

The Legal Aspect of Insidious Diseases in the Workplace: A Case Study of Jwaneng Diamond Mine in Botswana

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Abstract

The purpose of this study is to examine the legal aspect of insidious diseases in Botswana mining sector. Sixty respondents from Jwaneng mine will take part in this study involving top management and the rest of the staff members. And they will be served with questionnaires as a primary source of data collection. The approach gives opportunity to collate, process, present and analyse data from courts and authors. In so doing the study will identify the gap and inability of workers in Jwaneng mine to file a claim for compensation when faced with insidious diseases.

Early in the life of a Motswana miner, the legal aspect of insidious diseases wasn't necessary; because insidious diseases take a long time to manifest and most miners are not aware of their rights to compensation and so it becomes very difficult and complicated to file for a claim. Although Jwaneng mine has a good safety management record, there are instances when accidents still happen and therefore requiring some form of compensation and one way this can be done is by having it clearly stated in a contract of employment agreement. Employees may also be sensitized on their rights so they know the channels to take in seeking redress. This is aimed at ensuring there is harmony between the top management and workers in their respective endeavours.

Keywords: Botswana, Compensation, Debswana Diamond Mine, Jwaneng, legal aspect, Insidious diseases.

Introduction

In Botswana the legal aspects of insidious diseases in the mining sector present a major challenge facing the miners especially those in Jwaneng mine. The problem is compounded by the fact that number of miners who should be compensated as a result of insidious diseases contracted in their workplace are wallowing in ignorance of the rights available to them. This study seeks to sensitise and enable Debswana Jwaneng miners to file for compensation for any occurrences of insidious diseases as a result of exposures to workplace hazards generated by dust particles carrying silica inhaled by the miners and such other related lung diseases called pneumoconiosis. An insidious disease is any disease that comes on slowly and does not have obvious symptoms at first but developing in an individual, and he or she is not aware it is developing.¹

Although safety is a strategic priority at Debswana Jwaneng mines and the company has a rigorous standards and processes in place to prevent injuries and diseases from occurring, all operations run initiatives to promote a common culture of zero harm and deploy processes to facilitate swift reporting and investigation of every incident to identify root causes, initiate remedial action and to disseminate lessons learned; it however did not provide for adequate, equitable and commensurate compensation as a right fill a claim over insidious diseases contracted in the course of carrying out their duty.

The best solution is to provide a detailed provision in the miner's contract of employment of how it is a right accrued to them to file for a claim in their contract of employment. Surveillance of occupational exposures and insidious diseases is weak, despite the efforts of Debswana Diamond Company. Although provision for compensation for occupational lung diseases.

¹ Available at <https://medlineplus.gov>. Accessed on 31st July 2017.

Ignorance of the law is said to be no excuse, but most of the miners in Debswana Jwaneng mines are not really aware of their rights and so they won't be able to and wouldn't even care to file a claim. This has really limited them from claiming their rights to compensations.

This study relates to the methods or strategies for sensitizing and bringing to the knowledge of the Jwaneng miners in Botswana and thereby advocates for a comprehensive details in their contract of employment agreement.

Methods to be followed

Description of the site

Jwaneng is a setswana word in Botswana which simply means where a small stone is found. The Jwaneng pipe was discovered in the Naledi River Valley also known as "Valley of the stars", in Southern Botswana in 1972.

Debswana Jwaneng Mine is owned by Debswana, a partnership between the De Beers company and the government of Botswana. It is an open pit mine.² It is located at the south centre Botswana, about 160 miles southwest of Gaborone in Kalahari Desert and produces 12 to 15 million carats of Diamond per year on average basis.

Jwaneng Mines is the richest diamond mine in the world by Value.³ It was officially opened by the then President of the Republic of Botswana, His Excellency Sir Ketumile Masire. This later became fully operational in August 1982.

Currently Jwaneng mine is mining to a depth of 400 metres and is reaching 624 metres this year. The resource consists of three separate volcanic pipes/vents namely; north, south and centre pipes, two additional small kimberlite bodies have also been intersected within the pit, which erupted through Transvaal strata and the overlying karoo sediments.

Description of the research done

The approaches used in this study are analytical and comparative. The analytical approach is adopted for literature review. The comparative is used while comparing and looking at what is happening in the other mining sites in sites in Botswana.

