Reform of the Industrial Injuries Scheme
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by Professor Hugh Cockerell

In a White Paper the Government has announced its intentions for the industrial injuries scheme. Before reaching decisions on two matters it invites further comments from anyone interested.

A. Its decisions, briefly, are as follows:

1. Injury benefit should be abolished and replaced by sickness benefit. The differential in favour of those injured at work, at present £2.75 a week, will therefore disappear. For work accidents to employees sickness benefits to be payable even where the contributions ordinarily required to qualify for sickness benefit have not been fulfilled.

2. Disablement benefit is at present payable where an industrial accident or a prescribed disease gives rise to loss of faculty causing disablement of 1% or more. It is payable on top of earnings or other national insurance benefit. It takes the form of a weekly pension if disablement is 20% or more, or a gratuity for lesser disablement. Until 1953 disablement benefit was payable only for disablement that was either permanent or substantial. (By substantial was meant 20% or more). At present 90% of medical board assessments produce assessments of less than 20% disablement.

The Government proposes to continue the benefit for permanent loss of faculty of 1% or more but not to pay benefit for other 'substantial' disablement of less than 10%.

At present the percentage of disablement assessed corresponds to the percentage of the 100% pension awarded. The Government proposes that percentages of disablement of less than 50% shall in future receive a lesser proportion of the 100% pension, e.g. if disablement percentage is assessed at 20%, only 15% of the 100% pension will be paid. But where the disablement assessment is more than 50% a slightly higher proportion of the 100% pension will be payable, e.g. 85% for 80% disablement.

It is also proposed that disablement benefit should be payable 15 weeks after the accident rather than 26 weeks as at present.

3 The Government contemplates that from April 1983 benefit for industrial injury or sickness will be payable by the employer for the first 8 weeks of incapacity. It recognises that this will have an adverse effect on the compilation of data for industrial accident analysis needed by the Health and Safety Executive and is considering what should be done about this.

4. It is proposed to discontinue two types of industrial injury benefit - unemployability supplement and hospital treatment allowance. (These are drawn by only about 3,300 people.)

5. It is proposed to withdraw industrial death benefit allowance leaving people to rely on the main national insurance scheme. This will mean little financial difference for most of the 40,000 dependants concerned though some classes of widows and other dependants will lose substantially.

6. It is proposed that industrial injuries cover should apply overseas where employers have a liability to make national insurance contributions (usually for 12 months).

7. It is not proposed to grant industrial injuries cover for accidents during self-employment, loss of earnings unaccompanied by loss of faculty, or accidents during travel to or from work. These possibilities have been considered and rejected.

8. At present there are different attendance allowance schemes for those injured at work and for others. It is proposed to merge the industrial injuries scheme for these with the main scheme. This will entail 2,300 industrial injury beneficiaries losing their special constant attendance allowance but 'exceptionally severe disablement allowance' will be available to those who qualify for the higher rate of attendance allowance under the main scheme.

B. The matters on which comments are invited are

1. special hardship allowance;

2. deduction of social security benefits from damages.

1. <u>Special hardship allowance</u>

This is an allowance to compensate persons disabled by industrial injury for part of their loss of earnings. Its minimum rate is at present £19.32 and 90% of the 147,000 current recipients receive the maximum. It is tax free. The allowance once granted, continues after retirement age. It is based on the difference between pre-accident earnings and either his current earnings or those in a suitable employment that his disablement does not prevent him from following.

The Government proposes that -

a. the allowance should be renamed 'reduced earnings allowance';

b. it should cover earnings losses up to a much higher figure with a maximum of one half;

c. it should cease on retirement but be taken into account for the purpose of calculating national retirement and widows' pensions

d. it would also be payable to the very severely disabled, which it is not at present;

e. the allowance will depend on a comparison of pre- and post-accident earnings. Pre-accident earnings will be index-linked and can be increased to take account of normal prospects of advancement. Sickness or invalidity benefit and employer's sick pay will be treated as post-accident earnings as well as any actual earnings. Exceptionally, where the claimant becomes incapable of following his post-accident occupation for some reason unconnected with his relevant disablement, or where he could work but was unemployed, his allowance would be calculated as if he were still working in that occupation and any national insurance benefits would be disregarded. The earnings lost would be index-linked;

f. some means will be found for limiting the allowance where its payment, together with invalidity pension would raise the pensioner's income to more than 85% of his pre-accident earnings.

2. Deduction of Social Security Benefits for damages

The Government intends to amend the Law Reform (Personal Injuries) Act 1948 to end duplication between social security payments and damages in accordance with the Pearson Commission's recommendations.

COMMENT

1. Special hardship allowance

The proposals seem sensible in general but one question that needs careful consideration is whether employer's sick pay should be regarded as post-accident earnings, thereby reducing the allowance payable.

In the calculation of common law damages occupational sick pay is taken into account in the assessment unless (a) either the plaintiff is under a contractual obligation to refund it out of damages or (b) it is advanced by the employer as a loan on the express understanding that it will be repaid if damages are recovered. The Pearson Commission (para 505) recommended that this situation should continue. The Commission also recommended that benefits provided under a permanent health insurance taken out by an employer for the benefit of his employees should be left out of account in the assessment of damages.

Questions that need consideration are:

1. Should the Government seek to reduce the benefit payable by deducting sick pay received from employers?

2. What if employers make payments by way of loan only, repayable out of damages or benefit received?

3. How will sick pay be defined? Is it possible that the definition might be found to embrace payments under a permanent health insurance? Would that be the thin end of a wedge that could make payments under a voluntary insurance deductible e.g. in the calculation of damages?

2. Law Reform (Personal Injuries) Act 1948

Before coming down in favour of allowing the deduction of all social security benefits from tort damages the White Paper discussed the possibility of DHSS taking subrogation rights against a tortfeasor but concluded against this on practical grounds.

The Pearson Commission (para. 467-498) in discussing the question of duplication between tort compensation and social security favoured full co-ordination and recommended (para. 482) that the 'full value of social security benefits payable to an injured person or his dependants should be deducted from damages' instead of, as at present, one-half of certain benefits payable for five years in the case of an injured person, and nothing in dependants' claims for loss of dependency.

The Commission went on to suggest that the functions of compensation for pecuniary and non-pecuniary loss are distinct and that they should be separately assessed. They concluded (by a majority) that social security benefits should be classified under three heads, compensation for:

a) loss of income

b) expenses

c) non-pecuniary loss

and that benefits should be offset only against the damages payable under the relevant head. Presumably this is one of the recommendations accepted by the White Paper.

The foregoing relates to subsection 2(1) of the 1948 Act. Elsewhere in the Pearson Report (para. 339-342) there is a recommendation for the repeal of subsection 2(4) which requires the courts to disregard, in determining the reasonableness of medical expenses, the possibility of avoiding all or part of them by taking advantage of National Health Service facilities. The Commission proposed instead that private medical expenses should be recoverable if and only if it was reasonable on medical grounds that the plaintiff should incur them.

If Subsection 2(1) is to be amended it would seem sensible to amend subsection 2(4) at the same time. Insurers would presumably welcome changes to both subsections as bringing damages closer to the actual loss sustained by claimants.

Any member who would like his views considered in relation to either of the topics on which DHSS have invited comments is asked to notify the Honorary Secretary, Mr. A.H. Kay, as soon as possible.