AMRC

STRUGGLE FOR JUSTICE

WORKERS' COMPENSATION SYSTEMS IN THE ASIA PACIFIC REGION

ASIA MONITOR RESOURCE CENTRE
ANROAV

Struggle for Justice: Workers' Compensation Systems in the Asia Pacific Region

Asia Monitor Resource Centre

The Asia Monitor Resource Centre is an independent non-governmental organisation which focuses on labour concerns in the Asia Pacific region. The centre provides information, research, publishing, training, labour networking, and related services to trade unions, labour groups, and other development NGOs in the region. The centre's main goal is to support democratic and independent labour movements in the Asia Pacific region. In order to achieve this goal, AMRC upholds the principles of workers' empowerment and gender consciousness and follows a participatory framework.

Asian Network for the Rights of Occupational Accident Victims

The Asian Network for the Rights Of Occupational Accident Victims (ANROAV) is a coalition of victims' groups, trade unions, and other labour groups across Asia committed to the rights of victims and for overall improvement of health and safety at the workplace. The industrial disasters of Kader and Zhili in 1993, that together killed more than 250 workers led to a campaign by the labour and victims groups in Asia towards better health and safety rights of workers and victims. ANROAV was formally constituted in 1997 and now has members from 13 Asian countries/regions including China, Japan, Korea, India, Pakistan, Thailand, Indonesia, Vietnam, Bangladesh, Hong Kong, Taiwan, Nepal, Vietnam, and Cambodia.

Struggle for Justice: Workers' Compensation Systems in the Asia Pacific Region

This book is a joint publication by the Asia Monitor Resource Centre and the Asian Network for the Rights of Occupational Accident Victims.

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PREFACE

SANJIV PANDITA

Asia Monitor Resource Centre (AMRC) and the Asian Network for the Rights of Occupational Accident Victims (ANROAV) are pleased to bring out this publication on workers' compensation systems in the Asia Pacific region. ANROAV is a network that was initiated primarily by the victims' organisations and groups from the Asia Pacific region. The network presently also consists of trade unions, labour NGOs, and activists from about 13 Asian countries all working towards the rights of victims and also towards the occupational safety and health (OSH) rights of workers. The network that existed as an informal group for many years was broadened and consolidated due to two major industrial disasters in Thailand and China in the year 1993, that killed more than 260 workers, mostly young women (188 in the Kader factory in Thailand and 87 in the Zhili factory in southern China), and injured and disabled hundreds more.

Since its inception, the ANROAV has been campaigning against the dismal working conditions and miserable treatment of injured and disabled workers. One hard reality in the region is that the majority of dead, injured, and diseased workers and their families hardly receive any reasonable compensation; if they receive any compensation at all, the money is simply too little to support any sort of decent life. This leads the injured and diseased workers and their families into abject poverty. These are the people who pay a very high cost for economic and social development – a cost perhaps no amount of money can compensate.

The Asia Pacific region is diverse and OSH compensation systems vary from place to place. Yet there is a stark similarity in the manner workers face difficulties and are unable to access these systems. On paper most of the countries have framed laws that lay down procedures and rights for workers to claim compensation. There are some exceptions like Cambodia (which unfortunately is not covered in this volume) where the law in itself is totally inadequate and ambiguous without clear procedures for workers to follow.

At this juncture one may even look into the historical evolution of compensation systems. In basic terms we can say that they evolved over the years as a direct struggle of labour against the forces of capital with intervention from the state. Overall the laws on compensation can be classified into two main groups; one is the employers' liability system where a worker can sue the employer for injuries and diseases; the other is the no-fault compensation system which is more like workers' insurance and run by either state or private insurance companies. At present we are witnessing the increasing adoption of the no-fault compensation system in the region. The following citation may highlight some of the background related to these systems:

"Concealed in the commodities that capital creates are the acts of homicide produced in the conditions which capital creates to produce these commodities. The discourse around the workplace injuries and illnesses contains within itself potential for a critique of capitalist relations of production as murderous in essence. The shift from fault based inquiry, in the employers' liability system, to a no-fault compensation system was a way of shortcutting some of the gains workers and allies had made in their discourse by calling in question the moral legitimacy of the capital" (Bale, 1989)[1]

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[1] Bale, Anthony (1987), 'America's First Compensation Crisis: Conflict over the Value and Meaning of Workplace Injuries under the Employers' Liability System', Rosner, D and Markowitz, G (eds) *Dying for Work: Workers' Safety and Health in Twentieth-Century America* , Indiana University Press, Bloomington.

Bale's view is important and critical for the labour movement in Asia and is open for further debate. However, this book does not go deep into these debates, rather the aim of this book is to serve as a practical tool for trade unions, labour groups, activists, and researchers to look into the various compensation systems in the Asia Pacific region and what difficulties injured and diseased workers and their families face. This book is organised into 12 chapters covering nine countries/territories. The chapters describe at length the compensation systems in the region and are enriched with the case studies of workers seeking compensation. All the authors of these chapters have valuable experience with workers claiming compensation and most of this volume is based on a very personal experience of these authors.

Suing the employer for negligence is not an easy thing for the workers, who are in a very disadvantageous position from the beginning. With no income they have to bear the burden of financial expenditure for a process that may take many years and also may not result in favour of the worker. Lawyers are reluctant to take up such cases due to the inability of workers to pay their fees. Some lawyers, doctors, and activists who try to help workers to claim compensation often face the wrath of the employers in terms of defamation law suits. There have been many such cases in past. More recently, one gem company in Hong Kong has filed law suits against two activists in Hong Kong who were helping the workers from the China operations of the company, suffering from silicosis, to get compensation from the employer.

There are other problems; one of the most basic is to prove that the worker was working for that enterprise where she/he was injured or diseased. Sometimes employers, in order to save themselves from any liability, will not enter into any sort of formal contract with the worker. This can be seen in the case study presented in the China chapter by Tony. With no proof of employment, it becomes almost impossible for the workers to claim compensation from the employer.

Workers' insurance may seem to be an easy way out to prevent these lengthy litigations. However, there are major problems with this system and many workers face difficulties in claiming the compensation. The first and major problem is the way and the principle on which these schemes run, is to make money out of workers' misery. India and China are looked upon as major markets by insurance companies. Running the company into profit is the overriding principle, which means all the claimants are looked upon as defaulters and workers are made to run around to prove their claim. Insurance companies may even spy on workers, as noted by Gwynyth in the Australia chapter, in order to refuse the payment. Fund management invariably has become more important than providing much needed relief to the workers and their families. This is not only a problem of the privately run insurance companies. In the chapter on India by Kanhere in this volume, we can see that the state run insurance scheme in India also operates in a similar manner. The Employees State Insurance Corporation has amassed a huge amount of money in savings (about US$1.24 billion), money that is supposed to be for the health care and compensation of workers and their families yet the majority of workers find it difficult to get compensation from the corporation, and ironically the corporation provides loans to the central government - a clear example of gross misuse of workers' money. Also employers sometimes try to avoid buying insurance for the workers under different pretexts. Sometimes they employ workers as partners (as in the Hong Kong chapter by Chan Kam Hong). In addition it can be seen that there is no provision of immediate relief for the workers as processing claims takes a long time (sometimes years) and if the sole earning member of the family is dead or seriously disabled, this puts the worker and his/her family under a great financial burden.

Whereas there is no cap on the amount of money the employer can make, there is a definite cap on the amount of money a worker can receive as compensation. This is a major problem all across the region. It seems most of the compensation schemes have not been designed to take into account the realistic needs of the

worker. In Bangladesh, as explained by Khan and Hossain, the maximum amount a worker can receive is US$517 for total disability and for death the family cannot receive more than US$362. Besides, workers receive only part of their wages as sick leave allowance during their sickness or hospitalisation after the accident. In a way, workers are penalised for being sick or injured. Death and disability benefits are often capped at a few years' wages (paid usually as a lump sum) and the money is rarely sufficient.

According to the International Labour Organisation (ILO), occupational diseases are the major cause of workplace deaths but in reality occupational diseases in Asia are hardly reported, let alone compensated for. The major problem starts with the diagnosis of a disease. There are very few doctors who can correctly diagnose industrial-related diseases. Lung diseases like silicosis and byssinosis are routinely wrongly diagnosed, sometimes purposely, so as to deny workers any compensation. In this volume we can see from the chapter by Furiya that Japan has made some good progress in this regard. It is perhaps the only country in the world that has set up the standards for compensating death due to overwork also known as 'karoshi'. At most other places in the region the story is dismal. We can take the case of asbestos as an example, banned in most of the western world it is heavily promoted in Asia with India, China, and Thailand being the largest consumers. Thailand has one of the highest per capita usages of asbestos, which can be compared to the peak in the western countries yet there is no official case of asbestos related sickness compensation. Besides mesothelioma (a type of lung cancer caused by asbestos) is not yet diagnosed in most of the Asia Pacific countries.

There are some positive insights in this volume detailing how working for better compensation can actually improve the conditions at the workplace. This can be seen clearly from the case studies from Australia and Hong Kong. A strong trade union is also essential for better enforcement of the workers' compensation laws. As can be seen from Gwynnyth's chapter on Australia, without un-

ion support it is very difficult for the workers to get compensation. However the reality in the region is that there is a very low level of unionisation and a majority of workers do not belong to any union. Informal and sub-contractual workers are also vulnerable as many times they do not have legal protection due to unclear employer-employee relationships. This can be clearly seen in the case study by Tsai and Wan-Ling in the Taiwan chapter.

The victims' movement has played a major role in promoting the right to compensation and overall right to safe workplaces. Japan, Taiwan, Hong Kong, Korea, and Thailand have strong victims' organisations. There is no acknowledgement of the victims' contributions and victims' organisations are struggling to achieve this. Taiwan has made good progress in this regard; the government agreed to build a monument dedicated to the sick, dead, and injured workers at Taipei's 101 complex, which happens to be the world's largest building. However, victims' groups in Hong Kong are still campaigning to get deserved acknowledgement for the victims in Hong Kong.

These chapters also contain some suggestions for the improvement of the existing compensation system. One suggestion, expressed strongly in the introductory chapter by Earl Brown, is to broaden the legal coverage to all workers. There is also a major review needed in the present system in terms of the participation of the workers, trade unions, and victims' organisations in decision-making. At present workers have the least say in running the compensation schemes whereas they should be the major stakeholders in decision-making. Also workers' representatives should represent the medical boards that assess the disabilities of the workers so as to make them more worker-friendly.

This book is a result of more than two years of hard work by the ANROAV members. I would like to thank Furuya Sugio, who came up with this idea based on a similar comparative study in Europe. Professor Voravidh Charoenloet has also provided help guidance and support for this publication. Special thanks to Earl Brown

for writing the introductory chapter for this book based on all his experience and expertise fighting compensation cases for workers. I would like to thank all the authors who have taken out time to write chapters for this book. I would also like to thank Apo Leong, AMRC's director, for his ideas and for editing some of the China chapters. Dae-oup Chang, our research co-ordinator, has also supported this book by providing new ideas all the time and he deserves all my gratitude for his contributions. I feel short of words to thank our editor Ed Shepherd who has meticulously gone through each and every chapter and laid out this book; he even suffered occupational injury in this process. Thanks to Omana George our Communications Officer who made great efforts in co-ordinating the cover design. Last but not the least I would like to thank Oxfam Hong Kong, Oxfam Belgium, NOVIB, and the American Center for Labor Solidarity, Bangkok for their continued support.

Workers' Compensation: A Moral Inquiry

Earl V Brown

Law and Standards Ignored

Were one to openly propose that society should randomly kill, maim, and expose to disease its poorer teenagers and young men and women as a matter of course, outrage would follow. Yet, in the mines, mills, factories, and transport facilities of South, South East, and East Asia, this is precisely what is happening. Industrial and transport workers, most often younger men and women, are being killed, maimed and exposed to industrial diseases at an appalling rate. These younger industrial victims are hard working and productive. They are being ruthlessly sacrificed, and then denied access to health care and means of survival for themselves and their often-young families. Society ignores these deaths and this suffering.

Of course, this state of affairs violates universally acknowledged ethical and legal norms, ranging from the familiar proscriptions of the Lord Buddha, Jesus Christ, and the Prophet Mohammed, to Article 23 of the 1948 Universal Declaration of Human Rights, and subsequent reiterations in United Nations Covenants and International Labour Organisation conventions. See also *International Covenant on Economic, Social, and Cultural Rights*, 1966, Article VII. Every jurisdiction in the region has some form of social protection law that mandates compensation for occupational death, injury, and disease.

But these universal norms are being violated by employers on an hourly basis, to the accompanying silence of moral voices. Is this silence consent? A reflection of the real policy regarding industrial accidents and diseases? For some reason, religious, legal, and academic opinion-makers often see questions of industrial economics and relations as devoid of ethical dimensions, as a sort of moral free fire zone. Sheltered figures in government and academia discourse on competitive labour cost advantages and the need to develop, never adverting to the costs to workers and their families of this industrial mayhem. The costs to our societies as they struggle with the needs of industrial widows and orphans and the families of victims are never toted up. Of course, these are not 'our' sons and daughters or grandchildren, but those of the proverbial 'others'.

There are signs of hope, however. Local grass-roots organisations—notably trade unions, victims' right groups, and legal aid societies—are beginning to challenge the silence that surrounds occupational safety and health in this region. This ground-up movement is supported by experts in academia and in the professions of medicine and law, and by activists in the developed nations.

At the forefront of this global social justice movement is the Asia Monitor Resource Centre (AMRC) of Hong Kong. The AMRC has worked for years to link up community organisations, trade unions, victims groups, and professional activists on a regional basis, to infuse local campaigners with resources and expertise, and to develop regional campaigns against conditions that are, when all is said and done, regional. AMRC thus unites activists and professionals in, inter alia, Nepal, Pakistan, Japan, China, Thailand, India, Bangladesh, Cambodia, and Indonesia in the struggle for health and safe places of work. Currently, the AMRC is waging war against the widespread tolerance for deadly asbestos in work places and elsewhere.

This volume addresses one key element in the overall response to employers who profit from lax health and safety standard enforcement in the work place—that is, creating and enforcing ad-

equate workers' compensation laws. With this volume, activists in this region may now arm themselves with up-to-date information about the legal rights and methods of recourse for workers and their families who have been victimised by occupational accidents and diseases. The need for grass roots campaigns to enhance workers' compensation laws and to improve enforcement of such laws is great.

Unfortunately, the same moral obtuseness that surrounds the topic of industrial health and safety also shrouds the development of adequate occupational compensation laws in this region. Coverage is limited and spotty, leaving millions of workers without protection. Requirements that employers carry insurance are ill defined and, where defined, often unenforced. A major defect is the low level of recoveries—inadequate sums when one considers the actual needs of disabled young workers and their growing families over time, not to mention the needs of the survivors when the result of the employers' failure to provide a safe work place is death. See, e.g., *International Labour Organisation Convention No. 121 (1964) Concerning Benefits in the Case of Employment Injury* (convention establishing methodology for adequate benefit levels).

Employers, trade unionists, and their lawyers throughout the region will candidly admit that the company can all too often 'buy off' a victim's family on the factory step with a lump sum payment that only covers funeral expenses, and some months of food and housing costs. A human life is, in practice, only worth about US$2,500-5,000 in wide areas of Asia—if that! This book will arm activists in communities and mines, mills and factories to fight this cheapening of our humanity.

An adequate system of workers' compensation for industrial disease and accidents is central to alleviating the toll of work-related death and disease in Asia. In the remaining portion of this introduction, I review why workers' compensation is so important and some of the necessary elements of any adequate legal regime for workers' compensation.

The Centrality of an Adequately Designed Workers' Compensation Law

In private enterprise systems, there is a seemingly inexorable logic to labour law compliance—a logic that is mercilessly apparent in the area of industrial compensation. The law only works where it has adequate coverage, sets adequate normative standards and compensation levels, and requires adequate employer insurance. Comprehensive coverage sweeps in most employers and workers, pooling the overall risk and costs. Adequate norms of safety and compensation levels raise the cost of workers' lives and limbs, so that unsafe work places become more costly to the employer, and ultimately, unprofitable.

Strictly enforced insurance requirements again pool risks, and make one arm of private business, the insurance industry, an ally in enforcing work place health and safety. To damp down losses due to deaths, accidents, and injuries, insurance companies enforce the norms on individual employers. Additionally, insurers will rate each employer individually based on actual experience.

Individual employer rating is critical. Only by charging each employer based on that particular employer's occupational safety and health history are law violators adequately targeted and made to pay their 'social' freight. In short, individual rating sets the employer's insurance premium at a rate that reflects that employer's individual health and safety record. If the employer tolerates unsafe conditions, that employer pays a higher premium. If the employer operates too hazardously, the employer cannot obtain any insurance and therefore cannot operate legally at all. This way bad employers are driven out, and safer employers are not forced to subsidise their unsafe and reckless brethren.

But if all elements do not work simultaneously, another logic emerges; if coverage leaves out too many employers and workers, if standards are weak and compensation levels trivial, or if insurance is not required, then the employer who violates the law by running an intolerable shop paradoxically obtains a competitive labour cost advantage over the employer who furnishes workers with a safe work place. Occupational safety and health imposes costs.

Often, employers exaggerate those costs. Certainly, the death toll in this region could easily be reduced with minimal costs—such as, for example, unlocking factory doors to provide a means of egress during fires.

But, satisfying occupational safety and health requirements remains a cost. If any element of the worker compensation system is weak, then the unsafe operator can avoid those costs—putting his or her safely-operating competitor at a distinct disadvantage. In an age of long supply chains and cost obsession, this 'minor' advantage can turn out to be decisive in the award of a contract as brands strive to serve up their goods at a cost advantage, and with profits to placate investors.

Only an adequate law, adequately designed, that is with adequate coverage, norms, compensation levels, and insurance requirements can up the cost of unsafe operations to the point where operating safely becomes less costly and more profitable than operating unsafely. Then, the workers' compensation law becomes not just a law to remediate losses, but also attains an important preventative function as employers and insurers work together to reduce accidents, insurance premium rates and, in the end, suffering to workers and their families.

Conversely, if the law is inadequately designed or enforced, at any point of coverage, norms, and insurance, then an opposite dynamic is set in motion. The unsafe employer can beat out the safe employer and operate at a competitive advantage. This, in turn, motivates employers with an inclination to operate safely to cut corners. Thereby, the entire endeavour of setting and enforcing norms of safety and compensation is undermined. It now pays to violate the law and it costs to comply! This creates an incentive to violate the law, standing the logic of compliance on its head.

For example, occupational safety and health activists know that there is a brisk trade in some countries for very old and unsafe metal milling and tooling machines from Hong Kong and Japan. These disastrous machines exact a high toll of limbs from Asian youth. A well-designed workers' compensation system would drive out this amputating trade. Therefore, activists must pay attention to

the often technical and dry details of the overall design of the law—coverage, norm setting, and insurance administration. To do this adequately, activists must recruit allies in academia, law, and medicine. AMRC, with its regional scope, is pointing the way in this effort to scrutinise and reform workers' compensation law design on a regional basis.

Some Critical Legal Junctures

Apart from overall design, there are several discrete elements of the law that present recurring problems and require attention. These problems are most acute in the area of compensating for long-term diseases.

First, there is the question of causation. This is the legal formulation that determines whether a particular injury, disease or death can be legally attributed to the employer. The rules are often hidden, buried in judicial verbiage. An incorrect standard can nullify an otherwise well-designed law.

A judge in a jurisdiction in this region had a case of a female worker suing her employer, a textile company, for byssinosis or 'brown lung'—a pneumoconiosis caused by inhalation of cotton dust in textile factories. Our plaintiff had a long history of exposure to cotton dust at her factory. Nonetheless, the judge—in "*...a spirit of mutilating narrowness...*" approaching obtuseness—ruled that the plaintiff had not adequately proven that exposure at the work place had caused her condition. *US v Hutcheson*, 312 US 219 (1941) (Frankfurter, J discussing the tendency of upper class judges to misread labour laws). Why, this judicial worthy opined, she could have got the disease from washing clothes at home. Thus, no recovery.

This judge had no evidence to support his peculiar theory, and did not even address the commonsense objection that leaps to mind—why are not the housewives of the world afflicted with byssinosis? He and similar anti-worker judges need to be explicitly directed by the law to award benefits whenever presented with a given set of symptoms and a given period of exposure.

Without such clear rules, a perverse desire to mutilate the law with speculative views of causation and absurdly high proof requirements will prevail. Indeed, for some industries and conditions, formulaic rules of causation should be mandated—x years of exposure + y medical findings = recovery at z level. Judges need to be locked in to the system wherever possible.

A second problem is that of finding doctors to proffer medical opinions that are supportive of claimants. Of course, the employers in any jurisdiction can afford to endlessly contest medical opinion and serve up rebuttals to prove that a worker has contracted a given disease from work exposure.

Many a lawyer for worker compensation claimants can match my story: a client of mine, a long-time coal miner, consulted a noted lung specialist. The doctor read the miner's x-ray to show complicated pneumoconiosis, a condition compensable at a high rate. Later this same doctor was retained by coal companies and read a later x-ray of the very same miner as negative. But, coal workers' pneumoconiosis is a progressive disease, as is most lung disease. Our good doctor had just forgotten he had rendered the earlier diagnosis and remembered now only for whom he worked! This shows the potential variability of medical opinion.

Therefore, workers' compensation awards are best determined by tripartite medical panels with assured input from workers' organisations. This is the only way to avoid common-law trial contests where there is an expensive battle of hired experts—a battle that workers and unions will hardly have the treasury to sustain.

Finally, there is an imperative need to immunise doctors, lawyers, and activists in many jurisdictions in the region from both criminal and civil libel and slander (defamation) laws. All too often, these arcane laws harass doctors, lawyers, and activists who advocate for victims of industrial accidents and disease. This is, of course, not just a problem for occupational safety and health advocates, but for community, labour, and environmental activists as well. Somehow, a legal system that is utterly dysfunctional as to worker or environmental rights springs into effective and deadly action when a doctor speaks out about pestilent conditions in a

factory! Or an activist has the temerity to suggest that factory dormitory doors should be unlocked to provide ingress in case of fires—even if this risks some theft of light bulbs from the employers' storeroom!

As those who designed these laws of criminal and civil defamation well know, embroiling medical experts and occupational safety and health advocates in a maze of legal proceedings, with their certainty of legal fees and risks of imprisonment and fines, is an effective tool of repression. Few medical personnel are will to venture onto the workers' side in this field of occupational safety and health. The threat of litigation is enough to deter most of these few. At the end of the day, it is science and society—as well as workers—that lose from these obsolete and authoritarian laws.

Overall Compensation for Injury

The civil law of remedies—of civil compensation and prevention of losses—is poorly developed in this region. This general systemic flaw inevitably impacts recoveries in employment injury and disease cases. This is yet another hurdle that those seeking to prevent occupational deaths, injuries, and diseases need to understand and confront. In many jurisdictions, the laws or rules for calculating damages for losses are just inadequate. There are no clear provisions for court orders to prevent imminent, ongoing, or future hazards. And whatever inadequate judgments or orders are issued may be difficult or impossible to enforce.

Damages all too often are keyed to criminal penalties that are far too low, and, in any event, were never imposed with an eye to providing compensation over a lifetime for workers that are disabled and their families or the survivors of decedents. Any adequate system for establishing compensation levels should at least take into consideration the cost of living for workers and their families over a decent period of time based on the severity of loss. Care and education of dependants should enter into this equation. It is not too much to suggest that repeat violators and egregious violators should be subjected to punitive damages that go to the victims in order to deter future patterns of illegality.

Courts, labour tribunals, and regulators should be armed with powers to prevent impending or recurrent violations so that more workers do not suffer. It is important to remove repeat law violators from the market place. Not only to protect workers, but also employers who must compete with those violators!

Finally, occupational safety and health advocates need to ally with others—even employers—who seek to improve the laws for enforcement of legal orders and judgments. It is no secret that enforcing court awards, judgments, and orders is a regional problem. See, e.g., *Enforcement of Civil Judgments: Reaching for the Sky,* China Law and Governance Review, No. 2, 2004, www.chinareview.info. After much effort, cost, and time you can win in one tribunal and not be able to enforce your victory in another—where the employer's assets are—even in the same country.

And, where capital is mobile and much investment in industry foreign, there is simply no adequate international law structure for enforcing domestic judgments internationally. Thus, a Thai court award against a Taiwanese company may just languish unenforced, both within Thailand, at other Thai located enterprises of the Taiwanese employer, and also in Taiwan where the major assets of the employer most likely are to be found.

Another defect in the law of remedies in this region that afflicts workers' compensation law is the tolerance for manipulations of the corporate form. By use of the device of paper corporations, domestic and international companies are able to upstream the profits and downstream the liabilities, including workers' compensation liabilities. The operating entity, which killed or injured the worker, is often thinly capitalised and thus relatively 'judgment-proof'. The answer to this is two-fold. First, insurance requirements need to be strictly enforced so that the insurer pays if the violator fails to do so. Employers that fail to obtain insurance should be shut down and charged criminally. And, corporate formalities should not be allowed to win over operating realities where employers fail to adequately insure their factories, mines, mills, and transportation facilities.

Conclusion

This volume should be a good guide to the practicalities of workers' compensation law and practice in this region—a region that is now undisputedly the workshop of the world, and its major source of industrial deaths, injuries, and disease. But, as most readers already know, law is hardly enough. Adequate laws can only be brought into being by movements of workers and activists, and once created, can only be recreated by effective implementation at the instance of those same movements.

Health and Safety Workers' Compensation: the Australian Experience

Gwynnyth Evans

In order to understand the laws on health and safety in Australia we need to understand a little of the history of the country. Before the country was invaded by England the indigenous people had societies that were based on hunting and gathering. When the country was colonised by the British there were six different colonies. These were all developed with separate governments. When they were merged as Australia in 1901, one (federal) government connected them together; they were joined in a federation and the previous colonies formed States. This means that many of the powers were left with the state governments.

This is relevant because the laws covering workers' health and safety and compensation for dead, injured, and diseased workers were left with the state governments, so there are now eight separate laws on health and safety and nine different laws on workers' compensation. The laws are different in each of the states and territories. In order to establish the best laws it would be necessary to take bits out of the laws in each state and combine them.

In Victoria, where Australia Asia Workers Links is based, there is currently a campaign by unions to review the health and safety laws and get the good bits from the laws in all states (and from other countries) and put them into the Victorian Occupational Health and Safety Act. The clauses that we are trying to get into the law are clauses that give workers more rights to organise. The fact is that no matter what is in the laws we find that they only protect

workers where workers are organised to make demands on employers and to force governments to enforce the laws.

The laws that are designe to prevent workplace deaths, injuries, and illnesses are completely separate from those that provide for workers who have been killed, injured, or made or ill by work. Both of these sets of laws are important and there are union campaigns about health and safety and about workers' compensation but they are not seen as the same thing by the workers' movement in Australia.

Most of the questions that need addressing are covered by workers' compensation laws, not health and safety laws in Australia.

In all of the states in Australia, the occupational safety and health laws are about preventing workers from being injured or made ill, so that there are not issues of medical expenses and wages for those who are injured or made sick in the health and safety laws. The compensation laws are very different from state to state.

There are, however, some issues in the compensation laws that are common to all of the states.

In every state it is mandatory for all employers to have workers' compensation insurance.

The compensation system in all states is a 'no fault' system. This means that all workers who are injured at work are entitled to claim compensation. The term 'injured at work' covers all injuries that occur at the workplace or are contributed to by work. It is a very broad term that includes:

- traumatic injuries such as cuts, burns, being caught in machinery, and explosions etc.;
- cumulative injuries, such as musculoskeletal injuries like back injuries, repetitive strain injuries (RSI) such as carpal tunnel syndrome, epicondylitis, rotator cuff injury, noise induced hearing loss, and stress conditions as a result of violence or bullying;
- illnesses that result from exposure to dusts such as asbestos, coal dust, and cotton dust;
- illnesses that result from exposure to hazardous substances (dangerous chemicals);

• diseases from exposure to biological hazards such as HIV, and zoonotic diseases.

In most of the laws these examples are not listed but they define injury as "any physical or mental injury" where "employment is a significant contributing factor" and includes "the aggravation of any pre-existing injury or disease".

Some states also have workers' compensation coverage for any injury that occurs on the way to and from work. In other states these injuries are not covered.

Whilst under the law anybody who suffers a work related injury or illness has the right to claim compensation, the fact is that many workers do not lodge compensation claims. In reality there are many employers who put enormous pressure on workers not to claim. There is also fear that once they have successfully claimed, no employer would ever hire them again. And there is social pressure; anybody who claims compensation is a fraud unless the injury or illness is completely visible.

It is mostly workers with union protection for workers' right to compensation who are able to claim.

In order to make a claim for compensation the worker needs to have medical support. This means that the treating doctors must be prepared to state that the condition suffered is consistent with the work causation. Without support of treating doctors, workers who suffer any of the conditions other than traumatic injuries, have a much more difficult time claiming compensation successfully.

The compensation authorities may accept or reject claims. In order to decide they usually send the worker to a doctor of their choice, sometimes they have investigators check out on the work and/or spy on the worker.

If a claim is rejected there is a formal process of appeal. Again the process of appeal is differs according to state, but all have in common the need to go through conciliation. In some states this is followed by arbitration, without any right to appeal against a decision. In other states the appeal can go through the courts if the matter was not resolved at conciliation. In most of the states it is not

possible for the injured worker to have legal advice at conciliation (even if they could afford to pay a lawyer). In most states the unions ensure the workers' appeal through the conciliation and arbitration procedures.

Entitlements for workers whose claims for compensation have been accepted in all states are:

- weekly payments based on pre-injury wages - the amounts vary in different states; it could be anything between 60 to 100 percent of the worker's pre-injury average wages but in all cases there is some kind of weekly payment;
- the entitlement to weekly payments in some states is for a specific time only (e.g. two years), in other states it is available until a maximum is reached, or in the best systems it is paid for as long as the worker is unable to return to work;
- in all states injured workers are entitled to "reasonable medical and like expenditure" - this mean that doctors' visits, pharmaceuticals, physiotherapy, chiropractics, and surgery are covered by the compensation system;
- workers have the right to choose treating practitioners in all of these areas;
- in most states there are major pressures on workers to return to work, however employers are not under the same pressures to force them to take workers back when they are fit to return; this contradiction makes it very difficult for workers. Only in South Australia is there any serious barrier to employers sacking injured workers. It is only the workers who are members of unions who can put pressure on the employers through collective action who have much chance of being reintegrated into the workforce.

