WORKERS' COMPENSATION ON COMMUTING INJURIES IN JAPAN

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I The Statistics

According to the Department of Labour replied through telephone interview, no specified statistics regarding to commuting injuries are available at the time of September 1994, however, it said that from 20 to 25% among all labour accidents and occupational diseases will be commuting injuries(1).

II The Definition of Compensable Commuting Injuries

Commuting injuries are injuries which happened in the course of going from workers' "homes" to their "worksites" or going back from their worksites to their homes. Commuting "injuries" will include both physical disabilities and mental disabilities caused by accidents or diseases during commutation.

There are three types of commuting injuries under various law of Japan.

(1) The traditional type is a compensable injury under the ordinary workers' compensation system which require them to happen in the course of and arising out of employment.

(2) The new type is a compensable injury under the new system

which provides certain requirements under the Workers' Compensation Act (WCIA) which was revised in 1972 by adding new chapter to it. The WCIA provides that an injury in the course of commutation related to job performance by a reasonable method and a route between his or her home and workplace except that of in the course and arising out of employment shall be compensated (Art. 7 Sec. 1 Sub. Sec 2.).

(3) The third type is not compensable under both system as mentioned (1) and (2), but compensable under tort law or the Civil Code.

It should be reminded of the fact that commuting injuries include not only accidents, but also occupational diseases.

III The Brief History and the Reasons for Setting up the System

(1) A historical observation could easily show that workers' compensation scheme has its origin in workers' rights to sue employers for damages caused by employers' negligence proved in the course of and arising employment. As the Factory Act (FA) of 1911 was modeled after the German legislation, these explanations is applied to Japan.

This is a theoretical explanation by academics who know the history in developed countries, however, the Japanese reality was far from these explanation because there had been few civil damage litigation claiming compensation for labour accidents, so that famous common law defence doctrines developed in Anglo-American countries, such as those of common employment, assumption of risk, and contributory negligence had not overwhelmed workers' litigation. Moreover, trade union movement was oppressed by the government at that time, therefore, no strong demand for the promulgation of workers' compensation scheme. Then, it is safe to say that in Japan there was almost no circumstance which necessitated to trade off the workers' right to sue civil damages to employers with the workers' right for receiving minimum benefits provided under workers' compensation scheme. Therefore, there would not be pure practical reasons, but theoretical reasons for introduning non-fault legislation for workers' compensation at that time.

(2) The non-fault principle on workers' compensation scheme was introduced in 1911, and enacted in 1916 by the Factory Act. The

reasons for this introduction were three folded. Only employers should pay compensation for workers' injuries because (A) employers had gained their profits through workers' dangerous work.

(B) Employers had been in the position where they could have ultimate authority over working places so as to control safety and health of workers.

(C) In consideration of fair burden of damages cause by labour accidents and occupational diseases between employers and workers, employers should share burden because they have financial resources to do so. Therefore, only employers was provided to be liable for compensation under the FA.

(3) Even though the Workers' Compensation Act had been promulgated in the early 1920's, it had a limited coverage, such as to the construction industry. It was not until 1947, just after the defeat of the World War II, that a comprehensive workers' compensation scheme was proposed under a comprehensive workers insurance plan including an unemployment insurance scheme. This came originally from the General Headquarter of the Occupation Forces, the main opinion leader was the followers of American New Deal Policy.

It should be noted that at that time both benefits provided under the WCIA and civil damage awards were not set off. Later the amendment was taken place so that the amount of permanent disability and survivors pension are now set off with civil damage awards.

(4) It was in 1973 when the new type of the compensation system for commuting injuries was provided under the WCIA, controversial arguments were raised in the special Government Committee on Commuting Injuries by both the representatives of leading labour unions (the Labour) and those of the Employers' Association (the Employer) with the result of the compromising formula proposed by the representatives of the public (the Scholars).

The Labour insisted that commuting injuries should be regarded as those of traditional labour accidents and occupational diseases because "no commutation, no work", meaning that workers could not work at their worksites without going and leaving there without commutation, therefore commutation should be regarded as part of work. On the contrary the Employer argued that employers could never prevent commuting injuries because they were out of their reach. Then, the Scholars

proposed the compromising formula as mentioned later with the reasoning as follow. The report of the Committee stated that (A) commutation was workers actions closely connected with employment because commutation, which took certain times and routes every day, was necessary actions for workers. They were carried out by fixed forms in terms of their objectives and manners. Therefore commutation was not like private actions, such as leisure activities.

