

C005-E

Amend the Employees Compensation Assistance Ordinance to revise the scheme providing for the protection of the entitlement of employees and others to compensation for employment-related injury; for the making of relief payments to eligible persons in relation to damages for employment-related injury; to increase the membership of the Board; to revise the procedures for filing applications which may affect the Fund; to require the Board to be notified of proceedings which may affect the Fund; to empower the Board to take part in legal proceedings in order to protect the Fund; to reduce the amount of interest payable on payments from the Fund; to require employers who have failed to take out the relevant policies of insurance to pay a surcharge to the Board; and to make connected amendments, including consequential amendments to the Employees' Compensation Ordinance, the Employees' Compensation Insurance Levies Ordinance and the Employees' Compensation Insurance Levy (Rate of Levy) Order.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Employees Compensation Assistance (Amendment) Ordinance 2002.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Education and Manpower by notice published in the Gazette.

2. Long title substituted

The long title to the Employees Compensation Assistance Ordinance (Cap. 365) is repealed and the following substituted---

"An Ordinance to provide for the protection of the entitlement of employees and others to compensation for employment-related injury; for the making of relief payment to eligible persons in relation to damages for employment-related injury; for the establishment of a board and a fund for those purposes; and for incidental or connected matters."

3. Interpretation

Section 2 is amended---

(a) by renumbering it as section 2(1);

(b) in subsection (1), by adding---

"'cohabitee' (同居者), in relation to an employee, means any person who, at the time of the death of the employee, was living with the employee as the employee's wife or husband;

"eligible person" (合資格人士), in relation to a relief payment---

(a) where the employment-related injury concerned is non-fatal, means---

(i) the injured employee; or

(ii) in the case of the death of the injured employee after damages have been awarded---

(A) any surviving spouse or cohabitee of the injured employee;

(B) any surviving child of the injured employee, whether by blood or an adoption specified in subsection (2) made before the date on which the accident occurred to which the relief payment relates, who was under the age of 21 years at the time of the death of the injured employee;

(C) if there is no surviving spouse or cohabitee, and no surviving child, as mentioned in sub-subparagraph (A) or (B), any surviving parent of the injured employee;

(b) where the employment-related injury concerned is fatal, means a person who has any of the following relationship in respect of the deceased employee, whether by blood or an adoption specified in subsection (2) made before the date on which the accident occurred to which the relief payment relates---

(i) a spouse or cohabitee;

(ii) a child;

(iii) a parent or grandparent; or

(iv) 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;

"prescribed monthly amount" (訂明每月數額) means the amount specified in Part 1 of Schedule 4;

"prescribed relief payment" (訂明濟助付款) means the amount specified in Part 2 of Schedule 4;

"prescribed surcharge" (訂明附加費) means the amount specified in Part 3 of Schedule 4;

"relief payment" (濟助付款) means a relief payment made or which may be made from the Fund pursuant to an application under section 20A;

"spouse" (配偶), in relation to an employee, does not include a person who, at the time of the death of the employee, has ceased to be the employee's spouse;"

(c) by adding---

"(2) For the purposes of the definition of "eligible person"---

(a) an adoption means an adoption---

(i) made under an adoption order made in accordance with the Adoption Ordinance (Cap. 290);

(ii) to which section 17 of the Adoption Ordinance (Cap. 290) applies; or

(iii) made in Hong Kong in accordance with Chinese law and custom before

1 January 1973; and

(b) any person so adopted shall be treated as the child of the adopter, and not as the child of any other person, and all relationships to the adopted person shall be deduced accordingly."

#### 4. Constitution of the Board

Section 3(2)(b) is amended---

(a) by repealing "5" and substituting "6";

(b) in subparagraph (ii), by repealing "and";

(c) in subparagraph (iii), by adding "and" after "law";

(d) by adding---

"(iv) 1 is a person having expertise in the practice of insurance;"

#### 5. Employees Compensation

##### Assistance Fund

Section 7(1) is amended by adding---

"(aa) moneys received by the Board as surcharges under section 36A;"

#### 6. Application by employee etc. for

payment from the Fund in relation

to unpaid compensation

Section 16 is amended---

(a) by repealing subsection (1) and substituting---

"(1) A person who is unable to recover from an employer payment of an amount of compensation for which the employer is liable may apply for payment of that amount from the Fund.";

(b) in subsection (2), by repealing everything before paragraph (b) and substituting---

"(2) For the purpose of this section an employer is not to be regarded as liable for the payment of an amount of compensation unless---

(a) the amount is payable---

(i) pursuant to a judgment or order of a court or tribunal of competent jurisdiction in Hong Kong;

(ii) by virtue of section 16A(9) of the Employees' Compensation Ordinance (Cap. 282) following an assessment of compensation by the Commissioner under that section; or

(iii) pursuant to a Certificate of Compensation Assessment for Fatal Case or Review Certificate of Compensation Assessment for Fatal Case issued under the Employees' Compensation Ordinance (Cap. 282);";

(c) by repealing subsection (3) and substituting---

"(3) For the purpose of this section a person is not to be regarded as being unable

to recover from an employer payment of an amount of compensation for which the employer is liable unless the person has taken such proceedings to recover payment of the amount---

(a) from, wherever applicable---

(i) the employer;

(ii) the principal contractor who is liable

to pay compensation to the person

under section 24 of the Employees' Compensation Ordinance (Cap. 282); and

(iii) an insurer who has issued a policy of insurance---

(A) which is in force in relation to the injured employee at the time of the accident concerned; and

(B) indemnifying the employer, or the principal contractor mentioned in subparagraph (ii), in respect of such liability; and

(b) as are reasonable in the circumstances, having regard to the likely cost of such proceedings, the resources available to the person and the amount likely to be recovered from, wherever applicable, the employer, the principal contractor and the insurer.".

