

## GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

### DEPARTMENT OF EMPLOYMENT AND LABOUR

NO. R. 792

17 JULY 2020



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

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

**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:

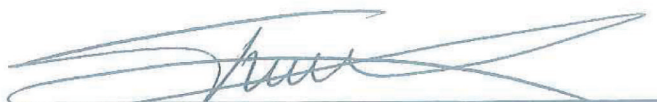
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Copies of the Regulations are herewith attached.

A handwritten signature in blue ink, appearing to read 'Nxesi', is written over a horizontal line.

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

## 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 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,



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

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.

- (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:

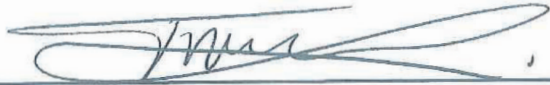
- (a) An employer's report of an Occupational Disease (W.CL.1);
- (b) A notice of occupational diseases and claim for compensation (W.C. L14);
- (c) An affidavit by the employee (W.CL.305) [(if an employer cannot be traced or the employer fails to timeously submit Employer's report of an Occupational 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;



- (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



**the doj & cd**

Department:  
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Date: 20 November 2019

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

**For attention:** Harry Maphologela  
**E-mail:** [Harry.Maphologela@labour.gov.za](mailto: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.)



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**

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

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.



(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.

(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.

### 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.



**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**

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<sup>1</sup> 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

<sup>1</sup> 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.”

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