12 September 2014 Edition 63

BC LEGAL

BRINGING CLARITY

BC DISEASE NEWS

A WEEKLY DISEASE UPDATE

CONTENTS

Welcome

Welcome to this week’s edition of BC Disease News. In the last week the SARAH Bill has been criticised by insurance lawyers and it has been argued that claimant lawyers are cashing in on NIHL claims.

This week we present the second part of our series on tinnitus. Solicitor Ashley Collins focuses on noise induced tinnitus, both in cases where there is NIHL and no NIHL present.

Any comments or feedback can be sent to Boris Cetnik or Charlotte Owen.

As always, warmest regards to all.

Australian PI firm considers itself 'well placed' for UK expansion

Australian personal injury firm Shine Lawyers has said it considers itself 'well placed' to take advantage of the changing UK legal market.[1]

The announcement by Shine, which unveiled its intention to follow Australian firm Slater and Gordon to the UK more than a year ago, came as it declared a 10% increase in turnover, and a 27% jump in net profit.

The holding company, Shine Corporate, said in its annual report to the Australian Stock Exchange: 'Whilst the directors believe there are ample opportunities for the group to continue to grow domestically, the directors will continue to monitor opportunities internationally…With its experience in the Australian market and its established systems and processes, the group considers itself well placed to capitalise on opportunities in the United Kingdom which is currently undergoing reform'.

The firm also noted it is keeping a 'watching brief' on the United States market too.

Shine is an exclusively claimant damages practice, primarily handling personal injury work. It was established in 1976 as a practice in Queensland and through growth and acquisition has grown to over 600 people located across nearly 40 offices throughout Australia.

The firm was the third largest personal injury firm in Australia. Last year it became the third law firm to list, following Slater and Gordon and Legal Holdings.

Managing director Simon Morrison said Shine has up to twelve acquisitions on the horizon.

Co-operative blames PI for losses

Plummeting revenue from personal injury work is the reason for the £5.1 million loss sustained by Co-operative Legal Services (CLS), managing director Matt Howells has said.[2]

CLS has seen a 64% decline in revenue over the past year. In response to that it has said that it is now restricting the provision of its personal injury services to Co-operative insurance clients and those with serious injuries.

Caoilionn Hurley, CLS finance director, said personal injury staff numbers had halved in the course of the past year to between 50-60. She said CLS has decided to focus on working entirely with clients referred by the Co-operative's insurance business and/or people who are seriously injured.

In response to questions as to whether the CLS brand has been damaged by negative publicity about the group, Mr Howells said: 'The Co-op is an exceptionally resilient brand. The challenges have had an impact – it would be wrong to say that hasn't been the case…But it is still a trusted brand that consumers trust in and believe. Historically this has been the key linchpin of our success'.

As we have noted before, traditional personal injury work has declined in value significantly. Disease work remains one of the few remaining lucrative areas of personal injury work. For that reason, claimant practitioners can be expected to target disease claims.

SARAH Bill criticised by insurance lawyers

Critics of the Social Action, Responsibility and Heroism Bill now include insurances lawyers, who have warned that the Bill may have little effect in practice.[3]

The president of the Forum of Insurance Lawyers, David Johnson, appeared last week at the Public Bill Committee of the House Commons to give his verdict on the Bill, which has become known as 'SARAH'.

The Bill intends to assure business owners and those involved in rescue situations that the courts will consider the context of their actions if proceedings are issued against them for negligence.

Johnson told the committee that while the Bill was well-intentioned it added little to the Compensation Act 2006, which already requires courts to 'have regard to' what prompted an individual's action. The Bill needed 'more robust' wording and definitions of subjective terms which are too open to interpretation. He said: 'It needs to be recognised that very few activities in life are entirely risk free, and that promotion of health and safety standards must be balanced with maintaining the personal freedoms that enable individuals and organisation to engage in activities of social worth. The thinking behind SARAH is laudable, but in practice may ultimately be ineffective in its current form'.

While insurance lawyers support the Bill in principle but urge amendment, claimant practitioners have contended that the Bill is unwarranted and potentially damaging. Fraser Whitehead, head of group litigation at Slater and Gordon, warned the House of Commons Committee that the Bill could have far-ranging consequences hindering access to justice.

He said: 'The Bill is in need of very substantial redrafting – it is beyond amendment…Without this it will produce highly undesirable consequences. If government acts in haste we all might regret at length. It could lower the standing of our law and of law making'.