The analytical method or approach gives the opportunity to collate, process, present and analyse data from courts, desk tops and authors. This attempts to clarify and to sensitize the miner of their rights. In so doing the text identifies gaps in the existing literature on the subject of the study which, at the end will enable the research to reach logical conclusions and offer solutions.

Similarly the adoption of comparative approach creates an insight into how the mining sector in Botswana promote compensation through the enforcement of human rights which helps in no small measure in the examination of the legal aspects of insidious diseases and identifies their problems when it comes to filing for claims.

The main aim of the comparative analysis is to discover the best approach deployed by Debswana Jwaneng Mine to promote filling for a claim.

Member of Parliament Mr. Kgoroba said Debswana is exploiting its workers by increasing its use of labour brokering in a bid to avoid the consequences of the legal obligations. In Botswana there are currently no legislative inroads aimed at curbing or regulating the industry. In the current economic climate and the high rate of unemployment, currently and controversially set at 17% by statistics in Botswana, the unemployed and particularly the youth are increasingly vulnerable to being traded as a "commodity" by a company seeking to employ short to medium term employee without the obligations imposed on them by the employment Act.⁴

² Available at <https://en.m.wikipedia.org/wiki/jwaneng>. Accessed on 31st July 2017

³ Available at www.debswana.com accessed 1st August 2017.

⁴ The Botswana Gazette Wednesday 30th August 2017.

Jwaneng mine is an open pit mine with the symbol of DK2 currently down to +300 meters below ground level (mbgl).

The fact that international labour law obligations have not been introduced locally does not however prevent the ideals espoused in those conventions being used by government and the high Court which is done at the Industrial court to give direction as to the approach to be opted for.

This study also shows that under the common law a contract of employment can only be between two parties and no place for a third party.

The Botswana law inherited from independence, affirms the fact that the contract of employment without certain legal aspect of liability and the right to compensation amounts to slavery, under normal labour brokering the agreements, labour brokers provide workers to meet the clients specific employment needs; which includes their rights as employees of the company, amongst many is the right to file for a claim as a result of constant exposure to dust which resulted to the employee contracting an insidious disease in his/her workplace.

Description of the methods used

The collection of primary data by way of interviewing and serving questionnaires revealed a number of divergent opinions and answers from individuals ranging from Debswana Diamond Company contractors, top management officers, spouse of a miner and miners themselves in Debswana Jwaneng mines.

S/N	Workers in jwaneng mines	Affected by insidious diseases	File for a claim	Compensated
1	Top management officers	Not diagnosed as yet/no sign yet	No	Not yet
2	Miner 1	Yes, slight pains/coughing	Not aware	No
3	Miner 2	Severe chest pains	Not aware	No
4	Spouse of miner	Frequent chest pains	They said she is not an employee but a spouse of employee	Not eligible

Compensation to insidious diseases

In investigating the reality in labour brokering it was found that various unreported industrial court decisions that looked beyond the contract of employment to ascertain who bore the ultimate responsibility for the workers' wellbeing and who bore the legal responsibility of ensuring obligation to workers under the Employment Act were adhered to.

The industrial court variously held that the application of these test must take account of the realities of the particular situation rather than the form in the parties choose to the relationship. In contrast however the Court of Appeal recently applied a strict adherence to the terms of the employee and employer relationship based on contract.

Legal scholars argued that applying the Court of Appeal judgement on termination of contract of employment based purely on the terms of the contract and the Industrial Court decisions that look beyond the contract would likely lead to legal uncertainty based on whether a claimant approached the High Court or Industrial Court for help.

This uncertainty undermines the legal certainty principle is a corner stone of the Rule of Law, stated an attorney. Though common Law and Botswana's International obligation under the International Labour Organisation Convention (ILO) can protect workers and address some of the disparities of interpretations of workers' rights they are not however binding on the Courts as they have not been introduced as local legislation. Zimbabwe, Namibia and South Africa have introduced legislation to

address such disparities and override the Common Law and incorporate International Labour Obligations into local law. This has not yet been done in Botswana.

Additionally, Botswana's International Obligations under the ILO have increasingly come under scrutiny with government being reported by the Botswana Federation of Public Service (BOFEPUSU). In May this year, for violating workers' rights under the joint bargaining council.

