

Improving claims handling for mesothelioma cases

Response

Forum of Asbestos Victims Support Groups

Introduction

The Forum of Asbestos Victims Support Groups (The Forum) is comprised of ten asbestos victims support groups in England.¹ Forum members visited more than 600 mesothelioma sufferers last year. One of the principal roles of the support groups is to give advice to mesothelioma sufferers on benefits and compensation.

Early advice and payment of benefits and compensation is essential as median survival for mesothelioma sufferers is from 8-14 months from diagnosis.² The Forum welcomes the leading role of the Department for Works and Pensions (DWP) in undertaking discussions aimed at speeding up payments of benefits and compensation to mesothelioma sufferers.

There are several important changes that could be made to expedite claims and improve benefits and compensation for mesothelioma sufferers, namely to: the Industrial Injuries Scheme benefits and associated allowances; the Pneumoconiosis etc. (Workers Compensation) Act 1979, and; common law compensation arrangements.

Summary of Proposals

1. Industrial Injuries Scheme

1(i) Disregard the whole of IIDB, or at least a substantial percentage of IIDB, where means tested benefits are paid

1(ii) Automatically pay Constant Attendance Allowance (CAA) and Exceptionally Severe Disablement Allowance (ESDA) to mesothelioma sufferers.

2. Pneumoconiosis etc. (Workers Compensation) Act 1979

2(i) Automatically treat a mesothelioma IIDB claim as a claim for a 79 Act payment.

2(ii) Automatically make a 79 Act payment on IIDB assessment

2(iii) Recover 79 Act payments from employers/insurers

2(iv) Equalise 79 Act payments for in-life and posthumous claims

3. Common Law

3(i) Extend Master Whitaker's fast-track system for mesothelioma claims

- 3(ii) Establish a central repository for employers liability insurance
- 3(iii) Impose a specific duty to make available and deposit all ELI records
- 3(iv) Establish an insurer of last resort for mesothelioma claimants
- 3(v) Amend the FSCS validation rule
- 3(vi) Pay 100% compensation in pre-72 mesothelioma FSCS claims.
- 3(vii) Allow a dependency claim on the death of a mesothelioma sufferer who has settled a claim for compensation in life.
- 3(viii) Improve arrangements for provision of medical records
- 3 (ix) The government should send a message to insurers that they must stop their attempts to prevent compensation being paid to mesothelioma victims

4. Improving take-up of benefits for mesothelioma sufferers

4(i) The Association of Personal Injury Lawyers (APIL) should take strenuous steps to ensure that solicitors give mesothelioma sufferers advice on benefits or sign post mesothelioma sufferers to expert sources of benefits advice.

4 (ii) Provide a DS1500 to all mesothelioma sufferers

4(iii) Provide government funding to accredited asbestos victims support groups.

Proposals for improving claims handling for mesothelioma cases

1. The Industrial Injuries Scheme

It is axiomatic that IIDB is paid as *compensation*: it is paid under the Industrial Injuries Scheme (IIS), which came into effect on the 5th July 1948, and replaced the Workman’s Compensation Acts, providing an improved, no-fault occupational compensation system.

IIDB is paid for *loss of faculty leading to disablement* which arises from an injury in the course of employment, or from a prescribed disease. Payments are made according to a scale from 1% to 100%, depending on the severity of the injury or disease. Mesothelioma, prescribed disease (PD) D3, is automatically paid at the 100% rate (currently £127.10). IIDB related allowances are paid to those assessed at least as 95% disabled.

1(i) Disregard the whole of IIDB, or at least a substantial percentage of IIDB, where means tested benefits are paid

If a recipient of IIDB is also in receipt of means tested benefits, it is possible for the injured person to lose part or all of the value of their IIDB because IIDB is treated as income, and means tested benefits are withdrawn pound for pound where IIDB is

paid. In contrast, IIDB is paid on top of wages, should the injured person be capable of work.

