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Paper for the House Committee meeting on 22 January 2010

Report of the Bills Committee on Occupational Deafness (Compensation) (Amendment) Bill 2009

Purpose

This paper reports on the deliberations of the Bills Committee on Occupational Deafness (Compensation) (Amendment) Bill 2009.

Background

2. The Employees' Compensation Insurance Levies Ordinance (Cap. 411) (ECILO) was enacted in 1990. The overall Employees' Compensation Insurance Levy (the Levy) rate was set at 2% of the insurance premium when it was first introduced. Since then, the Levy rate has undergone four reviews, all resulting in an upward adjustment, to the current level of 6.3%.

3. The Occupational Deafness (Compensation) Ordinance (Cap. 469) (ODCO) was enacted in 1995. Under ODCO, an employee is entitled to receive a one-off compensation for permanent incapacity in the form of a lump sum payment if he can satisfy the occupational requirements specified in ODCO and suffers from sensorineural hearing loss of at least 40 dB in both ears where such loss is due to noise in at least one ear. An eligible claimant is entitled to reimbursement of expenses reasonably incurred in the acquisition, fitting, repair or maintenance of a hearing assistive device (HAD) used by him in connection with his noise-induced deafness. The amount of expenses that may be reimbursed to an applicant for the first time in relation to the acquisition and fitting of HAD shall not exceed $9,000 and the aggregate amount shall not exceed $18,000.

4. In the light of the financial position of the Employees Compensation Assistance Fund Board (ECAFB) and the Occupational Deafness Compensation Board (ODCB), the Labour Department (LD) put up a proposal for consultation in November 2006. Under the proposal, the rates of the Levy for distribution to ECAFB and ODCB were

revised to 3.1% and 0.2% respectively, providing a scope for downward revision of the Levy rate by one percentage point from 6.3% to 5.3%.

5. LD consulted ECAFB, ODCB and the Employees' Compensation Insurance Levies Management Board (ECILMB) on the proposal in November 2006. While all these statutory bodies supported the proposal in general, employee representatives expressed reservations about the extent of the proposed adjustments and the degree of proposed reduction in the Levy rate.

6. Organizations with an interest in occupational deafness compensation, in particular, registered their disagreement with the extent of the proposed reduction in the proportion of distribution of the Levy to ODCB. They suggested a list of proposed items to improve the Occupational Deafness Compensation Scheme (the ODC Scheme) to further benefit persons with occupational deafness. Taking into account the concerns of employee representatives and organizations with an interest in occupational deafness compensation on the use of the funds of ODCB, LD proposed a revised package which contained both improvements to the ODC Scheme and adjustment of the rate and proportions of distribution of the Levy. Under the revised proposal, the rates of the Levy for distribution to ECAFB and ODCB were revised to 3.1% and 0.7% respectively, and the Levy rate was revised to 5.8 %.

The Bill

7. The Bill seeks to improve the compensation under ODCO for persons with occupational deafness through -

(a) providing compensation for employees suffering from monaural hearing loss (MHL) such that people who have only one ear with sensorineural hearing loss of 40 dB or above owing to employment in specified noisy occupations are also entitled to compensation;

(b) increasing the maximum reimbursable amount for expenses incurred in purchasing, repairing and replacing HADs from $18,000 to $36,000;

(c) providing further compensation for employees whose hearing deteriorates as a result of continued employment in noisy occupations; and

(d) introducing other technical amendments to improve the operation of the ODC Scheme by allowing ODCB to pay the expenses for HAD to a supplier or service provider direct on behalf of an applicant without requiring the applicant to pay the expenses first.

8. The Bill proposes to reduce the Levy rate from 6.3 % to 5.8 %. It also proposes to adjust the proportion of distribution of the Levy payable under ECILO to ECAFB,

ODCB and Occupational Safety and Health Council (OSHC) from 25/63, 18/63 and 20/63 to 31/58, 7/58 and 20/58 respectively.

The Bills Committee

9. At the House Committee meeting on 5 June 2009, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

10. Under the chairmanship of Dr Hon PAN Pey-chyou, the Bills Committee has held six meetings with the Administration, and received the views of deputations at one of the meetings. A list of deputations which have submitted views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

Increasing the ceiling for first-time reimbursement of HAD expenses

11. At present, the ceiling for first-time reimbursement of expenses in relation to the acquisition and fitting of HADs under ODCO is $9,000. Some members have pointed out that a ceiling of $9,000 may not be adequate for purchasing some of the more sophisticated HADs in the market. They consider that the current ceiling of $9,000 for first-time reimbursable amount for HADs should be increased to allow applicants a wider choice of HADs.

12. The Administration has advised that the setting of a first-time maximum reimbursable amount for HADs seeks to ensure that applicants who have little experience in using HADs will make a prudent choice in their first-time purchase. According to medical experts, there are currently different models of HADs available in the market with functions designed to better suit the different needs of individuals. Information provided by ODCB indicates that only about 3% of first-time applications for reimbursement of expenses relating to HADs involve amounts exceeding $9,000, with most of these applications involving expenses between $9,000 and $12,000. In view of members' concern, the Administration will introduce Committee Stage amendments (CSAs) to increase the ceiling for the first-time reimbursement of expenses for HADs from $9,000 to $12,000.

