



PRC Labor and Employment Law Newsflash

September 2015

Concurrence of Work-Related Death and Third-Party Tort Compensation

—— A case study of employer purchasing no work-related injury insurance for employee

An employee, with no work-related injury insurance effected by his employer, was hit by a third-person's car on his way to work and died from ineffectual rescue. His death was identified as work-related death. Can the employee's dependants obtain the work-related death compensation after receiving some third-party tort compensation?

1. Limited Re-Compensation at the Concurrence of Work-Related Injury and Third-Party Tort

It is first specified by the *Reply of the Supreme People's Court on Issues concerning Whether a Worker or his Relatives can Obtain Work-Related Injury Insurance after Receiving Civil Compensation* [(2006) Min Ta Zi No. 12] that an employee's dependants can receive both work-related injury and tort compensation at the concurrence of work-related injury and third-party tort: "A worker, who suffers from work-related injury for a third party's reason, or his close relatives can apply to the work-related injury insurance institution for work-related insurance benefits according to Article 37 of the *Work-Related Injury Insurance Regulation* after receiving civil compensation from such third party".

However, compensation limits differ in local juridical practices. The *Answers of the Civil Court 1 of Shanghai High People's Court on Certain Issues concerning the Cases on Concurrence of Work-Related Insurance and Third-Party Tort Compensation* (July 1, 2010) defines that no re-compensation shall be made, at the concurrence of work-related insurance and third party tort, to original wages and benefits as one of work-related insurance compensation (same as below) (if loss due to absence from work has been compensated, as one of tort damage compensation, same as below), medical expenses, nursing and life care expenses during the paid leave period (nursing expenses), board expenses in hospital, transportation expenses, accommodation expenses for medical treatment in any other province or city (accommodation and board expenses for medical treatment in any other province or city), rehabilitation and treatment expenses (rehabilitation, rehabilitation nursing, appropriate cosmetic surgeon, and follow-up treatment expenses), expenses of assistive

devices (expenses for disability aids), pension for dependants (living expenses of dependants), funeral grants (funeral expenses).

Article 6 of the *Minutes of the Symposium of Guangdong Higher People's Court and Guangdong Labor Dispute Arbitration Commission on Certain Issues concerning Labor Dispute Case Trial (Yue Gao Fa [2012] No. 284)* states that "If a third party has undertaken tort compensation liability and the employee or his close relative claims the employer for work-related insurance benefits, the expenses of medical treatment, assistive devices and funeral should be deducted from the liability of the employer for work-related insurance."

Different local regulations have directly brought about unfair results, i.e., different compensation in different places under the same circumstance. This issue has been specified expressly in the *Provisions of the Supreme People's Court on Several Issues concerning the Hearing of Administrative Cases of Work-Related Injury Insurance* promulgated in 2014 that "Where a worker suffers from work-related injuries due to reasons attributable to a third party, and the relevant social insurance agency refuses to pay work-related injury insurance benefits on the ground that the worker or his close relative has filed a civil lawsuit against the third party, the competent people's court shall not uphold the contention of the social insurance agency, but the medical expenses already paid by the third party shall be excluded".

2. How to Identify "Paid"

Article 12 of the *Guidance of Shenzhen Intermediate People's Court on Cases of Work-Related Injury Compensation (effective from August 2009)* states that "If an employee is injured due to a third-party tort and receives tort compensation first, his work-related injury compensation will not be affected, but the expenses of medical treatment, funeral and aid replacement shall not be claimed again". In 2010, I initiated labor arbitration on behalf an employee's dependants against the employer which failed to purchase social insurance for the employee, claiming for work-related death compensation, including funeral expenses and medical expenses. The arbitral award upheld all the arbitration claims, but the employer applied to Shenzhen Intermediate People's Court for cancellation of the award on the ground that failure of the employee's dependants to inform the arbitration court of having obtained funeral expenses and medical expenses in a third-party tort dispute case falls into "the opposing party concealing any evidence which is sufficient to affect the impartiality of the award". Although the judge of the tort case upheld the claims for funeral expenses and medical expenses, there is no enforceable property of the third party. It is my opinion that it should be subject to the received compensation instead of the effective but non-enforceable verdict, and the employee's dependants had not concealed any evidence which is sufficient to affect the impartiality of the award, so the award should not have been cancelled.

Shenzhen Intermediate People's Court held that the funeral expenses were one-time payout which had been upheld in the third-party tort dispute case and the dependants couldn't be double compensated; and the dependants concealed in the arbitration the fact that the claim for funeral expenses was upheld, resulting in the award upholding the claim for funeral

allowance, which falls into “concealing any evidence which is sufficient to affect the impartiality of the award”, so the court ruled to cancel the award. Then I brought a separate suit on behalf of the dependants against the employer for compensation, insisting on claiming for funeral expenses, but Shenzhen Intermediate People’s Court still rejected it for the reason that the effective judgment of the third-party tort case had upheld the relative’s claim for funeral expenses and the dependants might apply for enforcement once the third party had any property for compensation.

