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(These minutes have been seen by the Administration and cleared with the Chairman)

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Subcommittee on
Regulations relating to Occupational Safety and Health

Minutes of Meeting
held on Tuesday, 11 April 2000 at 10:45 am
in Conference Room A 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 Ronald ARCULLI, JP Hon CHAN Wing-chan Dr Hon LEONG Che-hung, JP Hon TAM Yiu-chung, GBS, JP
Member Absent	:	Hon Michael HO Mun-ka Dr Hon LUI Ming-wah, JP
Public Officers Attending	:	Mr LAM Kam-kwong 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

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		Mr J D SCOTT Senior Government Law Draftsman Department of Justice
		Ms Anastasia KWONG Senior Government Counsel, Department of Justice
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. Meeting with the Administration

[Paper Nos. CB(2)1497/99-00(01)-(08), CB(2)1591/99-00(01) and CB(2)1638/99-00(01)-(04)]

At the invitation of the Chairman, Principal Assistant Secretary for Education and Manpower (PAS(EM)) took members through the Administration's response to concerns raised by members at the last meeting on 8 March 2000 [Paper No. CB(2)1638/99-00(01)]. PAS(EM) highlighted the following -

(a) to avoid any conflict of interest, the Appeal Board would appoint an AMP to conduct a medical re-examination of the employee if the re-examination was considered absolutely necessary in the interest of the safety and health of the employee;

(b) the employee would be expected to co-operate in the medical re-examination arrangements unless he had a reasonable excuse, for example, he had undergone a re-examination by another AMP of his own accord; and

(c) the Administration did not consider it necessary to include a penalty clause for non-compliance with the regulation by the employee as the employee was already liable to cessation of

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employment if he refused to take the mandatory medical examination.

Arrangements for medical examinations and commencement of the Regulation

2. Mr CHAN Wing-chan expressed concern about the medical examination arrangements for casual and replacement workers in the construction and catering industries. He said that some casual and replacement workers might have to make their own arrangement for medical examination before they could secure employment when the Regulation came into operation. He therefore asked whether these workers could claim reimbursement for the medical examination expenses incurred.

3. PAS(EM) responded that the construction industry would not have such problem because the Construction Industry Training Authority (CITA) would act as the agent for contractors and proprietors in the medical examination arrangements for all construction workers. The medical examination fees would be met by an additional levy on the industry. As regards the catering industry and other industries covered by the Regulation, Occupational Health Consultant/ Labour Department (OHC/LD) said that the proprietors would be required to pay all expenses related to the medical examinations for the purpose of the Regulation.

4. In response to Mr CHAN Wing-chan's further query, PAS(EM) said that the Regulation did not provide a reimbursement procedure in respect of medical examination expenses incurred. He considered that payment of medical examination fees could be arranged between the employer and employee.

5. Mr LEE Kai-ming sought clarification on the proprietor's responsibility to meet the medical examination fees of casual workers. He asked whether a proprietor would have breached the law if the proprietor refused to pay the medical examination expenses of the casual or replacement workers already in his employ when the Regulation came into effect. He was worried that the employer might terminate the employment of these casual workers during the three months' grace period in order to avoid additional costs.

6. PAS(EM) said that the three-month grace period under section 3(2) was only to allow sufficient time for the proprietors to arrange medical examinations for their employees after the Regulation was enacted. The practical arrangements would be subject to mutual agreement between the proprietor and his employees. He noted Mr LEE's concern but considered it unlikely that an employer would choose to terminate the employment of a worker only to save some $400 a year for the medical examination fees.

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7. Mr LEE Kai-ming held a strong view that the Administration should take steps to plug the loophole under section 3(2). He reiterated his concern that some employers might dismiss the workers just before the expiry of the three-month period.

8. Mr HO Sai-chu commented that most of the proprietors would arrange the mandatory medial examination for their workers but he did not rule out the possibility that some casual workers might have to pay their own medical examination expense before securing employment. For the protection of the safety and health of workers, he considered that the Regulation should come into force as early as possible. As regards the CITA scheme, Mr HO asked whether the medical examination arrangement for construction workers could lead to abuses.

