Dorota Dzienisiuk

The role of solidarity in accident insurance

Within social insurance relating to accidents at work and occupational diseases the concept of solidarity plays a different role than in other branches of social insurance. The insurance contributions are financed exclusively by the employers, while the benefits are granted to insured persons or to members of their families. Therefore, the solidarity covers both groups. The advantage gained by the contribution payers is related to the restriction of their liability to those affected by accidents at work and occupational diseases. The solidarity should embrace all such affected persons, irrespective of the legal form of work performance. The legislative changes of 2018 regarding "persons performing gainful work" and "farmer's helpers" (farm hands) support the demand to incorporate within social insurance relating to accidents at work and occupational diseases out-workers and those on specific task contracts.

Key words: accident at work, insurance, occupational disease, solidarity

Submitted: 18.3.2019
Accepted: 27.11.2019

DOI: 10.32088/0000_5

Methodology for examining the idea of solidarity

At least three approaches to solidarity in accident insurance are possible: axiological, historical legal and dogmatic legal.

The axiological approach would focus on developing, with the use of the adopted concept of solidarity, the ideal accident insurance model, with which the current regulation could be compared.

The historical legal approach would refer to civil rules of liability for the effects of accidents at work, which had existed before the detailed legislation on accidents at work was enacted. Their breakdown constituted the beginning of social insurance, which to this day is perceived as being on the participants' solidarity. And that is why in accident insurance these rules still need to be applied to employers' liability. This distinguishes accident insurance from other types of social insurance, where issues of guilt and liability play a negligible role (*e.g.*, in sickness insurance this would open up the possibility of claiming any refund of sickness allowance or rehabilitation benefit from the perpetrator) or are completely disregarded (*e.g.*, in pension insurance).

Finally, a dogmatic legal approach could support, by analysis of the current legal status, the recreation of relationships corresponding to the perception of solidarity, being recognised for convenience, in accordance with the conference materials,[1] as an unequal participation in the creation of the fund and its use within the community, where there is no symmetry between the contribution and the realised benefit.[2] This paper adopts the last approach. It seems that the recent legislative changes may be considered as an indicator of the legislator's axiological preferences when designing social insurance regulations, and thus also its attitude to solidarity and the range of individuals where it appears or should appear.

The word "solidarity" is not explicit, it has many connotation and aspects. In dictionary terms, it means "a sense of community and shared responsibility resulting from the consensus of opinions and aspirations" or "a collective and individual responsibility of a specific group of people for the whole of a joint undertaking"[3] or "unanimity of conduct and aspirations, […] mutual support."[4] The preamble to the Constitution of the Republic of Poland mentions "the obligation of solidarity with others" as a guideline when applying the Constitution, and in Art. 20, as the basis for

1 This study builds on the theses of the paper presented at the XXVII academic conference of the Polish Social Insurance Association "Solidarity in social insurance" (Gniew, 13-14 September 2018).

2 R. Babińska-Górecka, a fragment of the description of the concept of the XXVII academic conference of the Polish Social Insurance Association "Solidarity in social insurance" (Gniew, 13-14 September 2018), unpublished information.

3 Polish definition: *Słownik Języka Polskiego*, https://sjp.pwn.pl/szukaj/solidarno%C5%9B%C4%87.html; entry: solidarność (9.3.2019).

4 Polish definition: Słownik Języka Polskiego, https://sjp.pwn.pl/doroszewski/solidarnosc;5498841.html; entry: solidarność (9.3.2019).

the state's economic system. This approach emphasises obligations related to solidarity, but it should be noted that joint and several cooperation has certain purposes and results. As a rule, work is undertaken for a specific purpose,[5] and the initiated projects cannot be detached from their results, in particular if such cooperation is included within the statutory framework. After all, the actions of the legislator (public authority) should be planned and targeted. Therefore, it seems that account should be taken of the goals and effects achieved through solidarity.

The term "solidarity" occurs 13 times in the Constitution and in ordinary laws, but not in social insurance laws,[6] although the following Acts of Parliament are closely related to social insurance: the Act of 20 April 2004 on employment promotion and labour market institutions,[7] and the Act of 27 August 2004 on health care benefits financed by public funds.[8] Solidarity (joint and several responsibility) of debtors and creditors is one of the established institutions of civil law (Art. 366 *et seq.* of the Civil Code), joint responsibility of the members of the Council of Ministers for the Council's activity, established in Art. 157(1) of the Constitution is an institution of constitutional law.

Although social insurance laws do not use the word "solidarity", the idea expressed by this term is of key importance to this area of law. It is understood in different ways, often in connection with the concept of risk community. These concepts together explain and justify an obligation to bear financial burdens imposed on an individual to ensure that, if the risk materialises, benefits can be obtained. As it has already been pointed out, the inequality of burdens and benefits is usually assumed. Some statements in the doctrine emphasise even more strongly, similarly as in the Constitution, solidarity on the side of obligations, ignoring their purpose – the benefits that result from them and the fact as to whether they are to apply to the entire community or merely to individuals.

For example, it is claimed that:

> […] solidarity of the risk community is expressed in financing (through individual contributions) […]. In the context of the distribution of benefits, justice is more often mentioned than solidarity.[9]

> The solidarity […] is reflected in […] a mechanism of bearing burdens for the purpose of affording insurance protection, […] as in the case of compulsory insurance coverage, where the fact of paying contributions does not only result in the right to one's own

5 For example, according to Tadeusz Kotarbiński, "work is a whole series of actions (in a particular case – a range of actions) having the nature of overcoming difficulties to satisfy someone's needs," T. Kotarbiński, *Traktat o dobrej robocie*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1982, p. 89.

