GUIDELINE FOR THE COMPILATION OF
A MANDATORY CODE OF PRACTICE FOR:

The Management of Medical Incapacity due to Ill-health and Injury

MINE HEALTH AND SAFETY INSPECTORATE
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DEPARTMENT OF MINERAL RESOURCES AND ENERGY

MINE HEALTH AND SAFETY INSPECTORATE

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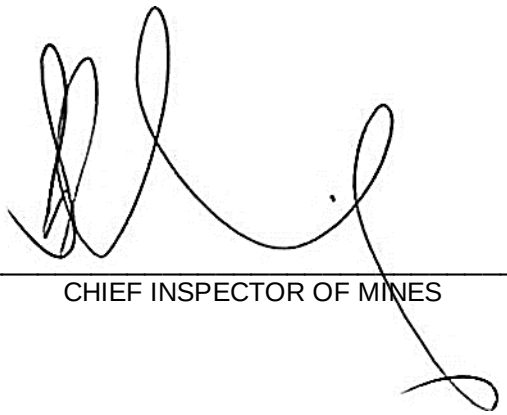

CHIEF INSPECTOR OF MINES

mineral resources & energy

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PART A: THE GUIDELINE

1. INTRODUCTION

1.1. This guideline has been drafted to assist the **OMPs**, the safety health and environment personnel and the **HR officers** in managing employees with **medical incapacity** in the South African mining industry.

1.2. This guideline does not deal with individual medical conditions, but rather aims to formalise the basic principles of the management of employees with **medical incapacity** in order to ensure that a fair and consistent approach will be followed.

1.3. An employee's medical condition, and the programme required for the effective management of such an employee, should be interpreted in functional terms. It should also be interpreted in the context of the specific job requirements and/or the specific job requirements of the adjusted or alternative jobs considered during the management of such an employee. The outcome of the processes followed must pose no additional risk to the health and/or safety of such an employee or his/her co-workers, where relevant.

1.4. In instances of **reasonable accommodation** or alternative jobs, the employer is always entitled to expect full productivity of the accommodated employee relating to the essential functions of the task.

1.5. The interpretation of this guideline should allow for the unique operational circumstances of all mining operations, e.g. small mines, open cast mines, underground operations, beneficiation plants, condensation plants or smelters.

1.6. This guideline applies to all current employees.

2. LEGAL STATUS OF THE GUIDELINE AND COP

2.1. In accordance with Section 9(2) of the **MHSA**, an employer must prepare and implement a **COP** on any matter affecting the health and/or safety of employees at mines, other persons who may be directly affected by activities of these mines and/or when the **CIOM** requires it.

2.2. The **COP** must comply with any relevant guidelines issued by the **CIOM** in accordance with Section 9(3) of the **MHSA**.

2.3. Failure by the employer to prepare or implement a **COP** in compliance with this guideline is a breach of the **MHSA**.

3. OBJECTIVE OF THIS GUIDELINE

3.1. The objective of this guideline is to ensure procedural and substantive fairness with employment decisions in respect of all current employees with **medical incapacity**, and those qualifying as persons with **disabilities** under the **EEA**.

3.2. The collateral objectives are to assist the **OMP** and **HR officer** tasked with preparing the **COP** and ensuring that the implementation thereof is appropriate, considering

the health and safety of all employees at the mine which, if implemented and complied with, would:

3.2.1. Be appropriate, considering the health and safety of all employees at the mine.

3.2.2. Ensure that employees who suffer from ill-health or injury, would be returned to their normal, adjusted or alternative work, where possible, by making early **return-to-work recommendations**.

3.2.3. Ensure that where employees who suffer from ill-health or injury cannot be accommodated in their normal, adjusted or alternative work, be managed in a consistent and fair manner.

3.2.4. Ensure that employees who are unfit to continue performing productively and safely in normal, adjusted or alternative work at the mine, are **medically incapacitated**.

3.2.5. Ensure that the affected employee will be able to perform work without an unacceptable health or safety risk to that employee or any other person.

4. DEFINITIONS AND ACRONYMS

4.1. **AMA** means the American Medical Association.

4.2. **CCMA** means the Commission for Conciliation, Mediation and Arbitration.

4.3. **CIOM** means Chief Inspector of Mines.

4.4. **COIDA** means the Compensation for Occupational Injuries and Disease Act, 1993 (Act 130 of 1993).

4.5. **COP** means a Code of Practice.

4.6. **DASS** means Depression Anxiety Stress Scales.

4.7. **Disability** means a recurring physical or mental **impairment** which substantially limits the capacity of the individual to meet occupational demands or, statutory or regulatory requirements.

NOTE:

Certain conditions or **impairments** may *NOT* be considered **disabilities**:

- Sexual behavioural disorders that are against public policy.
- Self-imposed body adornments such as tattoos and/or body piercing.
- Compulsive gambling, a tendency to steal or light fires.
- Disorders that affect the mental or physical state of a person if it is caused by the current use of illegal drugs or alcohol, unless the affected person has participated, or is participating, in a recognised programme for treatment.
- Normal deviations in weight, height and strength.
- Conventional physical and mental characteristics as well as common personality traits.

4.8. **DMRE** means Department of Mineral Resources and Energy.

4.9. **EEA** means the Employment Equity Act, 1998 (Act 55 of 1998) as amended.

4.10. **Employee representative** means:

- The recognised full-time union representative or part-time shop steward of the employee.
- The **health and safety representative** for the area.
- A colleague or a co-worker chosen by the employee.

4.11. **Essential functions of the job** means those functions of a job which must be done in order to achieve the goals and objectives of that specific job.

4.12. **Functional capacity assessment** means the objective test designed to replicate work tasks and assess the ability of an injured and/or ill employee to perform those tasks.