The concept of IIDB as compensation for loss of faculty because of work injury/disease is utterly negated where payment for loss of faculty is treated as income for means tested benefits purposes. This discrepancy is sometimes justified because IIDB recipients may also be entitled to Disability Living Allowance (DLA) or Attendance Allowance (AA), which are paid to all eligible disabled people, including recipients of IIDB. This is to confuse the nature and purpose of IIDB³. DLA and AA are *allowances*, (indeed, Constant Attendance Allowance and Exceptionally Severe Disablement Allowance are *allowances* paid instead of DLA/AA, and in addition to, IIDB where disablement is at least 95%) paid specifically for the extra costs associated with disablement. These allowances have nothing whatsoever to do with compensation for loss of faculty.

The Industrial Injuries Advisory Council (IIAC) has recommended an increase in IIDB payments for those who are terminally ill. If accepted, this would, for many mesothelioma sufferers on means tested benefits, simply redress, or partially redress, their present loss of benefits. It might not even restore the value of the current IIDB payment. In such circumstances, IIAC's intention to increase the relative value of IIDB for mesothelioma sufferers is hardly meaningful.

Why should the poorest people who suffer from mesothelioma lose part of the value of their compensation for their loss of health and life, while others who are simply fortunate enough to have, for example, occupational sick pay or occupational pensions enjoy the full value of their compensation for their disablement?⁴

1(ii) Automatically pay Constant Attendance Allowance (CAA) and Exceptionally Severe Disablement Allowance (ESDA) to mesothelioma sufferers.

CAA and ESDA are allowances paid to severely disabled recipients of IIDB who are assessed as at least 95% disabled. The higher rates of these allowances exceed the higher rates paid under DLA/AA. Almost all recipients of CAA/ESDA are mesothelioma sufferers.

Mesothelioma patients usually present with advanced disease, but are not initially sufficiently disabled to qualify for the highest rate of CAA/ESDA. It is common practice for a Jobcentre Plus to send out repeat application forms for CAA, as it is understood that mesothelioma sufferers' health will quickly decline. However, at the terminal stage of an illness, mesothelioma sufferers and their carers are often too overwhelmed to complete an application for CAA/ESDA. As a result, payments are often paid very late or not at all.

The dilemma facing mesothelioma sufferers in relation to CAA/ESDA is analogous to the problem faced by mesothelioma sufferers, who initially, presented reasonably well and were given low IIDB assessments, but whose health quickly deteriorated resulting in 100% disablement. This dilemma was resolved by automatically awarding all mesothelioma claimants 100% disablement in 2002.

Payment of CAA/ESDA automatically to mesothelioma sufferers would ensure that appropriate allowances are paid in a timely way to those suffering a terminal illness. Automatic payment would also relieve DWP staff of the administrative burden of sending out repeat CAA application forms.

2. Pneumoconiosis etc. (Workers Compensation) Act 1979

The exceptionally long latency of mesothelioma (sometimes 60 years) means that many sufferers are unable to successfully sue negligent employers, not just because their insurers cannot be traced, but because it is impossible to trace witnesses, or even prove employment, after such a lapse of time since exposure to asbestos. If the exposure was pre 1965 and light/transient then, although causative, there may well be difficulty proving breach of duty/negligence. The Pneumoconiosis etc. (Workers Compensation) Act 1979 (79 Act), is therefore an important means of compensation for many mesothelioma sufferers.

Few mesothelioma sufferers are aware of the 79 Act, and many Citizens Advice Bureaux, and Welfare Rights organisations have never heard of it. The short life expectancy of mesothelioma sufferers can mean that by the time a sufferer finds out about the 79 Act it is too late to claim. A simple and effective way to improve take up of this benefit, speed up payments, and increase in-life claims in proportion to posthumous claims would be to treat all mesothelioma claims for IIDB as a claim for a payment under the 79 Act.

2(i) Automatically treat a mesothelioma IIDB claim as a claim for a 79 Act payment.

Currently, payments are made under the 79 Act where employers are no longer trading, or it is so long since exposure to asbestos occurred that a successful claim in law is unlikely to succeed. Where payments are made under the 79 Act, and damages are subsequently awarded, the 79 Act payment is credited to the employer or insurer paying damages. It would be cost effective and more equitable if all mesothelioma claimants were automatically paid under the 79 Act, and where damages are subsequently paid, 79 Act payments recovered by the DWP.

