OCCUPATIONAL SAFETY AND HEALTH ACT IN THE PERSPECTIVE OF WORK ENVIRONMENT RIGHTS OF JAPAN

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The Content

ABSTRCT

Although the number of injured workers under the Workers' Compensation Act has been increasing, the frequency of labour accidents and the death rate has gone downward in Japan since the Japanese Occupational Safety and Health Act (JOSHA) was promulated in 1972. This would not be because of the Workers' exercise of their rights to protect themselves, but because of the legal framework under which employers' endeavour to protect their undertakings as well as the Department of Labour's administrative guidance.

The work environment rights including the right to know and the right to refuse dangerous work are not well quaranteed under the Act in Japan in comparison with those of advanced countries and the ILO standards, however, some trade unions have recently been pushing their labour movement towards the exercise cf their rights, especially those in safety and health committees.

PART I INTRODUCTION TO JAPANESE OSHA

I. DEVELOPMENT OF THE OCCUPATIONAL HEALTH AND SAFETY ACT OF JAPAN

The JOSHA has its origin in a mining police type of act which was modeled after a similar Act in Germany. The Mining Ordinance of 1895[1], enacted twenty three years after the Meiji Revolution, was later replaced by the Mining Act of 1899[2], and provided that an employer shouid be responsible for taking care of mine workers' life and health under the inspection of the Mining Inspection office. This was an administrative act by which the Government could supervise and police private mining companies.

The tradition that the Government could guide undertakings under its policy still remains today. Accordingly management generally tends to be morg likely to defer to the Government to demonstrate that they follow the law rather than to heed to workers' demands based on their rights.

Though a historical document shows that a mine was struck by workers with their demand that the employer should comply with the Act In 1884, this is a rare incident in our labour movement because any collective action by a group of workers or an union, including the right to hold a public meeting, to enjoy free speech and so on was prohibited by the Security Police Act of 1990[3] until 1945.

The Factory Act[4], which covered factories employing more than 15 employees, went into effect in 1912, and provided a similar legal framework to the Mining Act; namely, that an empioyer was obliged to provide safe and healthy working conditions and if not, a factory inspection office could order to do so. Neverthless, no workers' rights whatsoever were stipulated. After a heated parliamentary debate in which representaives of individual employers who opposed the Act were defeated, the underlining philosophy for the Act was that Japan as a whole needed to protect the good quality of labour forces from labour accidents and occupational diseases for competitive undertakings in addition to possessing a strong army so as to expand its economic power to the international market in the Far East. This is because Japanese political leaders at that time thought that Japan was a developing country, therefore to "catch-up" to the advanced countries such as the U.S., England, France and others was thought to be important for Japan. This "catch-upism" is still kept the part of the mentality of our Japanese corporate warriers these days.

Two years after Japan's surrender to the Allied Forces at the end of World War II, the Labour Standards Act of 1947[5], Chapter 5 of which was devoted to safety and health in workplaces, was enacted by the non independent Japanese Government under the Occupational Forces' labour policy. The General Headquarters of the Allied Forces had declared to liberate Japanese workers from pre-modernized labour relations and shoddy or cheap labour conditions for the purpose of the protection of workers and the promotion of trade unions by labour legislation. The Labour Standards Act was promulgated, which was regarded as a Constitution in the field of labour standards, guaranteeing the minimum standard of working conditions including safety and health at workplaces[6].

It is important to note that the Government considered the ILO standards such as a system of 8 hours of work per a day, weekly holi-

days and annual paid holidays when drafting tbe bill, however, no ILO Conventions concerning safety and health[7] had yet been ratified by Japan at that time.

Chapter 5 of the Labour Standards Act simply provided the basic provisions which set up the legal framework. The legal framework was that the Department of Labour could inspect an employer at its discretion, and prosecute it if any violation of the Act and the safety and health regulations concerned was found. Under this framework an employer was obliged to observe the duties prescribed under the Act, such as maintaining the safety and health standards, conducting health examination, providing safety and health education, appointing health officers and safety officers and so on. The Act also provided an important provision which delegated authority to the Department of Labour to promulgate detailed regulations concerning safety and health protecting against specific risks and in certain areas of activities.

As to the worker's right to take collective actions including safety and health activities, this was first granted in the Japanese history under the new Constitution. Art. 28 provides worker's fundamental rights including the right to organize, the right to bargain collectively and the right to act collectively under which the Trade Union Act of 1949[8] was enacted. Therefore. any trade union could legally propagand, negotiate jointly or bargain collectively with an employer, engage in trade union activities, call strike action, and assist workers in other ways with the purpose of occupational safety and health.

In 1970, the Nixon Administration of the U.S. supported Congress promulgating the Occupational Safety and Health Act. The following year the U.S. Government agreed to cooperate with the Sato Government of Japan to organize a joint committee on research in the field of occupational safety and health in both countries. After publication of the Joint Committee's report, Japan began to prepare a new JOSHA bill which became a law In 1972[9].

The reasons for the new Act were: (A) to decrease the number of labour accidents which had been increasing as a result of the rapid development of the Japanese economy at that time, (B) to expand the reach of the law to subcontracting companies working in the same premises as the parent companies, or joint venture operations working at the same work site, (C) to insert provisions for providing financial aid for the

safety and health of workers employed by small and middle-size undertakings, (D) to set up a target of "comfortable environment standards", (E) to insert a provision for the adjustment to the regulations concerning anti-pollution which would be provided under separate acts, (F) to up grade a number of important safety and health provisions which had been stipulated under separate regulations to the provisions of the Act, and (F) to introduce the prior notice system that an employer, who intends to construct or alter machines or buildings of the kind prescribed under the Act, should submit plans to the Director of Local Labour Standards Agency(10).

FOOT NOTES

(1) Law No. 87, 1890.
(2) Law No. 45, 1905.
(3) Law No. 36, 1900.
(4) Law No. 46, 1911.
(5) Law No. 49, 1947.
(6) KAZUO SUGENO, translated by LEO KANNOWITZ, JAPANESE LABOUR LAW 9, University of Tokyo Press, 1992.
(7) At the time of 1947, there were five Conventions specifically related to safety and health at workplaces: Convention No. 13, White Lead (Painting), 1921; Convention No. 27, Marking of Weight Packages Transported by Vessels 1929; Convention No. 32, Prevention against Accidents (Dockers), 1932; No. 53 Convention No. 53, Safety Provisions (Building), 1937; Convention Medical Examination of Young Persons (Industry), 1946.
(8) Law No. 174, 1948.
(9) Law No. 57, 1972.
(10) Rohdoh Syoh, Rohdohkijunhoh Kenkyukai Daisan Shoh Iinkai Hohkoku (The Report of the Department of Labour, Labour Standards Act Research Committee, The Third Sub-committee), 13 July, 1971.

II. THE LEGAL FRAMEWORK OF JOSHA

The legal framework that the Act mainly provides employers' duties imposed by the Government through administrative guiding and inspection with penalties when violated, and that Act does not provide for workers' rights as such, but their duties without penalties for non observance, has unchanged since the Mining Ordinance of 1889. This is because the Japanese Acts in this field have their charactristic of an

administrative police law as a tradition. However, after the end of the Second World War they have been classified as a part of "individual labour law" because the Labour Standards Act includes a general provision granting a worker's right to bargain with an employer in order to achieve parity. This, in turn is applied to the Chapter dealing with safety and health issues, since it is understood to be consistent with other "collective labour law" which guarantees workers' collective actions for safety and health.

The Japanese Occupational Safety and Health Act is consisted of 12 chapters which have 122 provisions in all, while safety and health regulations under the Act are composed of 10 special regulations with approximately 1220 provisions and 9 attached charts.

1. THE OBJECTIVE OF THE ACT

The General Provision Chapter enumerates the objectives of the Act as preventing labour accidents as well as establishing comfortable environments in workplaces (Art. 1).

2. THE SCOPE OF THE ACT

It is also stipulated in the Chapter, that the Act extends its coverage to the individuals who are not in direct contractual relations with workers concerned, for example, representatives of joint ventures, and manufacturers, designers, importers, distributors, constructors (Art. 3 and 4).

However, national civil servants are excluded from the coverage of the Act, while local government employees are covered, except by the Inspection Chapter, which replaces the Inspection Offices from the Department of Labour with the Civil Service Commissions at each local government.

Miners under the Mining Security Act and Sailors under the Sailors Act are excluded (Art. 115).

3. THE DEFINITIONS

A. "LABOUR ACCIDENT"

The important components of the definition of "Labour Accident" are that it includes occupational diseases as well as injuries and death arising out of and in the course of employment (Art. 1(1)). Therefore,

commuting accidents and diseases are not included even though they are compensable under the Workers' Compensation Insurance Act.

B. "WORKPLACE"

The JOSHA often uses the word "Workplace", to mean that a place or "the unit of workplace where a work is carried out continuously under one interdependent organization in one location, such as a factory, a mine, an office, a shop" (the administrative interpretation of the Department of Labour (DOL): Hatsu. Ki. No. 91, Dal 2–3, 18 September., 1972).

