

Social Security for Scotland:  
Benefits being devolved to the  
Scottish Parliament

## Devolution of Industrial Injuries Disablement Benefit (IIDB)



Clydeside Action  
on Asbestos

October 2015

---

## Table of Contents

<b>Foreword</b> .....	1
New cases of IIDB by condition: Scotland 2002-13 (Figure1).....	2
<b>Background</b> .....	3-5
Mesothelioma statistics for Scotland .....	6
CAA cases for IIDB by prescribed diseases (2011-2014) (Figure2):.....	7
<b>Industrial Injuries Scheme</b> .....	8-35
The future role for IIAC: How will the Scottish government decide which asbestos-related diseases to prescribe?.....	36-41
<b>Lump sum payments which are not being devolved</b> .....	42-53
Civil law compensation.....	54-57
<b>Who pays for the scheme?</b> .....	58-62

## Foreword

Following the 'no' vote in the Scottish referendum, Lord Smith of Kelvin was appointed by the Prime Minister to take forward the proposals on further powers for the Scottish Parliament. The Smith Commission reported with its recommendations on 27 November 2014.

On welfare, the Commission proposed that a range of disability benefits, including Industrial Injuries Disablement Benefit, should be devolved. The Scottish Parliament would have complete autonomy over these benefits.<sup>1</sup>

There are currently 32,200 people in Scotland in receipt of Industrial Injuries Disablement Benefit with an estimated spend in 2013/14 of £91 million.<sup>2</sup>

From 2003-2013, 4,015 Scots were awarded IIDB for an asbestos-related prescribed industrial disease. 1,670 were suffering from mesothelioma (150 of whom were female). See Figure 1.

---

<sup>1</sup> SPICe Briefing; The Smith Commission's Welfare Proposals

<sup>2</sup> (Welfare Spend in Scotland 2013-14 (estimated) and Number of Recipients).

[http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB\\_15-07\\_The\\_Smith\\_Commission\\_Welfare\\_Proposals.pdf](http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_15-07_The_Smith_Commission_Welfare_Proposals.pdf)

Devolution (Further Powers) Committee New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals.

[http://www.scottish.parliament.uk/S4\\_ScotlandBillCommittee/Reports/dfpr-15-03w-rev.pdf](http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/Reports/dfpr-15-03w-rev.pdf)

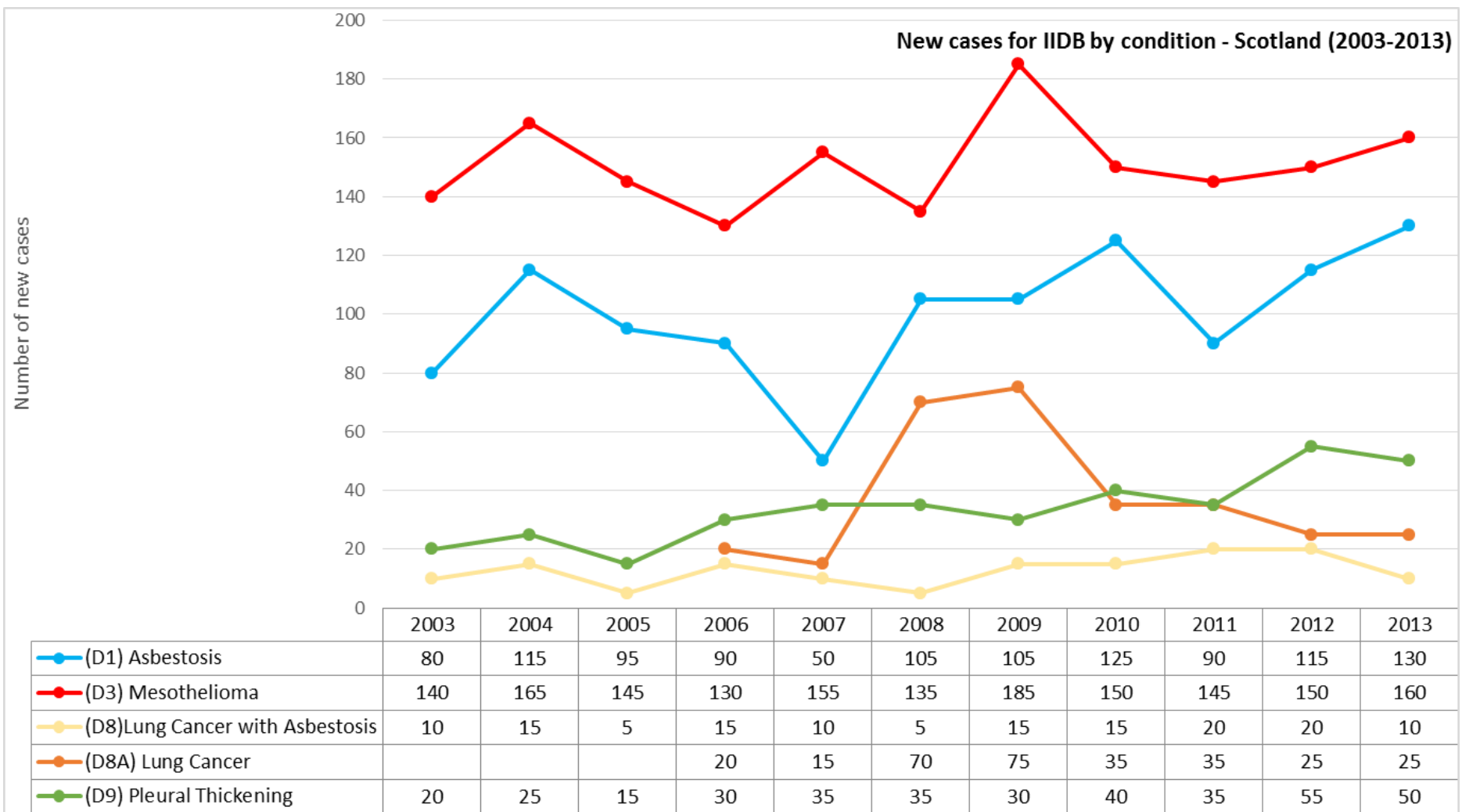


Figure1: DATA SOURCE: Department for Work and Pensions. Graph Illustration by CAA for informational purposes.

.....”according to one cumulative estimate something in the region of 25,000 Scots will have died through exposure to asbestos by 2025. Asbestosis is now one of the most deadly occupational diseases, and by any standards this constitutes a major tragedy of epidemic proportions.” Lethal Work: A History of the Asbestos Tragedy in Scotland: Ronald Johnston (Author) ) Arthur J. McIvor (Author) Professor Arthur McIvor. Professor in Social History. Director of the Scottish Oral History Centre Department of History University of Strathclyde.

## Background

The term asbestos refers to certain minerals with a fibrous structure called silicates which are found in the soil in certain parts of the world. Asbestos is a very good insulator against heat, sound and electricity and so it was mined to make very useful building materials. Unfortunately, breathing in asbestos fibres causes life threatening diseases. Asbestos was used extensively (millions of tonnes) in the UK until banned in 1999.

Asbestos is still in place in many buildings in Scotland. This includes factories, offices, schools and hospitals. This results in continuing occupational exposure for construction, maintenance and demolition workers if adequate precautions are not taken to identify and deal with asbestos. People using the building may be at risk if the asbestos is poorly maintained.

In 2013/14, injuries and ill health cost society an estimated £14.3 billion, with £9.4 billion from illness and £4.9 billion in injury.<sup>3</sup>

- This cost has generally fallen over the last ten years but has shown signs of levelling off since 2009/10.
- The majority of these costs falls on the individual (57%), while employers and the government/taxpayers bear a similar proportion (19% and 24% respectively).
- Past occupational exposure to known and probable carcinogens is estimated to account for about 5% of cancer deaths and 4% of cancer registrations currently occurring each year in Great Britain
- This equates to about 8,000 cancer deaths and 13,500 new cancer registrations each year
- Past asbestos exposure is the leading cause of deaths from occupational cancer today.
- The construction industry has the largest estimate of occupational cancer cases, with 3,500 cancer deaths and 5,500 cancer registrations each year from this industry

---

<sup>3</sup> <http://www.hse.gov.uk/statistics/causdis/cancer/cancer.pdf>  
<http://www.hse.gov.uk/statistics/overall/hssh1415.pdf>

Statistics for Scotland, excluding disease, shows a downward trend in workplace injuries but no clear trend in rates of work-related ill health -2012/13<sup>4</sup>

- **Fatal injuries:** there were 22 fatal injuries to workers.
- **Major injuries:** there were 1 843 major injuries to employees.
- **Injuries:** In 2012/13, there were 6 708 reported injuries to employees, 9% of the overall GB total. (RIDDOR).
- **Injury rates:** In 2012/13, total rate of reported injury was 301.7 per 100 000 employees, compared with a Great Britain average of 312.0 (RIDDOR).
- **Enforcement:** In 2012/13, HSE inspectors issued 813 notices and prosecuted 23 cases, 21 of which led to a conviction (91%).
- **Ill Health:** In 2011/12, 64 000 people suffered from work-related illness, a rate of 2 480 per 100 000 people working in the past 12 months (LFS).
- **Working days lost:** In 2011/12, 1.7 million working days were lost due to workplace injury and ill health, 0.9 days per worker (LFS).

