DEPARTMENT OF MINERAL RESOURCES

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MINE HEALTH AND SAFETY ACT, 1996 (ACT NO 29 OF 1996)

GUIDELINE FOR A MANDATORY CODE OF PRACTICE FOR THE MANAGEMENT OF MEDICAL INCAPACITY DUE TO ILL-HEALTH AND INJURY

I **DAVID MSIZA,** Chief Inspector of Mines, under section 49 (6) of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996) and after consultation with the Council, hereby issues the Guideline for the Management of Medical Incapacity due to Ill-health and Injury in terms of the Mine Health and Safety Act, as set out in the Schedule.

DAVID MSIZA
CHIEF INSPECTOR OF MINES

SCHEDULE

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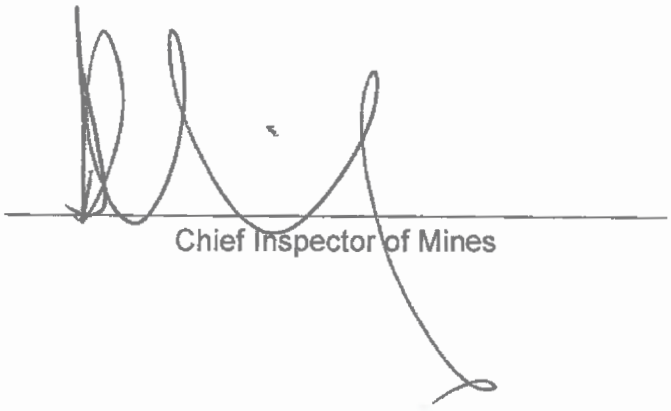
DEPARTMENT OF MINERAL RESOURCES

MINE HEALTH AND SAFETY INSPECTORATE

GUIDELINE FOR THE COMPILATION OF A

MANDATORY CODE OF PRACTICE FOR

THE MANAGEMENT OF MEDICAL INCAPACITY DUE TO ILL-HEALTH AND INJURY



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PART A: THE GUIDELINE

1. INTRODUCTION

1.1 This guideline has been drafted to assist **Occupational Medical Practitioners (OMP's)**, Safety Health & Environment consultants (SHE) and Human Resource Consultants in managing employees with **medical incapacity** in mining.

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

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

1.4 In instances of **reasonable accommodation** or alternative job placements, the employer is always entitled to expect full productivity of the accommodated employee.

1.5 The interpretation of this guideline should be applicable 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 The guideline applies to applicants or incumbents in a position.

2. LEGAL STATUS OF GUIDELINE AND COP'S

In accordance with Section 9(2) of the **Mine Health and Safety Act**, Act 29 of 1996 (as amended) an employer must prepare and implement a **Code of Practice (COP)** on any matter affecting the health or safety of employees and other persons who may be directly affected by activities at mines and when the Chief Inspector of Mines requires it. The **COPs** must comply with any relevant guidelines issued by the Chief Inspector of mines (Section 9(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 applicants or existing employees with **medical incapacity** and those qualifying as persons with **disabilities** under **EEA**.

3.2 Collateral objective is to assist the **OMP** and Human Resource Consultants charged with the task of preparing a **COP** which, if implemented and complied with, would:

a) Ensure that employees suffering from **medical incapacity**, where possible, would be returned to their normal, adjusted or alternative work by making early return to work recommendations.
b) Ensure that employees suffering from **medical incapacity**, where such employees cannot be accommodated in their normal, adjusted or alternative work, would be managed in a consistent and fair manner.
c) Ensure that employees suffering from **medical incapacity** are fit to continue performing productively and safely in the normal, adjusted, or alternative work at the mine.
d) 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

COP means a code of practice.

COIDA means Compensation for Occupational Injuries and Disease Act, 1993 (Act no 130 of 1993), as amended.

DISABILITY means an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of **impairment**.