4. THE WORKERS' DUTIES

Workers are requested to make their best effort to observe neccessary matter and to cooperate employers and persons concerning matters for the prevention of labour accidents

A. In general (Art. 4).
B. Specifically to protect from danger and health impairment (Art. 28 and 32(4)).
C. When an employer has to submit a plan to build or repair buildings, equipment, machines and etc. as prescribed under the Act and regulations.

The Act does not provide penalties for workers who violate its provisions. Whether the damages caused by the worker's violation of a provision prescribed under the JOSHA is attributable to the worker is an issue to be discussed.

5. THE EMPLOYERS' DUTIES

A. DUTY TO SET UP SAFETY AND HEALTH MANAGEMENT ORGANIZATIONS

a. Appointment of a General Safety and Health Manager.

Since the top management should be aware of their undertakings' policies on safety and health at work places, an employer employing certain number of workers, the number of which was decided under a Cabinet Order, shall appoint responsible persons for their policy, such as factory or branch office manager (Art. 10(1)).

A fine of up to yen 300,000 is provided for the violation of this provision (Art. 119(1)).

b. Appointment of Safety Supervisor And / or Health Supervisor.

With the purpose of managing technical matters, an employer employing more than 100 workers shall appoint health officers, while safety officers shall be appointed depending upon the scale of undertakings prescribed under a Cabinet Order.

An important authority granted to the Chief Labour Standards Inspection Agency is that, the Chief may order an employer to dismiss or and a Safety Supervisor or a Health Supervisor, if it deems it necessary to prevent a labour accident (Art. 12).

If a safety manager or / and health manager is not appointed though Act orders an employer concerned to do so, the same penalty as mentioned above is provided as the a failure of the appointment of General Safety Manager.

c. Appointment of Safety and Health Promoter.

An employer employing less than 100 workers shall appoint a Safety and Health Promoter to be in charge of similar duties imposed on a Safety Supervisor and a Health Supervisor (Art. 12(2)).

An employer employing less than 100 workers shall appoint a Safety and Health Promoter to be in charge of similar duties imposed on a Safety Supervisor and a Health Supervisor (Art. 12(2)).

No penalty provided for the violation of this provision, therefore, the protection of workers working in small undertakings are discriminatorily treated under the JOSHA. This may allow room for a constitutional argument that the Act infringes the Equal Treatment under the Law clause (Constitution Art. 14).

d. Appointment of an Industrial Doctor.

An employer shall appoint an Industrial Doctor or Physician for each workplace of a size as prescribed under Cabinet Order. The number of full time physicians is provided under the JOSHA Regulation. The details will be described in the Part II.

e. Appointment of Operation Chief.

The JOSHA provides that an employer shall appoint Operation Chief who have received licenses for supervising specific dangerous work from a Prefectural Labour Standards Inspection Agency (Art. 14).

f. Appointment of Members of the Safety Committee and / or Health Committee, or Safety and Health Committee.

An employer employing 50 or more workers of any industry shall appoint members of a Health Committee for each workplace, while an employer employing certain number of employees shall appoint members of Safety Committee as prescribed under a Cabinet Order.

Half of the members shall be workers' representatives, while the other half shall be employer's representatives, though a chairperson shall be a person from the employers' side.

This appointment is to be made upon the recommendation of the names of potential representatives submitted to the employer by a majority of the workers working in a workplace.

A penalty of a 300,000 fine is stipulated only for the employer's violation of setting up committees, but not for other violations, such as appointing workers' representatives as members of the committee (Art. 119(1)). Therefore. an employer who does not appoint workers' representatives on equal basis to the employer's representatives is not expected to be punished under the JOSHA. This means that the Act designs the system of these committees as one of the forums where workers can voice their opinions, not so much as true wokers' participation in safety and health matters.

The details will be provided in Part 11.

B. DUTY TO INFORM WORKERS OF THE ACT, THE CABINET ORDER AND REGULATIONS

a. A noteworthy provision is the one concerning the employer's duties to inform workers of the summary of the JOSHA the Cabinet Order and Regulations dealing with safety and Health (Art. 101) and to keep secret the results of physical examinations of workers and others (Art. 104).

A violation of this duty is punishable by yen 300,000 (Art. 119(1)).

b. This provision is important because workers can demand their employer to inform them of at least the summary of the Act and regulations etc. by making use of this provision. Even though the provision does not provide workers with "the right to know" per se, however, this could be interpreted as granting them a sort of "the right to know" as

will be described later.

This provision is weak because it has nothing to do with workers' right to know specific dangerous conditions or toxic substances at workplaces.

c. This provision accords with the ILO Convention No. 119 on the Prevention of Machines Accidents (Art. 10(1)) which imposes an duty employer to inform workers of the national law dealing with the prevention of labour accidents caused by industrial machines.

C. DUTY TO SHUT DOWN OPERATION WHERE THERE IS AN IMMINIENT DANGER

a. The JOSHA provides that it is an employer's duty to stop operation immediately, and take necessary measures such as the evacuation of workers if there exists an imminent danger of a labour accident (Art. 25).

Following this Article specific imminent dangerous situations are listed under the specific provisions of JOSHA regulations. For example: (1) The Organic Solvent Toxication Prevention Regulation Art. 27 Sub. 1 referring air deterioration in a tank caused by air conditioning machine trouble; (2) the Oxgyen Lacking Diseases Prevention Regulation Art. 14 referring to the danger of lacking oxygen in working places; (3) the Radioactive Ray Health Impairment Prevention Regulation Art. 42 Sub. 1 referring to the leakage of any radioactive substance as a result of the breakdown of preventive barriers, and so forth. These regulations set up the employer's duties, such as the evacuation of workers, the prohibition of requring workers to enter dangerous places, posting warning signs and others, except when rescuing the workers endangered at the sites.

The Act provides for fines up to 300,000 yen or imprisonment up to 6 months for the violation of these provisions (Art. 110(1)).

b. The Act does not indicate who will judge the existence of the imminent danger, however, a Department of Labour's Administrative Interpretation says that it is the employer's duty to do so (Kitatsu No. 602, 18 September, 1972).

This provision can be interpreted as providing workers with a sort of "right to refuse dangerous work" under a legal theory which will be described later.

c. This provision accords with the ILO Convention No. 115 on work at dangerous places.

D. DUTY TO CONDUCT HEALTH EXAMINATIONS

a. The JOSHA provides that an employer shall conduct health check up for workers carried out by a physician; (1) At the beginning of employment and upon the transfer a potentially harmful job which is new for the worker, as prescribed under the regulations, (2) periodical examinations are required once a year for workers employed on a full-time basis at typical worksites except dangerous or toxic places prescribed specifically under the JOSHA. An employer is required to conduct physical examination for workers more frequently, such as once six months, or three as prescribed under the regulations concerned (Art. 66(1)). The areas examined are also provided under the JOSHA and relevant regulations.

b. These examinations shall be executed as a rule during workers' working hours so that an employer shall not deduct payment from wages or salaries for hours spent in the examinations. If they are conducted after working hours, overtime payment shall be paid. This is because medical examinations are to be necessarily executed in relation to employment (DOL. Ki. Hatsu. No. 602, 18 September, 1972).

c. An employer is subject to a penalty of a fine up to yen 300,000 (Art. 120(1)) for the violation of these statutory duties, while a worker will be not be obliged to undergo the examinations.

d. Necessary countermeasures shall be taken by an employer in accordance with the results of the examinations and in consideration of the health condition of the worker concerned. These measures include the matters such as a change of worksite, job transfers, the shortening of working hours, the calibration of working environment, the installation or improvement of facilities or equipment, and other appropriate measures (Art. 66(7)).

The violation of this provision does not trigger any penalty because no penalty was stipulated for it. This suggests that the JOSHA reserved employers' managerial rights to assign work to their workers.

e. An issue arose when a worker was ordered to stay at home and wait for instructions from the employer without being asked his or her opinion as to whether the results of the medical exanination would allow

him or her to work. The Department of Labour directed that an employer can prohibit a worker from working only when it is necessary to do so because an employer should not deprive a worker of an employment opportunity by taking advantage of the results of medical examinations. The employer should ask the physician how to deal with the worker, and make its best efforts to keep the worker employed by transferring her or him, shortening his or her working hours and taking other possible measures. (DOL. KI. Hatsu. 601(1). 18 September, 1972[1]).

f. Another interesting legal issue raised by a worker was whether a worker could be compensated if a company's industrial doctor misinformed the worker about his or her health conditions which could had been known.

A public employee sued his employer for having failed to provide him of the correct information about his bad health condition which could had been revealed a year before. As a result, he was hospitalized immediately after the second medical examination. He asserted that if the industrial doctor would have carefully checked his medical record which had been prepared earlier that year, then he could have been more careful about his health so that he would not have needed to be hospitalized in the following year. The District Court decided that the plaintiff should be compensated for damages caused by the employer's negligence. However, the High Court and the Supreme Court reversed the District Court decision on the ground that the industrial doctor's judgment was not appealable because it was not based upon a "public authority's power" but a specialist's decision[2].

g. The JOSHA Art. 66(5) provides that if a worker does not want to receive a medical examination by the industrial doctor appointed by the employer, he or she can submit medical certification issued by the doctor whom he or she wants to be examined.

