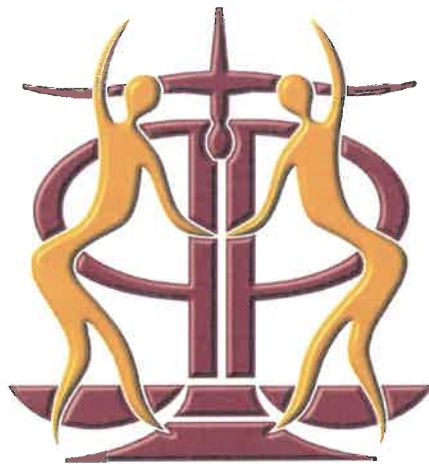


**CLOSING REPORT IN TERMS OF RULE 40(b) OF RULES RELATING TO
INVESTIGATIONS BY THE PUBLIC PROTECTOR AND MATTERS INCIDENTAL
THERE TO, 2018**



**PUBLIC PROTECTOR
SOUTH AFRICA**

File Number: 7/2- 005637/21

**INVESTIGATION INTO ALLEGATION OF FAILURE OR UNDUE DELAY BY THE
COMPENSATION FUND TO PROCESS AN OBJECTION LODGED IN TERMS OF
SECTION 91 OF THE COMPENSATION FOR OCCUPATIONAL INJURIES AND
DISEASES ACT 130 OF 1993**

CLOSING REPORT IN TERMS OF RULE 40(b) OF RULES RELATING TO INVESTIGATIONS BY THE PUBLIC PROTECTOR AND MATTERS INCIDENTAL THERETO, 2018 REGARDING AN INVESTIGATION INTO ALLEGATIONS OF FAILURE OR UNDUE DELAY BY THE COMPENSATION FUND TO PROCESS AN OBJECTION

1. INTRODUCTION

1.1 This is a closing report in terms of rule 40(b) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018*¹ (Public Protector Rules) as promulgated under section 7(11) of the Public Protector Act, 23 of 1994 (Public Protector Act).

1.2 Rule 40(b) of the Public Protector Rules provides that:

“Conclusion of complaint

40. A complaint is concluded under the following circumstances:

(a)...

(b) When the Public Protector reports his or her findings, point of view or directions in respect of an investigation to the complainant and the state institution concerned in terms of section 8(1) of the Act....”

2. THE COMPLAINT

¹ Published under Government notice No 945, Government Gazette 41903 of 14 September 2018 and Amended in Government Notice No 1047, Government Gazette 43758 dated 2 October 2020.

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- 2.1 The complaint was lodged with the Public Protector on 18 June 2021 on behalf of Mr Andre Djelatovic (the Complainant) against the Compensation Fund (CF) regarding allegations failure or undue delay to process an objection lodged in terms of section 91 of the Compensation for Occupational injuries and diseases act, 1993 (act 130 of 1993) (COIDA).
- 2.2 In essence it was alleged that:
- 2.2.1 The Complainant was working for Business Connexion Pty Ltd as an IT technician but was loaned out to another company that processed manganese where he was exposed to manganese from around 2010 until 2016. During this period he developed respiratory and neurological symptoms consistent with occupational diseases caused by manganese exposure.
- 2.2.2 The occupational disease was reported to the CF and the necessary medical reports submitted. The respiratory disease was assessed and he was awarded sixty percent (60%) permanent disability (PD) in terms of section 49(2) read with section 65 of COIDA resulting in pension for life according to schedule 4 of COIDA.
- 2.2.3 The more serious disease of neurological condition diagnosed by a Medical Specialist Neurologist as likely Cerebral Manganism was never assessed or given an award by the CF despite the CF having requested additional information from the Neurologist, which was submitted.
- 2.2.4 Around December 2019 an objection in terms of section 91 of COIDA was lodged against the failure or refusal by the CF to make a section 49(2) award for the neurological disease, which is an occupational disease in terms of COIDA. However the CF failed to rectify its default or set down the matter for the hearing as stipulated in section 91 (2) of COIDA.

- 2.3 The Complainant contends that the Cerebral Manganese is the more severe condition of the two occupational diseases and since he has already been awarded 60% PD, the combined occupational deceases renders him hundred percent (100%) PD.

