

February 2010



health, safety & environmental management

## [ e newsletter ]

### **A H Allen Ltd Return to Sheffield**

#### **Also in this month's Newsletter**

Following an absence of 7 years, A H Allen Ltd has returned home and opened a new office in Sheffield, South Yorkshire.

A H Allen's was formed in 1856 in Sheffield and was the public analyst for the region until as recently as 2003. At that time the business decided to expand their range of health, safety and environmental consultancy services and closed the laboratory, prompting a move to our current office Hessle, East Yorkshire.

#### **Updated Estimated UK Asbestos Insurance Costs**

Due to continued expansion in consultancy services and in order to better serve our existing and new customers in the Yorkshire region, A H Allen have opened the new office in Deepcar and appointed David Cooper manager of the business. Both Hessle and Sheffield will offer our broad range of services in:

- Asbestos surveying, analytical services, air monitoring, project management of removal and asbestos awareness training.
- Health and safety consultancy services such as policy and procedures, accident investigations, managed health and safety services and a range of training courses.
- Occupational hygiene services such as measurement of airborne contaminants, chemical and material assessments and COSHH evaluations.
- Fire safety risk assessments, fire marshal and extinguisher training and policy and procedures.

#### **Final corporate manslaughter sentencing guidelines issued**

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# Updated UK Asbestos Insurance Costs

A report has been published by the Actuarial Profession's UK Asbestos Working Party providing updated projections of UK asbestos-related insurance claims. The working party has been monitoring claims experience and trends and has updated its previous projection models for mesothelioma, asbestosis, asbestos-related lung cancer and pleural thickening claims. The current estimated cost of these future claims to the UK insurance industry from 2009 onwards has increased to £11.3bn from £4.7bn in the working party's previous 2004 projections, although the report explains that there is considerable uncertainty in the estimate. The majority (over 90%) of this cost relates to mesothelioma claims.

## **Background**

In 2004 the previous Working Party published a paper 1 containing estimates of the cost of asbestos-related claims to the UK insurance market. It relied on the population mesothelioma deaths projected by the Health and Safety Executive (HSE) as set out in their 2003 paper 2. Since 2004, the number of emerging insurance claims has been greater than expected and the Working Party was reformed in 2007 to investigate this.

The Working Party have collected industry claims data and considered the latest epidemiological studies for mesothelioma projections 3. They have investigated the recent trends and produced updated estimates, together with a discussion of the uncertainties involved.

## **The report's findings on mesothelioma**

The report shows an estimate of the cost to the UK insurance industry of mesothelioma claims from 2009 to 2050 of around £10bn, £8bn of which relates to the period to 2040. The estimate in the 2004 report for the same period to 2040 was £4bn. However, the current report comments on the high level of uncertainty in using the models for long-term projections, a comment that the HSL themselves made about their own work.

The working party has done detailed scenario testing and has used alternative model structures to investigate the possible outcomes. A range of scenarios produces costs for the period 2009 to 2050 of approximately £5bn to over £20bn. The outcomes quoted represent a guide to the uncertainty. The actual outcomes could fall outside this range.

Most of the £4bn increase in insurance costs for the period 2009 to 2040 is due to an increase in the number of insurance claims relative to the number of mesothelioma deaths. The proportion of mesothelioma deaths that resulted in a claim for the UK insurance market is estimated to have increased from around a third in 2003 to around two thirds in 2008. This trend is thought to reflect several key drivers, including increased public awareness, better access to information and the NHS Mesothelioma Framework leading to higher pre-death diagnoses and claim success rates. The future ratio of insurance claims to deaths is a key uncertainty.

## **Next steps**

The Working Party will continue to monitor future claims experience and will provide updates to its projections when appropriate. Many insurers and other parties are using the previous 2004 projections as a benchmark to understand the likely future emergence of asbestos-related insurance claims. The current report replaces the previous projections with a new set of benchmarks.

The report comments that "the estimates are suitable for a high level benchmarking approach for a portfolio that has similar overall characteristics to the market". However, the effect on individual insurers and defendants will depend on their individual exposures, the relevance of the trends to their circumstances and the action they have already taken over recent years as a result of emerging experience.

## **The 2009 report**

issued by the Actuarial Profession's UK Asbestos Working Party.

The HSL's 2009 paper entitled "[RR728 Projecting Mesothelioma Mortality in Great Britain](#)".

1 "UK Asbestos - The Definitive Guide"

2 "Mesothelioma Mortality in Great Britain: Estimating the Future Burden" (HSE 2003). The HSE projections were subsequently published in detail in the paper "The expected burden of mesothelioma mortality in Great Britain from 2002 to 2050" (HSE 2005).

