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TOPIC 3
OCCUPATION RISKS : SOCIAL PROTECTION AND EMPLOYERS' LIABILITY

NEW ZEALAND

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I GENERAL QUESTIONS

1. Please give general information on your system of protection/compensation for employment injuries and occupational diseases. When was it created? Which modifications were introduced in the system since its creation?

Overview: The Accident Compensation Scheme

In New Zealand, compensation for personal injury caused by accidents is covered by the *Injury Prevention, Rehabilitation, and Compensation Act* 2001 . Under that Act, all persons in New Zealand (which includes citizens, residents and temporary visitors) are covered for personal injury if that injury occurs in New Zealand.

The Accident Compensation Scheme resulted from the Report of the Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (1967) (known as the 'Woodhouse Report'). The Woodhouse Report recommended the removal of the common law right to sue for personal injury and its replacement with a system based on five guiding principles:

1. Community Responsibility;
2. Comprehensive Entitlement;
3. Complete Rehabilitation;
4. Real Compensation; and

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5. Administrative efficiency.

The recommendation of the removal of the common law right to sue for personal injury was based on the following:

- The failure of the common law to compensate large numbers of accident victims. In 1967, it was estimated that no more than 0.8 per cent of persons injured in industrial accidents were successful in common law actions through the court system;
- The waste involved in a system where much of the money was eaten up in legal and administrative expenses;
- The long delays in delivering benefits to those few accident victims who managed to win their actions through the courts;
- Personal blameworthiness was not the rationale of the law, as negligence law required individuals to meet an average community standard of care;
- Compulsory liability insurance had blunted or removed the deterrent of court action;
- The assessment of damages in one lump sum payment involved guesswork and speculation, and tended to over-compensate less serious injuries;
- The fact that the process of adjudication was a lottery and impeded rehabilitation of injured people;
- The fact that accident prevention did not form part of the system.

The scheme came into force on 1 April 1974.[1] Over the period since 1974 there have been a number of changes to the system, largely as a result of the differing positions taken by governments. For example, in the 1990s lump sum payments were abolished and employment-related injuries were opened up to private insurance companies, changes reversed by the present Act.

The governing Act which currently oversees accident compensation is the *Injury Prevention, Rehabilitation and Compensation Act* 2001. In summary, the Act confirms the removal of the common law right to sue for damages in return for the comprehensive availability and cover provided by the scheme, which provides universal benefits to those injured by accident without the need to prove fault. As a result, in most cases workers cannot sue employers for injury sustained in the workplace. Instead, compensation is provided through the Accident Compensation Scheme, which provides for compensation in the form of either periodic payments or, in the case of permanent impairment, a lump sum. It is generally accepted that the level of compensation provided by the scheme may be less than would be recoverable at common law. However, this is seen as appropriate in return for the universal availability of the scheme based on a no-fault approach.

As stated above, the Act provides compensation for personal injury caused by accidents. However, with respect to occupational diseases and employment injuries, the Act also provides cover for the specific category of 'work-related personal injury'. The definition of 'work-related personal injury' is broader than the basic definition of 'personal injury'. Therefore, work related person injury includes not only work-place related accidents, but also injuries caused by work-related gradual processes, such as occupational overuse syndrome (OOS) or repetitive stress injury (RSI), as well as diseases and infections. The compensation scheme covers work-related injuries regardless of the fact that at the time of the injury the worker may have been acting in contravention of any Act, regulations or

[1] *Accident Compensation Act* 1972 (NZ).

of the lawful instructions of an employer, or working under an illegal contract, or 'indulging in skylarking'.

The *Injury Prevention, Rehabilitation and Compensation Act* 2001 works in conjunction with the *Health and Safety in Employment Act* 1992 (HSE). This Act allocates responsibilities for health and safety in the workplace. Duties also extend through regulations to those who control workplaces, or design, manufacture or supply plant or equipment. The removal of the right to sue at common law for personal injuries was not intended to remove deterrents. Employers are still expected to maintain safe and appropriate workplaces. Thus, the removal of the right to sue has been alleviated by the *Health and Safety in Employment Act* 1992. This is based on the principle of prevention (rather than deterrence). The general framework of the Act has four key components:

(i) The Act covers people in a workplace and in its vicinity, with responsibilities largely allocated to those with control of hazards in the workplace.

(ii) The Act imposes a standard of care that requires steps to be taken that are practicable in the circumstances, bearing in mind the current state of knowledge, the benefits (reducing risks) and the costs.

(iii) The Act establishes a process for assessment and control of hazards in a place of work, as opposed to simply requiring compliance with standards relating to particular workplaces, so that employers must manage hazards through identification and elimination, isolation or minimisation.

(iv) The Occupational Safety and Health Service (OSH) can enforce the Act through warnings and notices requiring improvements, as well as ultimately through criminal prosecution. Thus, while the common law right to sue is removed by the *Injury Prevention, Rehabilitation and Compensation Act* 2001, the *Health and Safety in Employment Act* does provide strong sanctions, by means of high penalties, for those employers who fail to prevent events, exposures or accidents that cause serious harm.

Collective Agreements

Collective agreements are agreements that cover two or more employees who are union members. Only registered unions and employers can bargain for collective agreements. Collective agreements frequently include entitlements which are above statutory minima, including in the area of occupational health and safety. Collective bargaining is regulated by the *Employment Relations Act* 2000.

However, only a minority (approximately 21 per cent) of employees are covered by collective agreement, and very little information is available on the content of individual employment agreements. Of workers covered by a collective agreement in June 2005, 74 per cent were covered by a health and safety clause, and 23 per cent by a clause indicating that, where there are relevant health and safety codes, these will be adhered to; 29 per cent of employees were covered by a clause providing for the establishment of a system for employee participation in health and safety, and only 14 per cent were covered by a clause that provides for health checks for either new or existing employees. Specific policies dealing with occupational overuse syndrome (OOS) were found in collective agreements covering only 7 per cent of employees. However, protective clothing and equipment, where required, are available to 68 per cent of workers on collective agreements – those employees who lack this provision are in industries where such clothing and equipment is unnecessary.[2]

[2] Blackwood, L, Feinberg-Danieli, G, Lafferty, G & Kiely, P, *Employment Agreements: Bargaining Trends and Employment Law Update 2004/2005*, Industrial Relations Centre, Wellington, 2005.

