

Government Gazette
Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID AFRIKA

Regulation Gazette **No. 11147** *Regulasiekoerant*

Vol. 661 **17 July / Julie 2020** **No. 43529**

PART 1 OF 3

N.B. The Government Printing Works will not be held responsible for the quality of "Hard Copies" or "Electronic Files" submitted for publication purposes

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AIDS HELPLINE: 0800-0123-22 Prevention is the cure

IMPORTANT NOTICE OF OFFICE RELOCATION

government printing
Department:
Government Printing Works
REPUBLIC OF SOUTH AFRICA

Private Bag X85, PRETORIA, 0001 149 Bosman Street, PRETORIA
Tel: 012 748 6197, Website: www.gpwonline.co.za

URGENT NOTICE TO OUR VALUED CUSTOMERS: PUBLICATIONS OFFICE'S RELOCATION HAS BEEN TEMPORARILY SUSPENDED.

Please be advised that the GPW Publications office will no longer move to 88 Visagie Street as indicated in the previous notices.

The move has been suspended due to the fact that the new building in 88 Visagie Street is not ready for occupation yet.

We will later on issue another notice informing you of the new date of relocation.

We are doing everything possible to ensure that our service to you is not disrupted.

As things stand, we will continue providing you with our normal service from the current location at 196 Paul Kruger Street, Masada building.

Customers who seek further information and or have any questions or concerns are free to contact us through telephone 012 748 6066 or email Ms Maureen Toka at Maureen.Toka@gpw.gov.za or cell phone at 082 859 4910.

Please note that you will still be able to download gazettes free of charge from our website www.gpwonline.co.za.

We apologies for any inconvenience this might have caused.

Issued by GPW Communications

IMPORTANT NOTICE:

THE GOVERNMENT PRINTING WORKS WILL NOT BE HELD RESPONSIBLE FOR ANY ERRORS THAT MIGHT OCCUR DUE TO THE SUBMISSION OF INCOMPLETE / INCORRECT / ILLEGIBLE COPY.

NO FUTURE QUERIES WILL BE HANDLED IN CONNECTION WITH THE ABOVE.

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government printing
Department:
Government Printing Works
REPUBLIC OF SOUTH AFRICA

HIGH ALERT: SCAM WARNING!!!

TO ALL SUPPLIERS AND SERVICE PROVIDERS OF THE GOVERNMENT PRINTING WORKS

It has come to the attention of the *GOVERNMENT PRINTING WORKS* that there are certain unscrupulous companies and individuals who are defrauding unsuspecting businesses disguised as representatives of the *Government Printing Works* (*GPW*).

The scam involves the fraudsters using the letterhead of *GPW* to send out fake tender bids to companies and requests to supply equipment and goods.

Although the contact person's name on the letter may be of an existing official, the contact details on the letter are not the same as the *Government Printing Works*'. When searching on the Internet for the address of the company that has sent the fake tender document, the address does not exist.

The banking details are in a private name and not company name. Government will never ask you to deposit any funds for any business transaction. *GPW* has alerted the relevant law enforcement authorities to investigate this scam to protect legitimate businesses as well as the name of the organisation.

Example of e-mails these fraudsters are using:

PROCUREMENT@GPW-GOV.ORG

Should you suspect that you are a victim of a scam, you must urgently contact the police and inform the *GPW*.

GPW has an official email with the domain as **@gpw.gov.za**

Government e-mails DO NOT have org in their e-mail addresses. All of these fraudsters also use the same or very similar telephone numbers. Although such number with an area code 012 looks like a landline, it is not fixed to any property.

GPW will never send you an e-mail asking you to supply equipment and goods without a purchase/order number. *GPW* does not procure goods for another level of Government. The organisation will not be liable for actions that result in companies or individuals being resultant victims of such a scam.

Government Printing Works gives businesses the opportunity to supply goods and services through RFQ / Tendering process. In order to be eligible to bid to provide goods and services, suppliers must be registered on the National Treasury's Central Supplier Database (CSD). To be registered, they must meet all current legislative requirements (e.g. have a valid tax clearance certificate and be in good standing with the South African Revenue Services - SARS).

The tender process is managed through the Supply Chain Management (SCM) system of the department. SCM is highly regulated to minimise the risk of fraud, and to meet objectives which include value for money, open and effective competition, equitability, accountability, fair dealing, transparency and an ethical approach. Relevant legislation, regulations, policies, guidelines and instructions can be found on the tender's website.

Fake Tenders

National Treasury's CSD has launched the Government Order Scam campaign to combat fraudulent requests for quotes (RFQs). Such fraudulent requests have resulted in innocent companies losing money. We work hard at preventing and fighting fraud, but criminal activity is always a risk.

How tender scams work

There are many types of tender scams. Here are some of the more frequent scenarios:

Fraudsters use what appears to be government department stationery with fictitious logos and contact details to send a fake RFQ to a company to invite it to urgently supply goods. Shortly after the company has submitted its quote, it receives notification that it has won the tender. The company delivers the goods to someone who poses as an official or at a fake site. The Department has no idea of this transaction made in its name. The company is then never paid and suffers a loss.

OR

Fraudsters use what appears to be government department stationery with fictitious logos and contact details to send a fake RFQ to Company A to invite it to urgently supply goods. Typically, the tender specification is so unique that only Company B (a fictitious company created by the fraudster) can supply the goods in question.

Shortly after Company A has submitted its quote it receives notification that it has won the tender. Company A orders the goods and pays a deposit to the fictitious Company B. Once Company B receives the money, it disappears. Company A's money is stolen in the process.

Protect yourself from being scammed

- If you are registered on the supplier databases and you receive a request to tender or quote that seems to be from a government department, contact the department to confirm that the request is legitimate. Do not use the contact details on the tender document as these might be fraudulent.
- Compare tender details with those that appear in the Tender Bulletin, available online at **www.gpwonline.co.za**
- Make sure you familiarise yourself with how government procures goods and services. Visit the tender website for more information on how to tender.
- If you are uncomfortable about the request received, consider visiting the government department and/or the place of delivery and/or the service provider from whom you will be sourcing the goods.
- In the unlikely event that you are asked for a deposit to make a bid, contact the SCM unit of the department in question to ask whether this is in fact correct.

Any incidents of corruption, fraud, theft and misuse of government property in the *Government Printing Works* can be reported to:

Supply Chain Management: Ms. Anna Marie Du Toit, Tel. (012) 748 6292.
Email: **Annamarie.DuToit@gpw.gov.za**

Marketing and Stakeholder Relations: Ms Bonakele Mbhele, at Tel. (012) 748 6193.
Email: **Bonakele.Mbhele@gpw.gov.za**

Security Services: Mr Daniel Legoabe, at tel. (012) 748 6176.
Email: **Daniel.Legoabe@gpw.gov.za**

Closing times for **ORDINARY WEEKLY** *REGULATION GAZETTE* 2020

*The closing time is **15:00** sharp on the following days:*

- **24 December 2019,** Tuesday for the issue of Friday **03 January 2020**
- **03 January,** Friday for the issue of Friday **10 January 2020**
- **10 January,** Friday for the issue of Friday **17 January 2020**
- **17 January,** Friday for the issue of Friday **24 January 2020**
- **24 January,** Friday for the issue of Friday **31 January 2020**
- **31 February,** Friday for the issue of Friday **07 February 2020**
- **07 February,** Friday for the issue of Friday **14 February 2020**
- **14 February,** Friday for the issue of Friday **21 February 2020**
- **21 February,** Friday for the issue of Friday **28 February 2020**
- **28 February,** Friday for the issue of Friday **06 March 2020**
- **06 March,** Friday for the issue of Friday **13 March 2020**
- **13 March,** Thursday for the issue of Friday **20 March 2020**
- **20 March,** Friday for the issue of Friday **27 March 2020**
- **27 March,** Friday for the issue of Friday **03 April 2020**
- **02 April,** Thursday for the issue of Thursday **09 April 2020**
- **08 April,** Wednesday for the issue of Friday **17 April 2020**
- **17 April,** Friday for the issue of Friday **24 April 2020**
- **22 April,** Wednesday for the issue of Thursday **30 April 2020**
- **30 April,** Thursday for the issue of Friday **08 May 2020**
- **08 May,** Friday for the issue of Friday **15 May 2020**
- **15 May,** Friday for the issue of Friday **22 May 2020**
- **22 May,** Friday for the issue of Friday **29 May 2020**
- **29 May,** Friday for the issue of Friday **05 June 2020**
- **05 June,** Friday for the issue of Friday **12 June 2020**
- **11 June,** Thursday for the issue of Friday **19 June 2020**
- **19 June,** Friday for the issue of Friday **26 June 2020**
- **26 June,** Friday for the issue of Friday **03 July 2020**
- **03 July,** Friday for the issue of Friday **10 July 2020**
- **10 July,** Friday for the issue of Friday **17 July 2020**
- **17 July,** Friday for the issue of Friday **24 July 2020**
- **24 July,** Friday for the issue of Friday **31 July 2020**
- **31 July,** Thursday for the issue of Friday **07 August 2020**
- **06 August,** Thursday for the issue of Friday **14 August 2020**
- **14 August,** Friday for the issue of Friday **21 August 2020**
- **21 August,** Friday for the issue of Friday **28 August 2020**
- **28 August,** Friday for the issue of Friday **04 September 2020**
- **04 September,** Friday for the issue of Friday **11 September 2020**
- **11 September,** Friday for the issue of Friday **18 September 2020**
- **17 September,** Thursday for the issue of Friday **25 September 2020**
- **25 September,** Friday for the issue of Friday **02 October 2020**
- **02 October,** Friday for the issue of Friday **09 October 2020**
- **09 October,** Friday for the issue of Friday **16 October 2020**
- **16 October,** Friday for the issue of Friday **23 October 2020**
- **23 October,** Friday for the issue of Friday **30 October 2020**
- **30 October,** Friday for the issue of Friday **06 November 2020**
- **06 November,** Friday for the issue of Friday **13 November 2020**
- **13 November,** Friday for the issue of Friday **20 November 2020**
- **20 November,** Friday for the issue of Friday **27 November 2020**
- **27 November,** Friday for the issue of Friday **04 December 2020**
- **04 December,** Friday for the issue of Friday **11 December 2020**
- **10 December,** Thursday for the issue of Friday **18 December 2020**
- **17 December,** Thursday for the issue of Friday **24 December 2020**
- **23 December,** Wednesday for the issue of Friday **31 December 2020**

LIST OF TARIFF RATES

FOR PUBLICATION OF NOTICES

COMMENCEMENT: 1 APRIL 2018

NATIONAL AND PROVINCIAL

Notice sizes for National, Provincial & Tender gazettes 1/4, 2/4, 3/4, 4/4 per page. Notices submitted will be charged at R1008.80 per full page, pro-rated based on the above categories.

Pricing for National, Provincial - Variable Priced Notices		
Notice Type	**Page Space**	**New Price (R)**
Ordinary National, Provincial	1/4 - Quarter Page	252.20
Ordinary National, Provincial	2/4 - Half Page	504.40
Ordinary National, Provincial	3/4 - Three Quarter Page	756.60
Ordinary National, Provincial	4/4 - Full Page	1008.80

EXTRA-ORDINARY

All Extra-ordinary National and Provincial gazette notices are non-standard notices and attract a variable price based on the number of pages submitted.

The pricing structure for National and Provincial notices which are submitted as **Extra ordinary submissions** will be charged at R**3026.32** per page.

GOVERNMENT PRINTING WORKS - BUSINESS RULES

The **Government Printing Works** (**GPW**) has established rules for submitting notices in line with its electronic notice processing system, which requires the use of electronic *Adobe* Forms. Please ensure that you adhere to these guidelines when completing and submitting your notice submission.

Closing Times for Acceptance of Notices

1. The *Government Gazette* and *Government Tender Bulletin* are weekly publications that are published on Fridays and the closing time for the acceptance of notices is strictly applied according to the scheduled time for each gazette.

2. Please refer to the Submission Notice Deadline schedule in the table below. This schedule is also published online on the Government Printing works website www.gpwonline.co.za

   All re-submissions will be subject to the standard cut-off times.
   All notices received after the closing time will be rejected.

Government Gazette Type	Publication Frequency	Publication Date	Submission Deadline	Cancellations Deadline
National Gazette	Weekly	Friday	Friday 15h00 for next Friday	Tuesday, 15h00 - 3 working days prior to publication
Regulation Gazette	Weekly	Friday	Friday 15h00 for next Friday	Tuesday, 15h00 - 3 working days prior to publication
Petrol Price Gazette	Monthly	Tuesday before 1st Wednesday of the month	One day before publication	1 working day prior to publication
Road Carrier Permits	Weekly	Friday	Thursday 15h00 for next Friday	3 working days prior to publication
Unclaimed Monies (Justice, Labour or Lawyers)	January / September 2 per year	Last Friday	One week before publication	3 working days prior to publication
Parliament (Acts, White Paper, Green Paper)	As required	Any day of the week	None	3 working days prior to publication
Manuals	Bi- Monthly	2nd and last Thursday of the month	One week before publication	3 working days prior to publication
State of Budget (National Treasury)	Monthly	30th or last Friday of the month	One week before publication	3 working days prior to publication
Extraordinary Gazettes	As required	Any day of the week	*Before 10h00 on publication date*	*Before 10h00 on publication date*
Legal Gazettes A, B and C	Weekly	Friday	One week before publication	Tuesday, 15h00 - 3 working days prior to publication
Tender Bulletin	Weekly	Friday	Friday 15h00 for next Friday	Tuesday, 15h00 - 3 working days prior to publication
Gauteng	Weekly	Wednesday	Two weeks before publication	3 days **after** submission deadline
Eastern Cape	Weekly	Monday	One week before publication	3 working days prior to publication
Northern Cape	Weekly	Monday	One week before publication	3 working days prior to publication
North West	Weekly	Tuesday	One week before publication	3 working days prior to publication
KwaZulu-Natal	Weekly	Thursday	One week before publication	3 working days prior to publication
Limpopo	Weekly	Friday	One week before publication	3 working days prior to publication
Mpumalanga	Weekly	Friday	One week before publication	3 working days prior to publication

GOVERNMENT PRINTING WORKS - BUSINESS RULES

Government Gazette Type	Publication Frequency	Publication Date	Submission Deadline	Cancellations Deadline
Gauteng Liquor License Gazette	Monthly	Wednesday before the First Friday of the month	Two weeks before publication	3 working days **after** submission deadline
Northern Cape Liquor License Gazette	Monthly	First Friday of the month	Two weeks before publication	3 working days **after** submission deadline
National Liquor License Gazette	Monthly	First Friday of the month	Two weeks before publication	3 working days **after** submission deadline
Mpumalanga Liquor License Gazette	Bi-Monthly	Second & Fourth Friday	One week before publication	3 working days prior to publication

Extraordinary Gazettes

3. *Extraordinary Gazettes* can have only one publication date. If multiple publications of an *Extraordinary Gazette* are required, a separate Z95/Z95Prov *Adobe* Forms for each publication date must be submitted.

Notice Submission Process

4. Download the latest *Adobe* form, for the relevant notice to be placed, from the **Government Printing Works** website www.gpwonline.co.za.

5. The *Adobe* form needs to be completed electronically using *Adobe Acrobat* / *Acrobat Reader*. Only electronically completed *Adobe* forms will be accepted. No printed, handwritten and/or scanned *Adobe* forms will be accepted.

6. The completed electronic *Adobe* form has to be submitted via email to submit.egazette@gpw.gov.za. The form needs to be submitted in its original electronic *Adobe* format to enable the system to extract the completed information from the form for placement in the publication.

7. Every notice submitted **must** be accompanied by an official **GPW** quotation. This must be obtained from the *eGazette* Contact Centre.

8. Each notice submission should be sent as a single email. The email **must** contain **all documentation relating to a particular notice submission**.

   8.1. Each of the following documents must be attached to the email as a separate attachment:

      8.1.1. An electronically completed *Adobe* form, specific to the type of notice that is to be placed.

         8.1.1.1. For National *Government Gazette* or *Provincial Gazette* notices, the notices must be accompanied by an electronic Z95 or Z95Prov *Adobe* form

         8.1.1.2. The notice content (body copy) **MUST** be a separate attachment.

      8.1.2. A copy of the official **Government Printing Works** quotation you received for your notice. *(Please see Quotation section below for further details)*

      8.1.3. A valid and legible Proof of Payment / Purchase Order: **Government Printing Works** account customer must include a copy of their Purchase Order**. Non-Government Printing Works** account customer needs to submit the proof of payment for the notice

      8.1.4. Where separate notice content is applicable (Z95, Z95 Prov and TForm 3, it should **also** be attached as a separate attachment. *(Please see the Copy Section below, for the specifications)*.

      8.1.5. Any additional notice information if applicable.

GOVERNMENT PRINTING WORKS - BUSINESS RULES

9. The electronic *Adobe* form will be taken as the primary source for the notice information to be published. Instructions that are on the email body or covering letter that contradicts the notice form content will not be considered. The information submitted on the electronic *Adobe* form will be published as-is.

10. To avoid duplicated publication of the same notice and double billing, Please submit your notice **ONLY ONCE.**

11. Notices brought to **GPW** by "walk-in" customers on electronic media can only be submitted in *Adobe* electronic form format. All "walk-in" customers with notices that are not on electronic *Adobe* forms will be routed to the Contact Centre where they will be assisted to complete the forms in the required format.

12. Should a customer submit a bulk submission of hard copy notices delivered by a messenger on behalf of any organisation e.g. newspaper publisher, the messenger will be referred back to the sender as the submission does not adhere to the submission rules.

QUOTATIONS

13. Quotations are valid until the next tariff change.

    13.1. ***Take note:*** **GPW**'s annual tariff increase takes place on ***1 April*** therefore any quotations issued, accepted and submitted for publication up to ***31 March*** will keep the old tariff. For notices to be published from 1 April, a quotation must be obtained from **GPW** with the new tariffs. Where a tariff increase is implemented during the year, **GPW** endeavours to provide customers with 30 days' notice of such changes.

14. Each quotation has a unique number.

15. Form Content notices must be emailed to the *eGazette* Contact Centre for a quotation.

    15.1. The *Adobe* form supplied is uploaded by the Contact Centre Agent and the system automatically calculates the cost of your notice based on the layout/format of the content supplied.

    15.2. It is critical that these *Adobe* Forms are completed correctly and adhere to the guidelines as stipulated by **GPW**.

16. **APPLICABLE ONLY TO GPW ACCOUNT HOLDERS**:

    16.1. **GPW** Account Customers must provide a valid **GPW** account number to obtain a quotation.

    16.2. Accounts for **GPW** account customers **must** be active with sufficient credit to transact with **GPW** to submit notices.

        16.2.1. If you are unsure about or need to resolve the status of your account, please contact the **GPW** Finance Department prior to submitting your notices. (If the account status is not resolved prior to submission of your notice, the notice will be failed during the process).

17. **APPLICABLE ONLY TO CASH CUSTOMERS:**

    17.1. Cash customers doing **bulk payments** must use a **single email address** in order to use the **same proof of payment** for submitting multiple notices.

18. The responsibility lies with you, the customer, to ensure that the payment made for your notice(s) to be published is sufficient to cover the cost of the notice(s).

19. Each quotation will be associated with one proof of payment / purchase order / cash receipt.

    19.1. This means that **the quotation number can only be used once to make a payment.**

GOVERNMENT PRINTING WORKS - BUSINESS RULES

COPY (SEPARATE NOTICE CONTENT DOCUMENT)

20. Where the copy is part of a separate attachment document for Z95, Z95Prov and TForm03

20.1. Copy of notices must be supplied in a separate document and may not constitute part of any covering letter, purchase order, proof of payment or other attached documents.

The content document should contain only one notice. (You may include the different translations of the same notice in the same document).

20.2. The notice should be set on an A4 page, with margins and fonts set as follows:

Page size = A4 Portrait with page margins: Top = 40mm, LH/RH = 16mm, Bottom = 40mm; Use font size: Arial or Helvetica 10pt with 11pt line spacing;

Page size = A4 Landscape with page margins: Top = 16mm, LH/RH = 40mm, Bottom = 16mm; Use font size: Arial or Helvetica 10pt with 11pt line spacing;

CANCELLATIONS

21. Cancellation of notice submissions are accepted by **GPW** according to the deadlines stated in the table above in point 2. Non-compliance to these deadlines will result in your request being failed. Please pay special attention to the different deadlines for each gazette. Please note that any notices cancelled after the cancellation deadline will be published and charged at full cost.

22. Requests for cancellation must be sent by the original sender of the notice and must accompanied by the relevant notice reference number (N-) in the email body.

AMENDMENTS TO NOTICES

23. With effect from 01 October 2015, **GPW** will not longer accept amendments to notices. The cancellation process will need to be followed according to the deadline and a new notice submitted thereafter for the next available publication date.

REJECTIONS

24. All notices not meeting the submission rules will be rejected to the customer to be corrected and resubmitted. Assistance will be available through the Contact Centre should help be required when completing the forms. (012-748 6200 or email info.egazette@gpw.gov.za). Reasons for rejections include the following:

24.1. Incorrectly completed forms and notices submitted in the wrong format, will be rejected.

24.2. Any notice submissions not on the correct *Adobe* electronic form, will be rejected.

24.3. Any notice submissions not accompanied by the proof of payment / purchase order will be rejected and the notice will not be processed.

24.4. Any submissions or re-submissions that miss the submission cut-off times will be rejected to the customer. The Notice needs to be re-submitted with a new publication date.

GOVERNMENT PRINTING WORKS - BUSINESS RULES

Approval of notices

25. Any notices other than legal notices are subject to the approval of the Government Printer, who may refuse acceptance or further publication of any notice.

26. No amendments will be accepted in respect to separate notice content that was sent with a Z95 or Z95Prov notice submissions. The copy of notice in layout format (previously known as proof-out) is only provided where requested, for Advertiser to see the notice in final Gazette layout. Should they find that the information submitted was incorrect, they should request for a notice cancellation and resubmit the corrected notice, subject to standard submission deadlines. The cancellation is also subject to the stages in the publishing process, i.e. If cancellation is received when production (printing process) has commenced, then the notice cannot be cancelled.

Government Printer Indemnified Against Liability

27. The Government Printer will assume no liability in respect of—

27.1. any delay in the publication of a notice or publication of such notice on any date other than that stipulated by the advertiser;

27.2. erroneous classification of a notice, or the placement of such notice in any section or under any heading other than the section or heading stipulated by the advertiser;

27.3. any editing, revision, omission, typographical errors or errors resulting from faint or indistinct copy.

Liability of advertiser

28. Advertisers will be held liable for any compensation and costs arising from any action which may be instituted against the Government Printer in consequence of the publication of any notice.

Customer inquiries

Many of our customers request immediate feedback/confirmation of notice placement in the gazette from our Contact Centre once they have submitted their notice – While **GPW** deems it one of their highest priorities and responsibilities to provide customers with this requested feedback and the best service at all times, we are only able to do so once we have started processing your notice submission.
GPW has a 2-working day turnaround time for processing notices received according to the business rules and deadline submissions.
Please keep this in mind when making inquiries about your notice submission at the Contact Centre.

29. Requests for information, quotations and inquiries must be sent to the Contact Centre ONLY.

30. Requests for Quotations (RFQs) should be received by the Contact Centre at least **2 working days** before the submission deadline for that specific publication.

GOVERNMENT PRINTING WORKS - BUSINESS RULES

Payment of cost

31. The Request for Quotation for placement of the notice should be sent to the Gazette Contact Centre as indicated above, prior to submission of notice for advertising.

32. Payment should then be made, or Purchase Order prepared based on the received quotation, prior to the submission of the notice for advertising as these documents i.e. proof of payment or Purchase order will be required as part of the notice submission, as indicated earlier.

33. Every proof of payment must have a valid **GPW** quotation number as a reference on the proof of payment document.

34. Where there is any doubt about the cost of publication of a notice, and in the case of copy, an enquiry, accompanied by the relevant copy, should be addressed to the Gazette Contact Centre, **Government Printing Works**, Private Bag X85, Pretoria, 0001 email: info.egazette@gpw.gov.za before publication.

35. Overpayment resulting from miscalculation on the part of the advertiser of the cost of publication of a notice will not be refunded, unless the advertiser furnishes adequate reasons why such miscalculation occurred. In the event of underpayments, the difference will be recovered from the advertiser, and future notice(s) will not be published until such time as the full cost of such publication has been duly paid in cash or electronic funds transfer into the **Government Printing Works** banking account.

36. In the event of a notice being cancelled, a refund will be made only if no cost regarding the placing of the notice has been incurred by the **Government Printing Works**.

37. The **Government Printing Works** reserves the right to levy an additional charge in cases where notices, the cost of which has been calculated in accordance with the List of Fixed Tariff Rates, are subsequently found to be excessively lengthy or to contain overmuch or complicated tabulation.

Proof of publication

38. Copies of any of the *Government Gazette* or *Provincial Gazette* can be downloaded from the **Government Printing Works** website www.gpwonline.co.za free of charge, should a proof of publication be required.

39. Printed copies may be ordered from the Publications department at the ruling price. The **Government Printing Works** will assume no liability for any failure to post or for any delay in despatching of such *Government Gazette*(s)

GOVERNMENT PRINTING WORKS CONTACT INFORMATION

Physical Address:	**Postal Address:**	**GPW Banking Details:**
Government Printing Works	Private Bag X85	**Bank:** ABSA Bosman Street
149 Bosman Street	Pretoria	**Account No.:** 405 7114 016
Pretoria	0001	**Branch Code:** 632-005

For Gazette and Notice submissions: Gazette Submissions:	**E-mail:** submit.egazette@gpw.gov.za
For queries and quotations, contact: Gazette Contact Centre:	**E-mail:** info.egazette@gpw.gov.za
	Tel: 012-748 6200
Contact person for subscribers: Mrs M. Toka:	**E-mail:** subscriptions@gpw.gov.za
	Tel: 012-748-6066 / 6060 / 6058
	Fax: 012-323-9574

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF EMPLOYMENT AND LABOUR

NO. R. 792 **17 JULY 2020**



employment & labour
Department:
Employment and Labour
REPUBLIC OF SOUTH AFRICA

Compensation Fund, Delta Heights Building 167 Thabo Sehume Street, Pretoria 0001
Tel: 0860 105 350 | Email address: cfcallCentre@labour.gov.za www.labour.gov.za

REGULATIONS ON COMPENSATION FOR OCCUPATIONAL INJURIES AND DESEASES ACT No 130 OF 1993

Compensation Fund
WORKING FOR YOU

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO 130 OF 1993)

REGULATIONS ON MESOTHELIOMA DUE TO OCCUPATIONAL ASBESTOS EXPOSURE FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

The Minister of Employment and Labour, after consultation with the Compensation Board, has made the regulations under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No 130 of 1993) in Schedule A. These regulations are published for public comments only.

Interested and affected parties are hereby invited to submit written representations on the proposed Regulations. The aforesaid representations must be marked for the attention of **Mr TH Maphologela** and sent by registered post or emailed or hand delivered within 60 days of publication of this notice to the following addresses:

Compensation Fund
167 Thabo Sehume Street
Pretoria
0157

OR

PO Box 955
Pretoria
0001

Email addresses: Kimbly.Makgoba@labour.gov.za or Harry.Maphologela@labour.gov.za

1

Copies of the Regulations are herewith attached.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

SCHEDULE A

REGULATIONS ON MESOTHELIOMA DUE TO OCCUPATIONAL ASBESTOS EXPOSURE MADE UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

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1. Definitions

In these Regulations, a word or expression to which a meaning has been assigned in the Regulations, has the meaning so assigned to it and, unless the context otherwise indicates—

"asbestos" means amosite, chrysotile, crocidolite fibrous actinolite, fibrous anthophyllite and fibrous tremolite types;

"asbestos exposure" means exposure or likely exposure to asbestos dust whilst at the workplace;

"cytology" means the examination of cells from the body under a microscope. The test commonly checks for infection, inflammatory disease of the urinary tract, cancer, or precancerous conditions;

"histology" means a study of microscopic structure of animal or plant tissue;

"medical surveillance" means a planned programme or periodic examination,

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which may include clinical examinations, biological monitoring or medical tests of employees by an occupational health practitioner or in prescribed cases, by an occupational medicine practitioner;

"mesothelioma" means malignancy arising from the pleura and peritoneum in persons with a history of occupational asbestos exposure;

"occupational hygiene report" means the findings of occupational hygiene exposure assessments are recorded in occupational hygiene reports;

"pleural biopsy" means a sample of tissue taken from the body in order to examine it more closely. A doctor should recommend a biopsy when an initial test suggests an area of tissue in the body is not normal. Doctors may call an area of abnormal tissue a lesion, a tumor, or a mass;

"post-mortem examination" means a surgical procedure that consists of a thorough examination of a corpse by dissection to determine the cause, mode and manner of death or to evaluate any disease or injury that may be present for research or educational purposes;

"**Regulations**" means the regulations for compensation on mesothelioma due to occupational asbestos exposure made under the Compensation for Occupational Injuries and Diseases Act, 1993; and

"**workplace exposure**" means exposure or likely exposure to a hazardous substance whilst at work.

2. Diagnosis

(1) The diagnosis of mesothelioma must be made by a medical practitioner, based on a biopsy, cytology or post-mortem examination, to confirm the diagnosis of mesothelioma.

(2) If the diagnosis is made based on positive cytology results, such diagnosis must be supported by clinical features and radiological investigations, which must include the reports and films.

(3) If an employee is diagnosed with mesothelioma as a result of exposure to asbestos and is no longer in the employment of the same employer where

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asbestos exposure occurred, the current employer must complete the W.CL.1 and no liability will be attributed to that employer.

(4) The medical officers employed by the compensation fund will determine whether—

(a) mesothelioma is present; and

(b) the diagnosis was made according to acceptable medical standards.

3. Impairment

Whole person impairment will be determined in accordance with latest AMA Guide edition once maximal medical improvement has been reached.

4. Compensation Benefits

The compensation benefits payable according to the Act as follows:

(a) payment for temporary total disablement must be made for as long as such disablement continues, but not for a period exceeding 24 months;

(b) payment for permanent disablement must be made when the diagnosis of mesothelioma is confirmed and a final medical report is received;

(c) if the total impairment score is zero to three (i.e. permanent disablement less than or equal to 30%), permanent disablement must be determined and a lump sum must be paid in terms of the Act; and

(d) If total impairment score is more than three (i.e. permanent disablement is higher than 30%), pension must be paid in terms of the Act.

5. Medical Costs

(1) Medical costs must be provided for a period of not more than 24 months from the date of diagnosis or longer, if in the opinion of the Commissioner, further medical treatment will reduce the degree of the disablement.

(2) Medical costs must cover any necessary treatment provided by any healthcare provider.

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(3) The Commissioner must decide on the need for the nature and sufficiency of the medical costs to be supplied.

6. Death Benefits

If an employee dies as a result of occupational mesothelioma, the following death benefits are payable:

(a) reasonable burial expenses in terms of the Burial Expenses Policy; and
(b) spouse and dependent's pensions.

7. Reporting

The following documentation must be submitted to the compensation fund, or the employer individually liable, or the licensee concerned:

(a) An employer's report of an Occupational Disease (W.CL.1);
(b) A notice of occupational diseases and claim for compensation (W.C. L14);
(c) An affidavit by the employee (W.CL.305) [(if an employer cannot be traced or the employer fails to timeously submit Employer's report of an Occupational Disease (W.CL.1)];
(d) An industrial history (W.C. L 110);
(e) A clear history of occupational asbestos exposure or exposure in an industry where asbestos exposure is known to occur;
(f) the length of exposure;
(g) A medical surveillance report that is baseline periodic exit, where applicable;
(h) An occupational hygiene report, where applicable;
(i) A first medical report detailing the employee's illness in respect of an occupational disease (W.C.L 22);
(j) A histology of the pleural biopsy or cytology report of peritoneal fluid containing the name of the claimant and the diagnosis of mesothelioma of any type. The report should also detail the name of the pathologist, contact and reference details that will enable telephonic validation of the report;

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(k) A radiological investigations' report with films will only be required if cytology results are used to confirm the diagnosis;

(l) A progress or final medical report in respect of occupational disease (W.C.L 26);

(m) In the case of death—

(i) a death certificate and a BI1663 (notification of death) or where a notice of death is not available, a death certificate accompanied by a detailed medical report on a practice letterhead on the cause of death; and

(ii) Results of the post-mortem examination, where applicable.

8. Claims Processing

(1) The Commissioner must consider and adjudicate all claims.

(2) The medical officers employed by the compensation fund are responsible for the medical assessment of a claim and for the confirmation of the acceptance or rejection of a claim.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

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Mr Thobile Lamati
The Director-General
Department of Employment and Labour
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For attention: Harry Maphologela
E-mail: Harry.Maphologela@labour.gov.za

Dear Mr Lamati

LEGAL OPINION ON THE REGULATIONS FOR THE COMPENSATION ON MESOTHELIOMA DUE TO OCCUPATIONAL ASBESTOS EXPOSURE: YOUR E-MAIL OF 14 OCTOBER 2019

INTRODUCTION AND BACKGROUND

1. The Department of Employment and Labour (the "Department") requests us to scrutinise and provide a legal opinion on the Regulations for the Compensation on Mesothelioma due to Occupational Asbestos Exposure (the "draft Regulations"), to be made under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) (the "Act").

2. We have considered the proposed Regulations having regard to the following:

- The Constitution of the Republic of South Africa, 1996 (the "Constitution");
- the Act;
- the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000);
- other relevant legislation; and
- relevant case law.

DISCUSSION

Nature of power to make regulations

3. The delegation of legislative power to the Executive by Parliament is important and necessary for effective law-making and implementation. In **Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others** 1995 (4) SA 877 (CC), the Constitutional Court (the "CC"), per Chaskalson P, stated the following with regard to the need for Parliament to delegate its law-making powers to the Executive:

> "[51] The legislative authority vested in Parliament under s 37 of the Constitution is expressed in wide terms - 'to make laws for the Republic in accordance with this Constitution'. In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. **There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies.** The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation **within the framework of a statute under which the delegation is made**, and assigning plenary legislative power to another body...." (Our emphasis.)

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4. In the **Executive Council, Western Cape Legislature** case *(supra)*, at paragraph 57, the CC quotes, with approval, the following remarks by H M Seervai "*Constitutional Law of India*", 3rd edition (1983), Volume II, at paragraph 21.53, regarding the power of Parliament to delegate legislative power to the Executive:

> "(L)egislative power is not "property" to be jealously guarded by the Legislature, but is a means to an end, and if the end is desired by the Legislature and the difficulties in achieving that end cannot be foreseen, it is not only desirable **but imperative that the power to remove difficulties should be entrusted to the executive Government which would be in charge of the day-to-day working of the law**." (Our emphasis.)

5. The power to make regulations is a public power that must be exercised subject to the Constitution and the law. In **Affordable Medicines Trust and Others v Minister of Health and Others** 2006 (3) SA 247 (CC), the CC stated the following in this regard:

> "[48] Our constitutional democracy is founded on, among other values, the '(s)upremacy of the Constitution and the rule of law'. The very next provision of the Constitution declares that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'. And to give effect to the supremacy of the Constitution, courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. This commitment to the supremacy of the Constitution and the rule of law means that **the exercise of all public power is now subject to constitutional control.**
>
> [49] The exercise of public power **must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.** The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that **both the Legislature and the Executive** 'are constrained by the principle that **they may exercise no power and perform no function beyond that conferred**

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upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.

[50] In exercising **the power to make regulations**, the Minister **had to comply with the Constitution**, which is the supreme law, **and the empowering provisions** of the Medicines Act. **If, in making regulations, the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts *ultra vires*** (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted *ultra vires* is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been *ultra vires* under common law by reason of a functionary exceeding his or her powers is now invalid under the Constitution as an infringement of the principle of legality. The question, therefore, is whether the Minister acted *ultra vires* in making regulations that link a licence to compound and dispense medicines to specific premises. The answer to this question must be sought **in the empowering provisions**." (Footnotes omitted, our emphasis.)

6. In **Vorster and Another v Department of Economic Development, Environment and Tourism, Limpopo Province, and Others** 2006 (5) SA 291 (T) the court also stated the following in this regard:

"[18] Lawfulness is relevant to the exercise of all public power, whether or not the exercise of such power constitutes administrative action. Lawfulness **depends on the terms of the empowering statute**. If the exercise of public power **is not sanctioned by the relevant empowering statute**, it will be **unlawful and invalid**." (Our emphasis.)

Empowering provision

7. In making the proposed draft Regulations, the Minister must comply with the Constitution, which is the supreme law, and the empowering provision, which is section 97 of

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the Act. If the Minister exceeds the powers conferred by section 97 of the Act, the draft Regulations will be *ultra vires* and invalid.

8. Section 97 of the Act specifically authorises the Minister to make regulations and provides as follows:

"**97. Regulations.**— (1) The Minister may make regulations, after consultation with the Board, regarding—

(*a*) the place of meeting and the procedure to be followed at any meeting of the Director-General and assessors or at any proceedings in terms of this Act with which the assessors are concerned, or at any investigation in terms of this Act;

(*b*) subject to section 76, the fees payable to medical practitioners or chiropractors in respect of services rendered in terms of this Act;

(*c*) the procedure to be followed in paying assessments and fines to the Director-General;

(*d*) the persons to whom, the places where and the manner in which payment of assessments in terms of this Act shall be made;

(*e*) the determination of the amount and the conditions and manner of payment of benefits to assessors or classes of assessors;

(*f*) the disposal of moneys payable in terms of this Act to any person other than the Director-General and not claimed within the prescribed period by the person entitled thereto;

(*g*) any **matter which shall or may be prescribed by regulation in terms of this Act;**

(*h*) **any other matter, whether or not connected with any matter mentioned in paragraphs (*a*) to (*g*), which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.**

(2) Different regulations may be made under subsection (1) in respect of different classes of employers and employees and of different areas, and the Minister may, after consultation with the Board, in respect thereof differentiate in such manner as he or she may deem expedient.

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(3) Any person who contravenes or fails to comply with any regulation made under subsection (1) shall be guilty of an offence and liable on conviction to a fine, or imprisonment for a period not exceeding six months." (Our underlining.)

9. The regulatory powers of the Minister must be read together with the long title and section 65 of the Act, respectively, which provides as follows:

Long title:

"To provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases; and to provide for matters connected therewith."

Section 65:

"**65. Compensation for occupational diseases.**—(1) Subject to the provisions of this Chapter, an employee **shall be entitled to the compensation provided for and prescribed in this Act** if it is proved to the satisfaction of the Director-General—

(*a*) that the **employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment**; or

(*b*) **that the employee has contracted a disease other than a disease contemplated in paragraph (*a*) and that such disease has arisen out of and in the course of his or her employment.**

(2) If an employee has contracted a disease referred to in subsection (1) and the Director-General is of the opinion that the recovery of the employee is being delayed or that his temporary total disablement is being prolonged by reason of some other disease of which the employee is suffering, he may approve medical aid also for such other disease for so long as he may deem it necessary.

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(3) If an employee has contracted a disease referred to in subsection (1) resulting in permanent disablement and that disease is aggravated by some other disease, the Director-General may in determining the degree of permanent disablement have regard to the effect of such other disease.

(4) Subject to section 66, a right to benefits in terms of this Chapter shall lapse if any disease referred to in subsection (1) is not brought to the attention of the commissioner or the employer or mutual association concerned, as the case may be, within 12 months from the commencement of that disease.

(5) For the purposes of this Act the commencement of a disease referred to in subsection (1) shall be deemed to be the date on which a medical practitioner diagnosed that disease for the first time or such earlier date as the Director-General may determine if it is more favourable to the employee.

(6) The provisions of this Act regarding an accident shall apply *mutatis mutandis* to a disease referred to in subsection (1), except where such provisions are clearly inappropriate." (Our emphasis.)

10. The draft Regulations seek to establish requirements and procedures for the compensation for disablement caused by diseases sustained or contracted by employees in the course of their employment, or for death resulting from such diseases.

11. It must be noted that, in terms of section 97 of the Act, the Minister may not make any regulation, except after consultation with the Compensation Board.

12. Subject to our comments in the electronic copy of the draft Regulations and above, it is our view that the draft Regulations are duly authorised and fall within the ambit of the empowering provisions of the Act.

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General remarks concerning draft Regulations

13. We have redrafted the enabling provision of the draft Regulations to be legally sound. Since the empowering provision (i.e. section 97 of the Act) is drafted in the third person, namely, "*the Minister may make regulations…*", it constitutes two actions: the **making** of the Regulations by the Minister and the **publication** thereof. Therefore, we have amended the enacting provision to read as follows:

> "The Minister of Employment and Labour has, under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), after consultation with the Compensation Board, made the Regulations contained in the Schedule."

14. We have noted the use of the word "shall" throughout the draft Regulations. We propose that the Drafters of the Regulations avoid the use of the word "shall" in contemporary legislation. The word is archaic and denotes both the future form and obligation. We propose that the word "must" rather be used in instances where obligations are intended. We have proposed this amendment throughout the draft Regulations.

Summary and comments: draft Regulations

15. In a nutshell, the draft Regulations provides as follows:

***Ad* draft regulation 1 - Definitions**

15.1 We have noted that there are words and terms that are defined in draft regulation 1 that do not occur anywhere in the text of the draft Regulations. A definition provision is used to define words and expressions that are used in the draft Regulations, but that are not defined in the Act and that do not convey their ordinary dictionary meaning. Therefore, only words that require clarification and that occur in the text of the draft Regulations should be defined.

15.2 It must also be noted that substantial content must not be contained in the definition provisions, but rather form part of the substantive contents of the draft Regulations.

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***Ad* draft regulation 2 - Diagnosis**

15.3 In terms of draft regulation 2, the diagnosis of mesothelioma must be made by a medical practitioner. This draft regulation does not clearly indicate whether the medical officers employed by the compensation fund make a decision whether mesothelioma is present based on the reports received from a medical practitioner or whether they make these decisions without such reports. This must be clarified or redrafted in a manner that would accurately capture the Department's intention.

***Ad* draft regulation 3 - Impairment**

15.4 Draft regulation 3 states that "whole person impairment" will be determined in accordance with the latest *AMA Guide* edition. It is not clear what is meant by the terms "whole person impairment" and "AMA Guide". We propose that these terms be defined or that reference be made to a term which is already defined in the Act (e.g. "disablement").

***Ad* draft regulation 4 - Compensation benefits**

15.5 Draft regulation 4 provides for the compensation benefits payable in accordance with the Act. It is not clear where these compensation benefits are derived from. If these benefits are payable in accordance with the Act, we propose that this draft regulation must specify (i.e. by cross-reference) the sections and Schedules in the COIDA where these benefits are provided for.

15.6 This draft regulation further states that "*permanent disablement shall be determined and a lump sum shall be paid in terms of the Act*". For the sake of clarity and certainty, we propose that a cross-reference be inserted to the applicable section in the Act, which indicates the manner in which permanent disablement is determined and paid in terms of the Act (e.g. in terms of section 65(3) of the principal Act).

***Ad* draft regulation 5 - Medical costs**

15.7 Draft regulation 5 provides for the apportionment of medical costs.

***Ad* draft regulation 6 - Death benefits**

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15.8 Draft regulation 6 provides for the payment of death benefits to the dependants and widow of an employee who dies as a result of occupational mesothelioma.

15.9 The draft regulation is not clear, since it does not indicate what the "Burial Expenses Policy" is or where it may be obtained. We propose that the term be defined.

15.10 Furthermore, the draft regulation does not specify how the widow's and dependent's pensions will be determined. We propose that a specific cross-reference be inserted to the applicable policy or legislation (e.g. the principal Act) in terms of which these pensions are determined.

***Ad* draft regulation 7 – Reporting**

15.11 Draft regulation 7 provides for the list of documentation to be submitted to the compensation fund.

15.12 We have noted that the heading to this draft regulation does not accurately reflect the contents of the draft regulation and have, therefore, suggested that the heading to this draft regulation be amended to read **"DOCUMENTATION TO BE SUBMITTED"**. We have amended the Index in accordance with the proposed change to the heading.

***Ad* draft regulation 8 - Claims processing**

15.13 In terms of draft regulation 8, the Commissioner must "*consider and adjudicate upon the liability of all claims*". We suggest that the draft regulation should be amended to provide only that the Commissioner must consider and adjudicate all claims (as opposed to the "liability of all claims").

***Ad* draft regulation 9 – Short title and commencement (newly inserted)**

15.14 We have proposed the addition of a draft regulation that provides for the short title and commencement of the draft Regulations.

General remarks on the making of regulations

16. In **Central African Services (Pty) and Another v The Minister of Transport and Another, Case NO: 32238/2011 (North Gauteng)** the court, per Makgoka J, found the amendment regulations it was concerned with to be invalid, *inter alia*, because–

(a) the Minister and the agency concerned failed to comply with their constitutional obligation to ensure procedural fairness in the publication and promulgation of the Regulations;

(b) the agency failed in its constitutional duty to comply with its duty to facilitate proper public comment before publishing the Regulations;

(c) the Regulations were not promulgated in a manner consistent with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) and section 33[1] of the Constitution of the Republic of South Africa, 1996; and

(d) the Regulations were also not published in at least two official languages as required by section 6(3)*(a)* of the Constitution. (See paragraphs 29-38, 43-44, 51, 57 and 59 and also **Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another [2015] ZACC 12 (Case CCT 163/14)**).

17. The Department is reminded to comply with section 4 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) by publishing the draft Regulations for comment. We are of the opinion that the draft Regulations must also be published in at least two official languages, as provided for in section 6(3)*(a)* of the Constitution.

CONCLUSION

18. Subject to the above comments and the suggested amendments made in the

---

1 Section 33 of the Constitution states as follows:

"**33. Just administrative action.**—(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration."

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electronic text of the draft Regulations, we are of the view that the draft Regulations are authorised by section 97 of the Act, not in conflict with the Constitution and are valid.

Yours sincerely,

FOR THE OFFICE OF THE CHIEF STATE LAW ADVISOR
B VENTER / YD VAN ASWEGEN / A JOHAAR

12

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO 130 OF 1993)

REGULATIONS ON IRRITANT-INDUCED ASTHMA FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

The Minister of Employment and Labour, after consultation with the Compensation Board, has made the regulations under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No 130 of 1993) in Schedule A. These regulations are published for public comments only.