7. Application by employer for payment from the Fund

Section 17 is amended---

(a) by renumbering it as section 17(1);

(b) in subsection (1)(b), by adding "or deceased" after "injured";

(c) in subsection (1)(c)(ii), by adding "as specified in a notice under section 20 published in the Gazette" after "insolvent";

(d) by adding---

"(2) A principal contractor who has taken out a policy of insurance in accordance with section 40(1B) of the Employees' Compensation Ordinance (Cap. 282) is entitled to make an application under subsection (1)---

(a) in respect of compensation, as if the principal contractor were an employer;

(b) in respect of damages which the employer concerned is liable to pay, on behalf of the employer.

(3) Any reference to an employer in any other provision of this Ordinance which relates to this section shall be construed to include a principal contractor to whom subsection (2) applies.".

8. Application by employer for payment from the Fund to third party

Section 18 is amended---

(a) by renumbering it as section 18(1);

- (b) in subsection (1)(b), by adding "or deceased" after "injured";
- (c) in subsection (1)(c), by adding "as specified in a notice under section 20 published in the Gazette" after "insolvent";
- (d) by adding---

"(2) A principal contractor who has taken out a policy of insurance in accordance with section 40(1B) of the Employees' Compensation Ordinance (Cap. 282) is entitled to make an application under subsection (1)---

- (a) in respect of compensation, as if the principal contractor were an employer;
- (b) in respect of damages which the employer concerned is liable to pay, on behalf of the employer.

(3) Any reference to an employer in any other provision of this Ordinance which relates to this section shall be construed to include a principal contractor to whom subsection (2) applies."

#### 9. Section added

The following is added---

"18A. Provisions ancillary to sections 17 and 18

(1) An application under section 17 or 18 shall be made by an employer not later than 180 days after the date on which the employer is entitled to make the application.

(2) An employer who fails to comply with subsection (1) in the case of section 17 shall not be entitled to any payment from the Fund in relation to the application to which the failure relates.

(3) Where an employer makes an application under section 18 after the expiration of 180 days after the date on which the employer is entitled to make the application, no interest, or surcharge payable under the Employees' Compensation Ordinance (Cap. 282), as the case may be, is payable on the amount to which the application relates in respect of the period beginning on that expiration and ending on the date on which the application is made.

(4) No interest, or surcharge payable under the Employees' Compensation Ordinance (Cap. 282), as the case may be, is payable on the amount to which an application under section 18 relates in respect of the period beginning on the date of the application and ending upon the expiration of 180 days after that date."

#### 10. Limitations on applications by employers

Section 19(1) is amended---

- (a) in paragraph (a), by repealing "by the employer";
- (b) in paragraph (b), by repealing "of insolvency given under this Part" and substituting "under section 20 published in the Gazette".

11. Notice of insolvency of insurer

Section 20(2)(a) is repealed and the following substituted---

"(a) shall be in a form specified by the Board;"

12. Sections added

The following are added---

"20A. Application by employee etc. for relief payment from the Fund in relation to unpaid damages

(1) An eligible person who is unable to recover from an employer payment of an amount of damages for which the employer is liable may apply for a relief payment of that amount from the Fund.

(2) For the purposes of this section, an employer is not to be regarded as liable for the payment of an amount of damages unless the amount is payable pursuant to a judgment or order of a court of competent jurisdiction in Hong Kong.

(3) For the purpose of this section, an eligible person is not to be regarded as being unable to recover from an employer payment of an amount of damages for which the employer is liable unless the eligible person has taken such proceedings to recover payment of the amount---

(a) from, wherever applicable---

(i) the employer; and

(ii) an insurer who has issued a policy of insurance---

(A) which is in force in relation to the injured employee at the time of the accident concerned; and

(B) indemnifying the employer in respect of such liability; and

(b) as are reasonable in the circumstances, having regard to the likely cost of such proceedings, the resources available to the eligible person and the amount likely to be recovered from, wherever applicable, the employer and the insurer.

20B. Amount of relief payment

(1) Subject to section 20A(2) and subsection (2), the amount of a relief payment to an eligible person shall be the amount of damages for which the employer is liable to pay the eligible person after that amount is reduced by---

(a) the amount, if any, of compensation which has been paid or is payable under the Employees' Compensation Ordinance (Cap. 282) in respect of the injured employee in relation to the accident concerned; and

(b) the amount, if any, of those damages already paid by the employer.

(2) Notwithstanding the definitions of "compensation" and "damages", for the purposes of determining the amount of a relief payment---

(a) any interest payable on any amount; and

(b) any costs,  
arising from proceedings in respect of any damages or compensation claim shall not be included.

(3) For the avoidance of doubt, it is hereby declared that where---

(a) a non-fatal injury gives rise to a relief payment in relation to an eligible person who is the injured employee; and

(b) that eligible person subsequently dies,

then the balance, if any, of the relief payment shall be paid to the other eligible persons, if any---

(c) remaining in relation to that first-mentioned eligible person; and

(d) falling within paragraph (a)(ii) of the definition of "eligible person".

