

Ms Caroline Topping
HM Assistant Coroner for The County of Surrey

Chief Executive

██████████
Redgrave Court

Merton Road

Bootle

Merseyside L20 7HS

31 March 2023

Dears Ms Topping,

Fatal Accident to Malcolm James Basten on February 28th, 2016

Regulation 28 Report Action to Prevent Further Deaths dated 30th December 2022

Thank you for your Regulation 28 report of 30th December 2022, which raises important health and safety concerns.

May I take this opportunity to express my condolences to the bereaved family and all affected by the tragic circumstances that gave rise to the inquest.

Your Regulation 28 report arose from an accident in which Mr Basten suffered a fall from the first floor of a domestic construction site where he was working. The investigation is ongoing and HSE are in the process of preparing a file to be submitted to our Legal Services Division for a decision to prosecute. HSE will make sure that Mr Basten's family are kept informed of the outcome.

Your report sets out three key matters of concern;

Key Concern 1.

This was a sizable project with considerable work at height. No statutory agency was required to be notified of the work and then inspect the project during the construction.

The notification requirements of Schedule 6 to Construction (Design and Management) Regulations (CDM) 2015 have been directly transposed from the EU Directive and are set out in L153, Managing health and safety in construction <https://www.hse.gov.uk/pubns/priced/l153.pdf>. Although the UK has now left the EU, CDM 2015 is retained EU legislation. The Government is currently considering what steps it will take with regard to EU law.

CDM provides that for any construction site on which (1) work is scheduled to last for more than 30 working days with more than 20 workers occupied simultaneously, or (2) on which the volume of work is scheduled to exceed 500 person-days, specified particulars of the site must be notified to the national competent authority (HSE). The project where the incident occurred was not notified to HSE as it did not meet either of these criteria.

For the year 2021/22 there were 51,530 new notifications of construction projects in Great Britain. This figure doesn't include ongoing projects previously notified. Many more construction sites don't meet the threshold for notification and go ahead without any formal notification, such as the site Mr Basten was working on.

The current notification arrangements ensure that HSE is informed of the most significant construction projects. HSE currently uses this information as operational intelligence to help us direct our finite regulatory resources. This is in line with HSE's overall approach to regulating the construction industry. HSE is not, and has never been, resourced to visit every site that sends in a notification.

Due to the overall volume of all construction activity nationally, increasing the range of projects requiring notification would cause a significant increase in the amount of information the industry would have to supply to HSE and which HSE would have to process. This extra information would not significantly improve HSE's ability to target its resources while also creating significant extra administrative burdens.

Key Concern 2

There is no mandatory requirement for the principal contractor to undertake health and safety training from an accredited organisation before engaging in this type of project.

Although there is no mandatory requirement for the duty holder to undertake health and safety training Regulation 8 of CDM requires that anyone undertaking construction must be able to demonstrate that they have the appropriate health and safety skills, knowledge, experience. Where they are an organisation, the organisation should have the capability to carry out the work in a way that secures health and safety. If the dutyholder cannot demonstrate that they have these attributes then they should not accept the work.

CDM sets out a clear goal for all dutyholders to meet on site, specifically that anyone involved in a project (such as the Principal Contractor (PC)) should have the right level of health and safety skills appropriate for the job. Regulation 13 of CDM goes into more detail about the responsibilities of the PC, which anyone or any organisation should be able to demonstrate if they want to take on the PC role.

The published guidance on CDM ([L153 – Managing health & safety in construction](#)) contains more information about how to achieve compliance with the Regulations relating to skills, knowledge and experience. Paragraph 171 of L153 does state that any worker undertaking a site supervisory role should be provided with nationally recognised site supervisory training, which includes leadership and communication skills. HSE expects a PC to be able to demonstrate that they have met the standard required by the guidance.

Paragraphs 162 to 172 of L153 make it clear that while formal training courses have a crucial role, they should not be the only consideration. Newly trained people will need closer supervision and, if training took place some time ago, the necessary skills may have waned. Our guidance recommends a recent demonstration of capability alongside any training records.

Key Concern 3

There is no mandatory requirement for principal contractors to undertake health and safety training from an accredited organisation after an incident such as this has

occurred on one of their projects, nor to notify the HSE of any projects they undertake thereafter.

HSE's Enforcement Policy Statement (EPS) sets out the principles inspectors should apply when determining what enforcement action to take in response to breaches of health and safety legislation. Fundamental to this is the principle that enforcement action should be proportional to the health and safety risks and the seriousness of the breach. This means that if a lack of health and safety capability played a part in an incident, then requiring a dutyholder to undertake training will be a potential line of enforcement for HSE.

Although HSE has no formal policy to follow up known poor performers, evidence of poor health and safety performance is taken into account during any future interactions with HSE. This is described in HSE's Enforcement Management Model. As such, when considering whether enforcement action is proportionate, HSE views previous relevant enforcement action against a dutyholder as a significant aggravating factor.

In summary, the requirement for notification is based on the numbers of workers on a project and the duration of the project and not on the previous health and safety record of the contractor.

I hope this response is helpful and I will be happy to explain any of the contents of the letter should you require me too.

Yours Sincerely

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Chief Executive