

Construction Update

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HSE Statistics

Construction remains one of the highest risk sectors for serious and fatal accidents. According to statistics released by the HSE for the year 2018/19 - 79,000 workers suffered from work-related ill-health. Of these cases 21% related to stress, depression and anxiety and 62% to musculoskeletal disorders.

There were 30 fatal injuries to workers and 7 to members of the public, which is 3 times the average for all industries with 49% of the fatal injuries being as a result of falls from height.

In respect of the 54,000 non-fatal injuries: 25% were slips, trips or falls; 20% were due to handling, lifting or carrying; 18% due to falls from height and 12% were due to individuals being struck by moving objects.

There were 158 prosecution cases by the HSE (or the Crown Office and Procurator Fiscal in Scotland)

Of these cases, 146 resulted in a conviction of at least one offence (92%). This is a decrease in the number of prosecutions in 2017/18 which was 202 (resulting in 190 convictions of at least one offence). This reflects our own experience that we are having greater success in persuading the HSE not to prosecute cases especially where we have sound evidence to advance an arguable defence. It is therefore more vital than ever before that individuals and organisations obtain immediate legal advice at the outset of an incident and criminal investigation to preserve their position and any potential defence.

Occupational Stress in the Construction Sector

Interestingly, according to the HSE statistics, only 0.7% of workers suffered from stress, depression or anxiety which is statistically significantly lower than the average across all industries (1.4%). However research published by the Office for National Statistics indicates that the risk of suicide among low-skilled male labourers, particularly those working in construction roles was 3 times higher than the male national average.

The low incidence rate of mental ill-health in construction compared to the national average could be due to mental ill-health being under reported by employees due to a perceived stigma attached to the issue. There is no suggestion that the suicide rate is caused as a direct result of working in the construction sector. There are many other societal, socio-economic, and physiological reasons which may explain the higher rate.

Employers have duties under the Management of Health and Safety at Work Regulations 1999, to assess the risk of stress-related ill health arising from work activities and under the Health and Safety at Work etc. Act 1974, to take reasonably practicable measures to control that risk.

Whatever the initial cause of mental ill-health employers have a duty of care to ensure the mental health of their employees especially once an issue is known. Steps must be taken to prevent the exacerbation or relapse of mental ill-health as a result of work, these could include:

- Phased return to work
- 1 on 1 support and counselling
- Referral to an occupational health provider
- Provision of talking therapies

As with any other workplace hazard, if employers fail to adequately protect their employees from work-related stress, the HSE could investigate and take appropriate enforcement action. Work-related stress is one of the HSE's key strategic health priorities and in the future we expect to see prosecutions brought against organisations who fail to properly control the risk of stress-related ill health, which could result in significant fines imposed on offenders.

Within the construction sector, the duties to manage the risk of mental ill-health could extend not just to an employee's direct employer but also to other duty holders under the Construction (Design and Management) Regulations 2015 such as the Principal Contractor as part of the duty to plan, manage, monitor and co-ordinate health and safety in the construction phase of a project.

Sentencing

Total fines in the construction sector for 2018/19 were £15.7m which is an average fine of £107,000 per conviction.

Organisations involved in construction site incidents continue to be vulnerable to high fines given the hazardous nature of many construction activities, which means that even if incidents do not result in a fatality or a life changing injury, the Courts may still impose a high fine under the Sentencing Guideline due to the risk of harm created by the breach of duty.

The HSE have also demonstrated that they are not afraid to prosecute individuals as well as organisations. A useful example of this is the conviction in 2019 after a trial, of Clancy Docwra and one of its employees for breaches of health and safety legislation. They were prosecuted by the HSE following the death of an employee who was crushed against a wall by an excavator mounted vibrator (EMV) attached to a 35-tonne excavator, whilst he was working in close proximity to it. According to the HSE, the risks had not been properly considered and all site operatives should have been made aware of the exclusion zones required and the use of excavator safety levers.

The company was found guilty of breaches of sections 2(1) and 3(1) of the Health and Safety at Work etc. Act 1974 and was fined £1m and ordered to pay the prosecution costs of £108,502.30.

In addition to this, the site supervisor, Daniel Walsh, was found guilty of a breach of s.7(a) of the Health and Safety at Work etc. Act 1974 and was given a 6 month custodial sentence, suspended for 12 months and ordered to pay costs of £15,000.

This case is a stark reminder to all employees working on a construction site that under s.7(a) of the Health and Safety at Work etc. Act 1974 they owe a duty to take reasonable care for the health and safety of themselves and of other persons who may be affected by their acts and omissions at work. Failure to do so could easily result in a custodial sentence.

In cases involving a fatality, individuals could also face the prospect of an investigation into the offence of gross negligence manslaughter, which has much tougher maximum penalties (up to 18 years in custody compared to a maximum 2 years in custody for a conviction under s.7). However this offence is much more difficult to prove than a breach of s.7 and tends to be reserved for the most serious of failings.

New HSE guidance on welding fumes

In February 2019, HSE announced that there was to be a change in enforcement expectations for mild steel welding fumes. The announcement followed new scientific evidence that exposure to **all** welding fumes, including mild steel welding fumes, can cause lung cancer. There is also limited evidence to suggest that there may additional links to kidney cancer.

The consequence of this evidence is that there is now no known safe level of exposure to welding fumes and employers need to ensure that all welding activities are assessed and suitably controlled to ensure the health, safety and welfare of those undertaking the activities.

There is also now the requirement for the use of Local Exhaust Ventilation (LEV) to be used for indoor welding tasks along with suitable RPE (respiratory protective equipment) to protect against residual fumes.

We are starting to see an increase HSE inspectors targeting this issue with our clients and checking the suitability of RPE during site visits. If RPE is deemed unsuitable or not being used properly and the inspector considers that this constitutes a breach of the relevant health and safety legislation then inspectors are issuing Notification of Contraventions to clients, which in turn incurs subsequent charges under the Fee for Intervention Scheme.

Chris Baranowski and Charlotte Miles are part of the DAC Beachcroft regulatory team and specialise, in particular, in advising duty holders involved in construction who are facing investigations for corporate manslaughter, gross negligence manslaughter and other health and safety offences.

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