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## Workers' Compensation for Non-fatal Construction Accidents: Review of Hong Kong Court Cases

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### Abstract

Hong Kong is notorious for her high construction accidents rates. Although the accidents rate has dropped from 350 per 1000 workers in mid 1980 to 60 per 1000 workers in 2007, it still accounted for nearly one-fifth of all the industrial accidents in Hong Kong. Contractors were economically pressed and battered by exorbitant compensation over the years. This paper presents a comprehensive study of non-fatal accidents compensation court cases from 2004 to 2008. Although approximately one-third of the cases with injured persons aged between 47 and 56, the percentage of court cases over construction employees by age group was highest in age group 17-26. In terms of trade of workers, General laborers/causal workers stood the highest, then came electrical technicians and painters/decorators/plasterers. The highest rates of injury were falling from height and hitting by falling objects. Increasing from HK\$10,997,637 in 2004, the total compensation reached the peak of HK\$39,643,353 in 2006. The heaviest compensation was HK\$13,800,000 among 101 cases. Most of the victims were compensated under loss of earnings and Pain Suffering and Loss of Amenities. While general labourers marked the highest number of cases, less than one-fourth of them were awarded compensation which exceeded HK\$1,500,000. Four out of seven steel benders who filed court cases, however, received compensation greater than HK\$1.5 million for each case. Those who were struck by objects had relatively the highest chance to be compensated with a huge sum of money.

**Keywords:** Construction accidents, Work compensation, Court cases, Hong Kong

### 1. Introduction

Persistent high accidents rates on sites have caught the attention of many researchers and construction practitioners in Hong Kong (Siebert & Wei, 1998). Accidents replay on sites thousand times each year, and buzz on accidents prevention is boring but inescapable. As compared to other places in Asia, such as Japan, South Korea, Taiwan and Singapore, Hong Kong accidents rates on sites stood the highest among all. Muttering our astonishment, number of accidents per thousand employees was one-digit more in Hong Kong than others (Poon et al., 2008). Frazzled safety officials have taken a crack at overturning the situation by legal regulations, such as Occupational Safety and Health Regulation and Construction Sites (Safety) Regulations. To restore the victims position (Ashworth, 1986) and punish those ill-performed contractors, Employees' Compensation Ordinance was enacted in 1953 (Poon et al., 2008). Legislation as such established an ex ante "contract" between workers and employers where the employers promise to pay a specified amount for all accidents arising in course of employment. Workers' compensation also shifts the liability of workplace accidents from negligence liability to a form of shared strict liability (Fishback & Kantor, 1998). While millions of money have been spent by nerve racking contractors on construction accidents compensation, limited research has been done on the compensation cases. This paper provides some fundamental and useful information about the cases in District Court and High Court. It presents:

1. Total compensation spent by contractors each year

2. An estimation on percentage of compensation spent on a) Pain Suffering and Loss of Amenities (PSLA), b) Loss of earning, c) Loss of earning capacity, d) Special damages, e) Future treatment costs
3. Victims who were awarded huge sum of compensation (HK\$1.5 million) by a) Workers' trade of work, b) Parts of bodies injured, c) Mechanism of injuries

## 2. Liability of contractors on workers' safety under common law

In Hong Kong, it is widely accepted that 'judge made law' resulting from former court cases decided by judges in Hong Kong, UK and other common law jurisdictions. As questions of contractors and subcontractors' duties on safety issues have employment law dimensions, a brief outline of the applicable legal principles is necessary. As early as in 1950, Lord Oaksey had already provided his view on employer's duty in *Winter v Cardiff Rural District Council*: employers have to supply the employees with adequate directions as to the system of work or mode of operation and adequate plant. By the time system or mode of operation is highly dangerous, complicated or involves a number of men performing different functions or prolonged, it is naturally a matter for the employers to take the responsibilities of deciding what system shall be adopted. This view is confirmed in one of the recent court cases in Hong Kong, the learned judge held that " (f)irst, an employer owes to his employee a duty to exercise reasonable care to ensure that the system of work provided for him is a safe one. Secondly, the provision of a safe system of work has two aspects: (a) the devising of such a system and (b) the operation of it" *Li Moon Chai v Leung Shu Man* (2008). This view is also reaffirmed by other judges in *Liu Wai Leung v Asia Construction Co Ltd* (2008).

