



工伤保险法论

于欣华／著



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| 序 言 |

工伤保险是社会保险诸险种之一，伴随着世界各国工业化和现代化的发展，工伤保险在面对挑战中逐步完善。我国早在1951年就颁布了《中华人民共和国劳动保险条例》，该条例专章对工伤保险进行规范。但是，在计划经济时期，企业作为国家行政序列的单元之一，工伤保险其实就是以国家为后盾的企业保障。随着我国从计划经济向市场经济转变，企业逐渐摆脱行政束缚，成为社会主义市场经济主体之一，这就意味着昔日的工伤企业保障制度亦需随之变革。1996年劳动部制定了《企业职工工伤保险试行办法》，该试行办法虽然立法层次较低，却开启了我国工伤保险立法新的篇章。2003年国务院颁布了《工伤保险条例》，使得工伤保险在我国法律体系中的地位日渐提升，此后出台的一些系列部门规章及解释，特别是2009年7月24日国务院公布《关于修改〈工伤保险条例〉的决定（征求意见稿）》酝酿对我国《工伤保险条例》进行修改，预示着工伤保险正在迎来她的春天。

清末法学大家沈家本曾言：“法之盛衰，与政之治忽，实息息相通。”法学研究之盛衰，亦与法之治忽，息息相通。在我国工伤保险法律制度确立、完善的同时，针对工伤保险法律制度研究的论著也如雨后春笋般不断涌现，年轻学人于欣华博士的这本著作就是其中之一。在我国《社会保险法》刚刚出台，《工伤保险条例》新修之际，针对我国工伤保险法律制度进行分析和讨论颇合时宜：既能在将变未变之际，畅谈现行法律之不足，为今后立法提供可资借鉴之对策；又能在新法颁布之际，审视法律更新之优劣，审度今后立法之方向。

欣华博士的这本著作是他在近几年思考、总结的基础上完成的。整本著作在三个方面给我留下较为深刻的印象：

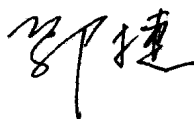
其一，本书虽然研究的是我国工伤保险法律制度，但是在开篇作者从大视野角度分析和探讨了工伤事故发展的一些悖论性问题，试图说明

通过法律制度构建工伤保险，只能在一定程度上起到抵御工伤事故的作用，设置法律制度之外的系统性应对措施才是解决工伤事故的根本之道。

其二，基于对地方性法规、规章的阅读和思考，作者较好地呈现出我国工伤保险法律制度地方化和碎片化特征。法律是被立法者制定出来的，制定的法律应当满足统一、明确、普适，类似行为在法律上应当得到类似对待和处理等法治基本要求。法律又是在实际生活被执行和遵守的“活”法。“活”法要求法律必须呈现地方性特点。如何将法律的普适性与地方性相结合，既不失法律之公正，又不忘地域之差别，着实是立法者必须思考和面对的问题。由于我国工伤保险在大多数地方还停留在市级统筹，必然决定了工伤保险的地方性特征在较长一段时间内还将存在，如何恰当看待地方性特点，构建能够被普遍、有效实施的工伤保险法律制度，作者进行了一定的尝试。

其三，作者对我国现有工伤保险相关著作和论文进行了阅读和思考，所撰写研究综述较为详尽，足以显示此书乃耗力之作；作者在写作过程中，既关注了我国工伤保险法律制度的现状，又大量引用国外文献，运用比较研究的方法反思我国制度的不足，既能从解读法条入手分析工伤保险，又能从学者争鸣之中畅谈自己看法，足以显示此书乃用心之作。

工伤保险法律制度研究虽然近年来取得了一系列成果，涌现了一批优秀学人，但相对于整个社会保障法律制度研究来说，仍显势弱，亟须深入研究和探讨。欣华博士以青年人惯有之热情，一反学术著作的冰言冷语，用热情、大胆的语言和论断，阐述了自己的看法，虽然一些观点尚有商榷之处，然其情可嘉。是为荐之！