The president of the Association of Personal Injury Lawyers, John Spencer, accused the Government of creating an 'ill-thought-through, populist' piece of legislation, which might encourage unsafe and reckless behaviour. He said: 'None of us would want to send our child off on a school trip and have them injured, and likewise we don't want them to be prevented from going on the trip because of a fear of litigation. But the fear is based on perception and we need education, not legislation, to address that'.

The committee will report to the House of Commons on 14 October.

Updated Claims Portal MI

The Claims Portal has released its latest management information (MI).

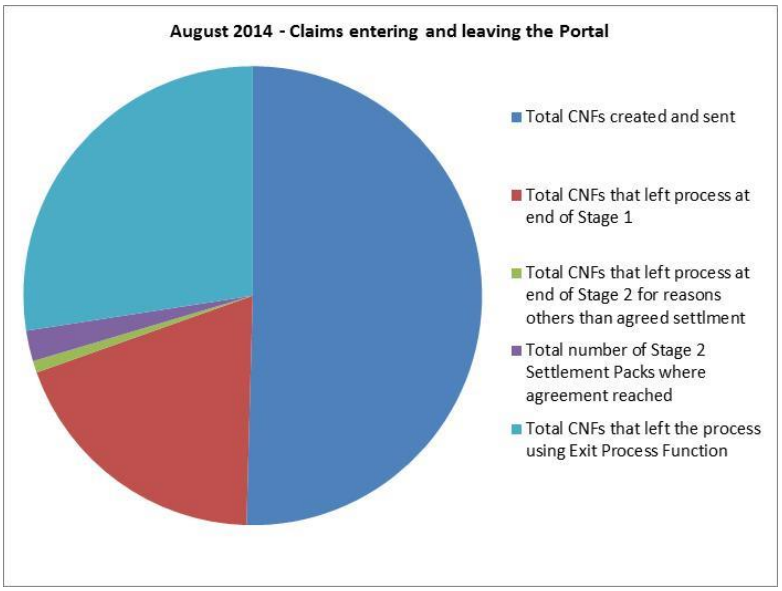
In August 2014, 1,349 disease claims entered the Portal. Of all the claims in the Portal in August, 512 left it at Stage 1. The majority of these, 423, were because of the time to reply expired. 89 cases were denied or admitted with an allegation of contributory negligence. 22 claims left the Portal at Stage 2 for reasons other than settlement. 734 were exited from the Portal: amongst these, 250 of them were for 'other' reasons, 69 were duplicate claims, and 143 were because of an incomplete claim notification form (CNF). 229 left the Portal because the claim required further investigation; this is unsurprising: complex disease claims do not lend themselves to full investigation within 30 days.

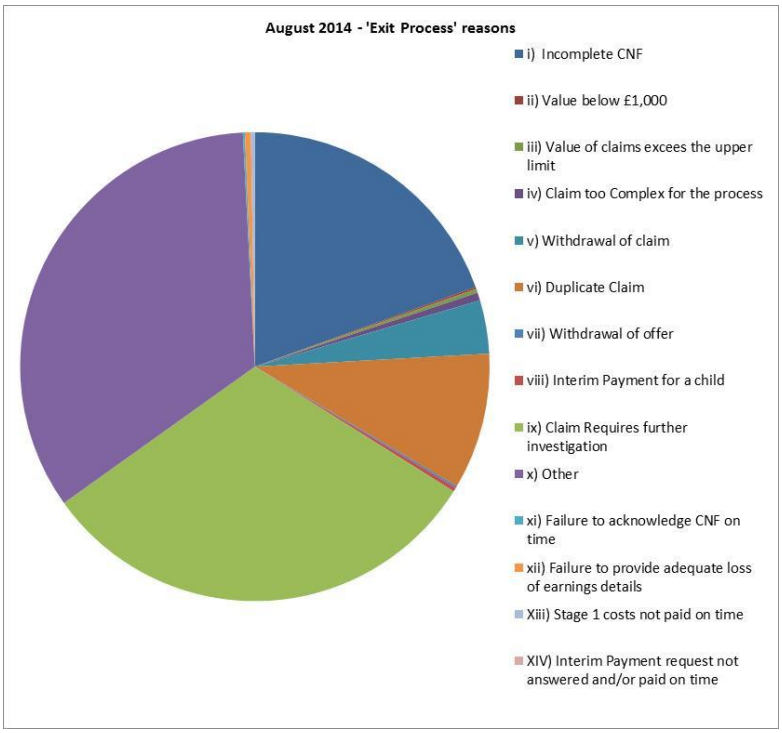
Once all the claims that left the Portal are accounted for, 398 claims remained in the Portal (which includes CNFs that have liability decisions outstanding).

