

# Work Injuries Compensation under the Employee's Compensation Act in Nigeria: What is Next?

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## Abstract

The paper focuses on the employment injuries compensation scheme established under the Employee's Compensation Act, 2010. It examines the scheme within the context of its objective, work force covered, financing, compensable injuries and compensation, and administration of the Act; and the extent to which the scheme is in tandem with international labour standards. This is done by relating the provisions of the Act with some relevant recommendations of the ILO as contained in the Employment Injuries Benefit Convention 1964 (C121) as amended. The aim is primarily to suggest ideas and policy alternatives where necessary for consideration by policy makers and further amendments to the law to guarantee adequate and sustainable injury compensation scheme for the worker and economic development in line with the ILO Employment Injuries Benefit Convention recommendation.

**Keywords:** Work, Injuries, Compensation, Nigeria

## 1. Introduction

The ILO Workmen's Compensation Conventions (1925, 1935, 1934, 1964) provided the anchor for Workmen's Compensation Schemes to resolve the issue of who bears the burden of industrial accidents in many countries, including Nigeria. The Conventions and the emergent compensation schemes put the financial burdens on the employers (Wambaugh 1911, Bohlem 1911, Smith 1914 & Worugji 2000). The Schemes provide social security and insurance for an injured worker and his or her family. The cardinal aim is to protect an injured worker and his or her dependants from want and degradation (social and economic) as result of industrial accidents (Wambaugh 1911, Bohlem 1911 & Smith 1914). The successive Workmen's Compensation Acts in Nigeria also focused on achieving this central objective, including the Employee's Compensation Act, 2010.

What, however, remains important today are the issues of compensable injuries, the work force covered, adequacy of the compensation payable and sustainable beneficial administration of the schemes generally. These have become particularly important considering the emergent global agenda for decent work. The Decent Work Agenda (1998 & 1999) is envisaged as a key to reducing poverty and creating sustainable development. The Decent Work Agenda as means of lifting people out of poverty and want has further raised the need for adequate social security for the workers or their dependants for any death, injury, diseases or disability arising out of and in course of employment, and occupational health and safety (MacNaughton & Frey 2010).

It is the desire to key into the Decent Work Agenda and to bring the labour law in Nigeria to spirit of cooperation with international labour standards that new legislation on workmen's compensation; and occupational health and safety, among others were envisaged. The preamble to the Labour Reform Bill, 2008 presented to the

National Assembly by the Executive is emphatic on this. The Employee's Compensation Act (ECA), 2010, is one of the laws enacted to provide income security for employees who suffer from work related occupational diseases or injuries; and survivor benefits for families of victims of related fatalities (death). The Employee's Compensation Act, 2010 repealed the Workmen's Compensation Act (WCA), 2004.

This work is a general overview of the Act within the context of its objectives, coverage of work force, financing, compensable injuries and compensation, and administration of the Act; and the extent to which the scheme is in tandem with international labour standards. This is done by relating the provisions of the Act with some relevant recommendations of the ILO as contained in the employment Injuries Benefit Convention 1964 (C121) as amended. The aim is to suggest ideas that would guide further policy changes and amendments to the law to guarantee adequate and sustainable social security for the injured worker and economic development in line with ILO Employment Injuries Benefit Convention recommendations.

## **2. Structural Characteristics of the Act**

The Act is generally divided into nine parts (parts 1-IX) covering sections 1 to 74 and two schedules. Part 1, in sections 1- 3 sets out the objectives, scope of the Act and exemptions as the case may be. Part II deals with procedures for making claims. This is contained in sections 4-6 dealing with employee's notification of injuries, employer's obligation to report accidents or diseases of an employee and the application for compensation respectively. Part III covers sections 7-16 setting out the compensable injuries. This includes compensation for injuries, mental stress, occupational diseases, hearing impairment, compensations for injuries occurring outside the normal workplace and vocational rehabilitation as the case may be. It also provides for limitation of actions, non waiver of compensation, prohibition of contribution by employees and other forms of protection of compensation. Part IV in sections 17-30 deals with the quantum and scale of compensation. This covers compensations in fatal cases, permanent total disability, permanent partial disability or disfigurement, temporary total or partial disabilities, and health care disability support, duty of accredited medical practitioners and other specialists as well as periods for making payments and the power of the Board to reconsider benefits as the case may be. It also deals with retirement benefits of the injured worker under the Pensions Reform Act.

Part V sets out the powers and functions of the Nigerian Social Insurance Trust Fund Management Board in sections 31 and 32 respectively. Part VI in sections 33-55 deals with sources of fund for the scheme. This covers employers' assessment and contributions as well as processes for resolution of disputes relating to the assessment and enforcement of contributions. Part VII covering sections 56-61 centres on the management and control of the Compensation Fund established under the Act; while part VIII in section 62 and 63 makes provisions for the establishment of the Investment Committee and the functions of the Committee. Part IX and the last covering sections 64-74 contain the miscellaneous provisions. The Act has two schedules. The first schedule is the list of occupational diseases while the second shows percentages of disability for the purposes of compensation.