It might be preferable to have a separate form for mesothelioma sufferers to apply for IIDB and the 79 Act payment.

2(ii) Automatically make a 79 Act payment on IIDB assessment

By paying all mesothelioma sufferers in receipt of IIDB a 79 Act payment, the costly administrative work of determining whether employers are still trading could be eliminated, effecting a considerable saving, and all mesothelioma sufferers would be ensured some compensation in-life. Where damages are subsequently awarded to mesothelioma sufferers, a 79 Act payment should be recovered by the government. This would mean no additional cost to government.

2(iii) Recover 79 Act payments from employers/insurers

The current practice of crediting 79 Act payments to employers/insurers who are liable to pay damages to mesothelioma sufferers offends the government's 'polluter

pays' principle by providing a generous government subsidy to the 'polluter'. Government could achieve a considerable saving by recovering 79 Act payments from employers/insurers.

2(iv) Equalise 79 Act payments for in-life and posthumous claims

A 79 Act payment to a widow of a mesothelioma sufferer (most dependants are widows) who has died is far less than a payment to a living mesothelioma sufferer. This disparity between in-life and posthumous payments is justified on the grounds that the 79 Act mirrors common law, which pays less to a dependant who claims, or settles a claim, on the death of a mesothelioma sufferer than to a claimant whose claim is settled in life. If a payment to a dependant is limited to a payment made under the Fatal Accidents Act 1976, this would be the case (although it can hardly be said that the 79 Act 'mirrors' the Fatal Accidents Act as a fixed amount of £10,000 and the 79 Act payments are based on a sliding scale). But this is not the case in common law. The Estate and Dependants of a deceased mesothelioma sufferer will also make a Law Reform claim in addition to a dependency claim under the Fatal Accidents Act, so that a posthumous settlement of a claim is often, in common law, greater in value than an in-life settlement of a claim, for reasons set out below. It is not uncommon for a mesothelioma sufferer to die within weeks of diagnosis, or even days. In such circumstances, it is likely that a claim under the 79 Act will not be made until a mesothelioma sufferer has died. But for a few weeks extra life, a mesothelioma sufferer might have secured a better payment for his/her family on his death.

Equal 79 Act payments for in-life and posthumous claims would be consistent with common law practice and fair to mesothelioma sufferers and their families.

3. Common law

Payment of damages in common law could be expedited and improved by:

3(i) Extend Master Whitaker's fast-track system for mesothelioma claims

Master Whitaker's fast track system for mesothelioma claims in the Royal Courts of Justice (RCJ) has achieved fast payments to mesothelioma sufferers, often within months, and in many cases has ensured that mesothelioma sufferers are paid compensation before they die.

Fast-track systems operate in some parts of the country, but none are as effective as the system operated in the RCJ. For this reason, we believe that the current system operated by Master Whitaker should be expanded, and adequately resourced, to deal with all mesothelioma claims in the RCJ. Such a specialist court, led by Master Whitaker, with three or more Masters or procedural judges in the RCJ specialising in these cases, would ensure consistency and expertise in dealing with mesothelioma claims, and preserve the body of knowledge and practice that has already been developed by Master Whitaker.

There are examples of the effectiveness of specialist courts for specific industrial diseases, such as the Dust Disease Tribunal of New South Wales, which will often complete mesothelioma cases within weeks, and occasionally days of proceedings being issued. We believe that a central, expert court dealing with mesothelioma is more advantageous than a weak replication of a fast track system throughout the country.

Master Whitaker is probably dealing with 400 mesothelioma cases at any one time, and this number is growing. Each case brings court fees of at least £1000 to the Court Service. The number of claims is increasing, so a specialist court could, if necessary, fund itself, although it would be lot better if some central funding was available.

