Construction Industry Prosecution Cases Under Malaysian Occupational Safety and Health Legislation

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<td>In 2015, a total of 140 construction workers, which consists of 47 locals and 93 foreigners (DOSH) suffered fatal injuries from on-site accidents. These workers are prone to be involved in mishaps due to unsafe use of tools and inexperienced handling of machines and materials in construction sites. In order to prevent industrial accidents from occurring, the Malaysian government established the Occupational Safety and Health Act 1994 for employers or firms to use as a guideline for them. Occupational Safety and Health Act 1994 (OSHA 1994) is used for employer, employee and manufacturer to put efforts in securing safety, health and welfare at workplace. According to numbers of accidents occurred on construction sites, it can be assumed that the enforcement and the compliance of OSHA by both employers and employees are weak. The prosecution is the last method executed in order to penalize the violation of the act by employers. Employers often do not want to spend money to comply with safe working practices to employees. But after an accident occurs, the employer will have to spend a lot of money for compensation of accidents and penalty imposed by DOSH. So far, there is very little published data and analysis of the prosecution cases under the Malaysian OSH legislation. Thus, the objectives of this study are to analyze the most common non-compliance cases of OSH legislative provision from a collection of prosecution cases, to determine the barrier to non-compliance of OSH legislation in the construction industry and to generate ways to increase compliance to OSH legislation for the construction industry. The study was conducted through several phases. There are three phases of research methodologies to answer the three objectives. The findings assisted the study in formulating recommendations that could significantly improve the efficacy and compliance levels of OSH legislation in the construction industry in Malaysia.</td>
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1. Introduction

In Malaysia, occupational safety and health (OSH) matter is under the jurisdiction of the Department of Occupational Safety and Health (DOSH). This government agency is responsible for administering, managing, and enforcing legislation related to occupational safety and health (OSH) in this country with the vision to cultivate an OSH culture in every workplace and to make every job and task safe and healthy for employers [1]. Other agencies which also monitor the construction safety is the Construction Industry Development Board (CIDB). Construction Industry Development Board Malaysia (CIDB) has taken the initiative to ensure that all workers in the construction sector possess a Green Card which required workers to have a safety training certificate before they start working. Besides ensuring construction workers to be aware of the importance of the workplace safety, the green card program also aims to provide information on the legal requirements and welfare for them.

Occupational Safety and Health Act 1994 is for the employer, employee and manufacturer to put efforts in securing safety, health and welfare at the workplace [2]. But, the increase in prosecution cases under OSH legislation indicates the lack of compliance to the regulations. Many employers have not

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established comprehensive accident prevention policies, but instead concentrate on maximizing profit [3]. The increase in the statistics for the prosecution cases in the construction industry reflects a lack of awareness of safety law in the construction industry in Malaysia.

1.1 Problem Statement

In 2015, a total of 140 construction workers, which consists of 47 locals and 93 foreigners [4] suffered fatal injuries from on-site accidents. These workers were prone to be involved in mishaps due to unsafe use of tools and inexperienced handling of machines and materials in construction sites. In order to prevent accidents in construction sites, the government imposed the Occupational Safety and Health Act 1994 for employers or firms to use as a guideline in managing the safety of labourers. According to the available data on Prosecution Cases under Malaysian Occupational Safety and Health Legislation for Construction Industry, there are various prosecution cases, but the issues are similar. The common issues are companies failed to hire Occupational Safety and Health officers, unreported accident cases to DOSH, the occupational safety and health committee were not formed etc.

According to the number of accidents presented by the DOSH’s data in construction, we can see that the compliance of OSHA in the construction industry is frail. Besides, enforcement and monitoring from DOSH seem to be less strict for employers. Enforcement of regulations is very vital in ensuring the efficiency of regulations [5]. Legislation or regulation is a guideline to control the activities in the construction industry for safety.