9. In reply to Mr HO Sai-chu, OHC/LD said that CITA was devising criteria to prevent abuse of the scheme, for example, the worker applying for medical examination might need to produce the "green card" certified by the contractor or proprietor.

10. Mr LEE Kai-ming asked whether it was possible to defer the commencement date of the Regulation by three months instead of giving a three-month grace period under section 3(2).

11. The Chairman therefore invited members' views on Mr LEE's proposal. Mr HO Sai-chu said that he had no strong view on the suggestion provided that proprietors were allowed sufficient time to make the medical examination arrangements for their employees before the Regulation came into operation.

12. Mr TAM Yiu-chung agreed with Mr LEE that the Regulation could be amended so that all serving employees should be medically examined before commencement of the Regulation. He pointed out that it was common Government practice to appoint a commencement date of a legislative proposal sometime after its enactment.

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13. In view of members' comments, the Chairman advised the Administration to consider the Subcommittee's suggestion on the commencement date of the Regulation and provide a written response.

Compensation to employees

14. Miss Cyd HO expressed concern whether casual and replacement workers would be eligible for compensation if they were found medically unfit for employment in the specified occupations. As these casual workers did not work for a particular employer, there might be difficulties in establishing their qualifying service period for compensation. Mr CHAN Wing-chan shared

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similar concern. Mr CHAN also asked whether consideration could be given to granting ex-gratia payments to those workers who did not meet the qualifying service requirements for employee compensation.

15. PAS(EM) responded that eligibility for employee compensation was specified in the Employees' Compensation Ordinance, the Pneumoconiosis (Compensation) Ordinance and the Occupational Deafness (Compensation) Ordinance. Concerns about the specified periods for employee compensation could not be dealt with by the proposed Regulation as this would require amendment to the relevant ordinances. Proposals for such amendments could however be considered during regular reviews of the employee compensation schemes. OHC/LD added that with the exception of exposure to excessive noise, existing legislation did not specify service periods for exposure to hazardous agents at work in order to be eligible for employee compensation on grounds of occupational illness.

16. In view of the multi-layered sub-contracting system in the construction industry, Mr CHAN Wing-chan inquired which layer of contractor would be responsible for compensation when a construction worker was certified medically unfit. PAS(EM) replied that the principal contractor would be held responsible for compensation in the first instance, and the compensation would be covered by the employee insurance policies taken out by the proprietor.

Central levy system

17. Mr LEE Cheuk-yan suggested that the medical examination fees for workers in the catering industry could be met by an additional levy as part of the Mandatory Provident Fund (MPF) Industry Schemes. Mr LEE Kai-ming expressed support for Mr LEE 's proposal but pointed out that it would involve some practical considerations because not all workers in the catering industry were affected by the Regulation. Some proprietors might therefore object to the calculation of the additional levy. He suggested that consideration could be given to setting up a special compensation fund for this purpose.

18. Mr HO Sai-chu expressed reservations about the practicability of using the MPF Industry Schemes for meeting the mandatory medical examination expenses. He said that it would further complicate the MPF Industry Schemes and he warned that the Administration should be cautious about the proposal.

19. PAS(EM) responded that the Administration had considered the Subcommittee's previous proposal of a central levy system to meet the medical examination expenses for workers not covered by the CITA scheme. However, as it was extremely difficult to estimate the number of workers in each non-construction industry covered by the Regulation, the proposal might end up in a complex system with very high administrative cost. Mr LEE Cheuk-yan

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disagreed with the argument, as the administrative costs should have been absorbed by the MPF Industry Schemes.

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20. The Chairman asked the Administration to consider members' suggestion and provide a written response.

Supply of appointed medical practitioners (AMPs)

21. As over 150 000 construction workers would be affected by the Regulation, Mr CHAN Wing-chan expressed concern that insufficient supply of AMPs would result in long waiting time for medial examinations and might delay workers from taking employment in the designated occupations.