2. How is the system organized? How it is financed?

The Accident Compensation Scheme is administered by the Accident Compensation Corporation (ACC), which was established under the Accident Compensation Act 1972. ACC is a Crown entity run by a Board of Directors who are responsible to the Minister for ACC. It is responsible for:

- collecting personal injury cover levies;
- determining whether claims for injury are covered by the scheme and providing entitlements to those who are eligible;
- paying compensation;
- buying health and disability support services to treat, care for and rehabilitate injured people;
- advising the government.

ACC also provides accident cover, injury prevention services, case management, medical and other care and rehabilitation services. The scheme spends about $1.4 billion each year on rehabilitation, treatment and weekly compensation. To fund these services, ACC collects premiums, and also earns income from investing the funds it holds.

All New Zealanders pay premiums for ACC cover. Premiums are set to pay for the current and future costs of all claims made in that year. The government funds the costs of injuries to people who are not in the paid workforce, on a 'pay-as-you-go' basis, meaning that ACC collects enough today to pay for all costs today.

Premium levels are set by the government, based on recommendations from ACC's Board of Directors that have followed from a formal public consultation process. As a result of improved scheme performance, premiums have fallen over the past two years by nearly $500 million, a 25 per cent drop. The premiums paid to ACC are assigned to one of seven accounts. When there is an ACC claim for this type of injury, the compensation is funded from the designated account. The following chart illustrates how funding is organised.[3]

[3] Based on the diagram found in Accident Compensation Corporation, *Annual Report 2005* www.acc.co.nz (last accessed 19 January 2006).

Where the funding comes from	Account name	What the account pays for
Premiums paid by all employers.	**Employers' Account**	Work-related personal injuries (except for work injuries for the self-employed or work injuries suffered before 1 July 1999. These are funded by the residual claims accounts).
Premiums paid by everyone in the paid workforce, through their PAYE.	**Earners' Account**	Non-work injuries suffered by people in paid employment (except motor vehicle accidents).
Premiums from self-employed people and private domestic workers.	**Self-employed Work Account**	Work-related injuries to self-employed people and private domestic workers.
Direct payment from government.	**Non-earners' Account**	Injuries to people who are not in the paid workforce, such as students, beneficiaries, retired people and children.
A tariff on the price of petrol and from a component of the motor vehicle licensing fee.	**Motor Vehicle Account**	Injuries involving motor accidents on public roads.
The Earners' and Non-earners' Accounts.	**Medical Misadventure Account**	Treatment Injuries - which are injuries that are caused by treatment. Before 1 July 2005, these injuries were called Medical Misadventure.
Premiums paid by employers and self-employed persons.	**Residual Claims Account**	Work injuries suffered before 1 July 1999 and non-work injury suffered by earners prior to 1 July 1992.

As can be seen from the above table, compensation resulting from work-related personal injury is paid from the Employers' Account, which is funded from premiums paid by employers. The requirement to pay premiums is sourced in s59 of the *Health and Safety in Employment Act* 1992. That section provides that every employer must pay a levy on the earnings paid to an employee.[4] This levy is paid annually, based on payroll. Currently employer levies are 88 cents per $100 of payroll. In addition, employers and self-employed persons pay premiums towards the on-going costs of pre-1999 injuries. This levy is placed in the residual claims account.[5] The current levy is 33 cents per $100 of payroll.

4 Section 59(2)(a).

5 Section 59(3) covers the residual claims levy.

3. What is the system's coverage? What are the major exclusions from the system's scope (for example small enterprise, non industrial enterprises, home workers, domestic workers, casual workers)?

It should be noted at the outset that New Zealand has not ratified ILO Convention No. 121, the *Employment Injury Benefits Convention 1964* (Schedule 1 amended in 1980).

General Coverage of Act

The foundation of the accident compensation scheme is the removal of the right to sue in return for universal access. All people in New Zealand receive coverage. However, claimants must still fall within the coverage provisions of the *Injury Prevention, Rehabilitation, and Compensation Act* in order to be eligible for compensation. A *personal injury* caused by an *accident* is the usual way by which cover and hence entitlements are given for personal injury under the Act. Both of these elements must be present.

Under s26 of the Act, 'personal injury' means the physical injuries to a person and any mental injury suffered by that person which is an outcome of those physical injuries to that person. The definition of accident in s25 of the Act can be summarised as a specific event or a series of events that involves force to the body, or twisting of the body. A specific event may include a burn, oral ingestion, inhalation, or absorption of chemicals. However, accident does not include the kind of injuries sustained through the gradual processes which frequently occur in the workplace, such as repetitive strain type injuries. Nor does it include disease or infection.

Therefore, in the sense that the Accident Compensation Scheme provides universal coverage for personal injury caused by accident, all categories of worker receive coverage. There are no exclusions. However, the Act also contains specific provisions relating to work-related personal injury (ss 28-30). These provisions allow coverage for workers for a broader range of injuries.

Specific Provisions on Work-Related Personal Injury

While universal coverage is available, as outlined above, it is important to determine whether a worker's injury fits within the specific definition of work-related personal injury for the following reasons:

1. A wider range of injuries is covered. These work-related provisions specifically allow compensation for gradual injuries (therefore including such work-place hazards as repetitive strain injuries), as well as diseases and infections transmitted to the worker as a result of their employment (s20(2), 28(4), s30). It also covers cardio-vascular incidents caused by unnatural exertion suffered in undertaking employment duties (s28(3)).
2. Availability of first week compensation. An employer must pay 80 per cent of lost earnings to an employee who is incapacitated through a work-related personal injury for the first week of incapacity. Only employees are paid first week compensation. If the claimant is not an employee or the injury is not work-related, the claimant does not receive weekly compensation until the end of the first week.
3. The extent of the employee's contribution to the accident, if any.
4. The employee's rehabilitation, and the employee's long term prospects of retaining employment with the employer.

Who is an Employee?

