EMPLOYEES COMPENSATION ASSISTANCE (AMENDMENT) BILL 2002

Clause 3 – Amendments to section 2 ("definition section")

Question 1 : Are surviving children aged under 20 eligible persons ?

Yes. It is our intention that in the case where an injured employee dies after he has been awarded damages, his surviving children under the age of 21 at the time of the death of the employee shall be eligible persons for entitlement to the relief payment.

Question 2 : Is the former spouse of an employee in a fatal accident who may have a valid dependency claim under the Fatal Accidents Ordinance not regarded as eligible person for relief payment ?

In Clause 3 of the Amendment Bill, a new provision is added to define "spouse" as not including 'a person who, at the time of the death of the employee, has ceased to be the employee's spouse'. Therefore, a former spouse of an employee, at the time of the latter's death, will not be regarded as an eligible person.

Under the reform package, the Employees Compensation Assistance Scheme (the Scheme) shall no longer be liable to pay assistance in relation to common law damages to injured employees or dependants of deceased employee. Instead, the Scheme will provide relief payment to eligible persons as defined under the Bill.

The Amendment Bill does not affect the rights of a former spouse of a deceased employee, if he/she has a claim, to recover any damages from the employer or other parties concerned.

Question 3 : Does the Bill seek to exclude other claimants from relief payment?

As mentioned above, the Scheme will no longer be liable to provide assistance for common law damages. In lieu of common law damages, relief payment will be payable to those persons who fall within the definition of "eligible person" as defined under the Bill. In short, the Scheme under the Amendment Ordinance shall no longer substitute the liability of employers in paying damages.

In a fatal accident, our intention is to allow family members as stated in paragraph (b)(i) to (iv) of the definition of "eligible person" to be eligible for relief payment if such family members were awarded damages by the Court. The family members listed in paragraph (b)(i) to (iv) of the definition are the same as those listed under the Employees' Compensation Ordinance (ECO). In the case of a nephew, being the son of the brother of the whole blood of the deceased employee, he shall fall within paragraph (b)(iv) of the definition of "eligible person".

Clause 6 & 12 – Amendment to section 16 & new section 20A

Question 4 : Is it intended that the employee has to issue proceedings against both the employer / principal contractor and the insurer in each case before applying for payment from the Fund?

Our original policy intent in respect of section 16 of the Employees Compensation Assistance Ordinance (the Ordinance) is to require an injured employee or other persons to try to recover payment of compensation or damages from ***all parties*** who are liable to pay such amount before he can apply for payment from the Fund. This is to ensure that the Fund would only serve as a last resort in providing assistance to those persons who are unable to recover payment of compensation or damages from all liable parties. The requirement can also prevent abuse by collusion between the person and the employer/insurer concerned.

However, the existing section 16(3) cannot achieve the above purpose as it only requires the injured employees to recover payment from the employer ***or*** insurer. It is therefore necessary to amend the subsection to make it clear that the injured employee must recover payment from the employer ***and*** insurer, wherever applicable, before he can seek assistance from the Fund. From actual operational experience, the Employees Compensation Assistance Fund Board (the Board) has from time to time waived the requirement of instituting recovery proceedings after having regard to the circumstances of the claim.

The above mentioned arguments also apply to section 20A(3)(a) which requires the eligible person to take proceedings to recover payment of damages from, wherever applicable, the employer ***and*** the insurer before he can apply for relief payment from the Fund.

Clauses 7, 8 & 9 – Application by employers for payment from the Fund

Question 5 : What is the rationale for imposing a time limitation for applications under sections 17 & 18

Section 18A(1) requires an employer to make an application to the Board for payment under section 17 or 18 within 180 days after the date on which he is entitled to make such application. The imposition of such limitation is to enable the Board to exercise the rights transferred to and vested in it under section 37 as early as possible so as to protect the interests of the Fund. Moreover, the earlier the employer makes the application, the easier it is for the Board to verify the eligibility of the employer, such as to get in touch with the employees concerned to confirm receipt of payment from the employer.

Question 6 : Why different treatments are given to employers applying for payment under sections 17 & 18 ?

Section 17 of the Ordinance provides for payment from the Fund to employers who have paid compensation or damages to their injured employees, but are not indemnified by their insurer due to the insolvency of the latter. It is considered that the proposed time limit of 180 days for making an application under section 17 should be reasonable to allow employers to have sufficient time to make an application for assistance. In order to deter employers from undue delay in submitting applications for assistance, which would affect the exercise by the Board of the rights transferred and vested in it under section 37 in recovering payment from the liquidators of the insolvent insurer, it is proposed that the Board shall not make any payment from the Fund to employers who submitted their application under section 17 beyond the time limit.

On the other hand, section 18 of the Ordinance enables employers to make an application for assistance for the benefit of a third party which would usually be the injured employees or family members of deceased employees. It is considered unfair to preclude payment from the Fund to such third party simply because the employer concerned has made a late application. On the other hand, there is still a need to discourage late applications. Therefore, it is also proposed that if the employer concerned made a late application under section 18, the Board shall not pay any interest or surcharge under the ECO in respect of the period after the expiration of time limit of 180 days. In such an event, the employer would have to pay the interest or surcharge to the third party.