Apart from the introduction and the layout of the Act as set out in this work, the work has adopted the layout set out hereunder. This covers the objectives of the Act, scope and application of the Act, fund and administration of the Act and the fund and contributions to the fund, scope and limit of liability for compensation, protection of compensation rights, compensable injuries, procedure for claim, scale of payment and periods of payment, dispute resolution mechanisms under the Act and conclusion.

### 3. Objectives of the Act

The cardinal objective of the Act as contained in the explanatory memorandum of the Act remains to provide social security and insurance for the injured employees and or their dependants by making comprehensive provisions for payment of compensation to such employees who suffer from occupational diseases or sustain injuries arising from accident at workplace or in the course of employment (section 1(a)-(f)). This includes compensation for fatal injuries as the case may be. Specifically, the essential objectives as set out in section 1 of the Act are:

- (a) Provide for an open and fair system of guaranteed and adequate compensation for all employees or their dependants for any death, injury, disease or disability arising out of or in the course of employment;
- (b) Provide rehabilitation to employees with work-related disabilities as provided in this Act;
- (c) Establish and maintain a solvent compensation fund managed in the interest of employees and employers;
- (d) Provide for fair and adequate assessments for employers;
- (e) Provide an appeal procedure that is simple, fair and accessible, with minimal delays; and
- (f) Combine efforts and resources of relevant stakeholders for prevention of workplace disabilities, including the enforcement of occupational safety and health standards.

It must be noted that the Act, unlike the earlier Workmen's Compensation Acts, apart from its general objective in the preamble, has specifically set out its specific essential objectives which under the present scheme includes prevention of workplace disabilities and enforcement of occupational safety and health standards (section 1(f) of the Act). This is a clear indication of the state readiness, not only to provide income for the injured but also to promote health and safety and general risk management at work. This is in conformity with article 26(1) of the ILO Recommendation C121 requiring member states to take measures to prevent industrial accidents and occupational diseases.

Promoting occupational safety and health at work not only ensures the health of the worker but also enhances productivity, work motivation and satisfaction. In addition, it contributes to the overall quality of life of the worker and society. Furthermore, the safety, health and wellbeing of the worker remains a crucial prerequisite for labour productivity, improvements and are of utmost importance in overall socio-economic and sustainable development. The inclusion of this as one of the objectives of the Employees Compensation Act is a development in the right direction. What is needed now are strategies for achieving this objective. This immediately calls for a sustainable law on health and safety at work.

### 4. Scope and Application of the Act

Section 2 (1) of the Act is emphatic that the Act shall apply to all employers and employees in the public and private sectors in Nigeria. This, in effect, means that all employers of labour are expected to contribute to the compensation fund established under the Act just as all employees are covered and can make claim for injuries under the Act as the case may be. Thus any worker employed under dependent labour relationship who suffers any of the injuries, disability or occupational diseases can claim under the Act. The only categories of workers under dependent labour relationship excluded for the purpose of a claim under the Act are members of the armed forces. This exclusion, however, does not extend to persons employed in civilian capacity in the armed forces (section 3 of the Act). This is however in tandem with the ILO Convention C121 Article 4(1) which requires that national legislation in respect of employment injuries shall protect all employees in the public and private sectors.

The Act defines employee to mean "a person employed by an employer under oral or written contract of employment whether on a continuous, part-time, temporary, apprenticeship or casual basis and includes a domestic

servant who is not a member of the family of the employer including any person employed in the federal, State and local government, and any of the government agencies and in the formal and informal section” (section 73 of the Act). And an employer for the purpose of the Act “includes any individual, body corporate, federal, State, or Local Government or any of the government agencies who has entered into a contract of employment to employ any other person as an employee or apprentice (section 73 of the Act)”.

The scope and application of the Act as provided in section 2(1) and the definitions of employer and employee are wider than the coverage under the Workmen’s Compensation Act, 2004 (sections 2(a)-(f) & 2(2) Workmen’s Compensation Act). The refocusing of the employee’s compensation scheme to include all employees and employers as provided under the Employee’s Compensation Act, 2010 has eliminated the controversies over the exclusions under the Workmen’s Compensation Act, 2004. It is, however, hoped that a more comprehensive provisions for work injuries would be made for the members of the armed forces who are excluded under the present scheme.

It must be noted that the Act covers only workers in dependent labour relationship. Thus workers in the informal unorganised employment or labour sector such as those in subsistent agriculture and other forms of informal unorganised employment relations are not covered. Even the title of the Act is also quite suggestive of this fact. This is quite unfortunate particularly in an environment where there is no other form of social security for work injuries and disabilities. It is suggested that since the scheme operates under a social insurance scheme, the other categories of workers should be accommodated in the scheme.

#### **5. Administration of the Act and the Fund Established by the Act**

Section 2(2) of the Act vests the power to implement the Act and manage the Compensation Fund established under the Act on the Nigerian Social Insurance Trust Fund Management Board (see NSITF Act 1993). In pursuance of this mandate and for the purpose of the Act, section 31 of the Act specifically provides that the Board shall (a) be in charge of overall policies for the administration of the Fund; (b) approve investment of any money in the Fund on the advice of the Investment Committee; (c) fix the terms and conditions of service including remuneration of employees of the Fund; (d) formulate policies and strategies for assessment of compensation, rehabilitation and welfare of employees who sustain injuries or contract occupational diseases at the workplace or in course of employment; and (e) do such other things which, in the opinion of the Board, are necessary to ensure the efficient performance of the Board.