Requirement for a continuous contract in any specified noisy occupations at any time within the 12 months before application for compensation is made

13. Section 14 of ODCO provides that a person who suffers from noise-induced deafness is entitled to such compensation as determined by ODCB under ODCO if he also satisfies ODCB, among others, that he has at any time been employed under a

continuous contract in any noisy occupation in Hong Kong within the 12 months before the date of his relevant application. Some members have queried the need for making continuous contract a requirement for compensation under ODCO. They have asked why a claimant has to fulfil the requirement of employment under a continuous contract in any specified noisy occupation at any time within the 12 months before he could make an application for compensation.

14. The Administration has explained that deafness can be caused by various factors other than prolonged exposure to excessive noise during employment in noisy occupations. These factors include ageing, viral infection, endocrine diseases such as diabetes, ototoxic medications, meningitis, brain tumours, and noise exposure during pastimes. If a worker has quitted or reduced his working time in noisy occupations for a long period of time, it would be difficult to reasonably presume that his hearing loss is caused by noise exposure at work. The purpose of requiring a continuous contract in noisy occupations within the 12 months preceding the date of application of a claimant is to enable a presumption of causation between occupational exposure and hearing loss.

15. The Administration has stressed that while the ODC Scheme is funded by employers' Levy, there is a need to ensure, as far as possible, that its dedicated objective of providing compensation for deafness caused by employment in noisy occupations is closely adhered to. The Administration considers that the requirement on employment under a continuous contract stipulated under ODCO is necessary, removal of which will render the time limit for application virtually non-existent and it will be difficult to reasonably presume that the hearing loss is employment-related.

Vetting of occupational requirements

16. Some members are concerned whether ODCB would exercise flexibility in the vetting process so that applicants would not be unduly excluded from the coverage of ODCO because of overly stringent criteria. They have requested the Administration to provide information on how ODCB vetted the occupational requirements of applications made under ODCO.

17. The Administration has explained that in practice, instead of simply requiring an applicant to prove that he has met the occupational requirements, ODCB would render suitable assistance to the applicant in the application process as far as possible. ODCB would first contact all the employers of the applicant to enlist their assistance in confirming the employment particulars which the applicant has furnished. If the information provided by the employer is found to differ from that provided by the applicant, ODCB would clarify with the applicant and request the provision of further information, such as contacts of their co-workers and direct supervisors. ODCB would approach these persons for additional information to substantiate the applications. ODCB would often make use of statements given by co-workers or direct supervisors, who have first-hand knowledge of the working environment of the applicant, as reliable

evidence to ascertain that the applicant can meet the occupational requirements. In addition, in assessing a case, ODCB would also consider any other relevant documentary evidence provided by the applicant, including employment contracts, wage records, tax returns, attendance cards, statements of Mandatory Provident Fund contributions and staff cards.

18. The Administration has stressed that ODCB has all along been exercising reasonable flexibility in vetting the occupational requirements of applications. ODCB will continue to provide appropriate assistance to the applicants in this respect.

Transitional arrangements for netting in MHL cases

19. At present, ODCO provides for compensation to employees who meet the occupational requirements and are confirmed to be suffering from noise-induced hearing loss to both ears. The Bill has made provision for transitional arrangements whereby some 500 claimants who have previously made applications to ODCB and found to be suffering from MHL can also be netted in for compensation. Clause 22 provides that a person whose previous application was refused on the ground that he only suffered from sensorineural hearing loss of not less than 40 dB in only one ear may make application for compensation again if he has fulfilled specified conditions.

20. Some members are concerned that there may be persons who have not made applications to ODCB in the past after they underwent self-arranged hearing tests and obtained results showing MHL, as they were aware that MHL was not compensable under ODCO at that time. As such, these persons would not be entitled to compensation under the existing transitional arrangements of the Bill. Since some of them may have already left employment and failed to fulfil the occupational requirements, they would also not be able to apply to ODCB for compensation after the Bill comes into effect. Members take the view that the proposed transitional arrangements should be made more flexible such that these special cases could also be netted in for compensation.

21. The Administration has advised that as long as the principles of fairness and reasonableness underpinning ODCO are not compromised, it is prepared to make the transitional arrangements more flexible. To address members' concerns, the Administration will move CSAs to net in workers with MHL -

(a) who had not filed any applications with ODCB in the past but could provide proof of his employment in the specified noisy occupations for the designated number of years and the self-arranged hearing test results showing their MHL at that point in time; or

(b) who could provide proof of such employment and hearing test results conducted in Hong Kong after their applications had been rejected by ODCB showing such MHL at that point of time.

The Administration has also advised that the results of such hearing tests will be adopted for the purpose of assessing the degree of hearing loss suffered by the claimant.

