Health and safety update

March 2019

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Any comments or queries?

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Construction company fined £300,000 after worker fatally injured from fall

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Curfew and fine for illegal waste offender

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Those engaged in welding activities, including mild steel, in any industry have been alerted of changes to the HSE's enforcement expectation in this area. more›

In the news

Shoreham air crash pilot not guilty of gross negligence manslaughter

Andrew Hill, aged 54, has been unanimously acquitted of charges of gross negligence manslaughter by an Old Bailey jury, following the deaths of 11 people in an air crash.

On 22 August 2015 Mr Hill had been flying an ex-military jet, a Hunter Hawker, in a display at the Shoreham Airshow in Sussex.

The prosecution alleged that Mr Hill was flying too low and failed to engage full throttle when performing a "bent loop" manoeuvre. It was contended that Mr Hill failed to abort the manoeuvre in time and instead committed to it when unsafe to do so. As a result, the jet crashed onto the westbound A27 and exploded into a fireball, killing five people in vehicles and a further six people standing on the grass verge watching the show.

Mr Hill was ejected from the jet, but was seriously injured due to his cockpit completely detaching from the jet along with the seat within it.

Mr Hill denied the manslaughter charges on the basis that he was suffering from a "cognitive impairment" possibly caused by G-forces whilst flying the jet. He said he had no memory of the crash or events immediately before it. He told a paramedic who attended to him at the scene that he had blacked out whilst in the air.

In his summing up Mr Justice Edis advised the jury that "what happened is pretty clear", but the question for them was why the accident happened. Given the not guilty verdict it would seem that the jury was unable to conclude, beyond all reasonable doubt, that Mr Hill could reasonably foresee a "serious and obvious risk of death" (the test of gross negligence manslaughter), as a result of any breach of duty on his part.

Following the crash in 2015 the organisers of the show announced in January 2016 that the 2016 show would be cancelled. The show has not been held since.

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Fines reduced by Court of Appeal for two companies in linked case

NPS London Ltd ("NPS") – assets of parent company

A fine of £370,000 imposed upon NPS by Southwark Crown Court in July 2017 has been reduced to £50,000 by the Court of Appeal.

NPS was sentenced for breaching Section 3 HSWA 1974 after pleading guilty to various asbestos management failures. At first instance the judge assessed culpability as "high" and the risk of harm as category 2 under the Sentencing Council's guidelines for health and safety offences.

With an annual turnover of £5m-£6m, NPS would ordinarily have been classed as a "small" company for the purposes of the sentencing guidelines. The starting point would therefore have been £100,000 with a sentencing range of £50,000 to £450,000.

However, NPS was a joint venture; its parent company owned 80% and the remaining 20% was owned by the London Borough of Waltham Forest. The judge took into account the annual

turnover of NPS's parent company, which was £125m at the time, thereby placing NPS in the "large" category for sentencing purposes. The starting point on that basis was a fine of £1.1m with a sentencing range of £550,000 to £2.9m.

The fine of £370,000 was assessed taking into account mitigating factors, such as NPS being a low profit organisation operating for local authorities, its previous good health and safety record and co-operation with the HSE.

NPS appealed and the Court of Appeal agreed that the first instance judge had incorrectly applied the relevant annual turnover of the parent company. It was held that the "offending organisation" was NPS and not the parent company. NPS was a distinct corporate entity, and by reference to its own turnover 'small' for the purposes of the guidelines. The starting point was therefore £100,000, and after taking into account the early guilty plea the original fine of £370,000 was reduced to £50,000.

The Court of Appeal remarked that although a court may consider "the resources of a linked organisation"; (*R v Tata Steel UK Limited* [2017] EWCA Crim 704), when sentencing an offender, it had done so incorrectly in this case. Even though the offender was a wholly owned subsidiary and the parent company would likely provide funds to pay the fine, this alone was not a reason to lift the corporate veil and treat the offender and the parent company as anything other than separate entities.

However, the court would be able to consider the availability of parent company funds when considering proportionality. In this case, although NPS had not made a profit, this was ignored because of the financial support available from the parent.

Squibb Group Limited ("Squibb") – importance of expert evidence in sentencing
This was a linked appeal by NPS's subcontractor, Squibb. The company appealed against a conviction under Section 2 HSWA 1974, alternatively against the level of fine imposed. The Court of Appeal upheld the conviction but reduced the original fine of £400,000 to £190,000.

The breach related to asbestos management failings. At the original hearing Squibb was found guilty of breaching Section 2 HSWA 1974 (duty to employees) but acquitted of breaching Section 3 HSWA 1974 (duty to non-employees).