3(ii) Establish a central repository for employers liability insurance

There is currently a requirement to keep employers liability insurance records (ELI) for 40 years. However, there is no system for central storage of insurance records, without which it is very likely that the current difficulties in tracing ELI records will continue into the future. As companies cease trading it is not possible to ensure that their records are accessible and traceable. There should be a compulsory requirement for all responsible organisations to record their ELI policies in an agreed central storage system and a halt to the practice of destroying such records.

3(iii) Impose a specific duty to make available and deposit all ELI records

The code of practice for tracing employers' liability insurance is not proving effective. There is a substantial amount of information on ELI held by insurers, brokers and others. We believe that the parties who hold this information will not voluntarily make available all the information they have. We believe there should be a specific duty placed on specified organisations (e.g. insurance companies, employers, solicitors, and others) to lodge all ELI information available to them in a designated, central storage system. A voluntary code is insufficient.

3(iv) Establish an insurer of last resort for mesothelioma claimants

Most employers carried ELI insurance prior to 1972 when ELI became compulsory, and there has been a high level of compliance with the legal requirement to hold such insurance since 1972. The consequences of the failure of governments to establish compulsory employers' liability insurance prior to 1972, and the failure of employers and insurers to maintain records of insurance, are borne entirely by mesothelioma sufferers, who lose compensation to which they are entitled.

It would be fair and just if an insurer of last resort were established, similar to the Motor Insurance Bureau (MIB), whereby insurers and government established a fund to provide compensation for mesothelioma sufferers where ELI cannot be traced. If ELI tracing were improved, it is likely that the numbers of untraced insurers would diminish, making the cost of a fund more manageable.

3(v) Amend the FSCS validation rule

Mesothelioma claimants have to wait for years in some instances to be paid compensation under the FSCS rules where an insolvency has not been validated, and there is the possibility that other parties may have some liability. The mesothelioma victim is the person least able to wait for the conclusion of an insolvency process: life expectancy is short and in such circumstances compensation is unlikely to be paid

before death. It should be possible, and would be more equitable, for the FSCS to pay a mesothelioma claimant and recover payments from other parties in due course.

3(vi) Pay 100% compensation in pre-72 mesothelioma FSCS claims.

Where the insurer and employer are insolvent, the FSCS will pay 90% of the compensation award for pre-1972 claims, but 100% for post-1972 claims. Most mesothelioma sufferers were exposed to asbestos prior to 1972. Whatever the justifications for this policy are in respect of insurers and policy holders, they are surely not applicable to mesothelioma sufferers, who are not individually party to employers' liability insurance arrangements. Mesothelioma sufferers have paid with their lives as a result of negligent exposure to asbestos; they should receive nothing less than 100% compensation

3(vii) Allow a dependency claim on the death of a mesothelioma sufferer who has settled a claim for compensation in life

A claim concluded by the estate and dependants after the death of a mesothelioma sufferer is usually more financially advantageous than a claim settled in life. This leads to the unpalatable practice of claimants' solicitors advising claimants and their families that a full settlement after death would be financially better for a mesothelioma sufferers' widow, and delaying proceedings. Claims settled after the victim's death includes the statutory £10,000 payment for bereavement damages in appropriate cases. The value of the deceased's services during his lost years can be claimed only by dependants, and not by the victim himself, if still alive.

In Scotland, the Scottish Executive has acknowledged that, 'mesothelioma sufferers face the dilemma of either settling their damages claim while still alive or not settling their claim before death so that their executor and relatives can claim awards which total more than the award of damages the sufferer was entitled to. Some sufferers are foregoing the compensation which would comfort them before they die in order to help their families.'⁵ For this reason, the Scottish Executive has proposed amendments to Section 1(2) of the Damages (Scotland) Act 1976 to resolve this dilemma. It would be just for a similar approach to be taken in England and Wales to address the discrepancy between compensation for in life and posthumous settlements.

3(viii) Improve arrangements for provision of medical records

The delay, in some instances, in the provision of medical records, can slow down the claims handling process. While clinical treatment is a priority, the importance of making records available to expedite mesothelioma claims is not always sufficiently understood.