Operation of the proposed new section 48(3)(c)

22. Clause 22 of the Bill seeks to provide for the transitional arrangements under section 48 of ODCO to include under the ODC Scheme a person whose previous application was refused by ODCB on the ground that he only suffered from sensorineural hearing loss of not less than 40 dB in only one ear, so that he may apply for compensation again if he fulfils the conditions specified by the proposed new section 48(3).

23. Members have expressed concern about the operation of the proposed new section 48(3)(c) of ODCO. They have asked about the policy intent behind and the burden of proof of the proposed new section 48(3)(c) which specifies that "there is no evidence proving that the sensorineural hearing loss was not due to noise". They have asked why the proposed new section 48(3)(c) is drafted in such a way, if the Administration intends to impose the evidential burden on ODCB instead of the claimants. They have also asked whether the proposed new section 48(3)(c) would be amended so as to clarify the onus of proof on ODCB and the types of evidence to be considered.

24. The Administration has advised that sensorineural hearing loss could be caused by a number of factors other than prolonged exposure to noise at work. Ageing, illness and medication are some other common factors that may also cause sensorineural hearing loss. As the objective of ODCO is to provide compensation for those employees whose hearing loss is caused by exposure to noise at work, it is necessary to exclude those cases where the claimants' sensorineural hearing loss is clearly not due to noise at work. This principle has been accepted and embodied in ODCO since its enactment.

25. The Administration has also advised that in general, ODCB would rely on information obtained during the processing of the application for compensation to determine whether the claimant meets the requirement that the hearing loss is due to noise at work. The Medical Committee of ODCB would make reference to the employment history, the pattern of the audiogram, the result of the medical examination, as well as any other medical reports that would be made available to ODCB. Unless there is strong contrary evidence, such as a medical report stating that the claimant has suffered from a disease resulting in his sensorineural hearing loss, the Medical Committee would likely give the benefit of doubt to the claimant and treat him as suffering hearing loss owing to noise at work.

26. The Administration has stressed that ODCB would apply the same standard in determining the applications made under the proposed new section 48(3). ODCB

would refer to the hearing test results relating to the claimant in respect of his application previously refused by ODCB, or any other information provided by the claimant at the time the application is made. For those cases covered by the transitional arrangements under the proposed new section 48(3), ODCB is in possession of the hearing test results previously conducted for the claimants. Given the time lapse, it would be quite difficult in practice to ascertain now the cause of the claimants' hearing loss by referring to anything other than such hearing test results. The proposed new section 48(3)(c) is so drafted as to uphold the principle that ODCO is to compensate the claimants for their hearing loss owing to noise at work while giving the claimants the benefit of doubt where there is no evidence specifically proving that their hearing loss is not due to noise. In gist, if the information available to ODCB, whether held by ODCB itself or provided by any person, does not contain any strong evidence that indicates the claimant's hearing loss is not due to noise at work, ODCB would, as it would in dealing with new applications, accept that he should be able to meet the requirement that the hearing loss of his worst ear is due to noise at work. The proposed new section 48(3)(c) would not impose the onus of proof on the claimant in the light of the proposed arrangement.

Determination of the percentage of permanent incapacity of a claimant and calculation of the amount of compensation payable in other jurisdictions

27. Members have sought information on the practices of other places in determining the percentage of permanent incapacity of a claimant with occupational deafness and calculating the amount of compensation payable to him.

28. The Administration has advised that it has studied the practices of the United States of America (USA), Canada, Australia and the United Kingdom (UK). In the jurisdictions studied, noise-induced deafness sustained as a result of working in noisy occupations is classified as an occupational disease. As far as the determination of the percentage of permanent incapacity is concerned, different practices are adopted in these places. In UK and Hong Kong, employees' compensation for the permanent incapacity of an employee is determined by the degree of his loss in earning capacity. In Canada and certain states of USA, the incapacity of an employee is determined by making reference to his "whole-person impairment". Under the concept of "whole-person impairment", compensation is provided for the permanent impairment of any body part or function to the extent to which it permanently impairs the employee as a whole person. In awarding compensation, some jurisdictions pay in a lump sum while others pay by way of periodic payments. Some of these payments are funded by social security while others are paid out of collective compensation funds or individual insurance covers. The Administration has stressed that since there are basic conceptual differences among various compensation systems, there are limitations in making direct comparisons in their ways of determining the amounts of compensation for occupational deafness in these jurisdictions.

Practices of other jurisdictions in determining the percentage of permanent incapacity of a person suffering from monaural hearing loss and calculating the amount of compensation payable

29. Members have requested the Administration to provide information on the legislation and practices of other jurisdictions in determining the percentage of permanent incapacity of a worker suffering from MHL.

30. The Administration has informed members that among the jurisdictions surveyed, MHL is compensable in some states of USA and some provinces in Canada where the concept of "whole person impairment" rating is adopted to determine the extent of an individual's impairment. This method of determination is fundamentally different from that of Hong Kong. Despite the fact that Canada and certain states in USA determine the incapacity or impairment with reference to whole person impairment, different methods are adopted to determine the percentages. In USA, some states like California determine the percentage based on the American Medical Association Guide, while in Canada, some provinces like the British Columbia have their own standard for determining the percentage of impairment for each part of the body under the law. As for the payment of compensation, some places pay in a lump sum while others pay in the form of weekly or monthly payment. As different practices are adopted in these jurisdictions, there is practical difficulty in making a direct comparison in their ways of determining the amount of compensation for MHL.

