.nssf.or.tz>.

case of the Ordinance requiring compulsory insurance with private carriers);⁵³⁰ but with no such requirement the Merchant Shipping Act.⁵³¹

3.7.4 Other employment injury-related schemes and initiatives

Tanzania does not have an established social assistance system. As a result, social assistance benefits are only provided by small-scale and uncoordinated pilot projects targeted at specific vulnerable categories such as the elderly, orphans and people living with HIV and AIDS (an example is the Community-Based Conditional Cash Transfer pilot scheme in three districts which targeted older people (over the age of 60), including those caring for children without parents).⁵³²

In addition to medical benefits provided by employers in terms of the Workmen's Compensation Ordinance, health care services are also provided by the public health care system and through social insurance. Health care by the public health care system is on a user-fee basis, although exemptions and waivers are granted to the most vulnerable sections such as the elderly.⁵³³ The National Health Insurance Fund provides health insurance to public service workers.⁵³⁴ However, The Minister of Health may extend coverage to other sectors. Community health funds also provide health coverage to households in communities where they are established.⁵³⁵

3.7.5 Gaps and challenges

Tanzania's OSH and employment injury compensation framework is fragmented, with separate laws governing these areas in the mainland and in Zanzibar. In addition, OSH and EI compensation in the mainland is governed by a plethora of laws. This has led to a dual system whereby in the absence of the envisaged Workers Compensation Fund, the NSSF operates a social insurance scheme for EI compensation but non-NSSF members and seafarers are covered under an employer-liability system. Fragmentation also extends to the institutional framework for the administration of the laws, as different institutions administer the laws governing EI compensation. There is also duplication of the obligations (such as reporting requirements) in the various laws. This contributes to confusion and consequent disregard for the existing rules. Given the lack of clarity and the costs to access information thereof, employers, may prefer to pay directly the medical

⁵³⁰ Section 25 of the Workmen's Compensation Ordinance.

⁵³¹ Section 139 of the Merchant Shipping Act.

⁵³² See Ackson T & Masabo J. 2013. Social protection and informal workers in Tanzania. Paper presented at the FES/SASPEN Social Protection for the Informal Economy Conference, Johannesburg (16-17 September).

⁵³³ *Ibid.*

⁵³⁴ See the National Health Insurance Fund Act of 1999.

⁵³⁵ See Sections 2 and 7 of the Community Health Fund Act 1 of 2001.

charges for their employees, which is then considered as benevolence from the employer. Employees, also fail to be informed about their rights under the existing regulations.⁵³⁶

While some of the older laws exclude several categories of workers from the ambit of their protection, the newer laws are more inclusive. This means some categories of employees and self-employed persons are not covered under the earlier laws. In a country with up to 90% of the economically active engaged in the informal sector, a vast majority of the workforce is thus left out of occupational health and safety protection.

Occupational safety and health as well as workers compensation laws are not adequately enforced, with only the Workmen's Compensation Ordinance implemented to some degree. As an example, although the preparation of a safety and health policy and the carrying out of a workplace risk assessment are required, few employers comply with these.⁵³⁷

There is poor coordination and networking between the different enforcement institutions, with no sharing of information among regulatory bodies.⁵³⁸ This may be the reason why a limited number of workplaces have been registered (i.e. 6 599 out of the estimated 27 500 workplaces – only 24%).⁵³⁹

The OSH system is hampered by the inefficiencies of the Occupational Safety and Health Authority. These relate to the inadequate planning of OSH inspection; OSH risks not adequately addressed; lack of quality assurance mechanism, adequate inspection of registered workplaces; inadequate medical health examination strategies; the absence of general control on OSH standards; poorly-documented inspection reports; poor capture of OSH incidents, and ineffective incident reporting system.⁵⁴⁰

The system is also affected by weak and ineffective OSH committees and representatives who fail to conduct primary inspection and ensure that occupational safety and health at the workplaces is maintained and harmonised.⁵⁴¹

Lengthy procedures are considered a major stumbling block to rapid compensation. One major factor is related to medical boards not sitting timely. According to some

536 Mtulia A. 2007. Compensation of occupational diseases: The Tanzanian experience. Paper presented at the International Social Security Association (ISSA) Seminar IV, Kribi, Cameroon (13-15 March), 6.

537 Matiko J. 2010. Injury and disease reporting in Tanzania. *African Newsletter on Occupational Health and Safety* 20(3):48-50 at 49 and Matiko J. 2013. Health and safety regulatory framework in Tanzania: Existing shortfalls and the way forward. *African Newsletter on Occupational Health and Safety* 23(3):63-65 at 64.

538 Matiko J. 2013. Health and safety regulatory framework in Tanzania: Existing shortfalls and the way forward. *African Newsletter on Occupational Health and Safety* 23(3):63-65 at 64.

539 NAOT (National Audit Office, United Republic of Tanzania). 2013. *A performance audit report on the management of occupational health and safety in Tanzania*, 57. [Retrieved 27 September 2014] http://www.nao.go.tz/?wpfb_dl=98.

540 *Ibid.* 58-61.

541 *Ibid.* 61.

commentators, ‘cases can wait for months to be examined and by then, even the extent of the injury/disease may have changed’.⁵⁴² This is compounded by the small value of benefits compared to such transaction costs and the high frequency in which workers can change jobs.⁵⁴³

Well-focused OSH training is not provided and most employers and employees have a very low level of awareness on occupational safety and health issues resulting in non-compliance with OSH legislation and standards.⁵⁴⁴

There are also weaknesses in the monitoring and evaluation of occupational safety and health activities (e.g. insufficient information for monitoring and evaluating OSH activities, few follow-up visits to workplaces, and poor statistics on occupational safety and health).⁵⁴⁵

3.7.6 Concluding observations

The fragmented and segregated nature of Tanzania’s occupational safety and health as well as employment injury compensation systems leave out a majority of workers in need of protection. In addition, the many challenges facing the systems means workers covered under the various laws do not get the necessary protection. A streamlined, harmonised and coordinated system should be established, with proper enforcement mechanisms. The establishment of a dedicated fund in that regard should be a promising way forward.

3.8 REPUBLIC OF ZAMBIA

3.8.1 Socio-economic context

Zambia has population of about 14.5 million persons⁵⁴⁶ and an estimated GDP of US\$42.1 billion.⁵⁴⁷ In 2012, the LFPR for persons aged 15 and older was 73.2% for females and 85.7% for males.⁵⁴⁸ Zambia is ranked at number 141 on the HDI. In 2013, the life expectancy at birth for females was 60 years and for males 56.3 for males.⁵⁴⁹

⁵⁴² Mtulia A. 2007. Compensation of occupational diseases: The Tanzanian experience. Paper presented at the International Social Security Association (ISSA) Seminar IV, Kribi, Cameroon (13-15 March), 6.

⁵⁴³ *Ibid.*

⁵⁴⁴ *Ibid.* 62-63.

⁵⁴⁵ *Ibid.* 63-65.

⁵⁴⁶ UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 218.

⁵⁴⁷ *Ibid.* 198.

⁵⁴⁸ *Ibid.* 174.

⁵⁴⁹ *Ibid.* 141.

3.8.2 Occupational safety and health

3.8.2.1 Scope of coverage

Occupational safety and health in Zambia is regulated by two pieces of legislation, namely: the Factories Act 2 of 1996 (Cap 441) and the Occupational Health and Safety Act 36 of 2010. The Factories Act has been enacted to ‘make further and better provision for the regulation of the conditions of employment in factories and other places as regards the safety, health and welfare of persons employed therein; to provide for the safety, examination and inspection of certain plant and machinery and to provide for purposes incidental to or connected with the matters aforesaid.’⁵⁵⁰ The Occupational Health and Safety Act establishes the Health and Safety Institute and provides for its functions; the establishment of health and safety committees at workplaces and for the health, safety and welfare of persons at work; the duties of manufacturers, importers and suppliers of articles, devices, items and substances for use at work; and the protection of persons, other than persons at work, against risks to health or safety arising from, or in connection with, the activities of persons at work.⁵⁵¹

Section 2(1) of the Health and Safety Act defines an ‘employee’ as “(a) any person, excluding an independent contractor, who works for another person, whether incorporated or not, or for a government agency, and who receives, or is entitled to receive, any remuneration; or (b) any other person who in any manner assists in carrying on or conducting the business of an employer’. Furthermore, it defines an ‘employer’ as ‘any person (a) who employs or provides work for another person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or (b) who permits any other person in any manner to assist in the carrying on or conducting of the person’s business, including any person acting on behalf of, or on the authority of, such employers.”

3.8.2.2 Rights and duties of employers and employees

An employer has, among others, the duty to ensure the health, safety and welfare of the employees at the employer’s workplace and place and maintain an employee in an occupational environment suitable to the employee’s physical, physiological and psychological ability.⁵⁵² The duties of an employee include: ‘to take reasonable care for the employee’s own health and safety and that of other persons who may be affected by the employee’s acts or omissions at the workplace; not operate any machine or engage in a process which is unsafe or is an imminent risk to the employee’s own health or safety and that of others; and cooperate with the employer or any other person in relation to any duty imposed on the employer or that other person, so far as is necessary to enable that duty or requirement to be performed or complied with.’⁵⁵³

550 Preamble of the Factories Act.

551 Preamble of the Occupational Health and Safety Act.

552 Section 16(1) of the Occupational Health and Safety Act.

553 Section 17(1)(a)-(c) of the Occupational Health and Safety Act.

3.8.2.3 Administrative and institutional framework

Section 6 of the Occupational Health and Safety Act makes provision for the establishment of the Occupational Health and Safety Institute. The institute has the power to, among others, investigate and detect occupational diseases and injuries at workplaces. The functions of the Occupational Health and Safety Institute include, among others, the following: to investigate and detect occupational diseases and injuries at workplaces; conduct medical examinations for occupational health and safety purposes catering for all industries including agriculture and construction; promote studies and carry out investigations and research on occupational health and safety; prepare and maintain statistics on employees morbidity and mortality and conduct and encourage awareness educational programmes relating to the promotion of occupational health and safety.⁵⁵⁴ The 2010 Act also provides for the enforcement of its provisions and that include the designation of authorised officers.⁵⁵⁵

3.8.2.4 Inspection and enforcement

Section 25(1) of the Occupational Health and Safety Act makes provision for the designation of authorised officers. An authorised officer has the power to enter, inspect and search any premises used as a workplace.⁵⁵⁶ Furthermore, an authorised officer may order the closure of the workplace if he or she has reasonable grounds to believe that any contravention of this Act is likely to cause death or bodily harm to an employee or other persons.⁵⁵⁷ Section 103(1)(a) of the Factories Act empowers the Chief Inspector to issue a written notice to the owner or occupier of a factory in relation to dangerous or defective factory. Penalties that can be imposed range from a fine not exceeding one hundred thousand penalty units to a fine not exceeding seven hundred thousand penalty units.⁵⁵⁸ Furthermore, periods of imprisonment that can be imposed vary from a period not exceeding one year to a period not exceeding seven years.⁵⁵⁹

3.8.3 Employment injury compensation

3.8.3.1 Scope of coverage

Workers' compensation in Zambia is regulated by the Workers' Compensation Act 10 of 1999. The concept 'worker' in terms of section 3(1) of the Act refers to "(a) any person who has entered into, or works under, a contract of service or of apprenticeship or of learnership with an employer, whether the contract is expressed or implied, is oral or in writing, and whether remuneration is calculated by time or by work done, or is cash or in kind; and (c) any person whose occupation is conveying for gain persons or goods by

⁵⁵⁴ Section 6 of the Occupational Health and Safety Act.

⁵⁵⁵ Part VI of the Occupational Health and Safety Act.

⁵⁵⁶ Section 26(1) of the Occupational Health and Safety Act.

⁵⁵⁷ Section 27(1) of the Occupational Health and Safety Act.

⁵⁵⁸ See Sections 16(3), 17(3), 19(3), 34 and 35 of the Occupational Health and Safety Act.

⁵⁵⁹ *Ibid.*

means of any vehicle, vessel or aircraft, the use of which that person has obtained under any contract other than a purchase or a hire-purchase agreement, whether or not the remuneration of the person under such a contract is partly an agreed sum and partly a share in takings, but does not include any person whose remuneration is fixed solely by a share in takings.”

Section 3(3) of the Act specifically excludes the following persons from its definition of ‘worker’: “(a) any person in – (i) the Zambia Police Force or the Public Service; (ii) the public service of any government or authority specified by the Minister, by statutory notice; (b) any person employed casually by an employer and not in connection with the employer’s trade or business; (c) any person to whom articles or materials are given out by any employer to be made up, cleaned, washed, ornamented, finished or repaired or adapted for sale on premises but under the control of the employer; (d) a member of the Defence Force; or (e) any person who is a member of a Service Commission established under the provisions of the Service Commissions Act.”

The concept ‘employer’ is explained in section 5(1) of the Act as follows: ‘The Government and any person or anybody of persons, corporate or incorporate, having a contract of service or apprenticeship or learnership with a worker shall be regarded, for the purposes of this Act, as the employer of that worker, whether the contract was entered into before the commencement of the Act.’

3.8.3.2 Administration and institutional framework

The Compensation Fund⁵⁶⁰ is administered by the Workers’ Compensation Fund Control Board (the Board) established in accordance with Section 10 of the Worker’s Compensation Act. Apart from administering the fund, the Board is responsible for advising the Minister on any matter in connection with the Fund or the Workers’ Compensation Act.⁵⁶¹

3.8.3.3 Benefits and eligibility conditions

Workers who contract occupational disease or are injured during the scope and course of their employment are entitled to compensation. The right to compensations extend to the deceased worker’s dependants in a case where such a worker dies as a result of the aforementioned disease or injuries. The Worker’s Compensation Act also makes provision for the Commissioners’ or an exempted employer’s duty to defray any expenses reasonably and necessarily incurred by the worker on account of an accident arising out of his or her scope of employment.⁵⁶²

560 Established in terms of Section 104 of the Workers’ Compensation Act.

561 Section 11 of the Workers’ Compensation Act.

562 Section 101(1) of the Workers’ Compensation Act.

3.8.3.4 Funding

The Compensation Fund consists of, among others, the assessments paid by employer, any monies paid the employers to the Board, any moneys paid as penalties imposed under the Workers' Compensation Act, interest from investments of the Fund, any payment made to the Board by exempted employers, and any other sums to which the Fund may become entitled.⁵⁶³ Every employer in Zambia, except the state and any employer exempted by the ministers, is liable to assessment.⁵⁶⁴ The liability to assessments also applies to employers of domestic workers.⁵⁶⁵

3.8.4 Other employment injury-related schemes and initiatives

Zambia has a Public Welfare Assistance Scheme (PWAS) which is aimed at assisting beneficiaries to fulfil their basic needs and enhance the community's ability to develop initiatives to overcome poverty and vulnerabilities.⁵⁶⁶ The targeted beneficiaries comprise of the youth, aged, sick persons and persons with disabilities. In addition, Zambia has implemented a cash transfer pilot scheme in Kalomo district.⁵⁶⁷ This programme is targeted at the poor households and its aim is to reduce extreme poverty, hunger and starvation.⁵⁶⁸

3.8.5 Gaps and challenges

One of the notable gaps inherent in the Zambian workers compensation scheme is that its scope of covered is intimately linked to the employer-employee relationship. Furthermore, it specifically excludes certain workers from its definition of 'worker'. Thus, persons who do not fall within the definition such as the independent contractors are excluded and marginalised.