In deciding the risk precautions, it is of the view that the employer should provide different degrees of protection on case by case basis " ...Where one employment happens to be more dangerous than another, a greater degree of care must be taken, but where the employer cannot eliminate the risk of danger, it is required to take reasonable precautions to reduce the risk as far as possible..." *Nguyen Van Vinh v Cheung Ying Construction Engineering Ltd* (2008). However, this does not mean that an employer is required to remove every risk which might confront its employee. As the Lord Oaksey commented in *Winter v Cardiff Rural District Council* (1950), "but this does not mean that an employer must decide on every detail of the system of work or mode of operation. There is a sphere in which the employer must exercise his discretion and there are other spheres in which foremen and workmen must exercise theirs.... On the other hand, where the operation is simple and the decision how it shall be done has to be taken frequently, it is natural that it should be left to the foreman or workmen on the spot."

Whilst the immediate employer of the employee is liable for the safety, *Morris v. Breaveglen* (1993) ruled that the principal contractor cannot escape his liability. In that case, the victim sustained injury while working under the employment of one employer, as he had been instructed to work under the directions of employees of a second employer. The general employers argued that they should not be liable for the injuries as they were not exercising direct control over the plaintiff. Nevertheless, judges invalidated such contention. In *Rainfield Design & Associates Ltd v Siu Chi Moon* (2000), judges share similar view "[t]he purpose of the Regulations was clearly to provide for the safety of workman and the primary responsibility for this must rest with the contractor responsible for the site. Even where a subcontractor had a contractual duty to provide plant and equipment, the contractor responsible for the site would not be relieved from its duty under the Regulations." Common law rules as such, however, were severely limited by common law defenses available to the employer, on employees' contributory negligence. If proved, it is possible to completely bar an employee's recovery.

## 3. Various legislation in relation to construction accidents compensation in Hong Kong

In response to work-related deaths and injuries, three major pieces of legislation have been enacted and implemented. The Factories and Industrial Undertakings Ordinance in 1980 laid down the general duties of employers at work. Its subsidiary regulation, Construction Sites (Safety) Regulations Chapter 59I, was written clearly to provide the safety of workman and the primary responsibility for this must rest with contractors. Contractors have to ensure suitable and adequate safe access to and egress from every place of work where the construction work is being carried out (Regulation 38AA(2)). They should also provide workers employed on sites with safety helmets (regulation 48(1)(1)). Where workers are employed on sites, contractors responsible for the sites should take such precautions as are necessary to prevent any workers from being struck by any falling materials or objects at work (Regulation 49(1)(1)).

Previous research shows that most of the accidents in Hong Kong involves falling from height, striking by objects etc (Poon et al. 2008). Specifically, it has also stated the responsibilities of contractors for different nature of work on sites, e.g. they also have to identify, rectify against all hazardous conditions, safeguard any person working at a height on the construction site (Regulation 38A) and to prevent any person from falling from height by taking adequate steps (regulation 38B(1)). Any contractor or workman engaged in construction work who does anything likely to endanger himself without reasonable cause or others shall be guilty of an offence and liable on conviction to a fine of HK\$50,000 (Regulation 69).

Another piece of legislation, Occupational Safety and Health Regulation, Chapter 509A, stipulates that every employer must ensure the safety and health at work of all the employer's employees. It has provided several requirements on safety system, safety place of work and manual handling operations, for example:

1. The person-in-charge for a workplace have to ensure that plant is not installed or kept unless the plant is safe and without risks to those who use the plant (section 3(1)).
2. He/she needs to ensure a) that the dangerous parts of plant installed or kept are effectively guarded; and b) in particular that, when any dangerous part of the plant is in motion, the guard relating to that part is kept in place (section 4(1)(1)).
3. The person responsible for a workplace must ensure that an effective means for draining the workplace is installed and maintained at the workplace if (a) an activity carried out at the workplace makes the floor of the workplace wet; and b) the wetness can be eradicated by means of a drainage system (section 14).
4. The person responsible for a workplace must ensure that employees employed at the workplace who undertake manual handling operations which may create safety risks are provided with relevant and comprehensible information (Section 29).

Although Hong Kong has a rather short history in safety and health regulations, history concerning workers' compensation ordinances in Hong Kong can be traced back to 1950. To protect the workers' welfare, Employees' Compensation Ordinance Chapter 282 Section 7 was enacted in 1953 (Poon, *et. al.*, 2008). It states clearly the amount of compensation in cases of permanent total incapacity due to work according to age of the employees. It has three categories:

1. Employees who are under the age of 40, he or she will be compensated with HK\$344,000 or 96 months of earnings whichever is higher (section 7(1)(a));
2. Employees who are over 40 years of age but under 56 years of age at the time of the accident are eligible to receive HK\$ 344,000 or 72 months of earnings whichever is higher (Section 7(1)(b));
3. Employees who are 56 or above are entitled to receive HK\$344,000 or 48 months earning whichever is higher (section 7(1)(c)).