In addition, according to Conn and McMahon (2016), it has been forty plus years since the American Congress enacted the OSH Act in their country [6]. Despite the length of years, there have been more than 400,000 workplace fatalities, yet fewer than eighty total OSH Act criminal cases have been prosecuted and only approximately a dozen have resulted in criminal convictions. Historically, the prosecutions typically have targeted cases in which the employers were alleged to have falsified documents and lied to OSHA in conjunction with underlying regulatory violations relating to an employee fatality. In other words, the “cover up,” so to speak, was worse than the crime. Chronic violators and employers who demonstrated a systematic rejection of worker safety laws also were more likely to face charges. Johnstone (2003) added that in the 1990s, about 90 percent prosecutions were cases where employers had failed in their general duties to employees in Victoria [7].

So far, there is very little published data and analysis of the prosecution cases under the Malaysian OSH legislation. Therefore, this study is important and timely in order to examine the most common cases and possible barrier of non-compliance to the OSH legislation based on the reported prosecuted cases. Not only that, this research would suggest several ways to increase compliance with OSH legislation in the construction industry.

1.2 Aim and Objectives of Study

The aim of this study is to examine the prosecution cases under the Occupational Safety and Health (OSH) legislation for the construction industry in Malaysia. Therefore, three (3) main objectives have been identified in this study as follows:

i. To analyze the most common non-compliance of OSH legislation provisions from the prosecution cases.

ii. To determine the barrier to non-compliance of OSH legislation in the construction industry.

iii. To generate ways to increase compliance to OSH legislation for the construction industry.

1.3 Scope of Study

This study focus on the prosecution cases under OSH legislation in the Malaysian construction industry based on data compiled by the Department Occupational Safety and Health (DOSH). Prosecution cases in the construction industry from April 2006 until February 2017 will be analyzed to provide data for the first objective.

A survey will be formulated for the respondents of this research who consists of contractors of construction companies and officers of Department Occupational Safety and Health (DOSH). The survey would be able to show the level awareness, level of knowledge, types of action, and types of reinforcements which were already taken by the respondents.

2.0 BRIEF LITERATURE REVIEW

A prosecution for criminal law is fundamental and it must be administered in an appropriate fashion as stated by Gunningham (2007) [8]. He also added that the legislature had chosen to emphasize the importance of occupational health and safety matters by
creating absolute offenses [8]. The prosecution is the last action that must be executed because there are employers who violate the legal provisions. Employers often do not want to spend money to comply with safety working practices to employees. But after an accident occurs, the employer will have to spend a lot of money for compensation of accidents and penalty imposed by DOSH. According to Aziz et al. (2015), an effective implementation of OSH can reduce accident rates and thus reduce the compensation paid [9].

As Hawkins (2002) suggested, prosecution is a ceremonial restatement of norms by which people and individuals' order social life [10]. Its use sustains the moral world which the regulatory organization inhabits. One way it does this is through the satisfaction given by the prosecution of a blameworthy defendant that moral boundaries are being maintained and reinforced. In fact, the OSH legislation is to ensure that both employers and employees are in a safe condition. Prosecution in this legislation matter is not to find fault with anyone but rather to maintain a safe working environment.

Most countries implemented the OSH legislation for the sole purpose of ensuring safety among labourers. An example of non-compliance of employer happened in the United Kingdom. CornwallLive (2017) posted that an employee was found floating face down in a sand filtration unit at a South West Water facility at Falmouth Docks on December 30, 2013. The company, South West Water, has been fined nearly 2 million for failing to ensure the safety of an employee [11].

Generally, a prosecution can be translated as one of the frequently employed instruments for the enforcement of health and safety legislation but it is not used arbitrarily without using proper procedures. Mekos (2010) mentioned that in Greece, the penal procedure for such issue usually starts on an initiative of a labor inspector who sends a complaint report to the public prosecutor [12]. Companies would face the same mean of legislative act if the employer and the employee do not comply with the act that has been enforced.

