

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

**REGULATIONS ON PULMONARY TUBERCULOSIS IN HEALTH WORKERS 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, 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:

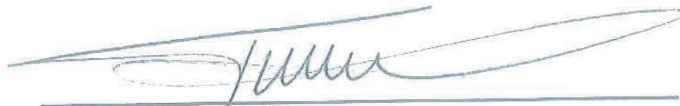
Compensation Fund
167 Thabo Sehume Street
Pretoria
0157

OR

PO Box 955
Pretoria
0001

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 'TW Nxesi', is written over a horizontal line.

MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR

DATE: 26/03/2020

SCHEDULE A

REGULATIONS ON PULMONARY TUBERCULOSIS IN HEALTH WORKERS FOR THE COMPENSATION FUND MADE UNDER COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993

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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 the meaning so assigned unless the context otherwise indicates—

“culture” refers to the growing of microorganisms, tissue cells, or other living matter in a specially prepared nutrient medium controlled condition;

“Gene XpertMTB/RIF” refers to a test used for rapid tuberculosis diagnosis and rapid antibiotic sensitivity. It detects mycobacterium tuberculosis and also identifies resistance to Rifampicin in less than 2 hours;

“lung function tests ” means a variety of tests that check how well the lungs are functioning, using instruments to test the volume, capacity and emptying of the lungs;

“mycobacterium tuberculosis” means a certain type of bacteria that have a tendency to affect mostly the lungs, but can affect other parts of the body;

“occupational pulmonary tuberculosis (PTB)” means an infectious disease caused by mycobacterium tuberculosis in the workplace;

“pulmonary” means lungs;

“pulmonary tuberculosis” means an infectious disease caused by mycobacterium tuberculosis which affects the lungs;

“radiology” means a science dealing with Xrays and other high energy radiation used to detect abnormalities in the body;

“ Regulations” means the Regulations on Pulmonary Tuberculosis in Health Workers for the Compensation Fund made under the Compensation for Occupational Injuries and Diseases Act, 1993;

“Rifampicin” means one of the drugs used to treat tuberculosis.

2. Diagnosis

- (1) The diagnosis of occupational pulmonary tuberculosis shall be made by a medical practitioner based on the following:
 - (a) definitive diagnosis by isolation of mycobacterium tuberculosis;
 - (b) by microscopy and culture of sputum or body fluids or tissue;
 - (c) presumptive diagnosis can be established with —
 - (i) a positive sputum smear and a relevant clinical or radiological picture;
 - (ii) two positive sputum smears; or
 - (iii) a positive GeneXpert MTB/RIF

Provided: if it is impossible to isolate mycobacterium tuberculosis using microscopy or bacterial culture, other acceptable diagnostic techniques may be used;

 - (d) a chronological relationship between the work-related exposure and the development of occupational pulmonary tuberculosis;
 - (e) a presumed exposure to occupational pulmonary tuberculosis bacilli in working environments where cases of active occupational pulmonary tuberculosis are found or as a result of analysis or testing of infected body tissues or fluids.
- (2) The medical officers employed by the Compensation Fund shall determine whether the diagnosis of occupational pulmonary tuberculosis as made according to acceptable medical standards.

3. Impairment

- (1) Pulmonary function impairment will be determined by a Lung Function Test done in accordance with the commissioner's regulations on Pulmonary tuberculosis.
- (2) Impairment as a result of pulmonary tuberculosis or complications arising from anti-tuberculosis medication administered to the employee, will be assessed in accordance with best practices using the criteria for rating permanent impairment under the latest American Medical Association Guide.
- (3) An employee must submit to the Compensation Fund a Final Medical Report in respect of an Occupational Disease (W.CL.26) when the employee's condition has reached maximum medical improvement and the report should clearly indicate if the employee has been compliant and has completed treatment.
- (4) An employee must submit to the Compensation Fund a recent lung function tests done six months to one-year post completion of occupational pulmonary tuberculosis treatment.
- (5) If the first lung function test post 6 months is abnormal, second lung function test after 12 months of treatment shall be used to determine permanent disablement.

