

**AN APPRAISAL OF EMPLOYEES' COMPENSATION: NIGERIAN EMPLOYEES'
COMPENSATION ACT, 2010 IN PERSPECTIVE**

BY

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DECLARATION

I declare that the work in this dissertation entitled “An Appraisal of Employees’ Compensation: Nigerian Employees’ Compensation Act, 2010 in Perspective” has been performed by me in the Department of Public Law, Ahmadu Bello University, Zaria. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this dissertation was previously presented for another degree or diploma at this or any other Institution.

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CERTIFICATION

This dissertation entitled “AN APPRAISAL OF EMPLOYEES’ COMPENSATION: NIGERIAN EMPLOYEES’ COMPENSATION ACT, 2010 IN PERSPECTIVE.” by Salihu Salihu IBRAHIM meets the regulations governing the award of the degree of Master of Laws (LL.M) of the Ahmadu Bello University, and is approved for its’ contribution to knowledge and literary presentation.

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DEDICATION

This research work is dedicated to my parent; Late Fatimah Ibrahim and Alh. Ibrahim Saleh for their moral Support.

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ABSTRACT

Employer and Employee relationship creates mutual duties and responsibilities which are complimentary. This duty is for the Safety and Health of the employee. The Government, on the other hand, has a complimentary role to play in the discharge of this duty, hence the duty now create a tripartite responsibility which is mutual and complimentary. To an Employee; the responsibility is to take care of him/herself and a fellow employee in the course of the employment. The Employer has the responsibility among several others to compensate an injured employee while the Government responsibility is to create and enforce its policies towards the welfare of all employees among several other responsibilities. However, the welfare of employees in both Public and Private Sectors have remained a mirage despite their contributions to national growth. The Government has now awoken to discharge one of its responsibility through a backed up legislation; Employees' Compensation Act, 2010. Although, there are previous legislation on workers' compensation, the new Act has distinguished itself by being all encompassing in scope and application. The Scheme, which is a Social Insurance, is being run by a government agency; Nigeria Social Insurance Trust Fund (NSITF) for six (6) years now. The question that readily comes to mind is how has the scheme touched, improved or set proper path for the welfare of the Nigerian employees? The aim of this research is to appraise the Employees' Compensation Act, 2010 with the objectives of appraising the prospects and challenges of the Act, to examine the operation of NSITF in relation to the support for employees' compensation and finally to proffer solutions to some flaws of the Act for future amendments. The research methodology adopted is doctrinal and the research has made several findings among which are; the State- Managed Scheme operated presently has hindered the acceptance and effectiveness of the employees' compensation scheme in Nigeria. Also some

provisions of the Act are over flawed and unconstitutional. Therefore, if the Scheme will be jointly operated with Private firms such as the Pension Scheme, it will go a long way in addressing other challenges discovered in the course of this research like the excessive discretionary powers of the Board of NSITF. Some of the provisions of the Act like Section 12 should be amended as it is unconstitutional to deny an injured employee recourse to the Court for the determination of his civil rights and obligations. Compliance with the scheme can be sustained where the certificate of registration issued by NSITF is being recognized as mandatory for pre-qualification for tender, registration of companies and budget approval for Ministries, Departments and Agencies (MDAs).

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

The relationship between employer and employee creates mutual duties on the parties. These duties may be expressly provided for in the terms of the contract of employment or implied into the terms, even though not expressly stated. Hence, the employer owes certain implied duties to exercise care or reasonable care for the employee's health and safety. These duties may be implied under common law and statutes.

The employer's implied duties under the common law is usually divided into three (3); provision of safe plant;¹ provision of safe and secure system of work;² provision of employee with reasonably competent fellow employees.³ While under the statutes, this includes` but not limited to the duties implied by the Constitution of the Federal Republic of Nigeria;⁴Labour Act;⁵ Factories Act⁶ and the International Labour Organization's Conventions and Recommendations and so forth.

Where a breach of any of these duties occurs and the employee sustained injury, then the employer will be liable to compensate the injured employee. What then is Compensation? It is

¹*Smith vs Baker* (1891) A. C. 325

²*Paris vs Stepney Borough Council* (1951) A. C. 367

³*Hudson vs Ridge Manufacturing Co. Ltd* (1957) 2 QB, 348

⁴ Cap. C23, *Laws of Federation of Nigeria, 2009* (As Amended)

⁵ Cap. L1, *Laws of Federation of Nigeria, 2004*

⁶ Cap. F1 *Laws of federation of Nigeria, 2004*

described as a monetary payment made to an injured workman in respect of injury sustained in the course of employment.⁷

Workmen's compensation scheme is over a century old. The first legislation was the 1897 Act, which requires the workman to show he had been injured only to claim compensation. In Nigeria, the first workmen's compensation legislation was the Ordinance of 1942. This legislation was said to be inadequate in terms of protection and meeting his financial needs when injured, hence Workmen's Compensation Act, 1978.⁸ The Act is equally considered inadequate in protecting the workman compensation.

Prior to the system of employee's compensation, workers injured at work were compensated under the system of negligence liability. This system required the worker to prove the following:

1. That the employer has a duty of care, owed to the worker.
2. That an accident has occurred.
3. That an accident was caused because the employer failed to exercise duty of care.
4. That the accident caused personal injury to the employee.⁹

The principle that an employer is not liable without proven negligence is illustrated in the case of *Chagaury vs Yakubu*,¹⁰ where the trial court though found that Chagaury, who is the company's driver, and the company were not liable but went ahead to award Yakubu N300, 000.0 (Three Hundred Thousand Naira, only) damages as compensation for psychological feelings of having pellets in his body for the rest of his life.

⁷ Ogunniyi, O. (1991) *Nigerian Labour and Employment Law in Perspective*, Folio Publishers Limited, Lagos.p.85

⁸ Cap. W6, *Laws of Federation of Nigeria*, 2004

⁹ *Ngilari vs Mothercat Ltd.* (1999) 13 NWLR (pt. 636) 626

¹⁰ (2006) 3 NWLR, 138; *Kabo Air Ltd vs Isma'il Moh'd* (2015) 6 A.C.E.L.R., p.71, CA.

The company and Chagaury appealed against the decision of the trial court. The Court of Appeal held that damages should not have been awarded against the Appellants since no finding of negligence was made. In *Iyere vs B.F.F.M Ltd.*¹¹, where the Supreme Court reiterated the principle that there can be no actionable negligence unless there is damage, which the two must co-exist.

More so, the employer enjoys three (3) defenses under the negligent liability rule of the common law and would not be liable to pay monetary damages if any of the defenses can be proved viz:

- a. Defense of voluntary assumption of risk.
- b. Fellow-servant defense or defense of common employment.
- c. Contributory negligence.

From the foregoing, it is easy for employers to escape liability. The situation left much to be desired. Hence, it became necessary, overtime, to abolish the common law negligent liability defense either statutorily or in judicial decisions.

Specifically, *Section 12(1) Labour Act*¹² provides thus: “It shall not be a defense to an employer who is sued in respect of personal injuries caused by the negligence of a person employed by him that the person was at the time the injuries were caused, in common employment with the person injured”. Also, the court has rejected the employee’s defence of not being liable on

¹¹ Appeal No. SC/309/2002

¹² *Cap LI Laws of the Federation of Nigeria (LFN)2004*

grounds of employee's negligence and self-inflicted injury in refusing to use Personal Protective Equipment [PPE].¹³

The regime of the *Employees' Compensation Act*¹⁴ basically is to address the patent flaws in the *Workmen's Compensation Act, 1987*. The Act repealed the Workmen's Compensation Act and enhanced provisions for compensation that will accrue to an employee or his estate in the event of death, illness, injury or any disability arising out of or in the course of the employee's employment. No doubt, the Act is a major step in the right direction in respect of protecting the employee.

Hence, the Act has abolished the negligent liability rule and instead introduced a "No-fault principle." Thus, an injured worker or dependent of the deceased employee will be entitled to compensation regardless of who is at fault; for this is in conformity with ILO's long standing recommendation. This does not mean encouraging deliberate self-injury, rather, the Act sets out to provide a system of guaranteed compensation for all employees or their dependents for any death, injury, disease or disability arising out of or in the course of employment.

Thus, the basis for this regime is for the injured worker to receive compensation however meager. Other strength of the Act covers creation of collective liability where all employers create a pool of funds for funding the cost of workers' compensation insurance and paying compensation claims. The Nigerian Social Insurance Trust Fund (NSITF) is the State institution saddled with regulating employees' compensation generally.

¹³*Western Nigeria Trading Co. Ltd. vs Busari Ajao* (1965) NMLR, 178

¹⁴Act No. 13, Signed into Law on the 17th Day of December, 2010

The new Act has also enhanced compensation to dependents. Mental stress is recognized by the new Act, a completely novel provision. Hence, where the disease caused an employee to injure himself even while not in a work place or in the course of employment, he will be entitled to compensation provided it arises out of the nature of work or the occurrence of any event in the course of the employee's employment.

Another important thing is that the Act has designed a better conflict resolution channels. However, Appeal against the decision of the Board lies to the National Industrial Court of Nigeria (NICN). Unlike before, NICN, is charged with exclusive jurisdiction to handle labour-related matters as a specialized court.

1.2 Statement of Problem

The welfare of the Nigerian workers have suffered neglect for many years. Public and private workers have contributed immensely to the economic growth of the country; however, they are left to the whims and caprices of their employers, who give less concern to their welfare.¹⁵

The Employees' Compensation Act, 2010, though a commendable legislation, however, poses some challenges which this work attempts to discuss and address. The harshness of the common law rules and the inadequacies of subsequent legislations had been whittled down either statutorily or judicially in the past. According to Uveighara,¹⁶ the workmen's compensation

¹⁵ Animashaun O. (2008). "The Plight of a Redundant Worker in Nigeria: The need for Statutory Intervention", *Labour Law Review*, 2(2):

¹⁶ Uveighara, E.E. (2001) *Labour Law in Nigeria*, Malthouse Press, Ltd, Ikeja, Lagos, Nigeria.

scheme was devised not as a substitute for the common law, but as an alternative system for compensating injured and dead workers at their work.

The list of occupational diseases in the Act falls short of international standards. The list contained in the first schedule of the Act omitted about thirty-three (33) categories of internationally recognized occupational diseases and has not made it clear whether the conditions specified to qualify for compensation and health benefits in the event of the disease are to be satisfied conjunctively or disjunctively.

Such difficulty if manifested will deprive an injured employee or his dependant right of action as experienced in another clime in the case of *Adetona vs Edet*¹⁷ where the court of Appeal held that there was no reasonable cause of action disclosed on the ground that the facts of the case did not give right to a relief in law.

The qualification placed on an employee or a dependent to be entitled to compensation is stringent in some instances. For instance, *Section 9[4]* of the Act provides that: "...unless the employee was free from the disease and complicating disease before being first exposed to the agent causing the disease in the work place." It's contended that this provision has no justification; because, the employer has the duty *ab initio* to medically examine every worker before commencement of work or as soon as possible thereafter. Hence, employers has duty to take their employees as they meet them.

¹⁷ (2003) 2 NWLR (pt. 889) 133

The establishment of the State-Managed Compensation Funds¹⁸ constitutes one of the most important positive innovations brought about in the new Act. However, the Board assumes the role of the regulator, administrator, manager and investor of the funds contributed by the employees. The increasing loss of public confidence in State-Managed Schemes poses a serious challenge to the regime of Employees' Compensation Act.

Perhaps this largely accounted for the non-registration with NSITF by employers; both public and private. Even though the law was enacted in December, 2010 but due to operational challenges on the part of the NSITF, it could not be implemented until sometime in 2011. Nevertheless, now six (6) years after implementation, yet there is nothing to write back home on compliance.

Many companies still have firm belief to insure their employees with private insurance firms not NSITF. While employers' contribution to the compensation scheme of the NSITF is a mandatory legal obligation, retaining private insurance firm can only be in addition to the NSITF scheme and not a substitute. The following research questions have been formulated from the problems herein highlighted:

1. Whether the Employees' Compensation Act, 2010 has provided a sufficient regime of employees' compensation in Nigeria?
2. Whether the security of the State owned Social Insurance Scheme is sufficiently supportive of the Employees' Compensation Act, 2010?

¹⁸ Section 32, *Employees' Compensation Act, op. cit.*

1.3 Aim and Objectives of the Research

The aim of this work is to appraise the new Employees' Compensation Act, 2010 in line with various conventions and recommendations by International Labour Organization from which the Act derives inspirations and guidance.

The objectives of this research are as follows:

1. To appraise the prospects and challenges of the Employees' Compensation Act, 2010 in Nigeria.
2. To examine the operation of *NSITF* in relation to the support of employees' compensation.
3. To proffer solutions to some flaws of the Act in line with Nigeria's peculiar circumstances.

1.4 Justification

The research will give a better understanding of the *Employees' Compensation Act, 2010* to the general public and students in particular. Aside the prospects and challenges of the new Act, solutions to some flaws of the Act will be proffered for future consideration. Therefore, this work is timely to the realization of a better system and workability of the new Act.

1.5 Scope and Limitations of the Research

The research intends to cover the Employees' Compensation Act, 2010. However, reference will be made to International Labour Organization's Conventions and Recommendations on the social and security welfare of a worker. This is because it is where the bulk of our labour laws

derives inspiration and guidance. Hence, judicial pronouncements, as well as decided cases in Nigeria and outside Nigeria may be examined.

Although this work is not a comparative study of what is obtainable in other jurisdiction. However, where necessary, reference will be made to other jurisdictions in order to drive home some points. Apart from the Employees' Compensation Act, 2010, reference may be made to other laws incidental thereto.

1.6 Literature Review

This work centers on the concept of employee's compensation with particular reference to the present Employees' Compensation Act, 2010. Though there are emerging writers on the new regime of employees' compensation, however many of the literatures are on the repealed Workmen's Compensation Act.

Elizabeth and Offornze¹⁹ in their book "*Employment & Labour Law*" discussed compensation under the new *Employees' Compensation Act* with some comparative analyses with the repealed Act. The book highlight some of the extant provisions of the new Act, albeit not elaborately. This work will go further to discuss the procedure for claim of compensation and to simplify beyond the provisions of the Act the meaning of "*Permanent Total Disability*", "*Permanent Partial Disability*" and so forth. A graphic workings of the scale of compensation will be provided.

¹⁹ Elizabeth and Offornze (2015) *Employment & Labour Law in Nigeria*, Mbeyi & Associates (Nig.) Ltd, Lagos

Bimbo²⁰ in his edited book “*Themes on the New Employees’ Compensation Act*” a compendium of contributions on various areas of the new Act. No doubt, this book is a master piece and a reference point on employees’ compensation in Nigeria and one of the leading authority in that area. However, this research work will complement in the area of arithmetical calculation of percentage due to an injured employee or dependant as a build up from the statutory provision as enumerated in the book. Thus, this research is distinguishable from his edited book.

Another upcoming writer is Audi,²¹ in his book, ‘*Nigerian Labour Law*,’ he examined the new Employees’ Compensation Act, 2010. However, the work did not bring out in a simple way the strength of the new Act as well as discussing the weakness and/or challenges faced in the new Act. It is the hope of this research work to uncover and proffer solutions where necessary. To this extent, this research is distinct from his work.

Chioma²² a leading author in labour and employment law in her book “*Nigerian Employment and Labour Relations Law and Practice*” touched on employees’ welfare and social security. The book highlights some provisions of *ECA, 2010* in relation to employees’ welfare and compensation. The book is unique, in that it dedicated a chapter on “occupational disease”²³ seeing it as a cross-cutting one. However, this work will adequately cover the wide scope of compensation as well as the challenges of the new Act will be addressed. Hence, this research work will be different from her work.

²⁰ Bimbo, A. (2013) *Themes on the New Employees’ Compensation Act*, Hybrid Consult, Abuja.

²¹ Audi, M.M. (2012) *Nigerian Labour Law*, Faith Printers International, Zaria, Kaduna.

²² Agomo, C.K. (2011) *Nigerian Employment and Labour Relations: Law and Practice*, Concept Publications Limited, Lagos, Nigeria

²³ *ibid*, Chapter 12, p.249

One of the authors on labour law, Emiola²⁴ in his book examines employee's compensation along with Workmen's Compensation Act, 1987. He sees compensation as a monetary payment for worker's injury as agreed between the employer and employee or as approved by the court. However, this research goes further in line with the new Act to see compensation as not only monetary, but also in kind. And the award is a paradigm shift from agreement of parties to being statutorily provided as well as less litigation in process of its claim. This research work will go further to highlight the strength of the new Employees' Compensation Act. Thus, this research work is distinguishable from his work.

Olakanmi²⁵ is another author on Labour and Industrial Law. In his book "*Labour Law*," like Ogwuche, this author only collates and compiles all labour related enactments such as Labour Act, Workmen's Compensation Act and supports them with few local cases. The law was not appraised but a quick guide to labour and employment laws. This research work will critically analyse the new Employees' Compensation Act.

Ogwuche²⁶ is another notable author on Employment, Labour Law and Trade Unionism. In his book "*Compendium of employment and Labour Law in Nigeria*" he treats the concept in bullet-point style as with all topics discussed in his book. These points were supported by statutory authorities and case laws and not a detailed work. They are at best, key points. Like the rest, his work examines the former Act (Workmen's Compensation Act). His work discusses the law as it

²⁴ Emiola, A. (2008) *Nigerian Labour Law*, Emiola Publishers, Ogbomosho, Nigeria

²⁵ Olakanmi (2008) *Labour Law*, Lawlords Publication, Abuja, Nigeria.

²⁶ Ogwuche, A.S. (2006) *Compendium of Employment and Labour Law in Nigeria*, Maiyati Chambers, Ikoyi, Lagos Nigeria.

is and not as it ought to be as this research work set to accomplish. The institutional framework and the evolution of workmen's compensation is not covered by his work as this research intends to cover.

Uvieghara²⁷ in his book "*Labour Law in Nigeria*" discussed the concept of workmen's compensation under the repealed Act. This work will examine the concept of employee's compensation under the new Act. Thus, the work is distinguishable from his work.