For a large number of injured workers these entitlements (already enumerated) are all that is available.

Workers who have permanent injuries have some method of claiming a lump sum, at least on paper. This varies dramatically in different states. In some states this is by a 'Table of Maims' which assigns certain sums for particular body parts e.g. 'eyesight, both eyes, $150,000'. In other states certain amounts of money are attached to the figure of 'Whole Person Impairment' that is assessed using the American Medical Asso-

ciation's Guidelines for the Evaluation of Permanent Impairment, which is a way of ensuring that it is unlikely that injured workers can receive more than about $10,000 to $25,000 if they can get anything at all.

The other area that it may be possible to obtain some redress again varies from state to state. In some states it is possible to attempt to take a common law case against the employer for negligence if the employer knew that the worker was at risk and did nothing to remove the risk. In other states this is limited and in others it is not possible at all. The amount that a worker can collect is usually capped at about $500,000, but it can be less than this (if this action can be taken).

Injuries from machinery are often permanent and usually leave workers disfigured for life
Photo: Australia Asia Workers Links

If a worker wins a common law negligence case against an employer all other compensation entitlements are no longer available to the worker.

Compensation laws in Victoria are amongst Australia's worst; they were among the best for about five years, but when the right wing capitalist Liberal Party became government they made many legal changes that took away the rights of injured/ill workers. Union campaigns are slowly bringing back some of the entitlements in Victoria's compensation.

But even in states with better laws, it is difficult for workers to get access to their rights unless they are supported by unions.

Whilst the priority that is given to campaigning about health and safety and workers' compensation differs from union to union, the unions in the industries that are the most dangerous usually see health and safety, workers' compensation as extremely important issues.

Particularly in this current period where the Federal government is trying to isolate and individualise workers it is a reality that if workers do not organise collectively around health and safety, more workers will be injured and killed no matter what the laws are on paper and compensation will not be achieved without collective organisation.

Injured Workers' Case Histories

The experience of injured and ill workers varies dramatically. Those who are members of a genuine union that takes health and safety and workers' compensation seriously have a very different experience from those workers who are individuals and not part of an organised, collective group despite the fact that the law is the same in both cases. This is as true in Australia as it is in the rest of the world.

The cases described below happened to two workers in the meat industry in Victoria state, Australia. There are serious injuries and illnesses in the meat industry. Those who are not familiar with the industry can easily imagine some of the injuries like the one pictured left, but there are also diseases, like ones that workers catch from animals) that can kill or make workers ill for the rest of their lives, and musculoskeletal injuries.

Case One

John worked in an abattoir that was the only reasonably big workplace in the area where he lived. The employer told anybody who wanted to work there that they could join the union but if they

did they could look for somewhere else to work. They were only employed on a daily basis and they did not have any rights to sick leave or holiday pay. John worked like this for two years but then he became sick.

He developed a disease that made him suffer extremely high temperatures, serious sweats, and he also developed a skin condition. He went to a doctor who diagnosed the flu and said he had to rest and keep up his intake of fluids. He was told by the abattoir manager that if he took time off the job he would be opting not to work there any more, so he kept going to work, but his condition got worse; he developed pain in all of his joints and continued to endure severe night sweats. He started to lose his short-term memory and developed serious personality problems.

The disease that he suffered from was not identified, but he was not able to keep working at the speed necessary or the regularity required and he was not given any more work. This meant he could not keep paying the rent for housing and he was evicted. He moved in with his brother's family. He developed 'chronic fatigue' where he still woke up with serious sweats that soaked the bed clothes (no matter what the room temperature was) but he was unable to get up and change his clothes and he would shiver while sweating profusely. He became unable to function normally for more than a few hours in a day. His concentration was largely destroyed.

John sought medical assistance but his condition was not identified and often his symptoms were identified as 'psychosomatic'.

John contacted some of the people who he had worked with at the abattoir and he heard that a few of them had some similar symptoms. One of them had found a doctor who was doing far more blood tests looking for the possibility of leptospirosis (symptoms include fever and body aches caused by a bacterium which damages liver, kidneys, and lungs or can cause meningitis), Q fever (a disease caused by a bacterium that can be caught from agricultural or domestic animals), brucellosis (another animal-borne disease with similar symptoms to the foregoing), or rickettsia.

Eventually John found a doctor who started to work systematically through all of the possibilities of animal linked diseases (zoon-

oses). The rickettsia bacterium was eventually isolated and identified as the source of the symptoms that he had suffered for seven years. Unfortunately the antibiotics that may have been effective against rickettsia in the early infection were not effective in curing John; there is no known effective treatment or control if it is not treated early.

John did put in a workers compensation claim but that was rejected. He sought advice from solicitors who say that they would pursue his claim for him but that he must be prepared to pay them if they did not win the case. John has no money, no assets, and no capacity to work because he is extremely ill with a disease that has no known cure. How can he risk having larger legal bills when he is trying to prove that he was infected at work years ago? The company that employed him has changed its name and legal entity twice in those years.

As an individual John is in a *Catch 22* situation.

Case Two

Joanne is a meat packer. She developed carpal tunnel syndrome (CTS) in both of her wrists. She was in constant pain that grew worse when she was in the cold; the packing room that she works in is maintained at four degrees Celsius. She could not control the strapping equipment any more or hold a cup, or do up buttons, or dress her child. She was waking at night with total numbness in one hand and tingling in the fingers on the other. CTS is a condition that is not visible. Joanne went to a doctor who told her that she was having 'hormonal problems' and gave her a wrap to put on her wrists at night.

Joanne worked in a workplace where most of the workers are union members who had recently elected a union delegate to the position of Health and Safety Representative representing the 70 packers. The Health and Safety Rep did a body mapping exercise with the packers. Joanne realised that a lot of the packers were having problems with their wrists and hands. They talked together and found that most of them had not consulted a doctor at all. The Health and Safety Rep advised them that there were people in the

union who could help them to find a doctor who knew about work-related health. They contacted the union who made appointments for them with the Workers Occupational Health Centre (WOHC). Joanne had the worst CTS and the doctor said that she needed time off work and had to have more tests to see what treatment would be best. The WOHC doctor gave her a certificate for two weeks off work.

Machinery that was invented to cut up dead animals is just as effective on live humans, causing horrifying injuries
Photo: Australia Asia Workers Links

Joanne spoke mostly Macedonian and could not read the WorkCover (an Australian system that promotes safety and health at work, and provides a workers' compensation scheme for the employers and workers) claim form which was in complex English. The Health and Safety Rep helped her to fill out the forms and went with her to hand them over to the company manager. The Health and Safety Rep told her that if there were any problems Joanne should contact him and if she had any questions about her rights she should find out from him or the union office.

The company's insurance company contacted Joanne to tell her that their doctor would have to examine her. She was also contacted by the insurance company's 'loss adjustor' who wanted to visit her at home to investigate her claim. Joanne's union told her that she had to go to the doctor but did not have to see the loss adjustor. On the first pay day that she was off work Joanne was not paid anything. She contacted her manager who told her that they

did not have to pay her anything while the insurance company decided whether her claim was accepted or not and that this would be about five or six weeks, and that she should come back to work. She was distraught as she was a single parent and did not know how she would feed the children. She contacted her union, which found out that she had entitlements to sick pay and annual leave. They made sure that they would pay her out of her entitlements while her claim was being evaluated.

The doctor that the insurance company sent her to looked at her for about 10 minutes and stopped her from speaking when she tried to tell him how her hands felt.

After two weeks the WOHC doctor gave her another certificate for four weeks off and organised an electromyogram (EMG - records the electrical activity of muscles) for her and go to a physiotherapist for specialised hand exercises. The doctor explained that they would not charge her as they were sure that her condition was work-related and they would wait until her claim was accepted and the insurance company would pay them.

After six weeks a letter from the insurance company told Joanne that they denied that she had a work-related injury and rejected her claim. She contacted the union who helped her to appeal against the decision and explained that the case had to go through a conciliation process before it would go to the court.

The union also worked with the doctor from the WOHC, assisted her through the bureaucratic processes, and arranged for her to receive government sickness benefits until the insurance company paid on the work injury.

The union paid for medical reports to take to conciliation and obtained the material from the insurance company, which it had used to reject the claim. Conciliation happened three months after the appeal was lodged. The union provided an advocate who argued her appeal.

The conciliation panel ruled that the insurance company should pay Joanne weekly (based on her pre-injury wage level which was more than her sickness benefits had been) and to pay all medical

costs for treatment that had already happened and whatever was needed until she was better, including surgery. Although the insurance company would not 'accept liability' it agreed to make all payments in accordance with the law.

Joanne did not need to go through the court system but if necessary in future, Joanne's union was prepared to underwrite the legal costs if the lawyers handling the case agreed to represent her on the basis of only charging legal fees if they were to win the case.

When the weekly payments came through, the insurance company paid back to the government the amount that Joanne had received in sickness benefits. Joanne's Health and Safety Rep then made sure that her record at work reinstated her entitlements to sick leave and annual leave.

Joanne continued to be treated by the doctors at the WOHC who organised surgery on her wrists carried out by specialist hand surgeons and hand therapists. It was another six months before Joanne was able to consider starting work again. The WOHC doctor clearly identified what she could do and what she could not do. The doctor visited her workplace and identified clearly what should be part of the return to work. The Health and Safety Rep helped by making sure that Joanne was supported by the workers when the supervisor tried to force her to do more than the doctor recommended and they gradually built up the number of hours and the nature of her tasks.

When she returned to work Joanne was surprised how the flow of work in her area had changed and how new equipment had been brought in to reduce pressure on her arms. The workers collectively had convinced management to make some improvements.

Joanne found that the Body Mapping, which had been crucial in making her realise that her CTS was work-related not hormonal, had also been a useful tool in arguing for improvements in workplaces.

What To Do

Australia Asia Worker Links

(Originally prepared by the Victorian Woodworkers Association)

Dealing with work-related injury or illness is difficult enough without having to deal with the legal set up. It is, however, necessary to deal with the WorkCover insurance system. It is even more problematic if your employer claims that every WorkCover claim is fraudulent.

Basic rules that you should follow

- Record any injury in the workplace Injury Register even if the injury is minor and does not cause you to go to a doctor or to go home.
- Get a copy of the record in the Register - your employer must give you a copy.
- Do not let your employer convince you that it is better not to put in a claim. If management tries to sack you for putting in a WorkCover claim, it is acting illegally and we will pursue this.
- Take your delegate or Health and Safety Representative with you so that there is a witness to your reporting.
- If you need to see a doctor, choose your own doctor, you do not have to get your treatment by a company doctor and we advise that you use doctors of your own choice who are totally independent.
- If you need time off work the doctor should give you a special WorkCover Medical Certificate, not an ordinary Medical Certificate.
- Even if you do not need time off work, but do need different duties or treatment such as physiotherapy, massage, or pharmaceuticals, get a WorkCover Certificate.
- You have the right to choose the treating practitioner (doctor,

surgeon, physiotherapist etc.) management cannot tell you who you have to see for treatment.

- You must sign the back of the WorkCover Certificates.
- Ask your doctor to give you a photocopy of it. You should keep a copy of every certificate before giving the original to your employer.
- Fill in a WorkCover Claim Form which is much longer and more complex than the Medical Certificate.
- Get your delegate, Health and Safety Rep, or organiser to help you fill in the claim form. There are a number of places on that form where making a mistake could reduce your entitlements.
- You need to give both the WorkCover Medical Certificate and the WorkCover Claim Form to the employer.
- If you hand the claim in personally take a witness.
- If you post the forms, use Registered Mail so that there is a record that the claim was received.
- Keep a copy of the claim form. You are supposed to be given a duplicate when you hand it in but it is often too hard to read so making a photocopy is a good idea.
- If your employer is unwilling to accept your claim, contact your delegate/organiser as soon as you can.
- If you are not losing time off work or need less than 11 days off work, your employer can decide to accept your claim and keep paying you normally. While the employer has to provide paperwork to the Victorian Woodworkers Association (VWA) they do not have to wait for the WorkCover investigation before paying you the first 10 days off work.
- When there is an injury in the workplace, there should be an investigation into the cause of the injury. The Health and Safety Reps should be involved in the investigation. The changes that are necessary to prevent you (or anybody else doing the work) from being injured further/again should be put in place.
- If the injury is going to result in more than 10 days off work, the WorkCover Agency (i.e. the insurer) decides whether the claim is accepted or not.
- The VWA Agency may make an appointment for you to see a doctor of their choice. You must keep the appointment but you should

be given one week's notice.

• If you do not keep the appointment your claim goes into limbo and is not processed any further.

• An Investigator (or Loss Adjustment Officer) may ask to meet you. You do not have to meet this person. An interview with this official is often used to find an excuse to reject your claim. Usually we advise you to refuse to talk to Investigators; certainly never see them by yourself and if you do feel that you must speak to them, organise the interview on neutral ground (not at home) and make sure that you have your delegate/organiser with you. It might be in your interest to meet the Investigator when the cause of your stress is the behaviour of a person at work (e.g. a bully) and you need to make a complaint and have it investigated.

• While the WorkCover investigation is happening (this is up to 28 days after the paperwork has been given to the VWA Agency) you may not get any wages. In this case it is possible to negotiate with your employer to allow you to use accrued entitlements such as sick leave or annual leave.

• Once your claim has been accepted you are entitled to receive back pay, from the date of injury.

• If you have used accumulated entitlements they must be re-accredited to you; check that they have been.

• If you are offered alternate or modified duties (light duties) at work, the offer should be in writing and you should take it to your doctor to discuss the duties.

• Your doctor should go to the workplace to see whether the duties are appropriate for your condition.

• In any discussion with management you have the right to have your delegate or Health and Safety Rep with you.

• Always have a witness to such discussions.

• In the workplace there should be a Rehabilitation Policy which has to be developed in consultation with the workforce.

• If management claims that there is a Policy but if it was not negotiated then you should get the delegates/Health and Safety Reps to re-open negotiations with management; they must consult with workers, not develop it unilaterally.

• One major issue that has to be negotiated is which Occupational

Rehabilitation Providers can be used.

- If your doctor provides a WorkCover Certificate that states that you are able to return to work on 'alternate duties' or 'modified duties' your employer has to try to find appropriate duties and make you an offer.
- Make sure that your doctor writes details of any limitations to be placed, e.g. no lifting more than 10 kilos, no twisting, no bending, no repetitive use of right arm, or whatever is appropriate. It is not in your interests if the doctor writes 'light duties' with no details.
- If your employer claims that there are no duties for you until you can do your pre-injury duties, talk to your delegate/Health and Safety Rep and take it up with the organiser if necessary.
- Your employer must provide suitable alternative duties if it is at all possible for the first year of incapacity. This does not mean that the employer can automatically sack you after a year but the situation is more complex and relates to the Workplace Relations Act more than the Accident Compensation Act.
- If your claim is accepted, the insurer may send you to a doctor for an 'independent opinion' on a reasonably regular basis (e.g. every six months); you must co-operate.
- They may also have you observed by private investigators if they think that you are more physically capable than your certificate says. The investigators might follow you and video you doing things such as hanging out washing or doing exercises. The investigator is not allowed onto your property but it is legal for them to sit in a car outside if they have notified the police. If you feel that you are being followed or watched, ring the police and report the person. That way if they have notified the police you will know that it is a formal investigation and not somebody who is casing your house for burglary or a person who is threatening you.
- If you are offered alternative duties (that must be in writing) that your treating doctor says are suitable, you must co-operate. If you do not, your WorkCover entitlement will be terminated immediately.

In other cases if the VWA intends to terminate your weekly payments or medical and like expenses they must give you either two weeks or four weeks written notice.

Workers' Compensation Commission: A Real Challenge for Bangladeshi Trade Unions

Shajahan Khan and Abul Hossain

Bangladesh has witnessed two independence struggles. First it got its independence from British in August 1947 and was became what was then the East Pakistan and on December 16, 1971, it got its independence from Pakistan which resulted in the creation of Bangladesh. Bangladesh remains one of the poorest nations in the world. In UN terms it is put under the group of 'Least Developed Countries'. Statistically, it can be seen that in terms of global poverty, its position ranks second lowest. In 1991, it was found that 28 percent of the Bangladesh population was living below the poverty line; in 1995-96, it was 25 percent; at present, 43 percent of the Bangladesh population is living below the poverty line. Poverty can be seen everywhere. According to official sources, each of the 132 million people in Bangladesh on average survives on an annual per capita income of only US$386. Bangladesh's position ranks number 138 on the Human Development Index prepared by the United Nations Development Programme in the year 2004. In particular, the status of our women is really bad. According to experts there are five main causes for its poverty:

- Natural disaster;
- Diseases and lack of resources in the health sector;
- Lack of social security;
- Lack of employment security; and
- Unnatural death of key family earners

Occupational Safety and Health

Industrial workers in Bangladesh continue to remain in darkness about their OSH rights. Even trade unions are not aware of it; if aware they are not able enough to raise awareness among the workers. Everyday, a huge number of working people fall victim to accidents in workplaces particularly in factories, construction sites, agricultural farms, garment and leather production, transport, fishing, launches, and other industries. All these accidents cause injuries that can lead to permanent disability and sometimes death. Occupational safety and health invalids remain unemployed and the resulting lack of income as well as lack of access to medical services ruins their families. As a consequence, their dependants live from hand to mouth and children have to start working; some take to crime. Neither government nor the owners of industry accept their responsibilities to help or rehabilitate these unlucky families.

Occupational hazards, on the other hand, resulting from flouting of health and safety legislation is widespread in the industrial sector of Bangladesh. Various entrepreneur surveys have found that the word 'occupational safety and health' is almost unknown to the employers. The problem is widespread even in the garments sector, which is one of the largest industrial sectors in Bangladesh Employers in this sector believe that there is no hazard in garment sector since, according to them, it does not involve any hazardous technology and hazardous chemicals. According to them, the possibility of workers death due to accident at work place is very rare and there is a general belief that disability due to injury or disease is almost zeroing in this sector. However, the findings of a research institute in Bangladesh the Bangladesh Institute of Development Studies (BIDS) have shown that occupational hazard is the main reason for the prevalence of widespread diseases and illness among the garment worker.

OSH and Workers Compensation Laws in Bangladesh

The Factories Act 1965 has evolved from the Indian Factories Act 1881. This act underwent lots of modifications during the colonial period, influenced by the establishment of International Labour Organisation (ILO) in 1919. The amendments in 1940 extended the Act's provision regarding health, safety, hours of work and conditions of employment. During the Pakistan Regime the Act applied till 1965 when the East Pakistan Assembly replaced it and enacted East Pakistan Factories Act 1965 which has remained more or less unchanged in the independent Bangladesh.

The Act along with the Factories Rules of 1977 mainly covers working hours, payment of overtime, leave and holiday, occupational safety and health, welfare and punishments for non-compliance with them.

The Workmen's Compensation Act, 1923, provides for compensation payment by certain classes of employer for occupational injury of the worker.

The Employer's Liability Act, 1938, defines certain defences that may not be raised in suits for damages concerning injuries to workers.

The Fatal Accidents Act, 1855, provides for the compensation for loss occasioned by death of the person caused by actionable wrong. A worker is entitled to Tk 30,000 (US$520) as compensation for death or permanent injury.

The Laws - and the Reality

Bangladesh like India and Pakistan has inherited most of the Colonial British Laws and most of them except for the minor modifications have not changed over the years. After almost three decades of independence, Bangladesh has still not reformed its laws as circumstances demand. Its existing worker's compensation laws are rigid and out of date. The Fatal Accident Act, 1885 provides for compensation to families for death of family members caused by lack of safety in the workplace. The Workmen's Compensation Act,

1923 states briefly how and to what level workers can apply for benefits. According to this law, an injured worker or, in case of death, his/her family is entitled to compensation as follows:

Monthly wages of injured worker (Tk)	Amount of compensation (Tk)	
	death	total disablement
0 to 100	8,000	10,000
101 to 200	12,000	16,000
201 to 300	14,000	19,000
301 to 400	16,000	21,000
401 to 500	18,000	26,000
501 and above	21,000	30,000

Note: US1.00 = Tk60

At present, the national minimum wage is above Tk 500. According to the Workmen's Compensation Act, 1923 the surviving family of any victim of a fatal workplace accident will receive $362 (Tk 21,000) only and in case of total permanent disablement the worker is entitled to $517 (around Tk 30,000) only. It is unbelievable that the life of a worker in Bangladesh is worth only $362, and that the value of their ability to function normally is just $517. Labour code of 1994 proposed highest amount for death $1052 (Tk. 61,000) and total disablement $1492 (Tk. 86,000), but it has not been passed by the parliament yet.

The same law states that, in case of temporary disablement, compensation shall be paid for the period of disablement or for one year, whichever period is shorter. In the first two months, 100 percent of the wage shall be compensated, while in the subsequent months, two thirds of monthly wages shall be paid. The amount of compensation varies between public sector workers, who receive the legal sums, and the private sector where it is much more difficult to receive the standard. However, this Act covers only limited number of industries in the private sector also. Victims of accidents, which occur mostly in the private sectors of agriculture, leather and garments factories, ship breaking, engineering and construction, cannot take advantage of the existing laws; in these cases the Department of Labour's performance is almost invisible.

It should be noted that Bangladesh has a labour recruitment policy that in most cases leaves the workers without any specific benefits. The policy contains the provision that workers are entitled to appointment letters, but whether the workers are given these letters depends on the sweet will of the employer. Although it is a basic right, due to lack of supervision by the concerned government department, the employers intentionally and regularly violate this right. As a result a labourer may be retrenched by the employer at any time.

In addition, workers in high occupational risk sectors are not awarded any extra remuneration. Because of widespread occupational hazards, most workers suffer from chronic ill health. Section 3(2) of the Workmen's Compensation Act, clearly states how a work related disease will be considered and what will be the role and responsibilities of the employer or owner of the workplace. But the situation is complicated because diseases are not legally defined.

Hazard Allowance

In many workplaces in Asia and even globally, workers are sometimes paid extra money which is termed as Hazard or Danger allowance. This is a monetary benefit they receive for the obvious risk they take. In places where workers do not receive such allowances, Trade Unions sometime demand extra money for the dangerous or risky jobs. There is nothing bad in demanding extra money. However, unions and workers should be careful as extra money does not save them from the actual hazards. They will be susceptible to accidents or diseases as the case may be. In long tern this extra money is insignificant compared to the price worker and her/his family may have to pay if he is injured, diseased or worse dies. In addition management may refuse to pay for the medical treatment in case of an accident or disease using this allowance as an excuse. This should be the last resort used at the workplace and primarily one should work towards making workplaces safe and healthy for workers as much as possible.

In fact working conditions and health hazards as a whole have changed over time. Unfortunately the old-fashioned law does not suit the present workers' situation at all, yet the authorities seem not to be even remotely concerned about such crucial issues. It is regrettable that the 'National Health Policy 2000' did not emphasise labour health issues as it needed to. Every year, hundreds of accidents cause thousands of deaths and disablement; it is high time that the seriousness of this situation is acknowledged; government should protect labourers' interests and work to save their lives and families as well as well as setting up a Workers' Compensation Commission to resolve all kinds of disputes.

National newspapers report how bad the situation really is:

- In 1991, 144 workers died and 620 were injured in accidents at workplaces.
- In 2001, 196 workers died and 508 were injured.
- In 2002, 168 workers died and 389 were injured.
- About 12,000 people died in road accidents every year. Nearly 65 percent of them are working class passers-by.
- About 1,620 people were murdered from January to June in 2003. Most of them were workers.
- About 4,000 people died in 496 launch accidents in the last 30 years. Most of them were workers with dependent family members.
- About 0.5 million (5 Lakh) working class people died in floods, cyclones, and fishing-boats in the last 10 years. Most of them were workers with dependent relatives.

Occupational Accidents in Garments Factories

Garment exports from Bangladesh constitute more than 70 percent of the total exports and earnings of about $6 billon, employing about 1.6 million workers in 3500 factories. Most of the Garment factories are located in the residential and commercial area of Dhaka, Chittagong, Narayanganj, Tongi, Gazipur, Saver etc. Most garment factories hardly comply with safety rules. So, naturally the garments workers have to suffer a lot of occupational accident. In the last decade about 50 major and minor fires broke in the garment industry resulting in death of more than two hundred workers injuring more than 1,000 workers.

Major Fires in Garment Factories in Bangladesh: 1991-2001

Factory Name	Cause of Accident	Date of Accident	No. of Deaths	No. of Injured	Compensation (Tk)
Saraka Garments, Dhaka	Electric short circuit	27-12-90	27 inc. owner	100	23 x 25,000 = 575,000
Proster Ind Mirpur, Dhaka	Electric short circuit	11-12-94	05	50	5 x 50,000 = 250,000
FA Fashions Dhaka	Electric short circuit	05-08-95	10	50	9 x 50,000 = 450,000
Tymud Fashion Dhaka	Electric short circuit	24-06-96	14	60	12 x 29,00 = 348,000
Rahman & Rahman Apparels, Dhaka	Electric short circuit	15-07-97	22	200	9 x 29,000 = 261,000
Tamanna Garments, Dhaka	Electric short circuit	30-07-97	27	100	25 x 29,000 = 725,000
Novaly Garment, Dhaka	Electric short circuit	06-09-97	5	50	5 x 29,000 = 145,000
Palmal Garments, Dhaka	Boiler burst	22-06-99	10	Nil	10 x 100,000 = 1,000,000
Rose Garments, Gazipur	Electric short circuit	09-07-99	5	50	-
Globe Knitting, Dhaka	Warehouse fire	27-08-00	12	50	9 x 100,000 = 900,000

Proposal for Workers' Compensation Commission

The Garment Workers Tailors League (GWTL) has been asking the Government to establish a Workers' Compensation Commission. It is believed that such a Commission formed by the government can work to change or modify our existing laws. It could help by taking the initiative for the well-being of working people.

A Workers' Compensation Commission is the union's most urgent demand from a humanitarian point of view. The union expects the sincerity and goodwill of the government to protect the interest of workers. In order to establish the Commission, the government can raise the necessary funds in various ways, such as:

- Through insurance policies;

• From the owners of the companies;
• Defining a specific amount of export and import earnings to be contributed to the Workers' Compensation Fund.

Garment factory in Dhaka
Photo: Bangladesh Occupational Safety, Health, and Environment Foundation

Main objectives of the Commission

• To establish the legal rights of workers' protection concerning occupational health and security;
• Proper implementation of labour laws in the industrial sector;
• To improve the level of occupational health and security and the health of labourers;
• To implement supervision of operational rules such as working conditions, wages, duty hours, insurance, leave, and appointment letters;
• To determine the nature and range of occupational accidents and diseases;
• To establish a system for paying compensation to workers immediately for any kind of workplace accidents, as well as the initiatives necessary to rehabilitate the victims' families;
• To put regulations in place for paying compensation and other relevant procedures as at present there is no homogenous law for workers' compensation;
• To organise effective training and advocacy programmes for workers about occupational risks and hazards;
• To ensure that all workers and employers are brought under a single compensation scheme.

Union recommendations

- In case of any appointment, both permanent and temporary, the basic criteria should mandate membership of the Workers' Compensation Commission;
- From the security point of view, night work should be stopped. Dangerous jobs especially should be strictly prohibited at night. Working times must be determined according to International Labour Organisation (ILO) conventions, the only universally accepted international laws and standards protecting workers;
- To introduce a special code of conduct regarding workers' security, welfare, and remuneration as well as pension and gratuity during retirement;
- Each workplace's fire control centre, health complex, and workers' welfare centre should be managed by the Workers' Compensation Commission;
- The Workers' Compensation Commission should be on the basis of ILO conventions. Workers, government, and factory owners must work together regarding the working environment. The Workers' Compensation Commission will work as an umbrella for planning and implementation of the labour code of conduct;
- All forms of child labour should be strictly prohibited and stopped through the proposed commission;
- The Workers' Compensation Commission will arrange special training for owners as well as workers. It will introduce appropriate labour laws and health and security training as set out in ILO standards;
- The Workers' Compensation Commission will be the sole responsible authority to ensure the rights and welfare of the workers. All administrative districts will be covered by the Commission;
- The Workers' Compensation Commission will play the key role in negotiating all kinds of labour disputes between government, owners, and workers;
- If necessary the Commission will arrange bi-lateral and tripartite meetings of the government, owners, and trade unions, to solve disputes regarding occupational health and security;
- The Workers' Compensation Commission will introduce mandatory insurance for workers and their families;

• To establish immediate workers' compensation, the Commission will start a campaign and build up a solidarity network with all affected sectors of society, such as civil society, news media, social institutions, and trade unions to push the government to set up this Commission.

The union believes that all these recommendations are possible if there is a free and independent Workers' Compensation Commission.

The union demands provide for all workers and employers under the proposed Commission, including:

- All types of women workers;
- Young workers;
- Temporary/seasonal labourers;
- Labourers working in the informal sector;
- Migrant labourers (domestic or abroad);
- Unemployed labourers;
- Sick labourers; and
- Elderly labourers.

This chapter was compiled from two presentations by Shajahan Khan and one presentation by Abul Hossain to an ANROAV meeting in 2003

Compensation cases: slow, unfair, and usually unpaid

A 19-year-old worker, Kamal, was electrocuted at Peoples Garments while ironing clothes made for one of the world's biggest retailers. He died instantly in Mirpur over **ten years ago**. On union advice his mother submitted a petition to the Dhaka Divisional Deputy Inspector of Factories for a legal suit against Peoples Garments, which, giving subcontracted work as a reason, flatly refused to compensate.

The Inspectorate filed a case in the Labour Court following an investigation. But Kamal's mother has still received no compensation because of the legal tangle.

Munna Khan, a worker at Maran Chand, died aged 54. He had been working for the sweetmeat outlet for over 35 years. Among his dependants is his handicapped daughter. Munna's relatives applied to Maran Chand for compensation, but received nothing.