Squibb appealed on the basis that the jury had incorrectly differentiated between the above duties. However, the Court of Appeal rejected Squibb's appeal stating that the duty to employees was higher than to non-employees and therefore different and more onerous. The jury had therefore reasonably reached the respective conviction and acquittal.

In terms of the fine, however, the Court of Appeal, whilst upholding the first instance assessment of "high" culpability, took a different approach to the assessment of harm category.

Squibb had relied upon an expert witness who opined that there was a "low" likelihood of harm because of the very low level of asbestos exposure. The first instance judge disagreed with the expert's view and concluded that the likelihood of harm arising was "medium", resulting in an overall harm category of 2.

The judge failed to explain his reasoning for rejecting the expert evidence. The Court of Appeal found that he was wrong to do so. Whilst the expert evidence was not perfect, and had potential for a wide margin of error, its methodology was essentially right, and no alternative evidence had been put forward by the prosecution. The Court of Appeal concluded that the only reasonable conclusion was that the likelihood of harm was "low". Therefore, the offence fell within harm category 3, for which the starting point for "high" culpability involving a "medium" organisation was £210,000.

Applying the first instance judge's adjustment from the starting point for mitigation, the fine was reduced from £400,000 to £190,000, thereby emphasising how significant such expert evidence can be in cases of this type.

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Fines and sentences

Two companies sentenced following the death of a five-year old girl trapped in a lift

As reported previously in our September 2018 bulletin, a five-year old girl, Alexys Brown, was fatally injured when, on 15 September 2009, her head became stuck in the vision panel of a disability lift at her family home in Weymouth. The lift was in place for Alexys' older brother (11 years old at the time) who was wheelchair bound and suffered with a degenerative neurological condition.

Alexys' brother had asked her to get his mobile phone from upstairs. Whilst doing so Alexys put her head through the damaged vision panel and she subsequently became trapped in between the lift and the ground floor ceiling.

Alexys' family had moved into the social housing accommodation, a three-bedroom house, in 2009. The lift had been installed by the time the Brown family moved into the property, but they were not shown any safety information about it and there was no risk assessment. Furthermore, concerns were raised about the vision panel 18 months prior to the incident but insufficient action was taken.

The landlord was Synergy Housing Limited ("Synergy"), which was part of Aster Property Limited ("Aster"). Orona Limited ("Orona") was the company responsible for ongoing maintenance of the lift.

Synergy, of Poole, Dorset, and Orona, of Sheffield, pleaded guilty to breaching Section 3(1) HSWA 1974.

At Bournemouth Crown Court, Synergy was fined £1million and ordered to pay £40,000 in costs. As previously reported, the charges against Aster, also under Section 3(1) HSWA 1974 were "ordered to lie on file". Orona was fined £533,000 and ordered to pay £40,000 in costs.

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£1million fine for Veolia after worker fatally injured by reversing vehicle

On 18 October 2013, John Head, an employee of waste company Veolia VS (UK) Limited, was walking across a yard at the Ross Depot Waste Transfer Station in Folkestone, when he was knocked over by a reversing refuse collection vehicle.

The company had pleaded not guilty to breaching Section 2(1) HSWA 1974. It sought to argue that although immediate remedial measures were taken after the incident, the system they had in place at the time was sufficient and the cause of death arose from the actions of its employees.

Although the mechanism of the incident was found to be unclear, Canterbury Crown Court heard how the company had failed to carry out a sufficient risk assessment of the yard, and consequently there were no specific control-measures for the movement of vehicles.

The company was found guilty and fined £1 million and ordered to pay costs of £130,000.

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10-month prison sentence for company director's illegal paint stripper sale

Nicholas Corbett, the sole director of Nuneaton-based Abel (UK) Ltd, now dissolved, was found to be selling a weed killer containing sodium chlorate, which was not approved for use in weed killers. He was also selling paint stripper containing dichloromethane (DCM), which was a restricted substance under the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation.

A condition of sale for the paint stripper was for the company to check at the point of sale that DCM was being sold for use solely in industrial installations, or to appropriately certificated professionals after October 2016. The company had failed in this condition. Enforcement notices served had been ignored.

At Warwick Crown Court, Mr Corbett pleaded guilty to breaching Regulations 9 and 18 Plant Protection Products Regulations 2011 and Regulation 10 REACH Enforcement Regulations 2008. He was sentenced to a 10 month-custodial sentence.