Another scholar that has written on the concept is Ogunniyi²⁸ in his book "*Nigerian Labour and Employment Law in Perspective*" treated the evolution and growth of workmen's compensation. However, his work has not witnessed the emergence of the new compensation Act. His work is equally based on the legal framework of workmen's compensation, without examining the institutional framework of the employee's compensation as this work intends to cover.

Slade²⁹ in his book "*Tolley's Employment Handbook*" discussed health and safety at work with a guide as to their success. While the new Act is an all-encompassing legislation in terms of injury suffered by the employee in the course of his work, it is one of the objectives of the scheme that right policies be put in place as precautionary measures in industry, sector or workplaces. Hence statutorily provided. Thus, this work will independently study the category of injuries and the statutorily percentage of each. Hence, the work is an extension of Slade's work above.

²⁷ Uvieghara, E.E., *op. cit.*

²⁸ Ogunniyi, O. *op. cit.*

²⁹ Slade, E. (2003) *Tolley's Employment Handbook*, 17th Edition, Clays Ltd., England, p.305

Selwyn³⁰ in his book “*Law of Employment*” also touched on health and safety at work. Both Selwyn and Slade see injuries within the confine of workplaces. Thus, this research work will extend it discuss to instances were injury will be compensable even not at the place of work provided it arises in the course or out of the employment.

Audi³¹ in his paper analyses some of the provisions of the new Act comparing them with the repealed Act. The paper highlights some of the new innovations of the new ECA. This work will further highlight some of the flaws of the ECA and solutions therefrom.

Olayinka and Bimbo³² their paper touched on a critical injury that pervaded all sectors of employment, that is, Mental Stress. It gives a detailed discussion on the topic with several case illustrations to bring home the graphic picture of how the disease affects employment in Nigeria particularly. And the paper offers suggestion to Human Resource Managers on precautionary measures to Mental Stress by employees. Although the writers acknowledged that under ECA, 2010 the employers were not directly responsible for paying the compensation, nevertheless their steps for precaution is necessary to avoid loss of productivity among others. This work, further, see this as responsibility of government to create the right policies so as to check the increase in Mental Stress among employees.

³⁰ Selwyn, N.M. (1978) *Law of Employment*, 2nd Edition, Butterworth Guilford, London pp.266-284

³¹ Audi, M. (2015). An Appraisal of the Employees’ Compensation Act, 2010, *Ahmadu Bello University Journal of Public International Law*, 1(7): 217-231

³² Olayinka and Bimbo (2011). Compensation for Mental Stress under the New Employees’ Compensation Act, 2010: Implication for Human Resource Management, *Labour Law Review, Nigerian Journal of Labour Law & Industrial Relations*, 5(3):

Comande³³ in his paper makes a comparative study of personal injury damages in Europe and United States. He observed that non-pecuniary awards through litigation is in the increase and it is devoid of any yardstick. However, under the ECA, 2010 to which forms the central theme of this research work, non-pecuniary awards for personal injury is statutorily provided and in the form of healthcare benefits to an injured employee and rehabilitation to a traumatized dependant as the case may be. Also the study of these is viewed from non-litigation process, hence the work is distinguishable from his work.

Guyton³⁴ in his paper which traced the history of workers' compensation from antiquity to modern times in America. The paper aptly captured the critical benefits of workers' compensation to an injured worker. However, his papers territorial scope is America and some better part of Europe. This research work will extend to Nigeria, also the evolution of workers compensation will be traced from Britain for the fact that most of our laws drives inspiration and guidance from there.

Cramer³⁵ in his paper viewed the deprivation from the focal point of common law viz a via tortious act. However, this research work will go further to highlight the qualification for such loss in order to be compensable under the Act. Thus, the loss of enjoyment in itself is not compensable by the Act save if it falls within the categories of injury covered by the Act as well as disable an employee from his work.

³³ Comande, G. (2005). Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States, *Temple International Comparative Law Journal*, 19:241-349

³⁴ Guyton, G.P. (1999). A Brief History of Workers' Compensation, *IOWA Orthopedics Journal*, 19:106

³⁵ Cramer, C.R. (1981). Loss of Enjoyment as a Separate Element of Damages, *Pacific Law Journal*, 12: 965-972

1.7 Research Methodology

The research methodology adopted in this work are doctrinal, various books and articles of Nigerian writers will be utilized extensively. Recourse will be made to foreign books and articles to understand the import and relevance of international Labour Organization's Conventions and Recommendations found relevant to the scope of this research work. Statutes and cases were not left out, for they help greatly in enhancing the work.

Since the central theme of this work is the employee's compensation, recourse may be made to both public and private organization to hear firsthand the level of compliance by the organization; and the package of social security welfare at their disposal.

NSITF which is the primary institution for social insurance will be visited. There, the successes and challenges of the scheme will be assessed. This is paramount as there is high level of non-compliance by employers of labour as stated elsewhere in this work. Hence the method to be adopted in this work are both doctrinal and empirical.

1.8 Organizational Layout

The research work is divided into five [5] chapters, with each chapter aimed at serving a purpose. Chapter one provides the general background of the research work, introducing the topic of research, highlighting the problems of the research and the significance of the research among others.

Chapter two covers the historical development of employment contract and employees' compensation in Nigeria; the 1942 Ordinance; the 1958 Workmen's Compensation Act and the Workmen's Compensation Act, 1987.

Chapter three deals with the operation of Employees' Compensation Act, 2010. Hence, an Appraisal of Employees' Compensation Act, 2010. Chapter four is examining Nigerian Social Insurance Trust Fund as a Compensation Regulatory Institution.

Chapter five deals with conclusion; there, the findings of the research discussed and recommendation(s) proffered.

CHAPTER TWO
HISTORICAL DEVELOPMENT OF EMPLOYMENT CONTRACTS AND
EMPLOYEES' COMPENSATION IN NIGERIA

2.1 Introduction

Employment can be define as a contract in which one person, the employee, agrees to perform work for another, the employer. This obligation carries with it an obligation to pay wages in return for service and a corresponding right of control on the part of the employer¹. This relationship between employee and employer pre-date the colonial era in Nigeria, taken into consideration the agricultural economy and the role of culture and traditions as the basis of the system of work and reward. Wage employment relatively started with the advent of British colonialist in Nigeria. And payment of compensation by employer to employee is traced to the accepted principle of employer's duty of care, welfare and safety.

The aim of this chapter is to discuss the history of employment and compensation from Britain with a view to highlight its operation in Nigeria side by side even before the reception of English Law. And also, to highlight the developmental phases of compensation laws and their weaknesses in Nigeria.

¹ Agomo, C.K. (2011) *Nigerian Employment and Labour Relations: Law and Practice*, Concept Publications Limited, Lagos, Nigeria, p.61

2.2 Brief History of Employment

Prior to colonial era, custom and traditions were the basis for system of work and reward. However, employer/employee relationship as existed in different part of the country was predominantly on agriculture. Thus, in most cases, the employer was the head of the family while the employees were members of his immediate family and extended family². In some cases, farming was carried out on a corporative basis where people of the same group or age organize to work for themselves in turns.

Where the plantation or farm is large, the services of slaves were employed. The employer/family head wielded a great high discretion here as he determine the reward, recruitment, selection and promotion if any; and he also determine when to get married (in the case of his children) or freedom (in the case of slaves). In some instances, the employer provides security or food to his employees³.

With the advent of British Colonialist in 1795, wage employment started as they (Britons) sought for the services of guides and carriers when they first stepped into what is now known as Nigeria. At the initial stage, wage employment was seen as degrading because chiefs who were mostly the recruitment agents used slaves, their troublesome children or those of their less favoured wives. Equally, the discipline in wage employment, that is, time to report, time for break and closing time amongst other disciplines, was seen as mini slavery⁴.

² Yesufu, T.M. (1982) *The Dynamics of Industrial Relations: The Nigerian Experience*, University Press, Lagos, p.45

³ George, Owoyemi and Onokala (2012). Evolution of Employment and Industrial Relations Practice: The Nigerian Experience. Retrieved December 12,2015 from www.ijbc.snet.com/journals/vol-3-no-12, p.188

⁴*Ibid*, p.191

By 1830 wage employment takes a prominent role in the colonial era, when another set of explorers from the UK arrived. British traders and Christian missionaries were later to penetrate the hinterland and commence trading. Hence the demand for labour by both traders and missionaries pushed up wages wherein it becomes then a prestige to work for the expatriates⁵.

In 1900 when the British Government took charge of the Southern and Northern protectorate from Royal Niger Company, wage employment was further made popular. This is because the British Government embarked on massive financing of railway constructions, hence employment opportunities rose. Mines explorations necessitated the then government to compulsorily recruit people. Though as it has been reported, those recruited compulsorily later opted to voluntarily continue⁶.

In another clime, the introduction of taxes for the adult male of the then population forced more people to join wage employment. This provides succor to teeming adult males in discharging their obligations. Also with the exposure of life in the urban areas and contact with the Europeans, the quest for wage employment increased, hence to quench this taste the need for permanent wage employment soared.

The Colonialist in a bid to reduce cost of governance at one point introduced some measures, example of such, is motor cars to reduce wage expenditures. Unfortunately, more natives returned back to farming. This made the colonialists to recruits from countries they had

⁵*ibid*, p.191

⁶*ibid*, p.192

colonised earlier like Sierra Leone and Ghana⁷. However the problems of language barriers and transportation cropped up, hence the colonialists resort to forced labour using chiefs⁸.

In 1930, the International Labour Organization (ILO) adopted the *Forced Labour Convention* by which forced labour was declared illegal; and by 1933 Nigerian Government through the *Forced Labour Ordinance*⁹ implemented the provision of the convention. Since then wage employment had come to stay in Nigeria. It rapidly gained ground as a major factor in the labour market.

When British left, after granting independence to Nigeria, the Nigerian civil service became the largest employer of labour. Thus, in order to foster unity “Federal Character Principle” was captured in the constitution. There was therefore the need for employment to be according to state of origin. The effect of this was to strike a balance in terms of representation in the workforce between the Northern part of the country and the Southern part of the country, and of course now the entire states in Nigeria.

2.2.1 Nature of Employment

From the historical background, we have seen basically two (2) stages of employment in Nigeria, that is, the Pre-Colonial era and the Colonial era. Thus, the Pre-Colonial era is built on *pertanalistic* employment relation with the head of the family as the employer and his children or relatives as the employees. This is because farming then was largely subsistence, hence the employment was seasonal. Hence, the relationship is typical of “Master and “Servant”.

⁷ *ibid*, p.193

⁸ *ibid*.

⁹ No. 22 of 1933

The employee in this stage has no specific work to undertake, but any work assigned by the head of the family. Remuneration here is not in monetary terms rather it was in kind depending on whom it concerns. This is because the economy was rural with no acceptable monetary currency that applies to all Nigerians. To children who works for the family unit; remuneration was mainly through payment of their dowry for marriages; to friends it was through exchange of food and drinks or working at the friends' farm in return. While to a slave it was food and drink, and freedom in some extreme circumstances¹⁰.

The Second stage marked the period of Colonial era, which brought the introduction of *voluntary employment* relations. This is an upshot of British employment relation. That is to say an individual enjoys freedom of contract that is freedom to enter into negotiation. Unlike the pre-colonial stage, the consideration is certain, that is, wages. There is transition from manual labour to machine based manufacturing. The discipline here is distinct from that of pre-colonial stage. The employment is basically formalized. The employment here comprises both casual and permanent, where employees moved far distance from their houses to seek employment.

The colonial period witnessed the emergence of workers' compensation for those who sustain injuries at work place. By and large, the nature of employment now is such that prescribed the mode of recruitment, promotion and remuneration.

2.3 Contract of Employment and Contract for Employment

¹⁰ George, Owoyemi and Onokala, *op. cit.*

Generally, a contract of employment is an agreement on the employment's conditions made between the employer and employee. The agreement can be made orally or in writing and it includes both express and implied terms. Thus, contract of employment is a species of contracts and is therefore governed by the general principles of the law of contract. The classification of employment contract helps in determining the rules regulating the labour matters arising therefrom. The distinction is important because it determines the statutory protection that accord to a worker. The right and remedies provided for under the Labour Act only applies to employer under the contract of employment/service.

Another reason is that employers are only vicariously liable for torts committed by employees who are under a contract of service. Likewise of importance is that, the system of taxation applied to each category is quite different. In a contract of service the employer is responsible under the Pay as You Earn(PAYE) system, whereas in a contract for service the independent contractor is subject to the self-assessment.

The question on how the courts distinguish between the two contracts started as far back as 19th century in the case of *Yewen vs Noakes*¹¹, where Bramwell L.J propound the control test that “ A servant is a person subject to the command of his master as to the manner in which he shall do his work.” It is also called the “Superintendence” test¹². However this test is found to be relevant only in simple relationship of employer and employee where the master has superior knowledge and skill, but it does not help in cases involving professionals as employees¹³. Thus, it becomes

¹¹ (1880) 6 QBD, 530

¹² Elizabeth and Offornze, (2015), *op. cit.* p.17

¹³ Agomo, C.K.,(2015), *op. cit.* p.63

no longer the most significant factor in determining whether a relationship is that of contract of employment or service.

The search for appropriate test led to the development of organizational test, also called an ‘integration’ test. This test seeks to ascertain whether the workman is employed as part of the business or work as an integral part of the business. If it turns out to be in the affirmative then there is contract of service, but where the worker happens to be an accessory to the business then it is a contract for service. This test was introduced by Lord Denning LJ in *Stevenson, Jordan & Harrison Ltd vs Macdonald and Evans*¹⁴ where he stated that an employee is a person who is integrated with others in the work place or business, even though the employer does not necessarily exercise a detailed control over what he does.

The third test also known as the “Mixed” or “Multiple” test, developed by Mackenna J. in *Ready Mixed Concret vs Minister for Pensions and National Insurance*¹⁵ where the court stated that three (3) conditions had to be fulfilled to establish a contract of service:

- i. There must be an obligation of the person to provide his own skill and work in return of wage or remuneration.
- ii. There must be a sufficient degree of control by the employer.
- iii. The other provisions of the contract must not be inconsistent with its being a contract of service.

¹⁴ (1952) 1 TLR 101

¹⁵ (1968) 1 All E.R. 433

The court found also that the economic reality of the situation should be considered when arriving at a decision on whether an employment falls under a Contract of Service beside the factors mentioned above.

It is important to view each contract as a whole, examines its terms and compare them with the reality of the relationship between the parties. The Supreme Court in *Siena Security Ltd vs Afropak (Nig. Ltd & 2 Ors)*¹⁶ encapsulate the various tests employed above in the determination of the distinction between the two contracts.

Lastly, the distinction is important as stated above because it defines the right of employees in terms of compensation. That is to say an employee whether in a contract of employment/service, whose employer is liable for his tort vicariously, is entitled to compensation¹⁷. This is because there is corresponding duty of care on the employer to the employee.

2.4 The Employer's Duty of Care

Generally speaking, the employer's duty of care is founded in tort, but it can also be expressed as an aspect of the contractual relationship between the employer and employee¹⁸. The employer's duty of care are in two (2) fold, namely, the common law and the statutes. The law requires an employer to take reasonable steps to ensure the safety of all employees¹⁹. He owes a common law and implied contractual duties to his employees to take reasonable care for their safety and

¹⁶ (2008) 6 CLRN

¹⁷ Sec 2, *Employees Compensation Act, op. cit.*

¹⁸ Rident, R.W. (1976) *Principles of Labour Law*, Sweet & Maxwell, London, p.339

¹⁹ Section 17(3) (c) *Constitution federal Republic of Nigeria, 1999 (As Amended)* Provides that the State shall direct its policies towards ensuring that: "The health, Safety and welfare of all persons in employment are safeguarded and not endangered or abused."

welfare. He must provide a safe place of work, safe and secure system of work, safe plant and equipment, suitable training and instructions, competent supervision, providing communications channels for employees to raise concerns and so on²⁰.

An employer, in common law, has a duty to take reasonable care to ensure that his employee is not exposed to risk of injury at his work. In *Priestly vs Fowler*²¹ which is the earliest clear statement of this duty cited *Boson vs Sandford*²² where Hold C.J stated that a master is liable for the act of his servant and undertakes for his care to all that make use of him. For whoever employs another is answerable for him which include liability to a fellow employee. However it is the same decision that sowed the seed of the doctrine of common employment which later impede the growth of the duty itself.

The statutes and international instruments²³ have implied duties of care on the employer. These statutes include but not limited to silent provisions in *Factories Act*²⁴ such as: no overcrowding²⁵, fencing of dangerous equipment²⁶ and the adequate training of any person to be assigned to operate machines²⁷. It was posited that the duty of care under the *Factories Act* is more onerous than the ordinary duty of care required by the common law.

²⁰ See *Factories Act, op. cit.* See also *Occupational Safety and Health Convention, (No.155), 1981.*

²¹ (1873) 3 MW & WI

²² (1690) 19 E.R., 382

²³ *Universal Declaration of Human Rights, 1948; International Covenant on Economic, Social and Cultural Rights, 1993; Equality of Treatment (Accident) Compensation, No. 9, 1925; Occupational Safety and Health Convention.*

²⁴ Cap. F1, *Laws of the Federation, 2004.*

²⁵ Sections 8 & 9, *ibid.*

²⁶ Section 18, *ibid.*

²⁷ Section 23, *ibid.*

Also the *Labour Act*²⁸ contains relevant provisions on duty of care like duty to medically examine workers being recruited before commencement of work or as soon as possible²⁹, duty to provide transportation and to take care of the health of workers in the process³⁰, and protection of the health and welfare of women and children particularly against night work³¹. The International Labour Organization (ILO) has conventions on employer's duty of care such as; *Equality of Treatment (Accident) Compensation*³², *Employment Injury Benefits*³³, and *Occupational Safety Health*³⁴ among numerous others.