4.13. **Health and safety representative** means a person elected, appointed and trained in terms of Section 29 of the **MHSA**.

4.14. **HPCSA** means Health Professions Council of South Africa.

4.15. **HR** means human resources.

4.16. **HR officer** is a skilled and qualified **HR** expert whose role is pivotal to any organisation with a work force. They are responsible for managing every aspect of the employment process, including the orientation and training of new staff members as well as their involvement in the **medical incapacity** committee processes to determine alternative placement of employees.

4.17. **Impairment** means the loss of use or the derangement of any body part, organ system or organ function. It may be of a physical, a mental - or a combination of both physical and mental - or sensory nature.

NOTE:

- Physical **impairment** means a temporary or permanent, partial or total loss of a bodily function or part of the body. It includes, but is not limited to, loss of limbs, trauma, etc.
- Mental and/or intellectual **impairment** means a clinically recognised condition or illness that affects the thought processes, judgment or emotions of a person.
- Sensory **impairment** means a clinically recognised condition or illness that affects the sensory organs of a person. It includes, but is not limited to, being deaf, hearing impaired or visually impaired.

4.18. **ILO** means International Labour Organisation.

4.19. **Inherent job requirements** means those requirements that the employer stipulates as necessary for a person to be appointed in the job and are necessary in order to enable the employee to perform the **essential functions of the job**.

4.20. **King III Report on Corporate Governance** means the booklet of guidelines for the governance structures and operation of companies in South Africa issued by the King Committee on Corporate Governance. Three reports were issued in 1994 (King I), 2002 (King II), and 2009 (King III) and a fourth revision (King IV) in 2016.

4.21. **LRA** means the Labour Relations Act, 1995 (Act 66 of 1995) as amended.

4.22. **Medical incapacity** means the inability to retain a **normal occupation** due to temporary or permanent **impairment** on the grounds of ill-health or injury that prevents the performance of the customary duties of an employee.

4.23. **Medical incapacity management / disability management** means the process of managing people with **medical incapacity** or **disability**.

4.24. **Medical Incapacity Management Committee** means a formal body at each business unit/operation/site responsible for the co-ordinating and synchronising of operational issues regarding the **rehabilitation**, re-skilling and re-training, the evaluation for replacement and the **reasonable accommodation** of people with **medical incapacity** or **disabilities**.

4.25. **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 an **OMP** contemplated in Section 13 of the **MHSA**.

4.26. **MHSA** means the Mine Health and Safety Act, 1996 (Act 29 of 1996) as amended.

4.27. **Minimum health standards** means the health status required of an employee, or a new recruit, taking into account the health and safety hazards to which such a person will be exposed to and the **inherent job requirements** to execute the essential functions of a job in a way that will not pose any danger to the health and safety of such a person or any co-workers, or has the potential to cause damage to the property of the employer.

4.28. **MMI** means maximal medical improvement.

4.29. **MMSE** means mini-mental state examination.

4.30. **Normal occupation** means the most recent occupation prior to the injury or illness that led to a **disability**.

4.31. **Occupational health and safety risks** means exposure to sources of harm and the potential impact thereof on the health and/or safety of a person or any co-workers.

4.32. **OHNP** means occupational health nursing practitioner which is a person who holds a qualification in occupational health as recognised by the **SANC**.

4.33. **OMP** means occupational medical practitioner, which is a medical practitioner, who is appointed in terms of Section 13(3) of the **MHSA** that holds a qualification in occupational medicine as recognised by the **HPCSA**.

4.34. **Progressive conditions** means those conditions that are likely to develop, change or recur with increased limitation of the ability of a person to function effectively. People living with **progressive conditions** or illnesses are considered as people with **disabilities** once the **impairment** starts to be substantially limiting.

4.35. **Reasonable accommodation** means the involvement of any change in the working environment or in the way things are customarily done, in order to enable a person with a **disability** to enjoy equal employment opportunities, access to work and employee benefits.

NOTE:

Reasonable accommodation may include, but is not limited to, the following:

- Modified job schedules.
- Reassignment of vacant positions.
- Provision of special equipment or devices.
- Modification of administrative procedures.
- Provision of assistant or support staff.
- Modification of training materials or procedures.

4.36. **Rehabilitation** means a structured programme developed to ensure the optimal recovery and deployment of employees who suffer **impairment** or **disability**.

4.37. **Return-to-work recommendations** means the recommendations made by the **OMP**, in conjunction with safety specialists, occupational hygienists, line managers and/or **HR** (where appropriate), giving guidance to the **Medical Incapacity Management Committee** for returning an employee to his/her normal work, adjusted work or alternative work. These recommendations should take into account the organisational dynamics and the exposure to **occupational health and safety risks**, outlines the process and workflows, and defines the roles and responsibilities of people involved.

4.38. **Safety officer** means a person on a mine who is responsible for the safety of the people who work or visit the mine.

4.39. **Section 12(1) appointee** means a part time or full time person qualified in occupational hygiene techniques to measure levels of exposure to hazards at the mine in line with Section 12.1 of the **MHSA**.

4.40. **SANC** means the South African Nursing Council.

4.41. **Work capacity evaluation** means a comprehensive evaluation and description of what the employee can and cannot do, thus a thorough understanding of the duties, working conditions, work processes, job tasks, job requirements, stressors and facilities of the workplace.

5. SCOPE

5.1. This guideline covers the basic requirements for the **OMP** and **HR officers** managing employees who have been **medically incapacitated**.

5.2. This guideline does not advise on the management of individual medical conditions, but rather prescribes the general principles to be followed for employees referred

for **medical incapacity** in order to ensure that such employees will be managed in a consistent and fair way.