These do not, however, mean that no restrictions on the amount of monthly earning in calculating compensation. In fact, the aforementioned monthly earnings are subject to a maximum of HK\$21,000 for estimating compensation. Settlement of claims between employers and employees can be done by various ways which included but not limited to direct payment or settlement, settlement by court or certificate. Under this ordinance, an employer must also process valid insurance to cover his liabilities for the work injuries for his employees (Labour Department, 2008b). It sounds easy to understand terms within the ordinance, "[r]egrettably, this ordinance had its origin in English statutes drafted nearly a century ago but which has since incorporated both English and local amendments, is by no means easy to follow. This is particularly regrettable when the purpose of the legislation is to provide for payment of compensation to injured employees, a class covering a wide spectrum of the community with various educational backgrounds" Lau Suet Fung v. Future Engineering Company Ltd (2003). This might provide one of the reasons why arguments over level of compensation arise and some of which end up in court.

#### 4. Research method

Descriptive statistical analysis of 101 workers' compensation court cases due to accidents on construction sites while they are doing construction work was carried out. All of them arose between 1<sup>st</sup> January 2004 and 13<sup>rd</sup> November 2008 in District and High Courts. Despite some unknown variables within the Hong Kong law report, it represents the best source of information available concerning nonfatal construction injuries court cases currently available. For simplicity, definition of construction site is adopted from Construction Site (Safety) Regulations as "... a place where construction work is undertaken and also any area in the immediate vicinity of any such place which is used for the storage of materials or plant used or intended to be used for the purpose of the construction work ..." And for the meaning of "construction work", one can also turn to the Factories and Industrial Undertakings Ordinance, Cap. 59, under section 2, it says "'construction work' means the construction, erection, installation, reconstruction, repair, maintenance ... renewal, removal, alteration, improvement, dismantling, or demolition of any structure or works specified in the Third Schedule ..."

#### 5. Results

##### 5.1 Age

Previous research has diverse views on which age group is more accident prone. While some authors concede that young workers have higher chance of accidents due to lack of experience, others argue that accident rate among older workers is not lower than that of younger ones (Li, 2006). This research reveals that majority of the serious injuries

come from the age group (47-56) which accounts for 30 among the 101 court cases, age group 27-36 and 17-26 marks for 18 and 15 cases respectively. There were 7 cases falling under the age group 57-67 only. Nevertheless, the percentage of court cases over construction employees by age group is highest in age group 17-26 as noted in (Table 1).

In a study conducted in Denver by Lowery et. al. (2000), workers who build elevators and conduits, install glass, metal, or steel were at particularly high risk of injury. A glance of Table 2 shows that general labourer/causal workers ranked highest, with a total of 26 cases, followed by electrical technicians, painters/decorators/plasterers, and carpenters, each of them accounted for 11 cases. A glimpse of Table 2, however, reviews that among all the percentage of litigation over injured cases, scaffolders ranked highest, followed by carpenters, each of them accounted for more than 2%.

### 5.2 Mechanism of injury

Previous study of Dement and Lipscomb (1999) revealed that the highest rates for compensation cases involving medical costs were observed for being struck by an object, lifting/movement and falls from height. In Japan, South Korea, Taiwan and Singapore, the most common type of construction deaths happened on sites was falls from a height (Poon et. al., 2008). In Hong Kong between 1997 and 2008, approximately one-fifth of the construction accidents on sites were 'striking against or struck by moving objects', 'injured whilst carrying' and 'fell on the same level' (Labour Department, 2008a). Nevertheless, the highest rates of injury involved litigation were falling from height (37) and being hit by falling objects (32). Generally speaking, there is an upward trend in being hit by falling objects (Table 3). Being hit by objects reflect poor housekeeping on sites, one of the major causes of accidents on sites as indicated in research by Li (2006) and Atkinson et al. (2005).