There are strong commercial cases for employers exercising duty of care towards their employees alongside being a legal obligation. As issues such as absenteeism through stress can be reduced greatly. Productivity will increase due to motivation of the employees, and enhancement of mutual understanding through communication channels between the employer and employee will create smooth running of the organization.

Finally, any term in a contract of employment that purports to override or negates an employee's common law or statutory employment right is null and void. Thus the duty of care placed on the employer is strict and in the absence of any explanation negligence of the duty is presumed³⁵ which will entitle an affected employee to proceed with an action in the court of law.

²⁸ Cap. L1, *Laws of the Federation, 2004*.

²⁹ Section 28, *ibid*.

³⁰ Section 29, *ibid*.

³¹ Sections 55, 60, 65, 66, *ibid*.

³² Convention No. 19, 1925

³³ Convention No. 121, 1964

³⁴ Convention No. 55, 1981

³⁵ Rident, R.W., *op.cit*. p.343

2.5 Negligence or Breach of the Duty by the Employer

Negligence in its legal sense means failure in law to do what a reasonable person would have done in the circumstances to keep the employee safe from harm. As stated above, every employer has a duty to take reasonable care of his employees, where there is failure to exercise this duty of care as required by law and the employee eventually sustained injury, the employer could be held liable for negligence.

At common law, the system of negligent liability requires the employee to prove the following:

- i. The employer has a duty of care, owed the employee.
- ii. An accident has occurred.
- iii. The accident was caused as a result of employer's breach of the duty.
- iv. The accident caused personal injury to the employee.

The employer's liability to an injured employee may be categorized into three (3) distinct theories. First, an employer may be directly liable to an injured employee by breaching its duty of care, safety and welfare. Second, the employer may have adopted or ratified a wrongful act of another employee, thus assuming responsibility for the harm. Third, vicarious liability may result where one employee is harmed by another³⁶. In order to establish employer's liability under a negligence theory, the employee must establish all of the factors of common law negligence liability stated above. The existence of a legal duty of care is usually a question of law for a judge, while foreseeability is often a question of fact for the jury³⁷.

³⁶ Stephen, J.B. (1997) *Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence*. Retrieved on January 15, 2016 from <http://scholarship.law.marquette.edu/mulr>

³⁷*ibid.*

The fact that the employer breach the duty of care does not connote liability. There must be casual connection between the breach of the duty and the injury sustained by the employee³⁸. Hence, the burden of proof of negligence lies on the employee while the employer bears that of rebuttal. Under common law, where the accident would have happen even if the employer had carried out his duty, there will be no negligence. But where the accident is of such character that it would not normally happen without negligence on the part of the person in charge (employer), the principle of *res ipsa loquitor* will apply as evidence of negligence on the part of the employer³⁹. Causation, said Lord Shaw, in *Leyland Shipping Co. vs Norwich Union Fire Insurance Society*⁴⁰ is not a chain, but a net; and that it is for the judge to decide as a matter of fact which of the causes forming the net was the proximate, and which the remote cause. Thus liability for negligence depends on the absence of reasonable care to prevent reasonable foreseeable dangers.

To establish liability of the employer it becomes necessary to show that the alleged breach of duty was either the sole cause or contributory cause of the injury. However, under the negligent liability rule the employer enjoys three (3) defenses:

i. Defense of voluntary assumption of risk-that the worker knew of the damages or risk involved in the work and willingly assumed risks by accepting the job. This means that by accepting the

³⁸ Agomo, C.K., *op.cit.* p.209

³⁹*ibid.*

⁴⁰ (1918) AC 350, 369

job offer, the worker has abdicated the right to sue for injuries. In *Smith vs Baker & Sons*⁴¹ the court quoting from the decision in (*Bowater vs Roley Regis Corporation*) states:

If nothing more is proved than that the workman saw danger, reported it, but on being told to go on, went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk and had not acted voluntarily in the sense of having taken the risk upon himself.⁴²

However, the defense will not apply where the worker had acted for the benefit of the employer. But it is available where the workman deliberately disobeys safety regulations which impose a direct duty on him⁴³.

ii. Contributory negligence-that the injured employee's negligence contributed to the occurrence of the accident. In *Evans vs Bakare*⁴⁴ the Supreme Court defines this defense as "that the party charged is primarily liable but that the party charging him has contributed by his own negligence to what had eventually happened." Here both the employer and employee were apportioned liability. It was opined that in assessing the quantum of contributory negligence the court need not adopt a strict mathematical approach but may take into account the degree of blameworthiness of the plaintiff⁴⁵.

iii. Common employment-that a fellow worker of the employee caused the accident. This is, however not a complete defense in that a success of same will reduce damages only. However, it

⁴¹ (1891) A.C 325 at 337

⁴² (1956) A.C 627 at 644

⁴³ *I.C.I. vs Shotwell* (1965) A.C. 627

⁴⁴ (1974) 1 N.M.L.R., 78 at 81

⁴⁵ *Rident, R.W., op.cit.* p.361

is important to note that, over time, the common law negligent liability defenses were abolished either statutorily or in judicial decisions.

Interestingly, the new regime of compensation law, which is to be discussed later, has introduced a “*No-fault principle*”. Hence the duty of care is so high on the employer, provided the injury sustain by the employee arises out of or in the course of employment, the employer will be held liable. The negligence and faults of either the employer or employee is usually immaterial. It is important to note that, the present regime of employees’ compensation has shouldered the burden of taking responsibility of an injured employee on *NSITF*. However, it is difficult for an injured employee who *deliberately* injured himself to succeed under the guise of this principle and claim compensation. This is because a self-injury has not qualified one of the conditions under the Act for compensation, that is, ‘Accident’. An accident has to be something unforeseen and sudden not deliberate.

2.6 Meaning of Employees’ Compensation

Black’s Law Dictionary,^{9th} Edition at page 320, defines Compensation as “payment of damages or any other act that a court orders to be done by a person who has caused injury to another.” Compensation is described as a monetary payment made to an injured workman in respect of injury which he has sustained in the course of employment⁴⁶. It is also a system whereby an employer pays, or provides insurance to pay, the cost wages and medical expenses of an injured employee. Such benefits may include benefits to dependants in the case of accidental death of the employee.

⁴⁶ Ogunbiyi, *op.cit.*

Employees' compensation law is governed by statutes, and the laws have developed in phases as can be seen later. However, the key features are consistent, an employee is automatically entitled to receive certain benefits when he/she suffers an occupational disease or accidental personal injury arising out of or in the course of employment.

The phrases "*in the course and out of employment*" had been a legal bridge which a claimant must successfully pass through in order to earn the compensation. This is because an accident or injury may occur in a way which has no causal link with the employment. Thus, it rests on the injured workman or dependent to show not only that the accident arose in the course of employment but also that it arose out of the employment⁴⁷. In *Davidson & Co. vs Robb*⁴⁸ Viscount Holden stated "there is required to be shown something in the nature of causal relation between the accident and an order, express or implied, given by the employer."

In *U.A.C (Nig.) Ltd vs Joseph Orekyen*⁴⁹ where a workman who was a supervisor at a petrol station while trying to separate a fight between one of the attendants and a customer, was thereby injured, leading to blindness on one eye, Lestang, C.J. reasons that there was a clear relation between the accident and employment, as it was part of the Respondent's duty to maintain order at the petrol station. However in *M. Ade Smith vs E.D Line, Ltd*⁵⁰, the plaintiff was employed in a ship belonging to the defendants. After he had finished the day's work and signed off he attempted to jump into a tug which intended to pass across to another tug which belonged to the

⁴⁷Rident, R.W., *op.cit.* p.356

⁴⁸(1918) 1 QB 317

⁴⁹(1961) L.L.R., 144

⁵⁰(1944) 17 N.L.R., 145

defendants. He fell into the water and dislocated his shoulder. It was established that there was no contractual obligation or duty on the part of the workman to use the tug of his employers; and it was not a special facility provided by the employers for the use of the workman. The employee succeeded at the trial court, but on appeal, the High Court reversed the decision on the ground that the accident did not arise out of and in the course of employment. Brook C.J stated that:

The question to be determined is when the applicant's employment ended. As a rule it does not continue after he has left employment, but it does not necessarily end when the employee leaves the actual place where he is working and there may be some reasonable extension where he travels from his work by some form of transport provided by his employers and which he is under a contractual duty to use or where he is using the means of egress from his employment.

The duty of the employer is not limited to these occasions when the employee is acting in the course of his employment. Provided the circumstances are sufficiently within the control of the employment as such, he will be liable even if the employee was on a frolic of his own. Thus, the limit imposed is not by the course of employment but by the reasonable responsibility of the employer⁵¹. Uvieghara⁵² succinctly put it that "A workman is in employment when he commences work, to when he closes from work, unless of course he interrupts his employment by doing something which is not reasonably incidental to his burden. Although the burden of proof of negligence lies on the employee.

2.6.1 Purpose of Employees' Compensation

The purpose of the compensation is to return the injured employee quickly and economically to the status of productive worker without harming the employer's business. Such compensation is not to punish or hurt the employer rather a system created where by insurance covered specific

⁵¹ Rident, R.W., *op.cit.*

⁵² Uvieghara, *op.cit.*

injuries in the course of employment. Thus, a worker whose injury is covered by the employees' compensation statute loses the common law right to sue the employer for that injury, but may still sue third parties whose negligence contributed to the workman injury. This is the import of *Section 12(1) of Employees' Compensation Act, 2010*.

2.7 The Evolution of Compensation Laws in Nigeria

Compensation, as has been stated above, varies from one jurisdiction to others, so also do the development of its regulated laws. In Nigeria, bulk of our laws derives inspiration and guidance from English law, hence our compensation laws traced its root from hitherto colonial masters. Suffice it to say the concept of compensation for the worker was bound up in the doctrine of *noblesse oblige*, meaning, that an honourable lord will care for his injured serf⁵³. Under feudalism, compensation for work-related injuries was at the discretion of the feudal lord⁵⁴. It was based on the defenses operated under common law that the legal framework for compensating injuries became so exceptionally restrictive that the defenses were tagged as “*unholy trinity*”.

The system of compensation can be traced to inadequacies of *Employers' Liability Law, 1871* in Germany. The law provides for limited social protection to workers in certain factories, quarries, rail roads and in mines. Then comes *Workers' Accident Insurance, 1884* creating the first modern system of workers' compensation. It made the employer, the insurer of accidents in the work place- regardless of his fault. Hence this law laid the groundwork for today's employees' compensation law.

⁵³ Guyton, G.P., *op. cit.*

⁵⁴*ibid.*

Workers' insurance spreads across western nations and in England as early as 1880, the British Prime Minister William Gladstone pushed through for the Employers' Liability Act⁵⁵. This abolished the common law "unholy trinity defenses" in theory, but it did not establish a "no-fault" system. That is to say the burden of proof of negligence by employer still lies with the employee. Furthermore, the law did not abolish the "right to die" contracts where workers renounce their right to sue for injury sustain in the industry. Thus the law had little effect on the workers care.

In 1893, the *Workers' Compensation Act* was proposed in the parliament. To an extent the law was equivalent to German law of 1884 in establishing the "no-fault" doctrine. Unlike the German model, it did not rely on state administration of insurance rather private insurance firms provided the insurance for workers. The delayed in its(*Workers' Compensation Act*) passage to 1897 was as a result of staunch opposition from manufacturing interests in parliaments, and House of Lord who feel threatened by the non-inclusion of a language which would have made "right to die" contracts a permissible means of circumventing the entire system.

In Nigeria, the first workmen's compensation legislation was the *Workmen' Compensation Ordinance, 1942* which was traced to the *Workmen's Compensation Act, 1925* operative in England. It later became known as the *Workmen's Compensation Act, Cap.222, Laws of the Federation of Nigeria, 1958*. It was followed by the *Workmen's Compensation Decree No.17 of 1987*, which later codified as *Cap.470, Laws of the Federation of Nigeria, 1990* and later re-

⁵⁵ Kramer, S.N. (1958) *History Begins at Sumer*, Thames and Hudson, p.93

codified as the *Workmen's Compensation Act, Cap. W6, Laws of the Federation of Nigeria, 2004* which the current Act repealed.

2.7.1 The Workmen's Compensation Ordinance, 1942

This is the first legislation in Nigeria that touches workers' compensation. The law came into effect on the 1st day of April, 1942. The legislation has 37 sections with accompanying rules made pursuant to Section 35 & 36 of the ordinance.

It is important to note that, the first court of instance to entertain compensation matters under the ordinance is the *Magistrate Court*, and appeal from there lies to High Court. Where the court found out that the contract of service is said to be illegal, for the purpose of giving effect to the law and having regard to the circumstances and the facts, the court will consider the person as having been working under a valid contract of service or apprenticeship⁵⁶.

However this law has restrictive interpretation of who is a "workman". It described a workman as one whose earning does not exceed #1600. That is to say a non-manual worker whose earning exceed #1600 will not qualified as workman. Also like in England, the industries engages "friendly societies" who takes charges of insuring workers. It is pertinent to note that according to the ordinance, for a workman to be entitled to compensation the injury sustained in the course of employment must be such that incapacitated him for five (5) consecutive working days⁵⁷. And where it is found that the injury is as a result of wilful misconduct of the workman, compensation

⁵⁶Section 2(2) *Workmen's Compensation Ordinance, 1942*

⁵⁷Section 5(1) (a), *ibid.*

will be disallowed⁵⁸. However, the court may use its discretion and award compensation where the injury in this case has resulted to death or permanent incapacity of the worker.

It is safe to say that this ordinance has set in motion a legislation on workmen's compensation which later legislation improved on, both in scope and administration. It was this law that later became the *Workmen's Compensation Act, Cap.222, Laws of the Federation of Nigeria, 1958*.

2.7.2 The Workmen's Compensation Act, 1987

The criticism of *Workmen's Compensation Ordinance, 1942* led to the repeal of the law in 1987 and the enactment of *Workmen's Compensation Act, 1987*. Initially, the Law was *Workmen's Compensation Decree, No.17 of 1987* which was later codified as *Cap.470, Laws of the Federation of Nigeria, 1990*, and later re-codified as *Workmen's Compensation Act, Cap. W6, Laws of the Federation of Nigeria, 2004*.

This *Act* was applauded as it improved the meaning and qualification of "worker" for the purpose of compensation. It has *fourty-two (42) sections* with *two (2) schedules* attached pursuant to *Section 41*, and *Sections, 7, 8 and 41* respectively. The *Act* provides the High Court with responsibility to adjudicate on cases or dispute between employee & employer, and enforcement of judgment resulting from injury sustained for purposes of implementing the provisions of the *Act*⁵⁹. Another notable provision of the *Act* is that of *compulsory insurance*. Every employer

⁵⁸ Section 5(1) (b), *ibid*.

⁵⁹ Section 20(1), *ibid*.

shall insure every workman employed by him against injury or death arising out of, or in the course of his employment⁶⁰.

The criticism of *Workmen's Compensation Act, 1987* ranges from the process of making claims which is time consuming. The time within which the compensation claims are paid to the injured workman or dependant is very long. Mostly, if the matter gets to court the proceedings also gets prolonged coupled with high cost of litigation. Hence the injured worker/dependant resort to settlement out of court and receive lower compensation than that which they would have received if they became successful at the end of the trial.

Another issue that affects the *Act* is that the benefits provided are rather too low. This has been one of the reasons previous compensation laws were constantly revised. The payment of *fifty four (54) months* salary as compensation to an employee for permanent incapacity is just too small. There is no doubt that *54 months* salary cannot actually compensate for permanent total disability such as loss of sight, limbs or feet which consigns the workman to constant psychological or emotional trauma and social ostracism through the rest of his life.

The compensation paid in accordance with the *Act* is lump sum. Thus, most employees on disengagement spend their money without meaningful investment to sustain them, thereby become a burden on the society again.

⁶⁰Section 40(1), *ibid*.

In conclusion, we have understood that the existence of employment relationship is the first condition that warrant compensation. And employment like compensation operated in Nigeria even before the reception of English Laws. The duty of care placed on the employer at earliest stage is not absolute but qualified. The criticism of compensation laws led to their repeal and now the enactment of *Employees' Compensation Act, 2010*.

CHAPTER THREE

AN APPRAISAL OF THE EMPLOYEES' COMPENSATION ACT, 2010

3.1 Introduction

The social and economic concern for accident cases in industries and workplaces; and the urgent need for incentives for industrial safety and rehabilitation of injured and disabled employees led to the enactment of various *Workmen's Compensation Acts* in many countries, Nigeria inclusive. This was further strengthened by the inadequacies of common law approach to compensation for industrial injuries¹. It is to solve or manage the injustices arising from the common law inability to fully address cases of industrial injuries and diseases that the clamour for workmen's compensation legislation gained momentum.

The workmen's compensation scheme aimed at improving social security and insurance for the injured employee and his dependants. Hence, various legislation reflected this in their preambles. Also the emergence of International Labour Organization and various conventions from which compensation legislation draws inspiration and guidance provided further impetus to the need for social security. These instruments emphasized the need for "Decent Work" which is the key means of lifting people out of poverty and want². Indeed, the scheme is, no doubt, directed towards protecting the injured employee and his family from social and economic degradation. It is against this background among others that the Federal Government repealed the *Workmen's Compensation Act, 1987* and enacted the *Employees' Compensation Act, 2010*. The *Employees' Compensation Act* is the legal instrument or framework that provides for the welfare of an injured

¹Atiyah, P.S. (1982), *Accidents, Compensation and the Law*, Wiendfield and Nicolson, London.p.75

² Gillian and Diane, *Decent Work, Human Rights and Millennium Developments Goals*, Race and Property Law Journal, 7(2): 303-331

or disabled employee in line with the Work Injury Scheme under the International Labour Organisation Convention³.

Now, to examine, to what extent the Employees' Compensation Act, 2010 hereinafter refers as the Act, secured the strategic objectives of the Decent Work Agenda as mandated by the ILO vis-a-vis adequate compensation for the employee and their dependants as the case may be, this chapter will examine the provisions relating to the type of compensation, their scope and the quantum of compensations payable to the category of beneficiaries.