5.3. This guideline must be read in conjunction with the following documents and any other applicable statutory obligations related to **disability** management: e.g. the Guideline for the Mandatory Code of Practice on the Minimum Standard of Fitness to Perform Work on a Mine, **LRA**, **EEA**, South African **Disability** Code, **ILO** Code and **COIDA**.

5.4. The **OMP** involved in the management process should be satisfied that the outcome of each individual case should not contribute negatively to the health and safety of the affected employee, or to the health and safety of any other person or co-worker.

6. MEMBERS OF THE INITIAL TASK GROUP

6.1. Principal members responsible

Dr Chris de Beer	Occupational Medicine Practitioner and Certified Professional in **Medical Incapacity** and **Disability** Management
Dr Andre du R Louw	**OMP**

6.2. Additional members

Dr Johan Schoeman	Occupational Hygienist
Dr Nico Claassen	Specialist Physiologist and Extra-ordinary Lecturer
Mr Jaco Snyman	Project Manager

6.3. Independent members

Dr Jaco Blignaut	**OMP**
Dr Martje Joubert	**OMP**
Me Zuritha du Preez	Senior **HR** Consultant: Matla Collieries
Mr Lukas Coetsee	Attorney of Law
Mr Francois Smith	Professional Safety Expert
Mr Paul Venter	Experienced Underground Mine Captain

6.4. Tripartite members

Dr D Mokoboto	State
Dr K Baloyi	Employer
Mr A Letshele	Organised Labour

7. MEMBERS OF THE GUIDELINE REVIEW TASK GROUP

STATE	EMPLOYERS	ORGANISED LABOUR
Dr Dipalesa Mokoboto Ms Matanki Hlapane Ms Duduzile Mahlaba Dr Lindiwe Ndelu	Dr Tumi Legobye	Mr Johan Kok

PART B: AUTHOR'S GUIDE

1. The **COP** must, where possible, follow the sequence laid out in Part C: Format and Content of the **COP**. The pages as well as the chapters and sections must be numbered, where possible, to facilitate cross-referencing.

2. Wording must be unambiguous and concise.

3. In this guideline for a **COP**, unless the context otherwise indicates the meaning of the words, will have the meaning as described within this document and that of the general understanding of such words.

4. It should be indicated in the **COP** and on each annexure to the **COP** whether:

4.1. The annexure forms part of the guideline and must be complied with or incorporated in the **COP** or whether aspects thereof must be complied with or incorporated in the **COP**.

4.2. The annexure is merely attached as information for consideration in the preparation of the **COP** (i.e. compliance is discretionary).

5. When annexures are used the numbering should be preceded by the letter allocated to that particular annexure and the numbering should start at one again. (e.g. 1, 2, 3, A1, A2, A3…).

6. Whenever possible illustrations, tables, graphs and the like, should be used to avoid long descriptions and/or explanations.

7. When reference has been made in the text to publications or reports, references to these sources must be included in the text as footnotes or side notes, as well as in a separate bibliography.

PART C: FORMAT AND CONTENT OF THE MANDATORY COP

1. TITLE PAGE

1.1. The title page must include:

1.1.1. The name of the mine.

1.1.2. The heading: *Mandatory Code of Practice for the Management of Medical Incapacity due to Ill-Health and Injury*.

1.1.3. A statement to the effect that the **COP** was drawn up in accordance with the guideline with reference number **DMRE 16/3/2/4-B8** issued by the **CIOM**.

1.1.4. The mine reference number for the **COP**.

1.1.5. The effective date of the mine's **COP**.

1.1.6. The revision dates of the mine's **COP** (previous and next revision dates if applicable).

1.1.7. The mine code number.

2. TABLE OF CONTENTS

2.1. The **COP** must have a comprehensive table of contents.

3. STATUS OF THE MANDATORY COP

3.1. Under this heading the **COP** must contain statements to the effect that:

3.1.1. The **COP** was drawn up in accordance with the guideline with reference number **DMRE 16/3/2/4-B8** issued by the **CIOM**.

3.1.2. This is a mandatory **COP** in terms of Section 9(2) of the **MHSA**.

3.1.3. The **COP** supersedes all previous relevant **COPs**.

3.1.4. All managerial instructions or, recommended procedures and standards on the relevant topics must comply with the **COP** and must be reviewed to assure compliance.

4. MEMBERS OF THE DRAFTING COMMITTEE PREPARING THE COP

4.1. In terms of Section 9(4) of the **MHSA** the employer must consult with the health and safety committee on the preparation, implementation or revision of any **COP**.

4.2. It is recommended that the employer should, after consultation with the employees in terms of the **MHSA**, appoint a committee responsible for the drafting of the **COP**.

4.3. The members of the drafting committee assisting the employer in drafting the **COP** should be listed giving their full names, designations, affiliations and experience.

This committee must include competent persons sufficient in number to effectively draft the **COP**.

5. GENERAL INFORMATION

5.1. General relevant information relating to the mine must be stated in this section of the **COP**, which must include at least the following:

5.1.1. A brief description of the mine and its location.

5.1.2. The commodities produced.

5.1.3. The new mining methods or mineral excavation processes.

5.1.4. Other related **COPs**.

6. TERMS AND DEFINITIONS

6.1. Any word, phrase or term of which the meaning is not absolutely clear, or which will have a specific meaning assigned to it in the **COP**, must be clearly defined. Existing and/or known definitions should be used as far as possible.

6.2. The drafting committee should avoid jargon and abbreviations that are not in common use or that have not been defined.

