PRC Labor and Employment Law Newsflash

September, 2014

Overlap of Work-related Injury Insurance Compensation and Other Compensation

When most people are talking about the hot topic that 'buying vegetables after work can be identified as work-related injury', seldom of us focus on the practice of how to solve the overlap problems of work-related injury insurance compensation and other kinds of compensation. Hence, we prepare this newsflash aiming to figure out the relation between work-related injury insurance compensation, commercial insurance compensation and personal injury compensation for your reference.

1. work-related injury not caused by a third party

The work-related injury not caused by the third party does not apply the personal injury compensation. Hence, the overlap only exists between work-related injury insurance compensation and commercial insurance compensation.

The Insurance Law of People's Republic of China (coming into effect since 1 October 2009) and *the Regulation on Work-Related Injury Insurance* (coming into effect since 1 January 2004) respectively stipulate that the commercial insurance and the work-related insurance are two different types of insurance. At present there are no laws or regulations that clearly specify whether these two kinds of insurance could compensate in the meantime. Well, in practice, the worker suffering from a work-related injury could enjoy the compensation from both the commercial insurance and the work-related injury insurance in general.

Nevertheless, many commercial insurance companies may use the 'the indemnity principle' regarding the payment of medical treatment, which means

that the insurance companies merely bear the rest part of the fee for medical treatment (after deducting the part that has been already compensated from other channels) within its insurance coverage.

2. work-related injury caused by a third party

a. the overlap work-related injury compensation and commercial insurance compensation.

When the worker suffers the work-related injury from a third party (such as traffic accidents and other violent harms, etc.), the compensation of the commercial insurance does not conflict with the compensation of work-related injury insurance. The worker can obtain the compensation from these two kinds of insurance. At present, there is relevant trial guideline at the local court, such as the regulation of Article 25 of *Directive Opinions of Guangdong Higher People's Court on Several Issues concerning the Trial of Labor Dispute Cases*.

b. the overlap of commercial insurance compensation and personal injury compensation

Workers could request the third party to pay personal injury compensation and this does not impact the commercial insurance company to bear its liability of commercial insurance compensation. After the occurrence of incidents, workers could first request the commercial insurance company to assume the compensation, then, they could still turn to the third party for the personal injury compensation.

c. The overlap of work-related insurance compensation and personal injury compensation

No specific or systematic provisions could be found in our current legal system about law application when confronting with the issue of the overlap of work-related insurance compensation and personal injury compensation. From all kinds of regulations and sporadic legal documents in different period of time about the work-related injury compensation, we could eventually conclude a general rule that 'the property-nature compensation cannot be obtained repeatedly; on the contrary, the personal-nature compensation can be obtained repeatedly'. Among the same items of property-nature compensation, the

work-related injury insurance compensation and personal injury compensation could not be paid repeatedly and during the calculation process, we should adopt the principle of 'choosing the higher standard of compensation'. Item 3 of Article 8 of *the Provisions of the Supreme People's Court on Several Issues concerning the Trial of Administrative Cases of Work-related Injury Insurance* (coming into effect since 1 September 2014) also supports the said principle.

However, if the worker requires the employer to bear the personal injury compensation liability, he or she will only get the work-related injury compensation pursuant to *the Regulation on Work-related Injury Insurance* without the personal injury insurance at the same time.

Case Study: Could a harm caused by the worker himself operating against the safety rules be identified as work-related injury?

Mr. Li is the employee of a printing company. In June 2013, Mr. Li and another co-worker from another workshop made an appointment on work shift privately. In that appointment, Mr. Li would work on his day-off, and his co-worker would replace him to work during the National Day holidays. On the first day of the work shift, because Mr. Li was not familiar with the procedure of adding materials into the printing machines and had no knowledge that the materials should be added after cutting off the power the main machine, Mr. Li stretched his hand hastily to add the materials, and unfortunately, his right hand was cut by the operating machine. After the accident, Mr. Li's parents came to the company and demanded the company to report work-related injury and assume the work-related injury liability.

Nonetheless, the company refused their request as the company held that Mr. Li had operated against the safety rules of the company. The company later terminated the employment contract of Mr. Li and refused to report Mr. Li's case as the work-related injury. In September 2013, after Mr. Li's injury got stable, he reported his case to the local labor bureau. After learning all the details of the case, the bureau held that the accident met the criteria of work-related injury.

Our team believes that, although Mr. Li did not perform his duty in the accident, the work-related injury identification department and the judicial department, out of the purpose of protecting the employees' interests, will be strict with the

situations where the work-related injury are not identified. As for those cases in which the workers are injured not performing their job duties but benefiting the company's interests will still be recognized as work-related injury even the workers breach relevant rules. The results also conform to the legislation purpose of work-related injury insurance.

This case also reminds all the employers to pay work-related insurance for the employees. Otherwise, all the fees and compensation regarding the work-related injury will be borne by the employers.

This newsflash is prepared by the Labor Law Team of Dacheng Law Offices. Members of the Labor Law Team: Maggie Kong, Shane Luo, Susan Shan, Kent Xu, Grace Yang, Anderson Zhang and John Zhou. If you have any inquiries regarding the PRC employment law matters, please contact us at laborlaw@dachenglaw.com.