NOTE:

Disabilities could include but are not limited to:

- *Serial behavioral disorders that are against public policy;*
- *Self-imposed body adornments such as tattoos and body piercing;*
- *Compulsive gambling, tendency to steal or light fires;*
- *Disorders that affect a person's mental or physical state if they are caused by current use of illegal drugs or alcohol, unless the affected person has participated or is participating in a recognized program of treatment;*
- *Normal deviations in weight, height and strength; and conventional physical and mental characteristics and common personality traits.*

*Employees are considered as persons with **disabilities** if they satisfy **all or any** of the physical, sensory, intellectual or mental **impairment** conditions.*

EMPLOYMENT EQUITY ACT (EEA) means the Employment Equity Act, Act 55 of 1998, as amended.

EMPLOYEE REPRESENTATIVE means the following:

- The employee's recognised full-time union representative;
- **Health and Safety Representative** for the area; or
- A colleague or co-worker of the employee's choice.

ESSENTIAL FUNCTIONS OF THE JOB means those functions of the job which must be done in order to achieve the goals and objectives of that specific job.

FUNCTIONAL CAPACITY ASSESSMENT means the objective test designed to replicate work tasks and assess an injured and/or an ill employee's ability to perform those tasks.

HEALTH AND SAFETY REPRESENTATIVE means a person elected, appointed and trained in terms of the **Mine Health and Safety Act** (Section 29)

IMPAIRMENT means the following: loss of use, or derangement of any body part, organ system, or organ function. **Impairment** may be of a physical, or mental and/or a combination of both, or a sensory nature.

NOTE:

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

ILO means International Labour Organisation.

INCAPACITY: means the temporary or permanent **impairment** on the grounds of ill health or injury.

INHERENT JOB REQUIREMENTS means those requirements the employer stipulates as necessary, for a person to be appointed to the job, and are necessary in order to enable an employee to perform the essential functions of the job.

LABOUR RELATIONS ACT (LRA) means the Labour Relations Act, Act 66 of 1995, as amended.

MEDICAL INCAPACITY means the inability to find and retain employment due to a disease and/or an injury that prevents the performance of the customary duties of an employee.

MEDICAL INCAPACITY AND/OR DISABILITY MANAGEMENT means the process of managing people with medical **incapacity** and/or **disability** including but not limited to recruitment, retention, and advancement.

MEDICAL INCAPACITY MANAGEMENT COMMITTEE means a formal body at each business unit and/or operation site responsible for co-ordinating and synchronizing operational issues regarding rehabilitation, re-skilling and re-training, evaluation for replacement and **reasonable accommodation** of people with medical **incapacity** and/or **disabilities**.

MEDICAL SURVEILLANCE means a planned program of periodic examinations which may include clinical examinations, biological monitoring, and/or other medical tests of employees by an **occupational health practitioner** or, in prescribed cases, by an **occupational medical practitioner.**

MHSA means the Mine Health and Safety Act, Act 29 of 1996, as amended

MINIMUM HEALTH STANDARDS (MHS) means the health status required of an employee, or new recruit, taking into account the health and safety hazards to which such a person will be exposed to, as well as 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 property of the employer.

OCCUPATIONAL HEALTH AND SAFETY RISKS means exposure to source of harm and the potential impact thereof on the health and/or safety of the person, or of co-workers.

OCCUPATIONAL HEALTH NURSING PRACTITIONER (OHNP) means an occupational health nurse or a person who holds a qualification in occupational health as recognised by the South African Nursing Council.

OCCUPATIONAL HYGIENIST means a competent person appointed in terms of Section 12 (1) of the **MHSA**

OCCUPATIONAL MEDICAL PRACTITIONER (OMP) means a medical practitioner, who holds a qualification in occupational medicine or an equivalent qualification, recognised by the Health Professions Council of South Africa (HPCSA).

PROGRESSIVE CONDITIONS means those conditions that are likely to develop or change or recur with increased limitation of the person's ability to function effectively.

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 and 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.*

REHABILITATION means a structured program developed to ensure optimal recovery and deployment of employees who suffer **impairment or disability**.

RETURN-TO-WORK RECOMMENDATIONS means the recommendations made by the **OMP**, in conjunction with safety specialists, **occupational hygienists**, line managers and/or Human Resources (where appropriate), giving guidance to the **Medical Incapacity Management Committee** for returning an employee to his or her normal work, adjusted work or alternative work.