3.2 Scope and Objectives of the Act

The *Employees' Compensation Act, 2010* applies to all employers and employees in the public and private sectors in the Federal Republic of Nigeria⁴. That is to say every Nigerian employee irrespective of class or category is covered by the Act. However, the only exception to its application are members of the Nigerian Armed Forces who are not employed in a civilian capacity⁵. The reason for this exemption was that, by the very nature of military business, they operate in a high risk environment and their employers, that is, the government, are statutorily obliged to provide minimum prescribed level of protective cover for each member of the said force, to ensure compensation in the events of accidents or death⁶. However, those employed in civilian capacity are not covered by the Armed Forces Act⁷.

³ No. 102 of 1952 (*Convention on Minimum Standards of Social Security.*)

⁴ Section 2(1), *Employees' Compensation Act, op. cit.*

⁵ Section 3, *ibid.*

⁶ Section 41, *Armed Forces Act*, Cap.A20, Laws of the Federation, 2004

⁷ Section 291, *ibid.*

Unlike the repealed Act, this Act gives an all-encompassing definition of an employee as;

A person employed by an employer under oral or written contract of employment whether a continuous, part time, temporary, apprenticeship, or casual basis and includes a domestic servant who is not a member of the family of the employer including any person employed in the Federal, State and Local Government and any government agencies and in the formal and informal sectors of the economy⁸.

The Act also defines an employer to “include any individual, body Corporate, Federal, State or Local Government or any of the government agencies who has entered into a contract of employment to employ any other person as employee or apprentice”⁹. A cursory look at the provisions above shows that the Act attempts to cover all users of labour in Nigeria. This was further buttressed when we consider the provision of *Section 44* of the Act which provides liability for assessment of independent contractors and sub-contractors provides:

Where any person or organization employs an independent contractor to perform any work in a workplace, both the person or organization and independent contractor shall be liable-

- (a) Jointly for any assessment under the Act relating to that work, and
- (b) For that amount which may, at the discretion of the board, be collected from either of them, or partly from one and partly from the other¹⁰.

Where a contract is sub-contracted, either the principal, the contractor or the sub-contractor shall be liable; or jointly shall be liable in relation to the work for assessment¹¹. Hence, where a party uses the labour or services of an independent contractor or sub-contractor, contributions are still required to be made. This Act was a complete departure from the repealed Act as no categories of employees are left out now.¹²

⁸Section 73, *Employees' Compensation Act, op. cit.*

⁹*ibid.*

¹⁰Section 44(1), *ibid.*

¹¹Section 44(2), *ibid.*

¹² As was done under Handiwork and Agricultural sectors under Section, 1(2), *Workmen's Compensation Act, op. cit.*

Unlike the impression given by the introduction of the repealed Act that the compensation was meant only for injuries arising in the course of employment. Even though, it is not all injuries that will result to death. The introduction is a shortfall from the provisions of the Act which substantially provided for compensation for death or incapacity arising out of and in the course of employment¹³. The *Employees' Compensation Act, 2010*, on the contrary, gave a more comprehensive introduction by making it clear, early enough, that it intends to apply to death, incapacity or disease arising from injuries out of or in the course of employment.

As encompassing as the definitions given by the Act, the Act has failed to provide the meaning of the phrase “members of the family”. This is because the extended family system in Africa makes it difficult to say who is not a member of the family. Thus, the Act should set a limit as to who constitute a member of a family, so as not to cover distant relatives of the employer. A corollary to that is the inclusion of domestic servant as an employee. It is true that most domestic servants are distant relatives of the employer who are being subjected to various forms of degradation that often led to injuries. More so, the Act has not provided any mechanism to cross-check and ensure proper records to enable it assess employers of domestic servants.

Equally, the definition of employer as given by the Act is not conclusive, for it starts with the word “includes”. Thus, a recourse to *Section 9, Labour Act*¹⁴ which defines employer as “any person who has entered into contract of employment to any person and includes the agent, manager or factor of that first mentioned person or personal representatives of the deceased employer.” Hence any employer not covered by either or both provisions, is not under any

¹³Section 3, *ibid.*

¹⁴*Op. cit.*

obligation under the Act, same with employee not covered by the definition given above.

Uvieghara posited thus:

...although statutory regulation also applies within the common law relation of employer and employee, it does not follow that a particular labour statute applies to every employee at common law. Each statute determines those employees to whom it may apply. *An employee who does not fall within a given definition in a statute or who is expressly excluded by a statute cannot claim a benefit under the statute nor can be made liable under it.*¹⁵

The Act attached more importance to its objectives, hence its inclusion in the statute makes it easier for the courts when interpreting any provisions of the Act to apply the purposive theory of interpretation. Also known as teleological approach which holds that common law courts should interpret legislation in the light of the purpose behind the legislation. The objectives were conspicuously, and in an equally comprehensive manner enumerated in *Section 1* of the Act.

Thus:

The objectives of the Act are to-

- (a) Provide for an open and fair system of guaranteed and adequate compensation for all employees or their dependants for any death, injury, diseases or disability arising out of or in the course of employment.
- (b) Provide rehabilitation to employees with work related disabilities as provided in the Act.
- (c) Establish and maintain a solvent compensation fund managed in the interest of employees and employers.
- (d) Provide for fair and adequate assessments for employers.
- (e) Provide an appeal procedure that is simple, fair and accessible, with minimal delays; and
- (f) Combine efforts and resources of relevant stakeholders for the prevention of workplace disabilities, including the enforcement of occupational safety and health standards¹⁶.

¹⁵ Uvieghara, *op. cit.*

¹⁶Section 1(a)-(f), *Employees' Compensation Act, op. cit.*

Thus, the Act intended to provide social security for an injured employee and his/her dependants in the case of death. And to safeguard assurances for compensation in the event of accident and injury. At the later part of this work we shall examine the extent at which the “Board” discharges its roles in line with the objectives of the Act. The Act has simplified the process of claiming compensation from hitherto endless litigation processes, hence a greeted with commendation.

3.3 Compensation for Death, Injury and Disease.

Social and economic security protection has long been guaranteed by *Universal Declaration of Human Rights*¹⁷ and the *International Covenant on Economic, Social and Cultural Rights*¹⁸. It was from these international instruments that the Act derives inspiration and provides social and economic security protection for Nigerian employees through impressive social insurance in the form of disability insurance, survivor benefits and healthcare provision. In which case these instruments serves as standard for gauging social security cases. Some forms of social security protection has been introduced in the Act, however it remains to be seen in the implementation.

The Act also provides “any employer, whether or not in a workplace, who suffers any disabling injury arising out of or in the course of employment shall be entitled to payment of compensation in accordance with part iv of this Act.¹⁹” The import of the above provision can be seen from the discussion of all the injuries compensable by the Act below:

¹⁷ Article 22 and 23, 1948

¹⁸ Article 9, 1976

¹⁹ Section 7(1), *Employees’ Compensation Act, op. cit.*

3.3.1 Injury

Section 7 of the Act inter alia provides “any employer, whether or not in a workplace, who suffers any disabling injury arising out of or in the course of employment shall be entitled to payment of compensation in accordance with part iv of this Act.”²⁰ From the above section, it is important to note that the basis upon which employee benefits from compensation for injuries rest on the phrase “any disabling injury arising out of or in the course of employment.” Hence an employee must suffer a disabling injury before he/she qualified for compensation.

The Act did not define and or state what constitute “disabling injury” but it defines injury. It is the opinion of this writer that the use of “disabling” in qualifying injury and occupational diseases by the Act is simply to qualify the liability of the employer or to limit his liability to only injury which incapacitate the employee from earning full wages as aptly captured by the repealed Act²¹. Injury as define by the Act “include bodily injury or disease resulting from an accident or exposure to critical agents and conditions in a workplace.”²²

Therefore disabling injuries covers both physical bodily injuries and injuries to the mind which arise out of or in the course of employment. Hence compensation for healthcare benefits for mental stress, occupational diseases and hearing impairment are all covered. However, by the import of *Section 7(2)* of the Act, the disabling injury must be by accident. Accident on the other

²⁰*ibid.*

²¹Section 3(2), *Workmen’s Compensation Act, op cit.*

²²Section 73, *Employees’ Compensation Act, op. cit.*

hand define to mean an occurrence arising out of or in the course of work which results in fatal or non-fatal occupational injury that may lead to compensation under the Act.²³

In *Fenton v Thorley*²⁴ Lord Lindley stated that an accident is an “unforeseen happening or an unexpected occurrence which produces hurt or loss.” This is so in order to distinguish injury arising from mere process of bodily degeneration which is not due to any particular known event relating to the employment. Hence, the injury must not have been designed by the employee himself, but occurred instantaneously from the event causing it.

The scope of compensation for the purpose of injury covered:

- (a) The employee’s principal or secondary residence.
- (b) The place where the employee usually takes meal.
- (c) The place where he usually receives remuneration provided that the employer has prior notification of such place.²⁵

There is a presumption that the injury occurred in the course of employment if the accident in which the injury sustained was caused by the employment.²⁶ However, the Act frowns at double compensation, hence where one injury or disease is superimposed on another, the Act provides for compensation only for the disability caused by the subsequent injury or disease.²⁷ The Act

²³*Ibid.*

²⁴ (1903) A.C, 443 at 453.

²⁵Section 7(2), *Employees’ Compensation Act.*

²⁶Section 7(4), *ibid.*

²⁷Section 7(5), *ibid.*

also covers injuries occurring outside the workplace if the nature of the business or employment covers it; equally the employee has authority or permission.²⁸

It is important to note that the injury compensable under the Act is personal injury, hence damage to personal property is not compensable. Personal injuries are injuries to the person, as distinct from injuries to property. Thus, damage to personal property such as jewelry, vehicle, and damage to artificial limb and even injured baby is not contemplated by the Act. The implication of *Section 7* of the Act, is that a nursing mother cannot claim compensation for an injury sustained by her child even if the injury arises out of or in the course of her employment. On the other hand, the law allows nursing mothers to carry their babies to places of work to the extent of recognizing and granting them some specific time to nurse their children.²⁹ Thus, the scheme should have extend to cover children within the nursing age as they are not immune from possible risk in the workplace.

3.3.2 Mental Stress

Compensation for mental stress is one of the many improvements of the *Employees' Compensation Act, 2010*. The Act provides for compensation for mental stress, where the mental stress is not as a result of an injury for which an employee is otherwise entitled to compensation. However, mental stress must be:

- (a) an *acute reaction to a sudden and unexpected traumatic event* arising out of or in the course of employment; or

²⁸Section 11, *ibid*.

²⁹Section 5(4) (d), *Labour Act, op. cit.*

(b) diagnosed by an accredited medical practitioner as *a mental or physical condition amounting to mental stress arising out of the nature of work* or the occurrence of any event in the course of the employment.³⁰

Mental stress was not define by the Act, however it has been define as “a state of being, resulting from the tension experienced by the imbalance between what is demanded and what is offered to meet that demand.”³¹ Mental stress, in medical terms, is described as physical or psychological stimulus that can produce mental tension or physiological reactions that may lead to illness.³²

There are many factors that cause mental stress among which are change of work, the working conditions or the organization of work in such a way as to unfairly exceed the work ability and capacity of the employee by his employer. Earlier as we have highlighted the employer is under a duty to take reasonable care of his employee, hence the emphasis that conditions of work are to be just and humane cannot be satisfied where the psychological needs and other challenges of the employee were ignored by the employer. It was opined that these adverse factors within the work environment are known to increase the risk of mental health problems among others³³. Such as high quantitative and qualitative workload, role conflict at work and ambiguity of work schedule, poor remuneration, lack of social support among others.³⁴

³⁰Section8(1), *Employees’ Compensation Act, op. cit.*

³¹ Eme I.N (2013) Compensation under the Employee’s Act. In: Bimbo,A (ed) *Themes on New Compensation Act, Hybrid Consult Publishers, Abuja, Nigeria, p.85*

³²*Mental Health. (2016)*. Retrieved March 21, 2016, from <http://www.fatfreekitchen.com/stress->

³³ Olayinka A. (2013) Compensation for Mental Stress under the New Employees’ Compensation Act, 2010. Bimbo, A. (ed) *Themes on New Compensation Act, Hybrid Consult Publishers, Abuja, Nigeria.p.207*

³⁴*ibid.*

There is no statistic of mental health problems in Nigeria workplaces, but a look at these adverse factors there is likelihood that the percentage will be higher in Nigeria. This is due to extreme poverty, poor social and welfare services and high rate of unemployment which create a situation for unhealthy and exploitative working conditions. Mental health problems like Post Traumatic Stress Disorder (PTSD); Generalized Anxiety Disorder and severe depression are commonly among Nigerian employees³⁵.

From the above provision, the categories of mental stress recognized under the Act is severely limited and that such disease must also be certified by a medical practitioner as fulfilling the conditions stipulated under the Act. For the purpose of this, the Board may appoint a Medical Board of Inquiry consisting of relevant specialist to review the situation to determine whether or not the employee is entitled to compensation for mental stress.³⁶

The requirement of the law that mental stress be independent of the injury covered by the Act is alarming. As it is difficult to ascertain the cause of mental stress when there are many causes or chain of causes or stress inducing factors from the history of the employee. For instance, where an employee out of and in the course of his employment involved in an accident and sustained injury which is compensable under the Act and later on suffers from PTSD. Thus, there is causal relationship between stress at work and mental disorder which occasioned a disability.

Another difficulty is when one consider the provision of the Act which stipulates that an employee who suffers a temporary total or partial disability be paid lump sum as may be

³⁵ Olayinka and Bimbo,(2011), *op. cit.*p.61

³⁶Section 8 (3), *Employees' Compensation Act, op. cit.*

determine by the Board using the second schedule as a guide.³⁷ However the second schedule despite the fact that it featured a wide range of disabling physical conditions and their estimable percentage of compensation, mental stress, either as group or as specific syndromes, are not included on the list. The same applies to the first schedule that contains a long list of possible occupational diseases.

Although a claimant under mental stress will be able to sustain a partial disability claim and earn appropriate fraction of his wages till the attainment of retirement age where the disability (mental stress) had been established in accordance with *Section 22*³⁸ of the Act. It is the opinion of this writer that many of the inconsistencies noted above could be attributed to the innovation of this head of injury, however the conditions stipulated had so far usurped its significance to Nigerian employees.

3.3.3 Occupational Diseases

Unlike the repealed Act³⁹ which left the issue of compensation for occupational diseases at the discretion of Minister of Labour upon proper medical advice, the new Act, has made claim for occupational diseases a right. Thus, compensation shall be payable in any of the circumstances below:

- (a) disable the employee from earning full pay.
- (b) result in death.
- (c) arise out of the nature of employment; or

³⁷Section 24 & 25, *Employees' Compensation Act, ibid.*

³⁸*ibid.*

³⁹Section 32, *Workmen's Compensation Act, op. cit.*

(d) is listed in the first schedule to the Act.⁴⁰

An occupational disease define as a disease contracted arising out of or in the course of exposure to risk factors.⁴¹

First schedule to the Act listed so many occupational diseases that are compensable. However, for the purpose of compensation, the disease need not fall under the list provided in the schedule to the Act. It is enough if it is shown that the disease is due to the nature of any employment in which the employee was employed. Thus, the Act offers healthcare benefits for occupational diseases or diseases aggravated by other diseases.⁴² For the purpose of healthcare benefit, the date of disability shall be treated as the date of the occurrence of the disability.⁴³

Personal representative of a deceased employee who died as a result of a disease under the section will be compensated, subject to the employee been in the employment where he contracted that disease; and was free from the complicating disease before the exposure.⁴⁴ There is a presumption death is caused by occupational disease where a deceased employee was under the age of 70 years when he died and suffered from non-traumatic occupational disease impairing his vital organs.⁴⁵

The Board may appoint Medical Board of Inquiry consisting of relevant specialists for the purpose of ascertaining occupational disease under this section to determine whether or not the

⁴⁰Section 9(1) (a)-(d), *ibid.*

⁴¹Section 73, *Employees' Compensation Act, op. cit.*

⁴²*ibid.*

⁴³Section 9(2), *ibid.*

⁴⁴Section 9(4), *ibid.*

⁴⁵Section 9(6), *ibid.*

employee is entitled to compensation.⁴⁶ The Act also provides that where an employee has been exposed to the agent causing the disease in two or more classes or sub-classes of the industry in the workplace, the Board may apportion the cost of the compensation among the funds provided by those classes or sub-classes on the basis of duration and severity of the exposure of each.⁴⁷ The word “may” used in the above provisions suggest that in all circumstances it is not obligatory on the Board. This is because there will not be any difference where there are exposures in different classes or sub-classes of the industry.

3.3.4 Hearing Impairment

This is one of the improvements of the *Employees’ Compensation Act, 2010*. While the repealed Act makes provision for permanent and total incapacity without elaborating on the nature of the injuries that may come under the partial or total incapacity, the new Act, in addition to classifying the scope of compensation into death, permanent total or partial incapacity, has made explicit provisions relating to the nature of injuries which may fall under these categories leaving no one in doubt. Hence, hearing impairment is one of disabling injury compensable by the Act.

Section 10(1) of the Act provides that where an employee suffers from hearing impairment of non-traumatic origin, but arising out of or in the course of employment, the employee shall be entitled to compensation. The implication of this provision is that the hearing impairment has to be of non-traumatic origin because where it is of traumatic origin, it will belong to the class of mental stress as posited earlier in this work.

⁴⁶Section 9(8), *ibid.*

⁴⁷ Section 9(5), *ibid.*

The Act has not define Hearing Impairment, but it is most likely that it results in injury than death. Medically, hearing impairment, could be described as a generic term which include both deaf and hard from hearing which refers to persons with any type of degree of hearing loss that causes difficulty in a traditional way. The term “deaf” is used to describe people with profound hearing loss such that they cannot benefit from amplification, while hard of hearing is used for those with mild to severe hearing loss but who can benefit from amplification.