6 S. Lewandowski, *"Solidarność" i "dobro wspólne" w polszczyźnie współczesnej i w polskim prawodawstwie. Analiza językowo-logiczna*, materials from XXII Conference of the Faculty of Law and Administration, University of Warsaw, on "Solidarity and the common good as values in law," 1-4 March 2019, Warszawa 2019, p. 58.

7 Consolidated text: Journal of Laws of 2018, item 1265, as amended.

8 Consolidated text: Journal of Laws of 2018, item 1510, as amended.

9 J. Jończyk, *Prawo zabezpieczenia społecznego*, Zakamycze 2006, p. 39.

> benefit, but also in the consent to finance benefits for other members of the community from part of the funds of each insured person.[10]

And that is because:

> Solidarity of the insured persons, also referred to as the solidarism of the insured persons, assumes establishment of communities exposed to similar random events (risk communities), in which the responsibility is spread among all insured persons.[11]

Taking into account the characteristic features of social insurance as a technique for implementing social security, it is claimed that the

> establishment of systemic foundations for protection requires the existence of solidarity, adjusted by the principle of distributive justice, which is based on the idea of categorical equality.[12]

And finally:

> According to traditional approaches, social solidarity determines the shape and content of the insured persons' obligations and lays down the rules for the creating and functioning of the insured persons' community (percentage share, no quota, lack of individual risk estimation, the right to benefit for those in relation to whom the social risk has materialised). […] Therefore, we should consider whether it can still […] be acknowledged that the principle of proportionality of benefits to the labour input (or to the contribution) in social insurance is relative, because it is subordinated to the principles of social solidarity and income redistribution, and that the principle of reciprocity is not treated in social insurance absolutely as the equivalence of contributions and benefits.[13]

Thus, looking at statements about solidarity in social insurance doctrine, one can raise many doubts with regard to accident insurance, in particular realising the nuances associated with various manifestations of solidarity in law, its relation to the concepts of justice, social justice, the common good, dialogue and cooperation of social partners, especially as part of the social market economy in the light of the compulsory nature of social insurance. This subject is most complex and extensive, so the following considerations are limited to a few strands that seem interesting and very topical. The main topics pertain to the determination as to whether solidarity really exists (or should exist) in social (accident) insurance only on the side of burdens and whether the role of the legislator is to recreate the community perceivable in a society affected by legal standards, or to create such a community according to assumptions adopted by the legislator, using insurance methods.

10 K. Antonów, *Prawo pracy i ubezpieczeń społecznych*, ed. K.W. Baran, Warszawa 2017, p. 718.

11 K. Ślebzak, *Prawo do zabezpieczenia społecznego w konstytucji RP. Zagadnienia podstawowe*, Warszawa 2015, p. 21.

12 *Ibid,* p. 218.

13 R. Babińska-Górecka, *op. cit.*

A community in which solidarity acts

If we refer solidarity in accident insurance to the concept of risk, different approaches are possible to outline the range of people belonging to the burden-bearing community and to develop the relationship between them. This affects the interpretation of legal provisions setting out the specific obligations and rights of the addressees of legal standards and the assessment of the manner in which the legislator regulates these matters.

In accident insurance we may speak of:

1) the community of insured persons and their families – using benefits, jointly interested in the appropriate determination of the qualifying conditions, the benefits amount and the manner of their provision;
2) the contribution payers' community – using their civil liability insurance, with a contribution calculated according to the risks arising from this liability or according to the number of insured persons, which indirectly may (but does not have to) express the financial capacity of a given contribution payer;
3) the community of contribution payers and the insured persons – in which case the total burdens and benefits would be decisive;
4) the general social community – in this approach, objectives set for accident insurance go beyond social insurance, *i.e.*, it is not only about securing the needs and reducing the number of benefits, but also about reducing the costs of the operation of individual organisations, efficient work, improvement of occupational safety and public security.

The financial situation of the accident fund is stable. Contributions paid exceed the value of paid benefits.[14] Hence, solidarity in accident insurance may be considered regardless of the external factors (*e.g.*, the state budget), although it seems that its structure may affect the environment (*e.g.*, the competitiveness of individual enterprises, occupational safety and health, level of health care, *etc.*).

Accident insurance burden (contributions) is borne only by contribution payers. Benefits (advantages) accrue to the insured persons. Thanks to so called projects,[15] some contribution payers may obtain certain resources (closely related to accident prevention, pursuing the objectives of accident insurance).

Thus, the solidarity in this type of insurance goes beyond the inequality of contributions and benefits, because contributions are only on one side. At the same time, based on these relationships, one may speak of a kind of community including contribution payers, insured persons and their families. This community is based on interdependent interests,

14 Zakład Ubezpieczeń Społecznych [Social Insurance Institution], *Raport roczny ZUS 2017* [2017 Annual Report], Warszawa 2018, p. 33.

15 Activities aimed to maintain earning capacity throughout the entire period of professional activity – Art. 37 *et seq.* of the Act of 30 October 2002 on social insurance in respect of accidents at work and occupational diseases; consolidated text: Journal of Laws of 2018, item 1376, as amended.

although in principle they occur at various stages of legal relationships within social insurance. Thus, it seems that solidarity in accident insurance should be considered jointly in relation to the burdens and benefits for contribution payers and the related benefits for the insured. It must also relate to benefits as a sense of establishing the social insurance system.