Reducing the required aggregate length of employment for making application for further compensation

31. Under clause 6 of the Bill, a person having been awarded compensation under ODCO is entitled to further compensation, if certain conditions are satisfied, for the additional permanent incapacity resulting from the person's additional hearing loss following further employment in noisy occupations. The Bill requires that an employee should have at least five years of employment in aggregate in any of the specified noisy occupations in Hong Kong after his last application before he can apply for further compensation. Some members take the view that the required aggregate length of employment should be reduced so that more employees could benefit from such further compensation.

32. The Administration has advised that studies show that while prolonged exposure to excessive noise can cause noise-induced hearing loss, the rate of hearing loss is the fastest in the first 10 years and will then slow down thereafter. On the basis of these studies, the Administration considers that five years of aggregate employment in noisy occupation is a suitable interval for the purpose of re-assessment of the deterioration in hearing due to continued exposure to noise at work. Nevertheless, since those employees have already been assessed to be suffering from occupational deafness, the adoption of a shorter interval for re-assessment may be beneficial to them as ODCB can then keep closer track of their hearing conditions and provide them with necessary

information on hearing conservation where appropriate. The Administration will move CSAs to reduce the aggregate length of employment required for making application for further compensation from five to three years.

Method of calculating the amount of further compensation for additional hearing loss sustained as a result of continued employment in a noisy occupation

33. Under clause 23 of the Bill, the amount of further compensation payable in a case relating to additional permanent incapacity is calculated on the basis of the average earnings at the time the claimant sustains the injury or disease. Hon IP Wai-ming has advised that the Hong Kong Federation of Trade Unions takes the view that the average earnings of the claimant in his previous successful application or the average earnings of the claimant in his current application, whichever is the higher, should be adopted for calculating the amount of further compensation.

34. The Administration has pointed out that under the existing employees' compensation system in Hong Kong, for an employee who is injured or contracts occupational diseases at work, the amount of compensation to which he is entitled for the permanent incapacity so sustained is basically calculated with reference to his age and earnings at the time he sustains the injury or contracts the disease. This serves to compensate for the prospective loss of earning capacity of the employee in the years ahead. ODCO follows this rationale in determining the amount of compensation. The Administration does not agree to any suggestions running counter to the prevailing principles of employees' compensation in the local context.

35. Hon IP Wai-ming remains of the view that in calculating the amount of further compensation, the Administration should take the average earnings of the claimant's previous successful application or the average earnings of the claimant's current application, whichever is the higher. He requests the Administration to consider his suggestion again when it next reviews ODCO.

Adjustment of the specified overall rate and proportions of distribution of the Employees' Compensation Insurance Levy

36. On the adjustment of the overall rate and proportions of distribution of the Levy, Hon LEE Cheuk-yan has pointed out that the Hong Kong Confederation of Trade Unions has not been consulted on the proposed adjustments. He considers that the overall Levy rate should be maintained at the current level of 6.3%, as this would ensure the generation of sufficient Levy income for distribution to ODCB, OSHC and ECAFB, and hence their financial viability and ability to perform their statutory functions and improve their services. He considers that more resources should be allocated to ODCB and OSHC. Hon LEE Cheuk-yan has indicated that he may consider moving CSAs to the effect that the current prescribed rate of Levy would continue to prevail. He may also consider moving CSAs to amend the proportions of distribution of the Levy proposed in the Bill.

37. Hon CHAN Kin-por is concerned that apart from the 6.3% Levy payable under ECILO, an employer is also required to contribute a levy of 2% to the Employees Compensation Insurer Insolvency Bureau and 3% for the Government Terrorism Facility Charge. He takes the view that there should be a mechanism whereby the overall Levy rate can be adjusted downwards or upwards in light of the prevailing circumstances. He supports the reduction of the overall Levy rate from 6.3% to 5.8% as proposed in clause 28 of the Bill.

38. The Administration has advised that it has all along been monitoring closely the financial positions of ECAFB, ODCB and OSHC. It will from time to time evaluate and review their respective financial situation. The proposal can ensure long-term financial viability of the three statutory bodies and their ability to perform their statutory functions. In arriving at the current proposal in relation to the adjustment and distribution of the Levy, the financial implications of the proposed improvements to the ODC Scheme and the income and expenditure patterns of the statutory bodies concerned have been critically assessed and taken fully into account. Stakeholders concerned have been duly consulted with their views carefully considered. Specifically, relevant statutory bodies, the Labour Advisory Board (LAB) and the Panel on Manpower have expressed support for the proposal when consulted.