(B) However, commuting injuries were not those happened under their employers' supervision or control, with some exception. Therefore they could not be regarded as injuries happened in the course of and arising out of employment.

(C) However, compensation for commuting injuries should not be left out as those of private injuries caused by their negligence, but those protected under certain newly created social system. This is because commuting injuries are the result of the modernization of present day life, such as the motorization of the Japanese society, the spread of the workers' residential areas to suburbs surrounding cities, and others.

(D) As the conclusion, commuting injuries should be compensated at the similar level of those in the course of and arising out of employment, which were traditional ones. If so, in view of administrative efficiency, the present WCIA should be mainly taken advantage of to include the new system.

(E) International trend on this issue was also taken into consideration, such as International Labour Organization' Convention No. 121 on Workers' Compensation, and legislation in France and West Germany at that time(2).

(5) In 1987 the WCIA was amended to delegate the Department of Labour to promulgate regulations govering conditions for compensation in case of interruption of commutation, such as those for purchasing daily necessity goods, attending educational training, going to poll, going to hospital for medical examination or treatment and like.

(6) In 1993 the Department of Labour' regulation under WCIA for compensation was issued to include benefits for injuries occurred when workers', who live separately from their families near their workplace, are coming to home where workers' family live and back to their workplace, provided that (A) more than one commutation in a week as a rule, and (B) within 200 kilometre distance or within three hour commutation

(Ki. Hatsu, No. 74).

IV The Differences between the Traditional Type and the New Type of Commuting Injuries Compensation

The Compensation system for workers' commuting injuries is generally managed under the WCIA. However, there are some differentiation between the two as a result of conflicting arguments between the Labour and the Employer at the Committee.

(1) Employees or claiming benefits under the new system have to pay part of the first medical examination charge because employers shall not liable for all the causes of injuries, but also employees are in the position to share the liability for injuries. Therefore, employees should contribute to some extent (200 yen in 1994), which is set off by part of temporary disability benefit, to the Special Workers Compensation Fund.

(2) Employees claiming benefits under the new system are not covered by the Labour Standards Act (LSA), Art. 19 Sub. sec. 1. which provides that employers shall not discharge employees during taking medical leave and thirty days after it. Therefore, they can not appeal before any Labour Standards Inspection Offices of the Department of Labour by asserting that his or her employer violated the LSA when being discharged. This is because the compensation for commuting injuries under the new system is not simply based on the principle of labour standards, but that of social security.

(3) Because all of the compensation for this new type of commuting injuries are not necessarily under employers' liability in theory, employers' responsibility to pay compensation to the injured for the waiting period of three days until temporary disability benefits are payed is not guaranteed to the injuried under the LSA Art 76 sub. sec. 1.

(4) Because this new type of injuries are not preventable by employers and do not occur under employers' control or supervision, the merit system, in which the amount of employers' contribution shall be decided by the specific ratio according to the past three year accident rate, shall not be applied, in stead it is decided by flat rate, which was 0.001% of wages payed to all employees hired by employers concerned

in 1994.

V The Traditional Type of Commuting Injuries Compensation System

Traditional commuting injuries have been compensated under the WCIA only when being proved as occurred in the course of and arising out of employment, regardless of negligence on the part of employers. This is because traditional type of workers' compensation scheme was based on the non-fault principle.

The following cases were compensated as the traditional ones because they were deemed to be under the supervision or control of employers to do things and met accidents. For example, an employee who was ordered to bring sold goods to a customer on his or her way home, or an employee who encounters a traffic accident on the way of heading to his or her worksite from his or her home and back in a vehicle owned by his or her employer. Reguirements for being compensated are the same under the WCIA as other ordinary labour accidents and occupational diseases. Anther example is a case where an employee was injured while moving from one working place to the other working place. These cases were regarded as those which occurred under employers' control or supervision.

VI The New Type of Commuting Injuries Compensation System

The following four requirements are proscribed under the WCIA Art. 7 Sub. sec. 1–2., therefore, compensable commuting injuries shall fulfil all of them for obtaining benefits under the new system. (1) Commuting injuries should happen in the course of commutation related to jobs or work of workers concerned. (2) They should happen on the way from their "homes" to "working place" and back. (3) Commutation concerned should be on the "reasonable routes". (4) Commutation should be by "reasonable method". In addition, (5) casual relationships between injuries and commutation shall be proved, and (6) special treatments to

necessary actions attached to employees' daily activities is provided under the WCIA.