Idris Ali, a casual worker, earned between Tk 2,500 (US$42; US1 = Tk 59) and Tk 3,000 a month at a re-rolling steel mill in Narayanganj. A terrible incident at work crushed both of his legs, leaving him unable to provide for his family of five, and he has languished at home in Netrokona district since 2003. The owners gave him Tk 3,000 and sent him home, but denied him his legal entitlement according to compensation law. His wife Shahara Khatun works as a domestic worker in the Mirpur area.

Like Kamal, Munna, and Idris, millions of blue-collar workers of the country have no effective social safety net. They get virtually no compensation from the employers for doing precarious jobs or for accidents. If paid, relatives of a dead OSH victim receive only a meagre amount of compensation but even this is usually not paid.

What is more appalling is that the 'value of life' of a worker is a paltry US$362 or Tk 21,000 which he is entitled to by the country's age-old labour law. Family members of an accidental death victim cannot claim more than this amount within the ambit of the law enacted during the British period.

From 'The Independent' (Bangladesh) on-line newspaper, 17 April 2004, sent to 'Asian Labour Update' by Badruddoza Nizam, General Secretary of Garments Tailors Workers League (GTWL), Bangladesh, affiliated with ITGLWF/ TWARO and Member of the TU-OHSE Working Party on Health, Safety and Environment

China: Gem Factory Victims Speak on Silicosis

These case studies are based on oral presentations at a meeting in Hong Kong of three workers who used to be employed in a gem factory in China and are now suffering from silicosis as a result of that work.

Worker 1

I started to work for a gem factory in Shenzhen in 1991. At that time I was earning only 148 RMB per month. From the very beginning I had no idea what impact this kind of work would have on my health. When I joined the company, like many other workers, I had no employment contract. However, we were so poor that we did not care about the contract. There were few hundred workers in this factory at that time. The working conditions in the factory were very bad. The work involved cutting off big chunks of precious stone into smaller pieces and processing them. Although this created a lot of dust, there were no dust control measures in place. There were some fans but they made no difference - there was so much dust that it was even difficult to see those working at the far end of the workshop. Everyday, when we started the work, we were very clean but by the time we had finished the work our bodies used to be covered with a thick layer of dust. The management did not provide us with any personal protective equipment (PPE) to protect ourselves from the dusty environment.

When I started work in the company, I was very strong and healthy. However, presently I cannot lift even light weights. Walking normally causes no problems, but if I try to climb stairs or do some hard work, I become breathless and have to stop. From our

faces we may seem normal but our bodies are damaged internally. We cannot find new jobs as we cannot do any hard work and thus it is very difficult for us to support our families. Our employer does not care about as we are of no use to him now. In the past when we were healthy and useful to him, he would often greet us and promise incentives for us if we worked hard but now he does not even want to see us.

This employer is really very bad. I have a very good family with two kids. As I have no income, my children cannot go to school any more. I know it is my responsibility to send them to school, however with no earnings I don't know how to fulfil this responsibility. I am also heavily in debt, borrowing money from my relatives. My elder son was in High School and the younger one in Junior High but both of them have dropped out now. They were very good at studies. I have a feeling that my kids hate me now as I cannot send them to school.

Worker 2

I was shocked and devastated when I came to know about my disease. I was the sole earner for my family and they depended heavily on me, so when I contracted silicosis it was like a pillar coming out of the foundations. It has been four years since I got this disease; I have had to borrow money from my relatives for medical expenses and now I am heavily in debt.

When I found out about my disease, I tried to find my boss but the factory had closed and moved to a different place. My family always expects that I will get some compensation but I have no courage to tell them that I have got no compensation. Most of the workers who got this disease are in their late 30s or early 40s. I have to support my family back at the village, as it is very difficult for them to get jobs there. However, getting a job is becoming almost impossible due to our deteriorating health. We can only do light work that does not involve too much exertion and even though we are ready to work for any wages no one offers us such jobs. My employer has been moving from one place to another and it has been impossible for me to have a face to face negotiation with him.

When the factory moves, they move everything, every material so that there is nothing to trace them and the employer is always avoiding us. We also sought the help of local government but it was of no use.

Worker 3

I worked in the factory from 1991 to 1995. After leaving the factory, although I was exposed to silica dust in the gem factory, in the next four and a half years I did not feel any pain or suffer problems due to the long latency period of this disease. I was arrested on fake charges of stealing gems and spent three years in prison. Then I was cleared of all the charges of stealing gems from the factory. Shortly after I came out of the prison, I started to feel pain in my body and felt there was something wrong with it. I was then employed in the new factory (same factory at a new place). I went home to my village around that time and was very sick. The medics at the village diagnosed my disease as tuberculosis. Then I went to the city hospital where I was diagnosed as suffering from silicosis. This was in 2002, seven years after I stopped work.

My sickness has put me in great financial debt as I have borrowed more than RMB200,000 from different sources for my treatment.

My employer has been using various tactics to avoid paying compensation. First he told me that since I got the disease at the old factory, the new factory is not responsible for my compensation. He also told me that the diagnosis of silicosis carried out in my province (Sichuan) is not valid in Guangdong province. I tried to seek the help of local authorities but nothing seems to have worked. I have been trying to find my employer but he has been evading me all along. Now I am here in Hong Kong and I hope I can catch him.

Development and Problems of Work-related Injury Insurance System in the People's Republic of China

Sun Shu-han (Translators: Chine and Apo Leong)

The workers' compensation system in China was first established during the early years of the People's Republic of China. On 25 February 1951, the former Government Administration Council promulgated the Labour Insurance Regulations and in 1953 issued the Decision on Several Amendments Regarding Labour Insurance Regulations. Both laws signalled the preliminary establishment of workers' compensation system in China. After that a series of minor amendments were made (mainly in extending coverage and increasing benefit levels. In 1957, the Ministry of Health listed 14 categories of occupational diseases, which brought further expansion of coverage as well). The workers' compensation system in this period played a significant role in protecting city and township workers' health and safety.

The implementation of the so-called Cultural Revolution in 1966 led to serious damage of the social security system. The work-related injury insurance together with other social insurance systems regressed to "Enterprise Insurance" which is a de facto employers' liability meaning that total liability lies with an individual enterprise. After the fall of the Gang of Four in 1976, China started economic reform by adopting an open market policy to replace the planned economic system. The deficiency of the existing Enterprise Insurance surfaced. On the one hand, old industry (heavy industry and high-risk industry) is left to bear the historical burdens of the injured and the dependents of deceased workers from the past,

as well as increasing medical costs and aftercare of new injuries, diseases, and deaths. On the other hand sunrise industries enjoy a much lighter responsibility. Also, due to historical reasons, existing laws and regulations only apply to state-owned enterprises and collectives but fall short of covering the majority of joint ventures, which started to boom in the 1980s. The Enterprise Insurance system could not cope with this trend where, sadly, the number of occupational deceases and industrial accidents are on the rise.

This (barely compensated) young woman still suffers from injuries inflicted by the Zhili Toys factory fire in 1993
Photo: Li Jia Hao

For the purpose of putting the market economy in a better shape, enhancing a reasonable labour force flow, and of establishing a modernised enterprise system and improving workers' health and safety, the former Ministry of Labour issued Provisional Provisions on Workers' Compensation Insurance for Enterprise Employees (LAOBUFA [1966] No. 266). Earlier, the government issued Assessment Standards for the Level of Disability Caused by Work-related Injury or Occupational Diseases (GB/16180-1996) in order to give a fair and objective assessment on the level of disability caused by work-related injuries or occupational diseases. The promulgation of LAOBUFA concluded all pilot programmes for reforming the work-related injury insurance system across the country during the past few years. Subsequently, the work-related injury social insurance system started to improve gradually.

However, the LAOBUFA is only a ministerial level regulatory document, which has weak legal binding. The Regulations on Workers' Compensation Insurance (RWCI) (State Council Decree No. 375) promulgated on 27 April 2003 (effective from 1 January 2004) means a revolutionary breakthrough for China's work-related injury insurance system, marking a new era of the system.

Given that China is currently reaching the fifth peak period of industrial accidents, the regulation is like just-in-time rain, like a big umbrella opening to protect workers' rights. It signals progress from a ministerial level regulatory document to an administrative regulation at State Council level. The authoritative level and legal status are both much stronger and play a very important role in regulating work-related injury insurance system and promoting prevention of industrial injuries and enhancing rehabilitation.

Accidents and Deaths in China's Coal Mines, 2004

	Number/% of Accidents			Number/% of Deaths		
	2004	+/- 2003	+/- 2003 %	2004	+/- 2003	+/- 2003 %
Industrial deaths	14,702	-294	-5.91	16,497	-829	-4.78
Coal mines	3,639	-504	-12.17	6,027	-407	-6.33

Source: State Administration of Work Safety, 2005, in Source: CSR Asia Weekly Vol. 1 Week 8

1. Raising Legislative Levels and Broadening Coverage of Work-related Injury Insurance.

The new RWCI clearly stipulates: "Workers in any kind of enterprises and employers of individual industrial businesses within the People's Republic of China have equal rights to access work-related injury insurance according to the regulation." The RWCI specifically highlights: "The worker in this regulation refers to a labourer who has a working relationship with an employing unit (including a formal labour relationship) in any form of employment, during any working period." The regulation broadens the targeted group, which is a breakthrough from segregating different forms of ownership of industry that include labourers in foreign-invested enterprises, joint ventures, and individual economic entities. They are all required to join work-related injury insurance systems. This means that even though temporary, migrant, or rural workers in factories

do not have formal contracts, as long as they can prove that there is a labour relationship with the employing unit in any form of employment for any time frame, they should enjoy protection from society and enterprises. Only labourers from state organs, institutions, and public organisations are exempt; the old regulations still apply to them. The widening of the coverage indicates stronger protection for workers' rights.

2. Further reform on benefits of work-related injury insurance to 'put people first'

More reasonable insurance benefits

The basis of benefits of work-related injury insurance is the labour relationship, which can be a relationship with a person or with property. The labour relationship determines the benefits of work-related injury insurance, it also emphasises long-term payments to make injured workers' basic living standards sustainable. The long-term sustainable basic living payment is paid on the basis of a worker's labour relationship with employer. So an injured worker is guaranteed that his/her income will not drop too much according to the labour relationship. The new regulation states: "In the sick leave period the salary and welfare benefits of a worker who was injured in a work-related accident or who stopped working due to occupational disease and who receives medical treatment, should not be affected, and should be paid by the employing unit." This conforms to the principle of compensating a victim's direct economic loss. Linking benefits with salary means linking a victim's compensation with his/her contribution to the enterprise, which in return should motivate the labourers. Medical treatment costs and death compensation is based on the last year's average wages of local staff and workers, based on the logic that in the same district, medical costs and funeral expenses are basically the same. In this way medical costs and funeral expenses are not related to the level of one's salary, which should be beneficial to low salary workers and new employees. In the end fair treatment for all is created.

The regulation makes more specific provisions on benefits to the injured and the dependents of the deceased to facilitate better

implementation and reduce labour disputes. The old work-related insurance system was based on local workers' average income to calculate compensation money for a victim's family. Although this can help to secure a basic living for the victim's family, in theory it does not play the principle role, as an insurance scheme should cover economic losses. While the new regulation has made related amendments: compensation money (a percentage of the deceased's salary) is paid to the direct dependent(s) who have no working ability and whose source of income relies on the deceased. In this case, the economic loss of the victim's family caused by the tragedy could be compensated to a certain extent.

Extended certification is now submitted by the employing unit

The regulation stipulates that when a worker is injured in an accident or according to the Law on Prevention and Control of Occupational Diseases is under prognosis or diagnosis as an occupational disease victim, the employing unit should submit application for injury certification at the appropriate level of the Labour and Social Insurance Administrative departments within 30 days of the accident or after the diagnosis or prognosis is made. In special circumstances the application period can be extended appropriately after reporting to the Labour and Social Insurance Administrative Department. The period for certifying disability is extended from 15 to 30 days and the application is now submitted by the employing unit instead of the victim. Also the regulation clearly stipulates that injuries suffered in traffic accidents while commuting to and from work count as work-related injuries. This not only maintains existing policy but also saves litigation costs and saves much time in legal procedures. This reduces the loss of workers' rights when a culprit absconds after a traffic accident. These are among the details that reflect the government's humanitarian concerns.

3. More scientific system, more standardised operation

A more standardised procedure to certify industrial injury affords better protection for victims, and more responsibility for enterprises

The RWCI stipulates that if a dispute arises when a worker or his/her dependant claims that injury is work-related but this is denied by the employing unit, the burden of proof rests with the employing unit. This clearly defines the responsibility of the enterprise and improves the efficiency of dispute handling.

The regulation also stipulates that after accepting an application for work-related injury certification, the Labour and Social Insurance Administrative Department should investigate and verify the injury when the need arises. The employing unit, worker, trade union, medical institute, and related department need to provide assistance or co-operation. For legally obtained papers (such as certificate of occupational disease diagnosis or prognosis) the Labour and Social Insurance Department should need no further investigation or verification.

More transparent and scientific assessment of work capability

The regulations stipulate setting up provincial, autonomous regional, municipal, and district (city) levels of work capability assessment committees consisting of representatives from the local Labour and Social Insurance Administrative Department, Personnel Administrative Department, Public Health Administrative Department, trade union, social insurance management agency (SIMA), and employing unit. The committees should build medical and health information data banks; medical experts listed in data banks should possess senior professional medical and health qualifications as well as specific knowledge related to work capability assessment. Moreover, sound professional ethics should be considered. Upon receiving applications the committee should randomly select three to five experts from the data bank to form an assessment team, allowing the expert team to give opinions and make conclusion based on their opinions. If need arises, a qualifying medical institution could be commissioned to assist diagnosis. Thus, the assessment members are changeable medical experts and not permanent office workers. This would not only enhance transparency and authority but also could prevent moral hazards, which shows the state's dedication and position to strengthen labour rights.

4. Further improvement of management to allocate work-related injury funds

Further regulating medical treatment period of work-related injury

Adjustment of the medical treatment period helps to eliminate the waste of medical resources and reduce the expenditure of the work-related injury fund. The now defunct LAOBUFA stipulated

Workers in a spectacle factory in China
Photo: AMRC

that the medical treatment period for industrial injury should not be longer than 36 months. This measure can, to some extent, get rid of the situation where injured workers seek medial treatment but refuse to be assessed so as to get full salary payment, and curb the unlimited waste of rehabilitation equipment and medical expenses. The new regulation stipulates: "Staff and workers suffering from work-related injury or occupational disease, who need to temporarily stop working to receive medical treatment, are generally entitled to sick leave not exceeding 12 months. Those with serious injuries and special situations can reasonably extend sick leave and medical treatment periods with approval from local and city level work capability assessment committees. Extensions should not exceed a further 12 months.

Further strengthening medical treatment management for work-related injury

China's work-related injury insurance system regulates the costs of full reimbursement arising from work-related injuries, a common practice around the world to provide basic protection for victims. However, it also brings to light the serious problems of wasting medical resources and eroding work-related injury insurance funds. In many places work-related injury insurance funds are unable to make ends meet due to uncontrolled medical treatment expenditure.

The new regulation does not make any changes on this subject but clearly instructs that injured staff or workers should receive medical treatment only at the medical institution that has signed the service agreement; emergency treatment can be channelled to nearby medical institutions. Non work-related sickness benefit for injured workers is not covered under these regulations, and should be treated under the basic medical insurance scheme. Medical treatment costs of work-related injuries conform with specifications in the Workers' Compensation Insurance Diagnosis, the List of Items for Treatment, and the List of Workers' Compensation Medications; Workers' Compensation Insurance Hospital Service Standards are covered by the work-related insurance fund. The Ministry of Labour and Social Security subsequently released measures dealing with the Workers' Compensation Insurance Diagnosis, the List of Items for Treatment, the List of Workers' Compensation Medications, and the Workers' Compensation Insurance Hospital Service Standards. These regulations can avoid or reduce wasting medical resources and eroding insurance funds, while at the same time providing high quality and efficient services through certain hospitals, so as to strengthen workers' rights protection.

5. Codifying the national work-related injury system

The regulations provide strict legal responsibilities

The RWCI stipulates that any organisation or individual has the right to report violations of its provisions. The Labour and Social Insurance Administrative Department should then conduct an immediate investigation and deal with the case according to the regulations and should keep the name of the informant confidential.

The RWCI has drawn up three 'forbidden areas' for Labour and Social Insurance Administrative Department officers: Any rejection of application for injury certification without just cause or certifying a person who does not satisfy the certification criteria for work-related injury; or failing to properly maintain workers' compensation insurance identification records, with the result that such records become unaccounted for; or accepting money or gratuities from interested parties.

Any Labour and Social Insurance Administrative Department officer committing any of the above-mentioned acts shall be subject to imposition of an administrative sanction in accordance with the relevant laws, and an investigation for the imposition of potential criminal liability shall be conducted in accordance with relevant laws if the act constitutes a crime.

The Social Insurance Management Agency that commits the following acts shall be ordered to make corrective actions by the Labour and Social Insurance Administrative Department and a person in a position of direct responsibility for other persons responsible for the act shall be subject to imposition of disciplinary sanctions in accordance with relevant laws. Such persons shall further be investigated for imposition of potential criminal liability in accordance with relevant laws if the act constitutes a crime. If any monetary losses have accrued to interested parties as a consequence thereof, the agency shall be liable for compensation in accordance with the relevant laws. These acts include:

- failure to maintain records of the contributions made by employers and of the work-related injury benefits received by workers in accordance with the relevant regulations;
- failure to set work-related injury benefits in accordance with the relevant regulations; and
- accepting money or gratuities from interested parties.

The Labour and Social Insurance Administrative Department should impose a fine and refund of work-related insurance benefits fraudulently obtained by employing unit, or injured worker or his/her lineal relative; and of social insurance expenses fraudulently obtained by a medical institution or auxiliary appliance provider. For serious violation that constitutes a crime, criminal liability shall be conducted in accordance with the law.

Building a public reporting system and enhancing transparency

The RWCI requests that when formulating work-related injury policy the Labour and Social Insurance Administrative Department or related departments should consult the trade union and the representative of the employing unit. The trade union should protect injured workers' legal rights and should be responsible to monitor their

enforcement. The SIMA should regularly publicise financial statements of work-related injury funds, and should make suggestions to the Labour and Social Insurance Administrative Department on the adjustment of premiums and fees at the opportune time. Individuals or organisations providing false work capability assessments, or false diagnosis certificates, or accepting money or gratuities from interested parties are subject to corrective actions imposed by the Labour and Social Insurance Administrative Department. Serious violations that constitute crimes will be subjected to criminal liability laws. Employing units should openly post information regarding work-related injury insurance on notice boards, and cannot evade responsibility by providing insurance only to permanent workers but not to temporary, rural migrant, or contract workers. In the past some employing units did not register injury insurance when an injured worker filed a claim at the social insurance office. The public posting system effectively helps to monitor actual registration and avoid incomplete registration or failure to register.

Labour and Social Insurance Administrative Departments can issue corrective actions to employing units that fail to join the work-related insurance scheme. Employing units should pay workers suffering from work-related accidents legally-mandated benefits, even if the employing unit did not join the insurance scheme. Workers who fail to meet the requirements or refuse to undergo work capability assessment or refuse medical treatment will not enjoy work-related insurance benefits.

Strengthening the monitoring regime and clarifying punishments

The RWCI stipulates that any individual or organisation engaged in work capability assessment providing false findings, or receives money or gifts from interested parties is subject to corrective actions issued by the Labour and Social Insurance Administrative Department and subject to a penalty from 2,000 yuan to 10,000 yuan. Serious violation that constitutes a crime is subject to criminal liability according to law.

Injured workers, lineal relatives, or employing units who defraud the work-related insurance fund reimburses the total amount to the agency, and pays a penalty of two to three times the value of

fraud. Serious violation that constitutes a crime is subject to criminal liability according to law.

The RWCI symbolises acceleration of China's work-related injury insurance system reform, however there are problems in implementation that need urgent attention.

Broadening coverage

By the end of June 2004, 49.96 million workers had joined the work-related injury insurance scheme, an increase of 600,000 workers over the figure before the regulation became effective. However, when compared with the total work force, the percentage of insured workers is comparatively low. I think we should take up three short-term measures to broaden effective coverage, which would help to expand insurance funds and spread risks.

Enterprises employing rural migrant workers should be the priority for incorporation into the work related injury insurance.

Since rural migrant workers have become a major sector of the labour force, they play an important role in building townships and cities. Their contribution to modernisation cannot be ignored, yet most of them do 3D jobs with little protection. They are the 'providers' as well as the victims of accidents. Once an accident causes injury or death, the employer gives very little compensation and/or provides limited medical treatment. Sometimes they are just abandoned. In case of death, employers pay very little or enter a private settlement with the dependants saying they comply with the illegal 'life and death' contract which means a worker signs off his rights and cannot claim compensation in line with the legal standards. Unfortunately, many occupational diseases only emerge after a long latent period when the rural workers have already finished the contract and returned to their villages. Their low earnings and limited savings from hard work are definitely unable to cover medical costs; chronic diseases lead to bankruptcies, ruining many families. This denial of labour rights causes many labour disputes and even generates social instability. To solve this problem, we must pay extra attention to rural workers' rights' protection and faithfully follow national laws and regulations to include rural migrant workers' labour insurance to improve the city and township insurance system.

To achieve this, we first need to standardise the labour relationship between employing unit and rural migrant workers as a precondition to protecting rural migrant workers' labour rights. We should seize the opportunity of a national employing unit survey to regulate the employment system. All employing units must sign contracts with workers (disregarding the workers' household registration status - city or rural) according to law and accept monitoring by government departments.

Secondly as highlighted by the RWCI, the solution for work-related injury insurance is closely related to production and to the health and safety of rural migrant workers. Subsequently, the Ministry of Labour and Social Security (MOLSS) issued a 'Notification concerning issues on rural migrant workers joining work-related injury insurance' on 1 June 2004, to emphasise and highlight that this group of workers should enjoy the same insurance as city and township workers and staff. The policy approach also focuses more on prevention instead of compensation after accidents occur. The government should put more effort to monitor enterprises that employ mostly rural migrant workers and industries where high rates of

China's Coal Sector Death Rate Compared with Selected Countries

Country		Deaths per million tons
China	Overall, 2003	4.17
	Township and village mines, 2003	9.62
	Unofficial – based on 20,.000 deaths/annum	13.84
	Shandong, 2004	0.42
	Shandong's top 7 mines	0.001
	Shenmu Dongsheng (China's largest)	0.026
Australia	2003 - 2004	0.014 (1 death/71.4 million tons)
Russia		0.34
South Africa		0.13
Ukraine		7
US	2003	0.034 (1 death/29 million tons)
	1860s	6% of miners died per annum

Sources: *Ming Pao*, 2 Dec 2004; PM, 15 Feb 2005, Occupational Health Institute of the Ukraine; John Fabian Witt, *The Accidental Republic*; State Administration of Work Safety; People's Daily, 5 November 2004; PWC, *Minerals Industry Survey Report, 2004* in *CSR Asia Weekly*, Vol. 1 Week 8

accidents and occupational diseases are recorded. Modernised and scientific preventive safety management measures should be adopted, rather than management or monitoring in hindsight.

Recommendations on co-ordinating work related injuries insurance scheme in the coal mining industry

Outside China, costs are high for health and safety to prevent coal mining accidents. Enterprises deposit a sum of money based on risk assessment before operations begin. However, China does not have such a system. When accidents happen factory and mining owners usually abscond. When this happens, local government

Death Toll from Serious and Very Serious Coal Mine Incidents in China, Oct 04 – Feb 05

Date	Location	Cause	Deaths
15 Feb 05	Yunnan, Fuyuan	Gas explosion	27
14 Feb 05	Liaoning, Sunjiawan	Gas explosion	213
22 Jan 05	Yunnan, Lijiang	Explosion	18
16 Jan 05	Chongqing, Nanchuan	Gas leak	10
12 Jan 05	Henan, Yiyang	Explosion	11
31 Dec 04	Hunan, Binzhou	Gas leak	10
29 Dec 04	Guangxi, Laibin	Flood	10
22 Dec 04	Shjanxi, Linfen	Suffocation	13
19 Dec 04	Sichuan, Yibin	Gas leak	14
13 Dec 04	Hunan, Xiangtan	Fire	18
12 Dec 04	Guizhou, Sinan	Flood	15
9 Dec 04	Shanxi, Yangquan	Explosion	33
1 Dec 04	Guizhou, Liupanshui	Explosion	16
28 Nov 04	Shanxi, Tongchuan	Explosion	166
23 Nov 04	Shanxi, Taiyuan	Explosion	12
20 Nov 04	Henan, Shahe	Fire	65
13 Nov 04	Sichuan, Pengzhou	Explosion	19
11 Nov 04	Henan, Pingdingshan	Gas explosion	33
5 Nov 04	Shanxi, Suzhou	Explosion	16
30 Oct 04	Liaoning, Fushun	Gas leak	15
22 Oct 04	Guizhou, Zhenfeng	Explosion	15
20 Oct 04	Henan, Taiping	Explosion	148
6 Oct 04	Beijing, Daanshan	Collapse	10
		Total	**907**

Source: CSR Asia Weekly, Vol. 1 Week 8

then needs to cover funeral expenses. Although China has laws stipulating that high-risk industries like mining should set up accident injury insurance for workers, many enterprises generally fail to conform.

For high-risk industries like coal mining, the state-run work-related injury insurance is insufficient. Because of the high-risks involved in coal mining, owners should be compelled to pay a certain amount of its funds. The fund should be operated by an industrial association or specialist injury insurance agency to guarantee the interests of workers to avoid them becoming destitute if the owner runs away when accidents happen. When a serious blast causes many injuries and deaths, the total compensation amount is huge. If insurance is organised with other industries, the motivation of other people joining this scheme will be lowered. (We've found out in our research that the regulation requires "work-related injury insurance in a place that should be pooled jointly at the municipal or district (city) levels ... other places are to be determined by the local governments at the provincial or autonomous region levels". There are too many problems at county level, but at the same time there are other problems if organised at the provincial level. For example, in Shanxi , a province crucial to China's coal mining production, even the pool at provincial level is insufficient to cover all compensation not to mention that the fund should also cover accident prevention costs. Then enterprises in provinces with fewer coal mines would not want to join with Shanxi's pool, fearing that their payment is only a contribution or donation to the high-risk province. Ultimately the pool system has become a disincentive. My suggestion is to set up a co-ordinated coal mining work-related injury insurance (similar to an industrial business association in Germany) and the sources of funds should come from three channels: enterprise payment for workers' insurance; risk guarantee; and partial subsidy from the MOLSS work-related injury insurance fund when the pool of funds does not break even. When conditions are more ready a national work-related injury insurance could be implemented.

Unifying injury insurance system

Starting from a social security system set up in the 1950s, there are different pension, medical, and work-related injury schemes covering various institutions and enterprises. Enterprise workers

injured at work are seen as industrial injuries while injured institution staff are seen as occupational injuries. The former is covered by work-related injury insurance established under the Labour Insurance Regulation and the subsequently issued Provisional Provisions on Workers' Compensation Insurance for Enterprise Workers . The latter is covered by the Military Personal Gratuities Regulation and related regulatory rules. During public health issues like SARS, civil servants are exposed to the same or even higher risk of virus attack as enterprise workers. In this situation central government immediately issued new regulations to compensate civil servants infected with SARS as work-related injuries. In fact, the risk of civil servants facing occupational hazards is the same as any enterprise workers. When we try to broaden insurance coverage to all enterprises and individual businesses, all employees working for any institutions, state organs, and public organisations should be covered. Their insurance premiums should be determined by their risk levels. This will pave the way for a wider pooling system in mutual risk sharing for a unified insurance system in the future. In the end, all employees would be effectively protected.

Closer integration of industrial insurance, accident prevention, and rehabilitation service

Through prevention techniques, industrial injuries would be reduced and hence compensation costs. Thus to integrate insurance and prevention is a scientific choice. International insurance systems have gone though this path of transforming passive compensation and dispirited insurance into an integrated system of compensation, prevention, and rehabilitation. We should not lag behind; our progress should be in line with economic development.

The foundation of production safety in China is still weak. Many accidents, hidden dangers, major casualties, and unregulated management are common issues. In 1998 the reform of the State Council led to the formation of the MOLSS, which is responsible for coordinating various social insurance schemes; on the other hand the State Administration of Work Safety (SAWS) was set up to be responsible for the overall management of production safety. The two bodies should enhance communication and co-operation, but currently there is a lack of coordination.

The safety monitoring body is an administrative organ at different governmental levels; local government should allocate funding to help this body to carry out its work. In some places, work-related injury insurance funds are siphoned off for safety prevention under the Provisions on Workers' Compensation Insurance. This robs the monitoring power of the fund from knowing how the money is spent, with dire consequence. The work-related injury insurance cannot do much for accident prevention, as the management agency has no technological support in health and safety. The lack of a motivation mechanism in insurance creates a mismatch in service delivery to the enterprises. At the same time due to low level pooling of the funds, and different localities with different industrial structures, some of the pool is too small, not even able to cover administrative costs while in places where the pool is large the fund has too much surplus, but very limited expenses in health and safety protection.

Article 38 of LAOBUFA states, "[T]he labour and social insurance administrative department should make reasonable adjustment on the next year's premium based on the performance of last year's industrial health and safety and the expenditure of the insurance. A floating rate should be adopted." The LAOBUFA is also required to conduct an annual audit on safety production, and is authorised to impose a higher floating rate from five to 40 percent of the previous premium. Enterprises with good safety records have a deduction bonus of five to 20 percent of last year's contribution. However given the fact that the floating rate in many places is going up rather than down and the determination scientifically based, the fund has generated an unreasonable balance and has lost its function to enhance safety production. Hence, the new RWCI does not stipulate on this issue.

How can industrial injury insurance play a significant role in preventing accidents? The LAOBUFA clearly lists specific items to be covered, including the accident prediction fund, occupational rehabilitation expenses, safety award, and promotion and research fee etc. The RWCI has no similar stipulation. A new law should be enacted to ensure the income side of the insurance fund plays a role in prevention such as safety measures or activities in accident prevention.