Interested and affected parties are hereby invited to submit written representations on the proposed Regulations. The aforesaid representations must be marked for the attention of **Mr TH Maphologela** and sent by registered post or emailed or hand delivered within 60 days of publication of this notice to the following addresses:

Compensation Fund
167 Thabo Sehume Street
Pretoria
0157

OR

PO Box 955
Pretoria
0001

Email addresses: Kimbly.Makgoba@labour.gov.za or Harry.Maphologela@labour.gov.za

1

Copies of the Regulations are herewith attached.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

SCHEDULE A

REGULATIONS ON IRRITANT-INDUCED ASTHMA FOR THE COMPENSATION FUND MADE UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

ARRANGEMENT OF REGULATIONS Pages

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3. Impairment.....5-8
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5. Medical Costs.....9
6. Death Benefits.....9
7. Reporting.....10
8. Claims Processing.....10

1. Definitions

"Bronchodilators" means drugs that cause widening of the bronchi, for example any of those drugs taken by inhalation for the alleviation of asthma;

"Bronchial challenge test" means a lung function test for asthma, which is more commonly used in adults than in children, and which might be performed if symptoms and screening spirometry do not clearly or convincingly establish a diagnosis of asthma and entails that you inhale increasing amounts of methacholine aerosol mist before and after spirometry. The methacholine test is considered positive, meaning asthma is present, if the lung function drops by at least 20%;

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"FVC" means forced vital capacity and consists of the total volume of air that can be exhaled during a maximal forced effort;

"FEV1/FVC ratio" means the percentage of the FVC expired in one second;

"FEV1" means forced expiratory volume in one second and entails the volume of air exhaled in the first second under force after a maximal inhalation, the normal values of which are between 80% and120%;

"Irritant-induced Asthma" means a disease characterised by variable airflow limitation and/or bronchial hyper responsiveness due to causes and conditions attributable to a particular working environment. These Regulations deal with non-immunological, namely Irritant-induced Asthma, resulting from a single intense exposure or multiple exposures to known irritant(s) in a previously healthy individual;

"IgE" means immunoglobulin E (IgE) test, which measures the level of IgE, a type of antibody;

"PEF" or **"PEFR"** means Peak expiratory flow (PEF), also called peak expiratory flow rate (PEFR), and is a person's maximum speed of expiration, as measured with a peak flow meter, a small, hand-held device used to monitor a person's ability to breathe out air;

"the Act" means the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993);

"Regulations" means the regulations relating to irritant-induced asthma made under the Compensation for Occupational Injuries and Diseases Act, 1993; and

"workplace exposure" means exposure or likely exposure to a hazardous substance whilst at work.

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2. Diagnosis

(1) A diagnosis of Irritant-induced Asthma shall be made by a medical practitioner based on the following:

(a) a lung function test;
(b) occupational exposure to a known cause of asthma;
(c) a chronological relationship between asthma and the working environment;

Note: If possible, the evidence for the diagnosis of asthma should be documented before commencing treatment.

(d) a characteristic history and physical examinations that suggests asthma;

(e) physiological evidence of variable airflow limitation including any one or more of the following:

(i) Significant reversibility of FEV_1 post-bronchodilator (>12% and >200ml);
(ii) excessive variability in twice-daily PEF (>10%) over 2 weeks. Daily PEF variability can be calculated as [(day's highest PEF – day's lowest PEF)/ mean of day's highest and day's lowest PEF]. This variability is summed and averaged over 2 weeks;
(iii) significant increase in FEV_1 (>12% and >200ml) after weeks of oral steroid anti-inflammatory treatment; and
(iv) positive non-specific bronchial hyper responsiveness (methacholine or histamine challenge test);

(f) exclusion of other pulmonary disorders that may explain the symptoms or simulate asthma, such as vocal cord dysfunction, hyperventilation syndrome, multiple chemical sensitivity syndrome or COPD;

(g) an occupational exposure preceding the onset of asthmatic symptoms;

(h) an exposure and/or physiological evidence of the relationship between asthma and the workplace environment (Diagnosis of Irritant-induced Asthma requires 1 and preferably one or more of (i)-(v)):

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(i) workplace exposure to an irritant agent present as a gas, smoke, fume, vapour or dust. The exposure could be single acute high-level exposure causing acute asthma symptoms within 24 hours, or chronic with low-level exposure causing late onset asthma symptoms;

(ii) an association between symptoms of asthma and work exposure;

(iii) significant work-related variability (≥20%) in serial PEFR;

(iv) work-related changes in serial testing of non-specific bronchial hyperresponsiveness (e.g. methacholine or histamine challenge test); and

(v) positive specific inhalation challenges in the laboratory or workplace challenges.

(2) Confirmatory diagnosis of irritant-induced asthma can only be determined on lung function tests performed three weeks after removal from exposure.

(3) The medical practitioners employed by the Compensation Fund shall determine whether the diagnosis of Irritant-induced Asthma was made according to acceptable medical standards.

3. Impairment

(1) Assessment of permanent impairment shall be determined no later than two years after diagnosis and removal from the exposure or reduction in the exposure , and after maximum medical improvement has been achieved.

(2) The degree of impairment will be evaluated based on lung function tests and the history of medication prescribed to control asthma. Original copies of lung function tests must be submitted to enable the medical practitioners to consider acceptability of the quality of these tests.

(3) A test carried out after the administration of a Bronchodilator must be included.

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(4) The impairment class will be determined by the two parameters (post bronchodilator FEV1 and medication requirements), each contributing to the compilation of a class, which determines the permanent disablement of a claimant (whole person impairment).
(5) The evaluation of airflow obstruction will be based on lung function testing in accordance with the Commissioner's Regulation on Irritant-induced asthma.

Table 1: Parameter 1: Postbronchodilator FEV1	
Class	FEV1 % Predicted
0	≥80
1	70 – 79
2	60-69
3	50 – 59
4	< 50

* FEV_1 % predicted = measured FEV_1 divided by reference FEV_1 x 100

Table 2: Parameter 2: Minimum Medication Prescribed	
CLASS	Medication
0	No medication.
1	Occasional bronchodilator, not daily. **OR** Occasional or daily short acting bronchodilators + daily low-dose inhaled steroid (≤ 400 micrograms Budesonide or equivalent*).
2	Occasional or daily short acting bronchodilators + daily low dose inhaled steroid (≤400 micrograms Budesonide or equivalent) in addition to any one of the following: – Daily long acting bronchodilator; – Leukotriene modifier; – Sustained-release theophylline; or – Occasional (1-3/year) course oral steroid. **OR** Occasional or daily short acting bronchodilators + daily medium dose inhaled steroid (400-800 micrograms of Budesonide or equivalent).

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3	Daily short acting bronchodilator + daily medium dose inhaled steroid (400-800 micrograms of Budesonide or equivalent) in addition to any one of the following: – Daily long acting bronchodilator; – Leukotriene modifiers; – Sustained-release theophylline; or – Occasional (1-3/year) course oral steroid
4	Daily short acting bronchodilator + daily medium dose inhaled steroid (400-800 micrograms of Budesonide or equivalent) in addition to any one of the following: – Daily long acting muscarinic antagonist (5 micrograms of Tiotropium or equivalent); or – Frequent (>3/year) course oral steroid in addition to any other asthma medication.

* 200 ug Budesonide is equivalent to 250 ug Beclomethasone dipropionate, 100 ug Fluticasone propionate and 80 ug Ciclesonide.

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Criteria for rating permanent impairment due to asthma

Class	CLASS 0	CLASS 1	CLASS 2	CLASS 3	CLASS 4
Whole person impairment rating (%)	0	2%-10%	11%-23%	24%-40%	45%-65%
Severity Grade (%)		2 4 6 8 10 (A B C D E) (minimal)	11 14 17 20 23 (A B C D E) (MILD)	24 28 32 36 40 (A B C D E) (Moderate)	45 50 55 60 65 (A B C D E) (Severe)
Clinical parameters (minimum medication needed, frequency of attacks etc.)	No medication required	Occasional bronchodilator, not daily. OR Occasional or daily short acting bronchodilators + daily low-dose inhaled steroid (≤ 400 micrograms Budesonide or equivalent*).	Occasional or daily short acting bronchodilators + daily low dose inhaled steroid (≤400 micrograms Budesonide or equivalent) in addition to any one of the following: – Daily long acting bronchodilator, or – Leukotriene modifier, or – Sustained-release theophylline, or – Occasional (1-3/year) course oral steroid. OR Occasional or daily short acting bronchodilators + daily medium dose inhaled steroid (400-800 micrograms of Budesonide or equivalent).	Daily short acting bronchodilator +daily medium dose inhaled steroid (400-800 micrograms of Budesonide or equivalent) in addition to any one of the following: – Daily long acting bronchodilator, or – Leukotriene modifiers, or – Sustained-release theophylline, or – Occasional (1-3/year) course oral steroid	Asthma not controlled by treatment: Daily short acting bronchodilator + daily medium dose inhaled steroid (400-800 micrograms of Budesonide or equivalent) in addition to any one of the following: – Daily long acting muscarinic antagonist (5 micrograms of Tiotropium or equivalent), or Frequent (>3/year) course oral steroid in addition to any other asthma medication.
Maximum postbronchodilater FEV1, percentage predicted	≥80%	70%-80%	60%-69%	50%-59%	<50%
Objective tests for degree of airway hyperesponsiveness PC20 mg/mL	6-8	3-5	3->0.5	0.5-0.25	0.24-0.125

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4. Compensation Benefits

(1) Payment for temporary disablement shall be made for as long as such disablement continues, but not for a period exceeding 24 months.

(2) In the case of permanent disablement less than or equal to 30%, a lump sum shall be paid in terms of the Act and removal from further exposure shall be recommended.

Note: Determination of permanent disablement shall be done at least three weeks after removal from exposure.

5. Medical Costs

(1) In all accepted cases of Irritant-induced Asthma, medical aid shall be provided for a period of not more than 24 months from the date of diagnosis or longer if further medical aid will, in the opinion of the Commissioner, reduce the degree of the disablement.
(2) The medical costs for purposes of providing medical aid as contemplated in sub-regulation (1) shall cover diagnosis of Irritant-induced Asthma and any necessary treatment of asthma provided by any health care provider, as well as any costs of chronic medication related to Irritant-induced Asthma treatment.
(3) The Commissioner shall decide on the need for, the nature and sufficiency of medical costs to be supplied.

6. Death Benefits

If the employee dies as a result of irritant-induced asthma death benefits payable shall consist of-

(a) reasonable burial expenses to be paid in terms of the Burial Expenses Policy; and

(b) spouse and dependent's pensions payable, where applicable.

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7. Reporting

The following documentation should be submitted to the Compensation Fund or the employer who is individually liable or the licensee concerned:

(a) Employer's Report of an Occupational Disease (W.CL.1);
(b) Notice of an Occupational Disease and Claim for Compensation (W.CL.14);
(c) First Medical Report in respect of an Occupational Disease (W.CL. 22);
(d) For each consultation, a Progress Medical Report (W.CL. 26);
(e) Final Medical Report in respect of an Occupational Disease (W.CL.26) when the employee's condition has reached maximum medical improvement. The most recent lung function tests available, which include pre- and post administration of a bronchodilator, and the medication prescribed should be attached to this report;
(f) Exposure History (W.CL. 110) or an appropriate employment history which may include any information that may be helpful to the Commissioner such as Safety Data Sheets, risk assessments or results of environmental hygiene assessments. The suspected workplace agent should be stated if known;
(g) A medical report on the employee's symptoms that details the history, establishes a diagnosis of COPD and includes results of lung function tests, chest radiographs where appropriate or any other information relevant to the claim; and
(h) An affidavit by the employee (W.CL.305) if an employer cannot be traced or the employer fails to timeously submit Employer's report of an Occupational Disease (W.CL.1).

8. Claims Processing

(1) The Commissioner must consider and adjudicate upon the liability of all claims.

(2) The medical officers employed by the Compensation Fund are responsible for medical assessment of the claim and for the confirmation of the acceptance or rejection of the claim.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

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the doj & cd
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Date: 05 December 2019

Mr Thobile Lamati
Director-General
Department of Employment and Labour (Compensation Fund)
Private Bag X117
Pretoria
0001

Dear Mr Lamati

Attention: Harry Maphologela

PROPOSED DRAFT REGULATIONS ON IRRITANT-INDUCED ASTHMA FOR THE COMPENSATION FUND MADE BY THE MINISTER UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993: YOUR E-MAIL DATED 14 OCTOBER 2019

INTRODUCTION

1. The Department of Employment and Labour through its Compensation Fund branch (hereinafter referred to as the "Department") has requested us to scrutinise the proposed draft Regulations on Irritant-induced Asthma for the Compensation Fund (hereinafter referred to as the "draft Regulations") made under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) (hereinafter referred to as the "Act").

2. According to the Department, the draft Regulations are technical in nature and therefore our office need not concern itself with the technical aspect of the draft Regulations as the Department's medical personnel has already attended to the technical issues or aspects of the draft Regulations, and are thus satisfied with them.

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3. We have thus scrutinised the draft Regulations in order to ensure that the proposed draft Regulations are *intra vires* the provisions of the enabling legislation, and that the said draft Regulations are drafted in the correct drafting form and style. We have made certain comments and indicated suggested amendments on the electronic copy of the draft Regulations, a copy of which is attached hereto.

DELIBERATION

Nature of the Power to make Regulations and its Application

4. The delegation of legislative power to the Executive by Parliament is important and necessary for effective law-making and implementation. In **Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others** 1995 (4) SA 877 (CC), the Constitutional Court, per Chaskalson P, stated the following with regard to the need for Parliament to delegate its law-making powers :

> "[51] The legislative authority vested in Parliament under s 37(now section 44) of the Constitution is expressed in wide terms - 'to make laws for the Republic in accordance with this Constitution'. In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. **There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies.** The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation **within the framework of a statute under which the delegation is made,** and assigning plenary legislative power to another body...." (Our emphasis.)

5. The power to make rules or regulations is a public power that must be exercised subject to the Constitution of the Republic of South Africa, 1996 (the "Constitution") and the law. In **Affordable Medicines Trust and Others v Minister of Health and Others** 2006 (3) SA 247 (CC), the Constitutional Court stated the following in this regard:

> "[48] Our constitutional democracy is founded on, among other values, the '(s)upremacy of the Constitution and the rule of law'. The very next provision of the Constitution declares that the 'Constitution is the supreme law of the Republic; law or conduct **inconsistent** with it is invalid'. And to give effect to the supremacy of the Constitution, courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. This commitment to the supremacy of the Constitution and the rule of law means that **the exercise of all public power is now subject to constitutional control.**

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> [49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and **the doctrine of legality, which is part of that law.** The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. **It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'**. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power." (Our emphasis.)

6. Regarding the power to make rules or regulations and to amend them, the Constitutional Court, in the **Affordable Medicines case**, stated the following:

> "[50] In exercising **the power to make regulations**, the Minister **had to comply with the Constitution**, which is the supreme law, **and the empowering provisions** of the Medicines Act. If, in making regulations, the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts **ultra vires** (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted ultra vires is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been ultra vires under common law by reason of a functionary exceeding his or her powers is now invalid under the Constitution as an infringement of the principle of legality. The question, therefore, is whether the Minister acted ultra vires in making regulations that link a licence to compound and dispense medicines to specific premises. The answer to this question must be sought **in the empowering provisions.**" (Our emphasis.)

7. In **Vorster and Another v Department of Economic Development, Environment and Tourism, Limpopo Province, and Others** 2006 (5) SA 291 (T) the court also stated the following in this regard:

> "[18] Lawfulness is relevant to the exercise of all public power, whether or not the exercise of such power constitutes administrative action. Lawfulness **depends on the terms of the empowering statute**. If the exercise of public power **is not sanctioned by the relevant empowering statute, it will be unlawful and invalid.**" (Our emphasis.)

8. From a reading of the above quotations, it is clear that in making regulations the Minister must comply with the Constitution, which is the supreme law of the land, and the empowering provision, which is a section 97, read with section 65 of the Act. If the Minister exceeds the powers conferred by section 97 read with section 65 of the Act, the proposed draft Regulations may be *ultra vires* and invalid.

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9. Sections 97 and 65 of the Act, which are the empowering provisions, respectively provide as follows:

"Regulations

97. (1) The Minister may make regulations, after consultation with the Board, regarding -

(a) the place of meeting and the procedure to be followed at any meeting of the Director-General and assessors or at any proceedings in terms of this Act with which the assessors are concerned, or at any investigation in terms of this Act;

(b) subject to section 76, the fees payable to medical practitioners or chiropractors in respect of services rendered in terms of this Act;

(c) the procedure to be followed in paying assessments and fines to the Director-General;

(d) the persons to whom, the places where and the manner in which payment of assessments in terms of this Act shall be made;

(e) the determination of the amount and the conditions and manner of payment of benefits to assessors or classes of assessors;

(f) the disposal of moneys payable in terms of this Act to any person other than the Director-General and not claimed within the prescribed period by the person entitled thereto;

(g) any matter which shall or may be prescribed by regulation in terms of this Act;

(h) any other matter, whether or not connected with any matter mentioned in paragraphs (a) to (g), which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.

(2) Different regulations may be made under subsection (1) in respect of different classes of employers and employees and of different areas, and the Minister may, after consultation with the Board, in respect thereof differentiate in such manner as he or she may deem expedient.

(3) Any person who contravenes or fails to comply with any regulation made under subsection (1) shall be guilty of an offence and liable on conviction to a fine, or imprisonment for a period not exceeding six months.

Compensation for occupational diseases

65. (1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General-

(a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment; or

(b) that the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of and in the course of his or her employment.

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(2) If the employee has contracted a disease referred to in subsection (1) and the commissioner is of the opinion that the recovery of the employee is being delayed or that his temporary total disablement is being prolonged by reason of some other disease of which the employee is suffering, he may approve medical aid also for such other disease for so long as he may deem it necessary.

(3) If an employee has contracted a disease referred to in subsection (1) resulting in permanent disablement and that disease is aggravated by some other disease, the Director-General may in determining the degree of permanent disablement have regard to the effect of such other disease.

(4) Subject to section 66, a right to benefits in terms of this Chapter shall lapse if any disease referred to in subsection (1) is not brought to the attention of the commissioner or the employer or mutual association concerned, as the case may be, within 12 months from the commencement of that disease.

(5) For the purposes of this Act the commencement of a disease referred to in subsection (1) shall be deemed to be the date on which a medical practitioner diagnosed that disease for the first time or such earlier date as the Director-General may determine if it is more favourable to the employee.

(6) The provisions of this Act regarding an accident shall apply mutatis mutandis to a disease referred to in subsection (1), except where such provisions are clearly inappropriate.". (Our emphasis.)

10. In the draft Regulations, "Irritant-induced Asthma" is defined as a disease characterised by variable airflow limitation and/or bronchial hyper responsiveness due to causes and conditions attributable to a particular working environment. The Act further defines "occupational disease" to mean any disease contemplated in section 65(1)(a) or (b), that is, a disease that has been contracted by an employee, which disease is mentioned in the first column of Schedule 3 such as the "occupational asthma" and that such disease has arisen out of and in the course of his or her employment.

11. Therefore, upon strict scrutiny of the provisions of section 97, read with section 65 of the Act, it would appear that the Minister is empowered to make different regulations under section 97(1), including prescribing any matter which shall or may be prescribed by regulation in terms of the Act or any other matter, whether or not connected with any matter mentioned in paragraphs (a) to (g) thereof, which he may deem necessary or expedient to prescribe in order to further the objects and purposes of the Act. It would further appear that the Minister may make different regulations under subsection (1) in respect of different classes of employers and employees and different areas, and that the Minister may, after

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consultation with the Board, in respect thereof differentiate in such manner as he or she may deem expedient for any occupational asthma which could be contracted by an employee in the course of his or her employment.

_Ad_ Regulation 1 - Definitions

12. Regulation 1 provides definitions for words used throughout the draft Regulations. Subject to our comments and suggested amendments on the electronic copy of the draft Regulations, we have no concerns regarding the proposed draft regulation.

_Ad_ Regulation 2 - Diagnosis

13. Regulation 2 provides that the diagnosis for Irritant-induced Asthma shall be done by a medical practitioner and further lays down the basis as to how the diagnosis is to done and the procedures to be followed when the diagnosis is done. Sub-regulation (6) provides that medical practitioners employed by the Compensation Fund shall determine whether the diagnosis relating to Irritant-induced Asthma was made according to acceptable medical standards.

14. It appears that the current sub-regulations (2) to (5) contain aspects on which a medical practitioner will base a diagnosis of Irritant-induced Asthma, similar to the aspects contained in paragraphs (a) to (d) of the current sub-regulation (1), and not independent provisions providing for different aspects with regard to diagnosis. For this reason, we are of the view that they should be listed with the aspects contained in the current sub-regulation (1). Subject to our above comments and our comments and suggested amendments on the electronic copy of the draft Regulations, we have no concerns regarding the proposed draft regulation.

Ad Regulation 3 - Impairment

15. Regulation 3 provides the timeframes as to when the claimant could be considered permanently impaired or not and procedures or steps to be followed to come to such a diagnosis or conclusion.

16. Sub-regulation (2) provides that original copies of lung function tests must be submitted to enable the Medical practitioners to consider the acceptability of the quality of these tests and to determine the degree of impairment which will be evaluated based on lung function tests and the history of medication prescribed to control asthma.

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17. Sub-regulations (3), (4) and (5) lay down further requirements to be followed to determine the impairment class regarding the Irritant-induced asthma. Subject to our comments and suggested amendments on the electronic copy of the draft Regulations, we have no concerns regarding the proposed draft regulation.

***Ad* Regulation 4 - Compensation Benefits**

18. Regulation 4 provides that payment for temporary disablement shall be made for as long as such disablement continues, but not for a period exceeding 24 months, whilst sub-regulation (2) provides that a lump sum shall be paid in terms of the Act for permanent disablement less than or equal to 30%.

19. Subject to our comments and suggested amendments on the electronic copy of the draft Regulations, we have no concerns regarding the proposed draft regulation.

***Ad* Regulation 5 – Medical Costs**

20. Regulation 5 provides that in all accepted cases of Irritant-induced Asthma, medical aid shall be provided for a period of not more than 24 months from the date of diagnosis or longer if, in the opinion of the Commissioner, further medical aid will reduce the degree of the disablement.

21. Sub-regulation (2) further provides that the medical costs shall cover diagnosis of Irritant-induced Asthma and any necessary treatment of asthma provided by any health care provider, as well as any costs of chronic medication related to Irritant-induced Asthma treatment.

22. Subject to our comments and suggested amendments on the electronic copy of the draft Regulations, we have no concerns regarding the proposed draft regulation.

***Ad* Regulation 6 - Death Benefits**

23. Regulation 6 provides what death benefits are payable to the family or dependents of the deceased employee provided that employee dies as a result of irritant-induced asthma. We have no concerns regarding the proposed draft regulation.

***Ad* Regulation 7 – Reporting**

24. Regulation 7 provides for various documentation to be submitted to the Compensation Fund or the employer who is individually liable. Subject to our suggested

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amendments on the electronic copy of the draft Regulations, we have no concerns regarding the proposed draft regulation.

***Ad* Regulation 8 – Claim Processing**

25. Regulation 8 provides that the Commissioner must consider and adjudicate upon the liability of all claims, while the medical practitioners employed by the Compensation Fund are responsible for medical assessment of the claim and for the confirmation of the acceptance or rejection of the claim. Subject to our comments and suggested amendments on the electronic copy of the draft Regulations, we have no concerns regarding the proposed draft regulation.

***Ad* Regulation 9 – Effective Date of the Regulations**

26. Regulation 9 provides the name for the draft Regulations and the date when the draft Regulations will come into operation. Subject to our suggested amendments on the electronic copy of the draft Regulations, we have no concerns regarding the proposed regulation.

CONCLUSION

27. We are of the opinion that the Minister is authorised by section 97, read with section 65 of the Act to make the draft Regulations and that, subject to our aforementioned remarks and our comments and suggested amendments on the text of the draft Regulations, the provisions thereof are, as far as we could ascertain, not in conflict with the Act and the Constitution.

Yours sincerely

FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
TW MESEFO // WJJ NEL // MA OLWAGE // A JOHAAR

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO 130 OF 1993)

REGULATIONS ON WORK-RELATED UPPER LIMB DISORDER FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

The Minister of Employment and Labour, after consultation with the Compensation Board, has made the regulations under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No 130 of 1993) in Schedule A. These regulations are published for public comments only.

Interested and affected parties are hereby invited to submit written representations on the proposed Regulations. The aforesaid representations must be marked for the attention of **Mr TH Maphologela** and sent by registered post or emailed or hand delivered within 60 days of publication of this notice to the following addresses:

Compensation Fund
167 Thabo Sehume Street
Pretoria
0157

OR

PO Box 955
Pretoria
0001

Email addresses: Kimbly.Makgoba@labour.gov.za or Harry.Maphologela@labour.gov.za

Copies of the Regulations are herewith attached.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

SCHEDULE A

REGULATIONS ON WORK-RELATED UPPER LIMB DISORDERS FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

ARRANGEMENTS OF REGULATIONS

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1. Definitions

In these Regulations, a word or expression to which a meaning has been assigned in the Act or these Regulations shall have that meaning and, unless the context otherwise indicates—

"Regulations" means the Regulations on Work-Related Upper Limb Disorders for the Compensation Fund made under the Compensation for Occupational Injuries and Diseases Act, 1993;

"WRULDs" means Work-Related Upper Limb Disorders which is a collective term for a group of occupational diseases that consist of musculo-skeletal disorders of the upper limb caused by exposure in the workplace affecting the muscles, tendons, nerves, blood vessels, joints and bursas of the hand, wrist, arm and shoulder. These are syndromes associated with characteristic symptoms and physical signs such as rotator cuff syndrome, epicondylitis at the elbow, tenosynovitis and nerve entrapments such as carpal tunnel syndrome.

2. Causes

WRULDs are caused, aggravated or precipitated by one or more of the following risk factors:

(a) Physical causes are:

(i) highly repetitive movements;

(ii) static muscle loading;

(iii) contact stress such as, but not limited to, uncomfortable gripping and twisting, sharp edges to hand tools, desk edges; and

(iv) vibration.

(b) Ergonomic causes are:

(i) awkward sustained postures;

(ii) highly repetitive movements;

(iii) movements requiring force; and

(iv) movements at the extremes of reach.

(c) In terms of these regulations, upper limb musculo-skeletal disorders will be presumed to be work-related if the nature of the work performed includes exposure to the relevant risk factors.

3. Diagnosis

The following criteria must be used to confirm the diagnosis:

(a) A diagnosis of WRULDs shall be diagnosed by a medical practitioner taking into account—

(i) the exposure history of an employee such as type and length;

(ii) medical history and clinical signs indicating the site and distribution, quality such as type and character, severity such as intensity, frequency and duration;

(iii) progression of the symptoms according to the type of disorder;

(iv) pre-placement assessment report so that baseline can be determined;

(v) clinical evaluation report by an occupational therapist and physiotherapist;

(vi) ergonomic assessment confirming workplace exposure;

(vii) occupational exposure to known risk factors and a chronological relationship between the WRULD and the work environment; and

(viii) the confirmatory tests or investigations (e.g. x-rays, strength testing, range of motion testing, nerve conduction tests), where appropriate.

(b) The medical officers employed by the Compensation Fund will determine whether the diagnosis of WRULD was made according to acceptable medical standards.

4. Impairment

Whole Person Impairment will be determined, in accordance with the latest American Medical Association Guide edition once Maximal Medical Improvement has been reached.

5. Compensation Benefits

(1) Compensation benefits shall be payable according to the Act.

(2) If total impairment score is zero to three (i.e. permanent disablement less than or equal to 30%), permanent disablement shall be determined and a lump sum shall be paid in terms of the Act.

(3) If total impairment score is more than three (i.e. permanent disablement is higher than 30%), pension shall be paid in terms of the Act.

(4) WRULDs assessment of permanent disablement shall be based on the latest American Medical Association Guides on musculo-skeletal impairment evaluation for the upper extremities.

6. Medical costs

(1) Medical costs shall be provided for a period of not more than 12 months from the date of the diagnosis.

(2) This period may be extended if, in the opinion of the Director-General, further medical costs will reduce the extent of the disablement.

(3) The medical costs cover diagnosing a WRULDs and any necessary treatment provided by a healthcare provider.

(4) The Compensation Commissioner will decide on the need for, the nature and the sufficiency of the medical costs supplied.

7. Death benefits

The following death benefits are payable:

(a) Reasonable burial expenses shall be paid in terms of the Burial Expenses Policy.

(b) If an employee dies as a result of occupational WRULDs, the pension benefits of such employee shall be payable to the spouse and the dependents of such employee.

8. Reporting

The following documentation must be submitted to the Compensation Fund, the employer individually liable, or the licensee concerned:

(a) W.C.L.1 Employer's Report of an Occupational Disease;

(b) W.C.L.14 Notice of an Occupational Disease and Claim for Compensation;

(c) W.CL.305 Employees' Affidavit for an Occupational Disease:when an employer does not timeously submit employer's report of an occupational disease(W.CL.1);

(d) W.C.L.110 Exposure History;

(e) an appropriate employment history together with ergonomic assessment report;

(f) W.C.L.301 First Medical Report in respect of a Work-Related Upper Limb Disorder ("WRULD");

(g) clinical evaluation report by an occupational therapist or physiotherapist;

(h) W.C.L.302 Progress medical reports in respect of WRULD, must be submitted with every consultation to the Compensation Commissioner;

(i) W.C.L.6 Resumption Report must be submitted on a monthly basis for as long as the case is open, even if the employee is at work;

(j) final medical report in respect of a WRULD and residual functional assessment report from the Occupational Therapist; and

(k) all other reports that may be relevant to the diagnosis and treatment of the condition such as, but not limited to an ergonomic assessment supported by photographs, video clips.

8. Claims Processing

(1) The Commissioner will consider and adjudicate upon the liability of all claims.

(2) The medical officers employed by the Fund are responsible for the medical assessment of a claim and for the confirmation of the acceptance or rejection of a claim.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

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Date: 09 December 2019

Mr. Thobile Lamati
Director-General
Department of Employment and Labour
Private Bag X 117
Pretoria
0001

For Attention: Mr. Harry Mapholoela
E-mail:Harry.Mapholoela@labour.gov.za

Dear Mr Lamati

LEGAL OPINION: REGULATIONS ON WORK-RELATED UPPER LIMB DISORDERS FOR THE COMPENSATION FUND MADE BY THE MINISTER UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

1. The Office of the Chief State Law Adviser has been requested by the Department of Employment and Labour ("Department"), to consider the draft Regulations on Work-Related Upper Limb Disorders ("WRULDs"),for the Compensation Fund, made by the Minister under the Compensation for Occupational Injuries and Diseases Act, 1993 ("draft Regulations"), in terms of section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) ("Act").

2. The Act provides for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases.

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3. Chapter VII of the Act provides for occupational diseases. Section 65 of the Act provides for compensation for occupational injuries and subsection (1) thereof reads as follows:

"Compensation for occupational diseases

65. *(1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General—*

(a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment; or

(b) that the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of and in the course of his or her employment.".

4. Section 97 of the Act empowers the Minister to make regulations, after consultation with the Compensation Board, in respect of certain specified matters. Section 97 provides as follows:

"Regulations

97. *(1) The Minister may make regulations, after consultation with the Board, regarding—*

(a) the place of meeting and the procedure to be followed at any meeting of the Director-General and assessors or at any proceedings in terms of this Act with which the assessors are concerned, or at any investigation in terms of this Act;

(b) subject to section 76, the fees payable to medical practitioners or chiropractors in respect of services rendered in terms of this Act;

(c) the procedure to be followed in paying assessments and fines to the Director-General;

(d) the persons to whom, the places where and the manner in which payment of assessments in terms of this Act shall be made;

(e) the determination of the amount and the conditions and manner of payment of benefits to assessors or classes of assessors;

(f) the disposal of moneys payable in terms of this Act to any person other than the Director-General and not claimed within the prescribed period by the person entitled thereto;

(g) any matter which shall or may be prescribed by regulation in terms of this Act;

(h) any other matter, whether or not connected with any matter mentioned in paragraphs (a) to (g), which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.

(2) Different regulations may be made under subsection (1) in respect of different classes of employers and employees and of different areas, and the Minister may, after consultation with the Board, in respect thereof differentiate in such manner as he or she may deem expedient.

(3) Any person who contravenes or fails to comply with any regulation made under subsection (1) shall be guilty of an offence and liable on conviction to a fine, or imprisonment for a period not exceeding six months." (Our emphasis).

5. The power of the Minister to make regulations is a public power that must be exercised subject to the Constitution of the Republic of South Africa, 1996 ("Constitution"), and the law. In exercising such power, the Minister is required to comply with the principle of legality. The principle of legality requires that no power or function may be exercised beyond that which is authorised by law. This mean that the Minister may only exercise the power to make, amend, or repeal regulations within the parameters of the Act.

6. The power to make regulations on WRULDs is derived from section 97(1)*(h)* of the Act. In terms of this section, the Minister may after consultation with the Board, make regulations pertaining to any matter, which he may deem necessary in order to further the objects and purposes of the Act.

7. In the case of *Bezuidenhout v Road Accident Fund*[1], the Supreme Court of Appeal commented on the power to make regulations "which may be necessary or expedient to prescribe in order to achieve or promote the object of this Act", by stating that this provision "cannot empower the making of regulations which widen the purpose and object of the present Act or which are in conflict therewith".

8. Thornton thus advises that such general provisions are purely ancillary or incidental to the purpose of the Act. They authorise the provision of subsidiary means of carrying into effect what is already enacted in the Act itself, and do not allow attempts to widen the purposes of the Act, to add new and different means of carrying them out, or to depart from or change its objectives.[2]

9. Further, the Constitutional Court in considering the principle of legality in *Affordable Medicines Trust and Others v Minister of Health and Others*[3] stated as follows:

> "[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality,

1 2003 (3) ALL SA 249 (SCA).
2 Thornton, *Legislative Drafting* at page 342.
3 2006(3) SA 247 (CC)

> which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive 'are constrained by the principle that they may exercise no power and perform no function beyond conferred upon them by law.' In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.
>
> [50] In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions of the Medicines Act. If, in making regulations, the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts ultra vires (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted ultra vires is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been ultra vires under common law by reason of a functionary exceeding his or her powers is now invalid under the Constitution as an infringement of the principle of legality. The question, therefore, is whether the Minister acted ultra vires in making regulations that link a licence to compound and dispense medicines to specific premises. The answer to this question must be sought in the empowering provisions.".

10. When making regulations under this Act, the Minister must comply with the Constitution which is the supreme law, and the empowering provision which is section 97(1)*(h)* of the Act, and if the Minister exceeds the powers conferred by section 97(1)*(h)*, the Regulations made will be ultra vires and invalid. Considering the subject matter of the draft Regulations, we are of the view that sections 97(1)*(g)* and *(h)* and 65(1)*(a)* of the Act are the appropriate provisions which empower the Minister to make the regulations.

***Ad* table of contents of the draft Regulations**

11. The table of content in the draft Regulations lists five clauses. According to Thornton[4], there is no advantage of providing a table of contents if the clauses are fewer than six clauses because the content can easily be seen from looking directly at the clause headings as they stand in their normal position. We propose that the Department omit the table of contents, because only five clauses are listed in the table of contents.

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***Ad* clause 1 of the draft Regulations: Definitions**

12. Clause 1 of the draft Regulation seek to provide for a list of definitions of words and expressions used in the draft Regulation. We have inserted a sentence at the beginning of regulation 1 to assist with the interpretation of definitions used in the Schedule. We have also inserted a definition of Regulations to avoid the tedious repetition throughout the draft Regulations. We also suggest that all words and expressions defined in the draft Regulation be included under clause 1.

13. Clause 1 of the draft Regulation contains a Note, which states that WRULDs will be used as an umbrella term for terms that have been previously used, such as repetitive strain injury, cumulative trauma disorder, occupational overuse syndrome, and occupational cervico-brachial disorder, and reads as follows:

> "Note: Previously other terms had been used, such as repetitive strain injury, cumulative trauma disorder, occupational overuse syndrome, occupational cervico-brachial disorder. For the purpose of these regulations the umbrella term, WRULDs will be used."

14. It is uncertain from the Note where the "other terms" referred to have been previously used in light hereof, we propose that the Note be omitted from the draft Regulations because these terms are not used in the draft Regulations.

***Ad* clause 2 of the draft Regulations: Causes**

15. Clause 2 of the draft Regulation seeks to provide for the causes of WRULDs. It states that WRULDs are caused, aggravated or precipitated by various risk factors, which includes physical causes. Clause 2(*a*) of the draft Regulation provides for a list of physical causes, which includes "vibration". It is uncertain what the word "vibration" in this context means, and therefore we propose that the Department clarify the context of the "vibration".

16. Clause 2*(b)* of the draft Regulations provides for the causes of ergonomic and clause 2*(b)*(iv) of the draft Regulations lists "movements at the extremes of reach" as one of the causes. It is uncertain what is meant by this expression. For the purposes of clarity and legal certainty, we suggest that the Department clarify what the expression means.

***Ad* clause 3 of the draft Regulations: Diagnosis**

17. Clause 3 of the draft Regulations seeks to provide for the criteria, which must be used to confirm a diagnosis of WRULDs. It further provides that a Medical Officer employed by the Compensation Fund will determine whether a diagnosis of WRULD is made according to acceptable medical standards.

***Ad* clause 4 of the draft Regulations: Impairment**

18. Clause 4 of the draft Regulations provides that "Whole Person Impairment" will be determined, in accordance with the latest American Medical Association Guide edition once Maximal Medical Improvement has been reached.

***Ad* clause 5 of the draft regulations: Compensation benefits**

19. Clause 5(1) of the draft Regulations states that payment for temporary total disablement shall be paid for as long as such disablement continues, but not for a period exceeding 24 months. We wish to bring to the attention of the Department that section 47(5)*(a)* of the Act provides for this therefore it is not necessary to repeat the provisions of the Act in the draft Regulations.

20. Clause 5(2) and (3) of the draft Regulations seeks to provide that the compensation benefits shall be payable according to the Act.

***Ad* clause 6 of the draft Regulations: Medical costs**

21. Clause 6 of the draft Regulations seeks to provide for the medical costs of WRULDs. It states that medical costs shall be provided for a period not exceeding 12 months from the date of the diagnosis, however the Director-General may extend this period if in the opinion that further medical costs will reduce the extent of the disablement.

***Ad* clause 7 of the draft Regulations: Death benefits**

22. Clause 7*(a)* of the draft Regulations seeks to provide for reasonable burial expenses as a death benefit, which must be paid in terms of the "Burial Expenses Policy". The Department is requested to clarify which "Burial Expenses Policy" is

contemplated in this clause because it is uncertain which burial expenses policy will be paid as a death benefit.

23. Clause 7*(b)* of the draft Regulations seeks to provide for payments of pension benefits to widows and dependents and it provides that "[w]*idows and dependent's pensions shall be payable, where applicable, if the employee dies as a result of occupational contact dermatitis*". Thornton[5] suggests that as a general rule legislation should be drafted in gender-neutral language in order to treat women and men equally. We have proposed in the MoU that the Department redraft clause 7*(b)* of the draft Regulation to avoid using gender specific language.

***Ad* clause 8 of the draft Regulations: Reporting**

24. Clause 8 of the draft Regulations seeks to provide for the documentation, which must be submitted to the Compensation Fund, the individually liable employer or the licensee concerned. It is uncertain from the clause which licensee is referred to, as the term "licensee" is not defined in the Act nor in the draft Regulations. We suggest that the Department further clarify which licensee is contemplated in this clause.

25. Clause 8*(d)* of the draft Regulations provide for W.C.L.110, which is one of the forms that must be submitted to the Compensation Fund, employer or a licensee concerned. It appears from the reading of the form W.C.L.110 that the form seeks to provide for the "exposure history" and not "exposure history and employment history together with ergonomic assessment report", because the title of the form only refers to "Exposure History". We have redrafted clause 8*(d)* to distinguish between the reports of employment history together with ergonomic assessment report from the report of exposure history.

***Ad* clause 9 of the draft Regulations: Claim processing**

26. Clause 9 of the draft Regulations seeks to provide for the Office of the Compensation Commissioner to consider and adjudicate upon liability of all claims. It further provides that the Medical Officers in the Compensation Commissioner's office

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are responsible for medical assessment of a claim and for the confirmation of the acceptance or rejection of a claim.

CONCLUSION

27. Section 97(1)*(h)* of the Act authorises the Minister to make Regulations in regards of WRULDs. In light of the exposition above, we are of the view that the Minister has the requisite authority to make the Regulations under consideration.

28. Subject to our comments and suggested amendments made directly in the text of the draft Regulations, we are of the view that the draft Regulations are in order and conforms to the form and style of legislative drafting.

29. We attached hereto a copy of the draft Regulations with track changes incorporating our suggested amendments for your consideration.

Yours sincerely,

FOR THE CHIEF STATE LAW ADVISER
T. NKABINDE / S. WILLIAMS / T. HERCULES

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO 130 OF 1993)

REGULATIONS ON CONTACT DERMATITIS FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

The Minister of Employment and Labour, after consultation with the Compensation Board, has made the regulations under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No 130 of 1993) in Schedule A. These regulations are published for public comments only.

Interested and affected parties are hereby invited to submit written representations on the proposed Regulations. The aforesaid representations must be marked for the attention of **Mr TH Maphologela** and sent by registered post or emailed or hand delivered within 60 days of publication of this notice to the following addresses:

Compensation Fund
167 Thabo Sehume Street
Pretoria
0157

OR

PO Box 955
Pretoria
0001

Email addresses: Kimbly.Makgoba@labour.gov.za or Harry.Maphologela@labour.gov.za

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Copies of the Regulations are herewith attached.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

SCHEDULE A

REGULATIONS ON CONTACT DERMATITIS FOR THE COMPENSATION FUND MADE UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

ARRANGEMENT OF REGULATIONS

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1. Definitions

In these Regulations, a word or expression to which a meaning has been assigned in the Act or these Regulations bears the meaning so assigned and, unless the context indicates otherwise-

"ADL" means Activities of Daily Living;

"allergen" means a substance that can cause an allergy, or a reaction on the skin or any other organ;

"dermatitis" means inflammation of the skin;

"dermatologist" means a medical doctor who has specialized in skin conditions;

"occupational contact dermatitis or eczema" means a clinically recognised condition of the skin caused entirely or aggravated by conditions in the workplace. Two types of contact dermatitis are generally recognized, namely irritant contact dermatitis and allergic contact dermatitis;

"patch test" means a test that is used to test skin for allergies. Allergens are applied to the skin using patches;

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"Regulations" means the Regulations on Contact Dermatitis for the Compensation Fund made under the Compensation for Occupational Injuries and Diseases Act, 1993;

"RPPTR" means Relevant Positive Patch Test Reaction.

2. Diagnosis

The diagnosis of occupational dermatitis shall be made by a medical practitioner based on the following:

(a) a detailed medical history and the nature and distribution of the skin lesions. A colour photograph must be provided, where available;

(b) a full history of all occupational risk factors (physical, chemical and biological);

(c) occupational exposure to a known causative agent of contact dermatitis and a chronological relationship between the dermatitis and the work environment.

(d) a confirmatory skin test which is mandatory such as the Patch Test.

(e) the opinion and confirmation of the diagnosis by a dermatologist when the dermatitis is recurrent or resistant to treatment for more than six consecutive weeks.

3. Impairment

(1) The impairment shall be assessed after removal from exposure or maximum medical improvement has been reached:

(2) Criteria for rating permanent impairment shall be determined based on the following:

(a) Table 8.2. must be used to establish the diagnosis, using objective physical examination and laboratory tests;

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(b) Table 8.3 provides suggestions for physical examination findings and laboratory tests;

(c) the individual must be placed in the appropriate class based on history, physical examination, and diagnostic findings;

(d) the impact of the skin disease on ability to perform ADLs must be focused upon;

(e) a beginning must be made by selecting the middle number of the class; and

(f) the percentage of time that symptoms are present and the amount of treatment required must be considered.

Table 8-2 Criteria for Rating Permanent Impairment due to Skin Disorders

IMPAIRMENT CLASS	CLASS 0	CLASS 1	CLASS 2	CLASS 3	CLASS 4
IMPAIRMENT RANGES	0	1%-9% UE	11%-27% UE	30%-42% UE	45%-58%
GRADE		1 3 5 7 9 (A B C D E)	11 15 19 23 27 (A B C D E)	30 33 36 39 42 (A B C D E)	45 48 51 54 58 (A B C D E)
HISTORY[a,c]	Skin disorder signs have been present in the past but are currently present <1% of the time[b] ***and*** no medication is necessary ***and***	Skin disorder signs and symptoms consistent with Table 8-3 are present 1%-30% of the time[b] ***and*** may intermittently require treatment with topical medications[a] ***and***	Skin disorder signs and symptoms consistent with Table 8-3 are present 30%-60% of the time[b] ***and*** often require treatment with topical or systematic medications	Skin disorder signs and symptoms consistent with Table 8-3 are present 60%-90% of the time[b] ***and*** require intermittent to constant treatment with topical medications ***and*** when signs	Skin disorder signs and symptoms consistent with Table 8-3 are present >90% of the time[b] ***and*** require treatment with topical or systemic medications on a regular basis[a] ***and*** There is

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	there is essentially no interference with activities of daily living (ADLs)	when signs and symptoms are present, there is minimal interference with ADLs	***and*** when signs and symptoms are present, there is mild interference with ADLs	and symptoms are present, there is moderate interference with ADLs	severe interference with most ADLS to the extent that confinement may be required. All cancers not in remission, other than basal cell carcinoma, automatically receive 58% combined with all other systemic or musculoskeletal impairments or 100% when terminal.
PHYSICAL EXAMINATION FINDINGS[c]		Physical examination findings in accordance with Table 8-3 are present when symptoms are present. When present, the findings (1) do not cover 10% of the body, (2) exclude the face and/or (3) are usually transitory or can be concealed.	Physical examination findings in accordance with Table 8-3 are present when symptoms are present. When present, the findings generally (1) cover 10%-20% of the body but can usually be concealed and/or (2)significantly involve	Physical examination findings in accordance with Table 8-3 are usually present. The findings generally (1) cover 20%-40% of the body and can be at least partially concealed in most social situations and/or (2) involve the entire	Physical examination findings Table 8-3 are present almost all the time. Findings generally cover >40% of the body and are not able to be concealed in most social situations. May move to highest number in class 4 depending on extent

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			the face or anterior part of the neck and/or hands.	palmar aspect of the hand.	ofinvolvement, and ability to conceal.