4. Compensation Benefits

The compensation benefits payable according to the Act are as follows:

- (a) Payment for temporary disablement which shall be made for as long as such disablement continues, but not for a period exceeding 24 months, or longer, if further treatment is required (e.g. drug resistant tuberculosis);
- (b) payment for permanent disablement which shall be made, where applicable, and when a Final Medical Report is received on condition that —
 - (i) the Final Medical Report and lung function test (in the case of pulmonary tuberculosis) must be submitted at least 6 months and no later than 12 months after completion of treatment of tuberculosis or sooner if the treating medical practitioner considers no further improvement is anticipated; and
 - (ii) where the lung function tests result done 6 months' post tuberculosis treatment, show abnormality, second lung function tests taken at 12 months' post treatment will be used to assess permanent disablement;
- (c) if total impairment score is zero to three (i.e. permanent disablement is 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 costs will reduce the extent of the disablement.
- (2) The medical costs shall cover the diagnosis of tuberculosis and any necessary treatment for the tuberculosis 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 as follows:

- (a) Reasonable burial expenses shall be paid in terms of a Burial Expenses Policy; and
- (b) Spouse and dependent's pensions shall be payable, where applicable, if the employee dies as a result of occupational pulmonary tuberculosis.

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);
- (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 will not timeously supply a 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 compensation commissioner i.e. risk assessments or results of environmental hygiene assessments including tuberculosis questionnaire and checklist; Submit tuberculosis questionnaire and check list.
- (e) First Medical Report in respect of an Occupational Disease (W.CL. 22);
- (f) laboratory results demonstrating mycobacterium tuberculosis;
- (g) supporting documentation relating to the assessment of impairment of the employee including, chest x-rays; radiology reports; lung function tests (which include pre- and post-administration of a bronchodilator); hearing function tests and nerve conduction studies;
- (h) for each consultation, a Progress/Final Medical Report (W.CL. 26);
- (i) Progress/Final Medical Report in respect of an Occupational Disease (W.CL.26) when the employee's condition has reached maximum medical improvement and the report should clearly indicate if the employee has been compliant and has completed treatment and the report must be accompanied by the recent lung function tests done six months to one-year post completion of occupational pulmonary tuberculosis treatment; and
- (j) in case of death, a death certificate and a BI-1663 (notification of death), ora death certificate accompanied by a detailed medical report on a practice letterhead, on the cause of death..

- (k) tuberculosis questionnaire r; and
- (l) tuberculosis checklist

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 confirmation of 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

OFFICE OF THE CHIEF STATE LAW ADVISER
P/bag X8069, Cape Town, 8000
12th Floor, Atterbury House, 9 Riebeeck Street, Cape Town, 8001
Tel (021) 441-4900 Fax (021) 421-7923

111119lt

Ref: 6/7/Labour/2019/20/147A&B
Enq: S Govender
Tel: 021 441 4906
Fax: 021 421 7943
E-mail: SaGovender@justice.gov.za
Website: <http://www.doj.gov.za>
Date: 06 December 2019

For Attention: Mr. Harry Maphologela
E-mail: Harry.Maphologela@labour.gov.za

Mr. Thobile Lamati
Director-General: Department of Employment and Labour
Private Bag X 117
Pretoria
0001

Dear Mr. Lamati

**LEGAL OPINION: REGULATIONS ON PULMONARY TUBERCULOSIS IN
HEALTH WORKERS FOR THE COMPENSATION FUND MADE BY THE
MINISTER UNDER THE COMPENSATION FOR OCCUPATIONAL INJURIES
AND DISEASES ACT, 1993**

INTRODUCTION

1. The Office of the Chief State Law Adviser has been requested by the Department of Employment and Labour ("Department"), to consider the draft Regulations on Pulmonary Tuberculosis in Health Workers for the Compensation Fund, made by the Minister under the Compensation for Occupational Injuries and Diseases Act, 1993 ("draft Regulations"), in terms of section 97 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) ("Act").
2. The Act provides 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.