3.8.6 Concluding observations

Unlike the workers' compensation scheme of South Africa, the Zambian scheme does extend coverage to the domestic sector. Employers of the domestic workers are legally required to pay assessments. This is to be welcomed. On a sad note, the Zambian labour inspectorate, just like that of many of its counterparts in the southern African

⁵⁶³ Section 104 of the Workers' Compensation Act.

⁵⁶⁴ Section 110 of the Workers' Compensation Act.

⁵⁶⁵ Section 115(1) of the Workers Compensation Act.

⁵⁶⁶ Barrientos A, Holmes R & Scott J. 2008. *Social assistance in developing countries database*. London: Department for International Development (DFID), 90.

⁵⁶⁷ *Ibid.*

⁵⁶⁸ *Ibid.* Also Omilola B & Kaniki S. 2014. *Social protection in Africa: A review of potential contribution and impact on poverty reduction*. Pretoria: UNDP, 35.

regions is marred by challenges. These challenges include the lack of resources (such as transportation and inspectors) to meaningfully conduct the labour inspections.⁵⁶⁹

3.9 REPUBLIC OF ZIMBABWE

3.9.1 Socio-economic context

Zimbabwe has a population of 14.1 million people, 39.6 of whom live in urban areas.⁵⁷⁰ It is ranked at number 156 on the HDI, with a GDP of US\$18.4 billion and a GNI per capita of US\$1 307.⁵⁷¹

The employment to population ratio is 88.6% and the LFPR for persons aged 15 and above is 85.7%.⁵⁷² The official unemployment rate is 5.4%. However, 87.1% of the working population are considered to be the working poor (less than US\$2 per day).⁵⁷³ Up to 44.1% of the population live in multidimensional poverty, 24.9% live in near multidimensional poverty, about 12.2% live in severe poverty and 72.3% live below the national poverty line.⁵⁷⁴ This may be because 84% of a total working population of about 5.4 million is engaged in informal employment (with 11% in formal employment and 5% in non-classifiable employment). Some commentators consider informal sector employment as the reason for the high unemployment rate, estimated at over 80%.⁵⁷⁵

3.9.2 Occupational safety and health

Occupational safety and health promotion is undertaken by the Accident Prevention and Workers Compensation Scheme of the National Social Security Authority (NSSA).⁵⁷⁶ The objectives of the scheme are to provide financial relief to employees and their families when an employee is injured or killed in a work-related accident or suffers from a work-related disease or dies thereof; create an awareness of, and promoting health and safety

⁵⁶⁹ DOL (Department of Labor, United States). n.d. *2012 Findings on the worst forms of child labour – Zambia* [Retrieved 30 September 2014] <http://www.dol.gov/ilab/reports/child-labor/zambia.htm>

⁵⁷⁰ UNDP (United Nations Development Programme). 2014. *Human development report 2014*. New York: UNDP, 218.

⁵⁷¹ *Ibid.* 159, 162 and 191.

⁵⁷² *Ibid.* 174.

⁵⁷³ *Ibid.* 202.

⁵⁷⁴ *Ibid.* 181.

⁵⁷⁵ 'Majority employed in informal sector – Zimstat survey'. 2012, November 4. [Retrieved 28 September 2014] <http://www.thestandard.co.zw/2012/11/04/majority-employed-in-informal-sector-zimstat-survey/>

⁵⁷⁶ See National Social Security Authority Act 12 of 1989; National Social Security Authority (Accident Prevention and Worker's Compensation Scheme) Notice, Statutory Instrument (SI) 68 of 1990; and NSSA (National Social Security Authority, Zimbabwe). n.d. *The accident prevention and workers compensation scheme*. [Retrieved 28 September 2014] <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50>

at all places of work; encourage adoption of health and safety legislation through factory and machinery inspection; and provide rehabilitation services to disabled employees so as to reduce their disablement and enable them to return to their former employment or otherwise prepare them for a useful and meaningful place in society.

3.9.2.1 Scope of coverage

According to Section 2 of the Factories and Works Act 20 of 1948 (as amended), the Accident Prevention and Workers Compensation Scheme covers all employees, except employees of the government, domestic employees and informal sector workers.⁵⁷⁷ It also covers employees who work or have worked or intend to work in a dusty occupation.⁵⁷⁸

3.9.2.2 Rights and duties of employers and employees

The various laws regulating occupational safety and health prescribe duties for employers and employees. Section 3(2)(k) of the National Social Security Authority Act (NSSA Act) prescribes that every employer is required to maintain a record in respect of every employee in his employ and must produce such records to NSSA inspectors on demand at all reasonable times. The employer must also keep summary record of the number of workers in his employ per month and the total wage bill per month.⁵⁷⁹ The employer is obliged to report any work-related accident of a worker within 14 days of gaining knowledge of such an accident;⁵⁸⁰ register a factory;⁵⁸¹ keep an accident register and record the particulars of any accident that requires to be notified as well as notify an inspector in writing of an accident;⁵⁸² and provide first aid before promptly referring the injured person or persons to the nearest medical centre.

Employers and employees have a duty not to wilfully or negligently injure a person or interfere with, misuse, or in a negligent manner use any means, appliance, convenience or other thing provided in pursuance of the Factories and Works Act for securing the health, safety or welfare of employees in any factory or place where structural work is performed.⁵⁸³ Employees have a duty not to wilfully and without reasonable cause or negligently, do anything likely to endanger the health, safety or welfare of themselves or others.⁵⁸⁴

⁵⁷⁷ See also NSSA (National Social Security Authority, Zimbabwe). n.d. *Employers guide current*. [Retrieved 28 September 2014] <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50>

⁵⁷⁸ See Section 2 of the Pneumoconiosis Act 13 of 1971 (as amended).

⁵⁷⁹ See also the National Social Security Authority (Accident Prevention and Worker's Compensation Scheme) Notice.

⁵⁸⁰ Section 47 of the National Social Security Authority (Accident Prevention and Worker's Compensation Scheme) Notice.

⁵⁸¹ Section 8 of the Factories and Works Act.

⁵⁸² Section 14 of the Factories and Works Act.

⁵⁸³ Section 30 of the Factories and Works Act.

⁵⁸⁴ Section 30 of the Factories and Works Act.

Employees have a right not to be victimised for giving information that they are required to give in terms of the law or gives evidence in any proceedings.⁵⁸⁵ They also have a right for their wages not to be deducted or for them to make a payment for a requirement of the law to be done or provided.⁵⁸⁶ According to Section 6 the Labour Act 16 of 1985 (as amended), employees have a right not to be required to work under any conditions or situations which are below those prescribed by law or by the conventional practice of the occupation for the protection of such employee's health or safety.

3.9.2.3 Administrative and institutional framework

The Occupational Safety and Health Division of the NSSA promotes safety and health in Zimbabwe through the establishment and maintenance of an effective occupational health and safety culture based on comprehensive occupational accident and disease preventive systems at all workplaces.

3.9.2.4 Inspection and enforcement

Enforcement of compliance by employers with their obligations to the Accident Prevention and Workers' Compensation Scheme is carried out by inspectors who have statutory powers of inspection and inquiry in order to enforce compliance. An inspector is empowered to inspect any premises or place where he or she has reasonable cause to believe there are eligible employees in order to register all unregistered employers and their employees and enforce payment of premiums; to make an examination or inquiry which he or she considers necessary to establish that the scheme is being complied with; to ask employers to produce any books, registers, wage records, accounts, monthly returns, receipts, computer databases and documents relevant to the Scheme; and to copy, make extracts from and photocopy any relevant documents.⁵⁸⁷

The NSSA Act also makes it an offence where a person contravenes a provision of a Scheme which is his duty to comply with; evades payment of any contribution through knowingly making false representation; falsely obtains or procures any payment or benefits for himself or herself or any other person; fails to comply with the instruments of the Act requiring him or her to register within the period specified in the Act; fails to ensure that any person gainfully employed by him or her on his or her establishment, is registered with NSSA; fails to maintain any relevant records, whether or not for the purpose of evading liabilities; fails to pay to the schemes any contributions within the stipulated period; obstructs any inspector or officer or servant of the NSSA in the discharge of his or her duties; fails, without lawful excuse, to produce documents he or she is required to have and to produce; fails, without lawful excuse, to produce documents he or she required to have and produce; and knowingly deducts from an employee's wage or

585 Section 26 of the Factories and Works Act.

586 Section 28 of the Factories and Works Act.

587 See Sections 39 and 40 of the NSSA Act; Sections 4, 5, 6 and 19 of the Factories and Works Act; and Sections 50 and 51 of the Pneumoconiosis Act 13 of 1971.

salary any amount exceeding the employee's share.⁵⁸⁸ These offences are punishable with a fine of between level 5 and 7 and to imprisonment for a period of between six months and two years or to both fine and imprisonment.⁵⁸⁹ In addition, where a person is convicted for failing to pay any contribution, surcharge or other amount; or for receiving an amount that he or she was not entitled under a scheme the court may give summary judgment in favour of NSSA for the amount which the person failed to pay or unlawfully received.

3.9.3 Employment injury compensation

Employment injury compensation is provided by the Accident Prevention and Workers' Compensation Scheme. The objective of the scheme is to prevent accidents at workplaces and to compensate workers who sustain injuries in work-related accidents or who contract work-related diseases.⁵⁹⁰

3.9.3.1 Scope of coverage

The Accident Prevention and Workers' Compensation Scheme covers all workers working in a profession, trade or occupation who are above the age of 16. However, civil servants and domestic workers are excluded.⁵⁹¹ It also covers employees who work or have worked or intend to work in a dusty occupation.⁵⁹²

3.9.3.2 Administration and institutional framework

The Accident Prevention and Workers' Compensation Scheme, together with the Pension and Other Benefits Scheme, is administered by the general manager of the NSSA. He or she is responsible for the management of the operations, investments and property of the Authority.⁵⁹³ The Authority administers every scheme and fund established in terms of the NSSA Act, advises the Minister on all matters concerning the operation of schemes and on matters relating to social security generally and does all things which the NSSA Act or any other enactment requires or permits it to do.⁵⁹⁴

⁵⁸⁸ See Section 3A, 41, 41B, and 48 of the NSSA Act.

⁵⁸⁹ Fines in Zimbabwe are set at various levels, from one (US\$20) to 14 (US\$5 000). The quantum of the level 5 fine is US\$200. It has been held that a level 4 fine (which is an amount of US\$100) clearly illustrates that the offence is not a serious one (*The State v Joe Gutuza & Munyaradzi Masawu* [2011] ZWBHC 3 and *The State v Viter Makumbe* [2013] ZWHHC 39).

⁵⁹⁰ See Section 3 of the National Social Security Authority Act 12 of 1989 and National Social Security Authority (Accident Prevention and Worker's Compensation Scheme) Notice, SI 68/1990.

⁵⁹¹ NSSA (National Social Security Authority, Zimbabwe). n.d. *Employers guide current*. [Retrieved 28 September 2014] <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50>

⁵⁹² See Section 2 of the Pneumoconiosis Act.

⁵⁹³ See Section 25 of the NSSA Act.

⁵⁹⁴ Section 21 of the NSSA Act.

3.9.3.3 Benefits and eligibility conditions

The Accident Prevention and Workers Compensation Scheme offers both short- and long-term benefits. Short-term benefits are periodical payments, lump sum payments, funeral payments and payment of medical costs.

Periodical payments are paid up to a maximum of 180 days and provide compensatory income where this has been lost or stopped by work-related accidents. Where a worker's injury results in residual disability, whether temporary or permanent, compensation is paid to him/her as a lump sum. If the percentage disability is 30% or less, the lump sum is a once off payment in full and final settlement of the injury on duty claim. A grant towards funeral expenses (funeral grant) is paid where a work-related injury or disease results in a worker losing his/her life. All medical expenses related to the injury at work are paid, as well as transport and provision of artificial appliances.

Long-term benefits are the workers' pension, widow/widower's pension, dependency allowance, constant attendance allowance and rehabilitation benefits. The workers' pension is paid where a worker's injury results in permanent disablement that is more than 30%. The widow/widower's pension is paid where a worker dies as a result of a work-related accident or disease. The surviving spouse receives a pension equivalent to two-thirds of the deceased's pension. In the case of a worker with more than one surviving spouse, the proceeds will be shared equally between/among them. If the surviving spouse remarries, he/she is awarded a lump sum equivalent to 24 months' pension. Children's allowances are included in the employee's pension for children up to the age of 19 years or up to 25 years if children are still attending formal school or university. Where a single worker dies as a result of a work-related accident, dependants such as parents, sisters or brothers receive the dependency allowance. The constant attendance allowance paid to constant attendants (nurse aides) for the service of caring for paraplegics, quadriplegics and other severely disabled workers. Rehabilitation services for injured workers are provided at the Workers' Compensation Rehabilitation Centre (WCRC) in Bulawayo. The centre aims to provide disabled workers with an enabling environment where they can be rehabilitated both physically and mentally. In addition, vocational training is offered in carpentry, leather craft, poultry and market gardening, metal work and tailoring to assist them to reintegrate into society as employable or self-supporting members.

Excerpt on the Workers' Compensation Rehabilitation Centre (WCRC) in Bulawayo, Zimbabwe

Rehabilitation of injured workers is an indispensable part of national social security. The Zimbabwe Ministry of Health through its National Health Strategy 2009-2013, reports that injuries are among the top ten causes of outpatient visits and account for 50% of all newly reported disabilities. It further reports that of particular concern are injuries resulting from road traffic, domestic and work-related accidents, which constitute 10–15% of all registered deaths in the population. According to the 2008 Annual Statistics Report for NSSA..., 1 046 483 workers were insured under the

accident prevention and workers compensation scheme as at 31st December 2008. Out of these workers 3 370 injuries occurred in 2008.