6.3. The definitions section should also include acronyms and technical terms used.

7. Risk management

7.1. Medical incapacity in an employee may impact the risk management decisions on a number of levels. The OMP responsible for managing employees with medical incapacity should ensure that at least the following risks are considered**:**

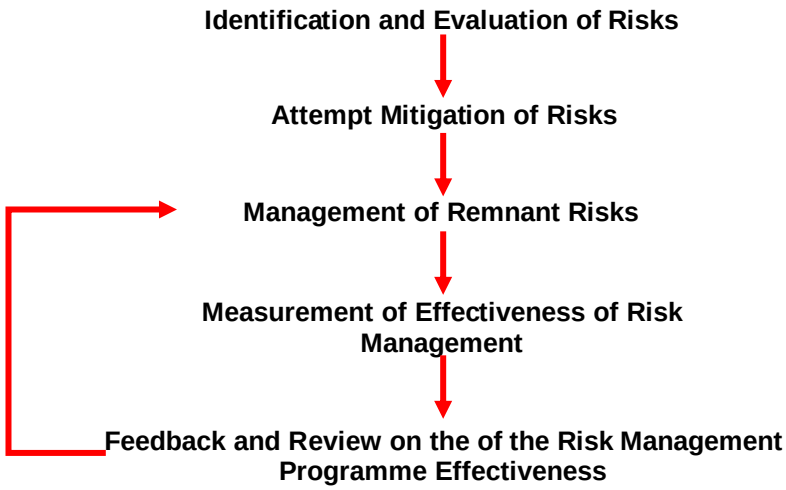
7.1.1. The workplace environment and or the conditions that might pose a threat on the medical conditions of the affected employee.

7.1.2. The health and safety of other people and any co-workers due to the impact of the work environment on an employee with **medical incapacity**.

7.1.3. The impact on productivity due to the effect of the underlying condition.

7.2. **Thus**, multi-disciplinary team inputs are necessary in the process of **medical incapacity** management, and normal risk management principles should be adhered to at all times. Below (Figure 1) is a simplified example of these risk management principles and processes, and this process should be applied to all levels of risk impact.

FIGURE 1: GENERIC EXAMPLE OF A RISK MANAGEMENT APPROACH



8. ASPECTS TO BE ADDRESSED IN THE COP ON THE MANAGEMENT OF EMPLOYEES WITH MEDICAL INCAPACITY WORKING AT A MINE

The **COP** must address the following:

8.1. The **medical incapacity** management process

8.1.1. Conducting a medical and/or health risk assessment in order to determine:

8.1.1.1. The potential for returning the affected employee to his/her normal, adjusted or alternative occupation based on the work capacity assessment.

8.1.1.2. The potential health and safety risks to continue with their normal, adjusted or alternative work.

8.1.1.3. The potential to make structured early **return-to-work recommendations**, which may include ongoing physical or psychological treatment and vocational **rehabilitation**.

8.1.1.4. Making early **return-to-work recommendations** to, amongst others, prevent such employee from developing a **disability** mind-set.

8.1.1.5. If and when an employee has been **medically incapacitated** and qualifies as a person with a **disability**, so that the employer can introduce the necessary interventions as required under the **EEA**.

8.1.2. Early identification of employees

8.1.2.1. The employer must identify employees with potential **medical incapacity** as follows:

a) Regular analysis of sick leave or absenteeism by **HR** to identify employees with long periods of absenteeism, as determined by the policies of the employer and as guided by or in alignment with the **LRA**.

b) Abnormal findings detected on employees during **medical surveillance** conducted (excluding the exit medical examinations).

c) Medical reports received from the treating health practitioners indicating an employee with **medical incapacity**.

d) Poor work performance and/or work attendance of employees reported by the line manager.

e) Employee self-reporting.

8.1.3. Processes to be followed for identified affected employees:

8.1.3.1. Wherever there is a reason to be concerned about any employee identified as per 8.1.2 above, possible **medical incapacity** should be determined.

8.1.3.2. The **HR officer** should arrange a formal meeting with such employee in order to identify the cause of absenteeism or poor performance and take appropriate actions. The employee can be classified in one of the following categories to facilitate further management:

a) Employee with a medical condition.

b) Employee with a social problem.

c) Employee with incapacity other than medical (e.g. training, skills, etc.).

d) Other **HR** factors (e.g. sick leave abuse).

8.1.3.3. Employees suffering from medical conditions are reported to the **OMP** to facilitate the **medical incapacity** management process.

8.1.4. The **OMP** must:

8.1.4.1. Conduct a medical assessment.

The medical assessment done by the **OMP** should be focused on obtaining a complete medical and work history, as well as all other relevant occupational health information to determine the fitness to work of the employee.

8.1.4.2. Refer an employee with **medical incapacity** recommendations to the **Medical Incapacity Management Committee**.

8.1.4.3. Refer for **work capacity evaluation**.

The **OMP** will determine the ability to execute the **essential functions of the job**, determining the endurance to sustain the capacity over the whole work shift and to do such a job without risk to the health and/or safety of the employee, their co-workers or other persons. It therefore depends on an evaluation of the physical and mental condition of the employee, the workplace conditions and the demands of the specific employee, considering the **minimum health standards** for the specific job in question.

8.1.4.4. In assessing the work capacity of an affected employee, consider the following:

a) Essential functions and job specifications.

b) **Minimum health standards**.

Refer to the appropriate **minimum health standards** of the relevant job to identify the specific physical and mental standards required.

c) The functional capacity.

NOTE:

When doing the **functional capacity assessment**, it should be remembered that the social model (ability of a person to do a job) is internationally (**ILO** and World Health Organisation) preferred to the medical model (medical diagnosis only).

