



**LEGAL UPDATE ON THE  
CERTIFICATION OF FITNESS TO WORK  
- DR JAN LAPERE**

# You know you are in South Africa, when

1. You produce a R 100 note instead of your driver's license when stopped by a traffic officer!
2. People have the most wonderful names: Christmas, Goodwill, Pretty, Wednesday, Blessing, Brilliant, Gift and Given!
3. You don't have to undress to undergo pre-placement medical testing!
4. 'Now-now' can mean anything from a minute to a month!
5. Audiograms are done in a caravan with rain pelting on the roof!
6. You continue to wait after a traffic light has turned to green to make way for taxis travelling in the opposite direction!
7. You paint your car registration on the roof!
8. You receive a mail: 'The Business of 'Medicals within the IDZ has reached a point where we can enjoy economies of scale, we can now pass on to our clients some cost savings'!
9. You have to take your own linen with you if you are admitted to a government hospital!
10. Prisoners go on strike!

# Legal Questions

- What medical services **should** an employer offer to employees?
- What medical services is an employer **not permitted** to offer to employees?
- Who is **responsible** for these medical services? Who has the **authority & accountability**?
- Is an employer permitted to have a **primary care** clinic on site?
- Are 'service providers' correctly offering the permitted and required services?

# Questions and answers

- Can a doctor certify medical examination outcomes when the whole examination is done by a professional nurse?  
**NO**
- Does the current scope of practice of a professional nurse include occupational medical examinations? **NO**
- Does an employer comply with its duties iro medical testing if medical examinations are done by professional nurses? **NO**
- Does an employer comply with its duties iro medical testing if medical examinations are done by a person or an organisation which is not registered with the HPCSA? **NO**
- Is it permissible for a doctor to work for or on behalf of an agent, institution, corporate or person who is not accredited as employer of practitioners registered with the Health Professions Council? **NO**

**Medical testing as legislated  
occupational H&S risk control & duty of the employer**

- Section 8 & 9 of the **Occupational Health and Safety Act**: general duties of employers to their employees and to other persons
- Sections 2 and 5 of the **Mine Health and Safety Act** define the duties of an employer to ensure safety on a mine

# Labour law differentiates between **medical surveillance** and **fitness for work**

- 1. Medical surveillance:** a planned programme of periodic examination ....by an occupational health practitioner or, in prescribed cases, by an occupational medicine practitioner
- 2. Medical surveillance** is a pure **occupational HEALTH risk control** measure and may or may not have a job placement (i.e. fitness for work) consequence.
- 3.** The objective of medical surveillance is to **provide information** to the employer, which assists with the elimination, control and minimisation of health risks, and to prevent, detect and treat occupational diseases.

# Medical surveillance

1. **Mine Health and Safety Act:** requires an appropriate system of medical surveillance considering all the health hazards to which employees may be exposed
2. **Occupational Health and Safety Act:** medical surveillance is defined for specific risks (asbestos, hazardous-biological agents & chemical substances, lead, noise) - not all health risks in the workplace have an explicit requirement for medical surveillance (e.g. stroboscopic light and high intensity light, laser, EMR non-ionising radiation, vibration, ultrasonic air waves, ergonomic risks)

# Fitness for work

1. **Fitness for work** means the ability to meet the specific requirements of a task or job.
2. Fitness for work is an occupational **HEALTH AND SAFETY control** specifically aimed at job placement.
3. The objective is **prevention** of job placement where the safety or the health of the employee or applicant or the safety of other persons may become affected by the health condition of the examined person.



