

For discussion on
15 November 2007

LegCo Panel on Manpower

A proposal to make mesothelioma a compensable disease under the Pneumoconiosis (Compensation) Ordinance

Purpose

This paper briefs Members on a proposal to amend the Pneumoconiosis (Compensation) Ordinance (“PCO”) with a view to making mesothelioma a compensable disease under the PCO.

Background

2. Mesothelioma is a rare form of tumour, which can be benign (i.e. non-cancerous) or malignant (i.e. cancerous). Most cases of mesothelioma are cancerous; hence the term “mesothelioma” is commonly taken as malignant mesothelioma. The disease has a strong association with occupational exposure to asbestos. The latent period between exposure to asbestos and development of mesothelioma ranges from 30 to 40 years or even longer. It is a serious disease that is difficult to diagnose and poorly responsive to therapy. Once diagnosed, cases of mesothelioma often rapidly turn fatal. Patients of mesothelioma may have great pain and suffering. Shortness of breath and severe chest pain are common symptoms.

3. At present, mesothelioma is not a prescribed occupational disease under the Employees' Compensation Ordinance. Under the PCO that provides compensation to pneumoconiosis patients or their family members in respect of incapacity or death resulting from the disease, pneumoconiosis is defined as fibrosis of the lungs due to exposure to asbestos or silica dust. Notwithstanding that mesothelioma is also caused by inhalation of asbestos dust, it is not compensable under the PCO unless the patients suffer from fibrosis of the lungs at the same time.

4. For mesothelioma sufferers without fibrosis of the lungs, the Labour Department has since 2005 assisted the patients or their family members to apply for a grant of \$350,000 per case from the Brewin Trust Fund (“BTF”). So far, the BTF has provided grants in six cases.

The statutory compensation scheme under the PCO

5. At present, the statutory compensation scheme under the PCO provides, where applicable, pneumoconiotics with a full range of compensation including compensation for incapacity, compensation for pain, suffering and loss of amenities, compensation for constant attention, payment of medical expenses and payment of expenses for medical appliances. In the case of death resulting from pneumoconiosis, the family members of the pneumoconiotics are also eligible for compensation for death and funeral expenses. The compensation and benefits available under the PCO are summarised at the Appendix.

6. The statutory compensation scheme operates under a system of collective liability. It is financed by a levy, currently at the rate of 0.25% of the value of construction operations and quarry products, collected from the construction and quarrying industries. Construction operations with total value not exceeding \$1 million are exempted from payment of the levy.

Justifications for making mesothelioma compensable under the PCO

7. Mesothelioma and pneumoconiosis share the following common characteristics:

- (a) both diseases share a common cause, i.e. inhalation of asbestos dust;
- (b) both diseases are progressive in nature;
- (c) both diseases have long latent period and it is not possible to precisely identify the period of employment causing the diseases for the purpose of claiming compensation from individual employers; and
- (d) both diseases cause permanent and irreversible damages as well as pain and suffering to the patients.

8. As mesothelioma and pneumoconiosis share a common cause and some common characteristics, it is reasonable to provide the same compensation and benefits to mesothelioma sufferers and pneumoconiotics and to be financed by the same funding source. Also, the tremendous difficulty in pinpointing the precise period of employment causing mesothelioma renders it impracticable to provide for compensation on the basis of individual employer's liability. It is reasonable for the statutory compensation scheme under the PCO to take up the responsibility to compensate mesothelioma on the basis of collective liability of employers.

9. In view of the long latent period between exposure to asbestos and development of mesothelioma, there will be practical difficulty for patients to provide proof of their specific employment and occupational exposure to asbestos some decades ago. Nevertheless, medical advice is that the disease has a strong association with occupational exposure to asbestos. Also, under the PCO, a pneumoconiotic is eligible for compensation if he fulfils the residence requirement. It is reasonable to apply the same eligibility criteria to mesothelioma sufferers.

Medical assessment

10. At present, claims for compensation for pneumoconiosis are referred to the Pneumoconiosis Medical Board (“PMB”) for assessment. Among other things, the PMB will assess the degree of incapacity of a pneumoconiotic by reference to the findings of Forced Vital Capacity test in accordance with the Fourth Schedule of the PCO. It is proposed that claims for compensation for mesothelioma should also be referred to the PMB for assessment on whether the claimants are suffering from mesothelioma and the degree of incapacity sustained, as well as for determination of the cause of death of the sufferers. Unlike pneumoconiosis which affects only the lung function of a patient in general, mesothelioma may affect other body functions of a patient, though the great majority of the cases affect the lungs. To cater for patients who may suffer other losses of body function, it is recommended that the PMB should be empowered to consider, other than the findings of Forced Vital Capacity test, the findings of other clinical examinations and medical reports for the purpose of assessing the aggregate degree of incapacity sustained by the mesothelioma sufferers. The aggregate percentage assessed in any particular case, however, should not exceed 100%.