It is therefore imperative for the **OMP** that each case be evaluated individually and not to make assumptions based on general perceptions or beliefs.

d) The physical capacity

This evaluation considers every bodily system or organ and evaluates the status quo of the function of the specific system or organ. Comparing the findings with the predicted values of *"normal"* individuals (refer to the normal values and **impairment** ratings in the 6th edition of the **AMA** Guide). An accurate measurement can be done on the **impairment** of the function of the specific system or organ.

e) The mental capacity

Mental capacity screening consists primarily of cognitive and mood screening by applying appropriate screening tests, e.g. **DASS**, **MMSE**, etc.

f) Occupational therapy evaluation and determining the **rehabilitation** prospects.

Medical **impairment** ratings depend on the **MMI** of specific medical conditions. The possibility of further medical treatment available, and the expected response to such treatment, has to be taken into account to evaluate the ability to improve on the existing functional and physical capacity assessment results of an employee.

g) Addressing **return-to-work recommendations**

Where it is possible to return an employee to his/her own, adjusted or alternative work, but the employee requires further/ongoing medical treatment and/or physical-, mental-, or vocational **rehabilitation**, the **OMP** should include such recommendations when referring the employee to the **Medical Incapacity Management Committee**.

As the early return to work placement of such employees usually involves a multidisciplinary team of experts (e.g. safety specialist, occupational hygienist, occupational therapist, treating specialists, clinical psychologist, etc.), the **OMP** should liaise with the appropriate specialists before making such recommendations.

An early return to work recommendation should contain the following information:

(i) Expected duration of the treatment, **rehabilitation** and training required.

(ii) Expected work capacity against predicted progress.

(iii) The recommended periods for doing re-assessments to determine the progress of the employee against the expected parameters.

(iv) Special **reasonable accommodation** measures to be implemented such as not working on heights or other measures relevant to the specific case.

(v) The proposed early **return-to-work recommendations** are then discussed at the appropriate **Medical Incapacity Management Committee**.

8.1.5. Requirements for **reasonable accommodation**

8.1.5.1. **Reasonable accommodation** requirements apply to employees with **disabilities** who are suitably qualified for the job and may be applicable:

a) In the working environment.

b) In the way work is usually done, evaluated and rewarded.

c) In the benefits and privileges of employment.

8.1.5.2. The obligation for **reasonably accommodation** may arise when an employee voluntarily discloses a **disability**-related accommodation need (which may be verified by the employer) or when such a need is reasonably self-evident to the employer.

8.1.5.3. Employers must also try to accommodate employees, as far as reasonably practicable, when work, or the work environment, changes or when **impairment** affects the ability of the employee to perform the **essential functions of the job**.

8.1.5.4. The employer should consult the employee and, where reasonable and practicable, technical experts in the relevant field, to establish appropriate mechanisms to accommodate the employee e.g. an organisation with or for people with **disabilities**.

8.1.5.5. **Reasonable accommodation** includes, but is not limited to:

a) Adapting existing facilities to make them accessible.

b) Re-organising workstations.

c) Changing training and assessment materials and systems.

d) Restructuring the job so that non-essential functions are re-assigned.

e) Adjusting work time and leave.

f) Providing specialised supervision, training and support in the workplace.

8.1.6. Management of employees with **medical incapacity**

8.1.6.1. It is imperative that the management of employees with **medical incapacity** will always be done in a substantive and procedurally fair manner. Due to the complexities of the different pieces of legislation in this regard, management should establish adequate governance structures to ensure full compliance.

8.1.6.2. Where such employee are still **medically incapacitated** after the pre-determined period for treatment or **rehabilitation**, the **OMP** should evaluate this employee to verify if such employee will qualify as a person with a **disability** and if so, then **reasonable accommodation** measures should be considered by the employer. The employee has to satisfy all three of the following criteria in order to qualify as a person with **disability**:

a) Medical **impairment** must be present.

b) The **impairment** should be, or is expected to be, long lasting (more than 12 months) or recurring (e.g. epilepsy).

c) The condition must cause substantial limitation in the ability of the employee to do the essential functions of his/her job.

8.1.6.3. The governance structure required to ensure effective and efficient management of **medical incapacity** should allow for the unique operational circumstances of each mining entity, e.g. small and large operations. It is, however, imperative that the functions listed below are represented at each operation.

8.1.7. **Medical Incapacity Management Committee**

8.1.7.1. This is a formal body at each mine/operation/site where **medical incapacity**, **impairment** and possibilities of treatment, **rehabilitation**, adaptation of tasks or the work environment, **reasonable accommodation** in alternative posts, or permanent medical **disability**, are discussed, evaluated and managed.

8.1.7.2. The directives for the decision-making in this committee must be the protection of employee rights of fair labour practices, safety and health of employees and

other persons, and the protection of the rights of the employer to productivity and not to suffer unjustifiable hardship.

8.1.7.3. It is important for the specific mine/operation/site to establish beforehand what would constitute a quorum for the decision-making purposes in their own context.

8.1.7.4. Suggested and/or co-opted members of the **Medical Incapacity Management Committee**:

a) The chairperson (a senior **HR officer**).

b) The **medical incapacity** co-ordinator.

c) The **HR** consultant of the medical case.

d) The **OMP** and/or **OHNP**.

e) A safety professional.

f) An Occupational Hygienists, if appropriate.

g) A secretary (to keep minutes).

h) The employee concerned.

i) The **employee representative**.

j) The direct supervisor and/or line manager of the area where the employee is employed.

k) Any other employee, specialist, social worker or consultant co-opted permanently or temporarily, by the chairperson to assist the **Medical Incapacity Management Committee** in fulfilling its functions.

NOTE:

The different functions could have the same representatives at small operations.