Section 28 further provides that a work-related personal injury is one which a person suffers while he or she is at any place for the purposes of his or her employment (s28(1)(a)). The definition of employment is broad (s6): 'work engaged in or carried out for the purposes of pecuniary gain or profit'.[6] Thus, 'employment' is distinguished from volunteer work and hobbies. The definition of employment permits coverage of injuries which occur during meal and refreshment breaks and periods of paid leave.

'Place of employment' is defined widely, to include a place that itself moves or a place to or through which the claimant moves (s28(1)(a)). Thus, for example, an employee has been found to be entitled to coverage, and hence compensation, in circumstances where he was injured by metal overhanging a rubbish bin in the work car park, even though the injury took place outside work hours.[7] Similarly, a community nurse using her employer's car to visit patients was held to be at her place of employment when she twisted her back retrieving a bag of medication from the rear seat of the car.[8]

Generally, therefore, all workers, including those in small enterprises, non-industrial enterprises, home workers, domestic workers and casual workers are covered by the Scheme. They fit within the definition of 'at a place for the purposes of his or her employment'. However, questions may arise as to their exact status as self-employed or employees for the purposes of calculating levies and determining who is responsible for payment of the levy – the employer or the worker as a self-employed person. A good example is a private domestic worker. The Act characterises private domestic workers as self-employed. Thus, they are responsible for payment of levies to ACC. However, if a private domestic worker is engaged for a significant number of hours per week by one employer, then ACC may characterise this person as an employee, in which case the employer will be responsible for payment of the levy.[9] It should be noted that the definition of employee is determined by reference to the tax status of the person at issue, not by reference to the usual common law tests for employer/employee/subcontractor.

An indication of the size of the scheme is that, in the 2004-5 reporting year, there were 1,523,946 new claims registered with ACC, of which 170,546 were with respect to work-related personal injuries, and an additional 45,007 were lodged by self-employed persons. With respect to work-related injuries (excluding the self-employed) this translates to claims by 9.88 per cent of the New Zealand population.

4. What are the contingencies covered by the system?

See Question 3 'Coverage', above.

5. Are commuting accidents covered by the system? If they are, how is a *commuting accident* defined?

6 See also *Sanford South Island Ltd v ARCIC* 16/2/95, Middleton, J, District Court, Blenheim.

7 *ACC v HIH Workable Ltd* 29/9/00, Middleton J, District Court, Wellington.

8 *Robertson v ARCIC* 17/2/98, Middleton J, District Court, Wellington. See further Armstrong et al, *Personal Injury in NZ*, Brookers, Wellington, at IP 28.04.

9 See further Armstrong et al, *Personal Injury in New Zealand*, Brookers, Wellington, at IP 13.02.

Commuting accidents are covered by the system to the extent that they fall within the Act's definition of 'work-related personal injury' in s28. However, the coverage of that section is quite limited. Specifically, it does not include injuries suffered while taking public transport or when using private vehicles. Section 28 generally provides that work-related personal injury includes personal injury that a person suffers while travelling to or from the place of employment. However, the coverage is limited in the following ways:

- Travel to and from work must occur at the start or finish of the day's work;
- The transport used must be provided by the employer for the purpose of transporting employees (thereby excluding public transport and private vehicles); and
- The transport must be driven by the employer or by another employee of the employer.

Under certain circumstances, travelling between place of employment and another place for the purposes of getting treatment for work-related personal injury is also covered, as long as the employee is taking the most direct practicable route.

The narrow coverage for commuting accidents is ameliorated by the fact that in New Zealand the universal coverage of the Accident Compensation Scheme means that employees suffering motor vehicle related personal injuries will be covered under the Act by virtue of being 'motor-vehicle injuries', rather than by virtue of being 'work-related personal injuries'. The only practical distinction from the employee's perspective is that a 'work-related personal injury' requires the employer to pay 80 per cent of salary for the first week after the injury. This is not a benefit which adheres to 'motor-vehicle injuries' – for these, compensation is only payable after the first week.

6. What links exist, if any, between the employment injuries and occupational diseases protection/compensation schemes and the general sick pay/sick benefits compensation schemes?

Provisions relating generally to sick leave entitlements are found in the *Holidays Act* 2003. The minimum sick leave entitlement under that Act is 5 days per year. An employee can carry over up to 20 days of leave. However, this may be varied by the provisions of any collective or individual bargaining agreements.

Sick leave is generally available to employees who are injured. However, if the worker has a claim under the *Prevention, Rehabilitation, and Compensation Act*, he or she can also gain access to entitlements under the ACC Accident Compensation Scheme.

Sick leave and the ACC scheme interrelate in the following way:

1. If an employee is receiving weekly compensation from ACC, the employer has no obligation to pay the employee;
2. An employer must not require an employee to take sick leave while that employee is on paid ACC leave;
3. If the employer pays the difference between ACC compensation and the employee's usual pay, the employer may deduct from the employee's sick leave entitlements in the proportion of one day for every five days the employer makes the payment. The employer may simply elect to top up the salary gratuitously;

4. If an employee has a work-related accident the employer has to pay 'first week compensation';
5. When the employee is taking leave for the first week of a non-work accident, sick leave may be used as there is no ACC entitlement in these circumstances;

The time an employee is on either unpaid sick leave or on ACC still counts as part of an employee's continuous service. Thus, the employee is still entitled to annual leave and sick leave according to their usual entitlements.

7. Can an employee be terminated because of absence from work due to an employment accident or an occupational disease? In case such is possible, please describe the procedure which must be followed.

At the outset it should be noted that New Zealand has not ratified ILO Convention 158 on Termination of Employment. Nevertheless, New Zealand courts have often taken the position that the standards embodied in the Convention are one factor to be taken into account in interpreting the domestic law. In addition, New Zealand law is generally in accord with Parts I and II of the Convention, including Art. 6, which specifies that an employee may not be terminated because of absence due to temporary illness or injury.

Provisions relating to termination are found in the *Employment Relations Act* 2000. The legislation does not specifically provide the circumstances in which an employee may be dismissed, nor does it provide a specific procedure that must be followed unless a specific process is set out either in a collective or individual employment agreement. However, both the reason for dismissal and the process followed by the employer must be fair and reasonable. Any employee who believes that a dismissal amounts to an 'unjustifiable dismissal' can challenge that dismissal by way of taking a personal grievance under Part 9 of the *Employment Relations Act* 2000. A personal grievance taken under that Act is generally the only mechanism which can be used to challenge employer decisions. The common law right to bring an action for unfair dismissal has been abolished by s113 of that Act. That provision also precludes the right to bring an administrative action for judicial review of dismissal of a state sector employee.