# Fitness for work

1. **Occupational Health and Safety Act:** asbestos, diving, heights work, tower crane, mobile construction plant & vehicles operation, suspended platform, forklift & crane, heat & cold, HCS, lead
2. **Basic Conditions of Employment Act:** S 17 (night shift) & Section 26 (pregnancy)
3. **Mine Health and Safety Act:** diving operations for underwater mining, emergency preparedness and response, minimum standard of fitness to perform work at a mine, TMM
4. **Merchant Shipping Regulations:** seafarer
5. **National Road Traffic Act's Regulations:** 65 years or older, PDP

# Onus of duty for medical testing

1. Onus is on **the employer** of the examined person (except NRTA: onus on applicant or testing centre).
2. The employer must ensure that **the correct professional person** does the medical testing.
3. The respective acts define, in some instances, **the competency or the registration** requirements for these professionals (Occupational **medicine** practitioner, Occupational **health** practitioner, registered medical practitioner, registered nurse, designated medical practitioner)
4. When assessing the employers' acts or omissions in respect of medical surveillance or fitness for work testing against the statutory requirement, **the medical professionals' knowledge, expertise and performance** is accredited to the employer.

# Onus of duty-fitness for work

- **Mine Health and Safety Act:** OMP
- **Occupational Health and Safety Act**
  - Asbestos, construction fitness, HCS, lead : OMP
  - Diving: designated (diving) medical practitioner as defined in Regulation 19
  - Heights work: no specific practitioner
  - Forklift & crane operation: no specific practitioner
  - Cold & Heat: a registered medical practitioner or a registered nurse according to a protocol prescribed by the registered medical practitioner
- **Basic Conditions of Employment Act**
  - Employee working night shift: no specific practitioner
  - Pregnant employee: 'qualified medical professional'
- **Seafarer:** OMP approved by the Authority
- **National Road Traffic Act**
  - Person 65 years or older: medical practitioner or occupational health practitioner\*
  - Professional Driving Permit: registered medical practitioner or occupational health practitioner\*

# Onus of duty-medical surveillance

1. Mine Health and Safety Act: OMP
2. Occupational Health and Safety Act
  1. Asbestos, HBA, HCS: OHP
  2. Diving: a designated (diving) medical practitioner as defined in Regulation 19
  3. Lead: OMP
  4. Noise: ENT specialist, speech therapist, OMP, SASOHN-registered technician
  5. No determination re risk-specific medical surveillance with respect to exposure to other physical-, ergonomic or psycho-social work risks.

# Can nursing practitioners do occupational medical examinations?

1. The **social labour** legislation which requires that a medical examination is done by a defined health practitioner (nursing or medical or other) does not define **the permissible scope of practice** of this professional, other than by its administrative reference to a registration or recognition by the respective professional council or other body.
2. The professional **scope of practice**, defining the permissible functions, duties and responsibilities of health care professionals is determined by **the Health Professions Act** and **the Nursing Act** and/or the respective **Councils** which they establish.

# Legal standards for the profession of medicine: The Health Professions Act

- **Exclusive right** to the physical or mental examination of persons, the diagnosis, treatment or prevention of physical or mental defects, illnesses or deficiencies in man, the giving of advice in regard to such defects, illnesses or deficiencies and the prescribing or providing of medicine in connection with such defects, illnesses or deficiencies.
- All persons practicing a health profession must **register with the Registrar of the Council**.
- Any person who is not registered in terms of the Act and practises a health profession is liable to a fine or to imprisonment for a period not exceeding 12 months.

# Occupational medicine (medical) practitioner

## social law definition

- *“A medical practitioner as defined in the Medical, Dental and Supplementary Health Service Professions Act, 1974, who holds a qualification in occupational medicine or an equivalent qualification which qualification or equivalent is recognized as such by the South African Medical and Dental Council”.*
- 2 year Diploma in Occupational Health/Medicine
- Obtained from an accredited University
- Entitles a registered medical doctor to register as **occupational medicine /medical practitioner**

# Occupational health practitioner

## Social Law Definition

- **OMP**; or
- Person who holds a qualification in occupational health **recognized as such** by the South African Medical and Dental Council, or
- Person who holds a qualification in occupational health recognized as such by the South African Nursing Council as referred to in the Nursing Act



# Nursing practitioner: categories

## Health Law Definition

1. Professional nurse
  - a. General Nursing
  - b. Psychiatric Nursing
  - c. Mental Nursing
  - d. Nursing For Mental Defectives
  - e. Fever Nursing
  - f. Sick Children's Nursing
2. Midwife
3. Staff nurse
4. Auxiliary nurse
5. Auxiliary midwife

