

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

REGULATIONS ON COMPENSATION FOR WORK-RELATED CHRONIC OBSTRUCTIVE PULMONARY DISEASE (COPD) FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

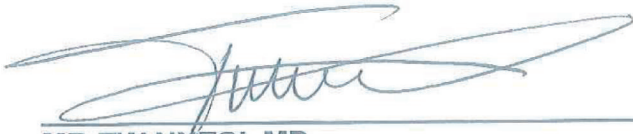
The Minister of Employment and Labour, after consultation with the Compensation Board has, under section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) made the Regulations in Schedule A. These regulations are published for public comments only.

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

Compensation Fund	OR	PO Box 955
167 Thabo Sehume Street		Pretoria
Pretoria		0001
0157		

Email addresses: Kimibly.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 COMPENSATION FOR WORK-RELATED CHRONIC OBSTRUCTIVE PULMONARY DISEASE (COPD) FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

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1. Definition

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

“Regulations” means the Regulations on Work Related Chronic Obstructive Pulmonary Diseases (COPD) for the Compensation Fund made under the Compensation for Occupational Injuries and Diseases Act, 1993;

“Work-related chronic obstructive pulmonary disease” (COPD) means a progressive disease of the airways, characterised by an abnormal inflammatory response and chronic airflow limitation (obstruction) that is irreversible or partially reversible due to causes and conditions attributable to a particular working environment. It is associated with lung hyperinflation and systemic effects. The dominant clinical correlates are chronic bronchitis and emphysema.

2. Diagnosis

- (1) The chronic obstructive pulmonary disease shall be diagnosed by a medical practitioner and the diagnosis should include:
 - (a) a characteristic history of progressive dyspnea and or chronic cough (with or without sputum production), **and** spirometry showing evidence of chronic airflow limitation. This is characterised by a post-bronchodilator FEV₁ /FVC ratio < 70% (400ug short acting beta 2 agonist; measured 15 minutes after administration of bronchodilator);
 - (b) a chronological relationship between the work-related exposure and the development of COPD. (As outlined in Annexure 1); and
 - (c) at least 15 years of workplace exposure to an agent(s) reported to give rise to work related COPD, but 10 years may be considered sufficient if exposure levels have been very high. Where particulate exposure data is available, levels $\geq 10\text{mg/m}^3$ inhalable dust level would be considered as high.
- (2) The diagnosis should be made within 10 years of last exposure to the causative agent/s.
- (3) The medical officers employed by the Compensation Fund will determine whether the diagnosis of work related COPD was made according to acceptable medical standards.

3. Impairment

- (1) Pulmonary impairment will be determined using the lung function tests in Table 1 – post-bronchodilator FEV₁ and the treatment of the individual in Table 2 to calculate the impairment score that equates to the level of permanent disablement in Table 3.

Table 1: FEV₁ (post-bronchodilator reading)	
Score	FEV₁ % Predicted
0	>80
1	65-79
2	55-64
3	45-54
4	<45

* FEV₁ % predicted = measured FEV₁ divided by reference FEV₁ x 100

Table 2: Treatment	
Score	Treatment
0	No medication
1	Bronchodilators (short-acting Beta-2 agonists or short-acting anti-

	cholinergics or both) as needed or regularly And/Or Oral Theophylline
2	Regular long-acting Beta-2 agonists or long-acting anti-cholinergics or both
3	Inhaled glucocorticosteroids And/Or Antibiotic treatment for frequent exacerbations (≥ 3 /year)
4	Treatment for chronic respiratory failure (e.g. long term oxygen therapy, ventilatory support)

- (2) Whole Person Impairment will be determined, in accordance with the latest AMA Guide edition once Maximal Medical Improvement (MMI) has been reached.

4. Compensation Benefits

The compensation benefits payable in terms of the Act are:

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

5. Medical Costs

- (1) Medical costs shall be provided for a period of not more than 24 months from the date of diagnosis or longer, if in the opinion of the Commissioner, further medical aid will reduce the extent of the disablement.
- (2) Medical costs shall cover the costs of diagnosis of COPD and any necessary treatment provided by any health care provider.
- (3) The Commissioner shall decide on the need for, the nature and sufficiency of medical costs to be supplied.

6. Death Benefits

Death benefits payable are:

- (1) Reasonable burial expenses shall be paid in terms of Burial Expenses Policy; and

- (2) Widow's and dependent's pensions shall be payable, where applicable, if the employee dies as a result of work-related chronic obstructive pulmonary disease.