*“When making comparisons between countries and regions, it should be noted that differences are strongly influenced by variations in the mix of industries and occupations. For example in Scotland and Wales compared to England, there are noticeably fewer employees in low-risk occupational groups, with relatively more in higher-risk ones”*

---

<sup>4</sup> <http://www.hse.gov.uk/statistics/regions/scotland/>

For men, in the UK, the geographical areas with the highest mesothelioma death rates were **West Dunbartonshire (SMR 537, 95% CI; 468 to 614, 216 deaths)**, Barrow-in-Furness (SMR 540, 95% CI 465 to 623, 186 deaths), and Plymouth (SMR 341, 95% CI 308 to 378, 373 deaths).

For women, the geographical areas with the highest mesothelioma death rates were Barking & Dagenham (SMR 501, 95% CI 382 to 644, 60 deaths), Sunderland (SMR 470, 95% CI 381 to 573, 97 deaths) and **West Dunbartonshire (SMR 398, 95% CI 267 to 572, 29 deaths)**.

A standardised mortality ratio is used to identify ‘blackspots’, where a figure of 100 would be the expected number of deaths, given the age of the population.<sup>5</sup>

---

<sup>5</sup> [Mesothelioma Mortality in Great Britain: Analyses by Geographical Area and Occupation\(pdf\) 2005](#)  
[Mesothelioma in Great Britain 2014: Mesothelioma mortality in Great Britain \(pdf\) 1968-2012](#)

There is a latency period of typically 15-60 years between exposure to asbestos fibres and asbestos related disease appearing. This means that the majority of current cases of asbestos related disease are associated with past industrial processes

Scotland has one of the highest incidences of mesothelioma and asbestos-related lung cancer in the world.

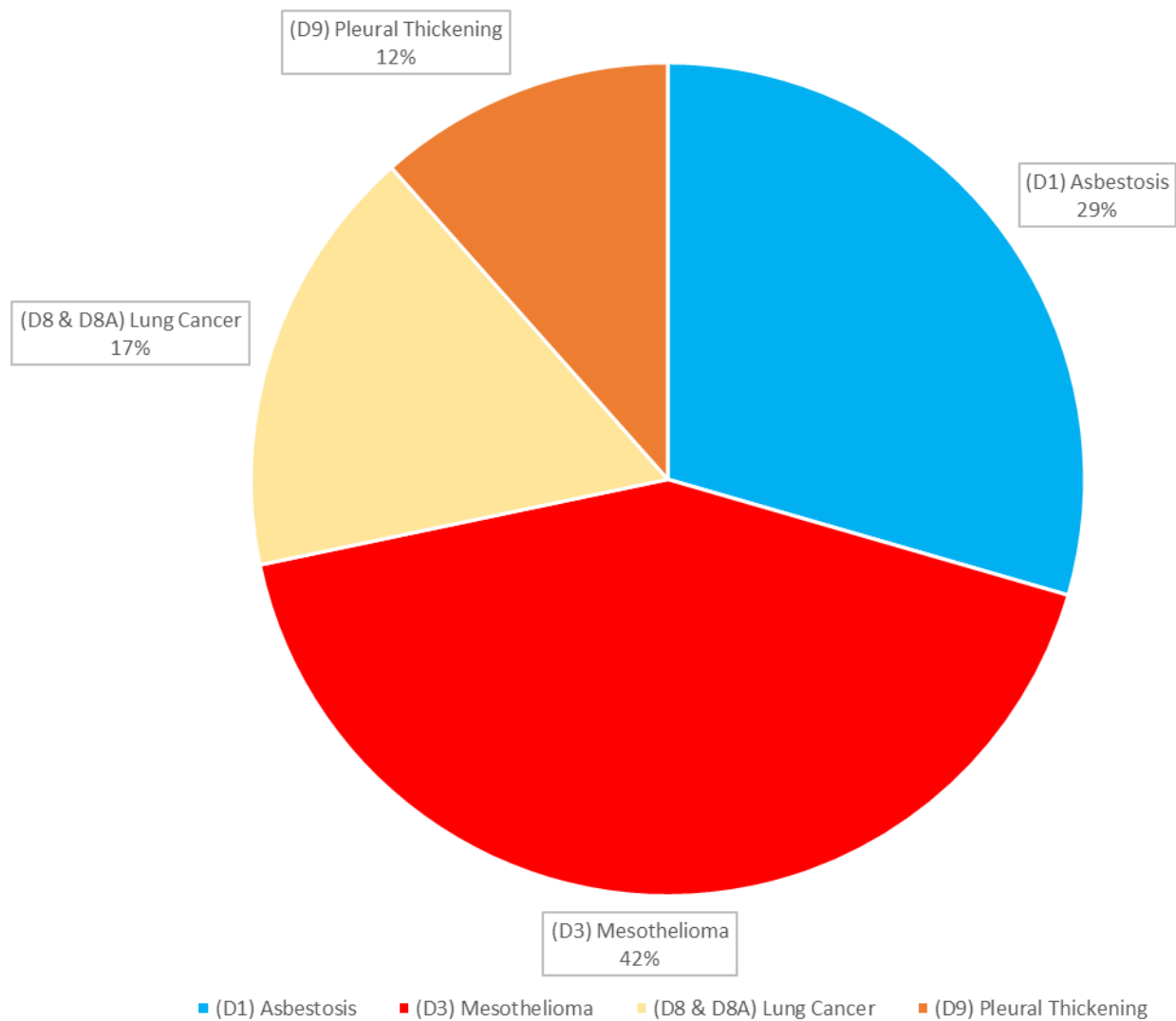
Male deaths are concentrated around ports and dockyards. Asbestos was used as insulation in ships and workers were exposed to it during fitting out and shipbreaking activities.

The county district with the highest SMR is the shipbuilding area of Clydebank, which had an SMR ten times higher than the average for Great Britain. Other port and dockyard areas within Strathclyde (Dumbarton, Bearsden and Milngavie, Glasgow city, Renfrew and Inverclyde) and Dunfermline also had high SMRs.

The overall SMR for Scotland was higher than the UK national average mainly due to these shipbuilding areas.



Figure 2: CAA Cases for IIDB prescribed conditions (2011-2014)



## Industrial Injuries Scheme

The Industrial Injuries Scheme provides non-contributory no-fault benefits for disablement because of an accident at work, or because of one of over 70 prescribed diseases known to be a risk from certain jobs. The scheme also covers people working on approved employment training schemes or courses.

The benefits payable under the scheme are known as Industrial Injuries Scheme Benefits (IISB). Benefits are paid to employees who were employed earners at the time of the accident or when they contracted a prescribed disease, or to people who were working on an approved employment training scheme or course. SS C&B Act 1992 sec 2(1)(a))

Accidents or diseases which arise out of self-employment or service in HM forces are not included in the scheme. SS C&B Act 1992 sec 2(1)(b)) SS C&B Act 1992 sec 115

All Industrial Injuries Disablement Benefits, except Industrial Death Benefit, are tax free. They are payable in addition to other incapacity and disability benefits but taken into account against income-related benefits.

The Industrial Injuries Scheme Benefits are:

- Industrial Injuries Disablement Benefit
- Constant Attendance Allowance
- Exceptionally Severe Disablement Allowance
- Reduced Earnings Allowance
- Retirement Allowance

You might get Industrial Injuries Disablement Benefit (IIDB) if you're ill or disabled from an accident or disease caused by work while you were on an approved employment training scheme or course. The amount you may get depends on your individual circumstances.

## **Eligibility:**

### **Accidents**

You may be able to claim Industrial Injuries Disablement Benefit (IIDB) if:

- you were employed when the accident or event happened
- you were on an approved employment training scheme or course when the accident or event happened
- the work accident or event that caused your illness or disability happened in England, Scotland or Wales. (There are some exceptions)

## Diseases

You can claim IIDB if you were employed in a job or were on an approved employment training scheme or course that caused your disease. The scheme covers more than 70 diseases including asbestos-related disease:

A disease or injury is prescribed when it is a risk arising from a person's occupation and not a risk common to everybody. The Industrial Injuries Advisory Council (IIAC) makes recommendations to the Secretary of State on what diseases the Industrial Injuries Scheme covers.

---

**“If you are suffering from pleural plaques only, you do not qualify for Industrial Injuries Disablement Benefit.”**

---

The UK Government currently accepts only the following prescribed diseases as asbestos related for the purposes of claiming Industrial Injuries Disablement Benefit (IIDB). Each disease has an allocated Prescribed Disease (PD) or (D) number i.e. D1, D3, D8, and D8A & D9.

D1 – Asbestosis

D3 – Mesothelioma

D8 – Primary carcinoma of the lung where there is accompanying evidence of asbestosis

D8A – Primary carcinoma of the lung

D9 – Diffuse Pleural Thickening

To qualify for Industrial Injuries Disablement Benefit, you must be suffering from a prescribed asbestos disease. You must also show that you have been exposed to asbestos while working for an employer (employed earner) in a prescribed occupation.

To meet the criteria for D8A exposure to asbestos must have been in the course of:

- a) The manufacture of asbestos textiles; or
- b) Spraying asbestos; or
- c) Asbestos insulation work; or
- d) Applying or removing materials containing asbestos in the course of ship building.

The minimum specified periods of exposure for these occupations is either:

- a) 5 years pre 1975 (in aggregate); or
- b) 10 years post 1975 (in aggregate).

To meet the criteria for D3 – Diffuse Mesothelioma it is not necessary to demonstrate that you worked directly with asbestos, you need only show that you were employed in a job which led to you being exposed to.... “asbestos, asbestos dust or any admixture of asbestos at a level above that commonly found in the environment at large”. In practice, this could involve any occupation where you may have been exposed to asbestos.