The High Court ruled in a civil damage claim case that this provision was not applicable to a doctor who was not a industrial doctor as the Act prescribed[3]. Therefore a worker is not in a position to follow his employer's mandate to be examined by the company doctor who was not an industrial doctor. On the other hand, in a case where a worker who refused such a doctor to be examined as a result his health condition deteriorated, the court supported employer's sanction against it, and

set off the amount of damages caused by the disease even though he was suffering from an occupational disease for which the employer should be liable[4].

h. The Radioactive Ray Health Impairment Prevention Regulation follows the ILO Convention 115 on Workers' Protection from Radioactive Substances of 1960, which was ratified by the Japanese Government. An employer shall execute appropriate medical examination for workers (Convention Art. 12 and 13).

i. Regardless of medical examination, a worker who is found to have contracted a communicable diseases prescribed under the DOL relations shall be prohibited from ongoing in work (Art. 68). A violation make an employer liable to a fine up to 300,000 yen or up to 6 months imprisonment (Art. 119(1)).

Other workers working at the same worksite, who are proven to have contracted the same communicable disease such as eye disease from a coworker suffering from such disease and continuing work, is eligible to workers' compensation bonefits (DOL, Ho. Hatsu. No. 229).

E. DUTY TO EXECUTE SAFETY AND HEALTH EDUCATION

a. An employer shall execute safety and health education on the following occasions.

(i) at the commencement of employment,
(ii) when ordering a worker to change jobs,
(iii) when ordering a worker to engage in dangerous or harmful work prescribed as such under the regulations (Art. 60, and 59(1) and (3)),
(iv) a person who is newly promoted to a supervisor or any other supervisor or directing position.

An employer violating this provision will be punished by penalties (Art. 119 and 120).

b. The Act provides that an employer shall make its best efforts to conduct safety and health education concerning dangerous and toxic work in the course of employment in general. This education is for workers engaging in dangerous and harmful work and those engaging in work for prevention of labour accidents at work places. The Department of Labour shall issue necessary guidelines for appropriate and effective education (Art. 60(2)).

The Department of Labour issued guidelines concerning improvement and development of ability of workers who engage in work for preventing labour accidents (DOL, Noryoku Kojou Shishin No. 1, 22 May, 1988).

No penalties are provided for an employer who does not fulfill these duties.

c. If inadequate safety and health education is proven to be one of the causes of a worker's health impairment, the court counts it as contributory negligence in assessing damages awards[5].

d. These provisions accord with the ILO Conventions on Radioactive Ray Prevention No. 115 (Art. 9(2)).

F. DUTY TO TAKE COUNTERMEASURES AGAINST SPECIFIC DANGER AND TOXICITY

Although it is not within the scope of this work to provide an exhaustive summary of the Act, the classification of the JOSHA and relevant regulations will be explained with some of the cases, in which courts refer to violations of specific provisions.

a. The JOSHA and the JOSHA Regulations provides many provisions for an employer to take certain dangers at worksites (Art. 20 to 36).

In a civil damages case, a worker was granted an award his employer for negligence because the employer did not provide a brake instrument for a car which caused a labour accident[6]. In another case, where a worker sued successfully where he proved that emergency alarm equipment had not been installed at the time of an accident, thus preventing him from timely evacuation properly from the accident site, and resulting in a serious injury[7].

b. The JOSHA and relevant regulations provide countermeasures which shall be taken by an employer to prevent workers from dangerous, explosive, toxic and other harmful substances (Art. 55 to 58).

A court decided to award a damage claim of a Self Defense Forces personnel contracted an occupational disease caused by toxic substances regulated by the Toxic Substance Health Impairment Regulation while working in a factory[8].

c. The JOSHA provide to prevent workers from dangerous work by, for example, granting licenses for specific work (Art. 72 to 77) and

so forth.

A court awarded compensation to a worker who was ordered to do dangerous work which should have been carried out by qualified workers regulated under the JOSHA Regulation. The worker was not licensed to do so and was invovled in an labour accident(9).

d. The JOSHA provides that an employer shall protect workers, who have to work at dangerous work places from labour accidents. Dangerous work places are those which expose workers to things, such as high pressure, high temperature, high risk caused by radioactive substances, and others.

The family of a worker, who died in a high pressure vessel because the employer did not provide a supervisory worker while the deceased was working, was awarded civil damages by a court(10). In another case, a worker, who fell down from a high building site, because the employer did not provided a preventive measure, was also awarded civil damages(11).

G. DUTY TO PROVIDE COMFORTABLE WORKING ENVIRONMENT

The OSHA was amended in 1993 with the addition of new provisions which require an employer to make its best efforts to provide comfortable working environment for workers. An employer has to maintain and manage the work place environment. The work environment includes temperature, ventilation, moisture, noise, lighting, smell, and working methods. These should be comfortable for workers.

Bathrooms at work places and other places shall be kept clean, and rest rooms for male and female workers shall be provided separately to liberate them from work stress. These provisions could be regarded new if employers under the Department of Labour' administrative guidance pursue these standards because these are the higher standards than the minimum ones which had been regulated by labour inspection and administrative guidance in the past. It should be noted that the JOSHA provides no penalties for an employer who violates these standards. Therefore, these provisions could become simply the target, if employers would not persue these standards and administrative guidance would not effective to make them to do so.

H. DUTY TO CONTINUE BOOK KEEPING

The employer shall as prescribed by Labour Department Ordinance, keep documents.

I. NON APPEALABILITY

There is a provision for employers or manufactures and others who have complaints on the decisions made by the Department of Labour on model examinations for license and other examinations of machines or buildings. This provision stipulates that they can not take administrative appeal procedures prescribed under the Administrative Complaint Adjudication Act (Art. 111).

6. THE DUTIES IMPOSED ON JOINT VENTURES, PARENT UNDERTAKING, MANUFACTURES, IMPORTERS, RETAILERS, LEASERS

The OSHA provides for several persons who shall be regulated.

A. In the case of joint ventures, one of the undertakings concerned shall be designated as the employer who is responsible for the fulfillment of the OSHA requirements (Art. 5).

B. "Parent undertakings" means employers who contracts with subcontractors to carry out part of the operations in the same working sites. For example, local governments order a parent understanding who has many subcontractors under it to construct subway transportation routes.

The added duties of parent undertakings are (Art. 30(1)).

a. to lead or guide subcontractors to follow the JOSHA and Regulations concerned,

b. to direct subcontractors to abide by the JOSHA and Regulations when finding the violations of them.

C. The JOSHA Regulation provides that the addtional duties to these added duties imposed to the employers in the construction industry and the shipbuilding industry. Their duties added are

a. to organize safety and health management organizations consisted of subcontracting undertakings,

b. to keep communication and adjustment of work and operations at work sites with subconstructors concerned,

c. to check or patrol around work sites for safety and health pur-

poses,

d. to lead, direct subconstructors to conduct safety and health education to their workers.

If a violation of these duties causes labour accidents it could be interpreted as a justifiable reason for a parent undertaking to be liable for civil damages awards to be paied to a worker injured as decided by the courts(12).

D. The JOSHA provides certain duties imposed on the following persons. A lease company of machines, a designer of building and others, and manufactures and importers of dangerous machines and toxic substances who are prescribed as being regulated under the JOSHA and other relevant regulations.

FOOT NOTES

(1) Johtoh Seikoh (Johtoh Steel Manufacturing Co.) case, Osaka District Court, 15 March, 1971, without citation in HIROSHI INOUE, ROHDOH ANZENHOU NUHMON (THE INTRODUCTION TO OCCUPATIONAL HEALTH AND SAFETY ACT, 8th edition, p. 148 Keiei Shoin (1991)).

(2) Tsuyama Zeimusho (Tsuyama Tax Revenue Agency) case, Okayama District Court Tsuyama Branch 24 April, 1973 Rohdoh Hanrei No. 181, Hiroshima High Court 13 September, 1978, Rohdoh Hanrei No. 383, Supreme Court The 1st Petit Court I April, 1983, Rohdoh Hanrei No. 383, Hiroshima District Court Takaoka Branch 30 October, 1984 Rohdoh Hanrei No. 444.

(3) Kyoto Sera (Kyoto Ceramics Co.) case, Tokyo District Court 29, November, 1984 Rohdoh Hanrei No. 447, Tokyo High Court 29 November, 1986 Rohdoh Hanrei No. 487.

(4) Kuhoh Eah Sahbisu and Nitsukoh (Airport Service and Japan Air Line) case, Tokyo District Court 12 March, 1991, Rohdoh Hanrei No. 588.

(5) The Hazama Gumi and Shimada Gumi (construction companies) case, Ohtsu District Court, 27 April, 1987 Rohdoh Hanrei No. 499.

(6) Tanabe Jidohsha (Tanabe Automobile Co.) case, Kyoto District Court 10 Kune, 1986, Rohdoh Hanrei No. 479.

(7) Yokota Jidohsha Kohgyoh (Yokota Automobile Manufacturing Co.) case, Nagoya Dictrict Court Okazaki Branch, 19 December, 1977, Rohdoh Hohritsu Junpoh No. 954.

(8) cf. Rikujoh Jieitai Jukyu Tai (Self Defense Army Supply Troops) case, Supreme Court 24 March, 1975 Hanrei Jihoh No. 971.

