

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

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

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

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

Compensation Fund	OR	PO Box 955
167 Thabo Sehume Street		Pretoria
Pretoria		000
0157		

Email addresses: [Kimbly.Makgoba@labour.gov.za](mailto:Kimbly.Makgoba@labour.gov.za) or [Harry.Maphologela@labour.gov.za](mailto: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 WORK-RELATED UPPER RESPIRATORY TRACT DISORDERS FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

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

#### 1. Definitions

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

**“immunology test”** means an antigen to detect the presence of antibodies to a pathogen, or an antibody to detect the presence of an antigen, of the pathogen in the specimens of the victim;

**“irritant”** means a substance that causes slight inflammation or other discomfort to the body;

**“Regulations”** means the Regulations on Work-related Upper Respiratory tract Disorders for the Compensation Fund made under the Compensation for Occupational Injuries and Diseases Act, 1993;

**“work-related upper respiratory tract disorders”** means diseases affecting the mucosal lining of the nose, larynx and pharynx caused or aggravated by conditions attributable to a particular working environment such as allergic or irritant rhinitis and nasal erosions and perforations.

## 2. Diagnosis

- (1) The diagnosis of Work-related upper respiratory tract disorders must be made by a medical practitioner based on the following:
  - (a) workplace exposure to agents reported to give rise to work-related upper respiratory tract disorder;
  - (b) chronological relationship between Work-related upper respiratory tract disorder and work environment; and
  - (c) evidence of sensitisation (immunological tests) to a known workplace allergen, where applicable.
- (2) The medical officer employed by the Compensation Fund must determine whether the diagnosis of Work-related upper respiratory tract disorder was made according to acceptable medical standards.

## 3. Impairment

Impairment must be assessed after maximum medical improvement has been reached and, where necessary, after removal from exposure using the latest AMA Guide.

### Table 11-6 Criteria for Rating Impairment due to Air Passage Deficits\*



IMPAIRMENT CLASS	CLASS 0	CLASS 1	CLASS 2	CLASS 3	CLASS 4
IMPAIRMENT RANGES (WPI %)	0	1%-9% WPI	11%-27% WPI	30%-42% WPI	45%-58% WPI
GRADE		1 3 5 7 9	11 15 19 23 27	30 33 36 39 42	45 48 51 54 58
HISTORY <sup>c</sup>	There are no complaints of dyspnoea at rest  <b>and</b> Minimal or no interference with any activities	There are no complaints of dyspnoea at rest  Activities requiring intensive effort may be interfered with or require medication to maintain optimal function	There are no complaints of dyspnoea at rest  <b>and</b> dyspnoea is produced by stress, prolonged exertion, hurrying, hill climbing, or recreational or similar activities except sedentary forms	There are no complaints of dyspnoea at rest  <b>and</b> dyspnoea is produced by walking more than 1 or 2 level blocks, climbing 1 flight of stairs even with periods of rest, or performance of other usual activities of daily living	Dyspnoea occurs at rest, although individual is not necessarily bedridden  <b>and</b> dyspnoea is aggravated by the performance of any of the usual activities of daily living beyond personal cleansing, dressing, or grooming

					<i>For ventilator dependence, refer to the pulmonary chapter ratings</i>
PHYSICAL EXAM	Minimal changes to the oropharynx, laryngo-pharynx, larynx, upper trachea, or lower trachea, or incomplete and episodic obstruction of the nose or nasopharynx	Mild changes to the oropharynx, laryngo-pharynx, larynx, upper trachea, or lower trachea, or incomplete and episodic obstruction of the nose or nasopharynx	Moderate changes to the oropharynx, laryngo-pharynx, larynx, upper trachea, or lower trachea, or reversible complete or permanent incomplete obstruction of the nose or nasopharynx	Severe changes to the oropharynx, laryngo-pharynx, larynx, upper trachea, or lower trachea, or obstruction of the nose or nasopharynx that is only partially reversible	Severe changes to the oropharynx, laryngo-pharynx, larynx, upper trachea, or lower trachea, or complete, nonreversible obstruction of the nose or nasopharynx
DIAGNOSTIC OR OTHER OBJECTIVE FINDINGS	There are no tests showing obstruction of the nose, sinuses, nasopharynx, oropharynx, or larynx	Sinus CT <sup>d</sup> shows mild mucosal thickening, mild obstruction of nasopharynx or oropharynx, or	Sinus CT shows moderate mucosal thickening or moderate obstruction of nasopharynx or oropharynx,	Sinus CT shows moderately severe mucosal thickening or turbinate swelling, or moderately severe	Sinus CT shows diffuse severe mucosal thickening or severe turbinate swelling, or severe obstruction of