## Payment Rates

- The level of your disability will affect the amount of benefit you may get. This will be assessed by a ‘medical advisor’ on a scale of 1 to 100%.
- Normally you must be assessed as 14% disabled or more to get the benefit. (See discussion on D1 and proposed change to D9: page 16-18)

Assessed level of disablement	Weekly amount (April 2015)
100%	£168.00
90%	£151.20
80%	£134.40
70%	£117.60
60%	£100.80
50%	£84.00

40%	£67.20
30%	£50.40
20%	£33.60

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/457239/DWP11-benefit-and-pension-rates-april-2015-280815.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/457239/DWP11-benefit-and-pension-rates-april-2015-280815.pdf)

## Assessing a claim for IIDB

Applications for Industrial Injuries Disablement Benefit (IIDB) for asbestosis and diffuse pleural thickening require an applicant to attend a medical which is arranged by the Jobcentre Plus and involves accessing medical records in order to make a decision on the claim.

## The use of x-rays in assessments for claims

The technical guidance for IIDB, states that a claimant may be sent for an x-ray in connection with their claim for PDD1 Pneumoconiosis (asbestosis).

*“In claims for pneumoconiosis, we will normally arrange for you to have an X-ray of your chest. If the X-ray and other evidence shows that you may have the disease you will then have a*

*medical examination. If the X-ray shows no trace of the disease your claim will be sent back to the decision maker who will consider whether to disallow it.”<sup>6</sup>*

In practice, sending claimants for an x-ray in this manner is no longer done. Given the known risks of radiation from x-rays, we would like to see this position confirmed in any future guidance for the IIDB scheme.

Our service users are invariably signposted by the medical profession following diagnosis at a hospital. This means that x-rays or CT-scans already exist as they will have been part of the proper diagnostic procedure for asbestos-related disease.

## **Confirmation of mesothelioma and lung cancer**

Applications for mesothelioma and lung cancer do not normally require a medical examination but an applicant does need confirmation from a medical professional that they have been diagnosed with the disease. This confirmation needs to state the nature of diagnosis (biopsy confirmed or not), and the date of onset for the disease. Currently, this confirmation is given in a number of different formats. For example, a letter from a consultant or GP, confirmation

---

<sup>6</sup> <https://www.gov.uk/government/publications/industrial-injuries-disablement-benefits-technical-guidance/industrial-injuries-disablement-benefits-technical-guidance>



from a LCNS by letter/Fax to Jobcentre Plus office or using Jobcentre Plus forms BI100PN (A) (the use of this particular form is not widespread in Scotland).

The Jobcentre Plus will accept a DS1500 form as proof of diagnosis. However, this form is not intended to be used for IIDB purposes. It is a form, completed by a GP, Consultant, hospital doctor or specialist nurse, which enables someone who is terminally ill to claim Personal Independence Payment (PIP) [previously: Disability Living Allowance (DLA)] or Attendance Allowance (AA) under what the DWP calls “Special Rules” as confirmation of the diagnosis of mesothelioma.

The use of a DS1500 for the purpose of confirmation for IIDB can be problematical, as not every medical professional will issue a DS1500 form for mesothelioma or lung cancer and it may not contain sufficient information regarding the ‘date of onset’ of the disease, which is not the same as date of diagnosis.

We are aware of some general confusion regarding the requirement that confirmation from a biopsy is required in order to make a successful claim for IIDB. We would like to make it clear, that we would find it unacceptable that anyone should be advised or given the impression that it is necessary to undergo a biopsy in order to confirm diagnosis of mesothelioma or lung cancer for the specific purposes of successfully claiming IIDB.

While it is certainly the case that a biopsy, if already carried out, allows a decision on confirmation to be made expeditiously, equally, under the current statute, a clinical diagnosis on a balance of probability is also acceptable to the Jobcentre Plus. **We would be very strongly opposed to any move from this position.**

In order to clarify the concerns outlined, we would like to see a standardised form for confirmation of diagnosis being introduced in Scotland. We believe that this form could also be used to allow automatic access to the Blue Badge Scheme.

## **Assessment of disability**

Disability is decided by comparing an applicant's condition as a result of the disease with the condition of a normal healthy person of the same age and sex. The doctor at the medical examination therefore asks a number of questions regarding any limitations (disablement) due to the condition. This forms part of the assessment and answers to the questions the doctor asks are recorded and form the 'statement'.

If the doctor decides that a claimant is suffering from a prescribed disease (The doctor acting on behalf of the Jobcentre Plus is not bound to agree with the consultant at the hospital who originally advised a claimant that they were suffering from an asbestos related condition) he

will advise the Jobcentre Plus on the level of disablement, expressed as a percentage between 1-100%.

Those suffering from lung cancer (PDD8 or PDD8A) and mesothelioma (PDD3) are automatically assessed as 100% disabled. Those found to be suffering from asbestosis, automatically receive an assessment of at least 1% and will qualify for IIDB. For all other prescribed conditions, you must be assessed at least 14% disabled before you can be paid IIDB.

We believe the requirement that a claimant must be at least 14% disabled before IIDB is payable should be removed for prescribed disease PDD9 Diffuse Pleural Thickening and be given the same Special Conditions status as D1 - pneumoconiosis (asbestosis) under The Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 Part V (Special conditions for disablement benefit for pneumoconiosis, byssinosis and diffuse mesothelioma). We believe this would simplify the system and would affect very few cases in Scotland.

20.—(1) On a claim for disablement pension in respect of pneumoconiosis or byssinosis , section 57(1) shall apply as if for “14 per cent.” there was substituted “1 per cent.”.

(1A) where on a claim for disablement pension in respect of pneumoconiosis or byssinosis, the extent of the disablement is assessed at one per cent. or more, but less than 20 per cent, disablement pension shall be payable at the 20 percent rate... <sup>7</sup>

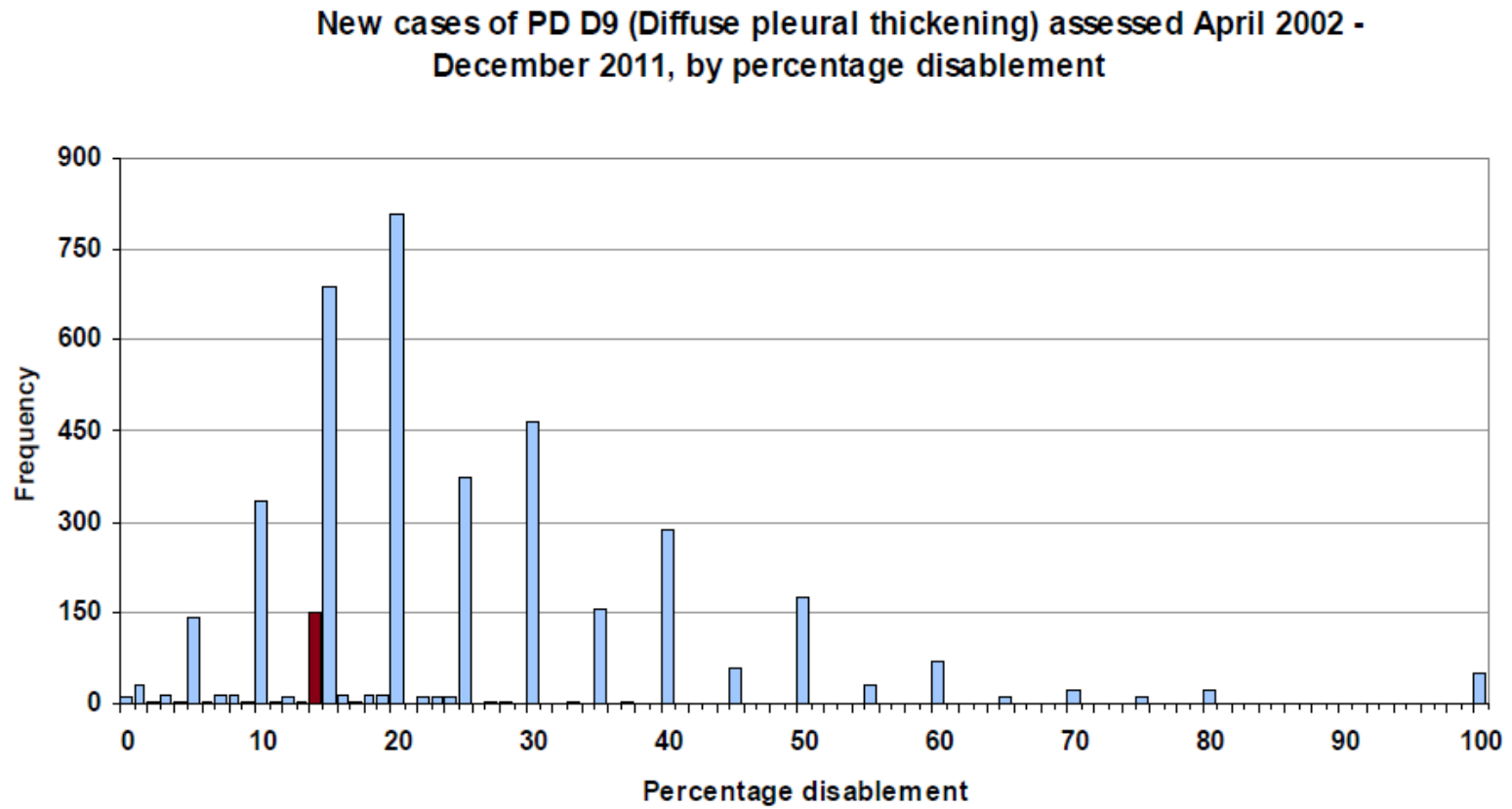
Figures show there were a total of 375 cases in Scotland of PDD9 - Pleural Thickening - assessed for IIDB from 2003-2013. Prescribed industrial diseases: new cases of lung diseases in England, Wales and Scotland by disease (2003 to 2013) <http://www.hse.gov.uk/statistics/sources.htm#iidx>.