In speaking only of the solidarity of burdens and obliged entities, we would lose the focus on the main purpose of social insurance, *i.e.*, to provide a means of subsistence for persons in certain life situations. Hence, we would have third-party insurance and not social insurance. For persons who receive accident insurance benefits, as a rule (except for insured persons paying contributions only for themselves), there is no relationship between the contribution and the benefit, unless account is taken of non-insurance work contribution in favour of contribution payers.

However, separate account should be taken of the narrower solidarity of contribution payers, as this group also has both burdens and advantages associated with the limited liability to employees (insured persons) or with obtaining benefits (persons engaged in non-agricultural activities). In terms of the burden imposed on them, there is also a diversity and asymmetry in costs and benefits. This community (of contribution payers) jointly creates a fund which, after the occurrence of a random event, is used by other persons (the insured), which limits the liability of the individual members of this community. Thus, solidarity on the debtors' side is exemplary: they all jointly bear the financial burden of damages for some of them.

Justification of solidarity

The purpose of the social insurance system is usually considered to be the provision of benefits that meet the needs or mitigate the effects of the loss or reduction of earnings incurred under certain situations as defined by law. Due to the fact that the costs of accident insurance are borne entirely by the contribution payers, who are often not natural persons, it should be assumed that the justification of solidarity in accident insurance cannot refer to altruistic reasons, but only to their own benefit obtained from a given form of insurance. Parties to these relations include not only humans who experience the same effects of random chance events, but also organisational units in relation to which one is not dealing with the provision of means of subsistence.

Contribution payers bear the consequences of events that usually affect other people (depending on the liability regime and except for the self-employed). The legislator imposes on them an obligation to pay a contribution, *i.e.*, a liability (as a negative consequence of risk) for events with which otherwise they may be unconnected (*e.g.*, due to force majeure). This brings the contribution closer to an additional non-equivalent public levy associated with labour costs. Such a contribution should be economically rational under the assessment of whether in this case an important public interest justifies interference with the constitutional freedom of economic activity.

Advantages achieved by contribution payers include: reduction of civil liability insurance costs through compulsory accident insurance, which due to compulsory participation provides all organisations with comparable costs and protection; greater willingness of the insured to take on risky employment; reduction of costs related to accidents at work and occupational diseases not covered by accident insurance (link with health insurance, method of calculating compensation for material and non-material damage), assistance in financing activities promoting OSH and motivating such activities (projects, method of determining the amount of accident insurance contribution).

Advantages achieved by the insured include certainty and a simplified procedure for obtaining relatively high benefits while maintaining the possibility of pursuing claims arising from employers' liability outside social insurance.

The special approach to solidarity in accident insurance also has another side. The structure of accident insurance benefits to a very narrow extent takes into account discipline necessary in social insurance, which leads to the creation of community and solidarity. This discipline is usually manifested in the requirement of a sufficiently long period of insurance coverage before one acquires the right to benefits and in referring to the special role of the cause of the insured event and fault in its occurrence (lack or reduction of benefits for the insured person and their family, supplementary liability, admissibility of recourse). The ease of acquiring the right to benefits reduces the importance of input and time, which build community and solidarity in other types of insurance. This is indicated by abusive practices when registering for insurance purposes, which is often done at the same time as reporting an accident at work.

Personal scope of solidarity (risk community)

Changes in the scope of employee rights and insurance entitlements

Concepts related to the understanding and scope of solidarity and its impact on the specification by the legislator of the risk community covered by compulsory accident insurance may and should translate into practical *de lege ferenda* conclusions, especially after taking into account the changes in the legal environment in which accident insurance functions. Two legislative changes were introduced in 2018, which, together and in the context of accidents at work, occupational diseases, risk community and solidarity within this community, lead to extensive and serious reflection on the basic assumptions of the structures adopted so far. The first relates to the scope of collective protection of rights and interests of persons performing work in various forms, including those under civil law; and the second relates to distinguishing, for the purposes of farmers' social insurance, another legal form of work performance, which is the so-called harvest assistance contract performed by farmer's helpers.

The Act of 5 July 2018 amending the Act on trade unions and some other acts[16] entered into force on 1 January 2019. It introduced the concept of a person engaged in gainful work to the Act of 23 May 1991 on trade unions.[17] This relates to an employee or person performing gainful work on a basis other than an employment relationship, if he or she does not employ other people for this type of work, irrespective of the basis of employment, and if his/her rights and interests related to the performance of work can be represented and defended by a trade union. At the same time, it was declared that the right to form and join trade unions was granted to persons engaged in gainful work.[18] Trade unions are organisations set up to represent and defend the rights, professional and social interests of "working people."[19]

The history of expanding the scope of employees' and employers' freedom of association to represent and protect their rights and interests, *i.e.*, the right of coalition, is closely related to the understanding of the concept of "employee" in the Conventions of the International Labour Organisation (ILO). The amendment was aimed to implement the recommendations formulated by the ILO Committee on Freedom of Association, which concerned the freedom of association in trade unions[20] and the judgement of the Constitutional Tribunal of 2 June 2015 (file No. K 1/13). It was claimed in the judgement that the scope of regulations regarding the admissibility of creating trade unions and joining them, provided for in Art. 2(1) of the Trade Unions Act, was too narrow in relation to the constitutional guarantees arising from Art. 59(1), in conjunction with Art. 12 of the Polish Constitution. When defining the group of individuals entitled to form trade unions and join them, the legislator used the criterion of form of employment. This criterion, however, was not provided for in the Constitution as an indicator of a group of individuals exercising the freedom of association in trade unions. In the opinion of the Tribunal, these individuals are characterised primarily by the fact of performing gainful work for someone's benefit and having professional interests that can be protected by a trade union as a group. In this context, it is not important in what form and on what basis a given person performs gainful work. In addition, the Tribunal has considered that the restriction consisting in granting out-workers simply the right to join a trade union (in Art. 2[2] of the Act), but excluding the possibility of forming a union itself, is unjustified from the point of view of the intended function of such an organisation.[21]

16 Act of 5 July 2018 amending the Act on trade unions and some other acts, hereinafter referred to as: the Trade Union Act (Journal of Laws of 2018, item 1608).