20C. Manner of payment of

relief payment

(1) Subject to subsections (3), (4) and (5) and sections 20D to 20G, where the amount of a relief payment does not exceed the prescribed relief payment, the Board shall pay the amount in full to the eligible person or eligible persons, as the case may be.

(2) Subject to subsections (3), (4) and (5) and sections 20D to 20G, where the amount of a relief payment exceeds the prescribed relief payment, the Board shall pay the amount to the eligible person or eligible persons, as the case may be, as follows---

(a) a first payment equivalent to the prescribed relief payment; and

(b) subject to section 20D, subsequent monthly payments at the rate of---

(i) the prescribed monthly amount; or

(ii) the monthly earnings of the injured employee at the time of the accident concerned,

whichever is the higher.

(3) A surviving child who was an eligible person falling within paragraph

(a)(ii)(B) of the definition of "eligible person" at the time of the death of the injured employee---

(a) shall be entitled to the payment under subsection (1) or (2)(a) notwithstanding that he has attained the age of 21 years or above at the time the payment is made;

(b) shall not be entitled to a payment under subsection (2)(b) if he has attained the age of 21 years or above at the time the payment would, but for this paragraph, be made.

(4) Where 2 or more eligible persons are entitled to receive a relief payment, the amount of relief payment paid to each eligible person shall not exceed the amount to which they are respectively entitled under section 20F.

(5) For the purposes of calculating the rate of payments under subsection (2)(b), the monthly earnings of the employee concerned shall mean the employee's earnings as determined in accordance with section 11 of the Employees' Compensation Ordinance (Cap. 282).

20D. Cessation of payments under section 20C(2)(b)

Payments under section 20C(2)(b) shall be payable until---

(a) subject to section 20G, the amount of relief payment has been fully paid; or  
(b) in the case of each eligible person entitled to receive such payments, the person---

(i) dies; or

(ii) ceases to be entitled to receive such payments pursuant to section 20E, whichever is the earlier.

20E. When eligible person ceases to be entitled to relief payment

An eligible person shall cease to be entitled to a relief payment where---

(a) subject to section 20C(3) in the case of an eligible person falling within paragraph (a)(ii)(B) of the definition of "eligible person", the person attains the age of 21 years;

(b) the eligible person has been paid the amount to which the eligible person is entitled, whether as relief payment or payment of damages from the employer concerned, including any combination thereof.

20F. Apportionment of relief payment

(1) Where 2 or more eligible persons are entitled to receive a relief payment in respect of a deceased employee, then the relief payment shall be apportioned as follows---

(a) either---

(i) on a pro rata basis in accordance with the respective amounts awarded to the eligible persons by the court mentioned in section 20A(2); or

(ii) on an equal share basis if subparagraph (i) is not applicable or that court has not otherwise made an order on how the amount of damages should be apportioned amongst the eligible persons;

(b) where an eligible person has died or is no longer entitled to a relief payment, the relief payment shall be re-apportioned to the remaining eligible persons in proportion to the outstanding amount of relief payment respectively due to them;

(c) where an eligible person makes a successful application to the Board for a relief payment at a time when the payments under section 20C(2)(b) are being made to other eligible persons, the payments shall be re-apportioned---



(i) from the date the Board makes a determination under section 22 that the first-mentioned eligible person is entitled to the relief payment; and

(ii) to the first-mentioned eligible person and the other eligible persons in proportion to the outstanding amount of relief payment respectively due to them.

(2) For the avoidance of doubt, it is hereby declared that the re-apportionment of a relief payment under this section shall correspond with whichever of subsection (1)(a)(i) or (ii) is applicable to the relief payment.

#### 20G. Set-off

Where an eligible person---

(a) is receiving payments under section 20C(2)(b); and

(b) during the course of receiving the payments, receives any payment of an amount of damages in relation to the injury to which the payments relate, then the Board shall set-off from the outstanding amount of the payments due to the eligible person the amount of damages (including damages by way of indemnity) so received by the eligible person."

#### 13. Applications

Section 21 is amended---

(a) in subsection (1)(b), by repealing "prescribed manner and form" and substituting "manner and form specified by the Board";

(b) by repealing subsection (4)(a) and substituting---

"(a) require the employer (or the employer's representative) or the employee or his member of the family or representative, the employer's insurer or any other employee of the employer to furnish such information or particulars relating to an application; and"

#### 14. Determination of applications

by the Board

Section 22 is amended---

(a) in subsection (1), by adding "and, in particular, the amount of each payment, if any, to be made from the Fund by virtue of those determinations" after "determinations";

(b) in subsection (2)---

(i) by repealing "An" and substituting "Subject to subsection (3), an";

(ii) by adding "half" after "at";

(c) by adding---

"(3) No interest is payable on an amount mentioned in subsection (2)---

(a) which is a relief payment;

(b) where the application concerned under section 16 is made after the expiration of 180 days after the date on which the employer concerned is liable for the payment

of the amount, in respect of the period beginning on that expiration and ending on the date on which the application is so made;

(c) in respect of the period beginning on the date the application concerned under section 16 is made and ending upon the expiration of 180 days after that date;

(d) where section 25B is applicable, in respect of the period between the expiration of the period mentioned in section 25B(1)(c) and the date on which an extension, if any, is granted under section 25B(2);

(e) where the application concerned is under section 17, in respect of the period beginning on the date the employer makes the payment concerned of an amount of compensation or damages and ending on the date on which payment is made from the Fund in respect of that application.