This issue has been specified expressly in the *Provisions of the Supreme People’s Court on Several Issues concerning the Hearing of Administrative Cases of Work-Related Injury Insurance* that “Where a worker suffers from work-related injuries due to reasons attributable to a third party, and the relevant social insurance agency refuses to pay work-related injury insurance benefits on the ground that the worker or his close relative has filed a civil lawsuit against the third party, the competent people’s court shall not uphold the contention of the social insurance agency, but the medical expenses already paid by the third party shall be excluded”. The expression “already paid by the third party” is more elaborate than that “the employee obtains tort compensation first”. Even if the claim for medical expenses is upheld in the effective judgment of a third-party tort case, while the third party has not made the payment, the employee/his dependants still may make the claim.

3. How to Pay Pension

The *Work-Related Injury Insurance Regulation* specifies that the amount of pension for dependants shall be adjusted in due time by the social insurance administrative authority of the pooling area in light of the change to the average wage of workers and living costs thereof. Measures for adjustment shall be formulated by the people's government of the province, autonomous region or municipality directly under the Central Government. The *Regulation of Guangdong Province on Work-Related Injury Insurance* regulates that the amount of pension for dependants shall be adjusted every year based along with the increase in the average wage of workers and shall not be adjusted in case of negative increase in the average wage of workers, and the dependants may not receive the pension unless in every June and December he provides the certificate of existence issued by the employee or the household registration department at his residence. The *Opinions of the Ministry of Human Resources and Social Security on Certain Issues concerning the Implementation of the Work-Related Injury Insurance Regulation* requires that all benefits payable by the work-related insurance fund shall be paid according to the relevant provisions of the *Work-Related Injury Insurance Regulation* and no long-term benefits may be paid in one lump sum. It is thus clear that if the pension for dependants is paid by a work-related insurance fund shall it shall be paid regularly and no payment in one lump sum shall be supported.

However, I believe that the above payment applies to social insurance funds instead of employers. As generally no employer is willing to pay compensation, it happens often that the employer creates difficulties or delays/refuses the payment when the dependants claim against the employer for compensation every month. It is also very inconvenient for the dependants to regularly apply for enforcement, while the employer might be likely to close down at any time.

The employer did not purchase the work-related injury insurance which should be purchased for the employee, breaching relevant laws and regulations, so the employer should be responsible for its behavior. Therefore, it would be better for the employer to make compensation in a lump sum by reference to the *Interpretation of the Supreme People's Court on Certain Issues concerning the Application of Law in Trying Cases on Compensation for Personal Damage* at the payment of pension for dependants.

If you have any inquiries regarding the PRC employment law matters, please contact us at hrlaw@dachenglaw.com.

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中国劳动法资讯速递

二零一五年九月刊

工亡赔偿与第三人侵权赔偿竞合问题

——以用人单位未为劳动者购买工伤保险为例

公司未为员工购买工伤保险，员工在上班途中被第三人驾驶的轿车撞伤，后抢救无效死亡，员工的死亡被认定为工亡。员工家属在获得第三人侵权纠纷获得部分赔偿后，是否还能获得工亡赔偿？

一、工伤与第三人侵权竞合支持有限制的重复赔偿

《最高人民法院（关于第三人侵权造成工伤的职工或其亲属在获得民事赔偿后，是否还可获得工伤保险补偿问题的答复）（2006）民他字第 12 号》规定，“因第三人造成工伤的职工或其近亲属，从第三人处获得民事赔偿后，可以按照《工伤保险条例》第三十七条的规定，向工伤保险机构申请工伤保险待遇补偿。”最先确定了工伤与第三人侵权竞合情形下，员工家属可以分别获得工伤赔偿、侵权赔偿。

但各地司法实践对赔偿标准的意见不一。《上海市高级人民法院民事审判第一庭关于审理工伤保险赔偿与第三人侵权损害赔偿竞合案件若干问题的解答（2010 年 7 月 1 日）》，明确了工伤保险赔偿中的原工资福利待遇（侵权损害赔偿中的误工费）、医疗费、停工留薪期间的护理费和生活护理费（侵权损害赔偿中的护理费）、住院伙食补助费、交通费、外省市就医食宿费（侵权损害赔偿中的外省市就医住宿费和伙食费）、康复治疗费（侵权损害赔偿中的康复费、康复护理费、适当的整容费、后续治疗费等）、辅助器具费（侵权损害赔偿中的残疾辅助器具费）、供养亲属抚恤金（侵权损害赔偿中的被抚养人生活费）、丧葬补助金（侵权损害赔偿中的丧葬费）等费用不支持重复赔偿。