DIAGNOSTIC TEST FINDINGS[c]	Diagnostic test findings expected to be positive are either negative or the test or tests have not been performed. For example, for allergic contact dermatitis, class 0 would be assigned if there were no relevant positive patch test reactions (RPPTRs)[e]	Diagnostic test findings expected to be positive are equivocal. For example, for allergic contact dermatitis, class 1 would be assigned for patch test reactions that are equivocal but would be considered relevant if positive.	Diagnostic test findings expected to be positive are positive and in the range of results expected in typical cases of the given diagnosis. For example, for allergic contact dermatitis, class 2 would be assigned if there was at least one RPPTR.[e]	Diagnostic test findings expected to be positive are positive and are somewhat beyond the range of results expected in typical cases of the given diagnosis. For example, for allergic contact dermatitis, class 3 would be assigned for multiple RPPTRs.[e]	Diagnostic test findings expected to be positive are positive and are significantly beyond the range of results expected in typical cases of the given diagnosis. For example, for allergic contact dermatitis, class 4 would be assigned if multiple RPPTRs[e] where present that indicated that the patient must avoid many widespread substance or crucial occupationally related substances.

[a] Determine the patient's class using the history, focussing on medically documented interference with ADLs. Objective examination findings must have been documented by a physician on at least one occasion to perform a rating.

[b] Scars are present permanently, and thus the time element is not used as part of the rating.

[c] Any facial scarring should be graded according to Table 11-5 and then combined with other impairments from this chapter when applicable.

[d] The category of Diagnostic Test Findings is not applied to scars. If no diagnostic tests are

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necessary or expected to be positive, then use number obtained after assessing physical examination findings as final impairment rating. Patch test reactions graded as having definite, probable, possible, or past relevance should all be considered to be RPPTRs (see Section 8.1b for a discussion of assigning relevance to patch

Skin Impairment Evaluation Summary

Table 8-3 Skin Impairment Evaluation Summary

Disorder	History, Including Selected Relevant Symptoms	Examination Record	Assessment of Skin Function	End-Organ or System Damage	Diagnosis	Degree of Impairment
Dermatitis[15, 26-29]	Duration, location, itch, redness, nail or pigment change Episode of superimposed Infection Progression and remission factors, response to therapy, side effect from therapy Atopy childness eczema Effect on work, hobbies, etc.	Papules, papule vesicular Erythema, serous discharge, crusting, edema, scale, lichenified or thickened plaques % of skin surface involved, hand, foot, face involvement	Clinical presentation and history Biopsy (may not be necessary) Patch testing only positive in allergic contact dermatitis)	Exfoliative erythroderma, atopy, rhinitis, asthma	Atopic, Allergic, irritant contact Acute, subacute, chronic Urticaria, photosensitive, Seborrheic, exfoliative, statis, hand and foot, nummular	See Table 8.2

4. Compensation Benefits

(1) Payment for temporary total disablement shall be made for as long as such disablement continues, but not for a period exceeding 24 months.

(2) If total impairment score is zero to three (i.e. permanent disablement less than or equal to 30%), permanent disablement shall be determined and a lump sum shall be paid in terms of the Act.

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(3) If total impairment score is more than three (i.e. permanent disablement is higher than 30%), a pension shall be paid in terms of the Act.

5. Medical Benefits

(1) Medical costs shall be provided for a period of 24 months from the date of diagnosis or longer, if in the opinion of the Commissioner, further medical costs would reduce the extent of the disablement.

(2) Medical costs shall cover the costs of diagnosis of occupational contact dermatitis and any necessary treatment provided by any medical practitioner as well as the costs of chronic medication in the sensitized individuals.

(3) Medical costs shall also be provided for episodes of acute on chronic flare-ups. The Commissioner shall decide on the need for, the nature and sufficiency of medical costs to be supplied.

6. Death Benefits

Death benefits payable are—

(a) reasonable burial expenses payable in terms of the Burial Expenses Policy; and

(b) widow's and dependent's pensions payable, where applicable, if the employee dies as a result of occupational contact dermatitis.

7. Reporting

The following documentation must be submitted to the Compensation Fund or the employer individually liable or the licensee concerned:

(a) Employer's Report of an Occupational Disease (W.CL.1);
(b) Notice of an Occupational Disease and Claim for Compensation (W.CL.1 4);
(c) an affidavit by the employee (W.CL.305) if an employer cannot be traced or the employer fails to timeously submit the Employer's report of an Occupational Disease (W.CL.1);
(d) Exposure History (W.CL. 110) or an appropriate employment history that may include any information that may be helpful to the Compensation Commissioner, such as Material Safety Data Sheets, risk assessment or environmental hygiene reports. The causal agent(s) must be confirmed;
(e) First Medical Report in respect of an Occupational Disease (W.CL.22)
(f) skin patch test results;

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(g) results of acceptable special medical tests or investigations carried out by the medical practitioner;

(h) Progress Medical Report (W.CL.26) for each consultation;

(i) Final Medical Report in respect of an Occupational Disease (W.CL.26) or the Dermatological report when the employee's condition has reached maximum medical improvement including colour photographs of affected areas; and

(j) In case of death, a death certificate and a BI1663 (notification of death) must be submitted. Alternatively, a death certificate accompanied by a detailed medical report on a practice letterhead on the cause of death should be submitted.

8. Claims Processing

(1) The Commissioner shall consider and adjudicate upon the liability of all claims.

(2) The medical officers employed by the Compensation Fund are responsible for the medical assessment of a claim and for the confirmation of the acceptance or rejection of a claim.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

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the doj & cd
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Date: 06 December 2019

Mr T Lamati
The Director-General
Department of Employment and Labour
Private Bag X117
PRETORIA
0001

For Attention: Mr Harry Maphologela (Harry.Maphologela@labour.gov.za)

Dear Mr Lamati

REGULATIONS ON CONTACT DERMATITIS FOR THE COMPENSATION FUND MADE BY THE MINISTER UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993:YOUR UNNUMBERED E-MAIL OF 14 OCTOBER 2019

BACKGROUND

1.1 The Department of Employment and Labour (hereinafter referred to as "the Department"), has requested us to scrutinise the form, format, legality and constitutionality of the draft Regulations to be made under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993).

1.2 The Department further informs us that the Regulations are technical in nature and we need not concern ourselves with the technical nature thereof as the Department's medical personnel has attended to the technical issues.

1.3 We have commented on the Regulations and proposed certain amendments directly on the electronic copy of the Regulations attached hereto.

SUMMARY OF REGULATIONS

2. *Ad* Regulation 1

2.1. Regulation 1 provides for definitions.

***Ad* Regulation 2**

2.2. Regulation 2 provides for the diagnosis of occupational dermatitis made by a medical practitioner.

***Ad* Regulation 3**

2.3. Regulation 3 provides for assessment of impairment after removal from exposure or maximum medical improvement has been reached.

***Ad* Regulation 4**

2.4. Regulation 4 provides for payment of temporary disablement for as long as such disablement continues, but for a period not exceeding 24 months.

***Ad* Regulation 5**

2.5. Regulation 5 provides for provision of medical costs for a period of 24 months from the date of diagnosis or longer if in the opinion of the Commissioner, further medical costs would reduce the extent of disablement.

***Ad* Regulation.6**

2.6. Regulation 6 provides for death benefits payable for reasonable burial expenses terms of the Burial Expenses Policy.

***Ad* Regulation 7**

2.7. Regulation 7 provides for the documents to be submitted to the Compensation Fund or the employer individually liable or the licensee concerned.

***Ad* Regulation 8**

Regulation 8 provides for the process by the Commissioner to adjudicate upon the liability of all claims.

NATURE OF POWER TO MAKE REGULATIONS

3. The delegation of legislative power to the Executive by Parliament is important and necessary for effective law-making and implementation. In **Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC),** the Constitutional Court ["CC"], per Chaskalson P (as he then was), stated the following with regard to the need for Parliament to delegate its law-making powers to the Executive.

> "[51] The legislative authority vested in Parliament under section 37 of the Constitution is expressed in wide terms - "to make laws for the Republic in accordance with this Constitution." In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including, as section 16A does, the power to amend the Act under which the assignment is made."

4. The power to make regulations is a public power that must be exercised subject to the Constitution and the law. In **Affordable Medicine Trust and** Others **v Minister of Health and Others** 2006 (3) SA 247 (CC) the CC stated the following:

> "[48] Our constitutional democracy is founded on, among other values, the '[s]upremacy of the constitution and the rule of law.'[1] The very next provision of the Constitution declares that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid.' And to give effect to the supremacy of the Constitution, courts "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".[2] This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control.

[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.[3] The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.[4] It entails that both the legislature and the executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.'[5] In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."[6]

Therefore in exercising the power to make regulations, the authorised functionary has to comply with the Constitution, which is the supreme law, and the empowering provisions.. If, in making regulations the functionary exceeds the powers conferred by the empowering provisions, the functionary acts *ultra vires* (beyond the powers) and in breach of the doctrine of legality.

Section 97 of the Act

5. Section 97 of the Act provides as follows:

"(1) The Minister may make regulations, after consultation with the Board, regarding-

(a) the place of meeting and the procedure to be followed at any meeting of the Director-General and assessors or at any proceedings in terms of this Act with which the assessors are concerned, or at any investigation in terms of this Act;

(b) subject to section 76, the fees payable to medical practitioners or chiropractors in respect of services rendered in terms of this Act;

(c) the procedure to be followed in paying assessments and fines to the Director-General;

(d) the persons to whom, the places where and the manner in which payment of assessments in terms of this Act shall be made;

(e) the determination of the amount and the conditions and manner of payment of benefits to assessors or classes of assessors;

(f) the disposal of moneys payable in terms of this Act to any person other than the Director-General and not claimed within the prescribed period by the person entitled thereto;

(g) any matter which shall or may be prescribed by regulation in terms of this Act;

(h) any other matter, whether or not connected with any matter mentioned in paragraphs (a) to (g),which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.

(2) Different regulations may be made under subsection (1) in respect of different classes of employers and employees and of different areas, and the Minister may, after consultation with the Board, in respect thereof differentiate in such manner as he or she may deem expedient.

(3) Any person who contravenes or fails to comply with any regulation made under subsection (1) shall be guilty of an offence and liable on conviction to a fine, or imprisonment for a period not exceeding six months."

From section 97(1) of the Act it is clear that the Minister does not have the express authority to make regulations dealing with work-aggravated asthma or with specific occupational diseases. Therefore, in order to make the draft Regulations the Minister must be so authorised by paragraph *(g)* or *(h)* of subsection (1) of section 97 of the Act.

Minister's power to make the draft Regulations in terms of section 97(1)*(g)* of the Act

6.1 The Minister is authorised to make regulations in terms of section 97(1)*(g)* of the Act if another section in the Act authorises him to make regulations relating to the subject matter dealt with in that section. There are many sections in the Act which, when read with section 97(1)*(g)* of the Act, authorise the Minister to make regulations. However, there are none that authorise him or her to make regulations regarding occupational diseases. Therefore, we are of the opinion that the Minister cannot make the draft Regulations in terms of section 97(1)*(g)* of the Act.

Minister's power to make the draft Regulations in terms of section 97(1)*(h)* of the Act

6.2. In view of our conclusion in paragraph 6.1 above it must be determined whether the Minister is authorised to make the draft Regulations in terms of section 97(1)*(h)* of the Act. This section makes it clear that the "objects and purposes" of the Act must be determined before the question whether the Minister has the power in terms of section 97(1)*(h)* of the Act to make the draft Regulations can be addressed. In **Road Accident Fund v Makwetlane** 2005 (4) SA 51 (SCA), (hereinafter referred to as "the **Makwetlane** case") the Court discussed the power of the Minister of Transport to make regulations to "achieve or promote the objects" of the Road Accident Fund Act, 1996 (Act No. 56 of 1996) and remarked as follows at pp. 58-59:

> "Section 26 empowers the Minister to make regulations in order to achieve or promote the objects of the Act. It does not confer authority on him to traverse terrain outside that limited scope and ambit. All regulations promulgated by the Minister must thus be reasonably necessary to achieve those objects and goals. It is indeed so that the possibility of fraud is greater in cases where the identity of the driver or owner of the vehicle in question has not been established, as it would usually be difficult for the RAF to secure evidence to dispute a claim (see *Mbatha* at 718H). Stricter requirements would thus be justified in unidentified vehicle cases. It follows that regulations designed to eliminate fraud and facilitate proof of legitimate claims, falling as it does within the Minister's power to regulate, would be permissible. No other reason has been suggested for such a requirement and I can think of none. That legitimate end, may not, however, be achieved by means that sweep too broadly. ...
>
> The Constitution places significant restraints upon the exercise of public power. It is a requirement of the rule of law that the exercise of public power should not be arbitrary. It follows that the exercise by the Minister of the regulatory power conferred upon him had to be rationally related to the purpose for which the power was granted - rationality being the minimum threshold requirement. (See *Pharmaceutical Manufacturers* paras [85] and [86].) Conduct that fails to pass that threshold requirement would fall below the standards set by our Constitution and would therefore be unlawful." (Our underlining.)

We are of the opinion that in view of the underlined remarks in the **Makwetlane** case, quoted above, the following deductions can be made regarding the Minister's power to make regulations in terms of section 97(1)*(h)* of the Act:

(a) Section 97(1)*(h)* of the Act limits the power of the Minister to making regulations that relate to the achievement of the objects and purposes of the Act.

(b) The regulations made under section 97(1)*(h)* of the Act must be rationally connected to the objects and purposes of the Act.

Objects and purposes of the Act

7. The Act does not contain a section that clearly sets out the objects and purposes thereof. Therefore, it is necessary to determine the objects and purposes of the Act by considering it as a whole. In **Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others** 2016 (3) SA 317 (SCA) the Court remarked as follows at p 356:

> "But I mention it because it illustrates the importance, in the context of the interpretation of the Implementation Act, of construing it in a way that accords with and gives effect to the spirit, purport and objects of the Bill of Rights.
>
> [89] The starting point in the interpretational exercise is the long title of the Implementation Act, which describes its purposes." (Our underlining.)

From the underlined remarks of the Court, quoted above, it is clear that the long title of a statute is an important source of information regarding the objects and purposes of that statute. The long title of the Act provides as follows:

> "To provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases; and to provide for matters connected therewith."

The first part of the long title states the purpose of the Act in clear terms. The second part of the long title provides that it is also the purpose of the Act to provide for matters connected to the compensation of employees for disablement or death caused by occupational injuries or diseases sustained or contracted by them in the course of their employment. Dermatitis is listed in item 2.2.1 of Schedule 3 as an occupational disease. We are of the opinion that regulations regarding the occupational diseases for which compensation may be claimed is a matter connected to the main purpose of the Act. Consequently, the Minister is authorised in terms of section 97(1)*(h)* of the Act to make regulations dealing with occupational diseases for which an employee may claim compensation in terms of the Act.

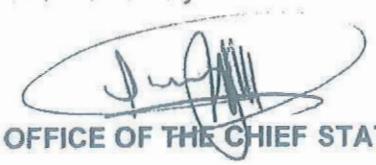
OFFICIAL LANGUAGES

8. We are of the opinion that the Regulations must be published in at least two official languages as required by section 6(3) of the Constitution of the Republic of South Africa, 1996.

CONCLUSION

9. Subject to the above comments and the suggested changes made on the text of the draft Regulations, we are of the opinion that the draft Regulations are authorised by section 97 of the Act.

Yours sincerely



OFFICE OF THE CHIEF STATE LAW ADVISER
S NETSHITOMBONI/ J NURSE/ B MAKHENE

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO 130 OF 1993)

REGULATIONS ON POST-TRAUMATIC STRESS DISORDER FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

The Minister of Employment and Labour, after consultation with the Compensation Board, has made the regulations under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No 130 of 1993) in Schedule A. These regulations are published for public comments only.

Interested and affected parties are hereby invited to submit written representations on the proposed Regulations. The aforesaid representations must be marked for the attention of **Mr TH Maphologela** and sent by registered post or emailed or hand delivered within 60 days of publication of this notice to the following addresses:

Compensation Fund
167 Thabo Sehume Street
Pretoria
0157

OR

PO Box 955
Pretoria
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Email addresses: Kimbly.Makgoba@labour.gov.za or Harry.Maphologela@labour.gov.za

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Copies of the Regulations are herewith attached.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

SCHEDULE A

REGULATIONS ON POST-TRAUMATIC STRESS DISORDER FOR THE COMPENSATION FUND MADE UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

ARRANGEMENT OF REGULATIONS

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1. Definitions

In these regulations, a word or expression to which a meaning has been assigned in the Act or these Regulations shall have the meaning so assigned and, unless the context otherwise indicates—

causality" means an association between a given cause and an effect, which requires that each of the following criteria is met to a reasonable degree of medical probability:

(a) a causal event took place;

(b) the person who experienced the event has the condition, that occurred as a result of an injury, impairment or disease;

(c) the event could cause the condition; and

(d) the event caused or materially contributed to the condition within medical probability.

"**chronology**" means the medico-legal phenomenon that requires that the series of events leading to the event, incident, injury or occupational disease must have a chronological sequence that justifies the link to the cause. In essence, the cause must precede the effect;

"**Clinician Administered PTSD Scale (CAPS)**" means a semi-structured interview that is designed to assess the essential features of Acute Stress Disorder and Post-traumatic Stress Disorder as defined in the DSM-IV and DSM-V and as edited or

revised from time to time by the American Psychiatric Association, 1994. In addition, the CAPS can also be used to assess the essential features of Acute Stress Disorder as currently defined by DSM-IV. The interview is designed to accommodate different time spans post-trauma as the referent point for diagnosis.

Specifically, the CAPS affords the clinician flexibility to inquire about symptoms and diagnostic status over the past week, most recent month, and or for lifetime diagnosis;

"**Evidence-based Medicine (EBM)**" means the conscientious, explicit, judicious and reasonable use of modern, best evidence in making decisions about the care of individual patients and a movement which aims to increase the use of high quality clinical research in clinical decision-making;

"**Independent Medical Examination (IME)**" means an examination for legal, insurance or financial reasons completed by a non-treating physician, who will not be involved in any further treatment or care of the beneficiary beyond the examination;;

"**managed healthcare**" means the clinical and financial risk assessment and management of healthcare through use of rule-based & clinical management based programmes;

"**Man-Job Specifications Traumatic Incident**" means any event that has significant emotional power , which involves any situation or event faced by emergency or public safety personnel, that causes a distressing, dramatic or profound change or disruption in their physical and or psychological functioning;

"**Maximum Medical Improvement (MMI)**" means a status where a patient is fully recovered and the treating medical practitioner is satisfied that no further improvement is anticipated on available surgical or medical treatment..The MMI is reached on a date from which further recovery or deterioration is not anticipated,

although over time there may be some expected changes;

"**medical probability**" means the link between the cause and effect which must satisfy the requirements for medical probability, which stipulates that the likelihood that an association between a cause and an effect be greater than 95% for the relationship to be considered probable. Anything below that is medically just "possible";

"**Occupational Risk Exposure Profile (OREP)**" means the report that profiles all the hazards an employee is exposed to, which are inherent to his or her occupation. These hazards are linked to the inherent requirements of the job and the inherent tasks and duties of the job. They include exposure to physical, chemical, biological, psychological and ergonomic hazards;

"**permanency**" means the condition whereby an impairment or disablement becomes static or well stabilised with or without medical treatment and is not likely to remit in the future despite medical treatment, within medical probability;

"**Post-Traumatic Stress Disorder(PTSD)**"means a mental disorder that represents a pathological response to a traumatic event, characterised by symptoms of recurrent and intrusive distressing recollections of the event namely nightmares, a sense of reliving the experience with illusions, hallucinations or dissociative flashback episodes, intense psychological or physiological distress at exposure to cues that resemble the traumatic event; avoidance of stimuli associated with the trauma ,e.g. inability to recall important aspects of the trauma, loss of interest, estrangement from others and increased arousal sleep disturbances, irritability, difficulty in concentrating, hyper vigilance, and exaggerated startle response;

The DSM–V Diagnostic criteria for PTSD include a history of exposure to a traumatic event that meets specific stipulations and symptoms from each of the four symptom

clusters: intrusion, avoidance, negative alterations in cognitions and mood, and alterations in arousal and reactivity. It follows exposure to actual or threatened death, serious injury or sexual violation. The exposure must result from one or more of the following scenarios in which an employee:

(a) directly experiences, witnesses the traumatic event in person, or was confronted with an event or events that involved actual or threatened death or serious injury, or threat to the physical integrity of self or others;

(b) learns that a violent or accidental, traumatic event occurred to a close family member or close friend;

(c) experiences first-hand repeated or extreme exposure to aversive details of the traumatic event, not through media, pictures, television or movies unless work-related and the condition causes significant distress or impairment in the employee's social, occupational, or other important areas of functioning; and

(d) the person's response involves intense fear, helplessness, or horror.

"Regulations" means the Regulations on Post-Traumatic Stress Disorder for the Compensation Fund made under the Compensation for Occupational Injuries and Diseases Act, 1993;

"traumatic event" means an event that is generally outside the range of usual human experience and would evoke significant symptoms of distress in the majority of people exposed. It is an intensely stressful event during which a person suffers serious harm or the threat of serious harm or death, or witnesses an event during which another person or persons is killed, seriously injured or threatened.

2. Diagnosis of PTSD

(1) Clinical diagnosis of medical conditions, including PTSD, must be based on approved evidence-based medical guidelines as guided by the medical scientific community as updated from time to time. The ICD-10 diagnosis of PTSD requires that the patient, firstly, must have been exposed to a traumatic event and secondly, suffers from distressing re-experiencing symptoms. For the purpose of these regulations, the diagnosis of PTSD must be made in accordance with the latest applicable version of the Diagnostic & Statistical Manual of Mental Disorders for PTSD.

(2) Diagnostic criteria for PTSD include a history of exposure to a traumatic event that meets specific stipulations and symptoms from each of four symptom clusters: intrusion, avoidance, negative alterations in cognitions and mood and alterations in arousal and reactivity. Criterion F concerns duration of symptoms; Criterion G assesses functioning and Criterion H clarifies symptoms as not attributable to a substance or co-occurring medical condition.

(3) All suspected PTSD cases must be referred to a psychiatrist for assessment and confirmation of diagnosis within three (3) months from the date of the provisional diagnosis or date of accident or traumatic incident. The Medical Officers in the Compensation Fund, shall determine if the diagnostic analysis was reached in accordance with the acceptable medical standards.

3. The DSM-V Diagnostic Criteria

The DSM-V Diagnostic Criteria are stipulated below and must be used and met in all cases of suspected PTSD.

Note: The latest edition of the DSM must always be used.

Criterion A: Stressor

Where a person was exposed to: death, threatened death, actual or threatened serious injury or actual or threatened sexual violence in one or more of the following circumstances:

(a) direct exposure;

(b) witnessing, in person;

(c) indirectly, by learning that a close relative or close friend was exposed to trauma. If the event involved actual or threatened death, it must have been violent or accidental in nature;

(d) repeated or extreme indirect exposure to aversive details of the event(s), usually in the course of professional duties, for example, first responders, collecting body parts; professionals repeatedly exposed to details of child abuse; and

(e) excluding indirect non-professional exposure through electronic media, television, movies, or pictures.

Criterion B: Intrusion symptoms

The traumatic event is persistently re-experienced in one or more of the following way(s):

(a) recurrent, involuntary and intrusive memories;

(b) traumatic nightmares;

(c) dissociative reactions, for example, flashbacks which may occur on a continuum from brief episodes to complete loss of consciousness;

(d) intense or prolonged distress after exposure to traumatic reminders; and

(e) marked physiological reactivity after exposure to trauma-related stimuli.

Criterion C: Avoidance

Persistently effortful avoidance of distressing trauma-related stimuli after the event in one or more of the following:

(a) trauma-related thoughts or feelings; and

(b) trauma-related external reminders, for example, people, places, conversations, activities, objects or situations.

Criterion D: Negative alterations in cognitions and mood

Negative alterations in cognitions and mood that began or worsened after the traumatic event, must be in two or more of the following indications:

(a) inability to recall key features of the traumatic event, usually a dissociative amnesia; not due to head injury, alcohol or drugs

(b) persistent and often distorted negative beliefs and expectations about oneself or the world, for example, . "I am bad," "The world is completely dangerous.";

(c) persistent distorted blame of self or others for causing the traumatic event or for resulting consequences;

(d) persistent negative trauma-related emotions, for example, fear, horror, anger, guilt or shame;

(e) markedly diminished interest in pre-traumatic significant activities;

(f) feeling alienated from others, for example, detachment or estrangement; and

(g) constricted affect or persistent inability to experience positive emotions.

Criterion E: Alterations in arousal and reactivity

Trauma-related alterations in arousal and reactivity that began or worsened after the traumatic event in two or more of the following:

(a) irritable or aggressive behavior;

(b) self-destructive or reckless behavior;

(c) hyper vigilance;

(d) exaggerated startle response;

(e) problems in concentration; and

(f) sleep disturbance.

Criterion F: Duration

Persistence of symptoms in Criteria B, C, D and E for more than one (1) month.

Criterion G: Functional significance

Significant symptom-related distress or functional impairment, for example, social or occupational.

Criterion H: Attribution

(a) disturbance is not due to medication, substance use, or other illness, for example, organic causes; and

(b) it must be specified if it is associated with dissociative symptoms.

Additional Considerations

In addition to meeting criteria for diagnosis, individuals may experience high levels of either of the following in reaction to trauma-related stimuli:

(a) depersonalization: experience of being an outside observer of or detached from oneself, for example, feeling as if "this is not happening to me" or being in a dream; and

(b) derealisation: experience of unreality, distance, or distortion, for example, "things are not real"

4. PTSD as an Occupational Disease

(1) An occupational disease is defined as any disease arising out of and in the course of an employee's employment. A disease would have arisen out of and in the course of employment if it has a broad causal connection to employment and that the employee must have contracted the disease while performing duties that he or she is contractually obliged to perform.

(2) Compensable PTSD is regarded as the result of an occupational injury or an occupational disease depending on individual circumstances, in terms of the Act. Therefore, the traumatic event(s) leading to the diagnosis of PTSD must be an accident or a series of accidents as defined in section 1 of the Act.

(3) A claim for PTSD shall not be eligible for benefits under the Act unless:

(a) the employee was exposed to traumatic event(s) arising out of and in the course of employment;

(b) the employment-related trauma was a pertinent factor in the development of the PTSD or played an active role during the development of PTSD; and

(c) notice of the claim for compensation was made to the employer or the Compensation Commissioner or the employer individually liable or the

licensee concerned within one (1) year from date of diagnosis of occupational disease or PTSD.

(4) When delayed-onset PTSD is diagnosed, the claim will be considered if notice of the claim for compensation was made to the employer or Compensation Commissioner within one (1) year of the date of diagnosis.

5. Occupations at risk of PTSD

Whether or not people develop PTSD depends on their subjective perception of the traumatic event as well as on the objective facts. Furthermore, those at risk of PTSD include not only those who are directly affected by a horrific event, but also witnesses, perpetrators and those who help PTSD sufferers namely, vicarious traumatisation. People at risk of PTSD include but not limited to:

(a) victims of violent crime, for example, physical and sexual assaults, sexual abuse, bombings and riots.;

(b) members of the armed forces, police services, journalists and prison service, fire service, ambulance and emergency personnel, health care personnel, including those no longer in service;

(c) victims of war, torture, state-sanctioned violence or terrorism, and refugees;

(d) survivors of accidents and disasters; and

(e) women following traumatic childbirth and individuals diagnosed with life-threatening illnesses.

6. Evolutionary Stages of PTSD

(a) Acute Stress Disorder

In the first month after trauma, trauma survivors may be diagnosed as having Acute Stress Disorder according to DSM–V, which is characterised by symptoms of PTSD and dissociative symptoms such as depersonalisation, derealisation and emotional numbing. The duration which specifies the disturbance must last at least two days but not more than four weeks, and must occur within four weeks of the traumatic event. The symptoms must resolve within four weeks after the traumatic event, otherwise the diagnosis must be reconsidered.

(b) Acute PTSD

This type of PTSD is characterised by classic symptoms that appear in the first month after the traumatic event, but last for less than three months in duration.

(c) Classic PTSD

Classically, PTSD tends to develop insidiously over a period of three to six months after the initial traumatic event.

(d) Delayed-onset PTSD

(i) The symptoms of Delayed-onset PTSD must surface at least six months or more after the traumatic event(s); and

(ii) A proper medical and occupational history must be taken to ensure that diagnosis is objectively made. The assessment and treatment of late-onset PTSD must therefore follow the same protocols as the early-onset type.

(e) **Persistent or Chronic PTSD**

For the condition of PTSD to be regarded as permanent the employee must have received appropriate treatment for a period of 24 months or an extended period of time as a treating doctor may determine.

7. Differential Diagnosis

(1) The Fund may provide treatment for the aggravation of pre-existing PTSD if it is proved that the aggravation is attributable to the employee's work environment.

(2) The medical service provider must ensure that all other potential differential diagnoses or pre-existing disorders are excluded before expressing opinion on PTSD and the work-relatedness of such a condition. The following differential disorders must be excluded before an occupational PTSD can be diagnosed:

(a) depression, for example, predominance of low mood, lack of energy, loss of interest, suicidal ideation;

(b) specific phobias, for example, fear and avoidance restricted to certain situations;

(c) adjustment disorders, for example, less severe stressor, different pattern of symptom;

(d) enduring personality changes after catastrophic experience or prolonged extreme stressor, different pattern of symptoms;

(e) dissociative disorders;

(f) neurological damage due to injuries sustained during the event; and

(g) psychosis, for example, hallucinations and delusions.

(3) If the report does not indicate or disclose the existence of a relevant pre-existing disorder or a significant co-morbid condition, if any, the Compensation Commissioner may not accept such report.

8. Management of PTSD

Treatment interventions must be evidence-based, scientifically valid and consistent with professional standards.

Early Interventions and Watchful Waiting

(a) The Fund will authorise treatment for acute reaction to traumatic events, the Acute Stress Disorder, arising out of and in the course of employment.

(b) A follow-up consultation should be arranged within one month of diagnosis of acute stress and a comprehensive report which includes prognostic details must be provided to the Fund after this consultation;

(c) A final consultation must be scheduled within two months for the purpose of final medical report.

(d) The treatment and management of Acute Stress Disorder must be finalised within three months of diagnosis and a final medical report must be provided at the end of this period.

(e) All cases of suspected PTSD must have a definitive diagnosis made within the first six months from date of first consultation.

(f) A medical practitioner who diagnoses an occupational PTSD must furnish the Compensation Commissioner or employer with a medical report indicating such diagnosis within three months and thereafter submit further medical reports at intervals set out in the Disease Monitoring and Reporting Table below.

(g) Where Acute PTSD is identified, the Fund shall extend the treatment to six months provided there is justifiable proof of need.

(h) Individuals who at the end of six months do not meet the full criteria for the diagnosis of PTSD, must have a differential diagnosis made and a Final Medical Report duly completed and sent to the Fund to finalise the claim.

Immediate Psychological Interventions for PTSD

(a) The treating general practitioner and treating psychiatrist must ensure that employees needing psychological support are identified early and are timeously referred to psychologist for assistance.

(b) The initial consultation with the psychologist will be automatically covered by the Fund, and the psychologist's treatment plan will then be pre-authorised based on a detailed assessment report prior to therapy being provided.

(c) The psychologist and medical practitioner must submit progress medical report to the Fund at the end of the authorised period.

Drug Treatment

(a) Healthcare practitioners must ensure that the treatment provided to patients is enlisted to the recommended drugs for PTSD as recommended by the South African Society of Psychiatrists and the South African Society of Psychologists.

(b) PTSD sufferers must be given sufficient information about the nature of these treatments to make an informed choice and patient preference should be an important determinant of the choice among the following and effective treatments:

(i) drug treatments for PTSD and change of treatment will only be authorised when prescribed by the treating psychiatrist;

(ii) adjunctive treatment will be approved where there is significant co-morbid condition, depression or hyperarousal that significantly impacts on the patient's ability to benefit from the recommended treatment;

(iii) this short-term treatment may be initiated by the general practitioner after thoroughly considering all drug interaction implications and where the benefit outweighs the risk;

(iv) subsequent drug modifications should be discussed with the relevant specialist in conjunction with the psychiatrist;

(v) a proof of compliance is required to support a claim of non-response to recommended lines of treatment where clinicians may recommend an item which is off code;

(vi) when an employee treated for PTSD has not responded to a drug treatment regime, and the treating psychiatrist considers adding further drugs after the maximum allowable dosages have been reached

on the initial recommended drugs, or the recommended lines of treatments have been exhausted, the Fund may at its own discretion, subject such further treatment plan to a peer review mechanism or refer an employee for further medical examination in terms of section 42 of the Act;

(vii) when an adult sufferer with PTSD has responded to drug treatment, it should be continued for at least 12 – 24 months before gradual withdrawal as recommended by SASOP;

(viii) the treating doctor, preferably the general practitioner must monitor treatment on a monthly basis for the first six months and provide monthly Progress Medical Reports to the Fund in the prescribed manner;

(ix) after the six months period, appropriate monitoring must be done on a lesser frequent basis not exceeding three monthly, where practicable. Six monthly reports from the psychiatrist must be submitted during this period and when maximum medical improvement has been achieved, a Final Medical Report from the treating psychiatrist must be provided;

(x) all PTSD patients requiring treatment beyond twenty-four (24) months shall be treated as chronic PTSD by the Fund. The Fund may at its own discretion, and after due processes, consider enrolling any particular employee with PTSD on its chronic treatment programme; and

(xi) a Final Medical Report from the psychiatrist indicating the need for continuing treatment on a lifetime basis must be provided to the Fund at the end of twenty-four (24) months.

(c) A detailed follow-up plan with appropriate motivation must also be provided at this point by the psychiatrist.

9. General Recommendations on treatment:

(1) All PTSD sufferers who are prescribed antidepressants or any psychotropic medication should be informed at the time that treatment is initiated, of potential side-effects and discontinuation or withdrawal symptoms as appropriate.

(2) For employees who are back at work, these must be communicated to the employer in the prescribed manner taking into account legal and ethical considerations governing the disclosure of confidential medical information.

(3) Where necessary and medically justifiable, employees doing shift work and safety-critical jobs must be accommodated in alternative placements while on such medications.

(4) For the purpose of sub-regulation 10.3, the services of an occupational therapist will be required.

10. Dealing with Comorbidities in PTSD

(1) In cases of high co-morbidity of PTSD with generalized physical and mental health problems, the multidisciplinary and interdisciplinary approach must be used.

(2) The treatment plan must be outlined and be in accordance with national credentialing policies and guidelines.

(3) The treating doctor must identify the comorbidities and the multidisciplinary and interdisciplinary teams and apply for authorisation of such treatment.

(4) Healthcare practitioners must clearly document their rationale for opting for such treatment, satisfy themselves that the potential benefits outweigh the known risks and that an informed consent has been duly obtained.

(5) Where beneficiaries are on other chronic medications, the Fund will only approve treatment for such chronic conditions during the acute phase and only where the dosage and form of such treatment is different from the usual treatment and where non-treatment of such has a negative impact on the treatment outcome of the PTSD.

11. Case Management of PTSD

PTSD case must be managed in accordance with the table below:

Disease Monitoring and Reporting:

Type of Disorder (Evolutionary Stage)	Onset of Symptoms (Months)	Duration of Symptoms (Months)	Frequency of Medical Reports		Timing of Final Medical Report (Months)			
			GP	Psychiatrist	3	6	12	24
Acute Stress Disorder	Immediate	< 3 months	Fortnightly	1 & 3 months				
Acute PTSD	1 – 3 months	1 – 6 months	Monthly	3 and 6				
Classic PTSD	1 – 6 months	6 – 24 months	Monthly	1, then 6 monthly				
Delayed-Onset PTSD	>6 months	6 – 24 months	Monthly	1, then 6 monthly				
Chronic PTSD	1- 6 months	>24 months	Three monthly	1, then 6 monthly				

12. The Responsibilities of the Treating Psychiatrists

The responsibilities of the psychiatrists to whom the employee has been referred by the medical practitioner are:–

(a) to thoroughly assess the employee as referred to him or her in the prescribed manner and make appropriate diagnosis based on the approved evidence-based medical guidelines as guided by the medical scientific community and updated from time to time. The assessment of PTSD sufferers should be conducted by competent medical practitioners and be comprehensive, including physical, psychological and social needs and a risk assessment;

(b) to device a structured treatment and patient management plan taking into account all relevant personal, social, workplace and environmental circumstances, including the monitoring plan. This plan must include clear roles of key personnel and have measurable and realistic targets;

(c) to institute appropriate treatment taking into account relevant legislation governing the prescription and administration of medicines and related substances. Patient preference should be an important determinant of the choice among effective treatments;

(d) PTSD sufferers should be given sufficient information about the nature of these treatments to make an informed choice;

(e) to provide relevant reports on the progress and prognosis of the employee and motivate for the need for continuing treatment, change of treatment or addition of further treatment modalities as appropriate

and this will include the motivation for the employee to be consulted by other specialists and for further objective clinical testing; and

(f) to provide expert evidence in medico-legal platforms including during tribunal and court proceedings concerning disputes related to the diagnosis, treatment and management of PTSD.

13. The Responsibilities of the Psychologists

The responsibilities of the psychologists to whom the employee has been referred by the medical practitioner are to–

(a) thoroughly assess and determine the psychological needs of the patient and devise a structured management plan after appropriate referral from the treating doctor;

(b) identify the need for social support and advocate the meeting of this need;

(c) institute appropriate evidence-based treatments and therapies as guided by the medical scientific community and updated from time to time, after approval is obtained from the Fund;

(d) collaborate with both the general practitioner and the treating psychiatrist to ensure that there is alignment and coordination of care and monitoring of the patient;

(e) identify the need for appropriate information about the range of emotional responses that may develop and provide practical advice on how to access appropriate services for these problems;

(f) offer help or advice to the patient or relevant others on how continuing threats related to the traumatic event may be alleviated or removed;

(g) provide reports to the Fund and treating doctors; and

(h) provide expert evidence in medico-legal platforms including during tribunal and court proceedings concerning disputes related to the diagnosis, treatment and management of PTSD.

14. The role of the Independent Medical Examiner

(1) The Independent Medical Examiner must conduct an examination which consists of a review of medical documentation or records, that shall render as confirmation of relevant medical history and an in-person examination and assessments or objective tests if appropriate.

(2) For the purpose of these regulations, the Fund may refer an employee to any Independent Medical Examiner including but not limited to a Psychiatrist, Occupational Therapist and or a Clinical Psychologist with experience in treating and managing patients with PTSD.

(3) The Independent Medical Examiner is required to use the Clinician Administered PTSD Scale for DSM-V (CAPS 5) to aid him or her in making an objective assessment of the presence and or absence of PTSD, as well as to grade the severity of symptoms thereof if he or she concurs with the diagnosis.

Note: The latest edition of the DSM must always be used.

(4) The scoring of CAPS is given below:

Table 14-10: CAPS - 5 Scoring

CAPS – 5 PTSD Severity	Score
Asymptomatic/ Few Symptoms	0 - 10
Mild PTSD/ Subthreshold	11 - 22
Moderate PTSD / Threshold	23 - 34
Severe PTSD Symptomatology	35 - 46
Extreme PTSD Symptomatology	≥ 47

(5) An employee who claims compensation shall, if and when so required and at the discretion of the Fund, after reasonable notice, submit himself at the time and place mentioned in the notice to an examination by a designated Independent Medical Examiner in accordance with Section 42 of the Act.

(6) The Independent Medical Examiner will have the following roles:

(a) assess and examine the employee with the diagnosis of PTSD and determine if the diagnosis was appropriately made based on chronology, causality, medical probability, evidence-based medicine and current best practice;

(b) determine the current appropriate diagnosis if it differs from the treating doctors and establish causation of disease or mechanism thereof if appropriate, severity of symptoms, restrictions and limitations;

(c) assess the appropriateness of treatment proposed or provided based on current best practice and recommended protocols and guidelines for people with PTSD;

(d) provide treatment recommendations and objective medical findings regarding the person's ability to return to work, and identify any relevant safety considerations;

(e) formulate opinion and prognosis based on factual findings from the assessment and using current best practice and recommended protocols;

(f) provide a duly formulated report with recommendation(s) to the Fund on the best course of action; and

(g) provide expert evidence in medico-legal platforms including during tribunal and court proceedings concerning disputes related to the diagnosis, treatment and management of PTSD.

15. Patient Assessment Guidelines

(1) For the purposes of—

(a) assessing an employee for diagnoses, the medical practitioners must use the latest edition of DSM;

(b) assessing the need for an extended treatment, medical practitioners must use the latest edition of The Management of PTSD in Adults and Children in Primary and Secondary Care – 2005 and Treatment Guidelines for Psychiatric Disorders – Volume 19 (3) of 2013;

(c) assessing impairment and disablement for PTSD the Fund will use the latest edition of the "Guides to the Evaluation of Permanent Impairment" compiled by the American Medical Association

(d) advising all healthcare professionals to use the material mentioned above in the diagnosis, treatment, management and assessment of impairment and disablement of employees suffering from occupational PTSD; and

(e) indicating that the three scales are used by which impairment due to PTSD is rated. Each scale should be measured and the impairment score calculated and the final impairment shall be the median or middle value of the 3 scores.

16. Brief Psychiatric Rating Scale

(1) The Brief Psychiatric Rating Scale measures major psychotic and non-psychotic symptoms in a person.

(2) The BPRS form consists of 24 symptom constructs, each to be rated on a 7-point scale of severity ranging from "Not Present" to "Extremely Severe".

(3) Medical practitioners must circle the number headed by the term that best describes the employee's present condition, rated on the employee's self-report for items 1-6, 8-11 and 14 and on the basis of observed behavior and speech for items 7, 12-13 and 15-24.

(4) They must accordingly add the total of the 24 BPRS symptom construct scores and read the BPRS impairment score from the TABLE 15 – 11.

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Table 15-10: Brief Psychiatric Rating Scale (BPRS)

SYMPTOM CONSTRUCT	SCORING						
1 Somatic concern	1	2	3	4	5	6	7
2 Anxiety	1	2	3	4	5	6	7
3 Depression	1	2	3	4	5	6	7
4 Suicidality	1	2	3	4	5	6	7
5 Guilt	1	2	3	4	5	6	7
6 Hostility	1	2	3	4	5	6	7
7 Elevated mood	1	2	3	4	5	6	7
8 Grandiosity	1	2	3	4	5	6	7
9 Suspiciousness	1	2	3	4	5	6	7
10 Hallucinations	1	2	3	4	5	6	7
11 Unusual thought content	1	2	3	4	5	6	7
12 Bizarre behaviour	1	2	3	4	5	6	7
13 Self-neglect	1	2	3	4	5	6	7
14 Disorientation	1	2	3	4	5	6	7
15 Conceptual disorganisation	1	2	3	4	5	6	7
16 Blunted affect	1	2	3	4	5	6	7
17 Emotional withdrawal	1	2	3	4	5	6	7
18 Motor retardation	1	2	3	4	5	6	7
19 Tension	1	2	3	4	5	6	7
20 Uncooperativeness	1	2	3	4	5	6	7
21 Excitement	1	2	3	4	5	6	7
22 Distractibility	1	2	3	4	5	6	7
23 Motor hyperactivity	1	2	3	4	5	6	7
24 Mannerisms and posturing	1	2	3	4	5	6	7

1 = Not Present 2 = Very Mild 3 = Mild 4 = Moderate 5 = Moderately Severe 6 = Severe 7 = Extremely Severe

Table 15-11: IMPAIRMENT SCORE OF BRIEF PSYCHIATRIC RATING SCALE (BPRS)

BPRS ADDED SCORE	BPRS IMPAIRMENT SCORE
24 – 30	0%
31 - 35	5%
36 - 40	10%
42 - 45	15%
46 - 50	20%
51 - 60	30%
61 - 70	40%
71 - 168	50%

17. Global Impairment of Functioning Scale

The Global Impairment of Functioning Scale is a 100 point single item rating scale for evaluating overall symptoms, occupational functioning and social functioning. Determine the GAF impairment score based on Table 15-20.

GAF	DESCRIPTION	GAF IMPAIRMENT SCORE
91 - 100	No symptoms; superior functioning in a wide range of activities, life's problems never seem to get out of hand, is sought out by others because of his or her many positive qualities	0%
81 -90	Absent or minimal symptoms(for example, mild anxiety before an exam); good functioning in all areas, interested and involved in a wide range of activities, socially effective, generally satisfied with life, no more than everyday problems or concerns (for example, an occasional argument with family members)	0%
71 - 80	Is symptoms are present, they are transient and expectable reactions to psycho-social stressors (for example,difficulty concentrating after family argument); no more than slight impairment in social, occupational or school functioning (for example,temporarily falling behind in school work)	0%
61 -70	Some mild symptoms (for example, depressed mood and mild insomnia) or some difficulty in social, occupational or school functioning (for example, occasional truancy, or theft within the household) but generally functioning pretty well, has some meaningful interpersonal relationships	5%
51 - 60	Moderate symptoms (for example, flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational or school functioning (for example, few friends, conflicts with co-workers)	10%
41 - 50	Serious symptoms (for example, suicidal ideation, severe obsessional rituals frequent shoplifting) or any serious impairment in social, occupational or school functioning (for example, no friends, unable to keep a job)	15%
31 - 40	Some impairment in reality testing or communication (for example, speech is at times illogical, obscure or irrelevant) or major impairment in several areas, such as work or school, family relations, judgement, thinking or mood, (for example, depressed adult avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home and is failing at school)	20%
21 - 30	Behaviour is considerably influenced by delusions or hallucinations or serious impairment in communication or judgement (for example, sometimes incoherent, acts grossly inappropriately, suicidal preoccupation) or inability to function in almost all areas (for example, , stays in bed all day; no job, home or friends)	30%
11-20	Some danger of hurting self or others (for example, suicide attempts without clear expectation of death, frequently violent, manic excitement) or occasionally fails to maintain minimal personal hygiene (for example, smears faeces) or gross impairment in communication (for example, largely	40%

	incoherent or mute)	
1-10	Persistent danger of hurting self or others (for example, recurring violence) or persistent inability to maintain personal hygiene or serious suicidal act with clear expectation of death	50%

18. Psychiatric Impairment Rating Scale

The behavioral consequences of psychiatric disorders are assessed on 6 scales, each of which evaluates an area of functional impairment namely: Self-care and Personal Hygiene ,TABLE 15-30, Social and Recreational Activities, TABLE 15-31, Travel, TABLE 15-32, Interpersonal Relationships, TABLE 15-33, Concentration, Persistence and Pace, TABLE 15-34, and Employability TABLE 15-35, therefore:

(a) medical practitioners must allocate a score from 1 to 5 in each of the 6 impairment domains based on objective evidence;

(b) they must then arrange the 6 scores from the lowest to the highest;

(c) select the middle 2 scores and add the 2 together; and finally

(d) determine the Psychiatric Impairment Rating Scale impairment score from TABLE 15-36.

