

**立法會**  
**Legislative Council**

LC Paper No. CB(2)1463/99-00  
(These minutes have been seen  
by the Administration)

Ref : CB2/SS/9/98

**Subcommittee on Factories and Industrial Undertakings  
(Loadshifting Machinery) Regulation**

**Resolution under section 7 of the  
Factories and Industrial Undertakings Ordinance (Cap. 59)**

**Minutes of Meeting  
held on Wednesday, 12 January 2000 at 10:45 am  
in Conference Room A of the Legislative Council Building**

- Members Present** : Hon Mrs Miriam LAU Kin-ye, JP (Chairman)  
Hon HO Sai-chu, SBS, JP  
Hon Cyd HO Sau-lan  
Hon LEE Kai-ming, SBS, JP  
Hon CHAN Wing-chan  
Hon CHOY So-yuk
- Members Absent** : Hon Ronald ARCULLI, JP  
Hon Andrew CHENG Kar-foo
- Public Officers Attending** : Mr Herman CHO  
Principal Assistant Secretary for Education and Manpower
- Mr Samson LAI  
Assistant Secretary for Education and Manpower
- Mr William SIU  
Assistant Commissioner for Labour
- Miss Marie SIU  
Senior Government Counsel

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**Clerk in Attendance** : Mrs Constance LI  
Chief Assistant Secretary (2) 2

**Staff in Attendance** : Mr Arthur CHEUNG  
Assistant Legal Adviser 5

Miss Betty MA  
Senior Assistant Secretary (2) 1

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**I. Administration's response to issues raised at the meeting on 21 December 1999**

[Paper No. CB(2)817/99-00(01)]

At the invitation of the Chairman, Assistant Commissioner for Labour (AC for L) briefed members on the Administration's response to issues raised at the meeting on 21 December 1999.

Duties of a responsible person under sections 3 and 4 of the Regulation

2. With regard to the duty of a "responsible person" to provide training courses under section 4, AC for L said that the Administration had examined overseas legislation and similar regulations under the Factories and Industrial Undertakings Ordinance (FIUO) such as the Lifting Appliances and Lifting Gear Regulation and the Suspended Working Platforms Regulation. The Administration was of the view that the proposal to require a responsible person to ensure that the machine operator should be in possession of a valid certificate as evidence that the latter had completed the required training was not particularly stringent. The requirement was consistent with other similar legislation and was in line with the enforcement practice. The Administration therefore considered that the wording of section 3 of the proposed regulation was appropriate.

3. AC for L added that the strict liability offences were not as absolute as they appeared. The Court would rule in favour of the defendant if he was able to prove that he had taken reasonable steps to prevent the occurrence of the offence. It was noted that the Court did not necessarily adopt a literal interpretation of strict liability offences. In enforcing the legislative requirements, the Administration would ascertain, as far as practicable, whether the responsible person had discharged his statutory responsibility before taking prosecution action. The policy objective was to cultivate partnership between the proprietor (and contractors) and the workers in maintaining a safe working environment.

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4. The Chairman sought clarification as to whether there were precedent cases in which the Court had made a ruling by adopting a literal interpretation of the strict liability provisions. AC for L responded that the Labour Department did not keep separate records for strict liability offences. Nevertheless, he would search for some such cases for reference by members.

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5. The Chairman pointed out that the Administration had not addressed members' concern as to whether it was reasonable to require a responsible person to guarantee that his employee could pass the training test and obtain a certificate under the proposed section 4(1). The Chairman said that the phrase "to be evidenced by possession of a valid certificate" in section 4(1) of the Regulation was unnecessary as there was a separate provision in section 3 governing the qualifications of an operator of the loadshifting machines. Miss Cyd HO also expressed concern that the Regulation as presently drafted could lead to confusion about the coverage and the duties of a "responsible person".

6. AC for L explained that the "responsible person" referred to in sections 3 and 4(2) might not necessarily be the same person. Under section 3, the responsible person referred to the person who needed to use a loadshifting machine, but under section 4(2), the responsible person was the employer of the machine operator. Section 3 required the responsible person to ensure that the loadshifting machine was operated by qualified persons while section 4 imposed the duty on responsible person to provide training to such operators.

7. The Chairman expressed doubt as to whether the legislative intent had been clearly reflected in the Regulation. In response to the Chairman, Assistant Legal Adviser 5 (ALA5) advised that there could be circumstances that a responsible person might not necessarily be the employer of a machine operator. For instance, a contractor responsible for the management of a construction site might not be the employer of the operator, therefore the contractor would have no duty under section 4.

