

Asbestos Victims Support Groups Forum – UK

Reforming Welfare to Reward Cm7363

A Response

Introduction

The Asbestos Support Groups' Forum UK consists of the following groups representing asbestos victims throughout the UK.

Asbestos Support West Midlands; Barrow Asbestos Related Disease Support; Bradford Asbestos Victim Support Group; Cheshire Asbestos Victims Support Group; Derbyshire Asbestos Support Team; Greater Manchester Asbestos Victims Support Group; Hampshire Asbestos Support & Awareness Group; Merseyside Asbestos Victims Support Group; North-West Wales Asbestos Victims Support Group; North East Asbestos Support & Awareness Group, Ridings Asbestos Support & Awareness Group, Sheffield And Rotherham Asbestos Group, Asbestos Action Tayside.

Our Response

Our response to the consultation on welfare reform is limited to answering questions 24 and 25, but we have taken this opportunity to highlight an important question in respect of government lump sum payments in lieu of civil compensation, particularly for mesothelioma.

In our response to the DWP IIDB consultation in 2007 we warned that it would be wrong to ignore the needs of asbestos victims who are rendered incapable of work. We said:

The government intends to dovetail the IIDB Scheme with its welfare reform programme which aims to significantly increase the employment rate for disabled people. In seeking to achieve this aim it would be wrong to ignore the needs of those, such as asbestos victims, who are rendered incapable of work, or who are affected late in life due to long-latent disease, or to reduce existing scheme provision in any way whatsoever. (Forum response to IIDB Consultation)

We are surprised that changes to IIDB are now subject to yet another consultation, ostensibly for the same reason given for the consultation in 2007 “..it is important to consider the reform of IIDB in the context of our wider changes to the welfare system.”

Q. 24 How might we reform Bereavement Benefit and IIDB to provide better support to help people adjust to their new circumstances while maintaining the work focus of the modern welfare state.

Over half of all Industrial Injuries Disablement Benefit (IIDB) prescribed disease payments are paid to asbestos victims.¹

Most asbestos victims are eligible for State Pension Credit, and the majority are over State Pension Age.² Almost all asbestos victims will never work again or are already retired.

Forty percent of all payments for prescribed diseases were made to mesothelioma sufferers in 2004/05.³ Mesothelioma sufferers have a life expectancy of between 8-13 months, and they will die as a result of their occupational exposure to asbestos.

Reform of IIDB cannot contribute to maintaining the work focus of the modern welfare state as far as asbestos victims are concerned.

The best way to reform IIDB for asbestos victims to help them to adjust to their changed circumstances is to stop treating IIDB as a 'benefit' and to treat it properly as compensation, so that recipients of IIDB do not lose their means tested benefits pound for pound and effectively lose part, or all, of their no-fault compensation.

Currently, asbestos victims who are sufficiently impoverished to require means tested benefits can be worse off claiming IIDB. It is simply ludicrous to treat IIDB as income when it is paid for loss of faculty resulting in disablement, i.e. for reduced lung function, loss of health and in cases of mesothelioma, loss of life.

Better support could be provided to Mesothelioma sufferers during their short life expectancy if Constant Attendance Allowance (CAA) were paid automatically at the highest rate. This would be consistent with the government's decision in 2002 to pay 100% IIDB to mesothelioma sufferers, despite the fact that for a short time on presentation with the disease, mesothelioma sufferers would not be 100% disabled. All too soon, mesothelioma sufferers are in need of constant care, but having been refused CAA in the first instance, or because they feel they do not meet the requirements for CAA, they never apply for this payment and never receive the help they need and deserve.

Very few awards of CAA are made for mesothelioma when in fact awards should be made in 100% of cases. If the government is serious about helping people "adjust to their new circumstances" what better way could be found than by providing the help mesothelioma sufferers need when this devastating and cruel disease takes its toll upon their health and their capacity to help themselves.

We have provided a detailed response on how reform of IIDB might help in rehabilitation for those who are of working age and for whom return to work is possible and most desirable. It is pointless repeating our responses here and we would urge the DWP to treat the responses to the 2007 consultation seriously.

¹ DWP IIDB Consultation Paper Fig. 8

² DWP IIDB Consultation Paper, 3.2 'Some 60% of new prescribed disease claims are from people over State Pension Age'.

³ DWP figures for Dec 2004 to Sept 2005 – 1,350 mesothelioma payments of 4,000 payments for PDs

Q 25. Are lump sum payments a good way of meeting people's needs? Do they give people more choice and control? Could we make more use of them?

Lump Sum Payments

Lump sum payments are generally, wholly inappropriate for asbestos victims. Asbestos diseases are progressive and invariably affect people later in life when work is rarely still an option.

As far as asbestos victims are concerned, periodic payments cannot 'unduly undermine a person's motivation to move into work', as is suggested at para. 6.30 as most asbestos victims are retired or close to retirement age.

Periodic payments to asbestos victims are important for the following reasons.

1. Periodic payments allow for reviews of IIDB assessments, unless an assessment for life is made, and take into account the effects of progressive diseases, such as asbestos-related diseases, and increased disablement. Consequently, compensation can be adjusted to reflect worsening symptoms which cannot be achieved if lump sum payments are made.
2. Periodic payments provide better compensation for asbestos victims who suffer from benign diseases and who have a reasonable life expectancy. Lump sum payments would not provide the same level of compensation as periodic payments do over time for most people who suffer from asbestosis or diffuse pleural thickening. It is recognised that a one-off payment of damages under compensate claimants who suffer serious occupational injury or disease.⁴
3. Lump sum payments do not address the negative impact of periodic payments on means tested benefits as it is likely that a lump sum would be treated as capital with an assumption of tariff income.
4. IIDB lump sum payments would be fully recovered on payment of damages, whereas periodic IIDB payments may only be recovered up to completion of civil claim or for a maximum of five years from the date of payment of IIDB.
5. Lump sum payments would have an adverse impact on ALL asbestos victims, for the above reasons.

