OCCUPATIONAL MEDICAL EXAMINATIONS AND
LABOUR LAW

by

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SUMMARY

South Africa’s Constitution and the Employment Equity Act have a major impact on the performance of medical examinations within the employment relationship.

Health and safety statutes list a number of occupational medical examinations, which an employer must perform. Other legislation permits the execution of medical examinations.

After listing the different statutory references to occupational medical examinations, this treatise examines under which conditions medical testing is required or permissible.

The fairness of employment discrimination based on medical facts, employment conditions, social policy, distribution of employee benefits and inherent job requirement is analysed through a study of the legal texts, experts’ opinions and case studies.

The particularities of the ethical and legal duties of the medical professional, performing the occupational medical examination, are also examined.

Finally, a comprehensive analysis of the different forms of occupational medical examinations is compiled by combining legal and policy-related job requirements and is attached as an annexure. This is the practical result of the research in this treatise combined with the personal experience of the author.
CHAPTER 1

INTRODUCTION

Medical examinations in the sphere of labour relations have been a long standing feature in South Africa: Miners, for instance, have obtained a “certificate of fitness” (the so-called “red ticket”), before being allowed to work in a mine.\(^1\) The right of an employer to require an employee or an applicant for a job to submit to a medical examination is determined by the Constitution,\(^2\) the statutes and the courts.

For the purpose of this study the terms “occupational medical examination”, “medical test”, “medical testing”, “occupational medical recommendation” and “diagnosis” will be defined as:

> “Any question, inquiry, physical examination, special test\(^3\) or other means designed to ascertain directly or indirectly, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition.”

The conclusion of the occupational medical examination will be a finding, a diagnosis or a recommendation and may influence employment conditions or discriminate against employees or applicants.

The legitimacy of an occupational medical examination is a constitutional issue and will not only be determined by the reason for the examination, but also by the effect its findings may have on job placement:

- Where the recommendation, resulting from the OME, allows for relevant job placement, the OME will have assessed an inherent requirement of the job.

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\(^1\) This function was performed by the Medical Bureau for Occupational Diseases, in terms of the Occupational Diseases in Mines and Works Act No 78 of 1973. Medical surveillance and the certification of fitness for work, was, with the introduction of the Mine Health and Safety Act No 29 of 1996, transferred to the mine and the appointed occupational medicine practitioner (s 13).


\(^3\) These tests may take the form of special questionnaires, X-rays, ultrasonography, Magnetic Resonance Scanning, audiometry, lung function testing, electro-cardiography, skin-, blood- and
Where the recommendation has no bearing on job placement, the OME will have been irrelevant and, if it unfairly discriminates, probably unconstitutional.

An occupational medical examination (OME) is a medical examination performed on an employee or an applicant for a job, in order to:

- Establish whether an applicant for a job meets the physical and mental requirements, inherent to the job (“pre-placement medical examination of an applicant”).

- Establish whether an employee continues to meet the inherent physical and mental requirements of the job (“periodical medical examination”) or meets the requirements of a new job or altered process (pre-placement medical examination of an employee).

- Establish a baseline parameter reading of specific biological indices, prior to engaging in an occupational exposure (“pre-exposure medical examination”, usually as part of pre-placement).

- Establish the effect of specific occupational exposure on the employee (“biological monitoring”).

- Establish the degree of incapacity of an impaired employee and the residual capacity of an employee, who has an impairment (“incapacity medical examination”, “sick absenteeism medical examination”).

- Establish pregnancy and its interaction with the work performed. (“pregnancy medical examination”).

- Establish the medical risk profile of an applicant, with regard to medical cost, potential loss of income earning capacity and death risk (“benefit medical examination”).

urine-tests and cytology. Psycho-metric testing aimed at measuring or comparing the mental
• Establish the medical condition of an employee at the time of leaving the employers’ service (“exit medical examination”).

In Chapter 2 of this paper the statutory regulation of OME’s is discussed. The chapter contains an extrapolation of the relevant legislative provisions in South African legislation.

Chapter 3 contains an evaluation of the legislative provisions that require and permit OME’s.

In Chapter 4 reference is made to the prohibition of unfair discrimination and the question of when discrimination is fair and justified.

Chapter 5 deals with the ethical and legal duties when OME’s are conducted.

The practical result of the research is included in the Annexure entitled “Occupational Medical Examination in Practice”. Included in the annexure are the typical OME’s conducted and a protocol for each of them, derived from the applicable law as well as medical experienced is suggested.
CHAPTER 2

STATUTORY REGULATION OF OCCUPATIONAL MEDICAL EXAMINATIONS

2.1 THE CONSTITUTION

The Constitution, as the supreme law of the Republic, guarantees everyone inherent dignity and the right to have this dignity respected and protected, bodily and psychological integrity and privacy.

No person may unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Fair discrimination has to be proven and is not forbidden. In accordance with the Bill of Rights, statutes preventing and prohibiting unfair discrimination in the labour environment have been enacted: the Labour Relations Act, the Basic Conditions of Employment Act and the Employment Equity Act.

2.2 THE LABOUR RELATIONS ACT

The Labour Relations Act acknowledges the need for occupational medical examinations indirectly in the fields of dismissal and in the fields of promotion,

S2.
S10.
S12(2).
S14.
S9(4).
Act 66 of 1995, referred to as “LRA” below.
Act 75 of 1997, referred to as “BCEA” below.
Act 55 of 1998, referred to as “EEA” below.
S188: “A dismissal that is not automatically unfair is unfair if the employer fails to prove that (a) the reason for the dismissal is a fair reason related to the employee’s capacity.”
demotion, training and the provision of benefits to employees.\(^{13}\)

Schedule 8, item 9, refers to a required performance standard against which the ability of an employee must be measured when assessing the fairness of a dismissal. Item 10 of the schedule instructs the employer to investigate a number of aspects of a disability causing medical incapacity.

### 2.3 THE BASIC CONDITIONS OF EMPLOYMENT ACT

The Basic Conditions of Employment Act (hereinafter the “BCEA”) requires a pregnant employee to notify the employer of her pregnancy in writing.\(^{14}\) Employees engaged in night shift work must be enabled to undergo a medical examination, for the account of the employer, before the employee starts night work, within a reasonable period of the employee starting night work and at appropriate intervals while the employee continues to perform such work.\(^{15}\)

The Act permits the employer to request an employee, who is entitled to sick leave pay, to produce a medical certificate stating that the employee was unable to work, on account of sickness or injury.\(^{16}\) For an employee living on the employer’s premises, the employer may be obliged to provide assistance to the employee to obtain the certificate. The confidentiality of any medical examination performed in terms of the BCEA is expressly protected in terms of section 90.\(^{17}\)

### 2.4 THE OCCUPATIONAL DISEASES IN MINES AND WORKS ACT

The Occupational Diseases in Mines and Works Act, 78 of 1973 (hereinafter “ODMWA”) regulates “benefit” medical examinations in terms of sections 32 and

\(^{13}\) Schedule 7 of the Act: Part B.2(1): “For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving (b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee.”

\(^{14}\) Ss 25 and 26.

\(^{15}\) S17(3).

\(^{16}\) S23(1).

\(^{17}\) S90(3): “The record of any medical examination performed in terms of this Act must be kept confidential and may be made available only (a) in accordance with the ethics of medical practice; (b) if required by law or court order; or (c) if the employee has in writing consented to the release of the information.”
A benefit examination is a medical examination for the purpose of determining whether a person is suffering from a compensatable disease or the degree of such disease. A medical practitioner who considers that a person, who has, to his knowledge, worked at a mine or works, is suffering from a compensatable disease must communicate his findings to the director. The director may instruct the doctor to perform, with the consent of the person concerned, a further medical examination.

2.5 THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT

The Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (hereinafter “COIDA”) also regulates a benefit examination for a claimant. An

S32: “Any person who works, or has worked at a mine or works, or any other person acting on behalf of such a person, may at any time, apply to the director for a medical examination of such person for the purpose of determining whether such person is suffering from a compensatable disease, or, if he has previously been found to be suffering from such a disease, the degree of such disease.”

S33(1): “Whenever a medical practitioner in the Republic considers or suspects that any person medically examined or treated by him, who has to his knowledge worked at a mine or works, or who he believes on reasonable grounds to have so worked, is suffering from a compensatable disease, such practitioner shall forthwith communicate to the director his findings at the examination, and shall on demand by the director furnish such further information at his disposal in regard to the examination or the health of such person as the director may require.”

(2): “The director may, in writing, direct a medical practitioner who has communicated his findings at the examination of any person to the director as contemplated in (1), to perform, with the consent of the person concerned, a further medical examination of that person or such an examination of a nature determined by the director, and a medical practitioner so directed who has performed an examination in accordance with the direction, shall forthwith submit to the director a detailed report on the result of the examination.”

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(2): “The director may, in writing, direct a medical practitioner who has communicated his findings at the examination of any person to the director as contemplated in (1), to perform, with the consent of the person concerned, a further medical examination of that person or such an examination of a nature determined by the director, and a medical practitioner so directed who has performed an examination in accordance with the direction, shall forthwith submit to the director a detailed report on the result of the examination.”

S42.

S42: “An employee who claims compensation or to whom compensation has been paid or is payable, shall when so required by the commissioner or the employer or mutual association concerned, as the case may be, after reasonable notice, submit himself to an examination by the medical practitioner designated by the commissioner.”
injured employee is permitted to choose his own doctor freely and no interference with this privilege is permitted as long as it is reasonably exercised.\textsuperscript{21}

Examinations required in terms of both the ODMWA and COIDA are not requested by an employer, but by a statutory official (director of commissioner).

\textbf{2.6 THE MINE HEALTH AND SAFETY ACT}

The Mine Health and Safety Act No 29 of 1996 (hereinafter “MHSA”) requires the mine manager to establish a system of medical surveillance,\textsuperscript{22} appropriate to the health hazards to which employees are exposed. The programme must assist the mine manager to eliminate, control and minimise the health risk and the hazards to which his employees may be exposed. The medical surveillance must consist of an initial medical examination and other medical examinations at appropriate intervals. The examinations must also assist in the prevention, detection and treatment of occupational diseases.\textsuperscript{23}

The MHSA establishes\textsuperscript{24} the Mine Health and Safety Council and the permanent committees of the Council. The Mining Occupational Health Advisory Committee\textsuperscript{25} is one of the 3 permanent committees.\textsuperscript{26}

The MOHAC has issued a guideline\textsuperscript{27} as “the basis for a mine occupational medical practitioner to draft an appropriate code of practice concerning fitness to perform

\begin{itemize}
  \item \textsuperscript{21} Schedule to the Act: Scale of fees for Medical Aid: Note (i): The employee is permitted to choose his own doctor freely and no interference with this privilege is permitted as long as it is reasonably exercised. The only exception is where employers provide their own medical aid facilities in toto, \textit{i.e} including hospital, nursing and other services (s78).
  \item \textsuperscript{22} MHSA s102: “Medical surveillance means a planned programme of periodic examinations, which may include clinical examinations, biological monitoring or medical tests, of employees by an occupational health practitioner or by an occupational medical practitioner contemplated in s 13.”
  \item \textsuperscript{23} MHSA s102: “Occupational disease means any health disorder including an occupational disease as contemplated by the Occupational Diseases in Mines and Works Act or by the Compensation for Occupational Injuries and Diseases Act.”
  \item \textsuperscript{24} Ss 41(1) and (2)
  \item \textsuperscript{25} MOHAC.
  \item \textsuperscript{26} Schedule 6 of the MHSA, added by Government Notice No R 1317 of 10 October 1997, determines the functions of the MOHAC to advise the Council on, \textit{inter alia}, “policy relating to health”, “standards, systems and procedures for assessing, avoiding, eliminating, controlling and minimising health risks”, “regulations on any aspect of health”.
  \item \textsuperscript{27} Guideline for Occupational Medical Practitioners, No 1 standards of fitness to perform work in a mine.
\end{itemize}
work at that mine”. All serving miners found permanently unfit or fit only for restricted service have a right of appeal to the Medical Inspector appointed by the Department of Mineral and Energy.

2.7 NATIONAL ROAD TRAFFIC ACT

The National Road Traffic Act 93 of 1996 disqualifies a person from holding a driver’s licence if the person suffers from any of the listed diseases or disabilities. Where an employer is a registered operator in terms of the Act ie where the employer’s vehicles are used to transport goods or persons, he must exercise proper control over the drivers of his vehicles. This responsibility includes the requirements in respect of the professional driving permit (hereinafter “PDP”) of the driver. In order to obtain a PDP, a driver has to produce a medical certificate from a doctor, certifying that the driver does not suffer from any uncontrolled listed condition. The driver must also pass a vision test in accordance with the regulations laid down by Government Gazette No 18692 of 23 February 1998. If a driver fails either of these tests, he may not obtain a PDP and can not be employed as professional driver.

Chapter VIII deals with the requirements of transportation of dangerous goods. Drivers require a PDP-D type licence. It is likely that stricter medical requirements will, in future, be set for this type of licence. The permitted level of alcohol in a driver’s bloodstream is 0,05 gram per 100 millilitres and, in the case of a professional driver 0,02 gram per 100 millilitres. The levels in the breath specimen are 0,24 and 0,10 milligrams alcohol per 1000 millilitres of breath specimen. Section 65 states:

“No person shall refuse that a specimen of blood or a specimen of breath shall be taken from him.”

Whether this section, read with section 49(c), entitles an employer to force an employee-driver to undergo a blood or breath test has, so far, not been decided.

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28 S15(1)(f)(g).
29 S49(c).
2.8 THE OCCUPATIONAL HEALTH AND SAFETY ACT

The Occupational Health and Safety Act\textsuperscript{30} (hereinafter “OHSA”) sets out a list of medical examinations, which employers must perform on their exposed employees and which employees, under regulated conditions, must allow to be performed. The Act instructs every employer to provide every employee with a working environment that is safe and without risk to his/her health.\textsuperscript{31} In this endeavour, the employer must\textsuperscript{32} enforce such measures as may be necessary in the interest of safety and health. These include medical surveillance and biological monitoring.

Medical surveillance means a planned programme of periodic examinations (which may include clinical examinations, biological monitoring or medical tests) of employees by an occupational health practitioner (hereinafter “OHP”)\textsuperscript{33} or, in prescribed cases, by an occupational medicine practitioner (hereinafter “OMP”).\textsuperscript{34}

Medical surveillance is defined,\textsuperscript{35} to cover the spectrum of potential effects of a hazard on an employee.

Medical surveillance of exposed employees may be grouped broadly into \textit{biological monitoring} and \textit{medical screening}.

Biological monitoring of exposure means “a planned programme of periodic collection and analysis of body fluids, excreta or exhaled air in order to detect and quantify the exposure to or absorption of any substance or organism by persons”\textsuperscript{36}.

There are two types of testing:\textsuperscript{37}

\textsuperscript{31} S8(1).
\textsuperscript{32} S8(2)(h).
\textsuperscript{33} OHSA s1(1)(xxxii): “An occupational medicine practitioner or a person who holds a qualification in occupational health recognised by the South African Medical and Dental Council, or the South African Nursing Council as referred to in the Nursing Act 50 of 1978.”
\textsuperscript{34} OHSA s1(1)(xxxv): “A medical practitioner as defined in the Medical, Dental and Supplementary Health Service Professions Act 1974 (no 56 of 1974), who holds a qualification in occupational medicine or an equivalent qualification, which qualification is recognised as such by the South African Medical and Dental Council.”
\textsuperscript{35} Hazardous Chemical Substances Regulations of the OHSA.
\textsuperscript{36} S1(1)(ii).
\textsuperscript{37} OHSA, Hazardous Chemical Substances Regulations Annexure 1 Guideline 4.2.1.
• Biological monitoring: the biochemical concentrations of substances or their metabolites in biological samples of exposed employees are measured. The aim is to measure the degree of absorption into the body, by measuring indicators in representative biological samples, typically urine or blood.

• Biological effect monitoring: this determines the intensity of the biochemical or physical changes due to exposure.

Employees must submit to the medical examinations.\textsuperscript{38}

The Act requires doctors who examine or treat employees with an occupational disease, to report the case to the person’s employer and to the chief inspector.\textsuperscript{39}

The principal objective of general medical screening is to detect disease at an early pre-clinical or pre-symptomatic stage, in order to take action to reverse these effects or to slow the progression of the disease. Such tests are well-established in general preventative medicine. A second objective is the assessment of the effectiveness of workplace control measures.\textsuperscript{40}

The legislature acknowledges the current limited number of validated screening tests and outlines an open list of examinations: simple clinical examinations (such as skin examination), X-rays, lung function testing, specimen (urine, blood, exhaled air) tests.

In designing and implementing a programme of medical surveillance, the employer must include the following steps:

• A risk assessment of potential exposures of employees.

\textsuperscript{38} S14(b): “Every employee shall at work as regards any duty or requirement imposed on his employer ..., co-operate with his employer ... to enable that duty or requirement to be performed or complied with”; and

S14(c): “… carry out any lawful order given to him, obey the health and safety rules and procedures laid down by his employer or by anyone authorised thereto by his employer, in the interest of safety and health.”

\textsuperscript{39} S25: “Any medical practitioner who examines or treats a person for a disease described in the second schedule of the COIDA or any other occupational disease, must report the case to the person’s employer and to the chief inspector and inform the person accordingly.”

