Unpacking Section 20 of the Mine Health and Safety Act

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INTRODUCTION

The mining sector is mainly regulated through the Mine Health and Safety Act (MHSA), Act No. 29 of 1996, which addresses health and safety requirements in the mining industry. Unlike the Occupational Health and Safety Act (OHSA), the MHSA offers employees an opportunity to dispute findings of an occupational medical practitioner (OMP) through Section 20. Accordingly, an employee may dispute a finding of unfitness to perform work by lodging an appeal to the medical inspector in case the decision was not made in a fair manner.

In terms of Section 49(1)(b) of the MHSA, the chief inspector of mines must appoint an officer, with prescribed qualifications and experience, as the medical inspector – a medical doctor with a postgraduate qualification in occupational health. The medical inspector serves as an ombudsman by investigating and adjudicating medical appeals in line with Section 20 of the MHSA. Unfortunately, Section 20 is limited to medically related disputes and excludes labour-related disputes. However, many people misinterpret the requirements of Section 20 of the MHSA, which are explained in this article.

UNPACKING THE SUBSECTIONS

1. Section 20(1) provides that:

"An employee may appeal to the Medical Inspector against –

a) a decision that the employee is unfit to perform any particular category of work; or
b) any finding of an occupational medical practitioner contained in an exit certificate prepared in terms of Section 17."

Basically, this implies that there are only two conditions under which an employee may lodge a Section 20 medical appeal. First, the employee has to have been declared permanently unfit to perform work. Temporarily unfit employees need not lodge a medical appeal as their medical conditions would still be under review. The second condition relates to the exit certificate, which is unrelated to fitness to work. This implies that an employee may not appeal a decision of unfitness, after exiting the mine. The exit certificate can also not be used as a supporting document for disputing unfitness, as the certificate does not contain information about the fitness status of an employee.

2) Section 20(2) provides that:

"An appeal under subsection (1) must –

a) be lodged with the Medical Inspector within 30 days of the relevant decision or finding, or such period as may be prescribed; and
b) state the grounds of the appeal."

When an OMP declares an employee permanently unfit for work, it is prudent for the OMP to assist the employee in line with Section 13(5)(b) of the MHSA. The OMP will need to advise the employee of his/her right to lodge a Section 20 appeal, and that the appeal must be lodged within 30 days of the employee being declared unfit for work. To assist the process, the OMP should provide the employee with a certificate of fitness, indicating his/her fitness status, and contact details for ease of communication with the medical inspector when clarity is sought, and for feedback to the OMP. The OMP should also submit a report to the medical inspector, when requested, indicating factors that were considered when making the decision about fitness to work.

Section 20(3) provides that:

"When the Medical Inspector receives an appeal under subsection (1), the Medical Inspector must choose a medical practitioner who is not employed by the employer of the employee…"

The problem with this subsection is that the requirements are outdated and not in sync with medical developments. First, in the occupational health sphere, employees get referred to other professionals such as audiologists, occupational therapists, physiotherapists, etc., who are not necessarily regarded as medical practitioners. Medical practitioners without an occupational medicine qualification might not be able to determine the fitness to work of an employee. However, an OMP can assess the fitness to work status of an employee, taking into consideration the working environment of the employee and the occupational hazards to which the employee is exposed.

Second, if an employee has just undergone a battery of investigations at a private facility, which may include MRI scans, CT scans and chest X-rays, it will not be necessary to repeat the same tests when the employee lodges an appeal. The results from the investigations conducted will still be relevant and should be considered by the medical inspector, without requesting repeat tests.

Section 20(4):

"The medical practitioner referred to in subsection (3), must report to the Medical Inspector, who must then consider the appeal and –

a) Confirm, set aside or vary the decision or finding of the occupational medical practitioner, or…"

The health practitioner to whom the employee is referred needs to submit a report of the findings to the medical inspector. This report, together with other factors and other reports, are interrogated to ascertain if the decision pertaining to the fitness to work status of the employee was fair and ethical. Section 20(4) gives the medical inspector the right to confirm, set aside, or vary the decision or finding of the OMP, after the appeal has been holistically interrogated. OMPs often resort to blanket decisions, avoiding individualisation and without considering the merits of each case. Both OMPs and employees have expectations that the medical inspector will take their side, forgetting that the decision to either confirm or set aside the OMP's findings is based on the facts presented.

Section 20(5):

"Nothing in this section precludes an employee from –

a) Obtaining and paying for a medical opinion from any other practitioner; or…"

This subsection implies that an employee may lodge an appeal and opt to self-refer to his/her own practitioner. This does not mean that the practitioner can make a ruling on the fitness to work status of the employee. The chosen practitioner needs to submit a report of the findings to the medical inspector so that the appeal can be finalised, considering the report and other factors. This option is offered to employees who are prepared to pay for a practitioner's services rather than having the medical inspector choose a practitioner paid for by the Department of Mineral Resources and Energy. This is disadvantageous to the employee as his/her chosen practitioner might not be able to perform the necessary investigations. The medical inspector might refer employees for a third opinion only if the report from the employee's chosen practitioner is inconclusive.

CONCLUSION

Section 20 of the MHSA was drafted with good intentions, to assist employees who might have been unfairly declared unfit for work, and to provide access to a second medical opinion for employees who cannot afford to consult a private practitioner. There are, however, challenges, which include misinterpretation of the Section, and some subsections not being in sync with medical developments. There is also confusion between Section 20 disputes and those related to the incapacity process. These need to be addressed in line with the Labour Relations Act. Unfortunately, employees disputing unfair labour processes and compensation matters tend to lodge Section 20 medical appeals, which are valid only under the two conditions mentioned. Awareness campaigns by the medical inspector are ongoing to clarify the requirements and interpretations of Section 20 of the MHSA.