China's work-related injury insurance fails to meet demands on safety monitoring, skill training, social promotion, and survey on causes of risk. This is mainly due to the lack of a proper channel for funding allocations on safety education and monitoring, test equipment, instruments, accident investigation check ups, and awards. So the related preventive work is hardly established. At the current stage, the insurance agency should work with the safety monitoring institution by inviting them to check the facilities and set up guidelines in frequency and standards of inspection. Reduced or exempted fees should be allowed to provide incentives for enterprises that are actively engaged in removing potential dangers or hazards. The insurance agency should also reserve a budget to fund educational and research work, to raise workers' awareness. In the production process discipline should be strictly enforced to ensure safety and health standards. Research work related to risk level analysis which has a bearing on the determination of the premium should be promoted and funded, to transform scientific findings into higher productivity. For effective use of the fund, the agency needs to establish accident and injury data analysis with designated personnel dealing with accident prevention and statistical data collection. (We should break the wall between departmental interests and facilitate cooperation with the safety agency so as to save funding.)

Enlarging the industrial injury insurance team

Currently, there is a big gap in quality and quantity of team working in injury insurance, which slows the progress of its services. While in many industrialised countries work-related insurance systems are more or less established. For example, the ratio of staff to the insured is 1:2,000. In a country as big as China, with so many accidents, the ratio of social insurance staff to workers is extremely unbalanced; even in areas that have better management, the ratio is 1:30,000. Due to the fact that in many administrative organs where the structures and number of staff is fixed, insurance personnel are limited compared with others. To rectify the grave situation of accidents, we need to do a lot such as to strengthen the work of the social insurance agency by increasing manpower and professional skills, and to adopt proper working procedures. The agency's staff

should be professional safety officers who can monitor enterprises compliance with safety laws and regulations, and make recommendations to remove accident hazards. Finally, the state level SAWS should employ professional, competent staff.

The promulgation of the RWCI is a move in the right direction. But the key issue remains to put more effort into monitoring, to ensure full implementation of the law, and in publicising the law to make workers aware of their rights to protect themselves, to make enterprises consciously abide by the law. Since China's labour market is now over-supplied, a many workers are in a disadvantageous position; we need to work hard to assist them in defending their rights. The RWCI should be able to benefit all workers in the long run.

Further reading:

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3/ Wang Xianzheng, Research and Implementation on Work-related Insurance and Accident Prevention, Beijing, Labour and Social Security Press, 2004 (in Chinese)
4/ Labour Law of the PRC, Beijing, Law Press China, 2002
5/ Law of the PRC on Safety in Mines, Law of the PRC on Prevention and Control of Occupational Diseases, Law of the PRC on Work Safety, Law Press China, Beijing, 2003
6/ Department of Labour Affairs of the MOLSS and Advisors' Service to Legal Reform in China undertaken by the German Development Corporation, Commentaries on Chinese Labour and Social Security Laws and Regulations, Beijing, China Press of Democracy and Legal System, 2004.
7/ Zheng Bingwen, Burning Issues in Social Security Reform, Beijing, Water and Electricity Publishing Press, 2004 (in Chinese)
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Main Features of the Workers' Compensation Scheme in China

Tony Fung

"[P]lease provide statistical information on occupational accidents and illnesses in the last five years, disaggregated by nature and frequency of accidents/illnesses, occupation, age and sex." - *UN Committee on Economic, Social and Cultural Rights, June 2004*[1]

"The Chinese government has made great efforts to establish an insurance system for work-related injuries that includes work-related injury prevention, compensation, and recovery. After January 2004, when the "Regulations on Insurance for Work-related Injuries" went into effect, the coverage of such insurance has expanded rapidly. By the end of June 2004, as many as 49.96 million employees had underwritten this insurance scheme." - *China State Council Information Office, August 2004*[2]

General features

- Compulsory in principle, all employers should join, paid by employers only.
- Carriers are local social security departments ('the Insurance' hereafter).
- Implicit exclusions: domestic workers, service providers (no employment relation).

All employees are entitled to the benefit; in cases where employees are not covered by the scheme because employers did not join it, employers are obliged to cover all the compensation/benefit.

1 "List of issues to be taken up in connection with the consideration of the initial report of the People's Republic of China concerning the rights covered by ICESCR" E/C.12/Q/CHNB/1

2 White Paper on China's Social Security and Policy

Legislation

• *Regulations on Insurance for Work-related Injuries* (State Council decree No. 375), enforced in January 2004.

• Provincial governments must draft provincial regulations about operational details and amounts of compensation.

• In 2003 the Ministry of Labour and Social Security drafted ministerial decrees stipulating 'work-related injuries recognition procedure', 'the definition of benefited dependent relatives in case of death in work-related injuries', and 'lump sum compensation for victims of work-related accidents in illegal employment' (i.e. working in unregistered companies, or child labour etc.); all these decrees became enforceable in January 2004.

Coverage

• 'Work accidents' including commuting accidents (i.e. accidents related to vehicles on regular route of travel to work/home and business trips).

• Special coverage: acute illness while on duty and death within the next 48 hours; involved in emergency relief and protecting the public interest; injured retired armed forces; rejuvenated wound.

• Explicit exclusion: employees injured as a result of a crime, drunkenness, and suicide.

• Government recognised occupational diseases (OD) according to the 'List of Occupational Diseases' issued in April 2002 by the Ministry of Health and the Ministry of Labour and Social Security.

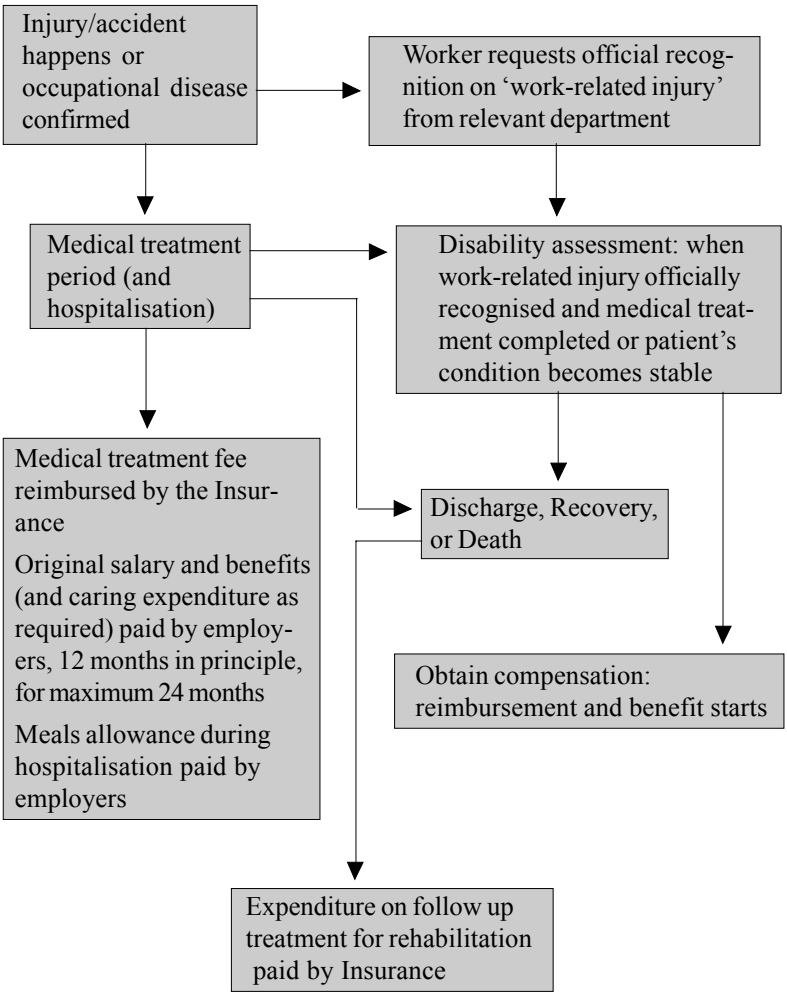
Benefits/Compensation

Main variables determining compensation amounts are:

• Injured worker's 'degree of labour ability'. Provisionally, 'the degree of disability' is adopted; assessed according to government standard—'Degree of Disability Caused by Work-related Injury and Occupational Diseases, GB/T16180-1996'. Grade 1 is the most serious and Grade 10 is the least.

• 'Injured worker's original monthly salary' ('monthly salary' hereafter), minimum amount is 60 percent of local 'staff and workers' average monthly salary'[3], maximum amount is 300 percent of local 'staff and workers' average monthly salary'. The terms 'monthly salary' and 'local staff and workers' average monthly salary' appears as the 'unit' amount of compensation in the following chart and table.

Major Compensation/Benefits



3 In Guangdong's provincial capital Guangzhou the local staff and workers' average monthly salary is Rmb2,092 (US$258) in 2002 and Rmb2,353 in 2003 (US$290). The mandatory minimum wage in Guangzhou was RMB510/month (US$63) in 2002. It is RMB684 now BUT note that previously, the authority did not state clearly whether insurance charge is included in the minimum wages, and they assume employer will add it ON TOP of the minimum wage amount, of course not. Now, insurance charge is included in RMB684.

Major compensations for accident and disease victims, by legally stipulated 'degree of disability'

	Disability Grades									
	1	2	3	4	5	6	7	8	9	10
1. Lump sum subsidy paid by the Insurance (Unit: months of monthly salary)	24	22	20	18	16	14	12	10	8	6
2. Monthly allowance paid by the Insurance (Unit: % of monthly salary)	90	85	80	75	NA	NA	NA	NA	NA	NA
3. Employer should arrange appropriate post, if none employer should provide monthly allowance (Unit: % of monthly salary)	NA	NA	NA	NA	70	60	NA	NA	NA	NA
Employment relationship	Employment relationship maintained and worker need not work; benefits are maintained. When worker retires, retirement benefits should be provided				Workers could resign. Employer should pay a lump sum on departure, amount subject to provincial regulation. (In Guangdong province the payment is up to 60 months of monthly salary for Grade 5 workers)					
4. Caring expenditure (monthly payment by the Insurance)	Depends on degree of impairment to self-care ability, three grades, payment unit: 'local staff and workers' average monthly salary' Grade 1: 50%; Grade 2: 40%; Grade 3: 30%									

As migrant workers always wish to end the employment relation, they prefer lump sum compensation, as China has no inter-province compensation. The Ministry of Labour and Social Security delegates provincial authorities to implement it. In Guangdong province, the authority stipulates that 'Grade 1' to 'Grade 4' injured worker could receive a 'monthly allowance' (item 2) in a lump sum, equal to amount of 10 years, if they prefer.

Major compensation for death, paid by the Insurance

Item	Details
Funeral subsidy lump sum	Amount equal to six months' local staff and workers' average monthly salary
Pension for dependent relatives	Monthly salary: spouse: 40%; other dependants: 30%
Lump sum subsidy	40 to 60 months of local staff and workers' average monthly salary subject to provincial regulations

Employers' tactics

This section lists tactics used by some employers in dealing with compensation cases to illustrate loopholes in the compensation system. Since uninsured employers are obliged to shoulder all compensations according to the law, employers have obstacles for claiming workers:

- Since official recognition of a work-related injury case is the first step of a compensation claim and reporting to the authorities is the employer's obligation, the employer avoids reporting the case. In addition, workers may not know they have the legal right to report an injury case.
- When an uninsured injured worker goes to hospital, the employer uses the ID of another worker who is covered by the scheme to obtain compensation. This makes trouble for the injured worker if there is dispute between the employer and the injured worker in the future.
- As medical expenses are paid by employers in advance in most cases, (and workers are unable to pay) some employers make this

Demonstration in Hong Kong against the bad working conditions in Chinese toy factories
Photo: AMRC

payment on condition that workers do not claim compensation, or agree on sub-standard amounts of compensation. Medical services are now privatised (i.e. highly expensive) in China.

• For employees who wish to end the employment relationship, employers should pay a lump sum upon departure according to both national and provincial regulations. However, employers deny notification was received or deny the injured worker entry to the factory and then claim that the worker did not return after medical treatment. It has become an excuse to take 'legal disciplinary action' to discharge workers and say the workers themselves are responsible.

• Since employers pay for medical treatment in advance in most cases, some employers collect the injured worker's medical file to make workers 'labour ability assessment' difficult because the file is incomplete. This further complicates claiming compensation.

• There are many ways to recruit workers using improper documents (e.g. ineffective contract), to avoid a formal employment relationship and thus responsibility for compensation.

• As labour dispute arbitration and judicial procedures are time-consuming, once compensation cases go to court, employers delay the process as long as possible—up to nearly three years maximum. Injured workers do not have sufficient capital to finance the procedures.

ON THE ROAD TO JUSTICE
WE ARE WALKING TOGETHER

HUANG LIWEI *(Translator: Tony Fung)*

This article was written by a lawyer involved in migrant workers legal aid services in Guangdong's provincial capital, Guangzhou. It records his assistance to his first injured worker client. Although this case happened a few years ago before enforcement of current law and regulations, most of the barriers to workers are still valid.

A desperate worker's letter

On 20 June 2002, a colleague placed a letter on my desk. "*What's all this about*?" I wondered. The letter said:

"*I am from Chongqing [in Sichuan, an inland province, home to many migrant workers]. I am a mould operator in A XX factory. I received no training at all after being recruited on 20 April 2002. On the morning of 1 May, the machine squashed my right forefinger. The bone was completely broken. The factory sent me to a nearby clinic for primary treatment. The clinic suggested that I go to a specialist hand surgery hospital [there is a lot of 'hand/arm surgery' in Guangdong, evidence of frequent work-related injuries]. However, the factory insisted I should be treated in the clinic first. On 3 May, my wound became worse; the factory sent me to Guangzhou Hanseng Finger Surgery Hospital.*

"*The hospital asked the factory to send people to care for me after surgery. But the factory refused. Therefore, I could only ask my wife to take leave to care for me. The factory did not see me any more after leaving me with Rmb100 (US$12.3). I didn't have any more money, and my wife was fired because her leave went over the limit. I asked my wife to go to my factory for money, but the factory would not even allow her to walk toward the main*

entrance. We could only eat bread or instant noodles. On 20 May the hospital requested my discharge, the factory sent a staff member to pay the hospital bill and then left me high and dry. We were so poor and didn't have a penny to take back to my flat. We had to sleep in the hospital corridor that night. The next day, a kind nurse gave us Rmb15 (US$1.85) to travel back home.

"*The doctor asked me to change the dressing after two weeks and clean the wound three weeks later. Then two follow-up treatments for rehabilitation should have followed, but all these need money! I went to the factory many times but they would not allow me inside, and wouldn't receive my phone call as well. Finally, the factory security team leader gave me Rmb200 (US24.6) to pay the bill to remove the steel pin used for fixing my finger. No one manages my case now. I visited the complaints office of the labour bureau, and the officer said I don't have any proof of the employment relationship. I was so desperate and found a leaflet your colleague had distributed in the hospital, I hope you could help me.*"

After reading this letter, anger cleared my mind from early morning sleepiness. I contacted Mr Yang, the writer of the letter, through his pager, and got his reply five minutes later: "*I know you are calling from the Document Handling Center, I remember your phone number and I am awaiting your call, I…*"

As he repeated the word 'I' he couldn't continue simply because he was overcome with emotion.
Lawyer: "Why didn't you call us?"
Yang: "I am afraid I can't speak clearly enough in telephone conversation."
Lawyer: "But you can come here, you ought to have our address."
Yang: "But I don't have…I really wish you can help me."

I understood what he said, he meant he didn't have the Rmb20 (US$2.5) for travelling.

Lawyer: "Tell me where you are, we will find you."

Where is the proof?

We had a meeting in which I was assigned to handle Mr Yang's case. I was a bit excited because it was my first case in the centre. Before going to visit Mr Yang, the boss at our centre reminded me to clarify what kind of proof Mr Yang had (to prove he was working

for the company) and whether he had any document that could be accessed. I went to see Mr Yang in the afternoon.

I met Mr Yang in his small flat, he is short and weak, and the flat is so dark I could only see him clearly when the street light was on.

Lawyer: "Would you mind showing me the document?"
Yang: "What document?"
Lawyer: "Like your employee ID, letter of employment, employee manual, pay slip, medical records…"

Mr Yang showed me his 'employee ID', 'employee manual', 'deposit slip', and 'medical record'. I saw Mr Yang's photo and the name of his factory (A XX) but no company chop on the ID. However, the name of the factory printed in the employee manual is 'Silver Machine' not 'A XX'. Mr Yang said all his colleagues had this manual and even the factory name on the main gate is Silver Machine. Yet, the whole factory workforce uses the name A XX. There was no company chop on the deposit slip, only the accountant's handwriting. How could these documents prove the employment relationship? Although the medical record is original, it could not prove the relationship directly.

Lawyer: "Did the factory insure for workers' compensation?"
Yang: "No."
Lawyer: "Did you sign any agreement or labour contract?"
Yang: "No."
Lawyer: "How about a salary pay slip?"
Yang: "I didn't get any wages before the accident."
Lawyer: "Did your factory use a punch card machine to record working hours?"
Yang: "Yes, but the foreman kept the cards."
Lawyer: "How about a meal record card?"
Yang: "No."
Lawyer: "Big trouble."

There is no evidence to prove the employment relationship between Yang and his factory. This makes it difficult to obtain official recognition for a work-related injury.

I copied all the available 'proof' and medical records before leaving. I went to Beiyun District Industry and Commerce Bureau

to identify the Silver Machine company. The answer was negative, only the name A XX is registered. It is difficult to speculate on the reason for the non-registration of Silver Machine, possibly having no company chop on the document or no access to working time record are problems. And the factory even uses another name in public. Perhaps it wishes to avoid responsibilities to workers or it used to use the name Silver Machine previously.

In order to make the factory responsible, we should obtain official recognition first. In principle, the factory should have reported the case, but now the factory dares not handle it, the worker then needs to apply for it. However, we had no evidence to prove Yang was an employee of A XX, and it is impossible to dig more evidence from the factory. Is it possible to rely on the Labour Bureau? I read regulations like 'Labor Monitoring Regulation', 'Regulation on Handling Labor Law Offence Cases' and 'Guangdong Provincial Labor Monitoring Regulation' in my office. I found the department had hidden some work-related accident reports, charged victims a deposit, workers uninsured for the compensation scheme, and no proper labour contracts, which are all labour law offences as mandated by the labour monitoring department. I thought that intervention by the department might be helpful.

Effective recognition

This author and Yang sought help from the labour monitoring department and achieved the recognition on 2 July 2003.

Heated argument in court

On 8 August the Guangzhou Labour Ability Assessment Committee ranked Yang with Grade 8 disability. On 12 August we filed the compensation claim with Beiyun District Labour Dispute Arbitration Committee. The hearing was on 20 November and the verdict was given on 31 December, ordering the factory to compensate altogether Rmb46,915.6 (US5,792), including lump sum subsidy, and a one-off payment for leaving the company, salary, and meals allowance during the period of medical treatment. The factory appealed the decision on 10 January 2003, the deadline for an appeal. The Beiyun District Court arranged the hearing on 7 March 2003.

The hearing started at 8:30 in the morning. Yang was waiting for me, exhausted after *half a year*.

The factory had changed its representative. I thought the case ought to be successful since we had evidence and a legal argument.

The factory claimed Yang had been told to report for duty since his discharge from hospital but Yang had not responded; and Yang did not follow procedure when reporting his injury for recognition and applying for labour ability assessment without informing the factory.

"*You would not allow me to go inside, how come now is my fault? Does it make sense*?" Yang shouted.

I asked him to calm down, "*Just answer the justice's or my question*."

Lawyer: "First, I must emphasise that contrary to what the factory representative said, it was Yang who asked factory management several times to handle the case. But the factory did not allow him inside. If it is the intention of the factory to settle the case, then it should have been the factory that reported the case to the labour administration instead of Yang. If the factory really attempted to contact Yang, please show your proof."

The factory insisted that Yang did not report for duty after medical treatment and that he did not inform the factory before reporting to labour department and disability assessment, which was not following the procedure.

Factory representative: "In fact, Yang misled the labour bureau and got the so-called recognition. The labour bureau did not get our report and did not even communicate with us; recognition should not be adopted here."

Lawyer : "Well, recognition is a labour bureau decision, if you have objection, the correct response is to make administrative litigation, instead of denying it now in the court."

Factory Representative: "We didn't fire Yang when he was hospitalised. As a matter of conduct he was absent from duty without informing the factory after medical treatment was completed, so

we could only discharge him as a disciplinary action. Therefore, claiming the lump sum payment for departure is not valid. In fact, we have additional proof here." The factory submitted a list of insured workers.

The factory had added Yang's name to the list after his injury, to prove they kept an employment relationship with Yang and to argue that there is no ground to claim a lump sum payment for departure.

Lawyer: "In fact, Yang asked for departure immediately after labour ability assessment result was released but the factory refused. In the arbitration tribunal, Yang demanded the factory accept a departure in front of the arbitrator."

Factory Representative: "Who submitted your resignation?"

Lawyer: "The factory security denied Yang entry so we left the letter there."

Factory Representative: "Exactly! How can it be proof then?"

The hearing finished and the two sides refused mediation. Yang asked when he would receive the compensation. "*One to two months at best, but a year is possible*," I could only tell him the reality.

As I write the court has not made a decision yet. But I believe the court's verdict will be the same as the arbitration committee, however, as the attitude of the factory managers indicated, they will appeal and make implementation of the court's decision difficult.

Yang still lives in the small flat in Beiyun district, earning very little from part-time jobs. It is very difficult for a worker to claim compensation; even it is only Rmb10,000. More than a year has passed; Yang's compensation was my first case for the Service Center and is not yet concluded. We will walk together on the road to justice and I wishes workers could walk less in the future. (the lawyer hopes workers could get compensation much more easily.

Courtesy of Migrant Workers Newsletter, issue No. 9, May 2003

Workers' Compensation in Hong Kong
Law, Procedures, and Problems

Existing Law

1. Scope of application (Effective from 1 August 1998)

The Employees' Compensation Ordinance is applicable to workers employed in all industries and professions. As long as such employees sustains injuries or dies as a result of an accident arising out of and in the course of employment, whether when taking the vehicle of transportation provided to them to and from work by their employer or on behalf of their employer, whether by sustaining injuries in an industrial accident or being diagnosed by a medical doctor of having contracted a statutory occupational disease, they will be protected by the Ordinance.

2. Amount of compensation

i. Any employee taking sick leave after sustaining injuries at work or being diagnosed as having contracted an occupational disease, his/her employer must continue to make him/her 'regular payments'.

Regular payment: $^{4}/_{5}$ of the employee's wages must be paid to the employee during the period of sick leave; i.e. average earnings per day x $^{4}/_{5}$ x number of sick leave days.

According to the law, 'earnings' includes: basic salary; allowances (except transportation allowance); tips and overtime payment; and any other remuneration of a constant nature.

There are two ways to calculate 'earnings': it is statutorily provided to use either the earnings for the month directly preceding the

accident or the average monthly earnings in the 12 months directly preceding the accident in the calculation, whichever is more favourable to the employee.

ii. Compensation for permanent incapacity:
Compensation will be assessed according to the employee's age and gravity of injury.

Age	Amount of compensation
Under 40	96 x monthly earnings x assessed percentage of incapacity
40 – 56	72 x monthly earnings x assessed percentage of incapacity
Over 56	48 x monthly earnings x assessed percentage of incapacity

Notes
Minimum total compensation: HK$344,000.00
Maximum monthly earnings of HK$21,000 will be used as a ceiling for calculation

Compensation for long-term care: (max) HK$412,000;
Prosthesis expenses: (max) HK$33,000;
Prosthesis repair expenses: HK$100,000 (10 years);
Medical expenses: From 4 April 2003, the daily maximum amount:

- HK$200 – same day either out-patient or hospitalisation;
- HK$280 – same day both outpatient and hospitalisation.

3. Method of compensation

i. Any employee whose sick leave period does not exceed seven days and who is not totally incapacitated, mutual consultations may be held directly between this employee and his/her employer to negotiate the compensation payment. The employer shall be required to submit a duly completed Form 2 or Form 2A to the Labour Department.

ii. An employee, whose sick leave period exceeds seven days, shall go to the Labour Department and cancel his/her sick leave one month prior to the expiration of such sick leave period. An employee who suffers from permanent incapacity after an industrial accident will have incapacity assessment arranged.

iii. For an employee who is assessed to have suffered permanent incapacity, the Labour Department will issue an Assessment Certificate to such employee and his/her employer. The employer shall

be required to pay the compensation to the employee within 21 days of the date of issue of the Assessment Certificate.

iv. An employee failing to receive the compensation after expiry of 21 days may request the employer to pay a surcharge equivalent to five percent of the compensation amount. Any payment delay exceeding three months will give rise to a surcharge equivalent to 10 percent of the compensation amount.

v. An employer failing to comply with the above provisions may be subject to prosecution and fine.

vi. An employer having received the employee's claim in writing for medical expenses shall pay the relevant amount within 21 days.

Compensation Procedures In The Event Of Death

If a worker is killed at work there are three possible procedures.

Procedure 1: Immediate relatives of the deceased worker must immediately contact the employer to discuss the funeral expenses and settling-in payment.

If a worker were killed in an accident, the employer must submit a detailed report to the Commissioner of the Labour Department within seven days of the accident. Immediate relatives of the deceased worker must immediately contact the employer to discuss the funeral expenses and settling-in payment. Under existing regulations, the employer must pay immediate relatives of the deceased worker HK$35,000 for funeral expenses, although this sum is insufficient to cover all aspects of the funeral. As the Labour Department needs time to handle compensation claims, money from the Employees' Compensation Ordinance will only be paid after one or two years' time, immediate relatives of the deceased worker should try to make the employer of the deceased worker make a settling-in payment or condolence payment.

In accordance with existing regulations, even though the employer is not required to make the settling-in payment, we believe that the employer has a moral duty to do so and The Association for the Rights of Industrial Accident Victims (ARIAV) has already assisted many immediate relatives of deceased workers in successfully recovering such payment.

Procedure 2: Complete application and registration forms for compensation at the Fatal Cases Office of the Employment Compensation Division of the Labour Department.

Immediate relatives of the deceased worker must register the deceased worker with Fatal Cases Office by bringing along the following documents:

- identity card of the deceased worker (authentic and photocopy);
- death certificate or burial permission/incineration certificate (photocopy);
- identity card of each eligible immediate relative of the deceased worker applying for compensation (photocopy);
- documents concerning the relationship between each eligible immediate relative of the deceased worker and the deceased worker.

At the same time, immediate relatives must choose a way by which application for compensation will be made: (1) adjudication by the Commissioner of the Labour Department or (2) determination by court of law.

Procedure 3: Immediate relatives choose the channel of compensation.

1. Compensation and allocation to be adjudicated by the Commissioner of the Labour Department.
2. If it were to be determined by a District Court, immediate relatives may be directed to:

- the Legal Aid Department by the Labour Department to recover the compensation;
- a court of law by the Labour Department for application;
- privately engage a solicitor to recover the compensation.

Application Procedures

When the Case is Determined by the Commissioner of the Labour Department

1. When immediate relatives of the deceased worker register the fatality at the Labour Department, they will be requested to sign a letter of authorisation so that the Labour Department may obtain information concerning the deceased worker from relevant authori-

ties and hospitals. Information, such as the coroner's report and police records etc., will be used to confirm whether death arose in the course of the deceased worker's employment. Also, the Labour Department will consult the employer in writing to determine whether the employer agrees to have the case adjudicated by the Commissioner of the Labour Department.

2. If all three parties (immediate relatives, the employer, and Labour Department) agree, compensation will be determined by the Commissioner of the Labour Department.

3. Immediate relatives eligible for compensation must separately apply with the Labour Department for compensation within six months of the death of the worker, submitting to the Labour Department valid documents certifying their relationship with the deceased worker such as the marriage certificate, birth certificate and notary certificate.

4. As required by law, the employer must pay the deceased worker HK$35,000 for funeral expenses. Immediate relatives of the deceased worker must apply to the Labour Department for funeral expenses by submitting invoices and receipts to the Labour Department.

5. While waiting for the compensation payment, the spouse of the deceased worker may apply for a monthly advancement from the compensation a temporary payment equivalent to 50 percent of the monthly earnings of the deceased worker.

6. Six months later, based on the application and relevant certification materials, the Commissioner of the Labour Department will determine the amount of compensation and the method of allocation. A compensation certificate will be issued to each applicant.

7. Immediate relatives of the deceased worker may recover payment from the employer with the compensation certificate. If immediate relatives of the deceased worker disagree with the Labour Department's decision, or if the employer fails to pay up, assistance may be requested from the Labour Department. If the intervention

of the Labour Department proves to be useless, immediate relatives of the deceased worker can apply to a District Court to recover the compensation.

8. It must be noted that if either the employer or the Labour Department refuses to turn the case over to the Labour Department for handling, immediate relatives of the deceased worker can apply directly to a District Court to handle the case.

When the Case is Determined by the District Court

Except for those cases that are determined by the Commissioner of the Labour Department, all compensation cases involving accidents that occurred in the course of employment can be turned over to the District Court for adjudication. Immediate relatives who wish to turn the case over to the court of law for adjudication must file an application with a District Court within 24 months of the accident by one of the following means:

- apply to the Legal Aid Department for legal aid in order to file the application at a District Court;
- directly file the application at a District Court;
- privately engage a solicitor to file application at a District Court on their behalf.

The Fatal Cases Office will direct immediate relatives to either the Legal Aid Department or the District Court to complete the formalities. If immediate relatives of the deceased worker who apply for legal aid have their application approved, they can choose a solicitor working for the Legal Aid Department or a solicitor nominated by the Commissioner of the Legal Aid Department or a private solicitor nominated by themselves. Money poses no problem for any of the options above.

If immediate relatives of the deceased worker living outside Hong Kong are eligible for compensation, they must present the following documents:

- identification documents, such as passport;

• 'kinship certificate' that proves their relationship with the deceased worker;
• 'entrustment letter' that entrusts a relative in Hong Kong to complete the formalities on their behalf.

The above documents must be written in the local language together with an English translated-version. If the documents are written in Chinese or English, no translated version is necessary. These documents, which must be issued by the authorities or a notary public of the locality where the immediate relatives live, must then be submitted to the China Ministry of Foreign Affairs Consulate Department (if the immediate relatives live in China) or officials of a Chinese Consulate General overseas (if the immediate relatives live in places/countries outside of China) for ratification and sealing.

