

The Mesothelioma Bill – Briefing for Peers

The Asbestos Victims Support Groups Forum is a national organisation representing asbestos victims support groups throughout the UK.

The Mesothelioma Bill

We welcome the Mesothelioma Bill which seeks to remedy the historic failure of insurance companies to maintain records of employers' liability insurance. This failure has meant that those suffering from long-latent asbestos-related diseases, whose employers are no longer trading, and who have been unable to trace their insurers, have for decades, gone uncompensated. However, we think the Bill can be much improved to provide the support that asbestos victims need and truly deserve.

Asbestos Victims' Expectations for a Bill

This Bill is the culmination of two years' Coalition Government negotiation with insurers following the Labour government consultation, *Accessing Compensation: Supporting people who need to trace Employers' Liability Insurance*, launched in February 2010. The main consultation proposals were for an Employers Liability Tracing Office to improve insurance tracing and, most importantly for asbestos victims, an Employers Liability Insurance Bureau (ELIB), which, like the Motor Insurance Bureau (MIB) would provide an insurance fund of last resort to pay **full** compensation for **all** those who could not trace their insurer and who could prove employer negligence.

What the Bill Provides

The Bill provides for an administrative 'tariff' scheme which pays average compensation based upon age to mesothelioma sufferers who cannot trace their insurer and who can prove negligence to the standard required by civil law. The average payment will be reduced by approximately 30% (figure given in the Bill Impact Assessment) and will be funded by a levy on active insurers. Mesothelioma sufferers diagnosed after 25 July 2012 will be eligible to apply for a payment.

Those Excluded from the Bill

The Bill excludes 50% of all asbestos victims, those suffering from asbestos-related lung cancer, asbestosis and pleural thickening, yet, including them in the scheme would represent just 20% of the total cost. The government argues that mesothelioma can be accommodated in the scheme because the only one known cause of mesothelioma is asbestos, and causation is more difficult for the other asbestos-related diseases. Yet, a long-standing, successful, administrative scheme pays compensation to all asbestos victims who can prove negligent exposure at the Turner & Newall asbestos factories.

The Bill excludes all those diagnosed prior to 25 July 2012, the date the Minister announced the scheme, which is an arbitrary date. At the very least, the three year limitation period in law should apply, i.e. three years prior to the date of the commencement of the consultation.

Improvements within the Bill for Mesothelioma Sufferers

The main improvement we wish to see within the provisions of the Bill relates to the reduction of 30% of the average compensation paid to eligible claimants. We think 100% compensation, i.e. the full age-based, average compensation should be paid.

The main argument for reduced compensation is that mesothelioma claimants may not try hard enough to trace an insurer and reduced compensation will act as an incentive to do so. We reject that argument because all mesothelioma claimants must go through the Employers Liability Tracing Office (ELTO) where a rigorous search will be conducted and ELTO has now set up an additional team to continue the search where an extended search has failed. Claimants cannot 'opt' for a scheme payment, they must first search rigorously for an insurer.

What is needed is an incentive for insurers to properly trace insurance records: paying reduced scheme payments is an invitation for individual insurers to see the scheme as the cheaper option: why pay full, individual compensation when they can pay 70% of average compensation?

Asbestos victims want to trace their insurer because if they do so, they can receive full, bespoke compensation, reflecting their particular circumstances, not an average payment which may fall far below the payment they should receive. This is what they had hoped for from the consultation: an Employers Liability Insurance Bureau paying individually assessed, full compensation after negligence had been proved in a civil claim.

Is 70% payment better than no payment?

Although this is not the Bill we wanted, we accept that this Bill is a major step forward: at last payments are to be made where none were paid before. But, it must be remembered that for decades it was asbestos victims who bore the burden of untraced insurance and insurers have saved hundreds of millions avoiding liability for insurance they wrote. For decades, the tax payer has funded the government lump sum payments for those who could not trace their insurer, and they have only recovered those payments when an insurer was found since 2008. Prior to that, insurers recovered all government lump payments which offset the compensation they paid, which amounted to hundreds of millions.

The insurers have negotiated a scheme which excludes 50% of asbestos victims, they are excused liability for all claims prior to 25 July 2012, their costs are reduced because average compensation means they do not have to engage in negotiations about individually assessed payments, and fault must be proved. And, the Government is giving insurers £17 million to help set up the scheme.

On top of all that they want to reduce average compensation by 30%. That is simply not acceptable.

100% Justice for Mesothelioma Sufferers

We believe that the Bill should provide for 100% payment of the age-based tariff payments. We believe that the date for claiming should be at least three years prior to February 2010.

NOTES

Background

Since 1972, employers' liability insurance has been compulsory, providing a captive market for the insurance industry, very much like the motor insurance market. Prior to 1972, almost all employers held insurance. Yet, insurers avoided liability for much of the insurance they wrote because many insurance records were routinely destroyed or lost.

In 1999, many insurers signed up to a voluntary code of practice, Employers Liability Code of Practice (ELCOP) to assist in tracing insurance, but the tracing success rate never exceeded 50%, and the tracing rate for mesothelioma in 2010 was just 34%. The ABI opposed calls for an employers liability database to prevent the problem of untraced insurance arising again in the future.

In 2008 the government commenced recovery of DWP lump sum payments to those who were successful in tracing their insurer and received compensation. Prior to that date, insurers recovered the lump sum payments, which gave them a 'windfall' resulting from government failure to recover the payments. In 2011, the government recovered over £23 million which would have gone to insurers had not the 2008 change been made.

In February 2010, the government launched a consultation, *Accessing Compensation: Supporting people who need to trace Employers' Liability Insurance*. The main consultation proposals included the establishment of an Employers Liability Tracing Office and an Employers Liability Insurance Fund, which, like the Motor Insurance Bureau would provide an insurance fund of last resort to pay full compensation for all those who could not trace the relevant insurer. The ABI opposed the establishment of any fund paid for by the insurance industry.

In April 2011, the Employers Liability Tracing Office (ELTO) was established which set up an employers liability database to record all EL insurance which at last provided a secure record of all insurance going forward. Some historic records have been put on the database.

On 25 July 2012 Lord Freud announced the results of his two-year negotiation with insurers and his intention to bring forward a Bill.

The then FSA (now FCA) have characterised the long-standing problem of untraced insurance as:

*'.. a situation where **insurers/other policyholders are inappropriately subsidised by claimants** that are unable to trace the relevant insurance company and/or are not aware of the existence of a potential coverage*