
REPORT NO. 28 OF 2009/10

REPORT ON A SYSTEMIC INVESTIGATION INTO ALLEGATIONS OF POOR SERVICE DELIVERY BY THE COMPENSATION FUND
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(i) Allegations of lack of transparency and undue delay in processing and finalising compensation claims

(a) Case Study 1: Ms S F Grobler approached the Office of the Public Protector (OPP) with the following complaints regarding an occupational injury that she sustained on 28 August 1997:

(aa) She alleged that the Compensation Fund failed to inform her of its decision regarding liability for her original claim for compensation; and

(bb) She alleged that the Compensation Fund unduly delayed in finalising her request to have her claim re-opened.

(b) Case Study 2: Mr S J Baleni approached the OPP with a complaint that the Compensation Fund unduly delayed in finalising his claim for compensation after he was shot whilst on duty on 28 May 1999.

(c) Case Study 3: Mr D Palm approached the OPP with the following complaints regarding an occupational injury that he sustained on 19 April 2003:

(aa) He alleged that the Compensation Fund prematurely assessed him at 35% permanent disablement whilst he was still entitled to receive compensation in respect of temporary disablement; and

(bb) He alleged that the Compensation Fund unduly delayed in providing him with authorisation to have an MRI scan taken so that his doctor could assess how to stem further deterioration of his medical condition.
(ii) Allegations of inaccessibility to the general public:

Case Study 1: Mr K H Davel and Mr N H de Villiers approached the OPP with complaints that the Compensation Fund failed in its duty to be accessible to the general public through its telephone system.

(iii) Concomitant to the investigation, the following were established:

(a) In the Grobler matter, the Compensation Fund expressed the view that it was not obliged, in terms of the Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA) to give information to employees regarding their claims;

(b) In the Baleni matter, the Compensation Fund submitted that correspondence was never sent to Mr Baleni advising him of the outcome of his claim, as he did not make enquiries directly with the Compensation Commissioner;

(c) In the Palm matter, the Compensation Fund maintained that Mr Palm was properly awarded permanent disablement;

(d) With regard to the Davel and De Villiers matters, the Compensation Fund submitted that its telephone system (as at 2005) was outdated and unable to provide proper functionality.

(iv) The following key findings were made:

(a) Employees who have been injured on duty have a right to information about their compensation claims, to include information pertaining to available remedies, whether liability has been accepted or repudiated by the Compensation Fund. The Compensation Fund has a corresponding duty to provide information, in terms of the implied provisions of COIDA and the express provisions of the
Constitution and the Promotion of Administrative Justice Act, 2000 (PAJA).

(b) The Compensation Fund failed to give effect to the right to procedurally fair administrative action, when it failed to give Ms Grobler, Mr Baleni and Mr Palm properly formulated written decisions regarding their claims, incorporating the principles of just administrative action as set out in Constitution and PAJA.

(c) The Compensation Fund unduly delayed in finalising Mr Baleni’s claim, when payment was made to him in respect of permanent disablement three and a half years after he was injured on duty.

(d) The Compensation Fund is unduly delaying in finalising Mr Palm’s objection and application for increased compensation. As at the date of issue of this report, three years has elapsed without commencement of the objection and section 56 proceedings.

(e) When handling compensation enquiries, call centre agents are not proficient in furnishing accurate and timely information regarding the applicability of COIDA and other relevant legislation.

(f) The Compensation Fund has an insufficient number of call centre agents to manage the huge influx of calls received on a daily basis.

(g) The Compensation Fund has an insufficient number of staff at its directorate: Legal Services, to process and finalise objection hearings timeously.

(vi) The Public Protector recommended the following:

(a) The Compensation Fund should ensure that the right to just administrative action, as embodied in the Constitution and PAJA; which includes the right to information and the corresponding duty to
inform; is consistently and uniformly applied by Compensation Fund officials when taking decisions regarding claims.

(b) The Compensation Fund should expedite the claims process by:

<table>
<thead>
<tr>
<th>(aa)</th>
<th>Registering claims, objections and other legal processes within 10 days of receiving accident reports, objection forms, other legal documents and supporting documents;</th>
</tr>
</thead>
<tbody>
<tr>
<td>(bb)</td>
<td>Furnishing persons who report workplace accidents or occupational diseases with acknowledgements of receipt, together with claim numbers, within 30 day of receiving accident reports;</td>
</tr>
<tr>
<td>(cc)</td>
<td>Furnishing persons who lodge objections or initiate other legal processes with acknowledgements of receipt of documents, within 30 days;</td>
</tr>
<tr>
<td>(dd)</td>
<td>Requesting additional information within 30 days of receiving accident reports, objection forms or documents relating to other legal processes;</td>
</tr>
<tr>
<td>(ee)</td>
<td>Registering incoming documents by means of a proper numbering, tagging and tracking system, five days after receipt;</td>
</tr>
<tr>
<td>(ff)</td>
<td>Furnishing progress reports regarding claims, objections and other legal processes, to employers and to injured employees or their representatives, every eight weeks after acknowledging receipt of accident reports, objection forms or other legal documents;</td>
</tr>
</tbody>
</table>
(gg) Adjudicating claims, within six months of receiving accident reports and other supporting documents required to finalise claims;

(hh) Communicating decisions in writing, within eight weeks after finalising claims; to employers and to injured employees or their representatives, by incorporating the principles of just administrative action as set out in PAJA;

(ii) Paying compensation to employers (where payment is due to them) and/or injured employees, within four weeks of taking decisions; and

(jj) Adjudicating and finalising objections and other legal processes, within 90 days of receiving objection forms or other legal documents (together with supporting documents) required to finalise the processes.

(c) The Compensation Fund should provide its call centre agents with training or additional training by September 2009, as proposed, in order to ensure that when dealing with telephone enquiries, they furnish accurate and timely information regarding the applicability of COIDA and other relevant legislation.

(d) The Compensation Fund should finalise its call centre permanent post structure by September 2009, as proposed, with a view to employing additional call centre agents to manage the huge influx of calls received on a daily basis.

(e) The Compensation Fund should finalise the filling of all vacant approved posts throughout its office by March 2010, especially at the chief directorate: Financial Management.
The Compensation Fund should urgently finalise its work study into an appropriate structure for the directorate: Legal Services, with a view to creating a permanent post structure, for approval and implementation by December 2009.
REPORT ON A SYSTEMIC INVESTIGATION INTO ALLEGATIONS OF POOR SERVICE DELIVERY BY THE COMPENSATION FUND

PART A: GENERAL

1. INTRODUCTION

This report is submitted to the National Assembly, the Minister of Labour, the Director-General of the Department of Labour and the Compensation Commissioner in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act). It relates to a systemic investigation into allegations of poor service delivery by the Compensation Fund.

2. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO CONDUCT A SYSTEMIC INVESTIGATION

2.1 The Office of the Public Protector (OPP) was established to enhance constitutional democracy in terms of Chapter 9 of the Constitution. In terms of section 182(1)(a) of the Constitution, the Public Protector is empowered to investigate complaints of improper conduct in state affairs or the public administration in any sphere of government.