Disease	Disease reference	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Total 2003-13 11 years
Pneumoconiosis	D1												
	coal	10	15	5	5	-	5	5	10	10	5	5	80
	asbestos	80	115	95	90	50	105	105	125	90	115	130	1100 (10)
	other	10	5	10	15	25	15	10	10	5	-	10	115
Diffuse Mesothelioma	D3	140 (10)	165 (15)	145 (15)	130 (15)	155 (10)	135 (15)	185 (20)	150 (15)	145 (10)	150 (15)	160 (15)	1670 (150)
Occupational Asthma	D7	10 (5)	15 (5)	15	10	5	15	20 (5)	5 (5)	5	10	5	120 (30)
Lung cancer with asbestosis	D8	10	15	5	15	10	5	15	15	20	20	10	145 (5)
Primary carcinoma of the lung (b)	D8A				20	15	70 (10)	75 (5)	35	35	25	25	300 (15)
Pleural thickening	D9	20	25	15	30	35	35	30	40	35	55	50	375 (5)

UK figures from 2002-2011 demonstrate the relatively small number of cases that would be affected (Figure 3). (14% threshold highlighted in red)

<sup>7</sup> <http://www.legislation.gov.uk/ukxi/1985/967/part/V/chapter/1/crossheading/special-conditions-for-disablement-benefit-for-pneumoconiosis-byssinosis-and-diffuse-mesothelioma/made>

Figure 3



<http://www.hse.gov.uk/statistics/adhoc-analysis/industrial-injuries-disablement-benefit.pdf>

## Effect of IIDB on other benefits

For those who receive means-tested benefits (such as Universal Credit, Pension Credit, Council Tax Benefit or Housing Benefit) an award of Industrial Injuries Disablement Benefit may affect entitlement to those benefits.

The amount of Industrial Injuries Disablement Benefit awarded depends on the level of disability which can be assessed as anywhere between 1% - 100%. The level of disability given determines how much Industrial Injuries Disablement Benefit you will be entitled to.

Assessed level of disablement	Weekly amount (April 2015)
100%	£168.00
90%	£151.20
80%	£134.40
70%	£117.60
60%	£100.80
50%	£84.00
40%	£67.20
30%	£50.40
20%	£33.60

The higher levels of disability tend to be given to those with significant breathlessness; however it not possible to say what level of disablement will be given following an assessment. This situation makes it impossible to advise those in receipt of means tested benefits whether or not they may actually be financially worse off by applying for IIDB.

For example, an award of IIDB higher than a claimant's existing entitlement to a 'passported' benefit such as the Guarantee rate of Pension Credit would disentitle them to automatic qualification for Housing Benefit, Mortgage Interest Payments and Council Tax Reduction.

It is not possible, having being awarded IIDB, for a claimant to disentitle themselves to that benefit and go back and claim the means-tested benefits that were lost previously, even if a claimant finds that they are financially worse off. This is compounded by the fact that it is not possible to access a payment under The Pneumoconiosis etc. (Workers' Compensation) Act 1979 without first being awarded IIDB.

## Constant Attendance Allowance

### Overview

You can claim Constant Attendance Allowance if you get Industrial Injuries Disablement Benefit or a War Disablement Pension and you need daily care and attention because of a disability. There are 4 different weekly rates of Constant Attendance Allowance. How much you get depends on the extent of your disability and the amount of care you need.

### Payment Rates

There are 4 different rates of Constant Attendance Allowance. How much you get depends on the extent of your disability and the amount of care you need.

Rate	Weekly amount
Exceptional rate	£134.40
Intermediate rate	£100.80
Full day rate (normal maximum rate)	£67.20
Part day rate (part-time rate)	£33.60



If you get the 'exceptional rate' or 'intermediate rate', you may also get Exceptionally Severe Disablement Allowance. £67.20

## **Effects of CAA on other benefits**

If you qualify for CAA, you cannot also get Attendance Allowance (AA), the care component of Disability Living Allowance (DLA), or the daily living component of Personal Independence Payment (PIP) unless it is higher than the CAA. In that case you will get CAA and may get the balance of the other benefit.

## **Exceptionally Severe Disablement Allowance**

This is an extra allowance if you are exceptionally severely disabled and already entitled to CAA at the intermediate or exceptional rate, and your need for the attendance is likely to be permanent. SS C&B Act 1992 sec 105(1)(a)(b), SS (Gen Ben) Regs 1982 reg 43 & 44)

You do not have to make a separate claim. Your entitlement will be considered at the same time as your CAA.

## Effects on other benefits

Your Exceptionally Severe Disablement Allowance does not affect any other National Insurance benefits such as:

- Incapacity Benefit
- Employment and Support Allowance (contribution-based)
- Contribution-based Jobseeker's Allowance
- Retirement Pension

Guidance on GOV.UK regarding ESDA's effect on means tested benefits states the following<sup>8</sup>:

*".....Exceptionally Severe Disablement Allowance may affect income-related benefits you or your partner receive such as:"*

- *Income Support*
- *Employment and Support Allowance (income-related)*
- *Income-based Jobseeker's Allowance*

---

<sup>8</sup> <https://www.gov.uk/government/publications/industrial-injuries-disablement-benefits-technical-guidance/industrial-injuries-disablement-benefits-technical-guidance#constant-attendance-allowance>

- *Pension Credit*
- *Housing Benefit*
- *Working Tax Credit*
- *Child Tax Credit*
- *Universal Credit*

We believe that the advice given via GOV.UK concerning ESDA is erroneous and that Exceptionally Severe Disablement Allowance is **not** taken into account as income for the purposes of claiming means-tested benefits. (See: IS Sch 9 para 9 IS regs; JSA Sch 7 para 10 JSA regs; ESA Sch 8 para 11 ESA Regs; HB Sch 5 paras 6 and 9 HB Regs).

## **How claims are decided**

When CAA is granted at the intermediate or exceptional rate, entitlement to Exceptionally Severe Disablement Allowance is automatically considered at the same time.

Currently, the decision on whether to award Constant Attendance Allowance and Exceptionally severe Disablement Allowance **is not assessed by a medical adviser**. This is due to the introduction of automatic 100% assessments for claimants awarded IIDB for PDD3 mesothelioma, PDD8 and PDD8A lung cancer with asbestosis and lung cancer in the absence of

asbestosis, as they are no longer required to attend a medical examination in connection with their claim.

Currently, contrary to the impression given in the IIDB technical guidance, entitlement to CAA and ESDA is now assessed by a Decision Maker via a questionnaire sent out to those who receive 100% assessments for IIDB. A claimant is invited to apply by completing and returning the questionnaire to the Jobcentre Plus or by confirming that they do not wish to apply at that time.

Many of our service users who suffer from mesothelioma and lung cancer have intimated to us that they find this process degrading and many do not apply, resulting in reduced uptake of benefit. Figures from the DWP regarding uptake of CAA and ESDA do not appear to be readily available from the DWP. It is not possible therefore to neither examine the details of uptake of those payments in Scotland nor ascertain what proportion of the overall IIDB budget they constitute. We believe this system of payments is cumbersome and should be changed.

A recent report by the Industrial Injuries Advisory Council, considering terminal cancers and Industrial Injuries Disablement Benefit,<sup>9</sup> revisited the idea of changes to industrial injury payments for terminally ill claimants:

---

<sup>9</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/302865/cm8846.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/302865/cm8846.pdf)

*“The Council has previously noted that claimants with terminal illness may, by virtue of their life-shortening illness, achieve less compensation than more moderately affected claimants drawing benefits over a longer time course.”*

The council discussed a number of options, including the introduction of lump sum payments for terminally ill claimants, including a lump sum payment in the first year reverting to weekly payments thereafter. However, in the end IIAC concluded:

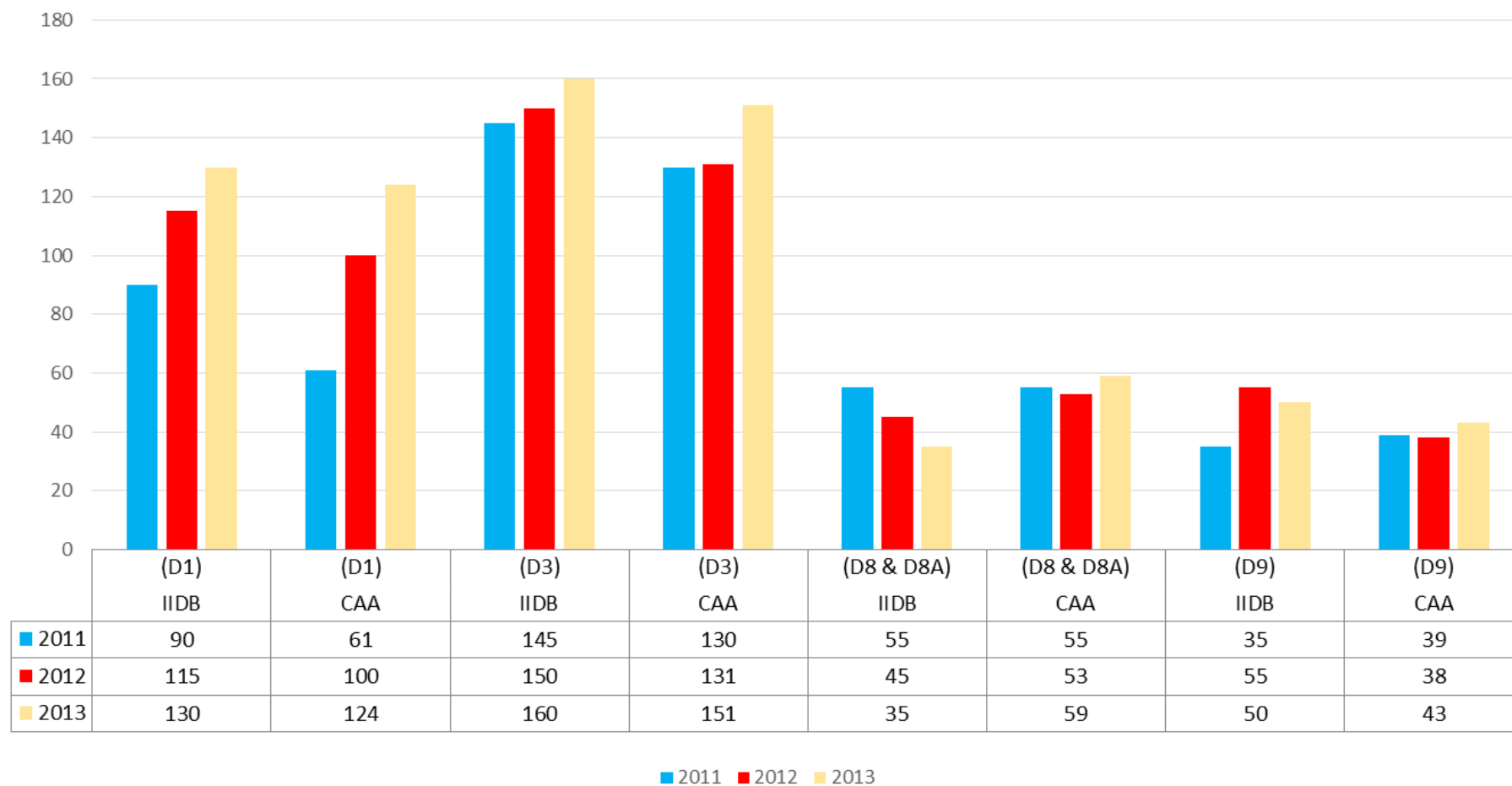
*“In the interests of encouraging early implementation of the recommendations in this report, the Council has decided against recommending a new system of lump sum payments; but asks that this option be borne in mind for the future, should a general review of payment mechanisms within the Scheme be undertaken.”*

The Scottish government now has the opportunity to review this issue. One possible recommendation would be to merge the component parts of CAA and ESDA into one lump sum payment, payable in the first year, in addition to the weekly award of IIDB, followed by weekly payments after the first year.

We would suggest that any new weekly payment payable after 52 weeks should retain the current overlapping benefit rules, be exempted from income purposes, as is the current

position, paid at the same rate regardless of age (over or under 65), and set at a limit no lower than the current combined maximum for both components of Personal Independence Payment: £139.75. This would affect cases for asbestos-related prescribed diseases: D3, D8 & D8A. (See Figure 4 for numbers of cases for Clydeside Action on Asbestos & DWP 2011-2013)

Figure 4: Comparison of new IIDB Cases to new CAA cases - Scotland (2011-2013)



## Delivery of IIDB

*“Further consideration will be given to the detailed practical aspects of devolving welfare. Key issues to be considered include how to deal with existing benefit awards, the timing of any transfer of responsibility (so as to allow time for the Scottish Government to put new arrangements in place), and the extent to which the existing links with reserved welfare benefits need to be maintained going forward. Some of the key issues are set out below, but this list is not exhaustive:*

*Cross- boundary issues, for example in respect of Carer’s Allowance where the carer may live in one jurisdiction whilst caring for someone in the other jurisdiction or in respect of industrial injuries where the injury may have occurred in a different jurisdiction to the one in which the individual is resident”<sup>10</sup>*

We would concur that there will need to be decisions with regard to jurisdictional claims for IIDB though the number that we deal with each year is extremely low. However, there are other areas that we feel should also be addressed as a priority:

---

<sup>10</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/397079/Scotland\\_EnduringSettlement\\_acc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397079/Scotland_EnduringSettlement_acc.pdf)



- Continuation of 'Fast track' procedures
- Continuation of IIDB application forms to be accessible via government website, in downloadable pdf format.
- Provision of prepaid envelopes to continue to be provided.
- Dedicated IIDB staff to build knowledge of the scheme. There were 2 IIDB centres in Scotland, Ayr and Clydebank, dealing with Scottish claims for IIDB before transfer of claims was moved to Barrow IIDB centre.
- The need for direct contact with IIDB staff. Telephone/Fax.
- Mail concerning an IIDB application to be handled by the office dealing with it.
- The need for the Scottish IIDB claims handlers to establish relationships and work closely together with colleagues in England who are responsible for dealing with the lump sum payment schemes.
- **A claim for IIDB is not also regarded as claim for a lump sum payment from The Pneumoconiosis etc. (Workers' Compensation) Act 1979. This has a separate claim form PWC1 and an application must be made within 12 months of an award of IIDB. This point is particularly important as it is not made clear in the Smith Commission report.**

---

## Industrial related Benefits which are not being devolved

---

*“It is unclear from the Smith Commission report whether devolving Industrial Injuries Disablement Benefit would also include devolving Reduced Earnings Allowance and Retirement Allowance which apply to those injured before October 1990.”*

[http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB\\_15-07\\_The\\_Smith\\_Commission\\_Welfare\\_Proposals.pdf](http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_15-07_The_Smith_Commission_Welfare_Proposals.pdf)

---

### Reduced Earnings Allowance

### Retirement Allowance

---

Reduced Earnings Allowance: Maximum rate £67.20

Retirement Allowance: Maximum rate £16.80

### REA Eligibility

You could get Reduced Earnings Allowance if you're suffering from an illness or disability caused by a work-related accident or disease that happened before 1 October 1990.

You must also meet all of the following:

- your level of disability is assessed to be at least 1%
- you can't return to your regular occupation
- you can't do other work with the same level of earnings as your regular occupation

## **Retirement Allowance (RA)**

Replaces REA when you reach state pension age if REA is at least £2 a week and you are not in regular employment. SS C&B Act 1992 Sched 7 para 13(1) & (2)

---

## **Industrial related Benefits which are not mentioned in Smith**

---

### **Industrial Death Benefit (Widow's or widower's pension)**

Higher rate £115.95 Lower rate £34.79

Industrial death benefit (IDB) is part of the industrial injuries scheme provided under social security legislation. IDB was designed as a benefit for dependants of people who die as a result of an accident at work or a prescribed industrial disease.

IDB is not payable in respect of deaths occurring on or after 11 April 1988. Industrial death benefit after 11 April 1998

Although IDB is not payable in respect of deaths occurring on or after 11 April 1988, widows receiving IDB before 11 April 1988 continued to receive permanent IDB payable at the same rate as the widowed mother's allowance.

A widow could also get a separate IDB child allowance for each dependent child. This allowance is still paid to widows who were receiving benefit on 10 April 1988 and is not taxable

An IDB widow's pension will cease if she re-marries.

## **Unemployability Supplement**

Basic rate £103.85

Amounts added for early incapacity: Higher rate £21.50; Middle rate £13.90; Lower rate £6.95

The weekly rate of IIDB was increased if

1. the claimant was incapable of work **and**
2. such incapacity was the result of the relevant loss of faculty **and**

3. such incapacity was likely to be permanent.

US was abolished from 6.4.87 but people in receipt of the benefit immediately before 6.4.87 continued to receive it. However should entitlement cease, for whatever reason, entitlement stops. SS CB Act 92, Sch 7, para 1 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/373247/dmgch72.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/373247/dmgch72.pdf)

## The role of the Industrial Injuries Advisory Council (IIAC)

The Industrial Injuries Advisory Council (IIAC) is an independent scientific advisory body that looks at industrial injuries benefit and how it is administered.

IIAC is an advisory non-departmental public body, sponsored by the Department for Work and Pensions.

Section 171(3) of the Social Security Administration Act 1992

1. The Industrial Injuries Advisory Council (in this Act referred to as “the Council”) constituted under section 62 of the [1965 c. 52.] National Insurance (Industrial Injuries) Act 1965 shall continue in being by that name.
2. Schedule 6 to this Act shall have effect with respect to the constitution of the Council and the other matters there mentioned.
3. The Secretary of State may from time to time refer to the Council for consideration and advice such questions as he thinks fit relating to industrial injuries benefit or its administration.
4. The Council may also give advice to the Secretary of State on any other matter relating to such benefit or its administration.

**Future role for IIAC how will Scottish government decide on which diseases to prescribe?**

*“...the opinion (was) that the Industrial Injuries Advisory Council (IIAC) has shown itself to be an extremely capable body and is well respected due to its tripartite nature and*

*its recommendations. Some felt that it had the support of both sides of industry as well as the scientific and medical community.”*<sup>11</sup>

The opinion expressed above was the general consensus view given by those who responded to the UK government consultation on IIDB carried out in 2007. However, there was some concern expressed that IIAC's standards of proof relied on scientific data being available, and that the effectiveness of the scheme was impeded by lack of available research and research funding.

Currently, the Industrial Injuries Advisory Council (IIAC) lists only the following 'prescribed' diseases for the purposes of claiming Industrial Injuries Disablement Benefit.

