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CDM and the Construction Industry

The new Construction Design and Management (CDM) regulations 2015 came into force on 6 April, following a five-year evaluation of the CDM regulations 2007.

James Ritchie, Association of Project Safety, will be presenting a panel debate on CDM at the Safety & Health Expo in June. He spoke to the show organisers about the challenges of CDM within the construction industry and what visitors can expect from the session in June.

What will be the biggest challenges with the introduction of CDM 2015?

By far the biggest challenge to the construction industry will be around implementation of CDM and coordinating health and safety on the smaller projects where this has not been required up until now.

The next biggest problem will be around ensuring that designers who take on the principal designer role have no only good technical ability but also sufficient skills, knowledge and ability in terms of design and construction health and safety risk management. I am not sure how many of them have 'clocked' that when the new CDM Regulations ask for skills, knowledge and experience, it means health and safety skills, knowledge and experience not just technical design.

How can safety and health practitioners and the health and safety industry assist with the implementation of CDM 2015?

By taking a proportionate but considered approach to construction health and safety risk management.

Small, simple projects should only require the production of short, simple, construction phase plans and provision of clear information from designers on only the significant residual design risk issues in their designs.

This approach relies on those construction health and safety practitioners who advise clients, contractors and designers, to ensure that they are not creating unnecessary bureaucracy in order to 'cover backsides'. There is, and will be, a need for good clear risk management advice on larger or more complex projects and health and safety practitioners, who have a good understanding of the design and construction process and how to coordinate health and safety, will have an important part to play in the delivery of CDM2015.

What can visitors to Safety & Health Expo expect to get out of attending your session around CDM?

Hopefully clear advice and guidance on the new CDM Regulations and how they should be implemented.

We would like to see agreement from all sides of the industry on a common, proportionate approach to implementation. We have been given the CDM Regulations – the industry now needs to get on and deal with them.

Drug driving: What Your Business Needs to Know

On March 2 2015, new regulations aimed at cracking down on drug-drivers came into force in England and Wales.

Although it has always been illegal to drive whilst under the influence of drugs, the new laws specify exact limits for 16 different illegal and prescription drugs, bringing the legislation in line with drink-driving laws.

Under this new legislation, police will be able to carry out roadside saliva tests, as well as impairment checks. Portable 'drugalysers' will be able to detect cocaine and cannabis whilst a blood test will be taken for other substances including heroin, ecstasy and prescription drugs.

Those using prescription drugs within recommended amounts will not be penalised.

Prescription drugs covered by the new law are clonazepam, diazepam, flunitrazepam, lorazepam, oxazepam, tamazepam, methadone and morphine. Penalties for drug-driving will be similar to those given for drink-driving and could include a criminal record, a 12-month ban, as well as a fine of up to £5,000.

Employers, particularly those operating a fleet or supply business, need to be aware of these changes. Employees should continue taking their prescription medicines, but be made aware that it is their responsibility to ask their doctor or pharmacist if they might affect their ability to drive. Any drivers that take prescription medication should also be encouraged to carry proof, which they can produce at the roadside if necessary.

Workplace policies and procedures must be in place, which allow employers to deal with any employee who breaks the law. For example, an employer might want to dismiss an employee if they are no longer able to work because of a drug-driving ban or where there are insurance problems due to a previous conviction for drug driving. If an employee has been made aware of the implications of the law and the consequence of its violation to their employment, they are in no position to contest dismissal.

As part of their wider risk assessments, employers should also consider conducting their own random drug testing. To be effective, employers need to introduce a clear drug-testing policy and there should be no doubt about the consequences for any employee who fails a test or refuses to be tested.

By Graham Evans
Graham Evans is practice leader at Risk Solutions

Guidelines for Appropriate Fines

Kevin Bridges and Chris Hopkins consider the environmental sentencing guidelines that came into effect in 2014, and how the proposed new guidelines for health and safety may have a similar impact.

Michael Caplan QC from the Sentencing Council introduced the proposed new sentencing guidelines for health and safety, corporate manslaughter and food hygiene offences in SHP's News Analysis.

While we await the outcome of the consultation process on the proposals, which closed on 18 February, it is interesting to consider what impact the separate guidelines for environmental offences have had since taking effect in July 2014.