Workers' Compensation Rehabilitation Centre (WCRC) is a public institution that is regulated under the Health Professions Council of Zimbabwe, as such clinical audit provides an opportunity to the WCRC staff to follow standard protocols, protects them from medico legal pit falls, establishes the basis for quality clinical practice and also ensures that rehabilitees were getting the quality of services in a standard manner across the board.

The WCRC Rehabilitation Program seeks to improve the quality of life for work-related injured rehabilitees by promoting healthy living, prevention of aggravation of condition, management of disabilities and injuries, through a process of rehabilitation empowerment and re-integration into the work environment and into society. In this regard the WCRC plays a crucial role in the continuum of care in line with the Public Health Care (PHC) approach...The primary objective of the WCRC is to provide clinical services to patients who have work-related injuries. ...The centre comprises a number of departments located in the same campus and sharing a common administration department. These are: occupational therapy, physiotherapy, clinic, paraplegic unit, maintenance, laundry, registry, stores, accounts, vocational training, social work and kitchen.

The centre serves as a referral centre for patients derived from the whole country. It is located next to Mpilo Central Hospital and has a capacity of 200 at any given time with 80 of them being in-patients. The total staff complement of the centre is about 60. The mission statement clearly states that the centre aims at providing comprehensive clinical treatment, which includes therapeutic and skills training for injured workers to enable them speedy re-integration back into society and work situations. Rehabilitation services provided at the Centre include: further medical treatment, spinal injury care, physiotherapy and occupational therapy, counselling and vocational Training.

Source: Ngwenya B. 2013.

3.9.3.4 Funding

Employers fund the Accident Prevention and Workers' Compensation Scheme through the payment of insurance premiums determined on the basis of industrial risk assessments.

3.9.4 Other employment injury-related schemes and initiatives

Workers who suffer occupational injury or disease will benefit from the Zimbabwe National Employment Policy Framework. The Framework was adopted in 2010 to integrate employment in all policy frameworks. It further seeks to integrate marginalised categories of persons (the disabled, women and youth) and employment sectors

(informal and subsistence), promote active labour market policy interventions involving improvement of the quality of labour supply and enhancement of labour demand.⁵⁹⁵

The Department of Social Welfare provides social welfare assistance to destitute or indigent persons. Categories deemed to be destitute or indigent are a person over sixty years of age; a person who is physically or mentally impaired; a person who suffers continuous ill-health; a person who is a dependant of a person who is destitute or indigent or incapable of looking after him- or herself; and a person who otherwise has need of social welfare assistance.⁵⁹⁶ Social welfare assistance is in the form of cash; rehabilitation, institutional nursing, boarding or foster home care; counselling services; the provision of orthopaedic and orthoptic appliances; occupational training; pauper burials; the supply of food or clothing; and any other assistance necessary to relieve destitution.⁵⁹⁷

3.9.5 Gaps and challenges

The coverage of occupational safety and health and employment injury compensation is narrow. It excludes the informal sector workers and some categories of employees. This is problematic since the vast majority of workers (up to 84%) are engaged in the informal sector, with no access and little (if any) regard for occupational safety and health.⁵⁹⁸

Occupational safety and health and employment injury compensation are regulated by several laws. However, these laws are not harmonised,⁵⁹⁹ which may lead to inconsistencies between the various laws. The laws are also outdated and no longer relevant to the management of safety and health at the workplace, as they do not adequately cover all aspects of occupational safety and health as well as relevant government undertakings.⁶⁰⁰

Despite the requirement to report accidents, they are generally not reported or recorded. The result is that accidents go unnoticed and no measures are taken to prevent the same accidents in the future.⁶⁰¹

⁵⁹⁵ See Government of Zimbabwe/ILO (International Labour Organization). 2015. *Decent work country programme for Zimbabwe 2012-2015*, 4. [Retrieved 28 September 2014] <http://www.ilo.org/public/english/bureau/program/dwcp/download/zimbabwe2.pdf>

⁵⁹⁶ Section 6 of the Social Welfare Assistance Act 10 of 1988 (as amended).

⁵⁹⁷ Section 5 of the Social Welfare Assistance Act.

⁵⁹⁸ It is contended that that 85.6%, 93.8%, 95.9% and 93.8% of SMEs do not have respectively occupational safety and health policies, risk analysis strategy, staff welfare facilities and did not keep accident records (see Mudavanhu N, Dzomba P, Mudavanhu C & Mazorodze S. 2013. Occupational safety and environmental risks scenario of small and medium enterprises (SMEs): An analysis of the situation in Harare Chemical Industries, Zimbabwe. *American Chemical Science Journal* 3(2):98-110 at 98).

⁵⁹⁹ Mywage. n.d. *Proposed review of health and safety legislation in Zimbabwe – November 2011*. [Retrieved 29 November 2014] http://www.mywage.co.za/main/news/mywage-south_african-news/proposed-review-of-health-and-safety-legislation-in-zimbabwe-2013-november-2011

⁶⁰⁰ 'Govt engages ILO in crafting a single safety law'. 2013, April 28. [Retrieved 29 September 2014] <http://www.thestandard.co.zw/2013/04/28/govt-engages-ilo-in-crafting-a-single-safety-law/>

⁶⁰¹ Katsuro P, Gadzirayi CT, Taruwona M & Mupararano S. 2010. Impact of occupational health and safety on worker productivity: A case of Zimbabwe food industry. *African Journal of Business Management* 4(13):2644-2651 at 2650.

Other major challenges currently facing the development of occupational health in Zimbabwe are a result of lack of an organised occupational health management system and legislation in addressing occupational health issues. Shortage of trained personnel and funding has also negatively constrained the development of occupational health. Some of the major constraints are lack of expertise at national policy level and lack of enforcement. The actual burden of occupational diseases remains unknown due to poor occupational health surveillance systems.⁶⁰²

3.9.6 Concluding observations

Zimbabwe's occupational safety and health and employment compensation system seeks to prevent accidents and injuries and to rehabilitate and reintegrate injured workers. However, the general attitude of employers towards occupational safety and health is largely negative, since little attention is paid to OSH training.⁶⁰³ There is recognition in Zimbabwe that the current laws on occupational safety and health are not achieving the desired outcomes. As a result, the laws are being reviewed to ensure that they are more focused and robust in enforcing high occupational health and safety standards.⁶⁰⁴ In addition, a comprehensive Occupational Safety and Health Bill is being developed to harmonise existing OSH laws and to bring them in line with key international labour standards.⁶⁰⁵

602 Moyo D. 2012. Challenges of practicing occupational health in developing countries, Zimbabwe. Paper presented at the 30th International Congress on Occupational Health, Cancun, Mexico (18-23 March).

603 Katsuro P, Gadzirayi CT, Taruwona M & Mupararano S. 2010. Impact of occupational health and safety on worker productivity: A case of Zimbabwe food industry. *African Journal of Business Management* 4(13):2644-2651 at 2651.

604 Mywage. n.d. *Proposed review of health and safety legislation in Zimbabwe – November 2011*. [Retrieved 29 November 2014] http://www.mywage.co.za/main/news/mywage-south_african-news/proposed-review-of-health-and-safety-legislation-in-zimbabwe-2013-november-2011

605 'Govt engages ILO in crafting a single safety law'. 2013, April 28. [Retrieved 29 September 2014] <http://www.thestandard.co.zw/2013/04/28/govt-engages-ilo-in-crafting-a-single-safety-law/>

EMPLOYMENT INJURY PROTECTION IN EASTERN AND SOUTHERN AFRICAN COUNTRIES

A COMPARATIVE OVERVIEW

Several issues arise from the employment injury protection systems of eastern and southern African countries. These relate to the increasing incidence of occupational injury and disease, the legal and effective scope of coverage, types of EI schemes, administration of EI schemes, adequacy of benefits, expenditure of the respective EI schemes, reporting obligations and times for accidents and diseases, and inspection and enforcement.

4.1 INCREASING INCIDENCE OF OCCUPATIONAL INJURY AND DISEASE

Many of the countries do not keep reliable statistics on occupational injuries and diseases. This is mainly because of the absence of comprehensive information on occupational accidents and injuries due to non-reporting and the lack of proper recording and notification systems.⁶⁰⁶ However, evidence from many of the countries shows that the incidence of occupational injury is high. As an example, claims registered by South Africa's Compensation Fund increased from 141 437 in the period 1 April 2011 to 31 March 2012 to 186 509 during the year from 1 April 2012 to 31 March 2013.⁶⁰⁷ Research in Ethiopia reveals that the extent of occupational injuries in some industries is at a level that needs immediate public health action.⁶⁰⁸ The annual report for 2010–2011 of

⁶⁰⁶ See, for example, Tau S & Seoke S. 2013. An assessment of the implemented occupational health and safety practices in Botswana construction industry. *African Newsletter on Occupational Health and Safety* 23(3):55-58; Gabe SG. 2010. *Occupational health and safety survey in small-scale clothing enterprises in Gaborone, Botswana*. Polokwane, South Africa: University of Limpopo (Medunsa Campus); Muigua DK. 2012. Realising occupational safety and health as a fundamental human right in Kenya. *Mount Kenya University Law Journal*:47-74; ILO (International Labour Organization). 2013a. *National profile on occupational safety and health – Kenya*. [Retrieved 20 September 2014] http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/policy/wcms_187632.pdf; NAOT (National Audit Office, United Republic of Tanzania). 2013. *A performance audit report on the management of occupational health and safety in Tanzania*. [Retrieved 27 September 2014] http://www.nao.go.tz/?wpfb_dl=98

⁶⁰⁷ DoL (Department of Labour, Republic of South Africa). 2014. *Annual report of the compensation fund 2014*. Pretoria: DoL, 19.

⁶⁰⁸ See Bogale D *et al.* 'Assessment of occupational injuries among Addis Ababa city municipal solid waste collectors: a cross-sectional study' *BMC Public Health* 2014, 14:169; Adane MM *et al.* 'Occupational Injuries Among Building Construction Workers in Gondar City, Ethiopia' *Occup Med Health Aff* 2013, 1:5.

Tanzania's National Social Security Fund indicates that the fund paid TZS34.48 million in employment injury in the 2009/2010 year and TZS34.74 million in the 2010/2011 year.⁶⁰⁹ The Namibian Social Security Commission's Employees' Compensation Fund processed 9 204 benefit awards for employment-related injuries and or diseases in the private sector in the 2009/2010 year. This represented an increase of 28.3% compared to the 2008/2009 year (7 173 benefit awards). During the same period, occupational injuries benefit awards in the public service increased from 220 to 234.⁶¹⁰

4.2 SCOPE OF COVERAGE: LEGAL AND EFFECTIVE

Scope of coverage consists of legal coverage and effective coverage. Legal scope of coverage refers to the proportion of workers covered under EI protection laws; while effective coverage entails the proportion of workers covered in practice. As the ILO has stated, legal coverage does not necessarily translate into effective coverage as the number of contributors lags behind the number of those covered by law.⁶¹¹

Legal coverage rates for EI protection in eastern and southern Africa (and the rest of sub-Saharan Africa) are low.⁶¹² This is because one of the key characteristics of the EI protection schemes in the eastern and southern African countries is that they exclude categories of 'atypical' workers, such as the informally-/self-employed, from their scope of coverage. This is particularly the case in Kenya, Lesotho, Malawi, Namibia, South Africa, Swaziland, Zambia and Zimbabwe. In addition, some employees are specifically excluded from the ambit of EI protection legislation. These include casual employees (e.g. Kenya, Lesotho, Namibia, Swaziland, Tanzania and Zambia), domestic or household workers (e.g. Ethiopia, Lesotho, South Africa, Swaziland and Zimbabwe), temporary workers (e.g. Ethiopia and Swaziland) and family workers (e.g. Botswana, Kenya, Lesotho, Malawi, Swaziland, Tanzania and Zambia). Another important point is that some countries covered in this study have special schemes for public servants or some categories of public servants, for example, Lesotho (special system for judges, members of parliament, and certain public servants), Zambia (special system for public-sector employees) and Zimbabwe (special system for civil servants).

Table 4.1 shows the major exclusions from employment injury protection schemes in selected eastern and southern African countries.

609 National Social Security Funds 2010/2011 Annual Report and financial statements 50.

610 Social Security Commission Annual Report 2009-2010, 6.

611 See ILO (International Labour Organization). 2014. *World social protection report 2014/15: Building economic recovery, inclusive development and social justice*. Geneva: ILO, 49. The report also states that worldwide, only 33.4% of the total labour force is mandatorily covered by law through social insurance; with 39.6% of the labour force covered by law when voluntary social insurance coverage and employer liability provisions are included.

612 ILO (International Labour Organization). 2014. *World social protection report 2014/15: Building economic recovery, inclusive development and social justice*. Geneva: ILO, 49.

TABLE 4.1 Major exclusions from employment injury protection schemes in selected eastern and southern African countries

Country	Casual employees	Temporary workers	Domestic workers	Non-citizens	Family members	Workers temporarily employed abroad	Self-employed	Outworkers	Tributers
Ethiopia		✗	✗	✗			✓		
Kenya	✗				✗	✗	✗		
Botswana					✗	✓	✓	✗	
Lesotho	✗	✓	✗		✗		✗		
Malawi	✗				✗	✓		✗	✗
Namibia	✗					✗	✗		
South Africa	✓	✓	✗	✓			✗		
Swaziland	✗	✗	✗		✗		✗	✗	
Tanzania	✗				✗		✓	✗	✗
Zambia	✗				✗		✗	✗	
Zimbabwe			✗				✗		
✓ = Yes ✗ = No									

Sources: Adapted and updated from Fultz E & Pieris B. 1998; extracted from feedback contained in questionnaires received; and SSA/ISSA (Social Security Administration, USA/International Social Security Association). 2013.

Effective coverage rates are also significantly lower. This has been attributed to the situation where countries reach high levels of coverage, but through voluntary participation for greater access of some categories of workers such as the informally-employed.⁶¹³ An example from the countries under review is Tanzania, where legal coverage (mandatory and voluntary) is over 70% of the labour force. However, less than 10% of the labour force is effectively covered in practice. Table 4.2 gives the legal coverage (mandatory and voluntary) and effective coverage rates for selected countries in the eastern and southern African regions.

TABLE 4.2 Legal coverage (mandatory and voluntary) and effective coverage rates for selected countries (approximate percentage)

Country	Mandatory coverage only	Mandatory and voluntary coverage	Effective coverage
Tanzania	10	75	5
Zambia	15	15	6
Zimbabwe	30	30	30

Source: Adapted from ILO (International Labour Organization). 2014, 50.