(1) Commutation should be related to jobs or works of employees injured.

However, to come late or earlier to working places approximately within two hours before or after performing their jobs or works will begin or end shall be interpreted as being eligible for benefits. For instances, an employee, who spent two hours at his trade union office located within the premises of his working place after his job had been over, was decided as eligible(3). Commuting injuries, which are not related to jobs or works will not compensated under the new system, an example of which is an injury occurred on the way to his office in order to receive salary(4).

(2) Commutation should starts or ends from "home" and "working place".

"Home" means that "a place where an employee lives for his or her daily life and where he or she uses as the base for his or her work"(5). Therefore, a hospital where en employee stayed once in two days for taking care of her husband was interpreted as "home"(6).

"Working place" has been interpreted more flexibly, so that a factory or an office as a whole is regarded as a "working place". Therefore, an accident which occurred inside of the premises of a factory, but not at an exact workplace for the employee injured was interpreted as commuting accident. Commuting injuries in the course of going to a customer's house from an employee's home as a first visit of the day, or coming back from a customer's house to an employee's home as a last visit of the day are also regarded as commuting injuries(7).

"To go from home to working place and back" does not necessarily mean only one occasion. Therefore, it includes commutation for lunch(8).

(3) Commutation shall be on a "reasonable route".

Unreasonable detours in the course of commutation are not covered

under the system. However, a commuting injury happened in an unusual route which was taken because of a strike by transportation workers[9], and a commuting injury happened in a road which was situated 450 meters apart from his ordinary route because of his sending off his wife to her working place[10] were decided as covered.

(4) Commutation shall be by "reasonable method".

Only socially acceptable commuting injuries are compensable under the new system. However, commuting injuries while not heavy drunken driving, qualified driving but without a driving licenses were decided as eligible for benefits under the new system[11].

(5) A reasonable casual relationship between commutation and injuries is required.

This is because the WCIA provides that compensable commuting injuries shall be "injuries in the course of commutation" (Art. 7 sub. sec. 1–2).

Therefore, injuries which unusually happened to commutation concerned are not covered. For example, an employee, who encountered to be stabbed by a mentally handicapped person[12] and who was bitten by a bee in the course of commutation[13], were decided not covered under the new system. However, commuting injuries happened as the realization of potential danger attached to commutation concerned are covered. Therefore, a female employee, who was attached by a robbery at midnight on her way home[14] and an employee who was shot to death as a result of his cranking his car horn too much to other cars because of his irritation at a traffic jam[15], were decided to be eligible for benefits under the new system.

(6) Special treatment to necessary actions attached to daily life activities is provided.

In general, injuries happened while employees are away from their commuting routes, which are to be compensable, are not covered under the WCIA. However, injuries, which happened on the compensable

routes after injured employees coming back to it from the uncompensable routes for their daily life necessities within minimum scope, are covered. According to the Department of Labour Regulation on the WCIA, the following four categories are proscribed (Art. 8). (A) Buying daily necessary goods, (B) attending vocational training held at public vocational school, (C) voting at public elections organized by governments, (D) going to a hospital to get medical treatment or examination, (E) any action comparable to (A), (B), (C) and (D). Therefore, for example, an employee, who is injured on compensable commuting route after coming back from his or her private route which were used for buying a daily necessary book at a book store was covered under the new system(16).

VII The Benefits provided under the WCIA

Briefly speaking, there are four types of benefits provided under the WCIA (Art. 21, 22), which are the same as those for traditional type of commuting injuries.

(1) Medical benefits are in kind, therefore no reimbursement as a rule with some exception.

(2) Temporary disability benefits are payed to workers injuries who are diagnosed as not able to work. In some cases, partial benefits for workers who are able to work part of a day are provided.

(3) Permanent disability benefits are provided to workers according to the recognition of the degree of the severities of disability which are decided by the local offices of the Department of Labour the (DOL). Most of them are payed under the pension scheme. Only for light disability benefits are lump sum.

(4) Survivors' benefits are payed in the form of pension to eligible recipients, the order of which is provided under the WCIA.

(5) Burial benefits are payed in lump sum. The minimum amount is calculated by the deceased workers' average wage multiplied by 1,000 days.

(6) Special pension scheme is provided under the WCIA, which are payed to workers who are decided by the local office of the DOL as eligible. They are selected from workers who were decided by the DOL that no more medical treatment is effective, and who exhausted the max-

imum years guaranteeing temporary disability benefits.