Those guidelines apply specifically to waste and environmental permitting offences but make clear that sentencing courts should also refer to them when dealing with other environmental offences. Separate environmental guidelines exist for organisations and individuals and follow a '12 step' approach, with the court required to consider initially the offender's level of culpability and harm to determine the offence category.

For organisations, the starting point and the appropriate range for the fine is based on the organisation's turnover or equivalent. For large organisations (turnover of £50m and over) the starting point in the guidelines for the most minor of environmental offences is £10,000, while for the most serious cases it is £1m (within a range of up to £3m). By contrast, for large organisations convicted of the most serious health and safety offences, the draft guidelines propose that fines should fall within a range of between £4m and £10m. Larger fines will apply to very large organisations with turnovers well in excess of £50m.

The guidelines are mandatory in their application and some cases that have come before the courts since they took effect are worthy of comment. South West Water (SWW) has been sentenced twice under the guidelines. It has a turnover of £500m (ten times that of the threshold for large companies provided for in the guidelines).

In the first prosecution at Truro Crown Court, SWW was fined £150,000 for three offences of unlawfully discharging sewage into a river. Applying the guidelines, the court found that each offence fell within the negligent (culpability), mid level – between categories 2 and 3 (harm) bracket. The starting point for each offence would have been £100,000 although the overall fine was reduced to take account of SWW's mitigation, including its early guilty pleas.

Significantly, the court did not consider SWW's previous convictions to be a significant aggravating feature of its offending.

In its second prosecution at Exeter Crown Court, SWW was fined a total of £125,000 for four separate offences involving discharges at three of its sites. The court classified each offence as falling within the negligent/ category 3 bracket (starting point of £60,000 for each offence). Again, the court did not consider the offences to be significantly aggravated by SWW's previous convictions.

Thames Water (TW), on the other hand, was fined £250,000 at Reading Crown Court after sewerage from a pumping station leaked into a brook within an area of natural beauty over a five-day period. TW has a turnover of £1.9bn. The court regarded TW's offending as falling within the negligent, category 3 bracket (starting point of £60,000).

However, given that TW's turnover greatly exceeded the threshold of £50m for large companies, the court applied a multiplier of five to fix a starting point of £300,000 before considering mitigating factors.

The overriding trend appears to be that the guidelines are delivering what was intended, with higher fines for environmental offences being imposed. Very large companies with turnovers greatly in excess of £50m should prepare themselves for the possibility of much higher fines than those provided for in the guidelines when sentenced for environmental or health and safety offences in future, with a multiplier being applied to the appropriate starting point.

However, there is no guidance available to the courts in such cases on whether to adopt the multiplier approach or not and if so, what that multiplier should be. This undermines the objective of ensuring consistency when it comes to sentencing companies with turnovers far in excess of £50m, as evidenced by the cases discussed here.

What is clear though is that when these cases come to be sentenced, great care will have to be taken to ensure, through legal argument, that an appropriate offence category is adopted so that a fair sentence is ultimately imposed.

Kevin Bridges is a partner and Chris Hopkins is a barrister at Pinsent Masons LLP

Narrow Escape for Victims of "Incompetent" Brothers

Two Sheffield brothers were jailed for safety failures after a building collapse left three injured, up to 20 people temporarily homeless, and nearby properties evacuated.

Naveed and Rizwan Hussain were prosecuted by the Health and Safety Executive (HSE) at Sheffield Crown Court following the collapse of a three-storey terrace in Brook Hill on 23 March 2013.

Two residents and a builder suffered minor injuries and the immediate area had to be evacuated when the front of the property and the flats on the two upper floors caved in.

HSE told the court it was 'remarkable' that no one had been killed given the extent of the collapse. The property, formerly Butler's Balti House, was so dangerous after the incident it had to be demolished by Sheffield Council.

The court heard the two 'incompetent' brothers had destabilised the structure of the building while refurbishing the basement. HSE's investigation found the central wall between 192 and 194 Brook Hill had collapsed due to the Hussains' poorly-planned and badly-managed refurbishment project.

The construction work by the Hussains involved lowering the floor in the basement and removing a number of internal walls. While that was underway, the central wall was undermined, causing it to collapse. In turn, the floors of the flats above and the front wall caved in, injuring three people.

