Occupational health and safety prevention and compensation laws: Pieces of the same puzzle

Abstract
The high level of occupational accidents and disease internationally indicates that laws and strategies aimed at preventing occupational accidents and diseases can be improved. The need to re-evaluate regulatory strategies is made more immediate by the growing informalisation of work over the last thirty years which has meant that an increasing proportion of workers are not protected by compensation or prevention laws. In addition, many small employers do not have the capacity to comply with OHS standards. Funds from compensation levies can be used to increase the resources and capacity of prevention agencies. While many compensation systems use experience rating to penalise employers with poor health and safety records, these systems often do not lead to improved health and safety conditions because they either do not impose sufficient costs on employers or lead to avoidance strategies. Imposing substantial penalty assessments on employers who are in breach of OHS standards is likely to create a more effective incentive for improved OHS performance.

Key words: occupational health and safety laws, informal work, workers’ compensation, economic incentives, experience rating

Introduction
It is universally agreed that occupational accidents and diseases should be minimised and all but the least developed of states have laws regulating health and safety at work. The continued high toll of work on life and health in so many countries indicates an immense gap between goal and reality. This paper addresses the question of how the law can best be used to promote good occupational health and safety (OHS) practices in the workplace and reduce the incidence of occupational injury and disease.

The central theme of this paper is that issues of prevention and compensation raise linked policy objectives that are best addressed in conjunction. Too often in practice this does not occur. While common sense indicates that prevention should be the priority using South Africa as a benchmark, greater resources (although by no means sufficient) are devoted to providing inadequate compensation to those who suffer occupational accidents or diseases than on prevention. Our laws and policies reflect a fatalistic acceptance of injury and disease at work. However, if regulation is to provide a basis for healthier and safer work, it must be attuned to the realities of the contemporary world of work.

Regulatory options for OHS
Traditionally, the law sought to prevent accidents and occupational diseases by prohibiting specific dangerous work practices and prescribing the limits within which work could take place; what scholars of regulation call a “command and control” approach or “red light” approach. Its origins lie in sector-specific Acts enacted in nineteenth century Europe in response to the new hazards emerging from the industrial revolution: these included Acts regulating work in mines and factories and standards for building and construction.

The shortcomings of detailed sector-specific legislation had become exceedingly clear by the second half of the twentieth century. The varieties of workplaces were too vast for all but the most severe hazards to be regulated in detail and prescriptive regulation did not ensure that employers and employees took proactive steps to ensure a healthy and safe workplace. These arguments are most clearly outlined in the highly influential Robens Report and the subsequent UK Health and Safety at Work Act of 1974. Modern statutes define the responsibilities of employers by general duties to provide a healthy and safe workplace through a systematic process of identifying and eliminating or controlling hazards. They set out the rights and duties of workers including the right to withdraw from danger and to participate in OHS activities and decision-making. This approach is referred to as one of “enforced self-regulation”. Experience has shown that this model of regulation works best for well-resourced larger companies with skilled technical staff but smaller enterprises frequently lack the skills and resources to achieve the required levels of OHS performance.

The capacity of laws to achieve actual change depends on a range of factors including the design of the key institutions, the allocation of resources and how a wider range of stakeholders respond to those laws. This includes how administrators and judges interpret and implement the
laws, whether employers voluntarily “buy in” to a culture of prevention and commit resources to improve OHS and whether trade unions and workers prioritise participation in OHS institutions. An effective regulatory system needs to achieve a balance of promoting voluntary compliance and best practice, encouraging trade unions and workers to engage with OHS issues, providing guidance (particularly to small and under-resourced employers), while at the same time containing sufficient deterrent to those who disregard the law or are tempted to cut corners. Experience shows that this is best achieved through combining a graduated series of sanctions with incentives to drive pro-active approaches.5

OHS AND THE NEW WORLD OF WORK

The already complex task of providing workers with adequate health and safety protection at work has become progressively more difficult over the last three decades. Internationally, global competitive pressures have led to an increasing informalisation of production and employment relationships. More and more work is performed by workers engaged under non-standard contractual arrangements, by self-employed workers or by workers in the informal economy. These workers earn less and have lower levels of employment, social security and union density than full-time employees in the formal economy.