In the discharge of the Fund management function, the Board, by virtue of section 32 of the Act is empowered to (a) carry out assessment of the amounts to be paid into the Fund by employers; (b) undertake regular actuarial valuation of industries, sectors, and workplaces and determine the rates of contributions by the employer into the Fund by such employers; (c) receive and credit into its account, all moneys payable into the Fund; (d) make all payments of the various compensation or benefits to any person entitled to such compensation or benefits and make all disbursements required to be made out of the Fund; (d) invest any money standing to the credit of the Fund as may be advised by the Investment Committee. And for this purpose, no investment shall be undertaken unless there is evidence to show that such investment is safe and not susceptible to market failures.

In keeping with one of the set objectives of the Act, which is to combine efforts and resources of relevant stakeholders for the prevention of workplace disabilities, including the enforcement of occupational safety and health standards, the Board shall cooperate with the National Council for Occupational Safety and Health for the prevention of occupational accidents, and diseases and for the promotion of safety and health culture at the workplace (section 32(f) of the Act). It is also expected to carry out other activities as are necessary or expedient to ensure the effective

performance of its functions generally (section 3(g) of the Act).

The Board is to keep proper accounts and records of the Fund and such account shall not later than 4 months after the end of the year be audited by an the auditor appointed by the Board as may directed by the Auditor-General (section 60 of the Act). It shall not later than 6 months after the end of the year submit an annual report to the President through Minister, on the activities and administration of the Fund and shall cause such reports to be published and distributed to all the social partners and the National Assembly (section 61 of the Act). It is also expected to, not later than 31<sup>st</sup> of August in each year prepare an estimate of its income and expenditures for the succeeding year (section 59 of the Act).

This raises the need for monitoring, implementation and supervision of these processes for effect and sustainability. This is in keeping with the Articles 24 and 25 of ILO C121 respectively which require members to accept general responsibility for proper administration of the institutions or services in the application of the Convention and accept general responsibility for the due provisions of the benefits provided.

It must however be noted that as at the end of 2012, the Board has only registered about 1, 020 employers and 295,000 employees for the scheme. The Director General of the Board has however promised to apply the necessary legal measures to compel more employers to register. (Bimbo Oyesola 2013). This is necessary and important because the scheme can only take off upon registration of employers and employees respectively.

## **6. The Fund and Contributions to the Fund**

### **(i) The Fund**

The Act in section 56 (1) established the Employee's Compensation Fund into which shall be credited all moneys, funds or contributions by employers for adequate compensation to employees or their dependants for any death, injury, disability or disease arising out of or in the course of employment. The sources of the Fund shall consists of (a) a take-off grant from the Federal Government; (b) contributions payable by employers into the fund; (c) fees and assessments charged or made pursuant to the Act or any regulations made under the Act; (d) the proceeds of investments of the Fund; (e) gifts and grants from any national or international organisations; and (f) any other money that may accrue to the Fund from any other source.

The money in the Fund shall be applied or expended for (a) payment of adequate compensation for all employees or their dependants for any injury, disease or disability arising out of or in the course of employment; (b) the provision of rehabilitation to employees with work-related disabilities; (c) payment of remuneration and allowances of members and staff of the Board; (d) supporting activities and programmes on the prevention of occupational accidents and hazards and the promotion of occupational safety and health at the workplace; (e) purchase of any equipment or material required for carrying out the functions of the Board; and (f) carrying out any activity or doing anything with respect to any of the functions of the Board (section 56(2) of the Act).

### **(ii) Employers' Assessment and Contributions to the Fund**

As noted, one of the sources of fund for the Compensation Fund is contributions from employers. Every employer is to make a minimum monthly contribution of 1.0 per cent of the total monthly payroll into the Fund (section 63 of the Act). The Board shall for this purpose, classify the employers as it deems appropriate based on risk factors of each class to determine the amount of contributions to be made into the Fund (section 33(1) of the Act). In order to secure payment of assessed amount, the Board may require an employer to provide security in an amount or form deemed appropriate by the Board (section 38 of the Act).

If an assessment is not paid as at when due or the required security is not provided when also required, the

Board may impose penalty in an amount equal to 10 per- cent of the unpaid assessment or the value of the security required (section 46 of the Act). It is an offence for an employer to default in providing the security as may be required by the Board or default in the payment of any amount due to the Fund or contravenes any decision of the Board (section 39(2) & (4) & 47 of the Act). The imposition of criminal sanctions in the regard is to secure prompt compliance in the payment of the assessment contributions and to make sure that the employers discharge the statutory obligations under the Act and to guarantee regular flow of fund in the Fund for the sustainability of the Fund and scheme.

### **(iii) Establishment of the Independent Investment Committee**

One of the objectives of the Act is to establish and maintain a solvent fund for the sustenance of the scheme. For this purpose, the Act not only established the Compensation Fund under the control and management of the Board but also vests the authority on the Board to invest any money standing to the credit of the Fund. The Board is to be advised on the portfolio of investment by the Independent Investment Committee established under the Act (section 58(a)-(f) of the Act). The Investment Committee is expected to carry out an investment survey in the economy and draw up a list of safe investment from time to time based upon which it could advise the Board on the investment of any money standing to the credit of the Fund (section 62 of the Act). The essence is to protect the Fund and to make sure that the Board does not get into speculative and unsecured investment. This, to a great extent, also secures the Fund.