Table 15-30: SELF-CARE, PERSONAL HYGIENE AND ACTIVITIES OF DAILY LIVING

	ROLE FUNCTIONING, SOCIAL AND RECREATIONAL ACTIVITIES
1	No deficit or minor deficit attributable to the normal variation in the general population. Regularly participates in social activities that are age, sex, and culturally appropriate. May belong to clubs or associations and is actively involved with these
2	Mild impairment. Occasionally goes out to such events without needing a support person but does not become actively involved(for example, dancing, cheering favourite team)

3	Moderate impairment. Rarely goes out to such events, and mostly when prompted by family or close friend. Will not go out without a support person. Not actively involved, remains quiet and withdrawn
4	Severe impairment. Never leaves place of residence. Tolerates the company of family member or close friend but shall go to a different room or place when others come to visit family or flat / room mate
5	Totally impaired. Cannot tolerate living with anybody, extremely uncomfortable when visited by close family member

Table 15-32: TRAVEL

1	**No deficit or minor deficit attributable to the normal variation in the general population. Can travel to new environments without supervision**
2	Mild impairment. Can travel without support person but only in a familiar area such as local shops or a neighbour
3	Moderate impairment. Cannot travel away from own residence without support person. Problems may be due to excessive anxiety or cognitive impairment
4	Severe impairment. Finds it extremely uncomfortable to leave own residence even with trusted person
5	Totally impaired. May require 2 or more persons to supervise when travelling

Table 15-33: INTERPERSONAL RELATIONSHIPS

1	No deficit or minor deficit attributable to the normal variation in the general population. No difficulty in forming and sustaining relationships for example, partner, close friendships lasting years)
2	Mild impairment. Existing relationships strained. Tension and arguments with partner or close family member, loss of some friendships
3	Moderate impairment. Previously established relationships severely strained, evidenced by periods of separation or domestic violence. Spouse, relatives or community services looking after children
4	Severe impairment. Unable to form or sustain long term relationships. Pre-existing relationships ended (for example, lost partner, close friends). Unable to care for dependents (for example, own children, elderly parent)
5	Totally impaired. Unable to function in society. Living away from populated areas, actively avoiding social contact

Table 15-34: CONCENTRATION, PERSISTANCE AND PACE

1	No deficit, or minor deficit attributable to the normal variation in the general population
2	Mild impairment. Can undertake a basic retraining course or a standard course of education or training at a slower pace. Can focus on intellectually demanding tasks for up to 30 minutes, then feels fatigued or develops headache

3	Moderate impairment. Unable to read more than newspaper articles. Finds it difficult to follow complex instructions
4	Severe impairment. Can read only a few lines before losing concentration. Difficulties in following simple instructions. Concentration deficits obvious even during brief conversation. Unable to live alone or needs regular assistance from relatives or community services
5	Totally impaired. Needs constant supervision and assistance in an institutional setting

Table 15-35: RESILIENCE AND EMPLOYABILITY

1	No deficit, or minor deficit attributable to the normal variation in the general population. Can work full time. Duties and performance are consistent with the injured employee's education and training. Able to cope with the normal demands of the job
2	Mild impairment. Can work full time but with modifications, or can work in the same position a reduced number of hours per week
3	Moderate impairment. Cannot work at all in same position. May be able to work in a less stressful occupation
4	Severe impairment. Cannot sustain work over time in any position
5	Totally impaired. Cannot work at all

Table 15-36: IMPAIRMENT SCORE OF PSYCHIATRIC IMPAIRMENT RATING SCALE (PIRS)

SUM OF PIRS MIDDLE SCORES	PIRS IMPAIRMENT SCORE
2	0%
3	5%
4	10%
5	15%
6	20%
7	30%
8	40%
9-10	50%

The final score will be determined by the Fund's adjudication panel after thoroughly examining the reports provided by the practitioners and having satisfied themselves of their objectivity and fairness.

19. Impairment

(1) The calculation of impairment at the time of diagnosis will solely be for the determination of the severity of the disease, the modality and extent of treatment required, and for providing tentative prognostic opinion.

(2) The Fund shall use such rating to monitor the impact of treatment and to evaluate the effectiveness thereof in collaboration with medical service providers.

(3) The final impairment calculation will only be determined after the employee has reached Maximum Medical Improvement

(4) The Compensation Fund's adjudicating medical panel shall determine if MMI has been reached based on the strength of the available medical reports by the treating psychiatrist and or other independent medical reports.

(5) The Final Medical Report will be required once the panel has adjudicated and concluded that the claimant has reached MMI, for purposes of deciding on impairment.

(6) The Final Medical Report must be based on scientifically-validated healing timeframes as determined by the medical scientific community as updated from time to time. Clinicians shall provide a Final Medical Report when so required by the Fund without any prejudice.

(7) The impairment shall be evaluated by the Fund using the latest edition of the "Guides to the Evaluation of Permanent Impairment", compiled

(8) Medical service providers must refrain from giving unsolicited opinion on impairment rating or permanent disablement

(9) The Fund carries the sole responsibility for determining impairment level and permanent disablement due to PTSD.

20. Compensation Benefits

The guidelines for benefits payable in terms of the Act are as follows:

(a) payment for temporary total or partial disablement shall be made for as long as such disablement continues, but not for a period exceeding 24 months and from the date of the accident or date of diagnosis and monthly progress reports must be submitted to the office of the Compensation Commissioner;

(b) this occurs when an employee's condition is such that he or she cannot perform his or her usual duties but is still capable of working at some job during the period of recovery and employers and medical service providers must collaborate to institute accommodation of the employee in modified duties as a critical element of the treatment plan and return-to-work strategy for such employees;

(c) the Compensation Fund must be satisfied that all measures have been reasonably considered before declaring an employee totally unfit to work on a temporary basis;

(d) temporary total disablement occurs when an employee is totally

expected to recover with treatment within a foreseeable period and Service providers who are advising employers on the employee's extent of unfitness and the length of time required for full recovery, must take into cognisance that work itself is also curative in nature, so as to guard against inadvertently disadvantaging employees with PTSD;

(e) periodic payments shall be made for as long as the temporary total disablement is deemed reasonable and shall continue for as long as evidence of continuing disablement is provided and this may not exceed twenty-four (24) months;

(f) the Fund may however at any point during this period and at its own discretion declare any such employee permanently impaired and where such a decision is made by the Fund, the medical service providers providing treatment and other services to the employee will then be required to furnish the Final Medical Report(s) as at that point in time;

(g) payment of permanent disablement shall be made, where applicable, when a Final Medical Report and or the report from the adjudication panel is received and the Final Medical Report must be submitted when an employee reaches the stage of MMI, whether or not he or she is on treatment;

(h) the Fund shall at its own discretion and where deemed necessary solicit such a report which shall be provided without reservation or prejudice.

(i) if total impairment score is zero to three, that is, permanent disablement less than or equal to 30%, permanent disablement shall be determined and a lump sum shall be paid in terms of the Act; and

(j) if total impairment score is more than three , for example, permanent disablement is higher than 30%, pension shall be paid in terms of the Act.

21. Medical Costs

(1) Medical costs shall be provided for a period of not more than 24 months from the date of accident or further 12 months, if in the opinion of the Director-General, further medical costs shall educe the extent of the disablement that an employee suffers from.

(2) Medical costs covers diagnosis of PTSD by a psychiatrist and any necessary treatment provided by any general practitioner or approved mental health provider, as well as hospitalisation and chronic medication when motivated for by the psychiatrist.

(3) The Compensation Commissioner must decide on the need for, the nature and sufficiency of medical costs to be provided, inclusive of chronic medication, if applicable.

(4) No treatment shall be automatically accepted by the Fund without prior authorisation, except in emergencies. In such cases, service providers must notify the Fund in the prescribed manner within seventy-two (72)

(5) All elective admissions and investigations shall require pre-authorisation by the Fund.

22. Reporting

Any consultation in respect of treatment for PTSD must be reported to the Fund in the prescribed manner as and when it happens.

No payments in lieu of any consultation or treatment shall be provided by the Fund without medical reports from practitioners. The following documentation must be submitted to the Compensation Commissioner or the employer individually liable or the licensee concerned:

(a) (W.Cl.2) Employer's Report of an Accident / Occupational Disease;

(b) (W.Cl.3) Notice of an Accident / Occupational Disease and Claim for Compensation;

(c) An W.CL.305 affidavit by the employee if an employer cannot be traced or the employer fails to timeously submit Employer's report of an Occupational Disease, W.CL.1.

(d) (W.Cl.4) First Medical Report in respect of an Accident or Occupational Disease, W.Cl.303 First Psychiatric Report

(e) (W.Cl.5) Progress Medical Reports in respect of an Accident / Occupational Disease or Progress Psychiatric Reports

(f) (W.Cl.5) Final Medical Report in respect of an Accident / Occupational Disease / Final Psychiatric Report

(h) detailed psychiatric and or psychological reports within the scope of practice of the therapist and or an occupational therapy report in the prescribed format

(i) any other relevant reports pertaining to the accident, diagnosis and treatment, where applicable and at the discretion of the Compensation Fund.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

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Dear Mr T Lamati

REGULATIONS ON POST-TRAUMATIC STRESS DISORDER FOR THE COMPENSATION FUND MADE BY THE MINISTER UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO. 130 OF 1993): YOUR UNNUMBERED MAIL DATED: 14 OCTOBER 2019

INTRODUCTION

1. We have been requested by the Department of Labour ("the Department"") to scrutinise, and provide it with a legal opinion on, the draft post-traumatic stress disorder regulations ("the Regulations") to be made in terms of section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) ("the Act").

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2. In scrutinising the Regulations we have considered the following legal instruments:

(a) The Constitution of the Republic of South Africa, 1996 ("the Constitution");

(b) the Act; and

(c) the case law.

LEGISLATION

3. Section 65 of the Act deals with compensation for occupational diseases and state as follows:

> ***"65. Compensation for occupational diseases.***–*(1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General–*
>
> *(a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment; or*
>
> *(b) that the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of and in the course of his or her employment.*

4. In terms of section 97(1) of the Act the Minister is empowered to make regulations in respect of the matters tabulated in paragraphs (*a*) to (*h*). Section 97 reads as follows:

> ***"97. Regulations***–(1) *The Minister may make regulations, after consultation with the Board, regarding–*

(a) the place of meeting and the procedure to be followed at any meeting of the Director-General and assessors or at any proceedings in terms of this Act with which the assessors are concerned, or at any investigation in terms of this Act;

(b) subject to section 76, the fees payable to medical practitioners or chiropractors in respect of services rendered in terms of this Act;

(c) the procedure to be followed in paying assessments and fines to the Director-General;

(d) the persons to whom, the places where and the manner in which payment of assessments in terms of this Act shall be made;

(e) the determination of the amount and the conditions and manner of payment of benefits to assessors or classes of assessors;

(f) the disposal of moneys payable in terms of this Act to any person other than the Director-General and not claimed within the prescribed period by the person entitled thereto;

(g) any matter which shall or may be prescribed by regulation in terms of this Act;

(h) any other matter, whether or not connected with any matter mentioned in paragraphs (a) to (g), which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.

(2) Different regulations may be made under subsection (1) in respect of different classes of employers and employees and of different areas, and the Minister may, after consultation with the Board, in respect thereof differentiate in such manner as he or she may deem expedient.

(3) Any person who contravenes or fails to comply with any regulation made under subsection (1) shall be guilty of an offence and liable on conviction to a fine, or imprisonment for a period not exceeding six months.

DISCUSSION

Minister's powers to make Regulations

5. It is convenient at this stage to deal with the Minister's power to make the regulations. The Minister's power to make the regulations is a public power that must be exercised subject to the Constitution and the law. In exercising such public power, the Minister is thus required to comply with the principle of legality. This means that the Minister can only exercise the power to make the regulations within the parameters of the Act and the Constitution.

5.1 In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[1], the Constitutional Court stated the following in paragraph 56 of the judgment regarding the principle of legality:

> *"It is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate when lawful. The rule of law - to the extent at least that it expresses the principle of legality - is generally understood to be a fundamental principle of constitutional law."*(footnote omitted)

5.2 The Constitutional Court in *Fedsure* referred to above, further states the following in paragraph 58 of that judgment:

---

[1] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1998 (12) BCLR 1458 (CC) ("Fedsure")*

"it seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense then, the principle of legality is implied within the terms of the interim constitution." (our underlining)

5.3 The Act authorises the enactment of delegated legislation, namely, the regulations. The power to make the regulations is vested in the Minister in terms of section 97 of the Act. Section 97 (1) of the Act sets out various matters the Minister is authorised to make regulations on. In terms of sections 97 (1) of the Act, the Minister may make regulations, after consultation with the Board regarding to various matters listed in that section.

5.4 From section 97 (1) of the Act it is clear that the Minister does not have the express authority to make regulations dealing with post-traumatic stress disorder. Therefore, in order to make the draft Regulations the Minister must be so authorised by paragraph *(g)* or *(h)* of subsection (1) of section 97 of the Act. We would in this regard like to expand slightly on this provision.

Minister's power to make the draft Regulations in terms of section 97(1)(g) of the Act

5.5 The Minister is authorised to make Regulations in terms of section 97 (1) *(g)* of the Act if another section in the Act authorises him to make regulations relating to the subject matter dealt with in that section. There are many sections in the Act which, when read with section 97 (1) *(g)* of the Act, authorise the Minister to make regulations. However, there are none that authorise him or her to make regulations regarding occupational diseases. Therefore, we are of the opinion that the Minster

cannot make the draft Regulations in terms of section 97 (1) *(g)* of the Act. If he does so, the Minister would be acting *ultra vires*.

Minister's power to make the draft Regulations in terms of section 97(1)*(h)* of the Act

5.6 In view of our conclusion in the preceding paragraph, it must be determined whether the Minister is authorised to make Regulations in terms of section 97(1)(h) of the Act. This section makes it clear that the "objects and purpose" of the Act must be determined before the question whether the Minister has the power in terms of section 97(1)*(h)* of the Act to make the draft Regulations can be addressed. In **Road Accident Fund v Makwelane** 2005 (4) SA 51 (SCA), (hereinafter after referred to as "the **Makwetlane** case") the Court discussed the power of the Minster of Transport to make regulations to "achieve or promote the objects" of the Road Accident Fund Act, 1996 (Act No. 56 of 1996) and remarked as follows at pp. 58-59:

> "Section 26 empowers the Minister to make regulations in order to achieve or promote the objects of the Act. It does not confer authority on him to traverse terrain outside that limited scope and ambit. All regulations promulgated by the Minister must thus be reasonably necessary to achieve those objects and goals. It is indeed so that the possibility of fraud is greater in cases where the identity of the driver or owner of the vehicle in question has been established, as it would usually be difficult for the RAF to secure evidence to dispute a claim (see *Mbatha* at 718H). Stricter requirements would thus be justified in unidentified vehicle cases. It follows that regulations designed to eliminate fraud and facilitate proof of legitimate claims, falling as it does

> within the Minister's power to regulate, would be permissible. No other reason has been suggested for such a requirement and I can think of none. That legitimate end, may not, however, be achieved by means that sweep too broadly. ...
>
> The Constitution places significant restraints upon the exercise of public power. It is a requirement of the rule of law that the exercise of public power should not be arbitrary. It follows that the exercise by the Minister of the regulatory power conferred upon him had to be rationally related to the purpose for which the power was granted – rationally being the minimum threshold requirement. (See *Pharmaceutical Manufactures* paras [85] and [86].) Conduct that fails to pass that threshold requirement would fall below the standards set by our Constitution and would therefore be unlawful."

5.7 We are of the opinion that, in view of the remarks in the **Makwetlane** case, quoted above, the following deductions can be made regarding the Minister's power to make regulations in terms of section 97 (1) *(h)* of the Act:

(a) Section 97 (1) *(h)* of the Act limits the power of the Minister to making regulations that relate to the achievement of the objects and purposes of the Act.

(b) The regulations made under section 97(1)*(h)* of the Act must be rationally connected to the objects and purposes of the Act.

5.8 This purpose is reiterated in section 97 (1) (*h*), where it is provided that 'The Minister may make regulations, after consultation with the Board, regarding any

other matter, whether or not connected with any matter mentioned in paragraphs (*a*) to (*g*), which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.' (Our emphasis)

5.9 As regards to section 97 (1) (*h*), this section is also phrased in such broad terms that it appears to be all encompassing. It is an omnibus provision. While section 97 (1) (*g*) undoubtedly covers the Minister's power to make the regulations, we are of the view that section 97 (1) (*h*) is the most apt provision in so far as the acts stipulated in regulation 3 are deemed to be occupational diseases contracted by employees.

5.10 Considering the subject matter of the regulations, we are of the view that sections 97 (1) (*h*) read with 65 (1) of the Act are the appropriate provisions in so far as the Minister's power to make the regulations is concerned.

5.11. We now turn to deal with the regulations as set out in the Schedule. We have suggested tracked changes with regards to the drafting style and form of the Regulations. This is done in order to align the Regulations with common drafting principles.

***Ad* Regulation 1**

6. Regulations 1 and 2 provide for the definition of some of the words used in the Regulations and we have suggested the removal of purpose of Regulations to Regulation 2 for the Department's consideration.

***Ad* Regulation 3**

7. Regulation 3 provides for the diagnosis of PTSD and requires that clinical diagnosis of medical conditions, including Post-Traumatic Stress Disorder, must be based on approved evidence-based medical guidelines as guided by the updated

medical scientific community as updated from time to time and be categorised in line with applicable criteria.

***Ad* Regulation 4**

8. Regulation 4 provides for the Diagnostic & Statistical Manual and diagnostic criteria that must be used and met in all cases of suspected PTSD. We have suggested that the Department should clarify the Regulation for legal certainty.

***Ad* Regulation 5**

9. Regulation 5 relates to PTSD as an occupational disease arising out of and in the course of an employee's employment. The Regulation further states that, a disease would have arisen out of and in the course of employment if it has a broad causal connection to employment and that the employee must have contracted the disease while performing duties that he or she is contractually obliged to perform.

***Ad* Regulation 6**

10. Regulation 6 provides for the occupational risk of PTSD, whether its development is dependent on people's subjective perception of the traumatic event as well as on the object facts, and that the effect of PTSD can extend to witnesses and perpetrators.

***Ad* Regulation 7**

11. Regulation 7 provides for the evolutionary stages of PTSD's, focusing on Acute Stress Disorder, Acute PTSD, Classic PTSD, Delayed-onset PTSD and Persistent or Chronic PTSD.

***Ad* Regulation 8**

12. Regulation 8 provides for differential diagnosis where the Compensation Fund may undertake to provide treatment for the aggravation or pre-existing Post-

management plan taking into account all relevant personal, social, workplace and environmental circumstances including the monitoring plan.

***Ad* Regulation 14**

18. Regulation 14 relates to the responsibilities of the Psychologists that they must thoroughly assess and determine the psychological needs of the patient and devise a structured management plan after an appropriate referral from the treating doctor.

***Ad* Regulation 15**

19. Regulation 15 deals with the role of the independent medical examiner, which role involves conducting an examination consisting of a review of medical documentation or records that shall render as confirmation of relevant medical history and in-person examination and assessments or objective tests if appropriate.

***Ad* Regulation 16**

20. Regulation 16 deals with patient assessment guidelines, which provides that when an employee is assessed for diagnosis, the medical practitioners must use the latest edition of the Diagnostic Statistical Manual.

***Ad* Regulation 17**

21. Regulation 17 relates to brief psychiatric rating scale, which is a tool designed to measure major psychotic and non-psychotic symptoms in a person. The brief psychiatric scale consists of 24 symptom constructs, each to be rated on a 7-point scale of severity ranging from "Not Present" to "Extremely Severe".

***Ad* Regulation 23**

27. Regulation 23 provides for the reporting processes, noting that, any consultation in respect of treatment for PTSD must be reported to the Compensation Fund in the prescribed manner as and when it happens.

***Ad* Regulation 24**

28. This is a new regulation for the Department to consider. Regulation 24 provides for the short title of the Regulations and that after having discussed with the Department, these Regulations shall be sent to the relevant stakeholders for commentary and later incorporation of inputs into the Regulations. Therefore, we have suggested to the Department that upon completion, to resend the Regulations to our office for further scrutiny.

CONCLUSION

29. In light of the exposition above, we are of the view that the Minister has the requisite authority to make the regulations under consideration. Subject to our suggested amendments made directly on the text of the regulations, we are satisfied that the regulations are in order and conform to the form ad style of legislative drafting.

30. We attach hereto a soft copy of the Regulations with track changes incorporating our suggested amendments for your consideration.

Yours sincerely



FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
Z. NTSHWANTI / X. MDLUDLU / S. MASAPU / A. JOHAAR

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO 130 OF 1993)

REGULATIONS ON OCCUPATIONAL ASTHMA FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

The Minister of Employment and Labour, after consultation with the Compensation Board, has made the regulations under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No 130 of 1993) in Schedule A. These regulations are published for public comments only.

Interested and affected parties are hereby invited to submit written representations on the proposed Regulations. The aforesaid representations must be marked for the attention of **Mr TH Maphologela** and sent by registered post or emailed or hand delivered within 60 days of publication of this notice to the following addresses:

Compensation Fund
167 Thabo Sehume Street
Pretoria
0157

OR

PO Box 955
Pretoria
0001

Email addresses: Kimbly.Makgoba@labour.gov.za or Harry.Maphologela@labour.gov.za

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Copies of the Regulations are herewith attached.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

SCHEDULE A

REGULATIONS ON OCCUPATIONAL ASTHMA FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

ARRANGEMENT OF REGULATIONS

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1. Definitions

In these Regulations, a word or expression to which a meaning has been assigned in the Act or these Regulations shall have such meaning and, unless the context otherwise indicates –

"Bronchodilators" means drugs that cause widening of the bronchi, for example any of those taken by inhalation for the alleviation of asthma;

"Bronchial challenge test" means a lung function test for asthma which is more commonly used in adults than in children. It might be performed if symptoms and screening spirometry do not clearly or convincingly establish a diagnosis of asthma. During this test, you inhale increasing amounts of methacholine aerosol mist before and after spirometry. The methacholine test is considered positive, meaning asthma is present, if the lung function drops by at least 20%. A bronchodilator is always given at the end of the test to reverse the effects of the methacholine;

"FEV1" means forced expiratory volume in one second, the volume of air exhaled in the first second under force after a maximal inhalation. Normal values (80%-120%);

"FVC" means forced vital capacity: total volume of air that can be exhaled during a maximal forced effort;

"FEV1/FVC ratio" means the percentage of the FVC expired in one second;

"IgE" means an immunoglobulin E (IgE) test which measures the level of IgE, a type of antibody;

"Methacholine" means an agent that, when inhaled, causes the airways to spasm (contract involuntarily) and narrow if asthma is present;

"Occupational Asthma" means a heterogeneous respiratory disease caused by an exposure in the workplace that is usually characterized by chronic airway inflammation. It is defined by a history of respiratory symptoms (e.g. wheeze, shortness of breath, chest tightness, cough) that

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vary over time and in intensity, accompanied by variable expiratory airflow limitation;

"PEFR" means the peak expiratory flow (PEF), also called peak expiratory flow rate (PEFR), and is a person's maximum speed of expiration, as measured with a peak flow meter, a small, hand-held device used to monitor a person's ability to breathe out air;

"Regulations" means the Regulations on Occupational Asthma for the Compensation Fund made under the Compensation for Occupational Injuries and Diseases Act, 1993;

"Skin prick test" means a method for medical diagnosis of allergies that attempts to provoke a small, controlled, allergic response;

"Workplace exposure" means exposure or likely exposure to a hazardous substance whilst at work.

2. Diagnosis

(1) The diagnosis of Occupational Asthma shall be made by a medical practitioner based on the following:

(a) a lung function tests;

(b) occupational exposure to a known cause of asthma; and

(c) a chronological or causal relationship between asthma and the working environment.

Note: If possible, the evidence for the diagnosis of asthma should be documented before commencing treatment.

(2) The criteria for a diagnosis of Occupational Asthma require all 5 factors listed below:

(a) a characteristic history and physical examinations that suggests asthma.

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(b) physiological evidence of variable airflow limitation. This includes one or more of the followings:

(i) Significant reversibility of FEV_1 post-bronchodilator (>12% and >200ml)

(ii) excessive variability in twice-daily PEF (>10%) over 2 weeks. Daily PEF variability can be calculated as [(day's highest PEF – day's lowest PEF)/ mean of day's highest and day's lowest PEF]. This variability is summed and averaged over 2 weeks.

(iii) significant increase in FEV_1 (>12% and >200ml) after 4 weeks of oral steroid anti-inflammatory treatment.

(iv) positive non-specific bronchial hyper responsiveness (methacholine or histamine challenge test)

(c) exclusion of other pulmonary disorders that may explain the symptoms or simulate asthma such as vocal cord dysfunction, hyperventilation syndrome, multiple chemical sensitivity syndrome or COPD.

(d) an occupational exposure preceding the onset of asthmatic symptoms.

(e) an exposure and or physiological evidence of the relationship between asthma and the workplace environment (Diagnosis of Occupational Asthma requires (a) and preferably one or more of (b)-(e):

(i) work-place exposure to an irritant agent present as a gas, smoke, fume, vapour or dust. The exposure could be a single acute high level exposure causing acute asthma symptoms within 24 hours, or chronic with low level exposure causing late onset asthma symptoms.

(ii) an association between symptoms of asthma and work exposure

(iii) significant work-related variability (≥20%) in serial PEF

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(vi) work-related changes in serial testing of non-specific bronchial hyper responsiveness (e.g. meth choline or histamine challenge test).

(v) positive specific inhalation bronchial challenge test in the laboratory or workplace test.

(3) Medical officers employed by the Compensation Fund shall determine whether the diagnosis of Occupational Asthma was made according to acceptable medical standards.

3. Impairment

(1) Assessment of permanent impairment shall be determined one year (but no later than two years) after diagnosis and removal from the exposure or exposure has been reduced, and after maximum medical improvement has been achieved.

(2) The degree of impairment will be evaluated based on lung function tests and the history of medication prescribed to control asthma.

(3) Lung function tests must be submitted to enable the Medical Officers to consider acceptability of the quality of these tests.

(4) A test carried out after the administration of a Bronchodilator must be included.

(5) The impairment class will be determined by the two parameters (post bronchodilator FEV1 and medication requirements), each contributing to the compilation of a class, which determines the permanent disablement of an employee.

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Table 1: Parameter 1: Postbronchodilator FEV1	
class	FEV1 % Predicted
0	≥80
1	70 – 79
2	60 – 69
3	50 – 59
4	< 50

* FEV_1 % predicted = measured FEV_1 divided by reference FEV_1 x 100

Table 2: Parameter 2: Minimum Medication Prescribed	
class	Medication
0	No medication.
1	Occasional bronchodilator, not daily. **OR** Occasional or daily short acting bronchodilators + daily low-dose inhaled steroid (≤ 400 micrograms Budesonide or equivalent*).
2	Occasional or daily short acting bronchodilators + daily low dose inhaled steroid (≤400 micrograms Budesonide or equivalent) in addition to any one of the following: – Daily long acting bronchodilator, or – Leukotriene modifier, or – Sustained-release theophylline, or – Occasional (1-3/year) course oral steroid. **OR** Occasional or daily short acting bronchodilators + daily medium

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	dose inhaled steroid (400-800 micrograms of Budesonide or equivalent).
3	Daily short acting bronchodilator +daily medium dose inhaled steroid (400-800 micrograms of Budesonide or equivalent) in addition to any one of the following: – Daily long acting bronchodilator, or – Leukotriene modifiers, or – Sustained-release theophylline, or – Occasional (1-3/year) course oral steroid
4	Daily short acting bronchodilator + daily medium dose inhaled steroid (400-800 micrograms of Budesonide or equivalent) in addition to any one of the following: – Daily long acting muscarinic antagonist (5 micrograms of Tiotropium or equivalent), or – Frequent (>3/year) course oral steroid in addition to any other asthma medication.

* 200 ug Budesonide is equivalent to 250 ug Beclomethasone dipropionate, 100 ug Fluticasone propionate and 80 ug Ciclesonide.

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Criteria for Rating permanent impairment due to asthma

Class	CLASS 0	CLASS 1	CLASS 2	CLASS 3	CLASS 4
Whole person impairment rating (%)	0	2%-10%	11%-23%	24%-40%	45%-65%
Severity Grade (%)		2 4 6 8 10 (A B C D E) (minimal)	11 14 17 20 23 (A B C D E) (MILD)	24 28 32 36 40 (A B C D E) (Moderate)	45 50 55 60 65 (A B C D E) (Severe)
Clinical parameters (minimum medication need, frequency of attacks etc.)	No medication required	Occasional bronchodilator, not daily. OR Occasional or daily short acting bronchodilators + daily low-dose inhaled steroid (≤ 400 micrograms Budesonide or equivalent*).	Occasional or daily short acting bronchodilators + daily low dose inhaled steroid (≤400 micrograms Budesonide or equivalent) in addition to any one of the following: – Daily long acting bronchodilator, or – Leukotriene modifier, or – Sustained-release theophylline, or – Occasional (1-3/year) course oral steroid. OR Occasional or daily short acting bronchodilators + daily medium dose inhaled steroid (400-800 micrograms of Budesonide or equivalent).	Daily short acting bronchodilator +daily medium dose inhaled steroid (400-800 micrograms of Budesonide or equivalent) in addition to any one of the following: – Daily long acting bronchodilator, or – Leukotriene modifiers, or – Sustained-release theophylline, or – Occasional (1-3/year) course oral steroid	Asthma not controlled by treatment: Daily short acting bronchodilator + daily medium dose inhaled steroid (400-800 micrograms of Budesonide or equivalent) in addition to any one of the following: – Daily long acting muscarinic antagonist (5 micrograms of Tiotropium or equivalent), or Frequent (>3/year) course oral steroid in addition to any other asthma medication.
Maximum postbronchodilater FEV1, percentage predicted	≥80%	70%-80%	60%-69%	50%-59%	<50%
Objective tests for degree of airway hyperesponsiveness PC20 mg/mL	6-8	3-5	3->0.5	0.5-0.25	0.24-0.125

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4. Compensation Benefits

(1) Payment for temporary disablement shall be made for as long as such disablement continues, but not for a period exceeding 24 months.

(2) In the case of temporary partial disablement being awarded, periodic payments will be dependent on re-assessment done every six months for a period of 24 months.

(3) After initial assessment, temporary partial disablement will be increased or decreased depending on this assessment.

(4) Impairment (Permanent disablement?) shall be assessed only after one year, but no later than two years after diagnosis or maximum medical improvement has been achieved.

(5) If the employee permanent disablement is assessed at 30% or less, the employee shall be entitled to a lump sum.

(6) If the employee permanent disablement is assessed at higher than 30%, the employee shall be entitled to a monthly pension.

5. Medical Costs

(1) Medical costs shall be provided for occupational Asthma for a period of not more than 24 months from the date of diagnosis or longer if, in the opinion of the Commissioner, further medical costs will reduce the degree of the disablement.

(2) The medical costs shall cover the costs of the diagnosis of occupational Asthma and any necessary treatment of occupational Asthma provided by any health care provider until the condition stabilises.

(3) The Commissioner shall decide on the need for, the nature and sufficiency of medical costs to be supplied.

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6. Death Benefits

Death benefits payable are:

(1) Reasonable burial expenses in terms of Burial Expenses Policy; and

(2) Spouse and dependent's pensions shall be payable, where applicable, if the employee dies as a result of occupational asthma.

7. Reporting

The following documentation should be submitted to the Compensation Fund or the employer individually liable or the licensee concerned:

(a) Employer's Report of an Occupational Disease (W.CL.1);
(b) Notice of an Occupational Disease and Claim for Compensation (W.CL.14);
(c) An affidavit by the employee (W.CL.305) if an employer cannot be traced or the employer fails to timeously submit Employer's report of an Occupational Disease (W.CL.1);
(d) Exposure History (W.CL. 110) or an appropriate employment history which may include any information that may be helpful to the Commissioner such as Material Safety Data Sheets, risk assessments or results of environmental hygiene assessments. The suspected workplace agent should be stated if known;
(e) First Medical Report in respect of an Occupational Disease (W.CL. 22). A medical report on the employee's symptom that details the history, establishes a diagnosis of asthma and includes results of lung function tests, chest radiographs where appropriate or any other information relevant to the claim;
(f) Confirmatory diagnosis of occupational asthma can only be determined on lung function tests performed three weeks after removal from exposure. This must be mentioned in the first medical report;

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(g) For each consultation, a Progress Medical Report (W.CL. 26);

(h) Final Medical Report in respect of an Occupational Disease (W.CL.26) when the employee's condition has reached maximum medical improvement. The most recent lung function tests available, which include pre- and post administration of a bronchodilator, and medication prescribed should be attached to this report;

(i) In case of death, a death certificate and a BI1663 (notification of death) should be submitted; and

(j) Alternatively, a death certificate accompanied by a detailed medical report on a practice letterhead on the cause of death should be submitted.

8. Claims Processing

(1) The Commissioner shall consider and adjudicate upon the liability of all claims.

(2) The medical officers employed by the Compensation Fund are responsible for medical assessment of the claim and for the confirmation of the acceptance or rejection of the claim.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

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the doj & cd
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Date: 09 December 2019

Mr Thobile Lamati
Director-General
Department of Employment and Labour (Compensation Fund)
Private Bag X117
Pretoria
0001

Dear Mr Lamati

Attention: Harry Maphologela (Senior Legal Administration Officer)

DRAFT REGULATIONS ON OCCUPATIONAL ASTHMA MADE UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993: YOUR E-MAIL DATED 14 OCTOBER 2019

INTRODUCTION

1. The Department of Employment and Labour (hereinafter referred to as the "Department") has requested us to scrutinise the English text (that being the only text submitted to us) of the draft Regulations on Occupational Asthma (hereinafter referred to as the "draft Regulations") to be made under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), (hereinafter referred to as the "Act"). According to the submission received from the Department, the draft Regulations are technical in nature and therefore our office is requested not to concern itself with the technical aspect of the draft Regulations.

2. We have thus scrutinised the draft Regulations in order to ensure that they are *intra vires* the provisions of the enabling legislation, not in conflict with the Constitution of the Republic of South Africa, 1996 (the "Constitution"), and that they are drafted in the correct drafting form and style. We have since scrutinised the draft Regulations for drafting form, style and

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legality, and have indicated suggested amendments and made certain comments on the electronic copy of the draft Regulations, a copy of which is attached hereto.

NATURE OF THE POWER TO MAKE REGULATIONS

3. The power to make regulations is a public power that must be exercised subject to the Constitution and the law. In **Affordable Medicines Trust and Others v Minister of Health and Others** 2006 (3) SA 247 (CC), the Constitutional Court stated the following in this regard at paras [48] to [50]:

> *"[48] Our constitutional democracy is founded on, among other values, the '(s)upremacy of the Constitution and the rule of law'. The very next provision of the Constitution declares that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'. And to give effect to the supremacy of the Constitution, courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. This commitment to the supremacy of the Constitution and the rule of law means that* ***the exercise of all public power is now subject to the constitutional control.***
>
> *[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and* ***the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'****. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.*
>
> *[50] In* ***exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions*** *of the Medicines Act. If, in making regulations, the* ***Minister exceeds the powers conferred by the empowering provisions*** *of the medicine Act,* ***the Minister acts ultra vires*** *(beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted ultra vires is in effect a finding that the minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been ultra vires under common law by reason of a functionary exceeding his or her*

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powers is now invalid under the Constitution as an infringement of the principle of legality. The question, therefore, is whether the Minister acted ultra vires in making regulations that link a licence to compound and dispense medicines to specific premises. The answer to this question must be sought ***in the empowering provisions.***" (Our emphasis.)

4. In **Vorster and Another v Department of Economic Development, Environment and Tourism, Limpopo Province, and Others** 2006 (5) SA 291 (T) the court also stated the following in this regard:

> *"[18] Lawfulness is relevant to the exercise of all public power, whether or not the exercise of such power constitutes administrative action. Lawfulness depends on the terms of the empowering statute.* ***If the exercise of public power is not sanctioned by the relevant empowering statute, it will be unlawful and invalid.***" (Our emphasis.)

5. It is clear from the above exposition that in making the draft Regulations, the Minister of Employment and Labour (hereinafter referred to as "the Minister") must comply with the Constitution, which is the supreme law, and the empowering provision, which is section 97 of the Act. If the Minister exceeds the powers conferred by section 97 of the Act in making the regulations, the regulations so made will be *ultra vires* and invalid. Thus, the Minister is obliged to make regulations in terms of section 97 of the Act only which are not in conflict with the Act.

DISCUSSION OF EMPOWERING PROVISION

6. Section 97 of the Act provides for the authority of the Minister to make regulations and reads as follows:

> ***"Regulations***
> *97. (1) The Minister may make regulations, after consultation with the Board, regarding -*
> *(a) the place of meeting and the procedure to be followed at any meeting of the Director-General and assessors or at any proceedings in terms of this Act with which the assessors are concerned, or at any investigation in terms of this Act;*
> *(b) subject to section 76, the fees payable to medical practitioners or chiropractors in respect of services rendered in terms of this Act;*
> *(c) the procedure to be followed in paying assessments and fines to the Director-General;*
> *(d) the persons to whom, the places where and the manner in which payment of assessments in terms of this Act shall be made;*

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(e) the determination of the amount and the conditions and manner of payment of benefits to assessors or classes of assessors;
(f) the disposal of moneys payable in terms of this Act to any person other than the Director-General and not claimed within the prescribed period by the person entitled thereto;
(g) any matter which shall or may be prescribed by regulation in terms of this Act;
(h) any other matter, whether or not connected with any matter mentioned in paragraphs (a) to (g), which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.
(2) Different regulations may be made under subsection (1) in respect of different classes of employers and employees and of different areas, and the Minister may, after consultation with the Board, in respect thereof differentiate in such manner as he or she may deem expedient.
(3) ..." (Our emphasis.)

7. Section 97 of the Act tabulates various matters in respect of which the Minister may make regulations. Upon scrutiny of the provisions of section 97(1)(a) to (f) of the Act, it is clear that the Minister does not have the express authority to make regulations dealing with occupational asthma. It follows therefor that in order to make the draft regulations the Minister must either utilise paragraph (g) or (h) of subsection (1) of section 97 of the Act. In so far as paragraph (g) of subsection (1) is concerned, we have scrutinised the whole Act and could not find any section which authorises the Minister to prescribe regulations relating to occupational asthma. In light thereof, we are of the view that the Minister cannot utilise paragraph (g) of subsection (1) of section 97 of the Act to make the draft Regulations. Any attempt to do so would render the regulations invalid and *ultra vires. The question that arises for determination is thus whether the Minister is authorised to make the draft regulations in terms of section 97(1)(h) of the Act.*

INTERPRETATION OF SECTION 97 (1) (h) OF THE ACT

8. The power of the Minister to make regulations under section 97 (1) (h) of the Act appears to be wide and can, in our view, be compared with the more usual phrase "regarding any matter which is considered necessary or expedient to be so prescribed in order to achieve the object of the Act" [see **Eden Village (Meadowbrook (Pty) Ltd v Edwards** 1995 (4) SA 31 (A), at pp. 43 and 44- the regulation-making power is described as being of a wide and embracing import] or "in general, any matter which he [the Minister] may consider necessary or expedient to prescribe in order to attain or promote the objects of this Act" [see **Zeem v Mutual & Federal Insurance Co Ltd** 1996 (4) SA 476 (W), at p.482] or "...in respect of any other matter which [the Administrator] may deem necessary or expedient to prescribe for the

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better carrying out of the objects of this ordinance"; see **Portion 675 Zandfontein CC v Sandton City Council** 1995 (4) SA 826 (T), at pp.832- the regulation-making power to promulgate regulations which he deems necessary or expedient is described as "extremely wide"]. In **Zeem v Mutual & Federal Federal Insurance Co Ltd** 1996 (4) SA 476 (W), at p.482, the court rejected as ill-founded the argument that the regulation-making power was worded in such wide terms ("in general, any matter which he [the Minister] may consider necessary or expedient to prescribe in order to attain and promote the objects of the Act") that it gave the Minister the power to promulgate any regulations that he deemed necessary.

9. In **Bezuidenhout v Road Accident Fund** 2003 (6) SA 61 (SCA) at p.65 the following is stated:

"[10]……In my view, however, this is of no consequence since it must in any event be implied that s 26 (1) ***cannot empower the making of regulations which widen the purpose and object of the present Act or which are in conflict therewith****. Bennion Statutory Interpretation 3rd ed (1997) at 189 points out that underlying the concept of delegated legislation is the basic principle that the Legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is to lay down the outline.* ***This means that the intention of the Legislature, as indicated in the enabling Act, must be the prime guide to the meaning of delegated legislation and the extent of the power to make it****. Bennion continues as follows:*

"The true extent of the power governs the legal meaning of the delegated legislation. The delegate is not intended to ***travel wider than the object of the Legislature****. The delegate's function* ***is to serve and promote that object, while at all times remaining true to it****…. ."* (Our emphasis.)

10. The court in the **Bezuidenhout** case, at para [10], continued as follows:

"In the case of Utah Construction and Engineering (Pty) Ltd and Another v Pataky [1966] AC 629 (PC ([1966] 2 WLR 197), the Privy Council considered the validity of a regulation made in terms of a statutory provision which empowered the Governor of New South Wales to 'make regulations not inconsistent with this Act prescribing all matters which are required or authorised to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act'. Dealing with the argument that the regulation in issue could be justified as being within the empowering section, the Privy Council said at 202 (adopting a statement in the judgment of the High Court of Australia

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in Shanahan v Scott (1956) 96 CLR 245 at 250) that the power delegated by an enactment-

> ***'does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the Legislature has adopted to attain its ends'".*** (Our emphasis.)

11. It is evident from what has been stated above that even where very wide powers are granted to make regulations by, for example, granting power to a Minister to make regulations which are necessary or expedient to facilitate the implementation or the attainment of the objects of the relevant Act, the exercise of such powers must relate, for example, to the implementation or the attainment of the objects of the relevant Act. It goes without saying that wide regulation-making powers cannot be used to regulate a matter in conflict with the provisions of the Act or to bring about a situation that could never have been intended by the Legislature. Furthermore, the exercise of such powers cannot be used to add to the substantive matter and scheme embodied in the legislation, unless the Act provides therefor.

12. The exercise of the regulation-making power by the Minister must therefore fall within the scope of the provisions of section 97 of the Act. Moreover, in our view the general powers contained in section 97 of the Act are ancillary or incidental to the implementation of the provisions of the Act. In other words, such powers cannot extend the scope or general operation of the Act or add to the purpose or provisions of the Act and should relate to the administrative or procedural matters.

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13. We are accordingly of the view that a draft Regulation falls within the scope of section 97(1) (h) of the Act if it-

(a) is required for, or contributes to the implementation of the Act;
(b) is of an administrative or procedural matter;
(c) is a subsidiary means of implementing the provisions of the Act;
(d) is incidental to the carrying out of the Act's specific provisions;
(e) does not attempt to widen the purpose of the Act;
(f) does not add new and different means to achieve that purpose; or
(g) does not add to the substantive matter and schemes of the Act.

14. In light of the above, it is necessary to point out at this juncture that the draft Regulations deal with occupational asthma. In this regard, section 65 of the Act which deals with occupational diseases provides as follows:

*"**65. Compensation for occupational diseases.—***

(1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General—

*(a) **that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment;** or*

(b) that the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of and in the course of his or her employment.

(2) If an employee has contracted a disease referred to in subsection (1) and the Director-General is of the opinion that the recovery of the employee is being delayed or that his temporary total disablement is being prolonged by reason of some other disease of which the employee is suffering, he may approve medical aid also for such other disease for so long as he may deem it necessary.

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(3) If an employee has contracted a disease referred to in subsection (1) resulting in permanent disablement and that disease is aggravated by some other disease, the Director-General may in determining the degree of permanent disablement have regard to the effect of such other disease.

(4) Subject to section 66, a right to benefits in terms of this Chapter shall lapse if any disease referred to in subsection (1) is not brought to the attention of the commissioner or the employer or mutual association concerned, as the case may be, within 12 months from the commencement of that disease.

(5) For the purposes of this Act the commencement of a disease referred to in subsection (1) shall be deemed to be the date on which a medical practitioner diagnosed that disease for the first time or such earlier date as the Director-General may determine if it is more favourable to the employee.

(6) ... "(Our emphasis.)

15. A scrutiny of section 65 of the Act reveals that an employee is entitled to payment of compensation if it can be proved that such an employee has contracted an occupational disease mentioned in Schedule 3 to the Act. Schedule 3 to the Act contains a list of occupational diseases. It is important to note that occupational asthma is listed as an occupational disease in sub-item 2.1.6 of Schedule 3 to the Act. It is our considered view that the regulations relating to occupational diseases for which compensation may be claimed, is required for, or contributes to the implementation of the Act or alternatively, is a subsidiary means of implementing the provisions of the Act. In the result, we are of the opinion that the Minister is authorised in terms of section 97(1)(h) of the Act to make regulations relating to occupational diseases for which an employee may claim compensation in terms of the Act.

16. It is against the background of the above discussion that we proceed to evaluate the draft Regulations.

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COMMENT ON DRAFT REGULATIONS

Ad regulation 1 of the draft Regulations

17.1 Regulation 1 of the draft Regulations provides for definitions. A definition clause is used to define words and terms which are used in the draft Regulations, but are not defined in the Act and that do not convey their ordinary dictionary meaning. Furthermore, defined terms must be used at least once in the text of the draft Regulations. Subject to our amendments and comments, this regulation appears to be in order.

Ad regulation 2 of the draft Regulations

17.2 Regulation 2 provides that the diagnosis for occupational Asthma shall be made by a medical practitioner based on (a) a lung function test; (b) occupational exposure to a known cause of asthma; and (c) a chronological or causal relationship between asthma and the working environment. Furthermore, and for the purposes of sub-regulation (4), sub-regulation (2) provides that the attending medical practitioner shall upon making a diagnosis record the evidence of the diagnosis of asthma before commencing the treatment. Moreover, sub-regulation (3) provides for the criteria for a diagnosis of occupational asthma. Subject to our amendments and comments, this regulation appears to be in order.