SAFETY OFFICER means person on a mine who is responsible for the safety of the people who work or visit the mine.

SUBSTANTIALLY LIMITING means a condition is substantially limiting if, in its nature, duration or effects, it **substantially limits** the person's ability to perform the essential functions of the job for which they are being considered or employed.

WORK CAPACITY EVALUATION means a comprehensive evaluation and description of what the employee can and cannot do, a thorough understanding of the duties, working conditions, work processes, job tasks, job requirements and stressors and facilities of the workplace.

5. SCOPE

This guideline covers a basic system for the **OMP** and Human Resources Consultants to use when managing employees suffering from **medical incapacity**.

5.1 This guideline does not advise management of individual medical conditions, but rather prescribes the general principles to be followed for employees suffering from **medical incapacity**. This is done in order to ensure that such employees will be managed in a consistent and fair way. All relevant legislation should be considered in this process. This guideline should therefore be viewed as an important tool to support employers to align the principles of **MHSA** with other relevant pieces of legislation e.g. **LRA, EEA, COIDA** and **COPs** e.g. South African Disability Code, **ILO** Code.

5.2 The **OMP** involved in this 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 (Occupational Medicine Practitioner)

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 (Occupational Medicine Practitioner)
- Dr Martje Joubert (Occupational Medicine Practitioner)
- Me Zuritha du Preez (Senior Human Resource Consultant – Matla Collieries)
- Mr. Lukas Coetsee (Attorney of Law)
- Mr. Francois Smith (Professional Safety Expert)
- Mr. Paul Venter (Experienced Underground Mine Captain)

6.4 Members of the Tripartite Task Team

- Dr D Mokoboto (State)
- Dr K Baloyi (Employer)
- Mr. A Letshele (Labour)

PART B: AUTHOR'S GUIDE

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

2. 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.

3. It should be indicated in the **COP** and on each annex to the **COP** whether:

   a) The annex 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**, or

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

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

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

6. 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 CODE OF PRACTICE

1. TITLE PAGE

The title page must include the following:

1.1 Name of mine;

1.2 the heading: **Mandatory COP for incapacity due to ill health and injury;**

1.3 a statement to the effect that the **COP** was drawn up in accordance with this guideline **DMR16/3/2/3 – A6** issued by the Chief Inspector of Mines;

1.4 the mine's reference number for the **COP;**

1.5 effective date of the **COP;** and

1.6 revision dates.

2. TABLE OF CONTENTS

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

3. STATUS OF THE MANDATORY CODE OF PRACTICE

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

3.1 The mandatory **COP** was drawn up in accordance with the Guideline DMR 16/3/2/3–A6 issued by the Chief Inspector of Mines.

3.2 This is a mandatory **COP** in terms of section 8 (2) of the MHSA.

3.3 The **COP** supersedes all previous relevant **COP's.**

3.4 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 DRAFTING COMMITTEE

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. The committee should include competent persons sufficient in number to effectively draft the **COP.**

5. GENERAL INFORMATION

The general information relating to the mine must be stated in this paragraph. The following minimum information must be provided:

5.1 A brief description of the mine and its location;
5.2 the commodities produced; and
5.3 other relevant **COP's**.

6. TERMS AND DEFINITIONS

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. The drafting committee should avoid jargon and abbreviations that are not in common use or that have not been defined. The definitions section should also include acronyms and technical terms used.

7. RISK MANAGEMENT

7.1 **Medical incapacity** in an employee may impact on 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 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 any underlying condition.

7.2 Multi-disciplinary inputs are thus 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. This process should be applied to all levels of risk impact due to the incapacity.