17 Act of 23 May 1991 on trade unions (consolidated text: Journal of Laws of 2019, item 263).

18 *Ibid*, Art. 2(1).

19 *Ibid*, Art. 1(1).

20 Case No. 2888, https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3057194 (10.7.2019).

21 In addition, on 13-16 May 2014, the Mission of the International Labour Organisation took place in Poland, at the invitation of the Ministry of Labour and Social Policy. It was recalled that all working persons in the broad sense of this word should have the right to organise, protect their right to organise and the right to a joint voice. Nevertheless, the Mission pointed out that the ILO supervisory bodies did not expect all rights contained in the Trade Union Act to be granted to self-employed persons and persons working under the civil law contracts.

Replication of this reasoning to accident insurance, its purpose and intrinsic solidarity, first of all raises questions about the scope of this solidarity towards persons performing work in various legal forms. If we assume that the purpose is to grant the necessary benefits to persons who have suffered as a result of an accident at work or an occupational disease, as a situation connected by nature with the exercise of gainful work, it is difficult to justify the exclusion of certain persons performing work from these rights simply because they perform it based on specified legal forms. The more so that the costs associated with these benefits are in any event borne by other entities, charged due to participation in business and legal transactions with employed persons' help – as those who perform the tasks of a given entity (in simplified terms – the contribution payer). Since, under civil law, these entities are responsible for persons employed as "persons entrusted with the performance of an act" (Art. 429, 430 and 474 of the Civil Code), then liability towards persons employed in connection with events that may occur in the working environment should also be included, and the postulate of establishing risk communities in social insurance from people exposed to the same risk should be considered. It seems that all working persons can be victims of accidents and become ill as a result of adverse factors of the working environment. This does not depend on the legal basis for performing the work. This is evidenced primarily by the fact that the self-employed persons, *i.e.*, persons conducting non-agricultural business activities have been covered by the accident insurance.

Out-workers

Since the understanding of "employee" is to be broad for the purposes of the right of coalition, consideration should be given to the understanding of this term in other ILO Conventions and international instruments, in particular in the field of social security. In the light of the broad understanding of the term "employee," confirmed by the ILO and the Constitutional Tribunal in Poland, one should first consider the position of persons engaged in out-work (so-called out-workers). In Poland, these persons are not subject to accident insurance, which results from Art. 12(2), in conjunction with Art. 6(2) of the Act of 13 October 1998 on the social insurance system.[22] This corresponds to the old regulation adopted already in Art. 2(b) of ILO Convention No. 17 concerning workmen's compensation for accidents of 10 June 1925, and ratified by Poland.[23] The ILO Conventions on occupational diseases do not exclude out-workers, but those injured as a result of occupational diseases or their family members were to be provided with compensation under the general principles of national legislation on compensation for accidents at work. Such provisions are contained in Convention No. 18 concerning workmen's compensation for occupational diseases of 10 June 1925,[24] replaced by Convention No. 42 concerning workmen's compensation for occupational diseases (revised) of 4 June 1934.[25]

22 Consolidated text: Journal of Laws of 2019, item 300, as amended.

23 Journal of Laws of 1937 No. 86, item 617.

24 See Journal of Laws of 1937 No. 86, item 619.

25 Ratification: Journal of Laws of 1949 No. 31, item 235.

ILO Convention No. 121 concerning benefits in the case of employment injury of 1964, and not ratified by the Republic of Poland, provides in Art. 4 that national legislation concerning employment injury benefits should protect all employees (including apprentices), in the public and private sectors, including co-operatives, and, in respect of the death of the breadwinner – prescribed categories of beneficiaries. However, any Member State of the ILO may make such exceptions as it deems necessary (paragraph 2) in respect of persons whose employment is of a casual nature and who are employed otherwise than for the purpose of the employer's trade or business (a), out-workers (b), members of the employer's family living in his house, in respect of their work for him (c).

It is worth noting that these older Conventions ratified by Poland required only compensation. Convention No. 121 provides only for periodic benefits, not compensation itself. Starting from Convention No. 102 concerning minimum standards of social security (not ratified by Poland in Part VI concerning accidents at work and occupational diseases), no compensation has been provided for, but only more favourable periodic benefits. They are to achieve the purposes previously set for compensation, *i.e.*, to secure access to medical treatment, medicines and necessary medical supplies (*e.g.*, prosthetic appliances) and to provide a permanent source of income.[26] This is possible because, at the same time, access to medical care is assumed independently (Part I of Convention No. 102). Persons engaged in out-work in Poland are compulsorily covered by health insurance. However, changes in the structure and forms of social security should have a holistic impact on the perception of the role of compensation as such and its relation to accident insurance benefits, and thus indirectly also on the perception of solidarity under this insurance.