Ad regulation 3 of the draft Regulations

17.3. Regulation 3 of the draft Regulations provides for the method of determining the degree of impairment and requires that assessment of permanent impairment must be conducted within one year, but not later than 2 years after the diagnosis, provided the patient has reached maximum medical improvement. Subject to our amendments and comments, this regulation appears to be in order.

Ad regulation 4 of the draft Regulations

17.4 Regulation 4 provides that payment for temporary disablement shall be made for as long as such disablement continues, but not for a period exceeding 24 months, whilst sub-regulation (2) provides that in the case of temporary partial disablement being awarded, periodic payments will be dependent on re-assessment done every six months for a period of 24 months. In so far as sub-regulation (4) is concerned, please refer to our comment on the text of the draft Regulations. Sub-regulation (5) provides that a lump sum shall be paid in terms of the Act for permanent disablement less than or equal to 30%. However, sub-regulation (6) provides that if the employee's permanent disablement is assessed at higher than 30%, the employee shall be entitled to a monthly pension. Subject to our amendments and comments, this regulation appears to be in order.

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***Ad* regulation 5 of the draft Regulations**

17.5 Regulation 5 provides that medical aid shall be provided for Occupational Asthma for a period of not more than 24 months from the date of diagnosis or longer if, in the opinion of the Commissioner, further medical aid will reduce the degree of the disablement. In terms of sub-regulation (2), the medical aid shall cover the costs of the diagnosis of Occupational Asthma and any necessary treatment of Occupational Asthma provided by any health care provider until the condition stabilises. Sub-regulation (3) empowers the Commissioner to decide on the need for, the nature and sufficiency of medical aid to be supplied. Subject to our amendments, this regulation appears to be in order.

***Ad* regulation 6 of the draft Regulations**

17.6 Regulation 6 provides for two types of benefits which are payable in the event the employee dies as a result of occupational asthma. These are (a) reasonable burial expenses; and (b) the dependant's pension where applicable. Subject to our amendments and comments, this regulation appears to be in order.

***Ad* regulation 7 of the draft Regulations**

17.7 Regulation 7 provides for documentation which is to be submitted to the Compensation Fund or the employer who is individually liable or the licensee concerned for the purposes of reporting. Subject to our amendments, this regulation appears to be in order.

***Ad* regulation 8 of the draft Regulations**

17.8 Regulation 8 provides for the responsibilities of the Commissioner and medical practitioners employed by the Compensation Fund during the claims processing. Subject to our amendments, this regulation appears to be in order.

Ad proposed regulation 9 of the draft Regulations

17.9 Regulation 9 contains the short title and commencement, which appears to be in order.

PUBLICATION OF THE DRAFT REGULATIONS

18. We wish to draw the attention of the Department to section 6 of the Constitution which provides for language usage by the government and reads as follows-

> *"(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.*

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(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

(3) (a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; ***but the national government and each provincial government must use at least two official languages.***

(b) Municipalities must take into account the language usage and preferences of their residents.

(4) The national government and provincial governments, ***by legislative and other measures, must regulate and monitor*** *their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.*

(5)….. ." (Our emphasis).

19. The legislative framework referred to in section 6(4) of the Constitution is the Use of Official Languages Act, 2012 (Act No. 12 of 2012) which provides in section 4 as follows:

"4. (1) Every national department, national public entity and national public enterprise must adopt a language policy regarding its use of official languages for government purposes within 18 months of the commencement of this Act or such further period as the Minister may prescribe, provided that such prescribed period may not exceed six months.

(2) A language policy adopted in terms of subsection (1) must-

(a) comply with the provisions of section 6(3)(a) of the Constitution;

(b) identify at least three official languages that the national department, national public entity or national public enterprise will use for government purposes;

(c)-(h)

(3) In identifying at least three official languages as contemplated in subsection (2)(b), every national department, national public entity and national public enterprise must take into account its obligation to take practical and positive measures to elevate the status and advance the use of indigenous languages of historically diminished use and status in accordance with section 6 (2) of the Constitution.

(4) …"

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20. It is clear from the above exposition that section 6(3) of the Constitution expressly creates an obligation for government at national and provincial level to act in a minimum of two of the official languages for any purpose of government including the passing of legislation. Furthermore, it is clear that the Use of Official Languages Act is the legislative measure referred to in section 6(4) of the Constitution and furthers the goals and aspirations of section 6 of the Constitution. Read *in tandem* with the Constitution, the Use of Official Languages Act requires the government to use at least three official languages for any purpose of government. With regard to the consequences of not adhering to the use of languages for government purposes as prescribed above, the Department's attention is drawn to the case of **Central African Services (Pty) and Another v The Minister of Transport and Another**, Case No: 32238/2011 (North Gauteng) where the court, per Makgoka J, found the amendment regulations that it was concerned with to be invalid, inter alia, because–

(a) the Minister and the agency concerned failed to comply with their constitutional obligation to ensure procedural fairness in the publication and promulgation of the Regulations;
(b) the agency failed in its constitutional duty to comply with its duty to facilitate proper public comment before publishing the Regulations;
(c) the Regulations were not promulgated in a manner consistent with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) and section 33 of the Constitution of the Republic of South Africa, 1996; and
(d) **the Regulations were also not published in at least two official languages as required by section 6(3)(a) of the Constitution.** (See paragraphs 29-38,43-44, 51, 57 and 59 and also **Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another** [2015] ZACC 12 (Case CCT 163/14)).

21. It is apparent from the above that the publication of the draft Regulations in the English language only will be inconsistent with section 4(2)(b) of the Use of Official Languages Act, read with section 6(3)(a) of the Constitution. Consequently, we are of the opinion that for the draft Regulations to withstand constitutional scrutiny, the draft Regulations must be published in compliance with section 4(2)(b) of the Use of Official Languages Act. In light of the above, we wish to bring it to the attention of the Department that our office upon request will be available to assist with the translation of legislation to any desired official languages.

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CONCLUSION

22. Subject to our remarks above and subject to our comments and suggested amendments on the copy of the draft Regulations attached hereto, we are of the opinion that the draft Regulations are not in conflict with the Act or the Constitution.

Yours sincerely,

FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
R MAKUYA // WJJ NEL // MA OLWAGE // A JOHAAR

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO. 130 OF 1993)

REGULATIONS ON LUNG CANCER FOR THE COMPENSATION FUND MADE UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

The Minister of Employment and Labour, after consultation with the Compensation Board has, in terms of Section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) made the regulations in Schedule A. These regulations are published for public comments only.

Interested and affected parties are hereby invited to submit written representations on the proposed Regulations. The aforesaid representations must be marked for the attention of **Mr TH Maphologela** and sent by registered post or emailed or hand delivered within 60 days of publication of this notice to the following addresses:

Compensation Fund	OR	PO Box 955
167 Thabo Sehume Street		Pretoria
Pretoria		0001
0157		

Email addresses: Kimbly.Makgoba@labour.gov.za or Harry.Maphologela@labour.gov.za

Copies of the Regulations are herewith attached.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

SCHEDULE A

REGULATIONS ON LUNG CANCER FOR THE COMPENSATION FUND MADE UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

ARRANGEMENT OF REGULATIONS

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1. Definitions

In these Regulations, a word or expression to which a meaning has been assigned in the Act or these Regulations shall have that meaning and, unless the context otherwise indicates—

"autopsy" means a post-mortem examination to discover the cause of death or the extent of disease;

"biopsy" means an examination of tissue removed from a living body to discover the presence, cause, or extent of a disease;

"cytology"means the study of the microscopic appearance of cells, especially for the diagnosis of abnormalities and malignancies;

"histology" means the study of microscopic structure of animal or plant tissues;

"lung cancer" means malignancy arising from within the lung tissue and the airways of the lungs;

"Occupational lung cancer" means malignancy arising out of exposures known to cause cancer within the workplace;

"Regulations" means the Regulations on Lung Cancer for the Compensation Fund made under the Compensation for Occupational Injuries and Diseases Act, 1993.

2. Diagnosis

(1) The diagnosis of lung cancer shall be made by a medical practitioner based on the biopsy or autopsy, i.e. the positive histological results or tumor detectable at post-mortem that confirms the diagnosis of lung cancer.

(2) Alternatively, if the diagnosis is made based on positive cytology results, such diagnosis should be supported by clinical features and radiological investigations.

(3) Radiological investigations should include the reports and films.

(4) The medical officers employed by the Compensation Fund shall determine if lung cancer is present and the diagnosis was made according to acceptable medical standards.

3. Impairment

Whole Person Impairment shall be determined, in accordance with the latest edition of AMA Guide once maximal medical improvement (MMI) has been reached.

4. Compensation Benefits

The compensation benefits payable according to the Act are—

(*a*) payment for temporary total or partial disablement shall be made for as long as such disablement continues, but not for a period exceeding 24 months;

(*b*) permanent disablement shall be assessed, where applicable, as and when the diagnosis of lung cancer is confirmed and final medical report is received;

(*c*) if total impairment score is zero to three (i.e. permanent disablement less than or equal to 30%), permanent disablement shall be determined and a lump sum shall be paid in terms of the Act; and

(*d*) if total impairment score is more than three (i.e. permanent disablement is higher than 30%), pension shall be paid in terms of the Act.

5. Medical Costs

(1) Medical costs shall be provided for a period of not more than 24 months from the date of diagnosis, or longer, if in the opinion of the commissioner, further medical aid will reduce the degree of the disablement.

(2) Medical costs shall cover diagnosis of lung cancer and any necessary treatment provided by any healthcare provider.

(3) The commissioner shall decide on the need for, the nature and sufficiency of medical costs to be supplied.

6. Death Benefits

Death benefits payable are—

(*a*) reasonable burial expenses payable in terms of the Burial Expenses Policy; and

(*b*) widow's and dependant's pensions payable, where applicable, if the employee dies as a result of lung cancer.

7. Reporting

The following documentation must be submitted to the Compensation Fund, the employer, individually liable or the licensee concerned:

(*a*) Employer's Report of an Occupational Disease (W.CL.1). Lung cancer may occur many years after exposure to the carcinogenic industrial agent. The employee may no longer be in the employment of the same employer where carcinogenic industrial agent exposure occurred. The current employer should complete the W.CL.1 and no liability will be attributed to that employer;

(*b*) Notice of an Occupational Disease and Claim for Compensation (W.CL.14);

(*c*) an affidavit by the employee (W.CL.305) if an employer cannot be traced or the employer fails to timeously submit Employer's Report of an Occupational Disease (W.CL.1);

(*d*) Exposure History (W.CL.110).There should be a clear history of industrial carcinogenic agent or exposure in an occupation or industry where carcinogenic exposure is known to occur and length of exposure;

(*e*) medical surveillance records where available;

(*f*) Occupational hygiene reports where available;

(*g*) First Medical Report detailing the employee's Occupational Disease (W.CL.22);

(*h*) Histology or Cytology Report should contain the name of the claimant and the diagnosis of lung cancer of any type. The report should also detail the name of the pathologist, contact and reference details that will enable telephonic validation of the report;

(*i*) Radiology Reports to confirm diagnosis. Radiological investigations report with films will only be required if cytology results are used to confirm the diagnosis;

(*j*) Progress or Final Medical Report in respect of Occupational Disease (W.CL.26); and

(*k*) in case of death, a death certificate and a BI-1663 (notification of death) should be submitted. Alternatively, a death certificate accompanied by a detailed medical report, on a practice letterhead, on the cause of death should be submitted. Post-mortem results where applicable.

8. Claims Processing

(1) The commissioner shall consider and adjudicate upon the liability of all claims.

(2) The medical officers employed by the Compensation Fund are responsible for the medical assessment of a claim and for the confirmation of the acceptance or rejection of a claim.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

the doj & cd
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Date: 11 December 2019

Mr T Lamati
Director-General
Department of Employment and Labour
Private Bag X117
PRETORIA
0001

For Attention: Mr H Maphologela
Per e-mail: Harry.Maphologela@labour.gov.za

Dear Director-General Lamati

REGULATIONS ON LUNG CANCER FOR THE COMPENSATION FUND MADE BY THE MINISTER UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO. 130 OF 1993)

INTRODUCTION

1. We have been requested by the Department of Employment and Labour ("the Department") to scrutinise, and provide it with a legal opinion on the Regulations on Lung Cancer for the Compensation Fund made by the Minister under the Compensation for Occupational Injuries and Diseases Act, 1993 ("the Regulations") in terms of section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) ("the Act").

LEGISLATION

2. Section 65 of the Act deals with compensation for occupational diseases and states as follows:

"Compensation for occupational diseases

65. (1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General—

(a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment; or

(b) that the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of and in the course of his or her employment.".

3. In terms of section 97 of the Act, the Minister is empowered to make regulations in respect of the matters tabulated in subsection (1) (*a*) to (*h*). In this regard, the section provides as follows:

"Regulations

97. (1) The Minister may make regulations, after consultation with the Board, regarding—

(a) the place of meeting and the procedure to be followed at any meeting of the Director-General and assessors or at any proceedings in terms of this Act with which the assessors are concerned, or at any investigation in terms of this Act;

(b) subject to section 76, the fees payable to medical practitioners or chiropractors in respect of services rendered in terms of this Act;

(c) the procedure to be followed in paying assessments and fines to the Director-General;

(d) the persons to whom, the places where and the manner in which payment of assessments in terms of this Act shall be made;

(e) the determination of the amount and the conditions and manner of payment of benefits to assessors or classes of assessors;

(f) the disposal of moneys payable in terms of this Act to any person other than the Director-General and not claimed within the prescribed period by the person entitled thereto;

(g) any matter which shall or may be prescribed by regulation in terms of this Act;

(h) any other matter, whether or not connected with any matter mentioned in paragraphs (a) to (g), which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.

(2) Different regulations may be made under subsection (1) in respect of different classes of employers and employees and of different areas, and the Minister may, after consultation with the Board, in respect thereof differentiate in such manner as he or she may deem expedient.

(3) Any person who contravenes or fails to comply with any regulation made under subsection (1) shall be guilty of an offence and liable on conviction to a fine, or imprisonment for a period not exceeding six months.".

DISCUSSION

Minister's powers to make Regulations

4. The Minister's power to make regulations is a public power that must be exercised subject to the Constitution and the law. In exercising such a public power, the Minister is thus required to comply with the principle of legality. This means that the Minister can only exercise the powers to make the regulations within the parameters of the Act and the Constitution.

4.1 In *Fedsure Life Assurance Ltd and Others vs Greater Johannesburg Transitional Metropolitan Council and Others*[1], the Constitutional Court stated the following in paragraph 56 of the judgment regarding the principle of legality:

> *"[1] It is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses the principle of legality – is generally understood to be a fundamental principle of constitutional law.".* (footnote omitted)

4.2 The Constitutional Court in *Fedsure* referred to above, further states the following in paragraph 58 of that judgment:

> *"It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense then, the principle of legality is implied within the terms of the interim constitution."* (our underlining)

4.3 The Act authorises the enactment of delegated legislation, namely, the regulations. The power to make the regulations is vested in the Minister in terms of section 97 of the Act. Section 97 (1) of the Act sets out various matters the Minister is authorised to make regulations on. In terms of section 97 (1) of the Act, the Minister may make regulations, after consultation with the Board regarding various matters listed in that section.

4.4 It is apparent from the regulations under consideration that the Minister has, after consultation with the Board and in terms of sections 65 (1) and 97 (1) (*h*) of the

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1 1998 (12) BCLR 1458 (CC) ("Fedsure")

Act, made the regulations in the Schedule.

4.5 If, in making regulations, the Minister exceeds the powers conferred by the empowering provision of the Act (Section 97), the Minister will act beyond his powers **(ultra vires)** and in breach of the doctrine of legality. Any such act will be invalid.

4.6 For the purposes of this opinion, it merits to mention that the long title of the Act illuminates the objects and purpose of the Act which is to provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases.

4.7 This purpose is reiterated in section 97 (1) (*h*), where it is provided that 'The Minister may make regulations, after consultation with the Board, regarding any other matter, whether or not connected with any matter mentioned in paragraphs (*a*) to (*g*), which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.' (our emphasis)

4.8 With regard to section 97 (1) (*h*), this section is also phrased in such broad terms that it appears to be all encompassing. It is an omnibus provision. While section 97 (1) (*g*) undoubtedly covers the Minister's power to make the regulations, we are, however of the view that section 97 (1) (*h*) is the most apt provision in so far as the acts stipulated in regulation 2 are deemed to be occupational diseases contracted by employees.

4.9 Law reports are replete with cases dealing with the powers of the Minister to make regulations. In **Road Accident Fund v Makwetlane** 2005 (4) SA 51 (SCA), (hereinafter referred to as "the **Makwetlane** case") the Court discussed the power of the Minister of Transport to make regulations to "achieve or promote the objects" of the Road Accident Fund Act, 1996 (Act No. 56 of 1996) and remarked as follows at pp. 58-59:

> "Section 26 empowers the Minister to make regulations in order to achieve or promote the objects of the Act. It does not confer authority on him to traverse terrain outside that limited scope and ambit. All regulations promulgated by the Minister must thus be reasonably necessary to achieve those objects and goals. It is indeed so that the possibility of fraud is greater in cases where the identity of the driver or owner of the vehicle in question has not been established, as it would usually be difficult for the RAF to secure evidence to

dispute a claim (see *Mbatha* at 718H). Stricter requirements would thus be justified in unidentified vehicle cases. It follows that regulations designed to eliminate fraud and facilitate proof of legitimate claims, falling as it does within the Minister's power to regulate, would be permissible. No other reason has been suggested for such a requirement and I can think of none.
That legitimate end, may not, however, be achieved by means that sweep too broadly. ...

The Constitution places significant restraints upon the exercise of public power. It is a requirement of the rule of law that the exercise of public power should not be arbitrary. It follows that the exercise by the Minister of the regulatory power conferred upon him had to be rationally related to the purpose for which the power was granted - rationality being the minimum threshold requirement. (See *Pharmaceutical Manufacturers* paras [85] and [86].) Conduct that fails to pass that threshold requirement would fall below the standards set by our Constitution and would therefore be unlawful.". (Our underlining)

4.10 In **Bezuidenhout v Road Accident Fund**[2] 2003 (6) SA 61 (SCA) the following is stated at [10]:

"……it must in any event be implied that s 26(1) cannot empower the making of regulations which widen the purpose and object of the present Act or which are in conflict therewith. ***Bennion, Statutory Interpretation 3rd ed (1997)*** states: 'The true extent of the power governs the legal meaning of the delegated legislation. The delegate is not intended to travel wider than the object of the legislature. The delegate's function is to serve and promote that object, while at all times remaining true to it.' The Privy Council said at 202 (adopting a statement in the judgement of the High Court of Australia in **Shanahan v Scott** (1956) 96 CLR 245 at 250) that the power delegated by an enactment: 'does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purpose of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends'.". (Our underlining)

4.11 As mentioned in par 2 above, Section 65 stipulates that an employee shall subject to the provisions of Chapter VII of the Act be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General (*a*) that the employee has contracted an occupational disease mentioned in the first column of Schedule 3, and that such disease has arisen out of and in the course of his or her employment; or (*b*) that the employee has contracted a disease other than a disease contemplated in paragraph (*a*) and that such disease has arisen

2 Bezuidenhout v Road Accident Fund (355/2002) [2003] ZASCA 69; [2003] 3 All SA 249 (SCA) (2 June 2003)

out of and in the course of his or her employment.

4.12 Schedule 3 of the Act contains a list of diseases relating to disease of the lung eg. Bronchopulmonary disease as well as other diseases of the lung. In addition Schedule 3 of the Act also contains a list of agents that can cause occupational cancer. Occupational cancer (which can include lung cancer) can result from several of the agents mentioned in sub-item 3.1 of Schedule 3 of the Act.

4.13 We have analysed the case law mentioned above, the subject matter of the regulations, and the rationality principle which must be considered to enable the Minister to achieve the objects and purposes of the act.

4.14 We are of the view that section 97 of the Act and the regulations relating to occupational diseases for which compensation may be claimed, may be regarded as a subsidiary means of implementing the provisions of the Act. In our view, the regulations may also be argued to fall within the ambit of regulations incidental to carrying out the Act's specific provisions contemplated in section 65. The powers do not extend the scope or general application of the Act nor add to the purpose or provisions of the Act.

4.15 We are further of the view that sections 97(1)(*h*) read with 65 (1) of the Act are the appropriate provisions in so far as the Minister's powers to make the regulations are concerned.

5. We now turn to deal with the regulations as set out in the Schedule. We have suggested tracked changes with regards to the drafting style and form of the Regulations. This is done in order to align the Regulations with common drafting principles.

***Ad* Regulation 1: Definitions**

6. Regulation 1 provides for the definition of some of the words used in the Regulations. We added a few definitions in regulation 1 for the Department's consideration.

***Ad* Regulation 2: Diagnosis**

7. Regulation 2 provides for the diagnosis of lung cancer by a medical practitioner and the various ways in which such a diagnosis can be made. Minor amendments were made to this regulation.

***Ad* Regulation 3: Impairment**

8. Regulation 3 provides that a Whole Person Impairment shall be determined in accordance with the latest AMA Guide edition once maximal medical improvement has been reached. Minor amendments were made to this regulation.

***Ad* Regulation 4: Compensation benefits**

9. Regulation 4 provides for the compensation benefits payable according to the Act after assessment of the total impairment score. Minor amendments were made to this regulation.

***Ad* Regulation 5: Medical costs**

10. Regulation 5 provides for the medical costs that will be provided after a diagnosis of lung cancer and the period of such assistance. This regulation seems to be in order.

***Ad* Regulation 6: Death benefits**

11. Regulation 6 provides for death benefits payable in terms of a Burial Expenses Policy and where the employee dies as a result of lung cancer, widow's and dependent's pensions will be payable. Minor amendments were made to this regulation.

***Ad* Regulation 7: Reporting**

12. Regulation 7 provides for the documentation that must be submitted to the Compensation Fund, the employer, individual liable, or the licensee concerned—

(*a*) Employer's report of an Occupational Disease (W.CL. 1);

(*b*) Notice of an Occupational Disease and Claim for Compensation (W.CL.14);

(*c*) an affidavit by the employee if an employer cannot be traced or fails to submit timeously (W.CL.305);

(*d*) Exposure history (W.CL.110);

(*e*) medical surveillance records where applicable;

(*f*) Occupational hygiene reports where available;

(*g*) First Medical Report (W.CL. 22);

(*h*) Histology or Cytology report;

(*i*) Radiology reports;

(*j*) Progress or Final medical report (W.CL.26); and

(*k*) death certificate (BI-1663).

Minor amendments were made to this regulation.

***Ad* Regulation 8: Claims processing**

13. Regulation 8 provides for the consideration and adjudication of all claims by the Commissioner and that the medical officers employed by the Compensation Fund are responsible for medical assessments of claims and confirmation of acceptance or rejection of claims. Minor amendments were made to this regulation.

14. The Department's attention is drawn to the fact that, in terms of section 6 (3) of the Constitution of the Republic of South Africa, 1996, the Regulations must be published in at least two official languages and non-compliance with this requirement may result in the Regulations being invalid.

***Ad* Regulation 9: Short Title and Commencement**

15. Regulation 9 provides for the date of commencement of the Regulations.

CONCLUSION

16. In light of the discussion above, we are of the view that the Minister has the requisite authority to make the regulations under consideration. Subject to our suggested amendments made directly in the text of the regulations, we are of the view that the regulations are in order and conform to the form and style of legislative drafting.

17. We attach hereto, a copy of the Regulations with track changes incorporating our suggested amendments for your consideration.

Yours sincerely

FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
C NICHOLSON / X MDLUDLU / S MASAPU / A JOHAAR

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO. 130 OF 1993)

REGULATIONS ON OCCUPATIONALLY ACQUIRED HIV/AIDS FORTHE COMPENSATION FUND MADE UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

The Minister of Employment and Labour, after consultation with the Compensation Board has, in terms of Section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) made the Regulations in Schedule A. These regulations are published for public comments only.

Interested and affected parties are hereby invited to submit written representations on the proposed Regulations. The aforesaid representations must be marked for the attention of **Mr TH Maphologela** and sent by registered post or emailed or hand delivered within 60 days of publication of this notice to the following addresses:

Compensation Fund	OR	PO Box 955
167 Thabo Sehume Street		Pretoria
Pretoria		0001
0157		

Email addresses: Kimbly.Makgoba@labour.gov.za or Harry.Maphologela@labour.gov.za

Copies of the Regulations are herewith attached.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

SCHEDULE A

REGULATIONS ON OCCUPATIONALLY ACQUIRED HIV/AIDS FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

ARRANGEMENT OF REGULATIONS

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1. Definitions

In these Regulations, a word or expression to which a meaning has been assigned in the Act or these Regulations shall have that meaning, unless the context otherwise indicates

"AIDS" means Acquired Immune Deficiency Syndrome – a syndrome that results from infection with Human Immunodeficiency Virus;

"antibodies" means substances produced by cells of human body's immune system in response to foreign substances that have entered the body;

"Commissioner" means the Compensation Commissioner appointed under section 2 (1)*(a)* of the Act;

"confidentiality" means right of a person, or employee to have their medical information, including HIV status, kept private within the multi-disciplinary team;

"counselling" means confidential dialogue between a client and a trained counsellor aimed at enabling the client to cope with stress and take personal decisions related to an illness, e.g. HIV / AIDS;

"HIV" means Human Immunodeficiency Virus – the name of the virus that weakens the immune system and leads to AIDS;

"HIV infected source" means an HIV positive person or an object contaminated by HIV positive blood or body fluids that can expose another person to HIV infection;

"immune system" means a complex system of cells and cell substances that protects the body from infection and disease;

"informed consent to HIV testing" means the situation whereby the exposed employee has been provided with information, understands it, and based on that he or she agrees to undertake an HIV test;

"maximum medical improvement" means when the treating medical practitioner considers that no further improvement is anticipated on available medical treatment;

"occupational exposure" means exposure to blood and other body fluids, which may be infected with HIV during the course of carrying out working duties;

"opportunistic infections" means infections that occur because a person's immune system is weak that it cannot fight infections;

"occupationally acquired HIV infection" means an infection contracted as a result of exposure to an HIV infected source in a workplace, resulting in progressive weakening of the immune system of an individual leading to AIDS. The HIV infection must have arisen out of and in the course of employment;

"Post Exposure Prophylaxis (PEP)" means the antiretroviral medicine that can reduce the HIV seroconversion risk, which should be taken immediately after the exposure, (no later than 72hours);

"Regulations" means the Regulations on Occupationally Acquired HIV/AIDS made under the Compensation for Occupational Injuries and Diseases Act, 1993.

2. Diagnosis

(1) The diagnosis of occupationally acquired HIV shall be made by the medical practitioner.

(2) The diagnosis of occupationally acquired HIV infection must be confirmed by any test that is acceptable according to the Department of Health HIV Guidelines and the South African HIV Clinicians Society.

(3) For the purpose of diagnosing possible HIV infection at any given time, the following criteria must be met:

(a) an occupational exposure to a potential HIV infected source;

(b) documented (proof of a reported) work – related incident or accident involving a potential HIV infected source;

(c) laboratory blood test results (baseline HIV, hepatitis B and RPR test results) of the exposed employee done within 72hours of the incident or accident, confirming the absence of HIV antibodies and the absence of HIV antigen/virus (PCR) including viral load;

(d) confirmation that the source was HIV infected; and

(e) confirmatory laboratory blood test results of the exposed employee confirming HIV infection (seroconversion) at six and or twelve weeks or six months after the date of the work-related incident or accident.

3. Impairment

(1) Assessment of impairment shall be determined after maximum medical improvement (MMI) has been reached i.e. when the treating medical practitioner considers that no further improvement is anticipated on available medical treatment.

(2) Permanent functional impairment due to residual and permanent sequelae of an HIV / AIDS related condition(s) shall be assessed according to the system and organ(s) affected.

(3) For functional scale which is consequently a component of the ratings for HIV disease.

(4) The class ratings for some of the processes considered reflect factors that have an impact on the ability of the individual with that disease to

perform Activities of Daily Livings (ADLs). No separate functional scale is used for these.

(5) The functional class derived in the below tables.

(6) The latest AMA guides approach exposure to HIV and overt disease using four tables below:

Methodology for Determining the Grade in an Impairment Class

IMPAIRMENT CLASS	CLASS 0	CLASS 1					CLASS 2					CLASS 3					CLASS 4				
SEVERITY GRADE (%)		1 (A	2 B	3 C	4 D	5 E)	6 (A	7 B	8 C	9 D	10 E)	11 (A	12 B	13 C	14 D	15 E)	16 (A	17 B	18 C	19 D	20 E)
				↑					↑					↑					↑		
		Class 1 Default					Class 2 Default					Class 3 Default					Class 4 Default				

(a) In order to consistently determine the appropriate impairment grade for a given class, the following procedure is recommended:

(i) determine the impairment class (IC) first, according to the "key factor" for that particular impairment grid;

(ii) default to the middle ("C") grade position for that IC;

(iii) for the first remaining (non-key) factor, determine the most appropriate IC position and record the number difference to the key factor IC;

(iv) repeat step 3 for each remaining (non-key) factor; and

(v) summate the IC column differences and add or subtract the final number from the default identified in step 1 to determine the final impairment grade.

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Table9. 1: Karnofsky Performance Status Scale (KPSS) Definitions Rating (%) Criteria	
100	Normal ; no complaints; no evidence of disease
90	Able to carry on normal activity; minor signs or symptoms of disease.
80	Normal activity with effort; some signs or symptoms of disease
70	Cares for self; unable to carry on normal activity or to do active work
60	Requires occasional assistant; but is able to care for most of his personal needs.
50	Requires considerable assistance and frequent medical care
40	Disabled; requires special care and assistance
30	Severely disabled; hospital admission is indicated, although death not imminent
20	Very sick; hospital admission necessary; active supportive treatment necessary
10	Moribund; fatal processes progressing rapidly
0	Dead

Table 9.2: Eastern Cooperative Oncology group Performance Status Scale (ECOG-PSS)

Class 0(none)	Fully active; able to carry on all predisease performance without restriction (Karnofsky 90% to 100%)
Class 1 (mild)	Restricted in physically strenuous activity but ambulatory and able to carry out work of a light or sedentary nature e.g. Light housework, office work (Karnofsky 70% to 80%)
Class 2 (moderate)	Ambulatory and capable of all self-care but unable to carry out any work activities; up and about more than 50% of waking hours (Karnofsky 50% to 60%)
Class 3 (severe)	Capable of only limited self-care, confined to bed or chair more than 50% of waking hours (Karnofsky 30% to 40%)
Class 4 (extreme)	Completely disabled; cannot carry out any self-care; totally confined to bed or chair (Karnofsky 10% to 20%)

*KPSS is widely used to describe the functional ramification of both oncology disease and AIDS

(7) In each class there are 5 different possible impairment grades.

(8) The median grade is the default rating for initial impairment determination and may be adjusted on either side of the median but only in the same impairment class, based on the non-key factors according to history and physical exam.

(9) The general steps for determining impairment class, and grade within class are outlined according to the example illustrated in table 9.8.

(10) The differences in clinical implications regarding movement from one class to another are large. The difference in the choices for ratings in class 3 & 4 as opposed to lower classes reflects the difference between having signs and symptoms that are generally controlled by treatment versus those that are uncontrolled by treatment.

9

Table 9.8: Criteria for Rating Permanent Impairment due to HIV Disease

Class	Class 0	Class 1	Class 2	Class 3	Class 4
Whole person Impairment Rating (%)	0	3% - 15%	18% - 30%	35% - 55%	60% - 80%
Severity Grade (%)		3 6 9 12 15 (A B C D E)	18 21 24 27 30 (A B C D E)	35 40 45 50 55 (A B C D E)	60 65 70 75 80 (A B C D E)
History	Requires no treatment	Requires ARVs Therapy to control signs and symptoms Of disease.	Requires ARVs Therapy and Constant medical therapy to prevent opportunistic infections – history of prior Infections.	Requires constant ARVs therapy and chronic suppressive therapy with at least 1 active opportunistic infection.	Requires constant medical therapy and chronic suppressive therapy with at least opportunistic infections and/or opportunistic infections require hospitalization at least once per year.
Objective Findings	CD4 count of > 800 or HIV by polymerase chain reaction (PCR) < 50	CD4 count of 500 to < 800 or HIV by PCR > 50 000	CD4 count of > 200 but < 500	CD4 count of < 200 but > 100	CD4 count of < 100
Functional class	Class 0	Class 1	Class 2	Class 3	Class 4

(11) Initial score based on CD4 count is adjusted to 75% if patient meets a history criterion for class and to 80% if also meets functional criteria. Objective findings are key factors, and a key factor driving the impairment class assignment. The other factors determine at what grade (%) the ratings in a particular class.

(12) Impairment % may reflect severity of symptoms, physical and laboratory findings and estimated functional limitation resulting from Hematologic abnormality.

(13) The ratings of all classes, especially class 4, have been decreased as once one moves to higher levels of impairment, there is inevitably involvement of other organ systems or other hematologic process.

NB: These should be identified, rated and combined with the haematology oncology impairment ratings.

Table 9.3: Burden of Treatment Compliance

Intervention	% Impairment
Chronic anticoagulant therapy	5%
Chronic oral corticosteroids (discretionary)	**Up to 3%**
Chronic other immunosuppressant therapy (discretionary)	**Up to 3%**
Iron chelation or other systemic therapy	**Up to 3%**
Chronic oral chemotherapy (discretionary)	**Up to 5%**
Intravenous chemotherapy: per cycle given over the prior 6 months*	**1%**
Radiotherapy : per week given over the prior 6 months	**1%**
Transfusion per unit per month	**1%**
Phlebotomy : per treatment per month	**1%**
Aphorises: per treatment per month	**3%**
Bone marrow transplant	**10%**

4. Compensation Benefits

Compensation benefits will be payable according to the Act. Eligibility for benefits will lapse if there is no seroconversion after 6 months from the date of the incident.

(a) **Temporary total disablement**

Payment for reasonable temporary total or partial disablement shall be made for as long as such a disablement continues but not for a period exceeding 24 months.

(b) **Permanent disablement**

Permanent disablement will be assessed:

(i) once the treating doctor has furnished a comprehensive final medical report (W CI 5) to the Commissioner.

(ii) a confirmed diagnosis of occupationally acquired HIV infection shall be determined according to the latest edition of AMA Guide on permanent disablement.

(iii) permanent disablement due to impairment as a result of a permanent sequelae of an HIV/AIDS related condition(s) shall be assessed according to other relevant regulations or schedules to the Act.

(iv) a confirmed diagnosis with advanced AIDS and or treatment failure where all available HAART regimens have been exhausted shall be determined according to the latest AMA Guide for permanent disablement.

5. Medical Costs

(1) The medical costs shall cover the management of exposure, the diagnosis of HIV infection and any necessary treatment, including antiretroviral drugs (post exposure prophylaxis and chronic medication), provided by any health care provider. Medical costs for Post exposure prophylaxis will be covered until confirmation that the source is negative or after the 6 months' window period repeat test and the employee is negative.

(2) When a person has seroconverted, medical costs shall be provided for a period of not more than 24 months from the date of diagnosis or longer, if in the opinion of the Commissioner, further medical cost will reduce the extent of the disablement.

(3) Medical costs shall cover the costs of diagnosis of HIV/AIDS and any necessary treatment provided by any health care provider.

(4) The Commissioner shall decide on the need for, the nature and sufficiency of medical costs to be supplied.

(5) The management of HIV/AIDS related opportunistic infections will be covered under the Act for accepted claims.

(6) The Commissioner shall decide on the nature of and the sufficiency of the medical costs to be supplied.

(7) The employer should ensure that the employee has access to Post Exposure Prophylaxis (PEP) and on treatment within 72hours after exposure.

6. Death Benefits

Death benefits payable are-

(a) the reasonable burial expenses payable in terms of the Burial Expenses Policy; and

(b) the widow's and dependant's pensions payable, where applicable, if the employee dies as a result of occupationally acquired HIV/AIDS.

7. Reporting

(1) The following documents must be submitted to the Office of the Compensation Fund immediately after the incident or accident:

(a) initial report of occupational exposure to blood or other body fluid-borne pathogens (W CL 306). Annexure A, and a copy of certified identity document;

(b) further documents as may be required to be submitted to the Office of the Compensation Commissioner or the employer individually liable or licensee after seroconversion are listed below, and confidentiality should be respected at all times;

(c) Employer's Report of an Accident (W CL 2);

(d) Notice of Accident and Claim for Compensation (W CL 3);

(e) First Medical Report (W CL 4);

(f) Laboratory blood test results (baseline HIV test results) of the exposed employee done within 72 hours of the incident/ accident, confirming the absence of HIV antibodies and the absence of HIV antigen/virus (PCR);

(g) confirmation that the source was HIV infected. Laboratory blood test of HIV test results of the source;

(h) confirmatory laboratory blood test results of the exposed employee confirming HIV infection (seroconversion) at six and or

twelve weeks or six months, after the date of the work-related incident or accident;

(i) Progress Medical Report to be submitted monthly to the Compensation Commissioner (W CL 5P);

(j) all other reports that may be relevant to the diagnosis and treatment of the condition;

(k) Final Medical report (W CL 5F); and

(l) in case of death, a death certificate and a BI1663 (notification of death) must be submitted, alternatively, a death certificate accompanied by a detailed medical report on a practice letterhead on the cause of death must be submitted.;

(2) The following principles must be adhered to when reporting:

(a) the employer or employer-provided health services may subject the exposed employee to HIV testing without Labour Court authorization if the testing is voluntary and confidential;

(b) where the source of possible infection is known, testing is compulsory;

(c) informed consent must be obtained from the source if HIV testing is contemplated; and

(d) during HIV testing for compensation purposes, it must be noted that "permissible" testing as defined in accordance with the Department of Health's policy on testing for HIV together with the HPCSA guidelines on good ethical practice must be adhered to.

8. Claims Processing

(1) The Commissioner will consider and adjudicate upon the liability of all claims.

(2) The medical officers employed by the Compensation Fund are responsible for the medical assessment of a claim and for the confirmation of the acceptance or rejection of the claim.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

the doj & cd
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Date: 6th December 2019

Mr T Lamati
Director-General
Department of Employment and Labour
Private Bag X117
PRETORIA
0001

For Attention: Mr H Mapholoela
Per e-mail: Harry.Mapholoela@labour.gov.za

Dear Mr T Lamati

REGULATIONS ON OCCUPATIONALLY ACQUIRED HIV/AIDS FOR THE COMPENSATION FUND MADE BY THE MINISTER UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO. 130 OF 1993)

INTRODUCTION

1. We have been requested by the Department of Employment and Labour ("the Department") to scrutinise, and provide it with a legal opinion on the Regulations on HIV/AIDS for the Compensation Fund made by the Minister under the Compensation for Occupational Injuries and Diseases Act, 1993 ("the Regulations") in terms of section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) ("the Act").

2. We have scrutinised the Regulations and have, where we found errors, made suggested amendments directly in the text of the Regulations for the

Department's consideration. For the purpose of this legal opinion, we provide hereunder an overview of the provisions of the Regulations.

LEGISLATION

3. Section 65 (1) of the Act deals with compensation for occupational diseases and states as follows:

> *"**65. Compensation for occupational diseases.**—(1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General—*
>
> *(a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment; or*
>
> *(b) that the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of and in the course of his or her employment."*

4. In terms of section 97 of the Act, the Minister is empowered to make regulations in respect of the matters tabulated in subsection (1) (*a*) to (*h*).

> *"**97. Regulations.**—(1) The Minister may make regulations, after consultation with the Board, regarding—*
>
> *(a) the place of meeting and the procedure to be followed at any meeting of the Director-General and assessors or at any proceedings in terms of this Act with which the assessors are concerned, or at any investigation in terms of this Act;*
>
> *(b) subject to section 76, the fees payable to medical practitioners or chiropractors in respect of services rendered in terms of this Act;*
>
> *(c) the procedure to be followed in paying assessments and fines to the Director-General;*
>
> *(d) the persons to whom, the places where and the manner in which payment of assessments in terms of this Act shall be made;*
>
> *(e) the determination of the amount and the conditions and manner of payment of benefits to assessors or classes of assessors;*
>
> *(f) the disposal of moneys payable in terms of this Act to any person other than the Director-General and not claimed within the prescribed period by the person entitled thereto;*
>
> *(g) any matter which shall or may be prescribed by regulation in terms of this Act;*

(h) any other matter, whether or not connected with any matter mentioned in paragraphs (a) to (g), which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.

(2) Different regulations may be made under subsection (1) in respect of different classes of employers and employees and of different areas, and the Minister may, after consultation with the Board, in respect thereof differentiate in such manner as he or she may deem expedient.

(3) Any person who contravenes or fails to comply with any regulation made under subsection (1) shall be guilty of an offence and liable on conviction to a fine, or imprisonment for a period not exceeding six months."

DISCUSSION

Minister's powers to make Regulations

5.1 The Minister's power to make the regulations is a public power that must be exercised subject to the Constitution and the law. The exercise of all public power is subject to the provisions of the Constitution which is the supreme law of the Republic[1]. The Constitution regulates the exercise of public power in different ways, which include the application of the Bill of Rights and other specific provisions of the Constitution, which regulate and control the exercise of particular powers. Another source of constraint on the exercise of public power is the rule of law which is one of the foundational values of our constitutional democracy[2]. The role of the rule of law as a form of constitutional control on the exercise of public power was sketched out in the **Affordable Medicines Trust and Others v Minister of Health and Others** 2006 (3) SA 247 (CC), where the Constitutional Court stated the following in this regard:

> "[48] Our constitutional democracy is founded on, among other values, the '(s)upremacy of the Constitution and the rule of law'. The very next provision of the Constitution declares that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'. And to give effect to the supremacy of the Constitution, courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its

[1] Section 1(c) of the Constitution of the Republic of South Africa, 1996 reads as follows:
"The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a) ...
(b) ...
(c) Supremacy of the Constitution and the rule of law."

[2] Masethla v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC) at paragraph [172].

inconsistency'. This commitment to the supremacy of the Constitution and the rule of law means that **the exercise of all public power is now subject to the constitutional control.**

[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the **Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.** In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.

[50] In **exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions** of the Medicines Act. If, in making regulations the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the **Minister acts ultra vires** (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted ultra vires is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been ultra vires under common law by reason of a functionary exceeding his or her powers is now invalid under the Constitution as an infringement of the principle of legality. The question, therefore, is whether the Minister acted ultra vires in making regulations that link a licence to compound and dispense medicines to specific premises. The answer to this question must be sought **in the empowering provisions.**"(Our emphasis.)

5.2 **In Voster and Another v Department of Economic Development, Environment and Tourism, Limpopo Province, and Others** 2006 (5) SA 291 (T) the court stated the following in this regard:

"[18] Lawfulness is relevant to the exercise of all public power, whether or not the exercise of such power constitutes administrative action. Lawfulness **depends on the terms of the empowering statute.** If the exercise of public power **is not sanctioned by the relevant empowering statute,** it will be **unlawful and invalid."**(Our emphasis.)

5.3 The Act permits the Minister to enact secondary legislation, namely, the regulations. The power to make the regulations is vested in the Minister in terms of section 97 of the Act. Section 97 (1) of the Act sets out various matters that the Minister is authorised to regulate on and in terms of section 97 (1) of the Act, the Minister may make regulations, after consultation with the Board regarding to various matters listed in that section.

5.4 From section 97(1) of the Act, it is clear that the Minister does not have the express authority to make regulations dealing with occupationally acquired HIV/AIDS. Therefore, in order to make the draft Regulations, the Minister must be so authorised by paragraph *(g)* or *(h)* of subsection (1) of section 97 of the Act. We would in this regard like to expand slightly on this provision.

Minister's power to make the draft Regulations in terms of section 97(1)*(g)* of the Act

5.5.1 The Minister is authorised to make regulations in terms of section 97(1)*(g)* of the Act if another section in the Act authorises him to make regulations relating to the subject matter dealt with in that section. There are many sections in the Act which, when read with section 97(1) *(g)* of the Act, authorise the Minister to make regulations. However, there are none that authorise him or her to make regulations regarding occupational diseases. Therefore, we are of the opinion that the Minister cannot make the draft Regulations in terms of section 97(1) *(g)* of the Act, should he continue to do so would render the regulations invalid and *ultra vires*.

Minister's power to make the draft Regulations in terms of section 97(1) *(h)* of the Act

5.5.2 In view of our conclusion in paragraph 5.5.1 above it must be determined whether the Minister is authorised to make the draft Regulations in terms of section 97(1) *(h)* of the Act. This section makes it clear that the "objects and purposes" of the Act must be determined before the question whether the Minister has the power in terms of section 97(1)*(h)* of the Act to

make the draft Regulations can be addressed. In **Road Accident Fund v Makwetlane** 2005 (4) SA 51 (SCA), (hereinafter referred to as "the **Makwetlane** case") the Court discussed the power of the Minister of Transport to make regulations to "achieve or promote the objects" of the Road Accident Fund Act, 1996 (Act No. 56 of 1996) and remarked as follows at pp. 58-59:

> "Section 26 empowers the Minister to make regulations in order to achieve or promote the objects of the Act. It does not confer authority on him to traverse terrain outside that limited scope and ambit. All regulations promulgated by the Minister must thus be reasonably necessary to achieve those objects and goals. It is indeed so that the possibility of fraud is greater in cases where the identity of the driver or owner of the vehicle in question has not been established, as it would usually be difficult for the RAF to secure evidence to dispute a claim (see *Mbatha* at 718H). Stricter requirements would thus be justified in unidentified vehicle cases. It follows that regulations designed to eliminate fraud and facilitate proof of legitimate claims, falling as it does within the Minister's power to regulate, would be permissible. No other reason has been suggested for such a requirement and I can think of none. That legitimate end, may not, however, be achieved by means that sweep too broadly. ...
>
> The Constitution places significant restraints upon the exercise of public power. It is a requirement of the rule of law that the exercise of public power should not be arbitrary. It follows that the exercise by the Minister of the regulatory power conferred upon him had to be rationally related to the purpose for which the power was granted - rationality being the minimum threshold requirement. (See *Pharmaceutical Manufacturers* paras [85] and [86].) Conduct that fails to pass that threshold requirement would fall below the standards set by our Constitution and would therefore be unlawful." (Our underlining.)