## **7. Scope and Limit of Liability for Compensation**

This covers both the compensable injuries and the scale and quantum of compensation payable for the compensable injuries. The scope and limit of liability for compensation (compensable injuries) are defined in part III of the Act, while part IV deals with scale and quantum of compensation payable in case of the injuries or liabilities.

### **(i) Compensable Injuries**

These are generally injuries or disabilities visible or latent, for which compensations are payable under the Act. These include physical injuries including fatal injuries; mental stress; hearing impairments; and occupational diseases (section 7-16 of the Act).

The Act no doubt has extended the scope and limit of liability for compensation beyond what was obtainable under the Workmen's Compensation Act 2004. The scope of compensable injuries under the Workmen's Compensation Act was primarily limited to personal injuries including fatal injuries and occupational diseases arising out of and in course of employment. Compensation for mental stress and hearing impairments are clear innovations introduced by the Act.

### **(a) Compensation for injuries**

Section 7(1) of the Employee's Compensation Act provides:

Any employee, whether or not in a work place, who suffers any disabling injury, arising out of or in course of employment, shall be entitled to payment for compensation in accordance with part IV of this Act.

The phrase 'any disabling injury arising out of or in course of employment' is the pivot around which payment of compensation for injuries revolves. Thus, for the employee to make any claim, the employee must suffer a disabling injury whether or not in a work place but must be work related. Compensation will be payable for disabling



injuries which incapacitate the employee from earning his normal wages. This is so, whether or not such employee suffers the injury at the place of work or outside the place of work provided it is associated with work or work related. The Phrase “arising out of or in course of employment” is a great departure from the phrase used in earlier Acts where compensable injuries revolved around injuries “arising out of and in course of employment” (See section 3(1) of the Workmen’s Compensation Act 2004).

Even though Section 7(1) of the Act did not specifically indicate that the disabling injury must be by accident, the compensation under the Act will be predicated upon the disabling injury being by accident arising out of or in course of employment. (See Section 7(2) & Section 8 of the Act). This is necessary to distinguish injury from accident on the one hand and that arising from mere process of bodily degeneration which is not due to any particular known event related to the employment. This is to ensure that the scheme retains its character as one primarily concerned with traumatic injuries (Ogus, Barendt & Wickley 1995). The term accident has also been defined under the Act to mean an occurrence arising out of or in course of work which results in fatal or non-fatal occupational injury that may lead to compensation under this Act (section 73 of the Act). It must also be noted that eligibility generally is on no fault basis. It is paid regardless of whether or not the employee was negligent in causing the injury as the case may be. But this would not accommodate suicide cases at place of work (See Article 22 of ILO Rec. C121).

Even though the Workmen’s Compensation Scheme by its character was originally and mainly concerned with traumatic work injuries, the Act has expanded the scope of the scheme beyond physical bodily injuries to clearly include some latent injuries and bodily challenges that are work related. This explains why the emphasis is now on “any disabling injuries”. Disabling injuries within this concept will no doubt cover both physical bodily injuries and other injuries to the mind provided they are work related. It is within this context that compensation and health care benefits are payable for some mental stress, occupational diseases and hearing impairment as the case may be under the Act.

#### **(b) Compensation for Mental Stress**

Section 8 of the Act makes compensation payable for mental stress arising from an acute reaction to a sudden and unexpected traumatic event or from mental or physical condition arising out of or in course of employment (Section 8(1) of the Act). Compensation for mental stress includes mental stress caused by change of work, the working conditions or organisation of work in such a way as to unfairly exceed the work ability and capacity of the employee by his employer (Section 8(2) of the Act). To avoid any disagreement that may arise in respect of any claims for mental stress arising in these circumstances, the Act empowers the Board to appoint a Medical Board of Enquiry to ascertain the mental conditions of the employee as the case may be (Section 8(3) of the Act).

The inclusion of compensation for mental stress arising from change of working conditions is important in view of the fact that the employer is under a duty to take reasonable care of the employee. It also buttresses the duty of mutual respect and cooperation in employment relations. The general requirement that the conditions of work are just and humane cannot be satisfied where the psychological needs and other challenges of the employee are ignored by the employer in decision making and implementation of such decisions. Compensation for mental stress and other injuries arising from disregard of this duty by the employer becomes necessary and desirable if human dignity at work must be respected and sustained. It is also a surer way of implementing health and safety standard in employment relations as emphasized by the National Employment Policy (p45).

This is a welcome development which it is hoped, will be given judicial backing through the implied duties

doctrine in employer/employee relations. We need not wait for actual injury to claim compensation. Prevention is better than cure. The duty in this regard can be enforced through pre-emptive actions and award of damages as the case may be.