This shift in the labour market involves two related trends: a rise in non-standard employment such as outsourcing, temporary and short-term working arrangements and the increasing displacement of work into the informal economy. In a middle income country with a large formal sector such as South Africa both trends are present in significant levels. In 2002, 6.6 million people were engaged in full-time employment; 3.1 million were engaged in non-standard or atypical employment within the formal sector; and 2.2 million in informal work and 8.4 million were unemployed. (Atypical employment includes temporary, part-time and outsourced work as well as approximately 1.1 million domestic workers. Official statistics do not provide a breakdown between full-time and non-standard employment.) In countries such as Brazil, Mexico, Indonesia and the Philippines the share of informal work is above 50% while in many other African countries it is as high as 90%. These shifts in the labour market have created a crisis for the application of labour laws resulting in an intense debate on the need to develop laws for the broader world of work. This debate is of immense relevance to OHS regulation. Notwithstanding the fact that OHS law generally tends to cover informal sector work, its application is often no more than theoretical. In addition, workers who are not employees are frequently excluded from the statutory compensation systems.

Globalisation has had the consequence that an increasing proportion of manufacturing and extractive industries have been shifted from the relatively well-regulated developed world to the developing world with the attendant higher level of injury and disease risk. While the services sector has grown in a country such as South Africa, roughly 50% of its workforce is still employed in hazardous sectors such as mining, construction, transport, agriculture and manufacturing.8

There is an extensive body of international evidence that job insecurity, contingent work arrangements and rising informality have adverse OHS outcomes. These include a significant rise in injury rates, diseases rates, hazard exposures and work-related stress. Workers such as temporary workers, subcontractors and self-employed persons tend to have a very limited understanding of their own responsibilities and those of other persons and receive inadequate training in the hazards associated with their tasks and relevant OHS procedures. Non-compliance with OHS laws may be a result of ignorance or a calculated response to economic pressures and the perceived risk of detection. OHS laws and enforcement strategies have been designed with permanent employees in large workplaces in mind and do not meet the needs of informalised workers. The growth of externalised and informalised work has weakened participatory mechanisms such as OHS committees and resulted in a decline in the coverage of workers’ compensation schemes.9,10

While much of this research has been conducted in the developed world, similar trends have been identified in the developing world. For instance, a study in South Africa indicates that informal sector workers are 7.2 times more likely to suffer work-related injuries than their formal economy equivalents.5 The full burden of occupational disease among informal workers is not known: it has been estimated that in the SADC region 1 in 50 cases of occupational disease are reported.11 A number of factors contribute to this: low levels of reporting and poor enforcement; the difficulty of linking illness to work; the concentration of hazardous work among the poor, and the inability to attribute disease to workplace conditions.

Small businesses, whether formally registered or not, tend to have significantly higher accident rates than larger businesses in the same sector. This has immense policy consequences in countries such as South Africa where small enterprises are viewed as a major motor of economic development and job creation. A high proportion of small employers do not have capacity to take preventative measures to prevent injury and particularly occupational disease. This poses real challenges for inspectors who are required to strike a balance between providing guidance on OHS compliance and enforcing standards. Many informal sector activities have significant public health and safety consequences – for instance, children may be exposed to hazardous substances such as lead from backyard activities such as car repair.12

L I N K I N G C O M P E N S A T I O N A N D P R E V E N T I O N

There are two primary models for providing workers’ compensation. The first is the “continental” model in which benefits for work-related injury and disease are provided as part of a comprehensive package of social security entitlements.
enjoyed by citizens as a whole, generally funded from tax revenue. The second approach which can be described as the “Commonwealth” model has a discrete workers’ compensation system, often operating within or linked to the Labour Ministry. These schemes may be run through a single public fund or (as in the case of many US states as well as developing countries such as Kenya) by permitting employers to purchase cover for their statutory compensation liabilities from private sector insurers. The use of private insurers in the compensation realm is controversial and it has been suggested that they introduce an inappropriate culture of “claim repudiation”.13

In certain jurisdictions, a single institution has overall responsibility for prevention, compensation and rehabilitation. This is true in some Canadian provinces including Ontario and British Columbia. There is considerable evidence that a close institutional linkage between prevention and compensation agencies improved prevention by integrating policy and decision-making on prevention and compensation, improving the quality of information available to target OHS problems, and by making compensation assessments responsive to employers’ OHS performance. If broader government structuring makes an integrated institution unfeasible, improved prevention can be achieved through appropriate institutional linkages provided there is a single forum at which policy concerning both prevention and compensation can be debated to inform integrated decision-making.13