### 5.3 Parts of bodies injured

In a study conducted by Dement and Lipscomb (1999), compensation claim incidences were highest for back/ shoulders, fingers, and leg/knee. In Hong Kong, claimants have to supply their medical assessment reports for compensation purposes. Doctors fill in the form which indicates which part of the bodies did the claimants suffer and the corresponding percentage of body impairment. There are also guidelines in Hospital Authority concerning impairment assessment on different parts of body injuries, e.g. injury on thumb induce greater body impairment than index finger. As shown in Figure 1, mechanism of injury was highest for limbs (51), cases accounting for half of the cases. The other common injuries are head (15), back (14), eye (12) and fingers or toes (11).

### 5.4 Compensation awarded in 2004-2008

The total compensation awarded for a victim would be the sum of all items of compensation for damages decided by the judges. The primary aim of compensation is to provide remedy to the victims as close as possible to the status had the accident not happened. As a matter of fact, victims might not award compensation under each and every sub-category of damages (Saram & Tang, 2005). After deciding the whole sum of money to be compensated, the judge would decide the percentage of liability which was borne by the contractors and/or subcontractors. Had there been no prior agreement on the percentage of each defendant's liability on construction injuries, court also decides the percentage out of which each party should pay, e.g. *Ho Ho Ming v Tse Po Wah & Others* (2008), *Pang Dai Shing v Ho Shun Ching and others* (2007). Although there is no consensus on how heavy the accidents compensation should be, the learned judge in *Hutchinson v London & North Eastern Railway Co* (1942) stated that "The real incentive for the observance by employers of their statutory duties ... is the possibility of heavy claims for damages. Such legislation would be nugatory if, in every case, employers could disregard the statute, and allege that ... the plaintiff could see the danger and, therefore, ought to have ceased working, which in many cases might mean dismissal, or to have taken some extra precaution which was not taken."

Compensation may be awarded under the following heading:

1. Pain Suffering and Loss of Amenities (PSLA): these compensate for injury which leaves victims disabilities which tarnish general activities and satisfaction of lives, but allow reasonable mobility to victims, for instance, bad fractures which lead to recurrent pain, *Lee Ting Lam v Leung Kam Ming* (1980). In order to consider the amount to be awarded under this heading, judges will also consider the victim's habit such as sport activities, family lives and background.
2. Loss of Pre-trial earning: this encompasses monthly earning from the Date of Accident to end of sick leave, *Wong Hak Man v Harvest Engineering Development Ltd and Chun Wo Building Construction Limited* (2008)
3. Post trial loss of earning: this encompasses the earning lose after trial, generally speaking, it takes into consideration the plaintiff's age on the day of hearing and the possible maximum age which the victim is still able to work, *Siu Leong Ching v Professional Scaffolding Engineering Co Ltd & Another & Tong* (2004)
4. Future medical treatment: this encompasses future inpatient treatment, *Wong Chun Lam v Tai On Civil Engineering Ltd* (2008)

5. Special Damages: these encompass hospital and other medical charges, such as expenses on tonic food, traveling, bonesetters, Chinese Herbalists, treatment in mainland hospital, Medical Accessories, Lin Chiu Lung v ILE Company Limited (2005), Wong Hak Man v Harvest Engineering Development and Chun Wo Building Construction Limited (2008)
6. Loss of Earning Capacity: victims would only be compensated under this heading of claim if and only if the plaintiff's injuries leave residual disabilities, leading them to disadvantages in labor market, Wong Chun Lam v Tai On Civil Engineering Ltd (2008)

Apart from the aforementioned items, judges might award the plaintiffs under the item such as loss of society, retirement benefit etc. Panel of judges might also deduct a sum of money which had been received by victim and their corresponding responsibilities for their negligence. In a few cases, judges might choose to award the victim according to employees' compensation under ECO, Section 9, 10 and 10A instead, e.g. Chu Yee Man v Chuen Kee Construction Co Ltd (2008). Figure 2 below illustrates the amount of total compensation for each case in chronological order.

Table 4 illustrates total amount of compensation each year and its detail breakdown. Total compensation was highest in 2006 which gave an account of HK\$39,643,353 and lowest in 2004 which was HK\$10,997,637. Loss of earning (which includes pre and post trial loss of earning and loss of MPF) accounts for the largest head of compensation, followed by Pain Suffering and Loss of Amenities. Among the 101 cases, the highest sum of compensation was HK\$13,800,000. The victim was a site casual worker, aged 31 at the time of the accident. He was suffered from injuries in his spine, fracture of limbs and ribs and a laceration over the left eye. Four victims were not compensated for any money. One of them failed to satisfy all the necessary criteria which would give the court the power to rule on the application his claim against. The other one also failed because there was no evidence that the plaintiff was assigned to do the alleged work by the contractor. Failing to file the report in timely manner and mentioned the injury during medical examinations were reason for zero compensation awards.