On the one hand, the above mentioned Conventions expressly allow the exclusion of out-workers from the scope of accident insurance, but on the other hand, by the very fact, they indicate that out-workers, as a rule, are employees within the meaning of those instruments. Since the similarities of the situation of out-workers and of other employees are noticed for the purposes of other Conventions, it is necessary to think again as to whether the considered exclusion from the scope of entitlements related to accidents at work and occupational diseases is not too outdated. Doubts can arise as to whether, after almost a hundred years since the adoption of the first Conventions, exclusion of out-workers from accident insurance has any sense, since this insurance covers freelancers/contractors irrespective of the place of work performance, and – above all – self-employed persons, and since it is generally assumed that out-workers should be covered by protection afforded to employees (see Art. 303[1] of the Labour Code).

Farmer's helpers

In 2018, the Act of 13 April 2018 amending the Act on farmers social insurance and certain other Acts (Journal of Laws of 2018 item 858) introduced another controversial regulation – concerning farmer's helpers (farm hands). This construction also irresistibly

26 See J. Piotrowski, *Zabezpieczenie społeczne. Problematyka i metody*, Warszawa 1966, pp. 150–151.

evokes the old ILO Convention, ratified by Poland long ago, which provided for the compensation for people who suffered accidents at work on the farm.

Pursuant to Art. 6(2a) of the Act of 20 December 1990 on farmers social insurance,[27] a farmer's helper (farm hand) is an adult with whom the farmer has concluded a harvest assistance contract, referred to in Art. 91a of the Act. Through this contract, this person undertakes to provide assistance for the harvest of agricultural products belonging to the sector referred to in Art. 1(2)(f), (i), and (n) of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products, as well as other herbs and herbal plants, at a specific place on the farmer's farm and for a specified period and the farmer is obliged to pay the agreed remuneration for the assistance provided. Performance of these activities under the harvest assistance contract[28] does not constitute employment within the meaning of the Labour Code.

The harvest assistance contract specifies the scope of operations performed on its basis by the farmer's helper (farm hand) and the date of commencement of the assistance, if it is different from the day of the contract (Art. 91a[3]). Before concluding the harvest assistance contract, the farmer's helper (farm hand) must declare the number of days in a given calendar year in which he/she provided help with the harvesting of hops, fruit, vegetables, tobacco, herbs and herbal plants based on the harvest assistance contracts concluded with other farmers (Art. 91b[2]). The total period of providing harvest assistance under harvest assistance contracts concluded by one farmer's helper (farm hand) may not exceed 180 days in a calendar year (Art. 91c[1] of the Act on farmers social insurance).

A new type of the named civil law contract has been introduced into the Act on farmers social insurance in order to allow the special provisions to specify for this group a separate scope of coverage for farmers social insurance and the benefits they are entitled to. Pursuant to Art. 7(1a), a farmer's helper (farm hand) is *ipso jure* covered by accident, sickness and maternity insurance, but only to the extent limited to the benefits specified in Art. 9(1), *i.e.*, a flat-rate compensation in respect of permanent or long-term damage to health or death as a result of accidents at work in agriculture or agricultural occupational diseases. The flat-rate compensation is payable (Art. 10[1]) to an insured person who has suffered permanent or long-term damage to health as a result of an accident at work in agriculture or has developed an agricultural occupational disease and to the family members of an insured person who has died as a result of an accident at work in agriculture or from an agricultural occupational disease. In the case of a farmer's helper (farm hand), an accident at work in agriculture is considered to be a sudden event caused by

27 Consolidated text: Journal of Laws of 2019, item 299, as amended.

28 Pursuant to Art. 91(2) of the Act on farmers social insurance, assistance in the harvesting of hops, fruit, vegetables, tobacco, herbs and herbal plants includes the following operations: 1) collecting hops, fruit, vegetables, tobacco, herbs or herbal plants; 2) removing unnecessary plant parts; 3) classification or sorting of harvested hops, fruit, vegetables, tobacco, herbs or herbal plants, or performing other operations aimed at preparing hops, fruit, vegetables, tobacco, herbs or herbal plants for transport, storage or sale or related to cultivating and improving crop quality.

an external cause that occurred while the farmer's helper (farm hand) carried out operations specified in the harvest assistance contract referred to in Art. 91a (Art. 11[1a]). An agricultural occupational disease means a disease which arose in connection with work on a farm, if it is included in the list of occupational diseases laid down in the provisions issued under the Labour Code (Art. 12). The flat-rate compensation is calculated for the insured person in proportion to the permanent or long-term damage to health (expressed in percentage terms) and the flat-rate amount determined in accordance with the Act (Art. 13[1]).

The farmer's helper (farm hand) must be registered for insurance purposes within 7 days of concluding the harvest assistance contract. The registration should not take place later than before the end of the period for which this contract was concluded (Art. 37[1a] of the Act on farmers social insurance).

It is important that the contributions for agricultural accident, sickness and maternity insurance, which corresponds to the universal accident insurance, are paid by the farmer. A monthly contribution is paid for each insured person (Art. 8[1]) to the same amount, and equal to the contribution for persons covered by agricultural accident, sickness and maternity insurance in its full scope. According to the explanatory statement of the draft law introducing this insurance title:

> A farmer's helper (farm hand) will be covered by this insurance only for a period of 120 days in a calendar year, and therefore the period of paying contributions for this insurance will be short, and the risk of accident proportionally higher than in the case of persons permanently working on the farm, at least because of the lack of experience in this field.[29]

Therefore, the amount of the contribution will be equivalent to three times the amount determined "in the manner specified in Art. 8(3), with the same range of benefits under this insurance."[30] The amount of the monthly contribution for accident, sickness and maternity insurance for the farmer's helper (farm hand) is therefore the same as for any person subject to this insurance and it constitutes the full amount of the insurance contribution, which is announced by the president of the Agricultural Social Insurance Fund in accordance with Art. 8(4) of the Act on farmers social insurance.

