CLB's opinions and recommendations on the *Draft for Comment regarding the State Council's proposed revisions to the Work-related Injury Insurance Regulations*.

After four-and-a-half years, an opportunity has finally arisen for the revision of the *Work-related Injury Insurance Regulations*. On 24th July 2009, the Legislative Affairs Office of the State Council released its *Draft for Comment* to canvas public opinion on its proposed changes. We note that in this draft, the State Council intends to make major changes to the existing *Work-related Injury Insurance Regulations* in the areas work injury certification and appraisal, procedures for dispute settlement, the severity of penalties, and the standards for death benefits after work-related accidents. We believe that these revisions will be a boon for the hundreds of millions of workers in China. And that after the revisions, the *Work-related Injury Insurance Regulations* will provide a firm legal basis for the task of ensuring insurance cover for work-related injuries in China, and will further be of great use in upholding the rights and interests of workers.

China Labour Bulletin is a labour rights organisation registered in Hong Kong. Since its foundation in 1994, the focus of its activities has always been the basic rights and interests of workers in mainland China. Since 2003, it has provided legal assistance to workers, and encouraged them to defend their rights and interests through legal channels, based on labour legislation and regulations. Several cases in which we have offered assistance in defence of labour rights, have involved disputes related to work-related injury or occupational disease. While providing such legal assistance, we have at the same time conducted research and analysis, building up considerable experience in the settlement of work-related injury and occupational disease disputes and forming our own opinions regarding the legal shortcomings in this area. Here, we wish to take the opportunity presented by the Legislative Affairs Office of the State Council in offering its draft revision of the *Work-related Injury Insurance Regulations* for public scrutiny to present the following observations and recommendations. Specific instances cited in our text are all cases in which China Labour Bulletin has provided legal assistance.

(1) In the *Draft for Comment*, Article 2, Paragraphs 1 and 2 are amended as follows: "All kinds of enterprise, commercial enterprises and public institutions, social organisations, private non-enterprise units and other organisations and individual

businesses with workers in their employ (hereafter "employer(s)") within the PRC shall join work-related injury insurance programs based on the provisions of these Regulations, and pay work-injury insurance contributions for all their workers or employees (hereafter collectively "worker(s)").

Workers at all kinds of enterprise, commercial enterprise or public institutions, social organisations, private non-enterprise units and other organisations and individual businesses with workers in their employ within the PRC all enjoy the right to work injury insurance benefits under the provisions of these Regulations."

CLB recommends: Expansion of the above provision to include, in particular, workers in irregular employment, such as temporary workers, half-day workers and project workers (sub-contracted labour). Workers in irregular employment form a significant component of the labour force in China. The *Labour Contract Law* specifically lays down the statutory rights of workers who do not work on a full-day basis, and their eligibility for protection under labour legislation. The *Regulations* should also take into consideration insurance for work-related injuries sustained by students from universities and colleges, technical schools, vocational senior middle school, and other institutions working as interns.

(2) In the *Draft for Comment*, Article 4, Paragraph 3 is amended as follows: "After an accident leading to injury of a worker, the employer should take such measures as are necessary to ensure that the affected worker receives prompt medical treatment. If the accident results in a fatality, the employer should undertake settlement measures and within 24 hours submit a written report to the Human Resources and Social Security department of the area involved; the injured worker or his or her close relatives or the trade union organisation may also submit a written report to the Human Resources and Social Security department of the area involved."

(Proposed addition of a Paragraph 4: "After receiving an [accident] report, the Human Resources and Social Security department shall, in cases of fatality, severe injury or lesser injury affecting at least five persons, send representatives to the scene as quickly as possible to conduct investigations and collect evidence. The employer shall cooperate in this work.")

CLB recommends:
I. Change "receives prompt medical treatment" to "promptly receive urgently needed medical treatment."

The addition of the words "urgently needed" will require the employer, in addition to administering prompt medical treatment, to take all necessary measures to prevent the accident victim from dying or becoming disabled.