(4) No surcharge mentioned in paragraph (e) of the definition of "compensation" in section 3 of the Employees' Compensation Ordinance (Cap. 282) shall be included in an amount mentioned in subsection (2)---

(a) where the application concerned under section 16 is made after the expiration of 180 days after the date on which the employer concerned is liable for the payment of the amount, to the extent that the surcharge arises in respect of the period beginning on that expiration and ending on the date on which the application is so made;

(b) to the extent that the surcharge arises in respect of the period beginning on the date of the application concerned under section 16 is made and ending upon the expiration of 180 days after the date.

(5) The interest payable on an amount mentioned in subsection (2) before the determination mentioned in that subsection is made shall be the rate mentioned in that subsection or the rate specified by the court or tribunal concerned, whichever is the lower.

(6) The Board may vary a determination under this section---

(a) to take account of---

(i) a person who becomes an eligible person on or after the date of the determination; or

(ii) the existence of an eligible person which was not known to the Board before that date; and

(b) in a manner not inconsistent with the provisions of this Ordinance."

#### 15. Costs

Section 23(1), (4) and (6) is amended by repealing "or damages" wherever it appears.

#### 16. Board liable in certain proceedings

as if employer

Section 25(1) and (4) is amended by repealing "or damages".

#### 17. Sections added

The following are added immediately after section 25---

"25A. Board may apply to be joined  
as party to proceedings

(1) If proceedings have been initiated to claim compensation or damages (whether initiated before, on or after the commencement of this section), the Board may apply to the court to be joined as a party to the proceedings as follows---

(a) where no policy of insurance is known to be in force at the time of the accident to which the proceedings relate, the Board may apply to the court to take over the defence as if it were the employer in the proceedings if---

(i) the employer cannot be identified or, if identified, cannot be found;

(ii) the employer is insolvent;

(iii) the employer is dead or has been dissolved, wound up or struck off the register;

(iv) the employer, for any reason, cannot be served with the notice of proceedings;

(v) at any time when the employer fails to attend the hearing, leaving the claim uncontested;

(b) where no policy of insurance is known to be in force at the time of the accident to which the proceedings relate and the employer is present at the proceedings, the Board may 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 (Cap. 4 sub. leg.);

(c) where the insurer concerned is insolvent, the Board may 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 (Cap. 4 sub. leg.).

#### 25B. Notification of proceedings

(1) Where, after the commencement of this section, a person commences by writ proceedings in respect of a claim for compensation or damages, the person shall serve on the Board and, where applicable, the insurer concerned a notice of the proceedings---

(a) in writing in a form specified by the Board, signed by the person and accompanied by a copy of the writ;

(b) by registered post; and

(c) subject to subsection (2), not later than 30 days after the date on which the writ is filed with the court.

(2) The Board may extend the period specified in subsection (1) in the case of a person who satisfies the Board, by notice in writing served on the Board, that there

are good reasons why the person cannot comply with subsection (1) within that period.

(3) A person who has served a notice under subsection (1) on the Board and who proposes to obtain judgment or reach settlement with the other party---

(a) in respect of the claim to which the notice relates; and

(b) within 45 days after the date on which the notice has been so served, shall, not less than 10 days before proposing to obtain judgment or reach a settlement, serve a notice in writing on the Board informing the Board that the person proposes to obtain judgment or reach a settlement in respect of that claim within 45 days after the date on which the first-mentioned notice has been served on the Board.

(4) It is hereby declared that---

(a) a notice under subsection (1) shall not combine a claim for compensation with a claim for damages;

(b) a notice under subsection (1) may be accompanied by a notice under subsection (3).

(5) A person who fails to comply with subsection (1) or (3) in respect of a claim mentioned in that subsection shall not be entitled to any payment under this Ordinance in respect of the claim, and notwithstanding the other provisions of this Ordinance.

(6) Upon receipt of a notice under this section, the Board shall carry out such inquiries as it considers necessary to facilitate the proper carrying out of the functions of the Board in relation to the claim to which the notice relates.

(7) For the purpose of carrying out inquiries under this section, the Board may---

(a) require the employer (or the employer's representative) or the employee or his member of the family or representative, the employer's insurer or any other employee of the employer to furnish such information or particulars relating to the claim; and

(b) make such inquiries from any other person connected or associated with the claim, as the Board considers necessary."

#### 18. Priority of payments from the Fund

Section 26(2)(a) and (b) is repealed and the following substituted---

"(a) amounts liable to be paid in respect of applications under section 16 shall have priority over amounts liable to be paid in respect of applications under section 17, 18 or 20A;

(b) amounts of compensation liable to be paid in respect of applications under section 18 shall have priority over amounts of damages liable to be paid in respect of applications under section 18 and amounts liable to be paid in respect of applications under section 17 or 20A;

(ba) amounts of compensation liable to be paid in respect of applications under section 17 shall have priority over amounts of damages liable to be paid in respect

of applications under section 17, amounts of damages liable to be paid in respect of applications under section 18 and amounts liable to be paid in respect of applications under section 20A;

(bb) amounts liable to be paid in respect of applications under section 20A where section 20C(1) or (2)(a) is applicable shall have priority over amounts liable to be paid in respect of applications under that section where section 20C(2)(b) is applicable and amounts of damages liable to be paid in respect of applications under section 17 or 18;

(bc) amounts of damages liable to be paid in respect of applications under section 18 shall have priority over amounts of damages liable to be paid in respect of applications under section 17 and amounts liable to be paid in respect of applications under section 20A where section 20C(2)(b) is applicable;

(bd) amounts liable to be paid under section 20A where section 20C(2)(b) is applicable shall have priority over amounts of damages liable to be paid in respect of applications under section 17; and".