Dismissal may be justified where an injury or illness is likely to affect the long-term ability of a worker to perform their duties. An employer is not bound to hold open the job of an employee who is sick or injured for an indefinite time.[10] However, as with all cases of dismissal, the reason for dismissal and the procedure followed must be reasonable and fair.[11] In particular, even if dismissal may be justified, an employer must act on the basis of a proper assessment of the employee's condition and alternatives such as suspension and the use of temporary employees should be considered prior to dismissal. The employer has the burden of justifying the dismissal. Any attempt to force an employee to resign due to illness or injury may amount to a constructive dismissal and therefore the employee may bring a personal grievance against their employer under Part 9 of the *Employment Relations Act* 2000.[12]

10 *Canterbury Clerical Union v Andrew and Bevan* [1983] ACJ 875.

11 *Wilson v Johnathons Catering Co Ltd* [2000] 1 ERNZ 660.

12 See, for example, *Auckland Shop Employees Union v Woolworths Ltd* [1985] 2 NZLR 372.

The decision in *Barry v Wilson Parking* provides guidance as to the kind of procedure which may be appropriate in cases of dismissal for illness.[13] According to Goddard CJ, the following would generally be appropriate:

- The employer should wait a reasonable time to give the injured employee an opportunity to recover. What is reasonable is a question of fact in each case;
- After a reasonable time has passed, the employer has to inquire in a fair and open-minded way whether the employee has any reasonable prospects of returning to work within a reasonable time;
- This inquiry includes seeking information from the employee. The employer must make the purposes for which this information is sought known to the employee. All relevant medical evidence should be obtained and the employer should ensure that it is the most up-to-date medical evidence available;

- The employer then has to consider, balancing fairness to the employee with reasonable business requirements,[14] whether the employee's position should be kept open for the specified period of time;

- This decision may be reconsidered from time to time.

Factors an employer may wish to consider when deciding whether to dismiss for illness-related problems are:

- The employee's contractual entitlement to sick leave (paid and unpaid);
- The duration of the employee's illness to date, and the effect this is having on the employer's business;
- The nature of the illness, the prospects for the employee's recovery and the possibility of them returning to work (which should be based on objective information such as a doctor's report);
- The length of time an employee has been with the employer;
- Whether the employee was likely to have been employed long-term if she or he had not been sick/injured;
- Steps the employer can take to aid rehabilitation, such as providing part-time or light duties;
- Whether there are any alternatives to dismissal that are reasonable in the circumstances.

What will constitute a fair procedure will depend on the circumstances of the particular case. However, the employee should have an opportunity to respond to the employer's decision.

13 *Barry v Wilson Parking New Zealand (1992) Ltd* [1998] 1 ERNZ 545

14 *Lang v Eagle Airways Ltd* [1996] 1 ERNZ 574.

II Responsibilities for the employer

8. Has the employer a general obligation of prevention? How it is sanctioned? Can he/she be prosecuted before a criminal jurisdiction?

General Obligations

The *Health and Safety in Employment Act* 1992 imposes a general duty on employers to ensure the safety of their employees. Section 6 states that every employer shall take all practicable steps to ensure the safety of employees while at work. This may include volunteers and persons receiving on-the-job training or work experience. Section 15 extends this general duty beyond a duty to employees by further providing that every employer must take all practicable steps to ensure that the action or inaction of employees does not endanger the public. In this context, 'employer' is broadly defined to include any person who employs any other person to do any work for hire or reward.

The duties in these sections are not absolute. Rather, the employer is required to take 'all practicable steps' to ensure the safety of employees or others in the workplace. Thus an employer is only required to take steps that are reasonably practicable in the particular circumstances, taking into account the nature and severity of harm that may occur, the current state of knowledge about the harm, the likelihood of that harm occurring, the severity of the possible injury, the likely efficacy of protective measures and the availability and cost of such measures (s2A(1)). The Act also specifically provides that an employer is only required to take steps in relation to circumstances that he or she knew about or ought reasonably to have known about (s2A(2)). In certain contexts, these general duties to ensure safety in the workplace extend beyond employers to those who control a workplace (which may or may not be the employer themselves), or as a principal to a contract.

The Act also imposes similar general duties on employees. Under s19, every employee must take all practicable steps to ensure their own safety at work, including using suitable protective clothing and equipment, as well as that no action or inaction of their own endangers members of the public.

Enforcement

The Act creates two categories of offence.

Section 49 creates an offence where (i) a person takes action forbidden by the Act, knowing that it is likely to cause serious harm or (ii) fails to take an action required by the Act, knowing that failure to do so is likely to cause serious harm.

The offence created by section 49 is an indictable offence. Hence, it may be prosecuted in a general court of criminal jurisdiction, namely the District Court. The penalty is a maximum of two years imprisonment and/or a fine of up to $500,000. In practice, the maximum penalty is rarely imposed.

Section 50 provides that the failure to comply with any listed provision of the Act is an offence. Unlike section 49, it is not necessary to prove that a defendant intended to fail to comply with the provision of the Act. This may also be prosecuted in a general court of criminal jurisdiction.

9. Which are the employer's obligations related to the protection of the workers' life and health? How are these implemented at the enterprise level and the plant level? What kind of control is made on their implementation?

Specific Obligations

The specific obligations of employers are designed to ensure that workers are not exposed to hazards at work.

a) Provide and maintain for employees a safe working environment.

The term 'working environment' is not defined in the Act. However, it refers not only to the physical environment (buildings, mines, vehicles, other structures, plant, lighting, ventilation, dust, etc.), but also to non-physical aspects generally. These include work arrangements (including the effects of overtime and shift-work) and the work process (for example, overcrowding, stress factors or ergonomic layout).

b) Provide and maintain for employees while they are at work facilities for their safety and health.