There continues to be an improved number of claims that have settled through the Portal: 58 claims settled in August bringing the total figure to 358. However, that is just 358 settlements out of a total of 13,207 claims since the Portal was extended to disease claims. That is a measly settlement rate of 2.71%, which hardly inspires confidence in the Portal regime given that it is designed to procure settlements. Meanwhile, an additional 10 cases have seen court packs completed so the court can adjudicate on quantum, bringing the total number of such cases to 30.

Of those claims that have settled through the Portal, the average amount of damages in August was £4,740. In July the average amount was £4,877, up from £4,762 in June 2014.

The following charts show, firstly, the ratio of claims entering and exiting the Portal in August 2014, and, secondly, the reasons for using the 'exit process' function in August 2014.





Claimants cashing in on NIHL claims

Claimant lawyers and claims management companies (CMCs) are 'increasingly cashing in' on NIHL claims, the Association of British Insurers (ABI) has said.[4]

The insurer trade body has posited that after last year's cut in fixed legal costs in the Claims Portal for settling personal injury claims, particularly in whiplash claims, there is 'growing evidence' that claimant practitioners are focusing their attention on deafness claims, which attract 'substantially' higher legal fees.

The ABI said the average legal fee for settling a NIHL claim last year was £10,500, compared with £500 for a whiplash claim settled through the Claims Portal. Further, it added that as the average compensation award for NIHL is £3,100, insurers are paying £3 in legal fees to lawyers for every £1 paid in compensation to the claimant themselves.

Speaking at the European Forum on Claims Management, James Dalton, head of motor and liability at the ABI, said: 'Industrial deafness claims are fast becoming the new cash cow for claimant lawyers, eager to make up for last year's reduction of fixed legal fees in the Claims Portal…With lawyers typically pocketing three times the amount of compensation paid to the claimant, the rise in industrial deafness claims shows that claimant lawyers are keeping the compensation culture alive and well…Insurers are here to pay fair compensation to genuine claimants. But we need to tackle the increasing number of industrial deafness claims by insuring that claimant lawyers' excessive legal fees are made more proportionate'.

Meanwhile, claimant firms have been exhorted not to view NIHL claims as easy money, since they carry significantly more risk than routine PI work.[5] Lesley Graves, managing director for personal injury consulting firm Citadel Law, said any firm seeing deafness cases as easy money was 'sorely mistaken'.

She said her firm's industrial disease specialists have seen a tenfold increase in demand to review cases with a quarter of new enquiries relating to industrial deafness. She said: 'Our review has highlighted serious incidents of poor case preparation and under-settlement or failure, leading to the risk of the firms themselves facing professional negligence claims…You can't pile them high and sell 'em cheap in this area of law'.

Graves also suggested that the insurance industry should do more to increase its members' skills for dealing with NIHL claims, to reduce the time cases take to progress.

Feature: Tinnitus – part 2

In the second part of this feature, Ashley Collins focuses on noise induced tinnitus- in cases where there is NIHL and no NIHL present.

Tinnitus in the absence of NIHL

Tinnitus is often associated with hearing loss, which can include NIHL. However where an individual suffers tinnitus but no NIHL can this be related to excessive noise exposure?

A 2008 paper *'The risk of tinnitus following occupational noise exposure in workers with hearing loss or normal hearing*[6]*'* concluded from a study involving 752 noise exposed workers that tinnitus only relates to noise exposure if NIHL is also present.

This view is supported by numerous other older publications. Glorig (1987) quoted in Dobie (1993)[7] said *"tinnitus must accompany a compensable level of hearing loss"* to be noise induced tinnitus. Alexelsson & Coles (1996) in 'Scientific Basis of Noise-Induced Hearing Loss'[8] stated *"in cases where the tinnitus is noise induced the configuration of the audiogram should be typical or compatible with NIHL".*

In their 2002 paper Occupational Deafness[9], the Department for Work and Pensions concluded that in cases of alleged noise exposure, tinnitus should only be considered noise induced if there is an element of NIHL. The paper states it cannot support the concept that noise induced tinnitus is a stand-alone disorder.