(9) Momoyama Kenzai (Momoyama House Construction Co.), Fukui District Court, 26 April, 1985, Rohdoh Hanrei No. 482, Rohdoh Hanrei No. 222.

(10) Denden Kosha and Ichikawa Kaiji Kogyo (Telephone and Telecommunica-

tion Public Corporations and Ichikawa Diving Business Co.) case, Matsuyama District Court, 3 October, 1985, Rohdoh Hanrei No. 472.

(11) Shinoda Chuzosho (Shinoda Steel Co.) case, Gifu District Court, 17 February, 1984, Rohdoh Hanrei No. 442.

(12) Kawasaki Junkoh and Taishoh Hoon Kohgyo (Kawasaki Heavy Industry Co. and Taishoh Heating Instrument Co.) case, Kobe District Court, 27 April, 1981, Rohdoh Hanrei No. 407; Osaka High Court, 20 January, 1983, Rohdoh Hanrei No. 407; Itakata Kensetsu and Maeda Dohro Co. (Kitakata Construction Co. and Maeda Road Construction Co.) case, Satsuporo District court, 28 February, 1984, Rohdoh Hanrei No. 433; Denden Kohsha and Ichikawa Kaiji Kohgyo Co. case as cited in (10) above.

III. THE ADMINISTRATION AND IMPLEMENTATION OF JOSHA

1. The statistics of labour accidents including occupational diseases attached are available from DOL.

2. The Department of Labour policy is that the penalty provisions under the JOSHA are to be rarely executed. Only a few cases have been reported in case reporters, for example the Daiei Dengyo (Daiei Electric Appliance Co.) case in 1971[(1)] and the Shientsu Kagaku (Shietsu Chemical Co.) case[(2)] in 1978 found in the Rohdoh Hanrei (Labour Law Reporter) until 1993.

3. There is an interesting decision in which the Osaka District Court supported the plaintiffs' assertion that workers' health were being injured as a result of the negligence that a Local Labour Standards Inspection Agency had not inspected the factory concerned enough to find their occupational hazards even though the same Agency had recognized workers working in the same factory had suffered from the same type of occupational diseases a few months ago. The court ordered the Department of Labour to pay damages to the workers because it found negligence on behalf of the Department in not inspecting the factory as the OSHA demanded[(3)]. The Osaka Hight Court and the Supreme Court on the same case reversed with the reasoning that the Agency had simply not exercised its discretionary power to inspect the factory because governmental agencies had its own discretion to inspect factories or not.

IV. THE DEVELOPMENT OF LABOUR' RECENT POLICY OF JOSHA

Drastic elements have recently being introduced into the Department of Labour' policy on JOSHA.

1. Under the ILO's influence, information about toxic substances must be well disseminated to all workers concerned. This is promoted by the introduction of "Chemical Data Sheet System". This system imposes duties on distributors to put data sheets outlining the proper handling of chemicals and attached to bottles or other parcels containing hazardous substances.

The employer who uses these chemicals:

A. has to attach the above mentioned safety information on containers of the chemicals,
B. has to form a safety or committee to deliberate the matters concerning publication at the toxicity of the chemicals,
C. has to use data sheets in the course of safety and health education.

The ILO Convention concerned No. 170 on Safety for the Usage of Chemical Substances at Workplaces is ratified by the Japanese Government in 1992(4).

2. Due to some particularly serious working conditions in Japan some workers have suffered from chronicl fatigue syndrome and stress, and on some occasions workers have died from continuous hard work without taking enough rest for weekend holidays and entitled paid holidays for some months (this is called "Karoushi"). This will be one of the reasons for new policy publicized in 1992 as "Kaiteki Shokuba" or comfortable working environment(5).

FOOT NOTES

(1) 13 December, 1971, Rohdoh Hanrei No. 273.
(2) Niigata District Court, 9 March, 1978, Rohdoh Hanrei No. 296.
(3) Ueda Mangan (Ueda Mangan Manufacturing Co.) case, Osaka District Court 30 September, 1982, Rohdoh Hanrei No. 401. This case was reversed by the Osaka High Court on 23 December, 1985, Rohdoh Hanrei No. 466 and the Supreme Court, the 1st Petit Court. on 19 October, 1989, Rohdoh Hanrei No. 556.
(4) DOL, news release, 14 April, 1992.

(5) DOL, news release, 10 January, 1992.

PART II WORKERS' PARTICIPATION IN SAFETY AND HEALTH

I. THE DEFINITION OF OCCUPATIONAL SAFETY AND HEALTH

Here in my opinion safety and health issues would not be confined as to those JOSHA defines because the Act provides only safety at work places in order to restrict the application of the Act to the areas where the Act can impose its statutory duties only on the persons concerned. However, some trade unions and scholars argue that the public environment, commuting, housing conditions, working hours, night shift, the number of paid holidays and so on should be taken into consideration for the purpose of maintaining and promoting the health of workers(1). Therefore, "occupational health and safety" in some of this Part II will include this broader frame of reference.

II. THE OBJECTIVES OF WORKERS' PARTICIPATION IN JOSHA

The ultimate objective is undoubtedly to secure the life and health of workers, but three steps will be classified from the perspectives of workers' rights in participation in safety and health:

1. the right to know,
2. the right to express an opinion,
3. the right to join in decision marking on occupational health and safety issues.

III. METHODS FOR ACHIEVEING THE OBJECTIVES

There are six levels of participatory methods in management dealing with safety and health in Japan.

1. the workers'–supervisors' communication at the shop floor level which is based on individual activities,

2. the safety and health committee level which is based on statutory institutions imposed employers to set up by the JOSHA. These committees are composed of workers' and employer's representatives on equal basis except the chairperson,

3. the joint labour-management level which is based on company's rules, past practices, or collective bargaining agreements,

4. the collective bargaining level which is based on trade union activities,

5. the strike or other militant collective actions level which is based on adversarily labour relations,

6. refusal to work in dangerous work with toxic substances, or in any other working environment in which imminent danger of a labour accident exists (Art. 25),

7. the reporting the fact of an employer's violation of the JOSHA to the Department of Labour and its subordinate agencies.

The difference between (5) and (6) workers' refusal of dangerous or harmful work which is based on the doctrine of no obligation to fulfill workers' duty to work when the employer breaks the terms and conditions of employment. The difference between (5) and (6) is related to public employee labour relations because (5) is prohibited by the law, while (6) is not.

IV. THE SAFETY AND HEALTH COMMITTEE UNDER THE JOSHA

1. SET UP AND PRACTICES

A. INSTITUTION

a. The JOSHA provides that any employer employing 50 or more employees on the constant basis shall set up occupational health committee (Art. 18(1)), while the employers of designated certain industries shall set up occupational safety committees (Art. 17(1)). These committees shall be set up in each "workplace", which means an office branch or a factory.

The designated employers are (A) persons who employ 50 or more employee on constant employment basis in the following industries. They are Forestry, Mining, Construction, Wooden Product Manufacturing, Metal Product Manufacturing, Product Manufacturing, Steel, Transport

Machine Manufacturing, Road Transportation, Ship Transportation, Car Repairing, Machine Repairing and Cleaning Industry. (B) Persons who employ 100 or more employees on the constant basis in the following industries; Transportation except on Roads and by Ships, Manufacturing except those mentioned in (A), Communication, Gas, Sewages, Heat, the Wholesale and the Retail of Commodities, Furniture, Appliances, the Retail of Fuel, Hotel, and Golf Industries.

b. The JOSHA provides that, in lieu of a safety committee or a health committee respectively, an employer may establish a safety health committee (Art. 19(1)).

c. The violation of the provision to set up these committees can be penalized, however, that of the appointment ratio provision does not induce penalty, Therefore, if employer appoint the number of workers' representatives which is less than that of employers' representatives, the employers would not be punished under the JOSHA.

B. PRACTICES

The recent statistics dealing with safety committees, health committees or safety health committees are available from the largest trade union in Japan: Rengoh or the Japanese Trade Union Confederation whose organization rate is 62.1%. The research carried out in 1992 shows that more than 90% of the surveyed 1609 undertakings which have legal duty to set up committees have done do[2]. The fact that more than 90% of undertakings in the Manufacturing Industry fulfilled their duty to set up committees is because workers are closer to dangerous work and toxic substances, while the fact that less than 50 of the undertakings in the Hotel and Leisure Industry and around 60% of those in the Banking, Insurance Commercial Industry and Local Government sector have done means that workers working in these sectors enjoy lower accident rates than the Manufacturing Industry.

On the other hand, the 51.2% of undertakings, which have no duty to do so, have not established them. Therefore, it is difficult for workers employed by small undertakings employing less than 50 employees to participate in safety and health issues, even though life and health issues have nothing to do with the size of undertakings.

C. LEGISLATIVE PROPOSAL

In relation to this matter, the number of employed workers proscribed under the JOSHA should be amended from 50 to 30, according to the Occupational Safety and Health Act Workshop (JOSHA Workshop) composed of scholars, doctors, and trade union leaders recently proposed amendment bill to the present JOSHA[3]. The author is a member of the Workshop.