This covers the requirement to provide facilities and equipment not covered by the concept of 'work environment'. More specific information on the nature of this duty is provided by the *Health and Safety in Employment Regulations* 1995. These regulations apply to all workplaces and specify facilities required for the health and safety of employees. Regulation 4 states that every workplace must provide the following: toilets, handwashing facilities, first aid equipment, emergency exits, lighting, ventilation, a means of controlling air contaminants and clean and quiet meal areas. In addition, Regulation 5 provides that, where necessary, facilities for washing, changing and storing dry clothes must be provided. Workplaces must also be clean and hygienic (reg 9) and wholesome drinking water must be provided (reg 8).

There are also regulations which impose particular requirements with respect to certain facilities. An example is the *Health and Safety in Employment (Mining – Underground) Regulations* 1999.

c) Ensure that plant used by any employee at work is so arranged, designed, made, and maintained that it is safe for the employee to use.

This duty is closely aligned with the specific hazard management duties contained in ss 7-10 of the *Health and Safety in Employment Act* (see below).

d) Ensure that systems of work do not lead to employees being exposed to hazards in or around their place of work.

This duty requires employers to design and implement safe systems of work. It has been interpreted as a broad duty, with the emphasis on co-ordination of work activity across the entire workplace. In particular, the Act requires that systems of work ensure that employees 'are not exposed to hazards arising out of the arrangement, disposal, manipulation, organisation, processing, storage, transport, working, or use

of things either in their place of work or near their place of work and under the employer's control' (s 6(d)).

Notably, because the duty applies to systems of work, the hazards need not be physical. Systems of work are to be designed to ensure that workers are not exposed to hazard because of, for example, shift work or extended hours of work.

e) Develop procedures for dealing with emergencies that may arise while employees are at work

Employers need to be prepared for the possibility that accidents may occur in the workplace. To the extent that such accidents can be foreseen, employers have a duty to prevent them and to limit any harm. Such accidents may occur as the result of a wide range of circumstances, for example inattentive work, badly designed equipment, mishaps by other workers, working without suitable instructions. In each case not only should systems of work be designed to limit the possibility of such accidents, but employers must have procedures in place to deal with these accidents. In addition, employers must also have procedures to deal with fire, earthquake and other civil defence emergencies.

As outlined above, the specific obligations discussed under this part are instances of the more general employer's duty in s6 to provide a safe and hazard-free place of work. However, the Act also imposes additional hazard management requirements in ss 7-10 of the *Health and Safety in Employment Act*. These complement the general duties of s 6, as follows:

- Section 7 requires that employers ensure that effective mechanisms are in place to identify hazards and to assess these hazards to determine whether they are significant;
- Section 8 specifically states that where there is a significant hazard, the employer must take all practicable steps to eliminate that hazard;
- Section 9 provides that if a significant hazard is identified, but cannot be eliminated, it must be isolated from the employees; and
- Section 10 finally states that if the significant hazard cannot be practicably eliminated or isolated, steps must be taken to minimise it and to protect employees. This includes monitoring employees' health.

Implementation

Employers are under a duty to provide a safe, hazard-free workplace. Thus, the Act and various Regulations specify the *outcome* or *result* that is to be achieved by employers. The means by which this is to achieved is left largely to individual employers. Thus, employers are generally free to choose the way in which they implement the appropriate safety processes to achieve this goal. The *Health and Safety in Employment Act* does not require employers to prepare formal statements of health and safety. However, in larger workplaces, particularly where there are unions present, formal statements are more likely to be prepared.

In addition, the government department which oversees health and safety in employment, the Department of Labour, provides both general guidelines to aid in implementing a safe and hazard-free workplace, as well as more specific guidelines for particular types of workplaces. Examples are: Improving Workplace Health and Safety for Small Businesses; How to Manage Hazards for Small Businesses; Guidelines for the Provision of Safety; Health

and Accommodation in Agriculture; and the Guidelines for the Provision of Facilities and General Safety in Commercial and Industrial Premises.

Control on Implementation

The main control on implementation is through the system of Occupational Safety and Health (OSH) Inspectors, who are employees of the Department of Labour.

Inspectors have the following duties:

- To help employers and employees improve workplace health and safety;
- To ascertain whether the duties under the Act are being complied with;
- To take all reasonable steps to ensure that the Act is being complied with.

OSH Inspectors visit workplaces in order to monitor health and safety. These visits do not result from complaints, but are rather part of a system of general monitoring. Certain industries may be marked as priorities for monitoring and possible investigations.

In addition, OSH Inspectors investigate:

- Complaints about health and safety;
- Notifications of serious harm, including fatalities;
- Notifications of occupational disease;
- Notifications of incidents (accidents that might have harmed someone).

In cases where monitoring shows that there is non-compliance with the Act, the Department has a number of enforcement options, although this is seen as a 'last resort'. Preferred strategies include 'engagement, education and enablement'.[15] In cases where enforcement is required, possible interventions include:

- Written warnings by the inspector
- Improvement notices
- Suspension notices
- Prohibition notices
- Revocation of registration, certificated, exemptions and approvals
- Application for a compliance order from the Employment Relations Authority
- Infringement notices

- Prosecutions.[16]

10. Can the employer delegate his/her powers as regards occupational safety and health? To whom? With which effects?

There are no specific provisions in the *Health and Safety in Employment Act* 1992 relating to delegation. Generally, however, employers cannot simply 'contract out' of their obligations by delegating them to another party. However, it may be that an employer can, for example, leave an employee or other representative, in charge of a workplace. In effect, therefore, they have delegated responsibility. In the event of an incident, the question of on whom

15 <http://www.osh.govt.nz/services/enforcement.shtml>.

16 <http://www.osh.govt.nz/services/enforcement.shtml>.

liability falls depends on whether the employer, in so delegating, took all practicable steps to ensure that their representative has adequate knowledge, training and resources to ensure employee safety. If adequate training etc has been provided then the employer may be considered to have fulfilled their statutory obligation to take 'all practicable steps' to ensure a safe workplace, and may therefore escape liability. The question of liability of the representative (as a person in control of a workplace) will in turn depend on whether they have also taken 'all practicable steps' which are within their control to ensure employee safety.

11. Are there external bodies which can collaborate with the employer with a view to improving health and safety records at the enterprise or the plant level? If such bodies exist, please explain their nature and competence.