3 In August 2009, the Health and Safety Laboratory (HSL), funded by the HSE, published its update, outlined in the paper "[RR728 Projecting Mesothelioma Mortality in Great Britain](#)" (HSL 2009). Separately, at a conference in Melbourne in April 2008, Professor Julian Peto, Cancer Research UK Chair of Epidemiology at the London School of Hygiene & Tropical Medicine, presented projections of worldwide mesothelioma deaths. These projections used an alternative model to the HSL's 2009 projections.

# Final corporate manslaughter sentencing guidelines issued

Definitive guidelines have been published to help courts deal with organisations that cause death through a gross breach of care, or where a health and safety offence is a significant cause of a death. Organisations guilty of corporate manslaughter can be given up to a seven-figure fine, and rarely less than £500,000, states the Sentencing Guidelines Council. For other health and safety offences that result in death, convicted companies can expect a six-figure penalty. Issuing its long-awaited guidelines on 9 February, the Sentencing Guidelines Council underlined that “punitive and significant fines should be imposed both to deter and to reflect public concern at avoidable loss of life”.

As stated in the draft guidelines, issued in October last year, the level of penalty should not be linked to company turnover or profit. However, account must be taken of the financial circumstances of the offending organisation, as well as the impact on employment of innocent parties, and the extent to which the fine could inhibit the delivery of services to the public – for example, in the case of a local authority, health trust, or police force.

For the guidelines to apply, a significant causative link between the conduct of the offending body and the death that occurred must be established. Some respondents to the Council’s consultation on the guidelines raised concern that many cases proceed as guilty pleas with limited opportunity to assess evidence of causation, and that the requirement could lead to lengthy argument in court as to whether or not the guideline applied.

Alison Gray, partner at Dickinson Dees law firm, suggested that the issue of whether the organisation’s actions or inaction constitute a significant cause of death will be the subject of much legal argument. However, Henry Kirkup, a partner in the safety, health and environment group at Berryman’s Lace Mawer LLP, remarked: “I can’t see how the prosecution could accept a guilty plea on the basis of a breach not causing a death and then reintroduce an argument that it did cause the death during any hearing or sentencing.”

Factors increasing the seriousness of the offence include the foreseeability of serious injury, whether non-compliance was common and widespread across the organisation, and how high up the organisation’s chain of command responsibility for the breach lay.

Other aggravating offences include the number of deaths and serious injuries caused, injury to vulnerable persons, failure to heed warnings or respond to near-misses of a similar nature, cost-cutting, and deliberate failure to obtain or comply with relevant licences.

Publicity orders will only be an option in the case of corporate manslaughter convictions, but should “ordinarily be imposed” in such cases. These may require offending organisations to publicise, in a specified manner: the fact of conviction; particulars of the offence; the level of fine; and the terms of any remedial order.

The publicity order should normally specify the place where public announcement is to be made, e.g. newspapers, company websites, and give guidance on the size of the notice or advertisement required. However, the guidelines also suggest that a newspaper announcement may be unnecessary if the proceedings are ‘certain’ to receive news coverage in any event. It will also be up to the court to determine the specific terms of an order.

Alison Gray said the orders would have a huge impact. “Organisations are not used to publicly advertising their failings. I think it will hit them quite hard. . . and the court and prosecution will get a say in what is publicised, so it will not be an easy time for them.”

The Council’s decision not to go down the route of linking fines to profit or turnover was broadly welcomed by Henry Kirkup, who said: “There would have been the scope for astronomical fines if based on turnover, and there would have also been scope for huge variations in fines for the same offence for different-sized companies.”

However, Thompsons Solicitors’ Mick Antoniwi described the approach taken by the Council as “a sledgehammer”. He said: “This positively encourages the small employer who is cavalier about health and safety and would be bust by a £500,000 fine to carry on regardless, and won’t put a dent in the profits of a big company that doesn’t care.”

Tim Hill, health and safety partner at law firm Eversheds argued that the most significant aspect of the guidelines is that they take effect so soon. He explained: “Unlike changes in legislation, which are rarely retrospective, and only apply to incidents that occur after a new Act or set of Regulations come into force – as these guidelines apply only to sentencing then they will apply to all cases which appear before the courts after 15 February – even if the incident occurred a number of months, or even years ago.”

The first prosecution under the Corporate Manslaughter and Corporate Homicide Act, involving Cotswold Geotechnical Holdings Ltd, is due to commence in the next couple of weeks.

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