List of Prescribed Diseases (PD);

- D1 – Asbestosis
- D3 – Mesothelioma
- D8 – Primary carcinoma of the lung where there is accompanying evidence of asbestosis
- D8A– Primary carcinoma of the lung
- D9 – Diffuse Pleural Thickening

---

<sup>11</sup> Injuries Disablement Benefit (IIDB) Scheme Consultation Report June 2007

IIAC have also considered other asbestos-related conditions but have decided not to add those to the current list of prescribed diseases:

- IIAC Cancers of the larynx or ovary and work with asbestos: IIAC information note. (February 2015)
- IIAC Position Paper 23: Pleural Plaques (June 2009)
- IIAC Position Paper 22: Laryngeal Cancer and Asbestos Exposure (July 2008)
- IIAC Position Paper 20: Asbestos Exposure and Retroperitoneal Fibrosis (June 2008)
- Report by the Industrial Injuries Advisory Council in accordance with Section 171 of the Social Security Administration Act 1992 reviewing the prescription of the asbestos-related disease (July 2005)

**Scientific opinion on other conditions which may be caused as a result of exposure to asbestos:**

*“...all types of asbestos cause lung cancer, mesothelioma, cancer of the larynx and ovary, and asbestosis.* [World Health Organisation: www.who.int/ipcs/assessment/public\\_health/asbestos](http://www.who.int/ipcs/assessment/public_health/asbestos)



*“There is some evidence to suggest that asbestos can also cause laryngeal cancer and may be implicated in causing pharyngeal, stomach and colorectal cancer...and conceivably a wide range of others.* [Asbestos: Effects on health of exposure to asbestos. Richard Doll and Julian Peto. HSE. 1985.pdf](#)

*“Across Europe 10 asbestos-related cancers are recognised; in the UK only two, lung cancer and mesothelioma, are prescribed. And it seems IAC is content to see workers with eight of the 10 asbestos related cancers continue to miss out.* <http://www.hazards.org/compensation/meantest>

## **Asbestos-related lung cancer**

- Research suggests there are probably about as many asbestos-related lung cancer deaths each year as there are mesothelioma deaths.
- This implies there are currently in excess of 2 000 deaths each year in Great Britain due to asbestos-related lung cancer.
- The ratio of lung cancers to mesotheliomas is expected to fall over time suggesting less than one asbestos related lung cancer per mesothelioma in the future.
- There were 285 cases assessed for disablement benefit in 2013. (IIDB).
- There were 100 cases of occupational lung cancer reported by chest physicians in 2013. The Health and Occupation Reporting network. (THOR).

- One reason that figures based on IIDB and THOR are substantially lower than the estimated number of asbestos related lung cancers is the difficulty in attributing individual cases to asbestos exposure.<sup>12</sup>

It will of course fall to the Scottish Government/Parliament to determine the future role of IIAC and consequently which prescribed diseases are amended or added to in the future<sup>13</sup>. If it decides to deviate from the current status quo, it will have to do so in an environment where there is no scientific consensus on those diseases that may be caused by occupational exposure to asbestos.

What is clear however is that the Scottish government cannot, in the context of devolved IIDB, do so in a fully autonomous way. For example, if the Scottish government decided to address the inherent problem with the occupational prescription for asbestos-related lung cancer (many fewer claims than evidence suggests exist) PDD8A and subsequently felt convinced by the weight of other scientific evidence to deviate from IIAC'S current recommendation, it would of course be free to do so.

---

<sup>12</sup> <http://www.hse.gov.uk/statistics/causdis/lungcancer/index.htm>

<sup>13</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/450631/iac-minutes-mar-2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450631/iac-minutes-mar-2015.pdf)

However, the current lump sum payment, The Pneumoconiosis etc. (Workers' Compensation) Act 1979, (only briefly mentioned by the Smith Commission report) is intrinsically linked to the IIDB prescription for asbestos-related conditions, and is not to be devolved. The failure to devolve this scheme or to recognise the intrinsic way that IIDB is linked to The Pneumoconiosis etc. (Workers' Compensation) Act 1979) has the consequential effect of ensuring that any future deviation from any of the current IIDB prescribed disease list for asbestos-related conditions could in fact disentitle a Scottish claimant to a lump sum payment under that scheme.

---

## Asbestos-related lump sum payments which are not mentioned in Smith

---

*“Payments for asbestos related diseases There are a number of schemes which provide payments to people diagnosed with certain dust related industrial diseases” (Kennedy 2012b)* The Smith Commission’s Welfare Proposals.

Current lump sum payment schemes:

- The Pneumoconiosis etc. (Workers’ Compensation) Act 1979
- Diffuse Mesothelioma Scheme 2008
- Diffuse Mesothelioma Payment Scheme (DMPS) 2014

Devolution of lump sum payment schemes has not been devolved. *Scotland in the United Kingdom: An enduring settlement* contains draft legislation confirming this position. In the wording of this legislation, there appears to be an error as the current prescribed criteria for lung cancer is:

- D8 – Primary carcinoma of the lung where there is accompanying evidence of asbestosis
- D8A– Primary carcinoma of the lung

And not as stated in the draft legislation:

*(v) primary carcinoma of the lung where there is accompanying evidence of one or both of asbestosis and bilateral diffuse pleural thickening.*

The prescribed disease D8A replaced the previous prescription for lung cancer and bilateral pleural thickening and inserted a new definition of “primary carcinoma of the lung” by reg. 2(1) of S.I. 2006/586 as from 6.4.06.<sup>14</sup>

## **The Pneumoconiosis etc. (Workers’ Compensation) Act 1979**

The pneumoconiosis etc. (workers compensation) Act 1979 provides a lump sum compensation payment to people suffering from certain dust related diseases, or if they have died, to their spouse or dependants, where their disease was the result of exposure to dust in the course of their employment.

The claimant must be unable to claim damages from their former employer, however claiming a payment under the 79 Act whilst investigations are undertaken into the possibility of

---

<sup>14</sup> The Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 <http://lawvolumes.dwp.gov.uk/docs/a4-3851.pdf>

pursuing a personal injury claim are very often carried out simultaneously. In practice the DWP will also make payments under the 79 Act where the exposure to asbestos took place over 20 years ago and the company has ceased trading. If a claim for civil compensation is successful the 79 Act payments which were made to the claimant will automatically be deducted from the claimant's civil settlement.

For the purposes of this paper the diseases are:

Mesothelioma; (D3)

Pneumoconiosis (including asbestosis) (D1)

Diffuse Pleural Thickening; (D9)

Primary Carcinoma of the lung (accompanied with asbestosis) (D8)

Primary Carcinoma of the lung (with no other radiological evidence of another ARD) D8 [a]

To qualify the criteria is:

- Industrial Injuries Disablement Benefit should have been, or is payable to the sufferer in respect of the disease;
- Each relevant employer has ceased trading, or where there is no realistic chance of claiming civil damages from that employer; or

- That no court action has been taken by the sufferer, the spouse or a dependant, and that no compensation has been received.

At present CAA Welfare Rights Officers will submit applications for Industrial Injuries Disablement Benefit and a payment under the 79 Act simultaneously. This is primarily due to the nature of these conditions; there is the possibility of a claimant dying during the period of submitting and having a decision on the Industrial Injuries Disablement application and being considered for a payment under the 79 Act. Posthumous Payments under the 79 Act are substantially less than “in life” payments.”

## **Time restrictions**

There are time restrictions on making an application for a payment under the 79 Act. On receipt of their award of Industrial Injuries Disablement Benefit the claimant has 12 months in which to apply for a Payment under the 79 Act Scheme. In posthumous claims the application must be made within 12 months of the date of death. Posthumous payments are paid at a lower rate than those payments made “in life”.

The administration of a devolved Industrial Injuries Disablement Benefit [IIDB] scheme would involve the Scottish Government having increased communication with the DWP in England. This is primarily due to there being a link between being awarded IIDB and obtaining a payment under the 79 Act scheme. Here there are time restrictions placed on being awarded IIDB and applying for a payment under the 79 Act; the claimant must apply for a payment within 1 year of receiving their award of IIDB, or in posthumous cases, the spouse or dependant must apply for a payment within 1 year of the person's death.

There would perhaps be more of a detrimental effect on applications for IIDB posthumously in cases where a post mortem is required, or where a death certificate has to be amended. It is therefore essential that a system is devised which would allow for an appropriate period of time for claimants to receive their awards of Industrial Injuries Disablement Benefit and to make a further application to the 79 Act scheme for consideration of a payment.

It is important to note there are currently no appeal rights under the 79 Act which, although contravenes article 6 of the ECHR's act, would be detrimental for Scottish claimants if not fulfilling the criteria with regards to time limits. Please see below a note on "no appeal rights" under the 79 Act:



The relevant cases relating to the right under Article 6 of the European Convention on Human Rights to practical and effective access to a court or tribunal for the determination of civil rights are as follows:

The case of **Golder v United Kingdom** states at paragraph 35 that “The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognized" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 must be read in the light of these principles. The right of access constitutes an element which is inherent in the right stated by Article 6 para. 1. ... The Court thus reaches the conclusion ...that Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only.

This principle was developed in the case of **Ashingdane v United Kingdom**, where the court stated that although the right of access to court may be subject to limitations, “the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired ... Furthermore, a limitation will not be compatible with Article 6 para. 1 if it does not pursue a legitimate aim and if there is not a

reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”

The case of **Airey v Ireland** is also relevant as the Court held that the possibility of the applicant being able to represent herself in the High Court did not provide the applicant with an effective right of access to the courts due to the complex nature of such litigation and that there was a breach of Article 6. This would be similar to requiring someone to undertake a judicial review in order to challenge the refusal to grant someone a payment under the 1979 Act.

At present judicial review is offered as an option given that there is no recourse to appeal, however this is an extremely expensive process to pursue, with legal aid not being available to pursue this option.