		laryngoscopy may show mild alteration in vocal fold (cord) function	or laryngoscopy may show moderate alteration in vocal fold (cord) function	obstruction of nasopharynx or oropharynx, or laryngoscopy may show moderately severe alteration in vocal fold (cord) function	nasopharynx or oropharynx, or laryngoscopy may show severe alteration in vocal fold (cord) function such as bilateral paralysis
<p><sup>a</sup> Individuals with successful tracheotomy or stoma should be rated as having 25% impairment of the whole person</p> <p><sup>b</sup> Move up in class 4 based on the severity and number of findings in physical exam and objective findings</p> <p><sup>c</sup> Key factor</p> <p><sup>d</sup> CT indicates computed tomography.</p>					

\*AMA Guides to the Evaluation of Permanent Impairment, 6<sup>th</sup> edition

#### 4. Compensation Benefits

The compensation benefits payable in terms of the Act are the following:

- (1) Payment for temporary total disablement or temporary partial disablement must be made for as long as the disablement continues, but not for a period exceeding 24 months;
- (2) When total impairment score is zero to three (i.e. permanent disablement less than or equal to 30%), permanent disablement must be determined and a lump sum must be paid in terms of the Act;



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

## 5. Medical Costs

- (1) Medical costs must be provided for a period of not more than 24 months from the date of diagnosis or longer, if in the opinion of the Commissioner, further medical aid will reduce the degree of the disablement.
- (2) Medical costs must cover diagnosis of Work-related upper respiratory tract disorders and any necessary treatment provided by a healthcare provider.
- (3) The Commissioner must decide on the need for, the nature and sufficiency of, medical costs to be supplied.

## 6. Death Benefits

Death benefits payable are the following:

- (1) Reasonable burial expenses in terms of the Burial Expenses Policy; and
- (2) A spouse and dependants' pensions payable, where applicable, if the employee dies as a result of Work-related upper respiratory tract disorders.

## 7. Reporting

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

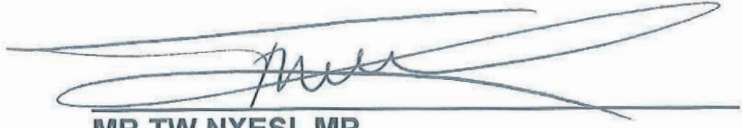
- (a) Employer's Report of an Occupational Disease (W.CL.1);
- (b) Notice of Occupational Diseases and claim for compensation (W.CL.14);
- (c) An W.CL.305 affidavit by the employee if an employer cannot be traced or if the employer fails to timeously submit the Employer's report of an Occupational Disease (W.CL.1);



- (d) Industrial history or workplace exposure history (W.CL 110) - there must be a clear history of occupational exposure or exposure in an occupation or industry where exposure to Work-related upper respiratory tract disorders is known to occur;
- (e) First Medical Report detailing the employee's illness in respect of an occupational disease (W.CL 22);
- (f) ENT or medical report detailing the employee's symptoms and clinical features;
- (g) Other appropriate tests such as immunological and ENT examinations or any investigation to confirm diagnosis, where applicable;
- (h) Progress or Final Medical Report in respect of occupational disease (W.CL 26);
- (i) in case of death, a death certificate and a BI1663 (notification of death) must be submitted. Alternatively, a death certificate accompanied by a detailed medical report on a practice letterhead on the cause of death must be submitted.