\textsuperscript{40} The HCS Regulations, in Annexure 1, outline the legislator’s interpretation of “medical screening” and “medical surveillance programme”.
• An identification of the target organs of the occupational hazards.

• A selection of reliable tests with high sensitivity, high specificity and high predictive value.

• A frequency of testing.

• The development of action criteria: although some criteria are provided in Table 3 of Annexure 1, the legislature acknowledges that occupational health practitioners will have to develop pragmatic criteria in the context of the specific workplace.

• Standardisation and quality control of the tests and laboratory process.

• Ethical considerations with particular regard to pre-test counselling: this should include the rationale for doing medical surveillance and the potential consequences of abnormal findings. Employees must be informed of their results and the recommendations by the OHP to the employer.

• Determination of the parameters and action criteria to assess the employee’s fitness to remain in the job.

• Actions in case of abnormal test results:
  
  o Repeating the test.
  o Further medical examination.
  o Notification of the employer.
  o Removal of the employee from further exposure.

• Evaluation of control: where an abnormal result is found, the workplace must be re-evaluated and remedial action taken.
• Keeping of records.

The proposed *modus operandi* to secure employees' co-operation is, for the employer, to issue a policy of protection of conditions of service in case of medical removal from a particular job.\(^{41}\) This policy would however be difficult to uphold in the case of an employer who exposed all employees to the same hazard (e.g., noise throughout the plant), in which case the employer has no alternative employment to offer.

The Asbestos Regulations proscribe regular health evaluation of all exposed employees.\(^{42}\) An employer may not allow an employee, who has been certified unfit for work by a doctor, to work in a place where exposure to asbestos is possible.\(^{43}\)

The Diving Regulations require that a diver report for a medical examination by a designated medical practitioner\(^ {44}\) at least every 12 months. The designated medical practitioner must examine the diver in respect of such aspects as are required by the chief inspector.

A diver is prevented from working if he has been unfit to dive for a continuous period of 14 days or more, until he furnishes the employer with a medical certificate indicating that he has recovered.\(^{45}\)

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\(^{41}\) Hazardous Chemical Substances Regulations. Annexure 1: HCS Guidelines. Guideline 4.4.1.(g): “… Co-operation of employees can be secured by a policy of protection of conditions of service in case of medical removal from a particular job.”

\(^{42}\) Asbestos Regulation 8(2): “In order to comply ... the employer shall ... ensure that a structured medical surveillance programme is drawn up ... which shall include: (a) An initial health evaluation...comprises an evaluation of the employee’s medical and occupational history; medical test which may include chest X-rays, pulmonary function testing or a physical examination; any other essential medical examination which in the opinion of the occupational medicine practitioner is desirable ...; and (b) subsequent ... evaluations, at intervals not exceeding two years ...”

\(^{43}\) Asbestos Regulation 8(3).

\(^{44}\) Diving Regulation 1: “Designated medical practitioner: a registered medical practitioner designated in terms of these regulations to establish whether divers are fit to dive.” Regulation 4(1): “The chief inspector may designate medical practitioners to undertake the medical examination of divers or prospective divers: Provided that only medical practitioners who are registered with the South African Medical and Dental Council and who have completed a course in underwater medicine, recognised by the chief inspector, shall be designated.”

\(^{45}\) Diving Regulation 4(6): “If, on account of indisposition or injury, a diver has been unfit to dive for a continuous period of 14 days or more, he shall not again participate in diving and no person shall require him to participate in diving unless he furnishes the employer with a medical certificate indicating the nature of his indisposition or injury and in which a medical practitioner certifies that he has recovered from such indisposition or injury. Provided that, if in the opinion of the diving
The Environmental Regulations require employees to be medically examined, where they are exposed to cold (temperatures below -18 degrees C) or to heat. Employees working in a noise zone must be subjected to audiometric examinations.

The Hazardous Chemical Substances and the Hazardous Biological Agents Regulations formulate detailed requirements for medical examinations of employees working with chemical or biological products. After a preliminary risk assessment, with particular emphasis on identifying which employees are exposed to the hazard, the employer must place these employees under medical surveillance, in accordance with a written medical protocol. The confidentiality of these examinations is regulated.

With respect to hazardous chemicals, the legislature instructs the occupational health practitioner to:

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supervisor, the indisposition or injury of a diver is of such a nature as to make an examination by a designated medical practitioner desirable, such diver shall not participate in diving until a designated medical practitioner has certified that he is once more fit for diving."

Environmental regulations for workplaces: Regulation 2(2)(c): (Cold): The employee is certified fit for work in a low-temperature area, in which the temperature is lower than -18 degrees C, by a registered medical practitioner or a registered nurse, according to a protocol prescribed by such practitioner and such employee is issued with a certificate to that effect and Regulation 2(4)(b)(l): (Heat): “The employee is certified fit for work in an environment where the BGT index, determined over a period of one hour, exceeds 30, by a registered medical practitioner or a registered nurse, according to a protocol prescribed by such practitioner and such employee is issued with a certificate to that effect.”

Environmental Regulation 7(10)(a): “Every employee employed in a noise zone must be subjected to audiometric examinations conducted in accordance with s 7 of SABS 083, by an audiometrist approved by the chief inspector.”

The medical surveillance protocol for HCS has consider that:
- Every employee "who may be exposed" to a substance listed in Table 3 of Annexure 1, must be under medical surveillance (HCS Reg 7(1)(a)). This will include the sampling of (exhaled) air, blood or urine specimen.
- Every employee exposed to any substance, which may be hazardous to the health of the employee, must be under medical surveillance (HCS Reg 7(1)(b)).
- An employee must be under medical surveillance when the occupational health practitioner recommends this practice (HCS Reg 7(1)(c)).
- The appropriateness of the medical surveillance must be ratified by an occupational medicine practitioner (HCS Reg 7(1)(c)).

Hazardous Chemical Substances Regulation 9: Confidentiality of medical records:
R 9(a): Personal medical records shall only be made available to an occupational health practitioner.
R 9(b): Personal medical records may not be made available to an inspector.
R 9(c): If an employee gives a formal written consent, his medical records may be perused by “any person”.

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• Be familiar with the latest scientific information regarding substances and tests.

• To design a programme that is rational, ethical and effective.

• To design a programme even if the available information is incomplete or there is uncertainty regarding exposures, toxicity and test performance.

The Lead Regulations instruct the employer to inform and train every exposed employee about the need for medical testing. All exposed employees and “every other employee”, who, in the opinion of the designated occupational health officer need medical surveillance must be included in the programme. The medical surveillance is defined in pre-placement testing, testing after three and six month's exposure and thereafter at a frequency determined by the tests results and/or the designated medical officer. Pregnant women are suspended from all work, which may expose them to lead and the biological monitoring values are different for women “who are capable of procreation”.

2.9 THE EMPLOYMENT EQUITY ACT

The Employment Equity Act prohibits all form of medical testing subject to exceptions in section 7:

50 Lead Regulation 4: Every employer shall ensure that every exposed employee is informed and trained with regard to (4(g)) the need for biological monitoring and medical surveillance.

51 The Lead Regulations were drafted before the terms Occupational Medicine Practitioner and Occupational Health Practitioner were introduced and still hold an old definition of [Regulation 1] “designated occupational health officer”: “A person who is a registered medical practitioner who has a qualification in occupational health or a registered nurse with an approved qualification in occupational health recognised by the SA nursing council and who has been designated in writing by the employer for the biological monitoring and medical surveillance of employees exposed to lead.”

52 Lead regulation 8(3): “… no employee [may return] to such work until...the employee’s blood lead concentration is less than 70 microgram/100 ml or the employee's urinary lead concentration is less than 130 microgram/l”; versus; Lead Regulation 8(4): “… a woman who is capable of procreation ... is suspended from such work when her blood lead concentration exceeds 40 microgram/100 ml or her urinary lead concentration 75 microgram/l, or if she becomes pregnant and ... [a woman who is capable of procreation may not return to lead work] unless her blood lead concentration is less than 35 microgram/100 ml or her urinary lead concentration is less than 65 microgram/l”.

“1. Medical testing of an employee is prohibited unless:

(a) Legislation permits or requires the testing or
(b) It is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job.

2. Testing of an employee to determine that employee's HIV status is prohibited unless such testing is justifiable by the Labour Court in terms of section 50(4) of this Act.”

These prohibitions also apply to applicants for employment.\textsuperscript{54}

In considering whether medical testing is justified, Du Toit \textit{et al}\textsuperscript{55} submit that the following are some of the criteria to be taken into account:

- Whether the work involves physical activity.
- Whether the test relates to actual and reasonable requirements of the job.
- Whether persons with disabilities are reasonably accommodated in carrying out the test.
- Whether applicants have been adequately informed as to the nature and purpose of the test and the fact that the results will be confidential.
- All applicants, and not only selected groups such as disabled persons, should be subjected to the medical tests.
- The results of the medical tests should be used for their stated purposes only.

Distinguishing, excluding or preferring an employee or applicant on the basis of an inherent requirement of the job does not constitute unfair discrimination in terms of the EEA.\textsuperscript{56}

\textsuperscript{54} S9.
\textsuperscript{55} Du Toit, Woolfrey, Murphy, Godfrey, Bosch, Christie \textit{Labour Relations Law 3\textsuperscript{rd} ed (2000) 452.}
\textsuperscript{56} S6(2)(b).
2.10 OTHER LEGISLATION

Municipal food-handling by-laws, such as a dairy by-law,\textsuperscript{57} include direct and indirect requirements for employees to be submitted to medical examinations:

- Direct instructions emanate from the Medical Officer of Health\textsuperscript{58} and instruct employees to undergo prescribed medical examinations.

- Indirect instructions are construed when the employer is instructed to ensure that employees are free of disease; this instruction may require the employer to have the employees medically examined.\textsuperscript{59}


\textsuperscript{58} Supra 17: s21(5): “All persons employed in a dairy shall submit themselves at such time and place and as often as the Medical Officer of health may require, for clinical, X-ray, serological and bacteriological examination in order that their freedom from infectious disease or carrier status thereof may be ascertained.”

\textsuperscript{59} Supra 17: s21(2): “No dairyman shall knowingly allow any person suffering from any communicable disease … to milk cows or in any way take part in the production or distribution or storage of milk” and s21(6): “… a dairyman shall be guilty of an offence if it shall be proven that he knew or by exercise of ordinary care could have ascertained that any such person was so suffering…of any of the said diseases”.

CHAPTER 3

UNDER WHICH CONDITIONS IS MEDICAL TESTING ALLOWED?

Section 7 of the EEA expresses the constitutional guarantee of dignity, bodily and psychological integrity and privacy in the workplace, for both employees and applicants. The fair discrimination, which the Constitution allows, is expressed as the exceptions of section 7(1). The analysis of these statutory exceptions has to be unravelled by the Labour Court. The legitimacy and unlawfulness of an occupational medical examination will be reviewed with the following questions at hand:

- Which legislation requires medical examinations?
- Which legislation permits medical examinations?
- When is discrimination fair and justified in the light of:
  - Medical facts.
  - Employment conditions.
  - Social policy.
  - Distribution of employee benefits.
  - The inherent requirements of the job.
- What are the inherent requirements of the job?

3.1 WHICH LEGISLATION REQUIRES OME’s?

3.1.1 THE OHSA AND MHSA

The OHSA and MHSA set out a list of required medical examinations, which employers must perform on their exposed employees and which employees, under regulated conditions, must allow to be performed. The statutes place the responsibility of performing occupational medical examinations on the employer.
These examinations aim to:

- Detect disease at an early stage.

- Assist the employer in taking action to reverse these effects or to slow the progression of the disease.

- Assess the effectiveness of workplace control measures.

Employees who may be exposed to noise, asbestos, lead, chemicals, biological agents, extreme temperatures and divers must be examined.

The indirect obligation of employees to allow occupational medical examinations, in terms of the OHSA, is to be found in the analysis of section 14, which instructs every employee to co-operate with his employer, with regard to any duty or requirement imposed on his employer. Employees must carry out any lawful order and obey the health and safety rules and procedures laid down by his employer in the interest of safety and health.

Equally indirect is section 22(e) of the MHSA, instructing every employee to co-operate with any person to permit compliance with the duties and responsibilities on that person in terms of the MHSA.

The Guideline on occupational medical examinations, issued in terms of the MHSA, advocates the following pertinent principles:

- It is better, at an initial examination, to exclude an applicant if there is any doubt about his or her continuing fitness. Flexibility should be exercised only during examinations for retention.

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60 See 15, 16.
• As a general rule, the medical examiner should be satisfied in each case that no disease or defect is present, which could either be significantly aggravated by working in a mine or represent an unacceptable health or safety risk to the individual miner, other miners or the safety of the mine.

• The occupational background should be considered.

• The possibility of an acute illness or medical emergency is of particular concern in a mine.

• In reaching a conclusion about fitness, the OMP should consider:
  
  o Any medical conditions present.
  
  o The age and experience of the miner.
  
  o The specific work on which the miner will be employed.
  
  o The health hazards that have been identified in relation to that specific work.

The Guideline categorises the fitness for work in a mine:

A. The standard has been met: a miner is fit for unrestricted mine service.

B. The standard has only been met in part: a miner is fit for restricted mine service.

C. The standard has not been met: a miner is temporarily unfit for mine service. The time period must be specified.

D. The standard has not been met: the miner is permanently unfit for mine service.
All serving miners found permanently unfit or fit only for restricted service have a right of appeal to the Medical Inspector appointed by the Department of Mineral and Energy.

The Guideline also lists the minimal physical requirements for work at a mine on initial and on periodic medical examination.

3.1.2 THE EMPLOYMENT OF EDUCATORS ACT

The Employment of Educators Act,\textsuperscript{61} in Schedule 1, outlines the incapacity code and procedures for poor work performance. The employer must appoint a medical practitioner to examine the educator (the employee), at the State’s expense, and report on the educator’s state of health. If an employee refuses the examination, the employer may initiate disciplinary proceedings against the educator for misconduct.\textsuperscript{62}

3.2 WHICH LEGISLATION PERMITS OME’s?

There is no express direct statutory permission for an employer to have an employee or an applicant medically examined. The permission has to be read indirectly. The following legislation permits the employer to require an applicant or employee to submit him/herself to a prescribed medical examination prior to engaging an applicant, prior to allowing an employee to continue with a certain job or prior to promoting an employee.

3.2.1 THE LRA

The Code of Good Practice Dismissal\textsuperscript{63} advocates its key principle that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. The guidelines in cases of dismissal arising from ill health or injury, require the employer (and any other person determining the fairness of a dismissal) to consider a number of medical

\textsuperscript{61} Act 76 of 1998.
\textsuperscript{62} Rule 3(7) of the Incapacity Code and Procedures for Poor Work Performance (Schedule 1 added by s15 of Act 53 of 2000).
\textsuperscript{63} Schedule 8.
(besides the operational) aspects of the employee’s status. These considerations are only possible if the employee has been examined in the framework of a “fitness for work” examination.

Work performance according to a required standard, is referred to in the guidelines in cases of dismissal for poor work performance. Du Toit\textsuperscript{64} advocates that the inability of an employee to meet a required standard can constitute a fair reason for dismissal and “by the same token, refusal to appoint or promote a person who does not measure up to an inherent requirement of the job in question is justifiable. If such a combination of factors can be shown, it is a complete defence to a claim of unfair discrimination”.

In some cases this standard may be determined at the hand of a medical examination: \textit{eg} colour vision testing in an electrician, balance testing of a scaffold worker.

The critical factor is “the inherent requirement” of the job.

\subsection{3.2.2 THE BCEA}

\begin{itemize}
\item \textit{Pregnant and lactating mothers}
\end{itemize}

The onus of reporting a pregnancy, the date on which the employee intends to commence maternity leave and return to work after maternity leave, lies with the employee.\textsuperscript{65} The onus of job adaptation and restriction of potential exposures lies with the employer:\textsuperscript{66} No employer may require or permit a pregnant employee to perform work that is hazardous to her health or to the health of her child. The Code of Good Practice on the Regulation of Working Time (rule 5.6) provides that shift arrangements for pregnant employees must be considered.

\textsuperscript{64} Cf 40 at 461.
\textsuperscript{65} S25(5): “An employee must notify an employer in writing ...”
\textsuperscript{66} S26(1).
Employers should formulate a policy for pregnant employees. As no employer can reasonably be expected to make adaptation for an unknown pregnancy, an important feature of this policy is the determination of pregnancy: employees must report a pregnancy as early as possible and employers should reserve the right to know about this status. Employers using toxic substances, which may affect the foetus, can reasonably be expected to have a system in place, which allows for the early determination of pregnancy. When an employee reports a pregnancy, the employer should organise an examination of the employee’s physical condition by a qualified medical professional.

- **Night shift workers**

Employers who engage employees to work night shifts must arrange for these employees to have a free medical examination. The risks to employee's health and the safety hazards associated with night work must be explained. The medical examination must be relevant to these hazards.

- **Sick leave**

An employee claiming sick leave pay must deliver proof of incapacity. The “request by the employer” for a medical certificate must be expressed in a sick absenteeism policy requirement that sick leave will only be granted (and paid) if the employee presents a valid sick certificate. If there is any doubt, the employer must be enabled to require the employee to be examined by a doctor, appointed by the employer. The employee is entitled to refuse this examination and rely on the validity

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67 The Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of a Child, issued in terms of s87(1)(b) of the BCEA, lists a limited number of hazards.

