

# One doctor's fight against a dysfunctional system of occupational disease recognition

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On 1 April 2019, the Labour Court of Liège in Belgium ordered the Federal Agency for Occupational Risks (Fedris) to pay disability benefits to two workers from the metal-racking company Polypal. This decision marked the end of the workers' long legal battle, doggedly supported by trade union medical advisor Dr Jilali Laaouej, to achieve recognition of their cancers as occupational diseases.

Polypal – formerly known as Métal Profil – specialises in the manufacturing of metal racking for shops and warehouses. Until the 1990s, the steel coils were formed into racks with the help of solvents containing the chemical benzene, which is now classified as a proven human carcinogen. In the late 2000s, four Belgian workers at the company developed types of blood cancer; two were diagnosed with non-Hodgkin lymphoma, and two with multiple myeloma. The workers at the company became aware of this ill-fated coincidence during a trade union meeting. They addressed their questions to the occupational physician who,

after researching the matter, confirmed that benzene was a potential cause of their conditions. Requests for recognition of the cancers as occupational diseases were submitted to Fedris in 2006.

Fedris rejected the four requests for recognition despite an investigation that produced conclusive evidence of the workers' exposure to benzene. The workers then decided to apply to an employment tribunal to uphold their rights. According to Dr Jilali Laaouej, trade union medical adviser for the Huy-Waremme branch of the General Labour Federation of Belgium (FGTB/ABVV), what was surprising was that "Fedris did not provide any reasons for its decision." By providing scientific advice to the victims, Dr Laaouej set in motion a train of events that would ultimately become the Polypal case.<sup>1</sup> These initial proceedings marked the start of a long struggle pitting Fedris against a group comprising the families of the victims, trade unionists from the metalworking sector and Dr Laaouej, who was determined to speak up against this public body's working practices.

The concept of a causal relationship lies at the heart of any procedure for

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*Tribunals find in favour of workers more than half of the time.*

recognising an occupational disease, since it is important to establish whether the disease from which the worker is suffering can be attributed to the activities involved in that worker's job. The steps involved in doing so include an assessment of the working environment and a clinical examination of the worker, with due regard for the development of scientific knowledge on the disease and its potential causes. To ensure that its findings reflect the most up-to-date science, Fedris provides for two complementary systems of recognition. A similar approach is followed in the majority of EU Member States.<sup>2</sup>

The "list" system is used if the disease referred to in the request appears on a list of recognised occupational diseases. If an individual is suffering from one of these diseases

1. The ETUI published an article on this case prior to its conclusion: Denis Grégoire, Recognition of occupational cancers: Belgian families' fight for justice, *HesaMag*, No. 15, 2017, p. 36.

2. Only one EU Member State (the Netherlands) operates a social security system that makes no specific benefit-related provision for victims of occupational disease.

↳ The family of Francisco Franco Molina, who died from multiple myeloma a few days after his 59th birthday, in front of the Polypal plant.  
Photo: ©Martine Zunini



and has been exposed to the risk factor referred to on the list, he or she is automatically recognised as a victim of an occupational disease; in other words, there is a legal presumption of causation between the disease and exposure to the occupational risk.

The “open” system was established only belatedly in 1990, even though the EU has recommended a system of this kind since 1966, and applies if the disease does not appear on the list. By way of contrast to the first system, requesting parties must provide evidence themselves of the causal link between the risk factor and the disease. This evidence is used by Fedris to assess whether the request is admissible, and hence whether the party in question is entitled to disability benefits. Fedris almost always rejects these requests. In 2019, it rejected 909 requests relating to private-sector undertakings and approved only seven.

If a request is refused under either of these recognition systems, the worker has no choice but to accept the decision or to lodge an appeal with an employment tribunal. In the latter case, the tribunals find in favour of the workers more than half of the time – a revealing figure that demonstrates

a certain stubbornness or even overzealousness on the part of Fedris. Many workers do not challenge the public body’s decisions because they are unaware of the legal remedies available to them or because they are hesitant to embark on long and costly proceedings. For many years now, Dr Laaouej has deplored the failings of a system that “exacerbates a social problem by imposing legal and financial obstacles” and roundly criticised the approach taken by Fedris, which appears to involve counting on the passage of time to discourage victims from taking action, thereby denying them their rights.