II. Change the sentence "the trade union organisation may also submit a written report to the Human Resources and Social Security department of the area involved" to "the union organisation *must* submit a written report to the Human Resources and Social Security department of the area involved and to the local-level union organisation;" Article 26 of the *Trade Union Law*, and Articles 3, 10, 22 and 33 of the *Production Safety Accident Report and Investigation & Treatment Regulations of the State Council*, impose on enterprises and local unions the obligation of taking part in investigations and settlements following accidents leading to work injuries. This requirement should be reflected in the *Work-related Injury Insurance Regulations*. Requiring enterprise union organisations to submit reports on accidents leading to work-related injuries would also help prevent employers from failing to disclose such accidents.

III. Change the wording in the proposed additional Paragraph 4 to: "After receiving an [accident] report, the Human Resources and Social Security department *and local union* organisation shall… "

(3) In the *Draft for Comment*, Article 12 is amended as follows: "Funding for work injury insurance is kept in a special account within the Social Insurance Fund, and used for insurance payouts for work-related injuries as stipulated by the Regulations, and for payment of related costs such as work-capacity appraisal, prevention of work-related injury and for payment of costs for other applications of the insurance coverage under the relevant laws and regulations."

CLB recommends: Remove the words "prevention of work-related injury" from the uses of the work injury insurance fund. The major purpose of the work injury insurance fund is payment of expenses and benefits after a worker suffers a work-related injury or occupational disease. It should not be used for payment of expenses before such injury or illness occurs. The costs of prevention of work-related injury and occupational disease should be paid separately and entirely by the employer.

(4) In the *Draft for Comment*, Article 16 is amended as follows: "Workers who are injured or killed as a result of workplace accidents in circumstances as described

under Articles 14 and 15 of these Regulations shall not be certified or recognised as victims of work-related accidents if the accident occurred as a result of their: (1) illegal activities, or (2) inebriation or drug abuse, or (3) self-mutilation or suicide.

CLB recommends: Put inebriation and drug abuse into two separate paragraphs. Also, "inebriation" should be reworded to "injury or fatality caused by his or her own behaviour while under the influence of alcohol." Workers should not be drinking alcohol during working hours at their workplaces. But if they are drunk when injured, they should still be regarded as victims of work-related accidents if the event leading to injury or death while they were drunk was caused by an external event (for example, improper operation of equipment by another person, or mechanical breakdown).

(5) In the *Draft for Comment*, Article 17, Paragraph 2 is amended as follows: "If an employer has not provided an application for work injury certification as laid down here before, the worker suffering such injury or his or her close relatives or the union organization may, within one year of the day of the accident, or of the day on which an occupational illness is diagnosed or evaluated, or of the day on which other circumstances [serving as key date] occurred, apply directly for work injury certification from the Human Resources and Social Security department in the area in which the employer is located."

CLB recommends:
I. Article 17 should take account of the possibility of dispute between the worker suffering a work-related injury or an occupational illness and the employer or work injury certification authorities during the period after the occurrence of the accident or diagnosis and appraisal of an occupational illness and before the application for work injury certification. Therefore, it is necessary to add a Paragraph 3, stating that the one-year window for making an application for work injury certification stipulated in Paragraph 2 can be extended in cases where the application period has been exceeded because of on-going legal action. (See case of Xiao Huazhong in box below)

China Labour Bulletin has noted during its legal work on behalf of workers with silicosis in mainland China that most sufferers developed more severe symptoms several years after leaving their employers and returning to their home villages, and only then received diagnoses from local occupational disease prevention and treatment centres and were confirmed as suffering from silicosis (as an occupational disease). However, when they approached their former employers seeking

certification of their work-related disease, they were always refused. Likewise, those who went directly to the work injury certification authorities found they refused to handle their cases, or demanded that they reapply after getting their occupational disease status re-evaluated and collecting supporting evidence. This has resulted in silicosis victims being unable to submit applications within a year of receiving their occupational disease diagnosis, and as a result they had no way of realising their entitlement to work-related injury benefits.