A previous study by Johnstone (2003) mentioned that a failure to comply with a legal act would generally lead to prosecution [7]. In addition, he also stated that a guideline which had set out six circumstances in which prosecutions would generally be taken; a Victorian OSH inspectorate's 1985 Prosecution Guidelines enlisted the rules below:

- the willful repetition of the same offence
- non-compliance with a provisional improvement notice
- offenses in relation to inspectors
- discrimination against an employee or prospective employee
- where the issue of notices is not considered appropriate for ensuring compliance

2.1 Types of offense in prosecution cases

Guo et al. (2015) reported that to improve the construction safety performance, continuous efforts have been made by both researchers and practitioners to enforce OSH laws [13]. From the following procedures that the offenders going through, there are several types of prosecution cases that happened in the construction industry. Cases were subjected to the specific sections of the OSHA 1994. These are the types of offense in OSH prosecution cases in Malaysia:

1) Failed to establish an OSH committee under Section 30(1), OSHA 1994
2) Failed to appoint Safety and Health Officer under Section 29(2), OSHA 1994
3) Failed to report the accident at the construction site to the nearest DOSH office under Section 32(1), OSHA 1994
4) Failed to provide safe work procedures under Section 15(1), OSHA 1994
5) Failed to comply with a prohibition notice under Section 49(1), OSHA 1994
6) Failed to check up and maintenance scaffolding structure until causes fatal accident under Section 17(1), OSHA 1994

2.1.1 Failed to establish OSH Committee

According to Occupational Safety and Health Act (1994), every employer should establish a safety and health committee in its organization in accordance with this section if [2].

(a) there are forty or more persons employed at the place of work; or
(b) the Director General directs the establishment of such a committee at the place of work.
The composition of a safety and health committee established under above subsection the election or appointment of persons to the committee, the powers of the members of the committee and any other matter relating to the establishment or procedure of the committee shall be as prescribed.

Every employer shall consult the safety and health committee with a view to the making and maintenance of arrangements which will enable him and his employees to cooperate effectively in promoting and developing measures to ensure the safety and health at the place of work of the employees, and in checking the effectiveness of such measures.

2.1.2 Failed to appoint Safety and Health Officer

According to Occupational Safety and Health Act (1994), an occupier of a place of work to which this section applies shall employ a competent person to act as a safety and health officer at the place of work. The safety and health officer shall be employed exclusively for the purpose of ensuring the due observance at the place of work of the provisions of this Act and any regulation made thereunder and the promotion of a safe conduct of work at the place of work.

2.1.3 Failed to report the accident at the construction site to the nearest DOSH office

According to Occupational Safety and Health Act (1994), an employer shall notify the nearest occupational safety and health office of any accident, dangerous occurrence, occupational poisoning or occupational disease which has occurred or is likely to occur at the place of work.

2.1.4 Failed to provide safe work procedures

According to Occupational Safety and Health Act (1994), it shall be the duty of every employer and every self-employed person to conduct his undertaking in such a manner as to ensure, so far as is practicable, that he and other persons, not being his employees, who may be affected thereby are not thereby exposed to risks to their safety or health.

2.1.5 Failed to comply with a prohibition notice

According to Occupational Safety and Health Act (1994), a person to whom an improvement or a prohibition notice is issued under Section 48 must comply with the same notwithstanding that an appeal against its issuance has been lodged. Besides, a person who without reasonable excuse fails to comply with any improvement or prohibition notice issued under Section 48 shall be guilty of an offense and shall, on conviction, be liable to a fine not exceeding fifty thousand Ringgit or to imprisonment for a term not exceeding five years or to both, and to a further fine of five hundred Ringgit for each day during which the offense continues.