19. Payments in anticipation of entitlement under section 16, etc.

Section 28 is amended---

(a) in subsection (1), by repealing "this Part" and substituting "section 16, 17 or 18";

(b) by repealing subsection (2) and substituting---

"(2) Any offer by the Board of payment under subsection (1) shall specify the section to which the Board considers that the person is or might be so entitled and, accordingly, any payment made under that subsection shall, for the purposes of section 26, be regarded as an amount as if the Board is liable to pay under the section so specified.

(3) If a person accepts an offer made under subsection (1) and receives payment accordingly, that person shall not have the right to make an application under section 16, 17 or 18, as the case may require, in respect of the claim to which the offer relates.

(4) If an offer made under subsection (1) is not accepted by a person, and in the subsequent proceedings in respect of the claim to which the offer relates the person is awarded an amount not more than the amount offered by the Board, then the Board shall not be required to pay more than the amount as awarded by the court or tribunal concerned.

(5) Where payment is made from the Fund to a person pursuant to subsection (3), then the Board shall not be liable to pay the costs incurred by the person after the

date of the offer to which the claim relates.

(6) Where the Board takes part in proceedings in respect of a claim for compensation, the Board shall have the right to agree costs with the parties involved in the proceedings prior to taxation."

#### 20. Interpretation

Section 31 is amended by adding ", unless the context otherwise requires" after "Part".

#### 21. Application of this Part

Section 33 is amended---

(a) in paragraph (b), by repealing "or" at the end;

(b) in paragraph (c), by repealing "applies." and substituting "applies; or";

(c) by adding---

"(d) any compensation or damages for injury to an employee who has been engaged outside Hong Kong by an employer who---

(i) is outside Hong Kong; and

(ii) has no place of business in Hong Kong (and whether or not the employer's business is for gain).".

#### 22. Survival of rights

Section 35 is amended---

(a) by renumbering it as section 35(1);

(b) in subsection (1), by repealing "On" and substituting "Subject to subsection (2), on";

(c) by adding---

"(2) Subsection (1) does not apply in the case of any rights and entitlement of a person in respect of a relief payment.".

#### 23. Section added

The following is added immediately after section 36---

##### "36A. Surcharge

(1) An employer who contravenes section 40(1) of the Employees' Compensation Ordinance (Cap. 282) shall be liable to pay a surcharge to the Board in accordance with this section.

(2) Subject to subsection (3), the amount of surcharge payable by an employer under subsection (1) shall be 3 times the levy payable to the Board under the Employees' Compensation Insurance Levies Ordinance (Cap. 411) on the premium paid in respect of the policy of insurance obtained to cause the cessation of the contravention referred to in that subsection to which the surcharge relates.

(3) The amount of surcharge payable by an employer under subsection (1) shall be the prescribed surcharge where---

(a) the employer fails to comply with a requirement under subsection (4) in any case where paragraph (b) is not applicable and the Board is otherwise unable to obtain the information and particulars necessary for subsection (2) to apply in the case of the employer; or

(b) the employer is not required to comply with section 40(1) of the Employees' Compensation Ordinance (Cap. 282) to cause the cessation of the contravention referred to in that subsection to which the surcharge relates.

(4) The Board may serve a notice in writing on an employer or insurer requiring the employer or insurer, as the case may be, to furnish information and particulars---

(a) which enables the Board to determine, to its satisfaction, the amount of surcharge payable by the employer under subsection (1); and

(b) within the period specified in the notice, being a period reasonable in all the circumstances of the case.

(5) Where a surcharge is payable under this section by an employer---

(a) the Board shall serve a notice in writing ("demand notice") on the employer, accompanied by a copy of this section in the Chinese and English languages, advising the employer---

(i) of the surcharge, its amount, the grounds therefor and the period, being a period of not less than 30 days after the date of service of the demand notice, within which the employer shall pay the surcharge to the Board; and

(ii) that the employer may, not later than 14 days after the date of service of the demand notice, serve a notice in writing ("review notice") on the Board requesting the Board to review, on the grounds specified in the review notice, the amount of the surcharge or the grounds therefor or both;

(b) the Board shall carry out a review requested in a review notice and serve a notice in writing ("final notice") on the employer---

(i) advising the employer that the demand notice is---

(A) confirmed;

(B) varied in the manner specified in the final notice and for the reasons stated therein; or

(C) withdrawn; and

(ii) not later than 30 days after receipt of the review notice.

(6) An applicant dissatisfied with a demand notice or final notice may commence proceedings in a court against the Board.

(7) Proceedings under subsection (6) shall be commenced by writ.

(8) A surcharge under this section shall be recoverable as a civil debt due to the Board.

(9) In this section, "employer" (僱主) includes a former employer."

## 24. Subrogation

Section 37 is amended---

(a) by repealing subsections (1), (2) and (3) and substituting---

"(1) Where a payment is made from the Fund under Part IV to any person ("the recipient"), being payment of an amount of compensation or damages which an employer, insurer or third party is liable to pay the recipient, all the rights and remedies of the recipient with respect to---

(a) the compensation or damages existing immediately before the payment are, to the extent of the amount of the payment; and

(b) any sum payable in respect of interest or costs in respect of the compensation or damages are,

transferred to and vested in the Board for the benefit of the Fund.