II. The following wording has been added to Article 17, Paragraph 2: "or of the day on which other circumstances [serving as key date] occurred." If other clauses do not provide an explanation of what constitutes "other circumstances," this vague wording should be removed.

The case of Xiao Huazhong

In 2003, physical discomfort caused by incipient pneumoconiosis forced Xiao Huazhong, a worker from rural Sichuan, to give up his job as a team leader in the Workers and Peasants coal mine in Qu county, Sichuan, where he had worked since 1995. In April 2007, after examination at Huaxi occupational disease centre of Sichuan University, he was diagnosed with third-stage pneumoconiosis. Towards the end of April 2007, Xiao went to the Dazhou Labour and Social Security office to apply for work injury certification, only to be told that this would take a very long time. Xiao also had great difficulty in obtaining official recognition of his employment relationship with the mine, and decided the better course would be to go to court, sue the mine operator and demand compensation for personal injury. But, after nearly two years of legal wrangling, the appeal court ordered the case to be settled under the provisions of the *Work-related Injury Insurance Regulations*. When Xiao once more submitted an application for work injury certification, the Labour and Social Security department in Dazhou responded that the time limit had expired.

(6) In the *Draft for Comment*, Article 29 has been changed to Article 30, and Paragraph 4 changed to read: "If a worker receives in-hospital treatment for a work-related injury, the standard meal and board costs for hospitalisation shall be paid by the work injury insurance scheme at a rate of 70 percent of the employer's standard meal allowance for its staff travelling on business. If, after presenting certification of

his condition from a medical institution and obtaining approval of the administrative organisation, a worker suffering a work-related injury received medical treatment at a facility outside the area in question, necessary transportation, food and lodging costs shall be paid from the work injury insurance scheme according to allowance standards prevailing at the employer for staff travelling on business."

CLB recommends: Revisions to the original Article of the *Work-related Injury Insurance Regulations* currently in force are no more than a transfer of the responsibility for providing meals during a hospital stay from the employer to the work injury insurance fund. This does not change the standards for hospital meal allowances. Moreover, different employers have different standards for meal allowances for staff travelling on business, and this revised provision could in practice be difficult to implement under the work injury insurance fund, and also be unfair because of the differing standards applied for workers with work-related injuries or occupational illnesses at different employers. Therefore, we recommend unifying these standards in the *Draft for Comment*, perhaps referencing the local average per capita living standard.

(7) In Chapter 7 of the current *Work-related Injury Insurance Regulations*, regarding legal liability, there is no provision for mandatory assumption of legal liability by employers and unions that have not complied with their legal obligations. In this area, the *Draft for Comment* shows no clear improvement.

In the *Draft for Comment*, Article 4, Paragraph 3 is amended as follows: "After a worker is injured in an accident, the employer should take measures to ensure that he or she receives prompt medical treatment and... a report should be submitted to the Human Resources and Social Security department of the administrative area in question. After a fatality, settlement measures should be taken." The revision does not stipulate any legal liability for employers or trade unions that do not comply with this provision.

CLB recommends: In the Chapter on Legal Liability, add that if employers have failed to provide timely treatment "to a worker who has been injured in a work-related accident," or are unable to carry out settlement measures when a "fatality occurs," or the unit and enterprise union organisation have failed to report to the competent authorities within the provided time limits, etc, they shall be required to assume legal liability.

Article 60 of the current *Work-related Injury Insurance Regulations*, and Article 62, Paragraph 2 of the *Draft for Comment* state: “When a work-related injury is suffered by a worker at any employer who should be but is not enrolled in a work injury insurance scheme under the provisions of these Regulations, the employer shall meet the costs of treatment under the provisions of these Regulations based on the terms and standards for work injury insurance benefits.” This paragraph should be treated as a separate provision. The current *Regulations* have it in the wrong place, and the *Draft for Comment* does not amend this.

