



ASBESTOS-RELATED DISEASES MEDICAL PANEL GUIDANCE MATERIAL

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Disclaimer

This information is for guidance only and not to be taken as an expression of the law. It should be read in conjunction with the *Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011* (the Act) and any other relevant legislation. The Act and the Regulations can be found at www.thelaw.tas.gov.au.

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General Information

A person is entitled to compensation under the *Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011* if the person has a compensable disease. A person has a **compensable disease** if the person has:

- an asbestos-related disease; and
- the contraction of the disease is reasonably attributable to exposure to asbestos in the course of the person's employment as a worker during a relevant employment period in which the person's employment is connected with Tasmania.

Asbestos-Related Disease

An asbestos-related disease is defined as a medical condition that is attributable to the person having been exposed to asbestos.

Causal connection between the disease and exposure to asbestos at work and the term 'reasonably attributable'

The legislation requires that the contraction of the asbestos-related disease is 'reasonably attributable' to exposure to asbestos in the course of the person's employment as a worker. This means that there must be a causal connection between the contraction of the disease and exposure to asbestos at work.

The degree of causation that is required is that the contraction of the disease must be "reasonably attributable" to exposure to asbestos at work. It is not necessary to prove that exposure to asbestos was the major or predominant cause of the disease, as long as it can be proven that the exposure to asbestos made a 'material contribution' to the contraction of the disease.

The term "material contribution" was discussed in the New South Wales decision of *Workers Compensation (Dust Disease) Board of NSW v Smith, Munro and Seymour NSWCA 19*. In that case, the court stated that "one factor can contribute to an outcome even though, relative to another factor, it has a minor effect. All that is required is that the effect be "material". Any assessment of this materiality is an evaluative judgment..."

A finding of causation may be based on a number of inferences drawn from facts, which may cumulatively allow an ultimate finding to be made. It will depend on circumstances as to whether these inferences are available through logic and commonsense, technical inquiry, or expert assessment.

In cases where epidemiological studies can not provide scientific certainty as to the probability of a material contribution, and further uncertainty surrounds the worker's experience, a logical reasoned inference of material contribution based on available expert evidence may be used.

Where the exposure may have arisen in more than one situation, it is the occupational exposure to asbestos (or the nature thereof) to which the disease must be reasonably attributable, in order to satisfy the test.

Medical Questions determined by Medical Panel

Worker Application

The following medical questions are to be determined by the presiding Medical Panel in respect to applications made by the worker.

In relation to an application for compensation which has not yet been determined by the Asbestos Compensation Commissioner, the medical panel is, **if it is satisfied that the person has a compensable disease**, to make a determination as to whether the person has an:

- imminently fatal asbestos-related disease; or
- a non-imminently fatal asbestos-related disease.

Where an application for compensation has been determined by the Asbestos Compensation Commissioner, the medical panel must also make a determination as to whether the person has an:

- imminently fatal asbestos-related disease; or
- a non-imminently fatal asbestos-related disease.

The medical panel is to determine that the person has an **imminently fatal asbestos-related disease**, if satisfied that:

- the person has an asbestos-related disease; and
- the person is reasonably likely to die within 2 years from the date on which the medical panel makes its determination; and
- an asbestos-related disease is reasonably likely to be a significant factor contributing to the person's death.

The medical panel is to determine that the person has a **non-imminently fatal asbestos-related disease** if it is satisfied that:

- the person has an asbestos-related disease; and
- the person is not reasonably likely to die within 2 years from the date the medical certificate is given, or if the person is reasonably likely to die within 2 years from the date on which the medical panel makes its determination, an asbestos-related disease is not reasonably likely to be a significant factor contributing to the person's death.

In addition to these medical questions, the presiding Medical Panel may also be asked other medical questions, including :

- questions related to the health of the person that are relevant to a claim for compensation or expenses under the scheme. For example, a question

- relating to whether or not an expense associated with a certain type of medical treatment is a reasonable expense and necessarily incurred;
- what asbestos-related disease or diseases the person is suffering from;
- whether the contraction of the asbestos-related disease is reasonably attributable to exposure to asbestos in the course of the person's employment;
- verifying the degree of impairment of the person (only for non-imminently fatal asbestos-related diseases);
- verifying the degree of incapacity of the person (only for non-imminently fatal asbestos-related diseases where the person is or has recently worked);
- whether the person may recover from the asbestos-related disease or has so recovered.

Member of the Family Application

The following questions are to be determined by the Medical Panel in respect to applications made by a member of the family of the deceased worker, this includes the spouse and children (under 22 years of age):

- whether the person had an asbestos-related disease or diseases;
- what asbestos-related disease or diseases;
- whether the contraction of the asbestos-related disease was reasonably attributable to exposure to asbestos in the course of the person's employment;
- was the asbestos-related disease or diseases reasonably likely to have been a significant factor contributing to the person's death;
- whether the person had an imminently fatal asbestos-related disease.

Medical Panel Process

Determinations of Medical Panel

A decision of two or more members is taken to be a decision of the medical panel. A medical panel consists of three members. If unable to make a determination, the medical panel must refer the medical question back to the Asbestos Compensation Commissioner, who will establish a new panel.

The determination of the medical panel is to specify the evidence and any reasoning used in determining the question. If the panel is unable to agree as to the determination, it is to include the reasons why the medical panel cannot agree.

Time for determination

The presiding medical panel must make a determination or may decide that it is unable to make a determination within 15 days of receipt of the information. For example, if the medical panel receives some information but requires further tests to be conducted, the medical panel is required to make its determination 15 business days after receiving the results of the tests. The medical panel's decision is to be given to the Commissioner within 3 business days after the decision is made.