2.1.6 Failed to create access at site construction until cause a fatal accident

a) According to Occupational Safety and Health Act (1994), it shall be the duty of every employer and every self-employed person to conduct his undertaking in such a manner as to ensure, so far as is practicable, that he and other persons, not being his employees, who may be affected thereby are not thereby exposed to risks to their safety or health.

b) It shall be the duty of every employer and every self-employed person, in the prescribed circumstances and in the prescribed manner, to give to persons, not being his employees, who may be affected by the manner in which he conducts his undertaking, the prescribed information on such aspects of the manner in which he conducts his undertaking as might affect their safety or health.

There are some cases that we can go through. There are all sorts of cases prosecutions have occurred no matter in Malaysia or other countries. According to Johnstone (2003) prosecution cases in Victoria during the period 1983–1991 had involved only 21 of the 594 cases (under 4 per cent) prosecuted involved a fatality [7]. Most cases which were prosecuted (67 percent) had involved incidents where fingers or hands were amputated, lacerated or otherwise injured. In the period from 1992–1999, just over 20 percent of prosecuted cases involved fatalities. About 30 percent of cases involved hand injuries and there were increases in the number of prosecutions for burns (6 percent) and harm from chemical exposure (2 percent). Not only that, from the United State Department of Justice (2005) said in 2005, Motiva Enterprises, LLC, the largest oil refinery in U.S. pled guilty to Clean Air Act and Clean Water Act violations [14]. An incident had involved an explosion that killed 1 employee and injured 9. This was a case which revealed the employer had no responsibility to make sure their employees are safe while working.
Based on the previous study, there are many cases of prosecution in occupational, safety and health legislation. This legislation is a mandatory act for every workplace, whether for the employee or the employer in order to prevent an accident and resulted in a prosecution. We can see, factors of non-compliance to legislation happened are:

i) Safety Management
   • Inadequate instruction
   • Rules are not enforced
   • Safety ignorance
   • Hazard ignorance
   • No safety devices

ii) Conditions of workers
   • Lack of safety awareness
   • Lack of co-ordination

iii) Physical Conditions
   • Fatigue
   • Unqualified workers

OSH legislation applies in all countries. The Labour, Safety, Health and Welfare Bill of 2012 empowers the National Council for Occupational Safety and Health to: enforce and implement OSH measures in the workplace; promote the protection of lives & properties; promote OSH awareness; carry out an inspection of the workplaces and monitor the compliance of all regulations or other OSH measures enshrined in the Bill [4]. From the case study in Nigeria, the barriers to comply the OSH legislation are:

- Lack of skilled person power
- Political influence
- Severity of penalties
- The judicial system
- Corruption and bribery
- Inadequate funding
- Inadequate legislation
- Lack of governmental commitment
- Insecurity
- Inadequate information
- Technology & economic growth
- Culture

Based on the factors above, compliance or enforcement of OSH legislation in Nigeria had become worst. These limitations in Nigeria must be solved with several ways. Recruitment and training of enforcement officers will improve enforcement of OSH regulation. The population of Nigeria is over 165 million; however, the number of enforcement officers is very low. Therefore, if more trained professionals are recruited and trained as OSH inspectors and enforcers, this will boost OSH enforcement in Nigeria. In the absence of proper enforcement of OSH regulations, organisations should adopt self-regulatory style of enforcement, as optimum OSH improve the images of the organizations and enable the organisations to maximise profit. Local government authorities should be involved in the enforcement of OSH regulations as done in the UK. Currently, the planning departments of many local government councils ensure that all buildings in the local government have approved building plans. A similar department made up of trained OSH inspectors should be set up to carry out inspection of workplaces at local level. As adequate information is vital in ensuing optimum OSH, provisions for adequate OSH information is pertinent, perhaps through information technology: mobile phone technological means of reporting accidents and unsafe practices can be adopted in Nigeria. Not only that, the development and adoption of Approved Code of Practice (ACOP) as applicable in the UK, as they will help with compliance and preventive (i.e. proactive) enforcement of OSH regulations. The Enforcement authority can develop these ACOPs. ACOPs are approved guidelines that help organisations, individuals and employees to comply with OSH regulations and indirectly ensure proactive enforcement. OSH regulations should be updated and revised as required to avoid having outdated regulations or regulations with plenty limitations.