## **Diffuse Mesothelioma Scheme 2008**

Most of those who develop Diffuse Mesothelioma have worked in jobs or been in environments where they have been exposed to asbestos dust particles in the air.

Where the illness is as a result of occupational exposure to asbestos and the person has been an employed earner he/she can claim under the Industrial Injuries Disablement Benefit (IIDB)

Scheme and potentially the Pneumoconiosis etc. (Workers Compensation) Act 1979.

However there are a number of cases of Diffuse Mesothelioma each year that have no occupational causation, who therefore cannot claim under the IIDB Scheme and the 1979 Scheme. The 2008 Diffuse Mesothelioma Scheme seeks to compensate this group of people.

#### Eligibility

You can claim a one-off lump sum payment if you:

- aren't entitled to a payment under the 1979 Pneumoconiosis Act
- haven't been given a payment for the disease from an employer, a civil claim or elsewhere
- aren't entitled to compensation from a Ministry of Defence scheme

Your exposure to asbestos must have happened in the United Kingdom.

For example:

- you came into contact with asbestos from a relative – e.g. by washing their clothes
- you were exposed to asbestos in the environment – e.g. you lived near a factory using asbestos
- your exposure to asbestos was while self-employed

- your exposure cannot be specified but it occurred in the United Kingdom

## **Dependants' Claim**

If you're the dependant (spouse, child, partner or relative) of someone who suffered from an asbestos related disease but who has died, you may be able to make a claim for the compensation outlined above.

A dependants' claim must be made within 12 months of the death of the sufferer.

Spend at a Scottish level is not available for all the benefits listed.<sup>15</sup>

<b>Benefit</b>	<b>GB spend 2012/13 £m</b>
Armed Forces Independent Payment	n/a
Budgeting Loans	-£5
Christmas bonus	£156
Contributory ESA	£2,305
Contributory JSA	£662
Mesothelioma 2008	£9
Housing benefit for pensioners	£6,424
Housing benefit for 'specified accommodation'	n/a
Pneumoconiosis 1979	£42
Over 75 TV licence	£596
Specialist Vehicle Fund	£16
Statutory paternity and adoption pay	n/a
Vaccine Damage Payments	£0
War Pensions	£0

<sup>15</sup> [http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB\\_15-07\\_The\\_Smith\\_Commission\\_Welfare\\_Proposals.pdf](http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_15-07_The_Smith_Commission_Welfare_Proposals.pdf)

## **Diffuse Mesothelioma Payment Scheme (DMPS) 2014**

You may be able to claim if all of the following apply:

- you were diagnosed with diffuse mesothelioma on or after 25 July 2012
- your mesothelioma was caused by exposure to asbestos when working in the UK
- you can't trace the employer that exposed you to asbestos, or their insurers
- you haven't made a civil claim against any employer or insurer
- you haven't received damages or a specified payment for mesothelioma and you're not eligible to a specified payment

You may also be able to claim if you were the dependant of a sufferer who has died.

You can claim for DMPS even if you have already claimed from the 2008 scheme or under the 1979 Pneumoconiosis Act. If you've already got a payment from the 2008 scheme or the Pneumoconiosis Act, it will be deducted from the amount you get from DMPS.

You must apply online at the DMPS website. You have up to three years after your first diagnosis of Diffuse Mesothelioma to make an application. If you were diagnosed between the

25th July 2012 and the date the scheme starts taking applications, you have three years to apply from the date the scheme starts taking applications.

Payments can be made to each dependant but the amounts equal the amount that would be payable if there was just one dependant.

## Civil law compensation

### **Employers' Liability Compulsory Insurance (ELCI)**

If a person is injured or becomes ill through work and believes that the employer has been negligent, the injured person has the right to sue the employer for compensation in civil law. The Employers' Liability (Compulsory Insurance) Act 1969 requires employers who have a business in Great Britain to take out ELCI to meet that liability. The system is 'fault-based': employees must demonstrate that the employer was negligent.

In any court action for damages for an asbestos related disease it is necessary to prove the following:

- The source of exposure
- Who the negligent party is
- A medical diagnosis; and
- A causal link between them

As the latency period between being exposed to asbestos and being diagnosed with an asbestos related disease is between 15-50 years, any evidence with respect to the nature of



exposure and source of liability is weakened. Claimants have found it extremely difficult to identify where, when and how their exposure took place. The majority of companies where exposure to asbestos took place have ceased trading.

As a result of former employers no longer being available to sue, there can be significant chunks of compensation deducted from what are known as the divisible conditions. For all asbestos related conditions, with the exception to mesothelioma, it is generally considered that the negligent parties ought only to contribute to the extent of their responsibility; that is to say for the period that they exposed the individual to asbestos.

Where a negligent party cannot be pursued either for reasons of non-existence or non-insurance, then it is not necessarily incumbent on the other parties to the action, to pick up that missing share. In some cases this can result in the majority of the claim being unpaid. It should also be noted that in pleural plaques cases it is only the exposure to asbestos in Scotland, which can be taken into account. This is because pleural plaques do not attract compensation in the rest of the UK.

a. It can be extremely difficult to establish liability in these cases. It is not sufficient to prove that the individual was exposed to asbestos. It must be established that the alleged negligent party had a duty of care to the individual and that there were sufficient levels of exposure to

put the negligent party on notice that they ought to be taking measures to protect the individual. These criteria vary enormously between cases dependant on the nature of the employer and the extent of the exposure to asbestos.

b. The question of time-bar is a perennial problem. An individual has 3 years from the date on which they knew or ought to have known that they have an asbestos related condition which can be attributable to a particular defender, within which to raise Court proceedings. Frequently, individuals have not been told of a finding of pleural plaques on x-ray but it is for them to prove that they were not told that, despite it appearing in their medical records.

Moreover, if an individual elects not to take action at the time they are diagnosed with pleural plaques, then should that individual go on to develop mesothelioma more than 3 years after the diagnosis of plaques, they will be considered to be out of time. There is the opportunity to appeal to the Court to use its discretion to allow such cases to continue but the exercise of discretion has been very limited in the Scottish Courts.

c. Individuals suffering from all but asbestos related lung cancer and mesothelioma will be asked to decide whether or not they wish to settle their case on a full and final or provisional basis. Provisional means that the individual takes a slightly smaller sum of money to reflect their condition at the given time, but should they go on to develop a more serious asbestos

related condition then they would be entitled to further damages. Should the individual accept full and final compensation, then they forfeit any right to return to Court in the event of a further condition.

## **Other routes**

Where an individual has been diagnosed with mesothelioma, but cannot trace insurance for the period of alleged negligent exposure, then it is possible for them to make an application to the Diffuse Mesothelioma Scheme for compensation. This reflects broadly the amount that they would receive through the civil court process. The Scheme is restricted to mesothelioma claims only and liability of the alleged wrongdoer must still be established.

If the individual has been employed by company Turner & Newalls, or one of their subsidiaries, or had used a Turner & Newalls product in the course of their employment, then it may be possible for them to make an application to the Turner & Newalls Trust. Turner & Newalls are no longer available to be sued as they did not carry appropriate employers' liability insurance and are no longer in business. The Trust meets these claims provided fairly strict criteria can be met. Only 20% of the value of the claim will be paid.

## Who pays for the scheme?

*“a worker who has been injured through an employer’s negligence is entitled to sue the employer for civil compensation, in which case the public purse can recover the cost of state benefits and medical treatment the victim receives.”<sup>16</sup>*

We fundamentally agree with APIL’S view given in their response to the UK government's IIDB consultation in 2007 and fully support the ‘polluter pays’ principle, under which all expenses incurred as a result of negligence are payable by those found to be negligent. APIL went on to say:

*“.....the importance of access to justice for injured people, and the difference this makes not only to the victim but also to the public purse and thus to society at large. Unless injured workers are able to bring a successful claim for compensation, the costs of rehabilitation and support for victims cannot be recouped through the compensation recovery system, and will therefore unnecessarily fall on the public purse, thus reducing funds available to help other ill, disabled or unemployed people.*

---

<sup>16</sup> <http://www.apil.org.uk/files/pdf/ConsultationDocuments/960.pdf>

*Protecting access to justice for injured people should therefore, in our view, form an integral part of any strategy to protect the future funding of an occupational injury benefit scheme. Notwithstanding the benefits of civil compensation, APIL would point out that this route will never be open to all victims of occupational injury or accident. The possibility of personal injury compensation can therefore not provide an alternative to the existence of a public, no-fault compensation scheme in the form of IIDB”<sup>17</sup>* The Association of Personal Injury Lawyers response to Industrial Injuries Disablement Benefit scheme Department for Work and Pensions consultation paper APRIL 2007

This is particularly relevant in the Scottish context and past concerns about the increasing failure of people to seek legal remedies for ‘justiciable’ problems (problems with a potential legal solution) as evidenced by Genn and Paterson 2001.