2. FUNCTION AND PRACTICES

These committees do not have decision making power. But the authority to investigate and to deliberate matters falling under the JOSHA. This legal nature of the committees is problematic because the Act does not guarantee the committees that the employers, who are to be provided reports of the results of investigations and deliberations carefully performed for the sake of and by the workers, would put them into practice. Therefore, to the JOSHA Workshop, the provision could be amended to bestow the authority to recommend the result of the investigations and deliberations just like the JOSHA grants Industrial Doctors of undertakings to their employers (OSHA Regulation Art. 14, Sub. 4).

A. INSTITUTION

a. Health Committees:

(A) The JOSHA provides the following matters as the function or authority of a health committee (Art. 18(1) and JOSHA Regulation Art. 22).

(1) matters pertaining to coutermeasures which are to form the basis for preventing workers' health impairment, and for maintaining and promoting health,

(2) matters related, to health pertaining to the causes and countermeasures to prevent the recurrence of labour accidents (including occupational diseases),

(3) matters pertaining to drafting health regulations,

(4) matters pertaining to planning of health education,

(5) matters pertaining to planning investigating the toxicity of chemical substances located in workplaces which are carried out under JOSHA 57−2(1) and Art. 57−3(1), and countermeasures based upon the evaluation of the results of such measurements,

(6) matters pertaining to the result of working environment measurement carried out under JOSHA Art. 65(1) or (5) and the formation of countermeasures based on the evaluation of the result of measurement,

(7) matters pertaining to medical examination and countermeasures to set up according to the result of it,

(8) matters pertaining to forming plans necessary for maintaining and promoting workers' health,

(9) matters pertaining to preventing health impairment related to machines or raw materials which are newly introduced into workplaces,

(10) matters pertaining to orders, instructions, recommendations, or guidance concerning to the prevention of workers' health impairment and issued in writing by the Minister of Labour, Prefectural Labour Standards Directors, Local Labour Standards Inspection Directors, Labour Standards Inspectors, or Industrial Health Expert Officers,

(11) matters pertaining to chemical data sheets,

(12) matters pertaining to a comfortable working environment,

(13) important matters pertaining to the prevention of workers, health impairment apart from those listed in the proceding items.

(B) The important matters the above mentioned list in relation to the workers' right to know and to intervene in managerial decisions from the point of safety and health of workers, are (vi), (vii), (viii), (x) and (xi). This is because the workers representatives in health committees can join in investigation activities on toxicity of the chemical substances located in their workplaces under above the mentioned items.

(C) And also they can access information obtained from the result of toxicity investigation under (vi), working environment measurement under (vii) and medical examination of workers under (viii).

(D) An interesting provision is the above listed (x). This provision is clear enough to guarantee the workers representatives in health committees information about the machines or raw materials which will be introduced or which are already newly introduced to workplaces in connection with workers' health. This means that this provision grants workers "the right to know" through a health committee. Nevertheless, provision does not refer to their authority to investigate the possibility of endangering workers' health which might be caused by the machines or raw materials before they are introduced in workplaces so that they

can in turn resist the introduction of them. Therefore, for instances when the employer wants to introduce an office automation system into a workplace which contains visual display terminals, the employer should inform the workers' representatives of such intention.

(E) The other important provision is (10) which guarantees the workers' representaitves access to the orders, instructions, recommendations, and guidance which were directed to their employer. Therefore they can not only be informed of or to know the dangerous points of their worksites or toxic substances which pointed out the possibility of labour accidents or occupational diseases by the governmental authority, but they can but also observe what measures were taken by the employers. This provision means that the workers' representatives can participate in part of the governmental labour inspection in a sense, because if they would find no effective countermeasures had been taken, they can point this out and demand them from the employers and they can report the facts to the governmental inspection offices. By the way, the Supreme Court decided that these offices have administrative discretionary power whether or not they would carry out investigation on the complainted facts[4]. Workers, who files complaints before any Local Labour Standards Agency or any administrative office, shall not be dismissed or discriminated against because of their filing (LSA Art. 103).

This is a type of workers' participation in safety and health found in Scandinavian countries.

b. Safety Committees:

The JOSHA provides that the following matters be investigated and deliberated in a safety committee (Art. 17(1) and OSHA Regulation Art. 21.):

(1) matters pertaining to coutermeaures to form the basis for preventing labour accidents,

(2) matters pertaining to safety in relation to causes and the preventive measures or reccurance of labour accidents,

(3) matters pertaining to drafting company's safety regulations,

(4) matters pertaining to developing safety education,

(5) matters pertaining to the prevention of labour accidents cause introducing machines, tools and other installations, or by raw materials,

(6) matters pertaining to orders, instructions, recommendations, or

guidance issued in writing by the Minister of Labour, Prefectural Labour Standards Inspection Directors, Local Labour Standard Inspection Directors, or Industrial Safety Expert Officers,

(7) important matters pertaining to the prevention of danger apart from the items listed above,

(8) as (11) mentioned above in health committees,

(9) as (12) mentioned above in health committees,

(10) matters any other items related to safety at workplaces.

B. PRACTICES

According to Rengoh statistics, more than the 80% of the surveyed committees are functioning. The bigger the scale of undertaking, the better the function of committees. The 93.3% of those employing 3,000 employees have well-functioning committees, while 63.1% of those employing less than 50 employees do so. Substantial differences are found among industries. For example, accident prone industries such as the Chemical Industry (47.6%) and Metal Industry (44.2%) count a higher percentage of utilization of committees in one hand, while the Service Industries such as the Public Service (18.7%) and Banking and Insurance Industry (13.3%).

3. THE FREQUENCY OF HOLDING COMMITTEE MEETINGS

A. INSTITUTION

The OSHA Regulation provides that employers shall hold safety health or safety and health committees meetings more than once in a month (JOSHA REGULATION Art. 23).

B. PRACTICES

a. In reality, only 3.2% of worksites surveyed by the Reigoh have never held committee meetings, though they are set up. In this regard, the fact that 6.3% of them did not even set up committees should not be forgotten.

b. An interesting point is the reason for not having held committees meetings. The main reason is because of employers' attitudes that they have not been positive for holding committees meetings, who were not positive towards having committee meetings. Next was trade unions' attitudes. Rengoh statistics shows that 74.5% of those surveyed found

the reason in the former, 53.1% in the latter. However, it should be noted that the majority of those surveyed replied that both employers and trade unions were not positive to hold committee meetings. Therefore, if both or one of them can be positive to do so, thus committee meetings will be held more often.

c. It is also worthy noting that only 5.1% of them found out that the miner legal penalty against the employers violating the JOSHA was the reason for not having been hold, while 16.7% of those surveyed the number of employees of which was 3,000 or more replied in the same way. Art. 120 Subsection 1 provides that an employer, who violates Art. 17 Subsection 1 and Art. 18 Subsection 1 which provides that an employer shall set up safety or health, or safety and health committees for the purpose of giving opportunities for workers to deliver their opinion on matters pertaining to safety or health, shall be penalized by a fine of up to 300,000 yen. However, it has never publicized that any employer has been punished under these articles by any Local Labour Standards Inspection Agency in the past.

This will mean that the surveyed undertakings expect no sanction. This may be because the penal system under the JOSHA has been watered down so heavily under the administration of the JOSHA by the Department of Labour.

A court decision shows that the fact that holding a safety committee meetings once a month as the JOSHA Regulation provides was not a justifiable excuse for not being liable for health impairment caused by labour accident[5].

4. THE DEGREE OF WORKERS' INVOLVEMENT

A. INSTITUTION

a. The Act provides that half of the members of the committee shall be workers' representaitves who are appointed by an employer subject to recommendations made by the majority of the workers working in a workplace. The chairperson of the committee is the person on the employer's side (Art. 17(4) and Art. 18(4)). Therefore, a casting vote could be the employer's. If there was a union which organized the majority of workers working at the same workplaces, then the majority union can recommend its members to a committee as workers' representatives of the workplace (Art. 17(3) and Art. 18(4)).

b. However, since this provision prescribes minimum standards because of the minimum standards clause of the Labour Standards Act Art. 1(2), which prescribes that the provisions provided under the Act are nothing but the minimum, is applied to the JOSHA, employers can legally change the ratio of the workers' representatives in committees to that of an employer's in order to increase the number of workers in comparison with those of employers' representatives, if the employers and the workers' representatives would agree.

c. A problem is raised when there are more than two trade unions at the same workplace. If no unions organize the majority of workers working at the workplace, then an employer is not obliged to appoint the worker's representatives from these unions. However, the employer is required to sit on the fence or take a neutral position if there were more than two unions at the same workplace. This is the result of application of the Supreme Court doctrine on plural unionism(6). If an employer intentionlly excludes a minority union from appointing the workers' representatives of a safety and health committee, then it constitutes an unfair labour practice(7).

If one of the trade unions in the same workplace organizes the majority of workers working at it, and other unions do not do it, then the method by which minority unions could send their representatives to the committees raises a problem. The employer's choice to appoint workers' representaitves only from the majority union is not illegal because the JOSHA provides that the employer shall appoint the workers' representatives from an union, if there is such union as representing the majority of workers at a worksite. But if minority unions disagree with the employer's chioce, then a labour dispute over the issue would arise. Under such circumstances, the employer is advised to take a policy to devide the numbers of the workers' representatives in a safety, health or safety and health committee after negotiation with these unions.