2.2 In terms of section 6(4) of the Public Protector Act, the Public Protector is competent to investigate, on own initiative or on receipt of a complaint, inter alia, any alleged:

2.2.1 Maladministration in connection with the affairs of government at any level;

2.2.2 Abuse or unjustifiable exercise of power, unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function; and
2.2.3 Any act or omission by a person in the employ of government at any level or a person performing a public function which results in unlawful or improper prejudice to any other person.

2.3 Section 182(1)(c) of the Constitution empowers the Public Protector to take appropriate remedial action in respect of conduct that has been investigated, to include resolving disputes or rectifying acts or omissions by mediation, conciliation, negotiation and making recommendations.

3. LEGAL NATURE OF THE COMPENSATION FUND

3.1 The Department of Labour (Department) fulfils its mission of reducing unemployment, poverty and inequality through a set of policies and programmes, which includes the programme: Compensation for Occupational Injuries and Diseases.

3.2 This programme operates within the legislative framework of the Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA).

3.3 Provision is made in terms of the programme for:

3.3.1 The Director-General, designated as the accounting officer of the Department, who is empowered to inquire into accidents and occupational diseases; adjudicate upon claims; administer the Compensation Fund and submit a report regarding the administration of COIDA to the Minister of Labour;

3.3.2 The Compensation Fund, which falls under the control of the Director-General; and

3.3.3 The Compensation Commissioner who is appointed by the Minister of Labour and who is accountable to the Director-General.
3.4 In as much as the programme is titled as such, it is commonly referred to as the Compensation Fund.

3.5 The Compensation Fund, operating within the confines of an organ of state\(^1\), is therefore subject to the investigative jurisdiction of the Public Protector.

4. BACKGROUND TO SYSTEMIC INVESTIGATION

4.1 A crucial component of an effective investigation is the identification of root causes or systemic deficiencies in the day-to-day functioning of organs of state, with the objective of assisting in eliminating problems that can impede service delivery. It is with this objective in mind that the Public Protector embarked on a systemic investigation into the Compensation Fund, after noting disturbing patterns of delays and complaints of inaccessibility.

4.2 In this regard, between January and April 2002, an Investigator at the OPP directed 13 compensation enquiries to the Compensation Fund in respect of complaints received at the national office.

4.3 When responses were not forthcoming, the Investigator called a meeting with Compensation Fund officials to discuss delays in attending to, responding to and finalising compensation claims.

4.4 During a meeting held on 24 May 2002, Mr J van der Merwe, Executive Manager: Claims at the time; highlighted the following challenges that the Compensation Fund experienced:

4.4.1 An inefficient claims processing system: The Compensation Fund received over 6 million documents per annum and opened 1 500 new files on a daily basis. It was explained that during 1999/2000, 242 126 accidents were...

4.4.2 Staff shortages: At the time, there were only 700 staff members dealing with the intake, signifying staff shortages. In this regard, the Compensation Fund was unable to attract more employees, as it was unable to compete with other market-players by offering better salary packages.

4.4.3 Electronic claims system: In 2001, a new electronic claims system was launched, with the expectation that it would make the processing of claims simpler.

4.4.3.1 The claims system was said to have the following benefits:

(a) All documents would be electronically scanned, indexed and stored on an electronic file;

(b) The Department’s provincial offices and other stakeholders, like employers and doctors would be able to access these files for enquiry purposes;

(c) The file would be available online and more than one person would be able to access it simultaneously;

(d) The system would reject duplicate document intake, thereby creating a more manageable file with less data; and

(e) The processing of claims would be simplified.

4.4.3.2 The Compensation Fund was experiencing problems with the system, which worked slowly and took too long to access. It was explained that even then, it did so on a page-by-page basis, shutting down before the entire file could be viewed. The Compensation Fund was being flooded with documents from external sources, like claimants, employers and doctors, thereby
exacerbating delays in dealing with claims. In order to address these problems, the producer of the system was called upon to investigate the matter.

4.5 The Compensation Fund decided to undertake a full work-study audit to investigate all possible failures in the organisation of the office that contributed to the delays experienced.

4.6 On 19 June 2003, the Public Protector subpoenaed the previous Compensation Commissioner, Ms S W Magojo, to give explanations for the root causes of delays experienced by the Compensation Fund in dealing with objections to Compensation Fund decisions. Ms Magojo reported as follows:

4.6.1 The number of objections had increased by almost 50% between the years 2002 and 2003, attributed to the fact that claimants had become more aware of their legal rights regarding compensation and because of an increase in claims relating to post traumatic stress disorder;

4.6.2 The increase was stretching the resources of the Compensation Fund, and although every effort had been made to process objections timeously, it was not possible to succeed in all cases;

4.6.3 More staff had been allocated to the legal section of the Compensation Fund, together with the appointment of additional presiding officers and assessors; and

4.6.4 The Compensation Fund was still busy with an investigation into its structure, systems and processes in order to consider restructuring the office and to address all areas causing delays in the processing of claims and objections.

4.7 In 2002, the national office of the OPP received 127 complaints for investigation from injured employees and/or their legal representatives/
representatives from community based organisations. Amongst others, complaints were received from Ms S F Grobler, Mr K H Davel and Mr N H de Villiers. In 2003, 2004 and 2005, 77 complaints, 43 complaints and 19 complaints respectively were received from, amongst others, Mr S J Baleni and Mr D Palm.

4.8 The bulk of the complaints related to allegations of undue delay and/or prejudice by the Compensation Fund in assessing, processing and finalising claims.

4.9 In as much as there appeared to be a reduction in the number of complaints received, the Public Protector decided to embark on a systemic investigation as a result of the following factors:


4.9.2 Issues surrounding interpretation and implementation of certain provisions of COIDA, read together with the Constitution and the Promotion of Administrative Justice Act, 2000 (PAJA) required dialogue;

4.9.3 Issues surrounding inconsistent application or non-implementation of the provisions of PAJA when finalising claims required consideration;

4.9.4 Issues surrounding access by members of the general public to the Compensation Fund when making enquiries required consideration; and

4.9.5 From time to time, media reports regarding allegations of undue delay in assessing, processing and finalising claims had come to the attention of the Public Protector.
5. OVERALL LEGAL FRAMEWORK OF THE INVESTIGATION

5.1 The Constitution

5.1.1 The preamble provides the contextual background to the Constitution, having been adopted to:

5.1.1.1 Establish a society based on social justice and fundamental human rights; and

5.1.1.2 Improve the quality of life of all citizens.

5.1.2 Section 27(1)(c) of the Constitution provides that everyone has the right of access to social security, including appropriate social assistance.

5.1.3 The Constitution however, does not define the term: “social security”, except to mention that it incorporates a right to social assistance.

5.1.4 This is confirmed by Moore et al² who indicate that a uniform definition of the concept “social security” is neither existent in South African nor international law.

