

**Submission
No 7**

**REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE
WORKERS' COMPENSATION (DUST DISEASES) BOARD**

Organisation: Asbestos Diseases Foundation of Australia Inc.

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The Director
Standing Committee on Law and Justice
Parliament House
Macquarie Street,
Sydney NSW 2000

Submission to Functions of the Workers Compensation (Dust Diseases) Board at the Asbestos Diseases Foundation of Australia

Background

We welcome the opportunity to make submissions in respect of the Workers Compensation (Dust Diseases) Board (the Board) (DDB). ADFA is a voluntary organisation which provides support to and advocacy on behalf of sufferers of asbestos disease and their families. ADFA has worked closely with the DDB for many years.

Asbestos sufferers have a unique set of issues separate and distinct from other workers compensation claims. This distinction has been recognised by the NSW Government, who has deliberately chosen to exclude asbestos diseases from the *Workers Compensation Act 1987* and set up a separate compensation regime.

Asbestos diseases are incurable and there are no treatments other than palliative measures. Questions of rehabilitation and return to work do not arise. Further, given that asbestos has been banned in Australia since 2003, there are no ongoing safety issues in relation to the use of asbestos in the workplace. As a result, unlike WorkCover, the DDB's sole concern is

to provide compensation and services to sufferers of asbestos disease, many of which are suffering from a terminal disease, and to their families.

Asbestos disease has a long latency period, the average time between exposure and diagnosis for mesothelioma is 37 years.

Mesothelioma sufferers have a very poor prognosis, the average life expectancy from diagnosis is 9-12 months.

Non malignant conditions such as asbestosis tend to be progressive and can lead to respiratory failure and death.

The incidence of asbestos diseases in Australia has not yet peaked. It is said that the peak for mesothelioma will not happen till the year 2020.

The Need for an Independent Board and Chair

The Board of the DDB is made up of representatives of both employers and employees who have considerable experience in asbestos disease, both the medical and legal aspects. The Board has had to consider complex medical and legal issues unique to asbestos claims such as attributing causation in lung cancer claims where the sufferer does not have asbestosis and was a smoker and the question as to whether malignant disease such as mesothelioma or lung cancer are divisible (relevant to situations where an applicant has had exposure to asbestos both as a worker within the meaning of the Act and non-occupational exposure, exposure outside New South Wales or while self-employed.)

The role of the employee representative is of particular importance. It allows organisations such as ADFA to raise any difficulties our members have directly with a Board member who in turn can bring these concerns quickly to the attention of the full Board. It also allows the employee representative to consult with ADFA and other concerned bodies about policy decisions before the Board.

Because of this, the Board must have an independent chair. We do not believe that the chairperson should have a role with the WorkCover Authority. Rather it should be a person with experience in both the medical and legal aspects of dust diseases claims.

Recommended Changes in the Procedures of the DDB

1. Provisional Liability

As noted above the average prognosis for a person suffering from mesothelioma is 9-12 months from diagnosis. Given the very short prognosis it is essential that persons eligible for benefits from the DDB receive those benefits as soon as possible. In our experience, an application to the DDB is made around the time of diagnosis of mesothelioma. The diagnosis is almost always made following a surgical procedure. A sufferer is then referred to an oncologist and chemotherapy commenced. A sufferer, having recently undergone surgery and about to commence chemotherapy, urgently requires access to DDB benefits in the form of payments for medical, hospital and pharmaceutical expenses as well as nursing care, nursing aids and equipment such as oxygen and home help (such as cleaning and gardening).

We understand the DDB aims to process malignant claims in under 2 months. We understand that the present system requires this time to allow the DDB to obtain medical reports, copies of the radiology film to be reviewed by the Medical Authority and an industrial history officer to take an industrial history which needs to be signed by the applicant.

Given the applicant's poor prognosis and urgent need for assistance we believe the DDB should adopt a process for malignant claims similar to workers compensation provisions where by a determination as to provisional liability is made within seven days of receipt of an application form, provided that the application form is accompanied by a diagnosing pathology or medical report and a Statutory Declaration of the applicant outlining their exposure to asbestos while a worker in New South Wales.

Once provisional liability is accepted then the applicant will be able to receive benefits including access to payments for medical treatments, nursing care, nursing aids and

equipment and home services as well as a pension. For those working at the time of diagnosis access to pension payment is important as most will be unable to return to work.

In our experience it is very rare for a mesothelioma claim to be rejected by the DDB. In nearly all cases the diagnosis is made on pathology and is not in dispute. Further, the question of whether the applicant was exposed to asbestos while a worker within the meaning of the Act is based on a signed industrial history. If the DDB requires a Statutory Declaration to be completed by the applicant at the time of their application, then they can quickly determine whether the person was a worker within the meaning of the Act.

In our experience, it will therefore be a rare situation where the DDB would not be able to make a preliminary determination of liability within seven days. In circumstances where the DDB is unable to determine provisional liability, then the claim can be refused until further information is provided.

2. Medical Costs

The other area we believe requires change is the existing cap on medical expenses under section 52(5) of the *Workers Compensation Act 1987* of \$50,000.00. This figure was introduced in 1987 and has not been indexed. Significant advances have been made in the treatment of asbestos disease, particular mesothelioma, since 1987. Indeed, in 1987, only palliative care was offered. Nowadays sufferers undergo a range of treatments including chemotherapy, radiotherapy and radical surgery. We believe the cap should be removed entirely and that all treatment should be funded provided it is reasonable and being undertaken on the advice of a registered medical practitioner.

Yours Sincerely

Eileen Day
Secretary
Asbestos Diseases Foundation of Australia Inc.