613 *Ibid.*

4.3 TYPES OF EMPLOYMENT INJURY SCHEMES

There are three main types of employment injury systems in eastern and southern Africa. These are *social insurance schemes*, *employer liability schemes* and *mixed social insurance and employer liability systems*. In total there are five social insurance systems (Ethiopia, Namibia, South Africa, Zambia and Zimbabwe), two of which are separate EI schemes. There are five employer liability systems (Botswana, Kenya, Lesotho, Malawi and Swaziland). Tanzania has a mixed social insurance and employer liability system.

Table 4.3 shows types of EI schemes in the different countries.

TABLE 4.3 Types of employment injury schemes

Country	Type of scheme	First law	Current law
Botswana	Employer-liability system compulsory involving insurance with a private carrier; or deposit with the Commissioner for Worker's Compensation; or another approved security	1936	1998 (Workers' compensation)
Ethiopia	Social insurance	1963 (public-sector pensions)	2011 (Public-sector pensions) 2011 (Private-sector pensions)
Kenya	Employer-liability system involving compulsory insurance with a private carrier	1946	2007 (Work injury)
Lesotho	Employer-liability system involving compulsory insurance with a private carrier approved by the Minister of Labour and Employment	1977	1995 (Workmens' compensation regulations)
Malawi	Employer-liability system without compulsory insurance	1946	2000 (Workers' compensation)
Namibia	Social insurance	1941	1995 (Amendment law)
South Africa	Social insurance, with purchase of private insurance by mining and construction industries	1914	1973 (Mining industry) 1993 (All other industries)
Swaziland	Employer-liability system involving compulsory insurance with a private carrier	1963	1983
Tanzania	Social insurance (NSSF) and employer-liability system involving compulsory insurance with a private carrier		1997 (Social insurance) 1983 (Workmens' compensation)
Zambia	Social insurance	1929	1999
Zimbabwe	Social insurance	1922	1990 (Statutory instrument)

Sources: SSA/ISSA (Social Security Administration, USA/International Social Security Association). 2013; NSSA (National Social Security Authority, Zimbabwe). 2009; and ILO (International Labour Organization). n.d.-b.

4.4 ADMINISTRATION OF EMPLOYMENT INJURY SCHEMES

Employment injury schemes in eastern and southern Africa are administered in a variety of ways. Where EI protection is provided through social insurance, the schemes are administered by social security agencies (e.g. Ethiopia's Public Servants' Social Security Agency and Private Organisation Employees Social Security Agency; Namibia's Social Security Commission; the Compensation Fund and Compensation Commissioner for Occupational Diseases in South Africa; Tanzania's National Social Security Fund; the Workers' Compensation Fund Control Board in Zambia and the National Social Security Authority of Zimbabwe). In countries operating employer-liability systems, ministries/government departments invariably undertake the administration of these schemes (this is the case in Botswana, Kenya, Lesotho, Malawi and Swaziland). Government ministries or departments undertake the supervision of EI schemes.

While some social security agencies administer only EI compensation, some schemes provide other benefits in addition to compensation. As an example, the Public Servants' Social Security Agency and Private Organisation Employees Social Security Agency in Ethiopia also provide retirement and invalidity pensions. Namibia's Social Security Commission provides maternity, sick leave and death benefits. The Tanzanian National Social Security Fund also administers retirement pensions, invalidity pension survivor's pension, maternity benefit and health insurance benefit. The National Social Security Authority of Zimbabwe also provides retirement pension and grants, invalidity pension and grants, survivors' pension and grants and a funeral grant.

Some of the countries have multiple schemes administering EI compensation. This is the case of South Africa, where separate schemes administer employment injury compensation for different occupations and/or categories of workers (Rand Mutual Assurance Company and Compensation Commissioner for Occupational Diseases for the mining industry, Federated Employers' Mutual for the construction industry and the Compensation Fund for all other industries). The supervision of the administering institutions is also carried out by two departments (Departments of Labour and Health).

Table 4.4 shows the administrative/institutional arrangements for the employment of injury protection.

TABLE 4.4 Employment injury protection administrative/institutional arrangements

Country	Administration	Supervision
Botswana	Commissioner of Worker's Compensation (Ministry of Labour and Home Affairs)	Ministry of Labour and Home Affairs
Ethiopia	Public Servants' Social Security Agency (Public sector) Private Organisation Employees Social Security Agency (Private sector)	Ministry of Labour and Social Affairs

Kenya	Director of Work Injury Benefits (Ministry of Labour, Social Security and Services)	Ministry of Labour, Social Security and Services
Lesotho	Workmen's Compensation Section (Ministry of Labour and Employment)	Ministry of Labour and Employment
Malawi	Workers Compensation Department (Ministry of Labour and Vocational Training)	Ministry of Labour and Vocational Training
Namibia	Social Security Commission	Ministry of Labour and Social Welfare
South Africa	Rand Mutual Assurance Company and Compensation Commissioner for Occupational Diseases (Mining industry) Federated Employers' Mutual (Construction industry) Compensation Fund (All other industries)	Department of Labour (Rand Mutual Assurance Company, Federated Employers' Mutual and Compensation Fund) Department of Health (Compensation Commissioner for Occupational Diseases)
Swaziland	Workmen's Compensation Unit (Ministry of Labour and Social Security)	Ministry of Labour and Social Security
Tanzania	National Social Security Fund Social Security Section (Ministry of Labour and Employment)	Ministry of Labour and Employment
Zambia	Workers' Compensation Fund Control Board	Ministry of Labour and Social Security
Zimbabwe	National Social Security Authority	Ministry of Public Service, Labour and Social Welfare

Sources: Adapted and updated from Fultz E & Pieris B. 1998; extracted from feedback contained in questionnaires received; and SSA/ISSA (Social Security Administration, USA/International Social Security Association). 2013.

4.5 ADEQUACY OF BENEFITS

Employment injury schemes mostly provide benefits for temporary and permanent disability (partial and total), transportation to hospital and medical care, survivors' (death benefits) and funeral grants. Assistive devices are also provided in a majority of the countries. Benefits are paid either as a pension or in a lump sum. A lump sum seems to be the preferred mode of payment for many schemes, with even permanent benefits paid in this way. Benefits are mostly in the form of cash payments, with few of the countries promoting the rehabilitation of injured workers or those who contract diseases.

Table 4.5 gives the replacement rates and duration for the various benefits.

TABLE 4.5 Replacement rates and duration for the various benefits

Country	Temporary benefits	Permanent benefits
Ethiopia	Incapacity gratuity for injuries less than 10%: lump sum equal to 47% of salary × 60 × percentage of injury.	Incapacity for injuries of 10% or more: pension of 47% of salary paid for life. Survivor's pension: widow or widower – 50%. Ceases on remarriage if the widow is younger than age 45, or age 50 for a widower – no limit if disabled. Each child: 20% (30% if no surviving parent). Parents: 15% (20% if no other survivors).
Kenya	Incapacity benefits: 50% of salary paid for up to 12 months. Transportation to hospital. Payment of medical costs.	Permanent incapacity: lump sum of 60 months' salary. Survivors' benefit: a lump sum of 60 months' salary paid to full dependents; reduced benefit paid to partial dependants.
Botswana	Incapacity benefit of 66% of the insured's earnings is paid for up to 24 months. Medical and surgical care, hospitalisation, and medicine: up to P75 000. Assistive devices: up to P10 000. Transportation costs: up to P1 500. Funeral grant: Lump sum of P100.	Incapacity benefit: lump sum of 60 months' salary (minus any temporary disability benefits paid). Constant-attendance supplement: up to 25% of permanent disability benefit. Partial disability: percentage of the full benefit up to P240 000. Survivors' benefit: lump sum of 48 months' salary (minus any temporary disability benefits paid). Benefit between P8 000 and P20 000.
Lesotho	Payment of costs for medical, surgical and hospital treatment, skilled nursing, and medicine: up to M10 000. Provision of assistive devices: up to M10 000. Payment of transportation costs: up to M1 500. Funeral grant: lump sum of M5 000.	Permanent disability pension: up to M8 000 a month. Survivors' benefit: up to M72 000 a month paid to a widow or dependent widower; children younger than age 18 or disabled; and dependent siblings, and parent.
Malawi	Incapacity benefit: a percentage of salary according to a schedule in law. Payment of reasonable expenses for medical, surgical, dental, and hospital treatment; skilled nursing services; medicine; assistive devices; and transportation. Funeral grant: employer pays cost of funeral if no surviving dependent.	Total disability benefit: lump sum of 54 months' salary. Partial disability: percentage of full benefit according to a schedule in law, depending on degree of disability. Constant-attendance allowance: lump sum based on individual circumstances. Survivors' benefit: lump sum of 42 months' salary to full dependants. Reduced benefit to partial dependants.

Country	Temporary benefits	Permanent benefits
Namibia	<p>Total temporary disability: 75% of salary paid for up to 24 months.</p> <p>Payment of reasonable medical expenses and transportation costs.</p> <p>Funeral grant: lump sum of up to N\$2 450.</p> <p>Death benefit: lump sum of N\$4 500 or twice the insured's last monthly earnings paid to the widow(er).</p>	<p>Partial permanent disability (<30%): lump sum of up to 15 × salary.</p> <p>Total permanent disability (>30%): pension of up to 75% of salary.</p> <p>Survivor's pension: widow or widower: 40% of total permanent disability pension. Each child: 20% of total permanent disability pension (ceases on marriage before 18).</p>
South Africa	<p>Temporary total disability (100%): 75% of salary paid for up to 24 months (can be extended in special cases).</p> <p>Temporary partial disability: percentage of salary paid periodically or as lump sum for up to 24 months.</p> <p>Payment of costs for medical, surgical and hospital care; rehabilitation; and assistive devices for up to two years (can be extended in special cases).</p> <p>Reimbursement of transportation costs.</p> <p>Funeral grant: up to R13 050.</p>	<p>Permanent total disability (100%): 75% of salary as pension</p> <p>Permanent partial disability between 31–99%: percentage of full pension according to degree of disability.</p> <p>Permanent partial disability up to 30%: 15 × monthly salary.</p> <p>Survivors' benefit: widow(er): lump sum of two months' permanent total disability pension and 40% of the permanent total disability pension for life.</p> <p>Orphan's pension: 20% of permanent total disability pension to each unmarried orphan under 18 (extended for students; no age limit if disabled).</p>
Swaziland	<p>Temporary disability benefit: 75% of salary for up to 24 months as a pension or a lump sum.</p> <p>Provision of medical care, surgery, hospitalisation, medicine, dental and eye care, transportation and assistive devices.</p> <p>Funeral grant: up to 300 lilangeni.</p>	<p>Permanent total disability benefit: Lump sum of 54 × monthly salary.</p> <p>Permanent partial disability benefit: percentage of full benefit according to loss of work capacity.</p> <p>Constant-attendance allowance: Lump sum of 25% of permanent disability benefit.</p> <p>Survivors' benefit: lump sum of 48 × monthly salary to unemployed widow(er), a disabled widow(er), and children (minus any permanent disability benefits paid to the deceased). Reduced benefit to partial dependents.</p>
Tanzania	<p>Temporary disability benefit: 60% of the insured's average daily wage for six months before month of disability paid for up to 26 weeks.</p> <p>Provision of medical, hospital, and nursing care; assistive devices; and cost of medicine and transportation up to a maximum.</p>	<p>Permanent total disability benefit: 70% of average monthly earnings for up to seven years.</p> <p>Permanent partial disability benefit (<30%): lump sum of up to 84 × average monthly earnings according to degree of disability.</p> <p>Constant-attendance allowance: 25% of permanent disability benefit.</p> <p>Survivors' benefit: lump sum of 60% of the deceased's average insurable monthly earnings paid as death benefit.</p>

Country	Temporary benefits	Permanent benefits
Zambia	Temporary disability benefits (<10%): lump sum of 50% of monthly salary for up to 24 months. Refund of all employer expenses for hospitalisation and treatment of occupational accidents and diseases.	Permanent total disability pension (100%): 50% of monthly salary at start of disability. Permanent partial disability pension (>10%): 50% of monthly salary at start of disability × degree of disability. Constant-attendance allowance: percentage of permanent total disability pension. Survivors' benefit: widow(er): 80% of disability pension paid monthly (lump sum of 24 months of pension paid as resettlement settlement on remarriage and end of widow(er) pension). Orphan's pension: 15% of the disability pension paid monthly to first orphan (30% for a full orphan) and 5% for each additional orphan (10% for each additional full orphan) younger than age 18 (up to eight orphans).
Zimbabwe	Temporary disability benefit: 100% of monthly earnings for the first 30 days; 51% thereafter for up to 18 months. Child's supplement: 12.5% of temporary disability benefit to first child; 5% each for second to fifth child; with National Social Security Authority determining amount for each subsequent child. Payment of all medical fees and transportation costs; and provision of assistive devices.	Permanent disability pension (>30%): If disability is rated at 75% or above the pension will be 51% of the worker's earnings. If it is below 75% it is calculated as 51% x salary x percentage disability, but lump sum if pension less than US\$30 a month. Partial disability (<30%): lump sum is paid. Child's supplement: 12.5% of temporary disability benefit to first child; 5% each for second to fifth child; with National Social Security Authority determining amount for each subsequent child. Survivors' benefit: widow(er): 66.7% of disability pension (24 months of pension paid as lump sum on remarriage). Child's supplement: 12.5% of temporary disability benefit to first child; 5% each for second to fifth child until age 19 or self-supporting; with the National Social Security Authority determining amount for each subsequent child.

Sources: SSA/ISSA (Social Security Administration, USA/International Social Security Association). 2013.

The countries generally comply with ILO standards on the provision of EI benefits. Cash benefits are provided to workers who are injured or contract a disease and suffer temporary incapacity (partial and total) and permanent incapacity (partial and total); as well as to the dependants of workers who die as a result of injury or disease. Other benefits provided include medical care, transportation, assistive devices and funeral benefits. These satisfy ILO prescription on the provision of employment injury benefit.⁶¹⁴

⁶¹⁴ According to Article 32 of the ILO Social Security (Minimum Standards) Convention 102 of 1952, employment injury protection should cover the following contingencies: (a) a morbid condition;

However, many of the countries fail to adhere to some ILO standards on the payment of EI benefits. Botswana, Kenya, Malawi, Namibia, Swaziland only provide benefits in the form of a lump sum, which are easily exhausted as workers face multiple demands for cash, and face the risks of poverty or even destitution after a short while. This is against ILO standards which require that for permanent total incapacity or the death of the worker, the benefit must be a periodical payment (pension).⁶¹⁵ Periodical payments must also be provided in cases where there is partial loss of earning capacity that is likely to be permanent.⁶¹⁶ Commutation of periodical payments to a lump sum is only permitted where the degree of incapacity is slight; or where the competent authority is satisfied that the lump sum will be properly utilised.⁶¹⁷

Some countries also do not provide benefits at the required minimum replacement rate. As an example, Ethiopia provides benefits for temporary and permanent incapacity at 47% of salary. This falls below ILO standards for permanent invalidity which stipulates a 50% minimum replacement rate for pensions for permanent disability.⁶¹⁸

Figure 4.1 shows the replacement ratios for temporary disability in selected eastern and southern African countries.