(2) Where a payment is made from the Fund under Part IV to or on behalf of an employer, being payment of an amount for which an insurer is liable to indemnify the employer under a policy of insurance, all the rights and remedies of the employer with respect to---

(a) the amount for which the insurer is so liable existing immediately before the payment are, to the extent of the amount of the payment; and

(b) any sum payable in respect of interest or costs in respect of the amount are, transferred to and vested in the Board for the benefit of the Fund.

(3) The Board may take such steps as it considers necessary to enforce the rights and remedies transferred and vested in it under this section, including steps where the Board permits in writing the recipient or employer from whom the rights and remedies were transferred to take proceedings to recover, for the benefit of the Fund, the amount (or any part thereof) to which the rights and remedies relate.";

(b) by adding---

"(6) For the purposes of this section---

(a) any payment made under section 28 to a person shall be deemed as a payment which the employer is liable to make to the person;

(b) a relief payment shall be deemed to be payment of an amount of damages, and the provisions of this section shall be construed accordingly.".

## 25. Section added

The following is added---

"37A. Recovery of payment

Where an eligible person receives any amount of damages in respect of an injury for which a relief payment has already been made, then the Board shall be entitled to recover from the eligible person as a civil debt such part, if any, of that amount which, taken together with the relief payment, is in excess of the amount of damages



to which the eligible person is entitled.".

26. Recovery of payment made by mistake

Section 38 is amended---

(a) in subsection (1), by repealing "Subject to subsection (2), where" and substituting "Where";

(b) by repealing subsection (2).

27. Offences

Section 40 is amended---

(a) in subsection (1), by repealing "of \$100,000" and substituting "at level 6";

(b) in subsection (2)---

(i) by adding "or 25B(7) or, where the person is an insurer, 36A(4)" after "section 21(4)";

(ii) by repealing "of \$5,000" and substituting "at level 2".

28. Regulations

Section 41(2) is amended by repealing "of \$10,000" and substituting "at level 3".

29. Section added

The following is added---

"45A. Amendment of Schedule 4

The Secretary may, by notice published in the Gazette, amend Schedule 4."

30. Section added

The following is added---

"46A. Transitional provisions in relation

to Employees Compensation

Assistance (Amendment)

Ordinance 2002

(1) Where before the commencement of section 6 of the Employees Compensation Assistance (Amendment) Ordinance 2002 ( of 2002) an employer is liable for the payment of an amount of compensation or damages for the purposes of section 16 as in force immediately before that commencement, then---

(a) the provisions of this Ordinance as amended by that Ordinance shall not apply to or in relation to any such compensation or damages;

(b) the provisions of this Ordinance as in force immediately before that commencement shall apply to and in relation to---

(i) any such compensation or damages; and

(ii) any application or claim made in relation thereto under this Ordinance as so in force, and whether or not the application or claim is made before, on or after that commencement.

(2) Sections 17, 18, 18A, 19, 20, 22(3)(e) and 23(7) to (11) inclusive are repealed.

(3) Section 26(2) is amended---

(a) in paragraph (a), by repealing "17, 18 or";

(b) by repealing paragraphs (b) and (ba);

(c) in paragraph (bb), by repealing "and amounts of damages liable to be paid in respect of applications under section 17 or 18";

(d) by repealing paragraphs (bc) and (bd).

(4) Section 28 is amended---

(a) in subsection (1), by repealing ", 17 or 18";

(b) by repealing subsection (2);

(c) in subsection (3), by repealing ", 17 or 18, as the case may require,".

(5) Sections 31(b), 37(2) and (5) and 41(1)(a)(iv) are repealed.

(6) Section 43(b) is amended by repealing "or employer's insurer, as the case may be,".

(7) Where before the commencement of this subsection---

(a) a notice under section 20 is published in the Gazette in respect of an insurer; and

(b) an employer is entitled to make an application under section 17 or 18 in relation to a policy of insurance issued by that insurer, then the provisions of this Ordinance as in force immediately before that commencement shall apply to and in relation to that entitlement.

(8) Where before the commencement of this subsection there is in force a policy of insurance in relation to an injured employee indemnifying the employee's employer in respect of the employer's liability for payment of an amount of compensation or damages in respect of the injury concerned for which he would be liable under section 16 or 20A, as the case may be, then, on and after that commencement, no person is entitled to make an application under that section in respect of any compensation or damages arising from that injury.".

31. Provisions regarding the Board and its members

Schedule 1 is amended, in paragraph 4, by repealing "4" and substituting "5".

32. Schedule added

The following is added---

"SCHEDULE 4 [ss. 2 & 45A]

Prescribed Monthly Amount, Prescribed

Relief Payment and Prescribed

Surcharge

PART 1

Prescribed Monthly Amount

\$10,000

PART 2

Prescribed Relief Payment

\$1,500,000

PART 3

Prescribed Surcharge

\$10,000 where section 36A(3)(a) of this Ordinance is applicable and \$5,000 where section 36A(3)(b) of this Ordinance is applicable".

33. Consequential amendments

The enactments specified in the Schedule are amended as set out in the Schedule.

SCHEDULE [s. 33]

Consequential Amendments

Employees' Compensation Ordinance

1. Interpretation

Section 3(1) of the Employees' Compensation Ordinance (Cap. 282) is amended by adding---

"EACAFB" (管理局) means the Employees Compensation Assistance Fund Board constituted by section 3(1) of the Employees Compensation Assistance Ordinance (Cap. 365);".