### **(c) Compensation for Occupational Diseases**

Under the Workmen's Compensation Act 2004, because of the anticipated fear of difficulties that may arise from drawing a distinction between where contraction of a disease involves process than work accident as such, the issue of compensation for occupational diseases was left to the discretion of Minister of Labour upon proper medical advice (See section 32 WCA 2004). But the Employee's Compensation Act 2010 has made claim for occupational diseases a right. Thus compensation will be payable to an employee where such employee due to the nature of his or her employment suffers from an occupational disease which disables him or her from earning full remuneration; or suffers from any of the occupational diseases listed in the first schedule to the Act (Section 8(d) & 9(1)(a) of the Act. Compensation in this regard is no more at the discretion of the minister of labour.

Similarly, where the death of an employee is caused by any occupational disease, the dependants of such diseased employee shall be entitled to compensation as the case may be (Section 9(1)(b) of the Act). Furthermore, an employee who in a work place becomes disabled from any uncomplicated disease or from any diseases complicated by any other disease, condition or factor shall be entitled to compensation for total or partial disability or as may be determined by the Board (Section 9(3) of the Act). Where on the other hand, death results from these uncomplicated diseases or diseases complicated as indicated under this subsection, the dependant of such deceased employee shall be entitled to compensation (Section 9(4) of the Act).

However, the employee or the dependants shall not be entitled to the compensation for the uncomplicated disease or from a disease complicated by any other cause or death, unless the employee has been in the employment in a work place associated with exposure to substances leading to that condition; and was free from the disease before being first exposed to the substance causing the disease in the work place (Section 9(4)(a) & (b) of the Act). Where the employee was exposed to the substance causing the disease in more than one industry in the work place, the Board may apportion the compensation among the funds as the case may be (Section 9(5) of the Act).

### **(d) Compensation for Hearing Impairment**

Section 10 of the Act extends payment of compensation to hearing impairments of non traumatic origin but arising out of or in course of employment. The compensation payable covers total or partial loss of hearing as the case may be. The amount payable would however depend on the regulations to be made by the Board in consultation with the National Council for Occupational Safety and Health in respect of the ranges of hearing impairments, the percentage of disability, methods of frequencies to be used to measure hearing impairments and any other matters relating to hearing impairment (Section 10(2) of the Act & item 22 Schedule 1 ILO C121, 1964). The method of calculation in this regard, it is hoped, will take into consideration health care including the cost of periodic medical check up and replacements of hearing aids for the injured employee as the case may be.

### **(e) Arising out of or in Course of Employment**

Payment of compensation under the Act is dependent on the disabling injury **“arising out of or in the course of employment”** (Section 7(1) of the Act). This remains the pivot upon which compensation revolves. Ordinarily, the phrase that the injury must **“arise out of employment”** means that the injury must be as a direct result of work the employee was employed to do. In effect, there must be a causal link or relationship between the injury and the work. Arising out of employment in fact requires an inquiry into cause of the accident leading to the injury (Ogus et al



1995, Smith & Wood 1980, Rideout 1979, Adeyemi 1989 & Worugji 2001). On the other hand, the phrase “in course of employment” is a matter of factual scope, the limit of work the employee is required to do and what may be incidental to the work. This, in effect, means that the limit to the course of employment is ordinarily determined by time, place and activity. Thus, whether an accident arose in course of employment is a question of facts depending on time, place and activity (job content) (Srivastava 2002 & Worugji, 2001). This simply means that the accident resulting to the injury must occur at the time and place of the employment while the employee is doing what he or she is employed to do. This, in effect, excluded journeys to and from work and other journeys not directly related to work.

But to circumvent the injustices this interpretation has created in some cases, the courts introduced what is regarded as the “doctrine of notional extension of time and place” to expand the scope of time and place of employments in some jurisdictions (Srivastava 2002 & Worugji, 2001). However, to avoid the controversy that had usually arisen in the determination of the factual scope of employment and the extent which this doctrine applied under the Workmen’s Compensation Acts, the Employee’s Compensation Act has clearly extended compensable injuries to cover commuting injuries sustained while on the way between the place of work and-

- (a) The employee’s principal or secondary residence;
- (b) The place where the employee usually takes meals; or
- (c) The place where he usually receives remuneration provided that the employee has prior notification of such place.

The Act has by this provision incorporated the ILO Employment Injury Benefits Convention 1964 provision relating to commuting accidents to be covered under the Workmen’s Compensations Schemes. These include industrial accidents arising from journeys to place of work and the employee permanent or temporary residence; to and from where the employee takes his meals; to and from where the employee ordinarily receives his salaries etc (See Article 7 ILO Convention C121).

Besides compensation for these journeys, the Act (Section 11 of the Act) has further extended compensation to injuries occurring outside the normal place of work. This is the case where the nature of the business of the employer extends beyond the normal place of work and the employee is injured while working in such a place or the nature of the employment is such that the employee is required to work both in and outside of the work place. But in all these cases, the employee must, however, have the authority or permission of the employer to work in such places at the time as the case may be.