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 The Public Protector is an independent constitutional body established under section 181(1) (a) of the Constitution of the Republic of South Africa, 1996 (Constitution) to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

- 3.2 Section 182(1) of the Constitution provides that:

“The Public Protector has power as regulated by national legislation –

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice,*
- (b) to report on that conduct ; and*
- (c) to take appropriate remedial action”.*

- 3.3 Section 182(2) of the Constitution directs that the Public Protector has additional powers and functions prescribed by legislation.

4 ISSUES IDENTIFIED FOR INVESTIGATION

- 4.1 **Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:**

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- 4.1.1 Whether the CF failed or unduly delayed to process an objection lodged in terms of section 91 of COIDA, and if so, whether the conduct amounts to maladministration and improper conduct in terms of the Constitution and section 6(4)(a)(i) of the Public Protector Act

5 THE INVESTIGATION

5.1 Methodology

- 5.1.1 The investigation into the complaint is conducted in accordance with section 182(1) of the Constitution, read with section 7 of the Public Protector Act.
- 5.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine the format and procedure to be followed in conducting any investigation with due regard to the circumstances of each case.

5.2 Approach to the investigation

- 5.2.1 The approach to the investigation included correspondence with the Complainants and the CF, analysis of the relevant documentation, consideration and application of the relevant laws, regulatory framework and prescripts.
- 5.2.2 The investigation was approached using an enquiry process that seeks to find out:
- (a) What happened?
 - (b) What should have happened?
 - (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration and improper conduct.

5.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the alleged conduct of the CF constitutes maladministration and improper conduct.

5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the CF to prevent maladministration and improper conduct.

6. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

6.1 Whether the CF failed or unduly delayed to process a section 91 objection, and if so, whether the conduct amounts to maladministration and improper conduct in terms of the Constitution and section 6(4)(a)(i) of the Public Protector Act

Common cause issues

The following issues are common cause:

6.1.1 The Complainant was employed by Business Connexion Pty Ltd as an IT technician.

6.1.2 The Complainant developed respiratory and neurological symptoms consistent with occupational diseases caused by manganese exposure.

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- 6.1.3 The occupational disease was reported to the CF and after respiratory disease was assessed and he was awarded 60% PD resulting in pension for life.
- 6.1.4 The neurological condition was never assessed or given an award by the CF and an objection in terms of section 91 of COIDA was lodged with the CF.

Issues in dispute

- 6.1.5 The issues for the Public Protector's determination is whether the CF failed or unduly delayed to process the objection lodged in terms of section 91 of COIDA.
- 6.1.6 The Public Protector Investigation Team raised this matter with the COO of the CF. Thereafter the Public Protector Investigation team continued to interact with the COO per email and also held meetings with them. During that interaction the COO requested further information such as medical reports, which was submitted by the Complainant.
- 6.1.7 Subsequently the Investigation team received a response from the CF indicating *inter alia*, that "the claim was submitted for review due to an objection to the awarded PD and that on review of the claim and subsequent documentation submitted the assessment is that from the medical reports submitted and the information from the employer, there is no indication that the PD can be increased, and that on review of the PD already awarded, when recalculated from the medical reports, it is well above what the reports indicate the condition was".
- 6.1.8 The Public Protector Investigation team informed the COO that the Complainant did not object to the awarded PD as it is said in their response and that the objection is in connection with the failure by the CF to assess the Complainant's neurological condition. It was further clarified that when the Complainant lodged

an objection in terms of section 91 of the COIDA the expectation was that the objection will be “considered by the Commissioner assisted by two assessors” in accordance section 91 (2) (a) of COIDA.

6.1.9 However, according to the response from the CF the claim was submitted for review and it was not clear whether this was a review in terms of section 90 (1) of COIDA or not, and whether there will be any hearing of the objection submitted by the Complainant regarding the failure by the CF to assess the Complainant’s neurological condition.

6.1.10 Subsequently the CF provided a copy of a letter that was addressed to the Complainant indicating that the objection will be heard on 22 April 2023. Subsequent communication with the Complainant confirmed that the correspondence from the CF has been received and the Complainant expressed his appreciation of the efforts of the Public Protector in this regard.

Application of the relevant law and prescripts

Compensation for Occupational Injuries and Diseases act, 1993.