于西北政法大学

2011年元旦

| Preface |

The Work-related Injury Insurance is one of the social insurances. With the development of industrialization and modernization around the world, the work-related insurance is making progress in challenges. Early in 1951, China has enacted Labour Insurance Regulations of the People's Republic of China, in which regulations on the work-related insurance were specially detailed. However, in the period of planning economy, enterprises were the part of national administration. The so-called work-related injury insurance was an enterprise security based on the state finance. As the planning economy transits to market economy, enterprises have gradually broken away from the national administrative bonds. They become one of the subjects of socialist free market, which means the old work-related injury insurance system should be reformed. In 1996, the Ministry of Labor drafted the Trial Procedures for Industrial Injury Insurance for Enterprise Employees. Although it was legislated in a low level, it opened a new chapter in the legislation of work-related injury insurance in China. In 2003, the State Council enacted Regulation on Work-Related Injury Insurances. The work-related injury insurance made its official position in China's legal system. A series of regulations and interpretation from different ministries made amendments to Regulation on Work-Related Injury Insurances, especially Decision of Amending Regulation on Work-Related Injury Insurances (Exposure Draft) enacted by the State Council in July 24 2009. These indicate that the work-related injury insurance is embracing spring.

Shen Jiaben, a great master of law in the late Qing Dynasty said: “The development of laws is closely connected to the concern of politics.” The development of researches on laws is also closely connected to that of law. As laws and regulations of the work-related injury insurance are making progress and move on a right track, publications on these studies also arises quickly. This book, written by Dr. Yu Xinhua, a young scholar, is one of these publications. At the time of Social Insurance of the People’s Republic of China is enacted and Regulation on Work-Related Injury Insurances is amended, the analysis and discussion on the legal system of work-related injury insurance is very necessary and right in time. It can point out the shortcomings of the current laws, providing possible solution for the future legislation. It can also review the advantage and disadvantage of the updating law, providing a direction for the future legislation.

Dr. Yu’s book is a production based on the thinking and reflection of the past few years. I’m very impressed with the following three aspects:

First of all, this book is studying on China’s legal system of work-related injury insurance, however, the author analyzes and discusses the paradox of the development in the work-related injury accidents in the beginning from a big perspective. He’s trying to convey that the work-related injury insurance constructed through legal system can only have a limited effect on the precaution of work-related injury accidents. The establishment of a systematic solution out of laws is very fundamental.

Secondly, based on the understanding and thinking of local laws and regulations, the author presents the characteristics of China’s legal system on work-related injury insurance—localization and fragmentation. Laws are

legislated by law makers. The legislation should meet the basic requirements of laws: consistency, explicitness, universality. The case alike should be treated and solved alike. Laws are executed in real life. A “live” law needs to pay attention to the local characteristics. How to coordinate the universality and locality of the law is an issue legislators must face and think: the equity of the law should be justified and the regional difference should also be observed. Currently, work-related injury insurance in places in China is still overall planned municipally. It determines the long time existence of locality of work-related injury insurance. Dr. Yu makes attempts in how the locality should be treated and the construction of a universal and effective legal system on work-related injury insurance.

Thirdly, Dr. Yu has read a lot of works and papers on work-related injury insurance in China and has thought a lot. His detailed research survey illustrates this great effort. In his writing, he not only focuses on China’s current legal system on work-related injury insurance, but also cites a lot from documentation of other countries. A comparative study method is employed to reflect the shortcomings in the system in China. He analyzes work-related injury insurance from the interpretation of law items as well as expresses his own opinions in the scholarly argumentation. This book is surely a heart-devoting work.

A series of the study on legal system of work-related injury insurance have been made in the past few years. A group of outstanding scholars also spring up. However, comparing with the study of legal system of social security, more researches and discussion should be made. Dr. Yu, young man as he is, is taking advantage of the enthusiasm and using his zeal and brave

words and arguments to elaborate his ideas, which is quite different from the traditional academic works. Although there are some points open pending for improvement, his scholarly enthusiasm deserves appreciation. This book is worth reading.