These are welcomed development in employees compensation law in Nigeria. It not only extended time and place but also activity as the case may be. This clearly brings the Nigerian law in tandem with International Labour Standards in this regard. Under the Workmen’s Compensation Act, the phrase is “out of and in course of employment” (Section 3(1) of the Act). This clearly created a relationship between the two concepts even though they do not mean the same thing. The use of the conjunctive word ‘and’ made it clear that “out of and in course of employment” are two separate concepts intersecting each other. But the courts in Nigeria in the determination of this relationship reached conclusions leading to injustice in some cases (See *M. Ade Smith v. Elder Dempster Line Ltd* (1944) 14 NLR 145; *Hannah Christopher Ngangkan v. Strasbag (Nig) Ltd* (1960) SCNLR 525; *Scandinavian Shipping Agencies v. Garuba Ajide* (1965) ALL NLR 652 & Worugji 1995).

To curb the absurdities created in the interpretation of this phrase under the Workmen’s Compensation Act, the Employees Compensation Act has not only put the phrase in disjunctive form by the use of the word ‘or’ but has

gone further to provide that where the injury or disease is caused by accident and the accident arose out of the employment, unless the contrary is shown, it shall be presumed that the injury occurred in course of employment (Section 7(4) of the Act & Ajomo 2010). This presumption clearly removes the dichotomy between determination of scope of employee's employment and issues of causation of the injury in the determination of compensable injuries. The burden on the employee to show the relationship between the employment and the injury as was the case under the Workmen's Compensation Act 2004 is no more necessary for the success of any claim under the Act. This brings Workmen's Compensation law in Nigeria in tandem with what is obtainable in some other jurisdictions. The combined effect of this provision and section 7(2) of that Act is that some of the absurd decisions by the courts relating to commuting injuries such injuries are now be compensable injuries under the Act. This again is a commendable development.

### **(ii) Scale and Quantum of Compensation**

One of the cardinal objectives of the Act is to "provide for an open and fair system of guaranteed and adequate compensation for all employees or their dependants for any death, injury, diseases or disability arising out of or in the course of employment" (Section 1(a) of the Act). This raises the issue of the adequacy or otherwise of the quantum of compensation provided by the Act.

The Act generally makes the quantum of compensation payable dependent on the nature of the injury or resultant disability to the employee as the case may be (See ILO C121 Article 26 & Schedule 1 to C121). For this purpose injuries or their resultant disabilities are categorised into:

- a. Fatal cases
- b. Permanent total disability
- c. Permanent partial disability or disfigurement
- d. Temporary disability (which may be total or partial).

#### **(a) Fatal cases:**

The beneficiaries in this regard are categorised into those wholly dependent on the deceased employee; and others. Those wholly dependent on the deceased employee include the widow or widower as the case may be, children and other family dependants or next of kins. The other categories of beneficiaries are those not wholly dependent on the deceased employee or had a reasonable expectation of pecuniary benefits from the continuation of the life of the employee.

The quantum of compensation payable where the deceased employee leaves dependants wholly dependent on his earnings, a widow or widower are:

- i. And two or more children, a monthly payment of a sum equal to 90 percent of the total monthly remuneration of the employee as at the date of death,
- ii. And one child, a monthly payment of a sum equal to 85 percent of the total monthly remuneration of the deceased employee as at the date of death. (Section 17(1)(a)(i)&(ii) of the Act).

Where on the other hand, the wholly dependent widow or widower who is without a child at the date of death of the employee, is 50 years of age or above or is an invalid spouse, a monthly payment of a sum equal to 60 percent of the total monthly remuneration of the deceased employee is made payable to the spouse (Section 17 (1) (a) (iii) of the Act). Where the spouse at the date of death of the employee is not invalid and is under the age of 50 years and has no dependent children, a monthly payment of a sum equal to the product or the percentage determined by subtracting 1 percent from 60 percent for each year for which the age of the dependants, at the date of the death of

the employee, is under the age of 50 years, and provided that the total percentage shall not be less than 30 percent (Section 17(1) (a) (iv) of the Act).

Where there is no surviving spouse eligible for monthly payment and the dependant is a child, 40 percent of what is payable in case of a permanent total disability is payable to the child (Section 17(1) (b) (i) of the Act & Article 1(e) ILO Convention). Where the dependants are two children, a monthly payment of a sum equal to 60 percent of what is payable in case of permanent total incapacity is paid (Section 17(1) (b) (ii) of the Act). Where the dependants are three children or more, a monthly payment of a sum equal to 80 percent of the monthly rate in case of permanent total disability is paid (Section 17(1) (b) (iii) of the Act).

The period of making payment to the widow or widower as the case may be is for life or as the Board may from time to time determine (Section 19 of the Act). But for the eligible children, the period of payment is until the child is up to the age of 21 or they complete undergraduate studies, whichever comes first (Section 17(1) (c) of the Act). However where the surviving child is disabled, the Board shall determine the period of the monthly payment for such time as the Board believes the disabled child would not have been dependent on the deceased employee (Section 17(1) (d) of the Act).

Where the deceased employee does not leave a dependent spouse or child (children) entitled to the compensation under the Act, but leaves other dependants or next of kin who were wholly dependent on the deceased employee, the Board shall determine a sum payable and proportionate to the pecuniary loss suffered by such dependant or next of kin as the case may be (Section 17 (1) (e) of the Act). Where also the employee leaves a spouse, child or children, or parent or parents who, though not dependent on the earnings of the employee at the time of the death of the employee, but had a reasonable expectation of pecuniary benefits from the continuation of the life of the employee, the board is also expected to make a monthly payment of an amount as it may deem fit to such persons (Section 17(1) (f) of the Act).