7. Reporting

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

- (a) Employer's Report of an Occupational Disease (W.CL.1).
- (b) First Medical Report in respect of an Occupational Disease (W.CL.22).
- (c) Notice of an Occupational Disease and Claim for Compensation (W.CL.14).
- (d) Exposure History (W.CL.110) or an appropriate employment history guided by Annexure 1.
- (e) Progress or Final Medical Report in respect of an Occupational Disease (W.CL.26).
- (f) Medical Report detailing the employee's exposures, symptoms, clinical features and treatment prescribed.
- (g) An affidavit by the employee if an employer cannot be traced or the employer will not timeously supply a W.CL.1. (W.CL.305)
- (h) Pulmonary function tests confirming diagnosis and final pulmonary function tests when no further medical improvement is anticipated.
- (i) Chest X-ray and radiology reports or other relevant investigations, where applicable.

Annexure 1: Agents and occupations associated with Occupational COPD¹⁻³

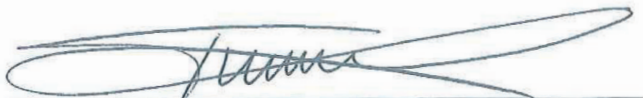
Agent	Occupation	
Chemicals, vapours or gases	Isocyanates Sulphur Dioxide Oxides of Nitrogen Solvents	Painters Foundries Chemical processors Cleaners, dry cleaners, personal services (hairdressers, nail technicians)
Dust		
• Mineral dusts	Silica, silicate, coal, asbestos, hard rock, cement, fibre, glass, quartz, asphalt	Mine workers, quarry workers, construction workers, highway or tunnel workers, transport workers, concrete/cement manufacturing, foundries, refractory brick workers, ship building, pottery workers

• Hard metal dusts	Aluminium	Engineering, metal workers, car manufacturers, foundries
• Organic dusts	Cotton, grain, wood, animal feed, endotoxins, oil mist, tea, microbials (plant/animal origin)	Wood and paper workers, records processing and distribution clerks, mill workers, grain workers, bakers, fertilizer manufacture, food processors, farmers/agriculture, cotton textile workers, tea manufacture.
Metal fumes		
	Cadmium Vanadium Aluminium	Metal workers
Fibers		
	Man-made mineral fibers. Ceramic fibers	
Complex mixtures	Welding fumes, engine exhaust, fire smoke, environmental tobacco smoke*, pesticides and herbicides	Welders, automobile industries (repairs, servicing), petrol stations, firemen/rescue services, transport workers, agriculture, waitresses (passive smoke).
Biological agents	Mycobacterium Tuberculosis	Health workers, silica dust-exposed workers
Epoxy resins	Optics, Fiber optics, painting, adhesives	Adhesives, rubber, plastics, leather manufacturing, paints, petroleum, electronics, painting

* Exposure must have taken place during and in the course of performing work

8. Claims Processing

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



MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR

DATE: 26/03/2020



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

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Date: 05 December 2019

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

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

Dear Mr Lamati

**REGULATIONS ON COMPENSATION FOR WORK-RELATED CHRONIC
OBSTRUCTIVE PULMONARY DISEASE (COPD) FOR THE COMPENSATION
FUND MADE BY THE MINISTER UNDER COMPENSATION FOR
OCCUPATIONAL INJURIES AND DISEASES ACT, 1993: YOUR EMAIL DATED:
14 OCTOBER 2019**

INTRODUCTION

1. We have been requested by the Department of Employment and Labour ("the Department") to scrutinise, and provide it with a legal opinion on, the draft regulations on Compensation for Work-Related Chronic Obstructive Pulmonary Disease (COPD) for the Compensation Fund ("the Regulations") that are to be made by the Minister in terms of section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993 ("the Act")).

2. We have scrutinised the Regulations and have, where we found errors and matters of concern, made suggested amendments directly in the text of the Regulations and comments for the Department's consideration. However, we note that there are some aspects of the Regulations which are of a scientific nature and as such we leave those scientific aspects to the Department's relevant personnel with

the scientific know-how to deal with them. The focus of our scrutiny of the Regulations ensures that the Regulations are *intra vires* the provisions of the enabling legislation, and that are drafted in the correct drafting form and style. For the purpose of this legal opinion, we provide hereunder an overview of the provisions of the Regulations.

Ad Regulation 1

3. Regulations 1 provides for the definition of some of the words used in the Regulations. We have made some suggested amendments in regulation 1 for the Department's consideration.

Ad Regulation 2

4. In terms of regulation 2, the chronic obstructive pulmonary disease must be diagnosed by a medical practitioner. It also states that the diagnosis must be made within 10 years of the last exposure to the causative agents and that the Medical Officers employed by the Compensation Fund ("the Fund") must determine whether the diagnosis was made according to the acceptable medical standards.