5.5.3 We have analysed the Makwetlane case, the subject matter of the

regulations, and the rationality principle which must be considered to enable the Minister to achieve the objects and purposes of the act. We are in this regard of the view that sections 97(1)(*h*) read with 65 (1) of the Act are the appropriate provisions in so far as the Minister's powers to make the regulations are concerned.

6. We now turn to deal with the regulations as set out in the Schedule. We have suggested tracked changes with regards to the drafting style and form of the Regulations. This is done in order to align the Regulations with common drafting principles.

***Ad* Regulation 1: Definitions**

7. Regulation 1 provides for the definition of some of the words used in the Regulations. We have made some suggested amendments in regulation 1 for the Department's consideration.

***Ad* Regulation 2: Diagnosis**

8. Regulation 2 provides for the diagnosis of occupationally acquired HIV by a medical practitioner and further for various ways in which such a diagnosis can be made. Minor amendments were made to this regulation.

***Ad* Regulation 3: Impairment**

9. Regulation 3 provides that assessment of impairment shall be determined after maximum medical improvement (MMI) has been reached, i.e. when the treating medical practitioner considers that no further improvement is anticipated on available medical treatment. Minor amendments were made to this regulation.

***Ad* Regulation 4: Compensation benefits**

10. Regulation 4 provides for the compensation benefits payable according

to the Act after assessment of the total impairment score. Minor amendments were made to this regulation.

***Ad* Regulation 5: Medical costs**

11. Regulation 5 provides that medical costs shall cover the management of exposure, the diagnosis of HIV infection and any necessary treatment, including antiretroviral drugs, provided by any health care provider. It further provides for the period of such assistance. Minor amendments were made to this regulation.

***Ad* Regulation 6: Death benefits**

12. Regulation 6 provides for death benefits payable in terms of the Burial Expenses Policy and where the employee dies as a result of occupationally acquired HIV/AIDS, widow's and dependent's pensions will be payable. Minor amendments were made to this regulation.

***Ad* Regulation 7: Reporting**

13. Regulation 7 lists the documentation that must be submitted to the Office of the Compensation Fund, immediately after the incident or accident. Minor amendments were made to this regulation.

***Ad* Regulation 8: Claims processing**

14. Regulation 8 provides for the consideration and adjudication of all claims by the Commissioner and that the medical officers employed by the Compensation Fund are responsible for medical assessments of claims and for the confirmation of acceptance or rejection of the claims. Minor amendments were made to this regulation.

***Ad* Regulation 9: Short title and commencement**

15. Regulation 9 provides for the date of commencement.

16. The Department's attention is drawn to the fact that, in terms of section 6 (3) of the Constitution of the Republic of South Africa, 1996, the Regulations must be published in at least two official languages and non-compliance with this requirement may render the Regulations to be unconstitutional.

CONCLUSION

17. In light of the exposition above, we are of the view that the Minister has the requisite authority to make the regulations under consideration. Subject to our suggested amendments made directly in the text of the regulations, we are of the view that the regulations are in order and conform to the form and style of legislative drafting.

18. A copy of the Regulations with track changes incorporating our suggested amendments, is hereto attached, for your kind attention.

Yours sincerely



FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
B TOISE / X MDLUDLU / S MASAPU

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO. 130 OF 1993)

REGULATIONS ON WORK-RELATED UPPER RESPIRATORY TRACT DISORDERS FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

The Minister of Employment and Labour, after consultation with the Compensation Board has, under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) made the Regulations in Schedule A. These regulations are published for public comments only.

Interested and affected parties are hereby invited to submit written representations on the proposed Regulations. The aforesaid representations must be marked for the attention of **Mr TH Maphologela** and sent by registered post or emailed or hand delivered within 60 days of publication of this notice to the following addresses:

Compensation Fund
167 Thabo Sehume Street
Pretoria
0157

OR

PO Box 955
Pretoria
000

Email addresses: Kimbly.Makgoba@labour.gov.za or Harry.Maphologela@labour.gov.za

1

Copies of the Regulations are herewith attached.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

SCHEDULE A

REGULATIONS ON WORK-RELATED UPPER RESPIRATORY TRACT DISORDERS FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

ARRANGEMENTS OF REGULATIONS

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1. Definitions

In these Regulations, a word or expression to which a meaning has been assigned in the Act or these Regulations has the meaning so assigned and, unless the context otherwise indicates–

"immunology test" means an antigen to detect the presence of antibodies to a pathogen, or an antibody to detect the presence of an antigen, of the pathogen in the specimens of the victim;

"irritant" means a substance that causes slight inflammation or other discomfort to the body;

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"Regulations" means the Regulations on Work-related Upper Respiratory tract Disorders for the Compensation Fund made under the Compensation for Occupational Injuries and Diseases Act, 1993;

"work-related upper respiratory tract disorders" means diseases affecting the mucosal lining of the nose, larynx and pharynx caused or aggravated by conditions attributable to a particular working environment such as allergic or irritant rhinitis and nasal erosions and perforations.

2. Diagnosis

(1) The diagnosis of Work-related upper respiratory tract disorders must be made by a medical practitioner based on the following:

(a) workplace exposure to agents reported to give rise to work-related upper respiratory tract disorder;

(b) chronological relationship between Work-related upper respiratory tract disorder and work environment; and

(c) evidence of sensitisation (immunological tests) to a known workplace allergen, where applicable.

(2) The medical officer employed by the Compensation Fund must determine whether the diagnosis of Work-related upper respiratory tract disorder was made according to acceptable medical standards.

3. Impairment

Impairment must be assessed after maximum medical improvement has been reached and, where necessary, after removal from exposure using the latest AMA Guide.

Table 11-6 Criteria for Rating Impairment due to Air Passage Deficits*

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IMPAIRMENT CLASS	CLASS 0	CLASS 1	CLASS 2	CLASS 3	CLASS 4
IMPAIRMENT RANGES (WPI %)	0	1%-9% WPI	11%-27% WPI	30%-42% WPI	45%-58% WPI
GRADE		1 3 5 7 9	11 15 19 23 27	30 33 36 39 42	45 48 51 54 58
HISTORY[c]	There are no complaints of dyspnoea at rest ***and*** Minimal or no interference with any activities	There are no complaints of dyspnoea at rest Activities requiring intensive effort may be interfered with or require medication to maintain optimal function	There are no complaints of dyspnoea at rest ***and*** dyspnoea is produced by stress, prolonged exertion, hurrying, hill climbing, or recreational or similar activities except sedentary forms	There are no complaints of dyspnoea at rest ***and*** dyspnoea is produced by walking more than 1 or 2 level blocks, climbing 1 flight of stairs even with periods of rest, or performance of other usual activities of daily living	Dyspnoea occurs at rest, although individual is not necessarily bedridden ***and*** dyspnoea is aggravated by the performance of any of the usual activities of daily living beyond personal cleansing, dressing, or grooming

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					For ventilator dependence, refer to the pulmonary chapter ratings
PHYSICAL EXAM	Minimal changes to the oropharynx, laryngo-pharynx, larynx, upper trachea, or lower trachea, or incomplete and episodic obstruction of the nose or nasopharynx	Mild changes to the oropharynx, laryngo-pharynx, larynx, upper trachea, or lower trachea, or incomplete and episodic obstruction of the nose or nasopharynx	Moderate changes to the oropharynx, laryngo-pharynx, larynx, upper trachea, or lower trachea, or reversible complete or permanent incomplete obstruction of the nose or nasopharynx	Severe changes to the oropharynx, laryngo-pharynx, larynx, upper trachea, or lower trachea, or obstruction of the nose or nasopharynx that is only partially reversible	Severe changes to the oropharynx, laryngo-pharynx, larynx, upper trachea, or lower trachea, or complete, nonreversible obstruction of the nose or nasopharynx
DIAGNOSTIC OR OTHER OBJECTIVE FINDINGS	There are no tests showing obstruction of the nose, sinuses, nasopharynx, oropharynx, or larynx	Sinus CT[d] shows mild mucosal thickening, mild obstruction of nasopharynx or oropharynx, or	Sinus CT shows moderate mucosal thickening or moderate obstruction of nasopharynx or oropharynx,	Sinus CT shows moderately severe mucosal thickening or turbinate swelling, or moderately severe	Sinus CT shows diffuse severe mucosal thickening or severe turbinate swelling, or severe obstruction of

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		laryngoscopy may show mild alteration in vocal fold (cord) function	or laryngoscopy may show moderate alteration in vocal fold (cord) function	obstruction of nasopharynx or oropharynx, or laryngoscopy may show moderately severe alteration in vocal fold (cord) function	nasopharynx or oropharynx, or laryngoscopy may show severe alteration in vocal fold (cord) function such as bilateral paralysis

[a] Individuals with successful tracheotomy or stoma should be rated as having 25% impairment of the whole person

[b] Move up in class 4 based on the severity and number of findings in physical exam and objective findings

[c] Key factor

[d] CT indicates computed tomography.

*AMA Guides to the Evaluation of Permanent Impairment, 6th edition

4. Compensation Benefits

The compensation benefits payable in terms of the Act are the following:

(1) Payment for temporary total disablement or temporary partial disablement must be made for as long as the disablement continues, but not for a period exceeding 24 months;

(2) When total impairment score is zero to three (i.e. permanent disablement less than or equal to 30%), permanent disablement must be determined and a lump sum must be paid in terms of the Act;

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(3) When total impairment score is more than three (i.e. permanent disablement is higher than 30%), pension must be paid in terms of the Act.

5. Medical Costs

(1) Medical costs must be provided for a period of not more than 24 months from the date of diagnosis or longer, if in the opinion of the Commissioner, further medical aid will reduce the degree of the disablement.

(2) Medical costs must cover diagnosis of Work-related upper respiratory tract disorders and any necessary treatment provided by a healthcare provider.

(3) The Commissioner must decide on the need for, the nature and sufficiency of, medical costs to be supplied.

6. Death Benefits

Death benefits payable are the following:

(1) Reasonable burial expenses in terms of the Burial Expenses Policy; and

(2) A spouse and defendants' pensions payable, where applicable, if the employee dies as a result of Work-related upper respiratory tract disorders.

7. Reporting

The following documentation must be submitted to the Compensation Fund or the employer individually liable or the licensee concerned:

(a) Employer's Report of an Occupational Disease (W.CL.1);

(b) Notice of Occupational Diseases and claim for compensation (W.CL14);

(c) An W.CL.305 affidavit by the employee if an employer cannot be traced or if the employer fails to timeously submit the Employer's report of an Occupational Disease (W.CL.1);

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(d) Industrial history or workplace exposure history (W.CL 110) - there must be a clear history of occupational exposure or exposure in an occupation or industry where exposure to Work-related upper respiratory tract disorders is known to occur;

(e) First Medical Report detailing the employee's illness in respect of an occupational disease (W.CL 22);

(f) ENT or medical report detailing the employee's symptoms and clinical features;

(g) Other appropriate tests such as immunological and ENT examinations or any investigation to confirm diagnosis, where applicable;

(h) Progress or Final Medical Report in respect of occupational disease (W.CL 26);

(i) in case of death, a death certificate and a BI1663 (notification of death) must be submitted. Alternatively, a death certificate accompanied by a detailed medical report on a practice letterhead on the cause of death must be submitted.

8. Claims Processing

(1) The Commissioner must consider and adjudicate upon the liability of all claims.

(2) The medical officers employed by the Fund are responsible for the medical assessment of a claim and for the confirmation of the acceptance or rejection of a claim.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

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the doj & cd
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REPUBLIC OF SOUTH AFRICA

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Date: 9 December 2019

Mr T Lamati
The Director-General
Department of Employment and Labour
Private Bag X117
PRETORIA
0001

Attention: H Maphologela

Dear Mr Lamati

REGULATIONS ON WORK-RELATED UPPER RESPIRATORY TRACT DISORDERS FOR THE COMPENSATION FUND MADE BY THE MINISTER UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993: YOUR EMAIL OF 14 OCTOBER 2019

1. The Department of Labour and Employment (the "Department"), requests our opinion on the draft Regulations (the "Regulations") on Work-Related Upper Respiratory Tract Disorders for the Compensation Fund Made by the Minister under the Compensation for Occupational Injuries and Diseases Act, (Act No. 130 of 1993)(the "Act").

2. We have scrutinised the draft Regulations, and have made suggested changes and comments on the draft electronically. We would like to make the following additional comments:

Nature of power to make regulations

3. The delegation of legislative power to the Executive by Parliament is important and necessary for effective law-making and implementation. In **Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others** 1995 (4) SA 877 (CC), the Constitutional Court (the "CC"), per Chaskalson P, stated the following with regard to the need for Parliament to delegate its law-making powers to the Executive:

> "[51] The legislative authority vested in Parliament under s 37 of the Constitution is expressed in wide terms - 'to make laws for the Republic in accordance with this Constitution'. In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. **There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies.** The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation **within the framework of a statute under which the delegation is made**, and assigning plenary legislative power to another body...." (Our emphasis.)

4. At paragraph 57, the CC, in the **Executive Council, Western Cape Legislature** case, quotes with approval the following remarks by H M Seervai "*Constitutional Law of India*", 3rd edition (1983), Volume II, at paragraph 21.53, on the power of Parliament to delegate legislative power to the Executive:

> "(L)egislative power is not "property" to be jealously guarded by the Legislature, but is a means to an end, and if the end is desired by the Legislature and the difficulties in achieving that end cannot be foreseen, it is not only desirable **but imperative** that the power to remove difficulties should be entrusted to the executive Government which would be in charge of the day-to-day working of the law." (Our emphasis.)

5. The power to make regulations is a public power that must be exercised subject to the Constitution of the Republic of South Africa, 1996 (the "Constitution") and the law. In **Affordable Medicines Trust and Others v Minister of Health and Others** 2006 (3) SA 247 (CC), the CC stated the following in this regard:

> "[48] Our constitutional democracy is founded on, among other values, the '(s)upremacy of the Constitution and the rule of law'. The very next provision of the Constitution declares that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'. And to give effect to the supremacy of the Constitution, courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. This commitment to the supremacy of the Constitution and the rule of law means that **the exercise of all public power is now subject to constitutional control**.
>
> [49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and **the Executive** 'are constrained by the principle that **they may exercise no power and perform no function beyond that conferred upon them by law**'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.
>
> [50] In exercising **the power to make regulations**, the Minister **had to comply with the Constitution**, which is the supreme law, **and the empowering provisions** of the Medicines Act. If, in making regulations, the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts **ultra vires** (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted ultra vires is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been ultra vires under common law by reason of a functionary

> exceeding his or her powers is now invalid under the Constitution as an infringement of the principle of legality. The question, therefore, is whether the Minister acted ultra vires in making regulations that link a licence to compound and dispense medicines to specific premises. The answer to this question must be sought **in the empowering provisions**." (Our emphasis.)

6. In **Vorster and Another v Department of Economic Development, Environment and Tourism, Limpopo Province, and Others** 2006 (5) SA 291 (T) the court also stated the following in this regard:

> "[18] Lawfulness is relevant to the exercise of all public power, whether or not the exercise of such power constitutes administrative action. Lawfulness **depends on the terms of the empowering statute**. If the exercise of public power **is not sanctioned by the relevant empowering statute**, it will be **unlawful and invalid**." (Our emphasis.)

7. In making the Regulations, the Minister of Employment and Labour (the "Minister") must comply with the Constitution, which is the supreme law and section 97 of the Act, which is the empowering provision. If the Minister exceeds the powers conferred by the empowering provision, then the Minister acts *ultra vires* and in breach of the doctrine of legality and the Regulations would be invalid.

Empowering provision

8. The draft Regulations are made in terms of section 97 of the Act. Section 97 of the Act empowers the Minister, after consultation with the Board, to make regulations and provides as follows:

> "**Regulations**
> (1) The Minister may make regulations, after consultation with the Board, regarding-
>
> *(a)* the place of meeting and the procedure to be followed at any meeting of the Director-General and assessors or at any proceedings in terms of this Act with which the assessors are

concerned, or at any investigation in terms of this Act;

(b) subject to section 76, the fees payable to medical practitioners or chiropractors in respect of services rendered in terms of this Act;

(c) the procedure to be followed in paying assessments and fines to the Director-General;

(d) the persons to whom, the places where and the manner in which payment of assessments in terms of this Act shall be made;

(e) the determination of the amount and the conditions and manner of payment of benefits to assessors or classes of assessors;

(f) the disposal of moneys payable in terms of this Act to any person other than the Director-General and not claimed within the prescribed period by the person entitled thereto;

(g) any matter which shall or may be prescribed by regulation in terms of this Act;

(h) **any other matter, whether or not connected with any matter mentioned in paragraphs *(a)* to *(g)*, which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.** (Our emphasis.)

(2) Different regulations may be made under subsection (1) in respect of different classes of employers and employees and of different areas, and the Minister may, after consultation with the Board, in respect thereof differentiate in such manner as he or she may deem expedient.

(3) Any person who contravenes or fails to comply with any regulation made under subsection (1) shall be guilty of an offence and liable on conviction to a fine, or imprisonment for a period not exceeding six months.".

From section 97(1) of the Act it is clear that the Minister does not have the express authority to make regulations dealing with work-related upper respiratory tract disorders. Therefore, in order to make the draft Regulations the Minister must be so authorised by paragraph *(g)* or *(h)* of subsection (1) of section 97 of the Act.

Minister's power to make the draft Regulations in terms of section 97(1)*(g)* of the Act

9. The Minister is authorised to make regulations in terms of section 97(1)*(g)* of the Act if another section in the Act authorises him to make regulations relating to the subject matter dealt with in that section. There are many sections in the Act which, when read with section 97(1)*(g)* of the Act, authorise the Minister to make regulations. However, there are none that authorise him or her to make regulations regarding occupational diseases. Therefore, we are of the opinion that the Minister cannot make the draft Regulations in terms of section 97(1)*(g)* of the Act.

Minister's power to make the draft Regulations in terms of section 97(1)*(h)* of the Act

10. In view of our conclusion in paragraph 9 above it must be determined whether the Minister is authorised to make the draft Regulations in terms of section 97(1)*(h)* of the Act. This section makes it clear that the "objects and purposes" of the Act must be determined before the question whether the Minister has the power in terms of section 97(1)*(h)* of the Act to make the draft Regulations can be addressed. In **Road Accident Fund v Makwetlane** 2005 (4) SA 51 (SCA), (hereinafter referred to as "the **Makwetlane** case") the Court discussed the power of the Minister of Transport to make regulations to "achieve or promote the objects" of the Road Accident Fund Act, 1996 (Act No. 56 of 1996) and remarked as follows at pp. 58-59:

> "Section 26 empowers the Minister to make regulations in order to achieve or promote the objects of the Act. It does not confer authority on him to traverse terrain outside that limited scope and ambit. All regulations promulgated by the Minister must thus be reasonably necessary to achieve those objects and goals. It is indeed so that the possibility of fraud is greater in cases where the identity of the driver or owner of the vehicle in question has not been established, as it would usually be difficult for the RAF to secure evidence to dispute a claim (see *Mbatha* at 718H). Stricter requirements would thus be justified in unidentified vehicle cases. It follows that regulations designed to eliminate fraud and facilitate proof of legitimate claims, falling as it does within the Minister's power to regulate, would be permissible. No other reason has been suggested for such a requirement and I can think of none. That legitimate end, may not, however, be achieved by means that sweep too broadly. ...

> The Constitution places significant restraints upon the exercise of public power. It is a requirement of the rule of law that the exercise of public power should not be arbitrary. It follows that the exercise by the Minister of the regulatory power conferred upon him had to be rationally related to the purpose for which the power was granted - rationality being the minimum threshold requirement. (See *Pharmaceutical Manufacturers* paras [85] and [86].) Conduct that fails to pass that threshold requirement would fall below the standards set by our Constitution and would therefore be unlawful." (Our underlining.)

We are of the opinion that in view of the underlined remarks in the **Makwetlane** case, quoted above, the following deductions can be made regarding the Minister's power to make regulations in terms of section 97(1)*(h)* of the Act:

(a) Section 97(1)*(h)* of the Act limits the power of the Minister to making regulations that relate to the achievement of the objects and purposes of the Act.

(b) The regulations made under section 97(1)*(h)* of the Act must be rationally connected to the objects and purposes of the Act.

Comments on the Regulations

11. These Regulations seek to regulate compensation for work-related upper respiratory tract disorders in terms of the Act.

***Ad* Table of contents**

12. We have noted the incorrect numbering of the table of contents and made the necessary amendments in order for the table of contents to accurately correspond with the text of the Regulations. Kindly ensure that the Regulations are correctly numbered before promulgation.

***Ad* regulation 3**

13. This regulation states that impairment shall be assessed after maximum medical improvement has been reached and, where necessary, after removal from exposure using the latest AMA Guide. Kindly ensure that the AMA Guide referred to in this regulation is the correct version.

***Ad* regulation 4**

14. This regulation deals with compensation benefits and is in line with the provisions of the Schedule 4 of the Act.

***Ad* regulation 9**

15. We have moved the paragraph with a heading "effective date of regulation" to the end as regulation 9 with the heading "Short Title and Commencement".

General remarks on the making of regulations

16. Although the Act does not expressly require the Regulations to be published for comment before being finally promulgated, we are of the opinion that, if the Regulations have not been published for public comment, they should first be published for public comment before being finally promulgated.

17. In **Central African Services (Pty) and Another v The Minister of Transport and Another, Case NO: 32238/2011 (North Gauteng)** the court, per Makgoka J, found the amendment regulations it was concerned with to be invalid, *inter alia*, because–

(a) the Minister and the agency concerned failed to comply with their constitutional obligation to ensure procedural fairness in the publication and promulgation of the Regulations;

(b) the agency failed in its constitutional duty to comply with its duty to facilitate proper public comment before publishing the Regulations;

(c) the Regulations were not promulgated in a manner consistent with the Promotion of Administrative Justice Act, 2000(Act No. 3 of 2000) and section 33 of the Constitution of the Republic of South Africa, 1996; and

(d) the Regulations were also not published in at least two official languages as required by section 6(3)(a) of the Constitution. (See paragraphs 29-38,43-44, 51, 57 and 59 and also **Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another [2015] ZACC 12 (Case CCT 163/14)**.

18. We are, of the opinion that the Regulations must also be published in at least two official languages, as provided for in section 6(3)*(a)* of the Constitution.

CONCLUSION

19. We have scrutinised the draft Regulations and subject to our comments and the suggested changes made to the text of the draft Regulations, we are of the opinion that the draft Regulations are authorised by section 97(1)(h) of the Act. A copy of the draft amended Regulations is attached hereto, and an electronic copy will be forwarded to your office via electronic mail.

Yours sincerely,

FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
R B PAUL / KA SELOKELA / S MASAPU

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO 130 OF 1993)

REGULATIONS ON COMPENSATION FOR WORK-RELATED CHRONIC OBSTRUCTIVE PULMONARY DISEASE (COPD) FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

The Minister of Employment and Labour, after consultation with the Compensation Board has, under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) made the Regulations in Schedule A. These regulations are published for public comments only.

Interested and affected parties are hereby invited to submit written representations on the proposed Regulations. The aforesaid representations must be marked for the attention of **Mr TH Maphologela** and sent by registered post or emailed or hand delivered within 60 days of publication of this notice to the following addresses:

Compensation Fund	OR	PO Box 955
167 Thabo Sehume Street		Pretoria
Pretoria		0001
0157		

Email addresses: Kimbly.Makgoba@labour.gov.za or Harry.Maphologela@labour.gov.za

Copies of the Regulations are herewith attached.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

SCHEDULE A

REGULATIONS ON COMPENSATION FOR WORK-RELATED CHRONIC OBSTRUCTIVE PULMONARY DISEASE (COPD) FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

ARRANGEMENT OF REGULATIONS

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3. Impairment.....2-3
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5. Medical Costs.....3
6. Death Benefits.....4
7. Reporting.....4-5
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1. Definition

In these regulations, a word or expression to which a meaning has been assigned in the Act or these Regulations shall have the meaning so assigned and,unless the context otherwise indicates—

"Regulations" means the Regulations on Work Related Chronic Obstructive Pulmonary Dieases (COPD) for the Compensation Fund made under the Compensation for Occupational Injuries and Diseases Act, 1993;

"Work-related chronic obstructive pulmonary disease" (COPD) means a progressive disease of the airways, characterised by an abnormal inflammatory response and chronic airflow limitation (obstruction) that is irreversible or partially reversible due to causes and conditions attributable to a particular working environment. It is associated with lung hyperinflation and systemic effects. The dominant clinical correlates are chronic bronchitis and emphysema.

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2. Diagnosis

(1) The chronic obstructive pulmonary disease shall be diagnosed by a medical practitioner and the diagnosis should include:

(a) a characteristic history of progressive dyspnea and or chronic cough (with or without sputum production), **and** spirometry showing evidence of chronic airflow limitation. This is characterised by a post-bronchodilator FEV_1 /FVC ratio < 70% (400ug short acting beta 2 agonist; measured 15 minutes after administration of bronchodilator);

(b) a chronological relationship between the work-related exposure and the development of COPD. (As outlined in Annexure 1); and

(c) at least 15 years of workplace exposure to an agent(s) reported to give rise to work related COPD, but 10 years may be considered sufficient if exposure levels have been very high. Where particulate exposure data is available, levels ≥10mg/m^3 inhalable dust level would be considered as high.

(2) The diagnosis should be made within 10 years of last exposure to the causative agent/s.

(3) The medical officers employed by the Compensation Fund will determine whether the diagnosis of work related COPD was made according to acceptable medical standards.

3. Impairment

(1) Pulmonary impairment will be determined using the lung function tests in Table 1 – post-bronchodilator FEV_1 and the treatment of the individual in Table 2 to calculate the impairment score that equates to the level of permanent disablement in Table 3.

Table 1: FEV_1 (post-bronchodilator reading)	
Score	**FEV_1 % Predicted**
0	>80
1	65-79
2	55-64
3	45-54
4	<45

* FEV_1 % predicted = measured FEV_1 divided by reference FEV_1 x 100

Table 2: Treatment	
Score	**Treatment**
0	No medication
1	Bronchodilators (short-acting Beta-2 agonists or short-acting anti-

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	cholinergics or both) as needed or regularly And/Or Oral Theophylline
2	Regular long-acting Beta-2 agonists or long-acting anti-cholinergics or both
3	Inhaled glucocorticosteroids And/Or Antibiotic treatment for frequent exacerbations (≥3/year)
4	Treatment for chronic respiratory failure (e.g. long term oxygen therapy, ventilatory support)

(2) Whole Person Impairment will be determined, in accordance with the latest AMA Guide edition once Maximal Medical Improvement (MMI) has been reached.

4. Compensation Benefits

The compensation benefits payable in terms of the Act are:

(1) Payment for temporary total disablement shall be made for as long as such disablement continues, but not for a period exceeding 24 months.

(2) If total impairment score is zero to three (i.e. permanent disablement less than or equal to 30%), permanent disablement shall be determined and a lump sum shall be paid in terms of the Act.

(3) If total impairment score is more than three (i.e. permanent disablement is higher than 30%), pension shall be paid in terms of the Act.

5. Medical Costs

(1) Medical costs shall be provided for a period of not more than 24 months from the date of diagnosis or longer, if in the opinion of the Commissioner, further medical aid will reduce the extent of the disablement.

(2) Medical costs shall cover the costs of diagnosis of COPD and any necessary treatment provided by any health care provider.

(3) The Commissioner shall decide on the need for, the nature and sufficiency of medical costs to be supplied.

6. Death Benefits

Death benefits payable are:

(1) Reasonable burial expenses shall be paid in terms of Burial Expenses Policy; and

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(2) Widow's and dependent's pensions shall be payable, where applicable, if the employee dies as a result of work-related chronic obstructive pulmonary disease.

7. Reporting

The following documentation must be submitted to the Compensation Fund or the employer individually liable or the licensee concerned:

(a) Employer's Report of an Occupational Disease (W.CL.1).

(b) First Medical Report in respect of an Occupational Disease (W.CL.22).

(c) Notice of an Occupational Disease and Claim for Compensation (W.CL.14).

(d) Exposure History (W.CL.110) or an appropriate employment history guided by Annexure 1.

(e) Progress or Final Medical Report in respect of an Occupational Disease (W.CL.26).

(f) Medical Report detailing the employee's exposures, symptoms, clinical features and treatment prescribed.

(g) An affidavit by the employee if an employer cannot be traced or the employer will not timeously supply a W.CL.1. (W.CL.305)

(h) Pulmonary function tests confirming diagnosis and final pulmonary function tests when no further medical improvement is anticipated.

(i) Chest X-ray and radiology reports or other relevant investigations, where applicable.

Annexure 1: Agents and occupations associated with Occupational COPD[1-3]

Agent	Occupation	
Chemicals, vapours or gases	Isocyanates Sulphur Dioxide Oxides of Nitrogen Solvents	Painters Foundries Chemical processors Cleaners, dry cleaners, personal services (hairdressers, nail technicians)
Dust		
• Mineral dusts	Silica, silicate, coal, asbestos, hard rock, cement, fibre, glass, quartz, asphalt	Mine workers, quarry workers, construction workers, highway or tunnel workers, transport workers, concrete/cement manufacturing, foundries, refractory brick workers, ship building, pottery workers

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• Hard metal dusts	Aluminium	Engineering, metal workers, car manufacturers, foundries
• Organic dusts	Cotton, grain, wood, animal feed, endotoxins, oil mist, tea, microbials (plant/animal origin	Wood and paper workers, records processing and distribution clerks, mill workers, grain workers, bakers, fertilizer manufacture, food processors, farmers/agriculture, cotton textile workers, tea manufacture.
Metal fumes		
	Cadmium Vanadium Aluminium	Metal workers
Fibers		
	Man-made mineral fibers. Ceramic fibers	
Complex mixtures	Welding fumes, engine exhaust, fire smoke, environmental tobacco smoke*, pesticides and herbicides	Welders, automobile industries (repairs, servicing), petrol stations, firemen/rescue services, transport workers, agriculture, waitresses (passive smoke).
Biological agents	Mycobacterium Tuberculosis	Health workers, silica dust-exposed workers
Epoxy resins	Optics, Fiber optics, painting, adhesives	Adhesives, rubber, plastics, leather manufacturing, paints, petroleum, electronics, painting

* Exposure must have taken place during and in the course of performing work

8. Claims Processing

(1) The Commissioner shall consider and adjudicate upon the liability of all claims.

(2) The medical officers employed by the Compensation Fund are responsible for the medical assessment of a claim and for the confirmation of the acceptance or rejection of a claim.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

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the doj & cd

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Mr T Lamati
The Director-General
Department of Employment and Labour
Private Bag X117
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For Attention: Mr Harry Mapholoela (Harry.Mapholoela@labour.gov.za)

Dear Mr Lamati

REGULATIONS ON COMPENSATION FOR WORK-RELATED CHRONIC OBSTRUCTIVE PULMONARY DISEASE (COPD) FOR THE COMPENSATION FUND MADE BY THE MINISTER UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993: YOUR EMAIL DATED: 14 OCTOBER 2019

INTRODUCTION

1. We have been requested by the Department of Employment and Labour ("the Department") to scrutinise, and provide it with a legal opinion on, the draft regulations on Compensation for Work-Related Chronic Obstructive Pulmonary Disease (COPD) for the Compensation Fund ("the Regulations) that are to be made by the Minister in terms of section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993 ("the Act").

2. We have scrutinised the Regulations and have, where we found errors and matters of concern, made suggested amendments directly in the text of the Regulations and comments for the Department's consideration. However, we note that there are some aspects of the Regulations which are of a scientific nature and as such we leave those scientific aspects to the Department's relevant personnel with

the scientific know-how to deal with them. The focus of our scrutiny of the Regulations ensures that the Regulations are *intra vires* the provisions of the enabling legislation, and that are drafted in the correct drafting form and style. For the purpose of this legal opinion, we provide hereunder an overview of the provisions of the Regulations.

***Ad* Regulation 1**

3. Regulations 1 provides for the definition of some of the words used in the Regulations. We have made some suggested amendments in regulation 1 for the Department's consideration.

***Ad* Regulation 2**

4. In terms of regulation 2, the chronic obstructive pulmonary disease must be diagnosed by a medical practitioner. It also states that the diagnosis must be made within 10 years of the last exposure to the causative agents and that the Medical Officers employed by the Compensation Fund ("the Fund") must determine whether the diagnosis was made according to the acceptable medical standards.

***Ad* Regulation 3**

5. In terms of regulation 3 pulmonary impairment must be determined using lung function tests set out in Table 1 and Table 2 provided for in that regulation. Regulation 3 also refers to Table 3 which purportedly reflects the level of score according to which permanent disablement must be calculated. We wish to point out that there is no Table 3 either under regulation 3 or anywhere in the Regulations themselves. The Department should therefore rectify this.

***Ad* Regulation 4**

6. Regulation 4 deals with the compensation benefits payable in terms of the Act. It states, amongst other things, that payment of temporary total disablement must be made for as longs as the disablement continues but nor for a period exceeding 24 months, and if the total impairment score is zero to three, permanent disablement must be determined and a lump sum must be paid.

***Ad* Regulation 5**

7. Regulation 5 deals with medical costs. It states, amongst other things, that medical costs must be provided for a period of not more than 24 months from the date of diagnosis or longer, if in the opinion of the Commissioner further medial aid may reduce the extent of the disablement, and that the medical costs must cover the costs of diagnosis of COPD and any necessary treatment provided by any health care provider.

***Ad* Regulation 6**

8. Regulation 6 deals with the payment of death benefits. It states that reasonable burial expenses must be paid in terms of a Burial Expenses Policy and that a window's and dependent's pension must be payable, where applicable, if the employee dies as a result of work-related chronic obstructive pulmonary disease.

***Ad* Regulation 7**

9. Regulation 7 deals with the reporting of the occupational disease to the Fund and the documents that must be submitted which include, amongst other things, the employer's report of an occupational disease (W.CL.1), the first medical report in respect of an occupational disease (W.CL.22) and the notice of an occupational disease and the claim for compensation (W.CL.14).

***Ad* Regulation 8**

10. Regulation 8 deals with the processing of claims and states that the Commissioner must consider and adjudicate upon the liability of all claims. It states further that the Medical Officers employed by the Fund are responsible for the medical assessment of a claim and for the confirmation of the acceptance or rejection of a claim.

MINISTER'S POWER TO MAKE REGULATIONS

14. In terms of section 97 of the Act the Minister is empowered to make regulations in respect of the matters provided for in that section. Section 97 of the Act states as follows:

"Regulations

97(1) The Minister may make regulations, after consultation with the Board, regarding—

(a) the place of meeting and the procedure to be followed at any meeting of the Director-General and assessors or at any proceedings in terms of this Act with which the assessors are concerned, or at any investigation in terms of this Act;
(b) subject to section 76, the fees payable to medical practitioners or chiropractors in respect of services rendered in terms of this Act;
(c) the procedure to be followed in paying assessments and fines to the Director-General;
(d) the persons to whom, the places where and the manner in which payment of assessments in terms of this Act shall be made;
(e) the determination of the amount and the conditions and manner of payment of benefits to assessors or classes of assessors;
(f) the disposal of moneys payable in terms of this Act to any person other than the Director-General and not claimed within the prescribed period by the person entitled thereto;
(g) any matter which shall or may be prescribed by regulation in terms of this Act;
(h) any other matter, whether or not connected with any matter mentioned in paragraphs (a) to (g), which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.

(2) Different regulations may be made under subsection (1) in respect of different classes of employers and employees and of different areas, and the Minister may, after consultation with the Board, in respect thereof differentiate in such manner as he or she may deem expedient.

(3) Any person who contravenes or fails to comply with any regulation made under subsection (1) shall be guilty of an offence and liable on conviction to a fine, or imprisonment for a period not exceeding six months.".

15. Chronic obstructive pulmonary disease, of which the Regulations are concerned with and the compensation thereof, is listed in item 2.1.9 in Schedule 3 of the Act. Items 1, 2, 3 and 4 of Schedule 3 of the Act read as follows:

"1. Schedule 3 deals with the List of Occupational Diseases which depicts diseases that are occupational and compensable on the benefits of an explicit presumption referred to in terms of section 66 of the Compensation for Occupational Injuries and Diseases Act, 1993.

2. The amended Schedule 3 is issued to align the list of diseases mentioned in the first column of Schedule 3 of the Compensation for Occupational Injuries and Diseases Act, 1993 with the list of occupational diseases appended to International Labour Organization R194 List of Occupational Diseases Recommendation, 2002.
3. The amended Schedule 3 is issued in conformity with sections 65(*a*) and 66 of the Compensation for Occupational Injuries and Diseases Act, 1993.
4. The List of Occupational Diseases appended to this amended Schedule 3 shall supersede the list of diseases mentioned in the first column of Schedule 3 in terms of 65 (*a*) of the Compensation for Occupational Injuries and Diseases Act, 1993".

16. Since the Regulations are concerned with the chronic obstructive pulmonary disease which is provided for in the Schedule 3 to the Act and the compensation in respect of chronic obstructive pulmonary disease, it seems that the Regulations under consideration fit within the purview of section 97(1)*(g)* and *(h)*, which empowers the Minister to make regulations. Accordingly, we are of the view that the Minister has the requisite authority to make the Regulations.

COMPLIANCE WITH PRESCRIBED STATUTORY PROCEDURE

18. We note that the Act does not prescribe any particular process to be adhered to during the making of regulations. However, insofar as the Regulations will have an impact on people's rights, it is imperative that a fair process must be followed in making the Regulations. In *Minister of Health & another v New Clicks SA (Pty) Ltd & others*[1] the CC stated the following:

> "Standards of fairness called for in respect of law-making by legislative administrative action are different to standards of fairness called for in cases involving adjudication or administrative decisions such as licensing enquiries and the like where individual interests are at stake and decisions affecting particular individuals have to be taken. An individual needs to know the concerns of the administrator and to be given an opportunity of answering those concerns. The decisions may depend on particular facts and may sometimes involve disputes of fact that have to be resolved.[2]

1 **[2006]** JOL 15636 (CC) *("New Clicks")*.
2 *Ibid* at para 153.

> When it comes to the making of regulations the context is different. Regulations affect the general public and that means that diverse and often conflicting interests have to be taken into account in deciding what the laws will be. The decision of the law-maker on how to resolve these conflicting interests is ultimately a question of policy.[3]
>
> In Parliament this is done through the publication of a Bill containing the provisions of the proposed legislation, hearings before parliamentary committees, and debates in Parliament where matters of principle raised by sectors of the public affected by the law can be contested.[4]
>
> Where laws are made through legislative administrative action, the procedure of publishing draft regulations for comment serves this purpose. It enables people who will be affected by the proposals to make representations to the law-maker, so that those concerns can be taken into account in deciding whether or not changes need to be made to the draft."[5] (Our underlining)

19. Furthermore, the Department's attention is drawn to the fact that, in terms of section 6(3) of the Constitution of the Republic of South Africa, 1996, the draft Regulations must be published in at least two official languages and non-compliance with this requirement may result in the Regulations being invalid. In *Central African Services (Pty) Cross-Border Road Transport Agency v Central African Road Services (Pty) Limited and another v The Minister of Transport and Another Case No: 32238/2011* (North Gauteng) the High Court found the amendment regulations promulgated by the Minister of Transport in terms of section 51 of the Cross-Border Road Transport Act invalid. The regulations had the effect of increasing the permit fees payable to the Cross-Border Road Transport Agency ("Agency") by cross-border road transport operators by a substantial amount. The court made, amongst other things, the following findings: The regulations were published only in English, contrary to the constitutional requirement that laws must be promulgated in two official languages; the right to procedural fairness in the publication and promulgation of the regulations had been violated; proper consultation on the tariff increases had not taken place; and the Agency's board had failed to apply its mind to the draft regulations. The High Court granted an order, *inter alia*, in the following terms:[6]

> (a) The Regulations were published in a manner inconsistent with s 6(3) of the Constitution.

---

3 *Ibid* at para 154.
4 *Ibid* at para 156.
5 *Ibid* at para 157.
6 The High Court's judgment was subsequently confirmed by the Constitutional Court in *Central African Services (Pty) Cross-Border Road Transport Agency v Central African Road Services (Pty) Limited and another [2015] JOL 33212 (CC)*.

(b) The Minister of Transport and the Agency failed to comply with their constitutional obligation to ensure procedural fairness in the publication and promulgation of the Regulations

(c) The Agency failed in its constitutional duty to comply with its duty to facilitate proper public comment before publishing the Regulations.

(d) The board of the agency failed in its statutory duty to properly consider the draft regulations, for the sake of consulting with the Minister.

(e) The Regulations are, as a consequence, promulgated in a manner that is inconsistent with the provisions of Promotion of Administrative Justice Act No. 3 of 2000 and section 33 of the Constitution, and are therefore invalid.

CONCLUSION

20. Subject to our comments above and the suggested amendments on the text, we are satisfied that the provisions of the Regulations are consistent with the Act, the Constitution of the Republic of South Africa, 1996, and conform to the legislative drafting form and style.

21. We attach hereto a soft copy of the Regulations incorporating our suggested amendments for your consideration.

Yours sincerely

FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
S RAMAILA/ J NURSE/ B MAKHENE-GADINI

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO. 130 OF 1993)

REGULATIONS ON PULMONARY TUBERCULOSIS IN HEALTH WORKERS FOR THE COMPENSATION FUND MADE UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

The Minister of Employment and Labour, after consultation with the Compensation Board has, under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) made the Regulations in Schedule A. These regulations are published for public comments only.

Interested and affected parties are hereby invited to submit written representations on the proposed Regulations. The aforesaid representations must be marked for the attention of **Mr TH Maphologela** and sent by registered post or emailed or hand delivered within 60 days of publication of this notice to the following addresses:

Compensation Fund
167 Thabo Sehume Street
Pretoria
0157

OR

PO Box 955
Pretoria
0001

Email addresses: Kimbly.Makgoba@labour.gov.za or Harry.Maphologela@labour.gov.za

Copies of the Regulations are herewith attached.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

SCHEDULE A

REGULATIONS ON PULMONARY TUBERCULOSIS IN HEALTH WORKERS FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

ARRANGEMENT OF REGULATIONS

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1. Definitions

In these regulations, a word or expression to which a meaning has been assigned in the Act or these Regulations shall have the meaning so assigned unless the context otherwise indicates—

"culture" refers to the growing of microorganisms, tissue cells, or other living matter in a specially prepared nutrient medium controlled condition;

"Gene XpertMTB/RIF" refers to a test used for rapid tuberculosis diagnosis and rapid antibiotic sensitivity. It detects mycobacterium tuberculosis and also identifies resistance to Rifampicin in less than 2 hours;

"lung function tests "means a variety of tests that check how well the lungs are functioning, using instruments to test the volume, capacity and emptying of the lungs;

"mycobacterium tuberculosis" means a certain type of bacteria that have a tendency to affect mostly the lungs, but can affect other parts of the body;

"occupational pulmonary tuberculosis (PTB)" means an infectious disease caused by mycobacterium tuberculosis in the workplace;

"pulmonary" means lungs;

"pulmonary tuberculosis" means an infectious disease caused by mycobacterium tuberculosis which affects the lungs;

"radiology" means a science dealing with Xrays and other high energy radiation used to detect abnormalities in the body;

" Regulations" means the Regulations on Pulmonary Tuberculosis in Health Workers for the Compensation Fund made under the Compensation for Occupational Injuries and Diseases Act, 1993;

"Rifampicin" means one of the drugs used to treat tuberculosis.

2. Diagnosis

(1) The diagnosis of occupational pulmonary tuberculosis shall be made by a medical practitioner based on the following:

(a) definitive diagnosis by isolation of mycobacterium tuberculosis;

(b) by microscopy and culture of sputum or body fluids or tissue;

(c) presumptive diagnosis can be established with —

(i) a positive sputum smear and a relevant clinical or radiological picture;

(ii) two positive sputum smears; or

(iii) a positive GeneXpert MTB/RIF

Provided: if it is impossible to isolate mycobacterium tuberculosis using microscopy or bacterial culture, other acceptable diagnostic techniques may be used;

(d) a chronological relationship between the work-related exposure and the development of occupational pulmonary tuberculosis;

(e) a presumed exposure to occupational pulmonary tuberculosis bacilli in working environments where cases of active occupational pulmonary tuberculosis are found or as a result of analysis or testing of infected body tissues or fluids.

(2) The medical officers employed by the Compensation Fund shall determine whether the diagnosis of occupational pulmonary tuberculosis as made according to acceptable medical standards.

3. Impairment

(1) Pulmonary function impairment will be determined by a Lung Function Test done in accordance with the commissioner's regulations on Pulmonary tuberculosis.

(2) Impairment as a result of pulmonary tuberculosis or complications arising from anti-tuberculosis medication administered to the employee, will be assessed in accordance with best practices using the criteria for rating permanent impairment under the latest American Medical Association Guide.

(3) An employee must be submit to the Compensation Fund a Final Medical Report in respect of an Occupational Disease (W.CL.26) when the employee's condition has reached maximum medical improvement and the report should clearly indicate if the employee has been compliant and has completed treatment.

(4) An employee must be submit to the Compensation Fund a recent lung function tests done six months to one-year post completion of occupational pulmonary tuberculosis treatment.

(5) If the first lung function test post 6 months is abnormal, second lung function test after 12 months of treatment shall be used to determine permanent disablement.

4. Compensation Benefits

The compensation benefits payable according to the Act are as follows:

(a) Payment for temporary disablement which shall be made for as long as such disablement continues, but not for a period exceeding 24 months, or longer, if further treatment is required (e.g. drug resistant tuberculosis);

(b) payment for permanent disablement which shall be made, where applicable, and when a Final Medical Report is receivedon condition that —

(i) the Final Medical Report and lung function test (in the case of pulmonary tuberculosis) must be submitted at least 6 months and no later than 12 months after completion of treatment of tuberculosis or sooner if the treating medical practitioner considers no further improvement is anticipated; and

(ii) where the lung function tests result done 6 months' post tuberculosis treatment, show abnormality, second lung function tests taken at 12 months' post treatment will be used to assess permanent disablement;

(c) if total impairment score is zero to three (i.e. permanent disablement is less than or equal to 30%), permanent disablement shall be determined and a lump sum shall be paid in terms of the Act; and

(d) if total impairment score is more than three (i.e. permanent disablement is higher than 30%), pension shall be paid in terms of the Act.

5. Medical Costs

(1) Medical costs shall be provided for a period of not more than 24 months from the date of diagnosis, or longer, if in the opinion of the commissioner, further medical costs will reduce the extent of the disablement.

(2) The medical costs shall cover the diagnosis of tuberculosis and any necessary treatment for the tuberculosis provided by any health care provider.