39. The Administration has pointed out that when ECILO was first introduced, the overall Levy rate was set at 2% of the insurance premium. Since then, four reviews were conducted and each resulted in an upward adjustment of the overall Levy rate. In the past, employers had expressed concern that the overall Levy rate should be reduced if the financial positions of the statutory bodies so permitted. The proposed reduction in the overall Levy rate, while modest, would be the first reduction since the enactment of ECILO in 1990. Notwithstanding the reduction, improvements would still be made to the ODC Scheme to benefit persons with occupational deafness while ECAFB and OSHC would continue operating effectively. The Administration has assured members that it will keep in view the financial situation of ECAFB, ODCB and OSHC. It will formulate improvement or adjustment measures as necessary to ensure that they are able to perform their respective functions. It will also strengthen enforcement and publicity to safeguard the occupational safety and health of workers.

40. The Administration has advised that the current proposal is reached by consensus among stakeholders and statutory boards after a due process of consultation. If members would raise a different proposal on the overall Levy rate and/or the rate of adjustment and distribution of the Levy, there is a need to go back to stakeholders, statutory boards and the LAB to consult them again on the change. This would undesirably delay the passage of the Bill, albeit the Administration would very much like to implement the proposals as early as possible to benefit persons with occupational deafness.

Drafting of clause 8 and clause 15 in relation to the use of "must" or "shall"

41. Members have expressed concern about the use of "must" in clauses 8(3), 8(4) and 15(3) of the Bill which respectively propose to amend section 20(2) of ODCO, to add the proposed new section 20(2A) and (2C), and to add the proposed new section 27D(3), whereas "shall" would continue to be used in other sections of ODCO, including sections 20(1) and 27D(2). Members have queried whether the simultaneous appearance of "must" and "shall" in the same section would cause confusion and problems in interpretation by the public and the courts in future. Members consider it more consistent to use the term "shall" or "must" in the same section of an ordinance.

42. To address members' concern, the Administration will move CSAs to amend the term "shall" as "must" in the proposed sections 20 and 27D of ODCO. The Administration has advised that a change has already been implemented in the drafting of legislation in the use of "must" to impose an obligation in place of "shall". This new style is now used in all new legislation. It is also adopted when amendments are made to existing legislation.

Drafting of clause 13 in relation to the use of "he" or "he or she"

43. Members have noted the use of "he or she" and "his or her noise-induced deafness" in the proposed new section 27B(1A), while "he" and "his noise-induced deafness" would continue to be used in section 27B(1). They consider it more consistent to use the same phrase in the same section of an ordinance. They have also asked about the reasons for using "he or she" and "his or her" only in the English text of the new section 27B(1A), while the corresponding renditions are not used in the Chinese text of the same section.

44. To address members' concerns, the Administration will move CSAs to amend "he" and "his noise-induced deafness" in sections 27B(1) and 48(1) as "he or she" and "his or her noise-induced deafness" respectively. Regarding the Chinese renditions of "he or she" and "his or her", the Administration has advised that gender-neutrality has no significant implications for Chinese drafting. If the English text uses a noun to achieve gender neutrality, the Chinese text can follow suit. However, the character "他" is more gender-neutral compared to "he". For example, "他們" is used for a group of people of both sexes. Therefore, if no interpretation problem is likely to arise in the particular context, "他們" and "他" may continue to be used as they are suitable and concise. The Administration has also advised that the Law Drafting Division of the Department of Justice has now adopted a policy of gender-neutral drafting. The use of language with a gender-bias might be viewed as discriminatory. A policy of gender-neutral drafting would also be in tune with the gender mainstreaming policies of the Government.

Committee Stage amendments

45. Apart from the CSAs referred to in the above paragraphs, the Administration will move other minor or technical amendments to the Bill. A copy of the draft CSAs to be moved by the Administration is in **Appendix III**.

Resumption of Second Reading debate on the Bill

46. The Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting on 3 February 2010, subject to the CSAs to be moved by the Administration.

Advice Sought

47. Members are invited to note the deliberations of the Bills Committee and the date for resumption of the Second Reading debate on the Bill.

Council Business Division 2
Legislative Council Secretariat
21 January 2010

Appendix I

Bills Committee on Occupational Deafness (Compensation) (Amendment) Bill 2009

Membership list

Chairman	Dr Hon PAN Pey-chyou
Members	Hon LEE Cheuk-yan Hon LEUNG Yiu-chung Hon Abraham SHEK Lai-him, SBS, JP Hon LI Fung-ying, BBS, JP Hon Alan LEONG Kah-kit, SC (since 28 July 2009) Hon CHAN Kin-por, JP Hon WONG Sing-chi Hon IP Wai-ming, MH Hon IP Kwok-him, GBS, JP (Total: 10 Members)
Clerk	Mr Raymond LAM
Legal adviser	Mr Timothy TSO
Date	28 July 2009

Appendix II

Bills Committee on Occupational Deafness (Compensation) (Amendment) Bill 2009

A. Organizations which have given oral representation to the Bills Committee

1. The Hong Kong Occupational Deafness Association
2. Employers' Federation of Hong Kong
3. Hong Kong Shipbuilding, Machinery Manufacturing, Electrical and Steel Industries Employees General Union
4. Association for the Rights of Industrial Accident Victims
5. Hong Kong Construction Industry Employees General Union
6. The Staffs & Workers Union of Hong Kong Civil Airlines
7. Hong Kong & Kowloon Spinning Weaving and Dyeing Workers General Union
8. The Hong Kong Federation of Trade Unions - Occupational Safety & Health Committee
9. Hong Kong Association of the Deaf