CLB recommends: Firstly, this provision should be put in the appropriate place; secondly, in the Chapter entitled Legal Liability, add a provision to the effect that employers that have not joined work-related injury insurance programs and who refuse to pay expenses shall be obliged to assume legal liability. Thirdly, if an employer refuses to join a work-related injury insurance program, authorise workers and unions to initiate legal proceedings in the People's Court against said employer.

Under Article 49 of the current *Work-related Injury Insurance Regulations*, “the Labour and Social Security authorities should undertake lawful supervision and monitoring of the status of collection of work-related injury insurance premiums and work injury insurance fund payouts.” In Chapter 1, entitled Legal Liability, there is no provision concerning the failure of government authorities to perform these duties.

CLB recommends: Add a provision here regarding “legal liability.”

Article 19, Paragraph 51 of the *Work-related Injury Insurance Regulations*, the *Trade Union Law*, the *Production Safety Law* and the *Production Safety Accident Report and Investigation & Treatment Regulations* and administrative regulations all lay down the powers and responsibilities of union organizations with regard to monitoring workplace safety and reporting and investigating accidents leading to work-related injuries. Regrettably, none of these laws and regulations have any provisions regarding a union’s liability for failure to perform such duties. This shortcoming has led to a situation in which unions carry out the above duties only on a discretionary basis, and avoid all responsibility for neglect of these duties. China Labour Bulletin believes that measures should be introduced in the revision of the *Work-related Injury Insurance Regulations* to address this problem.

CLB recommends: In the Chapter entitled Legal Liability, and in Article 4, Paragraph 3, Article 17 Paragraph 2, Article 9, Paragraph 1 of the *Draft for Comment*

and Article 51 of the *Work-related Injury Insurance Regulations*, add corresponding legal liability clauses for each of the obligations to be undertaken by trade unions.

(8) The current *Work-related Injury Insurance Regulations* and the *Draft for Comment* both lack provisions regarding advance payment of medical costs for workers suffering work-related injury or occupational disease who are in need of urgent treatment.

CLB recommends: Add to the *Draft for Comment* a provision for the advance payment of costs. After a worker who has suffered an industrial accident or occupational disease has received a diagnosis from the hospital or an occupational disease prevention and treatment centre, and has had his injury or illness certified as such, medical expenses should be paid in advance from the work injury insurance fund if the employer is already enrolled in it.

China Labour Bulletin has noted that in cases where employers ignore existing legislation and regulations and refuse to pay medical costs and occupational disease benefits, sufferers can go through up to 19 bureaucratic and judicial procedures to claim their due benefits. Namely:

Diagnosis of occupational disease (at an occupational disease prevention and treatment centre)
Appraisal of occupational disease (at a municipal health administration centre)
Re-appraisal of occupational disease (at a provincial level health administration centre)
Launch of litigation to prove employment relationship (at a court of first instance)
Non-compliance with judgment, launch of appeal (at an appeal court)
Work injury certification from labour authorities
Refusal of worker or enterprise to accept certification judgment (application for administrative reconsideration)
Non-compliance with the results of reconsideration, launch of administrative litigation (court of first instance)
Non-compliance with ruling, launch of appeal (at court of appeal)
Appraisal of capacity to work (by committee for appraisal of capacity to work)
Non-compliance with appraisal by worker or enterprise (apply for reappraisal)
Calculation of occupational disease benefits (work injury insurance fund)
Worker or enterprise rejects calculation (apply for administrative

reconsideration)
Non-compliance with conclusion of administrative reconsideration, launch of administrative litigation (court of first instance)
Non-compliance with ruling, launch of appeal (at appeal court)
Enterprise refuses to pay occupational illness benefits (labour dispute arbitration)
Non-compliance with ruling of arbitration panel, launch of labour dispute litigation (court of first instance)
Non-compliance with court ruling, launch of appeal (appeal court)
Application to court for compulsory enforcement of judgement (enforcement procedure)

It takes an enormous amount of time to complete all of these stages. Many sufferers of occupational diseases must waste the little time they have left on this paper chase. In addition to the torment of serious illness, they must also endure all manner of bureaucratic hurdles and obfuscation. Some sufferers die before receiving the work injury benefits due to them. Therefore, there is a pressing need to remedy the shortcomings of the current *Regulations* in this regard.