B. PRACTICES

The Rengoh statistics show that almost all of he trade unions and employers consider the importance of the committees in terms of appointing their representatives because the 92.28% of those surveyed appointed union officials or undertakings' officials as the representatives of their side in the committees.

Many trade unions consider safety committees or health committees highly important as part of their union activities because 65.6% of those surveyed appointed trade union leaders as the members of committees. However, the unions in the bigger undertakings send more union officers to their committees[8].

Judging from the Rengoh statistics, it seems that trade unions regard these committees as the places where they can express their opinion, rather than the place where neutral expertises will handle the matters pertaining to safety and health. This is because 26.8% of those surveyed appoint suitable persons other than trade union officers or undertaking officers, which include neutral technicians.

5. THE LEGAL NATURE OF COMMITTEES; DECISION-MAKING OR DELIBERATION

A. INSTITUTION

The JOSHA provides that a health or safety, or safety and health committee is an organization for investigation and deliberation on the matters prescribed under the JOSHA as mentioned above.

The Labour Department Interpretation states that a safety committee and health Committee is not the place to conduct collective bargaining, but a place for both employers and unions to be in cooperation for investigating and deliberating the safety matters. This is because "a safety or health committee is set up for an employer to hear workers' opinions and to get cooperation from workers on the promotion of safety and health matters" (Hatsu. Ki. No. 91, 18 September, 1972). Therefore, the management of a committee is not desirable if decided by majority vote, but desirable pursed if by the consensus of all the committee members (KI. Hatsu. No. 602, 18 September, 1972).

However, nobody can deny the fact that safety and health measures cost money to realize, therefore, there could be, in some cases, a conflict of interest between an employer who wants to do it at the lowest cost and workers who want to be done at any cost. This simple theory is proved in the following Rengoh statistics which show that only 35.1% of those surveyed undertakings relied by saying that their committees had been taking a policy of continuing to deliberate in order to reach a conclusion. They know that the parties would not be able to reach consensus on certain matters because of the cost issue.

B. PRACTICES

Through the Rengoh statistics, an interesting reality is revealed. The trade unions organized in the smaller scale undertakings are more inclined to take militant actions other than to continue to deliberate within committees, while those in the larger undertakings are inclined to continue to deliberate matters within committees. 40.0% of undertakings employing less than 50 employees versus 29.2% of those employing 30,000 or more in terms of the unions' attitude to stick to the policy of taking other measures such as collective bargaining, strike, etc. and other than committees' deliberation process.

6. COMPARISION WITH THE ILO STANDARDS

JOSHA does not reach the level of the ILO Convention on Safety and Health (1981) providing workers' rights of investigation and consultation with a employer on safety and health matters. The Japanese Government has a legally justifiable reason that Japan has not ratified the Convention at the Diet. However, Japan should move to ratify it because she has a reputation as the No. 1 country in term of her economic development. The international obligation in a moralistic term as well as international pressure against her can not be ignored. Japan has gained prosperity by exporting a lot of products produced at workplaces where many workers are working, and is located in Asia which has provided raw materials and markets to Japan who can be a sort of model country. The Convention suggests that national law provides that a worker could be granted the right to patrol workplaces, and the right to be provided information on safety and health at workplaces (Art. 19). A trade union could be placed in the position to be consulted with an employer on issues (cf. Art. 4, 8, 15). These provisions can be interpreted as saying that workers could participate in these activities through their representatives at a safety and health committee.

The important point is the degree to which the ILO reached as mentioned above. The ILO Recommendation on Safety and Health (1981) went so far as to provide that worker would participate in the decision-making process of management on safety and health issues (Part 4 Art. 12(1) and (2)).

JOSHA does not spell but in a clearly fashion that workers' representatives have the right to investigate workplaces, though it grants the

authority to do so to a safety, health, or safety and health committee, however, not to workers' representatives of such committees. The other important comparison with the ILO standards is that the JOSHA does not have any provision which guarantees committees either to submit recommendations to employers, or to make decisions binding employers on any safety matter.

The Department of Labour issued an interpretation guideline on the committees that both employers and workers are advised to take advantage of these committees as the place to cooperate each other. Therefore, it is not advisable to make these committees as the places where employers explain one sidedly their policy on safety and health to the worker representatives.

V. INDUSTRIAL DOCTOR UNDER THE JOSHA

1. INSTITUTION

A. APPOINTMENT

The JOSHA provides that undertakings employing more workers 50 or more workers shall appoint industrial doctors in accordance with the number of the employees employed. The employers employing 500 or more workers in certain undertakings provided under the Labour Department Ordinance shall hire industrial doctors as regular employees (Art. 13). A specialty in industrial hygiene is not required, but simply a person who is qualified as a doctor is eligible to appointed. Therefore, there is a possibility of not being able to find out specific types of occupational diseases unless effective network with suitable doctors or medical institutions is set up.

The JOSHA does not provide that employers shall obtain the recommendation or consent of workers' representatives in the process of appointing of industrial doctors like that of workers' representatives to safety or health, or safety and health committees.

The practice that workers participate in the process of appointing them can be seen in reality, even though the right is not guaranteed under the Act as explained later.

B. FUNCTION

The function or authority of these industrial doctors is more au-

thoritative. Industrial doctors are bestowed important supervisory and executive authority which is neither provided to safety or health officers, nor safety, health, safety and health committees under the Act:

a. Authority to issue to recommendations to a general safety and health manager on the following matters, and to guide and advise a general safety and health manager on the following issues (JOSHA Regulation Art. 14(1)):

b. The JOSHA provides that the duty of industrial doctors to check workplaces at least once a week with the purpose workers' health, and to immediately take necessary countermeasures to prevent impairment of workers' health whenever finding the possibility of harm or toxicity in work methods and sanitary conditions.

Other powers granted to industrial doctors are as follows (JOSHA Regulation Art. 14(1) and (2)).

c. medical examinations and health measures as a result of examination,

d. matters pertaining to maintaining and managing working environments,

e. matters pertaining to health management of the work process,

f. matters pertaining to health education, health consultant, and other measures for maintaing and improving workers' health,

g. matters pertaining sanitary education,

h. matters pertaining to the investigation of the causes of workers' health impairment and measures to prevent their recurrence.

2. PRACTICES

A. APPOINTMENT

The Rengoh statistics show that almost all undertakings appointed industrial doctors. Only 8.0% of those surveyed did not. The larger the scale of undertakings, the higher the the ratio.

However, in 36.8% of the surveyed undertakings, industrial doctors were not attending at health committee meetings as the member of safety, health or safety and health committees.

Only 26.4% of the surveyed undertakings hire industrial doctors as regular employees. In addition, 61.6% of them employ industrial doctors on part-time basis.

B. WORKERS' PARTICIPATION

It is interesting to note that in practice many undertakings surveyed provided opportunities for trade unions to give their consent, to employers in the process of appointment of industrial doctors, even though the Act does not require it. The Rengoh statistics show that 38.8% of those surveyed appointed industrial doctors after trade unions' participation in the process, while 48.1% of them did not. Undertakings which have night shift programs gave opportunities to unions (42.7%) in comparison with no night shift program (37.4%).

C. EFFECTIVENESS

As to the effectiveness of industrial doctors, 71.5% of those surveyed replied that they were functioning well. The larger the scale of undertaking, the more effective the doctors functioned. 86.0% of those employing 1,000 and more or more v. 52.2% of those employing from 50 to 99.

Main activities are medical examinations and continuing treatment of countermeasures taken as a result of examinations (81.8%), health consultant or counseling (79.8%).

However, in many cases they violate the JOSHA by not executing their duty of attending health committee meetings and not checking workplaces for the purpose of ensuring workers' health. Only 36.4% of those surveyed stated they have attended meetings, and 24.5% said they checked worksites. The larger the scale of operation, the more frequent were the monitiring activities. For example, statistics concerning attendance at a health committee meetings show 73.2% of undertakings employing 3,000 or more employees attended meetings regularly v. 23.7% of undertakings employing 50 to 99 employees attended regularly.

Judging from these two facts, industrial doctors are not well in activities other than medical examinations or health consultations in many workplaces.

3. LEGISLATIVE PROPOSALS

The issues to be raised to reform the industrial doctor system.

A. The issue in relation to workers' participation in safety and health is that workers are not guaranteed to participate in the process of selecting industrial doctors. Therefore it is under employers' discre-

tion to select them under the present JOSHA. Under this system, it is easier for industrial doctors to take a position favorable to their employers when conflict arises where workers or trade unions would take different views on medical issues in the hierarchy of the undertakings, since they are merely employees.

The statistics show that trade unions are more keen on reflecting their opinion in selecting their industrial doctors. This will be because they are more concerned with health issues as a result of their consciousness of increasing chronic fatigue syndrome (CFS) from continuous stress, and public awareness of Karoushi or corporate warriers' death out of hard and long working hours.

Therefore, the Act shouid be amended to guarantee representatives of a workplace the right to submit their opinion on the selection of their industrial doctor.

B. The present provision provides that the authority of checking working places is restricted to simply worksites. Therefore, it is not clear whether it can be extended to check installations and buildings. So that the provsion should be amended to include it.

C. Under the present Act, industrial doctors' authority to issue recommendations to a general safety and health manager is not backed up by any penalty imposed on the employer if not followed. Therefore, the Act should include a provision allowing administrative action for Labour Standards Inspection Agencies.