## 8. Claims Processing

- (1) The Commissioner must consider and adjudicate upon the liability of all claims.
- (2) The medical officers employed by the Fund are responsible for the medical assessment of a claim and for the confirmation of the acceptance or rejection of a claim.

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



**the doj & cd**

Department:  
Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

**OFFICE OF THE CHIEF STATE LAW ADVISER**

Private Bag X81, PRETORIA, 0001, Tel (012) 315 1130, Fax (012) 315 1743, Momentum Centre East Tower 12<sup>th</sup> Floor, Pretorius Street

Ref: 8/7/Labour/2019/20/154A+B  
Enq: Ms RB Paul  
Tel: (012) 315 4533  
E-mail: [bpaul@justice.gov.za](mailto:bpaul@justice.gov.za)  
Website: <http://www.doj.gov.za>

Date: 9 December 2019

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

Attention: H Maphologela

Dear Mr Lamati

**REGULATIONS ON WORK-RELATED UPPER RESPIRATORY TRACT DISORDERS FOR THE COMPENSATION FUND MADE BY THE MINISTER UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993: YOUR EMAIL OF 14 OCTOBER 2019**

1. The Department of Labour and Employment (the "Department"), requests our opinion on the draft Regulations (the "Regulations") on Work-Related Upper Respiratory Tract Disorders for the Compensation Fund Made by the Minister under the Compensation for Occupational Injuries and Diseases Act, (Act No. 130 of 1993)(the "Act").
2. We have scrutinised the draft Regulations, and have made suggested changes and comments on the draft electronically. We would like to make the following additional comments:

### Nature of power to make regulations

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

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

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

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



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

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

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

[50] In exercising **the power to make regulations**, the Minister had to **comply with the Constitution**, which is the supreme law, and the **empowering provisions** of the Medicines Act. If, in making regulations, the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts **ultra vires** (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted ultra vires is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been ultra vires under common law by reason of a functionary



exceeding his or her powers is now invalid under the Constitution as an infringement of the principle of legality. The question, therefore, is whether the Minister acted *ultra vires* in making regulations that link a licence to compound and dispense medicines to specific premises. The answer to this question must be sought in the **empowering provisions.**" (Our emphasis.)

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

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

7. In making the Regulations, the Minister of Employment and Labour (the "Minister") must comply with the Constitution, which is the supreme law and section 97 of the Act, which is the empowering provision. If the Minister exceeds the powers conferred by the empowering provision, then the Minister acts *ultra vires* and in breach of the doctrine of legality and the Regulations would be invalid.

#### **Empowering provision**

8. The draft Regulations are made in terms of section 97 of the Act. Section 97 of the Act empowers the Minister, after consultation with the Board, to make regulations and provides as follows:

#### **"Regulations**

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

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

concerned, or at any investigation in terms of this Act;

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

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

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

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

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

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

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

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

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

From section 97(1) of the Act it is clear that the Minister does not have the express authority to make regulations dealing with work-related upper respiratory tract disorders. Therefore, in order to make the draft Regulations the Minister must be so authorised by paragraph (g) or (h) of subsection (1) of section 97 of the Act.



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

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

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

10. In view of our conclusion in paragraph 9 above it must be determined whether the Minister is authorised to make the draft Regulations in terms of section 97(1)(h) of the Act. This section makes it clear that the "objects and purposes" of the Act must be determined before the question whether the Minister has the power in terms of section 97(1)(h) of the Act to make the draft Regulations can be addressed. In **Road Accident Fund v Makwetlane** 2005 (4) SA 51 (SCA), (hereinafter referred to as "the Makwetlane case") the Court discussed the power of the Minister of Transport to make regulations to "achieve or promote the objects" of the Road Accident Fund Act, 1996 (Act No. 56 of 1996) and remarked as follows at pp. 58-59:

"Section 26 empowers the Minister to make regulations in order to achieve or promote the objects of the Act. It does not confer authority on him to traverse terrain outside that limited scope and ambit. All regulations promulgated by the Minister must thus be reasonably necessary to achieve those objects and goals. It is indeed so that the possibility of fraud is greater in cases where the identity of the driver or owner of the vehicle in question has not been established, as it would usually be difficult for the RAF to secure evidence to dispute a claim (see *Mbatha* at 718H). Stricter requirements would thus be justified in unidentified vehicle cases. It follows that regulations designed to eliminate fraud and facilitate proof of legitimate claims, falling as it does within the Minister's power to regulate, would be permissible. No other reason has been suggested for such a requirement and I can think of none. That legitimate end, may not, however, be achieved by means that sweep too broadly. ...

The Constitution places significant restraints upon the exercise of public power. It is a requirement of the rule of law that the exercise of public power should not be arbitrary. It follows that the exercise by the Minister of the regulatory power conferred upon him had to be rationally related to the purpose for which the power was granted - rationality being the minimum threshold requirement. (See *Pharmaceutical Manufacturers* paras [85] and [86].) Conduct that fails to pass that threshold requirement would fall below the standards set by our Constitution and would therefore be unlawful." (Our underlining.)

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

- (a) Section 97(1)(h) of the Act limits the power of the Minister to making regulations that relate to the achievement of the objects and purposes of the Act.
- (b) The regulations made under section 97(1)(h) of the Act must be rationally connected to the objects and purposes of the Act.

### **Comments on the Regulations**

- 11. These Regulations seek to regulate compensation for work-related upper respiratory tract disorders in terms of the Act.

### **Ad Table of contents**

- 12. We have noted the incorrect numbering of the table of contents and made the necessary amendments in order for the table of contents to accurately correspond with the text of the Regulations. Kindly ensure that the Regulations are correctly numbered before promulgation.

### **Ad regulation 3**

- 13. This regulation states that impairment shall be assessed after maximum medical improvement has been reached and, where necessary, after removal from exposure using the latest AMA Guide. Kindly ensure that the AMA Guide referred to in this regulation is the correct version.



#### **Ad regulation 4**

14. This regulation deals with compensation benefits and is in line with the provisions of the Schedule 4 of the Act.

#### **Ad regulation 9**

15. We have moved the paragraph with a heading "effective date of regulation" to the end as regulation 9 with the heading "Short Title and Commencement".

#### **General remarks on the making of regulations**

16. Although the Act does not expressly require the Regulations to be published for comment before being finally promulgated, we are of the opinion that, if the Regulations have not been published for public comment, they should first be published for public comment before being finally promulgated.

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

- (a) the Minister and the agency concerned failed to comply with their constitutional obligation to ensure procedural fairness in the publication and promulgation of the Regulations;
- (b) the agency failed in its constitutional duty to comply with its duty to facilitate proper public comment before publishing the Regulations;
- (c) the Regulations were not promulgated in a manner consistent with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) and section 33 of the Constitution of the Republic of South Africa, 1996; and
- (d) the Regulations were also not published in at least two official languages as required by section 6(3)(a) of the Constitution. (See paragraphs 29-38, 43-44, 51, 57 and 59 and also **Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another [2015] ZACC 12 (Case CCT 163/14)**).

18. We are, of the opinion that the Regulations must also be published in at least two official languages, as provided for in section 6(3)(a) of the Constitution.

## CONCLUSION

19. We have scrutinised the draft Regulations and subject to our comments and the suggested changes made to the text of the draft Regulations, we are of the opinion that the draft Regulations are authorised by section 97(1)(h) of the Act. A copy of the draft amended Regulations is attached hereto, and an electronic copy will be forwarded to your office via electronic mail.

Yours sincerely,



FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER  
R B PAUL / KA SELOKELA / S MASAPU