Compensation for hearing impairment which amounts to total deafness but not resulting loss of earnings may be provided by the Board in consultation with the National Council for Occupational Safety and Health in respect of the ranges of hearing impairment, the percentage of disability, the methods or frequencies to be used to measure the impairment and any other matter relating thereto.⁴⁸ However, where loss or reduction of earnings results from the hearing impairment, the employee shall be entitled to compensation for total or partial disability under the Act.⁴⁹

In a situation where the hearing impairment is superimposed on an already existing hearing impairment, compensation shall be the difference between the employee’s impairment before and impairment after the occurrence of the last exposure.⁵⁰ This is done by calculating the proportion of the impairment following the hearing impairment that may reasonably be attributed to the exposure in two or more classes or sub-classes of industry in a workplace.⁵¹ The Board may apportion the cost of compensation among the funds provided by these classes or sub-

⁴⁸Section 10(2),*ibid.*

⁴⁹Section 10(3),*ibid.*

⁵⁰Section 10(5),*ibid.*

⁵¹*ibid.*

classes on the basis of the duration or severity of the exposure in each.⁵² Application for compensation under this heading must be attached with:

- (a) Medical report (as accredited under *Section 10(8)* of the Act)
- (b) Audiogram and employer's report
- (c) Other evidence of hearing impairment determined by the Board.

That the amount payable as compensation mostly under this heading depends on the regulations to be made by the Board shows the discretionary powers of the Board. There is no deafness that may not affect one's earnings directly or indirectly. It is hard of hearing that may not suffer earning loss, this is because it can benefit from amplification. The method of calculation should equally take into consideration healthcare benefit including the cost of periodic medical checkup and replacements of hearing aids for the injured employee as the case may be.

3.3.5 Death

Compensation for death under the Act is for loss of life arising out of or in the course of employment, and this is payable to the dependants. Unlike other heads of compensation discussed above, no other provision under part III of the Act prescribed "compensation for death", hence death is more or less like "disabling injury" and as pecuniary loss to dependants or next of kin by reason of the death of the employee. The Act under the scale of compensation, provides that "where death results from the injury of an employee, compensation shall be paid to the dependants of the deceased."⁵³

⁵²Section 10(6), *ibid.*

⁵³Section 17, *ibid.*

While prescribing compensation for death caused by disease, *Section 9* of the Act provides as follows:

(1) Where...

(b) the death of an employee is caused by an occupational disease;...compensation and healthcare benefits shall be payable under the Act.

(4) Where death results from any disability under sub-section (3) of this section, the dependants of the employee shall be entitled to compensation under this Act.

From the above provisions of *Section 7 and 9* of the Act; it is obvious that the Act recognizes that death cannot be treated in isolation of the possible causes, which includes injury or diseases. Thus, death is compensable under the Act. There is no definition of “death” proffered by the Act. However, medically, death is the cessation of all vital functions of the body, including the heartbeat, brain activity (including brain stem) and breathing.⁵⁴ Also the Act does not give an exhaustive definition of the word “dependant”, it merely described a dependant to “include those members of the family including adoptive and foster family of the deceased or disabled employee wholly dependent on his earnings at the time of his death or would but for the disability due to the occupational accident or disease, have been so dependent.”⁵⁵

The opening word used “include” suggest that other classes of dependants not covered by the Act may exist. However, the qualifying factor as provided by the definition above is that the dependant must be wholly dependent on the deceased employee. There must be evidence of actual support and reliance. These are questions of fact, hence dependency covers reliance on

⁵⁴*Medical Dictionary (2016)*. Retrieved March 24, 2016, from <http://medical-dictionary.thefreedictionary.com/death>

⁵⁵Section 73, *Employees' Compensation Act, op. cit.*

necessaries of life which include foods, clothing, shelter; and other things connected thereto.⁵⁶ However, the Board shall still make monthly payment of amount, which is to be determined by it, to spouse, children or parents of the deceased where they do not depend on the employee's income at the time of his death if they show that they had reasonable expectation of pecuniary benefit from the continuation of the life of the employee.⁵⁷

3.4 Scales of Compensation under the Act

There is improvement from the repealed Act which had only permanent total, permanent partial and temporary incapacities, hence temporary total or temporary partial disability, healthcare and disability support, and scale of compensation relating to enemy war-like action are such improvements in the new *Employees' Compensation Act, 2010*. These scales are:

- i. Scale of compensation in fatal cases.⁵⁸
- ii. Scale of compensation for permanent Total Disability.⁵⁹
- iii. Scale of compensation for Permanent Partial Disability and Disfigurement.⁶⁰
- iv. Scale of compensation for Temporary Total Disability.⁶¹
- v. Scale of compensation for Temporary Partial Disability.⁶²
- vi. Scale of compensation relating to enemy war-like action or counter action.⁶³
- vii. Healthcare benefit, disability support and rehabilitation.⁶⁴

⁵⁶*Welsh Navigation Stream and Co. Ltd v Evans* (1927) AC 834, 842-843

⁵⁷Section 17 (1) (f) (ii), *Employees' Compensation Act, op. cit.*

⁵⁸Section 17, *ibid.*

⁵⁹Section 21, *ibid.*

⁶⁰Section 22, *ibid.*

⁶¹Section 24, *ibid.*

⁶²Section 25, *ibid.*

⁶³Section 18, *ibid.*

⁶⁴Section 26, *ibid.*

3.4.1 Scale of Compensation in Fatal Cases

Fatal cases are categories involving death of an employee. Compensation payable for loss of life of an employee as envisaged under *Section 7 and 9* of the Act is as prescribed by *Section 17* of the Act. However, compensation payable here depend upon the number of dependants available to benefit and their closeness to the deceased employee. It is, therefore, a fair compensation for genuine pecuniary loss suffered by the dependants. This is in contrast with the provision of the repealed Act which gives lump sum amount equal to forty-two (42) months earnings of the workman to be shared equally without distinction between the categories of dependants.⁶⁵ This was considered grossly inadequate for dependants who had lost their bread winner, hence the enactment of the new Act. Under this new regime, the sum payable as compensation ranges from as low as 40% of the total monthly remuneration of the employee⁶⁶ to the highest rate of 90% of the total monthly remuneration of the employee.⁶⁷ While in some cases compensation is determine by the Board base on pecuniary lost suffered by the dependants.

As stated earlier in this work that a dependant must be one who relied on the deceased employee on necessities of life. Hence where a deceased employee leaves dependant on his earnings either widow or widower with two or more children, they will be entitled to a monthly payment of a sum equal to 90 per cent of the total monthly remuneration of the deceased employee at the date of his death.⁶⁸ For example, if the deceased employee's monthly remuneration is #120,000 at the time of death, then the 90% will be calculated as follows:

$$\mathbf{120,000 \times 90 = 10,800,000}$$

⁶⁵Section 4, *Workmen's Compensation Act, op. cit.*

⁶⁶Section 17(1) (b) (i), *Employees' Compensation Act, op cit.*

⁶⁷Section 17(1) (a) (i), *ibid.*

⁶⁸*ibid.*

$$\frac{10,800,000}{100} = \#108,000$$

Therefore the widow or widower with two children or more whose deceased employee's remuneration at the date of the death is #120,000 will earn a monthly compensation of #108,000 representing 90% Of his remuneration.

Where the deceased employee leaves a widow or widower with only one (1) child, then they are entitled to 85% of the total monthly remuneration of the deceased at date of his death.⁶⁹ Thus, taking the monthly remuneration at the date of death. The 85% entitlement here will be

$$\begin{aligned} 120,000 \times 85 &= 10,200,000 \\ \frac{10,200,000}{100} &= 102,000 \end{aligned}$$

Thus, the monthly amount of compensation will be #102,000.

Where a deceased employee leaves a widow or widower who is 50 years or above, and without a child all at the date of the death; or the spouse left is incapacitated to earn income by reason of disease or bodily or mental disablement, he/she will be entitled to 60% of the total monthly remuneration of the deceased monthly.⁷⁰ Thus, where deceased monthly remuneration is #120,000. The 85% will be:

$$\begin{aligned} 120,000 \times 60 &= 7,200,000 \\ \frac{7,200,000}{100} &= 72,000 \end{aligned}$$

Therefore the monthly amount of compensation due to the widow or widower will be #72,000.

⁶⁹ Section 17(1) (a) (ii), *ibid.*

⁷⁰ Section 17(1)(a)(iii), *ibid.*

Where the deceased employer leaves only a child, the child will be entitled to a monthly payment of a sum equal to 40% of the total monthly rate of compensation that would have been payable if the deceased employee had sustained a permanent total disability.⁷¹ Thus, by *Section 21(1) of the Act* an employee who sustained permanent total disability under the Act is entitled to 90% of his monthly remuneration. Taking #100,000 as the deceased employee monthly remuneration at the date of death –

To arrive at the compensation if it were Permanent Total Disability (P.T.D). Thus:

$$\begin{array}{r} 100,000 \times 90 = 9,000,000 \\ \underline{9,000,000} \quad = 90,000 \\ 100 \end{array}$$

Compensation for P.T.D will be #**90,000**

Now, the only surviving child of the deceased employee is entitled to 40% of #**90,000**.

$$\begin{array}{r} \text{Thus, } 90,000 \times 40 = 3,600,000 \\ \underline{3,600,000} \quad = 36,000 \\ 100 \end{array}$$

Therefore, the only surviving child will be entitled to monthly compensation of #**36,000**.

Where the children are two and no any surviving spouse, compensation is 60% of what is payable monthly for permanent total disability. Where the children are three or more, then they will be entitled to 80% of monthly payment for permanent total disability.⁷² Payment to the child is done until the child reaches 21 years of age or completes undergraduate studies.⁷³ Again this shows once more unfettered power of the Board. Where the surviving child is disabled, the

⁷¹Section 17(1)(b)(i), *ibid.*

⁷²Section 17(1)(b)(iii), *ibid.*

⁷³Section 17(1)(c), *ibid.*

Board shall extend the period of monthly payment for such time the disabled child would not have been dependent on the deceased employee.⁷⁴

Other instances abound in the Act where the Board shall have power to “determine the period of the monthly payment or what sum is reasonable and proportionate to the pecuniary loss suffered by dependants or next of kin.⁷⁵” In the absence of guidelines for exercising this discretionary powers, it may create unnecessary delays and bottlenecks, while giving opportunity for corruption.

Therefore, it is better to have a statutory percentage for these categories of dependants than to leave it based on the judgment of the Board. Also the formula for apportionment of compensation as stated in *Section 17(11) of the Act* will not be tenable in other instances. This is because allowances payable is considered as part of the estate of the deceased, hence subject to the prescribed mode of distribution as ordained⁷⁶.

It is hoped that the grounds contemplated by the said sub-section for different apportionment aside that prescribed by the sub-section; and by the combine effect of sub-section (13) of *Section 17 of the Act*, the Board should make its rules and decision in line with the faith of the deceased employee. Where a dependant is entitled to compensation for the death of two (2) employees, the total compensation payable shall not be more than 90% of the average remuneration of an employee and not less than the highest amounts that would be payable in each case.⁷⁷

⁷⁴Section 17(1)(d), *ibid.*

⁷⁵Section 17(1)(e), *ibid.*

⁷⁶*Holy Qur'an, Chapter 4: 11-12*

⁷⁷Section 17(12), *Employees' Compensation Act*, op cit.

By virtue of *Section 19 of the Act*, the period of payments for compensation under the Act shall be for the life of the person to whom payment is to be made, unless a shorter period applies under the provisions of the Act or as the Board may from time to time by regulations specify. This is in contrast with the lump sum payment of forty-two monthly remuneration of the deceased employee under the repealed Act.

3.4.2 Scale of Compensation for Permanent Total Disability

This is the second major class of compensation under the Act aside death which is fatal case of injury discussed earlier. By permanent total disability, it means the employee, though alive, but is rendered permanently incapable of doing any work, or unable to enjoy the life of the society. *Section 21(1) of the Act* provides “if a permanent total disability results from the injury of an employee, the Board shall pay to the employee compensation that is periodic payment equal to 90 per cent of the remuneration of the employee.” The compensation shall be payable monthly.⁷⁸ In contrast, under the repealed Act, in cases of permanent total incapacities the workman was entitled to only lump sum equal to fifty-four (54) months earnings.⁷⁹ An additional quarter of that lump sum was paid the workman only if the incapacity is of a nature requiring constant help of another person.

Permanent total disability as define by the Act means the physical functions or conditions; mental capacity or physiological health *arising from and in the course of employment* that cause a deviation for more than 12 months from the condition typical for the respective age which

⁷⁸Section 21(2),*ibid.*

⁷⁹Section 5, *Workmen’s Compensation Act, op cit.*

restrict participation in the life of society and includes disfigurement.⁸⁰ While the compensation is calculated from the first working day of any injury.⁸¹ In addition to the said compensation, a disabled employee is entitled to the further elaborate healthcare and disability support guaranteed under the Act.⁸²

The use of the italicized phrase above appears to reincarnate the same phrase used under the repealed Act; and which in turns makes it difficult for the employee or dependant(s) to qualify through. It is the view of this writer, that the conjunctive “and” used in the Act is used in liberal term as any of the disease will qualify if arisen either out of or in the course of employment in line with the objective of the Act.

Therefore, a claimant for permanent total disability is entitled to 90% of the employee’s earnings, until he/she attains 55 years of age, or if he is already 55 or more, then, for two (2) years after the date of the injury.⁸³

For example, where a claimant is 50 years at the time he sustained injury and his monthly remuneration was #100,000. His compensation for P.T.D will be-

$$\begin{aligned} 100,000 \times 90 &= 9,000,000 \\ \underline{9,000,000} &= \#90,000 \text{ representing } 90\% \\ 100 & \end{aligned}$$

If he is to retire at the age of 55, then:

$$5 \times 12 \text{ (months)} = 60 \text{ months}$$

$$\begin{aligned} \text{Therefore, } 90,000 \times 60 &= 5,400,000 \\ \text{Total amount of compensation} &= \# 5,400,000 \end{aligned}$$

⁸⁰Section 73, *Employees’ Compensation Act, op. cit.*

⁸¹Section 7(3), *ibid.*

⁸²Section 26, *ibid.*

⁸³Sections 2(1) and 23, *ibid.*

Where the claimant is not retiring at the age of 55 years, then, the monthly amount of compensation will be multiplied by the number of months it will take him to retire to arrive at the compensation due. This is one of the exception of compensation for life as captured by *Section 19 of the Act*. However, it is the view of this writer that an employee who suffered permanent total disability deserves compensation for life, moreso if the disabled employee has some strength to engage himself further employment but for the permanent disability suffered.

The Board shall set aside at the time a periodic payment is made to an employee, an amount equal to 7.5 per cent of the said periodic payment or an amount set by Pension Reform Act be remitted to the retirement savings account of the employee.⁸⁴ The employee may in addition, wish to apply to the Board to contribute an amount that is not less than 1 per cent and not greater than 7.5 per cent , and the Board shall deduct same and remit it to the employee's retirement savings account pursuant to pension Reform Act.⁸⁵ And this voluntary contribution can be stopped by an employee through an application in a prescribed form to the Board.⁸⁶

3.4.3 Scale of Compensation for Permanent Partial Disability or Disfigurement

Permanent partial disability has the same meaning with permanent total disability. By partial disability, it means, here the injury is not total. For instance, an injury to the eye which deprives the victim of seeing clearly for the rest of his life is permanent partial disability. Thus, if a permanent partial disability results from the injury of the employee, the Board shall estimate the

⁸⁴Section 28(3)(a), *ibid*.

⁸⁵Section 28(4), *ibid*.

⁸⁶Section 28(6) and (8), *ibid*.

impairment of earning capacity from the nature and degree of the injury; and pay the employee's compensation that is a periodic payment equal to 90% of an estimate of the loss of remuneration resulting from the impairment.⁸⁷The compensation here shall be determine and calculated in accordance with Second Schedule.⁸⁸

For permanent partial disability, the Claimant is entitled to 90% of an estimate of the loss of remuneration, which results from the disability or impairment, until the employee attains 55 years of age, or if he is already 55 or more, then, for 2 years after the date of the injury.⁸⁹For example, an employee who before the disability was earning #120,000, estimated now to have lost 50% of his remuneration resulting from the injury. The amount to be given periodically will, therefore, be 90% of the 50% estimable.

$$\text{Therefore, } 50\% \text{ of } 120,000 = \frac{50}{100} \times 120,000 = 60,000$$

$$\text{Hence, } 90\% \times 60,000 = 54,000$$

Therefore, the periodic compensation due to the disabled employee will be **#54,000**.

Where a permanent partial disability results from the injury of an employee and the Board determined the employee's impairment, the Board may pay the employee compensation with a periodic payment that is equal to 90% of the difference between the remuneration of the worker before the injury and whichever of the following amounts the Board considers to better represent the loss of earnings of the employee, the remuneration that 'the employee is earning after the

⁸⁷Section22(1),*ibid*.

⁸⁸Section22(2),*ibid*.

⁸⁹Sections 22(1) and 23,*ibid*.

injury’, or ‘ the Board estimates the employee is capable of earning in a suitable occupation after the injury⁹⁰.

However, a payment may be made under the foregoing head only if the Board determines that the combined effect of the occupation of the employee at the time of the injury and disability resulting from the injury is so exceptional that an amount determined as commensurate with the impairment does not appropriately compensate the employee for the injury.⁹¹In making the determination, the Board shall consider the ability of the employee to continue in his or her occupation at the time of the injury or to adapt to another suitable occupation.

Where permanent partial disability results from injury, the minimum compensation awarded under *Section 22 of the Act* shall be calculated in the same manner as provided by *Section 24 of the Act* for Temporary total disability but to the extent of only the partial disability.⁹²That is compensation of a lump sum in accordance with Second Schedule of the Act. Also where the employee has suffered a serious and permanent disfigurement which the Board considers is capable of impairing the employee’s earning capacity, a lump sum in compensation may be paid, although the amount the employee was earning before the injury has not been diminished.⁹³No yardstick has been provided here to determine the lump sum amount to be paid as compensation. In addition, the disabled employee is entitled to the further elaborate healthcare and disability support guaranteed under *Section 26 of the Act*.