The case of Deng Wenping

Deng Wenping, a rural migrant worker from Sichuan, contracted silicosis after working as a gemstone cutter for three years at Perfect Gem & Pearl Manufacturing Co., a Hong Kong-owned enterprise in Boluo county, Guangdong. At the end of 2000, Deng was diagnosed with stage II silicosis by the Guangdong Provincial Occupational Illness Diagnosis and Appraisal Committee. In April 2004, his illness entered stage III. In January 2001, Deng applied for arbitration at the local labour dispute arbitration committee. The legal process to obtain compensation involved two arbitration proceedings and a lawsuit. It was not until the chair of Guangdong's People's Congress Standing Committee instructed the Huizhou Municipal Intermediate Court to hear the case in July 2005 that a mediation settlement was reached. Deng was awarded a one-time compensation payment of 230,000 yuan. In January 2006, after a delay in treatment led to the worsening of his condition, he passed away in his home village in Sichuan.

(9) Under Article 60 of the current *Work-related Injury Insurance Regulations*, if a worker suffers a work-related injury at a time when his or her employer was not

enrolled in a work injury insurance scheme, costs shall be paid by the employer based on the terms and standards for work injury insurance laid down in the *Regulations*. But the *Regulations* provide no penalty measures in cases where an employer who has failed to join a work injury insurance scheme refuses to pay medical treatment costs for a work-related injury or occupational disease.

CLB recommends

I. Add a compulsory payment clause. If, subsequent to work injury certification and work capacity appraisal, a dispute breaks out between a worker who has suffered a work-related injury or occupational disease and his or her employer over related benefits, or the employer refuses to pay related benefits, the Human Resources and Social Security department, during the process of dispute settlement, should have the power to order the employer to pay medical costs in advance.

II. Add a penalty clause. After it is established in industrial dispute mediation or by court ruling that an employer is at fault, said employer should be ordered by the Human Resources and Social Security department to pay a sum equivalent to up to five times the cost of treatment of the work-related injury (or occupational disease) as compensation. This provision can be referenced in the provisions of Article 6 of the *Method for administrative penalties for violation of the Labour Law of the People's Republic of China* promulgated on 26 December 1994 by the Ministry of Labour.

China Labour Bulletin has noted that employers who have not enrolled in work injury insurance schemes often refuse to pay related costs to sufferers of occupational diseases, or use arbitration or judicial proceedings to deliberately drag things out. Moreover, even if the employer loses a civil case, its only obligation is to pay costs under the terms and standards provided for occupational disease benefits. It cannot be made to assume further liability for its illegal behaviour. Sometimes, during arbitration or judicial proceedings, the employer will seek a “settlement agreement” with the work-related injury victim at a rate significantly lower than the statutory requirement. At the same time, if proceedings are overly drawn out, sufferers of occupational diseases such as silicosis may abandon their compensation claim or pass away before dispute settlement. Adding the above compulsory clause would enable the use of government authority to ensure that a sufferer of an occupational disease receives prompt relief. Addition of a punitive damages clause would make employers think twice before deliberately delaying payment to work-related accident and disease victims.

(10) There is no provision for judicial redress in the current *Work-related Injury Insurance Regulations* or *Draft for Comment* for cases in which the local Human Resources and Social Security department or managers of the work injury insurance fund fail to perform their duties properly.

CLB recommends

I. In Chapter 6 of the *Regulations*, entitled Supervision and Management, include a clause that authorises a worker suffering a work-related injury or occupational disease, or his or her close relatives or a union organisation, to file an administrative lawsuit against the Human Resources and Social Security department or the managers of the work injury insurance fund who fail to perform their duties properly.