HSE said the Hussain brothers were not competent to carry out the work and were responsible for a number of safety failings – crucially they had no controls in place to support the building while it was being modified. The court heard Naveed Hussain had been the recipient of enforcement notices from HSE on a previous building job relating to failures to plan the work properly.

Rizwan Hussain, 39, of Rutland Road, Sheffield, was given a 12 month custodial sentence and a fine of £42,000 with £40,000 in costs after pleading guilty to a breach of the Health and Safety at Work etc Act 1974, a breach of the Construction

(Design & Management) Regulations 2007 and a breach of the two Prohibition Notices issued on 15 May 2013.

Naveed Hussain, 33, Pitsmoor Road, Sheffield, was given a 12 month custodial sentence and fined £40,000 with £60,000 to pay in costs after admitting a breach of the Health and Safety at Work etc Act 1974 and a separate breach of the same Construction Regulations.

After the hearing, HSE principal construction inspector Dave Redman said: "All three people injured in this avoidable incident were fortunate not to have been killed. One was saved by a table that had fallen across his body and shielded him from falling debris.

"But their narrow escapes owed more to luck than judgement on the part of the defendants, Rizwan and Naveed Hussain. Both acted incompetently in dealing with the project and fell woefully below acceptable standards.

"When carrying out major building alterations it is imperative that skilled structural engineers are employed to advise on the temporary supports needed. It is equally important that competent contractors are then used to ensure that those supports are correctly used for the duration of the work.

"The risks associated with this type of project are well-known in the construction industry and they are significant. Where competent people are not used and inadequate controls are employed there is always a risk of a catastrophic collapse and multiple fatalities."

His Honour Judge Murphy, sentencing, remarked: ""It was little short of a miracle that more people were not seriously injured or killed. This was a very serious incident "caused by your arrogance and greed.

"A statement needs to be made to people undertaking such projects" in relation to the importance of health and safety. The public would be appalled at anything less than a custodial sentence."

Fine and suspended sentence after warehouse roof death

A Lancashire-based toy distributor and a builder have been sentenced after a worker died when he fell nine metres through a fragile plastic panel in a warehouse roof in July 2012.

Craig Gray, 39, from Fleetwood, had been helping to clean the roof at Halsall Toys Europe Ltd as debris had been washing down the roof and into the gutters, causing them to overflow into the warehouse below. Four days into the job he stood on a clear panel designed to let in light, which gave way sending him nine metres to the concrete floor below. He died at the scene.

Halsall Toys had arranged with David Plant, an unemployed builder, for the roof cleaning work to be done, but did not carry out any checks to make sure he was competent.

Mr Plant and Mr Gray had worked on the roof, which covers 36,000 square feet, without any preparation work or planning having taken place in advance. They failed to use harnesses or any other equipment to keep them safe.

The company and builder David Plant were both prosecuted by HSE on 20 March 2015, after an investigation found no safety measures had been put in place to make sure the work could be carried out safely.

Halsall Toys Europe Ltd pleaded guilty to a single breach of the Health and Safety at Work etc. Act 1974 by failing to ensure the safety of Mr Gray. The company, of Copse Road in Fleetwood, was fined £200,000 and ordered to pay £10,483 towards the cost of the prosecution.

David Plant, 60, of Shetland Road in Blackpool, was given a 6 month prison sentence, suspended for 12 months, after being found guilty of a breach of the Work at Height Regulations 2005 by failing to make sure the work was carried out safely. Speaking after the hearing, HSE inspector Allen Shute said: "Craig Gray should never have been allowed onto the warehouse roof without being given suitable training and equipment, but both Halsall Toys and David Plant allowed his life to be put in danger.

"Halsall Toys hired Mr Plant to carry out the work despite him not having any previous experience of working on industrial roofs. The firm should have carried out checks to make sure the work would be carried out safely.

"Mr Plant also had a legal duty to make sure the right equipment was used for the job, whether it was using harnesses or simply placing covers over the fragile roof panels to remove the risk of them collapsing.

"Sadly incidents of workers falling through warehouse roofs are all too common, and it's vital firms do more to make sure this kind of work is carried out safely and by competent people."