Evidentiary matters

At the point where the matter is referred to a medical panel, the application will be accompanied by the following medical evidence.

Worker Application – Non-Imminently Fatal Asbestos-Related Disease

In the case of a non-imminently fatal asbestos-related disease, the person will have been assessed with at least 10% whole person impairment. The impairment assessment report confirming this will be forwarded to the medical panel, along with a medical certificate from a specialist and any other available medical evidence, including tests and examination results.

Worker Application - Imminently Fatal Asbestos-Related Disease

In the case of imminently fatal asbestos-related disease, a medical certificate from a specialist will accompany the application, along with any other available medical evidence, including tests and examination results.

Member of the Family Application

In the case of an application by members of the family, the application will be accompanied by a death certificate and any other available medical evidence.

In the medical certificate referred to above, medical specialists must complete section 2 of the medical certificate which relates diagnosis, symptoms, causation and prognosis. Section 3 relating to incapacity/fitness for work and section 4 relating to the current medical treatment summary, may be completed by a medical specialist or treating doctor.

A medical panel may refer to a medical practitioner, a medical question that has been referred to it by the Asbestos Compensation Commissioner. A medical panel may have regard to the opinion of a medical practitioner who is not a member of the panel.

When member must not sit on Medical Panel

A medical practitioner who is listed in the medical practitioner register under the scheme must not be selected to be a member of a medical panel in the following circumstances. If the Medical Practitioner:

- has been involved in the examination or treatment of the person in relation to their asbestos-related disease or in relation to the person's degree of impairment or incapacity; or
- has provided medical services, including giving a medical certificate to the person in relation to the asbestos-related disease or in respect to the degree of impairment or incapacity of the person; or
- has informed the Asbestos Compensation Commissioner that his or her selection on the medical panel could give rise to a conflict of interest.

Role of Accredited Impairment Assessors

Impairment assessment under the *Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011* is required in order to determine the amount of compensation to which a person is entitled. The amount of compensation is

determined by the degree of impairment based on the following classes of whole person impairment:

- Less than 10% impairment – person is not entitled to compensation but will be placed in a holding pattern until they reach 10% whole person impairment;
- 10-25% whole person impairment - entitled to compensation;
- 26-50% whole person impairment – entitled to compensation;
- 51% or more whole person impairment – entitled to compensation.

These classes are based on AMA5.

Impairment assessors who are accredited under the *Workers Rehabilitation and Compensation Act 1988* to perform impairment assessments will determine the degree of whole person impairment of a person who has a non-imminently fatal asbestos-related disease.

A decision of an accredited impairment assessor is taken to be a decision of the medical panel. However, the medical panel will verify the decision and may request the Commissioner to refer the impairment assessment to another accredited impairment assessor within 15 business days of receiving from the Commissioner a notice relating to an impairment assessment, if the medical panel is not satisfied with the determination of the impairment assessor.

Obligations Imposed on Medical Professionals (including Medical Panel members)

Under the legislation, a medical question may be referred to a medical professional. A medical professional includes a medical panel, a member of a medical panel, an accredited impairment assessor or a medical practitioner. In most cases, it is envisaged that the medical panel will refer medical questions which must be answered through a physical examination or test to other medical professionals.

If a question is referred to a medical professional, the medical professional may require the person to undergo at the time specified in a notice, an examination or test specified in the notice. The **notice must specify** that if the person refuses or fails (other than on reasonable grounds) to undergo an examination or test, the Asbestos Compensation Commissioner must refer the matter to the Asbestos Compensation Tribunal and the Asbestos Compensation Commissioner may refuse to deal with application until advice or a determination is received from the Asbestos Compensation Tribunal. (Section 55)

Such an examination or test may only be conducted if the medical professional considers it is necessary to determine the medical question. (Section 55)

A medical professional who is referred a question, may require the person to answer questions, or to produce relevant documents or information, or to consent to the production of relevant documents or information by another person. If this

requirement is imposed on a person, the medical professional **must advise** the person that if they refuse or fail to comply with the requirement, the Asbestos Compensation Commissioner must refer the matter to the Asbestos Compensation Tribunal and the Asbestos Compensation Commissioner may refuse to deal with application until advice or a determination is received from the Asbestos Compensation Tribunal. (Section 56)

In order to assist with the obligations of the Medical Panel under the Act, an information sheet is available and may be provided to a worker where the medical panel requires the worker to undergo at a time specified in a notice, an examination or test. In most cases, this will be unnecessary as staff from the Office of the Asbestos Compensation Commission will arrange the appointment and send the required information to the worker. The information sheet may also be provided to a worker where the medical panel directly requires the worker to answer questions, or to produce relevant documents or information, or to consent to the production of relevant documents or information by another person. The *Information Sheet – Attendance at Medical Appointments* is available at www.asbestos.tas.gov.au.

Refusal by person to assist medical professional

A medical professional **must advise** the Asbestos Compensation Commissioner if any of the following occurs. A person:

- unreasonably refuses or fails to attend an examination or test at a place and time of which they have at least 5 business days notice;
- refuses or fails to undergo an examination or test that the person is required to undergo;
- obstructs an examination or test that the person is required to undergo;
- unreasonably refuses or fails to answer questions asked by a medical professional;
- unreasonably refuses or fails to produce relevant documents or information, or to consent to the production of relevant documents or information when required by a medical professional.

Representation before medical professional

Under the legislation a person is not entitled to be represented by a person when attending an examination or test, unless permitted by the examining medical professional. However, the person is entitled to be accompanied by a person of his or her choice when they attend an examination or test.