B. Organizations who have provided written submissions only

1. Hong Kong Construction Association
2. Hong Kong Construction and Decoration Workers Association

OCCUPATIONAL DEAFNESS (COMPENSATION)
(AMENDMENT) BILL 2009

COMMITTEE STAGE

Amendments to be moved by the Secretary for
Labour and Welfare

Clause	Amendment Proposed
3	By deleting subclause (2) and substituting − "(2) Section 2 is amended by repealing the definition of "noise-induced deafness" and substituting − ""noise-induced deafness" (噪音所致的失聰) means − (a) binaural hearing loss; or (b) monaural hearing loss;".".
3(4)	By adding − ""binaural hearing loss" (雙耳聽力損失) means sensorineural hearing loss amounting to not less than 40 dB in each ear, where such loss is due in the case of at least one ear to noise, and being the average of hearing losses measured by audiometry over the 1, 2 and 3 kHz frequencies;".
4	By renumbering the clause as clause 4(1).
4	By adding − "(2) Section 5(1)(db) is amended by adding ", or who have suffered," after "suffering".".
6	In the proposed section 14A(2)(a), by deleting "5 years" and substituting "3

years".

6 In the proposed section 14A(2)(a)(i), by deleting "or".

6 In the proposed section 14A(2)(a)(ii), by deleting the semicolon and substituting "or, where there was more than one such previous unsuccessful application, the date of the last such application; or".

6 In the proposed section 14A(2)(a), by adding −

"(iii) if the latest successful application was made for compensation for which the entitlement arose under section 48(5), the date of the self-arranged audiometric test mentioned in section 48(5)(a) or, where there was more than one such test, the date of the last such test;".

7(1) In the proposed section 15(1), by deleting "or (3)" and substituting ", (3) or (5)".

7(3) In the proposed section 15(2), by adding "and (9)" after "section 48(4)".

New By adding −

"**7A. Referral to Medical Committee**

Section 19 is amended by adding "or 48(5)(a)" after "section 16(2)".".

8(2) By deleting everything after "by repealing" and substituting ""The Board shall" and substituting "Subject to section 48(4) and (9), the Board must".".

8(3) By deleting "noise-induced deafness other than monaural" and substituting "binaural".

8(4) In the proposed section 20(2A), by adding "or (9)" after "section 48(4)".

8(4) In the proposed section 20(2B)(b), in the English text, by adding “the” before “better”.

8(5) By deleting everything after “by repealing” and substituting ““shall make a determination under subsection (1) or (2)” and substituting “must make a determination under subsection (1), (2) or (2A) or section 48(4) or (9)”.”.

13 By adding −

“(1A) Section 27B(1)(a) is amended by repealing “is” and substituting “has at any time been”.

(1B) Section 27B(1) is amended by adding −

“(aa) has at any time been entitled to compensation pursuant to a decision made under section 23;”.

(1C) Section 27B(1)(b) is amended by repealing “is” and substituting “has at any time been”.

(1D) Section 27B(1)(c) is amended by adding “at any time” after “has”.

(1E) Section 27B(1)(c) is amended, in the English text, by adding “or her” after “his”.

(1F) Section 27B(1) is amended by repealing everything after “the Board for any expenses” and substituting “he or she has reasonably incurred in the acquisition, fitting, repair or maintenance of a hearing assistive device used by him or her in connection with his or her ear that suffers, or has suffered, from noise-induced deafness.”.”.

13 By deleting subclause (2) and substituting −

“(2) Section 27B is amended by adding −

“(1A) A person who fulfils the conditions specified in subsection (1)(a), (aa), (b) or (c) may apply to the Board for payment by the Board directly

to the device provider of any expenses he or she may reasonably incur in the acquisition, fitting, repair or maintenance of a hearing assistive device used or to be used by him or her in connection with his or her ear that suffers, or has suffered, from noise-induced deafness.”.”.

13 By adding −

“(3A) Section 27B(2)(a)(iii) is amended, in the English text, by adding “or her” after “him”.

(3B) Section 27B(2)(b) is amended, in the English text, by adding “or her” after “him”.”.

14 In the proposed section 27C(2), by adding “, irrespective of the number of applications under section 15 that the applicant has made” after “the applicant under that section”.

15(2) In the English text, by deleting everything after “is amended” and substituting “by repealing “shall be in a specified form and shall” and substituting “based on an entitlement arising under section 27B(1) must be in a specified form and must”.”.

15 By adding −

“(2A) Section 27D(2) is amended, in the English text, by repealing “shall” and substituting “must”.”.

18 By adding −

“(2A) Section 27G(2) is amended, in the English text, by repealing “shall” and substituting “does”.”.

18 By adding −

“(4) Section 27G(4) is amended, in the English text, by

repealing “shall” and substituting “is to”.”.