8.1.7.5. The functions of the **Medical Incapacity Management Committee** are to:

a) Consider the findings and the recommendations of the **OMP** to determine suitable alternative placement.

b) Consider the findings of the workplace inspection report for the purpose of determining possible **reasonable accommodation**.

c) Consider the recommended early **return-to-work recommendations** (if applicable) to determine suitable alternative placement.

d) Ensure compliance with all relevant legal obligations.

8.1.7.6. The **Medical Incapacity Management Committee** is responsible, after considering the recommendations of the **OMP**, to determine one of the following:

a) Permanent adjusted duty (continuation of normal services with job modification).

b) Temporary adjusted duty.

c) Permanent transfer to another type of work (even at a lower grade).

d) Termination of service, where an employee cannot be accommodated.

8.1.7.7. The **Medical Incapacity Management Committee** should:

a) Ensure fairness of process in all respects of their functions.

b) Allow for the employee involved, or his/her representative, to present his/her specific case and to make further representations to the panel for consideration.

c) Discuss the findings and recommendations of the committee, and the recommendations of the employee and/or his/her representative and should convey their findings to the employee in writing.

d) Inform the employee of internal dispute processes that are applicable to the company.

e) Assess and review its effectiveness on an ongoing basis to ensure continuous improvement.

8.1.8. Disputes concerning the process and/or decisions of the **Medical Incapacity Management Committee**

8.1.8.1. The **COP** should ensure that the objective of this committee should be to have consensus that the process followed was consistent with this guideline, and that fair labour practice was followed in each case with **medical incapacity** and/or **disability**. However, sometimes differences in opinion may exist between members of this committee on the management of a specific case and such differences should be solved in a practical, professional and timely manner to try and avoid delays in decision-making.

8.1.8.2. If the employee is disputing the process as mentioned on 8.1.3 above, the employee has the right to follow labour relations processes that exist, through the **CCMA** / labour court in line with processes prescribed in the **LRA**.

8.1.9. Appeal in terms of Section 20 of the **MHSA**

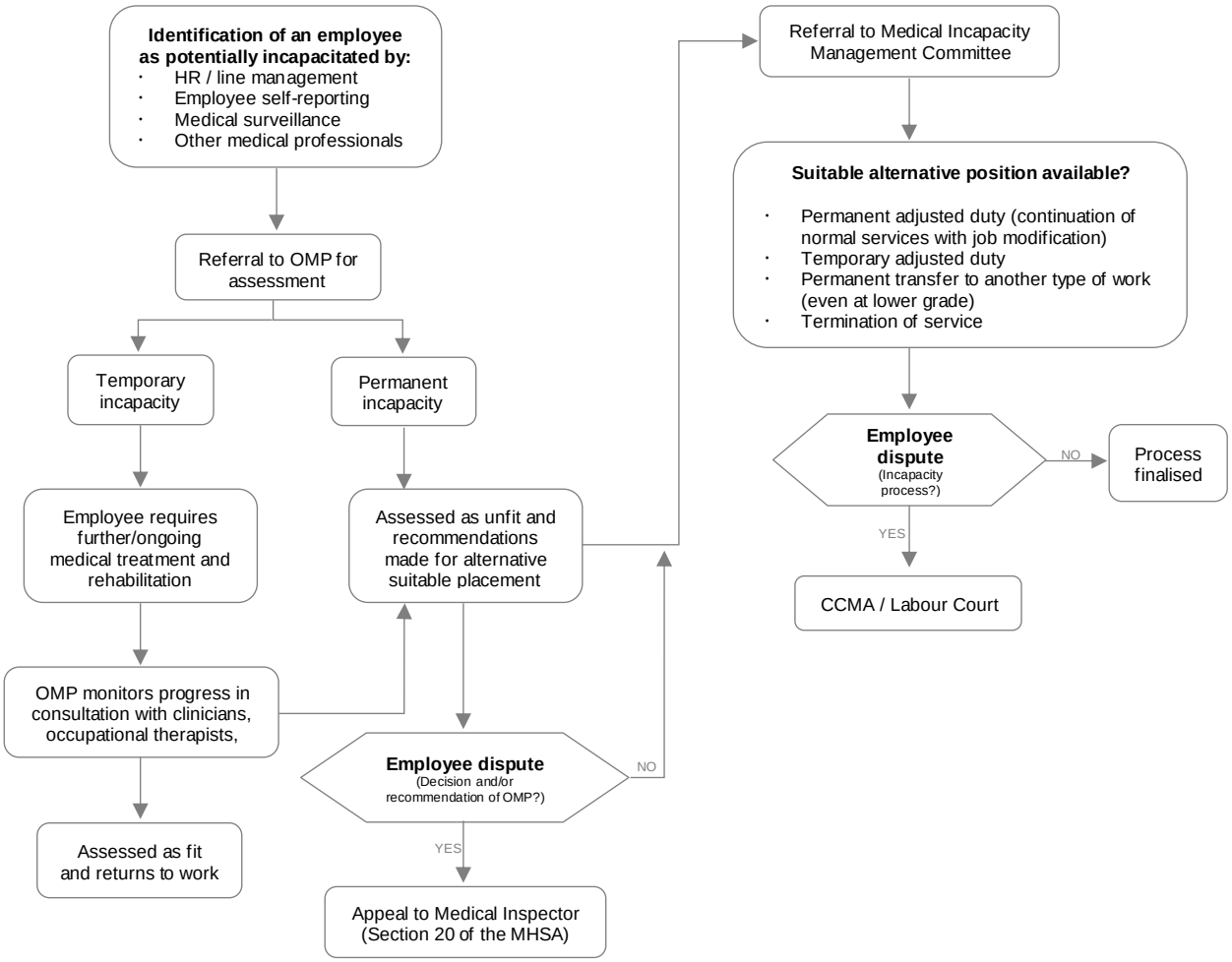
8.1.9.1. In terms of Section 20 of the **MHSA**, an employee may lodge an appeal to the Medical Inspector only if disputing the decision of the **OMP** that the employee is unfit.