In terms of heavy compensation, previous study in the United States revealed that the five costliest occupational injuries in construction industries were miscellaneous special trade contractors, followed by plumbing, heating, and air-conditioning and electrical workers (Waehrera, *et. al.*, 2007). Of these 101 cases in Hong Kong, 29 victims received compensation more than HK\$1.5 million (a line is drawn on HK\$1.5 million as this represents a large sum of compensation and sufficient amount of cases to give readers a generalized picture). While general labors marked the highest number of cases, less than one-fourth of them were awarded compensation which exceeded HK\$1.5 million. Four out of seven steel bender/ form worker who filed court cases have received compensation greater than HK\$1.5 million. Further details of different trade of workers' compensation can be found in Figure 3.

When we look at parts of bodies injured, head injured victims have the highest chance to be compensated with larger sum of money. Among all the head injured cases, 47% of them were awarded more than HK\$1.5 million. Eye and shoulder injured victims cases rank second (Figure 4). The results generally reflect seriousness of the injury has great impact when the judges decide level of compensation.

With regard to the mechanism of injury, approximately 54.5% of those were struck by objects were awarded by compensation above HK\$1.5 million. Meanwhile, around one-third of Slip and fall received such a high level of compensation (Figure 5).

## 6. Conclusions

Obedience to law is not taken for granted (Becker, 1968). One of the justifications for heavy sum of compensation is to prevent further similar offences. Huge sum of compensation churned out profit of these companies every year. Neither would the injured persons and their family members feel better. Year 2006 alone cost nearly HK\$40 million as compensation decided by court, not to mention those which have already spent before hearing. It has been said that judges decide the amount of compensation based on the seriousness of the accidents. Little wonder that head injuries cases have a higher chance to receive larger sum of money as compensation. Surprisingly, Steel benders tap into the trade of workers which was the group with greatest opportunity to award huge compensation but not the largest pool of cases among all trade of workers. After all, this study does not only provide useful information to contractors on preparing safety measures to different ages and trades of worker, it also provides comprehensive information to insurance companies when they provide services to their clients.

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Table 1. Number of court cases within each age group

Age group	Number of employees in construction sector by age group (2004-2007) (Census and Statistics Department, 2009)	Number of court cases (2004-2008)	Percentage of court cases over construction employees by age group ( $10^{-3}$ )
17 - 26	111.8	7	6.26
27 - 36	245.1	30	0.12
37 - 46	342.4	13	3.8
47 - 56	308.8	18	5.83
57 and above	61.4	15	0.24
Unknown	N/A	7	N/A
Total	1070.4	101	0.052

Table 2. Number of non-fatal accidents from 2004-2008 analyzed by type of work performed

Type of work	Number of court cases (2004-2008)	Number of injured cases (2004-2007) (Labour Department, 2008a)	Percentage of court cases over injured cases
Steel bender/form worker	7	570	1.23
Scaffolder	7	302	2.32
Plumber	3	523	0.57
Carpenter	11	491	2.24
Electrical technician	11	1559	0.71
General labourer / causal worker	26	N/A	N/A
Decorator/painter/plasterer	11	678	1.62
Other	26	N/A	N/A

Table 3. Categorization of construction injuries in Hong Kong litigation in 2004-2008

Year	Hit by falling object	Fell from height	Trapped in/between objects	Hit by moving objects	Slipped and fell	Struck by objects	Others	Total number of non-fatal accidents
2008	12	11	1	1	0	4	0	29
2007	7	6	2	0	0	0	1	16
2006	6	6	1	1	1	3	1	19
2005	6	9	0	1	3	4	0	23
2004	1	5	1	4	2	0	1	14
Total	32	37	5	7	6	11	3	101

Table 4. Total compensation awarded in 2004-2008

Year	Total number of non-fatal accidents	Total PSLA ('000)	Total loss of earning ('000)	Total loss of earning capacity ('000)	Total Special damages ('000)	Total Future treatment ('000)	Total Deductions from ECC and victims' faults ('000)	Total sum of compensation ('000)
2008	29	6,779	26,964	267	610	584	4,005	32,443
2007	16	3,400	13,980	950	530	279	890	15,937
2006	19	7,260	20,234	875	1,378	2,669	7,640	39,643
2005	23	6,085	24,645	2,404	506	382	7,771	25,725
2004	14	2,940	11,283	431	211	116	5,174	10,998