### Cases handled in isolation

The four cases were initially assigned to different judicial chambers and handled in isolation from each other. Each chamber appointed an expert responsible for determining whether the disease in question had been caused by exposure to benzene. This approach at judicial level merely reflected the way in which recognition requests are handled by Fedris; the public body considers all requests in isolation

from each other, even if they relate to the same company, the same exposure factor and the same type of disease.

According to Dr Laaouej, “The conduct of proceedings in isolation from each other is detrimental to our understanding of occupational diseases and our efforts to prevent them.” Researchers and lawyers alike are reliant on the collection of a wide range of different pieces of evidence in order to substantiate a hypothesis or a judgment. Multiple myeloma and non-Hodgkin lymphoma are rare diseases, which means that it takes several decades for scientific knowledge about them to advance to the point that definitive conclusions can be reached. Dr Laaouej accordingly stresses that it is a mistake to examine requests for recognition in isolation from each other, and to ignore the lessons that could be learnt from past appeals that resulted in recognition of an occupational disease. According to the medical adviser, it is a regrettable fact that “Fedris makes no use whatsoever of all the case law that has developed over years and years.” The experts appointed by the employment tribunal even produced their opinions in isolation from each other.

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## *This final report revealed that workers at Polypal were four times more likely to contract cancer than the general population.*

### **The concept of certainty**

Each of the expert opinions produced in the four workers' cases concluded that it was impossible to state with certainty that a causal relationship existed. Speaking in probabilistic terms, the experts believed that the scientific evidence adduced was not sufficient to make such statements with "certainty". Yet the concept of certainty is absent from the legislative framework underpinning the list system that is used as a basis for recognising diseases such as those caused by benzene and its homologues. What is more, this system imposes no obligations on workers to demonstrate a causal link. In fact, there is a legal uncertainty about certain diseases covered by the list system; in the case at hand, only the causal agent (benzene) is clearly defined by the reference framework, while the underlying diseases are not specified. This enrages Dr Laaouej: "It's not our fault if Fedris omitted to mention which diseases are caused by benzene! How can they exclude a causal relationship between a carcinogen and a blood cancer from the very outset? Surely this should, at the very least, raise questions from a medical and scientific perspective?"

During the proceedings, Fedris attempted to argue that the cases should be handled under the open system, which would make it possible for them to demand "direct and decisive" evidence of the causal relationship. If this were the case, only acute myeloid leukaemia – a more common and hence better-documented form of cancer – would qualify as an occupational disease caused by benzene. The lawyers engaged by the workers took care to highlight the cynicism of this defence strategy.

### **The first victory**

In the meantime, the International Agency for Research on Cancer (IARC) had published a new report referring to multiple myeloma and non-Hodgkin lymphoma as diseases caused by benzene.

With these new developments in mind, the employment tribunal, in a ruling handed down on 22 December 2011, ordered that the four cases should be consolidated, and appointed a new panel of experts. "This was a major victory for the trade unions," explains Dr Laaouej. "To the best of my knowledge, it was the first time in Belgium that a group of workers had succeeded in having their requests for recognition examined collectively." Unfortunately, two of the four workers died as a result of their illnesses and were denied the opportunity of learning the outcome of the deliberations.

### **Battle of the experts**

On 3 April 2013, the panel of experts submitted a report reiterating the IARC's conclusions: there is a statistically significant relationship between exposure to benzene and the aforementioned diseases. The employment tribunal endorsed the report, ruled that the two workers who were still alive were entitled to disability benefits, and recognised benzene as the cause of death for the two deceased workers.

In short order, Fedris appealed against the decision and commissioned its own expert to review the scientific literature again. By way of contrast to the reports produced by the panel of experts and the IARC, this new report concluded that there could be no

certainty regarding a causal relationship. After comparing the different documents, Dr Laaouej discovered that the report commissioned by Fedris cited additional research studies that turned out to have been deliberately excluded by the IARC and the panel of experts because they had been carried out by Concauwe, an organisation representing various petrochemical companies such as Esso, Shell and Total. All that remained was for the Labour Court to be made aware of this blatant conflict of interests.