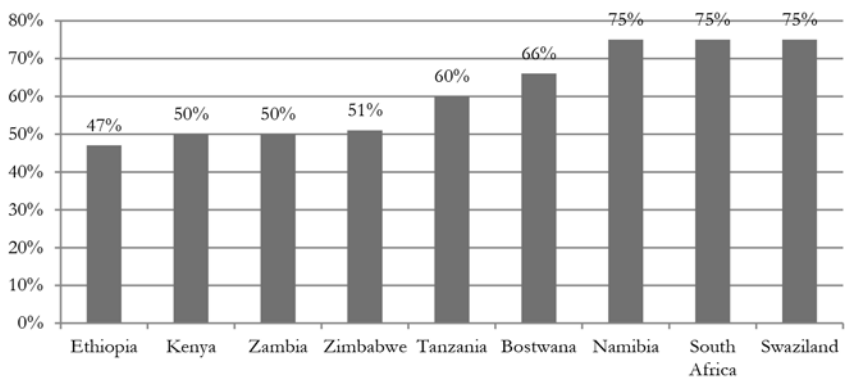


FIGURE 4.1 Replacement ratios for temporary disability [Source: Country questionnaires and national correspondents.]

(b) incapacity for work resulting from such a condition and involving suspension of earnings, as defined by national laws or regulations; (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 by the widow or child as the result of the death of the breadwinner; in the case of a widow, the right to benefit may be made conditional on her being presumed, in accordance with national laws or regulations, to be incapable of self-support.

615 See Article 36(1) of the ILO Social Security (Minimum Standards) Convention 102 of 1952.

616 See Article 36(2) of the ILO Social Security (Minimum Standards) Convention 102 of 1952.

617 See Article 36(3) of the ILO Social Security (Minimum Standards) Convention 102 of 1952.

618 See Article 36(1) read with Article 67 of the ILO Social Security (Minimum Standards) Convention 102 of 1952.

Figure 4.2 shows the replacement ratios for permanent disability in selected eastern and southern African countries.

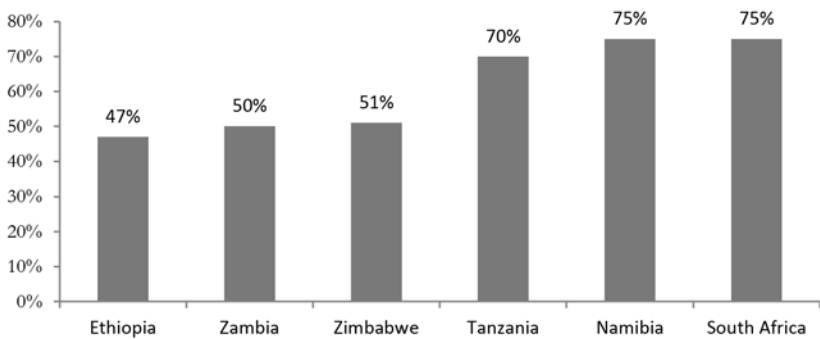


FIGURE 4.2 Replacement ratios for permanent disability [Source: Country questionnaires and national correspondents.]

4.6 EXPENDITURE

The total expenditure of the respective employment injury schemes varies, probably depending on the size of the scheme (number of workers covered). The spread of expenditure is uneven distributed between administration and procedures, prevention (reducing the number of workplace accidents and diseases), rehabilitation (ensuring that individuals affected by employment injury can return to work, if possible) and compensation (where affected workers are unable to return to work). While some schemes spend the bulk of their expenditure on administration and procedures, some spend more on claims payments. However, schemes do not prioritise prevention of occupational injuries and diseases and the rehabilitation or reintegration of workers. As examples, Swaziland spends 95% of its budget on compensation (payment to claimants) and 5% for administration; with 0% for prevention and rehabilitation. Zimbabwe also spends 17% on compensation, 11% on prevention, 6% on rehabilitation and 51% on administration. On its part, Namibia spends 10% on compensation, 23% on medical expenses, 0% on rehabilitation and 23% on administration.

TABLE 4.6 Approximate share of expenses on administration, prevention, rehabilitation and compensation

	Total expenditure of EI scheme (US\$)	Proportion on administration and procedures	Proportion on prevention	Proportion on rehabilitation	Claims payments
Malawi	442 981	–	–	–	–
Namibia	2.75 million	23%	0%	23% (Medical expenses)	10%

South Africa (Compensation Fund)	326.5 million	24.5% ⁶¹⁹	–	–	75% ⁶²⁰
Swaziland	2 million	5%	0%	0%	95%
Zimbabwe	27.9 million	51%	11%	6%	17%

Sources: Extracted from information contained in questionnaires; and DoL (Department of Labour, South Africa). 2014.

The following graph is a representation of the approximate share of expenses on administration, prevention, rehabilitation and compensation in selected countries.

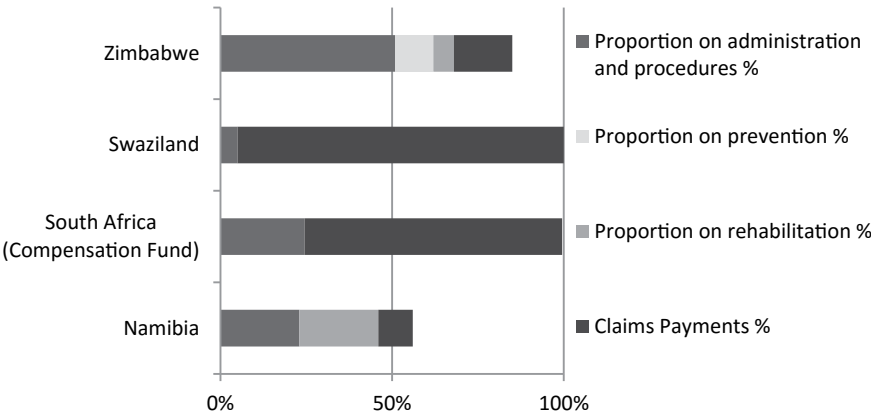


FIGURE 4.3 Graphic representation of approximate share of expenses on administration, prevention, rehabilitation and compensation

4.7 REPORTING OBLIGATIONS AND TIMES FOR ACCIDENTS AND DISEASES

As is evident in the tables in this section, showing the reporting of occupational accidents and diseases, a majority of the countries covered in this study have, with Ethiopia as an exception, a system of central or national reporting of occupational accidents and diseases.

The manner in which accidents are reported varies from one country to another. However, what is apparent from Table 4.7 is that occupational accidents are generally reported in writing. Also apparent in the table is that the use of electronic reporting of occupational accidents and diseases, which could be found in countries such as Malawi and South Africa, is not as widespread as it perhaps could be. This is one area in which countries

⁶¹⁹ Made up of administration expenses, employee costs, board members fees and prevention of accidents.

⁶²⁰ Consists of medical claims which include claims for rehabilitation (79%) and compensation claims (6%).

that are yet to use electronic reporting of accidents and diseases could explore in order to improve their systems. The notice of occupational accidents and diseases is submitted to a carrier of the EI scheme in Ethiopia, Namibia, and Zambia and state authorities in Lesotho, Malawi, Swaziland, Tanzania and Zimbabwe. South Africa has a hybrid approach in the sense that notice of occupational accidents and diseases is, depending on the industry, either submitted to the carrier of the EI scheme or state authority. This is largely due to the fact that South Africa has a Compensation Fund as well as two mutual associations (i.e. the Rand Mutual Assurance Company Limited which covers the mining industry and the Federated Employers' Mutual Limited, which operates in the construction industry). In addition, the person(s) with the power to report occupational accidents and diseases to the authorities varies between the countries covered in study. While it is common practice for employers and employees to report accidents and diseases, countries such as Lesotho, Malawi and South Africa extends this authority to, among others, a medical doctor and union representative.

TABLE 4.7 Reporting of occupational accidents

Country	Is there a central /national reporting system for occupational accidents	Who gives notice of (reports to the authorities) an occupational accident?	How is an occupational accident notified?	To whom is the notice of occupational accident is submitted?
Ethiopia	No	Employer	In writing	Carrier of the EI scheme
Lesotho	Yes	Employer Worker/employee Any medical doctor Union representative	In writing Using an official form	State authority
Malawi	Yes	Employer Worker/employee Company physician Any medical doctor Union representative Health insurance Other (in practice any concerned party can report)	In writing Using an official form Electronically	State authority
Namibia	Yes	Employer Worker/employee	In writing Using an official form	Carrier of the EI scheme
South Africa	Yes	Employer Worker/employee	In writing Using an official form Electronically	Carrier of the EI scheme State authority

Swaziland	Yes	Employer Employee	Using an official form	State authority
Tanzania	Yes	Employer Worker/employee	In writing Using an official form Verbally	State authority
Zambia	Yes	Employer Worker/employee (however, this must be confirmed by the employer)	Using an official form	Carrier of the EI scheme
Zimbabwe	Yes	Employer	Using an official form	State authority (National Social Security Authority)

Source: Extracted from feedback contained in questionnaires received.

As shown in Table 4.8, countries such as Ethiopia, Lesotho, Malawi, South Africa, and Swaziland have time restrictions for notice of an occupational disease. Namibia, Tanzania, Zambia and Zimbabwe do not have such restrictions.

TABLE 4.8 Reporting of occupational diseases

Country	Is there a central / national reporting system for occupational diseases?	Who gives notice of (reports to the authorities) an occupational disease?	How is an occupational disease notified?	To whom is the notice of occupational disease submitted?	Are there time restrictions for notice of an occupational disease?
Ethiopia	Not specified	Not applicable	In writing	Carrier of the EI scheme	Yes (30 days)
Lesotho	Yes	Employer Worker/ employee Any medical doctor Union representative	In writing Using an official form	State authority	Yes (within three days of qualifying industrial disease coming to the attention of the employer)
Malawi	Yes	Worker/ employee Any medical doctor Union representative Health insurance	In writing Using an official form Electronically	State authority	Yes

Namibia	Yes	Employer Worker/ employee Any medical doctor	In writing Using an official form	Carrier of the EI scheme	No
South Africa	No (diseases in the mine are reported to the Department of Health)	Employer Worker/ employee Company physician Any medical doctor Union representative	In writing Using an official form Electronically	Carrier of the EI scheme State authority	Yes (Within 12 months of the date of diagnosis)
Swaziland	Yes	Employer Employee	Using an official form	State authority	Yes
Tanzania	Yes	Workers/ employee Union representative	In writing Using an official form Verbally	State authority	No
Zambia	Yes	Employer Occupational, Health and Safety Institute	Using an official form	Carrier of the EI scheme	No
Zimbabwe	Yes	Employer	Using an official form	State authority (National Social Security Authority)	No

Source: Extracted from feedback contained in questionnaires received.

4.8 INSPECTION AND ENFORCEMENT

Pertinent laws do make provision for the inspection and enforcement of health and safety matters. However, as shown in Table 4.9, the OSH inspectors in countries such as Lesotho and Zambia are not empowered to issue fines for the violation of OSH rules.

TABLE 4.9 Inspection and enforcement

Country	Consulting and supervisory services by OSH inspectors provided by the EI scheme?	Are OSH inspectors allowed to fine for violations of OSH rules?	Does the EI scheme establish a set of binding OSH rules and regulations
Ethiopia	N/A	N/A	N/A
Lesotho	✗	✗	✗

Malawi	✓	✓	✓
Namibia	N/A	N/A	N/A
South Africa	✓	✓	✓
Swaziland	N/A	N/A	N/A
Tanzania	✓	✓	✓
Zambia	✓	✗	N/A
Zimbabwe	✓	✓	✓
✓ = Yes ✗ = No N/A= Not applicable			

Source: Extracted from feedback contained in questionnaires received.

Table 4.10 illustrates the cooperation between employment injury and other organisations for preventative activities (i.e. between EI inspectors and the state labour inspectors, EI and other government OSH agencies, and EI and national or international institutions).

TABLE 4.10 Cooperation between EI and other organisations for preventive activities

Country	EI inspectors and the state labour inspectors	EI and other government OSH agencies	National or international institutions
Ethiopia	✓	N/A	N/A
Lesotho	N/S	✓	N/S
Malawi	N/A	N/A	✓
Namibia	✓	N/A	✗
South Africa	✓	✓	✓
Swaziland	✓	✓	✓
Tanzania	✓	✓	✓
Zambia	✓	✓	✓
Zimbabwe	✓	✓	✓
✓ = Yes ✗ = No N/A= Not applicable N/S= Not specified			

Source: Extracted from feedback contained in questionnaires received.

MODERNISING EMPLOYMENT INJURY SCHEMES

PITFALLS AND CHALLENGES

Every country in the regions under discussion have systems of occupational safety and health and of employment injury. The systems face many challenges which negatively impact on their ability to achieve their objectives. Some of the challenges are the following:⁶²¹

- *Outdated laws:* Many of the laws regulating employment injury are out-dated and inadequate, some of them colonial or independence era laws with amendments dating back more than 20 years. This leads to limited scope of coverage of workers, narrow scope of benefits, inadequate penalties for non-compliance as they do not serve as proper deterrents, and outdated lists of occupational diseases (such as with the ILO List of Occupational Diseases Recommendation 194 of 2002)).
- *Fragmentation:* Occupational safety and health and employment injury systems are fragmented. In most cases, they are regulated in several statutes. In addition, different laws apply to different professions or categories of workers. The administration of these systems is also undertaken by different institutions, with separate institutions for occupational safety and health and others for EI compensation. Fragmentation is worsened by poor coordination and networking between the different enforcement institutions, with no sharing of information.
- *Scope of coverage:* The scope of coverage of occupational safety and health and of employment injury schemes is generally narrow. Schemes are mostly open to workers in formal employment, but only effectively reach a fraction of the formally employed population. They exclude the self-employed and informal sector workers. In addition, certain categories of employees are specifically excluded from the reach or scope of EI protection, such as casual workers, outworkers, domestic workers, members of the employer's family living and some public servants. In a region where up to 90% of the economically active population is involved in the informal sector, such exclusions mean the vast majority of workers are not covered for employment injury. This brings to question the relevance of these schemes to the general population.
- *Non-reporting of accidents and diseases:* Occupational safety and employment injury laws impose duties on employers and employees to report occupational accidents and diseases. This requirement is reinforced by penalties, such as a fine or imprisonment or of refusal to pay compensations benefits. However, accidents are not recorded or reported to employers' administrative institutions. This means the occurrence of accidents are not known, and measures to prevent these accidents occurring in the

621 See, generally, the section on country experiences.

future cannot be taken. Countries also have poor OHS surveillance systems, and national occupational accidents and diseases notification systems are poor or non-existent.