6.1.11 Section 65. (1) COIDA provides that “*Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the commissioner-*

- (a) that an employee has contracted an occupational disease; or*
 - (b) that an employee has contracted a disease other than an occupational disease and such disease has arisen out of and in the course of his employment.*
- (3) If an employee has contracted a disease referred to in subsection (1) resulting in permanent disablement and that disease is aggravated by some other disease,*

the commissioner may in determining the degree of permanent disablement have regard to the effect of such other disease.

6.1.12 Section 91 (1) of COIDA provides that *"Any person affected by a decision of the commissioner or a trade union or employers' organization of which that person was a member at the relevant time may, within 90 days after such decision, lodge an objection against that decision with the commissioner in the prescribed manner.*

- (2) (a) An objection lodged in terms of this section shall be considered and decided by the commissioner assisted by two assessors designated by him, of whom one shall be an assessor representing employees and one an assessor representing employers.*
- (b) If the commissioner considers it expedient, he may, notwithstanding paragraph (a), call in the assistance of a medical assessor.*
- (5) (a) Any person affected by a decision referred to in subsection (3)(a), may appeal to any provincial or local division of the Supreme Court having jurisdiction against a decision regarding-*
 - (i) the interpretation of this Act or any other law;*
 - (ii) the question whether an accident causing the disablement or death of an employee was attributable to his serious and wilful misconduct;*
 - (iii) the question whether the amount of any compensation awarded is so excessive or so inadequate that the award thereof could not reasonably have been made;*
 - (iv) the right to increased compensation in terms of section 56.*

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- (6) *Except where the commissioner orders otherwise, no obligation to pay any assessment, compensation or any other amount to the commissioner or to the compensation fund, or to pay any periodical payments to or on behalf of an employee under a decision of the commissioner, shall be suspended or deferred by reason of the fact that an objection has been lodged against such decision in terms of subsection (1), or that an appeal has been noted in terms of subsection (5).*

6.1.13 It is clear from the available evidence that the Complainant has been diagnosed with a disease which arose in the course of his employment as stipulated in section 65 (1) (b) of COIDA and therefore he is entitled to compensation in terms of section 65 (1) of COIDA. The CF has made an award in respect of the Complainant's respiratory condition which arose in the course of his employment. In terms of section 65 (3) of COIDA if the employee's contracted disease is aggravated by some other disease the CF may have regard to the effect of such other disease in determining the degree of permanent disablement of the employee.

6.1.14 According to the medical reports submitted to the CF the Complainant was also diagnosed with neurological condition described by a Medical Specialist Neurologist as likely Cerebral Manganism. The CF did not consider the Complainant's neurological condition during the assessment and determination of his disablement and the Complainant lodged an objection in terms of section 91 of COIDA against the failure by the CF to adjudicate on the neurological condition.

6.1.15 In terms of section 91 (2) of COIDA an objection lodged by the Complainant must be considered and decided by the Commissioner assisted by two assessors

designated by the Commissioner. However the CF failed or unduly delayed to consider the objection, which was lodged in December 2019.

7. FINDINGS

Having regard to the available evidence and the regulatory framework the Public Protector has made the following findings:

7.1 Regarding whether the CF failed or unduly delayed to process a section 91 objection.

7.1.1 The allegation that the CF failed or unduly delayed to process a section 91 objection is substantiated.

7.1.2 However, following the intervention of the Public Protector the CF is now in the process of considering the section 91 of COIDA objection and the matter was set down for hearing on the 12 of April 2023. However, the Public Protector Investigation Team has noted the decision of the CF to postpone the hearing in order to refer the matter back to the medical unit for medical opinion and directive due to the fact that, it transpired that the cerebral manganese was never taken into consideration upon calculation of permanent disablement, which the objection relates to.

7.1.3 During the regular monthly engagements with the COO the Public Protector Investigation team will continue to monitor the developments and ensure that this matter is prioritized as it has been outstanding for a long time.

8. CLOSURE

- 8.1 This matter is now receiving proper attention and there is no need for further investigation. However, the Public Protector will monitor the developments and update the Complainants regularly.

Yours sincerely



MS LELEDI SEKELE
CHIEF INVESTIGATOR: INVESTIGATIONS
DATE: 31/3/2023