A more recent 2011 study *'Tinnitus with a Normal Audiogram: Physiological Evidence for Hidden Hearing Loss and Computational Model'*[10] states exposure to noise for a relatively short period of time may have a permanent damage on an individual's inner ears. Although such damage is too minor to have an effect on the person's hearing, the damage may cause either temporary or permanent tinnitus.

The 2012 paper *Prevalence of leisure noise-induced tinnitus and the attitude toward noise in university students*[11] purported that noise induced tinnitus is a common phenomenon among young adults as a result of listening to loud music during leisure activities. The paper supports the notion that noise induced tinnitus can be present in the absence of NIHL. This is due to noise exposure causing inner ear damage which is not always perceived by the individual as hearing loss or measurable by an audiogram but resulting in noticeable tinnitus. Unfortunately, the study did not convey how many of the 145 participants alleged noise induced tinnitus without any NIHL.

The 2010 HSE Research Report 'A review of the current state of knowledge on tinnitus in relation to noise exposure and hearing loss'[12]

states that *'it is far from clear whether hearing loss and tinnitus occur as independent effects of noise exposure, or whether one is causally related to the other'*. The report concludes that more research is required to fully understand whether an individual can suffer from stand-alone tinnitus as a result of noise exposure.

Can stand-alone tinnitus from noise exposure be compensable?

This question was addressed by HHJ Inglis in his judgment in the *Nottingham and Derbyshire Textile litigation*. HHJ Inglis said at paragraph 131 *"what is agreed is that where there is tinnitus, but it is not possible to diagnose noise induced hearing loss it is not possible to say that the tinnitus is caused by noise, even if there is a history of noise exposure".*

Therefore as case law currently stands, stand-alone tinnitus allegedly arising from noise exposure is not compensable.

Tinnitus in association with NIHL – when is it noise related?

If an individual has been diagnosed with NIHL and tinnitus - it should not be immediately assumed that the tinnitus is as a result of the NIHL. As stated in part one of this feature, there are numerous other causes for tinnitus.

Are there are any particular characteristics of noise induced tinnitus differentiating it for tinnitus caused by other factors?

Is there a temporal association with the noise exposure and therefore NIHL?

The publication 'Hearing Disability Assessment - Report of the Expert Hearing Group'[13] considers that for tinnitus to be categorised as noise induced, the onset of tinnitus should be closely associated with the period of noise exposure. In other words, it should start at or about the time of exposure to noise (i.e. within one year of cessation of exposure).

The Department for Work and Pensions 2002 paper 'Occupational Deafness'[14] concludes tinnitus that starts more than a year after exposure to noise has ceased is unlikely to be due to noise.

Professor Mark E Lutman, one of the authors of the 'Coles Guidelines' on diagnosis of NIHL, is of the opinion that if tinnitus starts after noise exposure ends, they are not connected.[15]

Noise induced tinnitus pitching

According to Nergi and Schorn (1991) (quoted in Hinchcliffe & King op. cit.) *"tinnitus which is associated with noise damage can be matched to a frequency of 3kHz or above. Tinnitus which is matched to a frequency of less than 1 kHz is to be attributed to factors other than noise".* In other words, noise induced tinnitus is high pitched.

Since NIHL is predominantly affecting the high frequencies at 2-8 kHz this is also where the tinnitus pitch is most frequently found at pitch matching.[16] The vast majority of research shows that noise induced tinnitus can be matched to 2-8 kHz and should also be described as ringing, whistling and hissing in nature.[17]

Often for tinnitus to be noise induced, it should match a high frequency preferably at or just below the frequency of the maximum hearing loss.[18]

Summary

Noise induced tinnitus should only be diagnosed if the onset of tinnitus was during or soon after the claimant's exposure to noise and it can be matched in pitch to frequencies 2-8 kHz.

Conclusion

Stand-alone tinnitus claims, in the absence of NIHL, should be repudiated.

If an individual has NIHL and tinnitus, it should not be automatically assumed that the tinnitus is noise related, although it is certainly a possibility. The temporal association between onset of tinnitus and cessation of noise exposure should be explored. If onset is more than a year following cessation, than the tinnitus (with supportive medical evidence) should be denied as caused by noise exposure. Evidence may also be developed as to the pitch of the tinnitus and whether this correlates with the frequencies at which NIHL occurs.