5.1.5 From the point of view of the Constitution therefore, it is unclear whether a claimant would be in a position to assert entitlement to a right to social security in the context of a claim for compensation arising from a work-related injury or disease.

5.1.6 Other provisions that are relevant to the investigation are section 195 of the Constitution, relating to the basic values and principles governing public administration and section 33 of the Constitution, relating to the right to just administrative action.

5.2 COIDA

5.2.1 According to the White Paper for Social Welfare\(^3\), the underlying principle of social security is the provision of adequate economic and social protection to persons during unemployment, ill health, widowhood, disability and old age, either through contributory or non-contributory schemes.

5.2.2 Social security is commonly understood to include both social insurance and social assistance. According to Moore et al\(^4\), social insurance encapsulates principles of compulsory insurance initiated by the state and financed by shared contributions between employer and employee (as is the case with unemployment insurance). Other examples of social insurance include pension and compensation payable in respect of work-related injuries (financing of this scheme is carried by employers alone). In this regard, the Department has categorised COIDA under the programme: social insurance\(^5\).

5.2.3 It can therefore be interpreted that the right to have access to social security as provided for in section 27(1)(c) of the Constitution includes the right to have access to social insurance in the form of workers’ compensation.

5.2.4 Social insurance in the form of compensation operates within the framework of COIDA.

5.2.5 COIDA provides for compensation in respect of disablement or death caused by occupational injuries or diseases sustained or contracted by employees within the course of employment in respect of the following applicable benefits:

5.2.5.1 Temporary disablement

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(a) Temporary disablement comprises 75% of an employee's monthly earnings, up to a prescribed maximum amount. The employer is liable to pay the employee compensation for the first three months of the accident, and will be refunded by the Compensation Fund. In terms of section 47(5)(a) of COIDA, payments in respect of temporary disablement take place for as long as the disablement continues, but not for a period exceeding 24 months. In terms of section 47(6) of COIDA, if the disablement continues for more than 24 months, the Director-General may treat it as a permanent disablement.

(b) Section 48(1) of COIDA provides for the expiry of a right to compensation for temporary disablement:

(i) Upon the termination of such disablement or at the resumption of work upon which an employee was employed at the time of the accident, or at the resumption of any work by an employee at the same or greater earnings; or

(ii) If an employee is awarded compensation in respect of permanent disablement.

(c) According to section 48(2) of COIDA, the Compensation Fund can again award compensation for temporary disablement (commonly referred to as the re-opening of a claim) where:

(i) The employee’s disablement recurs or deteriorates; or

(ii) Further medical treatment is required necessitating further absence from work. However, this is subject to proof that the treatment will reduce the employee's disablement.

5.2.5.2 Permanent disablement: Assessment for permanent disablement is calculated in percentage form; for example, a claimant can be assessed at
5% permanent disablement. Compensation where the degree of disablement is 30% or less takes the form of a lump sum payment, based on 15 times the employee's monthly earnings, up to a prescribed maximum amount. If the degree of disablement is 31% or more, compensation takes the form of a monthly pension, payment of which expires at the end of the month when the employee dies.

5.2.5.3 Compensation where an employee dies

(a) A widow or widower is entitled to a lump sum payment as well as a monthly pension;

(b) Each child under the age of 18 years is entitled to a monthly pension; and

(c) Each child over the age of 18 years (physically or mentally handicapped and unable to earn an income or engaged with secondary or tertiary education) is entitled to a monthly pension.

(d) Burial expenses are also payable.

5.2.5.4 Medical expenses: All reasonable medical expenses incurred by or on behalf of an injured employee is payable.

5.2.5.5 Transport costs: The reasonable expenses incurred for the conveyance of an injured employee to a hospital, doctor or to his/her residence is payable.

5.2.6 Section 56 of COIDA provides for the payment of increased compensation due to the negligence of an employer.

5.2.7 In terms of section 91(1) of COIDA, any person affected by a decision of the Director-General may within 180 days after such decision, lodge an objection in the prescribed manner with the Compensation Commissioner. COIDA fails to define what constitutes a day, when calculating the 180-day period.
5.2.8 In terms of the Interpretation Act, 1957, calculation of the number of days takes place exclusively of the first day and inclusively of the last, unless the latter falls on a Sunday or public holiday, in which case time is calculated exclusively of the first day and exclusively of every such Sunday or public holiday.

5.3 The Public Service Act, 1994 (Proclamation 103 of 1994, as amended) and the Public Service Regulations, 2001

5.3.1 The Public Service Act, 1994 (Proclamation 103 of 1994)(Public Service Act) provides, amongst others, for the organisation and administration of the public service of the Republic of South Africa.

5.3.2 Section 7(3)(b) of the Public Service Act provides that the head of a department shall be responsible for the efficient management and administration thereof, including the effective utilisation and training of staff. In terms of Schedule 1 of the Public Service Act, the head of a department occupies the rank of Director-General.

5.3.3 Section 41(1)(d) of the Public Service Act provides that the Minister of Public Service and Administration may regulate on the management of matters regarding conduct, including a Code of Conduct, with which officers and employees of a particular department must comply.

5.4 The White Paper on Transforming Public Service Delivery, 1997

5.4.1 The White Paper on Transforming Public Service Delivery, 1997 (White Paper) provides a policy framework and implementation strategy for the transformation of public service delivery. In this regard, national and provincial departments are called upon to make service delivery a priority, in line with the principles of Batho Pele.

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5.4.2 The issue of service delivery and the related principle of Batho Pele are not independent, isolated, ideological concepts, but linked inextricably to the basic values and principles governing public service, as contained in section 195 of the Constitution.

5.5 PAJA

The purpose of PAJA is to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and the right to written reasons, as contemplated in section 33 of the Constitution, with the aim of promoting an efficient administration and a culture of accountability, openness and transparency regarding the performance of public functions.

5.6 The Public Finance Management Act, 1999

5.6.1 The purpose of the Public Finance Management Act, 1999 (PFMA) is to regulate financial management in the national and provincial governments and to ensure that all revenue, expenditure, assets and liabilities are managed efficiently and effectively, with the object of securing transparency, accountability and sound management principles.