The majority of hospital trusts in Merseyside have agreed to a Terminally Illness Protocol which prioritises solicitors' requests for medical records by accepting a new form, titled, "URGENT – Terminal Illness Case (TIC). It was noted in discussions that the current fee for providing medical records is insufficient. A higher fee, particularly for solicitors' priority requests, would enhance the capacity for trusts to provide information in a timely manner.

3 (ix) The government should send a message to insurers that they must stop their attempts to prevent compensation being paid to mesothelioma victims

The government's welcome initiatives to ensure adequate and fair compensation to mesothelioma sufferers, and their current endeavours to improve the handling of mesothelioma claims, are being undermined by continuing attempts by insurers to prevent compensation being paid to mesothelioma sufferers. Mesothelioma sufferers face inherent problems in tort resulting from the long latency of their disease: many mesothelioma sufferers never receive compensation because evidence of exposure and negligence is too difficult to establish because exposure occurred many decades ago. There are already too many legal hurdles for mesothelioma sufferers. It would therefore be helpful if the government sent a clear message to insurers that they should stop their manoeuvres designed to avoid paying compensation in mesothelioma claims.

The insurers' latest strategy is the argument about the correct trigger date for employers' liability insurance in mesothelioma cases. After 25 years or more industry-wide acceptance that the relevant or responsive ELI policy is the one in existence when the victim was exposed to asbestos dust, it is now being suggested by the Independent Insurance Company Ltd, Builders Accident Insurance Limited, and the Excess Insurance Company Limited (in Run-off) that the relevant EL policy might be the one in existence when the disease process begins or symptoms are manifested, many years later. If the employer has ceased to trade and has no assets, there may well be no EL insurance at the time the disease manifests itself. This new strategy is likely to delay and frustrate the claims process.

It is also being argued by some insurers that the legislation reversing the Barker decision does not apply in single exposer mesothelioma cases, and that damages there ought to be reduced to reflect apportionment between pre 1965 exposure if this is non tortious and post 1965 exposure, which will almost always be tortious, no matter how low the level of exposure.

As long as these and possibly other strategies are pursued, mesothelioma victims will not be assured of rapid and proper compensation.

4. Improving take-up of benefits for mesothelioma sufferers

4(i) The Association of Personal Injury Lawyers (APIL) should make strenuous efforts to ensure that solicitors give mesothelioma sufferers advice on benefits or sign post mesothelioma sufferers to expert sources of benefits advice.

All too often mesothelioma sufferers are NOT provided with information about key benefits (IIDB and Workers Compensation) when they contact solicitors. While the DWP is rightly looking to provide a leaflet for mesothelioma sufferers on sources of advice, this in itself will not address the failure of many solicitors to advise their clients of help they can get to apply for benefits.

*It is important to note that even Citizen Advice Bureau (CAB) and welfare advisers, who are benefits experts, are not always aware of payments under the 79 Act. Solicitors know about the 79 Act and should tell their clients, especially as organisations they may refer their clients to for benefits advice may know nothing about such payments.

4 (ii) Provide a DS1500 to all mesothelioma sufferers

The take up of Disability Living Allowance (DLA) and Attendance Allowance (AA) by mesothelioma sufferers is very low in some areas. Macmillan Cancer Relief launched a report in 2004, which showed that more than £126.5 million in disability allowances is unclaimed by people with terminal cancer, and more than half of people with cancer who die each year fail to claim the disability allowances to which they are entitled.⁶ The DWP will accept a DS1500 as evidence of a diagnosis of mesothelioma. The automatic provision of a DS1500 to mesothelioma sufferers would enhance the take up of DLA and AA as well as provide an immediate proof of diagnosis for DWP purposes.

4(iii) Provide government funding to accredited asbestos victims support groups.

Asbestos victims support groups (AVSGs) play an acknowledged and important role in realising the government's objective of increasing the take up of benefits which mesothelioma sufferers are entitled to. AVSGs are the only organisations which are fully conversant with benefits and compensation for mesothelioma sufferers, for example, CABs refer to us for advice. We rely solely on donations, which are insufficient to allow us to reach our full potential in reaching mesothelioma sufferers.

