HEALTH & SAFETY EXECUTIVE FOR NORTHERN IRELAND CONSULTATION

PROPOSALS FOR AN APPROVED CODE OF PRACTICE: CONTROL OF SUBSTANCES THAT CAUSE OCCUPATIONAL ASTHMA

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

SEPTEMBER 2002

The executive committee would like to acknowledge the assistance of the following people who contributed to the preparation of this response:

Robert Martin Executive Committee Member, APIL (Northern Ireland)

Any enquiries in respect of this paper should be addressed, in the first instance, to:

Richard Fairholme
Research Administrator, APIL
11 Castle Quay
Nottingham
NG7 1FW

Tel: 0115 958 0585
Fax: 0115 958 0885

E-mail: richard@apil.com

PROPOSALS FOR AN APPROVED CODE OF PRACTICE: CONTROL OF SUBSTANCES THAT CAUSE OCCUPATIONAL ASTHMA

The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad, including 106 members in Northern Ireland. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

Introduction

1. APIL supports the introduction of an Approved Code of Practice (ACoP) on occupational asthma, which will assist in preventing or reducing the incidence of occupational asthma in the workplace. We can, however, only extend our support for an ACoP provided that it contains sufficient *authoritative* guidance. In our response to the HSE consultation on occupational asthma in 2001, we considered that the ACoP lacked detail and authority. We are, therefore, concerned to see that the original guidance has remained virtually unchanged since we submitted our response to the consultation. APIL's concern is that the ACoP on occupational asthma was, and is still not, sufficiently tough or detailed to enable employers to tackle occupational asthma. To this end, APIL puts forward later in this response, recommended text which should be included in the ACoP as *authoritative* rather than general guidance. We also consider that a stand alone ACoP would be much more effective in tackling occupational asthma than an ACoP that is implemented as an appendix to COSHH.

The Approved Code of Practice

2. APIL acknowledges that the ACoP is likely to be incorporated as an appendix of COSHH. It is still, nonetheless, our firmly held view that a stand-alone ACoP would have the greatest impact, as this would stress the importance of, and the particular problems surrounding, occupational asthma. It would raise the problem of occupational asthma as a serious issue that demands *specific* action by employers.

3. We are also concerned that the HSENI ACoP definition of occupational asthma highlights the difference between asthma caused by work, and pre-existing asthma made worse by workplace conditions. It should be noted that employers have a duty to take care of all their employees, whether they have pre-existing asthma or not. If the ACoP definition of occupational asthma remains intact, it may confuse employers as to the full extent of their duties. We urge the HSENI to include *both* existing and acquired asthma sufferers in their definition, for the sake of clarity. We note with interest, however, that additional text has been incorporated into the authoritative guidance in Regulation 6 of the latest draft of the ACoP:

   …"*In deciding who might be harmed, it might be prudent to consider also who might be at more risk / vulnerable*." (Paragraph 5, HSENI ACoP)

   It is our interpretation of the above guidance that pre-existing asthma is a relevant consideration when assessing hazards. We feel, however, that the guidance should go further and state unequivocally that an employer's duties extend to employers with either pre-existing or occupationally acquired asthma.

4. We must stress at this point that unlike the original draft ACoP, it is not clear what is authoritative and what is general guidance in the HSENI ACoP. Based on the original draft ACoP, it is assumed that bold text is authoritative guidance, but this trend does not follow through to the HSENI version. We would seek clarity on this issue, since it

is of crucial importance that employers are aware what is authoritative and what is general guidance.

Enforcement

5. APIL believes it is of paramount importance that the HSENI make an open and detailed commitment to enforcing the ACoP when it is introduced. Given the current statistics, it is clear that employers are not currently complying with their duties under COSHH. APIL believes that the key to compliance is thorough enforcement. Many employers will only comply with their duties if it is more advantageous than non-compliance, i.e. that there is a real fear that a sufficiently serious sanction will be imposed. The need for employers to comply with the ACoP is imperative if the number of cases of occupational asthma is to be reduced.

Regulation 6 (Risk Assessment)

6. In our response to the HSE's consultation on occupational asthma, we made extensive comments on Regulation 6, and we are concerned that none of our original recommendations have been addressed materially in the latest proposed ACoP. We appreciate that guidance has to be generalised to a certain extent in order to achieve maximum penetration of industry, but we consider that the new proposed ACoP lacks sufficient detail required to achieve its aim, which is to reduce the incidence of occupational asthma.

7. If the employer is to control the risk of occupational asthma effectively, a proper risk assessment is crucial. Without a proper risk assessment, an employer cannot hope to comply with his duties under COSHH. APIL considers that in Regulation 6 there is significantly more that can be done to ensure that a risk assessment is carried out properly. ACoP text for Regulation 6 does not provide sufficient authoritative

guidance on how a risk assessment with particular regard to occupational asthma should be carried out. Authoritative guidance ensures that an employer does carry out a risk assessment, and importantly, carries it out properly. Hence, the following general guidance which is taken from the original draft ACoP should, for the reasons above, be used as authoritative guidance:

"The first step in the risk assessment, therefore, should be to study each job or operation and identify the most likely sources of exposure, particularly those giving rise to high concentrations, including those over short periods."

"The assessment should consider storage, transport, handling, use and disposal of substances and in particular cover:

A. *The ways in which the substance may become airborne and reach the employee*
B. *The effectiveness and range of control measures*
C. *The effect of failure of control measures or machines/ processes."*

"Special attention should be given to maintenance and other staff who may be subjected to unusually high concentrations over a short period of time, including during…"

"Employers must review the risk assessment if health surveillance indicates that an individual has developed asthma. In which case, the employer will need to look again at the substances the person handles, work practices and other materials that could be breathed in, including those from neighbouring activities."

