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CAPITALIZATION OF PAYMENTS AS A WAY TO COMPENSATE THE DAMAGE TO LIFE AND HEALTH OF AN INDIVIDUAL IN CASE OF A LEGAL ENTITY'S BANKRUPTCY

Abstract. The article is devoted to studying the compensation for loss of life or damage to health suffered by employees in case of an employer's bankruptcy. The authors reviewed and analyzed the procedure of dissolution and liquidation of a legal entity, and the procedure of capitalizing the payments to meet all of the obligations the bankrupt employer has before its employees.

Particular attention is paid to the problem of determining the order of priority of workers' claims for damage compensation in case of the employer's bankruptcy.

Separate attention is paid to the fact that bankruptcy — that is the debtor's incapability to resume its solvency through the procedures of rehabilitation and the settlement and to satisfy established monetary claims of creditors in accordance with the procedure set by the Law of Ukraine "On the restoration of the debtor's solvency or recognition of its bankruptcy" which leads to the use of the liquidation (dissolution) procedure.

The article is analyzed of legal acts concerning the capitalization of payments and compensation to victims. According to Part 2 of Art. 1205 of the Civil Code of Ukraine, in the event of the liquidation of a legal entity, payments due to the victim or persons entitled to such reimbursement as a result of the death of the breadwinner must be capitalized for payment to their victim or specified persons. At the same time according to the Article 6 of the Law № 1105 the subjects of the insurance against accidents are the insureds and in separate cases (when the victim is dead) — their family members and other persons, beneficiaries, and the insurer. Insured is the person entitled to the benefit of the insurance. Insureds are the employers and in some cases — the persons specially named as the insured. The insurer is the Social Insurance against industrial accidents and occupational diseases Fund of Ukraine.

Thus the article concludes that the insured is bound by legislature to conduct capitalization of insurance payments in any case of liquidation (not only through declaring the employer bankrupt but also in other cases provided by law).

Keywords: liability, injury, protection of workers, employer, bankruptcy, indemnification, reimbursement, individual (physical person), legal entity.

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КАПІТАЛІЗАЦІЯ ПЛАТЕЖІВ ЯК СПОСІБ ВІДШКОДУВАННЯ ШКОДИ, ЗАВДАНОЇ ЖИТТЮ І ЗДОРОВ'Ю ФІЗИЧНОЇ ОСОБИ В РАЗІ БАНКРУТСТВА ЮРИДИЧНОЇ ОСОБИ

Анотація. Проводиться дослідження особливостей відшкодування шкоди, заподіяної життю та здоров'ю фізичної особи (працівникові) у разі банкрутства роботодавця (юридичної особи). Розглянуто процедуру ліквідації юридичної особи. Проаналізовано порядок капіталізації платежів для задоволення вимог, що виникли із зобов'язань роботодавця-банкрута перед своїми співробітниками (фізичними особами). Особлива увага приділяється проблемі визначення черговості задоволення вимог із відшкодування шкоди працівникам у разі банкрутства роботодавця.

Визначено порядок пріоритетності вимог із відшкодування шкоди працівникам у разі банкрутства роботодавця.

Окремо звернено увагу на те, що банкрутство — це неспроможність боржника відновити свою платоспроможність за допомогою процедур санації та мирової угоди і погасити встановлені в порядку, визначеному Законом України «Про відновлення платоспроможності боржника або визнання його банкрутом» грошові вимоги кредиторів не інакше як через застосування ліквідаційної процедури.

Детально розглянуто положення нормативно-правових актів, що стосуються капіталізації виплат та компенсацій потерпілим фізичним особам. Згідно з ч. 2 статті 1205 ЦК України у разі ліквідації юридичної особи платежі, належні потерпілому або особам, які мають право на отримання такого відшкодування в результаті смерті годувальника, мають бути капіталізовані для виплати їх потерпілому або зазначеним особам. Водночас відповідно до статті 6 Закону № 1105 суб'єктами страхування від нещасних випадків є страхувальники, а в окремих випадках (коли потерпілий помер) — їхні члени сім'ї та інші особи, бенефіціари та страховик. Страхувальником є особа, яка має право на страхування. Страховиками є роботодавці, а в окремих випадках — особи, спеціально визначені страхувальниками. Страховиком є Фонд соціального страхування від нещасних випадків на виробництві та професійних захворювань України.