5 Costs of improvements

There are increased costs associated with:

- Disregard of all or part of IIDB
- Automatic payment of CAA/ESDA
- Equalisation of payments of in-life and posthumous 79 Act claims

There are neutral costs associated with:

- Automatic payment of 79 Act should not be an additional cost to government if payments are recovered by government where damages are paid. Also, it should be noted that there were 1,116 payments⁷ under the 79 Act to mesothelioma sufferers March 2005- March 2006, which is approximately 83% of IIDB mesothelioma assessments (2004 figure 1350 IIDB assessments⁸).

There are savings associated with:

- Recovery of 79 Act payments

Significant savings achieved if government recovers 79 Act payments could fund much of the above changes which incur extra costs.

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NOTES

¹ Bradford Asbestos Victims Support Group; Barking & Dagenham Asbestos Victims Support Group; Barrow Asbestos-Related Disease Support; Cheshire Asbestos Victims Support Group; Derbyshire Asbestos Support Team; Greater Manchester Asbestos Victims Support Group ; Merseyside Asbestos Victims Support Group; Northeast Asbestos Support & Awareness Group; Ridings Asbestos Support & Awareness Group; Sheffield and Rotherham Asbestos Group

² British Thoracic Society Standards of Care Committee. Statement on malignant mesothelioma in the United Kingdom. *Thorax* 2001;56:250-265

³ It is difficult to defend a system where its rationale is not clear. There is evidence that the role and purpose of the Industrial Injuries Scheme was unclear from its inception and that this is still the case today. It has been argued in a study of industrial injuries benefits that, from the beginning the role that disablement benefit was expected to play has been confused, referring to the DHSS (1980) Industrial Injuries Compensation: A Discussion Document, the author says:

'...the DHSS Discussion Document sometimes treats disablement benefit as compensation and at other times as income replacement, and there is a tendency in other circles to argue that 'over compensation' occurs when the incapacitated worker receives more than his previous income when disablement benefit is added to other benefits – though no similar argument is put forward when he receives disablement benefit (and possibly mobility allowance also) in addition to normal wages.' (Brown, J. (1982) *Disability Income: Part 1 Industrial Injuries*, Policy Studies Institute. p 226)

The Pearson Commission alludes to this distinction with reference to Severe Hardship Allowance:

'A further unsatisfactory feature of the allowance [Severe Hardship Allowance] is that it combines a benefit for loss of earnings with a benefit for loss of faculty; and, in doing so, blurs the distinction between these fundamentally different forms of compensation.' (Royal Commission on Civil Liability for Personal Injury 1973-1978, (Pearson Commission), Cmd. 7054, Chp. 17, para. I87)

Ogus and Barendt, commenting on the Industrial Injuries Scheme in 1982, stated that what emerges from the Industrial Injuries Scheme is:

'a jumble of benefit and allowances, some parts directed towards need, others toward income replacement. Yet the system as a whole is consistent with neither objective and seems to have no overall structure....It is much regretted that so little heed seems to have been paid to foreign systems, some of which adopt a more rational, and less cumbersome approach to these questions.' (Ogus, A. and Barendt, E. (1982) *The Law of Social Security*, 2nd. Ed. London: Butterworths, p297)

⁴ At working age, a mesothelioma sufferer, paid IIDB, who is reliant on Statutory Sick Pay and means tested benefits will lose the benefit of part of his IIDB payment

for his loss of faculty (his terminal disease). In contrast, his counterpart who has mesothelioma, who receives occupational sick pay at his full salary, may enjoy the full value of his IIDB.

On retirement, (and most mesothelioma sufferers are retired), a mesothelioma sufferer who is reliant on Pension Credit, will lose part of the value of his IIDB payment. In contrast, his counterpart, who has an occupational pension, may enjoy the full benefit of IIDB.

⁵ <http://www.scotland.gov.uk/Resource/Doc/135400/0033553.pdf>

⁶ www.macmillan.org.uk/news.aspx?id=1342

⁷ DWP letter to Forum 19th October 2006

⁸ IIDB assessments: <http://www.dwp.gov.uk/asd/iidb.asp>;