Selected few that were served with questionnaires	Availability of silica/abestos	Debswana jwaneng mines /contractors
Miners under 18 to 35years	Affirmed the availability of asbestos in jwaneng mine in large deposits where the diamond sits.	Contractors denied that there wasn't any large deposits of abestos in the mines
Miners above 35years	Affirmed the presence of insidious diseases	It became almost impossible to file for claims for ignorance of their rights and are not aware such rights and are afraid of losing their jobs at such age.
The community	Affirmed affected by dust from the mines	Contractors said they have no any form of relationships to warrant such legal obligations

The results

In Botswana surveillance of occupational exposures and insidious diseases are very weak notwithstanding efforts of Debswana Diamond Company. It has excellent Site Rules and Regulations for employer/employee and contractors⁵. The miners often go underground to get the Diamond with inadequate masks, most of the diamond are sitting on asbestos.

De beers who are partners with Botswana government to carry out mining activities denied that asbestos was not any problem. They also argued that most of the aged elderly miners that worked in South Africa, brought their insidious diseases to Debswana Jwaneng Mines and such their claims wouldn't suffice for the legal right to claim compensation.

Compensation is a form of insurance providing award to someone in recognition of loss, suffering or injury or in other words it is the total cash and non-cash you give to an employee in exchange for the work, workplace injury he or incur during the course of his or her carrying out her duty in the workplace, but as Debswana Diamond Company are denying that such insidious diseases don't exist because of their excellent health policies even if they do; the health policies and health officers in place would have carried out the routine checks and had tackled it since before it gets to the terminal stage.

Ventilation systems in the mines are always breaking down and yet they have to go deeper to get the diamond in such conditions where they must breath, and if they must breath they can only breathe the air around them, and the air is the air that is saturated with dust, this dust may contain one or two air pollutant like asbestos, silica sand and the likes which later becomes an insidious disease. . Their problems were very different and yet dangerous, the Doctors kept a very tight hold on the miners' health record saying that such issues were not directly affecting the miners. Diseases due to respiratory air-

⁵ STD/SHE/SHE/017 Mar 8TH 2012.

borne dust such as silicosis, asbestosis and chemical inhalation remain very harmful to the miners' health.

Botswana uses the most dangerous method of mining which is the open-pit mining. This is technically complex way of extracting ore and recovering diamond. It is used when open pit mining becomes uneconomic, as the open pit excavating around the Kimberlite pipe goes deeper, the cost of removing waste materials against the rate of diamond recovery against the rate of diamond recovery.

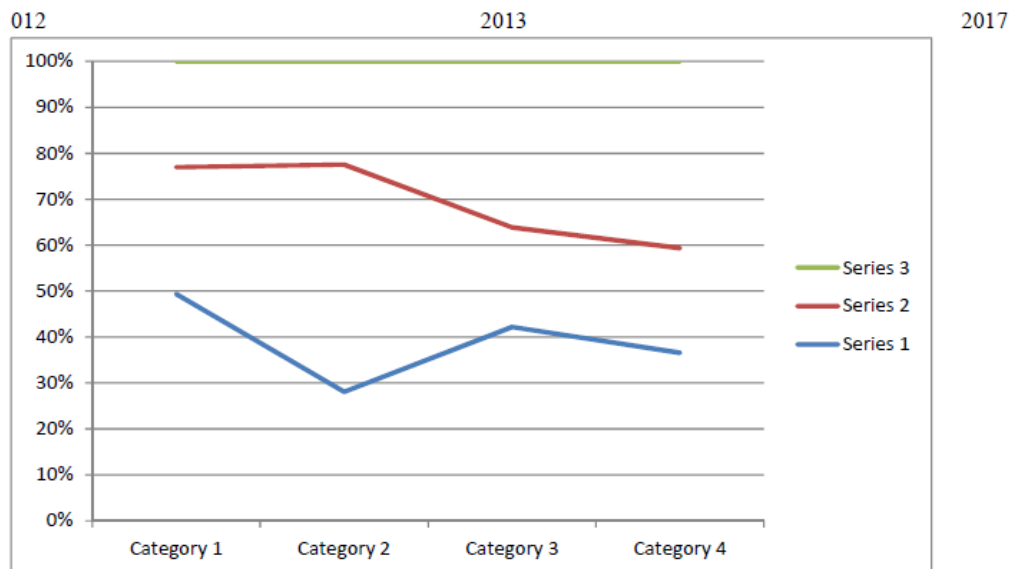
Botswana international obligations under the International Labour Obligation (ILO) have increasingly come under scrutiny, with the government being reported by the Botswana Federation of Public Service (BOFEPUSU) as failing in its obligations. In May this year 2017, for violating workers' rights under the joint bargaining council. The fact that International labour law obligation have not been introduced locally does prevent the ideals espoused in those convention being used by government and the High Court.