It is equally important that insurance coverage for farmer's helpers (farm hands) is associated with the health insurance coverage. Pursuant to Art. 66(1)(1)(ba) of the Act of 27 August 2004 on health care benefits financed by public funds, the health insurance obligation applies to persons who meet the conditions to be covered by social insurance

29 *Rządowy projekt ustawy o zmianie ustawy o ubezpieczeniu społecznym rolników oraz niektórych innych ustaw* [The government draft amendment of the Act on farmers social insurance and certain other acts], Sejm Paper No. 2334 of 13 March 2018, p. 3.

30 As for a voluntarily insured farmer, household member or person who has allocated land for afforestation. Pursuant to Art. 7(3) of the Act on farmers social insurance, another farmer, household member or a person who has allocated land for afforestation, is covered by accident, sickness and maternity insurance at his or her request, only to the extent limited to the benefits specified in Art. 9(1) (*i.e.*, as a farmer's helper [farm hand]) if he/she is covered by other social insurance or has an established entitlement to pension or social insurance benefits.

or social insurance for farmers, who are farmer's helpers (farm hands) within the meaning of the provisions on farmers social insurance. However, health insurance does not cover a farmer's family members (see Art. 67[3] of the Act).

The reasons for adopting this special regulation are interesting. According to the explanatory statement to the draft Act:

> An argument for the preparation of regulations regarding the harvest assistance contract is the widespread use of specific-work contracts in agriculture, which do not match the nature of the work of those employed at the harvest and do not give rise to the obligation to pay contributions. Adoption of flat-rate contributions will above all reduce labour costs and will significantly reduce the administrative obligations of farmers. The proposed Act meets the demands of the agricultural community regarding support for farmers at fruit and vegetable harvests, during which there is a significant accumulation of work.[31]

To sum up, a very simple social insurance structure was created, limited to registration for insurance purposes, paying a flat-rate contribution and providing minimum benefits arising from international obligations. One of the first conventions adopted by the ILO – Convention No. 12 concerning workmen's compensation in agriculture of 12 December 1921[32] – provides that each Member of the International Labour Organisation which ratifies this Convention undertakes to extend to all agricultural wage-earners its laws and regulations which provide for the compensation of workers for personal injury by accident arising out of or in the course of their employment. Already here doubts may arise as to the correctness of the applied solutions, since Convention No. 17 concerning workmen's compensation for accidents of 10 June 1925 (ratified by Poland), adopted some time later, provides that compensation should, in principle, be paid in the form of a (sickness/disability) pension or social security allowance (Art. 5).

Thus, the Polish statutory regulation of the harvest assistance contract maintains only the old minimum ILO standard. It also supports the idea of recognising farmer's helpers (farm hands) as "agricultural wage earners" thus respecting other employee rights in relation to them.

Persons performing specific-work contracts

Considerable attention has been paid above to the regulation concerning farmer's helpers (farm hands), because it seems that through this regulation the legislator has set a certain minimum standard that should be equally respected in relation to persons performing gainful activities, especially by analogy to the aforementioned development of accident insurance (first insurance instruments, first conventions…). At the same time, the design used is extremely simple and in fact detached from the detailed conditions of work performance.

31 *Rządowy projekt ustawy o zmianie ustawy o ubezpieczeniu…*, *op. cit.*, p. 2.

32 Journal of Laws of 1925 No. 54, item 380; ratification: Journal of Laws of the Polish state of 1924 No. 7, item 58.

And so we can move to the complicated and widely discussed problem of specific-work contracts. Since, according to the explanatory statement to the Act amending the Act on farmers social insurance, the introduced harvest assistance contract is to supersede the previous specific-work contract, it can probably be assumed that – in the opinion of the legislator – the work performed under both contracts has similar features (although they may "not match the nature of the work") and that these contracts are alternative to each other. Thus, since harvest assistance contracts are covered by insurance providing accident benefits and, what is even more important, health insurance, why in the light of the full legal situation regarding the performance of gainful work, are persons performing "correctly" specific-work contracts not covered by social security at least in this scope?

If persons exposed to a similar risk are to be covered by solidarity, under accident insurance it should apply to all persons exposed to the effects of accidents related to gainful activity, including persons engaged in out-work, specific-work contracts, members of supervisory boards and management boards. The problem of persons performing specific-work contracts being the most noticeable from the social standpoint.

By analogy to the initial period of social insurance development in the nineteenth century, it can be postulated to initially cover this category of persons only by accident insurance (keeping in mind significant differences and special conditions, it is possible to refer to the limited insurance of farmer's helpers (farm hands) in agricultural insurance) and possibly health insurance. It is pointed out that the first ILO Conventions required only protection against work-related risks. If they introduced employer's liability for accidents at work, they left unresolved the matter of choosing appropriate means to fulfil this liability.[33] The above mentioned ILO Convention No. 12 concerning workmen's compensation in agriculture and Convention No. 17 concerning workmen's compensation for accident, indicate that laws and regulations on compensation for accidents at work should apply to workmen, employees and apprentices employed by any enterprise, undertaking or establishment of whatsoever nature, whether public or private (with the exception of out-workers). We would like to remind the reader that compensation should be paid in the form of a (sickness/disability) pension (periodic payment), not later than as from the fifth day after the accident and should involve the right to medical assistance. Also Convention No. 42 concerning workmen's compensation for occupational diseases (revised) of 1934[34] only generally provides that each Member of the International Labour Organisation which ratifies this Convention undertakes to provide that compensation shall be payable to workmen incapacitated by occupational diseases, or to their dependants, in accordance with the general principles of the national legislation relating to compensation for industrial accidents.