2. Payment of compensation and objection

to determination of Commissioner

Section 6D is amended---

(a) by repealing subsection (4) and substituting---

"(4) An objection to a determination under section 6B(1)(a) may be made in writing---

(a) by the employer, any person who has made an application under section 6B(1) or the EACAFB;

(b) within 30 days after---

(i) in the case of the employer or any person who has made an application under section 6B(1), the date of issue of the Certificate of Compensation Assessment for Fatal Case concerned;

(ii) in the case of the EACAFB, the date on which an application is made under section 16 of the Employees Compensation Assistance Ordinance (Cap. 365) by a member of the family of the deceased employee,

or within such further time as the Commissioner, in the circumstances of any particular case, thinks fit; and

(c) stating the grounds of the objection.";

(b) in subsection (6)---

(i) in paragraph (a), by repealing "and to the employer if the employer" and substituting ", to the employer if the employer is not the objector and to the ECAFB if the ECAFB, as the case requires,";

(ii) in paragraph (c), by repealing "and each of the members of the family" and substituting ", each of the members of the family and the ECAFB, as the case requires,";

(c) in subsection (9), by repealing "or any person named in the Certificate" and substituting "any person named in the Certificate, or the ECAFB".

3. Determination by Commissioner of claims for funeral and medical attendance expenses

Section 6E is amended---

(a) by repealing subsection (10) and substituting---

"(10) An objection to a determination under subsection (1) may be made in writing---

(a) by the employer, any person who has made an application under that subsection or the ECAFB;

(b) within 30 days after---

(i) in the case of the employer or any person who has made an application under that subsection, the date of issue of the Certificate for Funeral and Medical Attendance Expenses concerned;

(ii) in the case of the ECAFB, the date on which an application is made under section 16 of the Employees Compensation Assistance Ordinance (Cap. 365) by a person who is entitled to the reimbursement of the expenses of the funeral of the deceased employee or of the expenses of the medical attendance on the deceased employee,

or within such further time as the Commissioner, in the circumstances of any particular case, thinks fit; and

(c) stating the grounds of the objection.";

(b) in subsection (12)---

(i) in paragraph (a), by repealing "and to the employer if the employer" and substituting ", to the employer if the employer is not the objector and to the ECAFB if the ECAFB, as the case requires,";

(ii) in paragraph (c), by repealing "and each of the persons who has made an application under subsection (1)" and substituting ", each of the person who has made an application under subsection (1) and the ECAFB, as the case requires,";

(c) in subsection (15), by repealing "or the persons named in the Certificate" and

substituting "the persons named in the Certificate, or the ECAFB".

4. Determination of claims in respect of minor injuries

Section 16A is amended---

(a) by repealing subsection (3) and substituting---

"(3) An objection to the amount of compensation assessed under subsection (1) may be made in writing---

(a) by the employer, the employee or the ECAFB;

(b) within 14 days after---

(i) in the case of the employer or employee, the date of issue of the certificate issued under subsection (2);

(ii) in the case of the ECAFB, the date on which an application is made under section 16 of the Employees Compensation Assistance Ordinance (Cap. 365) by the employee,

or within such further time as the Commissioner, in the circumstances of any particular case, thinks fit;

(c) stating the grounds of the objection; and

(d) by the objector sending a copy of the objection---

(i) where the objector is the employer, to the employee;

(ii) where the objector is the employee, to the employer;

(iii) where the objector is the ECAFB, to the employer and the employee.";

(b) in subsection (5), by adding "and, where applicable, the ECAFB" after "employee";

(c) in subsection (8), by adding ", the ECAFB" after "employee".

5. Cancellation of minor injuries

claim certificate by the Court

Section 16B(1) is amended by repealing "or the Commissioner" and substituting ", the Commissioner or the ECAFB".

Employees Compensation Assistance (Notice of Insolvency of Insurer) Regulation

6. Regulation repealed

The Employees Compensation Assistance (Notice of Insolvency of Insurer) Regulation (Cap. 365 sub. leg.) is repealed.

Employees' Compensation Insurance Levies Ordinance

7. Schedule 2 substituted

Schedule 2 to the Employees' Compensation Insurance Levies Ordinance (Cap. 411) is repealed and the following substituted---

"SCHEDULE 2 [ss. 4, 6(3)

& 7(1)]

Bodies Specified for the Purposes  
of Section 7(1)

Item	Specified body	Proportion of the net resources in respect of the relevant period ending on 30 September 2002 and up to the relevant period ending on 31 December 2007 and 30 September 2007 thereafter	the Board to be distributed	Proportion of the net resources in respect of the relevant period ending on 30 September 2002 and up to the relevant period ending on 31 December 2007 and 30 September 2007 thereafter
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1. The Occupational Safety and Health Council 20/63 20/63".
2. The Employees Compensation Assistance Fund Board 31/63 25/63".
3. The Occupational Deafness Compensation Board 12/63 18/63".

Employees' Compensation Insurance Levy  
(Rate of Levy) Order

8. Prescribed rate of levy

Paragraph 2(d) of the Employees' Compensation Insurance Levy (Rate of Levy) Order (Cap. 411 sub. leg.) is repealed and the following substituted---

"(d) on or after 1 April 1998 and before 1 July 2002 is 5.3%;

(e) on or after 1 July 2002 is 6.3%."