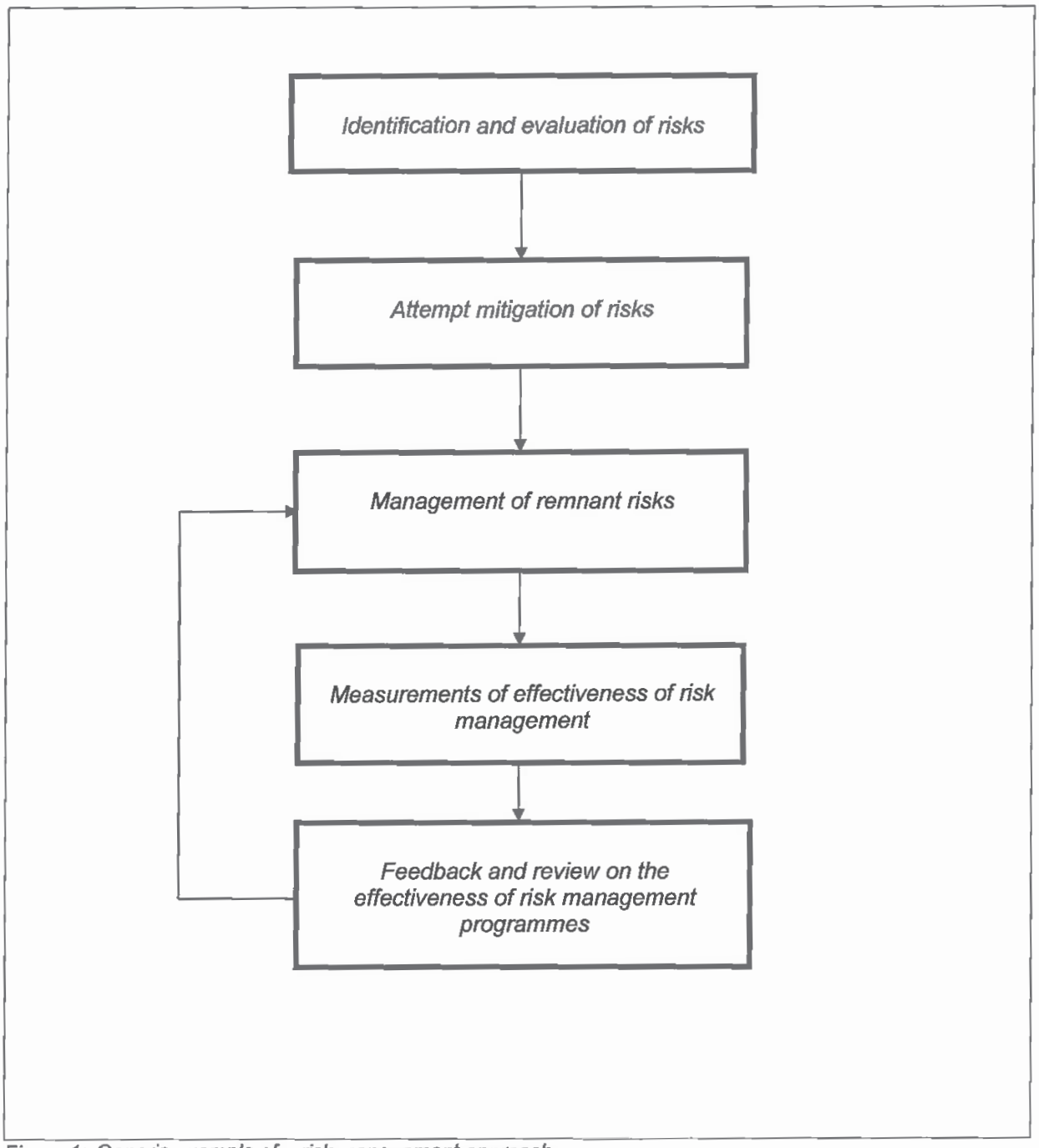


Figure 1: Generic example of a risk management approach.

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

The **COP** must set out how the significant risks identified and assessed in terms of the risk assessment process referred to in paragraph 7.1 above will be addressed.

The **COP** must cover at least the aspects set out below unless there is no significant risk associated with that aspect at the mine.

8.1 Medical Incapacity Management Process

8.1.1 Objectives

The **COP** must address the following:

8.1.1.1 The early identification of employees in need of incapacity management.

8.1.1.2 A medical- and/or health risk assessment in order to determine:

a) The potential for returning such employee to his own, adjusted or alternative job (**work capacity evaluation**).
b) The potential health and safety risks to continue with his own, adjusted- or alternative work
c) The potential to make structured early return to work recommendations, which may include ongoing physical or psychological treatment and vocational **rehabilitation**.
d) Making early return to work recommendations to, amongst others, prevent such employee to develop a disability mind set.
e) To establish if and when an employee with a medical **incapacity** will qualify as a person with a **disability** so that the employer can introduce the necessary interventions as required under **EEA**.