8. The Chairman sought further clarification on the duties of the employer under section 4, for example, whether the employer would need to ensure that his employee would pass the training test and acquire the certificate. ALA5 advised that the interpretation of section 4(1) (version as at 20 December 1999) could include arrangement by the employer for the operator to re-sit the test, as the section contained the requirement of "to be evidenced by the possession of a valid certificate". ALA5 pointed out it would be a policy matter for the Administration to consider as to whether the employer would have the duty to arrange re-sit of tests.

9. AC for L said that it was the duty of the employer to provide training to an operator so that the person "employed and instructed" by him to operate the

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loadshifting machine could obtain a valid certificate after training. If that person failed to obtain a certificate after making attempts, the employer would have no responsibility as section 4(1) would not apply as long as the person was not instructed to operate the machine.

10. Referring to section 8(2), ALA5 pointed out that it would be an offence if a responsible person failed to comply with the requirements in section 4(1) without reasonable excuse. He enquired whether not providing re-sitting arrangements could be regarded as a reasonable excuse for the purpose of section 8(2). The Chairman said that while she agreed that a responsible person should provide training, the Administration should consider spelling out clearly the re-sitting arrangements in the Regulation. The Chairman also expressed concern whether an employer was liable under section 4(1) if he had recruited a person to operate a loadshifting machine, irrespective of whether that person was actually required to operate the machine afterwards.

11. AC for L responded that, subject to legal advice, the employer had only indicated his "intention", instead of giving instruction for an employee to operate the machinery at the time of recruitment. The legislative intent of section 4(1) was to ensure that loadshifting machines were operated by persons who possessed valid certificates. If a person failed to obtain a valid certificate after repeated attempts, his employer could consider re-deploying him to another post. AC for L reiterated that a responsible person would only commit an offence if he had instructed a person who did not possess a valid certificate to operate the machine.

12. The Chairman suggested the Administration to consider simplifying the drafting of sections 3 and 4, in order to differentiate the duties of a responsible person to provide training for a loadshifting machine operator from the requirement for ensuring that the operator must meet the minimum age of 18 years and possess a valid certificate.

13. Senior Government Counsel (SGC) said that if the phrase "to be evidenced by the possession of a valid certificate" was to be removed from section 4(1), Labour Department might have difficulties to institute prosecution against an employer for not providing training to an operator of the machine. The responsible person could claim that he had provided training or was going to do so, which was very difficult to prove.

14. AC for L added that the intention of section 4 was to ensure that a responsible person would provide training to operators of loadshifting machines, to be evidenced by the latter's possession of a valid certificate.

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15. Miss Cyd HO commented that if an employer was required to provide training and guarantee that the employee would pass the training, the employer might eventually choose to employ one who was already in possession of the certificate. Mr CHAN Wing-chan considered that the current drafting of the Regulation was unclear as to who should bear the cost for re-sitting arrangements. Mr LEE Kai-ming also expressed concern about the financial burden on the employee if the latter had to pay for re-sitting the test. He pointed out that many existing operators had not received formal training. If they failed the test, they could not continue with their employment in the industry unless they made further attempts and bore the related expenses.

16. Principal Assistant Secretary for Education and Manpower (PAS(EM)) advised that participants of the forklift truck training courses provided by the Vocational Training Council (VTC) or the relevant trade unions could apply to re-sit the test for one time free of charge. Those of the earth-moving machinery training courses provided by the Construction Industry Training Authority could apply to re-sit the part(s) of the test they had failed but had to pay for the test fees. He added that the passing rates of these courses had been very high. As the trainees were mostly serving operators, there should be little difficulty for them to pass the test which was focused on the safe operation of machinery.

17. To address members' concern and to remove the ambiguity in respect of the duties of a responsible person, the Chairman advised the Administration to consider specifying in section 4 the number of re-tests to be provided by a responsible person. In this connection, she suggested that one additional course could be arranged by the employer.

18. AC for L and SGC said that enforcement difficulties might arise if a responsible person was not required to ensure that an operator would pass the training and obtain a certificate. He stressed that the intention of section 4(1) was not to provide endless training to the employee. If the employee failed to obtain a certificate, the employer could re-deploy the employee to another post.

19. Miss CHOY So-yuk commented that the drafting of section 4(1) might not give the intended legal effect, and that an employee might not necessarily agree to re-deployment.