Prof. Guo Jie

Written at Northwest University of Politics & Law

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第一章 导言：工伤的故事

凄惨一词，是对亚洲劳动者职业健康和安全状况最好的描述。
血汗工厂分布在亚洲的许多角落。

——Noel Colina

工业革命使得大机器生产逐渐代替了传统手工作坊生产，农村中的大量剩余劳动力被吸引到城市中的工业部门，传统劳动关系在这期间潜移默化地发生着改变：这些变化是根本的，它们影响了日后整个世界的政治经济体制，并成为世界社会保障制度的“催生剂”；这些变化也是沉重的，工业革命在改变往日生产模式、劳动关系形态的同时，扩大了手工作坊式小生产中“隐藏”的事故，导致工伤事故成为工业社会发展如影随形的“幽灵”。根据国际劳工组织统计，全世界每年发生的工伤事故达10万起以上，死伤2000多万人，其中死亡约15万人，占全世界总死亡人数的5%。^①英国健康安全与环境部（HSE）估计与工作有关的事故及疾病给雇主带来的成本每年大约在45亿英镑到95亿英镑之间，相当于全英国1990年工业企业贸易净利润的5%—10%，每个雇员平均170—360英镑，占GDP的2%—3%。意大利1991年工伤事故成本占GNP的3.05%。芬兰工伤事故成本占GNP的5%—15%。^②美国因工伤损失的工作日是罢工损失工作日的50倍，是失业损失工作日的一半至三分之一。^③工伤事故同样给我国带来巨大经济损失。据有关部门粗略估算，每年我国因职业

① 万成略：“工伤保险”，载《工业安全与环保》2002年第3期。另参见：孙树菡主编：《工伤保险》，中国人民大学出版社2000年版，第2页。

② David R. Walters, “Health and Safety Strategies in Europe”, J. Loss Prev. Process Ind. Vol. 9. No.5. 1996, pp.297-308.

③ Bernard Fortin, Paul Lanoie, “Effects of workers’ compensation: A Survey”.

病、工伤事故产生的直接经济损失达 1000 亿元，间接经济损失 2000 亿元。^① 工伤事故已成为一个国际性难题，是每一个工业化国家在其经济发展过程中都会不同程度出现的问题。正因为如此，阻止致命工伤事故已成为 21 世纪职业健康日程首要考虑的议题。

其实，早在工业革命之前，人们已经意识到工作与事故之间的密切联系，这种意识随着工业革命的深入而加强。奇怪的是，工作与事故之间关联意识的增强并没有随之带来工伤事故率的降低，相反是在某些阶段和特定国家及地区工伤事故率的急剧攀升。这不得不让人们思考是什么原因导致工伤事故率居高不下？为什么在工伤事故危害已经得到清晰认识的情况下，工伤事故却没有得到有效控制，至少在有些国家和地区没有得到有效控制？作为解决途径之一的工伤保险制度，在向工伤劳工提供补偿之外，是否能够充分起到降低工伤事故率的作用？这些问题是必须认真对待的。

一、工伤：一种无尽的循环

1899 年，一位 33 岁的病人被送到伦敦一家医院，他呼吸困难，在医院不到 14 个月就死去了。生前他曾在一家石棉纺织品厂的分梳室里工作，在那里曾经与他一起工作的 10 个工友已先后默默死去。1906 年，Mongtague Murray 医生把这个无名病人的病例报告给英国国会，使得这个病例成为第一起被正式记入档案的与石棉相关的死亡案例。^② 而此前，有多少人因为工作中接触石棉罹患疾病死亡，已不得而知。随后，法国、意大利、英国和美国等国纷纷证实石棉会给人类健康带来极度危害。于是工业化国家纷纷禁止了石棉的使用，或是把石棉的使用量减少到最小。2006 年国际劳工组织在《一项有关石棉的决议》中指出：“惊悉，估计每年有十万工人因暴露于石棉而死于石棉相关疾病……解决它的办法是消除未来石棉的使用。”^③

① 国务院研究室课题组编：《中国农民工调研报告》，中国言实出版社 2006 年版，第 33 页。

② Laurie Kazan-Allen：《扼杀未来——石棉在亚洲的使用》，亚洲专讯资料中心（香港）2008 年版，郭荣衡译，第 3 页。

③ Laurie Kazan-Allen：《扼杀未来——石棉在亚洲的使用》，亚洲专讯资料中心（香港）2008 年版，郭荣衡译，第 40—41 页。