22 By adding before subclause (1) −

“(1A) Section 48(1) is amended, in the English text, by repealing “Notwithstanding” and substituting “Despite”.

(1B) Section 48(1)(b) is amended by adding “or she” after “he”.

(1C) Section 48(1)(b) is amended, in the English text, by adding “or her” after “his”.

(1D) Section 48(1) is amended by repealing everything from “Ordinance, if −” to “the Board that −” and substituting −

“Ordinance −

(i) on satisfying the Board that he or she −”.

(1E) Section 48(1)(i)(A) is amended by repealing “he”.

(1F) Section 48(1)(i)(B) is amended by repealing “he”.”.

22 By deleting subclause (1) and substituting −

“(1) Section 48(1)(ii) is repealed and the following substituted −

“(ii) if the application is made within 12 months beginning on the commencement of section 1 to 20 of the amending Ordinance, that is to say, 6 March 1998.”.

(1AA) Section 48(1) is amended, in the Chinese text, by repealing “則除第 14(3)、17 及 29 條另有規定外，他有權” and substituting “該人有權”.”.

22 By deleting subclause (3) and substituting −

“(3) Section 48(2)(a) is amended by repealing everything from “or (3) of the pre-amended Ordinance” to “shall continue” and

substituting “or (3) of the pre-amended 1998 Ordinance, then sections 8(c), 15(4) to (6) and 31 of the pre-amended 1998 Ordinance continues”.

(3A) Section 48(2)(b) is amended by repealing everything from “or (3) of the pre-amended Ordinance” to “shall continue” and substituting “or (3) of the pre-amended 1998 Ordinance has been provided to the Board, then sections 16(1), 19 and 20(1) of the pre-amended 1998 Ordinance continues”.

(3B) Section 48(2)(c) is amended by repealing everything after “for compensation under” and substituting “section 15 of the pre-amended 1998 Ordinance and the Board has not determined the percentage of permanent incapacity of the claimant under section 20, the Board must make such determination in accordance with Schedule 4 to the pre-amended 1998 Ordinance.”.”.

22 By deleting subclause (4) and substituting −

“(4) Section 48(3) is repealed and the following substituted –

“(3) Despite section 14(1) and subject to sections 14(3) and 29, a person is entitled to such compensation as is determined by the Board under this Ordinance if −

(a) the person has not been awarded any compensation;

(b) the person has made previous application for compensation under the pre-amended 2010 Ordinance that was refused under section 22(1)(a) of that Ordinance on the ground that he or she suffered from sensorineural hearing loss of not less than 40 dB

in only one ear ("previous unsuccessful application"); and

(c) there is no evidence proving that the sensorineural hearing loss was not due to noise.

(4) In relation to a claimant applying for compensation based on an entitlement arising under subsection (3), the Board must determine the noise-induced deafness of the claimant having regard to −

(a) the result of the hearing test or medical examination as stated in the notice sent under section 22 in respect of the claimant's previous unsuccessful application mentioned in subsection (3)(b) or, where there was more than one such previous unsuccessful application, the last such application;

(b) any advice of the Medical Committee given in respect of the deafness of the claimant;

(c) the result of any medical examination that the Board may have required the claimant to undergo under section 16(1); and

(d) any investigations and inquiries into any other matter concerning the claimant's deafness or the claimant's occupational history that the Board may have made

under section 16(1).

(5) Despite section 14(1) and subject to sections 14(3) and 29, a person who has at any time suffered noise-induced deafness is entitled to such compensation as is determined by the Board under this Ordinance if −

(a) the person provides the Board with a report of a self-arranged audiometric test in relation to which report or test the requirements specified in subsection (6) are met;

(b) the person has had −

(i) at least 10 years of employment in aggregate in any noisy occupation in Hong Kong before the date of the self-arranged audiometric test; or

(ii) at least 5 years of employment in aggregate in any noisy occupation specified in paragraphs (c), (j), (k) and (y) of Schedule 3 in Hong Kong before the date of the self-arranged audiometric test;

(c) the person has at any time been employed under a continuous contract in any noisy occupation in Hong Kong within the 12 months before the date of the

self-arranged audiometric test;

(d) the person has not been awarded any compensation; and

(e) there is no evidence proving that the sensorineural hearing loss was not due to noise.

(6) The requirements referred to in subsection (5)(a) are that −

(a) the report must show the date on which the self-arranged audiometric test was conducted;

(b) the report must show that the person suffered from −

(i) hearing loss amounting to not less than 40 dB in only one ear, being the average of hearing losses measured by audiometry over the 1, 2 and 3 kHz frequencies; or

(ii) any hearing loss that the Medical Committee may, under subsection (8), infer from the report to amount to the hearing loss mentioned in subparagraph (i);

(c) the report does not indicate that the person mentioned in paragraph (f) has opined that the result of the self-arranged audiometric test is unreliable;

(d) the self-arranged audiometric test

was conducted in Hong Kong within the period from 1 July 1995 to the date immediately before the date on which the 2010 Amendment Ordinance is published in the Gazette;

(e) if the person has undergone one or more hearing tests arranged by the Board in connection with the person's application for compensation that was refused under section 22(1)(a) or, where there was more than one such application, the last such application, the self-arranged audiometric test was conducted after −

(i) the date of the hearing test on the result of which the Board's decision to refuse the application ("first decision") was based;

(ii) if the person has, under section 23, requested the Board to review the first decision, the date of the hearing test on the result of which the Board's decision to refuse to vary or reverse the first decision ("second decision") was based;

(iii) if the person has, under

section 28, appealed to the District Court against the second decision, the date of the hearing test on the result of which the District Court's decision to refuse to vary or reverse the second decision was based; and

(f) the self-arranged audiometric test was conducted, or the result of the test was certified by a person belonging to a category of persons designated under section 36(1)(b).