68 The Code of Good Practice, Item 5.7.

69 BCEA s17(3) and Code of Good Practice on the Arrangement of Working Time.

70 BCEA s23: “(1) An employer is not required to pay an employee (sick leave), if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight week period and, on request of the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee’s absence on account of sickness or injury. (2) The medical certificate must be issued and signed by a medical practitioner or person who is certified to diagnose and treat patients and who is registered with a professional council …”

71 It is an unfortunate but known and proven fact that certain doctors issue these certificates indiscriminately.
of the original certificate, thus reversing the onus on the employer to prove the invalidity of the original certificate. The dispute may be resolved where a “neutral” doctor can be agreed on by both parties.

The ethical restriction imposed by the Health Professional Council on the divulging of the actual disease on a sick certificate is bound to have an impact on the acceptability of a sick certificate: particularly those employers who may expose employees to occupational hazards, have a genuine interest in the health status of their employees.

For instance, a scaffold worker, who is booked off with diabetes mellitus, may only return to his normal duties once the condition is controlled. Where an employer is not aware of the diagnosis, he may expose the employee to a fatal hazard. Consequently, in risk workers, employers have a genuine need to know the health status and may, quite rightly so, require an employee to submit to a medical examination with regards to the employee’s fitness for work or fitness for duty.

### 3.2.3 THE OHSA

The General Administrative Regulations instruct employers not to allow any person to enter or to remain at a workplace, if that person appears to be under the influence of alcohol or drugs. The determination of what it means “to be under the influence” is left to self-regulation; the employer has to create a policy, which outlines the meaning. This same policy (referred to as the “fitness for duty” policy) should encompass the management of sick employees, employees taking regular medication, the process to be followed if an employee needs to be tested (the “chain of custody”) and, perhaps, the action to be taken in the case where the suspected employee refuses to be examined or tested.

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72 General Administrative Regulations 10(1): “... an employer ... shall not permit any person who is or who appears to be under the influence of intoxicating liquor or drugs, to enter or remain at a workplace.”
The fitness for duty policy will include such medical testing as alcohol breath analysis, urine cannabis, blood alcohol and clinical medical testing by a designated medical practitioner.

Employees taking medication, which can have side effects that can threaten the health and safety of himself or other persons, have a moral and statutory obligation to inform the employer. The statutory duty stems from sections 14 and 37: the employee, who does not report the potential hazard, did not take the reasonable care required.
CHAPTER 4

WHEN IS DISCRIMINATION FAIR AND JUSTIFIED (IN THE LIGHT OF MEDICAL FACTS, EMPLOYMENT CONDITIONS, SOCIAL POLICY AND DISTRIBUTION OF EMPLOYEE BENEFITS)?

4.1 FAIR DISCRIMINATION AND JUSTIFIABILITY

Discrimination means to “treat differently” or “to differentiate”. Treating a person differently without negative connotation, amounts to differential treatment (eg “Ladies First”). Differential treatment becomes discrimination if “it amounts to treating persons differently in a way, which impairs their fundamental dignity as human beings”.73

Du Toit74 proposes the following test for unfair discrimination in the employment context:

• Has there been differential treatment of the employee or applicant?
• If so, was such differential treatment of a pejorative nature?

“Discrimination” is established if both questions are answered in the affirmative and then a third question arises:

• Has any reason been offered to show that the discrimination was justified?

The Constitutional Court75 has confirmed that “there can be instances of discrimination, which do not amount to unfair discrimination…even in cases of discrimination on the grounds specified in section 8(2) [of the interim Constitution],76 which by virtue of section 8(4) are presumed to constitute unfair discrimination, it is

73 Prinsloo v Van der Linde (1997) 6 BLLR 759 (CC).
74 Cf 40 at 437.
75 Harksen v Lane 1998 (1) SA 300 (CC).
76 Act 200 of 1993.
possible to rebut the presumption and establish that the discrimination is not unfair”.

The Labour Court has confirmed that unequal or differential treatment of employees and applicants, even on any of the prohibited grounds, may be fair:77

“The justification requirement lies at the heart of the enquiry into unfair discrimination and involves a careful consideration of the context in which the dispute arises. There is no fixed formula to be applied mechanically. The Act provides two complete defences to unfair discrimination … By virtue of item 2(2)(b),78 if the inherent requirements of the job justify an act of discrimination, this is a complete defence to an unfair discrimination claim …”

The EEA79 extends the restrictions on medical testing to applicants for employment; in practice the pre-placement medical examination to which applicants are subjected and the resulting failure to appoint or consider for appointment may be unfair discrimination.

The EEA formulates the exception to the prohibition on medical testing conditional to such testing being “justifiable”. Justifiable means “able to be legally or morally justified; able to be shown to be just, reasonable or correct; defensible” (Shorter Oxford English Dictionary).

In Joy Mining Machinery (A Division of Harnischfeger (SA)(Ltd) v NUMSA & Others,80 Landman J considered the justifiability of HIV testing of employees by an employer, in an application for an order in terms of section 7(2) of the EEA. In deciding whether the HIV testing was justifiable, the court considered it appropriate to also take into account the general test for medical testing as set out in section 7(1)(b).

The court listed the following considerations in its determination of justifiability: the prohibition on unfair discrimination, the need for the testing, the purpose of the test, the medical facts, the employment conditions, the social policy, the inherent requirements of the job and the categories of jobs or employees concerned.

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78 Items 2(1)(a) and 2(2) of Schedule 7 Part B of the LRA, were repealed by Schedule 2 of the EEA, with effect from 9 August 1999.
79 S9.
Information, which does not go to the justifiability, but which the court considered also relevant to arriving at a proper decision: the attitude of the employees, whether the test is intended to be voluntary or compulsory, the financing of the test, the preparations for the test (the “informed consent”), pre-test counselling, the nature of the proposed test and procedure and post-test counselling.

Du Toit\textsuperscript{81} submits the following criteria in considering whether medical testing is justified:

- Whether the work involves physical activity.
- Whether the test relates to actual and reasonable requirements of the job.
- Whether persons with disabilities are reasonably accommodated in carrying out the tests.
- Whether applicants have been adequately informed as to the nature and purpose of the test and the fact that the test results will be confidential.
- All applicants, and not only selected groups, should be subjected to the relevant examinations.
- The results of the medical tests must be used for their stated purposes only.

4.2 JUSTIFICATION IN THE LIGHT OF MEDICAL FACTS

Medical illness and physical impairment may limit the job prospects of an employee or an applicant.

\textsuperscript{81} \textit{Cf} 40 at 452.
Both statutory (eg the OHSA) and policy requirements direct employers to establish a risk-based profile of its employment positions; eg the very strict medical requirements attached to an astronaut or an airline pilot are self-evident.

Medical experts have compiled exclusion criteria for a number of different occupations: eg the Guidelines of The South African Society of Occupational Medicine: Medical Requirements for Fitness to Drive, which outlines a number of absolute medical exclusions for drivers.

Medical facts will often change and, consequently, the discrimination (in the form of preventing an employee or applicant from performing a job) may be temporarily: eg the temporary suspension of a driver with uncontrolled diabetes.

The medical facts have to be considered in the light of the inherent requirements of the job and this may lead to differences of opinion: eg the “Guideline for Occupational Medical Practitioners, No 1 Standards of Fitness to Perform Work in a Mine” requires “binocular vision is necessary for all categories of miners”. The verbatim application of the guideline by mine doctors is causing conflict, where miners, who have worked underground for years, are now declared unfit.

The Constitutional Court82 has reflected on the medical grounds and ruled that the critical question is, whether refusing to appoint a person to a particular job on the basis of a particular medical diagnosis was an assault on that person’s dignity. When refusing to employ HIV positive persons, the court found this to be an assault on their dignity, where “they have been denied employment because of their HIV status, without regard to their ability to perform the duties from which they have been excluded”.

The fact that some HIV positive persons may be unsuitable for employment in a particular job, does not justify a blanket exclusion from that position to all HIV positive persons.

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4.3 JUSTIFICATION IN THE LIGHT OF EMPLOYMENT CONDITIONS

The medical examination performed on night shift workers or persons working in very hot conditions are examples, where this justification would apply.

Employees working on ships or sent to work in countries with poor infrastructures may be examined prior to departure. Historically, Jesuit monks had their appendix removed, prior to being sent as missionaries to Africa.

4.4 JUSTIFICATION IN THE LIGHT OF SOCIAL POLICY

Job placement of persons with disabilities will require an assessment of both the handicap caused by the person’s impairment and the person’s residual capacity. Placement of injured employees in jobs with restricted duties (so-called “light duty”) requires a medical assessment of the employee.

4.5 JUSTIFICATION IN THE LIGHT OF DISTRIBUTION OF EMPLOYEE BENEFITS

“Employee benefits” are not clearly defined in the labour statutes. Du Toit\(^{83}\) suggests that the word “benefits” should be given a narrow interpretation, excluding all payments that could be interpreted as falling under the broad ambit of “remuneration”. In the current context, benefits will include membership of medical aid funds, pension or provident funds and group life insurance. When taken as private insurances, medical examinations are standard pre-requisites, indicating not only one’s eligibility but also risk profile (and cost of contribution). When taken as part of a job packet, the associated medical examinations enter the realm of labour relations.

In the *Leonard Dingle*\(^{84}\) case, Seady AJ decided the jurisdictional issue, whether, in discrimination cases, retirement benefit funds (not being the employer of the employees who allege unfair discrimination) can be guilty of unfair discrimination

\(^{83}\) *Cf* 40 at 467.

\(^{84}\) *Cf* 57.
against an employee: the answer is in the affirmative, “particularly where there is a close *nexus* between the employer and [the insurer], as in this case, where the employer partly or totally manages the retirement benefit funds”. It is submitted that, where employers contribute a portion of the premiums to social benefits, their level of control on the benefit funds’ policies will always be a *nexus* to consider.

The Code of Good Practice on Key Aspects of HIV/AIDS and Employment,\(^8^5\) instructs employers to approach the Labour Court for authorisation if HIV testing is an access requirement to obtain employee benefits (Rule 7.1.4.(V)).

In view of the above, it seems necessary for employers to scrutinise all medical requirements of the benefits they offer to employees for all forms of direct or indirect discrimination. Equally, doctors performing such examinations may be found guilty of unfair discrimination by the Labour Court.\(^8^6\)

The Code of Good Practice on Key Aspects of Disability in the Workplace\(^8^7\) outlines the employer’s duties with regards to employee benefits such as fringe benefits, medical benefits, group disability assurance benefits, retirement schemes and life assurance schemes:

- The employer must ensure that the benefits do not unfairly discriminate against people with disabilities.
- Employees with disabilities may not be refused membership of a benefit scheme, only because they have a disability.
- Employers must investigate and offer benefit schemes, which reasonably accommodate persons with disabilities.

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\(^{8^5}\) Code issued in terms of s54(1)(a) of the EEA.
\(^{8^6}\) The EEA does not make it a criminal offence to conduct a test in violation of s 7. However, an employee may refer a dispute to the CCMA and, if unresolved there, to the Labour Court.
In the course of placement OME or disability OME, the employer will establish the risk profile of applicants or employees. This knowledge is required in order to exercise the different duties of an employer with regards to benefits.

4.6 JUSTIFIABLE IN THE LIGHT OF THE INHERENT REQUIREMENTS OF THE JOB

The EEA does not define, nor does it indicate which tests should be used to determine what an inherent requirement is. The notion “inherent requirement of a job” is very important, however, as employers may distinguish, exclude or prefer any person based on this requirement, without being unfair.88

The business necessity perceived by an employer may include arbitrary preferences (eg age, beauty, gender), which, in the view of the employer, serve a legitimate goal. In Swart and Mr Video (Pty) Ltd,89 the employer felt that employees under the age of 25 fitted the job better (because of the low salary and because of “compatibility” amongst young employees).

Pan American World Airways90 argued (in vain) that men lacked the compassion necessary to calm nervous or timid passengers and, for this reason, limited the job of flight attendants to women only. Whereas “compassion” may be an inherent requirement of the job, the court held that it was not a peculiarly female quality.

In Dothard v Rawlinson,91 the employer required prison guards to be at least 5’2”. The court found this height requirement not sufficiently relevant to the needs of the employer.

In Woolworths (Pty) Ltd v Beverley Whitehead,92 Willis JA, postulates that a film director, seeking to audition candidates to perform the role of a person famous in

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88 EEA s6(2)(b).
90 Diaz v Pan American World Airways Inc 42 F2d 1273 (9th Cir) [1981], as quoted in Du Toit et al 463.
91 433 US 321 [1977].
history, could fairly restrict the range of eligible applicants to persons who matched that person in sex, age and general appearance.

The above examples illustrate how widely varied a working definition for “the inherent requirement of a job” may be construed.

In the Woolworths\textsuperscript{93} Labour Court case, Waglay B suggests that a job has an inherent requirement when it possesses an “indispensable” attribute. The court qualifies this indispensable attribute as follows:

- It must be related to the job.
- It must relate in an inescapable way to the performing of the job.
- If the requirement is not met, a person simply does not qualify for the job.

The court also suggests the following test: “If the job can be performed without the requirement, then it cannot be said that the requirement is inherent”. The “relationship” between the attribute and the job was considered by the Labour Court judge and he found that one must not measure the fairness or unfairness of discrimination against the profitability or efficiency of a business enterprise.

Willis JA, in the Woolworths LAC judgement, takes a different view:

“\textit{I agree that profitability is not to dictate whether discrimination is unfair. Nevertheless, profitability is a relevant consideration. If the Labour Court were to make their decisions entirely indifferent to profitability, the consequences for our society would be disastrous.}”

An occupational medical examination is permitted if it is justifiable in the light of the inherent requirements of the job. Evidently the medical examination relates to the inherent requirements in its execution and/or its consequences. With regards to the execution, the following aspects of the medical examination must be considered:

- The types of questions asked.
- The types of clinical and special examinations performed.

With regards to the consequences, the following aspects of the medical examination must be considered:

- The potential outcomes of the medical examination.

- The potential actions of the employer, with respect to the potential outcomes of the examination.

As a universal rule, it is postulated that, for a requirement to be inherent, the employer has to conclude on different actions for different results of the medical tests:

- **The types of questions asked:** for example - Are you pregnant? An applicant for a job in a “lead” area (where the OHSA forbids employers from allowing pregnant employees to work), answering “yes”, is excluded from that job.

- **The type of clinical examination:** for example - Whereas an electrician needs colour vision, a fitter can function with colour blindness; colour vision testing on the apprentice electrician will determine whether he can engage in his apprenticeship; for the apprentice fitter, the colour vision test will have no repercussion, is irrelevant and does not test an inherent requirement of the job.

- **The type of special examination:** for example - A chest X-ray performed on a secretary employed in a silica quarry (where tuberculosis and silicosis are occupational diseases) is relevant; were the same person employed as a secretary at a university, the performance of a chest X-ray would be irrelevant as the existence of, for instance, old tuberculosis scars in the lungs would have no impact on her job placement.

- **The potential outcomes of the medical examination:** for example - When testing an applicant for a job in a noise zone, the diagnosis of perforated ear drums will cause most doctors to declare the applicant unfit for the job: why
place a person in a job, where the continuous wearing of hearing protectors may cause serious middle ear infections and even fatal meningitis? An employee, working in a noise zone, who presents after a weekend brawl with a perforated eardrum, will be placed in another department. If no such other work is available, the employee may be permitted to work in the noise zone, but continuous follow-up and treatment will be prescribed.

- **The potential actions of the employer:** for example - With respect to the potential outcomes of the examination: taking the previous example further, it is anticipated that the employer will not employ the applicant with the perforated eardrums: the employer would expose the employee to potential infection, the morbidity of the condition will cause sick absenteeism, the employee will require costly medical follow-up on a regular basis, the employee may require special, expensive, hearing protectors. The employee sustaining eardrum damage will be accommodated: either alternative temporary or permanent employment will be sourced or the employer will organise the prescribed management protocol.

The occupational medical examination format will thus have to take cognisance of the inherent requirements of a job: the questionnaire, the type of clinical examination and the choice of special tests must be relevant for these requirements.

Physical attributes (such as height, strength, dexterity, fine co-ordination, vision, mobility) may affect the productivity of an employee. Where the LAC left the door open for the employer to include considerations of “profitability” in the job requirements, the employer can set such parameters as to select the most economical applicant or to require reliable work attendance.

In contrast the placement (and retention) of employees with disabilities is advocated and (in the case of designated employers) regulated by the EEA. Physical attributes in the negative (e disabilities, which can be accommodated in a certain job; eg a wheelchair bound receptionist, a blind telesales-person) must also be considered.

The physical attributes, specific for a particular job, are expressed as a “**person-job specification**” (P-J specification).
In order for an applicant to be introduced in a job or an employee to remain in the job and perform the tasks required, as laid down in the job description, the following aspects of the job can be considered:

- **Productivity requirements**: *eg* how strong must a worker be in order to load cases on a truck in a productive manner?
- **Quality assurance requirements**: *eg* what fine vision requirements will assure minimal “second grade” production in a textile worker?
- **Occupational safety requirements**: which medical conditions can affect the safety of the employee or others (*eg* epilepsy in a scaffold worker)?
- **Occupational health requirements**: which medical conditions can aggravate the effect of occupational exposures (*eg* exclusion of lung disease in a miner)?
- **Disability restrictions**: which disabilities exclude placement in this job (*eg* all code 14 drivers must have binocular vision)?