The narrow construct of an accident sustained "while performing operations directly aimed at carrying out the work" during the period of accident insurance designated for the performance of just these operations (*e.g.*, during the period which must be indicated in the contract for specific work) and connected with the flat-rate contribution at the

33 J.M. Servais, *International Labour Law*, The Hague 2005, pp. 256–257.

34 Journal of Laws of 1949 No. 31, item 235; ratification: Journal of Laws of the Polish state of 1949 No. 31, item 236.

expense of the employer and with the health insurance, would allow initially for the elimination of many difficulties regarding the affiliation of persons performing a specific-work contract to the social security system (no link between the actual period of work performance and the remuneration, determination of remuneration for a given period, *i.e.*, the basis for calculating the contribution and the insurance period, indicating the contributions payer, *etc.*). Based on the experience collected during the operation of such a solution, it would be possible to develop a concept of extending social security to persons performing specific-work contracts.[35]

The material scope of solidarity

As mentioned above, the financial situation of the accident fund is stable and the contributions paid exceed the value of paid benefits.[36] Therefore, it would be expected that a rational legislator, by referring to insurance rules, would reduce the costs of protection by reducing the accident insurance contribution.

Meanwhile, from 1 January 2018, by means of the Act of 27 October 2017 amending the Act on social insurance in respect of accidents at work and occupational diseases,[37] the provisions of the Accident Insurance Act concerning accident prevention have been expanded (chapter 5). "Projects" have been regulated and defined as investment or investment-advisory activities aimed at maintaining earning capacity throughout the entire period of professional activity, with the value determined by the contribution payer, carried out within a set time frame (Art. 2[4a]). Such projects may be co-financed from the Social Insurance Fund. They are selected through a competition announced by the president of the Social Insurance Institution (ZUS) (Art. 37a[1] of the Accident Insurance Act). The maximum amount of co-financing depends on the number of people for whom the contribution payer pays social insurance contributions as at the date of filing an application for project co-financing (Art. 37b[1]).

This is another solution that raises doubts from the point of view of the role of solidarity in accident insurance. It seems that the threshold of solidarity required from contribution payers has been exceeded. Their financial contribution, often coming from entities that are really committed to ensuring an appropriate level of occupational safety and health in workplaces, is intended to support only some – those who have the resources to prepare an appropriate application. Also from the point of view of the subsidiarity principle expressed in the preamble to the Constitution, this solution seems superfluous to existing measures, such as imposing OSH obligations on employing entities (Art. 304-304^4 of the Labour Code) and varying the accident contribution rate for accident insurance depending on the level of risk for a given

35 See D. Dzienisiuk, *Skutki oddziaływania ustawodawstwa pracy na umowy cywilnoprawne w ubezpieczeniach społecznych*, "Praca i Zabezpieczenie Społeczne" 2019, Vol. 1, p. 111.

36 Zakład Ubezpieczeń Społecznych [Social Insurance Institution], *op. cit.,* p. 33.

37 Journal of Laws of 2017, item 2179.

contribution payer. Projects may be co-financed only to some contribution payers (determined irrespective of the insurance risk materialisation), and the obligation to finance accident insurance is imposed on all contribution payers employing persons covered by this type of insurance.

The extent of solidarity

The reconstruction also seems to be required for the justification of a higher level of benefits from accident insurance compared to insured persons granted benefits under other types of social insurance. These differences are taken into account in the ILO Conventions and applicable Polish legislation.

Meanwhile, the needs covered by social security do not differ depending on their causes, and the diversity is justified only by the concept of the liability of employers and other employing entities, as well as the contributions financed by them. In particular, in the context of constitutional principles of equality, subsidiarity and proportionality, constant assessment is needed to the extent to which it should be reflected in the social security system, which should take into account the needs of all beneficiaries.

Without referring to the concept of the compensatory role of benefits from accident insurance, it is not possible to explain why the benefits for victims are so privileged when compared to the benefits for other entitled persons, being in the same health or social situation but receiving benefits from a different type of insurance. From the point of view of a person incapacitated for work, interested in covering his/her needs, the issue of the cause of his/her health condition, especially in the long term, does not seem to be decisive. This applies especially not only to the academic example of persons injured as a result of one event, which may have a different legal qualification for individual participants, *e.g.*, a traffic accident which is an accident at work for some participants or an equivalent accident, for others – an accident on the way to or from work, while for other participants it is only the cause of damage to health giving the right to benefits "from the general state of health."[38]

From this point of view, the need to separate accidents on the way to or from work, in particular in terms of the amount of benefits, is also particularly doubtful.

Conclusions

Accident insurance is characterised by significant differences in the definition and effects of solidarity compared to other types of social insurance, *e.g.*, financing contributions only by contribution payers, modifying the burden not according to the better or worse

38 I. Jędrasik Jankowska, *Pojęcia i konstrukcje prawne ubezpieczenia społecznego*, Warszawa 2018, p. 135.

situation of the financing party, but according to the level of occupational hazards and their effects, and therefore in relation to insurance rather than solidarity rules. The adopted concept of solidarity is broad. It includes compensation obligations of contribution payers, but also benefits for entitled persons. Currently perceived problems arise from the way in which the scope of solidarity (felt or forced by legislation) translates into the defined boundaries of the risk community and coercion within it.