Таким чином, визначено, що страхувальник зобов'язаний законодавчим органом проводити капіталізацію страхових виплат у будь-якому випадку ліквідації (не тільки шляхом оголошення роботодавця банкрутом, а й в інших випадках, передбачених законом).

Ключові слова: відповідальність, шкода здоров'ю, захист працівників, роботодавець, банкрутство, відшкодування шкоди, фізична особа, юридична особа.

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КАПИТАЛИЗАЦИЯ ПЛАТЕЖЕЙ КАК СПОСОБ ВОЗМЕЩЕНИЯ ВРЕДА, ПРИЧИНЕННОГО ЖИЗНИ И ЗДОРОВЬЮ ФИЗИЧЕСКОГО ЛИЦА В СЛУЧАЕ БАНКРОТСТВА ЮРИДИЧЕСКОГО ЛИЦА

Аннотация. Проводится исследование особенностей возмещения вреда, причиненного жизни и здоровью физическому лицу (работнику) в случае банкротства работодателя (юридического лица). Рассмотрено процедуру ликвидации юридического лица. Проанализировано порядок капитализации платежей для удовлетворения требований возникших по обязательствам работодателя-банкрота перед своими сотрудниками (физическими лицами).

Особое внимание уделяется проблеме определения очередности удовлетворения требований по возмещению вреда работникам при банкротстве работодателя.

Ключевые слова: ответственность, вред здоровью, защита работников, работодатель, банкротство, возмещение вреда, физическое лицо, юридическое лицо.

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Actuality of the research. The Constitution of Ukraine recognizes the right to work of all its citizens which they exercise through their legal capacity. The term 'legal capacity' is used in the law doctrine to characterize a person as a subject of law. Legal capacity is most commonly defined as an individual's aptitude to be a participant of civil legal relationships [1, p. 116]. The system of social protection in Ukraine is currently going through transition from socially oriented economy to market economy. Private property recognition on the constitutional level and the practice of its execution in all spheres of economic relationships brings many legal problems that are not solved yet, including protection of employees before employers in case some damage is inflicted and needs to be compensated, especially when the employer declares bankruptcy.

The procedure of legal entities and entrepreneurs' bankruptcy is an integral part of market relationships. In Ukraine the risk of an employer's bankruptcy has direct impact on employees. Today the problem of paying the compensations remains unsolved for the damage to life and health of an employee when the employer is going bankrupt, and so this accentuates the actuality of this research.

Analysis of the recent research and publications.

More and more scientists raise in their works the questions of employees' rights protection during the bankruptcy of the employer. Significant contribution to the development of theoretical and practical aspects of insolvent employers' employees protection has been made by such scientists as S. S. Alekseev, I. A. Blank, V. F. Bogachev, M. D. Boyko, N. L. Zakharov, O. Zabramna, I. Y. Kiselyov, I. A. Ionnikova, N. A. Krichevskiy, N. G. Mekheda, G. Pavluchenko, S. M. Prilipko, G. V. Savitskaya, I. M. Sirota, and also the foreign researchers E. Altman, I. Ansoff, Y. Brigham, H. Mintzberg, R. Pike, S. Ross, R. Hope, A. Shapiro.

Purpose of the article is to study the procedure of payments capitalization in bankrupt employer's obligations to his employees.

Presentation of the material. According to the Article 104 of the Civil Code of Ukraine (further – the CCU) [2] the liability of a legal entity may end either through liquidation (dissolution) or through rights succession in the process of merges, acquisitions or breaking down a corporation (it should be noted that the Civil Code of Belarus (Article 53), Kazakhstan (Article 45) and some others retained such way of ending an entity's liability as reorganization which includes a merge, acquisition, breaking down a corporation, allotment and conversion). As a general rule, in case a legal entity obliged to compensate some damage to life, body or health is ended the obligation goes

onto its rights successors that inherit all responsibilities in all claims. Separately defined by law is the ending of a legal entity through the procedure of bankruptcy.