The person-job specification will determine medical fitness for work, light duty work, placement of persons with a disability and dismissal for medical incapacity.

The choice of standard and the quantification of minimum requirements are done scientifically.

A P-J specification is a list of objective and verifiable attributes, which are essential for an employee to function qualitatively, safely and hygienically in a particular job.

The basis for this determination can be found in legal (*eg* heat exposure) requirements, production requirements (*eg* colour vision in textiles), safety requirements (*eg* drivers), health requirements (refer risk assessment) and incident and accident statistics.
Quantitative determination must be done by means of universally acceptable techniques.  

For every job description, a person-job specification must be available. The occupational medicine practitioner performing the occupational medical examination must apply the required attributes to accepted scientific measurement practices.

Exclusions may be drafted for specific jobs, relating to the following commonly occurring chronic illnesses: diabetes, hypertension, cardiac ischemia, arrhythmia, pacemaker, peripheral ischemia, chronic obstructive and restrictive airways, obesitas, spinal deformities, chronic skin, ear-nose-and-throat, eye ailments, smoking, and epilepsy.

4.7 PERSONS WITH DISABILITIES

The question of what attributes are essential for a specific job is applied when analysing the employment of persons with a disability. The Code of Good Practice on Key Aspects of Disability in the Workplace, albeit not an authoritative summary of law, will be considered when the courts and tribunals interpret and apply the EEA. The Code is issued in terms of section 54(1)(a) of the EEA and is based on the constitutional principle that no one may unfairly discriminate against a person on ground of disability. The Code advises employers to have written person-job specifications, which must include: the inherent requirements and essential functions of the job, the necessary skills and capabilities of the job and a set of reasonable criteria for selection of applicants for the job.

The Code refers to a person with a disability as a person with a long-term (eg diabetes) or recurring (eg asthma) condition, having a physical or mental impairment

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94 For example optometrist for vision, NIOSH lift formula for lifting.
95 Cf 66.
96 72, rule 4.
97 The Code gives a cryptic outline in 7.1.2: “The inherent requirements of the job are the purposes for which the job exists. The essential functions and duties of the job are what are necessary to get the job done.”
and substantially limiting the person in relation to the working environment. Temporary illness or injury is considered not an impairment, which gives rise to a disability (rule 5.1.1(i)). However, the Code refers to this last category of employees also.

In a parallel to the Woolworths case, the Code\(^{98}\) advocates that “advertisements should include sufficient detail about the essential functions and duties of the job, so that potential applicants can make an informed decision if they meet the inherent requirements of the job”.

In evaluating medical testing,\(^{99}\) the Code sets the following principles:

Medical tests must be necessary to the employer’s business, relevant and appropriate to

- The kind of work performed,
- The fitness criteria for the job,
- The workplace,
- The hazards of the workplace.

Medical testing is divided into:

- Health tests, which assess the general health of an applicant.
- Ability tests, which assess whether the applicant is able to perform the essential job functions and duties.

Ability tests must be performed first and, once it is established that the person is competent to perform the essential job functions and duties, a job offer must be made.

\(^{98}\) In 7.1.4.
\(^{99}\) Rule 8.
The health test may only be done after the job offer has been made.

Medical testing for admission to employee benefit schemes may also only be done after a job offer has been made.

In accordance with the importance of occupational safety and health, the code establishes the following two principles:

- An employer should not employ a person with a disability if that disability would represent an actual direct risk of substantial harm to his/her own safety or that of other people. If reasonable accommodation could eliminate or reduce the risk, the person should still be placed in the position. Such a risk would, for instance, exist if an applicant-driver were to suffer from a serious vision defect; he could put himself and others at risk. If the vision defect can be corrected with prescription glasses, this could be considered “reasonable accommodation”. If the vision defect is permanent and no treatment is available, the applicant can be refused employment.

- An employer may or need not retain an employee with a disability, if objective assessment shows that, even with reasonable accommodation, the work would expose the employee or others to substantial health risks and there is no reasonable accommodation to mitigate the risk.

The above principles require the establishment of what is meant by:

- An actual direct risk of substantial harm: this is not defined in the code.

- Reasonable accommodation is defined in section 1 of the EEA as a modification or adjustment to a job or to the working environment, that will enable a person with a disability, to have reasonable access to or participate or advance in employment.
• Objective assessment: this is also not defined, but will entail an evaluation of the impact of the impairment of the person on the job, viewed from the perspective of the inherent requirements of the job.

The OME of the person with a disability will have to establish:

• Which impairment does the person suffer from?

• Is the medical condition long-term, recurring or progressive?¹⁰⁰

• Is the person substantially limited in the performance of the job? This assessment must consider if medical treatment or other devices would control or correct the impairment.

• Which reasonable accommodation could the employer adopt? This is a wide term, limited by the requirement that the means of accommodation must be cost-effective, that work performance of the disabled employee may be evaluated against the same standards as other employees and that the accommodation need not impose unjustifiable hardship on the business.¹⁰¹

The Code sheds some light on the general medical requirements applicable to recruitment and selection. When employers recruit, they must:

• Identify the inherent requirements of the job.

• Identify the essential functions of the job, the necessary skills and capabilities of the job (the “job description”).

¹⁰⁰ Code of practice Rule 5.1.1. “(i) Long-term means the impairment has lasted or is likely to persist for at least twelve months. (ii) Recurring impairment is one likely to happen again and to be substantially limiting. It includes a constant underlying condition, even if its effects on a person fluctuate. (iii) Progressive conditions are those that are likely to develop or change or recur ... Progressive or recurring conditions which have no overt symptoms or which do not substantially limit a person are not disabilities.”

¹⁰¹ Unjustifiable hardship is action that requires significant or considerable difficulty or expense and that would substantially harm the viability of the enterprise (code rule 6.12).
• Set reasonable criteria for the job (the “person-job specifications”).

The regulation of “interviews”\(^{102}\) applies also to the medical questionnaire used in placement OME. As mentioned, the medical examination is done after the employer has made a job offer conditional on medical or functional testing\(^{103}\) and must examine:

• Whether the applicant is able to comply with the inherent requirements of the job?

• Whether the applicant can perform the essential functions of the job?

• Which, if any, accommodation does the applicant need in order to comply with the first two requirements?

The questionnaire may enquire about the disability and should ask applicants to indicate how they would accomplish the inherent requirements, perform the essential functions and which accommodation they require.\(^ {104}\) Although the questionnaire is required to be objective and unbiased, applicants with disabilities may be required to undergo testing, which is not required by all other applicants.\(^ {105}\)

People with disabilities are entitled to keep their disability status confidential. If a disability is not self evident, an employer may require the employee to disclose sufficient information to:

• Confirm the disability, or

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\(^{102}\) Code 7.3. 1. Selections interviews should be sensitive, objective and unbiased. Interviewers should avoid assumptions about people with disabilities. 2. If an applicant has disclosed a disability or has a self-evident disability, the employer must focus on the applicant’s qualifications for the work, rather than any actual or presumed disability, but may enquire and assess if the applicant would, but for the disability, be suitably qualified. 3. Interviewers should ask all applicants to indicate how they would accomplish the inherent requirements of the job and perform its essential functions and if accommodations is required. 4. If the employer knows in advance that an applicant has a disability, the employer should be prepared to make reasonable accommodation during the interview.

\(^{103}\) Code rule 7.3.

\(^{104}\) Code rule 7.3.2, 7.3.3.

\(^{105}\) Code rule 7.4.3.
• Confirm the needs for accommodation.

The employer is also entitled to request the employee to be tested to determine the employee’s ability or disability. The testing is at the expense of the employer.\textsuperscript{106}

Medical testing on an employee after an illness or injury\textsuperscript{107} is permissible in order to establish the “functional disability of the employee”:

• Can the employee safely perform the job?
• Which reasonable accommodation does the employee need?

An employee who becomes disabled or an employee who is frequently absent from work (for reasons of illness or injury) may be consulted by the employer. This consultation, aimed at early return-to-work, re-integration into work, placement in alternative work, reduced work or flexible work placement, may decide on the need for a medical assessment: the disability OME and the absenteeism OME.

4.8 THE DISABILITY OCCUPATIONAL MEDICAL EXAMINATION

The “disability OME” is similar to the applicant’s examination (section 9 of the EEA extends the meaning of employee for purposes of sections 6, 7 and 8 to applicants for employment).\textsuperscript{108} The disability OME must, however, also result in information and recommendations with regards to job retention, promotion, demotion and employee’ benefits:

The aim of the examination is to assess:

• Whether the employee continues to comply with the inherent requirements of the job?

• Whether the employee can still perform the essential functions of the job?

\textsuperscript{106} Code rule 14.
\textsuperscript{107} Code rule 8.2.
\textsuperscript{108} Ss 7 and 8 restrict medical and psychological testing.
• Which, if any, accommodation does the employee need, in order to comply with the first two requirements?

• The possibility of and recommendations for an early return-to-work: residual capacities must be identified, which could assist with vocational rehabilitation (eg comparing the residual capacities against other person-job specifications in the workplace), transitional work programmes (eg home work or so called “light duty”, better referred to as “restricted duty”) and flexible working time.

• The possibility of and recommendation for alternative work.

An employee who becomes disabled and consequently incapacitated to perform his/her duties may be dismissed.\(^{109}\) The LRA does not define “incapacity”. The Code of Good Practice: Dismissal,\(^{110}\) also refrains from defining the substantive grounds for incapacity arising from ill health or injury. It suggests a number of considerations to be made by any person determining whether a dismissal on these grounds was unfair. It also suggests a process of investigation with regards to the incapacity or injury.

The incapacity OME must examine and scientifically quantify:

• Which impairment does the employee suffer from?

• Whether the condition is permanent.

• Whether the condition is temporary: the anticipated period of absence, the anticipated date at which the employee may return to work for restricted duties and for normal duties.

\(^{109}\) LRA s188(1)(a)(i).

\(^{110}\) LRA Schedule 8.
• Whether the employee is able to perform the work.

• The extent (or degree) of the incapacity or injury.

• The cause of the incapacity.

• The residual capacity of the employee and the extent to which the employee is capable of performing the work or alternative work.

• Which adaptations can be made to the employee’s work circumstances, in order to perform the work?

• Which adaptations can be made to the employee’s duties, in order to perform the work?

When employees claim an occupational injury (particularly when that injury occurred some time ago) or disease (particularly when the onus of proof is required), the status of “the cause of the incapacity” will be determined by the commissioner, appointed in terms of the COIDA and not the medical examiner, or the employer, for that matter.

The establishment of a link between the employee’s disability and a possible injury on duty or occupational disease is important, particularly in cases of dismissal. The courts have indicated that the duty on an employer to accommodate the incapacity of the employee is more onerous in these circumstances.

The communication of the cause of incapacity to the employer may present problems. Employees suffering from alcoholism and drug abuse enjoy special attention, in the form of a requirement to the employer to consider counselling and

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111 S65 of the Compensation for Occupational Injuries and Diseases Act (Act 130 of 1993, referred to as COIDA) requires an employee to prove, to the satisfaction of the commissioner, that the employee contracted an occupational disease or that the employee contracted a disease that has arisen out of and in the course of his employment.

112 LRA Schedule 8 10(4).

113 LRA Schedule 8 10(3).
rehabilitation. Employees, however, may be reluctant to divulge this diagnosis. Similar reservations will apply with employees suffering from AIDS-related illness.

The employee enjoys procedural rights, which may impact on the medical examination. Item 10(4) of the Schedule 8 of the LRA affords the employee the right to “state a case in response to” the findings of the incapacity OME. Assistance by a trade union representative or fellow employee is also allowed.

The doctor performing the OME may, therefore, have to accommodate pre-test and post-test consultation and counselling with the employee and his elected representative(s).

Whether the employee should be afforded this right within the ambits of the OME or whether the employer confines the procedural rights to the actual disciplinary proceedings, is a matter to be decided between the employer and the employee as is the choice of which doctor performs the OME.

4.9 SICK ABSENTEEISM AND OCCUPATIONAL MEDICAL EXAMINATIONS

The employee who is frequently absent from work will, in accordance with a company’s policy, be asked to explain the reason for the absence: this process is referred to as “an absenteeism enquiry”. When, during the enquiry, the employee alleges that the absenteeism is due to reasons of illness or injury, the employer may consult the employee to assess if the cause of the illness or injury is a disability that requires accommodation.114

Similarly to the disability OME, the absenteeism OME will determine:

- Which illness(es) or injury(ies) does the employee suffer from?
- Whether the condition is permanent, intermittent or temporary.

114 Code of Good Practice: Incapacity Clause 11.3.
• When the condition is temporary: the anticipated period of absence, the anticipated date at which the employee may return to work for restricted duties and for normal duties.

• When the condition is intermittent: what is the likelihood of recurrence and what is the potential impact of this on work attendance and work capacity.

• Whether the employee is able to perform the work.

• The extent (or degree) of the incapacity or injury.

• The cause of the illness or injury.

• Where the cause is work-related, the provisions of the OHSA and COIDA, with regard to occupational injuries and diseases must be implemented.\textsuperscript{115} the doctor must report an occupational disease to the chief inspector and inform the employee accordingly.\textsuperscript{116}

• The residual capacity of the employee and the extent to which the employee is capable of performing the work or alternative work.

• Which adaptations can be made to the employee’s work circumstances, in order to perform the work?

• Which adaptations can be made to the employee’s duties, in order to perform the work?

\textsuperscript{115} The exposure or accident leading to the illness or injury must be reported and investigated by the employer. The employer must report certain (“reportable”) incidents to the Director of the Department of Labour. The employer must report the matter to the appointed health and safety representative and the investigation report must be presented to and discussed by the health and safety committee. The employer must report the injury or disease to the commissioner of the COIDA.

\textsuperscript{116} OHSA s25.
In the process of this examination, the examiner may also find that the condition or conditions which caused the sick absenteeism are no longer present. At times, the examiner may actually find no evidence of such a condition having been present.

4.10 CONFIDENTIALITY

Employers, including health and medical services personnel, may only gather private information relating to employees if it is necessary to achieve a legitimate purpose.\(^{117}\) The confidentiality of this information must be protected by the employer.

CHAPTER 5

THE DOCTOR’S ETHICAL AND LEGAL DUTIES WHEN CONDUCTING OCCUPATIONAL MEDICAL EXAMINATIONS

A patient who consults a medical practitioner has a contractual relationship with the doctor. There is no equivalent contractual relationship between an OMP and the employees he examines. The employee is undergoing the examination because of his contract of employment with the employer. Occupational medical examinations are initiated by the employer in the case of pre-placement, periodical, medical surveillance, biological monitoring, incapacity, sick absenteeism, pregnancy, benefit medical and exit medical examination. Incapacity, pregnancy and benefit medicals may occur at the request of an employee.

Doctors (and nurses) performing OME are therefore exposed to special circumstances, in that, the “patient” is not always the initiator of the doctor-patient relationship.

Doctors and nurses performing OME have to abide by the same ethical guidelines, applicable to all medical and nursing practitioners but additional ethical guidelines apply. These “Guidelines on Ethical and Professional Conduct for Occupational Health Practitioners” have been compiled by the South African Society of Occupational Medicine and are endorsed by the South African Medical Association. The guidelines apply specifically to:

- Confidentiality of clinical and scientific information.
- Management of medical records.
- Fitness for work procedures.
- Relations with other medical practitioners.
- Drug and alcohol testing.
- HIV and AIDS.
- Research.
- Whistle blowing.
5.1 CONFIDENTIALITY

The right to confidentiality of a patient is grounded in the ethical, legal and constitutional right to privacy. Professional secrecy is a primary obligation of every health professional and it is an offence to divulge verbally or in writing, any information regarding the ailments of a patient, except with the express consent of the patient.

The protection of the confidentiality of health data and of the privacy of employees is one of the principles of the International Code of Ethics for Occupational Health Practitioners, prepared by the International Commission on Occupational Health.

Disclosure of clinical information about an employee (or applicant) requires written and informed consent. Informed consent requires the OMP to counsel the employee about:

- What information will be given?
- Why the information needs to be divulged.
- To whom, what information will be divulged.
- What potential consequences may follow?

Disclosure of the medical information acquired during an OME, to a third party, without the employee’s consent can only take place in exceptional circumstances. The following pre-requisites must all be present:

- A third party, or the employee himself, is at risk of death or serious injury.
- The employee, after counselling, does not inform the third party.
- The OMP informs the employee of his intention to break the confidentiality.

Medical reports issued in terms of occupational injuries and diseases (reporting in terms of the OHSA, COIDA and ODMWA) require medical information to be divulged. Should the employee refuse disclosure the claim can not be processed. In terms of
section 25 of the OHSA, any medical practitioner who examines or treats a person for an occupational disease must report the case to the person’s employer, the chief inspector (of the Department of Labour) and inform the person accordingly.