3. Chapter VII of the Act provides for occupational diseases. Section 65 of the Act provides for compensation for occupational injuries and subsection (1) thereof reads 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."*

4. Section 97 of the Act empowers the Minister to make regulations, after consultation with the Compensation Board, in respect of certain specified matters. Section 97 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

5. Schedule 3 of the Act deals with the list of occupational diseases which are occupational and compensable on the benefits of an explicit presumption referred to in terms of section 66 of the Act¹.

6. The draft Regulations seek to provide for compensation related to pulmonary tuberculosis in health care workers. This disease is referred to in Schedule 3 to the Act as tuberculosis of the lung which is the same as pulmonary tuberculosis and therefore this disease falls within the ambit of section 65(1)(a).

7. The Minister's power to make the regulations is a public power that must be exercised subject to the Constitution of the Republic of South Africa, 1996 ("Constitution") and the law. In exercising such 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 regulations within the parameters of the Act and the Constitution.

7.1. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*², 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)

¹

Presumption regarding cause of occupational disease

66. If an employee who has contracted an occupational disease was employed in any work mentioned in Schedule 3 in respect of that disease, it shall be presumed, unless the contrary is proved, that such disease arose out of and in the course of his employment.

²

1998 (12) BCLR 1458 (CC) ("Fedsure").

7.2. The Constitutional Court further stated the following in paragraph 58 that:

"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)

7.3 The principle of legality was also ruled upon in the case of *Pharmaceutical Society of South Africa and others: New Clicks South Africa (Pty) Limited v Minister of Health and another: Tshabalala-Msimang NO and another*³ where the court examined the scope of the Minister's powers in promulgating regulations under the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965).

7.4 The Supreme Court of Appeal held that the regulations which in essence provided for a pricing system that defined and controlled the single exit price of manufacturers and for a dispensing fee, went beyond the powers that were provided for in the Act. Another problem with the regulations was the fact that while the Act required that the regulations should prescribe the method of publication of the single exit price; these powers were delegated to the Minister or the Director-General. The regulations consequently failed the legality test on many fundamental aspects.

7.5 All regulations must therefore be drafted in compliance with the principle of legality, failing which the regulations may be declared as invalid.

7.6 The Constitutional Court has stated that "it is an important principle of the rule of law that rules be stated in a clear and accessible manner".⁴ This principle was demonstrated in the case of *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*⁵, where the Constitutional Court pointed out that "the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them".

³ 543/2004) [2004] ZASCA 122 (20 December 2004).

⁴ *Dawood and another v Minister of Home Affairs and Others; Shalabi and another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

⁵ 2001 (1) SA 545 (CC) at para 24.

7.7 The effect of what was stated in the abovementioned authority is that in making regulations, the Minister is under a duty to make regulations that are reasonably clear and precise, enabling citizens and officials to understand what is expected of them. In *Affordable Medicines Trust & others v Minister of Health, RSA & another*⁶ the Constitutional Court held as follows:

"[108] Regulation 18(5) was challenged on the basis that it is vague and does not conform to the principle of legality. The doctrine of vagueness is one of the principles of common law that was developed by courts to regulate the exercise of public power. As pointed out previously, the exercise of public power is now regulated by the Constitution which is the supreme law. The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives and should not be used unduly to impede or prevent the furtherance of such objectives." (Our underlining)

7.8 Regulations must therefore be drafted in such a manner that is clear and understandable. It should not be vague and it must be understandable to those to which it applies.

8. When making regulations under the Act, the Minister must comply with the Constitution and the empowering provision, which is section 97 of the Act. It appears that the power of the Minister to make regulations relating to compensation related to pulmonary tuberculosis in health care workers is not explicitly stated in section 97(1)(a) to (f) of the Act.