There is no doubt that the Employee's Compensation Act 2010 unlike the Workmen's Compensation Act 2004, has made a comprehensive and far reaching provisions for social security for the dependants and other persons who had reasonable expectation of pecuniary benefits from the continuation of the life of the deceased employee, but the basis upon which the quantum of compensation payable is determined is not clear. The uneven variation in the percentages is not comprehensible. Furthermore, the Act assumes monogamous relationships in all cases. What will be the situation where a deceased male employee may have more than a widow? There is the need for further clarification in these areas. It should not be left to the discretion of the Board. This is necessary to sustain the fair system of guaranteed and adequate compensation as the case may be, which is one of the cardinal objectives of the scheme.

#### **(b) Permanent total and partial disabilities**

Where an employee suffers some injuries leading to a permanent total disability, the Board shall pay to the employee a monthly payment equal to 90 percent of the remuneration of the employee (Section 21(1) of the Act). Similarly, if the disability is permanent partial, depending however on the degree of injury and the extent of impairment of any capacity of the injured employee, the Board shall pay to the employee a periodic payment equal to 90 percent of an estimated loss of remuneration resulting from the impairment (Section 25(1) & (2) of the Act). The compensation for this purpose is calculated in accordance with the second schedule of the Act.

It must be noted that the employee's compensation limited to 90 percent means that the employee is also made to share in the cost of the injury beyond the physical disability and pains. The basis for the sharing of this cost is not

known. This raises the issue of the equity in this regard. Can this be said to be in accord with the objective to provide for an open and fair system of guaranteed and adequate compensation for disabling injuries to an employee being propagated by the Act? The answer it is submitted with humility, is definitely no.

**(c) Temporary total and temporary partial disabilities**

Payment in these cases is a long sum in accordance with the second schedule of the Act or any regulation the Board may make in respect of the schedule. It must be noted that payment shall not be made in these cases for any disability that last for a period of more than 12 months (Section 23(a) & (b) of the Act).

Compensation for injuries resulting from disabilities under the Act is made to the employee, only if the employee is (Section 23(a) & (b) of the Act):

- a. Less than 55 years of age on the date of the injury,
- b. 55 years of age or older on the date of the injury.

Where the employee is less than 55 years such payment would continue until the employee reaches 55 years of age or the Board is satisfied that the employee would retire after that age or the date the employee would retire after attaining that age or the date the employee would retire. Where the employee is 55 years or more on the date of the injury, the payment would be discontinued 2 years after the date of the injury; the Board is satisfied that the employee would retire after the 2 years or the date the employee would retire as the Board may determine.

The duration of payment limited by the employee's age at 55 and not based on the statutory retirement age for employees in the employment where the injured employee works lacks any acceptable justification. Different employments have different retirement ages. It is hoped that the Board would take this into consideration before discontinuing any payment to an injured employee as the case may be.

It must be noted that the Act, apart from the departure from the lump sum payment system to regular monthly payment and provision of medical care, has gone further to provide for vocational rehabilitation, medical transport and attendant care. These are developments bringing the law on injury compensation in cooperation with the ILO standards (See ILO C121 Article 9-12).

**8. Protection of Compensation Rights**

It must be noted that no benefit or right to compensation to which the employee or the dependants may be entitled to under the Act can be waived or forfeited by any agreement with the employer; and any such agreement shall be void and unenforceable (Section 23(a) & (b) of the Act). Similarly, the employer cannot deduct any part of any sum which the employer is to pay or expected to pay into the fund from the employee or require the employer to contribute in any manner towards indemnifying the employer against liability which the employee has incurred or may incur under the Act (Section 14(1) of the Act). Beside these, to further protect the compensation payable to the injured employee or the dependants, no sum payable as compensation or any payment in respect thereof can be assigned or liable to attachment (Section 15 of the Act). Similarly, a claim shall not be set off against any sum payable as compensation under the Act except as may be allowed under the Act.

Set off is only allowed in case of money spent on social welfare needs to the injured employee or his dependants by the governments or the Board as the case may be. The Act makes it an offence punishable with a term of imprisonment not exceeding one year or a fine not less than one hundred thousand naira (#100,000) or both as the case may be and full repayment to the employee any such sum so deducted or contributed as the case may be (Section 14(2) & (3) of the Act).

## 9. Procedure for Claims

The employee who has suffered any injury or disability arising from occupational accident or disease or his or her dependants in case of death are to make the claims in the prescribed form to the Board duly signed by the employee or the deceased employee's dependant as the case may be. The application for any claim for compensation must be made within one year after the date of death, injury or disability arising from occupational accident or disease otherwise the claimant shall lose the right to any compensation in respect thereof (S. 6(2)). Compensation under the Act in lieu of any right of action statutory or otherwise which the injured employee or the dependants may have against the employer or in this case any claim from the board for any deaths, injury or compensation as the case may be. (Section 12(1) of the ECA).