8.1.2 Early identification of employees

The **COP** must identify employees with medical **incapacity** as follows:

a) Regular analysis of sick leave absenteeism by Human Resources to identify employees with high frequency absenteeism or those with long periods of absenteeism, usually longer than 21 days;
b) Employees with abnormal findings at pre-placement and/or annual **medical surveillance** done by the occupational health service;

c) Sick certificates from treating medical specialists indicating an employee with **medical incapacity**;
d) Line manager reporting poor work performance and/or work attendance of employees; and
e) Employee self-reporting:
   - Wherever there is reason to be concerned about any employee identified by one of these means, such instance should be investigated to determine possible **medical incapacity**;
   - The Human Resource Consultant arranges a formal meeting with such employee in order to identify the cause of absenteeism and/or poor performance and take appropriate actions. The employee is classified in one of the following categories to facilitate further management:
     - Employee with medical condition;
     - Employee with social problem;
     - Employee with **incapacity** other than medical (e.g. training, skills, etc.);
     - Other Human resource factors (e.g. sick leave abuse); and
   - Employees suffering from medical conditions are reported to an **occupational medical practitioner** to facilitate the **incapacity management process**.

8.1.3 The **COP** must do medical assessment

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

- The **OMP** should refer the employee with recommendations to the **medical incapacity management committee**.

8.1.4 The **COP** must perform **work capacity evaluation.**

8.1.4.1 **Work capacity evaluation** is the evaluation of the ability to execute the essential functions of the job, determining of the endurance to sustain the capacity over the whole work shift and to do such a job without risk to the health and safety of the employee, co-workers or other persons. It therefore depends on an evaluation of the employee's physical and mental condition, the workplace conditions and demands of the specific employee, taking into account the **minimum health standards** for the specific job in question.

In assessing the work capacity of an affected employee the **occupational medicine practitioner** should:

- Determine the **essential functions** and person-job specifications.
- Refer to the **minimum health standards.**
  (Refer to the appropriate **minimum health standards** of the relevant job to identify the specific physical and mental standards required.)
- Determine 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 **occupational medical practitioner** that each case be evaluated individually and not to make assumptions based on general perceptions or beliefs.*

- Determine the physical capacity:

  This evaluation considers every bodily system and/or organ and evaluates the status quo of the function of the specific system and or organ. Comparing the findings with the predicted values of "normal" individuals (Refer AMA Guideline 6th edition for normal values and impairment ratings) an accurate measurement can be done of the impairment of function of the specific system and/or organ.

- Determine the mental capacity

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

- Occupational therapy evaluation and determining rehabilitation prospects

  Medical impairment ratings depend on maximal medical improvement 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 an employee's ability to improve on the existing functional- and work capacity assessment results.

8.1.5 The **COP** must address **return to work recommendations**

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

8.1.5.2 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 **occupational medicine practitioner** should liaise with the appropriate specialists before making such recommendations.

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

a) Expected duration of treatment, rehabilitation and training required;
b) Expected work capacity against predicted progress;
c) The recommended periods for doing re-assessments to determine progress employee against expected parameters,
d) Special **reasonable accommodation** measures to be implemented such as not working on heights or other relevant to the specific case and;
e) The proposed early return to work recommendations is then discussed at the appropriate **medical incapacity management committee**.

8.1.6 The **COP** must address **reasonable accommodation.**

8.1.6.1 **Reasonable accommodation** requirements apply to applicants and employees with disabilities who are suitably qualified for the job and may be required:

- during the recruitment and selection process;
- in the working environment;
- in the way work is usually done, evaluated and rewarded; and
- in the benefits and privileges of employment.

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

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

8.1.6.4 The employer should consult the employee and, where reasonable and practicable, technical experts to establish appropriate mechanisms to accommodate the employee e.g. organisation with or for people with disabilities.