One of the objectives of the *Health and Safety in Employment Act* 1992 is to promote self-regulation by enterprises in the area of occupational safety and health. However, occupational safety and health generally is overseen by the Occupational Safety and Health Service (OSH) of the Department of Labour. OSH administers the *Health and Safety in Employment Act*. Its focus is on supporting safe and healthy workplace environments and reducing workplace hazards and injury. As noted above, OSH has both an educational mandate and enforcement powers.

OSH publishes approved codes of practice and guidelines to the *Health and Safety Act*, and also provide a wide array of publications designed to help employers comply with the requirements of the Act.[17] There are, for example, currently over one hundred publications available, covering general strategies for implementing OSH requirements, industry specific guidelines, noise, asbestos and hazardous substances. In addition, OSH runs seminars and public meetings on safety and health topics.

Examples of health and safety plans, and other aids to reducing workplace injury are also available from the Accident Compensation Corporation.[18] While the mandate of ACC is to prevent, and to compensate for, personal injury generally, ACC provide both industry and injury specific publications aimed at the workplace. Examples of industries targeted include retail, forestry and construction. Injuries targeted include back injuries and occupational overuse syndrome (OOS). ACC also provides guidelines on managing workplace environments in order to reduce hazards and the likelihood of injury.

Employers can join the ACC's Workplace Safety Management Practices Programme, and can voluntarily submit their own safety and health plans to ACC for comment. If these plans meet set workplace safety requirements, employers can receive discounts on ACC levies of between 10 and 20 per cent. Some employers also choose to engage private health and safety consultants to review their systems.

Both OSH and ACC have been described above.

17 These are available via the Department website: <http://www.osh.govt.nz>.

18 These are available via the ACC website: <http://www.acc.co.nz>.

12. Which are the employer's obligations as regards safety and health of workers of third parties, for example workers placed at his/her disposal by a temporary work agency, or employees of sub-contractors who perform work within the employer's premises?

Under the *Health and Safety in Employment Act* 1992, any person who controls a place of work must take all practicable steps to ensure that no hazard in the workplace harms anyone on the premises. This duty extends not only to contractors, subcontractors and employees of contractors and subcontractors, but to *any* person in the vicinity of the workplace: s16(1). Section 18 further specifies that any person who hires or engages a person must take all practicable steps to ensure that no contractor, subcontractor or employee of a subcontractor is harmed while undertaking the work for which they were hired.

There are also specific sections of the Act which extend the employers' general obligations under s6 (discussed above) to volunteers doing regular work with the enterprise. With certain exceptions, where persons performs regular volunteer work, the employers' obligations to provide a safe and hazard-free workplace are extended to them as if they were employees: s3C. Similar provisions extend the same obligations to persons performing work experience (s3E) and to 'loaned employees' (s3F).

13. How is the prevention of risks organized when two or several companies operate on the same worksite?

Neither the Act, nor the Department of Occupational Safety and Health, prescribe how workplaces with multiple operators are to be organised in a practical sense. This remains a matter of negotiation between all parties, and varies from case to case. However, under the *Health and Safety in Employment Act* all employers, including subcontractors, as well as all persons in control of a workplace, are responsible for the prevention of harm. Therefore, in any situation where multiple companies operate on one site there will also be multiple persons with responsibilities. Every employer will remain responsible to their employees. They will also be responsible to subcontractors and other people generally on the work site. Each subcontractor, as an employer, therefore also has an obligation to their employees. In fulfilling these obligations, each employer/person in control, must take 'all practicable steps' to ensure that no harm occurs. If one operator delegates responsibility to another operator for safety and health matters they must ensure that in so doing they take 'all practicable steps' to ensure that appropriate procedures and safeguards are in place (see further 'Delegation', question 10, above).

III Particular problems

14. Are psychic risks taken into account in order to determine the employer's responsibility (for example as regards the prevention of stress at work)?

As noted above, the main legislation relating to health and safety in New Zealand is the *Health and Safety in Employment Act*. One of the objects of this Act is to 'promote the prevention of harm to all persons at work' (s5). That section further provides that this object is to be achieved, *inter alia*, by providing a comprehensive definition of 'hazards' and 'harm', and that this definition should include harm caused by work-related stress. Thus the general obligation on employers, contained in s6, to provide a safe and hazard-free work environment, extends not only to the physical environment, but to the socio-psychic (including stress). Therefore, employers must take all practicable steps to ensure that the employee is not caused mental harm by factors in the workplace.

As a general rule, there is no legal requirement for employers to provide stress leave, although this may be provided for in collective or individual employment agreements. Notably, under the Accident Compensation Scheme there is no cover for stress or other 'psychic risks'. While the Act covers 'mental injury', the term is defined very narrowly.[19] Further, in order for there to be cover, the mental injury must be a result of physical injury.[20]

15. Is the employer required to take measures to guarantee that non smokers can work in a clean air environment?

In 2004 the New Zealand government amended the *Smoke-Free Environments Act* 1990 so as to require that, as of 10 December 2004, all indoor workplaces, including work canteens, meal rooms and corridors, become smoke-free. Under s5, employers must take 'all reasonably practicable steps' to ensure that no one smokes in an internal workspace. This duty complements the general obligations of employers to provide a safe and hazard-free work place which are contained in the *Health and Safety in Employment Act*.

Reasonably practicable steps would include: the display of no-smoking signs in the workplace; notification of contractors of the policy; training managers and supervisors with respect to the policy; and including reference to the policy in collective employment agreements. Failure to undertake such steps is an offence under the Act (s17(1)).

16. Does your national law restrict the employment of certain categories of workers in particularly hazardous works (e.g. the employment of minors or pregnant women, or of temporary workers)?

New Zealand law restricts the employment of minors in particularly hazardous work environments. It also restricts the work of women in areas where there may be 'reproductive hazards'.

Pregnant Women

As outlined above, under the *Health and Safety in Employment Act* 1992, employers have general obligations to ensure that workplaces are safe and hazard-free. Thus it may be assumed that workplaces which are generally safe and hazard-free for all workers are also safe and hazard-free for pregnant women. Nevertheless, the duty to ensure that workplaces are safe extends specifically to reproductive hazards. A 'reproductive hazard' is

[19] Mental injury means a clinically significant behavioural, cognitive or psychological dysfunction; *Injury Prevention, Rehabilitation and Compensation Act* 2001, s 27.