This statutory duty of a doctor may be frustrated by an employee refusing disclosure. From an ethical point of view, it is submitted that the above pre-requisites for disclosure-without-consent apply. Some authors take the legal view that the employee’s right to confidentiality is not absolute and that section 25 supersedes confidentiality.\footnote{Benjamin cf 101at 8.}

Access to and storage of medical records is the responsibility of the OMP. Mine and works’ records must be sent to the Department of Mineral and Energy, in the case of a mine closing, when the employee ceases to be employed at the mine or if required by the Chief Inspector of Mines. An employee’s medical surveillance record must be kept for 40 years (from the date of the last examination).

5.2 INTER-PROFESSIONAL RELATIONSHIP

Where the findings of the OMP are disputed by the employee, the employee’s personal doctor may be informed (with the employee’s consent). All relevant information will be forwarded to the doctor, who will be requested for a professional opinion.

Should a difference in opinion arise between the OMP and the employee’s own doctor, the opinion of a mutually agreed consultant will be sought. The MHSA gives the employee an explicit right to appeal against decisions and findings made by an occupational medical practitioner. The employee must lodge an appeal with the medical inspector of the Department of Minerals and Energy, who must arrange for a re-examination (at the State’s expense) by a medical practitioner, not employed by the mine. The medical inspector can confirm, set aside or vary the decision or finding appealed against.
5.3 CONFIDENTIAL INFORMATION

An OMP may not divulge information about the industrial processes, which he may obtain during the course of his work. Should the process or products used by the employer pose a health, hygiene or safety risk, the OMP must remind management of their responsibilities. Where the OMP considers disclosure of these hazards (eg to employees and to the health and safety representative) necessary, and management refuses such disclosure, the OMP’s responsibility towards employees’ potential exposure must take precedence over management’s refusal. It may be necessary to resort to a court order.

5.4 MEDICAL SURVEILLANCE

The questions and procedures used in an OME must be suitable and relevant. Procedures must carry no risk to the employee’s health.

When evaluating an employer’s medical surveillance protocols and actions, against the statutory requirement of “reasonably practicable”, the occupational medicine practitioner’s knowledge, expertise and performance is imputed to the employer. The OMP’s actions are measured against the general level of skill, knowledge and diligence expected from a doctor with a specialist qualification and expertise in occupational medicine. An OMP is expected to keep abreast of developments and advise the employer of any changes that should be made to health and safety practices.

The application of the statutory standard of care, to the conduct of an OMP is illustrated by a leading British case.\textsuperscript{119} The company had employed a full-time medical officer who had specialised in occupational medicine. An employee, working as a tool-setter in 1950, was required to bend over machinery covered with a film of oil. His clothing became saturated with oil and as a result, the skin of his scrotum and groin was frequently in contact with oil. The employee developed warts on his scrotum in 1965 and died the following year, aged 43. At the time, there was medical

\textsuperscript{119} Cf 101 at 10.
evidence that five years of continuous exposure to carcinogenic oils, produces a cancerous condition in some workers.  Since the 1940’s, medical scientists had recommended that workers exposed to a risk of cancer should undergo periodical medical examinations and be warned of the risk to which they were exposed. In 1960, the Factory Inspectorate has issued a pamphlet warning workers that warts on the scrotum were potentially cancerous and recommending them to avail themselves of periodical medical examinations. The company’s medical officer did not recommend the institution of periodical medical examinations, nor did he circulate the pamphlet or issue a warning to the employees. He believed that periodical medical examinations were out of proportion to the risk of cancer and that warnings would frighten the employees. In 1963, after a worker died of scrotal cancer, the medical officer gave a talk on the dangers of scrotal cancer, to the works council, but did not notify workers more widely of the hazard.

The court found that the failure of the company to implement six-monthly examinations for workers exposed to the risk of cancer was a breach of its duties to employees and awarded damages to the employee’s widow.

The failure of an OMP to meet the required standard of conduct can lead to:

- Prosecution of the OMP for failing to comply with the requirements of the relevant statutes.
- Termination of the OMP’s contract and a claim for damages by the employer or the employee.
- Disciplinary action against the full-time OMP, for not complying with his duties.
- The employer facing civil actions or claims for increased compensation in terms of the COIDA.
5.5 COMMUNICATION

The OMP has the ethical duty to communicate the findings of an OME to the employee or applicant. This communication must consist of:

- Any abnormal findings resulting from the examination.

- The impact of these findings on the job for which the person is examined.

- Any other findings, which may impact on the person’s ability to perform the job (e.g. insufficient grip strength).

- The recommendation, which the OMP will give to the employer:
  - With regards to job placement (fit, unfit, fit with restrictions).
  - With regards to job adaptation (need for reduced duties, alternative duties, special assistance with the work or the person).

- A referral to the applicant’s or employee’s designated medical practitioner, in case the finding requires medical treatment.

- An explicit outline of the fact that the OMP gives a medical opinion only and that the ultimate responsibility for and authority to decide on job placement, job adaptation, disciplinary action or dismissal lies with the employer.

The employee enjoys procedural rights, which may impact on the medical examination. Item 10(4) of the Schedule 8 of the LRA affords the employee the right to “state a case in response to” the findings of the incapacity OME. Assistance by a trade union representative or fellow employee is also allowed. The doctor performing the OME may, therefore, have to accommodate pre-test and post-test consultation and counselling with the employee and his elected representative(s).
Whether the employee should be afforded this right within the ambit of the OME or whether the employer confines the procedural rights to the actual disciplinary proceedings, is a matter to be decided between the employer and the employee, as is the choice of which doctor performs the OME.
ANNEXURE A

OCCUPATIONAL MEDICAL EXAMINATION IN PRACTICE

INTRODUCTION

South African employees are accustomed to sporadic or regular medical examinations at the workplace. Most employees have no objection to a medical test at the workplace, provided it is performed by a registered medical professional:

- The occupational health practitioner or factory nurse. (OHP).
- The occupational medical practitioner or factory doctor. (OMP).
- The approved audiologist performing audiograms.
- The optician doing vision testing.

Medical questionnaires used by human resource personnel are not always accepted by applicants or employees and, with the rights' culture becoming established, more individuals object to the occupational medical examination, now perceived as an invasion of privacy.

THE EMPLOYERS’ DUTIES

The Mine Health and Safety Act and the Occupational Health and Safety Act prescribe the establishment of risk based medical surveillance protocols to which the employee MUST be submitted.

The employee has the right to:

- Elect any occupational medical practitioner of his choice to perform the medical examination.
• Refuse the medical examination. In this case, the employer may not allow the employee (applicant) to work and the employee (applicant) is at risk of being dismissed (refused appointment) on grounds of misconduct or incapacity.

Employers have the duty to establish and implement the practice and pay for the examinations.

The employees’ statutory right to medical examinations, outside the OHSA and MHSA, is incorporated in the employer’s policies relating to night shift work, pregnancy, disability and sick leave.

Where the employer has an established team of medical professionals performing the examinations and the employee demands to use the service of his/her private doctor, the employer can reasonably apply the following policy:

• The doctor of choice must be of the same status as the company doctor: in mines and works, the statute prescribes the services of a registered occupational medicine practitioner.

• The documentation used in the medical surveillance standard operating procedure must be used by the doctor.

• The examination must be paid for by the employee.

THE EMPLOYER’ RIGHTS

In order to establish the employer’s right to have employees medically examined, in those cases where legislation permits, employers must include occupational medical examinations in the company’s operating policies.

• The Safety and Health Policy: OME referred to will include all aspects of occupational hygiene and safety including the examination of pregnant employees and employees working night shift.
• **The Job Placement Policy**: OME may refer to aspects of *fitness for work*, including quality, productivity, diet requirements, social policy and employee benefits. The policy must refer to pre-employment examination of non-employee applicant, pre-placement examination of employee-applicants (transfer medical examination or promotion) and the disability examination.

• **The Fitness for Duty Policy**, regulating the management of employees who may be under the influence of alcohol, drugs, medication or who may present for duty in a medically unfit state. OME will be designed to assist management with the immediate action and with subsequent disciplinary action.

• **Driver, Operator Policies**: highlight the need for OME, establishing aspects of fitness for work and fitness for duty, specific for drivers and machine operators.

• **Pregnancy Policy**: fitness for work of a pregnant employee, return to work after maternity leave.

• **Absenteeism Management Policy**: determination of the medical aspects related to the sick absenteeism of employees.

• **Sick Leave Policy**: includes the medical examination of employees returning after a period of sick leave.

• **Equity Policy**: includes the fair “placement” of the pre-placement medical examination in the pre-employment chain of events and the disability OME.

• **HIV/AIDS Policy or Life Threatening Disease Policy**. OME will establish an employee’s disabilities and communicate relevant facts to management.

• **Quality Policy**: quality-related medical requirements are physical or mental abilities and the absence of identified impairments. In certain instances, as in the food handling industry for instance, extensive requirements may be
formulated for a wide range of examinations (from daily hand-, nail- and scalp inspections to invasive test, such as blood tests) by a number of trained experts (doctors, nurses) but, which may include supervisory staff.

- **Fitness for Work Policy**: the pre-placement medical examination (referred to in the job placement policy) and the periodical medical examination (referred to in the safety and health and the driver/operator policy) will establish the fitness for work. Other examinations defined by this policy are the Night Shift Worker medical examination, the Key Person medical examination (often referred to as the “executive medical”) and the Ergonomic medical examination. In the latter, work related stressors (such as changing work processes) are assessed against the ergo-metry of the employee; factors such as age, sex, and disability may have to be taken into account.

- **The “Routine” Policy**: Routine medical examinations have effectively been abolished by the Employment Equity Act's determination that medical testing of an employee is prohibited.

**MEDICAL SURVEILLANCE OCCUPATIONAL MEDICAL EXAMINATIONS**

**Definition**

Medical surveillance is a risk-based set of planned medical examinations: prior to placement in a risk area (part of the pre-placement medical examination), prior to leaving a risk area (the exit OME), after having been exposed to a risk for a certain time (often, statutorily determined; eg noise after 6 months and then yearly or 2-yearly) or when the employer is suspicious of the employee’s fitness for work (eg after an accident, after illness –as part of an absenteeism OME-).

Medical surveillance includes: pre-placement, periodical (eg noise, lead, silica, asbestos, hazardous chemical substances), key person (executive), fitness for work (eg heat, shifts, pregnancy) and exit medicals.
Purpose

- Safe and hygienic placement of a person in the job.
- Establishment of pre-existing conditions and the ensuing recommendations to the employee and the employer.
- Detect disease at an early stage.
- Assist the employer in taking action to reverse early effects or to slow the progression of the disease.
- Assess the effectiveness of workplace control measures.
- Establish any effects the employment may have had on the health of an employee (during employment –periodical OME- or at termination of employment –exit OME-).

Legal status

- MHSA, OHSA, BCEA and guidelines, codes or regulations in terms of these statutes.

Company policies

- Safety policy, which must include reference to the practice and procedures of medical surveillance.
- Job placement policy.
- Fitness for work policy.
Standards

- Statutory: MHSA, OHSA and Regulations, Guidelines\textsuperscript{120} or statutory Advisory Committees.\textsuperscript{121}

- As determined by the occupational medicine practitioner in the code of practice for medical surveillance.\textsuperscript{122}

Timing

- Pre-employment: medical examination after a conditional offer to employment has been given to the applicant.

- Pre-placement: medical examination prior to transfer from one risk area to another.

- Periodical medical examination, as prescribed by the statutes\textsuperscript{123} or the occupational medicine practitioner.\textsuperscript{124}

- Exit medical: before, or as soon as possible after, termination of employment.

\textsuperscript{120} See 16.
\textsuperscript{121} SIMRAC: the Safety in Mines Research Advisory Committee, appointed by the Mine Health and Safety Council, has issued a “Handbook of Occupational Health Practice in the South African Mining Industry”, which provides practical tools for the implementation of a medical surveillance code of practice.
\textsuperscript{122} An example of this determination: the Hazardous Chemical Substances (HCS) Regulations of the OHSA, determine that the medical surveillance protocol for HCS has to take cognisance of the following:
Every employee “who may be exposed” to a substance listed in Table 3 of Annexure 1, must be under medical surveillance (HCS Reg 7(1)(a)). This may include the sampling of (exhaled) air, blood or urine specimen.
Every employee exposed to any substance, which may be hazardous to the health of the employee, must be under medical surveillance (HCS Reg 7(1)(b)). An employee must be under medical surveillance when the occupational health practitioner recommends this practice (HCS Reg 7(1)(c)). The appropriateness of the medical surveillance must be ratified by an occupational medicine practitioner (HCS Reg 7(1)(c)).
\textsuperscript{123} The performance of medical surveillance on persons working in a noise zone is regulated by the OHSA Environmental Regulations for Workplaces, which refers to the SABS Code 083.
\textsuperscript{124} An employee must be under medical surveillance when the occupational health practitioner recommends this practice (HCS Reg 7(1)(c)). The appropriateness of the medical surveillance must be ratified by an occupational medicine practitioner (HCS Reg 7(1)(c)).
Contents

• A general medical questionnaire.

• An occupational history questionnaire.

• A hazard-specific (eg chemical, noise, fumes) questionnaire.

• A physical examination.

• Special tests (if relevant): blood tests (eg random glucose or haemoglobin level), audiometry (person employed in a noise zone), lung function testing (eg persons working with raw cotton fibres), chest X-ray (eg persons working with silica), electrocardiogram (eg heavy duty drivers), cardio-vascular stress testing (eg person working in heat zones).

• Biological monitoring: persons working with specific substances may require urine (eg employees in the paint industry working with toluene) or blood tests (eg persons working with lead).

Outcomes

An applicant or employee may be:

• Fit for the work.

• Fit, but required to return for re-examination within a shorter period of time (eg employees working in a noise zone, who display a significant drop in hearing, as measured with an audiogram, will be required to be re-examined after 6 months).

• Fit, provided certain special precautions are taken (eg underground miners, requiring glasses, need to take two pairs of glasses underground).
• Temporarily or permanently unfit for the job.

**Copies of reports to**

• To the employer: the contents of the information released to the employer must be relevant to the medical surveillance and must be released with the consent of the employee.

• The employee if requested. A copy of the exit certificate, in terms of the MHSA, must be provided to the employee.

• To any other person, provided the employee consents in writing, to release the information.

**Employer not performing medical surveillance**

• An employer outside the mining industry, who does not perform mandatory medical surveillance is liable to criminal prosecution and, if found guilty, may be imprisoned for up to two years and/or be fined up to R100 000.

• Owners of mines and works must perform medical surveillance on their employees and, failure to do this may lead to imprisonment of up to two years and/or a fine determined by the Court.

**Employee refusing**

• The duty to perform medical surveillance is placed on the employer.

• The employer will impose the duty of medical surveillance on all relevant employees. As every employee must co-operate with the employer in order to enable the employer’s duty or requirement to be performed or complied with and every employee has to carry out any lawful order given, obey the health and safety rules and procedures laid down by his employer in the interest of
safety and health, it is postulated that an employee may not refuse to undergo medical surveillance.

- An employer may not permit an employee who requires to be under medical surveillance (e.g., hearing testing) to work in an area where such testing is mandatory (e.g., a noise zone).

**Employee not agreeing**

- An employee who does not agree with the finding of a medical surveillance examination may request a second opinion.\(^{125}\)

- This dispute will require resolution in terms of the company’s policies and procedures (job placement, fitness for work policies, disciplinary and grievance procedure).

- The MHSA specifically regulates this process through the services of the Medical Inspector of Mines.

**Assessment of fairness**

The fairness of the contents of medical surveillance protocols, of the distribution and execution of the examinations and of the management of the outcome protocols will be assessed against the background of what is considered “reasonably practicable”, the scientific background of the medical requirements and the execution of the OME, the selection of which employees are examined and the actions taken by the employer.

**The term “reasonably practicable”**

Both the OHSA and MHSA qualify the duties they impose, with the term “reasonably practicable”

\(^{125}\) MHSA s20.
practicable”. There are few South African cases guiding this principle. The English courts have, for instance, decided that the fact that a particular safety precaution is applied universally throughout the industry does not always make it reasonably practicable. The term is further discussed under the heading “The doctor’s ethical and legal duties” (page 65).

The scientific background of the medical requirements and the execution of the OME

Where directed by the statutes, an employer is legally bound to appoint an occupational medicine practitioner (OMP) and rely on his/her professional recommendations with regards to the medical aspects of risk management and medical surveillance. When evaluating whether an employer acts reasonably practicable and fair, the OMP’s knowledge and expertise are imputed to the employer. The OMP’s conduct will be measured against the general level of skill, diligence and knowledge of a medical practitioner with a specialist qualification in occupational medicine.

Where the OMP fails to perform an OME to the required standard, the employer could face civil actions and claims for increased compensation in terms of the COIDA, based on the employer’s failure to comply with the health and safety duties. The OMP personally, can also face several claims.

The OHSA acknowledges the scientific shortcomings facing the OMP, when deciding on the format of medical surveillance: “The onus is on the occupational health practitioner carrying out the medical surveillance to be familiar with the latest scientific information … and tests that might be useful. The aim should be to design

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126 Whether a measure is reasonably practicable requires a two staged approach. A measure is practicable if its implementation is feasible and possible without practical difficulty. Whether it is reasonably practicable depends on:
1. The severity and the scope of the occupational hazard or risk; 2. The available scientific knowledge concerning the management of the hazard (the knowledge that reasonably should be available); 3. The availability and suitability of risk management measures; 4. The cost implications and financial viability of risk management.


a programme that is rational, ethical and effective. This may have to be done in the face of incomplete information or uncertainty regarding exposures, toxicity and test performance.”