Government Lump Sum Payments in lieu of damages

The government currently spends millions of pounds of tax payers' money in lump sum payments to sufferers of asbestos-related diseases who are unable to trace the employers' liability insurers on risk at the time they were exposed to asbestos.

⁴ P Cane "Atiyah's Accidents, Compensation and the Law", Butterworths 6th Edition, 1999. p299

The government is paying partial compensation through lump sum payments instead of insurers, who wrote insurance, paying full compensation. Insurers escape liability simply because there never has been any mechanism to retain records in a traceable format.

There is a compelling case for insurance of last resort for workers who suffer from occupational injury or disease. The case is briefly stated below

Currently, injured workers only have partial insurance cover. If an employer fails to take out employers' liability insurance an injured worker has no redress and asbestos victims who cannot trace an EL insurer for the period when exposure to asbestos occurred many years ago also have no redress.

Motor accident victims have full protection. Injured motor accident victims are covered by the Motor Insurers' Bureau (MIB). Where one party has no insurance they are paid from the guarantee fund, the MIB. Injured workers do not have recourse to an EL insurance guarantee fund.

Following the revocation of Reg. 4(4) of the Employers' Liability (Compulsory Insurance) Regulations 1998 requiring employers to retain EL insurance certificates for 40 years we have called for replacement regulations to provide a comprehensive solution to the above problems which Reg 4(4) never achieved. But ministers have given MPs false reassurances that all is well for asbestos victims.

Ministers have mistakenly reassured MPs regarding asbestos victims' compensation by saying that "ABI data shows that 98% of potential EL claimants are currently able to locate an employer or insurer to claim against". This is a red herring: the figure 98% relates to current accident claimants who will almost always find a current employer or insurer to claim against, this is not the case for asbestos victims who fail to trace EL insurers who were on risk for asbestos exposure many years ago.

EL insurance 99.5% compliance but untraceable. Holding EL insurance has been compulsory since 1972. The HSE state that there is 99.5% compliance with ELCI regulations. Yet, the Review Statement for the ABI Tracing Code for the period 1 November 2005—31 October 2006 shows that the success rate for pre-72 enquiries was only 15% (268 out of 1809 enquiries) and the success rate for post-1972 was only 33% (1583 out of 4849 enquiries). Overall, the success rate in tracing insurers was only 28%. Yes, there was insurance, but it is untraceable.

Insurers are escaping liability for EL insurance they wrote over many decades because there has been no requirement to register EL insurance. Insurance records are now lost in hundreds of cases, even where companies have recently been dissolved. An example:

Mr. Livesey suffers from mesothelioma. He was exposed to asbestos while working for Tomlinsons, a company which was dissolved as late as 2004. His solicitor was able to trace the company's public liability insurers but was unable to trace the company's EL insurers. It is accepted by all concerned that the company held EL insurance: the policy simply cannot be found. Who carries the burden for an untraceable policy - Mr. Livesey does.

Government stands in for insurers by paying small lump sum payments under the Pneumoconiosis etc.(Workers Compensation) Act 1979 and the 2008 Diffuse Mesothelioma Scheme. Insurers escape liability for insurance they wrote and the tax payer picks up the tab.

We are calling for an Employers Liability Insurance Bureau, a guarantee fund for workers suffering occupational injury or disease, just like the Motor Insurers Bureau guarantee fund for motor traffic victims. ALL asbestos victims should be paid compensation where judgment is obtained from a guarantee fund paid for by insurers.

The comparison with Motor insurance and Employers' Liability Insurance

Motor Insurance

- It is a criminal offence under section 143 Road Traffic Act 1988 to drive a motor vehicle without insurance.
- The Motor Insurance Bureau (MIB) meets the liability to pay compensation for claims for personal injury under the terms of the MIB Uninsured Drivers Agreement and the Untraced Drivers Agreement.
- The MIB guarantees that people injured by negligent drivers obtain common law damages for personal injury or death caused by the negligence of uninsured and untraced drivers.

Employers Liability Insurance

- It is a criminal offence under section 5 of the Employers Liability (Compulsory Insurance) Act 1969 for employers to fail to insure in respect of employees' bodily injury and disease.**
- When an employer goes out of business and was either uninsured or the insurer cannot be traced there is no fund of last resort to meet the employer's liability to compensate the injured worker.
- The problem of uninsured employers and untraced insurers is a particular problem for long tail disease claims such as mesothelioma where as many as one in ten may fail because the employer no longer exists and insurers cannot be identified.

**Prior to 1969, no action was taken to compel employers to take out EL insurance because government argued that almost all employers held EL insurance.

Important Advantages of an ELIB

- An ELIB incurs no government costs and would ensure 100% recovery in every case where judgment is obtained and would generate an income stream from

which government can fund lump sum payments.

- Extra revenue from recovery would allow the government to cease recovering payments from the T&N Fund which only pays T&N claimants a small percentage of their full entitlement to compensation
- The outcome of the insurers “trigger issue”, which has the potential to devastate compensation for asbestos victims, would have no effect and would simply become an issue between insurers.