Liquidation (dissolution) through bankruptcy is termination of a legal entity's liability when its insolvency is recognized by court which is aimed at enabling the court to satisfy the creditor's claims by allowing the debtor's assets to be sold.

According to Part 2 of the Article 1205 of the CCU when the legal entity is liquidated the compensations to which the victims or their heirs after the loss of wage-earner are entitled must be capitalized and paid to the victim or the persons entitled.

The legislator, though using the term 'capitalization' doesn't give this category any definition. The word capitalization may stand for: 1) the system of means to introduce capitalistic relationships; 2) transformation of profit into capital for industrial expansion [3, p. 196]. Besides there is a number of encyclopedic explanations for this word: 1) calculation of value of the business or other assets according to the profit obtained per year [4, p. 1311; p. 276]; 2) formation of fictitious capital [5, p. 350].

From the context of Article 1202 of the CCU and the nature of the tort relationship that contains the right of an individual to get periodical payments and the obligation of the tortfeasor to make these payments we can make a conclusion that capitalization may be understood as a procedure to calculate the sum of money and to separate assets of a legal entity that are sufficient to fully pay compensation to the victim for the wrongdoing.

The sum of capitalized payments in the process of liquidation of a bankrupt business entity is transferred by the liquidator to the authorized body of the executive directorate of the Social Insurance Fund of Ukraine where the business entity was registered (Art. 2 Paragraph 5-1 of the Procedure for payment capitalization to satisfy the claims of citizens to bankrupt business entities as result of damage to life and health) [6].

Article 5 of the Law of Ukraine from September 23, 1999 № 1105-XIV 'About the compulsory state social insurance against workplace accidents and occupational diseases that caused the loss of ability to work' (further - Law № 1105) [7] states that the main principle of insurance against accidents is full and timely compensation paid by the insurer.

At the same time according to the Article 6 of the Law № 1105 the subjects of the insurance against accidents are the insurants and in separate cases (when the victim is dead) – their family members and other persons, beneficiaries, and the insurer. Insurant is the person entitled to the benefit of the insurance. Insurers are the employers and in some cases – the persons specially named as the insured. The insurer is the Social Insurance against industrial accidents and occupational diseases Fund of Ukraine.

The Article 25 of the Law № 1105 obliges the Social Insurance against industrial accidents Fund to pay from its assets all kinds of insurance payments and social services and also all kinds of prevention measures provided by Articles 21 and 22 of the Law № 1105 to the insurants and their dependents. According to the Article 45 of the Law № 1105 an employer acting as an insurant, in his own turn, must pay fully and timely insurance fees to the Fund as demanded by the established procedure.

By provisions of the Article 46 of the Law № 1105 the Fund is financed, in particular, by the fees paid by employers and the capitalized payments obtained through the liquidation of the insurant entities according to the procedure established by the Cabinet of Ministers of Ukraine.

Thus the insurant is bound by legislature to conduct capitalization of insurance payments in any case of liquidation (not only through declaring the employer bankrupt but also in other cases provided by law).

Let's discuss the following question: in what order the compensation of damage to life and health should be paid in the case of insurant's bankruptcy?

Capitalization of payments to satisfy the claims that derive from the bankrupt employer's obligation to compensate for the damage to life and health of individuals including those insured by the Social Insurance against industrial accidents and occupational diseases Fund, is conducted by

the Article 1 of the Procedure for payment capitalization to satisfy the claims of citizens to bankrupt business entities as result of damage to life and health [6].

The payments are capitalized separately to each particular employee that suffered an industrial injury as a result of some production accident (while fulfilling their working duties). When these payments are calculated it should be taken into consideration what was the victim earning, what is the percentage of professional ability s/he lost, what expenses had to be made to care for the victim, to provide rehabilitation, to buy prosthetics and individual transportation (wheelchair) and all kinds of social help according to the medical reports, one-time necessary compensation for trauma or an occupational disease that could lead to the victim's death, and other payments determined by law.

Capitalization of payments that are mentioned in Paragraphs 1-5 of the Article 2 of the Procedure is calculated for the time period defined as a difference between the average life span for men and women in the country and their age at the moment of capitalization (Art. 3 of the Procedure).