[20] *Queenstown Lakes DC v Palmer* [1999] 1 NZLR 549 (CA).

one which can affect reproductive health before or after conception takes place. It can also 'seriously affect a developing embryo or foetus and have adverse effects on the development of a baby or child'.[21] Hazards could include fumes and vapours, biological hazards, particularly hot working environments, working in cramped positions and night shifts. In order to fulfil their general health and safety obligations, employers may be required to transfer the employee to alternative duties, or to modify the employee's tasks, during pregnancy. Agreed terms and conditions of employment should not be changed.

Minors

At the outset it should be noted that New Zealand has no minimum age of employment, although there are specific provisions for the employment of 'young persons'. Regulation 54 of the *Health and Safety in Employment Regulations* 1998 subjects the employer to broad requirements with respect to persons under the age of 15 years. In particular, the regulation specifies that an employer must 'take all practicable steps to ensure that no employee under the age of 15 years works in any area at a place of work under the control of that employer:

(a) At any time when goods are being prepared or manufactured for trade or sale in that area;

(b) At any time when any construction work is being carried out in that area;

(c) At any time when any logging operation or tree-felling operation is being carried out in that area;

(d) At any time when any work is being carried out in that area that is likely to cause harm to the health and safety of a person under the age of 15 years.'

This duty also applies to any person who controls a place of work (reg 59). Additional restrictions imposed by the Act ensure that persons under 15 must not operate machinery (including power tools) nor drive a vehicle (regs 56, 57). In certain circumstances, however, a person over 12 may operate a tractor (reg 61). Finally, employers must take all practicable steps to ensure that young persons do not lift weights or perform other tasks where it may be injurious to their health (reg 55).

17. Can the employer be made liable for health damages suffered by his/her workers because of the use of products or substances whose harmfulness was not demonstrated at the time of their use, or whose harmful effects can be appreciated only on the long term (for example, the use of asbestos)?

Generally, under the *Injury Prevention, Rehabilitation and Compensation Act* 2001, employers cannot be sued for health damages suffered by workers because of the use of products or substances whose harmfulness was not demonstrated at the time of their use, or whose harmful effects can be appreciated only in the long term. However, as exemplary damages at common law are not barred, it remains possible for an employer to be liable if their conduct contributed to the harm and punitive sanctions such that a claim for exemplary damages are applicable.

[21] <http://www.osh.govt.nz>.

Otherwise, harmful effects such as asbestos inflicted on a worker will be covered under the *Injury Prevention, Rehabilitation and Compensation Act* 2001 as a 'work related gradual process, disease or infection suffered by the person' (s26).

18. Can the employer require from job applicants that they undergo genetic tests or HIV/AIDS tests in order to determine the worker's aptitude to be exposed to risks for which they would be particularly vulnerable?

There is no specific legislation in New Zealand that deals with HIV/AIDS testing in the workplace. According to the Department of Labour, drug testing may be used as an analogy in relation to HIV/AIDS testing. Various factors can be taken into account when deciding if employees can be tested for drugs. These include the industry in which they work and the work they do, and whether an employee's work may have a direct impact on others' safety. Drug testing may be justifiable if an employee works in a safety-sensitive area, exhibits signs of being affected by drugs, or has recently been involved in a workplace health and safety incident.

However, the employee's right to privacy under both the *Privacy Act 1993* and common law must be taken into account, especially in relation to the collection and analysis of samples, and the handling of test results. The *Human Rights Act 1993* and the *Bill of Rights Act 1990* are also relevant, although the latter refers only to certain employers. While not making unlawful an employer's requirement for an employee to undergo drug testing, they may have a bearing on whether that requirement is deemed reasonable.

Random testing may be more difficult to justify than the testing of designated employees for specific purposes. The employment agreement may contain the right for the employer to require testing, but this provision must be reasonable and must not contravene the protections in any relevant laws. If an employer suspects an employee of using drugs that may affect workplace health and safety, the first step should be to seek to resolve the issue through discussion, which may be assisted by the mediation services provided by the Department of Labour.

19. Can the worker withdraw from a situation of work in respect to which he/she has reasonable grounds to think it presents a danger for his/her life or health?

Under the *Health and Safety in Employment Act* 1992, a worker can refuse to undertake work if he or she believes that the work is likely to cause them serious harm (s28A). With regards to this matter, New Zealand law is consistent with ILO Convention No 155, *Occupational Safety and Health and the Working Environment*, Article 13.

As can be seen from the wording of s28A the threshold for determining whether a refusal is reasonable is 'serious harm'. While this is admittedly a high threshold, it is consistent with the ILO Convention.[22] In addition, 'serious harm' is offset by the fact that the right to refuse is based upon the employee's subjective belief in the existence of the harm. Notably, however, a worker can only refuse to undertake work which he or she believes will cause *themselves* serious harm. A worker cannot refuse such work on the basis it may bring harm to others, although such refusal may still be lawful at common law (see, for example, *James v*

[22] ILO Convention 155 refers to 'imminent and serious danger'.

Wellington City [1972] NZLR 70) or under s84 of the *Employment Relations Act* 2000 (the right to strike provisions).

Section 28A further provides that an employee may continue to refuse to undertake work if:

- The employee first attempts to resolve the matter with the employer. This attempt to resolve the matter must be undertaken in good faith;
- The matter remains unresolved; and
- The employee continues to believe on reasonable grounds that the work is likely to cause them serious injury.

IV Compensation of employment injuries and diseases

20. Which are the benefits payables under your national system of employment injuries compensation? How are they managed? Can they be refused, and if they can, in which cases?

Compensation for accidents and work-related personal injury is covered by the *Injury Prevention, Rehabilitation and Compensation Act* 2001 . This Act is described in detail in Part I of this report. The Act provides for periodic payments and, in limited circumstances, lump sum payments.

