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
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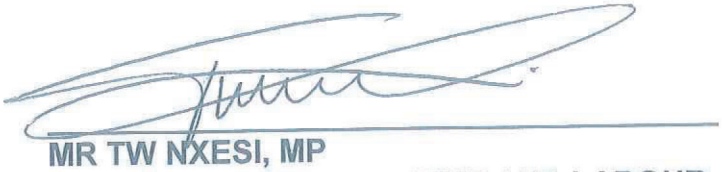
OR

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 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

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.

(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

(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.

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

	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.

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

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.

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;

(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

the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

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Date: 09 December 2019

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

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*

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;*

(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

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

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.

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.

(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.

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.

***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.*

(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) …"

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.

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