II. In Chapter 6 of the *Regulations*, include a clause that authorises individual citizens or social organisations to represent workers with work-related injuries or occupational diseases and their close relatives in initiating public interest litigation in cases where an employer fails to perform an obligation to provide work-related injury insurance, or the Human Resources and Social Security department or the managers of the work injury insurance fund fail to perform their duties appropriately.

(11) Article 18 of the current *Work-related Injury Insurance Regulations* requires that when a worker makes an application for certification of a work injury, he or she must provide documentation proving the existence of an employment relationship with the employer.

CLB recommends: In the *Draft for Comment*, add the principle of "reversal of the burden of proof." That is to say, if a victim of a work-related injury or occupational illness has presented an application for work injury certification and provided witness testimony that he or she has or had an employment relationship with the employer, but the employer subsequently still refuses to acknowledge the existence of an employment relationship, ongoing or in the past, then the employer shall assume the burden of proving that no such employment relationship exists or existed. As things stand, large numbers of rural migrant labourers in particular usually do not sign an official employment contract with the employer, or they sign a document that does not meet official standards. When the employment relationship is terminated, they are thus unable to carry out the necessary termination procedures. When workers who have suffered a work-related injury or occupational illness within such an employment relationship apply at their own initiative for work injury certification, they often find it very difficult to meet the demands of Article 18 of the *Work-related*

Injury Insurance Regulations, which states that "documents must be presented evidencing the existence of an employment relationship with the employer." If an employer refuses to provide written evidence of an employment relationship to a worker who has suffered a work-related injury or occupational disease, the authorities responsible for certifying work injuries cannot instigate certification procedures. This forces such workers into protracted arbitration and judicial proceedings just to confirm the existence of an employment relationship with their employer, and so impedes their access to prompt relief and related benefits.

(12) The General Principles Chapter of the current *Work-related Injury Insurance Regulations* state that the regulations were enacted to "encourage prevention of work-related injuries." Regrettably, this goal is not expanded on in the provisions of the *Regulations*, and the *Draft for Comment* does not touch on it either.

CLB recommends: In Chapter 6 of the *Regulations*, entitled Supervision and Management, insert these two provisions:

> Establish employee occupational health and safety supervisory committees in all large and medium-sized enterprise, and establish health and safety supervisory teams in small enterprises, with a joint health and safety supervisory committee set up in the area where these small enterprises are located. The members of the committees should be representatives chosen by the employees themselves. Establish a system in which occupational health and safety supervisory committees meet regularly with enterprise management, so that worker representatives may raise any safety-related incidents or potential occupational disease hazards they have become aware of, and encourage management to take prompt action. Establish a regular system of workplace inspections by worker representatives, who may raise workplace health and safety concerns with management at any time.
>
> Establish a system of special collective contracts covering occupational health and safety issues, to be drawn up after collective bargaining between the trade union and the employer. Responsibility for monitoring compliance with the collective contracts and settling disputes arising from them is vested in the State Administration of Work Safety and the local Human Resources and Social Security department.

While we welcome and encourage the efforts of the central government to improve

the system of insurance for work-related injuries, we also remain deeply concerned at the currently high levels of accidents leading to work-related injuries and cases of occupational disease. China Labour Bulletin believes that although the revision of the *Work-related Injury Insurance Regulations* will be seen as a blessing by most workers in the country, the true path to safeguarding and improving worker welfare standards lies in reducing the incidence of industrial accidents and occupational disease. Here, we reiterate, it is necessary to mobilise the workers and involve them in the management and supervision of workplace safety at enterprises, and to create a framework of systematic, lawful safeguards with the participation of labour, trade unions and government departments. In this way, it will be possible to transform the currently ineffectual system of top-down supervision and management, initiated from without, into a more effective bottom-up system, with the initiative coming from within.

China Labour Bulletin
Hong Kong (Special Administrative Region of the People's Republic of China)
General Post Office PO Box 11362
Tel: + 852 2780 2187
Fax: + 852 2359 4324
Email: clb@clb.org.hk
Website: www.clb.org.hk