Clause 12 – Apportionment of Relief Payment

Question 7 : How do the new provisions on relief payment work with the existing law of fatal accident claims ?

As mentioned above, the Scheme would no longer pay common law damages. Relief payment would be payable in lieu of common law damages. Only those persons falling within the definition of “eligible person” who are awarded damages by the court but are unable to recover payment from the employer would be eligible for relief payment. In other words, the Board would not substitute employers in taking over the liability to pay common law damages.

Eligible persons who have received or are in the course of receiving relief payment are still entitled to recover the awarded damages from the employer concerned. However, section 20G allows the Board to set off from the outstanding balance of relief payments if the eligible person is successful in recovering any amount of awarded damages from the employer concerned. Section 37A further provides that if the eligible person receives any amount of damages for which a relief payment has been made, then the Board shall be entitled to recover from the eligible person as a civil debt the amount of the relief payment. Likewise, those persons who are

awarded damages by the court but are not an eligible person under the Ordinance could take action to execute the award against the employer to recover the awarded sum due to them.

Clause 13 – Applications

Question 8 : who is "the employer's representative" under sections 21(4)(a) and 25B(7)(a) ?

"Employer's representative" in sections 21(4)(a) and 25B(7)(a) would include any person who is authorised by the employer to handle the case with the Board.

Clause 17 – Board may apply to be joined as party to proceedings

Question 9 : Are the situations set out in new section 25A(1)(a) to be construed conjunctively or disjunctively ?

The situation set out in new section 25A(1)(a) should be construed disjunctively as any one of these scenarios would have left the claim uncontested by the employer concerned.

Question 10 : How does the proposals in new section 25A(1)(b) and (c) operate within the existing system of civil procedure in relation to joiner of parties and third party proceedings ?

Section 25A(1)(b) empowers the Board to apply to the Court to join in the proceedings as a third party in accordance with Order 15, Rule 6 of the Rules of the High Court. It applies to the situation where the employer is uninsured and is present at the proceedings. Section 25A(1)(c) deals with the situation where the insurer of the employer has become insolvent. In both scenarios, it is likely that the employer or the insurer would not be available or have an interest to take part in the proceedings actively. Therefore, the policy intent is to enable the Board to take part in the proceedings on its initiative where it deems fit.

However, Order 16 of the High Court Rules allows ***the defendant who would like to claim against the third party*** to issue a notice to the third party and to bring that third party into the proceedings. This would not serve the policy intent of allowing the Board to join in the proceedings on its own initiative.

With the advice from the Department of Justice, it is proposed to enable the Board to apply to the Court to join in the proceedings through Order 15, Rule 6 of the High Court Rules.

Question 11 : What do the phrases "proposes to obtain judgment" and "proposes to reach settlement" exactly mean in section 25B(3) ? What stage of legal proceedings and negotiation for settlement is referred to ?

Our intention is to require, under section 25B(3), any person who has served a notice of proceedings on the Board and who has formulated a concrete proposal to obtain judgement or reach settlement with the other party to inform the Board within the period prescribed under the section. This subsection shall apply to a period of 45 days after the person has served the notice of proceedings on the Board. We are consulting the Department of Justice on how the provisions of this new subsection would be further clarified.

Question 12 : Does the Administration consider it desirable to give the Board discretion to allow application if the Board is satisfied that the claimant can justify the failure for complying section 25B(1) and (3) ?

We have already incorporated a provision allowing the person who missed the deadline of 30 days stipulated in section 25B(1) to serve on the Board a written notice to explain the reasons for failure to comply with the deadline. If the Board satisfies that there are good reasons, the Board may extend the period of 30 days for serving the notice of proceedings [section 25B(2)]. The person's right to be entitled to payment from the Board will be preserved if he is able to serve the notice of proceedings within the period extended by the Board under section 25B(2).

It is proposed under section 25B(3) that if a person who has served a notice of proceedings on the Board wishes to propose to obtain judgment or reach settlement with the other party within 45 days after the notice of proceedings has been served, then he has to inform the Board not less than 10 days before making such a proposal. Any person who fails to comply with this subsection shall not be entitled to any payment . The requirement seeks to ensure that the Board have sufficient time to study those cases where settlement or judgement would soon be reached or entered and to take appropriate actions where necessary. This requirement is reasonable and shall not cause any difficulties to the applicants. It should also be noted that after the expiry of the 45-day period, an applicant is no longer required to inform the Board before seeking judgement or reaching settlement.

Clause 23 - Surcharge

Question 13 : What court should the employer commence proceedings if he is dissatisfied with a demand notice or a final notice regarding the surcharge ?

Section 36A(6) is modelled on the existing section 24, which provides that an employer who is dissatisfied with a determination of the Board under section 22 may commence proceedings in a court against the Board. According to the Interpretation and General Clauses Ordinance (Cap.1), "court" is defined as "any court of the Hong

Kong Special Administrative Region of competent jurisdiction". Therefore, an employer may commence proceedings at any court of competent jurisdiction.

It should be noted section 36A has built in a review mechanism so that an employer may request for a review if he is dissatisfied with the determination of the surcharge made by the Board. The review procedure will provide a simple and inexpensive channel for an employer who wishes to seek redress from the determination of the Board in relation to the imposition of the surcharge.