8.1.9.2. This implies that the Section 20 appeal should be lodged after an employee has been declared permanently unfit and before an employee is referred for the **medical incapacity** management.

8.1.9.3. Section 20 of the **MHSA** does not apply when an employee is disputing the **medical incapacity** processes or decisions of the **Medical Incapacity Management Committee**.

8.1.9.4. Section 20 of the **MHSA** prescribes that an appeal should be lodged within 30 days of the decision of the **OMP**, and not within 30 days of the decision of the **Medical Incapacity Management Committee**.

FIGURE 2: FLOWCHART OUTLINING THE MANAGEMENT OF EMPLOYEES WITH MEDICAL INCAPACITY PROCESS IN THE SOUTH AFRICAN MINING INDUSTRY



8.1.10. Competencies

8.1.10.1. The **COP** must include requirements that personnel involved in the process of **medical incapacity** management should, where appropriate, have adequate knowledge and skills in the following:

a) Legal obligations related to employees with **medical incapacity** and/or **disability**.

b) Making structured early **return-to-work recommendations**.

c) Co-ordination, synchronization, case management and communication relating to medical treatment and **rehabilitation**.

d) Workplace assessment for **reasonable accommodation** of employees with **medical incapacity** and/or **disability**.

e) Health risk assessment practices for employees with **medical incapacity**.

f) Health impact assessment practices for employees with **medical incapacity**.

g) Assessment of medical **impairment** and **disability**.

PART D: IMPLEMENTATION

1. IMPLEMENTATION PLAN

1.1. The employer must prepare an implementation plan for its **COP** that makes provision for issues such as organisational structures, responsibilities of functionaries and, programmes and schedules for the **COP**, that will enable proper implementation of the **COP** (a summary of and a reference to, a comprehensive implementation plan may be included).

1.2. Information may be graphically represented to facilitate easy interpretation of the data and to highlight trends for the purposes of risk assessment.

2. COMPLIANCE WITH THE COP

2.1. The employer must institute measures for monitoring and ensuring compliance with the **COP**.

3. ACCESS TO THE COP AND RELATED DOCUMENTS

3.1. The employer must ensure that a complete **COP** and related documents are kept readily available at the mine for examination by any affected person.

3.2. A registered trade union with members at the mine, or where there is no such union, a **health and safety representative** on the mine, or if there is no **health and safety representative**, an employee representing the employees on the mine, must be provided with a copy. A register must be kept of such persons or institutions with copies to facilitate the updating of such copies.

3.3. The employer must ensure that all employees are fully conversant with those sections of the **COP** relevant to their respective areas of responsibilities.

ANNEXURE A: LEGISLATIVE FRAMEWORK

(For information purposes only)

1. The following legislation should be considered where an employee with **medical incapacity** is identified and, who requires some management programme because he/she cannot do his/her work:

1.1. The Constitution of South Africa

1.1.1. The Constitution is the highest legal authority in South Africa and includes a Bill of Rights setting specific protections.

1.1.2. The Labour Rights are as follows:

a) Equality (Section 9).

b) Human dignity (Section 10).

c) Labour relations (Section 23).

1.1.3. General labour rights include the right to:

a) Work.

b) Fair remuneration and conditions of service.

c) Access to training.

d) Belong to a trade union.

e) Bargain collectively.

f) Withhold labour.

g) Protection of safety and health.

h) Security against unemployment or injury on duty.

i) Job security.

j) Protection against unfair labour practices.

k) Protection against unfair discrimination.

1.2. Common law principles

1.2.1. Rights not specifically protected in current legislation may be protected under common law principles. It is important to consider such principles that may be applicable on specific cases.

1.2.2. Generally, employee rights are far more governed and protected by legislation. Equally so are those of employers. It is important to note that such protection is

generally applicable on independent contractors as they are not defined as employees by the applicable legislation.

1.3. Employment contract

1.3.1. The duties of the employer are:

a) To pay the employee for work done.

b) To provide safe and healthy working conditions.

c) To provide the employee with work.

d) Not to make the employee do work of a lower status than the employee was employed for.

e) Not to contract the employee to another employer without the employee's consent.

1.3.2. The following are duties of the employee:

a) To perform his/her work diligently.

b) To obey all reasonable orders and work rules.

c) Not to deal dishonestly with the property of the employer.

d) May not compete with the employer in respect of business.

1.4. Requirements of Schedule 8 of the **LRA**

1.4.1. The **LRA** by means of its Code of Good Practice (Section 10 of Schedule 8 of this Act), codifies a process relating to the incapacity due to ill health or injury of an employee. Provision for this Code is made in Section 203 of the **LRA**, which also reads that: Any person interpreting or applying **LRA** must take into account any relevant Code of Good Practice. The Dismissal Code has specific provisions for ill-health and injury, and a body of practices which have become known as incapacity management has evolved over time based on these provisions in the Dismissal Code. It differentiates between good practices in situations of temporary or permanent incapacity. In terms of this Code, the obligation of the employer can be summarised as follows:

1.4.1.1. An employer has to determine whether an employee is temporarily or permanently unable to work.

1.4.1.2. If the employee is temporarily unable to work, the employer should investigate the extent of the incapacity to find alternative solutions short of dismissal, to accommodate the employee. This includes investigating the nature of the job, the expected length of absence, the seriousness of the illness and the possibility of a temporary replacement.

1.4.1.3. If the incapacity is permanent, the employer should ascertain the possibility of securing alternative employment or adapting the duties or work circumstances of the employee to accommodate such employee's incapacity.