(3) The commissioner shall decide on the need for, the nature and sufficiency of medical costs to be supplied.

6. Death Benefits

Death benefits payable are as follows:

(a) Reasonable burial expenses shall be paid in terms of a Burial Expenses Policy; and

(b) Spouse and dependent's pensions shall be payable, where applicable, if the employee dies as a result of occupational pulmonary tuberculosis.

7. Reporting

The following documentation must be submitted to the Compensation Fund, the employer individually liable, or the licensee concerned:

(a) Employer's Report of an Occupational Disease (W.CL.1);

(b) Notice of an Occupational Disease and Claim for Compensation (W.CL.14);

(c) an affidavit by the employee (W.CL.305), if an employer cannot be traced or the employer will not timeously supply a W.CL.1;

(d) Exposure History (W.CL.110) or an appropriate employment history which may include any information that may be helpful to the compensation commissioner i.e. risk assessments or results of environmental hygiene assessments including tuberculosis questionnaire and checklist; Submit tuberculosis questionnaire and check list.

(e) First Medical Report in respect of an Occupational Disease (W.CL. 22);

(f) laboratory results demonstrating mycobacterium tuberculosis;

(g) supporting documentation relating to the assessment of impairment of the employee including, chest x-rays; radiology reports; lung function tests (which include pre- and post-administration of a bronchodilator); hearing function tests and nerve conduction studies;

(h) for each consultation, a Progress/Final Medical Report (W.CL. 26);

(i) Progress/Final Medical Report in respect of an Occupational Disease (W.CL.26) when the employee's condition has reached maximum medical improvement and the report should clearly indicate if the employee has been compliant and has completed treatment and the report must be accompanied by the recent lung function tests done six months to one-year post completion of occupational pulmonary tuberculosis treatment; and

(j) in case of death, a death certificate and a BI-1663 (notification of death), ora death certificate accompanied by a detailed medical report on a practice letterhead, on the cause of death..

(k) tuberculosis questionnaire r; and

(l) tuberculosis checklist

8. Claims Processing

(1) The commissioner shall consider and adjudicate upon the liability of all claims.

(2) The medical officers employed by the Compensation Fund are responsible for the medical assessment of a claim and for confirmation of acceptance or rejection of the claim.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

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Date: 06 December 2019

For Attention: Mr. Harry Mapholoela
E-mail: Harry.Mapholoela@labour.gov.za

Mr. Thobile Lamati
Director-General: Department of Employment and Labour
Private Bag X 117
Pretoria
0001

Dear Mr. Lamati

LEGAL OPINION: REGULATIONS ON PULMONARY TUBERCULOSIS IN HEALTH WORKERS FOR THE COMPENSATION FUND MADE BY THE MINISTER UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

INTRODUCTION

1. The Office of the Chief State Law Adviser has been requested by the Department of Employment and Labour ("Department"), to consider the draft Regulations on Pulmonary Tuberculosis in Health Workers for the Compensation Fund, made by the Minister under the Compensation for Occupational Injuries and Diseases Act, 1993 ("draft Regulations"), in terms of section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) ("Act").

2. The Act provides for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases.

3. Chapter VII of the Act provides for occupational diseases. Section 65 of the Act provides for compensation for occupational injuries and subsection (1) thereof reads as follows:

"Compensation for occupational diseases

65. *(1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General—*

(a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment; or

(b) that the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of and in the course of his or her employment.".

4. Section 97 of the Act empowers the Minister to make regulations, after consultation with the Compensation Board, in respect of certain specified matters. Section 97 provides as follows:

"Regulations

97. *(1) The Minister may make regulations, after consultation with the Board, regarding—*

(a) the place of meeting and the procedure to be followed at any meeting of the Director-General and assessors or at any proceedings in terms of this Act with which the assessors are concerned, or at any investigation in terms of this Act;

(b) subject to section 76, the fees payable to medical practitioners or chiropractors in respect of services rendered in terms of this Act;

(c) the procedure to be followed in paying assessments and fines to the Director-General;

(d) the persons to whom, the places where and the manner in which payment of assessments in terms of this Act shall be made;

(e) the determination of the amount and the conditions and manner of payment of benefits to assessors or classes of assessors;

(f) the disposal of moneys payable in terms of this Act to any person other than the Director-General and not claimed within the prescribed period by the person entitled thereto;

(g) any matter which shall or may be prescribed by regulation in terms of this Act;

(h) any other matter, whether or not connected with any matter mentioned in paragraphs (a) to (g), which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.

(2) Different regulations may be made under subsection (1) in respect of different classes of employers and employees and of different areas, and the Minister may, after consultation with the Board, in respect thereof differentiate in such manner as he or she may deem

expedient.

(3) Any person who contravenes or fails to comply with any regulation made under subsection (1) shall be guilty of an offence and liable on conviction to a fine, or imprisonment for a period not exceeding six months.".

DISCUSSION

5. Schedule 3 of the Act deals with the list of occupational diseases which are occupational and compensable on the benefits of an explicit presumption referred to in terms of section 66 of the Act[1].

6. The draft Regulations seek to provide for compensation related to pulmonary tuberculosis in health care workers. This disease is referred to in Schedule 3 to the Act as tuberculosis of the lung which is the same as pulmonary tuberculosis and therefore this disease falls within the ambit of section 65(1)*(a)*.

7. The Minister's power to make the regulations is a public power that must be exercised subject to the Constitution of the Republic of South Africa, 1996 ("Constitution") and the law. In exercising such public power, the Minister is thus required to comply with the principle of legality. This means that the Minister can only exercise the powers to make regulations within the parameters of the Act and the Constitution.

7.1. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[2], the Constitutional Court stated the following in paragraph 56 of the judgment regarding the principle of legality:

> "*[1] It is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses the principle of legality – is generally understood to be a fundamental principle of constitutional law.*".(footnote omitted)

---

1 ***Presumption regarding cause of occupational disease***

66. If an employee who has contracted an occupational disease was employed in any work mentioned in Schedule 3 in respect of that disease, it shall be presumed, unless the contrary is proved, that such disease arose out of and in the course of his employment.

2 1998 (12) BCLR 1458 (CC) ("Fedsure").

7.2. The Constitutional Court further stated the following in paragraph 58 that:

> "*It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense then, the principle of legality is implied within the terms of the interim constitution.*". (Our underlining)

7.3 The principle of legality was also ruled upon in the case of *Pharmaceutical Society of South Africa and others: New Clicks South Africa (Pty) Limited v Minister of Health and another: Tshabalala-Msimang NO and another*[3] where the court examined the scope of the Minister's powers in promulgating regulations under the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965).

7.4 The Supreme Court of Appeal held that the regulations which in essence provided for a pricing system that defined and controlled the single exit price of manufacturers and for a dispensing fee, went beyond the powers that were provided for in the Act. Another problem with the regulations was the fact that while the Act required that the regulations should prescribe the method of publication of the single exit price; these powers were delegated to the Minister or the Director-General. The regulations consequently failed the legality test on many fundamental aspects.

7.5 All regulations must therefore be drafted in compliance with the principle of legality, failing which the regulations may be declared as invalid.

7.6 The Constitutional Court has stated that "it is an important principle of the rule of law that rules be stated in a clear and accessible manner".[4] This principle was demonstrated in the case of *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*[5], where the Constitutional Court pointed out that "the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them".

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3 543/2004) [2004] ZASCA 122 (20 December 2004).

4 *Dawood and another v Minister of Home Affairs and Others; Shalabi and another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

5 2001 (1) SA 545 (CC) at para 24.

CONTINUES ON PAGE 258 - PART 3



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7.7 The effect of what was stated in the abovementioned authority is that in making regulations, the Minister is under a duty to make regulations that are reasonably clear and precise, enabling citizens and officials to understand what is expected of them. In *Affordable Medicines Trust & others v Minister of Health, RSA & another*[6] the Constitutional Court held as follows:

> "*[108] Regulation 18(5) was challenged on the basis that it is vague and does not conform to the principle of legality. The doctrine of vagueness is one of the principles of common law that was developed by courts to regulate the exercise of public power. As pointed out previously, the exercise of public power is now regulated by the Constitution which is the supreme law. The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives and should not be used unduly to impede or prevent the furtherance of such objectives*.". (Our underlining)

7.8 Regulations must therefore be drafted in such a manner that is clear and understandable. It should not be vague and it must be understandable to those to which it applies.

8. When making regulations under the Act, the Minister must comply with the Constitution and the empowering provision, which is section 97 of the Act. It appears that the power of the Minister to make regulations relating to compensation related to pulmonary tuberculosis in health care workers is not explicitly stated in section 97(1)*(a) to (f)* of the Act.

8.1 However, section 97(1)*(g)* provides that the Minister may make regulations, after consultation with the Board, regarding any matter which shall or may be prescribed by regulations in terms of the Act. In addition, section 97(1)*(h)* provides that the Minister may make regulations, after consultation with the Board, regarding any other matter, whether or not connected with any matter mentioned in paragraphs (a) to (g), which he may deem necessary or expedient to prescribe in order to further

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6 2006 (3) SA 247 (CC).

the objects and purposes of this Act.

8.2 In the case of *Bezuidenhout v Road Accident Fund*[7], the Supreme Court of Appeal commented on the power to make regulations "which may be necessary or expedient to prescribe in order to achieve or promote the object of this Act", by stating that this provision "cannot empower the making of regulations which widen the purpose and object of the present Act or which are in conflict therewith".

8.3 Thornton thus advises that such general provisions are purely ancillary or incidental to the purpose of the Act. They authorise the provision of subsidiary means of carrying into effect what is already enacted in the Act itself, and do not allow attempts to widen the purposes of the Act, to add new and different means of carrying them out, or to depart from or change its objectives.[8]

8.4 As is evidenced from the long title of the Act, the object and purpose of the Act is to provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for compensation in the case of death resulting from such injuries or diseases.

8.5 The draft Regulations concern the scope of compensation for occupational diseases. In terms of section 97(1)*(g)* of the Act read with section 65(1)*(a)* of the Act, the Minister may make regulations, after consultation with the Board, if it is proved to the satisfaction of the Director-General that the employee has contracted a disease mentioned in Schedule 3 to the Act and that such disease has arisen out of and in the course of his or her employment.

8.6 Considering the subject matter of the draft Regulations, we are of the view that sections 97(1)*(g)* and *(h)* and 65(1)*(a)* of the Act are the appropriate provisions which empower the Minister to make the regulations.

9. We now turn to deal with the draft Regulations as set out in the Schedule. We have suggested track changes with regards to the drafting style and form of the draft Regulations. This is done in order to align the draft Regulations with common legislative drafting style and form.

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7 2003 (3) ALL SA 249 (SCA).
8 Thornton, *Legislative Drafting* at page 342.

***Ad* clause 1 of the draft Regulations: Definitions**

9.1 Clause 1 of the draft Regulation provides for the definition of certain terms used in the Regulations. We have inserted a sentence at the beginning of regulation 1 to assist with the interpretation of definitions used in the Schedule. We have also inserted a definition of Regulations so as to avoid tedious repetition throughout the draft Regulations. We have rearranged the order of some of the definitions to ensure that they appear in alphabetical order.

9.2 We note that the Department has defined "Gen XpectMTB/RIF"; however, upon researching the term we note that no such term exists in any medical academia which we have considered in conducting our research. In the text of the draft Regulations the Department uses the term "GeneXpert MTB/RIF" which appears to be the correct medical term. The Department is requested to confirm its intention as to which term is correct and to amend this definition in clause 1 of the draft Regulations.

9.3 The Department has defined occupational pulmonary tuberculosis as follows: "occupational pulmonary tuberculosis" (PTB) means an infectious disease caused by mycobacterium tuberculosis in the workplace". We have noted that the Department uses occupational pulmonary tuberculosis and PTB interchangeably in the draft Regulations. According to Thornton, a definition should define one word or expression only[9]. The Department is advised to clarify in the draft Regulations which expression it wishes to use. If the Department wishes to use PTB in the draft Regulations, then this needs to be defined. Upon further perusal of the Act we noted that the Act refers to tuberculosis of the lung and bovine tuberculosis in Schedule 3, however there is no specific reference to pulmonary tuberculosis; occupational pulmonary tuberculosis or TB as an abbreviation for tuberculosis. We also note that in the draft Regulations, the Department refers interchangeably to occupational PTB, TB, pulmonary TB, tuberculosis and occupational pulmonary tuberculosis. It appears that all these terms are referring to the same thing which, in the context of these draft Regulations is an infectious disease caused by mycobacterium tuberculosis which affects lungs, contracted by an employee, which has arisen out of and in the course of his or her employment.

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9 Thornton, *Legislative Drafting* at page 151.

9.4 We propose that if the Department is desirous of using "occupational pulmonary tuberculosis" as an extending definition[10], then the Department is requested to clearly define and abbreviate the term in clause 1 of the draft Regulations. Further, if the Department wishes to use the phrase TB then we suggest that TB is defined in the draft Regulations. In addition the Department needs to be consistent with the use of terms throughout the draft Regulations so as to avoid ambiguities.

***Ad* clause 2 of the draft Regulations: Diagnosis**

9.5 Clause 2 of the draft Regulations seeks to provide for the diagnosis of occupational pulmonary tuberculosis and the various ways in which such a diagnosis can be made. We have suggested that paragraph *(c)* be divided into subparagraphs to make the Regulations more reader friendly, however if this does not correctly reflect the Department's intention then this may be ignored.

***Ad* clause 3 of the draft Regulations: Impairment**

9.6 Clause 3 of the draft Regulations seeks to provide for the manner in which pulmonary function impairment shall be determined and assessed.

9.7 We note that sub-regulation (3) does not read correctly as it does not stipulate if the Final Medical Report needs to be submitted. If the Department requires the submission of the Final Medical Report in respect of an Occupational Disease, then this needs to be clearly stated. In addition it needs to be stated in this regulation who is required to submit the report and to whom the report should be submitted.

9.8 Sub-regulation (3) also makes reference to lung function tests. If the Department requires that these tests need to be submitted, then this must be clearly stated in the draft Regulations and the details regarding who must submit the tests and to whom the tests should be submitted, must be contained thereto.

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10 According to Thornton at page 146, *"An extending definition stipulates for the defined term a meaning that in some respect goes beyond the meaning or meanings conveyed in common usage by the term. Such a definition usually adds to the conventional meaning an element of assigned meaning".*

***Ad* clause 4 of the draft Regulations: Compensation Benefits**

9.9 Clause 4 of the draft Regulations seeks to provide for the compensation benefits payable according to the Act after assessment of the impairment. Minor amendments were suggested in clause 4 of the draft Regulations.

***Ad* clause 5 of the draft Regulations: Medical Costs**

9.10 Clause 5 of the draft Regulations seeks to provide for the medical costs that will be provided after a diagnosis of tuberculosis. In sub-regulation (2) we have suggested the insertion of the words "for the tuberculosis" to narrow the ambit for which medical costs will be paid.

***Ad* clause 6 of the draft Regulations: Death Benefits**

9.11 Clause 6 of the draft Regulations seeks to provide for death benefits payable in terms of a Burial Expenses Policy and where the employee dies as a result of tuberculosis, widow's and dependent's pensions will be payable.

***Ad* clause 7 of the draft Regulation: Reporting**

9.12 Clause 7 of the draft Regulations seeks to provide for the documentation that must be submitted to the Compensation Fund, the employer, individual liable, or the licensee concerned.

9.13 We note that paragraph *(d)* does not read correctly as it does not stipulate if the tuberculosis questionnaire and checklist needs to be submitted. We have suggested a redraft of the paragraph for the Department's consideration.

***Ad* clause 8 of the draft Regulations: Claims Processing**

9.14 Clause 8 of the draft Regulations seeks to provide for the consideration and adjudication of all claims by the Commissioner and it makes provision for medical officers employed by the Compensation Fund to be responsible for medical assessments of claims and confirmation of acceptance or rejection of claims. We have suggested minor drafting amendments to clause 8 of the draft Regulations.

10. The Department's attention is drawn to the fact that, in terms of section 6(3) of the Constitution, the Regulations must be published in at least two official languages and non-compliance with this requirement may result in the draft Regulations being invalid.

CONCLUSION

11. In light of the above discussion, we are of the view that the Minister has the requisite authority to make the Regulations under consideration. Subject to our suggested amendments made directly in the text of the draft Regulations, we are of the view that the draft Regulations is in order and conforms to the form and style of legislative drafting.

12. We attached hereto a copy of the draft Regulations with track changes incorporating our suggested amendments for your consideration.

Yours sincerely



FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
S. GOVENDER / S. WILLIAMS / T. HERCULES

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

(ACT NO. 130 OF 1993)

REGULATIONS ON OCCUPATIONAL PULMONARY TUBERCULOSIS ASSOCIATED WITH SILICA DUST EXPOSURE FOR THE COMPENSATION FUND MADEUNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

The Minister of Employment and Labour, after consultation with the Compensation Board has, under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993 made the Regulations in Schedule A. These regulations are published for public comments only.

Interested and affected parties are hereby invited to submit written representations on the proposed Regulations. The aforesaid representations must be marked for the attention of **Mr TH Maphologela** and sent by registered post or emailed or hand delivered within 60 days of publication of this notice to the following addresses:

Compensation Fund	OR	PO Box 955
167 Thabo Sehume Street		Pretoria
Pretoria		0001
0157		

Email addresses: Kimbly.Makgoba@labour.gov.za or Harry.Maphologela@labour.gov.za

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Copies of the Regulations are herewith attached.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

SCHEDULE A

REGULATIONS ON OCCUPATIONAL PULMONARY TUBERCOLOSIS ASSOCIATED WITH SILICA DUST EXPOSURE FOR THE COMPENSATION FUND MADE UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

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1. Definitions

In these Regulations, a word or expression to which a meaning has been assigned in the Act or these Regulations shall have that meaning and unless the context otherwise indicates—

"culture" means tissue cells, bacteria in a condition suitable for growth;

Gene Xpert MTB/RIF" means test for rapid TB diagnosis; it detects mycobacterium Tuberculosis and resistance to Rifampicin in less than 2 hours;

"lung function tests (LFT)" means several tests used to test the functional ability of the lungs;

"mycobacterium tuberculosis (MTB)" means a certain type of bacteria;

"**occupational pulmonary tuberculosis (OPTB)**" means an infectious disease caused by mycobacterium tuberculosis in the workplace;

"pulmonary" means lungs;

"pulmonary tuberculosis" means an infectious disease caused by mycobacterium tuberculosis affecting the lungs;

"pulmonary tuberculosis associated with crystalline silica dust exposure" means an occupational disease caused by Mycobacterium tuberculosis in employees who have been exposed to crystalline silica dust in the workplace;

"radiology" means a science dealing with X-rays and other high energy radiation used to detect abnormalities in the body;

"rifampicin" means one of the drugs used to treat tuberculosis;

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"Regulations" means the Regulations on Occupational Pulmonary Tuberculosis associated with Silica Dust for the Compensation Fund made under the Compensation for Occupational Injuries and Diseases Act, 1993.

2. Diagnosis

(1) The diagnosis of occupational pulmonary tuberculosis shall be made by a medical practitioner based on the following:

(a) isolation of mycobacterium tuberculosis by culture of sputum or body fluids or tissue;

(b) a positive sputum smear and a relevant clinical/ radiological picture;

(c) two positive sputum smears, or a positive GeneXpert MTB/RIF;

(d) three negative sputum smears and a relevant clinical, radiological picture and a response to tuberculosis treatment; or

(e) other acceptable diagnostic techniques if it is impossible to isolate mycobacterium tuberculosis using microscopy or bacterial culture, may be used.

(2) The medical officers employed by the Compensation Fund shall determine if diagnosis of occupational pulmonary tuberculoses was made according to acceptable medical standards.

(3) Pulmonary Tuberculosis associated with crystalline silica dust exposure shall be presumed to be work-related:

(a) if the affected employee has silicosis attributable to silica dust exposure (silico-tuberculosis);

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(b) if the affected employee has been exposed to free crystalline silica in the workplace for two years in the absence of radiological evidence of silicosis where silica dust exposure is inherent to his or her work process or occupation; or

(c) the development of occupational pulmonary tuberculosis must be within 12 months from the last exposure date.

(d) if claimant had 15 years of silica exposure regardless of employment and radiological silicosis.

(4) The development of tuberculosis must be within 12 months from the last exposure date.

3. Impairment

(1) Pulmonary function impairment shall be determined based on the Lung Function Test done in accordance with the regulations on pulmonary tuberculosis.

(2) Impairment as a result of pulmonary tuberculosis, or complications arising from anti-tuberculosis medication administered to the employee, shall be assessed in accordance with best practices using the latest American Medical Association Guide criteria for rating permanent impairment due to pulmonary dysfunction.

4. Compensation Benefits

The compensation benefits payable according to the Act are as follows:

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(a) payment for temporary, total or partial disablement which shall be made for as long as such disablement continues, but not for a period exceeding 24 months.

(b) permanent disablement which shall be assessed, where applicable, and when a final medical report is received. The final medical report and lung function test must be submitted at least 6 months and no later than 12 months after completion of treatment of tuberculosis or sooner if the treating medical practitioner considers no further improvement is anticipated. If the first lung function test post 6 months is abnormal, second lung function test after 12 months of treatment will be used to determine permanent disablement.

(c) if total impairment score is zero to three (i.e. permanent disablement less than or equal to 30%), permanent disablement shall be determined and a lump sum shall be paid in terms of the Act.

(d) if total impairment score is more than three (i.e. permanent disablement is higher than 30%), pension shall be paid in terms of the Act.

5. Medical Costs

(1) Medical costs shall be provided for a period of not more than 24 months from the date of diagnosis or longer, if in the opinion of the Commissioner further medical costs will reduce the degree of the disablement.

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(2) Medical costs shall cover diagnosis of pulmonary tuberculosis associated with silica dust exposure and any necessary treatment provided by any healthcare provider.

(3) The Commissioner shall decide on the need for, the nature and sufficiency of medical costs to be supplied for the pulmonary tuberculosis.

6. Death Benefits

Death benefits payable are as follows:

(a) reasonable burial expenses shall be paid in terms of Burial Expenses Policy; and

(b) widow's and dependent's pensions shall be payable, where applicable, if the employee dies as a result of occupational tuberculosis related to silica exposure.

7. Reporting

The following documentation must be submitted to the compensation commissioner or the employer or individual liable or the licensee concerned:

(a) Employer's Report of an Occupational Disease (W.CL.1);

(b) Notice of Occupational Diseases and claim for compensation (W.C. L14);

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(c) An affidavit by the employee (W.CL.305) if an employer cannot be traced or the employer fails to timeously submit Employer's report of an Occupational Disease (W.CL.1);

(d) Exposure History (W.CL.110) - there should be a clear history of occupational exposure or an appropriate employment history and risk assessments or results of environmental hygiene assessments;

(e) First Medical Report detailing the employee's occupational disease (W.CL.22);

(f) Medical Report detailing the employee's symptoms and clinical features;

(g) The laboratory results demonstrating mycobacterium tuberculosis;

(h) Chest x-rays and radiological reports;

(i) Progress or Final Medical Report (W.CL.26) in respect of occupational disease and lung function test must be submitted at least 6 months and no later than 12 months after completion of treatment of tuberculosis or sooner if the treating medical practitioner considers no further improvement is anticipated; and

(j) In case of death, a death certificate and a BI1663 (notification of death) should be submitted. Alternatively, a death certificate accompanied by a detailed medical report on a practice letterhead on the cause of death should be submitted.

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8. Claims Processing

(1) The Commissioner shall consider and adjudicate upon the liability of all claims.

(2) The medical officers employed by the Compensation Fund are responsible for the medical assessment of a claim and for confirmation of acceptance or rejection of a claim.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

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the doj & cd
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Date: 17 December 2019

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Mr. Thobile Lamati
Director-General: Department of Employment and Labour
Private Bag X 117
Pretoria
0001

Dear Mr. Lamati

LEGAL OPINION: REGULATIONS ON PULMONARY TUBERCULOSIS ASSOCIATED WITH SILICA DUST EXPOSURE FOR THE COMPENSATION FUND MADE BY THE MINISTER UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

INTRODUCTION

1. The Office of the Chief State Law Adviser has been requested by the Department of Employment and Labour ("Department"), to consider the draft Regulations on Pulmonary Tuberculosis in Health Workers for the Compensation Fund, made by the Minister under the Compensation for Occupational Injuries and Diseases Act, 1993 ("draft Regulations"), in terms of section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) ("Act").

2. The Act provides for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases.

3. Chapter VII of the Act provides for occupational diseases. Section 65 of the Act provides for compensation for occupational injuries and subsection (1) thereof reads as follows:

"***Compensation for occupational diseases***

65. *(1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General—*

(a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment; or

(b) that the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of and in the course of his or her employment.".

4. Section 97 of the Act empowers the Minister to make regulations, after consultation with the Compensation Board, in respect of certain specified matters. Section 97 provides as follows:

"***Regulations***

97. *(1) The Minister may make regulations, after consultation with the Board, regarding—*

(a) the place of meeting and the procedure to be followed at any meeting of the Director-General and assessors or at any proceedings in terms of this Act with which the assessors are concerned, or at any investigation in terms of this Act;

(b) subject to section 76, the fees payable to medical practitioners or chiropractors in respect of services rendered in terms of this Act;

(c) the procedure to be followed in paying assessments and fines to the Director-General;

(d) the persons to whom, the places where and the manner in which payment of assessments in terms of this Act shall be made;

(e) the determination of the amount and the conditions and manner of payment of benefits to assessors or classes of assessors;

(f) the disposal of moneys payable in terms of this Act to any person other than the Director-General and not claimed within the prescribed period by the person entitled thereto;

(g) any matter which shall or may be prescribed by regulation in terms of this Act;

(h) any other matter, whether or not connected with any matter mentioned in paragraphs (a) to (g), which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.

(2) Different regulations may be made under subsection (1) in respect of different classes of employers and employees and of different areas, and the Minister may, after consultation with the Board, in respect thereof differentiate in such manner as he or she may deem expedient.

(3) Any person who contravenes or fails to comply with any regulation made under subsection (1) shall be guilty of an offence and liable on conviction to a fine, or imprisonment for a period not exceeding six months.".

DISCUSSION

5. Schedule 3 of the Act deals with the list of occupational diseases which are occupational and compensable on the benefits of an explicit presumption referred to in terms of section 66 of the Act[1].

6. The draft Regulations seek to provide for compensation related to pulmonary tuberculosis in health care workers. This disease is referred to in Schedule 3 to the Act as tuberculosis of the lung which is the same as pulmonary tuberculosis and therefore this disease falls within the ambit of section 65(1)*(a)*.

7. The Minister's power to make the regulations is a public power that must be exercised subject to the Constitution of the Republic of South Africa, 1996 ("Constitution") and the law. In exercising such public power, the Minister is thus required to comply with the principle of legality. This means that the Minister can only exercise the powers to make regulations within the parameters of the Act and the Constitution.

7.1. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[2], the Constitutional Court stated the following in paragraph 56 of the judgment regarding the principle of legality:

> *"[1] It is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses the principle of legality – is generally understood to be a fundamental principle of constitutional law.".*(footnote omitted)

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1 ***Presumption regarding cause of occupational disease***

66. If an employee who has contracted an occupational disease was employed in any work mentioned in Schedule 3 in respect of that disease, it shall be presumed, unless the contrary is proved, that such disease arose out of and in the course of his employment.

2 1998 (12) BCLR 1458 (CC) ("Fedsure").

7.2. In paragraph 58, the Constitutional Court further stated the following:

> "*It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense then, the principle of legality is implied within the terms of the interim constitution.*". (Our underlining)

7.3 The principle of legality was also followed in the case of *Pharmaceutical Society of South Africa and others: New Clicks South Africa (Pty) Limited v Minister of Health and another: Tshabalala-Msimang NO and another*[3] where the court examined the scope of the Minister's powers in promulgating regulations under the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965).

7.4 The Supreme Court of Appeal held that the regulations which in essence provided for a pricing system that defined and controlled the single exit price of manufacturers and for a dispensing fee, went beyond the powers that were provided for in the Act. Another problem with the regulations was the fact that while the Act required that the regulations should prescribe the method of publication of the single exit price; these powers were delegated to the Minister or the Director-General. The regulations consequently failed the legality test on many fundamental aspects.

7.5 All regulations must therefore be drafted in compliance with the principle of legality, failing which the regulations may be declared as invalid.

7.6 The Constitutional Court has stated that "it is an important principle of the rule of law that rules be stated in a clear and accessible manner".[4] This principle was demonstrated in the case of *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*[5], where the Constitutional Court pointed out that "the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them".

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7.7 The effect of what is stated in the abovementioned authorities is that, in making regulations, the Minister is under a duty to make regulations that are reasonably clear and precise, enabling citizens and officials to understand what is expected of them. In *Affordable Medicines Trust & others v Minister of Health, RSA & another*[6], the Constitutional Court held as follows:

> "***[108]*** *Regulation 18(5) was challenged on the basis that it is vague and does not conform to the principle of legality. The doctrine of vagueness is one of the principles of common law that was developed by courts to regulate the exercise of public power. As pointed out previously, the exercise of public power is now regulated by the Constitution which is the supreme law. The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives and should not be used unduly to impede or prevent the furtherance of such objectives*.". (Our underlining)

7.8 Regulations must, therefore, be drafted in a manner that is clear and understandable. They should not be vague and they must be understandable to those to whom they apply.

8. When making regulations under the Act, the Minister must comply with the Constitution and the empowering provision, which is section 97 of the Act. It appears that the power of the Minister to make regulations relating to compensation related to pulmonary tuberculosis in health care workers is not explicitly stated in section 97(1)*(a) to (f)* of the Act.

8.1 However, section 97(1)*(g)* provides that the Minister may make regulations, after consultation with the Board, regarding any matter which shall or may be prescribed by regulations in terms of the Act. In addition, section 97(1)*(h)* provides that the Minister may make regulations, after consultation with the Board, regarding any other matter, whether or not connected with any matter mentioned in paragraphs (a) to (g), which he may deem necessary or expedient to prescribe in order to further

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6 2006 (3) SA 247 (CC).

the objects and purposes of this Act.

8.2 In the case of *Bezuidenhout v Road Accident Fund*[7], the Supreme Court of Appeal commented on the power to make regulations "which may be necessary or expedient to prescribe in order to achieve or promote the object of this Act", by stating that this provision "cannot empower the making of regulations which widen the purpose and object of the present Act or which are in conflict therewith".

8.3 Thornton thus advises that such general provisions are purely ancillary or incidental to the purpose of the Act. They authorise the provision of subsidiary means of carrying into effect what is already enacted in the Act itself, and do not allow attempts to widen the purposes of the Act, to add new and different means of carrying them out, or to depart from or change its objectives.[8]

8.4 As is evidenced from the long title of the Act, the object and purpose of the Act is to provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for compensation in the case of death resulting from such injuries or diseases.

8.5 The draft Regulations concern the scope of compensation for occupational diseases. In terms of section 97(1)*(g)* of the Act read with section 65(1)*(a)* of the Act, the Minister may make regulations, after consultation with the Board, if it is proved to the satisfaction of the Director-General that the employee has contracted a disease mentioned in Schedule 3 to the Act and that such disease has arisen out of and in the course of his or her employment.

8.6 Considering the subject matter of the draft Regulations, we are of the view that sections 97(1)*(g)* and *(h)* and 65(1)*(a)* of the Act are the appropriate provisions which empower the Minister to make the regulations.

9. We now turn to deal with the draft Regulations as set out in the Schedule. We have suggested track changes with regards to the drafting style and form of the draft Regulations. This is done in order to align the draft Regulations with common legislative drafting style and form.

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7 2003 (3) ALL SA 249 (SCA).
8 Thornton, *Legislative Drafting* at page 342.

***Ad* regulation 1 of the draft Regulations: Definitions**

9.1 Regulation 1 of the draft Regulations provides for the definition of certain terms used in the Regulations. We have inserted a sentence at the beginning of regulation 1 to assist with the interpretation of definitions used in the Schedule. We have also inserted a definition of Regulations so as to avoid tedious repetition throughout the draft Regulations. We have rearranged the order of some of the definitions to ensure that they appear in alphabetical order.

9.2 We note that the Department has defined "Gen XpectMTB/RIF", however, upon researching the term, we note that no such term exists in any medical academia which we have considered in conducting our research. In the text of the draft Regulations the Department uses the term "GeneXpert MTB/RIF" which appears to be the correct medical term. The Department is requested to confirm its intention as to which term is correct and to amend this definition in regulation 1 of the draft Regulations.

9.3 We propose that if the Department is desirous of using "occupational pulmonary tuberculosis" as an extending definition[9], then the Department is requested to clearly define and abbreviate the term in regulation 1 of the draft Regulations. Further, if the Department wishes to use the phrase TB then we suggest that TB be defined in the draft Regulations. In addition, the Department needs to be consistent with the use of terms throughout the draft Regulations so as to avoid ambiguities.

***Ad* regulation 2 of the draft Regulations: Diagnosis**

9.4 Regulation 2 of the draft Regulations seeks to provide for the diagnosis of occupational pulmonary tuberculosis and the various ways in which such a diagnosis can be made. We have suggested that paragraph *(c)* be divided into subparagraphs to make the Regulations more reader friendly, however if this does not correctly reflect the Department's intention, then this may be ignored.

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9 According to Thornton at page 146, *"An extending definition stipulates for the defined term a meaning that in some respect goes beyond the meaning or meanings conveyed in common usage by the term. Such a definition usually adds to the conventional meaning an element of assigned meaning".*

***Ad* regulation 3 of the draft Regulations: Impairment**

9.5 Regulation 3 of the draft Regulations seeks to provide for the manner in which pulmonary function impairment shall be determined and assessed.

9.6 We note that sub-regulation (3) does not read correctly as it does not stipulate if the Final Medical Report needs to be submitted. If the Department requires the submission of the Final Medical Report in respect of an Occupational Disease, then this needs to be clearly stated. In addition, it needs to be stated in this regulation who is required to submit the report and to whom the report should be submitted.

9.7 Sub-regulation (3) also makes reference to lung function tests. If the Department requires that these tests need to be submitted, then this must be clearly stated in the draft Regulations and the details regarding who must submit the tests and to whom the tests should be submitted, must be contained thereto.

***Ad* regulation 4 of the draft Regulations: Compensation Benefits**

9.8 Regulation 4 of the draft Regulations seeks to provide for the compensation benefits payable according to the Act after assessment of the impairment. Minor amendments were suggested in regulation 4 of the draft Regulations.

***Ad* regulation 5 of the draft Regulations: Medical Costs**

9.9 Regulation 5 of the draft Regulations seeks to provide for the medical costs that will be provided after a diagnosis of tuberculosis. In sub-regulation (2) we have suggested the insertion of the words "for the tuberculosis" to narrow the ambit for which medical costs will be paid.

***Ad* regulation 6 of the draft Regulations: Death Benefits**

9.10 Regulation 6 of the draft Regulations seeks to provide for death benefits payable in terms of a Burial Expenses Policy and where the employee dies as a result of tuberculosis, widow's and dependent's pensions will be payable.

***Ad* regulation 7 of the draft Regulations: Reporting**

9.11 Regulation 7 of the draft Regulations seeks to provide for the documentation that must be submitted to the Compensation Fund, the employer, individual liable, or the licensee concerned.

***Ad* regulation 8 of the draft Regulations: Claims Processing**

9.12 Regulation 8 of the draft Regulations seeks to provide for the consideration and adjudication of all claims by the Commissioner and makes provision for medical officers employed by the Compensation Fund to be responsible for medical assessments of claims and confirmation of acceptance or rejection of claims. We have suggested minor drafting amendments to regulation 8 of the draft Regulations.

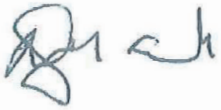
10. The Department's attention is drawn to the fact that, in terms of section 6(3) of the Constitution, the Regulations must be published in at least two official languages and non-compliance with this requirement may result in the draft Regulations being invalid.

CONCLUSION

11. In light of the above discussion, we are of the view that the Minister has the requisite authority to make the Regulations under consideration. Subject to our suggested amendments made directly in the text of the draft Regulations, we are of the view that the draft Regulations are in order and conforms to the form and style of legislative drafting.

12. We attach hereto a copy of the draft Regulations with track changes incorporating our suggested amendments for your consideration.

Yours sincerely



FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
A Small / A Selokela / S Masapu

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO 130 OF 1993)

REGULATIONS ON APPOINTMENT OF ASSESSORS, PRESIDING OFFICERS AND INTERPRETERS FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

The Minister of Employment and Labour, after consultation with the Compensation Board has, under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No 130 of 1993) made the regulations in Schedule A. These regulations are published for public comments only.

Interested and affected parties are hereby invited to submit written representations on the proposed Regulations. The aforesaid representations must be marked for the attention of **Mr TH Maphologela** and sent by registered post or emailed or hand delivered within 60 days of publication of this notice to the following addresses:

Compensation Fund	OR	PO Box 955
167 Thabo Sehume Street		Pretoria
Pretoria		0001
0157		

Email addresses: Kimbly.Makgoba@labour.gov.za or Harry.Maphologela@labour.gov.za

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Copies of the Regulations are herewith attached.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

SCHEDULE A

REGULATIONS ON APPOINTMENT OF ASSESSORS, PRESIDING OFFICERS AND INTERPRETERS FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

ARRANGEMENT OF REGULATIONS

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1. Definitions.....2
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3. Minimum requirements for Appointment.....3-4
4. Disqualification of Assessors, Presiding Officers and Interpreters.....4
5. Processes of appointment of Employer and Employee Assessors.....4
6. Processes of appointment of Medical Assessors, Presiding Officers and Interpreters.....5
7. Confirmation of appointment of Assessors, Presiding Officers and Interpreters.....5

1. Definitions

"Business" means employers' organisations representing the interests of employers;

"Labour" means federations of unions representing the interests of employees;

"NEDLAC" means National Economic Development and Labour Council; and

"Regulations" means the Regulations on Appointment of Assessors, Presiding Officers and Interpreters for the Compensation Fund made under the Compensation for Occupational Injuries and Diseases Act, 1993.

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2. Appointment

(1) The Minister may in terms of section 8 of the Act appoint the following assessors for hearing proceedings contemplated in terms of section 91(2)(a) and (b) of the Act: -

a. Employer;

b. Employee assessors; and

c. Medical assessor.

(2) The Minister must consult with the Board prior to the appointments in sub regulation (1)

(3) The Director-General may in terms of section 4(2) of the Act appoint the following persons for hearing proceedings contemplated in terms of section 91(2)(a) and (b) of the Act:-

(a) Presiding Officers; and

(b) Interpreters.

3. Minimum qualifications for Appointment

The minimum requirement for appointment as: -

(a) Medical assessor shall be:

(i) MBCHB;

(ii) registered with the Health Professions Council of South Africa;

(iii) a minimum of five years of practical experience as a medical practitioner; and

(iv) in good standing with Health Professions Council of South Africa.

(b) Presiding officer shall be:

(i) Bproc or LLB;

(ii) admitted legal practitioners;

(iii) a minimum of five years or more of practical experience;

(iv) in good standing with the Legal Practice Council of South Africa.

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(c) Employer assessors shall be:

(i) matric or grade 12 certificate;

(ii) nominated by Business; and

(iii) endorsed by NEDLAC.

(d) Employee assessor shall be:

(i) matric or grade 12 certificate;

(ii) nominated by Labour; and

(iii) endorsed by NEDLAC.

(e) Interpreter shall be :

(i) matric or grade 12 certificate;

(ii) diploma in language practice; and

(iii) a minimum of 3 years practical experience.

4. Disqualification of Assessors, Presiding officers and Interpreters

(1) An assessor shall be disqualified in terms of section 8(5) of the Act.

(2) A presiding officer and an interpreter shall also be disqualified in terms of sub-regulation (1) of this regulation.

5. Processes of appointment of Employer and Employee Assessors

(1) The Compensation Commissioner must request National Economic Development and Labour Council to provide Compensation Fund with a list of persons nominated by Labour and Business from which the Minister may appoint assessors representing the interests of Business and Labour.

(2) Upon receipt of the list of nominees, the Compensation Commissioner must present such list to the Minister for consideration of suitable candidates for appointment.

(3) The Minister must make appointments in accordance with sub-regulation 1(2).

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(4) Processes of appointment of Medical Assessors, Presiding Officers and Interpreters

(1) The Compensation Commissioner must advertise nationally or provincially in the media for the appointment of medical assessors, presiding officers and interpreters.

(2) Upon receipt of applications, the Compensation Commissioner or the officials delegated by him or her must shortlist candidates suitable for appointment.

(3) The list of shortlisted candidates must be forwarded to the Director-General for appointment.

(5) Confirmation of appointment of Assessors, Presiding Officers and Interpreters

The Minister and or the Director-General shall appoint the Assessors, Presiding Officers and Interpreters in writing as the case may be.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 26/03/2020

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DEPARTMENT OF EMPLOYMENT AND LABOUR

NO. R. 793 **17 JULY 2020**

LABOUR RELATIONS ACT, 1995

BARGAINING COUNCIL FOR THE MOTOR INDUSTRY-MIBCO: EXTENSION TO NON-PARTIES OF THE AUTOWORKERS' PROVIDENT FUND AGREEMENT

I, **Thembelani Waltermade Nxesi**, Minister of Employment and Labour, hereby in terms of section 32(2) of the Labour Relations Act, 1995, declare that the Collective Agreement which was concluded in the **Motor Industry Bargaining Council-MIBCO,** and is binding in terms of section 31 of the Labour Relations Act, 1995, on the parties which concluded the Agreement, shall be binding on the other employers and employees in that Industry with effect from the second Monday after the date of publication of this notice and for the period ending 31 August 2022.

.....

MR TW NXESI, MP

MINISTER OF EMPLOYMENT AND LABOUR

DATE: 26/03/2020

UMTHETHO WEZOBUDLELWANO KWEZABASEBENZI KA-1995

UMKHANDLU WOKUXOXISANA PHAKATHI KWABAQASHI NABASEBENZI EMBONINI YEZIMOTO: UKWELULWA KWESIVUMELWANO SABAQASHI NABASEBENZI SE AUTO WORKERS PROVIDENT FUND SELULELWA KILABO ABANGEYONA INGXENYE YASO

Mina, **THEMBELANI WALTERMADE NXESI,** onguNgqongqoshe WezeMisebenzi Nezabasebenzi, lapha ngokwesigaba 32(2) soMthetho Wobudlelwano Kwezabasebenzi ka 1995, ngazisa ukuthi isiVumelwano sabaqashi nabasebenzi esitholakala kwiSheduli yesiNgisi exhunywe lapha, esenziwa eMkhandlwini Wokuxoxisana Phakathi Kwabaqashi Nabasebenzi Bemboni Yezimoto, futhi ngokwesigaba 31 soMthetho Wezobudlelwano Kwezabasebenzi ka 1995, esibopha labo abasenzayo, sizobopha bonke abanye abaqashi nabasebenzi kuleyo Mboni kusukela ngoMsombuluko wesibili emva kokushicilelwa kalesiSaziso futhi kuze kube isikhathi esiphela mhlaka 31 kuNcwaba 2022.

.....

MR TW NXESI, MP

UNGQONGQOSHE WEZEMISEBENZI NEZABASEBENZI

USUKU: 26/03/2020

SCHEDULE

MOTOR INDUSTRY BARGAINING COUNCIL – MIBCO

AUTOWORKERS PROVIDENT FUND
COLLECTIVE AGREEMENT

in accordance with the provisions of the Labour Relations Act, 1995, made and entered into by and between the

Retail Motor Industry Organisation – RMI

and the

Fuel Retailers' Association of Southern Africa- FRA

and the

National Employers Association of South Africa – NEASA

(hereinafter referred to as the "employers" or the "employers" organisations), of the one part, and the

National Union of Metalworkers of South Africa - NUMSA

and the

Motor Industry Staff Association - MISA

(hereinafter referred to as the "employees" or the "trade unions") of the other part, being the parties to the Motor Industry Bargaining Council - MIBCO.

CLAUSE 1 - PERIOD OF OPERATION

This Agreement shall come into operation on such date as may be fixed by the Minister of Labour in terms of section 32 of the Act, and shall remain in force for the period ending 31 August 2022.

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CLAUSE 2 - SCOPE OF APPLICATION OF AGREEMENT

(1) Subject to the provisions of sub clause (2) of this clause, the terms of this Agreement shall be observed -

(a) in the Motor Industry in the Republic of South Africa;

(b) by all employees in grades 1 to 6 in the Motor Industry and by their employers in the Motor Industry.

(2) Notwithstanding the provisions of sub clause (1), the provisions of this Agreement shall not apply to –

(a) grades 1 to 6 employees who are members of the Motor Industry Provident Fund until such time as the parties agree that they are transferred to the Auto Workers' Provident Fund.

(b) any employee who has been granted a retirement benefit by any fund which provides for such benefits;

(c) employees in respect of whom their employer contributes, and for as long as their employer so contributes, to a pension fund/provident fund which was in operation on the date of coming into operation of this Agreement and which, in the opinion of the Council, provides benefits not less favorable than those provided by the Fund;

(d) any fixed term and/or probationary employee for six months from the date on which he begins employment in the Motor Industry; provided that any employer may in his discretion waive this exclusion.

CLAUSE 3 - DEFINITIONS

Any expressions used in this Agreement and which are defined in the Labour

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Relations Act, 1995, as amended from time to time and the Main Agreement shall have the meanings assigned to them in the Act and that Agreement, references to an Act shall include any amendments to such Act, and unless the contrary intention appears, words importing the masculine gender shall include females and vice versa; further, unless inconsistent with the context -

(1) **'Act'** means the Labour Relations Act, 1995 (Act 66 of 1995); as amended from time to time.

(2) **'Apprentice'** means an employee serving under a written contract of apprenticeship registered or deemed to have been registered under the Manpower Training Act, 1981, and includes a minor employed on probation in terms of the Act as well as a learner in terms of Chapter IV of the Skills Development Act, Act No. 97 of 1998;

(3) **'Council'** means the Motor Industry Bargaining Council – MIBCO, registered in terms of section 29 of the Act;

(4) **"Division B employees"** means those employees as defined in the Main Agreement from time to time.