The right to compensation may, however, be restored if the Board is satisfied that there existed special circumstances which precluded the filing of the application within the specified time provided that the application is filed within 3 years after that date (S. 6(3)). The Board upon receipt of the application may pay the compensation if it is satisfied that special circumstances existed which precluded the filing of an application within one year after that date and the application is filed not more than 3 years after the date of death, injury or disability arising from an occupational accident or disease (S. 6(4)).

The Board also has the liberty, notwithstanding the time limits, to pay the compensation for an occupational disease provided that there is sufficient medical or scientific evidence to justify such payment and such evidence only became available much later than the stipulated time limits (S. 6(5)). These exceptions are necessary to make sure that the rights of a claimant are not defeated on mere technical rules than substantive justice bearing in mind that one of the objectives of the Act is to provide for an open and fair system of guaranteed compensation. This is commendable.

However, before any claim is settled, the Board must verify the injury or disease for which a claim for compensation is raised has been duly reported to the National Council for Occupational Safety and Health Office as required by the Act (S. 5(7)). For this purpose, both the employees or their dependants in the case of death and the employers must of necessity report every death, injury or disabling occupational disease to the respective authorities as the case may be. The employee who suffers the injury or his or her dependant must within 14 days of the occurrence or receipt of the information of the occurrence, inform the employer of such incident, giving the name of the worker affected, the time and place of the incident, and the nature and cause of the injury or disease if known (S. 4(1)). Failure to provide the information as required may be a bar to a claim, unless the Board is satisfied that the information as given does not prejudice the employer or the employer had knowledge of the incident independently and the Board considers that the interest of justice requires that the claim be allowed (S. 4(4)).

Similarly, except where the Board has by regulation directed otherwise, the employer is expected to report to the Board and the office of the National Council for Occupational Safety and Health in the State within 7 days of its occurrence every injury to an employee in the workplace. In the case of death of an employee, the employer shall immediately report same to the Board (S. 5(1) & (7)). The report generally must be in the form prescribed by the Board giving, the name and address of the employee; time and place of the disease, injury or death; nature of the injury or alleged injury; name and address of any specialist or accredited medical practitioner who attended to the employee; and any other particulars required by the Board. Unless as may be allowed by the Board, failure to make a report as is required under the Act constitutes an offence under the Act (S. 5(5)).

## 10. Dispute Resolution Mechanisms

As noted, one of the objectives of the Act is to provide an appeal procedure that is simple, fair and accessible with minimal delay. TO meet this target, the Act has provided two levels of appeals. The first is to the Board itself for a review of its own decision. For this purpose, a person aggrieved by any decision of the Board may appeal to the Board for a review of such decision. The appeal, which of necessity, must be made in writing to Board within 180 days of the date of the decision complained of otherwise the right of appeal would be lost. Similarly, the Board must dispose of the appeal within 180 days. An appeal shall lie from any decision of the Board in its appellate capacity to the National Industrial Court (S. 55 of the Act).

It must be noted that the right of application to the Board for a review of its own decision within determinate time frame and subsequent appeal to the NIC has removed the adjudication process from the bureaucratic grip of the High Courts, which was the case under the Workmen's Compensation Act and their attendants delay in the handling of disputes. This is particularly important, knowing that in injury compensation claims generally, means of livelihood and sustainable income are at stake and major issues. Time therefore, is of essence.

## 11. Conclusion

There is no doubt that the Act has introduced a new regime of compensation for work injuries or disabilities. It has extended the scope of compensable injuries and the quantum of compensation for disabling injuries and or diseases arising out of or in course of employment. Apart from compensation for physical visible injuries, it has clearly redefined hearing impairments, occupational diseases and mental stress for compensation. Commuting accidents and associated injuries and certain injuries occurring outside the normal workplace which hitherto were not covered under the Workmen's Compensation Act are now compensable, thus bringing the law in tandem with International Labour Standards.

The difficulties associated with the determination of the relationship between "arising out of and in course of employment" under the Workmen's Compensation Act is now minimized by putting the phrase in disjunctive form "arising out of or in course of employment". The presumption that an injury "arising out of employment" is presumed to occur "in course of employment" also minimizes the difficulty associated with determining the scope of compensable injuries. This presumption clearly makes an injury "arising out of employment" a component of injury occurring "in the course of employment" in the face of it, which ordinarily would easily entitle the injured employee or his dependants to compensation as the case may be.

Furthermore, apart from enhancing the scale and quantum of compensation payable, there is a departure from the one time lump sum payment system to the regular monthly payment as the case may be. However, the need to take inflation and economic changes into consideration in the determination of quantum of compensation remains an issue to be addressed under the Law. It is hoped that this is an area the Board will take into consideration in the exercise of its powers and discharge of its functions under the Act (See section 31(d) & (f) and 32(g) of the Act). The duration of payment has also been extended. But the duration of payment for disabling injuries not taking into account the full duration of the employee's working life and associated income challenges after employment tenure need to be reconsidered (Umukoro 2009). This is particularly important since there is no other form of social security for the injured worker besides retirement pension.

While acknowledging that the Act represents a positive development in the provision of social security for the injured and disabled employee and the dependants, it is also hoped that all the institutional and bureaucratic arrangements for the implementation of the Law are put in place. This is necessary if the objectives set out in the Act



are to be achieved (See section 1(a) of the Act).

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