Discussion

Relationship of the results to the objectives

- (1) In principle, Debswana Jwaneng Diamond Mine compensation systems should exclude ineligible claims and provide benefits to eligible claims. However, for certain reasons, hindrances are there and are put in place to exclude ineligible claims will likely screen out some arguably compensable work related injuries as well.
- (2) The 1990 workers' compensation claim frequency has shown a steady decline a steady decline, this also shows a decline in injuries reported by the Bureau of Labour Statistics. However available evidences suggest that the number of reported workers' compensation claims greatly underestimates the actual number of workplace injuries eligible for benefits.
- (3) Restrictions on the benefits eligibility and increased hindrances to claims approval that had been adopted by many legal systems.

Workers' compensation indemnity frequency rates 2012 -2017



Consistency with other researchers

Elmer I. Schwartz and Byron S. Krantz⁶ said in their article that in order to preserve a right to remedy for this form of injury, some courts have taken the position that a cause of action accrues, and the statutes begins to run when the insidious disease results.

It is at this juncture that it would become pertinent to note the reasons for the enactment of limitations statute and to determine whether the interests of justice are served through modification of the concepts in order to cope with the problem of insidious diseases. They further stated that statutes of limitation were enacted in England as early as 1236 AD, and in Rome as early as 424 A.D.⁷ at the present time statutes take many forms and govern most types of actions. The obvious purpose of the statutes is to prevent suits upon fraudulent or state claims, where much evidences and many witnesses are no longer available⁸.

The prevailing view is that claims are not usually allowed to remain neglected over a period of years with no attempt to enforce them. Further it is to relieve courts of the burden of adjudicating stale or tenuous claims.

A realistic approach to the problem of insidious diseases was reached in the landmark case of *Urie v. Thompson*⁹. Plaintiff alleged that in 1940 he was forced to cease work as a fireman on a steam locomotives as a result a pulmonary disease diagnosed as silicosis. This permanently disabling affliction had been caused by continuous inhalation of silica dust blown or sucked into cabs of the locomotives on which he worked. The injurious concentration of silica dust in the air arose from the rail road of the mines and had affected his health as a result of exposure to the harmful dust in his workplace.

Michael D. Green¹⁰ said in his article that Toxic substances litigation has moved front and centre on the contemporary civil litigation stage. Its scope is massive its influence on doctrine is substantial, its challenges for administration of the civil justice system is unique. Toxic substances litigation and the compensation question it spawns present political, social, technological and economic challenges with which we have just begun to grapple and which we will continue to face for decades to come.

The most compelling problems posed by toxic substances litigation are its voracious appetite for civil justice system's resources and the difficulty of resolving factual issues of causation given the limited state of scientific understanding.¹¹

Since the first reported asbestos decision in 1973¹² tens of thousands of suits have been filed, and in some jurisdictions they continue to be filed at twice the rate at which they are being resolved.¹³

Judge Edward Becker of the Third Circuit Court of Appeals, for instance, characterized asbestos litigation, with some hyperbole as the most serious crisis the Federal Court had faced in its history.¹⁴

⁶ State of limitations in cases of insidious Diseases Cleveland State Law Review, EngagedScholarship@CSU, 1963.

⁷ Pollock and Maitland, History of English Law 81 (2nd ed. 1898); Sohn, The Institute of Roman Law 318-22 (3rd ed.1907).

⁸ Comments, Developments in the Law-statutes of Limitations, 63Harv.L.Rev. 1777 (1950).

⁹337 U. S. 153 (1949).

¹⁰ Michael D. Green, The Paradox of Statutes of Limitations in Toxic Substances litigation, 76 CAL. L. REV. 965 (1988). Available at: <http://scholarship.law.berkeley.edu/californialawreview/vol76/iss5/1doi>.

¹¹ See Rosenberg, The casual connection in Mass Exposure Cases: A Public Law Vision of the Tort System, 97 Harv. L. REV. 851, 851-59 (1984), the later problem is addressed infra text accompanying notes 34-49.