8.1.6.5 **Reasonable accommodation** includes, but is not limited to:

1. adapting existing facilities to make them accessible;
2. re-organising workstations;
3. changing training and assessment materials and systems;
4. restructuring the job so that non-essential functions are re-assigned;
5. adjusting work time and leave; and
6. providing specialised supervision, training and support in the workplace.

NOTE:

The employer is not obliged to accommodate an employee with a disability if this would impose an unjustifiable hardship on the business of the employer or where such a definite safety risk exists. Nor is the employer obliged to create new jobs in order to accommodate employees with medical ***incapacity*** *and/or* ***disability.***

8.2 Management of employees with **medical incapacity**

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. 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.

8.2.1 **Medical Incapacity Management Committee**

This is a formal body at each mine or operation or site where medical **incapacity** and/or **impairment** and possibilities of treatment, rehabilitation, adaptation of the

tasks or work environment, **reasonable accommodation** in alternative posts, or permanent medical **disability** are discussed, evaluated and managed.

The directives for the decision-making in this committee must be protection of employee rights of fair labour practices, safety and health of employees and other persons, and protection of employer's rights to productivity and not to suffer unjustifiable hardship.

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

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

1. The chairperson (a Senior Human Resources Official).
2. The medical incapacity coordinator.
3. The human resources consultant of the medical case
4. The **occupational medical practitioner (OMP)** and/or the **occupation health nursing practitioner (OHNP).**
5. Safety Professional.
6. **Occupational Hygienists**, if appropriate.
7. A secretary (to keep minutes).
8. The employee concerned.
9. The **employee representative**.
10. The direct supervisor and/or line manager of the area where the employee is employed,
11. Any other employee, specialist, social worker or consultant co-opted permanently or temporarily by the chairperson to assist the medical **incapacity** panel in fulfilling its functions.

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

8.2.2 Functions of **Medical Incapacity Management Committee**

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

8.2.2.1 Consider the **OMP's** findings and recommendations to determine suitable alternative placement.

8.2.2.2 Consider findings of workplace inspection report for purpose of possible **reasonable accommodation.**

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

8.2.2.4 Ensure compliance to all relevant legal obligations.

8.2.3 Where such employee still suffers from medical **incapacity** after the pre-determined period for treatment and/or rehabilitation, the **OMP** should evaluate this employee to verify if such employee will qualify as a Person with Disability (**EEA**) and if so, then **reasonable accommodation** measures should be considered by the mine. 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 (Usually measured against AMA guidelines).

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

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

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

- Permanent adjusted duty (continuation of normal services with job modification)
- Temporary adjusted duty
- Permanent transfer to another type of work (even at a lower grade)
- Termination of service, where an employee cannot be accommodated.