When the Case is Determined by the Coroner's Court

The majority of fatal cases that result from occupational and industrial accidents have to be subject to inquiry by a coroner to establish the cause of death and to raise suggestions for the prevention of similar accidents in the future. If the case concerning the deceased worker were simple, formalities on employee compensation could be finished before the coroner's inquiry would start.

Compensation to immediate relatives:
• If adjudicated by the Commissioner of the Labour Department:

Upon receiving the compensation certificate issued by the Labour Department (including statutory funeral expenses and compensation for death), immediate relatives of the deceased worker may recover the compensation from the employer.

• If action is filed with a court of law:

• Out-of-court settlement: At present, litigations concerning employee compensation are mostly settled out-of-court. If immediate relatives of the deceased worker accept to settle the case out-of-court, please pay attention to the following:

1. You must know clearly how much you should receive in respect of compensation, then assess whether you should accept the relevant settlement;

2. At the time of the out-of-court settlement, you must fully understand the details and conditions of settlement;

3. How litigation costs and solicitors' expenses will be calculated in the event of an out-of-court settlement.

• Determination by a court of law: If the case could not be settled out-of-court, it should be turned over to a court of law to determine the details of compensation.

Procedure 4: Compensation for Negligence

If the death of the worker were caused by the negligence of the employer or of a third party, immediate relatives of the deceased worker may, in addition to receiving employee's compensation, file a civil action in accordance with common law in order to recover compensation for negligence.

Immediate relatives of the deceased worker must apply to a court of law within 36 months of the occurrence of the accident by one of the following ways:

- apply with the Legal Aid Department for legal aid in order to file the application at a District Court;
- directly file the application at a District Court;
- privately engage a solicitor to file the application at a District Court on their behalf.

Compensation Regulations for Deceased Employees

Compensation for deceased employees is to be paid to immediate relatives of the deceased employee. In accordance with the provisions of the Employee Compensation Ordinance, 'immediate relatives' of deceased employees refers to:

- spouse or cohabiting partner;
- children;
- parents and grandparents (paternal and maternal); or
- grandchildren, stepparents, stepchildren, siblings, spouse's parents, son-in-law, daughter-in-law, spouse's siblings, siblings'

spouses, spouse's siblings' spouses, half-brothers, half-sisters who resided with the deceased employee in the same household 24 months directly preceding the accident.

Funeral Expenses and Medical Expenses

Anyone having paid for any funeral or medical expenses shall have the right to have such expenses reimbursed.

Immediate relatives must note that certain sums paid in relation to funeral expenses such as the preparation of vegetarian dishes, post-burial meal/refreshments etc., shall not be included in the scope of reimbursement.

Also when applying for reimbursement of funeral expenses, immediate relatives must submit to the Fatal Cases Office of the Labour Department authentic copies of invoices. However, it must be noted that a detailed breakdown for each item of expense must be set out on the invoice, such as expenses for religious ceremonies, coffin, candles, and incense etc. The Labour Department shall take out all items for which no reimbursement will be made, such as food items mentioned above, and a certificate will be issued to the immediate relatives such that they may seek reimbursement from the employer.

Amount of Compensation

The amount compensated to employees killed in industrial accidents will depend on the age and earnings of such employee at the time of the accident:

Compensation under the Employee Compensation Ordinance

Age	**Total Amount of Compensation**	
Under 40	84 months' earnings	Minimum total compensation:
40 – 56	60 months' earnings	HK$344,000
Over 56	36 months' earnings	

Maximum monthly earnings of HK$21,000 will be used as a ceiling for calculation

Compensation allocated to eligible immediate relatives

Eligible immediate relatives entitled to compensation		Amount of compensation
1	Spouse/cohabiting partner	Spouse/cohabiting partner 100%
2	Children	Children 100%
3	Parents/paternal and/or maternal grandparents	Parents/paternal and/or maternal grandparents 100%
4	Spouse/cohabiting partner and children	Spouse/cohabiting partner 50% Children 50%
5	Spouse/cohabiting partner and parents/paternal and/or maternal grandparents	Spouse/cohabiting partner 80% Parents/paternal and/or maternal grandparents 20%
6	Spouse/cohabiting partner, children, parents/paternal and/or maternal grandparents only (whether or not there are other eligible immediate relatives)	Spouse/cohabiting partner 45% Children 45% Parents/paternal and/or maternal grandparents 10% No allocation to any other immediate relatives
7	Children and parents/ paternal and/or maternal grandparents only	Children 80% Parents/paternal and/or maternal grandparents 20%
8	Other surviving immediate relatives only and no living spouse/cohabiting partner, children and parents/paternal and/or maternal grandparents	Other immediate relatives 100%
9	Spouse/cohabiting partner and other immediate relatives only	Spouse/cohabiting partner 95% Other immediate relatives 5%
10	Children and other immediate relatives only	Children 95% Other immediate relatives 5%
11	Parents/paternal and/or maternal grandparents and other immediate relatives only	Parents, paternal and/or maternal grandparents 95% Other immediate relatives 5%
12	Spouse/cohabiting partner, children and other immediate relatives only	Spouse/cohabiting partner 50% Children 45% Other immediate relatives 5%
13	Spouse/cohabiting partner, parents/paternal and/or maternal grandparents and other immediate relatives only	Spouse/cohabiting partner 75% Parents/paternal and/or maternal grandparents 20% Other immediate relatives 5%
14	Children, parents/paternal and/or maternal grandparents and other immediate relatives only	Children 75% Parents/ paternal or maternal grandparents 20% Other immediate relatives 5%

Remark 1 (on table opposite): If there were more than one eligible person in the same class, the amount of compensation will be divided between each person in equal portion. However, if the deceased worker had left behind surviving parents and surviving paternal and/or maternal grandparents, the amount of compensation will be divided by immediate relatives of this class as follows:

- parents 70%;
- paternal and/or maternal grandparents 30%.

Remark 2: Other immediate relatives include paternal and/or maternal grandchildren, stepparents, stepchildren, siblings, spouse's parents, son-in-law, daughter-in-law, spouse's siblings, siblings' spouse, spouse's sibling's spouse, half-brothers, and half-sisters who resided with the deceased employee as a member of the same household for the entire 24 months directly preceding the accident.

Immediate relatives must realise following

As the handling of compensation for all fatal cases takes time, additional time is needed by the Labour Department to issue judgments although applications had successfully been filed, it will take approximately one year before the compensation is ready for collection; if the case in question were directed to the court of law for handling, it takes even longer to pay the compensation (between one and two years).

Therefore, immediate relatives whose livelihood depends on the earnings of the deceased worker must promptly request the employer of the deceased worker to make a settling-in (or condolence) payment, in addition to being responsible for funeral expenses.

Even though the law does not mandate the employer to make a settling-in payment, we believe that the employer has a moral duty to do so and we have already assisted many immediate relatives of deceased workers in successfully recovering such payments.

ARIAV demanding a monument to injured workers in Hong Kong on Workers' Memorial Day *Photo: ARIAV*

Problems in Claiming Compensation and the Victims' Movement in Hong Kong

Based on AMRC's interview with Chan Kam Hong the Chief Executive Officer of the ARIAV

The problem is that though we have a worker compensation system, the amount of compensation is not enough. For example if a worker dies or is injured at work, s/he will only receive a lump sum compensation. This is a problem for injured and diseased workers as, even though they receive the one time payment, their condition may become worse in the future and they may need more medical care that this compensation amount is unable to meet. The compensation money in itself is too low. For example in the case of the injured or diseased worker the maximum compensation amount is equivalent to eight years' wages multiplied by the percentage loss of earning capacity, and for the worker who dies at work, the compensation to the dependents is not more than eight years' wages.

Overall the compensation money is too low for the injured and diseased workers as the money is insufficient to live on in Hong Kong. The other major problem here these days is that many companies ask workers to sign contracts when they join the company declaring that they are self-employed. These workers in case of occupational injury, disease, or death cannot receive any compensation. According to the law in Hong Kong, every employer has to

buy insurance for the worker. However, many employers in Hong Kong evade this responsibility by making workers 'partners' or 'self-employed'.

Occupational disasters pose a great threat to every worker all over the world. However, whenever the discussion on prevention issues is on the table, only the government, employers, and professionals are involved. It is extremely cynical of the government that victims and their organisations are always excluded from the decision-making panel and officialdom never considers their roles and participation in the movement. This may be due to a common misunderstanding that victims and their organisations are only concerned about their compensation and rehabilitation and that the rationale behind organising the victims is merely to raise compensation levels. While this is one of the functions of organising, it is not the only goal of victims' organisations. The movement's primary aim is to prevent occupational disasters and to stop the spread of industrial accidents and diseases.

Take ARIAV as an example. ARIAV is an organisation composed of injured workers, occupational disease victims, and families of industrial fatality victims. Since inception in 1981, ARIAV's unchanged goals are advocacy for reasonable compensation and prevention of occupational disasters. All ARIAV's members are occupational victims and their immediate relatives. They and their families truly suffered from various occupational disasters, and they clearly do not want others to suffer what they have suffered. As a result, ARIAV has organised victims into different groups by reference to causes of accidents or diversity of injuries and diseases. These groups fight for higher safety standards and improvement in the working environment so as to reduce the rate of occupational disasters.

Campaign on Banning Hand-dig Caisson

This section shows how ARIAV organised pneumoconiosis sufferers in order to prevent the spread of the disease.

Hand-dig caisson was a common construction method in Hong Kong before 1996 as it could lower building costs by reducing the use of machinery in foundation work. Before 1996, hand-dig caisson caused numerous deaths and injuries. On average over 300

caisson workers were injured per year and were reported to have contracted occupational diseases, mainly silicosis and occupational deafness. Moreover, the death toll in caisson work was also very high.

Since 1991, ARIAV organised victims and their families to demand that the government ban the use of hand-dig caisson. Combining with keen awareness about the issue in Hong Kong triggered by a series of catastrophic caisson accidents between 1992 and 1995, the campaign successfully finished with legislation that poses great restrictions on the method in the construction industry.

As the restriction ensured an exclusive ban on the 'hand-dig' method, problems related to hand-dig caisson were reduced and the number of dead pneumoconiosis sufferers (see table). In addition, the severity of disabilities suffered by victims after the legislation was passed dropped drastically.

Year	No. of cases of pneumoconiosis
1994	320
1995	200
1996	119
1997	125
1998	109
1999	152
2000	116
2001	131
2002	119

Pneumoconiosis was a common occupational disease in Hong Kong in the 1980s; most sufferers worked in the construction industry. At that time, the annual figure of new cases was about 300. And when they were diagnosed with pneumoconiosis, their situation was serious, often 60 to 70 percent loss of lung function.

ARIAV began to organise the sufferers in the 1980s and first assisted them with compensation. Most of the dead workers' wives were from mainland China and when they came to Hong Kong, they had no idea how to claim compensation. Also, in those days, it was not mandatory for the employer to insure workers. Thus we decided to organise these wives and named the organisation 'Mamas Group'. In the course of organising the movement, we also worked out numerous research projects and suggestions to prevent the disease. In the end, we discovered that the major cause of pneumoconiosis in Hong Kong was the 'hand-dig caisson' construction method. So, ARIAV concentrated on organising pneumoconiosis

sufferers and their families in fatalities concerning hand-dig caisson, fighting for the ban. After more than 10 years of organising work and campaigns, the Hong Kong government legislated stringent requirements on the hand-dig caisson method, which was virtually a statutory ban. The effect was very encouraging as the severity in respiratory function impairment of new cases in the years following the legislation dropped drastically from 60-70 percent to around 20 percent.

We succeeded in making the government set up a safety and health ordinance. Before this law was passed, the safety and health law only protected workers in factory and industrial undertakings while there was no protection for workers in the service sectors. The new safety and health ordinance protects all workers in Hong Kong. We were also successful in fighting for the occupational safety and health council. We also increased the number of labour inspectors - before there were not many inspectors and the probability of the factory being inspected was once in two or three years. However, now with the increased strength each factory can be inspected twice a year. We also forced the government to increase the punishment for the employer who does not take proper safety measures in the factory. The result of advocacy reflects clearly the importance of the involvement of occupational victims in occupational safety and health movement.

The contribution of workers and victims in Hong Kong's development is not recognised. We have been striving for this recognition, pressing the government to make 28 April a workers' Memorial Day. In the past 30 years thousands of workers have given their lives, limbs, and lung capacity to build Hong Kong. We have also been pressing the government to erect a monument dedicated to our dead and injured workers. Ironically, all the recognition the dead and injured workers receive here is wages for eight years – a very cheap price for the lives of workers and often-wrecked families who depend on that worker.

Social Security for Workers in India: some Ground Realities Pertaining to OSH

Jagdish Patel, Vijay Kanhere, and P S Malwadkar

The law provides Social security (pertaining to occupational safety and health, OSH) to the workers in a few sectors of India's economy, e.g. mining, manufacturing, and services. Most workers enjoying the benefits are public sector workers. Many workers in these in the private sectors of these industries enjoy the benefits. There are laws for working conditions for some sectors like Shop and Establishment Act but they do not have specific provisions for OSH.

This paper is based on our own experiences[1] with workers on OSH. Though our experiences are limited geographically, it gives a representative picture. The situation in other parts of India may be even worse but the possibility of a better picture is beyond imagination.

Laws for compensation

The Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 are the two main laws governing workers' compensation.

1) The Workmen's Compensation Act, 1923

In principle this act provides the right to compensation for workers in both organised and unorganised sectors Workers who can claim compensation under this Act are given in the second schedule of the Act. Compensation paid as a lump-sum is determined by a

1 This paper is based on the experiences of the two organisations in India, the Peoples Training and Research Centre, Baroda and the Occupational Health and Safety Centre, Mumbai.

schedule proportionate to the extent of injury and the loss of earning capacity. Young workers and workers receiving higher wages receive higher compensation subject to a limit. On 8 December 2000 the minimum compensation payable under this Act increased from Rs 50,000 (US$1,111) to Rs 80,000 (US$1,777) in case of death, and from Rs 70,000 (US$1,555) to Rs 90,000 (US$2,000) for permanent total disablement. Under the amended act, the maximum amount of compensation has risen from Rs 228,000 (US$5,066) to Rs 456,000 (US$10,013) and that of the permanent total disablement from Rs 274,000 (US$6,088) to Rs 548,000 (US$12,177), as recommended by the Second Labour Commission.[2]

Construction and agricultural workers can apply for compensation under this Act whose definition of a 'workman' is quite broad. There is provision for temporary disablement as well as partial or total permanent disablement or death caused at work. Compensation is intended to compensate loss of earning capacity.

The report of the Second Labour Commission notes: "…The method of claiming compensation for disability is so long and tortuous that one rarely gets compensation to which one is entitled by law….often workers die without receiving compensation…" As a remedy it recommended a modified Employees' State Insurance (ESI) Scheme (with limited contributions and benefits) to workers in the informal sector.

There were 901, 862, and 960 fatal accidents in registered enterprises in 1997, 1998, and 1999 respectively (almost eight million workers are registered). These figures exclude fatal accidents in mines, railways and ports because the Workman's Compensation Act does not cover these sectors where statistics are unreliable. The government does not publish statistics of accidents in other sectors. If all occupational accidents compensable under the Workmen's Compensation Act were notified, the numbers would be much bigger.

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2 The Second National Commission was set up by national government on 15 October 1999 to suggest rationalisation of the existing labour laws in the organised sector and umbrella legislation for ensuring minimum level of protection to workers in the unorganised sector.

Official number of compensated workers

Year	Fatality	Permanent Disability	Temporary Disability
1997	947	1,391	2,117
1998	896	1,231	42,598
1999	1,023	1,557	8,747

Few injured or diseased workers are compensated because of practical difficulties. A few case studies follow to describe this.

• Migrant worker Jitendra Mahato worked in a small engineering unit in Baroda, Gujarat state. He had a mechanical crush injury resulting in the amputation of two fingers. After a few days he was discharged from hospital. When he asked for a disability certificate the doctor refused. After resuming duty on 22 March 1996, he repeatedly asked for compensation and was fired on 4 April 1996. His lawyer sent the employer a legal notice on 10 April 1996 for compensation, and a claim was filed in local labour court with the compensation commissioner. On 16 December 1997 the court ruled in his favour; the employer was ordered to pay Rs 52,193 (US$1,173) for compensation, fine, expenses, and interest. When Mahato asked the employer for the money he was kicked out and told '…come what may we are not going to pay you…'. The lawyer then presented the certificates issued by the court to the District Collector to collect the sum. They waited for a long time but there was no result. Meanwhile we at Peoples Training and Research Institute (PTRC) heard about this case and decided to help. On 21 February 2000 we presented a memorandum to the Collector who assured quick action. We were advised to meet Mr Mamlatdar the officer responsible for collection. He too assured us of quick action. Nothing happened. Two months later we sent a press release and photograph to The Times of India, a leading newspaper, which published the story. We again visited Mamlatdar who assured action. In the next six months we contacted his office continuously—every time they said 'next week'. We decided to approach the High Court. We paid a lawyer part of the initial fees and Mahato paid part. He filed the petition in January 2001—the court ruled on it in December 2002, directing the Collector to get the amount as soon as possible. At one point the employer told the High Court that since he could

Workers in the coal mines of Dhanbad, India
Photo: Sanjiv Pandita

not pay the amount he should be imprisoned! The lawyer and worker continued to follow-up. Finally, in April 2003 the first instalment of Rs 10,000 (US$222) was paid to the worker after seven years of struggle. This amount is only one fifth of the original order. No more has been paid since.

Had the lawyer not been so diligent Mahato would have stopped half way through the struggle. In Baroda alone trade unions have won claims worth millions but the cash has not been realised. Few unions approach the High Court as neither unions nor workers can afford the expense.

• In another case, a worker in a medium scale aluminium company approached PTRC. He had suffered an injury working on a hydraulic press. PTRC collected the necessary information and prepared the notice. When PTRC invited the worker to sign the application, he did not turn up. When we visited him, he said he was not interested. His company has a notorious safety record of many workers injured by presses. Most workers there are on contracts, and threatened with being kicked out if they claim compensation. Once a plastic surgeon in a public hospital requested our help in reducing accidents in this company, but as workers themselves are scared to make a claim, we are helpless. There is a union but it is not effective.

• Prahlad Mukadam, a worker in a small unit in Baroda had an accident when he was sent to another company for supplies. His legs were crushed between a vehicle and logs stored in the other company. His employer admitted him to a private hospital and paid him for four months. He was asked to resume duty but the doctor did not issue a fitness certificate. He contacted PTRC to help claim compensation. When his treatment was complete we advised him to get a disability certificate, but for months he did not appear. When he finally contacted us we reminded him to bring the disability certificate and informed him about the court fee. He did not contact us again. Though working in a unit covered by the ESI Act, the employer had not insured him. According to the Act, in such cases workers are guaranteed benefits.

• Diamond worker Jagdish Sindha was enjoying a holiday with friends, when a local wireman sought help to lay an electric line. They agreed on Rs 50 (US$1) for the two or three hours of work and were chopping a tree branch from the line's path when Jagdish fell from the tree. He died after a month of hospital treatment. The family spent Rs 95,000 (US$2,111) by mortgaging the land they owned. When PTRC learned of the incident we advised the family about compensation and sent a notice to the officer concerned, but the family did not contact us again maybe for want of legal expenses.

• Mehboob Rheman Sheikh was a welder from West Bengal working in Gujarat. He worked for a contractor at the Gandhar project of Indian Petrochemicals Ltd, a giant public sector company recently partly privatised. On 29 December 1995 while welding about 20-22 feet above ground, he fell from an unsecured ladder injuring his back. He was taken to hospital where he was pressurised by management to get a 'voluntary' discharge, which he refused. He was dumped at a small tin shed on the site with only the floor for a bed and nothing to read. PTRC visited him the following May; though very hot there was no electricity in his shed. Though the doctor had advised him not to squat, there he had no access to a toilet and had to he had to go to the toilet outside and therefore had to squat. There was no certainty how long the Company would allow him to

live in that shed. The place is quite far away from us to monitor the progress of the claim. Later we found that the lawyer we had introduced him to had changed sides, which happens quite often as workers have no money for legal fees.

• Ornaments have been manufactured from agate and other semi-precious stones in Khambhat (Camby) city and surrounding villages in Gujarat for 2,500 years. Manufacturing jobs (breaking, shaping, and polishing etc.) are carried out by workers known as the 'fodya' or the ghasiya' etc.

Most traders export their products. Some traders have preliminary jobs done in their premises while the rest of the work is done by the workers or middlemen working at home. Most middlemen employ five to 10 workers. Workers at all stages are paid by piece rates.

Grinding the stone on electric grinding (emery) wheels at 2-3,000 rpm generates large amounts of fine dust around 2-5 micron in size which, when inhaled, reaches the alveoli in the lungs. The dust contains more than 90 percent of free silica particles that settle in lungs causing silicosis—a deadly disease that has already killed large numbers. Some families have been completely wiped out while many children are made orphans. Marriages often break up when one of the couple develops silicosis.

It takes five to 10 years to contract silicosis. Some people are only beginning to know the difference between tuberculosis (TB) and silicosis. TB is curable; silicosis is not. Though silicosis is compensable under the Workmen's Compensation Act, there is not a single case of a claim, due to complex social situation and the oppressive nature of the industry. Once the worker gets the disease her/his condition becomes pitiful. In many cases there is no one to look after victims who are compelled to work till death. Large numbers of women are grinders and hence the death rate among women is high.

2) Employee's State Insurance Act, 1948

This Act provides for the Employees' State Insurance Scheme, an integrated social security scheme, supposed to provide protection to workers in the organised sector and their dependants for

contingencies such as sickness, maternity, and death, and disablement due to an OSH injury or disease.

The ESI Act applies to the following categories of factories and establishments:

1. Non-seasonal units using electrical power and employing 10 or more persons;

2. Non-seasonal and non-power-using units employing 20 or more persons

Under this scheme workers pay 1.75 percent of earnings and employers pay 4.75 percent of the total wage bill. Employees earning up to Rs 40 a day are exempt from contribution. State governments bear one-eighth share of expenditure on Medical Benefit within the per capita annual ceiling of Rs 600 and any additional expenditure beyond that ceiling. The ESI Scheme is administered by the Employees' State Insurance Corporation (ESIC), which comprises members that are supposed to represent the central and state governments, employers, employees, Parliament, and the medical profession. Benefits under this scheme include:

- Medical Benefit: the ESI runs its own dispensaries and hospitals for treatment freely available to the worker and his/her family.
- Sickness Benefit: if a sick or injured worker cannot work because of illness, s/he can access this benefit, under which s/he is entitled to 50 percent of wages.
- Disablement Benefit. If the worker has an accident at work, s\he will be paid 75 percent of wages until treatment and thereafter the disablement.
- Dependent Benefit: If a worker dies from occupational accident or disease his\her dependents are entitled to compensation.
- Extended Sickness Benefit. A worker suffering from a listed disease, can access sickness benefit beyond the normal limit of 91 days up to two years.
- Funeral Benefit. If a worker dies for any reason, his\her dependents can access this benefit worth Rs 2,000.

All benefits above have limitations, but most workers are not aware of them.

The ESI has also many inherent problems and overall has failed to provide most of the stated services to insured workers. The major problem areas of ESI are:

1) Huge savings yet no money for workers

There are many complaints about the ESI Scheme. Corruption is a minor cause but the major cause is the ESI system itself.

The ESI Corporation and the state governments run ESI Scheme. The ESIC collects contributions from workers and employers through the employers. It spends less than necessary thus saving money every year. In the 50 years up to 2000, the ESIC had saved a mind-boggling Rs 5,600 crore or Rs 56 billion (US$1.24 billion). This money is officially saved and recorded in the annual reports of the ESIC. Despite these huge savings the ESIC and state governments are closing hospitals.

The decision making process specified in the ESI Act is faulty. Each state decides expenditure for medical services; Rs 87.5 of every 100 spent is given to the states by the ESIC. The ESIC defines limits on spending for medical services and if any state spends more it, not the ESIC, must pay the extra costs. Thus the states avoid spending on necessary services. The states are short of funds due to mismanagement and the workers suffer, though the ESIC is flooded with money partly given by workers.

Let us look at the contributions in year 1999-2000: workers con-

Contribution of the state governments compared to the interest earned by the ESIC and other figures (X billion Rupees)

Year	Contribution of state governments	Contribution from workers and employers	Interest & other income of ESIC	Arrears from employers	Income minus expenditure
1991-92	—	3.0657	1.4423	—	—
1992-93	—	4.4994	1.3247	—	—
1993-94	—	4.9696	1.9553	—	—
1994-95	—	5.2115	1.9011	—	1.4654
1995-96	—	5.2657	2.1000	2.2212	1.3867
1996-97	0.91	6.0451	2.1896	2.5633	2.2526
1998-99	1.18	12.1240	2.9794	4.5228	5.0835
1999-00	1.42	12.5776	3.1898	5.2479	5.9463

tributed Rs 3.38 billion, the employers contributed Rs 9.19 billion and the contributions from the state governments as medical costs amounted to Rs 1.40 billion.

The ESIC uses the savings (indented for workers' compensation) to give low-interest loans to central Government; apart from this, the ESIC also gives concessions to employers. By the end of year 1999-2000 the arrears (non payment of the insurance money) from employers were a huge Rs 5.24 billon of which arrears from the public sector amounted to about Rs 1.49 billion.

2) Undemocratic Decision Making:

The ESI Act constitutes the ESIC. Decision-making is controlled by central and state governments. There are a maximum 61 members constituting the ESIC; 12 are appointed by central Government, each of 27 states appoints one representative, only 10 represent the workers who are also selected by central Government in consultation with workers' federations; employers have 10 representatives selected similarly; two representatives of the medical profession are also selected by central Government. Hence decision-making is dominated by the nominees of the central and the state governments.

Thus one of the largest contributors, the workers (or employers who pay on their behalf), who pay every month, do not have a significant say on the decisions. On the contrary, the workers are viewed with mistrust. A common view that a major cause of ESI failure is workers' 'misuse' arises from such mistrust and is factually wrong. Many activists also share this mistrust based on subjectivity, not on facts. In 1999-2000, sickness benefit paid in terms of number of days per insured person (IP) were just an average of 1.93, i.e. the ESIC paid sickness benefit on average for less than two days per worker for the whole year. If the exact figure of 1.93 days per worker in the whole year includes genuine sickness as well, how much is misuse by workers? It is negligible.

Moreover in 1997 the cost of medical services was Rs 3.15 billion and that of payment for sick leave was only Rs 490 million, or just eight percent of the total expenditure. Obviously this is not the cause of problems.

3) Procedural Difficulties in Claiming the Compensation

Workers ought to be the major shareholders of the ESIC. In reality they are treated by the system as if they are the free-loaders. Application procedures for benefits are worker-unfriendly: different kinds of forms need filling in, complicated by difficult procedures; every receipt produced by workers is viewed as if it were a forgery. Workers are made to run from pillar to post, forced to bring copies of various papers that are needed for administration, and made to collect records from employers, yet this task is a duty of the ESIC. Workers are even forced to prove that they suffer from an occupational disease, but detection of such disease is again a duty of the ESIC, not the employee. Staff treat workers with disrespect and the system's rules are not transparent. Instead of getting help from the ESI uneducated workers face the worst difficulties. This is illustrated by the following case.

Jagdish Kanji Parmar, 26, worked for a contractor in Ahemedabad Electricity Company. His job was to replace old cables. He and a workmate were about 22 feet up a pole. Other workers were tensioning a wire when suddenly it broke. Both workers fell. As Jagdish fell the pole crashed on his back, seriously injuring him. He was rushed to hospital and the company was informed. He was covered by the ESI Act. The company filled out the forms and sent them to the office concerned. He applied for disablement benefit, too, but did not know about compensation. The lawyer he contacted asked for Rs 500, which he paid. The lawyer sent a notice under the Workman's Compensation Act, to which the company replied but evaded paying any damages. The worker was poorly informed about the procedures and did not need a lawyer in this case. All he had to do was to approach the ESI to initiate the claim for compensation. He was diagnosed as suffering from paraplegia. He was not able to move freely and attend duty. So he moved out of Ahemedabad and went back to his village. He had just married when he had the accident. Soon his wife deserted him. In June 2002, when the family was out he set himself on fire. When the family returned they only found his ashes.

Cramped workplace in India *Photo: PTRC*

Injured employees must produce an accident report filled in by the employer. If the employer refuses, the worker finds it almost impossible to get any compensation. Even after an accident report is produced, any resultant disabilities are not estimated properly by the Medical Boards constituted under the scheme and the injured workers are denied proper compensation. Challenging the decisions of the authorities in courts is a difficult proposition for individual workers as the ESIC fights cases up to the highest court. The ESIC has strong financial muscle that is used against the contributor workers.

This is illustrated by the following cases concerning Noise Induced Hearing Loss (NIHL).

- A worker in a compressor room of a big engineering unit complained of hearing loss. PTRC advised him on this issue and he was diagnosed by ESI to be suffering from noise-induced deafness. We then advised the worker to have the form filled in by the company and submit it to the ESIC. When he approached the company, the clerk 'advised' him not to insist on obtaining the form otherwise he would face serious action. The worker was scared and decided not to go for compensation.
- A textile mill worker approached us through his union to claim compensation for NIHL. He was diagnosed and then approached

the ESIC to initiate the process. The manager of the company informed him that he had worked there for 20 years but had never heard of compensation for hearing loss! When the manager was convinced that there is such a provision, no form was available in the company. The union even visited the director who had declared his ignorance about NIHL compensation. PTRC supplied the form. When the worker appeared in front of the ESI medical board, a board member took him outside and scolded him for false claim. Later he was officially told that his claim was turned down. The union challenged the decision in court. After 10 years the court ruled in the union's favour. But the ESIC decided to appeal this decision in a higher court. Again workers' money was used to turn down a genuine claim.

The following case also illustrates the shortcomings of the ESI system.