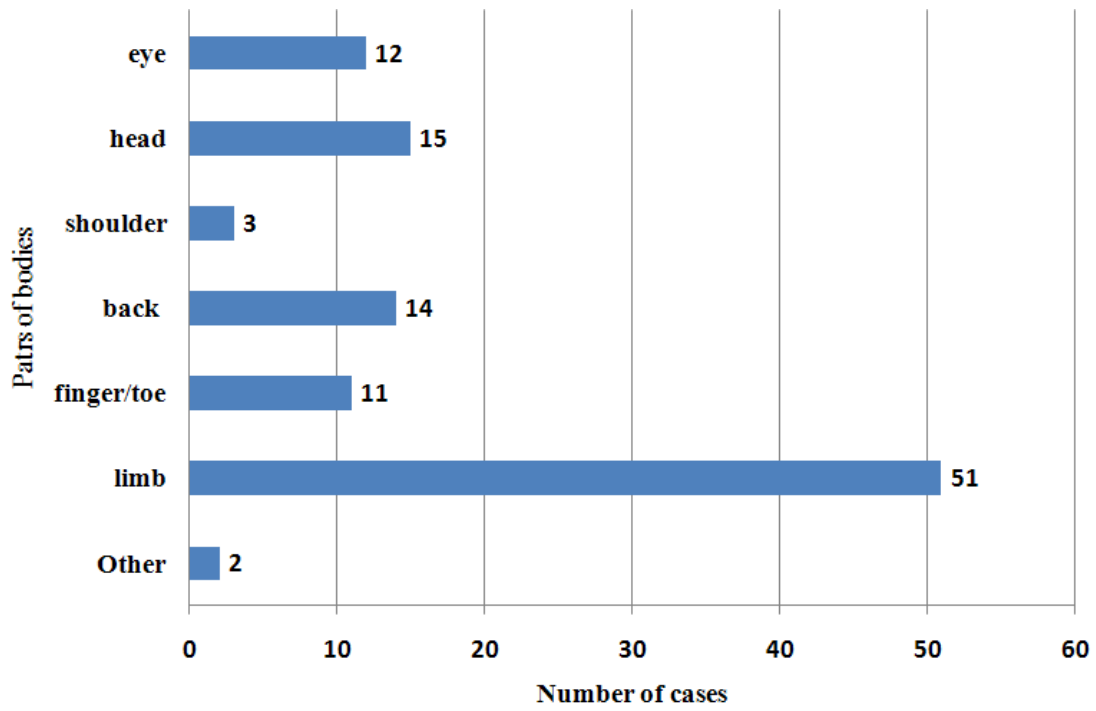


Figure 1. Parts of body injured among the 101 court cases in 2004-2008

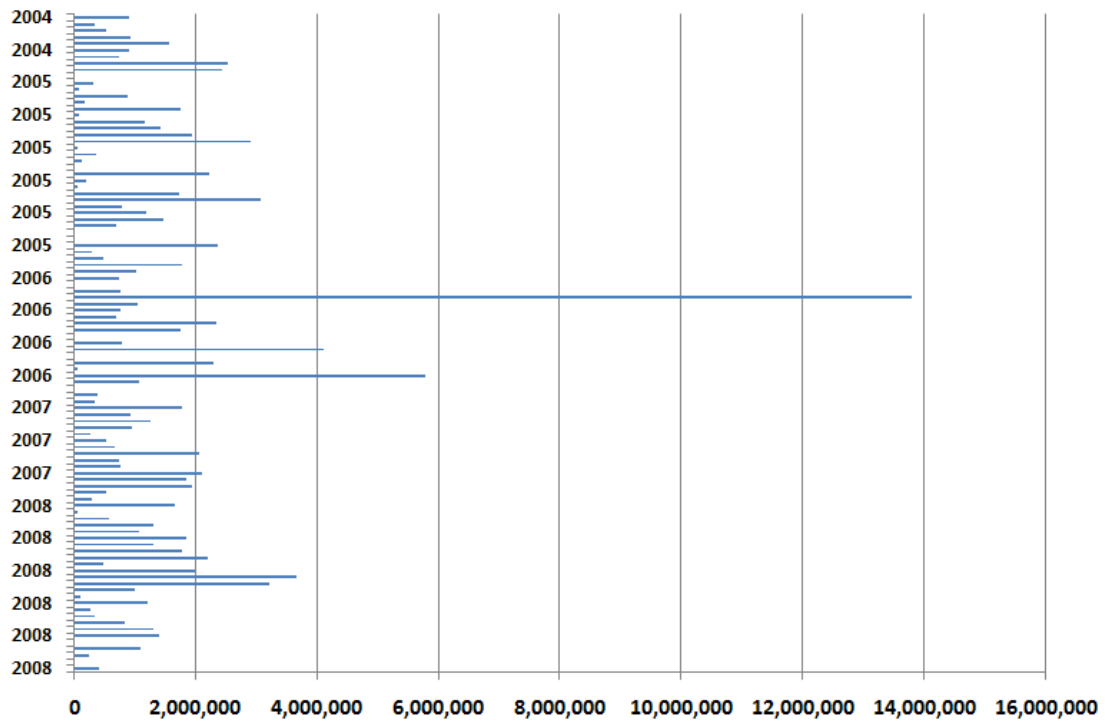


