

立法會
Legislative Council

LC Paper No. CB(2)2226/99-00
(These minutes have been seen
by the Administration)

Ref : CB2/SS/4/98

**Subcommittee on
Regulations relating to Occupational Safety and Health**

**Minutes of Meeting
held on Thursday, 13 January 2000 at 10:45 am
in the Chamber of the Legislative Council Building**

- Members Present** : Hon Andrew CHENG Kar-foo (Chairman)
Hon HO Sai-chu, SBS, JP
Hon Cyd HO Sau-lan
Hon LEE Cheuk-yan
Hon LEE Kai-ming, SBS, JP
Hon CHAN Wing-chan
Dr Hon LEONG Che-hung, JP
- Member Absent** : Hon Michael HO Mun-ka
Dr Hon LUI Ming-wah, JP
Hon Ronald ARCULLI, JP
Hon TAM Yiu-chung, GBS, JP
- Public Officers Attending** : Mr Herman CHO
Principal Assistant Secretary for Education and Manpower
- Mr Samson LAI
Assistant Secretary for Education and Manpower
- Dr LEUNG Lai-man
Occupational Health Consultant, Labour Department
- Miss Marie SIU
Senior Government Counsel

Ms Anastasia KWONG
Senior Government Counsel

Clerk in Attendance : Mrs Constance LI
Chief Assistant Secretary (2) 2

Staff in Attendance : Mr Arthur CHEUNG
Assistant Legal Adviser 5

Miss Betty MA
Senior Assistant Secretary (2) 1

I. The Administration's response to concerns raised at the meeting on 15 December 1999

[Paper No. CB(2)800/99-00(01)]

At the invitation of the Chairman, Principal Assistant Secretary for Education and Manpower (PAS(EM)) took members through the Administration's response to members' concerns raised at the meeting on 15 December 1999 [Paper No. CB(2)800/99-00(01)]. The Administration's response was summarized as follows -

- (a) the Administration had carefully considered Mr LEE Kai-ming's proposal of a central levy system to pay for the medical examinations of those workers not covered by the Construction Industry Training Authority (CITA), and concluded that it was extremely difficult to devise a fair and simple scheme for some 40 000 workers in different industries. The Administration believed that it would be more convenient and cost-effective to leave it to the proprietors concerned to arrange and pay for the required medical examinations for their workers;
- (b) the Administration would closely monitor the supply of appointed medical practitioners (AMPs) to ensure that there would be adequate AMPs to cope with the demand generated by the phased implementation of the Regulation;
- (c) the Administration was unable to obtain concrete figures on the number of replacement/casual workers engaged in those designated occupations subject to the medical examination

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requirements. Based on the statistics from the Census and Statistics Department, it was estimated that among the 195 000 workers requiring medical examinations, some 14 100 workers were part-time workers, including 12 600 construction workers, 600 Chinese restaurant workers and 900 manufacturing workers;

- (d) workers who were permanently suspended from employment in a particular occupation because of incapacity arising from an occupational disease were entitled to compensation under various compensation laws. As such, the Administration considered that there was insufficient justification to include a provision in the proposed Regulation to provide for the entitlement of these workers to additional ex-gratia payments;
- (e) the Labour Department would initiate an investigation within 24 hours upon notification of an urgent case of occupational disease. For the rest of notified occupational disease, the Labour Department would conduct an investigation as soon as practicable; and
- (f) for the purpose of section 13 of the Regulation, the Administration would appoint a Senior Occupational Health Officer or an Occupational Health Officer qualified in occupational medicine and with experience in the occupational disease relevant to the appeal. The definition and qualifications of these members to be appointed to the Appeal Board were given in paragraph (f) of the Administration's response.

Entitlement of ex-gratia payment

2. Mr CHAN Wing-chan expressed disappointment that the Administration did not accede to members' repeated requests for the granting of ex-gratia payments to workers who were recommended by AMPs to be permanently suspended from employment in a particular occupation. He urged the Administration to reconsider its position.

3. PAS(EM) responded that the legislative intent of the proposed Regulation was to safeguard the health of workers in designated occupations. He reiterated that there was little justification for providing additional ex-gratia payments to these workers who were already entitled to compensation under various compensation laws.

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Medical examination fees

Admin 4. Dr LEONG Che-hung suggested the Administration to consider specifying the range of fees for each type of medical examinations required under Schedule 2 for general information. PAS(EM) agreed to consider.