Ad Regulation 3

5. In terms of regulation 3 pulmonary impairment must be determined using lung function tests set out in Table 1 and Table 2 provided for in that regulation. Regulation 3 also refers to Table 3 which purportedly reflects the level of score according to which permanent disablement must be calculated. We wish to point out that there is no Table 3 either under regulation 3 or anywhere in the Regulations themselves. The Department should therefore rectify this.

Ad Regulation 4

6. Regulation 4 deals with the compensation benefits payable in terms of the Act. It states, amongst other things, that payment of temporary total disablement must be made for as long as the disablement continues but not for a period exceeding 24 months, and if the total impairment score is zero to three, permanent disablement must be determined and a lump sum must be paid.

Ad Regulation 5

7. Regulation 5 deals with medical costs. It states, amongst other things, that medical costs must be provided for a period of not more than 24 months from the date of diagnosis or longer, if in the opinion of the Commissioner further medical aid may reduce the extent of the disablement, and that the medical costs must cover the costs of diagnosis of COPD and any necessary treatment provided by any health care provider.

Ad Regulation 6

8. Regulation 6 deals with the payment of death benefits. It states that reasonable burial expenses must be paid in terms of a Burial Expenses Policy and that a widow's and dependent's pension must be payable, where applicable, if the employee dies as a result of work-related chronic obstructive pulmonary disease.

Ad Regulation 7

9. Regulation 7 deals with the reporting of the occupational disease to the Fund and the documents that must be submitted which include, amongst other things, the employer's report of an occupational disease (W.CL.1), the first medical report in respect of an occupational disease (W.CL.22) and the notice of an occupational disease and the claim for compensation (W.CL.14).

Ad Regulation 8

10. Regulation 8 deals with the processing of claims and states that the Commissioner must consider and adjudicate upon the liability of all claims. It states further that the Medical Officers employed by the Fund are responsible for the medical assessment of a claim and for the confirmation of the acceptance or rejection of a claim.

MINISTER'S POWER TO MAKE REGULATIONS

14. In terms of section 97 of the Act the Minister is empowered to make regulations in respect of the matters provided for in that section. Section 97 of the Act states as follows:

"Regulations

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

- (a) the place of meeting and the procedure to be followed at any meeting of the Director-General and assessors or at any proceedings in terms of this Act with which the assessors are concerned, or at any investigation in terms of this Act;*
- (b) subject to section 76, the fees payable to medical practitioners or chiropractors in respect of services rendered in terms of this Act;*
- (c) the procedure to be followed in paying assessments and fines to the Director-General;*
- (d) the persons to whom, the places where and the manner in which payment of assessments in terms of this Act shall be made;*
- (e) the determination of the amount and the conditions and manner of payment of benefits to assessors or classes of assessors;*
- (f) the disposal of moneys payable in terms of this Act to any person other than the Director-General and not claimed within the prescribed period by the person entitled thereto;*
- (g) any matter which shall or may be prescribed by regulation in terms of this Act;*
- (h) any other matter, whether or not connected with any matter mentioned in paragraphs (a) to (g), which he may deem necessary or expedient to prescribe in order to further the objects and purposes of this Act.*

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

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

15. Chronic obstructive pulmonary disease, of which the Regulations are concerned with and the compensation thereof, is listed in item 2.1.9 in Schedule 3 of the Act. Items 1, 2, 3 and 4 of Schedule 3 of the Act read as follows:

- "1. Schedule 3 deals with the List of Occupational Diseases which depicts diseases that are occupational and compensable on the benefits of an explicit presumption referred to in terms of section 66 of the Compensation for Occupational Injuries and Diseases Act, 1993.

2. The amended Schedule 3 is issued to align the list of diseases mentioned in the first column of Schedule 3 of the Compensation for Occupational Injuries and Diseases Act, 1993 with the list of occupational diseases appended to International Labour Organization R194 List of Occupational Diseases Recommendation, 2002.
3. The amended Schedule 3 is issued in conformity with sections 65(a) and 66 of the Compensation for Occupational Injuries and Diseases Act, 1993.
4. The List of Occupational Diseases appended to this amended Schedule 3 shall supersede the list of diseases mentioned in the first column of Schedule 3 in terms of 65 (a) of the Compensation for Occupational Injuries and Diseases Act, 1993".

16. Since the Regulations are concerned with the chronic obstructive pulmonary disease which is provided for in the Schedule 3 to the Act and the compensation in respect of chronic obstructive pulmonary disease, it seems that the Regulations under consideration fit within the purview of section 97(1)(g) and (h), which empowers the Minister to make regulations. Accordingly, we are of the view that the Minister has the requisite authority to make the Regulations.