Figure 2. Total amount of compensation of each cases in 2004-2008

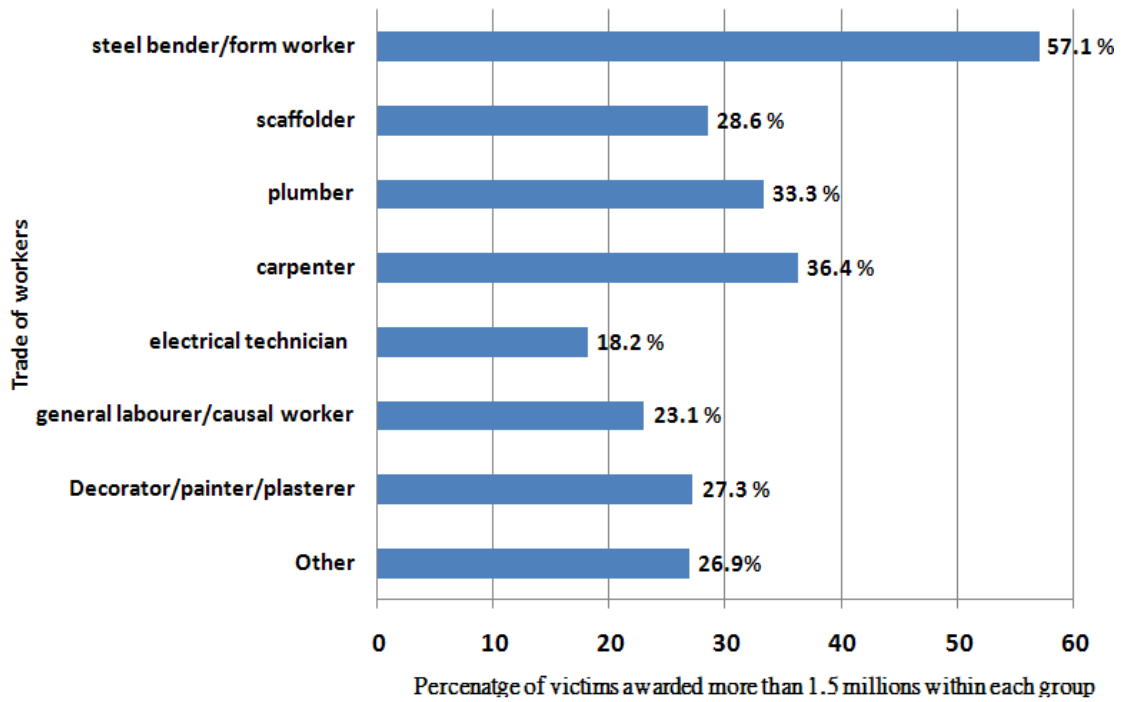


Figure 3. Percentage of victims awarded more than HK\$1.5 million within each group