- *Lack of coordination and networking:* Lack of coordination and networking has meant the failure of to link occupational safety and health systems with employment injury schemes. Institutions that promote occupational accident and disease prevention do not receive information on accidents and diseases from EI schemes. This is due to the failure of employers and employees to report occupational accidents and diseases and lack of a proper recording and notification systems and comprehensive information on occupational accidents and injuries.
- *Institutional and administrative issues:* The finalisation of employment injury claims requires interaction between many parties (e.g. the administrative institution or insurer, employee, employer, medical authorities and sometimes the state). However, institutional and administrative constraints in the benefit processing organisations lead to delay in the finalisation of claims.⁶²²
- *Poor compliance and weak enforcement:* The effectiveness of the occupational safety and health framework is affected by the monitoring and enforcement capacity of administrative institutions. Most of the institutions face challenges of human resource, financial and material shortages. These prevent them from carrying out inspections or limiting inspections to urban areas or to industrial zones. Penalties for non-compliance in OHS as well as EI laws are also very low, not reflecting present-day realities, and do not act as sufficient deterrents. The Botswana Factories Act is indicative of this, as it states that where a contravention results in a person being killed, or dies, or suffers any bodily injury the occupier or owner of the factory is liable to a fine of not more than P400 (about US\$43) or to six months imprisonment or to both fine and imprisonment. In addition, Lesotho's Labour Code provides for a fine of M300 (about US\$27) or 12 months imprisonment or both; while the Workmen's Compensation Act provides for no more than M200 (about US\$18) or no more than 12 months imprisonment.
- *Training:* Occupational safety and health laws require that training should be provided to employers, self-employed persons and employees (including OSH officers). However, in many instances, this training is not given. This means that most employers and employees have a very low level of awareness on occupational safety and health issues resulting in non-compliance with occupational safety and health legislation and standards.
- *High number of employer liability employment injury systems:* As mentioned previously, there are three main types of EI systems in the eastern and southern African regions: social insurance, employer liability and mixed social insurance and employer liability systems. In total there are five social insurance systems (Ethiopia, Namibia, South Africa, Zambia and Zimbabwe), two of which are separate EI schemes. There are

622 See Mpedi LG & Nyenti M. 2013. *Portability of social security benefits in mining sector*. [Retrieved 7 October 2014] http://www.southernafricatrust.org/docs/highlights_portability_of_social_security_benefits_in_mining_sector.pdf

five employer liability systems (Botswana, Kenya, Lesotho, Malawi, and Swaziland). Tanzania has a mix social insurance and employer liability system (see Table 4.3 on page 102). Employer liability schemes have various disadvantages, which make their continued operation inadvisable. As an example, individual employer liability schemes provide compensation as a lump-sum, while social insurance schemes provide a combination of periodic payments for severe disabilities and lump sums for more minor ones.⁶²³ Therefore, individual employer liability scheme do not meet ILO requirements on the provision of EI benefits.⁶²⁴ In addition, individual employer liability schemes have multi-layered procedures for the determination eligibility (i.e. interaction between the government, the employer, and an insurance company) which can cause extended delays for disabled claimants and surviving family members.⁶²⁵

- *Focus on compensation:* EI systems in the regions are mainly compensation-focused, with little or no efforts on prevention of occupational accidents or diseases or on rehabilitating and reintegrating workers who are injured at work or contract an occupational disease. Out of all the EI schemes, only Zimbabwe's NSSA undertakes rehabilitation of injured workers or those who contract a disease.⁶²⁶
- *Inadequacy of benefits:* Benefits provided by employment injury schemes are inadequate. There are still a number of employer liability schemes, where benefits are paid in the form of a lump sum which is easily exhausted as workers may not have the skills to invest large sums of money. In addition, the value of benefits paid out is often very small especially when legislation sets maximum limits. Maximum benefits prescribed in law are not in line with the times, as the laws are often outdated. Finally, even where benefits are paid in the form of pensions, they are also inadequate as a result of erosion of their purchasing power of pensions by inflation. Most laws do not provide for indexing of pensions benefits for inflation.⁶²⁷ As an example, in Namibia the maximum temporary disability pension is N\$4 125 a month (about US\$375) while the maximum partial permanent disability pension is N\$4 900 a month (about

623 See Fultz E & Pieris B. 1998. *Employment injury schemes in southern Africa: An overview and proposals for future directions*. ILO/SAMAT Policy Paper No. 7. Harare, Zimbabwe: ILO, 11.

624 Article 36 of the ILO Social Security (Minimum Standards) Convention 102 of 1952 requires periodic payments for severe disabilities and lump sums for more minor disabilities.

625 Fultz E and Pieris B. 1998. *Employment Injury Schemes in Southern Africa: An Overview and Proposals for Future Directions*, 18-19. Social insurance schemes also have the advantages of pooling risks and finances through a national fund, which can raise its standard of protection by providing benefits throughout an injury or illness on a periodic basis. Such schemes also provide workers with greater certainty of receiving benefits, and free employers from the financial risks associated with an unexpected costly employment injury claim or an atypically large spate of employment injury claim (*ibid.*, 22).

626 Sourced from questionnaire completed by Ms Penny Munkawa of the Namibia Ministry of Labour and Social Welfare (20 May 2014).

627 See Barbone L and Sanchez L. 1999. Pensions and social security in Sub-Saharan Africa: Issues and options. Paper presented at the XIII International Social Security Association African Regional Conference, Accra, Ghana (6-9 July).

US\$445).⁶²⁸ In Kenya, the permanent partial disability benefit in terms of the Work Injury Benefits Act is a lump sum of 60 months of the insured's earnings up to 240 000 shillings (about US\$2697). However, benefits are adjusted periodically by the Minister of Labour.⁶²⁹ Tanzania's Workmen's Compensation (Amendment) Act 17 of 1993 provides for maximum permanent disability benefits of TZS108 000 (about US\$65).

- *Lack of awareness and research on occupational safety and health:* In many of the countries, there is limited awareness of occupational safety and health (e.g. Ethiopia, Kenya, Lesotho, Malawi and Tanzania) which leads to non-compliance with OSH legislation and standards. This is blamed on many factors, such as illiteracy, absence of OSH promotion institutions, inadequate funding for OSH awareness programmes, poor linkages between OSH promotion and work injury compensation as well as inadequate research on occupational safety and health. However, certain countries do recognise the need for awareness-raising and have adopted or are planning measures to promote new EI schemes (as in the case of Lesotho, Malawi, Zimbabwe and Kenya).

⁶²⁸ SSA/ISSA (Social Security Administration, USA/International Social Security Association). 2013. *Social security programs throughout the world: Africa, 2013*, 141. [Retrieved 22 September 2014] <https://www.ssa.gov/policy/docs/progdesc/ssptw/2012-2013/africa/ssptw13africa.pdf>

⁶²⁹ *Ibid.* 107.

MODERNISING EMPLOYMENT INJURY SCHEMES

FUTURE DEVELOPMENTS

6.1 REVIEW OF OCCUPATIONAL SAFETY AND HEALTH LEGISLATION

There is a need to overhaul and streamline the occupational safety and health legislation in force in many of the countries under review. This is to remedy deficiencies in current frameworks, such as outdated laws; fragmented systems with multiple laws regulating occupational safety and health (sometimes for different categories of persons); occupational injury lists that are not up-to-date etc.

Some of the countries recognise that they need to review their existing OSH legislation to address current challenges. For example, Botswana has developed OSH standards to serve as guidelines and is in the process of developing an occupational health and safety policy. The review and harmonisation of the OSH legislation is also one of the initiatives underway or planned to improve the OSH situation in Malawi.

6.2 EXTENSION OF COVERAGE

The high and increasing informalisation of work in eastern and southern Africa means that few workers are able to benefit from EI protection. In addition to the already limited number of workers covered, some categories that fall under the definition of employees are also excluded. Efforts should be made to bring these categories of workers into protection. Some countries have already made some progress in this regards. These include Ethiopia, where informal sector workers can voluntarily belong to the Private Organization Employees Pension Scheme, and Tanzania where the NSSF has extended coverage to self-employed persons. South Africa is also reviewing and amending its Compensation for Occupational Injuries and Diseases Act so as to (amongst others) extend the personal scope of coverage through the inclusion of domestic and farm workers. Countries should thus ensure that all categories of workers who can be included in the EI scheme(s) are granted access.

6.3 REPLACEMENT OF EMPLOYER LIABILITY SCHEMES WITH SOCIAL INSURANCE SCHEMES

The disadvantages of employer liability systems have been highlighted,⁶³⁰ and proposals for southern African countries to convert these schemes into social insurance schemes have been made earlier.⁶³¹ However, a sizeable majority of the countries under review still operate an employer liability system. On the other hand, some of the countries have recently converted their employer liability schemes to social insurance schemes. An example is Ethiopia, which recently established the Public Servants' Pension Scheme and the Private Organization Employees Pension Scheme. In addition, Malawi provided for the creation of the establishment Workers' Compensation Fund in 2000 to administer the compensation of workers and dependants for work-related injuries and diseases, although it is yet to be put into operation. Tanzania has recently established a Workers Compensation Fund which started collecting contributions on 1st July 2015 and will be paying benefits from 1st July 2016.

6.4 FOCUS ON PREVENTION AND REHABILITATION/ REINTEGRATION

The ILO has stated that an effective employment injury scheme is one that adopts a holistic approach, linking the functions prevention, rehabilitation and compensation. This is in line with the present-day approach of social security, which is not merely curative (only providing compensation) but also preventive and reintegrative.⁶³²

The ILO has urged the linking of EI schemes with preventive OSH initiatives and proposed modalities to achieve this.⁶³³ This includes through regulatory measures; adopting an experience rating where higher or lower employer contributions are charged depending on past claims records; engaging with workers' organisations, works councils or safety and health committees established by the social partners; providing appropriate training and expert advice; providing incentives to encourage appropriate preventive OSH initiatives by employers; schemes undertaking not only a formal inspection role but also an informal advisory and consultative role; schemes making use of expert advice on occupational safety and health; schemes ensuring safe products through testing and

630 See ILO (International Labour Organization). 2013c. *Strengthening the role of employment injury schemes to help prevent occupational accidents and diseases*. [Retrieved 6 October 2014] http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_214022.pdf

631 See Fultz E and Pieris B Employment Injury Schemes in Southern Africa: An Overview and Proposals for Future Directions ILO/SAMAT Policy Paper No. 7 (1998).

632 See Berghman J. 1991. Basic concepts of social security. In D Pieters (ed) *Social security in Europe: Miscellanea of the Erasmus programme of studies relating to social security in the European communities*. Brussels: Bruylant, 18-20.

633 ILO (International Labour Organization). 2013c. *Strengthening the role of employment injury schemes to help prevent occupational accidents and diseases*, 18-23. [Retrieved 6 October 2014] http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_214022.pdf

certification; schemes making use of medical personnel; and schemes finding effective ways to disseminate information.

Eastern and southern African countries recognise the need for the prevention of occupational injuries and diseases, as evident by their enactment of OSH laws in all the countries. However, these systems are not very effective due to various challenges they face. In addition, the rehabilitation and reintegration of workers is becoming high on the agenda of some states. Zimbabwe presents an example of a focus on the rehabilitation and reintegration of workers, with the NSSA offering rehabilitation services and vocational training to injured workers. South Africa and Namibia have also recognised the need to incorporate rehabilitation of workers in the employment injury law. The Compensation for Occupational Injuries and Diseases Act is currently under review for amendment in South Africa. One of the objectives of the amendment is to provide for the rehabilitation and reintegration of employees injured in the workplace and those who have contracted a disease.

6.5 IMPROVEMENT OF MONITORING AND ENFORCEMENT

Occupational safety and health as well as employment injury laws mandate the monitoring and enforcement of compliance of their procedures. In order to promote compliance, the relevant institutions have been given the responsibility for monitoring and enforcement. Inspectors are appointed and given wide powers in monitoring and enforcing compliance with regulations. However, countries must first address the challenges currently faced in the monitoring and enforcement of occupational safety. In the first instance, the monitoring and enforcement bodies must be integrated or coordinated to avoid fragmentation of services. South Africa has undertaken initiatives aimed at improving OSH monitoring and enforcement. It established an integrated inspectorate and is modernising and restructuring its labour inspectorate. These are in a bid to address challenges it faces in this regard, such as acute shortage of qualified labour inspectors, insufficient data gathering and information systems for policy design, the lack of effective communication and record keeping systems, and inadequate use of electronic means of reporting and data collection which makes it difficult to assess compliance for the purposes of strategic planning and setting priorities.⁶³⁴ Suitably-qualified inspectors must be appointed. Inspectorates should be enabled to achieve their objectives and should be provided with sufficient financial and material resources.

Penalties for non-compliance should also be adjusted to a level that will deter employers and employees from failing to undertake their OSH obligations. The example of Swaziland is instructive, where contravention of OSH legislation is punishable with a fine of E50 000 (about US\$5 000) or imprisonment of up to ten years or both fine and imprisonment;^{with} courts able to impose a higher sentence where death results from such a contravention.