《广东省高级人民法院、广东省劳动人事争议仲裁委员会关于审理劳动人事争议案件若干问题的座谈会纪要（粤高法〔2012〕284 号）》第六条规定，“第三人已承担侵权赔偿责任，劳动者或者其近亲属又请求用人单位支付工伤保险待遇的，用人单位所承担的工伤保险责任应扣除医疗费、辅助器具费和丧葬费。”

各地的不同规定曾直接导致同一种情况在不同地方发生赔偿不一致的不公。2014 年颁布的《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》对此问题有了明确的规定，“职工因第三人的原因导致工伤，社会保险经办机构以职工或者其近亲属已经对第三人提起民事诉讼为由，拒绝支付工伤保险待遇的，人民法院不予支持，但第三人已经支付的医疗费用除外”。

二、“已支付”的标准

《深圳中院关于工伤待遇案件指导意见（2009 年 8 月起实施）》第十二条“劳动者系第三人侵权所致，劳动者先获得侵权赔偿的，不影响其享受工伤待遇，但对于医疗费、丧葬费和辅助器具更换费不得重复享有”。2010 年，笔者代理员工家属向未为员工购买社保的用人单位提起劳动仲裁，主张用人单位承担工亡赔偿责任，包括丧葬费、医疗费等。仲裁裁决支持所有仲裁请求，但用人单位以员工家属已经在与第三人侵权纠纷案中，已获得丧葬费、医疗费但未告知仲裁庭属于“对方当事人隐瞒了足以影响公正裁决的证据”为由向深圳中院申请撤销裁决。该案中，尽管判决支持了丧葬费、医疗费的诉讼请求，但第三人实际没有可执行的财产。笔者认为，赔偿应以实际获得赔偿款项为准，而不是以生效但未能履行的判决为准，所以员工家属并没有隐瞒足以影响公正裁决的证据，裁决不该被撤销。

深圳中院认为丧葬费属于一次性支出，已经在家属与第三人侵权纠纷案中获得支持，不能获得双倍赔偿，亲属在仲裁程序中，隐瞒了丧葬费获得支持的事实，致使裁决重复支持其丧葬补助金的请求，属于隐瞒了足以影响公正裁决的证据，撤销该仲裁裁决。后笔者代理家属另行起诉用人单位要求赔偿，其中仍坚持主张丧葬费，但深圳中院还是以第三人侵权案生效判决已经支持家属关于丧葬费的请求，一旦第三人有财产可以赔偿，家属可以启动执行程序要求赔偿为由不予支持丧葬费。

现《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》对此问题有了明确的规定，“职工因第三人的原因导致工伤，社会保险经办机构以职工或者其近亲属已经对第三人提起民事诉讼为由，拒绝支付工伤保险待遇的，人民法院不予支持，但第三人已经支付的医疗费用除外”。“第三人已经支付的”比“劳动者先获得侵权赔偿的”更进一步细化了，即使第三人侵权案生效判决中支持了医疗费，但第三人并没有实际支付，员工/员工家属还是可以主张。

三、用人单位支付抚恤金的方式

《工伤保险条例》规定了供养亲属抚恤金由统筹地区社会保险行政部门根据职工平均工资和生活费用变化等情况适时调整。调整办法由省、自治区、直辖市人民政府规定。《广东省工伤保险条例》规定供养亲属抚恤金每年随职工平均工资增长调整，职工平均工资负增长时不调整，供养亲属抚恤金的供养亲属，应当在每年的六月份和十二月份提供由用人单位或者居住地户籍管理部门出具的生存证明，方可领取。《人力资源和社会保障部关于执行〈工伤保险条例〉若干问题的意见》要求，由工伤保险基金支付的各项待遇应按《条例》相关规定支付，不得采取将长期待遇改为一次性支付的办法。可见，当供养亲属抚恤金支付主体是社保基金的时候，供养亲属抚恤金定期支付，并不支持一次性支付。

但笔者认为，上述支付方式适用的主体是社保基金，而不是用人单位。由于用人单位一般不愿意支付赔偿，家属每月向用人单位主张赔偿遇到用人单位刁难或者推迟/拒绝支付也是经常发生的，家属若因此定期申请强制执行也是十分不方便的，且用人单位还有随时倒闭的可能性。用人单位应该为员工购买工伤保险却未购买，违反了法律法规的规定，应该为自己的行为承担责任。所以，对于用人单位，支付供养亲属抚恤金时更

适合参照《最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释》进行一次赔偿。

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