5.6.2 In terms of section 3, the PFMA applies to departments, with the head of department being the accounting officer.

5.6.3 Section 38(1) of the PFMA provides that accounting officers:

5.6.3.1 Must ensure that departments have and maintain effective, efficient and transparent systems of financial and risk management and internal control; and

5.6.3.2 Are responsible for the effective, efficient, economical and transparent use of resources of the department.

5.6.4 Section 45 of the PFMA provides that an official of a department:
5.6.4.1 Must ensure that the system of financial management and internal control established for a particular department is carried out within the area of responsibility of that official; and

5.6.4.2 Is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official’s area of responsibility.

6. THE INVESTIGATION

6.1 The investigation was conducted in terms of sections 6 and 7 of the Public Protector Act and comprised the following:

6.1.1 Meetings with the previous Compensation Commissioner (Ms S W Magojo) and other officials of the Compensation Fund;

6.1.2 Assessment of documents and information supplied in respect of the investigation;

6.1.3 Evaluation of the legal framework pertaining to the investigation, to include research of applicable legislation, international instruments, policy documents, case law and literature pertaining to social security; and

PART B: ALLEGATIONS OF LACK OF TRANSPARENCY AND UNDUE DELAY IN PROCESSING AND FINALISING COMPENSATION CLAIMS

1. CASE STUDY 1: MS S F GROBLER

1. THE COMPLAINTS

1.1 Ms S F Grobler approached the OPP with the following allegations regarding an occupational injury that she sustained on 28 August 1997:

1.1.1 The Compensation Fund failed to inform her of its decision regarding liability for her original claim for compensation, causing her to suffer prejudice as a result of legal action that was taken against her for failing to pay an account; and

1.1.2 The Compensation Fund unduly delayed in finalising her request to have her claim re-opened.

2. BACKGROUND TO THE COMPLAINTS

2.1 On 28 August 1997, Ms Grobler sustained back injuries whilst on duty. The accident was duly reported and all documents supporting the claim were lodged with the Compensation Fund. According to Ms Grobler, it failed to report on the outcome of the original claim.

2.2 As a result of continued pain, she underwent an operation on 23 September 1999. In this regard, on 11 October 1999, her doctor submitted a request to the Compensation Fund to have her claim re-opened. In as much as Ms Grobler’s medical aid paid for the operation, she was of the view that the Compensation Fund was liable to refund her on the basis that the operation was necessitated as a result of the work-place injury. She alleged that her doctor re-sent the request for re-opening on 1 February 2000 when no response was received.
2.3 In addition to other medical expenses, Ms Grobler received two accounts totalling R4 479.08 for treatment received, being R1 304.48 (incurred on 29 July 1999) and R3 174.60 (incurred on 21 December 2000). It is unclear whether her medical aid declined responsibility for the payment of these accounts.

2.4 She failed to explain what transpired between February and December 2000 regarding her request for re-opening. She indicated that during January 2001, her doctor contacted her regarding non payment of an account. In this regard, she contacted the Compensation Fund in order to find out what had transpired regarding her request for re-opening.


2.6 On these occasions, she allegedly spoke to the following officials at the Compensation Fund: Vincent, Ms Otto, Ms Gerber, Ms Myburg, Ms Stadler, Ms Snippe, Ms Visagie, Lea and Ms Swanepoel. In all instances, she was allegedly informed that the file would be requested (presumably from the archives) and that a report-back would be made to her. She maintained that this was never done.

2.7 Ms Grobler allegedly visited the Compensation Fund personally on 15 August 2001. According to her, she learnt for the first time from Ms Swanepoel that her original claim for compensation had been rejected. She alleged that Ms Swanepoel undertook to furnish her with a written explanation regarding the decision.

2.8 On her understanding, the Compensation Fund declined to pay for the two accounts because they were incurred two years after the original claim was
lodged. Ms Grobler apparently pointed out to Ms Swanepoel that the Compensation Fund’s understanding regarding the one account was incorrect, in that it was incurred within the two year period of the claim (between 27 August 2007 and 29 July 1999). Ms Swanepoel allegedly undertook to have the account paid.

2.9 The doctor subsequently issued summons against Ms Grobler in February 2002, as payment of the account remained outstanding.

3. THE COMPENSATION FUND’S RESPONSE

3.1 Allegation of failure to inform Ms Grobler of its decision regarding liability for her original claim for compensation

3.1.1 The Compensation Fund informed the OPP that according to medical evidence, Ms Grobler suffered back pain, where after she was operated on 1 September 1996. The Compensation Fund could find no evidence that the back injury was sustained as a result of an occupational injury.

3.1.2 The Compensation Fund received notification that she was injured on duty on 27 August 1997, sustaining temporary aggravation of a pre-existing back condition. It accepted liability for the payment of compensation and reasonable medical expenses, but only for soft tissue injury (temporary aggravation of a pre-existing back condition) and only up to 21 November 1997. According to its records, Ms Grobler received active medical treatment until 21 November 1997. At this stage, medical reports showed that any pain that she may have been experiencing could only have arisen as a result of screws and rods inserted during 1996, and not as a result of the 1997 work-place injury.

3.1.3 Payment of R3 509.65 in respect of temporary disablement was made to Ms Grobler’s employer in November 1997, in refund of the amounts that the employer paid to her whilst she was off duty.
3.1.4 The Compensation Fund did not accept liability for the payment of compensation and medical expenses after 21 November 1997, as it was not satisfied that the treatment received was necessitated as a result of the work-related accident. In this regard, only medical expenses incurred prior to this date were approved for payment.

3.1.5 The Compensation Fund was unable to award permanent disablement as the medical evidence did not substantiate a finding that her back injuries for which she was operated upon were sustained as a result of the 1997 accident.

3.1.6 According to the Compensation Fund, Ms Grobler contacted its office telephonically on 23 March 1998 and 18 August 1998 when she was informed that no further compensation would be payable. It was maintained that on 18 August 1998, Ms Grobler requested its Ms H M Stadler to provide confirmation of their conversation to the facsimile number: 012-323 0856.

3.1.7 The Compensation Fund indicated that on 21 August 1998, the following facsimile was sent to Ms Grobler, communicating its decision regarding her original claim for compensation:

FAKS BOODSKAP

"Vir aandag: Mnr Grobler

...

U Faksnommer: 323 0856

...

Werknemer: Susan Grobler
Datum van Ongeval: 97-8-27
Insake: SkadeLosstelling

Hiermee moet ek u meedeel dat u tans geen aktiewe behandeling ondergaan nie dus word geen verdere tydelike arbeidsongeskiltheid betaal nie.

Aangesien u reeds 'n rugoperasie voor die besering aan diens opgedoen het en dieselfde vlakke nou geopereer was, is u nie geregtig op vergoeding vir blywende arbeidsonge-
3.1.8 According to the Compensation Fund, the facsimile was inadvertently addressed to Mr Grobler. It was maintained however, that it was intended for and referred to Ms Grobler.

3.1.9 The Compensation Fund indicated as follows regarding an employee’s right to information for injuries sustained in a work-related accident:

3.1.9.1 In terms of COIDA, the employer registers with the Compensation Fund in order to obtain employee insurance coverage for injuries or occupational diseases sustained within the course of employment;

3.1.9.2 The employer pays the annual contributions arising out of Compensation Fund assessments;

3.1.9.3 When work-place accidents arise and are reported, the employer is responsible for making payment for the first three months whilst the Compensation Fund is still processing the claim;

3.1.9.4 **COIDA does not place an obligation on it to give information to employees regarding claims, as it is assumed that employers will provide them with status reports;**

3.1.9.5 Every time a new claim is registered, liability accepted and payment made, this administrative action is communicated to the employer, as it is the employer who is the policy-holder. Some administrative decisions, like
repudiations, are communicated to employees, employers and medical service providers and in this respect, all enquiries are responded to, irrespective of who is enquiring; and

3.1.9.6 With the advent of the Constitution, the issue of transparency is taken into account and employees are given information **should they request it.**

3.2 **Allegation of undue delay in finalising Ms Grobler's request to have her claim re-opened**

3.2.1 The Compensation Fund indicated that in July 1999, Ms Grobler's doctors referred her to an orthopaedic surgeon, who suggested doing surgery to address a medical condition emanating from the procedure that was performed in 1996.