(7) If it is not reasonably practicable to ascertain the date of the hearing test mentioned in subparagraph (i), (ii) or (iii) of subsection (6)(e), that subparagraph is to be construed as if the reference to that date were a reference to the date of the Board's decision or the District Court's decision mentioned in that subparagraph.

(8) If the hearing losses as shown in the self-arranged audiometric test mentioned in subsection (5)(a) were not measured by audiometry over the 1, 2 and 3 kHz frequencies −

(a) the report of the self-arranged audiometric test must contain information that makes it possible for the Medical Committee to infer the average hearing loss of the person over the 1, 2 and 3 kHz frequencies; and

(b) the Medical Committee may, if it considers it appropriate, infer the average hearing loss of the person over the 1, 2 and 3 kHz frequencies relying on the information given in the report.

(9) In relation to a claimant applying for compensation based on an entitlement arising under subsection (5), the Board must determine the noise-induced deafness of the claimant having regard to −

(a) the report mentioned in subsection (5)(a) or, where there was more than one such report, the last such report;

(b) any advice of the Medical Committee given in respect of the deafness of the claimant;

(c) the result of any medical examination that the Board may have required the claimant to undergo under section 16(1); and

(d) any investigations and inquiries into any other matter concerning the claimant's deafness or the claimant's occupational history that the Board may have made under section 16(1).

(10) Subsection (5) does not apply to a person who is entitled to apply for compensation for which the entitlement arises under subsection (3) or section 14.

(11) A person who has applied for compensation for which the entitlement arose under section 14 (“existing application”) must not apply for compensation for which the entitlement arises under subsection (3) or (5) if −

(a) the existing application is still pending;

(b) the existing application has been refused by the Board under section 22 but there is −

(i) a pending review by the Board under section 23 in respect of the existing application; or

(ii) a pending appeal to the District Court under section 28 concerning the Board’s review under section 23 in respect of the existing application.

(12) If a person’s existing application has been refused by the Board under section 22, and −

(a) the person makes an application for compensation for which the entitlement arises under subsection (3) or (5) (“section 48 application”); and

(b) before the section 48 application is disposed of, the person −

(i) requests a review by the Board under section 23 in respect of the existing

application; or

(ii) appeals to the District Court under section 28 concerning the Board's review under section 23 in respect of the existing application,

then, the Board must not process the section 48 application until the review or appeal is disposed of.

(13) If before the commencement of the 2010 Amendment Ordinance, a claimant had applied for compensation under the pre-amended 2010 Ordinance but the Board had not at that commencement determined the noise-induced deafness of the claimant under section 20 of the pre-amended 2010 Ordinance, then, on or after that commencement, the Board must make the determination under this Ordinance.

(14) In this section −

(a) "pre-amended 1998 Ordinance" (《修訂前的 1998 年條例》) means this Ordinance as in force immediately before the commencement of sections 1 to 20 of the amending Ordinance, that is to say, 6 March 1998;

(b) "pre-amended 2010 Ordinance" (《修訂前的 2010 年條例》) means this Ordinance as in force immediately before the commencement of the 2010 Amendment Ordinance;

(c) "2010 Amendment Ordinance" (《2010 年修訂條例》) means the Occupational Deafness (Compensation) (Amendment) Ordinance 2010 (of 2010).".".

New — By adding −

"**22A. Noisy Occupations**

Schedule 3 is amended by repealing "[ss. 2 & 39]" and substituting "[ss. 2, 14, 39 & 48]".".

23(5) — In the proposed section 5(a) of Schedule 5, by adding "or, where there was more than one such previous unsuccessful application, the date of the last such application" after "section 48(3)(b) of this Ordinance".

23 — By adding −

"(6) Schedule 5 is amended by adding −

"6. In calculating the amount of compensation payable to a claimant on the basis of the noise-induced deafness of the claimant determined under section 48(9) of this Ordinance, "relevant date of application" (提出申請的有關日期) means −

(a) for the purposes of sections 1 and 3(a), the date of the self-arranged audiometric test mentioned in section 48(5)(a) of this Ordinance or, where there was more than one such test, the date of the last such test; and

(b) for the purposes of section 3(c), the date of the commencement of

section 48(9) of this Ordinance.”.”.

24 By adding −

“(1A) Schedule 7 is amended, in section 1, by repealing “$9,000” and substituting “$12,000”.”.