Imposing financial sanctions on non-compliant employers through the compensation system can be an extremely significant incentive for improved employer OHS performance provided the sanctions are sufficiently high to create a real incentive. From bitter experience we also know the corollary to be true: an inadequate compensation system promotes a climate in which employers do not invest in healthy and safe production technology. The low levels of compensation paid to black mineworkers for occupational lung diseases in South Africa prior to 1994 and the resulting low assessment rates for employers contributed to the poor control of dust levels in the mining industry and led to the epidemic of pulmonary disease among mineworkers and ex-mineworkers. Massive levels of injury and disease were “exported” to the homelands and neighbouring territories from which the mines drew their labour and the real cost of mining was hidden. Almost a decade and a half into democracy these anomalies have not been removed, the incidence of silicosis has worsened and access to compensation benefits for mineworkers has become more difficult.14

Workers’ compensation schemes can be used in a variety of ways to promote prevention. At a collective level, a portion of the levies can be used to cover the costs of OHS prevention and promotion activities. In some systems, the cost of the OHS inspectorate is paid from compensation income; in many others, a significant portion of compensation funds is allocated to a range of the prevention activities including OHS education, training or research. Well-targeted programmes should result in OHS improvements that reduce compensation levies in the long-run.15

In South Africa, the compensation system operates without costs to the fiscus but is located within the public service and as a result of public sector pay restraints is unable to retain skilled personnel. Likewise, the prevention inspectorates have high levels of vacancies and competent inspectors are lured away by the private sector. Using a portion of the employers’ compensation levies as a “revenue stream” could allow for an integrated para-statal institution with responsibility for both prevention and compensation to be established which could offer competitive conditions of employment to specialist staff.16

Workers’ compensation schemes are based on a trade-off, workers acquire the right to compensation for injuries and ill health caused by work without needing to show that this was due to the employer’s fault but usually, as is the case in South Africa, forfeit the right to institute civil claims for damages against their employer. Employers are required to pay an assessment to the Compensation Fund and are insulated from the possibility of costly civil claims. In South Africa they receive this protection even if they do not register with the Fund. While “no fault” compensation offers considerable benefits it can reduce the incentive for employers to adopt a proactive approach to prevention. In some countries, employees retain the right to institute personal injury civil claims for work-related accidents and diseases but it is unclear whether this has a significant remedial impact and may result in considerable resources being consumed by legal fees. Administrative sanctions imposed upon employers who do not comply with OHS standards offer a more feasible means of providing incentives.15

Because employees generally waive their right to pursue civil claims, workers’ compensation differs from other forms of social insurance. While the Canadian and South African courts have accepted that the legislative enactment of a “trade-off” of this type does not violate any protected constitutional right, the level of benefits received by workers needs to be constantly reviewed to ensure that it remains equitable. In South Africa, compensation benefits do not reflect the full cost of work-related injury and disease. No account is taken of the employee’s loss of earning capacity and employment as a result of disability: an approach which is particularly inequitable to manual workers and young employees. Only workers with a disability in excess of 30% receive pensions and the “meat chart” for assessing disability has remained unchanged for over 60 years. The only major progressive reform in this period has been the significant revisions of the schedule of occupational diseases in 1993 and 2004. There is no compensation for the pain, suffering and loss of life quality caused by injury or disease and these damages cannot be recovered through civil action. While the payment of 75% of lost wages to temporary disabled workers meets international standards, there are strong arguments for paying a higher percentage to low-paid workers, as is the case with unemployment insurance. South African legislation
does not give permanently disabled workers a right to receive rehabilitation or vocational retraining.\textsuperscript{16,17}

Employees have no right in terms of compensation legislation to return to work after injury or illness. Employees who wish to challenge a decision to terminate their employment on grounds of their physical incapacity must institute separate legal proceedings under the unfair dismissal provisions of the Labour Relations Act of 1995.\textsuperscript{5} The dismissal can be challenged on procedural grounds if the employer did not engage in a consultation process before the dismissal and on substantive grounds if it can be shown that the employee can perform his or her previous job or if the employer could reasonably provide an employee with permanent impairment with suitable alternative employment. However, relatively few cases are brought on this basis. A strong case can be made for “return to work” decisions being located within the compensation system.