8.2.4 The Committee should ensure fairness of process in all respects of their functions.

8.2.5 The Committee should 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; to bottom of 9.3.2.

8.2.6 The Committee Members should 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.

8.2.7 The Committee should inform the employee on the appeal procedures, if applicable.

8.2.8 The Committee should assess and review its effectiveness on an ongoing basis to ensure continuous improvement.

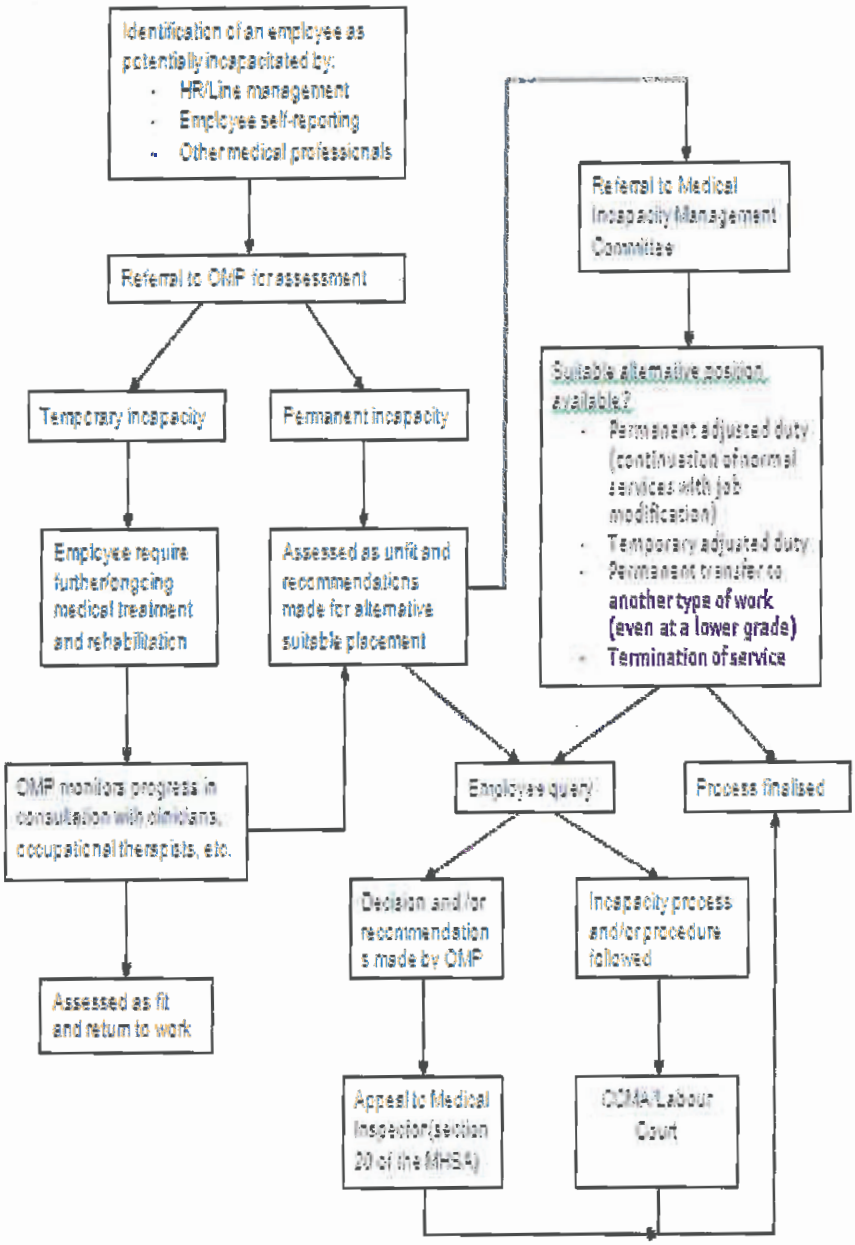
8.3. Disputes concerning the process and/or decisions of the **Medical Incapacity Management Committee:**

8.3.1 The **COP** should ensure that the objective of this committee is 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 resolved in a practical, professional and timely manner to try and avoid delays in decision making.

8.3.2 Appeal in terms of section 20 of the **MHSA**

If the employee is not satisfied with the process as mentioned in 8.2.2 above, the employee still have the right to, in terms of Section 20 of the **MHSA** lodge an appeal to the Medical Inspector.

8.3.3 Flowchart outlining the management of employees with medical incapacity process



8.3.4 Competencies

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

8.3.4.1 Legal obligations related to employees with **medical incapacity** and/or **disability**;

8.3.4.2 making structured early return to work recommendations;

8.3.4.3 coordination, synchronization, case management and communication relating to medical treatment and rehabilitation;

8.3.4.4. workplace assessment for **reasonable accommodation** of employees with **medical incapacity** and/or **disability**;

8.3.4.5. health Risk Assessment practices for employees with **medical incapacity**;

8.3.4.6. **Health Impact Assessment** practices for employees with **medical incapacity**; and

8.3.4.7. 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 organizational structures, responsibilities of functionaries and programs and schedules for this **COP** that will enable proper implementation of the **COP**.

> ***NOTE:***
> *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 purpose of risk assessment.

2. COMPLIANCE WITH THE CODE OF PRACTICE

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

3. ACCESS TO THE CODE OF PRACTICE 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 on written request to the manager. A register must be kept of such persons or institutions with copies to facilitate 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 responsibility.