⁹⁰Section 22(4)(b),*ibid*.

⁹¹Section 22(5),*ibid*.

⁹²Section 22(7),*ibid*.

⁹³Section 22(8),*ibid*.

Like that of Permanent total disability, the Board shall set aside at the time of the periodic payment to an employee, an amount equal to 7.5 per cent of the said payment or an amount set by Pension Reform Act which will be remitted to the retirement savings account of the employee. The employee may in addition, wish to apply to the Board to contribute an amount that is not less than 1 per cent and not greater than 7.5 per cent , and the Board shall deduct same and remit it to the employee's retirement savings account pursuant to pension Reform Act. And this voluntary contribution can be stopped by an employee through an application in a prescribed form to the Board.

Thus, in the case of *A.O.Obasuyi & Sons Ltd vs Erumiawho*⁹⁴The Respondent/Applicant brought an application under the repealed Act for injuries sustained in the course of his duty in which three of his fingers were totally severed and the fourth finger was permanently damaged. In an application for award of compensation, the Respondent/Applicant successfully got 54% of his monthly earnings in accordance with the repealed Act. This demonstrates a typical case of permanent partial disability. But if it were to be treated under the new Act, the difference of compensation will be obvious.

3.4.4 Scale of Compensation for Temporary Total Disability

Temporary total disability has not been defined by the Act. However, by the scale of compensation of the said disability we will be able to know what type of disability constitute temporary total disability. Section 24 of the Act provides-

⁹⁴ (1999) 8 N.W.L.R (Pt. 630) p.227 at 239.

- (1) Subject to section 28(4) Of this Act, if a temporary total disability results from an employee's injury, the Board may pay the employee compensation of a lump sum in accordance with the second schedule to this Act or any regulation made pursuant to section 22(3) of this Act.
- (2) The payment referred to in sub-section 1 of this section shall not be in respect of *any disability that last for a period of more than 12 months.*

Suffice to say, temporary total disability is that disability that did not last more than 12 months. Where it exceeds 12 months, it will fall under the category of permanent disability discussed above. And that a lump sum compensation shall be paid by the Board to an employee for an injury that results to temporary total disability. This compensation shall be paid in accordance with Second Schedule of the Act or any regulation made by the Board.

A claimant of Temporary total disability may equally apply to contribute to his retirement savings account aside that amount set by the Board, an amount which is not less than 1 per cent and not greater than 7.5 per cent of his compensation. That is from the lump sum compensation paid to him/her. Also the compensation is being paid in accordance with *Section 23 of the Act*. That is the claimant will be entitled to compensation until he reaches 55 years of age, or if he is already 55 or more, then, for two (2) years after the date of the injury.

It is important to note that the Act says “may”⁹⁵ and considering the fact that the compensation for Temporary total disability is a lump sum compensation, it is the view of this writer that the “may” used is purposive/discretionary. This is because, the application of the section may not be tenable in cases where a periodic payment is not feasible. Alternatively, the claimant of Temporary total disability will wait until the fulfilment of these conditions encapsulated in the

⁹⁵Section 23, *Employees' Compensation Act, op. cit.*

section, thereby relied on healthcare benefits. This will constitute hardship on the part of the disabled employee, hence not the intendment of the Act.

3.4.5 Scale of Compensation for Temporary Partial Disability

Like Temporary total disability, this also was not define by the Act. Interestingly, *Section 25 of the Act* reads *mutatis mutandis* with *Section 24 of the Act* on Temporary total disability above. That is to say, Temporary partial disability is also that disability that did not exceed 12 months. By Temporary partial, the disability is not complete, that is to say the defectiveness beside been a year or less, is not complete. For instance, where the eye got injured, but the employee is able to see faintly with it within 12 months.

Therefore, a lump sum compensation shall be paid by the Board to an employee for an injury which results into Temporary partial disability that does not last for a period of more than 12 months. The compensation shall be in accordance with the Second Schedule of the Act or any regulation made pursuant to *Section 22(3) of the Act*.⁹⁶ A disabled employee may equally apply to contribute to his retirement savings account aside that amount set by the Board, an amount which is not less than 1 per cent and not greater than 7.5 per cent of his compensation.

3.4.6 Scale of Compensation relating to enemy war-like or Counteraction.

Where death, injury or disability of an employee arises from enemy war-like or counteraction, and the government offered compensation to the employee or his dependant equal to the compensation the employee or dependant would have gotten from the Act, the employee or

⁹⁶Section 25,*ibid*.

dependant will no longer benefit from the compensation provided under the Act.⁹⁷ This echoed the prohibition of double compensation by the Act. The employee or dependant will, however, be entitled to compensation under the Act where the compensation provided by the government is less than that of the Act only to the extent of the difference between what the Act prescribed and what was given by the government.⁹⁸

Enemy war-like action define to “include civil insurrection, riots, commotion, conflicts, terrorist acts, hostilities⁹⁹ etc. Counteraction here means an action to reduce or prevent the bad effect of enemy war-like action. Therefore, where the government decided to compensate the victims of insurgency in the Northeastern Nigeria ravaged by terrorist acts, an injured employee, disabled; or the dependant(s), compensation will be measured by that under the Act. Where the compensation is less, the difference paid in lieu. On the other hand, the acts of civilian Joint Task Force (JTF) which cut across the working classes will perfectly describe counteraction in this case, since their action is to assist in restoring peace to the area.

3.5 Healthcare Benefit, Disability Support and Rehabilitation

In addition to the foregoing categories of compensation provided by the Act, some healthcare benefits, disability support and rehabilitation are provided for, though largely at the discretion of the Board. The Act provides:

- (1) The Board may, in getting an injured employee back to work or in assisting to lessen or remove resulting disability, take any measure and make the expenditures from the Fund that it considers necessary and expedient

⁹⁷Section 18, *ibid.*

⁹⁸*ibid.*

⁹⁹Section 73, *ibid.*

- regardless of the date on which the employee first became entitled to compensation.
- (2) The Board may, where it considers it necessary, provide counselling services to the dependant.¹⁰⁰

The Act accordingly provides that-

...the Board may provide for the injured employee any medical, surgical, hospital, nursing and other care or treatment, transport, medicines, crutches and apparatus, including artificial members, that it may consider reasonably necessary at the time of the injury, and thereafter during the disability, to cure and relieve from the effects of the injury or alleviate those effects, the Board may adopt rules and regulations with respect to furnishing healthcare to injured employees entitled to it and for the payment of it.¹⁰¹

Daily allowance for the subsistence of an injured employee undergoing treatment outside his place of residence is also payable irrespective of the employee being entitled to other compensation.¹⁰²In the case of emergency, cost of medical services rendered to an injured employee by a physician other than that appointed by the Board for *justifiable and reasonable cause* shall be paid by the Board.¹⁰³However, the Act has not define what will constitute “reasonable and justifiable cause”. The Board may authorize employers to provide healthcare at the expense of the Board on terms fixed by the Board and the employer shall provide to an injured employee, when necessary, immediate conveyance and transport to a hospital for initial treatment.¹⁰⁴

Healthcare furnished as provided in such emergency or by the employer shall at all times be subject to the discretion, supervision and control of the Board, and the Board may enter into contract with any medical practitioner, nurse or other person, accredited by the Board, authorize

¹⁰⁰Section 16(1), *ibid.*

¹⁰¹Section 26(1), *ibid.*

¹⁰²Section 26(2), *ibid.*

¹⁰³Section 26(3), *ibid.*

¹⁰⁴Section 26(4), *ibid.*

to treat human ailments, hospitals and other institutions for any healthcare required, and to agree on a *scale of fees or remuneration* for that healthcare; and all questions as to necessity, character and sufficiency healthcare to be provided shall be determined by the Board.¹⁰⁵ The fees or remuneration shall not be more than the fees that will be proper and reasonable if the employee were to pay.¹⁰⁶

Where the injured employee wishes to employ a physician or medical practitioner of his choice to treat him/her, the Board shall permit, provided that it will not affect the powers of the Board to supervise and provide healthcare in away where it considers expedient.¹⁰⁷ However, any medical practitioner who attends to an injured or alleged case of injury in a workplace shall report to the Board within 7 days after the first date of his/her attendance to the injured employee.¹⁰⁸ This is to enable the Board know the status of the injured employee and response to the treatment. Failure to submit this report is an offence and attracts cancellation or suspension to render healthcare pursuant to the Act.

Healthcare services are not compulsory, but at the discretions of the Board. But in the case of occupational diseases, healthcare benefits are compulsory. This is so in the wordings of *Section 9(1)(d) of the Act* that where “an employee suffers from any occupational disease listed in the First Schedule to this Act, compensation and healthcare benefits **shall** be payable under this Act.” Also the authorization of the Board for healthcare benefits, in as much as it is under the field of the medical practitioner as authorize under the Medical and Dental Practitioner’s Act,

¹⁰⁵Section 26(5), *ibid.*

¹⁰⁶Section 26(6), *ibid.*

¹⁰⁷Section 26(7), *ibid.*

¹⁰⁸Section 27(1) (a) (b), *ibid.*

becomes a liability that must be settled by the Board. Healthcare benefits to dependant is by way of counselling as captured by *section 16(2) of the Act above*. The Act, here contemplates the psychological trauma that dependant(s) may find self after losing a breadwinner.

3.6 Conditions for Compensation under the Act

Basically there are four (4) conditions for compensation; these conditions had been discussed above in the course of our discussion viz: employee, personal injury, accidentally and out of or in the course of employment. Aside these four factors which non-existence of any deprives a person from compensation, there are other factors which equally serves as pre-requisite for compensation such as-

3.6.1 TimeLimit:

There is time frame within which an application for compensation is made, hence no compensation is payable unless an application is made within one year after the death, injury or disability arising from occupational accident or disease, except the Board is otherwise satisfied of any special circumstances causing the failure and provided the application is made within three years of the occurrence.¹⁰⁹

3.6.2 Notification of Injury:

Failure to notify the employer of an injury or disabling occupational disease in a workplace by the employee or dependant in the case of death within 14 days of the occurrence or receipt of the information of the occurrence, would be a bar to a claim, unless the Board is otherwise satisfied.

¹⁰⁹Section 6(2) and (3),*ibid*.

3.6.3 Election to sue in Court:

An election by an employee or dependant to bring an action in court for breach of duty or any other cause of action in respect of any death, injury or disability arising out of or in the course of employment shall be a bar to a claim under the Act.¹¹⁰

3.6.4 Age Limit: 55 years of age:

By *Section 23 of the Act*, in permanent total and permanent partial as well as temporary total and temporary disability cases, compensation may be paid to the employee only if the employee is-

- (a) Less than 55 years of age on the date of the injury, until the date the employee reaches 55 years of age; or the Board is satisfied that the employee would retire after reaching 55 years, or until the date the employee would retire , as may be determined by the Board; and
- (b) 55 years of age or older on the date of the injury, until 2 years after the date of the injury, or the Board is satisfied that the employee would retire after 2 years of the injury, or until the date the employee would retire, as may be determined by the Board.

3.7 Procedures for a Claim of Compensation

An injured or disabled employee in a workplace, or in the case of death, the dependant, to claim compensation within the scope of the Act must follow some procedural steps in accordance with the provision of the Act. These to large extent constitute the due processes of law, in which case a condition precedent that determines the jurisdiction of the Board.¹¹¹ Thus the procedures to be followed to claim compensation are:

3.7.1 Employer's Notification of Injury

¹¹⁰Section 12(3),*ibid*; *Famuyiwa v Falawiyo (1972) All NLR,446*

¹¹¹*Madukolu v Nkemdilim (1962) SC NLR, 341. Amadi v NNPC (2000) 10 NWLR (pt.674) 76*

Once there is an injury or disabling occupational disease to an employee, or in the case of death, the dependant, shall within 14 days of the occurrence, inform the employer appropriately.¹¹² It suffices where any of the employer's representative was informed like manager, supervisor, first aid attendant or agent in charge of the work.¹¹³ The information must be accompanied with the name of the employer, the nature and cause of the disease or injury if known and the time and place of the occurrence.¹¹⁴ Failure to provide these information is a bar to a claim of compensation, unless the Board is satisfied that the information, though imperfect, is sufficient to describe the injury or disease; the employer or his representative had knowledge of it; or the interest of justice requires that the claim be allowed.¹¹⁵

Where the employer request the particulars of injury or occupational disease, if the employee is fit to do so, he/she shall provide the employer with the information on a form prescribed by the Board.¹¹⁶ Form ECS. BF01 is to be filled for the purpose of notification of death, injury or occupational disease.

3.7.2 Employer's Report to the Board

The employer shall in turn report in the prescribed form to the Board and the nearest office of the National Council for Occupational Safety and Health Office within 7 days of the relevant occurrence or receipt of the information under *Section 4 of the Act*.¹¹⁷ The report of the employer shall include name and address of the employee; time and place of the disease, injury or death;

¹¹²Section 4 *Employees' Compensation Act, op. cit.*

¹¹³*ibid.*

¹¹⁴*ibid.*

¹¹⁵Section 4(4), *ibid.*

¹¹⁶Section 4(3), *ibid.*

¹¹⁷Section 5(1)(2) & (7), *ibid.*

the nature of the injury; the name and address of any medical practitioner or specialist who attend to the employee; and in any manner by regulation required by the Board.¹¹⁸ It is an offence for any employer not to report any case of injury or death to the Board, unless allowed by the Board for some sufficient reasons failure to report will attract a fine of #20,000 for the first non-compliance or imprisonment for a term not exceeding one (1) year or #100,000 for every subsequent case of non-compliance or to both.¹¹⁹

Where the non-compliance is by a corporate body, every director, manager, secretary or other officers of the body corporate, partner, officer of the firm; or any person purporting to act in the aforementioned capacity shall be liable, unless he/she proves that the act or omission took place without his/her knowledge, consent, connivance or neglect; or shows reasonable steps taken to prevent the commission of the offence.¹²⁰ The National Industrial Court shall have the jurisdiction to try any offence within the scope of this Act, and any appeal from the court shall lie to the Court of Appeal as of right.¹²¹

3.7.3 Application for Compensation

Finally, an application for compensation shall be made on a prescribed form, signed by the employee or the deceased employee's dependant.¹²² An application for compensation for hearing impairment must be supported by a specialized medical practitioner of the ailment; an audiogram

¹¹⁸Section 5(4), *ibid.*

¹¹⁹Sections 5(5) and 71(2), *ibid.*

¹²⁰Section 71(2), *ibid.*

¹²¹Section 254 (5) and (6), *CFRN, op. cit. (Third Alteration Act. No.3, 2010)*

¹²²Section 6 (1), *Employees' Compensation Act, op. cit.*

and a report by the employer; or other evidences of the hearing impairment as may be determined by the Board.¹²³

An application for compensation generally shall be within a year after the occurrence of death, injury or disability arising from an occupational accident or disease.¹²⁴ However, if the Board is satisfied with reasons or circumstances that precluded the application, the Board may still entertain the application provided it is within three years after the occurrence.¹²⁵ Similarly, the Board may pay compensation for an occupational disease where there was no sufficient medical or scientific evidence within the three years after the date of its occurrence, but this evidence becomes available at a later date and the application re-filed.¹²⁶

An application in respect of money spent on healthcare or medical services rendered, unless otherwise directed by the Board, such claim shall not be paid if it is submitted 90 days from the date the last treatment was given or 90 days from the date the accredited medical practitioner or other person providing medical services was first aware that the Board may be liable for his services, whichever first occurs.¹²⁷

The Board may dispense with any requirement to provide written notice in favour of an illiterate person and instead notice in any form may suffice.¹²⁸ However, the Act has not define an

¹²³Section 10 (7),*ibid.*

¹²⁴Section 6(2),*ibid.*

¹²⁵Section 6(3),*ibid.*

¹²⁶Section 6(5)(a)(b),*ibid.*

¹²⁷Section 27(3),*ibid.*

¹²⁸Section 69,*ibid.*

“illiterate”. Legally, an illiterate person is one who is unable to write, read or understand a particular document.¹²⁹

3.8 Compensation Rights of an Employee/Dependant

The rights or benefits accrued to employee or dependant under the Act cannot be waived or forfeited by any agreement with the employer; any agreement entered as such shall be null and void; and unenforceable.¹³⁰ Also the employer cannot deduct any sum from the remuneration of an employee in order to pay or expected to pay into the Fund; or require the employee to contribute in any manner towards indemnifying the employer against liability which the employee has incurred or may incur under the Act.¹³¹

A claim shall not be set-off against any sum payable as compensation except as may be allowed under the Act. Set-off is only allowed in case of money spent on social welfare needs to the injured employee or his dependant by the government or the Board as the case may be.¹³² The Act makes it an offence punishable with a term of imprisonment not exceeding one year or a fine not less than hundred thousand naira (#100,000) or both, as the case may be and full repayment to the employee any such sum so deducted or contributed, as the case may be.¹³³

In Conclusion, it has been observed above that the new regime of employee’s compensation has simplified the process of claiming compensation through the Act. The Act now has a wider coverage from the often restrictive scope it suffers over the years. Furthermore, the enhancement

¹²⁹*Ezeigwe v Awawa Awadu (2008) 11 NWLR (pt. 1097) 158.*

¹³⁰Section 23(a)(b),*ibid.*

¹³¹Section 14(1),*ibid.*

¹³²*ibid.*

¹³³Section 14(2) and (3),*ibid.*

of compensation packages through monthly compensation than a lump sum payment experience in the repealed Act has gone a long way in saving an injured employee from becoming a burden to the society after spending the lump sum amount.

CHAPTER FOUR
NIGERIAN SOCIAL INSURANCE TRUST FUND AS A COMPENSATION
REGULATORY INSTITUTION.