Regulation 11 (Health Surveillance)

8. Health surveillance is crucial as it can lead to the early detection of adverse changes due to exposure to hazardous substances and may identify the need for improved control measures. For these reasons, it is extremely important that much of the general guidance given in the original draft ACoP should become authoritative guidance so that the benefits of health surveillance are maximised. The following, essentially concerned with when and how to implement a system of health surveillance, should become authoritative guidance:

"If the substance is totally enclosed, health surveillance may still be necessary since failure of control measures could lead unknowingly to exposure e.g. failure of filters in extraction systems or leakage of RPE due to poor fit or maintenance."

"A health surveillance programme should include pre-employment (or pre-assignment) assessment of past exposures; any history of respiratory systems or disease and baseline information about breathing capacity. It should also include the provision of information about relevant symptoms to report to a responsible person (someone properly trained in accordance with the instructions of an occupational health doctor or nurse), with ongoing surveillance comprising the administration of an annual questionnaire."

"Best practice would be to carry out low level health surveillance where the following conditions are met:

D. Where there is only suggestive evidence of a hazard;
E. There is little likelihood of exposure in the particular circumstances of work; or
F. The substance may be handled in a way that normally prevents inhalation.

But high-level health surveillance is needed where the following conditions apply:

- *Where there is strong evidence of a hazard; and*
- *It is not possible to conclude that there is insignificant or no risk in the circumstances of the work."*

"Employees should be given information about relevant symptoms to watch out for. The employer should make clear arrangements for an employee to report symptoms to an identified responsible person who can refer them for detailed assessment to a health professional...A responsible person should monitor symptoms (e.g. checking questionnaire answers) among employees exposed to substances that can cause occupational asthma…"

"In confirmed cases of occupational asthma, control measures should immediately be reviewed and consideration given to increasing the frequency of surveillance."

"This record should contain the employee's details, a job history involving work with substances which can cause occupational asthma and the conclusions of health surveillance procedures, phrased in terms of fitness for work.

9. In addition, paragraph 50 of the original draft ACoP concerning the role of the employer should be authoritative, not general, guidance:

" It is important that employers:

- *make employees aware of the purpose and benefits of health surveillance and the importance of participation. Employees should be encouraged to consult their representative for advice if they have any concerns;*
- *appoint responsible persons (e.g. a trained supervisor or first-aider) to monitor and record respiratory symptoms;*
- *ensure that all employees with respiratory symptoms which may be work-related are investigated as soon as possible by an occupational health physician;*

- *provide an occupational physician with access to the workplace and information to allow them to make an informed opinion on:*
  - *whether symptoms are likely to be related to work;*
  - *the likely identity of the substance causing asthma;*
  - *the individual's fitness for any particular job; and*
  - *whether any special precautions should be taken;*
- *monitor and review the effectiveness of health surveillance programmes;*
- *examine the work practices where employees may have respiratory symptoms and carry out a thorough review of the risk assessment and adequacy of controls when cases of occupational asthma have occurred. Pay particular attention to exposure of maintenance staff; and*
- *when considering the employment of someone with asthma, including whether to employ them, bear in mind their duties under the Disability Discrimination Act (DDA) 1995, which may apply to someone with asthma. Under that Act, employers with 15 or more employees may have to make a reasonable adjustment to their work arrangements or premises to remove substantial disadvantage to a disabled person…"*

Regulation 12 (Information and Training)

10. APIL considers that the provision of information is crucial to the success of any strategy to reduce occupational asthma. For this reason APIL believes that paragraphs 62 and 63 of the original draft ACoP, which detail the training and information that should be provided to employees, should be authoritative rather than general guidance.

11. APIL is pleased to see that *some* of the general guidance at paragraph 63 of the original draft ACoP is now incorporated as authoritative guidance, highlighted here in italics:

"Employees should be provided with suitable and sufficient information covering in particular:

…*The nature of any substance likely to cause occupational asthma to which they may be exposed*".

We also welcome the following new text on providing training for the use of respiratory protective equipment (RPE):

"Employers should also give employees proper training, including induction training before they start the job. Appropriate training should be given in respect of:

…*The use of RPE where it is used as a control measure, and other control measures to further reduce exposure to the substance*".

12. We must, however, repeat our suggestion that the *whole* of both paragraphs 62 and 63 of the original draft ACoP should be authoritative, rather than general guidance. Employers will then be under no misapprehension as regards their duty to undertake complete and effective training and education of their employees.

Summary of Recommendations

13. APIL supports an Approved Code of Practice on occupational asthma, which will assist in achieving the HSE's own target of reducing by 30 per cent the incidence of occupational asthma by 2010[1]. We remain concerned, however, that the latest draft ACoP lacks detail and authority. A generalised ACoP may achieve a good level of penetration into industry, but it is likely that it will fall short in providing adequate protection for employees. In our opinion, a more detailed, standalone ACoP is necessary. We also consider that specific sections of the general guidance in the original draft ACoP should be authoritative guidance. We urge the HSENI to reconsider the nature and content of the ACoP before it is implemented, with particular regard to Regulations 6, 11, and 12. When the ACoP is introduced, it is also crucial that importance is attached by the HSENI to enforcing compliance with the provisions.

[1] HSC 'Business Plan 2002-2003'