3.2.2 The operation was performed on 23 September 1999. According to the Compensation Fund, the doctor only requested re-opening of the claim on 11 October 1999, that is, after the operation was performed. In the request, he was apparently unable to say whether there had been any improvement in Ms Grobler's medical condition.

3.2.3 According to the Compensation Fund, authorisation for treatment in the form of an operation is granted when likely to produce an improved medical condition to the extent of reducing disablement. It indicated that the costs of diagnosis and exploration are not paid for and explained that although doctors are in a position to provide unlimited medical treatment to their patients; restrictions and statutory limitations are placed on compensation. The opinion was held that Ms Grobler's doctor may have been aware that the Compensation Fund would not have approved re-opening for the procedure, but decided to continue with the operation anyway.

3.2.4 The Compensation Fund indicated that it was unable to pay medical accounts incurred in respect of the operation performed on 23 September 1999 as Ms Grobler's doctor failed to justify conducting the operation.
II. CASE STUDY 2: MR S J BALENI

1. THE COMPLAINT

Mr S J Baleni approached the OPP with an allegation that the Compensation Fund was taking an unduly long time to finalise his claim for compensation after he was shot whilst on duty on 28 May 1999.

2. BACKGROUND TO THE COMPLAINT

2.1 After the accident, Mr Baleni was diagnosed with left shoulder injuries and post traumatic stress disorder.

2.2 The accident was duly reported and all documents supporting a claim for compensation were lodged with the Compensation Fund. In this regard, two claim numbers were allocated to him, being: 99/108231 and 99/090025.

2.3 He indicated that the Compensation Fund accepted liability for the payment of compensation and reasonable expenses in respect of the claim for post traumatic stress disorder (claim number 99/108231). In this regard, he was receiving a monthly pension.

2.4 According to Mr Baleni, notwithstanding numerous requests, the Compensation Fund failed to finalise his claim for bodily injuries under claim number 99/090025.

3. THE COMPENSATION FUND’S RESPONSE

3.1 The Compensation Fund responded as follows regarding the complaint:

3.1.1 It was indicated that because the employer incorrectly submitted two Employers Reports of the Accident in respect of the two separate injuries sustained by Mr Baleni, duplicate claims were opened with two separate claim numbers.
3.1.2 This was corrected and claim number 99/090025 was cancelled, leaving claim number 99/108231 for a single combined claim.

3.1.3 Liability for the payment of compensation and reasonable medical expenses was accepted for both injuries. The Compensation Fund approved payment of R5 169.01 in respect of temporary disablement on 17 February 2000; being R1 318.90 favour of the employer and R3 850.11 in favour of Mr Baleni.

3.1.4 Mr Baleni was awarded 55% permanent disablement for loss of range of movement of his left shoulder and post traumatic stress disorder.

3.1.5 No further compensation was payable and the claim was regarded as finalised.

3.2 Upon receiving the response, the OPP requested further particulars from the Compensation Fund, to include the following:

3.2.1 Whether information pertaining to the erroneous opening of two separate claims and the subsequent correction thereof was communicated to Mr Baleni, in order to impress upon him that he was not entitled to payment in respect of two separate claims; and

3.2.2 Whether he was informed of his right to object to the Compensation Fund’s assessment of his claims (where he wished to do so) in terms of section 91 of COIDA, and if so, whether he was provided with the WG 29 objection form for completion.

3.3 The Compensation Fund responded as follows:

"...[I] have to advise that no previous correspondence was sent to Mr Baleni.... Kindly take note that correspondence is normally sent out when an employee or representative enquires regarding the progress/outcome of a claim. In this case the employee did not make any

8 Only the relevant portions of the Compensation Fund’s response is captured.
enquiries directly to the Commissioner. Therefore, he was not informed of the outcome of the claim.

(Emphasis added)

[I] have also to advise that the employee has a right to object against any decision taken by the Commissioner, but it is not the Commissioner’s duty to provoke the employee to do so. Mr Baleni was well aware of his percentage disablement as he is receiving a monthly pension since 10 December 2002. If he was not satisfied with his percentage of permanent disablement, it was his duty to object against [the] decision. If he informed the office of

sent to him.

(Emphasis added)⁹

3.4 The gist of the response is interpreted as follows:

3.4.1 Mr Baleni was not notified of the progress or outcome of his claim;

3.4.2 Progress/outcome reports are only sent to employees (or other persons) when enquiries are made for such reports;

3.4.3 For enquiries to be responded to, they must be forwarded directly to the Compensation Commissioner;

3.4.4 In as much as an employee has a right to object to a decision, it is not the Compensation Commissioner’s duty to provoke such person to exercise such right;

3.4.5 Mr Baleni must have been aware of the outcome of his claim, as he was receiving a monthly pension. In this respect, he was well within his right to object to the decision taken; and

3.4.6 Objection forms (WG 29 forms) are only sent to persons when they have communicated an intention to object to a decision taken.

⁹ The thread of this statement will be taken up later in the report, when discussing the Palm matter.
III. CASE STUDY 3: MR D PALM

1. THE COMPLAINTS

1.1 Mr D Palm approached the OPP with the following allegations regarding an occupational injury that he sustained on 19 April 2003:

1.1.1 The Compensation Fund prematurely assessed him at 35% permanent disablement whilst he was still entitled to receive compensation in respect of temporary disablement; and

1.1.2 The Compensation Fund unduly delayed in providing him with authorisation to have an MRI scan taken so that his doctor could assess ways of stemming further deterioration of his medical condition.

2. BACKGROUND TO THE COMPLAINTS

2.1 On 19 April 2003, Mr Palm sustained back injuries whilst on duty. As a result of the accident, he underwent an operation on 15 May 2003.

2.2 The Compensation Fund accepted liability for the payment of compensation and reasonable medical expenses on 9 September 2003. In this respect, it made the following payments:

2.2.1 Temporary disablement in the amount of R34,487.70 in favour of the employer, in respect of advances that the employer paid to Mr Palm whilst he was off duty. The balance of R74,267.33 was paid to Mr Palm, bringing the total payment to R108,755.03; and

2.2.2 Permanent disablement assessed at 35%, based on two medical reports furnished on 18 and 31 March 2004. In this regard, Mr Palm was awarded a monthly pension on 14 June 2004 (payable from 31 March 2004). His medical condition was required to be reviewed one year after the award was made.
2.3 According to Mr Palm, he received notification of the award from the Compensation Fund on 7 July 2004, to include information on the degree of disablement, the pension number and the monthly pension amount. On 8 July 2008, he forwarded a letter to the Compensation Fund, “objecting” to the decision taken to the following effect:

“...Your decision to find me 35% disabled and to place me on pension is a unilateral decision and is unfounded and a direct violation of [COIDA] and there [is] sufficient proof on record that you have not done your duty to us. Furthermore, it is a gross violation of my constitutional rights.