(7) Workers' welfare programs, some of which are unique to the Japanese WCIA. There are four types of program (Art. 23). (A) Special funding to the injuried or survivors who need for extra money for their children' education, their initiation of new business and others. (B) Funding to employers who need money for medical check-up of their employees. (C) The program for rehabilitation to society. (D) Others.

These program are decided by the Department of Labour to execute them. It is entirely up to the discretionary power to it which will be managed under policy consideration to assist the injuried and their suvivors. Because these condsideration are not necessarily based on the legal principle of employers' liability, it could be called as part of social security scheme for workers.

VIII The Procedure to be recognized as Commuting Injuries

(1) The initial decisions to recognize as eligible for commuting injuries are decided by the local office of the DOL under consultation with the DOL in defficult cases.

The appeal procedures are consisted of two steps. The first step was to local commissioners who also decide cases under consultation with the DOL. Therefore, this step is nothing but for double check to confirm if the inial step was following the past practices.

(2) The second step is to the Labour Insurance Appeal Board which is the highest organization as an administrative adjudicatory committee. The board is composed of members, but the majority of them are appointed from ex-high officials of the DOL. Therefore, some commentators criticize them on its neutrality.

(3) The third step is at district courts, the fourth step is at high courts, and the final step is at the Supreme Court. These court procedures are to negate or support the final decisions made by the Labour Insurance Appeal Board, therefore, these cases are categorized as administrative cases where the State is the party.

IX The Role of Commuting Injuries Compensation to Insurance System: the Fiance

(1) As the benefits for commuting injuries are provided under the WCIA, the role of commuting injuries compensation insurance system is obvious that it is almost the same as ordinary workers' compensation insurance which is managed by the government, namely the Department of Labour. No private or commercial insurance system deals with it except that employers will buy a special insurance premium for civil damage awards which will be paid to workers injured or deceased as additional payment to these benefits.

(2) One difference between the traditional WCIA one and the new one is found in contribution. Under the traditional system, as a principle, employers should contribute almost all of fund to the special budget on workers' compensation insurance managed by the Department of Labour because it is based on non-fault principle.

Very small portion of the fund has been subsidized by the government. However, part of fund of the new system is contributed by workers injured or deceased to part of their first medical examination fee, which is 200 yen or almost 2 U.S. dollars. The principle underlining this system is not non-fault principle, but social security.

(3) The government subsidies a few to the WCIA fund. It will amount less than 0.001% of all WCIA budget. Therefore, the amount is negligible. However, its symbolic significance can not be denied. Namely, commuting injuries are the result of the modernization of Japanese society, therefore, the government shall contribute to the WCIA fund as part of social security scheme.

(4) However, because of such a small amount of contribution, the principle that the fund should be relied upon employers' liability is still maintained under the WCIA as a whole.

X The Preventiveness of Commuting Injuries

Because the WCIA provides no specific preventive measures to any labour accidents and occupational diseases, no preventive measures for

commuting injuries are not provided as well. Other law, such as Traffic transportation Act will serve as legal tools to prevent commuting injuries.

FOOT NOTES

(1) According to the Kyoto Labour Standard Office, 30% of labour accidents in Kyoto Prefecture in 1994 was caused by traffic accidents, KYOTO SHINBUN (Kyoto Newspaper) January 12, 1995.
(2) Tsukin Tojou Saigai Chousakai Houkoku (The Report of Commuting Injuries), 25 August 1972, Seifu Kankoubutsu Senta (Government Printing Office).
(3) Ki. Shu. (an interpretation by the Director of Labour Standards, Department of Labour) No. 1881, 15 November, 1974.
(4) A decision by the Workers' Insurance Appeal Board (WIAB), 30 September 1978.
(5) Ki. Hatsu. No. 644, 22 November, 1973.
(6) Ki. Shu. No. 1027, 23 December, 1972.
(7) A decision by WIAB, 20 October, 1977.
(8) Ki. Hatsu. No. 644, 22 November, 1973.
(9) Ki. Hatsu. No. 260, 1 December, 1974.
(10) Ki. Shu. No. 286, 4 March, 1974.
(11) Ki. Hatsu. No. 644, 22 November, 1973.
(12) Ki. Shu. No. 4039, 4 June, 1975.
(13) Ki. Shu. No. 3464, 17 January, 1975.
(14) Ki. Shu. No. 1267, 19 June, 1974.
(15) Ki. Shu. No. 1931, 23 December, 1977.
(16) Ki. Shu. No. 3051, 27 November, 1974.