In some cases the mild nature of the tinnitus will have little impact on the value of a NIHL claim such that extensive medical enquiries are not costs effective. In other cases where the tinnitus is moderate-severe, and significantly impacts on quantum, then these investigations may well be warranted.

References

1 Neil Rose, 'Listed Australian PI Firm "Well Placed" for UK Expansion' (Legal Futures, 28 August 2014) <http://www.legalfutures.co.uk/latest-news/listed-australian-pi-firm-well-placed-uk-expansion> accessed 8 September 2014.

2 Nick Hilborne, 'Personal Injury to Blame for Co-operative Legal Services Losses' (Legal Futures, 5 September 2014) <http://www.legalfutures.co.uk/latest-news/personal-injury-blame-co-operative-legal-services-losses> accessed 8 September 2014.

3 John Hyde, 'Insurance Lawyers Call for More "Robust" Heroism Bill' (Law Society Gazette, 5 September 2014) < http://www.lawgazette.co.uk/law/insurance-lawyers-call-for-more-robust-heroism-bill/5042925.article> accessed 8 September 2014.]

4 'ABI: Lawyers and CMCs "Cashing In" on Deafness Claims' (Insurance Times, 9 September 2014) <http://www.insurancetimes.co.uk/abi-lawyers-and-cmcs-cashing-in-on-deafness-claims/1409863.article> accessed 9 September 2014.

5 John Hyde, 'Firms Warned Not to See Industrial Deafness as "Easy Money"' (Law Society Gazette, 10 Septmeber 2014) <http://www.lawgazette.co.uk/practice/industrial-deafness-not-easy-money/5042990.article> accessed 11 September 2014.

6 Rubak, T., et al., International Journal of Audiology, 2008. 47(3): p.109-114.

7 'Medical-Legal Evaluation of Hearing Loss' (Van Nostrand Reinhold) New York, NY (1993) pp. 133-164

8 ed. Alexsson et al., Thieme

9 Occupational Deafness; Report by the Industrial Injuries Advisory Council in accordance with Section 171 of the Social Security Administration Act 1992 reviewing the prescription of occupational deafness; Presented to parliament by the secretary of state for work and pensions by command for Her Majesty; November 2002.

10 Schaette R, McAlpine D (2011); J Neurosci 31:13452-13457. Discussed at: http://www.tinnitus.org.uk/tinnitus-and-hidden-hearing-loss

11 Gilles A, De Ridder D, Van Hal G, Wouters K, Kleine Punte A, Van de Heyning P; Otol Neurotol. 2012 Aug; 33(6): 899-906. Doi: 10.1097/MAO.0b013e31825d640a.

12 Prepared by the Health and Safety Laboratory for the Health and Safety Executive 2010; RR768 Research Report.

13 Published by the Department of Health and Children (1998)

14 Occupational Deafness; Report by the Industrial Injuries Advisory Council in accordance with Section 171 of the Social Security Administration Act 1992 reviewing the prescription of occupational deafness; Presented to parliament by the secretary of state for work and pensions by command for Her Majesty; November 2002.

15 http://www.baaudiology.org/files/1213/8597/6090/R_11_Mark_Lutman_-_Medicolegal_Audiology.pdf

16 Alexsson A, Prasher D. Tinnitus induced by occupational and leisure noise. Noise Health 2000;2:47-54

17 ISVR (1990) Clinical Audiology Course

18 Axelsson & Sandh British J Audiol (1985)

Disclaimer

This newsletter does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to provide an update on issues that may be of interest to those handling occupational disease claims. Specialist legal advice should always be sought in any particular case.

BC Legal is a Limited Liability Partnership registered in England and Wales under number OC379945. We are authorised and regulated by the Solicitors Regulation Authority. The registered office is 1 Nelson Mews, Southend-on-Sea, SS1 1AL. The partners are Boris Cetnik and Charlotte Owen. More details on the firm can be found at www.bc-legal.co.uk

Partners: B. Cetnik, C. Owen
Registered Office: 1 Nelson Mews, Southend-On-Sea, SS1 1AL
BC Legal LLP is a Limited Lability Partnership registered in England and Wales Registered No: OC379945
We are Authorised and Regulated by the Solicitors Regulations Authority (SRA No 590579)