Case of Chromium Toxicity

A 30 year-old unit manufacturing chromium salts in Baroda employed about 200 mostly inter-state migrant workers. OSH standards were very poor. Workers had formed an independent militant left union. Three workers attended an OSH workshop in Mumbai in 1985 that was organised by PRIA (an organisation based in New Delhi). Participants observed that all three of them were suffering from dermatitis. Thereafter we at PTRC kept contact with them but somehow we could not make good progress in improving the OSH situation; workers and union would not take it seriously. In 1995 one of the shop floor leaders had to amputate a toe following a non-healing ulcer, arousing the union's interest. We pressured a Factories Inspector to carry out an inspection and medical check. It was revealed that 50 workers had nasal septum perforation (a condition that occurs due to chronic exposure to a specific salt of chromium: hexavalent chromium). 16 workers had dermatitis. Later we found that seven workers had died in the previous two years either immediately after retiring or when still working. At least two or three among them were suspected cases of the toxic effects of chromium. We wrote to the ESIC to make an inquiry for compensation. The Certifying Surgeon wrote to the factory to initiate the

compensation process, but the ESI would not accept the forms; instead it advised all workers to be sent to them for diagnosis. Some workers went. Three of these were awarded compensation and were paid arrears. Their disability was assessed to be 10-15 percent. After two months one of them received a notice from ESIC to pay back the arrears saying, "It was paid to you by mistake!" We challenged this decision; the Court put a stay on collection. The matter is pending in court for a final hearing. This success inspired other workers to claim. In a second batch 20 workers appeared before the Board, which assessed their disability to be 0 percent, but did not give any reasons for this decision, which PTRC has challenged in court. Meanwhile because of press publicity, the National Institute of Occupational Health (NIOH), a premier research institute on OSH, carried out a study, but refused to share the report; however, we obtained it from the Labour Commissioner. Though the study was poorly done we found 10 cases of obstructive and\or restrictive lung disease. One of these workers then made a claim for occupational asthma and the Board awarded him 30 percent disability. Now he receives Rs 600 per month. The union activist whose toe had been amputated was fired for 'giving an interview to the press and defaming the company'. PTRC claimed for his ulcer and toe and after much representation, ESIC admitted his claim. He was examined by the Board and awarded 10 percent temporary disablement, to be reviewed after one year. Recently they examined him and awarded him permanent disability. Last year we came across three cases of NIHL and one case of asthma. They were examined by an ESI hospital and issued with certificates. When requested by the ESIC to provide information necessary to process the claim, the company refused. It is now more than six months without movement on these claims. PTRC offered to furnish necessary information on oath, but the offer was refused.

4) Poor Medical Facilities

Apart from the problems with compensation for occupational injuries and diseases, the ESI system does not even provide proper treatment facilities for insured workers and their families. Patients needing a CT scan or audiometry (to check hearing loss) are re-

ferred to Ahemedabad in Gujarat even though these facilities are privately available locally. This causes much delay in getting proper treatment. Poor quality drugs, unavailability of drugs, lack of doctors and other staff, unavailability of equipment, and poor functioning and efficiency of staff are common complaints. We have deduced from our long experience that only urban workers get benefits. ESI has no dispensaries in villages so workers would have to travel a long way when sick. Instead they prefer to pay private doctors available on the doorstep, but there is no reimbursement for such expenses.

Reform of the ESI system

The whole system has existed for 50 years without any real challenge to its undemocratic character. This contributory scheme needs to be totally reformed and made participatory. The basis of participation is very clear; the workers—the contributors—should be the main participants. United action is needed today for improving this scheme and making it available for informal workers.

Increasing awareness about the facilities available under this scheme can make a beginning. Recently in Kolkata, the OSHC realised that retired jute workers were not aware about access to medical facilities for retired worker and spouse at only Rs 10 a month for life. How many workers are aware of this facility? The workers in Aurangabad, Maharashtra state formed an action committee about ESI. They meet every 15 days and collect complaints from the workers. ESI officials often browbeat individual workers; a lone worker feels powerless when pitted against a mistrusting giant like the ESIC. With a united action committee these workers approach the system more confidently and realise their rights and gain confidence. There is a need for such united and consistent actions to make use of already available rights. The committee in Aurangabad consists of activists from various unions.

The following examples of additional facilities can be easily accessed:

- The ESIC provides information on all procedures and rights to the contributors in their mother tongue/regional language, not only in Hindi and English.

- For insured workers whose job involves risk of exposure to agents causing occupational disease, the ESIC can provide a red Identity Card as prescribed in the Local Office Manual (the Local Office maintains a separate register of occupational disease-prone industries).
- ESIC board panel doctors/dispensaries maintain separate records for each insured worker to record details of treatment. ESIC can provide an insured person with a copy of the records in booklet form called the IP's Health Record Book, which serves as an authentic certification of leave on medical ground and of outside advice of purchase of drugs/medicines, examinations/tests, or treatment to get a cash benefit in addition to an up-to-date complete health record of each IP.
- The ESI does not cover all geographical areas. For example, Ratnagiri district, Maharashtra state has many chemical and other industries but is not covered by the ESI Scheme. The workers there need this scheme but the State Government does not extend this scheme to Ratnagiri and many such areas. As we saw ESIC has enough reserves to cover new areas. The scheme works in such a way that the more formal sector workers get covered the more its reserves grow. Such extensions will strengthen the scheme to help needy workers and will increase provision of medical facilities to workers in the informal sector as well.
- Facilities to detect occupational diseases with proper equipment should be available in all cities, (the ESIC has only one occupational disease centre for Maharashtra and Goa, but this centre did not have even an audiometer.

There has to be a thorough discussion among workers and organisations about the changes needed in the ESI Scheme. There is a possibility of radical and beneficial changes in the ESIS through major amendments to the ESI Act. The changes are financially feasible. In case of ESIS the demand is not for subsidies, it is to stop subsidising the central Government and provide proper, overdue, and financially possible facilities to workers. Workers are already suffering due to the present intense programme of privatisation, and will have to pay a lot more money for medical facilities and even

then they may not get proper medical treatment. Neo-liberal opportunists have proposed privatising the ESI scheme in a bid reform it. All such initiatives should be opposed as we need to reform this system to make it more democratic with real workers' participation and not to sell it to some private corporation.

Compensation is a Basic Human Right
Observations from India

Vijay Kanhere

We claim compensation when workers' lungs or limbs are injured, when there is permanent loss of vital capacities, and death. However a senior unionist recently said to me, "Claiming compensation is like converting the loss of life or limb into dollars. How can you place a price tag on workers' precious limbs and organs? You should work for prevention of occupational accidents and diseases."

After an aeroplane crash or road accident I have never heard anyone say, "Do not work for compensation, work for prevention." In reality compensation amounts in these cases are very high compared to what the worker's families receive after a fatal accident or occupational disease. Particularly in air accidents at least some amount is paid out almost immediately. In these cases it is accepted that working for compensation is not contrary to working for prevention.

When it comes to occupational accidents and amputations, I have even heard a manager claim, "When they need money to pay a dowry for a daughter's wedding, some workers deliberately put a finger or two in a running machine so as to get money in compensation." Obviously this is a biased and largely untrue statement and is also aimed at diverting attention from the fact that neglect of preventive mechanisms and methods of work as well as mismanagement are the true reasons for accidents in workplaces.

The time gap is very long between accidents occurring and actually receiving hard cash in compensation. Resultant permanent disabilities are evaluated only after all medical treatment is com-

plete – this is the time when the disability is judged to be permanent or otherwise. Evaluation is the basis for calculating the amount of compensation to be paid for disability. Amounts for temporary disablements are not large as they mainly only compensate for the loss of wages during the period of medical treatment.

In cases of winning compensation under state-run social security systems, the time gap is usually less than for private insurance cases and procedures may not involve the courts.

In case of receiving compensation directly from an employer or the employer's insurance company, the injured worker has to claim the amount and usually it is the employing company or insurance company doctor who evaluates the disability. If the worker does not receive any (or less) compensation s/he needs to negotiate through a union or has to approach the courts. Procedures in courts take many years and are costly. Unions may bear costs of legal procedures and lawyers but there are other costs such as loss of wages to visit courts and cost of travel to the court, which are borne by the injured worker. Even if one wins a case and the judgment orders the employer to pay up, the time gap in getting the money is usually awesome. There are two possibilities under Indian laws and under the laws of most other countries:

A. The employer does not challenge the judgment … but also does not pay up. Under Indian laws the injured worker must then approach the Revenue Department and request to recover the amount of compensation from the employer as arrears of land or building tax (receivable by the government). This may take a long time. In one case of injury due to radiation Mr Kushar the injured worker won a favourable judgment. The Occupational Health and Safety Centre (OHSC based in Bombay) approached the Revenue Department which claimed that it had not received any direction from the labour court.

We approached the court staff.

They said that they had posted the order to the Revenue Department. "Go and trace it through the Post Offices," said the unconcerned clerk. After a lot of running around (if Mr Kushar were

alone he may have given up the pursuit) we were advised to ask the court for a copy of the letter and deliver it to the Revenue Department ourselves.

We applied for a second letter.

"Do you see the third cupboard? See that it is full of orders in favour of workers and no money is received by the workers; these papers are for the last 13 years. Why do you make such a noise in the office? Mr Kushar's order is just six months old," said a clerk.

The accident occurred in 1981.

We won the judgment in 1996.

No money was paid till 1997.

B. The employer challenges the judgment in a higher court - then the matter may be dragged up to the highest court, with the employer or the insurance company concerned making full use of their financial strength and the legal knowledge of lawyers to tire the injured worker with delays that can last decades; or the victim dies.

The neglect of paying out compensation is not limited to India, but is universal; after working for twelve hours a woman worker in New York, US, fell down and suffered a paralytic attack in 1997. By 2001 she had still not received any compensation as reported by NMASS (www.nmass.org) - a group campaigning for workers' health and safety in New York. This example is typical not an isolated case.

In the above case of radiation injury to Mr Kushar, the union's lawyers were not aware that the health problems he suffered from 1981 to 1991 due to heavy exposure to radiation at work in 1981 were covered by the law for compensation of occupational accidents in India. Apart from burns his problem was that his capillaries were narrowing due to exposure to radiation and he was losing strength in his right hand. There was a need for the lawyers to know about the right to compensation for occupational diseases as well as when health problems emerge later in the aftermath of an accident.

Unions and even doctors find it difficult to make evaluations for

disablements such as lung diseases, hearing loss, and narrowing of blood capillaries resulting in loss of strength as in case of Mr Kushar.

Two areas that still need attention concerning occupational diseases and accidents are:

- whereas there is automatic presumption of a connection between work and disease in cases of listed diseases; but
- criteria for evaluation of disablements when no amputation is involved are too vague (for example: there is no amputation but fingers are permanently bent; permanent partial incapacity of lungs; skin diseases).

Degrees of disablement due to amputations are statutorily laid down and very clear, but there is a glaring lack of pressure from the workers' side for progress in the above two areas, and the medical fraternity (and needless to say worker activists) does not clearly understand the legal framework for diagnosis of occupational diseases. These areas need to be more clearly developed and understanding the issues involved needs to be widespread. The rate of compensation for occupational diseases is very low especially in developing countries.

The OHSC estimated that in Mumbai alone there were **10,000** workers affected by byssinosis (damaged by cotton dust) in 1996; by 2004 **only 356** of them have received compensation. Many of them have received less than due compensation as the Special Medical Board of the Indian social security system (ESIS) evaluates according to the degree of disablement. Very few workers can afford to challenge these arbitrary decisions in courts. These figures show clearly that an immense amount of work is yet to be done regarding the right to win compensation for permanent damage caused by occupational diseases.

Neglect and paltry amounts workers receive

In many countries there are social security systems for medical facilities and for compensation of occupational injuries. These systems usually spend much less than needs demand. The most neglected area is in compensation for occupational diseases.

Table 1

Country	Difference between receipts and expenditure as *percentage* of receipts
Bahrain	75.5
Bangladesh	23.7
India	68.6
Indonesia	24.2
Iran	-
Kuwait	53.7
Malayasia	64.5
Pakistan	13.2
Saudi Arabia	144
Singapore	33
Sri Lanka	62.2
Syria	53.8
Thailand	60.3
Fiji	50.8

Source: 'Social Security Systems in Developing Countries', Parduman Singh, FES, Delhi, 1996 (selected statistics)

Table 1 shows the massive savings (profits) that governments and insurance companies make by these schemes in the Asia-Pacific region.

A similar picture is seen on other continents. Only Algeria and Benin social security schemes spend more than they receive (-3.5% and -26.7% of receipts respectively). The reasons are not known to us.

When it comes to Indian workers not covered by ESIS, the facts are gloomy. See Table 2.

Average compensation from 1991 to 1998 amounts to 95,760 rupees (US$2,198) per compensated fatality. If we take into consideration uncompensated fatalities in construction and small scale factories, the average compensation is miniscule. As said earlier the above gloomy situation relates to fatalities; for disabilities due to occupational diseases the picture is even worse.

Would it be correct to say that instead of compensation we should concentrate on prevention?

No! We need to work for establishing the right to get compensation, especially for the neglected occupational diseases.

OSH areas for immediate development

- Workers' representatives acquiring correct legal understanding regarding occupational diseases (OD) - diagnosis, burden of proof, and neglect in social security systems;
- Workers' representatives in the committees of the social security systems becoming active about proper compensation and ODs.

Table 2. Fatalities and legal compensation recorded by the Government in Indian factories

Year	Officially recorded No. of workers killed under the ESI	No of deaths compensated by law	Amount of compensation (X million rupees)
1991	690	1409	72.09
1993	910	474	17.28
1994	696	545	28.10
1995	892	231	15.78
1996	907	1050	79.06
1997	901	947	121.30
1998	862	896	198.05
Total	**5,858**	**5,552**	**531.66**

Source: Statistical Abstract, India, 2001
Note: Column 3 indicates compensated deaths under the Workmen's Compensation Act. This Act applies to factories, construction work and other activities. Some of the fatally injured workers in factories shown in column 1 were covered by another Act for compensation, the Employees' State Insurance Act.

We have already shown that in Mumbai 356 workers diagnosed by our centre as byssinosis victims were recognised as such by the social security system and struggled for compensation. In Mumbai workers' representatives were active in the social security system and there has been continuous activity by the OHSC for the last seven years. In other states, wherever workers' representatives were/are active in the social security system, the system is more responsive and workers' rights are more likely to be recognised. Where workers' representatives paid less attention, the system has not responded and workers are deprived of their right to compensation for permanent disabilities.

Workers' representatives need to

- Advocate proper use of accumulated savings in the Social Security Apex bodies at the national level;
- Increase awareness of doctors about industrial ill health;
- Make administrators aware by persuasion and active pressure;
- Promote development of worker activists' skills to recognise occupational diseases, support them and help the affected workers in follow-ups with the medical authorities and government;

- Work towards expanding social security systems so as women and men in the informal sector can take advantage of them and win the right to be compensated for occupational injuries;
- Educating worker activists and doctors and lawyers about occupational diseases, criteria of diagnosis, and demystification of medical technology;
- Try to ensure that doctors, especially those in social security systems who practice in working class areas, are educated to enable them to confidently diagnose occupational diseases.

Compensation as a right

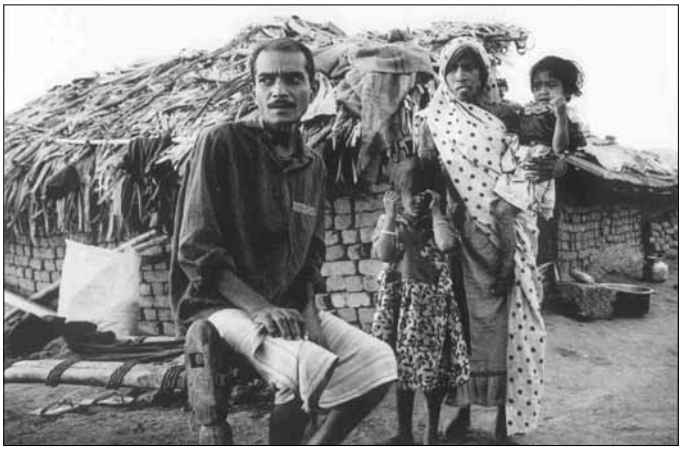
Compensation is a monetary mitigation for a wrong done. Prevention refers to a possible future wrong. Someone who has lost a vital organ/limb/capability has to receive compensation as an internationally recognised human right. There cannot be two ways about this right. At the same time prevention and efforts for prevention should not be ruled out.

On the contrary, winning a right to compensation drives employers and manufacturers to work for prevention; these sections of the ruling class understand the language of money and power. If being careless about workers' health becomes costly to them, they become more careful. (They may also close their shops, as some of the workers' organisers and governments comprehend).

In the US workers fought for compensation for coalminers' pneumoconiosis, byssinosis, asbestosis, and even noise induced hearing loss. Insurance companies that had underwritten employers' risks had to pay out huge amounts, which in turn increased premiums. This in due course increased preventive measures in work processes.

The semi-human basis of workers' compensation

In India as in other countries the amount of compensation is based on the loss of earnings ability. The loss of reproductive capability is the loss of a vital human function, though it may not result in any loss of earning ability. India's Workmen's Compensation Act does not consider this loss as worthy of compensation; the courts ask a worker affected as above to approach civil courts for redress of a civil wrong (under the Law of Torts). Burden of proof under civil laws is much stricter and legal processes even lengthier than



Silicosis victim in Gujarat *Photo: PTRC*

the special compensation laws for workers. The Workmen's Compensation Act legislated during the rule of the British does not recognise any loss other than the loss of earning ability, with the result that other human losses such as disruption to family, family life, or social life are not considered worthy of financial reimbursement under special laws for workers.

Paltry compensation amounts by employers or their insurance companies based on laws that regard workers on a semi-human basis are also inadequate. Neglect of campaigning to establish the right to compensation by the workers' movement is also partly responsible for similar neglect by the employers.

Source of money for compensation

There are two sources for money under India's special laws to fund workers' compensation. Under the Employees' State Insurance Act (as in many other countries under social security systems, it is the apex corporation under government supervision), government pays the compensation. For workers not covered by social security the employer is responsible for paying compensation. Apparently this second source is more just, based on the principle 'culprit pays', but in practice employers insure themselves and insurance companies pay the compensation and litigate on behalf of employers. Insurance companies function on the basis of earning

more and paying less, so receiving compensation from social security systems may prove easier than getting it from insurance companies. Often it is more difficult to claim individual rights from employers than from social security.

The issue of money-allowance

This is a very contentious problem. Many unionists criticise the practice of negotiating hazard allowances, saying it is against workers' interests to ask for them, because it not only means hazards will not disappear but worse it creates a vested monetary interest among workers to maintain hazardous practices. One worker activist worked relentlessly with a team to reduce noise and nitrogen oxide fumes in the workplace and achieved remarkable success in controlling hazards. This activist is a strong supporter of hazard allowances. He deserves a hearing as he has been part of a team that has gone beyond pious wishes. He lectures and has actually organised workers' teams to prevent hazards. He says, "Management that accepts a demand for hazard allowance in the first place accepts that there are hazards in the workplace he controls. Secondly a worker who takes risks should be paid for it. What is the alternative? If a worker refuses the allowance, then does s/he get a safe work place? Most probably not! The persons who talk about working for safety hardly do anything to bring it about. If a worker does not accept a hazard allowance, then she or he may be forced to work in hazardous conditions which are not even recognised as such and also get no money for loss of health."

I had a similar experience. Workers producing cough drops and other medications were exposed to alcohol. They used to be paid a hazard allowance. Some workers wanted to know more details of the hazards they worked with. I gave them detailed notes about the chemicals used and their long term effects. The workers in that plant forced management to arrange a study of hazards. A government institute visited the plant on a prearranged date known to management, which took care to keep the fumes down. The report by the reputable institute said, "There are no hazards; the fumes are within safe levels and management takes all precautions and these are working." After this report the situation returned to its 'normal'

hazardous level. The policy of putting off major leak-control measures till weekly maintenance continued, and the level of fumes for the rest of the week was high; workers felt them and smelled them. But they could do little after a scientific report denied their experience, so the hazard allowance was discontinued by a management armed with a 'clean chit' by an official institute.

The problem of hazard allowances in my opinion does not have a simple one-liner solution. At each place workers groups need to deliberate and decide.

Allowance for prevention!

Accidents leading to work absences of injured workers for the legally defined number of hours in law are designated as reportable accidents (48 hours absence) or recordable accidents (72 hours absence) accidents. Companies attempt at least to bring down number of recordable accidents though not to prevent them. Many times they attempt actually to bring down **only** the number on record by adopting devious means. For example if not hospitalised injured workers are asked to attend work but be idle so that the absence is less than the legally defined period for entering a recordable accident in record books.

Some companies arrange a bonus plan for workers if there are no reportable accidents over a given period. The bonus rises the more 'accident free' days, working as an incentive for peer pressure on injured workers to refrain from recording accidents. A conscientious worker who refuses to play the game is criticised for causing a loss of bonus to the whole team. Thus the bonus actually encourages workers to hide accidents, and is a serious problem labour groups must deliberate.

There are no two ways about working for the right to compensation for death, work injuries, and occupational diseases - the answer is an emphatic Yes! We must work vigorously for this important human right and workers' right without which their well-being, health, limbs, and very lives are jeopardised for company profits.

Workers' Compensation in Japan

Furuya Sugio

Case Study - Asbestos-Related Diseases

I have a report entitled "Occupational Diseases in Europe—comparative survey conducted in 13 countries" (Eurogip, 2000). I would like to introduce Workers' Accident Compensation Insurance scheme in Japan in line with a case study given in this report and to compare Japanese system with European systems.

A given case:

A man aged 50 was affected by asbestosis complicated by a lung cancer. 20 years ago, he worked for five years in a firm that produced car brakes with asbestos; he is also a former smoker. His gross wage was 2,500 euros/month (30,000 euros/year). He had to take leave to undergo surgery (a lung ablation), followed by major chemotherapy treatment. After eight months away from work, he was incapable of resuming his job. He died a few months later leaving behind him a widow, four children from a first marriage (aged 23, 20, 18 and 17, all students), and two children from the second marriage (aged four and one).

File a claim

A victim or dependant must submit the application forms for workers' compensation benefits (in the case above: Medical, Absence, Surviving dependants, and Funeral Expenses) to the Labour Standards Inspection Office (LSIO) that has jurisdiction over the victim or dependant's address or the address where the car brake firm is/was).

Many victims and surviving dependants (dependants hereafter) are not informed about the workers' accident compensation scheme and its application procedures. Victims do not become sick until many years after they leave a job in cases such as asbestos-related diseases, so they often don't remember when or even whether they were exposed to asbestos.

So if practical advice is not available, it might be impossible for victims/families to file claims for compensation. JOSHRC supports victims/families to obtain compensation. Victims and dependants arrive at our office through various paths.

The deadlines for submitting the application forms are two years for Absence and Medical Compensation Benefits, and five years for Disability and Survivors [Dependants] Compensation Benefits and Funeral Expenses.

Hospital or clinic

A doctor who suspects an occupational origin of an injury/disease isn't obliged to notify the injury/disease to a competent authority such as the LSIO in Japan.

All application forms for workers' compensation insurance benefits have columns for a doctor's certification. The application form for Medical Compensation Benefit is submitted to the LSIO via a hospital or clinic, thereby a victim can receive medical treatment free of charge. The opinion of a victim's doctor has a real influence in recognising occupational injuries and diseases, so help from the doctor is crucial.

However generally doctors and other relevant staffs of the hospital or clinic are not trained well about workers' compensation system or about occupational medicine, and tend to avoid troublesome jobs. As for lung cancer, doctors always ask, "Do you smoke?" But rarely ask, "Have you ever been exposed to asbestos?"

We explain to them about the system, the victim, and the work, and ask for their help. If they still won't help and/or the medical treatment they recommend wouldn't be appropriate for a victim, we might recommend that the victim changes to another hospital or clinic, but this would be impractical in the case above.

Officially, all people who live in Japan are covered by one of a few health care insurance schemes; the relevant scheme is clear at the time of patient's first visit to a hospital or clinic. But things are often not clear; in many cases, when we meet a victim/family we find that medical treatment has been sought through another health scheme. If the hospital or clinic will submit an application form for Medical Compensation Benefit of workers' compensation insurance to an LSIO office, prior to doing so, the hospital or clinic must pay back benefits received from the other scheme. But if the LSIO decides not to pay the workers' compensation insurance benefit as the case was found to be ineligible afterwards, the hospital or clinic couldn't cover them, other than asking the victim to pay those expenses. There is no proper system to adjust between the various schemes without imposing a burden upon a victim.

This is not only troublesome but also unfair. And this could be a reason that a hospital or clinic refuses to help a victim to advance the procedures. So we ask the LSIO to start an investigation for recognition following the submission of an application form for Absence or other benefit. After the LSIO decides the case is eligible for compensation, the hospital or clinic pays back benefits received from the other health care insurance, and then submits an application form for Medical Compensation Benefit to the LSIO. The LSIO may ask a victim to submit a written pledge to (or make the hospital or clinic to) do so.

Employer

In this case, the employer in question is the employer of the car brake firm where the victim worked for five years 20 years ago.

Article 23 of the Enforcement Regulations of the Workers' Accident Compensation Insurance Law (WACIL) prescribes that "the employer must promptly certificate the necessary information when a victim or dependant asks." This clause is not subject to punishment. In reality employers often refuse the certification and other assistance.

The LSIO can receive application forms without employer certification if the employer refuses to supply it.

If the firm has closed, we must find (written certifications by) two ex-fellow workers to prove that the victim had worked for the firm.

The amounts of Absence, Disability, and Survivors (Dependants) Compensation Benefits and Funeral Expenses are calculated on a sliding scale based on gross wages that the victim earned in the last three months at the company. Concerning the benefits paid in the form of pensions, bonuses that the victim had earned in the last year at the firm (20 percent of the amount of all bonuses, but capped at 1.5 million yen) is added in the calculation. If the information is not available the chief of the Prefectural Labour Office decides. Sliding scale rates are revised by the Minister of Health, Labour, and Welfare (MHLW) annually.

It is made simpler if the employer supports the case to be recognised as an occupational disease, and offers the relevant data, information, etc. So we negotiate with the employer to do so.

Labour Standards Inspection Office

The LSIO that received an application form for workers' compensation starts the necessary investigation. The LSIO will:

- hear from the victim, families and fellow workers about the work, exposure to hazards, health situation and diseases (including diseases other than the one in question) of the victim and fellow workers,
- hear from the employer about the business and victim, the results of work environment measurement and health examinations, etc., and ask to submit the relevant data (information, drawings and photos, etc.), and
- ask the victim's doctor to submit written opinions about the diagnoses, clinical and pathological findings, correlation between the victim's work and the diseases, etc., and chest X-ray, laboratory results, and any other relevant data.

Then the LSIO asks for opinions from their medical advisor(s), and if necessary consults with the Prefectural Labour Office and the MHLW. Finally the LSIO decides whether (all or part of) the compensation benefits should be paid or not.

We submit the LSIO written opinion(s) based on the data obtained from the victim him/herself, families, fellow workers, employer, victim's doctor(s) and other sources to prove that the case is eligible for compensation benefits. If necessary we ask medical, legal, and other specialists to write independent opinions.

We also often meet officials of the LSIO calling for recognition as occupational diseases (OD).

Q1: Is it an occupational disease?

A-Japan: Yes. Both diseases are included in the list of ODs. Asbestosis is covered by pneumoconiosis, which is a prescribed occupational disease, and lung cancer due to asbestos exposure is listed as an occupational cancer.

The recognition criteria for asbestos-related diseases are set up, and now under review. Both diseases are considered compensable in the light of these criteria. If a victim has only lung cancer without pneumoconiosis, the recognition criteria requires a 10-year period of occupational asbestos exposure.

A-Europe: Yes for both diseases in eight countries. In four countries, Yes for asbestosis, but there are reservations, such as lung cancer following asbestosis. In Sweden which has no list of ODs, Yes for both diseases if proved.

Q2: Taking account of the fact that the victim is a smoker?

A-Japan: No for both occupational diseases.

A-Europe: No for both diseases in 11 countries. In Sweden, Yes for both diseases. In Italy, No for asbestosis, and Yes for lung cancer.

Q3: Reimbursement rate of medical expenses?

A-Japan: 100 percent. All expenses of necessary medical treatments are granted for Medical Compensation Benefit.

A-Europe: 100 percent in 12 countries. In Sweden, the victim has to pay 8.9 euros/day + 200 euros for chemotherapy.

Q4: Compensation for temporary disability for eight months sick leave?

A-Japan: 80 percent of the daily average wage per day of absence is paid under Absence Compensation Benefit up to death (eight months + few months, even after retirement) except for the first three days. Regarding the first three days, the firm producing asbestos car brakes must pay 60 percent of the daily average wage per day under the Labour Standards Law. The average wage is calculated on a sliding scale based on gross wages that the victim earned over the last three months at the car brake firm. If the monthly average wage was 2,500 euros, the Absence Compensation Benefit is 2,000 euros/month (16,000 euros for eight months). The Workers' Compensation Insurance scheme doesn't adopt a concept like 'temporary disability'.

A-Europe: For eight months, from 14,000 euros in Portugal to 20,000 in Finland, and 5,130 euros in Greece.

Q5: Permanent disability rate?

A-Japan: Japan's Workers' Compensation Insurance scheme adopts no concept like "permanent disability rate".

A-Europe: 50-100 percent (100 percent in seven countries).

Q6: Compensation for permanent disability?

A-Japan: The Enforcement Regulations for the WACIL has a table of disability grades for the Disability Compensation Benefit, but this benefit is paid where a disability corresponds with any item in the table remaining after one injury/disease healed. Where medical treatment is still needed, and a worker is unable to work/obtain wages due to the medical treatment, the Absence Compensation Benefit should be paid, regardless of the length of period of absence (even after retirement). The Absence Compensation Benefit is 80 percent of the average wage, so if the monthly average wage was 2,500 euros, benefit would be 2,000 euros/month.

Heals

According to the government, the term 'heals' refers to a situation where a symptom has stabilised and it is expected that any additional generally-accepted medical treatment will produce no positive results. This situation is called 'consolidation'. Accordingly, consolidation does not necessarily mean that physical conditions are

completely restored. This abnormal interpretation and its application often cause disputes.

A-Europe: From 1,667 euros/month in Germany to 3,375/month in Italy, and 710 euros/month in Greece.

Q7: Funeral expenses

A-Japan: 5,000 euros. Funeral Expenses are 315,000 yen plus 30 days of the daily average wage; where this totals less than 60 days of daily average wages, 60 days of daily average wage.