ANNEXURE A: Legislative framework

(This annexure is for informational purpose)

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

1. The Constitution of South Africa

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

The Labour Rights are as follows:-

- Equality (Section 9)
- Human Dignity (Section 10)
- Labour Relations (Section 23)

2. General labour rights

The general labour rights include the right to:

- Work.
- Fair remuneration and conditions of service.
- Access to training.
- Belong to a trade union.
- Bargain collectively.
- Withhold labour.
- Protection of safety and health.
- Security against unemployment or injury on duty.
- Job security.
- Protection against unfair labour practices.
- Protection against unfair discrimination.

3. Common law principles

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

4. Employment contract

The duties of the employer are:

1. To pay the employee for work done.
2. Provide safe and healthy working conditions.
3. To provide the employee with work.
4. Not to make the employee do work of a lower status than the employee was employed for.
5. Not to contract the employee to another employer without the employee's consent.

The following are duties of the employee:

1. To perform his/her work diligently.
2. To obey all reasonable orders and work rules.
3. Not to deal dishonestly with the property of the employer.
4. May not compete with the employer in respect of business.

5. Labour Relations Act: Requirements of Schedule 8

The Labour Relations Act, 1995, by means of its Code of Good Practice (Section 10 of Schedule 8), codifies a process relating to an employee's incapacity due to ill health or injury. Provision for the 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, an employer's obligation can be summarised as follows:

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

- 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.

- 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

- 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

- 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.

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

  - If the employee is not capable, the extent of the **incapacity**.
  - The extent to which the employee's work circumstances may be adapted to accommodate the **disability** or, where this is not possible, the extent to which the employee's duties may be adapted; and
  - The availability of any reasonably suitable alternative work.
  - The Labour Court has found that in order to accommodate an employee rather than to dismiss, reasonably suitable alternative employment at a reduced salary and/or job-grading is acceptable, and
  - Ultimately either the CCMA or the Labour Court will determine if any action in terms of this policy was procedurally and substantively fair.

6. MHSA and regulations (Act 29/1996)

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

- ensure that every employee complies with the requirements of this Act;
- institute the measures necessary to secure, maintain and enhance health and safety;
- provide persons appointed under subsection (2) and (4) with the means to comply with the requirements of this Act and with any instruction given by the inspector;
- consider an employee's training and capabilities in respect of health and safety before assigning a task to that employee; and

- 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.

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

- Identify the hazards to health or safety to which employees may be exposed while they are at work;
- assess the risks to health or safety to which employees may be exposed while they are at work;
- record the significant hazards identified and risks assessed; and
- make those records available for inspection by employees.
- determine all measures, including changing the organisation of work and the design of safe systems of work, necessary to:

  a) eliminate any recorded risk;
  b) control the risk at source;
  c) minimise the risk; and
  d) in so far as the risk remains:

     1. provide for personal protective equipment; and
     2. institute a programme to monitor the risk to which employees may be exposed.

- onduct an investigation in terms of section 11(5) when serious illness or life-threatening conditions occur.

7. Employment Equity Act

- The **EE** Act 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:

- identify and remove unfair discrimination; and

- increase representation.

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 organisation's Employment Equity Plan to be implemented in line with an agreed strategy over time. These requirements are the following:

- increase the representation of employees with **disabilities**;
- audit for unfair **disability**-related discrimination;
- conduct a workforce **disability** profile;
- afford **reasonable accommodation**;
- train;
- develop; and
- retain employees with **disabilities**.

The requirements of the **EEA** means 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.

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 3 Report.

Now the following should apply in relation to suitably qualified people with **disabilities**. They should be:

- hired they must be offered appropriate employee benefits; and
- retained where appropriate.

8. Relevant codes of practice

8.1 SA Disability Code

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.

8.2 International Labour Organisation's (ILO) Code of Practice on Disability Management

In late 2000 the first International Labour Organisation (ILO) Code of Practice on Disability Management (CGPDM) 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."*

The ILO Code must be read together with the **EEA** above as it outlines for organised labour and employers how to "retain" people with **disabilities** as required by the **EEA**. The ILO Code was ratified by the SA-government for implementation alongside our own SA Disability Code

9. The ILO recommendation

The guideline recommends that "every employer should have a plan to minimise the impact of **disablement** on the people it employs".