COMPLIANCE WITH PRESCRIBED STATUTORY PROCEDURE

18. We note that the Act does not prescribe any particular process to be adhered to during the making of regulations. However, insofar as the Regulations will have an impact on people's rights, it is imperative that a fair process must be followed in making the Regulations. In *Minister of Health & another v New Clicks SA (Pty) Ltd & others*¹ the CC stated the following:

"Standards of fairness called for in respect of law-making by legislative administrative action are different to standards of fairness called for in cases involving adjudication or administrative decisions such as licensing enquiries and the like where individual interests are at stake and decisions affecting particular individuals have to be taken. An individual needs to know the concerns of the administrator and to be given an opportunity of answering those concerns. The decisions may depend on particular facts and may sometimes involve disputes of fact that have to be resolved.²

¹ [2006] JOL 15636 (CC) ("*New Clicks*").

² *Ibid* at para 153.

When it comes to the making of regulations the context is different. Regulations affect the general public and that means that diverse and often conflicting interests have to be taken into account in deciding what the laws will be. The decision of the law-maker on how to resolve these conflicting interests is ultimately a question of policy.³

In Parliament this is done through the publication of a Bill containing the provisions of the proposed legislation, hearings before parliamentary committees, and debates in Parliament where matters of principle raised by sectors of the public affected by the law can be contested.⁴

Where laws are made through legislative administrative action, the procedure of publishing draft regulations for comment serves this purpose. It enables people who will be affected by the proposals to make representations to the law-maker, so that those concerns can be taken into account in deciding whether or not changes need to be made to the draft.⁵ (Our underlining)

19. Furthermore, the Department's attention is drawn to the fact that, in terms of section 6(3) of the Constitution of the Republic of South Africa, 1996, the draft Regulations must be published in at least two official languages and non-compliance with this requirement may result in the Regulations being invalid. In *Central African Services (Pty) Cross-Border Road Transport Agency v Central African Road Services (Pty) Limited and another v The Minister of Transport and Another Case No: 32238/2011* (North Gauteng) the High Court found the amendment regulations promulgated by the Minister of Transport in terms of section 51 of the Cross-Border Road Transport Act invalid. The regulations had the effect of increasing the permit fees payable to the Cross-Border Road Transport Agency ("Agency") by cross-border road transport operators by a substantial amount. The court made, amongst other things, the following findings: The regulations were published only in English, contrary to the constitutional requirement that laws must be promulgated in two official languages; the right to procedural fairness in the publication and promulgation of the regulations had been violated; proper consultation on the tariff increases had not taken place; and the Agency's board had failed to apply its mind to the draft regulations. The High Court granted an order, *inter alia*, in the following terms:⁶

- (a) The Regulations were published in a manner inconsistent with s 6(3) of the Constitution.

³ *Ibid* at para 154.

⁴ *Ibid* at para 156.

⁵ *Ibid* at para 157.

⁶ The High Court's judgment was subsequently confirmed by the Constitutional Court in *Central African Services (Pty) Cross-Border Road Transport Agency v Central African Road Services (Pty) Limited and another* [2015] JOL 33212 (CC).

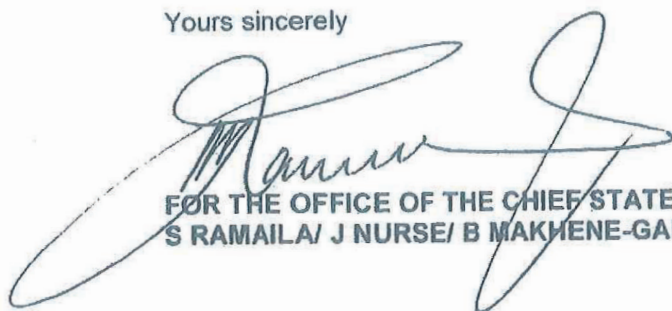
- (b) The Minister of Transport and the Agency failed to comply with their constitutional obligation to ensure procedural fairness in the publication and promulgation of the Regulations
- (c) The Agency failed in its constitutional duty to comply with its duty to facilitate proper public comment before publishing the Regulations.
- (d) The board of the agency failed in its statutory duty to properly consider the draft regulations, for the sake of consulting with the Minister.
- (e) The Regulations are, as a consequence, promulgated in a manner that is inconsistent with the provisions of Promotion of Administrative Justice Act No. 3 of 2000 and section 33 of the Constitution, and are therefore invalid.

CONCLUSION

20. Subject to our comments above and the suggested amendments on the text, we are satisfied that the provisions of the Regulations are consistent with the Act, the Constitution of the Republic of South Africa, 1996, and conform to the legislative drafting form and style.

21. We attach hereto a soft copy of the Regulations incorporating our suggested amendments for your consideration.

Yours sincerely



FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
S RAMAILA/ J NURSE/ B MAKHENE-GADINI