⁶³⁴ See Republic of South Africa/ILO (International Labour Organization). 2010. *Republic of South Africa decent work country programme 2010 to 2014*, 16. [Retrieved 7 October 2014] <http://www.ilo.org/public/english/bureau/program/dwcp/download/southafrica.pdf>

6.6 IMPROVEMENT OF OCCUPATIONAL ACCIDENTS AND DISEASES NOTIFICATION SYSTEMS

The ILO has stated that data on occupational injuries and diseases and their effects on workers' health are essential for national policy-makers and organisations responsible for workplace safety and health to formulate evidence-based OSH policies, and to set priorities and targets for action. It is also essential for employers, OSH regulators, social security institutions, OSH professionals and other stakeholders to fulfil their obligations for the prevention and control of work-related diseases.⁶³⁵ ILO instruments that lay down key principles and requirements on establishing a national system for occupational disease surveillance are helpful in guiding east and southern African countries in this regard.⁶³⁶ The instruments propose guidelines for the creation of a national system for recording and notification of occupational diseases.⁶³⁷

The ILO further states that:

[A] national computerized system for submitting notifications of occupational diseases, and for storing and processing the collected data, will facilitate the compilation and analysis of data, and the publication of national statistics. An Internet-based national data collection system can significantly improve the effective notification of occupational diseases, the analysis of notified data, and the computation of national statistics. Priority should be given to establishing a uniform, manageable and secure national notification system via the Internet.⁶³⁸

6.7 ILO GUIDELINES FOR THE CREATION OF A NATIONAL SYSTEM FOR RECORDING AND NOTIFICATION OF OCCUPATIONAL DISEASES

A national system for recording and notification of occupational diseases must include a national policy for the following:

635 ILO (International Labour Organization). 2013b. *National system for recording and notification of occupational diseases: Practical guide*, 1. [Retrieved 8 October 2014] http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@safework/documents/publication/wcms_210950.pdf

636 Such as Protocol of 2002 to the Occupational Safety and Health Convention, 1981 (No. 155), the List of Occupational Diseases Recommendation, 2002 (No. 194), and the Code of Practice on Recording and Notification of Occupational Accidents and Diseases, 1996.

637 A national system for recording and notification of occupational diseases (NSRNOD) is considered to be 'a system that should collect accurate, comprehensive and reliable data on occupational diseases, compile and analyse these data, and publish statistics and reports'. The system aims to provide comprehensive, reliable data on diseases caused by work, so that OSH activities can be organised to prevent occupational diseases, protect workers' health, and enhance workers' work ability and productivity, and to help in planning strategies and programmes for social security schemes, and for compensating the victims of occupational disease (ILO (International Labour Organization). 2013b. *National system for recording and notification of occupational diseases: Practical guide*, 3-4. [Retrieved 8 October 2014] http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@safework/documents/publication/wcms_210950.pdf).

638 *Ibid.*

- recording and notification of occupational diseases,
- for inspecting and investigating cases of occupational disease,
- for compiling, analysing and publishing statistics on occupational diseases;
- a responsible competent authority or authorities, and mechanisms to coordinate the relevant authorities and bodies;
- a national list of occupational diseases; diagnostic criteria for occupational diseases, and procedures for recognising diseases as occupational;
- a classification system for occupational hazards;
- requirements and procedures for reporting, recording, notifying, investigating, compiling and analysing occupational diseases, and for publishing statistics and reports;
- standard forms and uniform coding for recording occupational diseases;
- clearly defined duties and responsibilities for the relevant competent authorities, for employers and workers and their organisations, for occupational health services, for social security institutions, and for others involved in the recording and notification of occupational diseases;
- an employer-based record-keeping and notification system that covers all workers for whom they are responsible;
- notifications by other parties, such as occupational physicians, dentists, and social security institutions;
- a centre responsible for the national collection, compilation, analysis and dissemination of occupational disease data;
- compliance mechanisms, including occupational safety and health inspection; and
- measures to expand the coverage to all branches of economic activity, all enterprises and all workers, regardless of their employment status, and including workers in the informal economy.

6.8 IMPROVEMENT OF BENEFITS

The conversion of employer liability schemes to social insurance schemes will improve benefits by paying out periodic benefits throughout the period of contingency. These were some of the motivations for Malawi envisaged conversion of its employer liability system to a workers' compensation fund. However, social insurance schemes must also avoid the erosion of the purchasing power of benefits by indexing benefits to inflation. The case of Tanzania, where the Workmen's Compensation (Amendment) Act set the maximum permanent disability benefits at TZS108 000 (about US\$65) in 1983 without any increments for 31 years, is a glaring example.

EMERGING TOPICS IN EMPLOYMENT INJURY AND DISEASE PROTECTION

7.1 MIGRATION AND EMPLOYMENT INJURY PROTECTION

The World Bank estimates that about 30 million Africans – about 3% of the continent's population – have migrated internationally (including within Africa).⁶³⁹ It states that about two-thirds of migrants from sub-Saharan Africa, particularly poorer migrants, go to other countries in the region; with the bulk of migrants remaining within their sub-regions.⁶⁴⁰ This implies that the employment injury protection of migrant workers is an emerging discourse. This is especially true of southern Africa, where labour migration dates back more than 150 years.⁶⁴¹ South Africa has always attracted and continues to attract a vast majority of migrants in the SADC region, with a large proportion concentrated in the mining industry.⁶⁴²

A vast majority of the mineworkers worked on contract in terms of corporate work permits. Therefore, they were eligible for South African social security benefits (compensation for occupational injuries and diseases benefits; and private social security benefits from their employers such as retirement insurance, medical insurance and housing allowances).⁶⁴³

However, reports indicate that former mineworkers from South Africa and other SADC countries who contributed to South African social security or their dependants face huge constraints regarding access to these benefits when they return to their countries of origin. They also face challenges in getting access to follow-up services such as medical benefit examinations as required by South African legislation. This has led to an estimated R5.7 billion in 'unclaimed' or 'unreachable' benefits in various social security schemes.⁶⁴⁴

639 Ratha D, Mohapatra S, Ozden C, Plaza S, Shaw W *et al.* 2011. *Leveraging migration for Africa: Remittances, skills, and investments*. Washington DC: The World Bank, 1.

640 *Ibid.* 2.

641 See Crush J. n.d. *Contract migration to South Africa: Past, present and future*. [Retrieved 11 February 2015] <http://www.queensu.ca/samp/transform/Crush.htm>

642 See Mpedi LG & Nyenti M. 2013. *Portability of social security benefits in mining sector*, 2 [Retrieved 7 October 2014] http://www.southernafricatrust.org/docs/highlights_portability_of_social_security_benefits_in_mining_sector.pdf ii.

643 *Ibid.*

644 *Ibid.* iii.

7.2 CONTINUUM OF CARE

A major issue facing workers who suffer occupational injury or disease is the continuum of care after the injury or disease. The situation of former mine workers in the Southern African region is an example. A vast majority of these workers have worked in South Africa's mining sector, which has a disproportionately high tuberculosis (TB) risk (with more than 30% of TB infections in Southern Africa).⁶⁴⁵ Since the sector relies heavily dependent on labour migrants from South Africa's rural areas and surrounding countries – with up to 40% of workers originating from Lesotho, Swaziland and Mozambique – the frequent migratory movements of miners across provincial and national borders extends this TB risk over a wide geographical area.

In order to mitigate the consequences of occupational diseases such as TB, some institutions provide social and benefits support. An example is TEBA (The Employment Bureau of Africa), which provides support to people affected by HIV and AIDS, TB, silicosis and spinal cord injuries.⁶⁴⁶ TEBA's social and benefits support aims to reduce new HIV infections by at least half using a combination of available and new prevention methods; to ensure that 80% of all people who need antiretroviral treatment (ART) actually do get it, and that 70% of these people do recover and remain alive and on treatment; to reduce the number of new TB infections and deaths caused by TB by half; to ensure an enabling and accessible legal framework that protects and promotes human rights in order to support the implementation of the National Strategic Plan; and to reduce self-reported stigma related to HIV and TB by half.

TEBA has also implemented an ex-mineworkers' Home-based Care (HBC) programme in SADC since 2002. The HBC programme enrolls on average 80–100 medically-repatriated mineworkers who are referred by South African mines every month. The programme provides palliative care to sick ex-mineworkers and their families. The programme also provides health education, one-on-one counselling and risk reduction messages disseminated through door-to-door visits and campaigns (promoting consistent condom use and reducing multiple partnership). In addition, the programme promotes health-seeking behaviour and provides post counselling, referral for further biomedical services and HIV counselling and testing (HTC). It also provides education on voluntary medical male circumcision sexually transmitted infections, the prevention of mother to child transmission, antiretroviral, post exposure prophylaxis, etc. The programme provides adherence support, delivery of medical treatment on request, nutrition assessment (including weight, height body mass index and mid-upper arm circumference

645 See Mpedi LG & Nyenti M. 2013. *Portability of social security benefits in mining sector*, ii. [Retrieved 7 October 2014] http://www.southernafricatruster.org/docs/highlights_portability_of_social_security_benefits_in_mining_sector.pdf; and Motsepe N. 2014. Rehabilitation and accompanying of mine workers in their home countries. Paper presented at the FES/ILO Consultative and Training Workshop on Employment Injury Protection in Southern and Eastern Africa, Harare, Zimbabwe (20-22 October).

646 Motsepe N. 2014. Rehabilitation and accompanying of mine workers in their home countries. Paper presented at the FES/ILO Consultative and Training Workshop on Employment Injury Protection in Southern and Eastern Africa, Harare, Zimbabwe (20-22 October).

indicators), food supplements and education on healthy living (three food groups), and seeds and other nutritional supplements.⁶⁴⁷

Figure 7.1 shows the TEBA support given to a patient with spinal cord injuries. The photographs show the renovations and adaptations made to the bathroom/toilet areas of the patient's home.

Spinal cord injuries (SCI) home renovations and adaptations: bathroom



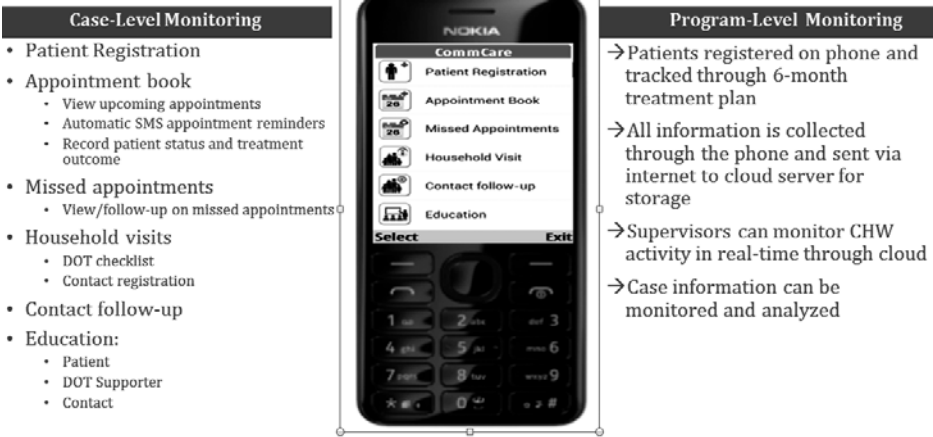
FIGURE 7.1 Spinal cord injuries home renovations and adaptations [Source: Motsepe N. 2014.]

TEBA also does case monitoring and management through the use of new technologies. This is done at two levels: case-level monitoring and programme level monitoring. Case-level monitoring is through cell phone applications for patient registration, appointments, missed appointments, household visits, contact follow-up and education. In programme-level monitoring, patients are registered on a phone and tracked through a six-month treatment plan; information is collected through the phone and sent via the internet to a cloud server for storage. Supervisors monitor community health worker activity in real time through cloud; and case information is monitored and stored.⁶⁴⁸

⁶⁴⁷ *Ibid.*

⁶⁴⁸ *Ibid.*

FIGURE 7.2 Case monitoring and management – use of new technologies



Source: Motsepe N. 2014.

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Ethiopia

A Duressa

Advisor to the Director General

Public Servants Social Security Agency

Lesotho

R Adoro

Administrator: Workmen's Compensation

Ministry of Labour and Employment

Malawi

A Chanza

Ministry of Labour and Vocational Training

Namibia

PA Munkawa

Deputy Director: Occupational Health and Safety

Ministry of Labour and Social Welfare

South Africa

K Tselane

Acting Chief Director: Operations

Department of Labour

C Lengolo

Deputy Director: Exempted Employers

Department of Labour

Swaziland

C Sibanda

Head: Workmen's Compensation Funds and Department of Social Security

Ministry of Labour and Social Security

Tanzania

AA Mushi

Director: Research and Policy

Social Security Regulation Authority

Zambia

K Mukwikwile

Acting Director: Benefits

Workers Compensation Fund Control Board

Zimbabwe

H Chikova

Director: Benefits Schemes Planning and Research

National Social Security Authority

APPENDIX

ILO Survey questionnaire

Please fill the following items of the identification form:

Country:

Person processing the form:

Institution and address:

Department:

Position of interview partner:

Phone:

Email:

Remarks:

Date:

QUESTIONNAIRE

Please attach any additional information you may have, such as statistics, tables, graphs, internet hyperlinks to public data etc.

How to **activate** the checkboxes: Make a double click on a checkbox ☐ and select “activate” in the context menu in order to fill the checkbox with a cross ☒.

How to **deactivate** the checkboxes: For corrections please make another double click on an activated (crossed) checkbox, select “deactivate” in order to delete the cross in the checkbox.

1. Employment injury scheme – general:

- 1.1 Is there an employment injury (EI) scheme in your country? ☐ yes ☐ no
(This includes schemes known under other names such as workers' compensation, occupational accident insurance, employers' liability...)
- 1.1.1 If yes, is it mandatory (based on a law)? ☐ yes ☐ no
(If possible, please attach a copy of the law)
- 1.1.2 Is the scheme *(please check one box)*:
☐ social insurance, public system
☐ employers' liability
☐ private
☐ public/private mix system
☐ other *(please specify)*:
- 1.1.3 In the case of a public EI system, is it part of the national social insurance or social security scheme? ☐ yes ☐ no
- 1.1.4 If yes, please specify if it is:
☐ a separate scheme
☐ a combined one with other areas of social security such as health insurance.
- 1.1.5 Is membership in the EI scheme compulsory for employers/enterprises? ☐ yes ☐ no
- 1.1.6 Is the EI scheme a no-fault insurance system? ☐ yes ☐ no
(that is, insured people are exempted from claims for damages by their insurance scheme, although they might have contributed to an accident by misbehaviour, by human error etc.)
- If yes, what happens in cases of intent or culpable negligence when violating occupational safety and health (OSH) regulations?
 In wilful misconduct of the employer:

 In wilful misconduct of the insured (employee/worker):

- 1.1.7 Is there a national or EI scheme strategy on OSH? ☐ yes ☐ no
(If possible, please attach a copy of the strategy)

2. Occupational accidents & occupational diseases

2.1 Are there separate schemes for occupational accidents and occupational diseases? ☐ yes ☐ no

2.1.1 If not, does the EI scheme distinguish between occupational accidents and occupational diseases? ☐ yes ☐ no

2.2 What is the definition of an occupational accident in your EI scheme?
.....
.....

2.2.1 How is the definition of an occupational accident fixed? *(Please check one box)*

- ☐ not applicable
☐ by law
☐ by the EI scheme administration
☐ by a government commission
☐ by an independent commission
☐ other (please specify):
.....