1.4.1.4. In any investigations related to incapacity, the employee should be allowed to state a case in response, and to be assisted by a trade union representative or a fellow employee. It is suggested that all incapacity proceedings be conducted in consultation with the incapacitated employee.

1.4.1.5. The degree of incapacity is relevant to the fairness of any dismissal, whether for temporary or permanent incapacity. The cause of incapacity is relevant and, if the cause arises from a working circumstance, the duty of an employer to assist such an employee is greater. In the case of certain kinds of incapacity, such as alcoholism, drug abuse and post-traumatic stress disorder, counselling and **rehabilitation** may be appropriate steps for an employer to consider.

1.4.1.6. An employer should, at all times during assessments, consider whether the employee is capable of performing the work and:

a) If the employee is not capable, the extent of the incapacity.

b) The extent to which the work circumstances of the employee may be adapted to accommodate the **disability** or, where this is not possible, the extent to which the duties of the employee may be adapted.

c) The availability of any reasonably suitable alternative work.

1.4.1.7. The Labour Court has found that in order to accommodate an employee rather than to dismiss the employee, reasonably suitable alternative employment at a reduced salary and/or job-grading is acceptable.

1.4.1.8. Ultimately either the **CCMA** or the Labour Court will determine if any action in terms of this policy was procedurally and substantively fair.

1.5. **MHSA** and its regulations

1.5.1. Section 7 of the **MHSA** prescribes that an employer should staff a mine with due regard to health and safety. It further prescribes that every employer must:

a) Ensure that every employee complies with the requirements of this Act.

b) Institute the measures necessary to secure, maintain and enhance health and safety.

c) Provide persons appointed under sub-section (2) and (4) with the means to comply with the requirements of this Act and with any instruction given by an inspector.

d) Consider the training and capabilities of an employee in respect of health and safety before assigning a task to that employee.

e) Ensure that work is performed under the general supervision of a person trained to understand the hazards associated with the work and who has the authority to ensure that the precautionary measures laid down by the employer are implemented.

1.5.2. Section 11 of **MHSA** prescribes that an employer should assess and respond to risk. It further prescribes that every employer must:

a) Identify the hazards to health or safety to which employees may be exposed to while they are at work.

b) Assess the risks to health or safety to which employees may be exposed to while they are at work.

c) Record the significant hazards identified and the risks assessed.

d) Make those records available for inspection by employees.

e) Determine all measures, including changing the organisation of work and the design of safe systems of work, necessary to:

(i) Eliminate any recorded risk.

(ii) Control the risk at source.

(iii) Minimise the risk.

(iv) In so far as the risk remains:

- Provide for personal protective equipment.

- Institute a programme to monitor the risk to which employees may be exposed.

f) Conduct an investigation in terms of Section 11(5) of **MHSA** for serious illnesses or health threatening occurrences.

1.6. **EEA**

1.6.1. The **EEA** identifies *people with **disabilities*** as a designated group, to remedy decades of unfair discrimination, and to redress unjustifiable imbalances in their representation in the workplace, as compared with black people, woman and males. For employers, the Act therefore establishes two overall obligations in relation to people with **disabilities** to:

a) Identify and remove unfair discrimination.

b) Increase representation.

1.6.2. To achieve these, the Act requires designated employers to take specific steps and actions. Each of them needs to be understood, planned and then

incorporated into the Employment Equity Plan of the organisation to be implemented in line with an agreed strategy over time. These requirements are:

a) Increase the representation of employees with **disabilities**.

b) Audit for unfair **disability**-related discrimination.

c) Conduct a workforce **disability** profile.

d) Afford **reasonable accommodation**.

e) Train.

f) Develop.

g) Retain employees with **disabilities**.

1.6.3. The requirements of the **EEA** mean that suitably qualified people with **disabilities** cannot be unfairly discriminated against or be subjects of questionable or unfair labour practices in employment. It is expected of the employer to report on this from time to time in the prescribed employment equity report.

1.6.4. Apart from the risks, equitable employment practice is the right thing for leading corporate citizens to aim for according to the strategic objectives identified by the **King III Report on Corporate Governance**.

1.7. Relevant **COPs**

1.7.1. The following should apply in relation to suitably qualified people with **disabilities** and these employees should be retained where appropriate.

1.7.2. South African **Disability** Code

1.7.2.1. In addition to the **EEA**, the Department of Labour has published at the end of 2002 the final Code of Good Practice on Key Aspects of **Disability** in the Workplace. Its objective is to guide employers in their efforts to attain equity for people with **disabilities**. This Code must be read together with the HIV/AIDS Code of Good Practice issued earlier by Government.

1.7.3. **ILO COP** on **Disability** Management

1.7.3.1. In late 2000, the first **ILO COP** on managing **disability** in the workplace was announced. It outlines:

*"Fair and equitable treatment of workers with **disabilities** … and the key roles and responsibilities of all the process stakeholders: employee, employer, trade unions, insurance providers. The policy focuses on return to work and job retention."*

1.7.4. The **ILO** Code must be read together with the **EEA** above as it outlines how organised labour and employers can retain people with **disabilities** as required by the **EEA**. The **ILO** Code was ratified by the South African Government for implementation alongside our own **disability** code.

1.8. The **ILO** recommendation

1.8.1. The guideline recommends that: Every employer should have a plan to minimise the impact of disablement on the people it employs.

Department of Minerals Resources and Energy
Mine Health and Safety Inspectorate

Private Bag X59
Arcadia
0007

Switchboard: +27 (0) 12 444 3000

Trevenna Campus
Building 2C
70 Meintjes Street
Sunnyside

Email: mhsi@dmre.gov.za

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