Composition of Appeal Board

Admin 5. Referring to the qualifications of an Occupational Health Consultant to be appointed to the Appeal Board, Dr LEONG Che-hung suggested that the Administration could include the specialty requirement in the Regulation by referring to the specialist registration approved by the Medical Council under the Medical Registration Ordinance. The Administration agreed to consider the suggestion.

6. On section 13(1) of the Regulation, Dr LEONG Che-hung expressed concern that two out of the three members of the Appeal Board would be medical practitioners and that they might not have the necessary expertise to review the recommendations in medical examination reports made by AMPs.

Admin 7. Occupational Health Consultant of Labour Department (OHC/LD) responded that the arrangement was to provide flexibility for the Commissioner for Labour to appoint medical practitioners with specialist qualifications relevant to the subject of the appeal. He assured members that Appeal Board members would either be qualified AMPs or medical practitioners with qualifications in specialties recognized under the Medical Registration Ordinance. Dr LEONG Che-hung considered that the Administration should further specify in the Regulation that medical practitioners to be appointed to the Appeal Board must possess specialist qualifications. OHC/LD agreed to consider the suggestion.

Suspension from employment in a particular occupation

8. Mr LEE Cheuk-yan expressed concern about the arrangement for workers who were certified by an AMP to be temporarily unfit for his particular occupation, but no sick leave was granted. OHC/LD responded that there could be occasions where a worker might not need sick leave although he was temporarily unfit for a particular occupation. For instance, a worker with a high level of lead in his blood might not suffer from obvious sickness that rendered him unsuitable for working in other posts.

9. Mr LEE Cheuk-yan opined that in the absence of any provision in the Regulation requiring the employer to re-deploy or transfer the worker concerned to another post, the proprietor could refuse to make such arrangement. He suggested that the Administration should include a provision in section 10 of the

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proposed Regulation requiring the proprietor to arrange a change of post for a worker who was recommended temporary suspension if no sick leave was granted by the AMP. The Chairman agreed with Mr LEE's proposal.

10. PAS(EM) responded that it would be difficult to enforce such a requirement, because redeployment often entailed a change in wages and working conditions. It would be more appropriate for redeployment to be made by mutual agreement between the proprietor and the worker as such arrangement was dependent on the availability of suitable jobs in the workplace and acceptance by the worker. The Administration would issue guidelines to employers on the re-deployment arrangements for the purpose of section 10.

11. Mr LEE Cheuk-yan said that a provision could be added to section 10 with a rider that the redeployment arrangement would be subject to the agreement of the employer and employee, and that sick leave would be granted to the worker if no agreement could be reached.

12. The Chairman shared the concern of Mr LEE that a grey area existed where a worker on temporary suspension might not be entitled to any compensation or sick leave. He also noted that it might not be always possible to arrange a suitable posting for the worker concerned. He therefore considered that the Administration should review whether there was adequate protection of employees' interest in the existing Employment Ordinance and various compensation laws.

13. Mr HO Sai-chu agreed with the Chairman that some proprietors would have difficulties to arrange a change of post for a worker who was certified medically unfit for a particular occupation because many factories in Hong Kong were small enterprises employing less than twenty staff. While he appreciated the need to safeguard the interest of employees suffering from occupational diseases, he wondered whether it was feasible to devise a fair redeployment system under the Regulation.

14. Mr CHAN Wing-chan also acknowledged that it was difficult to arrange a change of post in certain occupations such as tunnelling work. He considered that workers on temporary suspension should be granted paid sick leave to avoid disputes.

15. Mr LEE Cheuk-yan also enquired about the arrangement for workers who were found medically unfit because of a disease other than the specified occupational disease. Dr LEONG Che-hung shared similar concerns. They asked whether disclosure of a worker's other health aspects which were not related to the purpose of the Regulation would intrude the worker's privacy.

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16. OHC/LD responded that the responsibility of the AMPs was to advise the proprietors concerned the medical fitness of the employees to perform the work of certain specified occupations. AMPs did not have statutory responsibility to inform the proprietors of findings which were unrelated to the employees' suitability for the job.

17. In summarizing members' concerns, the Chairman strongly urged the Administration to consider specifying in sections 10(b) and (c) that where a change of post was not practicable, the worker should be granted paid sick leave. For workers recommended permanent suspension of employment, ex-gratia payments should be provided under section 10(d). He said that if the Administration did not address these concerns, the Subcommittee would consider making amendments to the Regulation.

