

**Bills Committee on
Employees Compensation Assistance (Amendment) Bill 2002**

**The Administration's Response –
Operation of the Relief Payment Provisions**

Introduction

This paper provides information requested by members of the Bills Committee at the meeting held on 9 May 2002 on the following aspects –

- (a) the differentiation of fatal and non-fatal injuries;
- (b) the apportionment of relief payments among the eligible family members and the need for the eligible persons to obtain Court order before becoming entitled to relief payment;
- (c) the issue of estate and the will of the deceased employee in the arrangement.

(A) Differentiation of Fatal and Non-fatal Injuries

2. Under the new section 20A (Clause 12 of the Employees Compensation Assistance (Amendment) Bill 2002), an eligible person may apply for a relief payment from the Employees Compensation Assistance Fund (the Fund) if he is unable to recover from the employer payment of an amount of damages for which the employer is liable. That section further provides that an employer is not to be regarded as liable for the payment of damages unless the amount is payable pursuant to a judgement or order of a Court.

3. In a common law claim, it is the Court which determines the liability as well as amount of damages payable. It is understood that a fatal and a non-fatal injury would give rise to different items of claim for damages under common law. In general, a work-related injury will be considered as a fatal one if the death of the employee is primarily attributable to the work accident in which he/she was injured. If an employee dies from a cause not relating to the work-related accident in which he/she is injured, the employer shall only be liable for the damages arising from the injury.

4. In the operation of the relief payment, it is not the responsibility of the Employees Compensation Assistance Fund Board (the Board) to determine whether an application is made under a fatal or non-fatal injury. The Board only needs to follow the decision of the Court as to whether a case is relating to a fatal or a non-fatal work injury and apply the relevant provisions when determining the payment of relief payment.

(B) Apportionment of Relief Payments and Court Order

5. It has been proposed that a relief payment should be payable under the Employees Compensation Assistance Scheme (the Scheme) in lieu of common law damages. As a general principle, the proposed relief payment shall be payable to those persons who have been awarded the damages by the Court. However, in order to provide better protection for the immediate family members of the injured employee, the relief payment shall continue to be payable to such immediate family members if the injured employee passes away before the amount of the relief payment has been exhausted.

Non-fatal Injury

6. In a non-fatal injury, the common law damages, if any, would be awarded to the injured employee. Therefore, the whole amount of the relief payment will be payable to him/her.

7. However, if the injured employee dies before the amount of the relief payment has been exhausted, the relief payment shall still be payable to his/her immediate family members as follows —

- (i) the spouse/cohabitee of the injured employee;
- (ii) any surviving child of the injured employee who is under the age of 21 years at the time of the death of the injured employee;
- (iii) any surviving parent of the injured employee if there is no surviving spouse/cohabitee or surviving child under the age of 21 years.

8. As no court award has been made for the “eligible persons” as mentioned in paragraph 7, the amount of the relief payment will be, in accordance with the new section 20F(1)(a)(ii), apportioned on an equal share basis.

Fatal Injury

9. In a fatal injury, those eligible persons as defined in item (b) of the definition of “eligible persons”¹ in section 2 may apply for the payment of relief payment only if they have been awarded an amount of damages for the fatal injury. It means that not all those eligible persons as listed in the definition would be entitled to relief payment in every case. From the past experience of the common law claims for fatal personal accidents, we noted that the largest part of the damages had been awarded to the spouse/cohabitee, children and parents of the deceased person.

10. In the fatal injury, the amount of relief payment shall be apportioned among those eligible persons who have been awarded damages in a judgement or order made by the Court as follows —

- (i) on a pro rata basis in accordance with the respective amounts awarded by the Court; or
- (ii) on an equal share basis if the Court has not otherwise made an order on how the amount of damages should be apportioned.

In either case, the Board should have no difficulty to ascertain the amounts to be payable to the respective eligible persons.

11. Under the Amendment Bill, the relief payment in respect of a fatal injury will be payable to the eligible persons in accordance with the award made by the Court. As long as the eligible person concerned obtains a judgment or an order from the Court under a common law claim in relation to the fatal injury to an employee, that eligible person shall be entitled to apply to the Board for relief payment to the amount as awarded by the Court.

¹ These “eligible persons” are the same as those family members as defined under the Employees’ Compensation Ordinance (Cap. 282) who would be entitled to compensation for death in a fatal work-related accident. They include:

- (a) a spouse or cohabitee;
- (b) a child;
- (c) a parent or grandparent; or
- (d) a grandson, granddaughter, stepfather, stepmother, stepson, stepdaughter, son-in-law, daughter-in-law, brother, sister, half-brother, half-sister, father-in-law, mother-in-law, brother-in-law, sister-in-law, and child of a brother or sister of the whole blood.

Need for Court Order

12. The policy intent of the relief payment is to provide assistance to those eligible persons who have been awarded damages as a result of a work-related injury but unable to recover the amount from the employer concerned. In a work-related accident, the employer should be liable to pay damages if he has been at fault in failing to safeguard the safety of the injured employee. In Hong Kong, both the liabilities and quantum of a common law claim have to be determined by the Court. In order to ensure that the relief payment is payable only to those deserving cases, it is imperative that the Court should have made an award. Otherwise, the Board would be subject to uncertainty over which case that should be given the assistance in relation to relief payment.

13. Under the new section 20A(2), an employer shall be regarded as being liable for the payment of an amount of damages pursuant to a judgement or order of a Court. We envisage that a consent order given by the Court on the liability and the amount of damages as agreed by the parties concerned in the proceedings should fulfil the requirement under section 20A. Therefore, the Board could, after joining as a party in a proceeding, agree with the applicants to settle a common law claim and seek a consent order from the Court for the purpose of making payment, in the form of relief payment, to the applicants.

(C) Estate and Will of the Deceased Employee

14. It has been our policy intention that the assistance of relief payment payable under the Ordinance should **not** be regarded as part of the estate of the deceased employee. In Clause 22 of the Amendment Bill, it has been made clear that the rights of any persons to the relief payment would not survive after his/her death and should not be regarded as part of his/her estate. The payment of relief payment has to follow the provisions of the Ordinance and not subject to the arrangements that might be provided for in the will of the deceased employee.

15. We have not proposed to erode the rights of the estate of a deceased employee. There is nothing in the Amendment Bill to stop the estate administrator of a deceased employee from taking action against the employer for any liabilities the latter is liable to pay.

16. In order to avoid double benefit, the Amendment Bill has provisions, namely, the new sections 20G and 37A, provide that the Board may set off or recover any amount of payment of relief payment payable or

paid to an eligible person if the latter receives an amount of damages during the course of receiving relief payments. However, the Board shall not have the right to recover from the estate administrator, who is not an eligible person, any sum even if the latter receives any money from the employer concerned.