8.1 However, section 97(1)(g) provides that the Minister may make regulations, after consultation with the Board, regarding any matter which shall or may be prescribed by regulations in terms of the Act. In addition, section 97(1)(h) provides 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

⁶

2006 (3) SA 247 (CC).

the objects and purposes of this Act.

8.2 In the case of *Bezuidenhout v Road Accident Fund*⁷, the Supreme Court of Appeal commented on the power to make regulations "which may be necessary or expedient to prescribe in order to achieve or promote the object of this Act", by stating that this provision "cannot empower the making of regulations which widen the purpose and object of the present Act or which are in conflict therewith".

8.3 Thornton thus advises that such general provisions are purely ancillary or incidental to the purpose of the Act. They authorise the provision of subsidiary means of carrying into effect what is already enacted in the Act itself, and do not allow attempts to widen the purposes of the Act, to add new and different means of carrying them out, or to depart from or change its objectives.⁸

8.4 As is evidenced from the long title of the Act, the object and purpose of the Act 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 compensation in the case of death resulting from such injuries or diseases.

8.5 The draft Regulations concern the scope of compensation for occupational diseases. In terms of section 97(1)(g) of the Act read with section 65(1)(a) of the Act, the Minister may make regulations, after consultation with the Board, if it is proved to the satisfaction of the Director-General that the employee has contracted a disease mentioned in Schedule 3 to the Act and that such disease has arisen out of and in the course of his or her employment.

8.6 Considering the subject matter of the draft Regulations, we are of the view that sections 97(1)(g) and (h) and 65(1)(a) of the Act are the appropriate provisions which empower the Minister to make the regulations.

9. We now turn to deal with the draft Regulations as set out in the Schedule. We have suggested track changes with regards to the drafting style and form of the draft Regulations. This is done in order to align the draft Regulations with common legislative drafting style and form.

⁷ 2003 (3) ALL SA 249 (SCA).
⁸ Thornton, *Legislative Drafting* at page 342.

Ad clause 1 of the draft Regulations: Definitions

9.1 Clause 1 of the draft Regulation provides for the definition of certain terms used in the Regulations. We have inserted a sentence at the beginning of regulation 1 to assist with the interpretation of definitions used in the Schedule. We have also inserted a definition of Regulations so as to avoid tedious repetition throughout the draft Regulations. We have rearranged the order of some of the definitions to ensure that they appear in alphabetical order.

9.2 We note that the Department has defined "Gen XpectMTB/RIF"; however, upon researching the term we note that no such term exists in any medical academia which we have considered in conducting our research. In the text of the draft Regulations the Department uses the term "GeneXpert MTB/RIF" which appears to be the correct medical term. The Department is requested to confirm its intention as to which term is correct and to amend this definition in clause 1 of the draft Regulations.

9.3 The Department has defined occupational pulmonary tuberculosis as follows: "occupational pulmonary tuberculosis" (PTB) means an infectious disease caused by mycobacterium tuberculosis in the workplace". We have noted that the Department uses occupational pulmonary tuberculosis and PTB interchangeably in the draft Regulations. According to Thornton, a definition should define one word or expression only⁹. The Department is advised to clarify in the draft Regulations which expression it wishes to use. If the Department wishes to use PTB in the draft Regulations, then this needs to be defined. Upon further perusal of the Act we noted that the Act refers to tuberculosis of the lung and bovine tuberculosis in Schedule 3, however there is no specific reference to pulmonary tuberculosis; occupational pulmonary tuberculosis or TB as an abbreviation for tuberculosis. We also note that in the draft Regulations, the Department refers interchangeably to occupational PTB, TB, pulmonary TB, tuberculosis and occupational pulmonary tuberculosis. It appears that all these terms are referring to the same thing which, in the context of these draft Regulations is an infectious disease caused by mycobacterium tuberculosis which affects lungs, contracted by an employee, which has arisen out of and in the course of his or her employment.

⁹ Thornton, *Legislative Drafting* at page 151.