Dacheng Law Offices
24/F, Shanghai World Financial Center
100 Century Avenue, Shanghai 200120, P. R. China
Tel: 86-21-5878 5888 Direct: 86-21-2028 3597
Fax: 86-21-2028 3853 Mobile: 86-188 0176 6837
www.dachenglaw.com

中国劳动法资讯速递
二零一四年九月刊

工伤赔偿与其他赔偿的竞合

在当前“买菜认定工伤”等话题大热之际，却很少有人关注工伤赔偿与其他种类赔偿的竞合问题及实务中如何操作的问题。为此，我们特意梳理工伤赔偿与商业保险赔偿、人身损害赔偿的关系，供大家参考。

一、 非第三人侵权造成的工伤

非第三人侵权造成的工伤，不适用人身损害赔偿，而只存在商业保险赔偿和工伤保险赔偿的竞合。

《中华人民共和国保险法》（自 2009 年 10 月 1 日起生效）和《工伤保险条例》（自 2004 年 1 月 1 日起生效）分别规定了商业保险和工伤保险，两者属于不同的险种。我国当前的法律法规未就两者是否可以同时理赔做明确规定，但在实务操作中，如果公司同时为员工购买了商业保险和工伤保险，一般可同时享受商业保险和工伤保险的赔偿。

但很多商业保险公司对意外医疗保险金的给付约定了“补偿原则”，意味着在其保险责任范围内，保险人仅对扣除已获得补偿后的剩余医疗费用，按照合同约定承担给付保险金责任。

二、 第三人侵权造成的工伤

(一) 商业保险赔偿和工伤保险赔偿的竞合

员工在因第三人侵权（包括交通事故和其他暴力伤害等）而发生工伤时，商业保险赔偿与工伤保险赔偿一般不冲突，员工可同时获得商业保险和工伤保险的理赔。目前，已经有地方的相关审判口径，如《广东省高级人民法院关于审理劳动争议案件若干问题的指导意见》第 25 条之规定。

(二) 商业保险赔偿和人身损害赔偿的竞合

员工可请求第三人进行人身损害赔偿，且这并不妨碍商业保险公司承担商业保险的赔偿责任。在发生事故后，员工先行向商业保险公司索赔也不妨碍事后再向第三人索要人身损害赔偿。

(三) 工伤保险赔偿和人身损害赔偿竞合

我国现行法律自始没有对工伤保险赔偿和人身损害赔偿发生竞合时如何适用法律进行专门的、统一的明确规定。从我国关于工伤保险赔偿的各相关法律规定来看，零散分布于各个时期不同法律文件中的关于二者发生竞合时如何处理的规定及沿革，最终基本上可以得出“财产性质的赔偿不可兼得、人身性质的赔偿可以兼得”的大原则。相同并重复的项目中，工伤保险与人身损害赔偿不可重复计赔；在计赔过程中，采用相同并重复项目下“就高足额赔偿的原则”进行赔付。《最高人民法院关于审理工伤保险行政案件若干问题的规定》（2014 年 9 月 1 日起生效）第八条第三款也支持了前述的基本原则。

但如果员工要求用人单位承担人身损害赔偿责任的，则只能根据《工伤保险条例》的规定获得工伤赔偿，而无法同时获得人身损害赔偿。

案例分析：员工违章作业受伤，是否可以被认定为工伤？

小李是某印刷公司的员工，2013 年 6 月，小李与另一车间的同事私下约定调班，由小李在其休息日代同事上班，以换取该同事在十一长假时为其顶班。调班的第一天，小李由于对印刷机添料的程序不了解，不知道应当先关闭主机电源再填料的基本要求，贸然在印刷机仍在正常工作时，伸手加料，导致右手被机器轧碎。事故发生后，小李的父母赶到公司，要求公司申报工伤、承担工伤责任。但公司以小李违反公司规章制度为由，解除了与小李的劳动关系，并拒绝为小李申报工伤。2013 年 9 月，小李的伤情稳定后，向当地的劳动部门申报工伤。劳动部门在认真了解了案情的全部经过后，依法认定小李遭受的事故伤害属于工伤。

本所律师认为，尽管小李从事的是非本职工作，但工伤认定部门和司法机关本着维护员工切身利益的宗旨，对于不予认定工伤的情形予以严格掌握；对于非本职工作但为本单位的利益负伤的，即使存在一定的违规，仍应当认定为工伤。这样的认定结果符合工伤保险的立法宗旨。

本案也再次提醒所有的用人单位，务必为所有的员工缴纳工伤保险，否则与工伤有关的所有费用、赔偿均由用人单位埋单。

本资讯速递系大成劳动法团队撰拟，责任编辑：孔琪、罗欣、单训平、徐智强、杨傲霜、张根旺和周军。期待我们的资讯速递能对您有所裨益。若您有任何问题，请通过电邮 laborlaw@dachenglaw.com *联系我们团队。*

大成律师事务所
上海市世纪大道 100 号环球金融中心 24 层（200120）
电话：86-21-5878 5888 直线：86-21-2028 3597
传真：86-21-2028 3853 手机：86-188 0176 6837
www.dachenglaw.com