¹² *Borel v Fibreboard Paper Prods, Corp*, 493 F.2d 1076 (5th Cir. 1973) cert. denied, 419 U. S. 869 (1974).

¹³ See, e.g., GAO, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON LABOR STANDARDS, COMMITTEE ON EDUCATION AND LABOR, HOUSE OF REPRESENTATIVES, ASBESTOS: GROWTH OF FEDERAL CLAIMS, COURT CASES and LITIGATION COSTS 20(1988); R. Klein, Year End Report on the 1986 Asbestos Litigation in Philadelphia County (undated), reprinted in Asbestos litigation Rep. (Andrew) 14,299, 14,299 (March 6, 1987); see also Bruce, The Armies of Asbestos, AM. Law., Nov. 1979, at 19; Chen, Asbestos Litigation is a Growth Industry, ATLANTIC, July 1984, at 24; Pa Supreme Court is asked to void Emergency Trial Rules in Philadelphia, Asbestos Litigation Rep. (Andrews) 15,716, 15,717 (Sept. 18, 1987) (more asbestos cases were filed in one month than were terminated the previous year and the backlog at current rates of processing cases is 21 years)

¹⁴ 3d Circuit Hears Three Hours of Arguments on School Class Action Appeals, Asbestos Litig. Rep. (Andrews) 11,480, 11,481 (Jan. 17, 1986).

Again BabaraWrubel¹⁵ a breach of contract of employment of legal duty to act with reasonable care may invoke the full panoply of product liability litigation¹⁶.

Further research that may be necessary to answer the questions raised by the results

Compensation for research subjects of insidious diseases in the mining sector of any legal system has been an old an established practice. Many researchers had written a lot about compensation and legal aspects of insidious diseases in the mining sector. For over 200 years, compensation and the legal rights to file for a claim had been offered to research participants for various reasons like monetary gains so that they would come up with new research topics as regards compensation and the filing of claims in the workplace.

Below is a table showing the eligibility and age differences between workers in Debswana mines as regards rights to claim and compensation.

S/N	Number of years worked	Eligibility	Presence of pollutants	Compensation awarded
1	Miner 1 age 18 -25 years	5years is experiencing slight chest pains	Yes	Denied rights and compensation
2	Miner 2 age 26-39years	19years affected by silicosis and pneumonco	Yes	Denied legal rights to claim for compensation
3	Miner 3 age 40-59years	25 to 30years experiencing cardio-pulmonary tuberculosis	Yes	Delayed but given and not commensurate to the degree of injury.
4	Employee's spouse	Silicosis	Yes	Not attended to
5	Employee's family	Silicosis	Yes	Not attended to

Responses to the questionnaires shared

A number of miners in Debswana Diamond Jwaneng Mine and top management Officers were served with questionnaires and the outcome of their responses were divergent and controversial responses.

Sixty respondents were served with questionnaires, only about 11 responded amongst the top management officers. Others were about 25 amongst the miners that responded who are directly affected with harmful substances in the mines, the people living around and close to Debswana Diamond mines responded; some of which were family members of the miners and administrative staff of Debswana Diamond Mines in Jwaneng and also are some members of Jwaneng Community.

The questions that were asked in the questionnaires are questions that relates to working conditions, insidious diseases in the workplace and whether there seem to be some kind of redress or rights; even the rights to file a claim or the right to compensations.

¹⁵ Liability Insurance for Insidious Disease Who picks up the tab? 48 Fordham L. Rev. 657 (1980).

¹⁶ In 1916 Judge Cardozo announced the doctrinal basis of product liability law. If a nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, then it is a thing of danger. Its nature gives warning of the consequences to be expected. Also is the case of manifestation theory that is somehow similar to liability insurance. Manifestation theory refers to a legal theory recognizing an injury as an insurable loss when injury is manifested to an injured. Manifestation theory is also an insurance doctrine stating that an injury or disease is covered under the policy, on a first appearance of symptoms of the covered injury or disease. Manifestation theory is also known as exposure theory, actual-injury trigger, or triple trigger. However, some injuries do not manifest themselves immediately between the occurrence of the event and time when the injury becomes apparent. The consequences are referred to as delayed manifestation injuries. A delayed manifestation injury is not recognized under manifestation theory and hence coverage cannot be provided under insurance policy. The following is an example of a case law defining manifestation theory. Manifestation theory states that an insurance coverage applies under a policy if the property damage manifests during the policy period, regardless of when the act from which it resulted occurred. [Audubon Trace Condo. Ass'n v. Brignac-Derbes, Inc., 924 So. 2d 1131 (La.App. 5 Cir. Feb. 27, 2006)].