9.4 We propose that if the Department is desirous of using "occupational pulmonary tuberculosis" as an extending definition¹⁰, then the Department is requested to clearly define and abbreviate the term in clause 1 of the draft Regulations. Further, if the Department wishes to use the phrase TB then we suggest that TB is defined in the draft Regulations. In addition the Department needs to be consistent with the use of terms throughout the draft Regulations so as to avoid ambiguities.

Ad clause 2 of the draft Regulations: Diagnosis

9.5 Clause 2 of the draft Regulations seeks to provide for the diagnosis of occupational pulmonary tuberculosis and the various ways in which such a diagnosis can be made. We have suggested that paragraph (c) be divided into subparagraphs to make the Regulations more reader friendly, however if this does not correctly reflect the Department's intention then this may be ignored.

Ad clause 3 of the draft Regulations: Impairment

9.6 Clause 3 of the draft Regulations seeks to provide for the manner in which pulmonary function impairment shall be determined and assessed.

9.7 We note that sub-regulation (3) does not read correctly as it does not stipulate if the Final Medical Report needs to be submitted. If the Department requires the submission of the Final Medical Report in respect of an Occupational Disease, then this needs to be clearly stated. In addition it needs to be stated in this regulation who is required to submit the report and to whom the report should be submitted.

9.8 Sub-regulation (3) also makes reference to lung function tests. If the Department requires that these tests need to be submitted, then this must be clearly stated in the draft Regulations and the details regarding who must submit the tests and to whom the tests should be submitted, must be contained thereto.

¹⁰

According to Thornton at page 146, "An extending definition stipulates for the defined term a meaning that in some respect goes beyond the meaning or meanings conveyed in common usage by the term. Such a definition usually adds to the conventional meaning an element of assigned meaning".

Ad clause 4 of the draft Regulations: Compensation Benefits

9.9 Clause 4 of the draft Regulations seeks to provide for the compensation benefits payable according to the Act after assessment of the impairment. Minor amendments were suggested in clause 4 of the draft Regulations.

Ad clause 5 of the draft Regulations: Medical Costs

9.10 Clause 5 of the draft Regulations seeks to provide for the medical costs that will be provided after a diagnosis of tuberculosis. In sub-regulation (2) we have suggested the insertion of the words "for the tuberculosis" to narrow the ambit for which medical costs will be paid.

Ad clause 6 of the draft Regulations: Death Benefits

9.11 Clause 6 of the draft Regulations seeks to provide for death benefits payable in terms of a Burial Expenses Policy and where the employee dies as a result of tuberculosis, widow's and dependent's pensions will be payable.

Ad clause 7 of the draft Regulation: Reporting

9.12 Clause 7 of the draft Regulations seeks to provide for the documentation that must be submitted to the Compensation Fund, the employer, individual liable, or the licensee concerned.

9.13 We note that paragraph (d) does not read correctly as it does not stipulate if the tuberculosis questionnaire and checklist needs to be submitted. We have suggested a redraft of the paragraph for the Department's consideration.

Ad clause 8 of the draft Regulations: Claims Processing

9.14 Clause 8 of the draft Regulations seeks to provide for the consideration and adjudication of all claims by the Commissioner and it makes provision for medical officers employed by the Compensation Fund to be responsible for medical assessments of claims and confirmation of acceptance or rejection of claims. We have suggested minor drafting amendments to clause 8 of the draft Regulations.

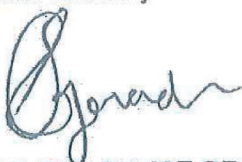
10. The Department's attention is drawn to the fact that, in terms of section 6(3) of the Constitution, the Regulations must be published in at least two official languages and non-compliance with this requirement may result in the draft Regulations being invalid.

CONCLUSION

11. In light of the above discussion, 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 draft Regulations, we are of the view that the draft Regulations is in order and conforms to the form and style of legislative drafting.

12. We attached hereto a copy of the draft Regulations with track changes incorporating our suggested amendments for your consideration.

Yours sincerely



**FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
S. GOVENDER / S. WILLIAMS / T. HERCULES**