Interviews with management of Thika municipality industries noted that the main reasons for non-compliance with OSH measures by industries are [15]:

- Reluctant safety officers who are supposed to carry out inspections.
- Inactive health and safety committees in the industries.
- Lack of awareness of importance of OSH measures.
- Lack of adequate resources to implement OSH measures by the industries.
- Some of the industry managements are ignorant of OSH measures.

Some recommendations that, if implemented, would improve the safety and health of workers in industries in Thika municipality. The management of industries in Thika municipality should develop laws and regulations to ensure employees comply with the OSH measures in the industries. For immediate action, it is crucial to making OSH
laws, mandatory for employees to wear PPE while at their places of work. There should be a safety and health committee in every industry that will ensure that the industry complies with all the required OSH measures. The management of industries should put in place measures to raise awareness among the employees about OSH and its importance. The employees should also be given trainings like fire safety and first Aid training. Personnel working in hazardous areas in the industries should be educated about the prospective hazards and about the safety mechanisms that can help them in dangerous situations. The government should provide all the necessary resources to facilitate inspections in the industries to ensure that OSH regulations are complied with. Some of the resources that are inadequate, according to the study include: Staff, funds and transport facilities.

Effectiveness of compliance of OSH enforcement could be improved also by the following [16]:

- More instructions and advice are given to workplaces
- The quality of inspection is improved
- Resources are allocated on customer-initiated inspection requests
- The professional skills of the inspectors are being developed
- Inspectors spend more time in the workplaces to be inspected
- The safety management systems of the workplaces are inspected
- The function of the safety management systems of the workplace is monitored in practice
- The inspections are concentrated on objects of enforcement defined in the performance agreement
- The work of the inspectors is harmonized
- More inspections are carried out at a distance
- Follow-up enforcement carried out at a distance is made more effective
- More follow-up enforcement are being carried out
- More follow-up visits are being made
- The enforcement of each section of the Act is made stricter

3.0 METHODOLOGY

The study will be conducted through several phases. The first phase is a preliminary study which explains about the problem statement, study aim, the three (3) objectives, scope and importance of the study. The second phase is the literature review, which explains in detail about prosecution under Malaysian occupational safety and health legislation for the construction industry and the issues of non-compliance with the OSH legislation.

The third phase is field study and data collection. The primer data were acquired using document search and interview, whereas the secondary data will be gathered from journal articles and other published report. The main data for this study were based on the prosecution cases compiled by DOSH from April 2006 until February 2017. The prosecution cases will be analyzed to classify the most common non-compliance with the OSH legislation. The barrier of non-compliance of OSH legislation and ways to increase compliance to OSH legislation are acquired through questionnaire survey and expert interview. The data are analyzed using frequency distribution analysis and average index method. The results will be discussed and presented in tables and figures to simplified understanding.

4.0 EXPECTED FINDINGS

The aim of this study is to examine the compliance OSH legislation in Malaysian construction industries according to prosecution cases. The expected findings would provide a guidance based on three objectives which are to identify the most common non-compliance of OSH legislation provisions from the prosecution cases, and an overview of the barrier to non-compliance of OSH legislation from contractor as an employer to the workers. Lastly, suggestions on ways to increase compliance to OSH legislation in the construction industry would be formulated.

From this study, a list of common non-compliance of legislation would be created. The list will be sorted according to the top ten common non-compliance clauses or sections in OSHA 1994. For the second objective, a list of barriers to comply the legislation would be made. Finally, according to the list, we need to come out with some methods to overcome the barrier and to reduce the non-compliance with legislation and also can reduce prosecution cases in Malaysia.

Reference