Reference to the role of solidarity in accident insurance is needed to properly shape the risk community for the purposes of this type of insurance. If the community based on solidarity and constructed by legal standards were to relate to exposure to equal risk and its effects, then accident insurance should be provided for every gainful activity, including for persons engaged in out-work and performing specific-work contracts, as well as for pupils and students performing commission contracts and service contracts,[39] in particular at the concurrence of various social insurance titles, including the concurrence of activity and the right to maternity allowance.[40]

And the juxtaposition of the principle of solidarity with the principle of subsidiarity is an argument against imposing subsequent obligations on accident insurance. In particular, care for occupational safety and health can be (efficiently and more cheaply in global terms) provided by employers without the participation of Social Insurance Institution and without public funds.

The development of social security – primarily as regards health care benefits financed from public funds and social security broadly understood, including pensions in respect of incapacity for work (disability/invalidity) or death of the breadwinner – results in a situation where the compensation from accident insurance currently has a different function than at the time of the adoption of the first legal instruments in this field, including ILO Conventions relating to accidents at work and occupational diseases, ones ratified by Poland. In this context, more detailed research on the amount of accident insurance benefits as compared to other social insurance benefits and overall obligations of employing entities (including those of a civil law nature) as payers financing accident insurance contributions seems promising.

Numerous problems and issues appear within the context of the role of solidarity in accident insurance. These can mainly be reduced to the question of whether the extent of the diversity of accident insurance is not too great compared to other types of insurance and social security benefit systems.

---

39 M. Zieleniecki, *Zakres podmiotowy ubezpieczenia społecznego* [in:] *Ubezpieczenie społeczne – dawniej i dziś*, Wrocław 2013, p. 53.

40 D. Dzienisiuk, *Niektóre problemy związane z pojęciem wypadku przy pracy* [in:] *Ubezpieczenie społeczne z tytułu wypadków przy pracy*, Warszawa – Toruń 2015, pp. 38–40.

Dorota Dzienisiuk, Assistant Professor
Faculty of Law and Administration,
University of Warsaw
ORCID: 0000-0002-0543-9114

SOURCES

- Antonów K., *Prawo pracy i ubezpieczeń społecznych*, ed. K.W. Baran, Warszawa 2017.
- Babińska-Górecka R., a fragment of the description of the concept of the XXVII scientific conference of the Polish Social Insurance Association "Solidarity in social insurance" (Gniew, 13-14 September 2018), unpublished information.
- Dzienisiuk D., *Niektóre problemy związane z pojęciem wypadku przy pracy* [in:] *Ubezpieczenie społeczne z tytułu wypadków przy pracy*, Warszawa – Toruń 2015.
- Dzienisiuk D., *Skutki oddziaływania ustawodawstwa pracy na umowy cywilnoprawne w ubezpieczeniach społecznych*, "Praca i Zabezpieczenie Społeczne" 2019, Vol. 1.
- Jędrasik-Jankowska I., *Pojęcia i konstrukcje prawne ubezpieczenia społecznego*, Warszawa 2018.
- Jończyk J., *Prawo zabezpieczenia społecznego*, Zakamycze 2006.
- Kotarbiński T., *Traktat o dobrej robocie*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1982.
- Lewandowski S., *"Solidarność" i "dobro wspólne" w polszczyźnie współczesnej i w polskim prawodawstwie. Analiza językowo – logiczna* [in:] *XXII Konferencja Wydziałowa. Solidarność i dobro wspólne jako wartości w prawie*, Warszawa 2019.
- Piotrowski J., *Zabezpieczenie społeczne. Problematyka i metody*, Warszawa 1966.
- Servais J.M., *International Labour Law*, 2005.
- Ślebzak K., *Prawo do zabezpieczenia społecznego w konstytucji RP. Zagadnienia podstawowe*, Warszawa 2015.
- Zakład Ubezpieczeń Społecznych [Social Insurance Institution], *Raport roczny ZUS 2017* [2017 Annual Report], Warszawa 2018.
- Zieleniecki M., *Zakres podmiotowy ubezpieczenia społecznego* [in:] *Ubezpieczenie społeczne – dawniej i dziś*, Wrocław 2013.

Rola solidarności w ubezpieczeniu wypadkowym

W ubezpieczeniu wypadkowym solidarność pełni inną rolę niż w pozostałych rodzajach ubezpieczenia. Składki są finansowane wyłącznie przez płatników składek, a świadczenia są udzielane ubezpieczonym lub członkom ich rodzin. Należy więc przyjąć, że solidarność obejmuje jednych i drugich, a korzyść osiągana przez płatników składek polega na ograniczeniu ich odpowiedzialności wobec poszkodowanych wskutek wypadków przy pracy i chorób zawodowych. Solidarność powinna obejmować wszystkich takich poszkodowanych, niezależnie od prawnej podstawy świadczenia pracy. Zmiany legislacyjne dokonane w 2018 r. wobec osób wykonujących pracę zarobkową i pomocników rolnika przemawiają za objęciem ubezpieczeniem wypadkowym osób wykonujących pracę nakładczą oraz umowę o dzieło.

Słowa kluczowe: wypadek przy pracy, ubezpieczenie, choroba zawodowa, solidarność