A-Europe: From 1,103 in France to 3,865 in Germany, 30 euros in Spain, and 650 euros in Greece.

Q8: Compensation for widows and children

A-Japan: Amount and type (pension or lump-sum) of the Survivor [Dependant] Compensation Benefit is determined by the number of dependants and other factors. If a widow was living on the victim's income when he died, and if all children depend on the same livelihood as the widow, 19,167 euros/year (Survivors [Dependants] Compensation Pension) and 25,641 euros (Survivors [Dependants] Special Allowance, lump-sum payment) will be paid to the widow.

Four children aged under 18 are taken into account to calculate pensions, but don't have individual rights to receive benefits. Amount of the Survivors [Dependants] Compensation Pension for five dependents (a widow and four children) is 245/365 (67 percent) of the victim's annual wage and this rate is the maximum amount of the Survivors' [Dependants'] Compensation Pension.

A-Europe (examples): In Italy, 15,000 euros/year for the widow and 2,500 euros/year each for six children (total 30,000 euros/year, 100 percent of the victim's annual wage).

In Spain, pension of 13,500 euros/year to be shared between the two widows according to the duration of the marriage, and 3,300 euros/year for four children aged under 21 (total 26,700 euros/year, 89 percent of the victim's annual wage).

In Sweden, 6,400 euros/year for the widow, 3,772 euros/year each for the two youngest children of the first marriage, and 3,772 euros/year each for two children of the second marriage (total 21,488

euros/year, about 72 percent of the victim's annual wage).

In Greece, 3,120 euros/year for the widow and 900 euros/year each for up to six children (total 8,520 euros/year, about 28 percent of the victim's annual wage).

In Denmark, the widow receives a pension of 9,000 euros/year for three to five years due to her young age and thus have the opportunity to vocational training/education and of being able to provide for herself. But the pension can be paid over five years, as long as the training lasts, and even over 10 years in some circumstances. She receives a transitional allowance of 13,467 euros plus running benefit amounting 30 percent of her husband's annual income.

Recognition Standards for Asbestos-related Diseases in Japan

A: Asbestosis

Applies to those who: 1) and 2)-a, or 1) and 2)-b

1) exposed to asbestos in his/her work at present or in the past;

2a) for pneumoconiosis (asbestosis) that is classified as Grade 4 (heaviest pneumoconiosis, and the patient's need to be under treatment);

2b) for pneumoconiosis (asbestosis) that is classified as Grade 2 or 3 (patient has clinical findings of pneumoconiosis), and with a complication (pulmonary tuberculosis, tuberculous pleurisy, secondary bronchitis, secondary bronchiectasis, or secondary pneumothorax).

B: Lung cancer

Applies to those who have lung cancer, with: 1), 2), or 3) or 4)

1) asbestosis (on chest X-ray);

2) non-asbestosis (on chest X-ray), with more than 10 years of occupational asbestos exposure history, and with clinical findings such as continuous inhaled fine fibres at the bottom of the lungs when s/he breathes in, pleural plaque or pleural calcification on chest X-ray, or asbestos bodies in sputum;

3) non-asbestosis (on chest X-ray), with more than 10 years of occupational asbestos exposure history, and with pathological findings obtained from TBLB (transbronchial lung biopsy), open lung biopsy,

autopsy, et al., such as diffuse fibrous proliferation, pleural plaque, pleural calcification, asbestos fibres or asbestos bodies in lung tissue;

4) none of the above, but the patient has a history of relatively short, or intermittent temporary, high concentration exposure to asbestos; in this case the Ministry of Labour examines each case to determine whether the disease is occupational in origin.

C: Mesothelioma

Applies to those with 1) or 2) or 3).

1) pleural or peritoneal mesothelioma with more than five years of occupational asbestos exposure history, and with asbestosis (on chest X-ray);

2) pleural or peritoneal mesothelioma with more than five years of occupational asbestos exposure history, and with pathological findings obtained from an autopsy et al., such as diffuse fibrous proliferation, pleural plaque, pleural calcification, or asbestos fibres or asbestos bodies in lung tissue;

3) none of the above, but the patient has pleural, peritoneal, pericardial or other mesothelioma, or diagnosis is difficult; in this case the Ministry of Labour examines each case to determine whether the disease is occupational in origin.

Summary of Workers' Compensation in Japan

Workers' Accident Compensation Insurance Law

In Japan, the most important workers' accident compensation scheme is administered by the Government (under the jurisdiction of the MHLW) under the Workers' Accident Compensation Insurance Law (WACIL).

The WACIL was enacted in 1947, along with the Labour Standards Law (LSL). The LSL puts all employers under the obligation to comply with minimum standards of working conditions specified in this Law. The minimum standards of workers' accident compensation are prescribed in LSL Chapter 8. The purpose of the Workers' Accident Compensation Insurance is to ensure the discharge of the employers' obligations under the LSL by making employers take out this obligatory insurance.

The LSL also has a chapter for OSH. Though as the contents and relevant regulations and guidelines had increased, the OSH Law was separately enacted in 1972. Chapter 5 Article 42 of the LSL prescribes only "matters concerning the safety and health of workers shall be provided for by the OSH Law"; Article 1 of the OSH Law prescribes "the purpose of this Law is to secure, in conjunction with the LSL, the safety and health of workers in the workplaces as well as to facilitate the establishment of a comfortable working environment". Many regulations and guidelines have been established under the OSH Law.

Businesses and Workers Covered

The WACIL applies to all businesses that employ a worker or workers in Japan with limited exceptions.

National and local government employees (except for part-time local government employees engaged in blue-collar work) and mariners are not covered by the WACIL; other equivalent schemes are set up for those workers. The WACIL doesn't apply obligatorily to one-person operation businesses, which are categorised as agriculture, forestry, or fishery enterprises with less than five workers; these workers can be covered by the WACIL under special procedures. Moreover, another special system is established to permit employers of small- and medium-size businesses, the self-employed who don't employ workers and workers assigned to overseas jobs, to join the WACIL.

At present, the number of businesses covered by the WACIL is approximately 2.7 million; the number of workers covered is approximately 48.5 million.

Under the WACIL, all workers are treated without discrimination in types of employment, nationalities etc. So a temporary or casual worker, (so-called 'illegal') migrant worker, etc. can receive the equivalent compensation benefits to those as a regular or permanent worker.

Even if a worker suffers from an occupational disease after resignation or retirement from the job in which s/he had been exposed to a hazard, s/he can receive compensation benefits.

Asbetos Victims' Association of Japan Photo: Sugio Furuya

Additionally even if an employer has not paid insurance premiums, a worker can receive compensation benefits, as the government collects insurance premiums for the past period from an employer, separately from paying out compensation benefits. Employers are required to pay insurance premiums, which are calculated by multiplying total payable wages by the insurance rate determined for each business category (from 5/1,000 to 129/1,000).

Summary of the WACIL

The purpose of the WACIL is "to grant necessary insurance benefits to workers in order to give them prompt and equitable protection against injury, disease, disability, or death resulting from an occupational (work-related including commuting for work) cause, and to promote the rehabilitation of workers who have suffered injury, or contracted a disease, resulting from an occupational cause or from commuting, to assist such workers and their dependants and to secure proper working conditions etc., and thereby to contribute to the promotion of the welfare of workers" (Article 1).

Workers' accidents are divided into 'occupational accidents' and 'commuting accidents'. Commuting accidents have been covered by the WACIL since 1973.

On the other hand, correlations between 'injury', 'disease', 'disability', and 'death' are conceptually explained as below by the government;

Work-related accident that causes:
- Injury;
- Disease and Disability;
- Injury, Disease, and Death;
- Injury and Disability;
- Injury and Death;
- Disease;
- Disease and Disability;
- Disease and Death;
- Death.

Work-related hazard that causes:
- Disease;
- Disease and Disability;
- Disease and Death.

The eight types of insurance benefits:
(1) Medical Compensation Benefit;
(2) Absence Compensation Benefit;
(3) Disability Compensation Benefit;
(4) Dependants' Compensation Benefit;
(5) Funeral Expenses;
(6)Injury and Disease Compensation Pension (since 1977, partially since 1960);
(7) Nursing Care Compensation Benefit (since 1996); and
(8) Secondary Health Examination Benefit (since 2001).

The types and contents of insurance benefits by the WACIL have been improved step by step, becoming better than compensations set by the LSL.

Claim for Recognition of Occupational Accident

In order to receive an insurance benefit, a suffering worker (victim) or his/her dependant must file a claim (submit a prescribed application form for the compensation) to the competent LSIO at each time. (There are 343 LSIO offices in Japan.)

The chief of the LSIO shall decide whether all or part of the

compensation should be granted to the worker/dependant.

The victim/dependant him/herself, the employer, fellow workers, and the victim's doctor will be heard and asked to submit information by the LSIO. Then the LSIO may ask the opinion of medical advisors, and if necessary consult with the Prefectural Labour Office and the MHLW.

Article 23-2 of the Enforcement Regulations of the WACIL prescribes that the employer of a worker can submit an opinion about the claim to the LSIO. This clause was introduced in 1987 following the employers' request to introduce a system in which an employer can file a claim to make re-examination of a decision by the LSIO when an employer is dissatisfied with it.

It is not assumed that an attorney, trade union, OSH non-profit organisation (NPO) such as us (JOSHRC), are involved in the procedures in the law and regulations. In reality we can influence, at least partially, the procedure by submitting information and opinions, by direct negotiation with LSIO officials, and by other approaches.

Standard time periods for administrative procedures are set up by the Administrative Procedures Law enacted in 1994. Generally it is one month, but it is six months for recognition of occupational diseases; there is no time limit for recognition of diseases not specified in the list of occupational diseases. Moreover, those time periods mean only that the LSIO should make an effort to decide within the time periods wherever possible but they are not mandatory.

In reality this law has facilitated shortening such periods, but even so it takes more than one year in cases of diseases due to overwork, etc.

Appeal and Litigation

If a victim or dependant is dissatisfied with an LSIO decision, s/he can appeal to a Workers' Accident Compensation Insurance Referee for a re-examination of the decision, and if dissatisfied with this decision, can appeal to the Labour Insurance Review Panel for a third examination.

The Referees are assigned to 47 Prefectural Labour Offices, and the Panel is set up at the level of the MHLW. The Counsellors

and representatives of workers and employers, are assigned to the Panel, and they can only submit opinions about the claim to the Panel.

A victim or dependant dissatisfied with a decision of the Panel can bring a case before the court against the chief of the LSIO to revoke the decision.

If the Referee or Panel doesn't make a decision within three months of an appeal, a victim or dependant can go to the third examination. This rule was introduced in 1996, previously cases could take 10 years or more to reach a resolution.

On the other hand, compensation by the WACIL is based on minimum standards, compensation doesn't cover full damages caused by a worker's accident; a victim or dependant who has received insurance benefits can claim additional compensation from the employer.

But the number of civil litigation cases for workers' compensation claim brought by victims or dependants was only 262 in 2001. This is an extremely low level in comparison with those in case of general commuting accidents and medical accidents. Chances of winning litigation is also low, as these cases place an excessive burden on a victim or dependant in terms of costs, time, appointment of proper attorney, burden of proof, cultural, social and other factors.

As to additional compensation, a substantial number of large- and medium-size enterprises have established rules that apply to workers' accidents that are recognised by the LSIO as eligible for compensation benefits. This may be an advantage that the Japanese trade union movement has achieved since the 1970s.

Notification and Statistics

Article 97 of the Regulations on Occupational Safety and Health prescribes that "when worker(s) have been killed or absent from the workplace for more than three days due to occupational accident, the employer shall present a 'Notification of Workers' Death, Injury, and Disease' to the LSIO". But this notification has no links to compensation for workers or dependants.

Also, a doctor who diagnoses an injury or disease which could be of occupational origin is not obliged to notify the fact to the LSIO or other body.

So, two different data on workers' accidents (deaths, injuries, and diseases) are available in Japan:

- Data based on notification by employers under the rules of the OSH Law;
- Data based on compensation by the Workers' Accident Compensation Insurance scheme.

There are important differences between the two data:

Time-lag factor

The former calculates a case from the time the LSIO was notified by an employer (based on the calendar year), while the latter counts the time the LSIO decided to grant compensation benefit for a case applied by a victim or dependant (based on the fiscal year).

Factors to increase the latter

- The latter includes when an employer hasn't notified about a case because s/he hasn't recognised it as an occupational accident, not known the obligation to notify, or neglected the obligation;
- The latter includes all cases without reference to whether absence is required or not, whereas the former sums up only cases requiring more than three days absence;
- The latter includes a case that occurred after resignation or retirement from a job that exposed a worker to a hazard, whereas the former doesn't include those cases;
- The latter includes cases of commuting accidents, cases of special members of the Workers' Accident Compensation Insurance (self-employed workers and employers of small enterprises), whereas the former doesn't include those cases.

Factor to increase the former

- The former includes a case that may not be compensated eventually (because a worker/dependant won't file a claim, or the LSIO won't recognise it as an accident even if an employer considered it so), whereas the latter includes only a case the LSIO decided as a worker's accident.

In both statistics, only limited data is available. A report by the Governmental Administrative Audit recommended that the MHLW

improve availability of a more detailed financial picture of the Workers' Compensation Insurance in 1999. The JOSHRC has been exploring data using the Information Disclosure Law, 2001; effective improvements have not been made yet.

For example, the numbers of claims and of not-compensated cases are available for only a few diseases, and the numbers by sex, age, job, length of medical treatment/absence, amount of payments, etc. are almost unavailable.

Situation of Workers' Accidents

Though occupational accidents have decreased in the long term, there are still considerable cases annually.

The annual number of fatal accidents peaked at 6,712 in 1961 and was 1,790 in 2001 which has decreased by 26.7 percent of the peak record.

We can identify three phases:
phase1: peak, 1960-70,
phase2: cut by half, 1970-80, and
phase3: stabilisation, 1980-now.

The statistics for deaths are more likely to reflect the real situation, because it is relatively difficult to conceal. Japan succeeded in halving the number of fatal accidents in only 10 years (1970-80), but then hasn't achieved a significant reduction of fatal accidents.

As observed earlier the OSH Law was enacted in 1972, and relevant regulations have been strengthened under it. But it is designed to ensure OSH only by the combination of specific obligations for employers and governmental labour inspections. It adopts a typical 'rules-based approach', and doesn't consider workers as essential players in OSH. We are up against a brick wall because of this weakness.

The JOSHRC is calling for fundamental changes to the OSH scheme, adopting the 'enabling approach', where 'enabling' means 'empowerment'; empowerment of workers and victims is the key concept.

Apart from that, the annual number of casualties (deaths, inju-

ries, and diseases) reached 481,686 in 1961 and was 133,598 in 2001. There is a similar trend in occupational deaths. Note here, concerning injuries and diseases, that only cases requiring an absence of eight days or more were included in the statistics until 1972, after which they expanded to cases requiring an absence of four days or more.

It maybe possible to use the number of new recipients of workers' compensation benefits as a provisional indicator of total workers' accidents. The number reached at 1,716,678 in 1968 and was 603,101 in 2000, a decrease of 35.1 percent from the peak. The number of compensated occupational diseases reached at 19,013 in 1980 and was 8,741 in 2001, a decrease of 50.0 percent from the peak. But these numbers have been partially influenced by improvements in system, administration of the workers' compensation insurance scheme, and other factors.

In a case of injury, key points for the investigations by the LSIO are whether a worker had an accident or not, and whether the accident caused such injury, mainly by hearing the worker, employer, colleagues, and victim's physician.

It seems that there is relatively less trouble in cases of injury than those of disease. But in fact, there are incidents that are named 'hiding of accidents'.

Recognising Occupational Diseases

The Japanese government's list of occupational diseases (OD) is provided in Table 2 of the Enforcement Regulations of the Labour Standards Law, which lists nine major categories.

No. 1 category is assigned to "diseases resulting from occupational injuries". This accounts for 50-70 percent of all compensated occupational diseases. And about 70-80 percent of total compensated No. 1 category diseases are for lower-back pain (such as acute lower-back pain, lower-back sprain, acute lumbar intervertebral disc hernia, etc.) resulting from occupational injuries. In 2000, 7,628 cases from a total 9,485 cases is 80.4 percent). In a case of a No. 1 category OD, key points for the investigations by the LSIO are almost the same in a case of occupational injury.

No. 2-9 category diseases are allocated to other (narrow) ODs;
No. 2 diseases due to physical factors such as non-cancer radiation disorders, diver's disease, deafness etc.;
No. 3 diseases caused by jobs which involve extreme physical tension such as chronic low-back pain, vibration disease, neck-shoulder-arm disorder, etc.;
No. 4 non-cancer diseases due to chemical substances;
No. 5 pneumoconiosis and its complication diseases;
No. 6 diseases due to pathogens such as bacteria and viruses;
No. 7 occupational cancer;
No. 8 category is called an Additional Provision. The MHLW can add an OD in this category without amending the Regulations, but few diseases have been added;
No. 9 category called 'Comprehensive Relief Provision' (CRP), prescribes "other diseases which are apparently caused by work";
Nos. 2-7 categories have a similar sub-category as the CRP;
Nos. 1-9 categories, other than the CRP, are called 'Specifically Enumerated (Listed) Provisions'. So, even if a disease does not apply to any "Specifically Enumerated (Listed) Provision", such disease can be recognised as an OD under the 'Comprehensive Relief Provisions'.

Japan's list of ODs adopts the Open system not the Restrictive one.

With no contrary evidence and if all the requirements below are satisfied a Specifically Enumerated (Listed) Provisional disease is considered an OD:
(1) A hazard prescribed in the list of ODs exists in the work place.
(2) The condition of exposure to such hazard is recognised as enough to cause a prescribed disease in terms of dose, period, and form of exposure.
(3) The appearance and progress of such disease is consistent with medical knowledge on health due to such a hazard.

For recognition of a CRP disease, the cause between a disease and work must be proved on a case by case basis; the government argues that the evaluation as an OD is not yet enough.

Recognition criteria have been set up for some diseases in administrative notices by the chief of Labour Standards Department of MHLW, whereby if a disease satisfies the relevant recognition criteria, it should be recognised as an OD.

But for all cases a victim or dependant shoulders the burden of proof.

Regarding the number of annual occupational diseases, we can see interesting features in comparison with the notification statistics and compensation statistics.

Total numbers of both statistics are almost the same; this is also true of pneumoconiosis and its complication diseases (No. 5).

But the number compensated exceeds the number of notifications for many categories except for two sub-categories. Even for occupational cancers (No. 7), the number compensated is more than 10 times the number of notifications. The main reason is probably because these diseases often appear after resignation or retirement from the job in which a worker had been exposed to the hazards.

Two exceptions are diseases resulting from injuries (No. 1) in which 'acute' lower-back pains are the majority and 'chronic' lower-back pains (a sub-category of No. 3). For other sub-categories of No. 3, such as repetitive stress injuries (RSI) like neck-shoulder-arm syndromes and vibration diseases, the number compensated exceeds by far the number of notifications. This may be explained by employers' denials of RSIs, type of employment (almost are casual workers—for vibration diseases among forest workers), and other factors.

For 'acute' and 'chronic' lower-back pains, it seems that there is no small number of victims who didn't file a claim despite the employer considering them as ODs and notified the LSIO. In some cases the LSIO didn't recognise them as ODs. Data for in-depth analysis is not available. JOSHRC calls for the correction of this situation.

In addition, the rate of compensated occupational diseases per 100,000 workers in Japan is lower than in European countries. This

does not mean lower incidence in reality, but could mean there are weaknesses in the system and operation of the Workers' Accident Compensation Insurance scheme.

Recent progress

Setting up recognition guidelines for mental disorders including karojisatsu (suicide due to overwork) in 1999.

Substantial relaxation of recognition criteria for karoshi (cerebro-cardio diseases) in 2001.

Official recognition of lung cancer as a complication of pneumoconiosis in 2003.

Review of recognition criteria for asbestos-related diseases (now under review).

Victims' Organisations

There are two national associations of victims for pneumoconiosis and spinal cord injuries, both with more than 5,000 members:
National association of pneumoconiosis victims; and
National association of spinal cord injury victims.
There are two offending enterprise- and medical institution-based victims' groups:
Chromium poison victims who worked for the Nippon Chemical Industrial Co.
Arsenic poison victims who worked for the Sumitomo Metal Mining Co.
Some trade unions, such as the All-Japan Forest Workers' Union, the All-Japan Dock Workers' Union, and the National Federation of Construction Workers' Unions, are actively organising victims and detecting victims among their members.

Laws on Work Accidents and Professional Diseases in Macao SAR

Ung Wai keong

Owing to the frequent occurrence of accidents at work and occupational diseases in Macao, in compliance with the relevant Convention of International Labour Organisation, the Macao Government established the No 40/94/M law on Work Accidents and Professional Diseases, which determines the norms of legal compensation for loss of life or working capacity of workers due to work accidents or professional diseases.

There are some exceptions according to the law:

- When injury is caused on purpose by the worker, or who did not comply with safety rules laid down by the employer;
- When the work accident is caused completely by the negligence of the worker(s);
- When the work accident is caused by permanent or temporary loss of reason of the workers;
- When the work accident could not be expected or avoided. Such accidents are not caused purposefully by people or working or environmental conditions;
- When the work accident is caused by change of public order.

According to the requirements of the law, all employers have the responsibility to purchase labour insurance for their workers to make sure all workers have legal protection when they suffer from an occupational accident.

Definition and coverage

Working accidents: refer to injuries, sustained in the place of work within working hours, which directly or indirectly cause permanent incapacity or death of worker(s). According to the law, the injuries incurred in the following cases are also considered as work accidents and should be entitled to compensation:

- Injury caused during the execution of work determined by the

employers, even when it did not occur in the place of work or within working hours;
- Voluntary work for the employer, which brings profit to the company;
- When taking transportation provided by the employer to or from the place of work;
- Going to receive wages/salary.

Occupational diseases: diseases listed in the law, which are contracted by workers resulting from working for the employer in a potentially dangerous industrial environment for a period of time.

Assessment and procedure

When the worker suffers from a work accident or is proved to have an occupational disease, the employer must send him to the nearest hospital immediately. If the employer is not in the place of work when the worker has an accident, the worker or a family member should inform the employer or his representative within 24 hours orally or in writing. After the employer has been informed, s/he should report to the insurance company all the details about the accident and provide all evidence at the same time. The insurance company then analyses the information and ascertains whether it is a real accident; when it is confirmed, the insurance company pays the victim compensation according to the terms of the policy.

When the worker is sent to hospital, the attending doctor should prepare a report about the body part that is injured, the degree of injury, dates in and out of the hospital, and any temporary or permanent loss of working ability. A copy of this report is sent to the insurance company and treated as principal evidence to the compensation that the insurance company will pay to the injured.

In addition the employer should report the accident to the Labour Department, the Court, and the Social Security Fund, which will provide suitable assistance or financial help to the injured and his family.

Compensation

When it is proved to be a real accident, the employers do not compensate but the insurance company has to compensate the injured or the family of the deceased employee according to the terms

of the policy. There are two types of compensation, medical expenses and cash payments.

1. Medical expenses: The objective of medical outlay is to help the injured to recover, restore working ability, including medical treatment, nursery care, necessary operations, medicine, in-patient fees, medical equipment, and transportation.

Maximum medical expenses are 1) less than three million Macao dollars (about US$374,000) for each victim; 2) if treated outside health establishments, not more than 250 Macao dollars (about US$30) per day, including medical treatment and medicine expenses.

2.Cash compensation: There are two situations: compensation in fatal cases and compensation in cases of total or partial incapacity.

2.1 Compensation in fatal cases: Victim's next of kin has the right to receive the following compensation, based on the age of the victim.

Table 1

Age of deceased employee	**Compensation amount** (X basic monthly earnings)
Under 25	120
25 to under 35	108
35 to under 45	96
45 to under 56	84
56 or above	72

'Basic monthly earnings' in Table 1 means cash remuneration, remuneration in kind, and regular subsidies, but does not include regular overtime pay, bonuses, irregular subsidies, travel allowance, and social security contributions by the employer.

Maximum compensation is 400,000 Macao dollars, the minimum is 120,000.

Coverage for family members of the victim and the distribution of the compensation among them is determined by law.

Additionally the family of a deceased employee is entitled to receive a funeral subsidy not exceeding the value of 30 days of daily basic earnings, which cannot be less than 3,300 Macao dollars but not more than 13,000 dollars. If the employee died outside Macao, the subsidy is doubled.

2.2 Compensation for permanent total incapacity

Table 2

Age of injured employee	Amount of compensation
Under 25	132 monthly basic earnings
25 to under 35	120 monthly basic earnings
35 to under 45	108 monthly basic earnings
45 to under 56	96 monthly basic earnings
56 or above	84 monthly basic earnings

2.3 Compensation for permanent partial incapacity

In cases of permanent partial incapacity the amount of compensation is a certain percentage of the amount of compensation paid out in cases of permanent total incapacity. The percentage is determined by the law.

The maximum compensation for permanent total incapacity is 500,000 million Macao dollars but cannot be less than 165,000 dollars. The maximum for permanent partial incapacity is also 500,000 million.

2.4 Compensation for temporary total incapacity

The injured is entitled to two thirds of basic earnings.

2.5 Compensation for temporary partial incapacity

The injured is entitled to receive compensation equal to the loss of two third of his working capacity.

If temporary incapacity lasts more than 24 months, s/he is re-evaluated as having permanent incapacity by law. The doctor in charge should evaluate the degree of incapacity of the employee and prepare a report for the purpose of applying for compensation of permanent incapacity.

Analysis of work accidents in recent years

According to statistics provided by the Labour Department, the number of cases peaked in 1996, registering 3,747 work accidents. The low point was in 1999 when 3,218 accidents were registered. Most cases were not serious; taking the years from 1998 to 2001

for example, fatal cases were 13, seven, 16, and six respectively. For the same years, the number of cases of permanent total incapacity were 13, seven, 16, and six respectively. Serious cases represented only a small percentage of the total cases. However, the number of serious cases for the first half of 2002 increased compared to the same period of previous year. The number of fatal cases was four, the same as the previous year, but the number of cases of permanent total incapacity was seven, a 75 percent growth. So, the risk of work accidents cannot be overlooked.

Based on the figures shown in Table 3 overleaf the number of work accidents ranked top in the 'manufacturing' sector, the average number for each year between 1998 and 2001 was 841. The next most serious sector was 'hotels and restaurants' where the average number per year was 722. The third was the 'community, social, and personal services' sector with 619 average per year. Fourth was 'wholesales, retails and repair' sector with an annual average of 489. Fifth was in 'construction' where the average per year was 373. Serious work accidents were concentrated in construction; taking the first half of 2002 as an example, half of the four fatal cases were construction workers. The proportion of work accidents in the above five sectors represented over 86 percent of the total.

Almost half of workplace accidents were caused by lifting overheavy weights/twisting or hurt by pressure or pointed objects. Hand injuries represented about 35 percent of the total.

According to figures from the Labour Department, the number of cases of occupational diseases was very few, only registering one case in 1998. The reason for such a low figure is that in all likelihood, it was too difficult to prove that incapability was mainly due to occupational reasons.

Table 4 on page 149 shows recent premiums paid and successful claims for labour insurance.

The figures indicate that the operation of labour insurance was normal. Amounts paid in successful claims compared to premiums paid is relatively low. This implies that some injured workers were

Table 3

Economic Activities	Number of work accidents in 1998	1999	2000	2001	2002
Agriculture, Hunting and Forest	9	1	0	3	n.a.
Manufacturing	906	785	881	792	381
Electricity, Water and Gas	19	14	11	27	n.a.
Construction	465	346	323	356	116
Wholesales, Retails and Repair	490	494	470	502	248
Hotels and Restaurants	717	638	766	767	426
Transport, Storage and Communications	159	182	268	270	103
Banks and Insurance	24	26	27	33	n.a.
Real Estate, Renting and Business Service	55	61	111	136	61
Public Administration and Social Security	14	10	23	40	n.a.
Education	58	72	87	71	n.a.
Health and Social Welfare	25	19	20	28	n.a.
Community, Social and Personal Services	717	556	600	603	381
Domestic Work	23	14	20	23	n.a.
Totals	**3,681**	**3,218**	**3,607**	**3,651**	**n.a.**

Source: Labour Department of Macao

not successful in claims due to non availability of sufficient evidence, or that the workplaces are unusually safe, or *that the funds are regularly used for purposes other than paying compensation*.

Observations

High premiums for labour insurance: Premium rates were determined by the Macao Government on 14 August 1995 through administration order No 236/95/M, which specified the premium for each kind of economic activity. Most rates are over one percent, the highest was 41.7 percent. Though insurance companies give

discount premiums to clients who recorded none or few work accidents. On the whole premium rates are relatively high, and should be adjusted downwards provided that this kind of insurance is generally profitable in insurance companies.

Table 4

	1998	1999	2000	2001
Premium	57,374	52,927	48,298	49,305
Claim	23,073	20,635	25,170	24,667

(X 1,000 Macao dollars)
Source : Macao Monetary Authority

Raising the level of protection: The amount of compensation is not considered low when compared with the levels paid in Hong Kong and Taiwan. However, the maximum amounts of compensation for cases of permanent total incapacity and fatal cases are 0.5 and 0.4 million Macao dollars respectively, while the minimums are only 165,000 and 120,000 Macao dollars, obviously not enough according to the cost of living in Macao. If the minimum monthly expenditure for a four-member family is accepted as 4,000 Macao dollars, the minimum compensation in cases of permanent total incapacity will only last 41 months.

Compensation by way of annuity: Compensation is paid as a one-time lump sum. If the injured is the main source of family income, compensation would only support the family for four to five years. Although the Social Security Fund can help families by way of handicap subsidy provided that the injured has contributed to the Fund for more than five years, young workers with less than a five years' work record are not protected by the Social Security Fund. Because of this, a change in the payment mechanism for compensation from a lump sum to an annuity should be considered by the Government.

Enlarging the scope of protection: The law does not protect self-employed persons. However, because they also risk being injured in a workplace accident, they should also be covered by legal protection.