*“....people who had experienced a potentially justiciable personal injury were less likely to take action relative to any other type of justiciable problem....* Genn and Paterson 2001<sup>18</sup>

The principle of the polluter pays is the fundamental principle that has underpinned the history of asbestos-related compensation. This issue cannot be reduced to an argument over compensation alone: there is a fundamental principle behind it. This same principle was fully

---

<sup>17</sup> <http://webarchive.nationalarchives.gov.uk/20100824153959/http://dwp.gov.uk/docs/iidb-response.pdf>

<sup>18</sup> Paths to Justice Scotland: What People in Scotland Do and Think about Going to Law. Genn and Paterson 2001.

endorsed by the Scottish government on deliberations over the Damages (Asbestos-Related Conditions) (Scotland) Bill:

*.....the issue of fault is central to the legislation. Compensation arises because there has been fault on the part of employers. That is uppermost in the mind of claimants. They feel aggrieved that someone has caused them injury because of carelessness and breach of the law. Fault is very much part of asbestos cases, and it is deeply felt by all claimants and their former colleagues. Many of those who are afflicted by pleural plaques might feel that, apart from the money, the compensation should involve some recognition of the negligence or fault that occurred*<sup>19</sup>

Fergus Ewing: Damages (Asbestos-Related Conditions) (Scotland) Bill: stage 1

As APIL stated, “Unless injured workers are able to bring a successful claim for compensation, the costs of rehabilitation and support for victims cannot be recouped through the compensation recovery system, and will therefore unnecessarily fall on the public purse, thus reducing funds available to help other ill, disabled or unemployed people”.

---

<sup>19</sup> <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=2459&mode=pdf>

## The Compensation Recovery Unit (CRU)

The CRU recovers social security benefits in certain compensation cases and NHS costs in certain injury cases. CRU publishes data on the:

- cases registered
- settlements recorded
- recoveries made

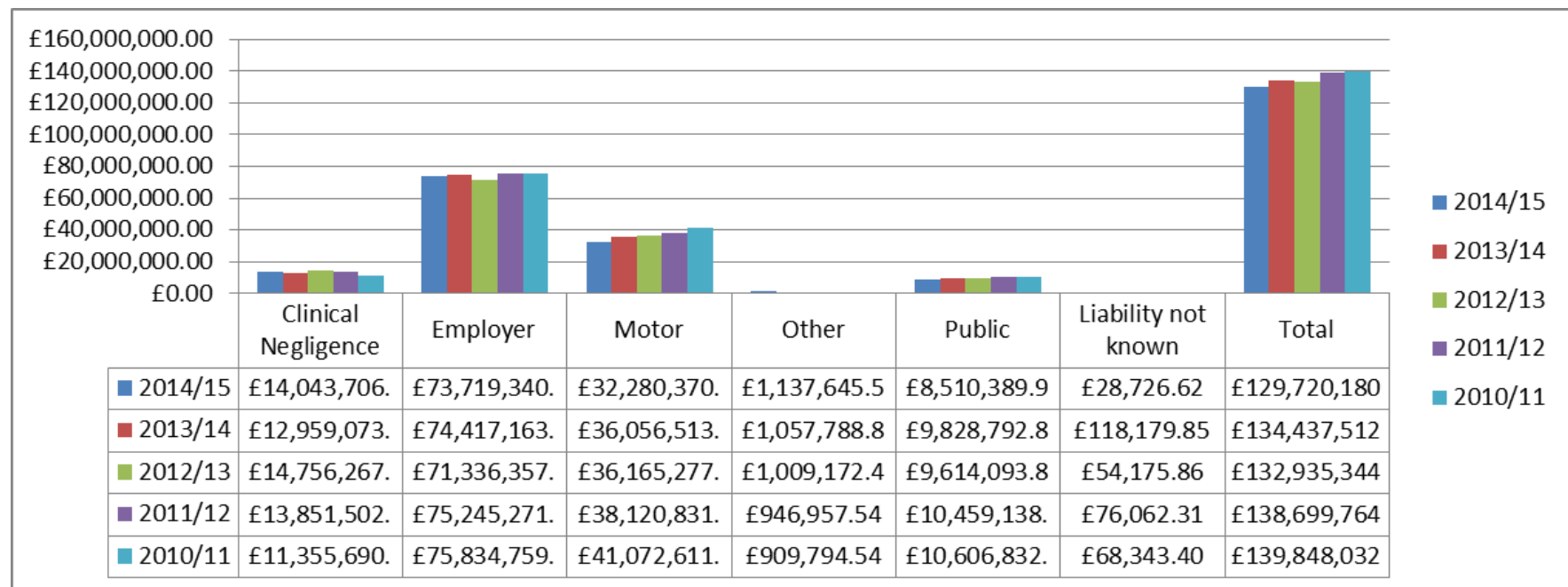


Figure 5: Recoveries made by CRU 2010/11 – 2014/15 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/424358/recoveries-made-cru-2014-15.csv/preview](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/424358/recoveries-made-cru-2014-15.csv/preview)

It is not clear from the Smith Commission or subsequent literature, but we would assume that any devolved benefits paid as a consequence of personal injury and recovered by the CRU will be retained in Scotland. The total UK recovery by the CRU for 2013/14 was £134,437,512.07. This will be fundamental to the continuation of the IIDB scheme in Scotland and ever more salient given the apparent discrepancy in how much the scheme will cost to operate in Scotland: Attached estimated costs of total spend for IIDB in Scotland: (Appendix A & B)

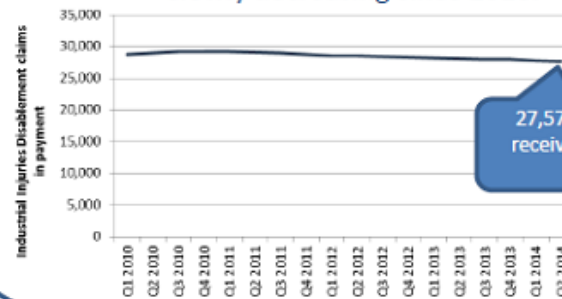


## [Appendix A] Source: Social Security for Scotland: Benefits being devolved to the Scottish Parliament March 2015

IIDB is for individuals who are ill or disabled as a result of an accident or disease caused by work or while they were on an approved employment training scheme or course.

It is estimated that in 2013/14 £83m was spent on IIDB in Scotland, around 9.5% of the GB total which is slightly more than Scotland's population share (8.6%). This estimate is based on the proportion of Industrial Injuries Benefits expenditure spent on IIDB at the GB level.

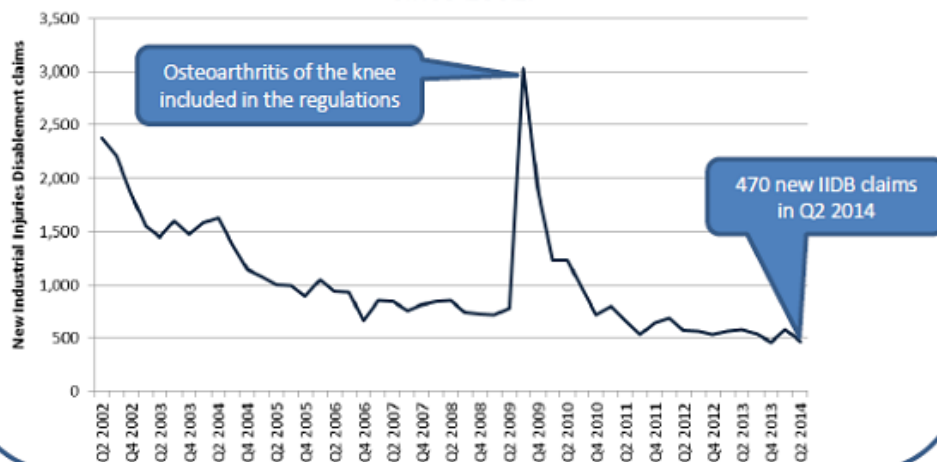
The number of IIDB claims in payment has been slowly decreasing since 2010.



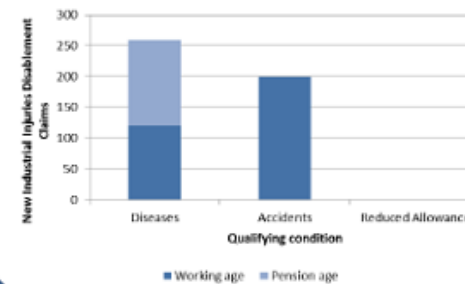
Gender split



The number of new claimants has been on a general downward trend since 2002.



Diseases are the most common qualifying condition for IIDB accounting for 55% of all new claims. However, accidents account for 63% of all new working age claims.



## [Appendix B]

**Table 6: Value of Benefits Proposed for Devolution 2013-14**

	£m
Disability Living Allowance	1,473
Attendance Allowance	481
Winter Fuel Payments	186
Carer's Allowance	182
Industrial Injuries Disablement Benefit	91
Severe Disablement Allowance	91
Discretionary Housing Payments *	18
Personal Independence Payments	17
Funeral Payments	4
Sure Start Maternity Grants	3.9
Cold Weather Payments **	0.0275
<b>Total</b>	<b>£2,547</b>

**Sources: DWP Benefit Expenditure by Region 1996/97 to 2013/2014:**

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/361362/Expenditure\\_by\\_region\\_201314.xlsx](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/361362/Expenditure_by_region_201314.xlsx)

Department for Work and Pensions. *Outturn and Forecast: Budget 2014*. Available at:

<https://www.gov.uk/government/statistics/benefit-expenditure-and-caseload-tables-2014>. Funeral payments based on 10% of estimated GB spend in 2013-14 Sure Start based on 10% of GB spend in 2013-14. PIP spend: Scottish Government estimate in *Social Security for Scotland: Benefits being Devolved to the Scottish Parliament*: <http://www.gov.scot/Publications/2015/03/1692>

\*this is the DWP spend, the Scottish Government has also provided DHP funding. In 2013-14 the Scottish Government made £20m available for DHPs and in 2014-15 it made £35m available.

\*\* There were only 1,100 payments for 2013/14 due to a mild winter

IIDB 2013 -14 32,200 recipients 0.5% of total spend

[http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB\\_15-07\\_The\\_Smith\\_Commission\\_Welfare\\_Proposals.pdf](http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_15-07_The_Smith_Commission_Welfare_Proposals.pdf)