

**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.

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 LUNG CANCER FOR THE COMPENSATION FUND MADE
UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND
DISEASES ACT, 1993**

| ARRANGEMENT OF REGULATIONS | Pages |
|-----------------------------------|--------------|
| 1. Definitions..... | 2 |
| 2. Diagnosis..... | 3-4 |
| 3. Impairment..... | 4 |
| 4. Compensation Benefits..... | 4-5 |
| 5. Medical Costs..... | 5 |
| 6. Death Benefits..... | 5 |
| 7. Reporting..... | 5-7 |
| 8. Claims processing..... | 7 |

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

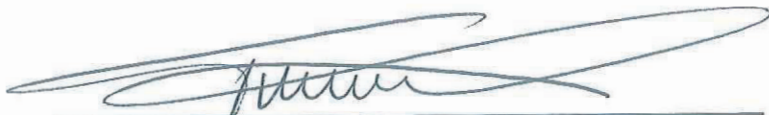
The following documentation must be submitted to the Compensation Fund, the employer, individually liable or the licensee concerned:

- (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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Mr T Lamati
Director-General
Department of Employment and Labour
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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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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

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);

8

- (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