Occupational Accident and Disease Compensation Systems and Practices in Taiwan

Tsai, Chih-Chieh and Liu, Wan-Ling

Occupational Safety and Health laws

Labour Safety and Health Law (originally set up in 1974)

Main content: standard of safety and health facilities, limitation on working hours on special operations, limitation on children and women, labour for special operations, regular health check for workers, setting up a Labour Safety and Health Committee, educational training for safety and health, and investigation for occupational accidents.

Labor Inspection Law (originally set up in 1931)

The Labor Inspection law was enacted to implement the labour inspection system, and to enforce labour laws and labour-management rights and benefits. In the year 2002, a total of 277 inspectors carried out inspections of 10.2 percent of all firms in Taiwan.

Occupational Accident Compensation Problems under Irregular Employment Relations

'According to a business estimate, at least 50,000 labourers exist in the labour-dispatch [working via agency] sector in Taiwan at present. Now, the labour-dispatch sector includes 12 service industries that the government plans to promote this year. With the increasing trend of flexible employment, companies in Taiwan are all trying to reduce wage costs by hiring informal labourers. This makes labour-dispatch really fashionable recently.' 4 May 2004, Economic Daily News*, Taipei.*

We see recently more and more irregular employment in Taiwan. Most of it happens in the service sector such as janitors or

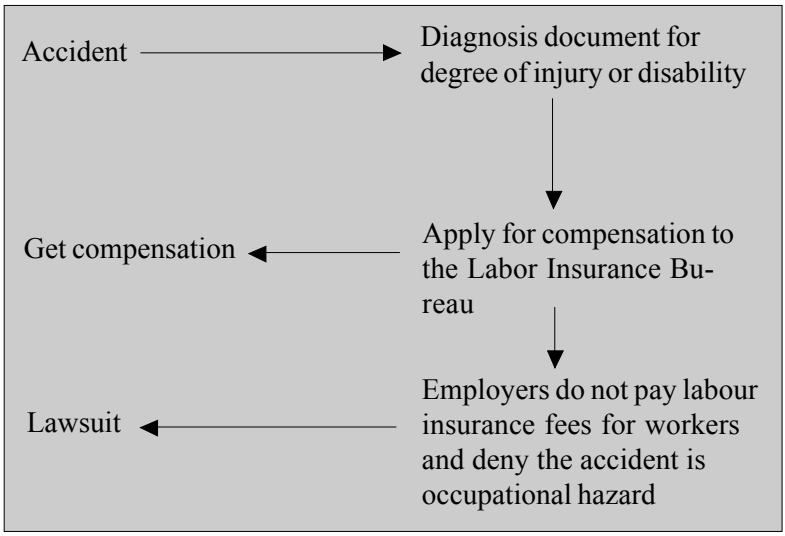
Compensation systems

	Statute of Labour Insurance	Labor Standard Law	Law of Protection for Occupational Accident Victims
Year of original implementation	1958	1984	2003
Workers covered	Those who join the Labor Insurance scheme	Most workers (by industries)	All workers
Compensation paid by	Labor Insurance Bureau	Employers	Labor Insurance Bureau
Medical compensation	Full amount	Full amount	-
Injury or illness compensation	70% of salary for the first year, 50% of salary for the second year	Full amount of salary	-
Disability compensation	Depends on degree of disability	Depends on degree of disability	Workers not in Labor Insurance scheme can apply for minimal compensation
Death	45 months of salary	45 months of salary	Workers not in compensation Labor Insurance can apply for minimal compensation
Living allowance, health instrument compensation, and nursing compensation	-	-	For several years

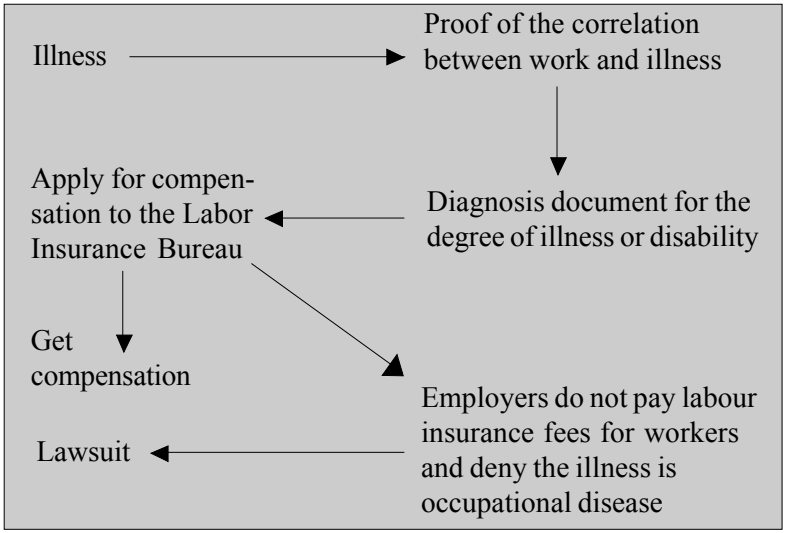
Note: If employers pay labour insurance fees for workers, then workers can only apply for compensation to the Labor Insurance Bureau and cannot ask employers for additional compensation.

How the systems operate

Occupational accident



Occupational disease



sales in department stores. Also, many factory security guards are dispatched by security service firms, not hired directly by the factories any more. Laid off workers are re-hired at an original workplace as cheaper part-time workers, contractors, or dispatch workers in the manufacturing sector. These older skilled workers suffer from piece rate payment or hourly payment, but keep supplying the boss with high-quality labour as in the past. These irregular workers are not protected by the Labor Standard Law and the Labor Insurance Law.

Due to the characteristic of labour-dispatch, which is composed of dispatcher, dispatched labour, and the buyer, there is an employment contract between the dispatcher and the dispatched labour but not between the dispatched labour and the buyer. At the same time the buyer has total managing power to order dispatched workers how to work. If an occupational accident happens or disease is contracted, it seems that neither dispatcher not buyer needs to pay compensation to the worker, because the accident occurred on the shop floor of the buyer, not the dispatcher; in this situation the responsibility for the occupational accident compensation is very confused. As bosses finds that this is a good way to avoid their customary duties and responsibilities, more and more companies prefer hiring irregular dispatched workers in order to escape retirement pay and all other labour welfare. This forces more and more workers to accept flexible hiring in order to earn their livings.

The Case of Shin-Li Chemical Leather Company - Irregular Workers Replace Formal Workers

This company was located in Tainan county, southern Taiwan. From June 2001, this company laid off 138 workers within one year, but also made contracts with two dispatchers and one contractor at the same time. By hiring contractors and dispatched workers, it successfully destroyed the trade union organisation and also escaped all the responsibilities to workers that are regulated in the Labor Standard Law. Shin-Li now hires 300 formal workers, 80 contractors and more than 30 dispatched workers.

These contractors are not employees at all by law, even though

An accident victim from Taiwan speaking in Bangkok Photo: Sanjiv Pandita

in fact they are all laid off ex-formal workers of Shin-Li. These contractors are paid by piece rate. According to the law, contractors are self-employed. So once they become hurt or sick, Shin-Li needs to do nothing for them. How much money can a contractor earn in normal working hours? –Only about US$390 a month! That is half or one-third of a normal salary for domestic labour—even less than the money a migrant worker can earn in Taiwan.

How about those dispatched workers? They are paid US$2-3 per hour. If they can manage to secure work eight hours a day, seven days a week, they would make US$640 in one month. Unfortunately, they can often only manage to work two hours a day. That means dispatched workers are unable to earn enough money for a family to survive. Whenever dispatched workers are hurt in the workplace, the dispatcher never shows up. The workers actually often have no idea about who and where their real boss is, because the only management they contact everyday is that of Shin-Li Chemical Leather Company. The wise Shin-Li management tell victim workers, "You get your boss to come here, I will ask him to compensate you."

Recently, this company lacks enough labour but is not hiring formal workers. There are cheaper irregular labourers working in

every department. Because of their cheaper price, Shin-Li Chemical Leather Company even forbids formal workers to work overtime work, and instead lets informal night-shift workers do the work.

What about the health and safety conditions on the shop floor? When you enter this factory, you can smell different chemicals in different areas. Sometimes the nameless chemicals smell so strong that passers-by may feel dizzy if they keep standing in one area for a while. If you walk further, you feel the high temperature in dying-machine area, the terrible odour in the printing area, and the heavy powder and fibres in the woollen section. Besides, it is very clear that the building of factory is not safe at all. So, under the roof, some sweatshop conditions happen.

Statements from Shin-Li workers:

"One time a worker's glove was gripped by a machine. In order to save the whole palm of his hand, he cut off three fingers by pulling. After that, most workers refuse to wear gloves anymore; we just touch chemical materials directly by hands."

"One time some chemicals spilled over onto my legs. Although I had no idea about what they were, I immediately rinsed my legs with a lot of water. The next morning, the muscles of my legs had turned hard. I had to see a doctor and had to spend quite a period of time to get cured."

"Many co-workers suffer from skin diseases and liver illness for years. We think those chemicals in plants cause it, but no doctor investigates for us. Some persons die very soon after retirement."

Conclusion

In the Shin-Li case, the trade union officials tried to argue three cases of occupational diseases. In the first case, the doctor said that there was no evidence to prove that the worker's sickness was connected with his job, according to the material list offered by employer. In the second case, a worker just accepted redundancy before he received the doctor's approval paper. In the third case, that worker gave up because the process of getting occupational disease compensation was too complicated for him.

Under the support of Shin-Li Trade Union, we had the chance

to enter this factory and investigate it. We found that the Shin-Li Trade Union really wants to do something for its members, especially on heath and safety issues. But many limits make it difficult to improve, such as:

- Difficulty obtaining a doctor's certification. By law, specialist occupational disease doctors have no power to enter a private factory to do necessary investigations. Without investigation, doctors cannot get evidence to prove a relationship between disease and work. So, only limited kinds of occupational disease can be certificated.
- The only evidence a doctor can acquire is 'Material Safety Data' in the factory. But such data is usually incomplete, and there are more new materials used inside the plant that are not included yet.
- Government officers always take the employers' side. I even heard in public one officer say, "No need to do too much on labour safety protection. We need to give capitalists enough reasons to keep rooted in Taiwan."

Unfortunately, from the Shin-Li case alone we can see that occupational disease problem in Taiwan still has a long way to go to resolve it satisfactorily from a workers' viewpoint.

Recently, our government tried to set up a Labor Dispatch Law. When this law is passed by Taiwan's congress in the near future, it is certain that hiring irregulars will grow very quickly. With a low rate of union organising, we really worry that occupational accident and disease situation will become more complicated.

Case Study of Ren Zhi Liao

(Taiwan Association for Victims of Occupational Injuries). Based on his presentation at the ANROAV annual meeting in September 2004**.**

When I was 16 years old, I suffered an industrial accident. I was working in a ceramics factory. I was also studying arts at that time in evening school. I suffered a serious injury to one of my hands on 5 November 1996. I was very worried about my future and wept all the time.

When I first worked there, I was assigned to work in the oven. Many of the workers there were routinely getting burns and other

injuries. As the company grew I was assigned to do other sorts of work. There were many orders and we had to work long hours and that left me exhausted. This led to the tragic accident where my left hand got crushed by heavy rollers.

I suffered 40 percent disability in my left hand and was incapable of lifting anything with that hand. I could not even lift things as light as toilet paper with my left hand, and it gave me lots of pain. I felt incapable of doing even the very basic things with my left hand.

This injury left me traumatised and I still have nightmares about the accident. This started to affect my family also as I often screamed in the middle of the night.

The government and the company were very apathetic about my case and the company refused to pay me compensation. At that time my teacher helped me to approach different organisations to fight for compensation. Thus, I was introduced to the Taiwan Association for Victims of Occupational Injuries (TAVOI), an organisation working for occupational accident and disease victims. They helped me to fight my case against the company.

I was, however, forced to resign from the job after I appeared at a media conference on TV where I was advising young workers how they could prevent accidents at the workplace. My employer was very angry and he scolded me, but I stood firm on what I had done and felt there was nothing wrong with that. Now I also work with TAVOI and help other accident and disease victims to claim compensation. My major responsibility in TOVOI is as an instructor to students in colleges and university to prepare them for possible hazards at the workplace before they start work in the factories.

Before the accident I was studying to be an arts designer. However, now I realise that apart from getting recognition as a professional designer I want to use my skills to strengthen the movement so that workers and students can fight for their basic rights.

Protection of Workers Who Suffer Occupational Illness: Lessons from Thailand

Bundit Thanachaisethawuth

Scope of Work Safety and Occupational Health

The World Health Organisation (WHO) and International Labour Organisation (ILO), both bodies of the United Nations, classify the scope of occupational safety and health (OSH) into four categories:

1. Promote and protect workers in all occupations to achieve good physical and mental health and to attain social well-being.
2. Prevent workers' health from deterioration due to work.
3. Protect workers and employees from all risks at work.
4. Enhance a healthy working environment that enables workers to conduct socially and economically productive lives and to contribute positively to sustainable development.

Occupational hazards

Hazards at work can be divided into two categories:

1. Occupational accident: means unexpected accidents resulting from an unprotected working environment that causes injuries, disabilities, and/or death.
2. Occupational disease: means illnesses suffered by workers as a result of the working environment or due to the nature of the work. Some diseases have immediate effect, some take a long time to show symptoms and develop severe and chronic health impacts such as disabilities or death, the conditions of which are irreversible.

Employees' Assistance Laws: To Protect Workers from Occupational Hazards

The Employees' Assistance Fund was first set up in 1974. It is comprised of employees' and employers' contributions, which vary depending on the levels of risk in each kind of work.

Employees who are protected by the Employees' Assistance Fund under the Employees' Assistance Act include those who work for employers and get paid for that.

The law does not protect workers in the following sectors:
1. Central, provincial, and local government bodies;
2. State enterprises;
3. Private schools;
4. Not-for-profit ventures;
5. Vending businesses.

The Workmen's Compensation Fund is enforceable for any business that employs at least one worker and up to ten workers starting from 1 April 2002.

By the end of 2003, 273,626 businesses with 7,033,907 employees were protected under the Employees' Assistance Fund whereas there are 11 million workers in private businesses and about 10 million self-employed persons.

Employees who qualify for benefits from the Fund have been harmed, made ill, or injured as following:
1. Those who become disabled, due to the working environment or contract an occupational illness or die as a result of working conditions or the nature of work.
2. Those who are harmed as a result of working on the instructions of employers.
3. Those workers, despite the cessation of employee status, shall have two years statutory limitation to claim from the assistance fund since the date that an occupational illness was detected.

The rights of workers and benefits received due to occupational illness

1. The foundation of the rights

An employee receives compensation including medical expenses

and compensation for the days s/he is unable to work, funeral expenses, or expenses for rehabilitation, since the date they became ill through work regardless of the description of his/her status, i.e., employees who receive a daily wage, an hourly wage, a wage paid for piece work, provisional workers, or workers in the probationary period.

2. Number of absent days

The law does not specify the number of absent days allowed, therefore, the employee is entitled to take medical leave in accordance with the actual extent of illness with certification from a qualified doctor.

3. Wages received during medical leave

The law does not specify wages that workers should receive during medical leave. They depend on working regulations, customary practice in the workplace, and agreements between employers and employees or the union.

4. Medical compensation

An employee is entitled to actual medical expenses, but no more than 35,000 baht (US$1 = 41.4 baht - US$846). Workers who suffer injuries requiring operations or suffer severe or chronic diseases as prescribed by the Office of Social Security or certified by the Medical Board of Directors where the aforementioned amount is not sufficient, are entitled to extra medical expenses but no more than 85,000 baht total. If medical compensation still does not cover medical expenses, workers are entitled to further expenses, but no more than 200,000 baht total in accordance with the ruling of the Medical Board of Directors.

Workers on medical leave are paid after they are absent for three days in a row. The payment shall be 60 percent of the monthly wage counting from the first day of absence throughout the whole medical leave period, but not longer than one year. The minimum compensation is 2,000 baht per month, and no more than 9,000 baht per month.

5. Loss of organ or damage to an organ that reduces ability to work

Workers are entitled to compensation of 60 percent of monthly

wages depending on the nature of the loss, but not for longer than 10 years. '[R]educes ability to work' means the loss of organs or ability to work for both physical and mental aspects upon completion of medical treatment.

6. Work rehabilitation

Work rehabilitation is provided for employees who suffer injury and lose ability to work to retrieve both physical and mental efficiency, or occupational rehabilitation that suits physical conditions.

Compensation for work rehabilitation shall not exceed 20,000 baht.

Compensation for operation and work rehabilitation shall not exceed 20,000 baht.

7. In case of death

7.1 Compensation for funeral expenses is 100 times the minimum daily wage.

7.2 Monthly compensation is based on 60 percent of monthly wages for eight years. The minimum compensation is 2,000 baht, the maximum is 9,000 baht per month.

Occupational diseases: Victims of 'Development'

It is a common notion that workers suffer occupational diseases due to carelessness in protecting themselves. They are often accused of having to endure the work because they want to continue earning income and care less for their health; as the saying goes "Fear to starve than to die". This reasoning is too simplistic. The real causes are the reckless development of the capitalist economy by the Thai government that has increased inequality between rich and poor, with no consideration for environmental and social responsibilities, which has led to disruptions in social structures and relations causing the rural sector to be the object of acute poverty and lack of development. Many young people from rural area have to work as cheap industrial labour. There is no preparation for them to adjust to urban and industrial sector lifestyles.

Most workers who migrate to urban and industrial sectors have low education. They are unaware of their rights to organ-

ise and to negotiate for fair minimum payments. For the sake of their families' survival, they work overtime for extra income; many work consecutive shifts. Others are forced by employers that specify a daily working quota, to work continuously resulting in insufficient rest breaks as well as often being exposed to toxic substances or health threatening environmental conditions. Some suffer chronic diseases resulting from poor OSH conditions, losing the ability to work normally. They may suffer all these problems without being aware of them. For example, workers in textile factories inhale cotton dust that floats around factories with inadequate ventilation. Thus they suffer chronic and acute respiratory problems as their lungs lose breathing abilities.

Workers in the electronics sector are exposed to lead that accumulates in their internal organs causing deterioration of nervous systems, the motor systems of limbs, unhealthy standing posture, and muscle and joint pain.

Government policies to promote private investment have brought about structural problems, social injustices, a lack of good governance, and inhumane treatment of workers. Most efforts are on constructing the infrastructure (electricity, road, transportation, tel-

Demonstration on 8th anniversary of Kader fire near Bangkok that killed 188 workers – mostly young migrant women *Photo: Sanjiv Pandita*

ecommunications, etc.) without preparing OSH educational and medical systems to protect workers from harm including:

1. A lack of medical doctors and specialists in OSH who have experience in examining diseases resulting from work.

2. Reporting systems in conventional medical facilities do not sufficiently accommodate occupational diseases.

3. No standard examination practices among medical specialists for occupational diseases has led to conflicting doctors' opinions to workers. This results in the delay of pay outs from the Employees' Assistance Fund, and in certain cases suffering workers have to appeal to rulings by the Board of Directors of the Fund, after which they must seek a court ruling to overturn such a decision.

Many workers hire lawyers to fight for compensation. They have to wait a long time in complicated cases, while their dependants have to rely on other income to survive.

4. Some employers refuse to accept a doctors' diagnosis that confirms the link between the working environment and the disease a worker suffers. They appeal to requests for compensation fearing it will taint their corporate image and make them subject to inspection by officers; in certain cases they fear they will be required to increase their contribution to the Employees' Assistance Fund as they suspect that many more workers actually suffer from occupational diseases. They are unwilling to invest in improved machinery and facilities, or install safety equipment because it increases production costs and hence reduces profitability.

Some employers force workers to seek remedies from the Social Security Fund, which only covers workers who suffer non-occupational diseases if the workers want to continue to work.

Some employers instruct employees to seek medical services from particular hospitals knowing that they can 'convince' the doctors there to refuse to issue medical certificates that confirm occupational diseases; they refuse to accept diagnoses by independent doctors. Therefore workers are unaware of diseases. Without proper treatment from specialist doctors, workers suffer chronic diseases to the point where

they can no longer work and have to return to their rural homes where they await death, or have to suffer meagrely.

According to statistics of the Employees' Assistance Fund about workers who suffer accidents at work, in 2001 and 2003, 200,000 workers sought compensation each year; most were injured or had accidents at work. However, confirmed cases of occupational diseases in these years number less than 100 per year; this figure is simply not credible. Some believe it is due to the lack of standards in medical examinations. In any case most workers are fired before they can tap the assistance fund.

Most importantly, a great number of workers who have been harmed at work have not had access to examination by specialist OSH doctors; they continue working in harmful environments that gradually weaken their health; some lose lives and jobs unfairly, and have to spend their own money to treat themselves, which is tantamount to a grave violation of their human rights and dignity.

Suggestions for OSH Reform

In order to provide quality, humane, and equal services in workers' OSH, the following points should be considered:

1. To ensure the prevention of OSH diseases and injuries; proper examinations and treatment; help from the Employees' Assistance Fund for workers during medical leave; health and work rehabilitation; a comprehensive health insurance scheme to cover all workers; and most importantly a shift in OSH concepts from protective towards preventive measures.
2. Proper understanding of workers' living and working conditions that vary with age, marital status, sexual activity, working environment, shift work, years at work, nature of the work, preventive measures against chemicals used at work and worker exposure to them.

Importantly OSH specialists have to understand the social and cultural aspects of migrant workers. Many workers from rural areas used to live at the mercy of nature and were not bound by

routines such as fixed working hours/days and holidays. When they are subject to a systematic way of living that urban and industrial living demands and new risks at work, they need support to adjust to new conditions. Statistically, new workers tend to suffer higher work-related accidents than experienced workers.

3. The promotion of workers' freedom and rights including:

- The right to information about risks in the workplace. Employers should be made to provide orientation sessions to prepare workers for entry into production systems.
- The right to refuse and change to jobs that are less harmful to health, if employers fail to provide workers with new job opportunities or to correct the vulnerable working environment.
- Workers' equal status and participation with employers, academics, specialists, and government officers at all levels in designing policies and measures related to OSH.
- The right to lodge complaints with employers to improve dangerous working environments in accordance with the standard working environment as prescribed by laws.
- Participation in monitoring safety inspection of workplace on a transparent basis, without being dominated by governmental inspectors. This would rarely happen without an effective trade union.
- Involvement in the appointment and firing of OSH safety inspectors and medical officers at workplaces in order to acquire responsible officials to work for OSH needs in the factories.

4. The reform of governmental systems and the enforcement of relevant laws and regulations to ensure prompt and appropriate penalty.

- Consolidation of governmental offices with overlapping duties to create unity in the work.
- Establishing independent management structures, which are free from governmental influence and based on genuine participatory democracy and multipartite systems at all levels, in particular, among agencies concerned with occupational hazards and diseases so that consumer protection organisations can participate equally to help solve problems. This is unlikely to happen without strong unions.

• Punishment and incentives for entrepreneurs to improve work safety and working environments. There should be more innovative ways such as the enforcement of fiscal and financial tools, investment benefits, and tax deduction, all of which have to be considered in light of proposed OSH plans of investors and how they abide by the plans. If entrepreneurs commit violations of labour laws and safety regulations, investment benefits should be subject to immediate revocation. Employers should be entitled to tax exemptions for OSH training of workers.

Managers who follow unsafe production systems and perpetuate hazardous working environments must be instructed to stop production with workers on full pay until all conditions are up to legal standards, rather than simply being subject to sporadic warnings or meagre fines.

5. The promotion and support for medical practitioners to increase knowledge about occupational disease examinations, and to protect them from management persecution when certifying links between diseases and work. All occupational health facilities in areas with a lot of workers should be equipped with the necessary resources and equipment to help prevent diseases and protect workers' health such as providing health check ups for workers before, during, and after work, suitable for each kind of employment. Workers should be consulted in medical service choices, and employers and medical practitioners required to explain examination results to aid understanding of every worker.

The recruitment process of the Medical Board of Directors of the Employees' Assistance Fund and the Social Security Fund and their roles in examining occupational diseases should rest on reliable principles and practice. All processes should be comprehensible to all workers who should have fair and quick access to appeal rulings without exacerbating the suffering of ill workers.

Under the economic globalisation and trade liberalisation onslaught as well as unfair investment of powerful or developed nations, attempts have been made to link trade with issues of labour

rights, environmental standards, and human rights, which, according to World Trade Organisation proponents, constitute trade barriers and taking advantage over developing nations. As long as the government maintains full-scale export-oriented industrialisation, they must keep monitoring the impacts of these 'social clauses' in order to improve OSH and the working environment.

We have to face the necessity to adjust to new standards and agreements imposed by multilateral organisations, of which Thailand is a party including the 'Four Os';

1. International Labour Organisation (ILO) such as:
- Convention no. 155 on OSH and the working environment;
- Convention no. 161 on OSH services, procedures, bodies, and facilities.

2. International Organisation for Standardisation (ISO) such as the ISO 18000, standard on management of work safety and occupational health.

3. World Trade Organisation (WTO)

4. World Health Organisation (WHO)

The main points

1. In order to abide by international standards of practice, in particular, the ISOs, costly investment and co-operation and understanding of workers at all levels are needed. Without sufficient support from the government this poses a huge challenge for small and medium enterprises.

Efforts to abide by ISOs results in increasing production costs and affects pay rises and working conditions. Increasing the employment of temporary labour or subcontract workers means declining bargaining powers of workers in future.

2. International standards have to be respected only in the export sector, especially to the USA and Europe. Domestic enterprises will not try to meet the standards unless the government makes it a legal requirement, or unless the entrepreneurs themselves become aware of the importance of such standards.

Kader Fire – Symptom of Industrial Failure

Ed Shepherd

A man working next door to the factory when the fire broke out said, "I was upstairs in our work-room when one of the employees who happened to be looking out of the window cried that there was a fire around the corner. I rushed downstairs, and when I reached the sidewalk the girls were already jumping from the windows. None of them moved after they struck the sidewalk … Bodies were falling all around us … They stood on the windowsills tearing their hair out in the handfuls and then they jumped."

146 workers, almost all young women, died because of 'security' - doors and windows were locked to minimise chances of theft - or blocked by inflammable material, leaving the women no choice but to try to reach a floor that had open windows to jump from; more than a third of the deaths occurred when workers jumped out of upper floor windows.

Firemen found the rest of the dead workers piled up against locked doors.

The above could be a description of recent industrial fires with hundreds of deaths and injuries in Thailand or China, but the statement above was made on 25 March 1911 by the junior partner of Levy and Son, adjacent to the Triangle Shirtwaist factory in New York, USA.

The owners of the company were charged with manslaughter but were acquitted in 1914 provided they agreed to pay an insulting $75 damages to the families of 23 victims who had sued.

The story made headline news around the world because it was the world's worst factory fire to date. This grisly record was not broken for almost a century when the Kader toy factory fire near Bangkok killed 188 workers – again most of the victims were young migrant women who were unable to open illegally locked and blocked doors and windows on lower floors.

An Industry Department inquiry after the Kader fire showed that 144 of 244 factories employing more than 100 workers had inadequate fire escapes and fire alarms. The inquiry showed that

accidents were increasing at a rate of 20 to 30 percent annually, compared to annual industrial growth of 12 to 15 percent.

The official inquiry also showed that industrial injuries and illnesses rose from 37,000 in 1987 to 50,000 in 1988, 125,000 in 1991 and over 150,000 in 1992.

Including unreported accidents, the report estimated that 5,000 workers died at work per year.

Kader fire victim
Photo: Sanjiv Pandita

Although the government inquiry concluded that Kader management had violated safety laws with the connivance of government officials, it took over a year of sustained pressure to force the government to charge a factory engineer and three board members. Compare this to the detention of a Kader worker; Viroj Yusak was charged almost immediately after he admitted smoking a cigarette just before the outbreak of fire.

These and other cases were concluded in early 2003. Kader was fined the equivalent of US$12,300 for negligence. Charges against 14 company officials including the managing director, an engineer, and a shareholder were dropped. But Viroj Yusak was jailed for ten years.

The Kader building where most of the deaths occurred was illegally constructed. Overhead walkways linking the four buildings that composed the factory complex had not been approved under the Building Control Act.

The Factory Act was violated; instead of being built with reinforced concrete the factory was made with cheaper uninsulated steel, resulting in rapid collapse, killing many of the workers who had not escaped.

Kader had not obtained the legally required local construction certificate. This was possible because the government does not employ enough qualified engineers to ensure the law is enforced. Demonstrating that nothing has materially changed since the 1993 fire, on May Day 2003, *The Nation* reported, "Safety and environment standards in the factories are generally low. A senior official admits that only 10,000 plus factories can be inspected each year while there are 300,000 factories nationwide.

Solutions?

Three proposals are often made to improve factory safety:

1) Create an independent occupational safety and health (OSH) group with regulatory powers - because the government cannot generate enough money to allow civil servants to enforce OSH laws, it is doubtful that an independent group could finance itself, because it would have to be enormous, and consequently cost a fortune, to inspect all the factories concerned. Furthermore in 2000 more than two thirds of Thailand's factories employed less than 10 workers, who are not legally protected by the Workmen's Compensation Fund. It is unlikely that OSH standards in these factories could be policed by an outside group. And what of all the factories that operate illegally?

2) Increase trade union involvement in education and participation - unfortunately it is improbable that campaigns by existing trade unions could effectively improve OSH accident/incident rates, since only three percent of workers in Thailand are organised into unions – the prevalence of factories with less than 10 workers as already noted, is a huge obstacle to serious improvement in the rate of worker organisation.

3) Reform OSH laws - although worthwhile, the proposal to reform OSH laws misses the point. In both the Triangle Shirtwaist factory disaster and in the Kader fire, death tolls were so high because the buildings were illegally built or illegally operated or both. Had the

laws been followed in 1911 New York and 1993 Bangkok, the fires would not have broken out in the first place, and in the case of Kader, the building would not have collapsed before the workers had escaped.

These ideas are valuable components of an OSH system, but the only effective solution is for companies and governments to tackle OSH by letting workers control their own safety. Instead of repressing independent democratic trade unions, they must instead discourage the small companies that are often sweatshops, and alternatively advocate worker participation in democratic trade unions that represent all workers, and allow workers to inspect and bargain working conditions with employers.

Unless governments and businesses understand and embrace this suggestion, OSH protection for workers will remain the dream it has been since 1911.

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