22. OHC/LD responded that the Regulation would be implemented by phases. Since not many workers were included in the first phase which would only affect the four types of occupations already subject to statutory medical examinations, the Administration did not envisage any problem in the supply of AMPs for conducting the medical examinations. He added that the majority of workers belonged to the category of exposure to excessive noise and they would be included in the last phase. The Administration would closely monitor the situation to ensure that there would be adequate supply of AMPs for implementation of the remaining phases.

Proposed amendment to section 12 on the re-deployment arrangement

23. The Chairman informed members that pursuant to the decision at the last meeting, the Subcommittee had consulted the industry, Labour Advisory Board and employers' and employees' associations on the proposed amendment to section 12 requiring proprietors to arrange re-deployment of workers during the period of suspension. He said that at the last meeting, the version without the penalty clause had been adopted for consultation with the industry. The Chairman then drew members' attention to the summary of views from the respondents [Paper No. CB(2)1639/99-00(03)] and invited members' comments on the proposed amendment.

24. Mr LEE Cheuk-yan noted that the Hong Kong Occupational Safety and Health Association (OSHA) had made two suggestions in its response [Paper No. CB(2)1497/99-00(06)] -

(a) that section 12(2) of the Regulation should be amended to require the proprietor to take measures to improve the workplace environment, working process, and safety equipment; and

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(b) that the proposed section 12(3) should be amended so that the employee would not be suspended from employment in his original occupation if re-deployment could not be arranged.

25. On suggestion (b) above, Mr LEE Cheuk-yan said that OSHA had in fact proposed to grant sick leave to the worker if re-deployment was not possible. He requested the Administration to give its views on the suggestions.

26. On suggestion (a) of OSHA, OHC/LD said that the employer's responsibility for ensuring the safety of a workplace was already specified in the principal ordinance (i.e. Factories and Industrial Undertakings Ordinance) and the relevant subsidiary legislation. Non-compliance with these safety requirements in workplaces could lead to prosecution under these legislation. The Administration therefore did not consider it necessary to include the same requirement in the Regulation.

27. On suggestion (b) of OSHA, PAS(EM) said that it would be against the spirit of the Regulation if the proprietor was allowed not to comply with a recommendation of an AMP which was made on the basis of medical expertise for the safety and health of the worker. It appeared that the issue was related to members' previous concern as to whether sick leave should be granted during the period of suspension. However, since entitlements for paid sickness days were already were provided for in the Employment Ordinance and the Employees' Compensation Ordinance, the Administration had no intention to expand or vary the existing entitlements.

28. Representing the Chinese General Chamber of Commerce, Mr HO Sai-chu expressed objection to the proposed amendment to section 12. He said that proprietors would normally arrange re-deployment, as far as practicable, for permanent employees if they were recommended temporary suspension. He considered it rather unlikely that an employee would be recommended temporary suspension from employment without sick leave and without re-deployment. He believed that employer-employee relationship should not be governed by legislation and he therefore disagreed that the Subcommittee should move an amendment to introduce a statutory requirement on re-deployment.

29. Dr LEONG Che-hung also pointed out that according to the submissions of the Occupational Deafness Compensation Board and the Hong Kong College of Community Medicine, there would be practical difficulties in implementing the proposed re-deployment requirement. While he had no particular views on the proposed amendment, he suggested an alternative amendment to sections 10(b) and (c) as follows -

(a) section 10(b) to be read as "should be suspended from employment in his particular occupation for such period as that appointed

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medical practitioner may specify in the form, *during which time he should be given sick leave*,"; and

(b) section 10(c) to be read as "should be suspended from employment in his particular occupation until he is certified fit to work in that occupation*, the period should not exceed 120 days during which time he would be offered sick leave*.".

30. OHC/LD responded that it would be up to an AMP to decide, based on the latter's professional expertise, as to whether a worker would require sick leave. The period of sick leave for occupational illness could range from a few weeks to a few months. For instance, a worker who had excessive metal in his body would need a few weeks to clear such metal.

31. Mr CHAN Wing-chan said he would prefer the sick leave option in view of the practical difficulties in the re-deployment arrangements.