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Balfour Beatty fined £600,000 for death of worker struck by wheeled excavator

On 13 January 2016, Ian Walker, a 58-year old construction worker, was fatally injured by a wheeled excavator whilst working on the Third Don Crossing in Aberdeen. The 14-tonne excavator was rotating whilst filling up for fuel next to a mobile fuel tank when it struck Mr Walker. He was crushed between the excavator and the fuel tank.

During 4 January 2016 and 13 January 2016 Balfour Beatty Civil Engineering Limited was principal contractor at the site. Although the company had a documented system for the refuelling of all plant and equipment, and had identified the task as a high risk activity, there was a lack of implementation of the system. It was also found that there was a lack of lighting in the vicinity, which, if in place, may have helped the excavator driver see Mr Walker. Furthermore, the gap between the excavator and the fuel tank was too small and there were no barriers or signs in place during the refuelling.

The company pleaded guilty to breaching Regulation 13(1) Construction (Design and Management) Regulations 2015 and was fined £600,000 by Aberdeen Sheriff Court on 7 January 2019.

The above sentence came on the same day as a 45-year old man suffered serious injuries when a portable cabin fell on him on a Balfour Beatty compound off the A9 in Perthshire. The worker was part of a crew working on the Scottish Government's £3billion dualling project. The incident is currently under investigation by the HSE after Police Scotland was called to the scene.

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Arcadia Group fined £450,000 after 10-year old suffered serious injury in a Glasgow Topshop store

On 7 February 2017, a 10-year old girl accompanying her mother during a shopping trip suffered a fractured skull, when a queue barrier toppled in a Topshop store in Glasgow's Silverburn shopping centre.

Although the girl had been swinging on the barrier, Glasgow Sheriff Court found that it should have been secured to the floor. Furthermore, the company had failed to implement

a safe system for the transfer of two queue barriers from their Argyle Street store to the Silverburn store.

Topshop owner, Arcadia Group, pleaded guilty, to breaches of sections 3 (1) and 33 (1) (a) HSWA 1974 and was sentenced to a fine of £450,000. In mitigation, the company said that it had pleaded guilty at the first opportunity, and cooperated closely with regulators to ensure that a safe system was now in place for the transfer of fixtures and fittings between stores.

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Two companies each fined £350,000 following death of a worker crushed by machinery at a paper mill

In February 2017, 29-year old Austin Thomas, a former soldier, was working for haulage firm, CM Downton Ltd at Shotton Paper Mill, owned by UPM-Kymmene. Mr Thomas was fatally injured when he was struck from behind by a shovel loader.

An HSE investigation found that there was no safe system of segregating pedestrians and vehicles, and there was only limited visibility for drivers of shovel loaders in and around the mill.

CM Downton Ltd pleaded guilty to breaching Sections 2(1) and 3(1) HSWA 1974. It was fined £350,000, ordered to pay costs of £6,613.90 and a victim surcharge of £170.

UPM-Kymmene pleaded guilty to breaching Section 3(1) HSWA 1974. It was fined £350,000, ordered to pay costs of £6,711.90 and a victim surcharge of £170.

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Construction company fined £300,000 after worker fatally injured from fall

On 14 November 2015, an employee of London-based Formation Construction was using a concrete breaker on a building site in Acton in order to create a stairwell opening. He suffered fatal injuries after falling from a height of 7.5 metres.

Westminster Magistrates' Court heard how the relevant works were not properly planned or supervised leading to the worker's death.

Formation Construction of Hackney, London, pleaded guilty to breaching Section 2 (1) HSWA 1974 and was fined £300,000 and ordered to pay costs of £17,528.

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Environmental

Two convictions quashed in pollution appeals

In *Millmore & Others v Environment Agency* [2019] EWHC 443 (Admin), the Court of Appeal overturned two out of five convictions for pollution offences relating to employees of Southern Water.

During 11-13 July 2016 the Environment Agency ("EA") visited a number of waste water plant premises, operated by Southern Water, to investigate potential breaches of the Act. The EA was met with a lack of cooperation and conduct "calculated to frustrate the inspection".

The relevant five employees were originally convicted at Folkestone Magistrates Court for obstructing an authorised person in the exercise of his powers or duties to prevent pollution, pursuant to Section 110(1) Environment Act 1995 ("the Act").

Although Southern Water was charged with separate offences, it was acquitted due to the prosecution failing to prove that it was criminally liable for the actions of its employees.

The employees appealed against their respective convictions. The Court of Appeal quashed two convictions, but upheld the other three. In summary the Court held that:

- an omission to act could constitute obstruction if the person charged was under a duty to act, and
- there was a distinction between an employee who had merely reported what their employer had told them, and an employee who took active steps to obstruct the authorised person.