18. PAS(EM) reiterated that for cases where a worker was found permanently unfit for his particular occupation after medical check, the proprietor should arrange for the redeployment to another post. If a mutual arrangement for a change of post could not be reached, the proprietor could terminate the employment contract of the worker who would be entitled to benefits according to the relevant provisions in the Employment Ordinance. The Administration did not envisage any problems in respect of section 10(d) of the proposed Regulation. With regard to sections 10(b) and (c), the Administration considered that there should not be many cases of workers not granted sick leave while on temporary suspension. In these cases, the proprietor concerned should redeploy the worker to another job as far as practicable. To allay members' concerns, PAS(EM) said that the Administration would further consider the sick leave arrangements under sections 10(b) and (c) having regard to the implications on other employment related legislation.

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19. Responding to the Chairman, Assistant Legal Adviser 5 (ALA5) advised that the proposed Regulation was subsidiary legislation made under section 7 of the principal Ordinance, i.e. the Factories and Industrial Undertakings Ordinance (the Ordinance). The scope of this Regulation was confined to those powers conferred upon Commissioner for Labour under section 7 of the Ordinance. The proposed Regulation was made in accordance with section 7(1)(n) of the Ordinance where the Commissioner for Labour was empowered to require the proprietor of the industrial undertaking concerned to arrange medical examinations for his employees. ALA5 further advised that there would be technical difficulties to amend sections 10(b) and (c) to the effect that sick leave would automatically be granted if a change of post was not possible for workers who were recommended temporary suspension of employment after medical check. A corresponding amendment might need to be made to the principal Ordinance, such as the definition of "paid sick leave".

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Medical examination fees for casual workers

20. Noting that the Administration opposed to the proposal of a central levy system to pay for medical examinations of those workers not covered by the CITA scheme, Mr LEE Kai-ming expressed concern that casual workers would have to pay the medical examination fees before they could secure employment. PAS(EM) said that the legislative intent was to require the proprietors to pay for the medical examinations of their employees irrespective of whether they were casual workers.

21. Mr HO Sai-chu pointed out that the proprietors would normally agree to pay the medical examination fees for workers under their employment.

II. Clause-by-clause examination

[Paper No. CB(2)608/99-00(02)]

22. The Chairman said that while the Subcommittee had examined sections 1-10 of the proposed Regulation at the last meeting, the Administration had provided a revised version (dated 13 December 1999) of the proposed Regulation with amendments to sections 2, 3, 6, 8 and 12. Members then examined the proposed amendments to these sections.

Section 2 - Interpretation and application

23. PAS(EM) explained that the amendment to section 2 sought to provide a clear meaning for "building works", in response to members' concern at the meeting on 10 November 1999.

24. ALA5 asked whether "industry" and "industrial undertaking" in sections 2(2) and (4) carried the same meaning for the purpose of the Regulation as there was no definition of "industry" in the Ordinance. PAS(EM) agreed to provide a written response.

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Section 3 - Prohibition against employment without being medically examined and certified

25. PAS(EM) said that the proposed addition of section 3(2) sought to make clear the arrangement of medical examination for a person who was already engaged in a designated occupation. The proprietor would be required to arrange a medical examination for the serving employees within three months after commencement of the Regulation.

26. ALA5 said that it was not clear whether section 3(1) applied only to new recruits as the text also referred to Schedule 2 which included periodic medical checks for existing workers. If it was the legislative intent, the Administration

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might consider stating expressly in section 3(1) that the provision on pre-employment examination in Schedule 2 was applicable to new recruits only. PAS(EM) agreed to provide a written response.

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27. ALA5 further pointed out that section 3(1) did not require an employee to pass a medical check and to produce a medical report upon request of the proprietor. PAS(EM) responded that the legislative intent of section 3(1) was to ensure that any person engaged in the designated occupation listed in Schedule 1 would have been medically examined by an AMP. The suitability of a person to take up an employment would be determined by the proprietor after taking into consideration the AMP's recommendation. Ms Anastasia KWONG, Senior Government Counsel (SGC(AK)) supplemented that section 3(1) stated expressly that a proprietor should not employ any person who had not been medically examined by an AMP and certified fit to work in that occupation.

Section 6 - Proprietor to bear expenses of medical examination

28. PAS(EM) said that the Administration proposed to delete "investigation and certification", in response to members' concern raised at a previous meeting.

Section 8 - Employee to be periodically medically examined

29. PAS(EM) said that the Administration proposed to delete "from time to time" from this section as a new section 3(2) has been added to specify the medical check arrangements for existing employees.

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30. In response to ALA5, PAS(EM) agreed to examine whether it was necessary to specify the responsibility of employees to attend the first-time medical examination.