32. Mr Ronald ARCULLI was of the view that relevant industries and employers' and employees' associations should be consulted on any new proposal of the Subcommittee. Otherwise, the introduction of new amendments would be unfair to proprietors and would adversely affect the employer-employee relationship. As regards the proposed amendment to section 12, Mr ARCULLI questioned its enforceability since there was no penalty provision. He said he would consider moving an amendment to add a penalty clause (which did not impose criminal liability) on the employee for non-compliance with the provisions in the Regulation.

33. Mr LEE Cheuk-yan pointed out that the issue of sick leave was discussed at previous meetings. He was then under the impression that sick leave exceeding a limit was not permissible under the Employment Ordinance. He had therefore suggested that consideration could be given to granting 4/5 of the worker's wages during the period of temporary suspension if sick leave was not recommended by an AMP.

34. Mr LEE Cheuk-yan also referred to section 11 of the Employment Ordinance which stipulated that an employee could not be suspended from employment for more than 14 days in a month, otherwise the employee would be regarded as dismissed. He therefore sought clarification from the Administration whether a worker who was not granted sick leave during temporary suspension for a period exceeding two weeks under section 10 of the proposed Regulation would be regarded as dismissed under section 11 of the Employment Ordinance. He also asked whether section 10 of the Regulation was in contradiction with section 11 of the Employment Ordinance.

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35. Senior Assistant Law Draftsman responded that sections 9 and 11 of the Employment Ordinance set out the conditions under which an employer might dismiss or temporarily suspend his employees. However, section 12 of the Regulation aimed to impose an obligation on the proprietors to implement the recommendations of an AMP made under section 10 of the Regulation. It appeared therefore that the right to dismiss an employer under sections 9 and 11 of the Employment Ordinance was not in conflict with the obligations imposed on the proprietors under the Regulation.

36. Assistant Legal Adviser 5 pointed out that section 11 of the Employment Ordinance set out the specific scope under which an employer might suspend his employee for a period of not more than 14 days in a month. For example, an employer might temporarily suspend his employee if the employee was involved in disciplinary action or criminal litigation, and that the suspension could also serve as the notice period for termination. It appeared therefore there was no conflict between section 11 of the Employment Ordinance and section 12 of the Regulation.

37. Mr LEE Cheuk-yan pointed out that under section 31B of the Employment Ordinance, an employee was eligible for severance payments if he was suspended for more than 14 days in four weeks. However, under section 12 of the Regulation, an employee could be suspended from employment for a period exceeding 14 days as recommended by an AMP. He considered that there was inconsistency between the two provisions and strongly requested the

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Administration to seek further clarification on the issue.

38. As there had been detailed discussion on the issues, the Chairman advised that the Subcommittee should take a decision on the proposed amendment to section 12 before dealing with the issue raised by Mr LEE Cheuk-yan in paragraph 34. The Chairman said that while the legislative intent was to protect the occupational health and safety of an employee, there could be situations where an employee might be suspended from employment without being granted sick leave. The proposed amendment to section 12 on re-deployment arrangement was therefore to safeguard the employees' interest in these situations. The Chairman advised that a decision should be taken as to whether the Subcommittee should move the proposed amendment to section 12. He said that in accordance with Rule 76(8) of the Rules of Procedures of the Legislative Council, a decision could be taken by a majority of members voting.

39. The Chairman then ordered a vote to be taken on the proposal for the Subcommittee to move an amendment to section 12 to require a proprietor to arrange redeployment, as far as reasonably practicable, of an employee who was recommended temporary suspension by an AMP without sick leave. Three members voted for and five members voted against the proposal. The Chairman

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therefore concluded that the Subcommittee would not move the amendment but members could consider moving amendments in their own name.

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40. As regards Mr LEE Cheuk-yan's query on the compatibility of section 11 of Employment Ordinance and section 12 of the Regulation, the Chairman requested the Administration to provide a written response. He said that the Administration's responses to issues raised by members would be circulated to members. Further meetings would be scheduled if necessary. If there were no further questions on the Regulation, the Subcommittee would report to the House Committee.

II. Any other business

41. There being no other business, the meeting ended at 12:20 pm.

Legislative Council Secretariat
24 July 2000