(5) **'Establishment'** means any premises or part thereof in or on which activities in the Motor Industry or part thereof are conducted;

(6) **'Independent Board'** means the Board established by the Council in terms of section 32 of the Act, to consider appeals from non -parties against the refusal of a non -party's application for exemption from the provisions of this Agreement and the withdrawal of such an exemption by the Council;

(7) **'Fund'** means the Auto Workers' Provident Fund, established in terms of the rules of the Fund for the purpose of providing lump sum benefits or annuities for employees in the Motor Industry or for the dependants of such employees on the death of such employees;

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(8) **"Grades 1 to 6 employees"** means those employees as defined in the Main Agreement from time to time;

(9) **'Journeyman'** means an employee who is validly in possession of either a Grade CA or Grade CAE membership card issued to him on or after 1 January 1984 by either the Motor Industry Combined Workers' Union or the National Union of Metalworkers of South Africa, or MISA/SAMU or any one of the organisations that preceded the amalgamation of the Motor Industry Staff Association and the South African Motor Union;

(10) **'Main Agreement'** means the Agreement in which wages and other conditions of service are specified for employees in the Motor Industry, as published in terms of section 32 of the Act;

(11) **'Motor Industry'** or **'Industry'** means the Motor Industry as defined in the Main Agreement from time to time;

(12) ' **PFA**' means the Pension **F**unds Act 24 of 1956 as amended from time to time;

(13) **'Pensionable remuneration'** means the amount which an employer would normally and/or regularly pay to an employee, either weekly or monthly, in respect of the ordinary hours required to complete either a full normal week or month, as the case may be, and does not include remuneration which an employee who is employed on a piece work basis receives over and above the amount he would have received if he had not been employed on such basis, but includes commission received on the sale of goods; provided, however, that all commission received in excess of R9 000 per month shall be excluded, unless the employer an employee jointly agree that contributions shall be paid on commission earnings in excess of the aforementioned limitation;

(14) **"Region EC"** means those areas defined as "Area A (EC)" and "Area B (EC)"

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in the Main Agreement;

(15) **"Region KZNL"** means those areas as defined in "Area A (KZNTL)" and "Area B (KZNL)" in the Main Agreement;

(16) **"Region FS & NC"** means those areas defined as "Area A (FS & NC)" and "Area B (FS & NC)" in the Main Agreement;

(17) **"Region Highveld"** means those areas defined as "Area A (Highveld)" and "Area B (Highveld)" in the Main Agreement;

(18) **'Region Northern'** means those areas defined as "Area A (Northern)" and "Area B (Northern)" in the Main Agreement;

(19) **"Region WP"** means those areas defined as "Area A (WP)" and "Area B (WP)" in the Main Agreement;

(20) **"Regional Council"** means a committee appointed as such by the Council in terms of its constitution for any region defined herein;

(21) **"Retirement age"** means 65 years;

(22) **"Voluntary member"** means a person admitted to membership by a Regional Council in terms of clause 5 of this Agreement;

(23) **"Week"** means a period of seven consecutive days commencing at midnight on a Sunday.

CLAUSE 4 - ESTABLISHMENT AND OBJECTS OF THE FUND

(1) The Auto Workers' Provident Fund (hereinafter referred to as the "Fund"), originally established in terms of Government Notice No. R. 837 of 23 June

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1995, is hereby continued.

(2) The Fund shall consist of contributions as specified in this Agreement, and interest, dividends or rental earnings on investments.

(3) The objects of the Fund shall be, in accordance with the rules of the Fund as determined from time to time, to provide benefits for members.

CLAUSE 5 - MEMBERSHIP

(1) Subject to the provisions of clause 2 of this agreement and of sub clause (3) of this clause, membership of the fund shall be compulsory for every employee, within the registered scope of the Council and falling below the threshold defined in the Main Agreement, employed in the Motor Industry in grades 1 to 6 who has not reached retirement age.

(2) Employees who are not compulsory members in terms of sub clause (1) and Directors of companies, members of Close Corporations, Sole Proprietors and Partners in business directly engaged in, or in connection with the Motor Industry, may be admitted to voluntary membership of the Fund at the sole discretion of the Regional Council concerned, and the provisions of the Agreement shall *mutatis mutandis* apply to persons admitted to voluntary membership and their employers.

(3) Every employee for whom membership is compulsory in terms of sub clause (1) of this clause, and every person admitted to voluntary membership in terms of sub clause (2) of this clause, shall -

(a) complete the form specified in Annexure A to this Agreement and lodge such completed form with the Secretary of the Regional Council for the Region in which he is employed, within one month after the date on which he enters, re-enters or becomes employed in the Motor Industry;

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and for purposes of this paragraph an employee shall be deemed to have re-entered the Motor Industry when he has changed employment from one Region to another;

(b) when required to do so by the Council, a Regional Council or the Fund, furnish such evidence and information, documentary or otherwise, as may be necessary for purposes of his identity, his membership of the Fund and/or payment or determining of any benefit arising out of such membership.

CLAUSE 6 - CONTRIBUTIONS

(1) Every employee for whom membership of the Fund is compulsory in terms of clause 5(1) or every voluntary member in terms of clause 5(2) of this Agreement, shall contribute 7,5 per cent of his pensionable remuneration to the Fund in respect of each week of employment in the Motor Industry; provided that where an employee receives or is entitled to receive wages for less than 23 hours in any week, no contributions shall be payable by him in respect of such week.

(2) The contributions specified in sub clause (1) shall, subject to the proviso contained in sub clause (1), be deducted by the employer from every employee's wages on the first pay-day after this Agreement comes into operation, and on each pay-day thereafter.

(3) Every employer shall contribute and add to the contributions deducted in terms of sub clause (2) an amount equal to 8% of the member's pensionable remuneration.

(4) The total amount of contributions deducted from the earnings of employees and contributed by employers in terms of sub clause (2) and (3) of this clause shall be paid each month to the Secretary of the Regional Council for the

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Region within the area of jurisdiction within which the employer's establishment is situated, and each such payment shall be accompanied by a written statement containing the following details:

(a) Name, initials and national identification number of each employee;

(b) amount of contributions remitted in respect of each employee;

(c) the date on which service began or service ended, in the case of employees whose employment began or ended since the details were last submitted.

(5) Employee and employer contributions (contributions) payable in terms of this clause shall be payable by the employer no later than 30 (thirty) days after of the month immediately following that to which the contributions relate. The employer shall, together with the contributions payable under this clause, submit a statement containing the details referred to in sub clause 4 of this Agreement to the Secretary of the relevant Regional Council.

Note:

(a) The present postal addresses of the Secretaries of the various Regional Councils are as follows:

For Region EC: P.O. Box 7270, Port Elizabeth, 6056
For Region KZNL: P.O. Box 17263, Congella, 4013
For Region FS & NC: P.O.Box 910, Bloemfontein, 9300
For Region Highveld: P.O.Box 2578, Randburg, 2125
For Region Northern: P O Box 2578, Randburg, 2125
For Region WP: P.O.Box 17, Bellville, 7535

(b) Forms prepared specifically for the furnishing of the details required by this clause may be obtained from the Regional Secretary of the Region

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concerned.

(6) The contributions payable by employers as specified in sub clause (3) shall not be refundable.

(7) The contributions collected by Regional Councils in terms of this clause shall be paid to the Fund.

(8) Compound interest on late payments or unpaid amounts and values shall be calculated for the period from the first day of the month following the expiration of the period in respect of which the relevant amounts or values are payable or transferable until the date of receipt by the fund at the rate prescribed…

(9) Notwithstanding the provisions of this clause an employer who has been discovered in terms of the provisions of the Collective Administrative Agreement between the parties, shall be liable for any amounts due in respect of provident fund contributions, excluding contributions for which the employee is liable in terms of this agreement or any other agreement relating to the provident fund, from commencement of employment in respect of each employee including penalties and interest payable to the provident fund in terms of the PFA in respect of such employee. This provisions of this clause are subject to the respective employee electing in writing within 30 days of the discovery referred to sub clause (b) above whether to enforce or the waive compliance with the provisions of this clause by the employer.

CLAUSE 7 - ADMINISTRATION

(1) The Fund shall be administered in accordance with rules approved by the Financial Services Board; which rules shall not be inconsistent with the provisions of this Agreement, the Act or of the PFA, and a copy of the rules and details of any amendments to them shall be lodged with the Financial Services Board.

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CLAUSE 8 – LIQUIDATION OR DISSOLUTION

(1) In the event of the dissolution of the Council or in the event of its ceasing to function during the currency of this Agreement, the Parties may appoint the Company, to perform the functions of the Council in respect of this Agreement. If the Company is unwilling or unable to discharge such duties the Financial Services Board shall appoint a trustee or trustees to perform the Council's function. The Company or the trustee(s) so appointed shall have all the powers vested in the Council for purposes of this Agreement.

(2) In the event of the dissolution of the Council or in the event of its ceasing to function during the currency of this Agreement, the Financial Services Board may appoint the Company to perform the functions of the Council in respect of this Agreement. If the Company is unwilling or unable to undertake the performance of such functions, the Financial Services Board may appoint a trustee or trustees to perform the Council's function. The Company or the trustee(s) so appointed shall have all the powers vested in the Council for purposes of this Agreement.

(3) In the event of the dissolution of the Council or in the event of its ceasing to function during the currency of this Agreement, the Registrar of Labour Relations may appoint the Company to perform the functions of the Council in respect of this Agreement. If the Company is unwilling or unable to undertake the performance of such functions, the Registrar of Labour Relations may appoint a trustee or trustees to perform the Council's function. The Company or the trustee(s) so appointed shall have all the powers vested in the Council for purposes of this Agreement.

CLAUSE 9 - AGENTS

The Council or any Regional Council may appoint one or more specified persons as

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agents to assist in giving effect to the terms of this Agreement, and it shall be the duty of every employer and every employee to permit such persons to enter such premises, institute and complete such enquiries and to examine such documents, books, wage sheets, time sheets and pay tickets, question such individuals and to do all such acts as may be necessary for the purposes of ascertaining whether the provisions of this Agreement are being observed, and no person shall make a false statement to such agent in connection with his investigations.

CLAUSE 10 – EXEMPTIONS

(1) Subject to the provisions of the Act and the PFA, exemption from any of the provisions of this agreement may be granted by the Council or Regional Councils, to any party on application.

(2) Application for exemption shall be made, in a form prescribed by the Council, to the General Secretary of the Council or the Secretary of the Regional Council within whose area the applicant operates or is employed.

(3) The Regional Council or the Council, as the case may be, shall subject to the provisions of the Act and PFA, fix the conditions subject to which such exemptions shall be valid, and may, if it deems fit, after one week's notice has been given, in writing, to the person(s) concerned, withdraw any license of exemption.

(4) The secretary of the Regional Council or the Secretary of the Council, as the case may be, shall issue to every person granted exemption, a license signed by him setting out -

(a) the name of the person concerned;

(b) the provisions of this Agreement from which exemption is granted;

(c) the conditions subject to which such exemption is granted; and

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(d) the period during which the exemption shall be valid.

(5) In respect of establishments registered under Chapters II or III of this Agreement, the following exemptions procedure applies:

(a) An employer that applies for an exemption in order to pay a lesser wage increase or to be exempted from paying on actuals shall complete the wage exemption application form available on request from the local Regional Councils.

(b) The employer shall consult its employees on the employer's intention to apply for an exemption and the application for exemption must contain details and proof of the consultation process.

(c) The employer, in the application shall furnish all relevant financial information supporting the motivation for the exemption applied for.

(d) The employer shall lodge the application for exemption with the local Regional Council and the employer shall specify that it is a Chapter II or III application for an exemption and the employer shall specify the exact nature of the exemption applied for as prescribed in paragraph (5)(a) of this clause.

(e) Any application for exemption made to the Council or Regional Council, as the case may be, shall be considered in accordance with the following exemption criteria:

(i) the written substantiation and motivation submitted by the applicant;

(ii) the extent of consultation with and the petition for or against granting the exemption as provided by employers or employees who are to be affected by the exemption if granted;

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(iii) the scope of exemption required;

(iv) the infringement of basic conditions of employment rights;

(v) the fact that a competitive advantage is not created by the exemption;

(vi) the viewing of the exemption from any employee benefit fund or training provision in relation to the alternative compatible *bona fide* benefit or provision, including the cost of the employee, transferability, administration management and cost, growth and stability;

(vii) the extent to which the proposed exemption undermines collective bargaining and labour peace in the Motor Industry;

(viii) any existing special economic or other circumstances which warrant the granting of the exemption;

(ix) cognisance of the recommendations contained in the Report of the Presidential Commission to Investigate Labour Market Policy; and

(x) any recommendation from the Council.

(f) The Council or the Regional Council, as the case may be, shall make a decision on the application for an exemption within 30 days from the date upon which the application was lodged with them.

(6) The Secretary of the Regional Council or the Secretary of the Council, as the case may be, shall -

(a) number consecutively all licenses issued;

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(b) retain a copy of each licenses issued; and

(c) where exemption is granted to an employee, forward a copy of the license to the employer concerned.

(7) The Secretary of the Regional Council or the General Secretary, as the case may be, shall issue to every person granted a license, a letter of authority signed by him setting out, read with the changes required by the context, the information referred to in sub clauses (5) and (6) above.

CLAUSE 11 - DISHONOURED CHEQUES

Subject to the provisions of clause 6 of this agreement, whenever an employer pays any sum of money which is due to the Council in terms of this Agreement, in any manner other than in cash and such payment is not honored for any reason whatsoever, then and in such event a penalty shall be payable by the employer to the Council, which penalty shall be equal to 1,5 per cent to 2 per cent as determined by the Council in its sole discretion, of the amount of the purported payment. Any penalty due to the Council in terms of this clause shall be payable on demand.

CLAUSE 12 - INDEPENDENT BOARD

(1) In terms of section 32(3)(e) of the Act, the Council hereby establishes an independent body, to be known as the Independent Board to consider appeals from non-parties against a refusal of a non-party's application for exemption from the provisions of a published collective agreement and the withdrawal of such an exemption by the Council. The following provisions shall apply to the Independent Board:

(a) The Council shall appoint 6 (six) independent persons (Members) to constitute the Independent Board, for the avoidance of doubt, such persons shall not be representative, office bearer or official of the council

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or party to the Council or any of its collective bargaining agreements. The independent persons shall be appointed for a period of 12 (twelve) months and shall possess *inter alia* the following qualities:

(i) the ability to be objective, independent and impartial;

(ii) sound decision-making skills;

(iii) leadership qualities, particularly in respect of exercising sound judgment;

(iv) be a person in whose impartially and integrity the public can have confidence;

(v) understand and comply with confidentiality requirements;

(vi) working knowledge and experience of labour and collective bargaining matters; and

(vii) knowledge and understanding of judicial / quasi-judicial processes.

(b) The Council shall determine such other terms of appointment of Members of the Independent Board subject to the provisions of the Labour Relations Act.

(2) Any non-party employer may lodge an appeal with the Independent Board against the Council's or Regional Council's decision, as the case may be, to refuse to grant an application for an exemption from the provisions of a published collective agreement and the withdrawal of such an exemption by the Council, in which event the following procedure shall apply:

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(a) An appeal shall be in writing and shall be addressed to the General Secretary of the Council or the Secretary of the Regional Council, as the case may be, for consideration by the Independent Board.

(b) All appeals lodged by non -parties shall be considered by the Independent Board with due regard to the Exemption criteria set out in sub clause (7) below.

(c) All appeals shall be substantiated or motivated by the applicant and shall include the following details:

(i) the period for which the appeal is required;

(ii) the Agreement and clauses or sub clauses of the Agreement from which appeal is required;

(iii) proof that the exemption applied for has been discussed by the employer, his employees and their respective representatives; and the responses resulting from such consultation, either in support of or against the application, are to be included with the appeal.

(3) The Independent Board may, having regard to the individual merits of each appeal, grant or refuse the appeal if -

(a) it does not undermine the agreement;

(b) it is fair to the employer or his employees and other employers and employees in the Industry.

(4) The Independent Board shall deal with all appeals within 30 days of the date on which the appeal was submitted.

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(5) Once the Independent Board has granted an appeal, it must issue a certificate and advise the applicant(s) accordingly within 14 days of the date of its decision.

(6) When the Independent Board dismisses or dismisses part of an appeal it shall advise the applicant(s) within 14 days of the date of such decision.

(7) ***Exemption criteria*:** The Independent Board must consider all appeals with reference to the following criteria:

(a) the written substantiation and motivation submitted by the applicant;

(b) the extent of consultation with and the petition for or against granting the appeal as provided by employers or employees who are to be affected by the appeal if granted;

(c) the scope of appeal required;

(d) the infringement of basic conditions of employment rights;

(e) the fact that a competitive advantage is not created by the appeal ;

(f) the viewing of the appeal from any employee benefit fund or training provision in relation to the alternative compatible *bona fide* benefit or provision, including the cost of the employee, transferability, administration management and cost, growth and stability;

(g) the extent to which the proposed appeal undermines collective bargaining and labour peace in the Motor Industry;

(h) any existing special economic or other circumstances which warrant the granting of the appeal ;

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(i) cognisance of the recommendations contained in the Report of the Presidential Commission to Investigate Labour Market Policy; and

(j) any recommendation from the Council.

CLAUSE 13 - RESOLUTION OF DISPUTES

(1) For the purpose of this Agreement a "dispute" means any dispute about the application, interpretation or enforcement of this Agreement, or any other collective agreements entered into by the parties to the Council.

(2) Any such dispute shall be referred to the Council in the form specified by the Council. This provision does not apply when the Council makes use of the procedure set out in sub-paragraph (4).

(3) If the Council fails to resolve the dispute through conciliation and the dispute remains unresolved, it shall be referred for arbitration to the MIBCO-Dispute Resolution Centre in terms of section 52 of the Act. The arbitrator shall have the power to decide upon the procedure to be followed at the arbitration hearing in terms of section 138 of the Act, and be entitled to make an award in respect of the parties' arbitration cost in terms of section 138 (10) of the said Act.

(4) The provisions of this clause stand in addition to any other legal remedy through which the Council may enforce a collective agreement.

(5) The arbitrator's decision shall be final and binding subject to the parties' right of review to the Labour Court.

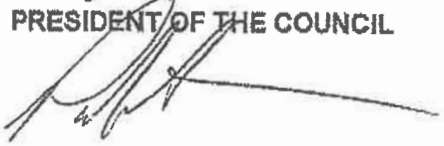
(6) Any other dispute shall have the same meaning as defined in the Act and be dealt with in terms of section 51 of the said Act.

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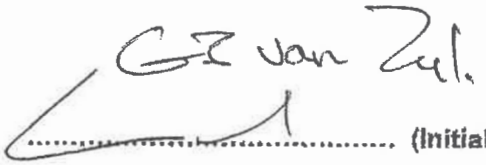
SIGNED AT RANDBURG, ON BEHALF OF THE PARTIES, THIS 13 DAY OF JANUARY 2020



..... (Initial and Surname)
PRESIDENT OF THE COUNCIL



..... (Initial and Surname)
VICE-PRESIDENT OF THE COUNCIL



..... (Initial and Surname)
GENERAL SECRETARY

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ANNEXURE A TO THE AUTO WORKERS' PROVIDENT FUND AGREEMENT

APPLICATION FOR REGISTRATION AS A MEMBER

Fund No .....

Identity No .....

Surname .....

First names .....

Date of birth .....(year) ..... (month) .....(day)

Sex (state male or female).....

Employed by (employer's name and address)

.....

.....

Occupation

.....

Applicant's private address

.....

.....

Where you employed in the Motor Industry previously?

.....

If the answer is "Yes", state name and address of employer

.....

I, the undersigned, hereby apply to be registered as a member of the Auto Workers' Provident Fund and agree to abide by the provisions of the Fund's rules in force from time to time.

I nominate as my beneficiary in the event of my death:

First names

(Mr/Mrs/Miss).....

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Surname.....

Relationship (state: wife, husband, father, mother, son, daughter, as the case maybe)

.....

Address:

.....

.....

Identity No. of beneficiary (where applicable)

.....

Date..... .....

(Member's signature)

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ANNEXURE B TO THE AUTO WORKERS' PROVIDENT FUND AGREEMENT

APPLICATION FOR REGISTRATION AS A VOLUNTARY MEMBER

Fund No .....

Identity No .....

Surname .....

First names .....

Date of birth .....(year) ..... (month) .....(day)

Sex (state male or female).....

Employed by (employer's name and address)

.....

.....

Occupation .....

If an employer, state full name of business

.....

.....

Status of employer (e.g. owner, director, partner, member?

.....

If the answer is "Yes", state name and address of employer

.....

I, the undersigned, member of .....

Hereby apply to be registered as a member of the Auto Workers' Provident Pension Fund and agree to abide by the provisions of the Fund Rules in force from time to time.

Where you employed in the Motor Industry previously? .....

If answer is "Yes", state name and address of employer and your Fund No

.....

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Date.....

.....

(Member's signature)

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DEPARTMENT OF EMPLOYMENT AND LABOUR

NO. R. 794 **17 JULY 2020**

LABOUR RELATIONS ACT, 1995

BARGAINING COUNCIL FOR THE MOTOR INDUSTRY-MIBCO: EXTENSION TO NON-PARTIES OF THE MOTOR INDUSTRY PROVIDENT FUND COLLECTIVE AGREEMENT

I, **THEMBELANI WALTERMADE NXESI**, Minister of Employment and Labour, hereby in terms of section 32(2) of the Labour Relations Act, 1995, declare that the Collective Agreement that was concluded in the **Motor Industry Bargaining Council-MIBCO,** and is binding in terms of section 31 of the Labour Relations Act, 1995, on the parties which concluded the Agreement, shall be binding on the other employers and employees in that Industry with effect from the second Monday after the date of publication of this notice and for the period ending 31 August 2022.

.....

MR TW NXESI, MP

MINISTER OF EMPLOYMENT AND LABOUR

DATE: 26/03/2020

UMTHETHO WEZOBUDLELWANO KWEZABASEBENZI KA-1995

UMKHANDLU WOKUXOXISANA PHAKATHI KWABAQASHI NABASEBENZI EMBONINI YEZIMOTO: UKWELULWA KWESIVUMELWANO SABAQASHI NABASEBENZI SE MOTOR INDUSTRY PROVIDENT FUND SELULELWA KILABO ABANGEYONA INGXENYE YASO

Mina, **THEMBELANI WALTERMADE NXESI,** onguNgqongqoshe WezeMisebenzi Nezabasebenzi, lapha ngokwesigaba 32(2) soMthetho Wobudlelwano Kwezabasebenzi ka 1995, ngazisa ukuthi isiVumelwano sabaqashi nabasebenzi esitholakala kwiSheduli yesiNgisi exhunywe lapha, esenziwa eMkhandlwini Wokuxoxisana Phakathi Kwabaqashi Nabasebenzi Bemboni Yezimoto, futhi ngokwesigaba 31 soMthetho Wezobudlelwano Kwezabasebenzi ka 1995, esibopha labo abasenzayo, sizobopha bonke abanye abaqashi nabasebenzi kuleyo Mboni kusukela ngoMsombuluko wesibili emva kokushicilelwa kwalesiSaziso futhi kuze kube isikhathi esiphela mhlaka 31 kuNcwaba 2022.

.....

MR TW NXESI, MP

UNGQONGQOSHE WEZEMISEBENZI NEZABASEBENZI

USUKU: 26/03/2020

SCHEDULE

MOTOR INDUSTRY BARGAINING COUNCIL – MIBCO

MOTOR INDUSTRY PROVIDENT FUND AGREEMENT
COLLECTIVE AGREEMENT

in accordance with the provisions of the Labour Relations Act, 1995, made and entered into by and between the

Retail Motor Industry Organisation – RMI

and the

Fuel Retailers' Association of Southern Africa- FRA

and the

National Employers Association of South Africa – NEASA

(hereinafter referred to as the "employers" or the "employers" organisations), of the one part, and the

National Union of Metalworkers of South Africa - NUMSA

and the

Motor Industry Staff Association - MISA

(hereinafter referred to as the "employees" or the "trade unions") of the other part, being the parties to the Motor Industry Bargaining Council - MIBCO.

CLAUSE 1 - PERIOD OF OPERATION

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This Agreement shall come into operation on such date as may be fixed by the Minister of Labour in terms of section 32 of the Act, and shall remain in force for the period ending 31 August 2022.

CLAUSE 2 - SCOPE OF APPLICATION OF AGREEMENT

(1) Subject to the provisions of sub clause (2) of this clause, the terms of this Agreement shall be observed -

(a) in the Motor Industry in the Republic of South Africa;

(b) employees in Division B, grades 7 and 8 and apprentices in the Motor Industry and their employers.

(2) Notwithstanding the provisions of sub clause (1), the provisions of this Agreement shall not apply to –

(a) employees in Division B, grades 7 and 8 and apprentices who are members of the Auto Workers' Provident Fund until such time as the parties agree that they are transferred to the Motor Industry Provident Fund.

(b) any employee who has been granted a retirement benefit by any fund which provides for such benefits;

(c) employees in respect of whom their employer contributes, and for as long as their employer so contributes, to a pension fund/provident fund which was in operation on the date of coming into operation of this Agreement and which, in the opinion of the Council, provides benefits not less favorable than those provided by the Fund;

(d) any fixed term and/or probationary employee for six months from the

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date on which he begins employment in the Motor Industry; provided that any employer may in his discretion waive this exclusion.

CLAUSE 3 - DEFINITIONS

Any expressions used in this Agreement and which are defined in the Labour Relations Act, 1995, as amended from time to time and the Main Agreement shall have the meanings assigned to them in the Act and that Agreement, references to an Act shall include any amendments to such Act, and unless the contrary intention appears, words importing the masculine gender shall include females and vice versa; further, unless inconsistent with the context -

(1) **'Act'** means the Labour Relations Act, 1995 (Act 66 of 1995); as amended from time to time.

(2) **'Apprentice'** means an employee serving under a written contract of apprenticeship registered or deemed to have been registered under the Manpower Training Act, 1981, and includes a minor employed on probation in terms of the Act as well as a learner in terms of Chapter IV of the Skills Development Act, Act No. 97 of 1998;

(3) **'Council'** means the Motor Industry Bargaining Council – MIBCO, registered in terms of section 29 of the Act;

(4) **"Division B employees"** means those employees as defined in the Main Agreement from time to time.

(5) **'Establishment'** means any premises or part thereof in or on which activities in the Motor Industry or part thereof are conducted;

(6) **'Independent Board'** means the Board established by the Council in terms of

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section 32 of the Act, to consider appeals from non -parties against the refusal of a non -party's application for exemption from the provisions of this Agreement and the withdrawal of such an exemption by the Council;

(7) **'Fund'** means the Motor Industry Provident Fund, established in terms of the rules of the Fund for the purpose of providing lump sum benefits or annuities for employees in the Motor Industry or for the dependants of such employees on the death of such employees;

(8) **"Grade 7 employees"** mean those employees as defined in the Main Agreement from time to time;

(9) **"Grade 8 employees"** mean those employees as defined in the Main Agreement from time to time;

(10) **'Main Agreement'** means the Agreement in which wages and other conditions of service are specified for employees in the Motor Industry, as published in terms of section 32 of the Act;

(11) **'Motor Industry'** or **'Industry'** means the Motor Industry as defined in the Main Agreement from time to time;

(12) ' **PFA**' means the Pension **F**unds Act 24 of 1956 as amended from time to time;

(13) **'Pensionable remuneration'** means the amount which an employer would normally and/or regularly pay to an employee, either weekly or monthly, in respect of the ordinary hours required to complete either a full normal week or month, as the case may be, and does not include remuneration which an employee who is employed on a piece work basis receives over and above the amount he would have received if he had not been employed on such basis, but includes commission received on the sale of goods; provided, however, that all commission received in excess of R9 000 per month shall be excluded,

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unless the employer an employee jointly agree that contributions shall be paid on commission earnings in excess of the aforementioned limitation;

(14) **"Region EC"** means those areas defined as "Area A (EC)" and "Area B (EC)" in the Main Agreement;

(15) **"Region KZNL"** means those areas as defined in "Area A (KZNTL)" and "Area B (KZNL)" in the Main Agreement;

(16) **"Region FS & NC"** means those areas defined as "Area A (FS & NC)" and "Area B (FS & NC)" in the Main Agreement;

(17) **"Region Highveld"** means those areas defined as "Area A (Highveld)" and "Area B (Highveld)" in the Main Agreement;

(18) **'Region Northern'** means those areas defined as "Area A (Northern)" and "Area B (Northern)" in the Main Agreement;

(19) **"Region WP"** means those areas defined as "Area A (WP)" and "Area B (WP)" in the Main Agreement;

(20) **"Regional Council"** means a committee appointed as such by the Council in terms of its constitution for any region defined herein;

(21) **"Retirement age"** means 65 years;

(22) **"Voluntary member"** means a person admitted to membership by a Regional Council in terms of clause 5 of this Agreement;

(23) **"Week"** means a period of seven consecutive days commencing at midnight on a Sunday.

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CLAUSE 4 - ESTABLISHMENT AND OBJECTS OF THE FUND

(1) The Motor Industry/MISA Provident Fund established on 1 January 2001 is hereby continued as the Motor Industry Provident Fund (hereinafter referred to as the "Fund").

(2) The Fund shall consist of:

(a) Contributions paid to it in terms of this agreement;

(b) Interest, dividends, rental income and capital gains derived from the investment of its moneys;

(c) Money or any other assets transferred to it from any other pension or provident fund; and

(d) Any moneys or other assets lawfully acquired from any other source\ whatsoever.

(3) The objects of the Fund shall be, in accordance with the rules of the Fund as determined from time to time, to provide benefits for members.

CLAUSE 5 - MEMBERSHIP

(1) Subject to the provisions of clause 2 of this agreement and of sub clause (3) of this clause, membership of the fund shall be compulsory for every employee, within the registered scope of the Council and falling below the threshold defined in the Main Agreement, employed in the Motor Industry in grades 1 to 6 who has not reached retirement age.

(2) Employees who are not compulsory members in terms of sub clause (1) and Directors of companies, members of Close Corporations, Sole Proprietors and Partners in business directly engaged in, or in connection with the Motor

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Industry, may be admitted to voluntary membership of the Fund at the sole discretion of the Regional Council concerned, and the provisions of the Agreement shall ***mutatis mutandis*** apply to persons admitted to voluntary membership and their employers.

(3) Every employee for whom membership is compulsory in terms of sub clause (1) of this clause, and every person admitted to voluntary membership in terms of sub clause (2) of this clause, shall -

(a) complete the form specified in Annexure A to this Agreement and lodge such completed form with the Secretary of the Regional Council for the Region in which he is employed, within one month after the date on which he enters, re-enters or becomes employed in the Motor Industry; and for purposes of this paragraph an employee shall be deemed to have re-entered the Motor Industry when he has changed employment from one Region to another;

(b) when required to do so by the Council, a Regional Council or the Fund, furnish such evidence and information, documentary or otherwise, as may be necessary for purposes of his identity, his membership of the Fund and/or payment or determining of any benefit arising out of such membership.

(4) Every person who is admitted to voluntary membership in terms of sub clause (2) of this clause shall complete the form specified in Annexure B to this agreement and lodge such completed form with the Secretary of the Regional Council concerned.

CLAUSE 6 - CONTRIBUTIONS

(1) Every employee for whom membership of the Fund is compulsory in terms of clause 5(1) or every voluntary member in terms of clause 5(2) of this

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Agreement, shall contribute 7,5 per cent of his pensionable remuneration to the Fund in respect of each week of employment in the Motor Industry; provided that where an employee receives or is entitled to receive wages for less than 23 hours in any week, no contributions shall be payable by him in respect of such week.

(2) The contributions specified in sub clause (1) shall, subject to the proviso contained in sub clause (1), be deducted by the employer from every employee's wages on the first pay-day after this Agreement comes into operation, and on each pay-day thereafter.

(3) Every employer shall contribute and add to the contributions deducted in terms of sub clause (2) an amount equal to 8% of the member's pensionable remuneration.

(4) The total amount of contributions deducted from the earnings of employees and contributed by employers in terms of sub clause (2) and (3) of this clause shall be paid each month to the Secretary of the Regional Council for the Region within the area of jurisdiction within which the employer's establishment is situated, and each such payment shall be accompanied by a written statement containing the following details:

(a) Name, initials, trade union membership number (if any) and national identification number of each employee;

(b) amount of contributions remitted in respect of each employee;

(c) the date on which service began or service ended, in the case of employees whose employment began or ended since the details were last submitted.

(5) Employee and employer contributions (contributions) payable in terms of this

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clause shall be payable by the employer no later than 30 (thirty) days after of the month immediately following that to which the contributions relate. The employer shall, together with the contributions payable under this clause, submit a statement containing the details referred to in sub clause 4 of this Agreement to the Secretary of the relevant Regional Council.

Note:

(a) The present postal addresses of the Secretaries of the various Regional Councils are as follows:

For Region EC: P.O. Box 7270, Port Elizabeth, 6056
For Region KZNL: P.O. Box 17263, Congella, 4013
For Region FS & NC: P.O.Box 910, Bloemfontein, 9300
For Region Highveld: P.O.Box 2578, Randburg, 2125
For Region Northern: P O Box 2578, Randburg, 2125
For Region WP: P.O.Box 17, Bellville, 7535

(b) Forms prepared specifically for the furnishing of the details required by this clause may be obtained from the Regional Secretary of the Region concerned.

(6) The contributions payable by employers as specified in sub clause (3) shall not be refundable.

(7) The contributions collected by Regional Councils in terms of this clause shall be paid to the Fund.

(8) Compound interest on late payments or unpaid amounts and values shall be calculated for the period from the first day of the month following the expiration of the period in respect of which the relevant amounts or values are payable or transferable until the date of receipt by the fund at the rate prescribed...

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(9) Notwithstanding the provisions of this clause an employer who has been discovered in terms of the provisions of the Collective Administrative Agreement between the parties, shall be liable for any amounts due in respect of provident fund contributions, excluding contributions for which the employee is liable in terms of this agreement or any other agreement relating to the provident fund, from commencement of employment in respect of each employee including penalties and interest payable to the provident fund in terms of the PFA in respect of such employee. This provisions of this clause are subject to the respective employee electing in writing within 30 days of the discovery referred to sub clause (b) above whether to enforce or the waive compliance with the provisions of this clause by the employer.

CLAUSE 7 - ADMINISTRATION

(1) The Fund shall be administered in accordance with rules approved by the Financial Services Board; which rules shall not be inconsistent with the provisions of this Agreement, the Act or of the PFA, and a copy of the rules and details of any amendments to them shall be lodged with the Financial Services Board.

CLAUSE 8 – LIQUIDATION OR DISSOLUTION

In the event of the dissolution of the Council or in the event of its ceasing to function during the currency of this Agreement, the Parties may appoint the Company, to perform the functions of the Council in respect of this Agreement. If the Company is unwilling or unable to discharge such duties the Financial Services Board shall appoint a trustee or trustees to perform the Council's function. The Company or the trustee(s) so appointed shall have all the powers vested in the Council for purposes of this Agreement.

CLAUSE 9 - AGENTS

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The Council or any Regional Council may appoint one or more specified persons as agents to assist in giving effect to the terms of this Agreement, and it shall be the duty of every employer and every employee to permit such persons to enter such premises, institute and complete such enquiries and to examine such documents, books, wage sheets, time sheets and pay tickets, question such individuals and to do all such acts as may be necessary for the purposes of ascertaining whether the provisions of this Agreement are being observed, and no person shall make a false statement to such agent in connection with his investigations.

CLAUSE 10 – EXEMPTIONS

(1) Subject to the provisions of the Act and the PFA, exemption from any of the provisions of this agreement may be granted by the Council or Regional Councils, to any party on application.

(2) Application for exemption shall be made, in a form prescribed by the Council, to the General Secretary of the Council or the Secretary of the Regional Council within whose area the applicant operates or is employed.

(3) The Regional Council or the Council, as the case may be, shall subject to the provisions of the Act and PFA, fix the conditions subject to which such exemptions shall be valid, and may, if it deems fit, after one week's notice has been given, in writing, to the person(s) concerned, withdraw any license of exemption.

(4) The secretary of the Regional Council or the Secretary of the Council, as the case may be, shall issue to every person granted exemption, a license signed by him setting out –

(a) the name of the person concerned;

(b) the provisions of this Agreement from which exemption is granted;

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(c) the conditions subject to which such exemption is granted; and

(d) the period during which the exemption shall be valid.

(5) In respect of establishments registered under Chapters II or III of this Agreement, the following exemptions procedure applies:

(a) An employer that applies for an exemption in order to pay a lesser wage increase or to be exempted from paying on actuals shall complete the wage exemption application form available on request from the local Regional Councils.

(b) The employer shall consult its employees on the employer's intention to apply for an exemption and the application for exemption must contain details and proof of the consultation process.

(c) The employer, in the application shall furnish all relevant financial information supporting the motivation for the exemption applied for.

(d) The employer shall lodge the application for exemption with the local Regional Council and the employer shall specify that it is a Chapter II or III application for an exemption and the employer shall specify the exact nature of the exemption applied for as prescribed in paragraph (5)(a) of this clause.

(e) Any application for exemption made to the Council or Regional Council, as the case may be, shall be considered in accordance with the following exemption criteria:

(i) the written substantiation and motivation submitted by the applicant;

(ii) the extent of consultation with and the petition for or against

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granting the exemption as provided by employers or employees who are to be affected by the exemption if granted;

(iii) the scope of exemption required;

(iv) the infringement of basic conditions of employment rights;

(v) the fact that a competitive advantage is not created by the exemption;

(vi) the viewing of the exemption from any employee benefit fund or training provision in relation to the alternative compatible *bona fide* benefit or provision, including the cost of the employee, transferability, administration management and cost, growth and stability;

(vii) the extent to which the proposed exemption undermines collective bargaining and labour peace in the Motor Industry;

(viii) any existing special economic or other circumstances which warrant the granting of the exemption;

(ix) cognisance of the recommendations contained in the Report of the Presidential Commission to Investigate Labour Market Policy; and

(x) any recommendation from the Council.

(f) The Council or the Regional Council, as the case may be, shall make a decision on the application for an exemption within 30 days from the date upon which the application was lodged with them.

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(6) The Secretary of the Regional Council or the Secretary of the Council, as the case may be, shall -

(a) number consecutively all licenses issued;

(b) retain a copy of each licenses issued; and

(c) where exemption is granted to an employee, forward a copy of the license to the employer concerned.

(7) The Secretary of the Regional Council or the General Secretary, as the case may be, shall issue to every person granted a license, a letter of authority signed by him setting out, read with the changes required by the context, the information referred to in sub clauses (5) and (6) above.

CLAUSE 11 - DISHONOURED CHEQUES

Subject to the provisions of clause 6 of this agreement, whenever an employer pays any sum of money which is due to the Council in terms of this Agreement, in any manner other than in cash and such payment is not honored for any reason whatsoever, then and in such event a penalty shall be payable by the employer to the Council, which penalty shall be equal to 1,5 per cent to 2 per cent as determined by the Council in its sole discretion, of the amount of the purported payment. Any penalty due to the Council in terms of this clause shall be payable on demand.

CLAUSE 12 - INDEPENDENT BOARD

(1) In terms of section 32(3)(e) of the Act, the Council hereby establishes an independent body, to be known as the Independent Board to consider appeals from non-parties against a refusal of a non-party's application for exemption

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from the provisions of a published collective agreement and the withdrawal of such an exemption by the Council. The following provisions shall apply to the Independent Board:

(a) The Council shall appoint 6 (six) independent persons (Members) to constitute the Independent Board, for the avoidance of doubt, such persons shall not be representative, office bearer or official of the council or party to the Council or any of its collective bargaining agreements. The independent persons shall be appointed for a period of 12 (twelve) months and shall possess *inter alia* the following qualities:

(i) the ability to be objective, independent and impartial;

(ii) sound decision-making skills;

(iii) leadership qualities, particularly in respect of exercising sound judgment;

(iv) be a person in whose impartially and integrity the public can have confidence;

(v) understand and comply with confidentiality requirements;

(vi) working knowledge and experience of labour and collective bargaining matters; and

(vii) knowledge and understanding of judicial / quasi-judicial processes.

(b) The Council shall determine such other terms of appointment of Members of the Independent Board subject to the provisions of the Labour Relations Act.

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(2) Any non-party employer may lodge an appeal with the Independent Board against the Council's or Regional Council's decision, as the case may be, to refuse to grant an application for an exemption from the provisions of a published collective agreement and the withdrawal of such an exemption by the Council, in which event the following procedure shall apply:

(a) An appeal shall be in writing and shall be addressed to the General Secretary of the Council or the Secretary of the Regional Council, as the case may be, for consideration by the Independent Board.

(b) All appeals lodged by non -parties shall be considered by the Independent Board with due regard to the Exemption criteria set out in sub clause (7) below.

(c) All appeals shall be substantiated or motivated by the applicant and shall include the following details:

(i) the period for which the appeal is required;

(ii) the Agreement and clauses or sub clauses of the Agreement from which appeal is required;

(iii) proof that the exemption applied for has been discussed by the employer, his employees and their respective representatives; and the responses resulting from such consultation, either in support of or against the application, are to be included with the appeal.

(3) The Independent Board may, having regard to the individual merits of each appeal, grant or refuse the appeal if -

(a) it does not undermine the agreement;

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(b) it is fair to the employer or his employees and other employers and employees in the Industry.

(4) The Independent Board shall deal with all appeals within 30 days of the date on which the appeal was submitted:

(5) Once the Independent Board has granted an appeal, it must issue a certificate and advise the applicant(s) accordingly within 14 days of the date of its decision.

(6) When the Independent Board dismisses or dismisses part of an appeal it shall advise the applicant(s) within 14 days of the date of such decision.

(7) ***Exemption criteria*:** The Independent Board must consider all appeals with reference to the following criteria:

(a) the written substantiation and motivation submitted by the applicant;

(b) the extent of consultation with and the petition for or against granting the appeal as provided by employers or employees who are to be affected by the appeal if granted;

(c) the scope of appeal required;

(d) the infringement of basic conditions of employment rights;

(e) the fact that a competitive advantage is not created by the appeal ;

(f) the viewing of the appeal from any employee benefit fund or training provision in relation to the alternative compatible *bona fide* benefit or provision, including the cost of the employee, transferability, administration management and cost, growth and stability;

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(g) the extent to which the proposed appeal undermines collective bargaining and labour peace in the Motor Industry;

(h) any existing special economic or other circumstances which warrant the granting of the appeal ;

(i) cognisance of the recommendations contained in the Report of the Presidential Commission to Investigate Labour Market Policy; and

(j) any recommendation from the Council.

CLAUSE 13 - RESOLUTION OF DISPUTES

(1) For the purpose of this Agreement a "dispute" means any dispute about the application, interpretation or enforcement of this Agreement, or any other collective agreements entered into by the parties to the Council.

(2) Any such dispute shall be referred to the Council in the form specified by the Council. This provision does not apply when the Council makes use of the procedure set out in sub-paragraph (4).

(3) If the Council fails to resolve the dispute through conciliation and the dispute remains unresolved, it shall be referred for arbitration to the MIBCO-Dispute Resolution Centre in terms of section 52 of the Act. The arbitrator shall have the power to decide upon the procedure to be followed at the arbitration hearing in terms of section 138 of the Act, and be entitled to make an award in respect of the parties' arbitration cost in terms of section 138 (10) of the said Act.

(4) The provisions of this clause stand in addition to any other legal remedy through which the Council may enforce a collective agreement.

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(5) The arbitrator's decision shall be final and binding subject to the parties' right of review to the Labour Court.

(6) Any other dispute shall have the same meaning as defined in the Act and be dealt with in terms of section 51 of the said Act.

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SIGNED AT RANDBURG, ON BEHALF OF THE PARTIES, THIS 13TH DAY OF JANUARY 2020

..... (Initial and Surname)
PRESIDENT OF THE COUNCIL

..... (Initial and Surname)
VICE-PRESIDENT OF THE COUNCIL

..... (Initial and Surname)
GENERAL SECRETARY

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ANNEXURE A TO THE MOTOR INDUSTRY PROVIDENT FUND AGREEMENT

APPLICATION FOR REGISTRATION AS A MEMBER

Fund No .....

Identity No .....

Surname .....

First names .....

Date of birth .....(year) ..... (month) .....(day)

Sex (state male or female).....

Employed by (employer's name and address)

.....

.....

Occupation

.....

Applicant's private address

.....

.....

Where you employed in the Motor Industry previously?

.....

If the answer is "Yes", state name and address of employer

.....

I, the undersigned, hereby apply to be registered as a member of the Motor Industry Provident Fund and agree to abide by the provisions of the Fund's rules in force from time to time.

I nominate as my beneficiary in the event of my death:

First names

(Mr/Mrs/Miss).....

Surname.....

Relationship (state: wife, husband, father, mother, son, daughter, as the case maybe)

.....

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Address:

.....

.....

Identity No. of beneficiary (where applicable)

.....

Date..... .....

(Member's signature)

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ANNEXURE B TO THE MOTOR INDUSTRY PROVIDENT FUND AGREEMENT
APPLICATION FOR REGISTRATION AS A VOLUNTARY MEMBER

Fund No .....

Identity No .....

Surname .....

First names .....

Date of birth .....(year) ..... (month) .....(day)

Sex (state male or female).....

Employed by (employer's name and address)

.....

.....

Occupation .....

If an employer, state full name of business

.....

.....

Status of employer (e.g. owner, director, partner, member?

.....

If the answer is "Yes", state name and address of employer

.....

I, the undersigned, member of .....

Hereby apply to be registered as a member of the Motor Industry Provident Pension Fund and agree to abide by the provisions of the Fund Rules in force from time to time.

Where you employed in the Motor Industry previously? .....

If answer is "Yes", state name and address of employer and your Fund No

.....

Date..... .....

(Member's signature)

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DEPARTMENT OF EMPLOYMENT AND LABOUR

NO. R. 795 **17 JULY 2020**

LABOUR RELATIONS ACT, 1995

BARGAINING COUNCIL FOR THE FISHING INDUSTRY: RENEWAL OF PERIOD OF OPERATION OF MAIN COLLECTIVE AGREEMENT

I, **Stephen Rathai**, Director: Collective Bargaining, duly authorized by the Minister of Employment and Labour, hereby, in terms of section 32(6)(a)(ii) of the Labour Relations Act, 1995, declare the provisions of Government Notices Nos R.587 of 27 July 2012, R. 55 of 1 February 2013, R. 935 of 6 December 2013, R. 564 of 3 July 2015, R. 9 of 5 January 2018 and R. 280 of 1 March 2019 to be effective from the date of publication of this notice and for the period ending 31 December 2020.

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S RATHAI
DIRECTOR: COLLECTIVE BARGAINING

DATE: 8/7/2020

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