Periodic Payments

The majority of compensation payments are in the form of weekly payments in compensation for loss of salary. If a person is unable to work because of injury, ACC may pay up to 80 per cent of the pre-injury salary during this period. As noted above, in Part I, ACC does not provide this payment in the first week of injury. However, in the case of work-related injury, the employer is liable to make this first week's payment. Workers who receive compensation payments must participate in the formulation of a rehabilitation plan, designed to facilitate their return to work.

Lump Sum Payments

Generally, lump sum payments are only available for injuries which occurred after 1 April 2002.[23] Lump sum compensation is a one-off payment to compensate for permanent impairment resulting from an injury. It can be paid in addition to other benefits under the scheme. The amount of the lump sum payment depends on the level of impairment suffered.

Generally, injuries assessed at under 10 per cent impairment (for example a common lower back injury) will not be eligible to receive lump sum payments, while injuries assessed at 80% or more (for example paraplegia) will receive the maximum entitlement which is $104,109.06.[24] Lump sum payments are tax-free. Injuries are assessed in accordance with the American Medical Association Guide to the Evaluation of Permanent Impairment (4th ed). Assessment is per person, not per injury. There is no lump sum payment available for 'pain and suffering'.

While those who are permanently impaired prior to 1 April 2002 cannot apply for a lump sum payment, they may be eligible for an independence allowance. The amount of the allowance depends on the level of impairment. As with lump sum payments, assessment of impairment is made in accordance with the American Medical Association Guide to the Evaluation of

[23] Lump sum payments were originally available under the Accident Compensation Scheme. However, they were abolished in the late 90s by the incoming National Government. On their return to power, the Labour government reinstituted lump sum payments.

[24] <http://www.acc.co.nz>.

Permanent Impairment (4th ed). Again, impairment of less than 10 per cent will attract no allowance, while an impairment of 80 per cent or more will result in being eligible for the maximum allowance. The maximum allowance is currently $68.77 per week.[25]

Other Benefits

ACC also provides other benefits – for example, travel costs associated with treatment, modification of the home in cases of severe impairment, wheelchairs, artificial limbs, and support services for the injured person or their family.

21. Is compensation limited in any form or the worker can be compensated in full for the damage he or she has suffered? Can the employee profit from an option between asking for limited compensation within the employment injuries system or for full compensation in accordance with civil law/common law?

As noted above, under the *Injury Prevention, Rehabilitation and Compensation Act*, compensation in full is limited to injury that occurred on or after 1 April 2002.

As outlined in Part I, the right to seek compensation at common law for personal injury covered by the *Injury Prevention, Rehabilitation and Compensation Act* has been abolished, apart from aggravated damages. Hence employees cannot elect to seek compensation at common law. As outlined in Part I, it is generally accepted that the level of compensation provided by the scheme may be less than would be recoverable at common law. However, this is seen as an appropriate offset in return for the universal availability of a scheme based on a no-fault approach.

22. Do you have any experience with regard to the establishment of special funds to compensate for damages to life or health arising out of the use of products or substances whose harmfulness was not demonstrated at the time of their use, or whose harmful effects can be appreciated only in the long term (for example asbestos)?

The only compensation scheme is the Accident Compensation Scheme under the *Injury Prevention, Rehabilitation and Compensation Act* 2001.

Generally, harmful effects appreciated only in the long term would fall under 'permanent impairment' which will attract lump sum payments under the Act subject to the conditions described above in regard to lump sums.

I. The role of the workers' representatives as regards protection of health.

23. How is the workers' participation organized in order to improve safety and health at work and to organize the prevention of accidents and occupational

[25] <http://www.acc.co.nz>.

diseases at the enterprise level? Do you have ad-hoc committees established with a view to taking care of safety and health issues at the enterprise level or the plant level? How are they made up? What are their responsibilities and faculties? What rights and guarantees are granted to workers who are members of these committees? Do they receive training so as to better discharging their tasks? Can they be assisted by external experts?

The *Health and Safety in Employment Act 1992* contains a general commitment to employee participation in occupational health and safety matters, which extends to the development of employee participation systems and the training of health and safety representatives. In May 2003, the *Health and Safety in Employment Amendment Act 2002* took effect, strengthening the commitment to employee participation. The amendments brought New Zealand's occupational health and safety legislation into line with the 'good faith' provisions contained in the *Employment Relations Act 2000*. All parties to the employment relationship (employers, employees and unions) are expected to cooperate in good faith to ensure proactive health and safety programmes. The main ways of achieving this goal are the appointment of employee health and safety representatives in those workplaces where the employees and/or the union request them, and the establishment of health and safety committees.

Employers are expected to ensure that workers have 'reasonable opportunities' to participate in the management of health and safety. Assessment of 'reasonable opportunities' should take into account the number of employees, different places of work and the distance between them, potential sources or causes of harm, the nature of the work, its organisation and management, and the type of employment arrangement (including seasonal and temporary work). All workplaces with 30 or more employees are required to introduce an employee participation system. In workplaces with fewer than 30 employees, where one or more employees requests an employee participation system, then such a system must be developed. However, if there is no demand from employees, it is not compulsory for workplaces to have a health and safety representative.

The overall intent of current legislation is to encourage occupational health and safety issues to be addressed within the workplace, without the need for intervention by Occupational Safety and Health officials. Employers must either implement recommendations from the workplace health and safety committee or (where there is no committee) the workplace health and safety representative, or provide them with a written statement indicating why the recommendations cannot be implemented.

Participation systems must contain review procedures and may contain any other matters on which the employer, employees and (if present) union agree – such as the number of days of paid leave available for health and safety representatives to participate in training programmes. A system may also allow for more than one health and safety representative or committee – these may represent different types of work, worksites or other groupings. Such provisions may also be included in collective agreements.

The responsibilities of the health and safety representative and/or committee are to: foster positive health and safety management practices; identify hazards, and discuss with the employer how these may be dealt with; consult with OSH inspectors; promote employees' health and safety interests generally, as well as specifically with respect to employees who have been harmed, including their rehabilitation and return to work; to carry out functions conferred by an employee participation system or the employer (with the agreement of the

representative or her/his union). There is no legal obstacle to representatives and/or committees seeking the assistance of external experts.

V Other questions

24. Please present any other question which in the law or practice of your country relates to this topic and which has not been addressed in the questionnaire above.