You have deprived me of essential medical treatment, which could have been beneficial to my possible recovery, by wilfully withholding medical treatment from me.

....

Your decisions and actions are contradictory to [section] 47 of the Act and I therefore refuse to accept it and will do everything possible to prevent any further exploitation and being deprived [of] my right”.

(Emphasis added)

2.4 On 12 July 2004, he forwarded a letter to the Compensation Fund “serving as an official appeal for consideration under the provisions of [section] 56(1) of COIDA” which he trusted would enjoy urgent attention. In this regard, he expressed the view that he was entitled to increased compensation on the basis that the accident was caused by negligence attributable to his employer.

2.5 Mr Palm continued submitting progress medical reports to the Compensation Fund on the basis that his medical condition was deteriorating and in support of his contention that the Compensation Fund prematurely awarded him permanent disablement. On 7 October 2004, he stated as follows: “I furthermore would like to have it placed on record that, as to date, I have received absolutely NO reply to any of the outstanding issues on record”, which statement can be taken to include his “objection” to the decision awarding him 35% disablement and his “application for increased compensation” in terms of section 56(1) of COIDA.
3. THE COMPENSATION FUND’S RESPONSE

3.1 Allegation of improper assessment of permanent disablement at 35%

3.1.1 The Compensation Fund contended as follows regarding the allegation that it improperly and prematurely awarded Mr Palm permanent disablement:

3.1.1.1 In as much as COIDA provided for the payment of temporary disablement for as long as this form of disablement continued but not for a period exceeding 24 months, this did not mean that the Compensation Fund would automatically pay compensation and medical costs for two years in each and every claim, but only if necessary and only for as long as active treatment was administered to reduce the disablement;

3.1.1.2 Taking into account that COIDA defined permanent disablement to mean the permanent inability of an employee to perform any work as a result of a work-related accident, the Compensation Fund sought to further define the concept to exist in the presence of the following circumstances: “symptomatic treatment of pain” (not active treatment); “disability can no longer be reduced”; “curative treatment is no longer envisaged” and “medical condition has not stabilised”;

3.1.1.3 Mr Palm was properly awarded permanent disablement based on two medical reports received on 18 and 31 March 2004 respectively to the effect that he “would not recover from structural neurological damage”, “the only means of making his life bearable [being] symptomatic treatment for pain control”;

3.1.1.4 The fact that his medical condition had not stabilised was one of the reasons why it was recommended that his claim should be reviewed in March 2005, where provision is made in COIDA for permanent disablement to be increased if a condition deteriorated (or reduced if a condition improved); and
3.1.1.5 Mr Palm’s right to compensation in respect of temporary disablement expired when he was awarded permanent disablement.

3.1.2 The Compensation Fund adopted the following stance regarding his dissatisfaction with its decision awarding him 35% permanent disablement and his appeal that it consider his ‘application’ for increased compensation in terms of section 56(1) of COIDA:

3.1.2.1 He was at liberty to lodge an objection in the prescribed manner, in terms of section 91 of COIDA. A WG 29 objection form was attached for completion by Mr Palm. Mr Palm was advised to return the completed objection form no later than 180 days from the date of the decision; and

3.1.2.2 It was not in receipt of a properly submitted application for increased compensation from Mr Palm, which should have been submitted on a WG 30 form. The form was attached for completion.

3.1.3 The OPP forwarded Mr Palm’s completed objection and application for increased compensation to the Compensation Fund on 17 March 2005. On 7 April 2005, the OPP provided the Compensation Fund with additional information for insertion on the objection form. On 25 May 2005, the Compensation Fund informed the OPP that it could find no record of the objection having been submitted. The OPP again forwarded the objection on 27 May 2005.

3.1.4 On 8 June 2005, the Compensation Fund informed the OPP that the objection and application for increased compensation were defective as their times for submission had prescribed.

3.1.5 The Compensation Fund indicated that the objection should have been received by no later than 21 December 2004.

3.1.6 With regard to the application for increased compensation, it was indicated that in terms of section 56(3)(a) of COIDA, the application should have been
lodged in the prescribed manner within 24 months of the date of the accident. It was explained that in exceptional circumstances, the Compensation Commissioner could exercise discretion by extending the period by a further 12 months, on good cause shown. In this regard, Mr Palm was requested to furnish reasons, on affidavit, why the application was not lodged timeously.

3.1.7 Based on the provisions of section 91 of COIDA regarding the prescription period for the lodging of objections, the OPP requested the following information from the Compensation Fund:

3.1.7.1 A copy of the decision awarding Mr Palm 35% disablement;

3.1.7.2 The date when the decision was made and forwarded to him;

3.1.7.3 An indication whether he was advised of his right to object to the finding within the prescribed 180-day period;

3.1.7.4 An indication whether he was provided with a copy of a WG 29 objection form in order to facilitate submission; and

3.1.7.5 The date when notification was forwarded to him of his right to apply for increased compensation in terms of section 56 of COIDA within 24 months of the date of the accident prior to 3 January 2005 (that is, the date when the Compensation Fund informed the OPP of the position).

3.1.8 The Compensation Fund provided the OPP with a copy of the award, in the format of a W Ac 15/1 form. The OPP was informed that the decision awarding permanent disablement was taken on 14 June 2004.

3.1.9 The Compensation Fund indicated that Mr Palm was not informed of his right to object as it was not seen as an infringement of his right to compensation in terms of COIDA. It was explained that its office quoted information pertaining to a right to object in letters of repudiation, where
liability was not accepted. In view of the above, Mr Palm was not provided with a copy of the WG 29 objection form for completion. Finally, it was indicated that section 56 of COIDA did not confer a duty on the Compensation Commissioner to inform an employee whether or not to proceed with an application for increased compensation.

3.2 Allegation of undue delay in providing Mr Palm with authorisation to have an MRI-scan taken

3.2.1 On 1 March 2004, an official at the Compensation Fund informed Mr Palm as follows regarding his doctor’s request for authorisation to conduct an MRI scan:

“…Ms Willemsen therefore referred the matter to our medical section to inform you of their decision. I also referred the copy I received last week to Ms Njozela at our medical section to advise you. She advised me that this office does not pay for such investigations, you must pay it out of your own pocket, and she will inform you accordingly”.

(Emphasis added)

3.2.2 On 23 June 2004, the same official indicated as follows:

“…On 14 January 2004, Dr … said that he required Mr Palm to undergo a further MRI scan. During March 2004, Ms Njozela faxed a letter to Dr … confirming that this office will pay the reasonable costs of the scan. …”.

(Emphasis added)

3.2.3 On 22 November 2004, the OPP requested a copy of Ms Njozela’s facsimile that she allegedly addressed to Mr Palm’s doctor in March 2004, authorising him to conduct the MRI scan, as he informed us that authorisation was only granted on 12 October 2004.