20. The Chairman concluded that the Subcommittee did not object to the training and certification requirements for operators of specified loadshifting machines. However, members had expressed much concern about the strict liability imposed on a responsible person by requiring him to ensure that the operator must pass the training test. The Chairman considered that the problem could be solved by improving the drafting of sections 3 and 4, and by specifying the number of re-test to be provided by the employer. PAS(EM) agreed to reconsider the drafting of sections 3 and 4.

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Commencement notice to be made under the Regulation

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21. PAS(EM) said that the commencement notice to be made under the Regulation would be subsidiary legislation subject to the negative vetting procedures of the Legislative Council under section 34 of the Interpretation and General Clauses Ordinance. The Administration would also allow a grace period up to 18 months for the Regulation to come into effect. As there would be ample time for Members to comment on the commencement date of the Regulation, the Administration did not consider it necessary to subject the commencement notice to the positive vetting procedures. He assured members that the Administration would report to the Panel on Manpower of the Legislative Council before commencement of the proposed Regulation.

22. Members raised no further questions on the arrangement for commencement notice and the proposed amendments listed in paragraph (c) of the Administration's response [Paper No. CB(2)817/99-00(01)].

**II. Clause-by-clause examination**

[Paper No. CB(2)704/99-00(01)]

Section 5 - Duty of person to attend training course

Section 6 - Production of certificate

23. ALA5 advised that under section 5, a person attending the training course provided by a responsible person was not required to pass the test, which was different from the requirement for a responsible person in section 4.

24. Members raised no questions on these two sections.

Section 7 - Exemption

25. In response to Mr LEE Kai-ming and the Chairman, PAS(EM) said that a holder of a valid driving licence for truck and lorry issued under the Road Traffic Ordinance would be exempted from the Regulation. However, those drivers holding a Special Purpose Vehicle Driving Licence would not be exempted, because they were not required to undergo driving tests prior to the issue of such licence. He explained that as the proposed training was to enhance the safe operation of loadshifting machines at construction sites and industrial undertakings, it would not be appropriate to exempt this category of drivers from the training requirement.

26. In response to Mr LEE Kai-ming's further enquiry, PAS(EM) said that a truck or lorry was usually used for transporting construction materials within a

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construction site, and that there were similar safety requirements for operation of a truck or lorry as the road safety requirement. For other types of loadshifting machines used in construction sites and industrial undertakings, it involved not only the movement of machinery from one location to another, but also the use of machines for other activities, such as loading and unloading of cargoes.

27. AC for L added that the issue of Special Purpose Vehicle Driving Licence by Transport Department was confined to the movement of the specified vehicles on some restricted roads. He clarified that all operators, except truck or lorry drivers, would need a certificate for operating a loadshifting machine on construction sites and at the cargoes handling areas.

Section 8 - Offences and penalties

28. Responding to the Chairman, ALA5 advised that a fine at level 3 and 5 was respectively \$10,000 and \$50,000.

29. PAS(EM) said that the Administration had proposed an amendment to section 8(3) to specify that a person was liable to an offence if he failed to attend the training course provided. The Chairman suggested that the reference to the "person" in section 5 might need to correspond with that under section 4(1). SGC agreed to revise the drafting to the effect that "any person" meant "a person who was instructed to operate the machine as mentioned in section 4(1)".

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Schedule

30. In response to Mr LEE Kai-ming, AC for L said that the schedule listed all common loadshifting machines currently used in the industrial undertakings and construction sites in Hong Kong.

31. Members raised no other questions on the Schedule to the Regulation.

Way forward

32. In response to the Chairman, PAS(EM) agreed to provide a complete set of the revised Regulation by February 2000 incorporating members' views.

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Clerk

33. In concluding the deliberation of the Regulation, the Chairman said that the Subcommittee supported the general principle of the training and certification requirements proposed in the Regulation, with the exception of section 4(1) under which a responsible person was required to guarantee that the employee must pass the training test and obtain a valid certificate. She urged the Administration to amend section 4(1) to address members' concerns. Otherwise, the Subcommittee would propose an amendment to section 4(1). The Chairman further advised that the revised Regulation from the Administration would be circulated to members and that a further meeting might not be necessary if members were satisfied with the finalized amendments.

*(Post-meeting note : The Subcommittee agreed to the revised version of the Regulation provided by the Administration on 28 January 2000 [LC Paper No. CB(2)996/99-00]. The Chairman therefore reported to the House Committee on 18 February 2000.)*

### **III. Any other business**

34. There being no other business, the meeting ended at 12:30 pm.

Legislative Council Secretariat

13 March 2000