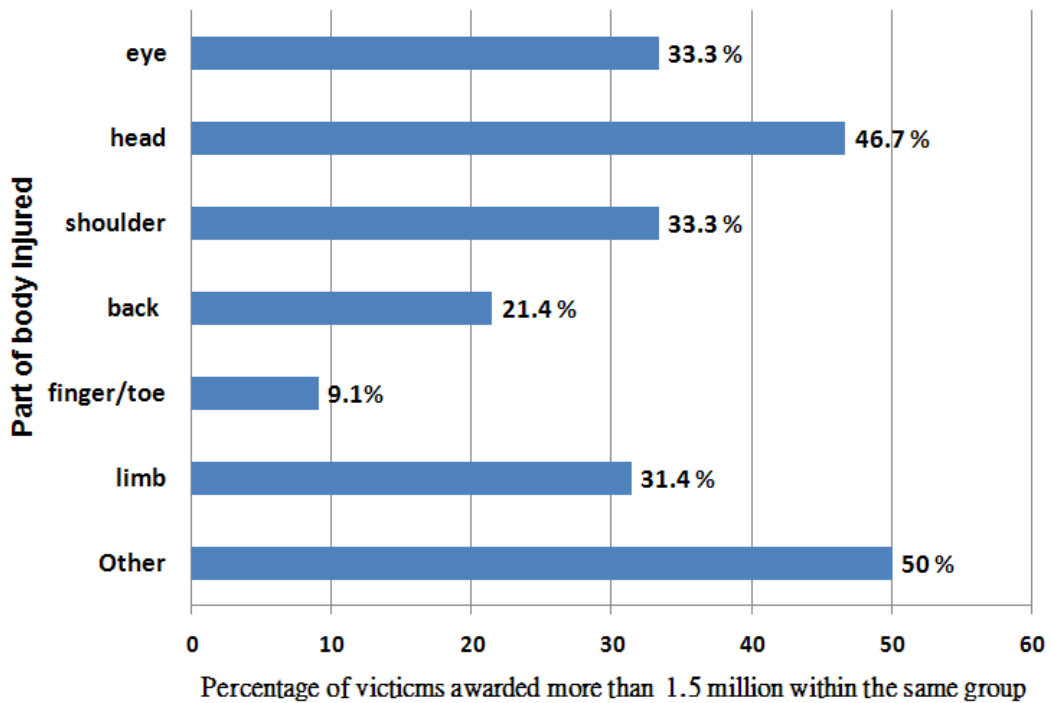


Figure 4. Percentage of workers' compensation greater than HK\$1.5 million analysed by parts of bodies injured

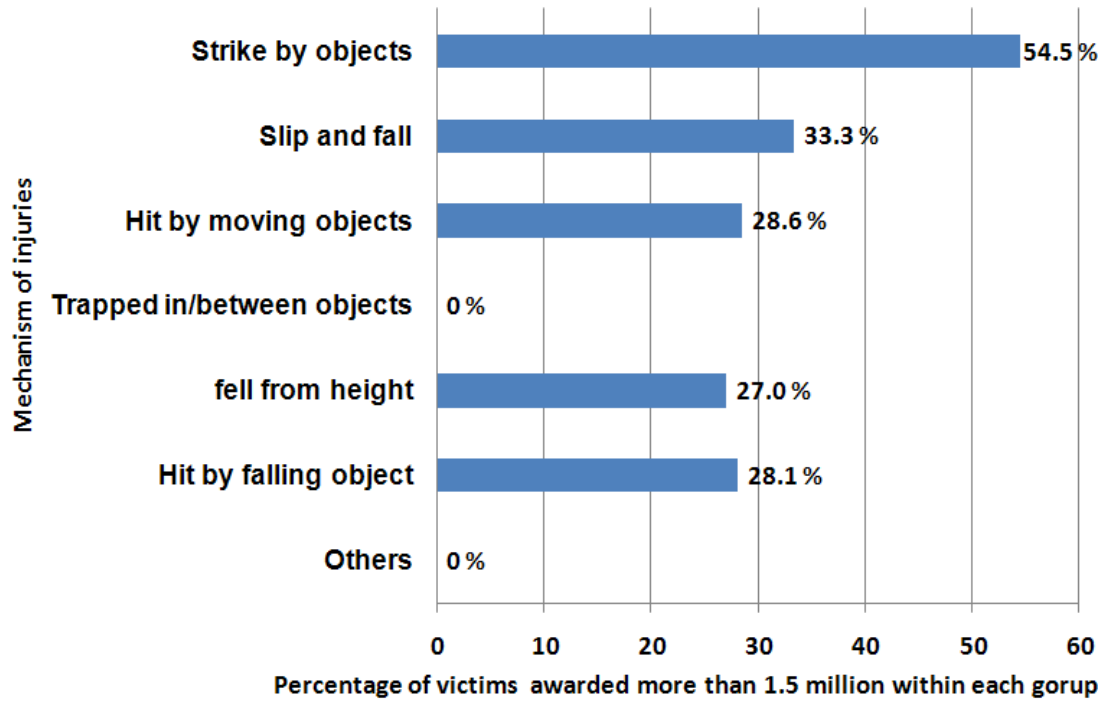


Figure 5. Percentage of victims awarded more than HK\$1.5 million categories by mechanism of injury.