The appellants' respective conduct is summarized as follows:

Helen Millmore ("M")

M was a management scientist, who told the EA that she had been instructed by the Southern Water to object to the EA taking away any items. Furthermore, she indicated that the EA would not be accompanied around the premises nor were they permitted to be unaccompanied. The Court of Appeal held that M had merely communicated Southern Water's position, rather than failing personally to comply with a requirement to assist. M was neither under a duty to carry out any specific act nor had she obstructed the EA investigator. Her conviction was quashed.

Carl Smith ("S")

The allegations against S were based upon interference with the EA's investigation rather than obstruction. S stated to the EA that he had been instructed by Southern Water's solicitor that no documents were to be removed from the site. However, by that time the EA had already obtained the relevant records.

S also stated to the EA that they were not permitted to walk around the premises without legal representation, due to Southern Water not having reasonable notice of the EA's visit. S also informed the EA that he had been instructed to request that they leave the premises. However, S allowed the EA to remain until all of the evidence had been collected, bagged and logged correctly, after which the EA left the site.

S's conviction was quashed. No clear distinction had been drawn between merely reporting Southern Water's position and carrying out instructions to obstruct the EA's powers. There was no specific act or omission giving rise to a finding under the Act.

Peter Rowbottom ("R")
R was a process operator who initially handed over site diaries to the EA, as they had requested. The diaries were placed into evidence bags. However, after telephone discussions between R, his line manager and the EA, R took the diaries back, removed them from the room and locked them in a cupboard, whilst the EA and the line manager were engaged in a further telephone discussion.

His conviction was upheld. His actions were a clear breach of Section 108(4)(k) of the Act and had prevented the EA from exercising their powers, going beyond merely failing to assist or hand over documents.

Robert Parker and Matthew Annetts ("RP" and "MA")
The act of locking diaries in a van was clearly an obstructive act and the respective convictions of RP and MA were upheld.

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Disqualified director ordered to repay illicit funds at proceeds of crime hearing

Mr Dugbo was a director of TLC Recycling. In July 2016 he was convicted of falsifying documents to facilitate illegal claims for the amount of collected household, electrical waste, so as to recover higher fees through a Government-backed scheme. In addition, Mr Dugbo had breached the terms of his environmental permit by treating CFC gas cylinders at his company premises.

He was sentenced to seven years in prison for breaching The Waste Electrical and Electronic Equipment Regulations 2013.

At a Proceeds of Crime hearing in February 2019, Mr Dugbo, was ordered to repay £1,373,060 obtained as a result of his fraud, after bank accounts were traced in Nigeria, Senegal and Spain. If Mr Dugbo fails to repay the amount he will face a further eight years in prison.

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Curfew and fine for illegal waste offender

On 10 January 2019, Tony Haywood, who was running a breaker's yard in Awsworth, Nottingham, was sentenced at Derby Magistrates Court for offences concerning illegal waste activities and operating without an Environmental Permit.

Tony Haywood took over the running of the yard from his son, Stuart Haywood, in June 2017 after the latter was sentenced to 30 weeks in prison for illegal vehicle waste activities at the yard.

A Remediation Order had been served upon Stuart Haywood for the removal of all waste from the yard and for no additional waste to be taken there. When Tony Haywood took over the yard he removed vehicles in order to comply with the Remediation Order. However, from November 2017 and January 2018 Tony Haywood began depolluting and dismantling the vehicles, despite knowing that he required an Environmental Permit to do so. The process of depollution entails

removal from vehicles of many potentially harmful substances, including battery acids, fuels, oils, coolants and anti-freeze.

The permit was required due to the hazardous nature of that process.

Tony Haywood was convicted under Regulation 12(1) and Regulation 38(1)(a) Environmental Permitting (England and Wales) Regulations 2016.

He was sentenced to a fine of £13,000 and a four-month curfew between the hours of 19.00 and 07.00. In addition to the fine, he was ordered to pay £4,897 compensation to the Environment Agency, £8,175.48 in legal costs, and an £85 victim surcharge.

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Round-up

HSE issue safety alert for mild steel welding fume

Those engaged in welding activities, including mild steel, in any industry have been alerted of changes to the HSE's enforcement expectation in this area. This follows new scientific evidence from the International Agency for Research on Cancer that exposure to mild steel welding fume can cause lung cancer, and possibly kidney cancer. The Workplace Health Expert Committee has endorsed the reclassification of mild steel welding fume as a human carcinogen.

For more information on action required for those specialising in this area please see here.

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