D. An industrial doctor should be independent from employers in order to keep a neutral position vis-a-vis from both employers and workers. This type of legislation is found in England.

E. A Labour Standards Inspection Agency concerned should have the authority to dismiss or add industrial doctors, if it deems it appropriate. The such authority is provided under the JOSHA in the case of a safety or a health supervisor (Art. 11(3)). The similar provision should be added to the JOSHA when amended.

4. COMPARISON WITH ILO STANDARDS

The same criticism is possible on the JOSHA in terms of not providing enough workers' participation in the industrial doctor system under the JOSHA. The Convention on Occupational Health Organization (1985) provides that national law should take into consideration workers' parti-

cipation in the system (Art. 8).

Again an important suggestion is made in the Recommendation attached to the Convention. It suggests that national law could provides that workers participate in the decisions which might affect organizational management on health issues (Art. 33(1) and (2)).

As pointed out in the legislative proposal mentioned above, the JOSHA does not provide that an industrial doctor is to be appointed by an employer with the workers' recommendation.

VI. THE WOEKERS' RIGHT TO REFUSE DANGREOUS WORK

1. INSTITUTIONAL PROVISION

Mentioned above in Part I, II. 5. C. (p. 12).

2. PRACTICES

No Statistics or other materials are available. However, my research by interviews of four important Prefectural Labour Standards Inspection Agencies: Tokyo, Osaka, Kumamoto and Niigata in 1980 suggested that none of the cases, where a worker refused dangerous work or hazardous work including those handling toxic substances at workplaces was reported. This might be because workers in Japanese undertakings would not be independent enough to execute their rights, and rather they would consider their reaction of their coworkers which might be to see them as overly assertive and to isolate them because of a family-like industrial relations.

3. THE THEORY OF CONTRACT OF EMPLOYMENT

Under the theory of contract of employment, though there is no explicit statutory provision under the JOSHA, a worker has a right to refuse dangerous work. This is because an employer has a duty to provide a safe and healthy working environment to a worker on one hand, and worker has the right to work under such conditions on the other hand. Upon the employer does not provide safe and healthy working conditions, the employer breaches the contract of employment. Under these circumstances, the worker has no duty to work under such conditions (the Civil Code Art. 533). The worker may have the right to be compen-

sated for breach of contract by the employer. If the worker executes his or her right to demand the employer to provide safe and healthy for him or her by showing up at his or her workplace, and the employer does not do, then the worker has the right to get paid for time during which the worker can not work. This is because his or her losing working hours is caused by the employer's negligence in not providing safe and healthy working environment for the worker. Therefore, the worker has the right to refuse dangerous or toxic working conditions which violate the contract of employment with payment.

The leading case is the Chiyoda Maru case of 1968 in which the Supreme Court ruled that "the risk endangering the plaintiff was not the sort of the risk attached to working on board as a telecommunication worker on the Chiyoda Maru. Therefore, though the degree of a risk was not so great, the worker working on the Chiyoda Maru who is a party of the labour contract was not held to be forced to fulfill the duty against his will"[9]. In this case the plaintiff was ordered to sail on board which was expected to sail into the Korean Sea and was thus the Chiyoda Maru at a risk of being bombed by the U.S. Air Force under training. The duty anticipated was decided as being beyond the scope of duty as part of the contract of employment of the plaintiff. Another District Court followed this decision later[10].

Other leading Supreme Court decision in 1975 is relevant to the employer's duty to fulfill its contract of employment. In the Rikujoh Jieitai Hachinohe Chuton Butai (Self Defence Army Hachinohe Stationary Troops) case in which the Court decided that "an employer has the duty to take care its employees for the protection of their life, body and others from danger arising out of and in the course of employment, by making use of the employer's premise, equipment, or machines and tools which were provided for work, and work under the employer's direction[11].

Turning to the JOSHA as mentioned above. Art. 25 provides the employer's duty to shut down operation and take necessary measures to protect workers including evacuation of workers in the face of imminent dangerous situations. As this provision can be interpreted as becoming part of the contract of employment because many provisions prescribed under the JOSHA, including the Art. 25 regulate their content. A district court supported this theory by ruling that "the theory, that the duties

prescribed under the JOSHA had two legal natures of public and private duty at the same time, was not self contradictory"[12]. Under this theory, a worker has a statutory ground to refuse dangerous or toxic work which poses an imminent danger. However, a problem is who decides the emergence of such working environment. The court will do so. The Department of Labour's Interpretation says that workers can evacuate themselvas from imminent danger in the manner of an emergency evacuation provided under the Criminal Code 35 (Ki. Hatsu. No. 602. 18, 1972). Negotiation between an employer and a trade union can also decide it, if they agree.

4. COMPARISON WITH THE ILO STANDARDS

The ILO Convention No. 154 on Safety and Health provides that a worker, who evacuated from working environment where he or she had a reasonable reason to believe that there was imminent and serious danger to life or health, shall be protected from unfair results arising out of conditions or practices in the nation concerned (Art. 13(f)). The worker shall inform his or her employer of such a situation. The employer, faced with a worker's evacution, can not order him or her to return to such a working environment until taking countermeasures (Art. 19).

The JOSHA has provided only an employer's duty to evacuate workers. Therefore no worker's rights were provided. The JOSHA should be amended as providing that (1) a worker shall be protected from unfair treatment, such as a disciplinary action, (2) if he or she decides that the situation poses an imminient danger according his or her judgement which was reasonable for him or her, (3) and if he or she reports the situation to the employer, (4) and even if he or she evacuates themselves from worksites.

VII. THE RIGHT TO KNOW DANGEROUS ENVIRONMENT

The JOSHA does not provides any specific provision guaranteeing a worker to be informed of or to know dangerous or toxic working environments or any other working conditions. However, as mentioned above, the Act provides the following as an employer's duties.

1. to place the summary of the JOSHA and relevant regulations in

work places,

2. to provide opportunities for workers' representatives at a safety, health, or safety and health committee to investigate the toxicity of substances as prescribed under the regulations concerned,

3. to study and to deliberate the result of working environment measurement and the medical examination of workers,

4. to study and to deliberate the data sheets of chemicals placed in their workplaces,

5. to condisder and to deliberate what determines a comfortable working environment for workers at worksites.

These provisions are interpreted as providing a worker "the right to know" their working environments because of applying the same theory of contract of employment to these provisions as mentioned above that the employer's statutory duties prescribed under the JOSHA are mostly interpreted as employer's duties under the contract of employment. The employer is obliged to perform these duties as parts of their contract of employment with workers.

A court decision ruled that an employer was negligence in a case where it did not inform a worker of the fact that countermeasures against toxic substances which poisoned the worker were written in the vessel containing them(13).

VIII. THE RIGHT TO REPORT AN EMLOYER'S VIOLATION TO AN OSHA OFFICE

The JOSHA provides that a worker, who found a violation of any provision of the JOSHA or JOSHA Regulations in a workplace, can report the fact to the Prefectural Labour Standards Director, Local Labour Standards Inspection Director or Labour Standards Inspector, and require them to take appropriate measures (Art. 97(1)). The employer shall not discharge, or execute any other discriminatory action against the worker because of it (Art. 97(2)).

Even if this provision looks as if it grants a worker the right to report any employer's violation of the JOSHA to the Labour Department Agency, the agencies reported to are not bound to begin investigation on the reported case because they are administrative discretion whether to do so or not. This is accordance with a Supreme Court decision(14).

IX. EMPLOYER-WORKER COMMUNICATION DEVICES

It is striking that the safety and health issue granted such high rankings in the following communication devices between workers and employers, even though no trade union involved. This fact suggests that safety and health issues are important for individual workers. The issue of safety ani health is one of the important agendas brought to the various types of communication devices between employers and employees according to statistics from Department of Labour on the matter in 1989[15].

1. At a "personal proposal device" in which individual workers can submit suggestions to their supervisors on increasing productivity issue and others. 66.4% of those surveyed 4,000 undertakings had it. Among 7 issues proposed under this device, the safety and health issue received the 2nd ranking (59.55 of all proposals) next to the increasing productivity issue.

2. At a "grievance procedure device" through which workers can file a complaint before a grievance committee, among 10 issues, the safety and health issue was ranked 2nd (33.0%) next to a daily routine work issue. This device was set up by 33.8% of those surveyed.

3. At a "shop floor meeting" device in which matters were discussed at each workplace while sitting on tool boxes, among 6 issues the safety and health issue was also 2nd, ranking next to a routine work assignment issue out of six agenda items. Many undertakings took advantage of this device which amounted to 77.7% of those surveyed.

4. Among 11 "complaints in the minds of workers" surveyed, the safety and health issue was in 4th ranked, next to wages, working hours and human relations at workplaces. This device is not popular among Japanese undertakings, 33.8% of which set up this device.

5. At a "quality control circle activities" device, the safety and health was not more popular than other issues. This device is regarded as a voluntary small group activity by amicable discussion and cooperative group activity by co-workers at their workplaces which would be held at least once a week. A survey suggested that 21.0% of the issues raised at these QC discussion meetings which ranked in 5th among 6 issues next to increasing productivity, quality controls, confirming soli-

darity among co-workers, and developing job capability. It was found that 66.4% of those surveyed organized this device.