4.1 Introduction

Nigeria Social Insurance Trust Fund (NSITF) is a creation of statute. It was established by *Act No.73 of 1993, cap. N88, Laws of the Federation of Nigeria, 2004*. And by virtue of the Act, the NSITF management shall consist of eleven members comprising one Chairman, one Managing Director, three Executive Directors and six other members¹. The Board is empowered under

¹ Section 4(1), *Nigeria Social Insurance Trust Fund Act, Cap.N88, Laws of the Federation, 2004*

*Section 9(3)*² to employ staffs to assist the Managing Director in carrying out the functions of the Board, hence it is this Board that is charged with the implementation³ and management⁴ of the Fund and the general implementation of the Employees' Compensation Act, 2010.

Nigeria Social Insurance Trust Fund is to employee's compensation scheme like what Pension Commission is to pension scheme. However, there mode of administration differs because the social insurance scheme is managed by the State unlike pension scheme that has private firms operated as Pension Fund Administrators. Thus, Nigeria Social Insurance Trust Fund plays a significant role in the success or otherwise of the entire scheme. There are other government institutions/ departments that complement the occupational safety and health of employees across all sectors of the economy which often gives rise to employees' compensation.

This chapter examines the scope of the Nigeria Social Insurance Trust Fund, including a discussion of the emergence of the Fund and the role of the Board in the administration of the Act. This discussion will highlight the brief history of the scheme, including the powers of the Board as the highest decision making body with a view to determine whether the Board's enormous discretionary powers have translate into better, smooth and effective administration of the scheme.

4.2 Brief History of Social Insurance Schemes in Nigeria

Social Insurance scheme has been in existence in Nigeria over fifty years ago. The NSITF has evolved from the defunct National Provident Fund. The National Provident Fund (NPF) was

²*ibid.*

³ Section 2(2), *Employees' Compensation Act, op. cit.*

⁴ Section 57, *ibid.*

established by an Act of parliament in 1961 to provide a poverty alleviation measure as required by *Convention No.102 of the International Labour Organization (ILO)*. However, the scheme was targeted at protecting employees, who were then mostly multinational, from financial difficulties in the event of old age, cessation of employment or death because they are non-pensionable employees. Nigeria Provident Fund is a defined compulsory contributory scheme design for workers in both public and private sectors, hence largely as a saving scheme.

The Act provided for monthly contributions by members at the rate of 6% basic salary or a total sum of #96.00 *per annum* to be paid in equal proportion by both employer and employee. In the event of old age, employment cessation, emigration from the country or death, the cumulative amount contributed plus an accrued interest of 7% calculated on a compound interest was to be paid to the employee or his/her dependant as the case may be. In 1974, the Act was amended to cover only employees in the private sector within the NPF, while the public sector was removed from it.

In 1992, the Technical Committee on Privatization and Commercialization (TCPC) (now Bureau on Public Enterprise) recommended the repeal of the Act and partial commercialization of its activities in order to make it self-funded. This followed the report of various persons and bodies including the International Labour Organization (ILO) experts appointed by the Federal Government to review the operations of NPF, which found the activities unsatisfactory. Thus, in 1993, the Federal Government promulgated the Nigeria Social Insurance Trust Fund (NSITF).

This new Act vested all assets and liabilities of the National Provident Fund Management Board (NPFMB) in the Nigeria Social Insurance Trust Fund Management Board (NSITFMB). And

finally, NSITF was launched in July, 1994. Under the provisions of NSITF Act, all employers of labour in the private sector which were registered under the Companies and Allied Matters Act (CAMA), either as companies or partnerships, irrespective of the number of their employees or were sole businesses with a workforce of not less than five (5) employees, were required to register as members of the NSITF scheme and remit their contributions monthly. The employers are required to remit 1% of their monthly payroll. The scheme provides retirement pension benefit, survivor benefit, death grant and such other benefits.

NSITF scheme had operated as a very successful government Agency from July, 1994 to June, 2004, as it was about to stabilize as a pension provider came *Pension Reform Act, 2004. Section 71(2)*⁵ redefined the mandate of NSITF to the provision of “Social Security Insurance Services other than Pension”. Thus, to give backing to the above mandate given by the section, the Employees’ Compensation Act was passed into law in December, 2010.

The objectives of the Act are to-

- (a) Provide for an open and fair system of guaranteed and adequate compensation for all employees or their dependants for any death, injury, diseases or disability arising out of or in the course of employment.
- (b) Provide rehabilitation to employees with work related disabilities as provided in the Act.
- (c) Establish and maintain a solvent compensation fund managed in the interest of employees and employers.
- (d) Provide for fair and adequate assessments for employers.
- (e) Provide an appeal procedure that is simple, fair and accessible, with minimal delays; and
- (f) Combine efforts and resources of relevant stakeholders for the prevention of workplace disabilities, including the enforcement of occupational safety and health standards⁶.

⁵*Pension Reform Act, Cap. P4, Laws of the Federation, 2004*

⁶Section 1(a)-(f), *Employees’ Compensation Act, op. cit.*

The above objectives of the Act has set the purposive nature of the Act that all the provisions of the Act need to be interpreted towards it purposiveness. Paragraph F is instructive in that Nigeria Social Insurance Trust Fund with other stakeholders can be proactive to industrial or workplace injuries, however Nigeria has not yet show support in Occupational Health and Safety as it affects it workers. Despite the support of International Labour Organisation Nigeria has not passed into law the *Occupational Safety and Health (OSH) Bill* since the 7th Assembly.⁷

The Fund has commenced the process of widening its scope of social security benefits to the aged, unemployed, child welfare and the physically challenged. To this end, a bill for an amendment of the NSITF Act to incorporate other Social Security program is pending before the National Assembly for consideration.

4.3 Meaning of Social Insurance

Social Insurance is a form of social security where people receive benefits or services in recognition of their contributions to an insurance program.⁸ To an employee, it is a social protection measure accorded while under employment; and extended to their dependants in the event of death. In all cases the injury, disease or death must arise in the course or out of employment.

Social Security Schemes in many countries like Nigeria covers not just the employed class but also the unemployed, hence the recognition of the right to Social Security in the *Universal*

⁷ Mustapha, S. (2016) OSH: ILO, FG Partner to Ensure Occupational Safety in Workplaces. *Daily Trust*, April 25, p.36

⁸ Erogo and Amadi, (2013) Social Security under the Employees' Compensation Act, 2010. In: Bimbo,A. (ed) *Themes on New Employees' Compensation Act*, Hybrid Consult Publishers, Abuja, Nigeria, p.85

Declaration of Human Rights (UDHR).⁹ Furthermore, the UDHR enshrines the right to an adequate standard of living¹⁰. Similarly, the *International Covenant on Economic, Social and Cultural Rights* recognizes “the right of everyone to social security, including social insurance (*ICESCR*)¹¹.” This requires the protection of people against the risk of sickness, disability, employment injury and so on.

Therefore, the recent move to amend the NSITF Act, 1993 in order to inject various form of social security benefits geared towards protecting the unemployed class. Thus, social security benefits, including social insurance benefit must be adequate, accessible to all, and provided without discrimination.

4.3.1 Purpose of Social insurance Scheme

The purpose of Social Insurance in its narrow view to employee’s welfare has been captured by the preamble of Employees’ Compensation Act, 2010 as provisions for compensation for any death, injury, disease or disability arising out of or in the course of employment; and for related matters. Social Insurance as a social protection measure aimed at addressing the multi-dimensional deprivation likely to happen during injury, disease or death in the extreme circumstances. This was further made clear by one of the objectives of the Act and coincidentally the first which is to provide for an open and fair system of guaranteed and adequate compensation for all employees or their dependants for any death, injury, disease or disability arising out of or in the course of employment, hence a social insurance scheme.

⁹Article 22, 1948

¹⁰Article 25, *ibid*.

¹¹Article 9, July, 1993

The Scheme is concerned with payment of defined compensation to employees for injuries or diseases which are directly attributable to workplace accidents or exposures. Social Insurance is non-profit oriented as opposed to Commercial Insurance. Even where premiums is not been remitted forthwith by employers that will not affect the employee (beneficiary) from enjoying the cover of the specified events. That is to say the scheme is an exception to the principle of “*No Premiums No cover*” obtainable in the commercial insurance.

4.4 The Structures of Nigeria Social Insurance Trust Fund (NSITF)

Nigeria Social Insurance Trust Fund (NSITF) as a government agency offers social insurance to all categories of employers and employees from public and private institutions. The legal structure of NSITF as a government agency is akin to other government agencies, that is, having a Board at the top. However, the composition and number of members differ altogether.

An 11-member Board of Directors provides guidance and strategic direction to the NSITF. The Board has a chairman, who leads and preside over the Board sitting. Also, it has the Managing Director & Chief Executive Officer (CEO), who handles implementation of the Board strategies and day to day management of the organization.

Also in the Board are three (3) Executive Directors: Administration; Finance & Investment; and Operations. Other members are; permanent secretary Ministry of Labour; president of the Nigerian Labour Congress, representative of employers in the Nigerian Employer’s Consultative

Association (NECA), representative of Labour from the power sector, representative of employers in the Food & Beverage industry and a representative from the Central Bank of Nigeria. And a secretary to be appointed by the Board.

It is important to point out here that the day to day management of the agency is sphere headed by the Managing Director & CEO followed by the three executive directors above. Immediately after them are several General Managers, Deputy General Managers and Assistant General Managers who all together formed the managerial cadre of the agency. Down this structure are Principal Managers, Senior Managers and Assistant Managers together with other supporting staffs who performs several function for the effective administration of the scheme.

4.5 The Role of the Board

The Nigeria Social Insurance Trust Fund Management Board (NSITFMB) is saddled with powers and functions by the Act.¹²This ranges from policy formulation to general administration of the Fund. Part V of the Act is devoted to the powers and functions of the Board, the body established to administer the Act.

One of the major critique of the repealed Act is that the entire administration of compensation is left in the hands of employers and their private insurers. Where employers negate in paying premiums, the employees certainly will be at the receiving ends. Hence, the Act left the fate of employees to the whims and caprices of employers which is quite against International Labour Standards. The ECA, among numerous others, sought to rectify this anomaly, hence the

¹² Section 31 and 32, *Employees' Compensation Act, op. cit.*

empowerment of a statutory body (NSITFMB) with the administrative and management of employees' compensation. The Board has the power to carry out the following;

- a) be in charge of overall policies for the administration of the Fund established under Section 56 of this Act.
- b) approve investment of any money in the Fund on the advice of the Investment Committee established under section 62 of this Act.
- c) fix the terms and conditions of service including remuneration of employees of the Fund.
- d) formulate policies and strategies for assessment of compensation, rehabilitation and welfare of employees who sustain injuries or contact occupational diseases at workplace or in the course of employment; and
- e) do such other things which, in the opinion of the Board, are necessary to ensure the efficient performance of the Board under this Act.¹³

The Board has a number of functions to perform, such as:

- a- carry out assessment of the amounts to be paid into the Fund by employers under the Act.
- b-undertake regular actuarial valuation of industries, sectors and workplaces and determine the rates of contributions by employers into the Fund by such industry, sector or workplace;
- c-receive and credit into its account, all moneys payable into the Fund under the Act.
- d-make all payments of the various compensation or benefits to any person entitled to such compensation or benefit and make all disbursements required to be made out of the Fund established under the Act;
- e-invest any money standing to the credit of the Fund only in accordance with the advice of the Investment Committee established under Section 62 of the Act;
- f-cooperate with the National Council for Occupational Safety and Health for the prevention of occupational accidents and diseases and for the promotion of safety and health culture at the workplace; and
- g-carry out other activities as are necessary or expedient to ensure the effective performance of its function under this Act.¹⁴

The Board has numerous other functions under the Employees' Compensation Act which falls under paragraph (g) above. This include the following;

¹³ Section 31(a)-(e), *ibid.*

¹⁴ Section 32,*ibid.*

i-Receive reports of accidents, injuries, diseases and deaths from all employees and/or all employers in both public and private sectors.¹⁵

ii-Receive applications for claims from employees and their dependants, as the case may be.

iii-Verifying claims of injuries, diseases and deaths and verifying if reports of injuries, disease, death e.t.c have been made to the National Council for Occupational safety and health office in the state where any occurred.¹⁶

iv-Prescribe and define a category of minor injuries not required to be reported to the Board.¹⁷

v-Make rules of procedures for making claims for compensation under the Act.¹⁸

vi-Determine if there is sufficient and substantial cause for delays in reporting and or making claims under the Act.¹⁹

vii-Set up ad-hoc Medical Board of Inquiry to ascertain the validity of claims for compensation for mental stress.²⁰

viii-Act as a quasi-judicial body in having appeals by aggrieved parties against decisions of the Board.²¹

From the above, the Board has completely appropriated to itself the function of management which is the day to day running of the institution, that is, the NSITF leaving the MD as a rubber stamp of the board. Most of their functions here constitute cost and burden to the institution. For

¹⁵Sections 2(1), 5(3), *ibid.*

¹⁶ Section 5(7), *ibid.*

¹⁷ Section 5(6), *ibid.*

¹⁸ Section 5(8), *ibid.*

¹⁹ Section 6(3), *ibid.*

²⁰ Section 8(3), *ibid.*

²¹ Section 55(1), (2) & (3), *ibid.*

instance, there is an allegation that sitting allowance for the board to vet and approve a claim of #100,000 and above far exceed this figure which is due to the claimant.

It is apparent that the scope, multiplicity and depth of the above statutory functions of the Board is enormous, hence the NSITFMB lacks the capacity, the personnel, infrastructure, material as well as financial resources to give practical effect to all the functions of the Board. More so, some of the powers of the Board appears undemocratic and usurpation of legislative power to make laws on the employee's compensation. For instance, *Section 30*²², *ECA* provides that "The Board may make rules for the reconsideration of benefits payable under the Act." This clearly portends danger, as the Board may amend, review or add to or subtract from the express provision of Act without recourse to the legislative arm of government charged with sole responsibility to enact laws.

4.5.1 Employers' Assessment and Contribution to the Fund

It is the Board's responsibility to carry out assessment relating to liability to contribute to the Fund and to collect the contribution for remittance to the Fund. The assessment is based on estimates of the employer's payroll provided.²³

Contribution payable by employers is one of the moneys that formed the Fund in accordance with *Section 56(1)*²⁴ of the Act. The contributions made every employer subject to assessment by

²²*ibid.*

²³ Section 43,*ibid.*

²⁴*ibid.*

the Board. Part VI, which consist of *Section 33-55* makes provisions for employer's assessment and contributions. There are two main factors upon which contribution is made to the Fund;

1. Minimum monthly contribution of 1% of the total monthly payroll for the assessment year.²⁵
2. Varied assessment rate based on the categorization of risk factors of each class or sub-class industry, sector or workplace.²⁶

The import of the above provision is that the 1% contribution stipulated under the Act is minimum, as the Board is empowered to prescribe a higher contribution taken into consideration the risk factors of the particular industry, sector or workplace. The Board is authorized to assess employers for such sums in such manner, form and procedures as may be determine time to time by it.

Every employer shall have separate account called "Employer's Experience Account" to be maintain by the Board.²⁷ This account shall have all the moneys assessed and due for payment. Every employer shall keep and furnished to the Board all information and documents necessary to make the assessment.²⁸ And, in order to enforce its powers against any employer, *Section 54* of the Act empowers an officer of the Board to enter any workplace, at any time, with or without warrant or notice, to require the production of any document, license, record, report; remove any such documents; inspect the workplace, make inquiries of any person who is or was in the workplace, and so on.

²⁵Section 33(1), *ibid.*

²⁶ Section 33(2), *ibid.*

²⁷ Section 41(1), *ibid.*

²⁸ Section 39, *ibid.*

The Board may alternatively require an employer to provide security instead of amount as deemed sufficiently appropriate.²⁹ Where an employer defaulted in payment of an assessment or provision of security, the Board may assess a penalty in amount equal to 10% of the unpaid assessment or the value of the security required.³⁰ This will be enforced by a cause of action in court, and shall be entitled for the cost of action for the recovery thereon.³¹

However, where an employer fails to provide all the materials required to make the assessment or the information provided was not complete, though gives the probable amount of the payroll of the employer or the nature of the employer's industry, the Board may make provisional assessment.³² Where the said assessment is found out to be different from the actual and required assessment, the employer or the Board shall be liable to pay the difference to the other party.³³

Furthermore, failure to provide estimates of payrolls is an offence punishable by:

- 1) Imprisonment for not more than 1 year or fine not exceeding #100,000 or both
- 2) A minimum fine #1,000,000 for a body corporate in addition each director or officer shall be personally liable on conviction to imprisonment for a term not exceeding 1 year or a fine of #100,000 or both.³⁴

4.5.2 Management/Investment of the Fund

²⁹ Section 45, *ibid.*

³⁰ Section 46, *ibid.*

³¹ Section 36, *ibid.*

³² Section 48, *ibid.*

³³ *ibid.*

³⁴ Section 39(4), *ibid.*

Employees' Compensation Act, 2010 as a Social Insurance Scheme, which provides legal framework for employees' compensation, is being managed by a public agency. *Section 2(2)*³⁵ stipulates that the scheme shall be managed by NSITF. This is in line with *Section 71(2)*³⁶ and the provisions of the NSITF Act, 1993, which was charged as an agency of government to manage all social security insurance schemes other than pension.

Aside the general administration of the ECA, the Board has the sole responsibility of managing the Fund established under *Section 56, ECA*.³⁷ The Fund consist of;

- i. A take-off grant from the Federal Government.
- ii. Contributions payable by employer's into the Fund pursuant to the Act.
- iii. Fees and assessment payable as required by the Act.
- iv. Proceeds of Investment of the Fund.
- v. Gifts and grants from any national or International Organization
- vi. Any other money that may accrue to the Fund from any other source.

The Act establishes the "Investment Committee"³⁸ consisting of the following:

- (a) A representative of the following-
 - (i) Central Bank of Nigeria
 - (ii) Nigeria Investment Promotion Commission
 - (iii) National Pension Commission.
- (b) 3 representative of the most represented employers' organization.