And, indeed, the Labour Court found these arguments convincing, and appointed a new expert on 6 February 2017. This time, however, it specified the level of evidence necessary to demonstrate causality. According to the judge, since the diseases caused by benzene had been recognised under the list system, Fedris could not request that the burden of proof required to demonstrate causality be similarly demanding to that required under the open system. The Court confirmed that any association, no matter how minimal, qualified as adequate evidence, and the new expert was asked to produce an opinion which differed in this respect from those previously produced.

This final report revealed that workers at Polypal were four times more likely to contract cancer than the general population. In its ruling of 5 November 2018, the Court endorsed this expert opinion and confirmed that the complainants were indeed victims of occupational diseases.

### **Attempts to minimise payouts**

Yet the battle was far from over. The next task was to calculate the benefits to be paid. The Court was obliged to adjudicate not only on the workers' level of physical disability, but also on the socioeconomic factors likely to influence their return to work, for example their ages or qualifications. The simple addition of these two calculated rates could then be used as a basis for calculating the level of benefits that Fedris would be legally obliged to pay, expressed as a percentage of gross salary.

The expert report highlighted the fact that both workers were experiencing a significant level of physical disability, and provided an insight into the problems they had encountered in finding suitable jobs.

↳ **Jilali Laaouej, trade union medical adviser for the FGTB in Liège-Huy-Waremme. His scientific advice to the victims set the Polypal case in motion.**

Photo: ©Martine Zunini



3. [https://www.ilo.org/global/publications/world-of-work-magazine/articles/WCMS\\_081326/lang-en/index.htm](https://www.ilo.org/global/publications/world-of-work-magazine/articles/WCMS_081326/lang-en/index.htm)

Nevertheless, fresh controversy arose in response to Fedris' assessment of these socioeconomic factors as "negligible", and its proposal to award related benefits to the two workers of up to only 5 per cent of their gross salary (in addition to the 25 per cent recommended by the panel of experts to account for the workers' physical disability). What is more, the public body asserted throughout the proceedings that the socioeconomic rate should, by definition, always be lower than the rate for physical disability. The Labour Court ultimately rejected this argument, which in actuality has no legal basis.

In the end, the two workers were awarded a socio-economic rate of 65 per cent of gross salary in addition to a physical disability rate of 25 per cent, which came as a relief for the victims and their families. The total benefits granted to one of the complainants were, however, capped at 50 per cent in accordance with the wording of the initial claim.

### **An emblematic case**

The victims and their families had to wait 13 years before their conditions were recognised as occupational diseases – 13 gruelling years punctuated by evaluations and counter-evaluations, testifying to the determination with which Fedris seeks to prevent challenges to its decisions. Two of the four workers passed away before the proceedings came to an end. According to Dr Laaouej, "The Polypal case is emblematic

of a system that cheats workers out of their rights to compensation." The handling of cases in isolation from each other, the failure to take case law into account and the obfuscation surrounding the concept of certainty all combine to create obstacles to recognition. In his words, this is a "genuine scandal" that affects not only the victims of occupational cancers, but anyone who submits a request for recognition.

responsibilities and increase their contributions." In reality, the remainder of the bill is currently footed by the sickness and disability insurance funds, or in other words by society as a whole. In turn, Fedris maintains that it has never called into question the basic system whereby its decisions are challenged, and that it is merely defending "its point of view, that is to say, the approach it takes to assessing requests". As regards

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Fedris' attitude to the appeals lodged against its decisions can also be traced back to a lack of funding. Its annual budget, which is made up of employer contributions, amounts to around one billion euros. In a report,<sup>3</sup> the International Labour Organization (ILO) estimates that occupational risks cost some four per cent of annual GDP, which amounts to 19 billion euros in the case of Belgium. Dr Laaouej is indignant about the current situation: "That figure is a very long way from the amount we actually spend on occupational diseases and workplace accidents! Employers are the ones who are really responsible for occupational risks, and they should shoulder their

budgetary issues, Fedris claims that it does not "operate within a fixed budget, since the amount earmarked is not set in advance"; this amount fluctuates "according to need".

The Belgian Court of Cassation recently found against Fedris in another case on the grounds of its extremely selective interpretation of the concept of causality, but this time under the open system. This ruling – handed down on 22 June 2020 – is also likely to encourage the recognition of cancers as occupational diseases. It remains to be seen whether this challenge, which is merely one more in a long line, will cause Fedris' working practices to be put under the spotlight in any meaningful way. ●