Explanatory Memorandum

The principal object of this Bill is to amend the Employees Compensation Assistance Ordinance (Cap. 365) ("the principal Ordinance") to---

- (a) revise the scheme providing for the protection of the entitlement of employees and others to compensation awarded for employment-related injury;
- (b) provide for relief payment in the case of damages awarded for employment-related injury;
- (c) revise the procedures for filing applications which may affect the Employees Compensation Assistance Fund ("the Fund");
- (d) empower the Employees Compensation Assistance Fund Board ("the Board") to apply to be joined as a party to proceedings which may affect the Fund;

(e) require the Board to be notified of proceedings which may affect the Fund;  
(f) reduce the amount of interest payable on payments from the Fund; and  
(g) require employers who have failed to take out the relevant policies of insurance to pay a surcharge to the Board.

2. Clause 2 repeals and replaces the long title to the principal Ordinance to ensure that the long title accurately describes the principal Ordinance as amended by the Bill.

3. Clause 3(b) amends section 2 to, inter alia, add 2 new definitions of "eligible person" and "relief payment". The definition of "relief payment" is the term used to describe the payment that may be made from the Fund by the Board under the scheme relating to damages for employment-related injury. The definition of "eligible person" is the term used to describe the persons who may be entitled to a relief payment.

4. Clause 4 amends section 3(2)(b) to provide that there shall be an additional member of the Board who is a person having expertise in the practice of insurance. Clause 31 makes a consequential amendment to Schedule 1 to increase the quorum of the Board from 4 to 5.

5. Clause 6(a) repeals and replaces section 16(1) to remove references to damages because applications for relief payment relating to damages will now be made under new section 20A at clause 12. Clause 6(c) repeals and replaces section 16(3) to clarify the circumstances in which it is considered that a person is unable to recover from an employer payment of an amount of compensation such that the person is entitled to make an application to the Board for payment from the Fund in respect of that amount.

6. Clause 9 adds a new section 18A to specify the period within which an employer shall make an application under section 17 or 18 for payment from the Fund where the employer's insurer is insolvent. The new section 18A also specifies the sanctions that follow if the employer fails to make such an application within the specified period.

7. Clause 12 adds new sections 20A to 20G dealing with relief payments. New section 20A sets out the basis on which an eligible person may make an application to the Board for a relief payment. New section 20B specifies the amount of relief payment to which an eligible person will be entitled. New section 20C sets out the manner of payment of a relief payment. It should be noted that a relief payment in excess of a specified amount will be by way of monthly payments (see new section 20C(2) and Parts 1 and 2 of Schedule 4 at clause 32). New section 20D sets out the circumstances in which those monthly payments shall cease. New section 20E sets out the circumstances in which an eligible person ceases to be entitled to a relief payment. New section 20F provides for the apportionment of a relief payment where there are

2 or more eligible persons entitled to the relief payment. New section 20G empowers the Board to set-off, from the outstanding amount of monthly payments due to an eligible person, the amount of damages received by the eligible person subsequent to receiving the monthly payments.

8. Clause 14 amends section 22 to reduce the interest payable on payments from the Fund.

9. Clause 17 adds new sections 25A and 25B. New section 25A empowers the Board to apply to the court to be joined as a party to the proceedings which may affect the Fund. New section 25B requires persons who commence proceedings in respect of a claim for compensation or damages to notify the Board of the proceedings. Such a person is also required to notify the Board of any proposal to obtain judgment or reach a settlement with the other party in respect of the claim. A failure by the person to notify the Board in either case disentitles the person to any payment under the principal Ordinance in respect of the claim.

10. Clause 19 amends section 28 to enhance the protection afforded to the Fund where the Board makes a payment, or offers to make a payment, from the Fund in anticipation of a person's entitlement to such a payment under section 16, 17 or 18.

11. Clause 21 amends section 33 to disallow any claim in respect of any compensation or damages for injury to an employee engaged outside Hong Kong where the employer is outside Hong Kong and has no place of business in Hong Kong.

12. Clause 22 amends section 35 to provide that the right of a person in respect of a relief payment does not survive the person for the benefit of his estate.

13. Clause 23 adds a new section 36A to provide for a surcharge on employers who have failed to take out policies of insurance as required by section 40(1) of the Employees' Compensation Ordinance (Cap. 282).

14. Clause 30 adds a new section 46A(1) to provide transitional provisions in respect of an employer's liability for compensation or damages under section 16 before section 16 was amended by the Bill. Such a liability will be dealt with as if the principal Ordinance had not been amended by the Bill. Further, the new clause also adds new section 46A(2), (3), (4), (5) and (6) to provide for the repeal of sections 17, 18, 18A, 19, 20, 22(3)(e), 23(7) to (11), 28(2), 31(b), 37(2) and (5) and 41(1)(a)(iv) and the amendment of sections 26(2), 28(1) and (3) and 43(b), at a later date. The reason for this is that the insurance industry in Hong Kong is in the process of establishing a scheme which will in effect replace the present provisions of the principal Ordinance relating to applications by employers for payments from the Fund where their insurers are insolvent. The new section 46A(2), (3), (4), (5) and (6) will be brought into operation when that scheme is in place. New section 46A(7) and (8) specifies transitional provisions arising from the commencement of new section



46A(2) to (6).

15. Clause 33 and the Schedule make consequential amendments to the Employees' Compensation Ordinance (Cap. 282), the Employees' Compensation Insurance Levies Ordinance (Cap. 411) and the Employees' Compensation Insurance Levy (Rate of Levy) Order (Cap. 411 sub. leg.).