2.3 What is the definition of an occupational disease in your EI scheme?

(How are they classified as occupational?)

.....
.....
.....

2.3.1 How is the definition of an occupational disease fixed? *(Please check one box)*

- ☐ not applicable
☐ by law
☐ by the EI scheme administration
☐ by a government commission
☐ by an independent commission
☐ other (please specify):
.....

2.3.2 Is there a prescribed/national list of occupational diseases for which benefits or compensation are payable? ☐ yes ☐ no

(If possible, please attach the prescribed list)

2.3.3 If yes, is the list based on any internationally recognised list:

☐ ILO Recommendation No. 194 concerning a List of Occupational Diseases, 2002

☐ EU Commission Recommendation 2003/670/EC (19/09/2003)
concerning the European schedule of occupational diseases

☐ other (please specify):
.....

2.3.4 Are there other insured incidents, such as commuting accidents,
under the EI scheme? (If yes, please specify):

.....
.....

3. Reporting of occupational accidents and diseases

3.1 Is there a central/national reporting system for:

– Occupational accidents

☐ yes ☐ no

– Occupational diseases

☐ yes ☐ no

3.2 Who gives notice of (reports to the authorities)
an occupational accident? (Please check all which apply)

☐ employer

☐ worker/employee

☐ company physician

☐ any medical doctor

☐ union representative

☐ health insurance

☐ other (please specify):

3.3 Who gives notice of (reports to the authorities)
an occupational disease? (Please check all which apply)

☐ employer

☐ worker/employee

☐ company physician

☐ any medical doctor

☐ union representative

☐ health insurance

☐ other (please specify):

- 3.4** How is an occupational accident or disease notified?
(Please check all which apply)
- ☐ in writing
- ☐ using an official form
- ☐ electronically
- ☐ other (please specify):
- 3.5** To whom is the notice of an occupational accident or disease submitted?
- ☐ carrier of the EI scheme
- ☐ state authority
- ☐ other (please specify):
- 3.6** Are there time restrictions for notice of an occupational disease? ☐ yes ☐ no
(If yes, please specify):
- 3.7** Does your country publish national statistics:
- On occupational accidents ☐ yes ☐ no
- On occupational diseases ☐ yes ☐ no
- 3.7.1** Are the statistics available in a time series?
- for occupational accidents ☐ yes ☐ no ☐ not applicable
- for occupational diseases ☐ yes ☐ no ☐ not applicable
- 3.7.2** Are these statistics used for prevention purposes?
(for example, defining priorities for preventive actions)
- for occupational accidents ☐ yes ☐ no ☐ not applicable
- for occupational diseases ☐ yes ☐ no ☐ not applicable
- If there are annual reports covering statistics, please attach copies if possible.

4. Coverage

- 4.1** Who is insured and can receive benefits and/or rehabilitation?
(Please check all that apply)
- ☐ contracted worker/employee
- ☐ people doing volunteer and community service
- ☐ helpers in need, first-aiders (e.g. at accident locations)
- ☐ self-employed
- ☐ part-time workers
- ☐ apprentices
- ☐ trainees, people on work training
- ☐ pupils, students, children at day care centres

4.2 Are the following groups of employees/workers insured?

- | | | |
|--|------------------------------|-----------------------------|
| – spouses and collaborating family members | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| – migrant workers | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| – informal workers | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| – domestic workers | <input type="checkbox"/> yes | <input type="checkbox"/> no |

5. Funding of the EI scheme

5.1 How is the scheme funded? Is it a...

(Please check all that apply, e.g. if your EI scheme is financed by contributions and include also a dynamic allocation of emerging costs, please check "contribution-based" and "pay-as-you-go-system"):

- | | | |
|---|------------------------------|-----------------------------|
| – contribution-based? | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| – pay-as-you-go-system?
<i>(sharing of costs/ expenses, dynamic allocation of emerging costs can be combined with regular contributions)</i> | | |
| – capital-covered system?
<i>(e.g. financed through a national fund of a public law foundation, fed by contributions, taxes or others)</i> | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| – tax-based system?
<i>(for example, like the UK National Health Service NHS, which is funded/state-subsidised by taxes)</i> | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| – mix of contributions & taxes/subsidies of the state? | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| – other <i>(please specify):</i> | | |

5.2 Who pays the contributions?

- | | | |
|--|------------------------------|-----------------------------|
| – Solely the employers or enterprises | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| – Shared contributions of employers and employees | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| – All tax payers
<i>(in case of a state-subsidised system)</i> | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| – Special tax for employers and/or employees/workers
<i>(like social insurance contributions)</i> | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| – other <i>(please specify):</i> | | |

5.3 Does the EI scheme allow for a bonus-malus system?

(for example, dependent on the OSH performance of members of the EI scheme)

	<input type="checkbox"/> yes	<input type="checkbox"/> no
--	------------------------------	-----------------------------

5.4 Does the EI scheme allow for rebates and surcharges? ☐ yes ☐ no
(for example, dependent on the OSH performance of members of the EI scheme)

5.5 Does the EI scheme consider retentions and regress? ☐ yes ☐ no
(The EI scheme can ask for entitlement to damages for emerging costs of an occupational accident or diseases in cases of intent or culpable negligence of the employer/enterprise)

5.6 Does the EI scheme provide any kind of economic incentives for prevention? ☐ yes ☐ no
(for example, financial premiums or support, awards)

6. Administration of the EI scheme

6.1 Who administers the scheme?

- ☐ Ministry of Labour, Social Security or of Health
- ☐ Government agency or public authority
- ☐ Social security agency
- ☐ Private insurance company
- ☐ A mix of organizations (e.g. for accidents and diseases, please specify):
-
-

6.2 Is the administration of the EI scheme independent of the funder? ☐ yes ☐ no
(in most countries the employers/enterprises)

6.3 If it is a non-governmental administration, is there a governmental influence and/or control of the administration? ☐ yes ☐ no ☐ not applicable

6.4 Is the EI scheme management board:

- ☐ a governmental board
(state/Government)
- ☐ a tripartite board
(state/Government, employers and employees'/workers' representatives)
- ☐ a self administration board of the social partners
(employers' and workers' representatives)
- ☐ a private management board
(insurance company)
- ☐ other (please specify):

6.5 Is the EI scheme management board independent in relation to the following?

- | | | | |
|--|------------------------------|-----------------------------|---|
| – determination of services in general | <input type="checkbox"/> yes | <input type="checkbox"/> no | <input type="checkbox"/> not applicable |
| – prevention services | <input type="checkbox"/> yes | <input type="checkbox"/> no | <input type="checkbox"/> not applicable |
| – rehabilitation services | <input type="checkbox"/> yes | <input type="checkbox"/> no | <input type="checkbox"/> not applicable |
| – benefits/compensation | <input type="checkbox"/> yes | <input type="checkbox"/> no | <input type="checkbox"/> not applicable |
| – definition of its statutes | <input type="checkbox"/> yes | <input type="checkbox"/> no | <input type="checkbox"/> not applicable |
| – its budget | <input type="checkbox"/> yes | <input type="checkbox"/> no | <input type="checkbox"/> not applicable |
| – hiring of staff | <input type="checkbox"/> yes | <input type="checkbox"/> no | <input type="checkbox"/> not applicable |
| – fixing contribution levels | <input type="checkbox"/> yes | <input type="checkbox"/> no | <input type="checkbox"/> not applicable |
| – definition of risk classes | <input type="checkbox"/> yes | <input type="checkbox"/> no | <input type="checkbox"/> not applicable |
| – fining enterprises/employers for not complying with the statutes and regulations | <input type="checkbox"/> yes | <input type="checkbox"/> no | <input type="checkbox"/> not applicable |

7. Services and benefits

7.1 Is there provision within your EI scheme to promote medical rehabilitation? ☐ yes ☐ no

7.1.1 Are there medical services within the EI scheme? ☐ yes ☐ no ☐ not applicable

7.1.2 Does the EI scheme undertake research on medical rehabilitation? ☐ yes ☐ no ☐ not applicable

7.2 Is there provision within your EI scheme to promote occupational rehabilitation? ☐ yes ☐ no

7.2.1 Does your EI scheme provide retraining for injured or sick workers? ☐ yes ☐ no ☐ not applicable

7.3 Is there provision within your EI scheme to promote social rehabilitation for support

- | | | |
|--|------------------------------|-----------------------------|
| – for adaptation of accommodation | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| – support for adaptation of cars | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| – support for adaptation of workplaces | <input type="checkbox"/> yes | <input type="checkbox"/> no |

8. Prevention services

8.1 Is your EI scheme actively involved in **promoting preventive measures** to decrease the numbers of occupational accidents and diseases? ☐ yes ☐ no

- 8.2** Are there **separate funds for prevention activities**? ☐ yes ☐ no
(for example, allocating a certain percentage of employers' contributions or state budget to such a fund which can be used for preventive purposes)
- 8.2.1** If yes, please explain how this works *(percentage allocation or indicative sum, relationship/cooperation with OSH agencies in this respect)*:
- 8.3** If your EI scheme has a preventive approach, what **kinds of measures** are included *(the following measures and services are examples of those provided by some EI schemes, please check all that apply)*:
- 8.3.1** **Consulting and supervisory services** by OSH inspectors provided by the EI scheme? ☐ yes ☐ no ☐ not applicable
- 8.3.1.1** Are such inspectors allowed to **fine for violations** of OSH rules? ☐ yes ☐ no ☐ not applicable
- 8.3.2** Does the EI scheme **establish a set of binding OSH rules and regulations**? ☐ yes ☐ no ☐ not applicable
- 8.3.3** Does the EI scheme provide occupational **health care and/or medical examinations** for workers? ☐ yes ☐ no ☐ not applicable
- 8.3.4** Do the EI scheme's OSH experts support enterprises/employers in the **assessment of occupational risks**? ☐ yes ☐ no ☐ not applicable
- 8.3.5** Does the EI scheme provide **workplace health promotion** measures? ☐ yes ☐ no ☐ not applicable
- 8.3.5.1** If so, please specify if the workplace health promotion is executed in cooperation with other organizations, and which *(for example, health insurance scheme)*:
- 8.3.6** Does the EI scheme provide **operational services**, such as measurements of hazardous substances or ergonomic analysis and advice at the workplace? ☐ yes ☐ no ☐ not applicable

- 8.3.7 Does the EI scheme provide **education, qualifications and/or trainings**? ☐ yes ☐ no ☐ not applicable
(for example, to safety representatives, safety professionals, supervisors, management staff, etc)
- 8.3.8 Does the EI scheme provide **testing and certification services** in order to promote the occupational safety of products? ☐ yes ☐ no ☐ not applicable
(for example testing and certification of particular machinery, electrical operating equipment, personal safety equipment, and quality-management systems, etc)
- 8.3.9 Does the EI scheme undertake **research in the field of prevention**? ☐ yes ☐ no ☐ not applicable
- 8.3.9.1 If so, does The EI scheme **run research institutions** of its own? ☐ yes ☐ no ☐ not applicable
- 8.3.10 Does the EI scheme **offer economic incentives** to enterprises with regard to operational prevention? ☐ yes ☐ no ☐ not applicable
(e.g. financial support for enterprises introducing an OSH management system)
- 8.3.11 Does the EI scheme provide **other incentives**, such as awards, “name-and-shame” lists, etc? ☐ yes ☐ no ☐ not applicable
(If so, please specify):
.....
.....
- 8.3.12 Does the EI scheme produce and distribute **information and communication on prevention matters**? ☐ yes ☐ no ☐ not applicable
(for example any information on OSH such as brochures, internet, CD-ROMs, DVDs, communication tools such as internet or telephone hotlines for queries, etc.)
(If so, please specify):
.....
.....
- 8.3.13 Any **other prevention measures and activities** (please specify):
.....
.....

8.4 Is there cooperation between the EI and the following organizations for preventive activities:

- EI inspectors and the State labour inspectors? ☐ yes ☐ no ☐ not applicable
- EI and other government OSH agencies? ☐ yes ☐ no ☐ not applicable
- National or international institutions in other countries (*international cooperation*)? ☐ yes ☐ no ☐ not applicable

(If yes, please specify):
.....
.....

9. Scientific advisory body

- 9.1** Does the EI scheme have a scientific advisory body? ☐ yes ☐ no
If so, is the body independent of the funder? ☐ yes ☐ no ☐ not applicable

10. Expenditures

Please use the latest year for which data are available, and please specify the year. If possible, please provide the data for this section for the past five years.

- 10.1** What is the total expenditureUS\$ or €
of the whole national EI scheme?
(if compensation, rehabilitation and prevention
are organized in different institutions please sum up)

- 10.2** What proportion of the overall budget of the EI insurance scheme is spent on:

- 10.2.1 Administration and procedures? %
(e.g. social court action, adjustment
with health insurance institutions, regress actions etc.)

- 10.2.2 Prevention (if applicable)? %

- 10.2.3 Rehabilitation (if applicable)? %

- 10.2.4 Payments to claimants? %

This document gives valuable information on possible improvement of the systems in the countries included in the research. The countries should be urged to heed this information and ensure implementation of the recommendations made in this report in order to increase the effectiveness of the existing systems.

Wilna Louw-Malan

Edwilo Occupational Health and Safety Services

An authoritative book providing a comparative overview of laws on occupational health and safety in selected Eastern and Southern African countries, as well as their compensation for occupational injuries and diseases legislation, is long overdue. For far too long researchers doing comparative research on employment injury protection have been limited to sources from other continents. This book is a very welcome addition to existing social security law sources.

Professor Kitty Malherbe

Faculty of Law, University of the Western Cape



Centre for International
and Comparative Labour
and Social Security Law
(CICLASS)

The Centre for International and Comparative Labour and Social Security Law (CICLASS) is a research centre attached to the Faculty of Law of the University of Johannesburg (UJ). It was established in 1994. CICLASS' articulated mission is to drive the development of viable and sustainable labour law and social security (protection) systems to address inequality and bring about social justice in the emerging economies.



International
Labour
Organization

The International Labour Office is a tripartite United Nations agency that brings together governments, employers and workers representatives of 187 member States to set labour standards, develop policies and devise programmes promoting decent work for all women and men. The ILO was founded in 1919. The main aims of the organization are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.



The Friedrich-Ebert-Stiftung (FES) is the oldest political foundation in Germany with a rich tradition dating back to its foundation in 1925. Today, it remains loyal to the legacy of its namesake and campaigns for the core ideas and values of social democracy: freedom, justice and solidarity. It has a close connection to social democracy and free trade unions. FES promotes the advancement of social democracy.



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