Section 11 - Employee to retain report

31. The Subcommittee then proceeded to examine section 11 of the proposed Regulation based on the revised version of 13 December 1999. Members noted that section 11 sought to require an employee to retain a copy of the medical examination report and of any accompanying recommendation and to produce it for inspection by the Commissioner for Labour upon request.

Section 12 - Proprietor to act in accordance with recommendation

32. Members noted that a new subsection (2) was added to require a proprietor to take all reasonable and lawful means to implement the recommendation in a medical report made under section 10.

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33. ALA5 sought clarification on how an employer could implement a recommendation in section 10 as required under section 12(1), for example, a recommendation on permanent suspension of employment under section 10(d). He said that it would be beyond the capability of the proprietor to ensure that the employee concerned would not seek to work for another employer. PAS(EM) clarified that the obligation in this section was only confined to the present employment of the employee. It would be unfair for the proprietor to ensure that the employee concerned would not change to work for another company. As the proposed Regulation would require a proprietor to arrange pre-employment medical check for his employees, there should already be sufficient safeguards against the employment of a person who was medically unfit for the specified occupation.

34. For cases where the employee was not due for the next periodic medical check, ALA5 asked whether the employee could refuse to produce his medical examination report to his new proprietor. PAS(EM) responded that a person would be required to produce a valid medical examination report when he applied for employment in the specified occupation. Otherwise, the person would be required to attend "pre-employment" medical examination as a newcomer. ALA5 commented that the current drafting of the provision on pre-employment examinations did not spell out clearly whether such examination was applicable to newcomers to the industry or workers changing employers. PAS(EM) clarified that if a person could produce a valid medical certificate, he would not be required to undergo a fresh medical check even though he changed to work for another employer. However, fresh medical examinations would be required for those persons who did not have valid medical certificates for various reasons. He stressed that the legislative intent was not to prohibit a person on permanent suspension from seeking employment because the person's health condition might improve after a period of treatment.

Section 13 - Employees' right to appeal against action to implement recommendation

Admin 35. PAS(EM) said that the Administration would delete the reference to "Occupational Health Officer" in subsection (1) in view of members' comment.

Admin 36. Referring to subsection (6), ALA5 asked whether "decision" carried the same meaning as "recommendation" as the Chinese version was "建議". Miss Marie SIU, Senior Government Counsel agreed that the English version of "建議" in subsection (1) should be "recommendation". The Administration would make an amendment accordingly.

37. In response to Dr LEONG Che-hung, PAS(EM) said that according to section 13(5), a recommendation that was appealed against would be suspended

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for the time being until a decision was made on such appeal. In the meantime, a worker would be allowed to continue with his employment.

38. The Chairman inquired why the Appeal Board could make other recommendations as it might think fit under section 13(6). SGC(AK) said that the provision was to empower the Appeal Board to make new or additional recommendations as appropriate.

39. In this connection, ALA5 asked whether the Appeal Board was empowered to arrange an independent medical check for the appellant before it made other recommendations. PAS(EM) responded that the Appeal Board was empowered under section 13(3) to require the appellant to be medically examined again by virtue of section 8. When section 13(3) was invoked, the independent medical examination would normally be carried out by the Occupational Health Consultant sitting on the Appeal Board. Dr LEONG Che-hung opined that a second medical check might not be necessary as the Appeal Board should be able to take a decision based on the findings of the current medical report and test findings. He was of the view that an appeal board should only revoke or maintain the original decision. If new recommendations were to be made, the appellant might demand a further medical check in appeal against the new recommendations made by the Appeal Board. Mr CHAN Wing-chan shared similar concerns. Dr LEONG further asked whether a timeframe would be set for hearing an appeal.

40. PAS(EM) replied that appeal procedures and timeframe would be decided by the Appeal Board after the Regulation came into operation. The Administration would remind the Appeal Board to deal with all appeals as early as practicable. SGC(AK) added that an appellant could also make written representations to the Appeal Board under section 13(6).

41. In summarizing the discussion, the Chairman said that while members agreed that the decision of the Appeal Board would be final, some members expressed reservation as to whether the Appeal Board could make new recommendations to substitute the original recommendation. They were also concerned whether an appellant could further appeal against the new recommendation. PAS(EM) agreed to consider the issues and revert to the Subcommittee later.

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Sections 14 to 16

42. Members noted that the penalty for a proprietor, an employee and an AMP for contravening the relevant provisions would be a fine at levels 5 (\$50,000), level 2 (\$5,000) and level 5 respectively.

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III. Any other business

43. Members agreed to hold the next meeting on 24 January 2000 at 3 pm.

44. The meeting ended at 12:45 pm.

Legislative Council Secretariat

26 May 2000