The selection of employees

- Employees submitted to medical surveillance must be chosen from a geographical and/or functional perspective:

  - The geographical perspective refers to exposure zones or areas: all employees working in a mine must be subject to medical surveillance; employees working in that mine’s heat zone underground will undergo different testing from office staff working in the mine’s surface area; employees working in the mine’s offices in town, outside the geographical area of the mine, may not require medical surveillance at all.

  - Functional exposure refers to the specific work exposures of an employee, irrespective of the place of work, but related to the work performed: welders expose their lungs to welding fumes, scaffold workers are at risk of falls, should they become dizzy, medical personnel can contract tuberculosis when working with tbc patients.

  - Both geographical and functional exposures are determined by the risk assessment and risk measurement, which is a mandatory requirement for every employer.

  - For every job, a hazard identification, risk assessment and risk measurement study must be available and included in the person-job specification.

129 OHSA HCS Regulations Annexure I 4.4.2.
• Results of previous OME (eg an employee with a known ear disease may be examined more frequently) and known personal factors (eg pregnancy, disability) may affect the frequency and type of OME.

The actions taken by the employer

• Dismissal: LRA and Code of Good Practice: Dismissal.

• Duty restriction: LRA and Schedule 7, Part B, conduct of the employer relating to promotion or demotion or the provisions of benefits to an employee and Code of Good Practice: Disability.

PRE-EMPLOYMENT/ PRE-PLACEMENT MEDICAL EXAMINATION

Purpose

• Medical surveillance OME.

• Establish whether an applicant for a job meets the physical and mental requirements, inherent to the job (“pre-placement medical examination of an applicant”).

• Establish whether an employee meets the requirements of a new job or altered process (pre-placement medical examination of an employee).

Legal status

• OHSA, MHSA with regards to medical surveillance.

• EEA: inherent requirements of the job, as defined in the person-job specification.
Company policies

- The Safety and Health policy: with regards to the medical surveillance aspects.

- The Job Placement policy and fitness for work policy: refer to person-job specification and may include:
  
  - Quality requirements: *eg* accurate near vision in textile inspectors; absence of chronic skin or scalp conditions in food handlers.
  
  - Productivity requirement: *eg* minimum height requirement in packers, requiring to reach a certain height in order to pack bobbins on a machine; use of two hands in transporters; strength requirement for employees packing crates.
  
  - Client requirements: *eg* temporary employment services (labour brokers) may have clients who require placement of employees in noise zones; the labour broker will require his employees to have an audiometric examination, although the employee is not *per se* employed in a noise zone.

- Driver, operator policies: coded drivers requiring a Professional Drivers Permit (PDP) or forklift operators requiring a driver’s medical examination.

- Equity policy: the pre-placement medical examination must be done after an applicant has been given a job offer. Job placement of persons with disabilities.

Standard

The person-job specification.
Timing

After a job offer was given. The appointment of the applicant is subject to him/her complying with the medical requirements of the person-job specification.

Contents

• Identical to the medical surveillance examination.

• Specific requirements may be included in the special examinations: eg Vision: colour vision; Strength: grip and back strength are commonly measured in view of ergonomic requirements.

Outcomes

• The report issued by the OMP, is an internal advisory document to management: the actual decision whether to employ the applicant is made by management.

• The applicant may be declared:

  o Fit for the work.

  o Fit, provided certain special precautions or certain accommodation is made available by the employer (eg a diabetic forklift driver may require regular medical check-ups and confirmation that the condition is controlled).

  o Unfit for the job.

• Employers may, for instance, in the case of highly skilled employees whose services are difficult to obtain, make exceptional work accommodation (eg
computerised milling machine operators – CNC operators - in the metal engineering industry).

Copies of report to

- To the employer: where the employee is declared unfit for the job, the OMP is required to counsel the employee. The report to the employer need not contain any medical information. Where the employee is booked provisionally fit, the employer will require sufficient knowledge of the employee’s medical condition, in order to manage the occupational risk and make the necessary accommodation. An employer is entitled to all relevant information. If accommodating the employee requires the co-operation of other employees, it may be necessary to reveal the fact of a person’s disability to some of the person’s colleagues, particularly a supervisor or manager. The employer may, after consulting the person with the disability, advise relevant staff that the employee requires accommodation, without disclosing the nature of the disability, unless this is required for the health or safety of the person with the disability or other persons.

- The employee if requested.

Employer not performing

There is no legal requirement for an employer to perform a pre-placement medical, except all requirements referred to in the medical surveillance pre-placement OME.

Employee refusing

It is reasonable to expect the employer to decline the appointment or promotion, where the prospective candidate refuses to submit to the medical examination. The employer may be required to give the applicant an opportunity to state his case as to the reasons for the refusal. Where the refusal relates to the applicant disputing

\[130\] Code of Good Practice: Disability Rule 14.2.6 and 14.2.7.
which inherent requirement of the job is being assessed, it is submitted that the onus of proof will lie with the employer. The employer will be required to prove how potential different outcomes of the proposed medical test will result in different actions on the part of the employer with regard to job placement of the applicant.

**Employee not agreeing**

It is an integral part of the duty of an OMP to communicate the findings of an OME with the applicant or employee (see “Ethics”).

An employee who does not agree with the outcome of a pre-placement medical examination may, in the case of a mine or works, apply to the Medical Inspector of the Department of Mineral and Energy. Where the employer does not fall under the MHSA, there is no statutory right of a second medical opinion. In accordance with ethical medical practice, the OMP may refer the employee or applicant to a doctor of his/her choice for a second opinion. Should the employee’s doctor and the OMP have a different opinion (with a different impact on the recommendation for job placement to the employer), the opinion of a mutually agreeable medical expert may be sought.

Where, as a result of the medical report, the **employer refuses the appointment** of an applicant or the promotion of an employee, a case of unfair labour practice can be made. Section 11 of the EEA has been interpreted to mean that the onus will be on the applicant (for the job) to prove that there was discrimination, and to allege that such discrimination was unfair. The onus then passes to the employer to establish either that no discrimination had taken place, or, alternatively, that such discrimination was fair within the meaning of section 6(2).  

**SICK - ABSENTEEISM MEDICAL EXAMINATION**

Where management perceives an employee’s absenteeism record to be unacceptable, the employee will be required to explain the reason for the prolonged

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131 *Cf* 40 at 455.
or recurrent absence from work. In the case where the employee alleges medical reasons for the absenteeism, management may request a sick-absenteeism medical examination.

Purpose

The brief of this examination is to:

- Determine the reason for recurrent or prolonged sick leave.
- Determine measures for future prevention.
- Determine how the employee may be assisted, with treatment, early re-introduction and rehabilitation.

Legal status

The employer’s right to request an employee to undergo an absenteeism medical examination is based on:

- The OHSA and MHSA require safe job placement: an employee with a medical condition may endanger himself (eg epileptic scaffold worker) or others (eg employee with infective tuberculosis).
- The BCEA regulates the medical assessment of pregnant employees and night workers. The Act also regulates payment of sick leave (section 23): “An employer is not required to pay an employee sick leave, if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight week period and, on request of the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee’s absence on account of sickness or injury. The medical certificate must be issued and signed by a medical practitioner or person who is certified to diagnose and treat patients and who is registered with
a professional council.” The validity of the certificates may be in question, thus necessitating a medical expert opinion.

- The EEA regulates the medical examination of persons with disabilities. Medical tests must be necessary to the employer’s business, relevant and appropriate to the kind of work performed, the fitness criteria for the job, the workplace and the hazards of the workplace. An employer need not retain an employee with a disability, if objective assessment shows that, even with reasonable accommodation, the work would expose the employee or others to substantial health risks and there is no reasonable accommodation to mitigate the risk.

**Company policies**

Company policies referring to the absenteeism OME:

- Safety and Health policy, driver and operator policies: safe job placement, ongoing surveillance of the effect of the work on employees.

- Fitness for duty policy: determination whether alcohol, drugs or medication affect the work attendance.

- Pregnant and lactating mother's policy.

- Absenteeism management policy and the sick leave policy.

**Standard**

- The person-job specification.

- Sick certificates have to be of an acceptable standard.
• The employer’s period of concern must be defined (and must be the same period as the one which was the subject of the absenteeism enquiry).

Timing

The absenteeism OME occurs after the employer has enquired into the perceived excessive absenteeism, the employee has alleged a medical reason and has agreed to an OME. The employee should be counselled prior to the examination\(^{132}\) and the employer must obtain an “informed consent” from the employee. The findings of the OME and the report, which the OMP releases to the employer, must be discussed with the employee. The employee’s consent is required prior to releasing the report: the OMP may request a written consent to disclosure on the report, or rely on a tacit consent, by handing the report to the employee personally who may then present it to the employer.

Contents

• A questionnaire, specific for the period of absenteeism and the illness or injury causing the absenteeism.

• A general medical and an occupational history questionnaire.

• A physical examination, if required.

• Special tests may be necessary to determine whether the condition is work related and to determine the severity of the condition.

• Where the employee appears to be disabled, the absenteeism OME may take the form of disability OME.

• Biological monitoring: persons working with specific substances may require special tests.

\(^{132}\) See above 5.5 Communication.
• Where management suspects that the employee may be absent for reasons other than the stated illness on the certificate, the OMP must contact the doctor who issued the certificate. The standard of this intra-professional process is guarded by ethical rules.

**Outcomes**

The outcome of this examination may be:

• There was (at the time of the absence form work) or still is a valid medical reason for the absenteeism:
  
  o Related to the work (*eg* a welder developing asthma).
  o Not related to the conditions at work (*eg* adult onset asthma).

• The diagnosis on the medical certificates, forming the base for the absenteeism, do not correspond with the illness of the employee (*eg* employee booked of for “myo-fibrositis”, but suffered from Monday-hang-overs).

• There is no evidence of a chronic or recurrent ailment causing the sick absenteeism (*eg* employee booked off for different, non-related, minor ailments).

**Recommendations to the employer**

• There is a valid medical reason for the absenteeism: the job placement of the employee must be adapted and, if the condition is an established occupational disease, the statutory processes in terms of the OHSA, MHSA, COIDA or ODMWA must be applied.

• The diagnoses on the medical certificates do not correspond with the illness of the employee or there is no evidence of a chronic or recurrent ailment causing
the sick absenteeism: this will be reported factually to the employer, who may engage in a disciplinary process.

Copies of report to

- The employer: as far as confidential information may be included, the employee’s consent is required.
- The employee.
- The employee’s treating doctor.\textsuperscript{133}

Employee refusing

In terms of section 23 of the BCEA an employer is not required to pay an employee sick leave if the employee, does not produce a medical certificate stating that the employee was unable to work on account of sickness or injury.

Where the validity of the certificate has become a matter of dispute (eg when the employer disputes the findings of the doctor who certified the employee to be incapacitated for work) and the employee refuses to the absenteeism OME, the employer may refuse to pay the sick leave.

Where the absenteeism OME has to shed light on future job placement, the employer may suspend the employee until a medical report has been received. The dispute, where the employee refuses to be examined by the company OMP, may be resolved

\textsuperscript{133} South African Society of Occupational Medicine  \textit{Guidelines on ethical and professional conduct for occupational health practitioners} Item 5 at 8: “From time to time the medical officer may be asked by management to enquire about the health of a worker. The occasion may also arise that management has reason to suspect that a worker may be absent for reasons other than the stated illness. In these cases, the closest possible co-operation with the worker’s practitioner should be sought. If this fails, the medical officer may examine the worker at the request of management, with the informed consent of the worker and, he should inform the practitioner concerned, of the time and place of his intended examination. Should a difference in medical opinion arise, the opinion of a mutually agreed consultant should be sought. If the need arises for the doctor employed in industry to query a sick certificate, he should consult the doctor who issued the certificate. In no circumstances should he supersede the opinion of another doctor, without prior consultation.”
where a “neutral” doctor can be agreed on between the OMP, the employee’s private
doctor and the employee.

**Employee not agreeing**

As with other OME, it is an integral part of the duty of an OMP to communicate the
findings of an OME with the employee. An employee who does not agree with the
outcome of an absenteeism OME may request that the OMP refers the employee to
a doctor of his/her choice for a second opinion. Should the employee’s doctor and
the OMP have a different opinion (with a different impact on the recommendation for
job placement to the employer), the opinion of a mutually agreeable medical expert
may be sought.

Where, as a result of the medical report, *the employer refuses to pay the sick leave*,
the employee may lodge a complaint with the Department of Labour, can bring a
claim arising from the contract of employment or can bring a claim in a civil court,
including the Small Claims Court (BCEA section 77).

Where, as a result of the medical report, *the employer demotes or dismisses* the
employee, a case of unfair labour practice or unfair dismissal can be made.

**Assessment of fairness**

As with job placement the onus of proof of the fairness of the labour practice will rest
on the employer. The findings of the absenteeism OME will be the substantive part
of the proof.

**EXIT MEDICAL EXAMINATION**

**Purpose**

The purpose of the examination is to establish any medical defects or the lack
thereof at the time of leaving the workplace.
The defects may have been present upon employment (eg established hearing loss), may have become apparent during employment but are not related to the work or may have been caused by injuries on duty or by occupational disease.

Legal status

The MHSA (section 17) requires that every employee at a mine, whose employment is terminated ("for any reason"), must undergo a medical examination before, or as soon as possible after, termination.

The OHSA does not explicitly mention exit medicals, but includes them in the medical surveillance. The Draft Noise Induced Hearing Regulations prescribe “an exit audiogram, which is obtained in accordance with the requirements of SABS 083, for every employee whose employment is terminated or who is permanently transferred to another workplace in respect of which audiometric tests [are not required]”.

Company policies

Health and Safety Policy.

Standards:

- Statutory: MHSA, OHSA and Regulations, Guidelines or statutory Advisory Committees.

- As determined by the occupational medicine practitioner in the code of practice for medical surveillance.

- The risk assessment and measurement of the workplace and the person-job specification of the work performed by the employee, determine the defects which must be excluded.

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134 Cf 95.
135 Government Gazette 22499 Notice 681.
Timing

Before or as soon as possible after the termination of employment.

Contents

- General medical questionnaire.
- Injury on duty and occupational disease-specific questionnaire.
- Hazard-specific questionnaire.
- Clinical medical examination and any special tests, relevant to the type of defects sought.
- Declaration by the employee: a written listing, and explanatory note, by the employee of which defects he/she is leaving the workplace with and the (perceived) connection these may have with the workplace.
- Conclusive report (opinion) from the OMP to management.

Outcomes

The report may conclude:

- No ailments at exit.
- Established loss due to an occupational injury or disease:
  - Claimed and compensated by the COIDA or ODMWA.
- Claimed and not yet compensated by the COIDA or ODMWA: the employer must continue with the claim management, although the person no longer is an employee.

- Not claimed from the COIDA or ODMWA: the OMP performing the exit OME must initiate the claim and report the occupational disease to the Inspector of the Department of Labour.

- Established loss, but not due to an occupational injury or disease.

**Copies of report to**

- To the employer: the contents of the information released to the employer must be relevant to the medical surveillance (thus allowing for non-work related information to be omitted) and the presence or absence of an occupational disease. A copy may be released only, with the consent of the employee. There is no legal duty to supply the employer with a copy of the exit medical certificate, but a copy must be kept in the medical surveillance record.

- The employee if requested. The MHSA, however, instructs the OMP to provide the employee with a copy.

- To any other person, provided the employee consents, in writing, to release the information.

**Employer not performing**

- An employer outside the mining industry, who does not perform mandatory medical surveillance (which includes the exit OME) is liable to criminal prosecution and, if found guilty, may be imprisoned for up to two years and be fined up to R100 000.
• Owners of mines and works must perform medical surveillance on their employees and, failure to do this may lead to imprisonment and/or a fine.

**Employee refusing**

• Section 17(3) of the MHSA is explicit: “The employee must attend the [exit] examination.”

• The onus of performing the exit OME, as with so many health and safety requirements, lies with the employer. An employment relationship can, in certain circumstances endure beyond its lawful termination;\(^\text{136}\) this, it is submitted, mostly benefits the employee who can rely on statutory employee-rights. Although the OHSA instructs every employee to co-operate with his employer, with regard to any duty or requirement imposed on his employer and employees must carry out any lawful order and obey the health and safety rules and procedures laid down by his employer in the interest of safety and health, employers have limited power to force an employee’s attendance at an exit OME. Some employers include the exit OME in the termination-of-employment procedure: The employee’s documentation and final pay-out (including salary and retirement contribution) are withheld until the employee complies with the completion of an agreed set of procedures (return of equipment and company cars, reimbursement of loans, resignation from insurance schemes, agreements of non-disclosure or restricted employment, exit OME, etc). The legality of an agreed withholding of salaries and pension/retirement funds may be arguable.\(^\text{137}\)

**KEY PERSON OCCUPATIONAL MEDICAL EXAMINATION**

The key-person occupational medical examination, often referred to as “executive medical” is a periodical medical examination of an employee who holds a key

\(^{136}\) *Borg Warner SA (Pty) v National Automobile & Allied Workers Union (now know as National Union of Metalworkers of SA* (1991) 12 ILJ 549 (LAC) at 557G-I.