This catalogue of shortcomings reveal that the bulk of the costs of poor OHS practices by employers are “externalised” and borne by workers, their families and public institutions rather than employers. Enhanced benefits and strengthened security of tenure for workers who suffer injury and disease at work would help to create a climate in which employers adopt more proactive approaches to OHS prevention. While this would probably result in employers paying higher compensation levies, this can be justified in the light of the extensive protection employers receive under the compensation system and the need to create incentive for improved commitment to OHS performance.

In many jurisdictions, compensation authorities are empowered to adjust the assessment rate of employers with unacceptable injury rates through a system of “experience rating”. In South Africa, for instance, a portion of employer’s assessments are set aside to be paid as rebates to employers with better than average claims records. While “experience rating” retains a theoretical appeal, particularly among economists, in practice it has very little impact. Firstly, as compensation claims represent a small part of the costs of accidents and ill-health, a major adjustment in levies is needed for experience rating to constitute a real economic incentive. Secondly, experience rating may lead to employers adopting counter-strategies such as contesting claims, pressuring employees not to lodge claims or contracting out particular aspects of work.\textsuperscript{15}

A more successful approach is one which allows for penalty assessments to be imposed on employers if inspections or inquiries reveal a workplace that is not in compliance with the relevant OHS standards. This penalty can initially be suspended while the employer is given an opportunity to comply with the relevant legal requirements. This approach is prospective in its operation and prioritises prevention. Again, the penalty must be sufficiently high to create a real incentive for improved OHS and not be an amount that employers can merely regard as an affordable additional cost. A well-trained and resourced inspectorate is a requirement for this approach as well as clear guidelines for determining the penalties that can be imposed. Employers must believe that an inspector calling unannounced at their premises is a real possibility.\textsuperscript{5}

Internationally a large proportion of workers fall outside of compensation systems. In South Africa, coverage is limited to workers engaged in terms of a contract of employment but for many years coverage was further restricted by the manner in which the compensation authorities applied the law. Legislation places the principal obligation to report accidents and diseases and supply claims information on the employer. Over many years, an administrative practice was applied of not paying compensation where employers did not comply with these obligations. This practice, which severely prejudiced employees of non-compliant employers, was challenged in a public interest class action law suit which led to the Compensation Fund agreeing to alter its administrative procedures and establish a separate Department to process 198 000 claims that had been delayed by employer non-compliance. This figure equates roughly to the number of claims lodged annually and included claims classified as “pending” for up to 12 years.\textsuperscript{18} This practice had unacceptably placed the risk of employer non-compliance at the door of the employee and reveals a bureaucratic concern to limit claim expenditure because of a concern about the liquidity of the Fund. As a result, employees including employees in small informal businesses may claim and receive worker’s compensation, irrespective of whether their employer has registered in terms of the law provided they can produce satisfactory proof of employment. Self-employed persons and independent contractors remain outside the net of worker’s compensation and any extension to these categories would require legislative amendment.\textsuperscript{17}

\textbf{Conclusion}

In conclusion, it is worth reflecting on why issues of health and safety, and particularly compensation drop so easily down the reform agenda. While the South African government enacted an impressive raft of new labour laws to transform its labour market after 1994, a Cabinet decision in 1999 to integrate prevention and compensation legislation and institutions is still being implemented. As a result our OHS institutions and laws (with the exception of prevention legislation in the mining industry) are those inherited from apartheid.

An innovative prevention strategy developed by the Ontario authorities argues for the need for a “tipping point” to promote changed attitudes to OHS equivalent to the changes in social consciousness that have occurred in respect of issues such as smoking and global warming.\textsuperscript{19} An important linkage to be developed is the close connections between OHS practices and environmental damage. One measure of the distance to be travelled is the comparison between the practice of imposing multi-million rand fines based on a percentage of turnover on employers who engage in anti-competitive practices while those who engage in dangerous practices at best receive a slap on the wrist.
OHS legislation emerged as a response to the Industrial Revolution. While labour market changes in the last 30 years may not be as dramatic, they are having the consequence of decreasing protection, enhancing risk and allowing employers to avoid the costs of poor OHS practice. The starting point for reform in both the compensation and prevention arenas is the adoption of models that can enhance a consciousness of these issues among smaller and informal business operators and their workers. As is the case with environmental degradation, we have no alternative.

REFERENCES
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