The proposal

11. Having considered the above factors, it is recommended to amend the PCO to:

- (a) extend its coverage to include malignant mesothelioma as a compensable disease under the PCO;
- (b) subject the mesothelioma sufferers to the same eligibility criteria as the pneumoconiotics under the PCO for the purpose of applying for compensation, i.e. to be eligible for compensation under the PCO, a person diagnosed as suffering from mesothelioma should have to be resident in Hong Kong for 5 years or more; mesothelioma sufferers with less than

5 years' residence are also eligible if they contracted the disease in Hong Kong;

- (c) provide to eligible mesothelioma sufferers the same compensation and benefits as those for pneumoconiotics;
- (d) empower the PMB to assess whether the claimants are suffering from mesothelioma and the degree of incapacity, and to determine the cause of death of the sufferers; and
- (e) amend the title of the PCO to reflect the extension of its coverage to include mesothelioma.

Financial Implications

12. According to the Hong Kong Cancer Registry of the Hospital Authority, there were on average 12 new cases of mesothelioma per year during the 10-year period from 1995 to 2004. The patients in some of these cases might suffer concurrently from pneumoconiosis with fibrosis of the lungs. Compensation should already have been paid to these patients under the PCO. On the other hand, in view of the more common industrial use of asbestos from the 1960's to 1970's and the long latent period between asbestos exposure and development of mesothelioma, it is envisaged that the number of new mesothelioma cases will not decrease during the next 10 years. Taking into account these factors, it is estimated that about 10 new mesothelioma claims without fibrosis of the lungs will be received by the PCFB every year. The additional compensation payout is estimated to be \$7 million (or \$700,000 per case) per year. In 2006, the PCFB has a surplus of \$9.2 million. As at end-December 2006, the cumulative balance of the PCFB is some \$967 million. Judging from the present financial position of the PCFB, there will not be any need to adjust the levy collected from the construction and quarrying industries if the proposal is implemented.

Consultation

13. The PCFB and the Labour Advisory Board ("LAB") were consulted on the proposal on 18 September 2007 and 10 October 2007 respectively. The proposal received the unanimous support of the two Boards. The LAB in particular advised that the legislative exercise to implement the proposal should be accorded priority so that the benefits for the mesothelioma sufferers can be improved as early as possible.

Legislative Timetable

14. Subject to the advice of Members, we plan to introduce an amendment bill into LegCo to give effect to the proposal within the 2007-08 legislative session.

Labour and Welfare Bureau
Labour Department
November 2007

**Compensation provided under the
Pneumoconiosis (Compensation) Ordinance**

- (a) **Compensation for incapacity** arising from pneumoconiosis until the death of the pneumoconiotic concerned. Compensation for total incapacity is \$18,930 per month (for the year 2007).
- (b) **Compensation for incapacity prior to date of diagnosis** payable in respect of the period from the earliest diagnosed date of the disease to the date of diagnosis for incapacity arising from pneumoconiosis.
- (c) **Compensation for pain, suffering and loss of amenities** resulting from pneumoconiosis, at a monthly rate of \$3,180, is payable until the death of the pneumoconiotic concerned.
- (d) **Compensation for constant attention**, at a monthly rate of \$4,160, is payable to pneumoconiotics whose incapacity is of such nature that they are unable to perform the essential actions of life without the care and attention of others.
- (e) **Payment of medical expenses** for medical treatments in connection with pneumoconiosis, subject to a daily ceiling of \$200 for out-patient or in-patient treatment in any one day or \$280 for out-patient and in-patient treatment received on the same day.
- (f) **Payment of expenses for medical appliances** that are reasonably necessary in connection with the incapacity arising from pneumoconiosis.
- (g) **Compensation for death** to family members of pneumoconiotics who die as a result of pneumoconiosis. The minimum amount of compensation is \$100,000.
- (h) **Compensation for bereavement** payable to the family members of a deceased pneumoconiotic where at the time of his death no certificate has been issued by the Pneumoconiosis Compensation Fund Board under the Ordinance. The amount of compensation is \$100,000.
- (i) **Funeral expenses**, subject to a ceiling of \$35,000, is reimbursable to any person who has incurred expenses for the funeral of a pneumoconiotic who dies as a result of the disease.