\(^{137}\) For and in dept discussion on set-off and cession of remuneration, see Brassey *Employment and Labour Law* Volume 1 E1:26.
function in the employer's business.

This OME is partly a special form of medical surveillance (in as much as the effect of occupational hazards is assessed) and partly a contract-based business risk assessment (in as much as the health of the key person may be a critical business issue).

**Purpose**

The purpose of the key person OME must be clearly outlined in a "Key-Person OME Policy":

- The aspects of medical surveillance are identical to other employees: a risk based OME.

- The aspects of general health have to be outlined on a contractual basis, and must address:
  - Can the employee refuse this aspect of the key person OME?
  - Can the employee refuse disclosure of the result of this aspect of the key person OME to the employer (eg refusing to disclose the existence of a heart condition, which may affect work attendance)?
  - Can the employee refuse disclosure of selected results (eg refusing to disclose a high blood cholesterol level, which pre-disposes to the development of a heart condition)?

*Purpose of medical surveillance include:*

- Pre-placement key OME: safe and hygienic placement of a person in the job and establishment of pre-existing conditions.
• Detection of occupational disease (eg stress related disorders) at an early stage.

• Assist the employer in taking action to reverse these effects or to slow the progression of the disease.

• Assess the effectiveness of workplace control measures.

• Establish any effects the employment may have had on the health of an employee.

*Purposes of general health screening include:*

• Assistance with the curative and preventative measures (eg medication, organised physical training).

• Assessment of business risk with regards to work attendance, performance, continuity planning, education.

The annual complete medical examinations, including a personal risk assessment for frequently occurring “dread” diseases, may be considered a perk of the job. Certainly, the fact that the employer foots the bill is a perk. But the potential effects of the disclosure of diseases or risk factors to the employer, on the key-employee’s career prospective, must be taken into consideration.

*Legal status*

• In as far as the OME is a part of the medical surveillance programme, the OHSA and MHSA refer.

• The voluntary health screening is contract-based.
• With regards to the profitability requirement of a business, the contents of the “inherent requirements” of a key person’s position is probably not all that different from that of any other employee. The LC and LAC judges in the Woolworths cases expressed different opinions on how relevant business profitability is. The requirement of “continuity of employment” is totally dispelled by Waglay B (“No employer can receive any guarantee that an incumbent will remain in its employ for an uninterrupted period anytime”).

• However, the same judge acknowledges that “getting a job done within a prescribed period could well be an inherent requirement”.

Company policies

Key person OME are defined in the Fitness for Work Policy. The definition of a key person, the contractual obligation to attend, and the amount of information the company requires the doctor to release and the potential consequences of the different outcomes must be clearly outlined.

Standards, timing and contents are all based on the requirements of the medical surveillance protocol and on the contractual agreement. Other factors which require careful regulations are the potential outcomes, the identification of the persons who have access to the medical report, the action of the employer in the case where the employee refuses to be examined or does not agree with the doctors’ findings.

THE OME OF PREGNANT EMPLOYEES AND NURSING MOTHERS

The Constitution, the LRA, the EEA, the BCEA, the OHSA and MHSA

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Cf 70, 71.

Waglay in Woolworths LC (cf 72) at [30]: “... the fairness or unfairness of the discrimination cannot be measured against the profitability or for that matter efficiency of a business enterprise”.

Willis in Woolworths LAC (cf 71) at [134]: “… profitability is a relevant consideration. If our Labour Courts were to make their decisions entirely indifferent to profitability, the consequences for our society would be disastrous”.

S12(2): reproduction, s27(1)(a): right to reproductive health care, s9(3), (4): no person may be discriminated against on account of pregnancy.

S187(1).

S6.

S26.
contain special provisions concerning the protection of the health of women against potential hazards in their working environment during pregnancy, after the birth of a child and whilst breast-feeding. The Code of Good Practice on the Protection of Employees During and After the Birth of a Child has been issued in terms of section 87(1)(b) of the BCEA and guides employers and employees concerning the application of section 26(1) of the BCEA, which prohibits employers from requiring or permitting pregnant or breast-feeding employees to perform work that is hazardous to the health of the employee or that of her child.

Item 5.6 of the Code of Good Practice on the Regulation of Working Time provides that shift arrangements for pregnant employees must be considered.

The proposed protection mechanisms are:

- Work hazard identification, risk assessment and risk management specific to pregnancy and lactation.
- Listing all non-hazardous occupations.
- Education and training.
- Workplace policies and procedures with regards to notification of pregnancy and the medical examination of the employee.
- Arrangements for ante-natal and post-natal care.

Purpose

The pregnancy OME aims to:

- Establish the existence of a pregnancy and the anticipated date of confinement.

Both the MHSA and OHSA require the employer to provide a work environment that is safe and
• Establish the effect of the pregnancy on the work and vice versa.\textsuperscript{145}

• Advise the employer on job adaptation.

**Legal status**

The OME of the pregnant employee is advocated in the Code:

• **Rule 5.7**: When an employee notifies an employer that she is pregnant, her situation in the workplace should be evaluated. The evaluation should include an examination of the employee’s physical condition by a qualified medical professional.

• **Rule 5.10**: If there is any uncertainty or concern about whether an employee’s workstation or working conditions should be adjusted, it may be appropriate, in certain circumstances, to consult an occupational health practitioner.

• **Rule 5.14**: Where there is an occupational health service at a workplace, appropriate records should be kept of pregnancies and the outcome of pregnancies, including any complications in the condition of the employee or child.

The OHSA and MHSA contain general provisions of safe and healthy job placement. This will, inevitably, require the establishment of the existence of a pregnancy and an expected date of confinement.

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\textsuperscript{145} without risk to the reproductive health of employees.

The first 16 weeks of the pregnancy mark the formation of the foetus with extremely fragile cell divisions and a high risk of abortion and malformation. From 16 weeks onwards, the bulge of the abdomen, associated discomfort and ergonomic hindrance may require job adaptation. From 36 weeks till term, the effective functioning on a continuous basis is impaired. Physical work for the duration of a normal shift is impossible. Office work is pre-disposing to venous return problems. Post partum complications on the maternal side are breast feeding problems, insomnia, venous flow problems and tiredness. The well-being of the newborn will also affect the attendance and the performance of the nursing mother.
Certain jobs carry direct statutory restrictions (eg work in a lead zone, diving) or indirect restrictions (eg work involving whole body vibration or where the abdomen is exposed to shocks or jolts).

The Nuclear Energy Act 131 of 1993 controls the use of electronic products involving radio-activity, and regulates the medical examinations of registered radiation workers.

Company policies

An employer’s policy on pregnant mothers refers, amongst other, to pregnancy OME. The pregnant employee must be offered alternative employment during her pregnancy, on terms that are no less favourable than the employee’s ordinary terms and conditions of service (BCEA section 26(2)). The OME will have to conclude on:

- Exclusive activities, *ie* the work, which the employee can not perform.
- Inclusive activities: *ie* the work, which the employee is able to do.

Standards

- Person-job specification.

- Mandatory risk assessment: Code item 5.3: Where appropriate, employers should maintain a list of employment positions not involving risk, to which pregnant and breast-feeding employees could be transferred.

Timing

Employees must be encouraged to inform the employer of their pregnancy, as early as possible.

Contents

Non invasive clinical and ultrasonic examinations.
Outcomes

The pregnancy OME will outline:

- The existence of a pregnancy, the current duration of the gestation, the anticipated date of confinement and, if there is a clear policy on maternity leave, the date on which the employee will stop working.

- The impact of the pregnancy on the job performance (eg abdominal bulk prevents the employee from leaning over a machine to do the normal work).

- The risks associated with the stage of the pregnancy and the recommendation to the employer.

- Where the OME excludes all placements at the employer’s workplace and no alternative work is available, the pregnant employee may not be given work. This is only acceptable, if the OME provides conclusive proof that it is not practicable to place the pregnant employee in the workplace.

Copies of report to

- To the employer: the contents of the information released to the employer must be relevant to the occupational impact; eg the existence of twin pregnancy will shorten the period, which a factory worker can work during her pregnancy, because of the impact of the abdominal bulk.

- The employee and to any other person, provided the employee consents in writing, to release the information.
Employer not performing

The employee’s obstetric doctor can provide some of the information. The employer has no statutory duty to perform a pregnancy OME; the Code is intended as a guideline only. The norms established by the Code are general and may not be appropriate for all workplaces. The Code acknowledges that a departure from these norms may be justified in proper circumstances.

Employee refusing

The onus of an early reporting of a pregnancy lies with the employee. The onus of job adaptation and restriction of potential exposures lies with the employer.

The refusal to be examined or to report a pregnancy can be construed as a self-inflicted restriction of the many rights of a pregnant employee.

Employee not agreeing

Where the employee disagrees with the findings of the OMP, the employee’s personal doctor may be informed (with the employee’s consent). All relevant information will be forwarded to the doctor, who will be requested for a professional opinion. Should a difference in opinion arise between the OMP and the employee’s own doctor, the opinion of a mutually agreed consultant obstetrician will be sought.

THE OME OF THE EMPLOYEE RETURNING AFTER MATERNITY LEAVE

The physical work-capacity of the employee who returns after a pregnancy is, at times, different from what it was before the pregnancy:

- Pregnancy complications have an impact on the employee’s ability to return to work. This effect may be temporary (eg a caesarean section will prolong the impairment of an employee engaged in heavy physical duty) or permanent (eg post-natal venous thrombosis will prevent an employee from doing standing and dangerous work).
• Medical conditions, such as diabetes and hypertension, often appear during pregnancy and affect the employee even after confinement.

• Breast-feeding mothers may suffer from engorgement of the breasts.

The medical examination of employees returning from maternity leave is a special form of pre-placement leave. It is different from other pre-transfer (or pre-promotion) medical examinations, in that the refusal to allow an employee to resume work after maternity leave amounts to an automatically unfair dismissal.146

Purpose

The placement of post-maternity employees in the workplace requires the establishment of the temporary or permanent impact of the pregnancy on the employee work capacity.

Legal status

• OHSA, MHSA with regards to medical surveillance.

• EEA: inherent requirements of the job, as defined in the person-job specification.

• LRA: special protection of the pregnant employee.

Company policies

• The Safety and Health policy: with regards to the medical surveillance aspects.
• The Job Placement policy and fitness for work policy: person-job specification.
• Driver, operator policies.
• Pregnancy policy.

146 LRA s186 c) and 187(1)(e).
- Equity policy: Job placement of persons with disabilities.

**Standards**

Person-job specification: the examination will consist of a verification that the employee’s post-maternity work status is in accordance with the P-J specifications.

**Timing**

Prior to re-entry on the shop-floor.

**Contents**

- General medical questionnaire.
- Pregnancy-specific questionnaire.
- Clinical medical examination relevant to the type of defects sought: *eg* abdominal examination in case of caesarean section, blood pressure measurement in case of pre-eclampsic toxaemia or hypertension.
- Conclusive report from the OMP to management.

**Outcomes**

- The report issued by the OMP, is an internal advisory document to management.
- The post-maternity employee may be declared:
  - Fit for the work.
Fit, provided certain special precautions or certain accommodation is made available on a temporary (e.g., regular medical check-ups confirming that the condition is controlled) or permanent basis (e.g., assistance with certain aspects of the job, alternative job placement).

Unfit for the job: the report will then have to take the shape of a disability OME report.

Copies of report to

- To the employer: As with other pre-placement OME, where the employee is declared unfit for the job, the OMP is required to counsel the employee. The report to the employer need not contain any medical information.

- The employee if requested.

Employer not performing

There is no legal requirement for an employer to perform a post-maternity OME, except for the medical surveillance requirements.

Employee refusing

It is reasonable to expect the employer to refuse the re-introduction of a post-maternity employee in a hazardous work-place, where she refuses to submit to the medical examination. The employer is required to give her an opportunity to stake her case as to the reasons for the refusal. Where the refusal relates to the applicant disputing which inherent requirement of the job is being assessed, the onus of proof will lie with the employer. The employer will be required to prove how potentially different outcomes of the proposed medical test will result in different actions on the part of the employer and with regard to job placement of the applicant. This process is particularly sensitive because of the risk of automatically unfair dismissal.
Employee not agreeing.

An employee who does not agree with the outcome of a post-maternity OME may request a second medical opinion. The OMP will refer the employee to a doctor of her choice. Should the employee’s doctor and the OMP have a different opinion (with a different impact on the recommendation for job placement to the employer), the opinion of a mutually agreeable expert obstetrician will be sought.

Assessment of fairness

The assessment of the fairness of the requirement of, the contents of and the outcome of a post-maternity medical examination engages the rules of fair dismissal, fair labour practices and fair treatment of persons with disabilities.

THE OME OF THE NIGHT SHIFT EMPLOYEE

Purpose

Employees involved in regular night work disrupt their circadian (daily body) rhythms. This may result in physical, psychological, emotional and social stresses. The effectiveness of medication may be affected by a circadian change. Employees with gastro-intestinal, cardio-vascular and epileptic conditions may not adapt to night shift work. A night shift worker occupational medical examination is a statutory right of every employee who regularly performs night shift work.

Legal status

- Section 17(3)(b) of the BCEA directs an employer to make arrangements for every employee, who regularly performs night shift work, to undergo a medical examination.

- Section 7 of the BCEA requires employers to regulate employee’s working time in accordance with the OHSA and MHSA and with due regard to the health and safety of employees and their family responsibilities.
Employers must take working-time schedules into account, in complying with their statutory duties to provide and maintain a safe and healthy work-place environment (OHSA and MHSA).

A Code of Good Practice on the Arrangement of Working Time is issued in terms of section 87(1)(a) of the BCEA.

**Company policies**

The night shift worker OME is defined in the Fitness for Work Policy. The potential consequences of the different outcomes must be clearly outlined.

Standards, timing and contents should be determined by individual or collective agreement in the light of the employee’s health status, the nature of the work the employee performs and the employee’s working hours.\(^\text{147}\)

Factors which require consensus are the potential outcomes, the identification of the persons who have access to the medical report, the action of the employer in the case where the employee does not agree with the doctors’ findings.

**Standards and contents**

The Code outlines what the examination should cover (rule 8.4):

- Any difficulties, the employee may have in adapting to night shift work routines.
- Any health problems that the employee is manifesting.
- Any psychological, emotional and social stresses experienced by the employee.

\(^{147}\) Code Arrangement of Working Time Rule 8.3.
• Strategies that may help the employee cope with night work.

• Education input on the risks of shift work.

• Insomnia and problems of sleep deprivation, such as irritability and chronic fatigue.

• The use of medication affected by the circadian rhythms.

• Diet and the use of caffeinated drinks, alcohol, sleeping pills and cigarettes.

**Timing**

The examination must be performed at the time of commencing regular night shift work and thereafter at regular intervals whilst the employee continues to work regularly at night.

**Outcomes**

Employees may be:

• Fit for night shift without restrictions.

• Fit for night shift with restrictions (*eg* rest periods, meal intervals, special first aid services).

• Unfit for night shift work.

**Copies of report to**

• To the employer: The OMP is required to counsel the employee. The report to the employer need not contain any medical information.
• The employee if requested.

**Employer not performing**

The duty of arranging this OME is based in the BCEA and, should the employer refuse, a compliance order may be issued by an inspector of the Department of Labour.

**Employee refusing**

This is a voluntary examination regulated by individual or collective agreement.

**Employee not agreeing**

An employee who does not agree with the outcome of a night-shift OME may request a second medical opinion by a doctor of his/her choice. Should the employee’s doctor and the OMP have a different opinion (with a different impact on the recommendation for night shift work), the opinion of a mutually agreeable expert specialist medical practitioner will be sought.

**THE OME OF AN EMPLOYEE WITH A DISABILITY OR MEDICAL INCAPACITY**

When an employee sustains a mental or physical impairment and this has an incapacitating effect, the employee becomes disabled. Medical problems may interfere with the work or work may interfere with an employee’s medical problem.

**Purpose**

The disability OME will establish:

• The impairment of the employee.

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148 Disability can be temporary or permanent, partial or total.
The effect it has on the employee’s capacity to perform his current work.

The effect on the employee’s prospects of job retention, promotion, demotion and on the employee’s social benefits.

**Legal status**

- OHSA and MHSA: safe job placement.
- LRA: Schedule 8: dismissal for medical incapacity.

**Company policies**

Disability, incapacity to perform work, the impact of disability on the employee’s and other persons’ safety and health, temporary disability, placement of a person with a disability in the workplace and special arrangements the company puts in place for persons with a disability will feature in the following company policies:

- Safety and Health policy.
- Job Placement policy.
- Fitness for Work policy.
- Driver, Operator policies and Dangerous Procedures’ policies.
- Pregnancy policy.
- Absenteeism Management policy.
- Sick Leave policy.
- Equity policy.
- Quality policy.

**Standards**

The standards of the OME are set by:
• The employee should be counselled prior to the examination and the examiner must obtain an informed consent from the employee.

• The person-job specification of the job’s inherent requirements.

• The legal requirements of equity in job placement.
  
  o Can the employee comply with the inherent requirements of the job?

  o Can the employee perform the essential functions of the job?

  o Which, if any, accommodation does the employee need, in order to comply with the first two requirements?

  o Which residual capacities are in place, which could assist with vocational rehabilitation, transitional work programmes and flexible working conditions?

  o Which alternative work-placement must be considered?