3.2.4 On 3 January 2005, the Compensation Fund submitted that authorisation was only granted to the doctor on 12 October 2004, and not during March 2004, as stated earlier.
IV. EVALUATION

1. The Compensation Fund’s responses in the afore-mentioned case studies raise critical questions regarding the legal position of an injured employee in respect of the right to information and the Compensation Fund’s role regarding the corresponding duty to inform, which right and obligation co-exist mutually. In other words, no right to information can exist where there is no legal obligation to inform.

2. CASE STUDY 1: THE GROBLER MATTER

2.1 The Compensation Fund paid the following in respect of Ms Grobler:

2.1.1 Temporary disablement; and

2.1.2 Medical expenses of R15 016.33 incurred up to 21 November 1997 (paid directly to her medical suppliers).

2.2 It was unable to award Ms Grobler permanent disablement as liability was only accepted in respect of temporary aggravation of a pre-existing back condition. In this regard, any permanent disablement that was likely to have been diagnosed was regarded as having existed prior to her work accident, thus precluding the Compensation Fund from assuming liability.

2.3 The Compensation Fund is assumed to have accepted liability for the payment of compensation and reasonable medical expenses on or before 6 November 1997 as they approved payment for temporary disablement on 6 November 1997.

2.4 There is no indication that it informed Ms Grobler of the outcome of her claim between 28 August 1997 and 6 November 1997 (when payment for temporary disablement was approved). Again, there is no indication that it informed her of the outcome of her claim between 7 November 1997 and 21 November 1997 (the date when she last received active medical
treatment and the date up to which reasonable medical expenses was paid). Lastly, there is no indication that the Compensation Fund informed her of the outcome of her claim between 22 November 1997 and 23 March 1998 (she was apparently verbally informed of the outcome of her claim on 23 March 1998).

2.5 The Compensation Fund maintains that COIDA does not place an obligation on its office to give information pertaining to claims to employees (based on the assumption that employers will do this) unless specific enquiries are made.

2.5.1 COIDA

2.5.1.1 Strictly speaking, COIDA does not provide for an automatic right to information in respect of injured employees.

(a) Section 40(3) of COIDA provides as follows:

"The Director-General shall, at the request of an injured employee or his employer, furnish such information as the Director-General may deem necessary to enable that employee or employer to comply with the provisions of this Act".

(Emphasis added)

(b) In other words, even though section 40(3) of COIDA provides an injured employee with the right to information, the right is not automatic, but only comes into effect once the employee has requested such information. In addition, an employee's right to information is limited only to what the Director-General may deem necessary in order to enable the employee to comply with the provisions of COIDA.

(c) The converse will have the same effect; meaning that an automatic obligation by the Compensation Fund to give information will only
come into effect once an employee has requested such information and the Director-General has deemed it necessary to provide it.

2.5.1.2 The OPP holds the view however, that by implication, COIDA does make provision for an obligation by the Compensation Fund to furnish employees with information pertaining to claims, by virtue of the following:

(a) COIDA does not place an obligation on employers to give claim-related information to employees.

(i) It is arguable in this respect that the Compensation Fund has a greater duty of care in promoting workers’ rights as human rights, and that it would be quick to assume responsibility for ensuring that injured employees are given basic information automatically against which to exercise their rights, especially regarding issues that directly affect their interests.

(ii) For the Compensation Fund to adopt a stance that an employer would in any event provide information to an employee is to assume the role of an unaffected third party. The Compensation Fund is not an unaffected third party regarding the provision of social security in the form of workers compensation; it provides a channel within which COIDA operates, the rationale for removal of workers compensation from the arena of common law to statutory regulation as attested to by section 35 of COIDA which provides as follows:

“No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death”.

(Emphasis added)

(b) Section 38(1) of COIDA provides that written or verbal notice of an accident must be given by an employee to an employer and may be
given by an employee to the Compensation Commissioner. In practice, an employee exercises the right to report directly to the Compensation Commissioner where an employer has failed to report the accident. In such a case, the Compensation Fund is obliged to deal directly with a reporting employee.

(c) Section 91(1) of COIDA provides as follows:

"Any person affected by a decision of the Director-General ... may within 180 days after such decision, lodge an objection against that decision with the Commissioner in the prescribed manner."

(Emphasis added)

(i) Section 91 does not provide for an affected person (usually an employee) to lodge an objection with an employer, but directly with the Compensation Commissioner.

(ii) Objection proceedings are, in terms of section 91(5)(b) of COIDA, afforded the same status as Magistrates’ Court civil proceedings. Court proceedings are initiated by way of formal notification (in the form of pleadings) to parties having legal standing. The view is held that this is what section 91(1) of COIDA had in mind when directing affected parties to lodge objections with the Compensation Commissioner. An affected employee dissatisfied with a finding repudiating liability or with the amount of compensation awarded has no recourse to an employer, only to the Compensation Fund, as it is not the employer who takes the administrative decision but the Compensation Fund itself (in the personage of the Director-General, Compensation Commissioner or any other person to whom decision-making has been delegated).

(iii) Irrespective of the party whose legal obligation it is to physically hand over this information, the fact is that an employee must be
apprised of the contents of a decision, in order to take an informed stand whether or not to object.

(iv) In other words; section 91(1) of COIDA places a legal obligation on someone to give information pertaining to a claim to employees. This could either be the employer or the Compensation Fund. It is submitted that section 91(1) of COIDA places the obligation on the Compensation Fund. The aim of the section is to provide a mechanism of redress regarding a decision; in this regard, it is the Compensation Fund that takes the decision, not the employer. The employer has no role to play regarding the administrative process of assessing, processing, adjudicating and finalising claims.

(v) The Compensation Fund’s assumption that an employer would inform an employee regarding the outcome of a claim is therefore, in the OPP’s view, misplaced.

2.5.2 The Constitution and PAJA

2.5.2.1 The Constitution is the supreme law of South Africa. Law or conduct that is inconsistent with it, is invalid and all obligations imposed by it must be fulfilled.

2.5.2.2 In terms of section 8 of the Constitution, the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.

2.5.2.3 Section 33(1) of the Constitution provides for the right to administrative action that is lawful, reasonable and procedurally fair. In terms of section 33(2) of the Constitution, anyone whose rights have been adversely affected by administrative action has the right to be given written reasons. Section 33 of the Constitution therefore, in no uncertain terms, provides for the right to information, and in the context of compensation, the right to information pertaining to claims.
2.5.2.4 Section 39(1)(a) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Section 39(2) of the Constitution provides that when interpreting any legislation, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

2.5.2.5 COIDA cannot be read in isolation therefore; interpretation thereof must accede to the supreme provisions of the Constitution, recalling in this respect that all law or conduct inconsistent with the Constitution is regarded as invalid. Interpretation of any Bill of Rights provision requires a purposive and value-laden approach consistent with the spirit of democracy, human dignity, justice and the concept of ubuntu.

2.5.2.6 In any question relating to the right to information and the duty to inform, regard must be had to the contents of the right to just administrative action as contained in PAJA.