³⁵ *ibid.*

³⁶ *Pension Reform Act, op. cit.*

³⁷ *Section 57, Employees' Compensation Act, op. cit.*

³⁸ *Section 62, ibid.*

(c) 3 representative of the most represented employees' organization.

(d) A representative of the Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture.

The Investment Committee shall make its standing orders and supplementary rules for its proceedings, subject to the provisions of the Act.³⁹ The Investment Committee offers advice to the Board on the standing to the credit of the Fund under the Act.⁴⁰ However, the Investment Committee shall receive from the Board, an annual report on the Board's investment⁴¹, which in turn forward same together with its recommendation to the National Labour Council and the Minister.⁴² Also no investment shall be undertaken by the Board unless there is evidence to show that such investment is safe and not susceptible to market failures.⁴³

However, there is hardly any investment that is not susceptible to market failures except that the degree of failure and depreciation of value varies. Although, the intendment of the drafters is understood, and it is to forestall abuse and recklessness in investment. It is suggested that a guideline for acceptable portfolios with a room for flexibility be provided.⁴⁴

The function of the Investment Committee include:

1-Carrying out investment surveys and drawing up a list of safe investment from time to time.

³⁹ Section 62(2), *ibid.*

⁴⁰ Section 62(3), *ibid.*

⁴¹ Section 62(4), *ibid.*

⁴² Section 62(5), *ibid.*

⁴³ Section 32(2), *ibid.*

⁴⁴ Agomo, C.K. (2011) *Nigerian Employment and Labour Relations: Law and Practice*, Concept Publications Limited, Lagos, Nigeria.P.242

2-Advising the Board of the investment of any money standing to the credit of the Fund under the Act.

3-Carrying out independent assessment of the investment activities of the Board, and

4-Forwarding the Board's report of its investment activities to the National Labour Council and the Minister.

This further point out the enormous power of the Board in the administration of the Act. Though NSITF has covered the whole country with its almost 55 branches nationwide, but it remains to be seen in the effective administration of the employees' compensation scheme. A checked at the NSITF reveals that there is no data base of registered employers and employees for which the scheme set to cover. And no policy in place to capture thousand employers in the informal sectors.

Furthermore, the institution lacks trained personnel that, now almost six years, ought to be conversant with the provisions of the Act for proper administration and effective output. This accounted for the slow pace of progress recorded by the scheme. Many a times the employees resorted to marketing the scheme across industries, workplaces or sectors like Bankers marketing their banks. This is absurd and that may have led the employers either reneging in prompt remittance of contribution or absenting registration all together.

The Investment Committee is but a mere advisory body with the Board having the final say, this is because the Board has the discretion to make a preference to all investment portfolios draws

by the Committee. All that the law requires is that any investment embarked by the Board must not be susceptible to market failures, that is to say it must be reasonable business wise.

4.6 Decision of the Board

By decision of the Board, here is an attempt to re-emphasize the enormous and discretionary powers of the Board to take any decision in the administration of the *Employees' Compensation Act, 2010*. That is to say, the Board is the sole highest decision making body of the scheme.

Besides being enormous, the powers given to the Board may at times lead to undemocratic decision. For instance, the Act gives the Board power to make rules for the reconsideration of benefits payable under the Act without recourse to the legislators. And it is the same Act that expressly states the percentage entitled by any injured or disabled employee and dependant(s). Also, an instance where the Board has the final say as to investment of the accrued Fund of the scheme among others. Whereas the composition of the Investment Committee comprises the think-tank on knowledge of investment compared to the members of the Board that appears to balance group interest.

Furthermore, the Act allows the Board quasi-appellate jurisdiction to review its earlier decision taken. Thereby allowing it a window to have a second bite at the cherry. It is equally among the decision of the Board to institute a cause of action in court; including prosecuting matters which constitute offences in accordance with the provisions of the Act.

The Board can fix the term and condition of services including the remuneration of Nigeria Social Insurance Trust Fund's employees. Another instance where the decision of the Board vis-a-vis discretionary powers of the Board counts is the provision of healthcare benefits. Healthcare benefits is important as it augments any compensation that accrues to the injured employee. Also, it starts from the day of the injury while compensation period starts a day after. That is to say the period of compensation will start counting from the day after the occurrence of the injury. The provision of artificial hands, legs and so on falls within the purview of healthcare benefits and it is within the discretion of the Board not a right of injured or disabled employee.

4.7 Right of Appeal

Because of these discretionary and quasi-judicial powers vested on the Board, the Act makes provision for right of appeal against any decision aggrieved by a party. This is because some of the decision may affect the rights of the claimants. *Section 55(1)*⁴⁵ provides that a person aggrieved by any decision of the Board may appeal to the Board for a review of such decision. This is so where the Board is presented with fresh or additional evidence or information.

However, any person aggrieved with the Board's decision has 180 days from the date of such decision within which to appeal against otherwise the person shall lose his right of appeal.⁴⁶ Also the Board is statutorily required to determine such appeal within 180 days from the date of filing the appeal.⁴⁷ Thus, the quasi-appellate jurisdiction of the Board is rather surpaflous. For how can an appeal be considered and determined by the same body whose decision is being appealed

⁴⁵ *Employees' Compensation Act, op. cit.*

⁴⁶ Section 55(2), *ibid.*

⁴⁷ Section 55(3), *ibid.*

against? Assuming fresh additional evidence or information surfaces after the initial decision of the Board, an aggrieved party willing to appeal against may be required first to come by way of pre-action notice at the National Industrial Court. This will afford the Board the opportunity of correcting its earlier decision to avoid needless litigation.

A further right of appeal against the appellate decision of the Board shall lie to the National Industrial Court (NIC).⁴⁸ The NIC is a specialized court with exclusive jurisdiction over labour, employment, industrial relation and other matters arising out of or connected therewith.⁴⁹ It is important to note that the decision of NIC is final except on the question of Fundamental Human Right.⁵⁰ *Section 9*⁵¹ provides

- (1) Subject to the provision of the Constitution of the Federal Republic of Nigeria, 1999 and subsection (2) of this Section, no appeal shall lie from the decisions of the Court to the Court of Appeal or any other Court except as may be prescribed by this Act or any other Act of the National Assembly.
- (2) An appeal from the decision of the Court shall lie only as of right to the Court of Appeal on question of Fundamental Human Rights as contained in chapter iv of the Constitution of Federal Republic of Nigeria, 1999.

The Constitution Federal Republic of Nigeria under *section 243 (2)-(4)* had already stated that an appeal concerning Fundamental Human Right of an employee is as of right to the Court of Appeal and that any other appeal from the decision of National Industrial Court to Court of Appeal so allowed will be with the leave of the Court. However, the decision of the Court of Appeal will be final. Furthermore, where the matter appeal against is a criminal matter, appeal can further lie up to Supreme Court.

⁴⁸ Section 55(4), *ibid*.

⁴⁹ Section 254(c)(i), *Constitution OF the Federal Republic of Nigeria, 1999 as amended (Third Alteration) Act, 2010*

⁵⁰ Section 5(2), *ibid*

⁵¹ *National Industrial Court, Act No.1, 2006*

4.8 National Policy on Occupational Safety and Health

The safety and health of an employee creates a tripartite duty between the employer, employee and the government. The national policy is one of the government approach to discharge this duty, hence it aims at achieving a national development in the economy through minimizing the causes of the effects of hazards in the working environment. In 2006, Nigeria in response to her ratification of Occupational safety and Health Convention⁵² created its national policy on Occupational Safety and Health. However, instead of having a *National Council on Occupational Safety and Health* with board members to be responsible for the general safety and health of all workers a department was rather created in the Federal Ministry of Labour and Employment charged with the responsibility of promoting and enforcing occupational safety and health of all employees in Nigeria.

In 2016, Nigeria developed a National Occupational Safety and Health Profile. The profile identify all the major stakeholders of occupational safety and health, their roles, capacity and achievements, and equally provides a framework for the strengthening of the National Occupational Safety and Health with the goal of improving the performance of all sectors of the economy and ensure harmonization of workers' rights, protection and welfare. It is important to note also that no any government institution that provides *social insurance* to injured or disabled employee beside Nigeria Social Insurance Trust Fund (NSITF) provided employers are duly registered.

⁵² Convention No. 155, 1981

However there are several key Associations, Organisations, International affiliated organisations and Non-Governmental Organisations that are involved in Occupational Safety and Health (OSH) awareness and issues in Nigeria, these are; Institute of Safety Professional (ISPON); and Society of Occupational and Environmental Health Physicians of Nigeria (SOEHPON); Safety Advocacy and Empowerment Foundation(SAEF); OSHAssociation; American Society of Safety Engineers (ASSE); International Institute of Risk and Safety Management (IIRSM); World Safety Organisation (WSO); International Association Safety Professionals (IASP); Institute of Occupational Safety and Health (IOSH); Nigeria's Employers Consultative Association (NECA); and Nigeria Labour Congress (NLC).

In conclusion, Nigeria Social Insurance Trust Fund has come a long way to stay as the leading Social Insurance agency of the government. Even though, the Fund was saddled to render all forms of social security measures except pension, yet the Fund largely concerns with employees' compensation only. In 2015, the MD/CEO of NSITF in an interview with Guardian Newspaper⁵³ puts the total number of employees covered by the scheme at 7 million with about 33,900 employers registered. Even at that there is no single data base of all employees covered by the scheme.

There is need to amend the Act to incorporate other Social Security measures of the government. For instance, the determination of the Buhari led government to give #5000 to the vulnerable people in Nigeria amongst numerous other social security interventions should be incorporated in the Nigeria Social Insurance Trust Fund's mandate with define procedures.

⁵³ Olayinka C. (2015), NSITF to Prosecute Employers over Workers' Scheme. The Guardian Newspaper, Dec. 22, p.28

The need for professional and trained personnel has been identified as one factor that will boost the operation of the scheme. This entails professionals that will steer the scheme and be able to publicize the corporate responsibility of the Fund so as to win the confidence of not just the employees but the employers to register with the scheme as alternative to commercial insurance.

The Board enormous and discretionary powers also identified as factor militating against the smooth running of the scheme, for example, a situation where it is the board that will determine the disability, occupational diseases and or verify the medical condition of an injured employee or his bills is quite cumbersome. These duties can at best be handled by professionals in the relevant field while the board assume the final say. Hence the need to whittle-down these powers in order to repose confidence and transparency in the system.

Another way is to fashion the entire scheme along Pension Scheme. In that we would have a joint State and Private Insurance Scheme where the State will assume regulatory role allowing the private firms to administer/manage the funds. Thus, this scheme will have Insurers Fund Administrators (IFAs) having the same functions like Pension Fund Administrators (PFAs). The composition of the Board is short of the think-tank required on investment compared with the advisory committee on investment to the Board.

CHAPTER FIVE

SUMMARY AND CONCLUTIONS

5.1 Summary

The *Employees' Compensation Act* was signed and passed into law in November, 2010. It repealed the *Workmen's Compensation Act Cap.W6, Laws of the Federation of Nigeria, 2004* and made compensation for death, injury, disease or disability arising out of or in the course of employment and other matters incidental thereto.

This research has uncovered the historical perspectives of employment *vis-a-via* compensation. Although the history of worker's compensation can be dated back to antiquity, this work traced modern compensation from 18th century in Germany with reference to England because that is where bulk of Nigerian laws derives inspiration and guidance. In this work, we also discussed

the evolution of compensation laws from *1942 Ordinance* to the present *Employees' Compensation Act, 2010*.

The emergence of Employees' Compensation Act, 2010 was greeted with a lot of commendation because it widens the scope of employee's compensation from hitherto restrictive scope. There are a lot of innovations in the new Act, for instance, for the first time it introduces a new category of injury called "Mental Stress" which is compensable under the Act¹. Also the scales of compensation and compensation packages has been enhanced from what was known under the repealed Act. The new Act views compensation not only from the monetary aspect but also provides rehabilitation and healthcare benefits. Furthermore, it simplifies the process of claiming compensation from often litigation base approach to a much required alternative means by way of correspondences between the claimant and the Nigeria Social Insurance Trust Fund Management Board.

Another notable provision of the Act is the establishment of the "Fund"². This consist of the take-off grant from the federal Government, contributions payable by employers, fees and assessments charged pursuant to the Act, proceeds of investment of the Fund, gifts and grants from National and International Organizations and including any money that may accrue to the Fund from any other source. This Fund was to be managed by the Nigeria Social Insurance Trust Fund Board in accordance with the provision of the Act. The Board wielded enormous discretionary powers under the Act that it can alter, add to or extends the period for which

¹Section 8, *Employees' Compensation Act, NO. 13, 2010*

² Section 56, *ibid.*

compensation is to be paid to claimant whose period had already been expressly stated under the Act.

The research also discussed some challenges posed by the new Act, that is, some flaws under the Act. Like the excessive discretionary powers given to the Board; the State-managed Scheme and limitation of action by an injured employee or dependant of a deceased employee among other challenges. For these flaws to some extent militate against the success of the scheme almost seven (7) years now after its emergence. The research also examines the Nigeria Social Insurance Trust Fund and discussed its institutional deficiency. The role of the Board in the scheme and the enormous discretionary powers it wielded has been discussed.

5.2 Findings

From the above, it is glaring that the *Employees' Compensation Act, 2010* has set to improve and simplify the process of employee's compensation. This can be seen from the introduction of "No-fault Principle" to enhancement of compensation packages among others. The following are some major findings of this research:

Firstly, enormous discretionary powers of the Board, we found out that the new Act has given too much discretionary powers to the Board that it appropriated to itself the Management, Regulation and Investment of the scheme. For instance, the Act says the Board may make rules for the reconsideration of benefits payable under the Act³. The implication of this provision is that the Board may amend, review or subtract from the express provision of the Act. Also healthcare benefit as important as it was is at the discretion of the Board.

³ Section 30, *ibid.*

Secondly, powers of enforcement, it has been observed that the powers of enforcement targeted the formal sectors only. Whereby the informal sectors has equally greater percentage of employees that need to be protected. There is also no specified process on how to recover contributions and assess the employers of domestic servants. Generally, there is no proper and simple means to enforce compliance with the scheme by employers of labour.

Thirdly, limitation of action, we found out that *Section 12(1) of the Act* appears to usurp the inalienable right of an injured or disabled employee to approach a court for the determination of his civil right⁴. The section is the re-incarnation of the “*Right to Die Contract*” fought and inserted by employers of labour during the early introduction of modern Workmen’s Compensation Law in England. Now, that is the law as captured in the above provision of Employees Compensation Act, 2010, hence any compensation matter will be decided according to the existing law. It was held in *Nwaosa v Ports & Terminal Multiservice Ltd & Anor.*⁵ referring to the judgment of Supreme Court in *Obiuweubi v CBN*⁶ that the law in force or existing at the time the cause of action arose is the law applicable for determining the case. Hence, the cases cited in this work would have not gone to court if the cause of action arises presently, because of the limitation of action provided in the above section.

Fourth, contributions by way of premiums remitted by employers constitutes one of the sources of the “Fund” as established under *Section 56 of the Act*. It can be attained either by 1% of total

⁴ Section 36(1), *Constitution of the Federal Republic of Nigeria, 1999 (as amended)*.

⁵ (2014) 47 N.L.L.R (Pt. 152) 228 NIC

⁶ (2011) 7 NWLR (Pt. 1247) 465 at 495, SC

monthly payroll or base on assessment of risks associated with an industry, workplace or sector; hence an increase in contributions. However, it has been observed that in terms of compensation no such distinction is made between high risked industries, workplaces or sectors that paid higher contributions. This goes to show that the Act attached more importance to contributions than the provision of fair and guaranteed compensation.

Fifth, appellate status of the board, we found out that the quasi-appellate jurisdiction of the Board is rather superfluous. For it is right to say that the Board here will be sitting in its own cause having *ab initio* decided the matter and reached a decision.

Sixth, public confidence, it has been observed that almost seven (7) years now since the emergence of the scheme yet the public perception about it even in the formal sector is very low. This is due to the institutional deficiency as well as corruption that permeated the system. It has equally been noted that the Federal Government at the take-off of the scheme paid contributions un-behalf of all its tertiary institutions and research agencies, but the irony of this is that the institution charged with the management of the scheme failed and or neglect to inform the beneficiaries to enable them access the funds/policy.

5.3 Recommendations

Flowing from the above findings, it is hereby recommended as follows:

First, ajoint State and Private Scheme where the Nigeria Social Insurance Trust Fund as government institution remains the regulator only allowing private insurance firms to manage the

fund. Here the scheme will be fashioned along Pension Reform Act, hence we would have Insurers Fund Administrators (IFAs) that would have same functions like Pension Fund Administrators (PFAs). That will go a long way in whittling down the excessive discretionary powers of the Board because they will cease to be the custodian of the funds.

Second, widening enforcement powers of Nigeria Social Insurance Trust Fund to informal sectors. This can be done where the Act specify means of how to recover contributions and assess the employers of informal sectors. Also there is need to start prosecuting erring registered and non-registered employers.

Third, amendment of Section 12(1) of the Employees' Compensation Act, Section 12(1) of the Act be expunged in order to give an injured or disabled employee or dependant right to institute action at the court of law if that will entitle him/her higher compensation. The said section is contrary and inconsistent with the provision of the constitution, hence null and void.

Fourth, fair and guaranteed compensation had been one of the objectives set out by the Act. Thus, higher contributions by industry, workplace or sector should correspond with a higher compensation to employees of that industry, workplace or sectors who are prone to high risks.

Fifth, pre-trial conference should be conducted instead of the Board sitting on its own decision appealed against, let all new facts and evidences be settled at pre-trial conference while at the National Industrial Court (NIC).

Sixth, publicity, the Nigeria Social Insurance Trust Fund should engage print and media houses for awareness campaigns about the scheme and its mandate to employees. And certificate of compliance be issued and recognized as requirement for any contract bid by a company just like it is obtainable in the case of Corporate Affairs Commission (CAC) and Federal Inland Revenue Service (FIRS). There is also need to have desk officers across Ministries, Departments and Agencies and all major private employers of labour for firsthand information and enquiries about the scheme.

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