X. LABOUR-MANAGEMENT JOINT CONSULTATION AND COLLECTIVE BARGAINING

It should be noted that both labour-management joint consultation machineries and collective bargaining practices are well use of in resolving safety and health issues.

As many as 85.6% of labour-management joint consultation machineries brought the safety and health issue to consultation tables according to the survey by the Department of Labour mentioned on the Employer-worker Communication Devices in 1989. The 1st ranked issue of importance was shortening working hours and the 2nd was the safety and health issue, both of which require time to reach the satisfactory conclusions for the parties. In Japan this machinery is well utilized as 58.1% of 4,000 undertakings set up them, or 93.7% of those surveyed by the Japan Prodictivity Center in 1990[16]. Contrary to a collective bargaining technique, even though trade union representatives organizing workers within the same undertakings are involved in many cases, this machinery does not anticipate adversarial industrial relations, but cooperative harmonized relations, therefore the former could induce strike actions, while the latter would meet and confer between the parties and if no agrement reaches, the employer has discretion to put the matters into practice in the end. In some cases where no agreement reaches and a trade union is a party, both parties agree to move to a collective bargaining stage. However, in general, according to the statistics mentioned above, both employers and workers consider the safety and health issue is suitable for this machinery to carry on.

Collective bargaining methods were used to resolve conflict on the safety and health issues in some cases. Reaching a compromising formula, the parties agree to collective bargaining agreements which amounted to 91.3%[17] or 91.7%[18] of researched trade unions around 1990. The safety and health provision was included in 76% of the collective bargaining agreements of the former research, or 81.2% of the latter. It is understandable that the safety and health issue was placed in 4th among 9 agenda in the former research and 4th among 10 agenda items in the

latter, next to wages, working hours and job security at bargaining tables.

These facts are supported by the union members' consciousness on the safety And health issue. 52.2% of those surveyed members of trade unions in 1990 replied that they expect their unions to confer, negotiate or bargain with their employers on the safety and health issue. This issue ranked 5th out of 24 issues, which followed the issues of wages, renumeration, work hours, and job security[19].

XI. WORKERS' PARTICIPATION IN SAFETY AND HEALTH AT LOCAL AND NATIONAL LEVEL

As an institutional tool, the Labour Standards Act provides that trade union representatives, on an equal basis to employers, are quaranteed to be appointed as the members of the Prefectural Labour Standards Deliberation Committees and the National Labour Standards Deliberation Committee. The latter is an important form where the workers representatives can express their opinion on labour standards issues, including the safety and health issues, which will become the provisions of the JOSHA, the regulations or ordinances of the Department later. For example, the 1992 revision of the JOSHA, which added provisions concerning the creation of comfortable working environment, was formulated after the policy paper on that issue had been discussed at the National Labour Standards Deliberation Committee where the workers representatives from the Rengoh had the floor to speak out safety and health issues from the workers' point of view.

PART III THE PERSONAL OPINION

The JOSHA might be one of the reasons for decreasing number of labour accidents and occupational diseases, but it would not be significant, I am afraid.

One of the main reasons would be the employers' devices to try to keep communication between the workers and their supervisors. These devices are, as mentined above, personal proposal device, shop floor meeting device, grievance procedures and the like.

These devices would have made the employer to keep eyes on safety and health conditions at workplaces through workers' opinions expressed by these devices. Then the employer would be ready to prevent labour accidents and occupational diseases.

The statistices show that safety and health issues are placed In high rankings among other issues concerning working conditions. This notion of groupism and the culture of shame, the workers would not make use of them any way.

The government effort would not be forgotten. The Department of Labour has publicized the 5 year trend to decrease the number of labour accidents and occupational diseases by targeting the specific risks and industries in every 5 years.

Administrative guiding is also thought effective to enforce the JOSHA by guiding, leading and recommending the employers to take the countermeasures informal economic and social sanction. These are thought effective to the employer who would really violate the JOSHA in the village type of Japanese society where the culture of shame and groupisim are predominant.

It is my opinion that unless the consciousness of workers would be well built in the mind of workers, the more activities to decrease the number of labour accidents and occupational diseases under the initiatives of workers would not be expected.

In this connection recent activities by the Rengoh and the Local Government Employee Union are noted because they perused investigation on safety and health committees at workplaces, and proposed the amendment of JOSHA, both of which were taken place last year in 1992. We expect the labour movement at the policy making level in the future.

I always propose the new concept of "workers' environment right", by which I mean that every worker should have their authority to control working environment which suround him or her. This right shall be based on their moral right as one of the human right at workplace. In Japan the tort provision under the Civil Code (Art. 709) can be interpreted as guranteeing this right.

FOOT NOTES

(1) The World Health Organization expands the terminology in the field of safety and health describing as "job related accidents" which could refer to the

causes of accidents beyond employment. This was used instead of using "accidents arising out of and in the course of employment" which is used in Japan.

(2) The Rengoh (Nihon Rohdohkumiai Sohrengoh or the Confederation of Trade Unions), "Anzeneisei ni Kansuru Chousa" (the Research on Safety and Health), October, 1992.

(3) The Jichitai Rohdohsha Rohdoh Anzen Eisei Hoh Kenkyuhkai (the Occupational Safety and Health Act Workshop, Local Government Safety and Health Research Group), "Rohdoh Anzeneisei Hoh Kaisei Hohno Teigen (A Proposal on the Amendment to the Japanese Occupational Safety and Health Act), December, 1992.

(4) The Supreme Court, The Second Petit Court, 10 December, 1982.

(5) Nagoya Futoh (Nagoya Port) case, Nagoya District Court, 22 October, 1976, Rohdoh Hanrei No. 268.

(6) Nitsusan Jidohsha (Nitsusan Auto Manufacturing Co.) case, Supreme Court, the Third Petit Court (23 April, 1985), Rohdoh Hanrei No. 450, p. 23.

(7) Nihon Garasu (Japan Glass Manufacturing Co.) case, Osaka Labour Relations Commission (8 July, 1978), Rohdoh Hanrei No. 302, p. 71.

(8) In details, 84.6% of those surveyed undertakings employing 3,000 or more have appointed union officers as committee members, while 55.6% of them employing from 50 to 99 have them.

(9) Min. Shuh. (The Civil Cases Reporter of Supreme Court Decision) Vol. 22, No. 13, p. 3050 (24 December, 1968).

(10) Shinbun Yusoh (Newspaper Delivery) case, Tokyo District Court (24 December, 1982), Rohdoh Hanrei (Labour Cases) No. 403, p. 68; Hanrei Jihoh No. 1071, p. 142. cf. Kyoto Seisakusho (Kyoto Manufacturing Co.) case, Osaka High Court (19 February, 1980), Rodoh Hanrei Appendix No. 341, p. 45; Kumamoto District Court (17 September, 1981), Rohdoh Hanrei Appendix No. 372, p. 25.

(11) Min. Shoh. Vol. 29, No. 2, p. 143 (2 February, 1975).

(12) Katoh Kinzoku Kohgyoh (Katoh Metal Manufacturing Co.), Roh. Min (Labour Court Cases), No. 25, p. 1 (16 December, 1974); Ban Chuhzohsho (Ban Steel Factory) case, Tokyo District Court (30 November, 1972), Rohdoh Hanrei No. 188, p. 52; Chubu Denryoku Kuraishi Denryoku (Chubu Electric Power Kuraishi Branch) case, Totsutori District Ct (22 June, 1978), Rohdoh Hanrei Card No. 301; Matsumura Gumi (Matsumura Construction Co.), Osaka District Court (25 May, 1981), Rohdoh Keizai Sokuhoh No. 1113.

(13) Mikuni Kogyo (Mikuni Industry) case, Nagano District Court, Suwa Branch (7 March, 1991), Rohdoh Hanrei No. 588.

(14) Abeno Rohdoh Kijun Kantoku Kyoku (Abeno Labour Standards Inspection Agency) case, Supreme Court, the Second Petit Court (10 December, 1982),

Rohdoh Hanrei Card No. 401.

(15) The Department of Labour, Nihon no Rohshi Komunikeishon no Genjoh (The Present Situation of Communication between Workers and Employers in Japan), Ohkurasho Insatsukyoku (Government Printing Office), 1990, p. 20, 21, 22, 23 and 29.

(16) Nihon Seisansei Honbu (Japan Productivity Center), Rohshi Kyohgi Sei no Juhjitsu o Motomete (Seeking the Improvement of Labour-Management Joint Consulation System), 1990, JPC, p. 251.

(17) Rohdoh Shoh (The Department of Labour), Rohdoh Kyoyaku Teiketsu Ritsu Sokuhoh (The Summary of the Collective Bargaining Agreement Rate), March 1992, p. 8 and 13.

(18) Rohdoh Shoh, Saishin Rohdoh Kyohyaku no Jitsutai (The Reality of Collective Bargaining Agreements), 1989, Rohmu Gyohsei Kenkyuhsho, p. 31 and 32.

(19) Nihon Seisansei Honbu (JPC), Rohdohkumiaiin Ishiki Chohsa (Research on Trade Union Members' Consciousness), 1990 JPC, p. 98.