2.5.2.7 For the purposes of this investigation, “administrative action” is defined as any decision taken or failure to take a decision by an organ of state when exercising a public power or performing a public function in terms of the Constitution or any legislation which adversely affects the rights of any person and which has a direct, external legal effect.

2.5.2.8 Section 3(1) of PAJA requires administrative action that materially and adversely affects the rights or legitimate expectations of any person to be procedurally fair.

2.5.2.9 In terms of section 3(2)(b) of PAJA, in order to give effect to the right to procedurally fair administrative action, an administrator must give a person:

a. Adequate notice of the nature and purpose of the proposed administrative action;
b. A reasonable opportunity to make representations;

c. A clear statement of the administrative action;

d. Adequate notice of any right of review or internal appeal, where applicable; and

e. Adequate notice of the right to request reasons in terms of section 5 of PAJA.

2.5.2.10 Section 5 of PAJA provides that any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date the person became aware of the action or might reasonably have been expected to have become aware of the action, request that an administrator furnish written reasons for the action. In other words, reasons must be given in writing.

2.5.2.11 According to the definition of “administrative action”, the decision taken must adversely affect the rights of a particular person.

(a) Decisions taken by the Compensation Fund repudiating liability for the payment of compensation can be regarded as administrative action.

(b) However, what of decisions accepting liability for the payment of compensation; is it possible to regard these decisions as administrative action?

(c) The view is held that such decisions do amount to administrative action, as it is not the acceptance or repudiation of liability that is at issue, but the amount of compensation that has been awarded. For example, an employee may wish to object to the amount of compensation that has been awarded, as he/she may regard it to be insufficient. In this respect, at an objection hearing, the employee
2.5.2.16 Ms Grobler indicated that on 15 August 2001, she visited the Compensation Fund where she learnt for first time that her claim for compensation and medical expenses had been rejected. The Compensation Fund denied this. It was maintained that she was informed of the outcome of her original claim for compensation, in writing, on 21 August 1998, after she was verbally informed of the position on 23 March 1998 and 18 August 1998.

2.5.2.17 Section 5 of PAJA provides that any person whose rights have been affected by administrative action and who has not been given reasons may, within 90 days after the date the person became aware of the action or might reasonably have been expected to have become aware of the action, request that an administrator furnish written reasons.

2.5.2.18 In terms of PAJA therefore, verbal notification to employees cannot be regarded as adequate. The OPP submits this to be the correct position. There is no guarantee that verbal notification will be fully explained by officials and whether, as a matter of course, employees are advised of available remedies should they be dissatisfied with decisions. The implications of legal or technical terminology are not readily understandable by everyone. Added to this, the retentive value of verbal communication is not always as enduring as information that has been conveyed in writing. All verbal notifications that the Compensation Fund may have made to Ms Grobler will therefore be disregarded.

2.5.2.19 According to the Compensation Fund, the first written notification was sent by facsimile on 21 August 1998. Even if the OPP was to accept that she was apprised of the Compensation Fund’s decision in writing on 21 August 1998, the following concerns are raised regarding the notification:

(a) It cannot be established when the facsimile was sent (an inserted date does not necessarily mean an actual sending date), whether receipt was acknowledged and the individual or organisation to
whom the number is allocated, as no facsimile report is attached to the document;

(b) The contents of the notification are found to be inadequate, as it does not assist Ms Grobler in fully understanding the administrative decision that was taken. In this regard, there is no distinction between the accepted and unaccepted portions of the claim and there is no indication as to the payments that were made, the payments that would not be made, the persons or suppliers to whom payments were made and the reasons for the payments; and

(c) Taking into account that a portion of the claim was rejected, there is no reference to available remedies regarding possible dissatisfaction with the decision.

2.5.2.20 In addition, the following is noted about the facsimile:

(a) The original claim appears to have been finalised on 31 November 1997, when the decision was taken that Ms Grobler did not sustain permanent disablement as a result of accident; and

(b) The facsimile is dated 21 August 1998, meaning that it was sent nine months after the original claim was finalised.

2.5.2.21 In as much as the Compensation Fund holds the view that it only has an obligation to report to employers (regarded as the actual policy holders for policies of social insurance) it failed to produce proof to the effect that Ms Grobler’s employer was informed of the outcome of the claim (so that, on its version, the employer could be placed in a position to communicate this information to the employee) at a date earlier than 21 August 1998.
2.5.2.22 Taking into account the OPP’s position that an obligation lies with the Compensation Fund to report to employees and taking into account the view that communication should be done in writing, there appears to be no reason why the Compensation Fund only informed Ms Grobler of the outcome of her claim nine months after it was finalised.

2.5.2.23 In addition, there is no indication that the Compensation Fund communicated to either Ms Grobler or her doctor its rejection of her request for re-opening, on the basis that there was insufficient medical justification for the operation performed on 15 September 1999.

3. **CASE STUDY 2: THE BALENI MATTER**

3.1 The stance taken in the Grobler matter is that an injured employee has a right to information and the Compensation Fund has a corresponding duty to provide information regarding the status and outcome of compensation claims.

3.2 In the Baleni matter, regarding the duty to provide information, the Compensation Fund indicated that correspondence is normally sent only when an employee makes enquiries regarding the claim (consistent with its stance in the Grobler matter).

3.3 Further, it indicated that because Mr Baleni did not make enquiries “directly to the Commissioner”, he was not informed of the outcome of his claim. In this respect, Mr Baleni informed the OPP as follows when lodging his complaint: “Despite numerous attempts to have this money paid to me as from 1999, no payment was ever made”.

3.4 The Compensation Fund’s statement gives the impression that it did receive Mr Baleni’s enquiries, but that because they were not directed to the Compensation Commissioner, they did not receive the necessary attention. If this interpretation is correct, then it would be interesting to hear how the Compensation Fund would justify ignoring a request for information merely
because it was not directed to the Compensation Commissioner or Director-General in person. Based on common sense, it is believed that the words: "Director-General", as appears in section 40(3) of COIDA should not be interpreted literally where this would amount to an absurdity. It could not have been the legislature's intention to expect the Director-General to respond to requests for information from injured employees. It is a well-known principle of law in the public service that certain powers and duties can be delegated or assigned. In terms of COIDA, delegation or assignment can take place either to the Compensation Commissioner or to officers or employees11.

3.5 It can be argued that the very award of a monthly pension to Mr Baleni was sufficient notification of the outcome of his claim, as the Compensation Fund has done when making the statement that:

"Mr Baleni was well aware of his percentage disablement as he is receiving a monthly pension since 10 December 2002".

3.6 Legally however, this is not the correct position. A compensation award can appear on a W Ac 15/1 form (awards appearing in other formats are not unusual), to include the following information:

3.6.1 Employee details (name, identity number, marital status, address, earnings);

3.6.2 Employer details (company name, registration number);

3.6.3 Accident details (date of accident, claim number, diagnosis); and

3.6.4 Details of the award (applicable legal provision relating to the award, degree of disablement, nature of the award, date of the award, payee name).

11 Section 3 of COIDA.