The top management officers in Debswana Jwaneng Diamond mines seem not to agree with the presence or likely hood of an occurrence of an insidious disease because of the health policies they have put in place. When asked if they had followed the laid down rules and principles in the International Labour Organisation; they seem not to strongly ascent to have strictly followed the principles laid down by the International Labour Organisation as complying with the principle as regards the rights and compensation of an employee. Some of the top management officers said that if the miners are affected and are suffering from insidious diseases is was because they brought it from their former place of work in South Africa where they were mining before they came back to work in Debswana Jwaneng Mine in Botswana and that there are likelihood of the miners that came from South Africa to had been exposed to insidious diseases before they started working in Debswana Jwaneng Mines in Botswana.

When asked whether their miners have some sort of rights to file a claim and also the rights to compensations, they said yes, but their statements and policies seem to be only on paper and not operational as it were. The Debswana Jwaneng Diamond miners are not even aware of certain rights accrue to them when it comes to filing for a claim and compensations for the insidious diseases they suffer as a result of exposure to dust air pollutants of silica and asbestos the inhale while blasting the earth crust just to reach the diamond they are looking for.

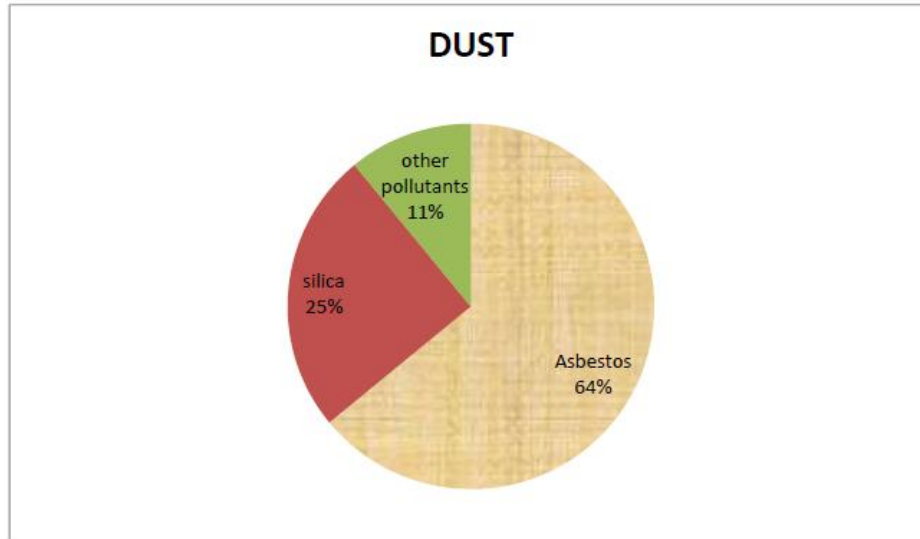
The Debswana Jwaneng Diamond miners affirmed to the question in the questionnaire as to whether there are dust substances containing silica and asbestos in the Debswana Jwaneng Mines; their workplace. More than twenty three affirmed to the presence of dust substances of silica and asbestos in large quantity. They also strongly agreed; agreeing to the question put forth in the questionnaire as to whether any of them, as Debswana Jwaneng Diamond miner had fallen sick of insidious diseases as a result of working in Debswana Jwaneng Diamond Mine. Almost all of them said the Diamond seats on asbestos.

Botswana has not really legislated and implemented the principles of International Labour Organisation into their laws and so the enforcement of these rights is weak. Furthermore, the miners are ignorant of the rights available to them and would rather suffer.

Family members too said there are large deposits of asbestos and this also had affected them in some way or the other. More than four family members ranging from their spouses to their kids, also affirm of being affected by frequent chest pains and inhalation of dust blown towards their dwelling place by the wind and this had caused them a lot to treat and managed.

Conclusion

In conclusion the tables below indicates and shows the different ages filing for a compensation as a result of exposure to silica dust, asbestosis and their company's response.



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