• The legal requirements of fairness in dismissal.

  o Which impairment does the employee suffer from?

  o Is the condition is temporary or permanent?

  o When temporary: the anticipated period of absence, the anticipated date at which the employee may return to work for restricted duties and for normal duties.

  o The impact of the impairment on the employee ability to perform the work.

  o The extent (or degree) of the incapacity or injury.
o The cause of the impairment.

o The residual capacity of the employee and the extent to which the employee is capable of performing the work or alternative work.

o Which adaptations can be made to the employee’s work circumstances, in order to perform the work?

o Which adaptations can be made to the employee’s duties, in order to perform the work?

o Procedural rights (Item 10(4) of the Schedule 8 of the LRA): right to state a case in response to the findings of the incapacity OME and assistance by a representative.

Timing

• As part of the pre-placement OME of an applicant with a disability.
• As part of the absenteeism OME.
• As part of a “poor performance” investigation by the employer.
• As part of a disability claim by the employee.

Contents

• A general medical and an occupational history questionnaire.

• A physical examination, if required.

• Special tests may be necessary to determine whether the condition is work related and to determine the severity of the condition.

• Biological monitoring: persons working with specific exposures.
• The standard of the examination must enable the examiner to answer the above questions.

Outcomes

The report will outline:

• Whether the employee suffers from an impairment which does/does not affect his normal work temporarily/permanently.

• Suggestions on adaptations to the employee or to the job.

• The residual capacity of the employee and alternative job placement suggestions.

• The need for an application for incapacity benefits.

• The relevant information, required by the employee, to engage in discussion with his employer, with regard to future job placement.

The impact of the report on applicants’ or employee’s job placement may be:

• Permanent and total disability for the particular job, for all different occupations at the employer’s business or for the open labour market. The applicant will not be placed and the employee will be dismissed. The financial impact of the different permutations is determined by the contractual agreement in the disability insurance and/or the statutory regulations of the Unemployment Insurance Act.¹⁴⁹

• Temporary total or partial disability for the particular job, for all different occupations at the employer’s business or for the open labour market. The

impact on job placement and remuneration will depend on the employer’s assessment of the different factors within the nature of the business.

- No occupational disability: the employee is able to perform the required job.

**Copies of report to**

- The employee.

- The employer: the employee’s consent is required prior to releasing the report.

- The COIDA commissioner or Director of the ODMWA, in cases an occupational cause for the disability.

- The insurance company underwriting disability claims.

**Employer not performing**

- The Code of Good Practice on Key Aspects of Disability in the Workplace\(^{150}\) expands on the duties of an employer in the job placement of persons with disabilities with regards to the job advertisement, the job placement interview and pre-placement OME. Where the employer decides on fair discrimination or incapacity dismissal, the findings of the OME are critical substantive information.

- Where the incapacity affects occupational safety or health (and the disability OME is part of medical surveillance), the employer is liable to criminal prosecution.

**Employee refusing**

- People with disabilities are entitled to keep their disability status confidential.

\(^{150}\) See ft 73.
• Where the employee refuses the incapacity OME, safe job placement, equitable job placement, disability insurance claims and fair employment practices are frustrated.

• The Code entitles the employer to information:

  o The questionnaire may enquire about the disability.

  o The questionnaire should ask applicants/employees to indicate how they would accomplish the inherent requirements; perform the essential functions and which accommodation they require.\textsuperscript{151}

  o Applicants with disabilities may be required to undergo testing, which is not required by all other applicants.\textsuperscript{152}

  o If a disability is not self evident, an employer may require the employee to disclose sufficient information to confirm the disability or confirm the needs for accommodation.

  o The employer is also entitled to request the employee to be tested to determine the employee’s ability or disability. The testing is at the expense of the employer.\textsuperscript{153}

  o Medical testing on an employee after an illness or injury\textsuperscript{154} is permissible.

**Employee not agreeing**

In view of the potential impact of the OMP report on job placement, job security and income earning capacity and in view of the explicit statutory procedural requirement

\textsuperscript{151} Code rule 7.3.2, 7.3.3.  
\textsuperscript{152} Code rule 7.4.3.  
\textsuperscript{153} Code rule 14.  
\textsuperscript{154} Code rule 8.2.
with regards to persons with disabilities, strict application of the dispute procedure relating to the disability OME is mandatory.

The MHSA regulates the dispute process, where an employee is found unfit to perform work, through the services of the Medical Inspector of Mines.

Assessment of fairness

The Code of Good Practice on Key Aspects of Disability in the Workplace, albeit not an authoritative summary of law, will be considered when assessing the fairness of the requirement, execution, findings and actions taken as a result of the disability OME.

The Constitutional Court has ruled that the mere existence of a medical condition, which potentially could render an employee unfit for work (e.g., HIV-AIDS, tuberculosis), does not justify a blanket exclusion of all employees from this position. The assessment of the employee’s actual ability to perform the required work is what matters: e.g., employees suffering from “open” tuberculosis are contagious for 1 week: the risk of infecting other employees has disappeared after 1 week. However, where a person suffers from multi-resistant tuberculosis, the chances of sterilising the sputum are smaller (some persons actually never manage to eradicate the infection). Multi-resistant tuberculosis occurs in patients who relapse (or re-infect) and, of these, a large percentage are HIV positive. From the above, it may be deducted that an employee suffering from a first attack of tuberculosis will be fit for duty after 1 to 2 weeks; whereas the same can not be said of a recidivist. To prove the non-infectiousness of the recidivist requires a special sputum culture, which takes 6 weeks to perform.

155 The employee enjoys procedural rights, which may impact on the medical examination. Item 10(4) of the Schedule 8 of the LRA affords the employee the right to “state a case in response to” the findings of the incapacity OME. Assistance by a trade union representative or fellow employee is also allowed.

156 MHSA s20.

157 Footnote 62.

158 Open tuberculosis refers to the patient whose sputum contains contagious Mycobacterium tuberculosis germs: when coughing or sneezing, the patients may create an infectious spray of air.
FITNESS FOR DUTY OME

Definition and Purpose

The fitness for duty OME is indicated where employees come on duty and their fitness to perform the tasks ahead may be in question.

Alcohol, illegal drugs and regular medication used by an employee may affect the employee’s capacity to perform work safely. The medical examination and tests making up this fitness for duty OME, aim to detect whether an employee is affected by alcohol, drugs or medication.

The degree of intoxication (eg smelling of alcohol versus alcoholic ataxia), the source of intoxication (eg alcohol from liquor versus alcohol from a cough mixture) and the differentiation between actual effect of the substance (eg being on a cannabis “trip”, versus having a positive cannabis urine test\textsuperscript{159}) may be required “outcomes”.

Other inherently required physical requirements, particularly in the field of personal hygiene, also determine employee’s fitness to start duty: eg in the food industry, where skin and scalp diseases can infect food; or in the medical industry, where asymptomatic carriers of certain bacteria pose an infection danger to prosthesis patients.

A special form of fitness for duty examination is the preventative and post-incident testing: the preventative testing falls in the category of random testing (eg random body search or alcohol testing at the entrance of the workplace) whereas the post-incident testing is a policy-regulated mandatory test of an operator involved in an incident or accident (eg alcohol and cannabis testing after a road accident or incident).

\textsuperscript{159} Cannabis urine tests can be positive up to 90 days after a person last used it.
The fitness for duty may be performed by non-medical persons: *eg* alcohol breath analysis may be done by security personnel; or pre-duty hand inspection may be done by a foreman.

**Legal status**

- OHSA: General Administrative Regulation 10.\(^{160}\)

- EEA: inherent requirements of the job.

**Company policies**

- Safety and Health policy.

- Company disciplinary rules and regulations: alcohol, drugs, medication, security, random testing.

- Fitness for duty policy.

- Driver, operator policies.

- Quality policy.

**Standards and Timing**

Fitness for duty testing may be initiated by a *random procedure* (*eg* every 10\(^{th}\) employee entering the gate in the morning); a procedure included in the medical surveillance (*eg* liver or serum tracers tested, in the search for chronic alcohol use) or after someone is suspicious of an employee’s condition.

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\(^{160}\) OHSA General Administrative Regulations 10: “(1) ... an employer shall not permit any person who is or who appears to be under the influence of intoxicating liquor or drugs to enter or remain at a workplace. (2) ... no person at a workplace shall be under the influence of or have in his possession or partake or offer any other person intoxicating liquor or drugs. (3) An employer ... shall, in the case where a person is taking medicines, only allow such person to perform duties at the workplace, if the side effects of such medicine do not constitute a threat to the health and safety of the person concerned or other persons at such workplace.”
Although the legal and policy backgrounds are solidly based, the procedural approach requires prior consensus (there is nothing worse than an argument with an inebriated person about the need for a breathalyser test): this is referred to as “the chain of custody” and outlines the time frame, responsible persons, equipment, process and procedures followed in case of a fitness for duty test.

The acceptable standards (e.g. the brand name of the disposable tests in alcohol breath analysis), the immediate action and the linkage of the test and test results with the company’s disciplinary procedures must be outlined.

Alcohol and intoxicating drugs are statutorily prohibited, not only for consumption by an employee but also for their presence at the workplace and for their mere potential effect: “if a person appears under the influence”, he may not enter or remain at the workplace.

To be illegal, medication effects have to pose a threat to the safety and health of the employee or others.

Hygiene requirements are day-to-day requirements, included in the company policies, and may be assessed by the supervisory personnel (e.g. regular hand-checks for dirty nails, infected lesions, jewellery) or form part of medical surveillance (e.g. monthly bacterial cultures of nose and skin in operating theatre sisters).

Contents

The tests may be varied and include questionnaires (e.g. the existence of diarrhoeal disease in food handlers), exhaled air tests (e.g. alcohol breath analysis), urine tests (cannabis), blood tests (alcohol level, liver function tests) and clinical inspection (e.g. the examination of the inebriated patient, hand-skin-nails-scalp inspection in food handlers).

Because of the potentially far-reaching consequences of the fitness for duty OME, the contents and standards of the chosen tests must be agreed on, in terms of the
fitness for duty policy (eg who handles the chain of custody, which tests are used, what to do when an employee refuses testing).

Outcomes

The fitness for duty OME has a limited outcome: positive (the employee is under the influence, the employee suffers from a listed condition) or negative.

The person performing the OME will, particularly where the test is performed by a professional person, most likely also be required to express an opinion on the consequence of the finding: the employee is fit/unfit for duty.

Quantifying the degree of intoxication may be done at two levels:

• At bio-chemical level, where the actual drug-level in the test is measured (eg alcohol percentage in blood).

• At functional level, where the effect of the drug on cognitive functions is measured (eg walking on a straight line, fine co-ordination testing).

Positive outcome-permutations can then be:

• The employee’s measured biochemical level is above an agreed (or, in the case of road traffic drivers, a legal) limit, and/or

• The substance is affecting the employee (eg he appears under the influence; he can not safely operate a machine).

• The employee does not conform to the fitness criteria required in the workplace (eg the employee is a Salmonella161 carrier).

161 Salmonella typhi causes typhoid fever. About 3% of untreated patients shed organisms in their stool and are referred to as chronic enteric carriers. Salmonella carriers are unfit to handle food.
Copies of report to

- The employee.

- The employer: the employee’s consent is required prior to releasing the report.

Employer not performing

The employer is responsible for managing the access and presence of persons who appear under the influence of a substance at his workplace. Omitting to exercise this function is a breach of the General Administrative Regulations of the OHSA.

Company policies and procedures must delegate this responsibility to the appropriate shop-floor level: eg security personnel, line manager, health and safety representative.

The OHSA requires every employee to report the presence of a person who may render the workplace unsafe,\textsuperscript{162} to the employer.

Employee refusing

The employee is entitled to refuse the fitness for duty OME.

No examination or specimen test may be performed without the employee’s informed consent. The employer can refuse the employee from entering the workplace, until the employee’s fitness for duty is proven. The onus of proving that an employee is unfit for duty lies with the employer, but, it is the employee who must prove fitness for duty, once he has refused to submit to the OME.

Whereas an employee who is unfit for duty due to an intervening medical condition or the side effects of medical treatment, will benefit from paid sick leave, the employee who is under the influence of alcohol or an illegal substance, can not claim this right.

\textsuperscript{162} OHSA s14(d).
As a refusal often occurs where the employee is *non compos mentis*, policy and procedures must make provision for prompt action in the form of the removal of the employee from the employer’s premises.

**Employee not agreeing**

The chain of custody forms a part of the company’s policies and is individually (contractually) or collectively agreed upon.

The correct execution of any part of the chain may be questioned by the employee, who must prove the allegations. The policy should include:

- The option of an immediate second opinion by an expert chosen by the employee.
- The option that the OME is performed by an expert chosen by the employee.
- The presence of an employee’s representative during the process.

**Assessment of fairness**

Fairness in the management of fitness for work procedures relies on statutory and policy interpretations.

Common problems are:

- Inconsistent practices: *eg* the executive returning to the office from a (well-irrigated) business lunch; the “fully” stocked office bar.

- The chosen parameters and tests: *eg* a company driver-policy stating “drivers must be free from alcohol consumption 24 hours prior to driving company vehicles”, renders any person with a breath smelling of alcohol unfit for duty; *eg* the sensitivity of the apparatus used for breath analysis is arbitrary; *eg* the urine
test for cannabis is not necessarily related to the use of cannabis in the hours prior to work, or to the actual fitness of the employee to engage in his normal activities.

- Different expert opinions lead to different requirements: *eg* food retailers will insist that the manufacturing employer submits its employees to medical tests such as bacterial cultures, whereas the World Health Organisation expresses the opinion that such tests are not necessary.\(^{163}\)

**HIV TESTING OF EMPLOYEES**

The HIV/AIDS epidemic in South Africa is causing rising sick absenteeism and death rate. It is expected to have considerable impact on productivity, employee benefits, occupational health and safety, production costs and workplace morale.

The Minister of Labour has issued the Code of Good Practice: Key Aspects of HIV/AIDS and Employment,\(^{164}\) which promotes, as measures to deal with HIV/AIDS in the workplace:

- The development of a workplace HIV/AIDS policy.

- The development of workplace HIV/AIDS programmes aimed at prevention of new infection, provision of care for infected employees and management of the impact of the epidemic on the business. A recommendation included in this programme is to encourage voluntary testing of employees.

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\(^{164}\) Code issued by the Minister of Labour, on the advise of the Commission for Employment Equity, in terms of s54(1)(a) of the EEA and by NEDLAC in terms of s203(1)(a) of the LRA.
Purpose

The purpose of HIV testing of employees may be for:

- The individual employees to know their status.
- The employer to know the prevalence of HIV/AIDS in the workplace, in order to formulate a strategy dealing with the impact on the business.
- The purposes of a claim for compensation, following an occupational accident involving a risk of exposure to infected blood or other body fluids.

Legal status

The unique position of the Human Immuno-deficiency Virus infection and the Acquired Immune Deficiency Syndrome in South African labour legislation is witnessed by the references in at least nine Statutes. With reference to a medical examination, section 7(2) of the EEA, prohibits testing of employees (and applicants for a job) to determine the HIV status, unless the test is determined justifiable by the Labour Court.

The Code elaborates prudently on this section by stating:

“Whether s 7(2) of the EEA prevents an employer-provided health service, supplying a test on an employee who requests a test, depends on whether the Labour Courts would accept that an employee can knowingly agree to waive the protection of the section. This issue has not yet been decided by the courts.”

The Code distinguishes between:

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• Authorised testing,\textsuperscript{166} for which the employer must obtain Labour Court authorisation.

• Permissible testing,\textsuperscript{167} which may only take place at the initiative of an employee, within the doctor/nurse-patient relationship, with informed patient consent, with pre-and post-test counselling and within strict ethical confidentiality.

Authorised testing aimed at establishing HIV prevalence in a workforce, was accepted by the Labour Court,\textsuperscript{168} subject to the test being voluntary and anonymous. Employees may also not be given the result of their individual test.

\textbf{Company policies}

The HIV/AIDS policy or the Life Threatening Disease policy.

\textbf{Standards}

HIV testing of an employee, at the request of the employee is strictly a doctor-patient matter.

Where an employee suffering from AIDS becomes incapacitated to perform the normal work, a disability OME may be required. The HIV status, per se, is not relevant. The CD4+T count was found to be relevant in determining whether an employee is fit to remain in the job.\textsuperscript{169} The standards of the disability OME will apply.

\begin{flushright}
\textsuperscript{166} Authorised testing includes testing during an application for employment, as a condition of employment, during procedures related to termination of employment, as an eligibility requirement for training or staff development, as an access requirement to obtain employee benefits.

\textsuperscript{167} Permissible testing includes as part of a health care service provided at the workplace, in the event of an occupational accident and for the purposes of applying for compensation following an occupational accident.


\textsuperscript{169} Hoffman at 62: In the case of SAA flight attendants, a CD4 count of below 200 would indicate that they were not capable of performing their duties.
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Contents of the tests

The court in *Joy Mining* limited the test to the ELISA saliva test (a non-invasive test). A variety of HIV blood tests are commercially available.

AIDS is diagnosed clinically by the prevalence of recurrent infections, often associated with complications, by the occurrence of typical skin or mucosa lesions, or by a general decline in the patient’s condition, all associated with a positive HIV test. Bio-chemical diagnosis of AIDS is done by means of CD4+T cell count and viral load tests.
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