Judicial practice wherein points that the current legislation doesn't relieve solvent legal entities in case of their dissolution from the duty to finance the Social Insurance against industrial accidents and occupational diseases Fund through making capitalized payments [8].

If an insurant in the process of its liquidation has to fulfill the obligation for a certain amount of time to capitalize and pay the expense to the entitled person the insurant also has to be obliged to capitalize insurance fees for insured persons that will receive insurance compensation from the insurer.

It would hardly damage the interests of any worker under the agreement of employment because the timely compensation payments would continue without any capitalization by the insurer that gets the insurance fees from insurants and distributes the insurance risk between them. Nowadays it happens when an insurant goes bankrupt and lacks the assets to satisfy even the highest priority claims, and the damage was inflicted to health before the Law of Ukraine 'About the compulsory state social insurance against workplace accidents and occupational diseases that caused the loss of ability to work' came into effect, or the case is about compensating the damages as the result of death of a wage-earner, because in such cases the insurance compensation is paid in full if the payments were capitalized while liquidating the legal entity or not.

And so when the payments were not fully capitalized the insurer disclaims its obligation to fully compensate the damage to life and health of the persons insured and will not fulfill this duty in all its extent even if the capitalization that indeed was conducted covers the insurance fees paid by the bankrupt insurant in the period of such capitalization, thus amounting to or even exceeding the sum that the insurant could claim if the normal economic responsibility was possible.

Speaking about the procedure of the payments formation the Article 9 of the Procedure for investigation and registration of workplace injuries, occupational diseases and industrial accidents provides that medical prevention facility must during the 24 hours transfer through the means of connection or the paper work an urgent message about the victim's admittance that mentions that an industrial accident occurred. Employer that received the message about the industrial accident must within the 24 hours gather a committee comprising of no less that three persons and organize the investigation into the case (Article 10 of the Procedure). The accident investigation committee must within three days give its conclusion if the accident bears connection to the production cycle or not and also study all the circumstances of the case, and if some further research is necessary or some expertise or tests need to be conducted to determine the conditions and reasons that lead to the accident, the time limit may be postponed under the written agreement with the territorial body of State and municipal technical control relating to where the enterprise is situated (Article 14 of the Procedure) [9].

The Social Insurance against industrial accidents Fund considers the case concerning the insurance payment according to the victim's or the beneficiary's claims upheld by all the necessary documents and must reach a decision within 10 days excluding the day when the documents were

filed (Article 36 of the Law of Ukraine «About the compulsory state social insurance against workplace accidents and occupational diseases that caused the loss of ability to work»).

The Social Insurance against accidents Fund may postpone the insurance payment until the conditions for the payments are met, if the documents were filed in violation of the established requirements.

All the mentioned above leads to conclusion that the employees that have no financial means to care about their physical health should note that they may receive the compensation no sooner than 15 days from the moment when the industrial accident occurred.

The whole mechanism of filling the budget of the Fund by means of payments capitalization is built in such a way that the victim registered by the Fund should have the guarantees of the social security, being sure of the future, knowing that the state acting through the Fund will be able under any social and economical circumstances at any moment in time in no regard to any external affairs to provide for the worker and support him.

The obligation to capitalize payments in case of an entity's liquidation makes the employer think about occupational safety and care about safe working environment for its employees, constantly conduct some accident prevention activities and provide the workers with modern means of protection from harmful and dangerous industrial agents.

Conclusions. Thus, a conclusion should be made that payments capitalization is necessary in the process of a legal entity's dissolution to ensure the protection of employees, but its procedure must be improved. Furthermore, the ranking of an employee's claims to be satisfied in the order of priority remains of current interest, and so do the time limitations and the scope of the compensation.

It is necessary to exclude the possibility for employers to transfer their businesses from one class of professional risks to another without sufficient basis. A system of discounts and bonuses should be developed to encourage those organizations where the level of employees traumatizing and occupational disease is dynamically declining and the jobs with harmful, hard and dangerous working conditions are cut down.

Also, indexing of the monthly payments to the victims under the currently valid procedure is conducted exclusively in the limits of assets under the budget of Social Insurance Fund for the corresponding year, which creates the risk for the victims to possibly remain without indexing the sum of compensation for an extended amount of time.

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