# Occupational Health Nurse?

## Health Law Definition

- The Nursing Act and the South African Nursing Council respectively do **not identify** or **register** an occupational health practitioner
- **1981**: Regulation 238 - Certificate in Occupational Health Nursing
- **1993**: Regulation 212 – Teaching guide for a course in clinical nursing science leading to registration of an additional qualification
- ~~Registration with Recognition by~~ South African Nursing Council: professional nurse + additional qualification: ***Post Basic Occupational Health Nursing Science***

# South African Nursing Council: 24 August 2011

- ‘Nurses who successfully completed training in Occupational Health Nursing Science and are registered with SANC with additional qualification: **Post Basic Occupational Health Nursing Science, are recognised** by SA Nursing Council as **Occupational Health Nurses**.
- In lieu of *[sic]* their registration and licence to practice certificates they are legible *[sic]* to practice in their capacity as occupational health nurses’

# Endorsement of medical reports by medical practitioners

- Not explicitly addressed in any of the current Health Professions Council **ethical rules**
- Substantive and format guidelines for medical certificate of **illness**
- No guidelines for a medical certificate of **fitness**
- Council decision dated 22 may 2006: “**We wish to advise that it will not be permissible for you [the doctor] to fill in a certificate of fitness without personally examining the patient, unless if the tests by the occupational nurse are performed under your supervision’.**

# HPCSA Registration models

- Limited registration **business models**
  - Solo Practice
  - Partnerships
  - Associations
  - Incorporated Practices
- **Explicit prohibition on corporate ownership** (‘allowing a person who does not otherwise qualify as a partner or shareholder of a professional practice in terms of the Act or the Ethical Rules, to directly or indirectly, in any manner whatsoever, share in the profits or income of such a professional practice’)

# ?Registration as clinic/institution

**From:** [Adv Ntsane Mathibeli](#)

**To:** dr...

**Sent:** Monday, July 04, 2011 1:57 PM

Dear Dr.....

Kindly be advised that section 17 of the Health Professions Act, 1974 (Act No. 56 of 1974) provides as follows:-“17. Registration a prerequisite for practicing.....

**The aforementioned section of the Act refers to the registration of persons (medical practitioner) and not clinics or any institutions.**

**This is so because the Health Professions Council of South Africa regulates practitioners and not clinics or establishments.**

**There is no provision in the Act for the registration of clinics.**

Kind regards

**Adv Ntsane Mathibeli**

Legal Advisor: Legal Services

**HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA**

# Employment of Dr as employee

- **Employment of practitioners** will be decided on an *ad-hoc* basis by a committee of the HPCSA
- If the motive for employment is to generate income to the employer, or remunerate the employee on a fee-sharing basis, it should not be approved
- **Agencies recognised** for employing practitioners that are registered under the Health Professions Act:
  - The Public Service
  - Universities / Training Institutions (only limited for purposes of training and research)
  - All registered persons within the HPCSA may also employ fellow registered practitioners
- Any other agent, institution, person may lodge an application with the HPCSA for the purposes of employment of a practitioner registered with the Health Professions Council

# Employment of Dr as employee

- All employing institutions should be accredited by the HPCSA
- Professional appointments
  - A practitioner shall accept a professional appointment or employment from employers approved by the council only in accordance with a written contract of appointment or employment which is drawn up on a basis which is in the interest of the public and the profession
  - The contract of appointment shall be made available to the council at its request



# Statutory controls

- Department of Labour
- Department of Minerals and Energy
- Health Professions Council of South Africa
- Nursing Council of South Africa
- Criminal prosecution under Section 17(5) of the Health Professions Act
- Department of Health

# Quo Vadis

1. The Health Professions- and Nursing Councils and Departments of Labour and of Minerals and Energy should **audit and police** current practices, against written guidelines
2. Whilst resource restrictions may require deployment of nursing and other practitioners in independent occupational medical practice, this must be done within **current statutory and ethical rules**
3. Where such rules are perceived to hamper **progress**, the relevant authorities may require assistance from the **professional organisations**