

# COMPETENCY

## PART 1 ..... FOUNDATIONS



### COSHH ACOP

#### REG 12

*The employer must ensure that the person, or people, to whom any work is delegated is competent to do it.*

Applies to Regs 6, 7, 9, 10, 11

### DEFINITION?

#### OXFORD DICTIONARY

*“Facts, information, and skills acquired through **experience** or **education**; the theoretical or practical understanding of a subject.”*

### SAGE ADVICE

#### WARREN BUFFET

*Everybody's got a different circle of competence. The important thing is not how big the circle is. The important thing is staying inside the circle.*



### HSE'S PERSPECTIVE?

*Competence can be described as **the combination of training, skills, experience and knowledge that a person has and their ability to apply them to perform a task safely**. Other factors, such as attitude and physical ability, can also affect someone's competence.*

## “Competency” - Introduction

OK - so for starters we certainly all have an in-built ‘**notion**’ of what we mean by this elusive word .... but is that enough?

On the one hand, there is little by way of ‘*hard facts*’ guidance in the legislation, ACoPs and Guidance.

But on the other we do know that if we fail in any test of our (or our Contractor’s) ‘**competency**’ then there may be drastic consequences (see below).



*And, anyway - someone is going to have to prove I’m not competent!*

Errr.... not really as in Criminal Law (see later) there is an oddity in that the normal standard that the “*Accused is innocent until proven guilty*” turns on its head when considering “*Competency*”.

Instead we have the “*Reversal of the Burden of Proof*”. Meaning? Well strictly - in law it is for the accused to prove their innocence rather than the prosecutor to prove their guilt. Oh My!!

Maybe the first thing we should do is have a closer look at what exactly the Health and Safety law states .... oh ..... and have regard to what the ACoPs say on this subject ... and relevant (HSE) Guidance.

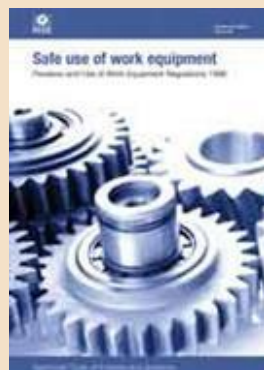
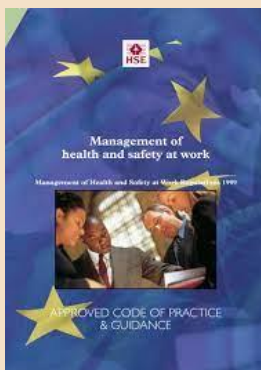
And finally, importantly, - what have the Courts said?

## Legislation (Examples)

**Management of Health and Safety at Work (MHSWR) Regulations at Reg 7** requires every employer to “*appoint one or more **competent** persons to assist him in undertaking the measures he needs to take to comply with relevant requirements and prohibitions imposed upon him by or under the relevant statutory provisions*”.

**PUWER** requires the use of **competent** persons *for inspection and examination of work equipment*. This would cover **LEV “Commissioning”** for example, which is not specifically addressed in the CoSHH Regs

**CoSHH ACoP para 175** - “*Employers must ensure that whoever carries out maintenance, examinations and tests is **competent** to do so*”



## What Happens When it Goes Wrong - Criminal Law?

HSE have been active in recent years on this topic of 'competence' (or lack of it!) and a number of fairly recent cases immediately come to mind: -

**2010** - Perryman Properties - fined for failing to check the competence of a contractor

**2011** - Miskelly Bros and their safety consultants - both fined (safety consultant for failing in 'competence').

**2013** - Prior Scientific Instruments and their health and safety consultants both fined

**2020** - A self-employed consultant fined for breach of legislation for providing health and safety advice on technical and complex matters while not being qualified to advise his clients

**2022** - LEV company that tests ventilation systems has been fined for putting hundreds of workers at risk of serious lung diseases

## And, under Civil Law?

Whilst HSE are the primary enforcing body for breaches of health and safety legislation we must also give consideration to the parallel legal track of Civil Law. .... And from that the effects of the ample Case Law handed down from the Civil Courts where they have considered 'competence'..... or the lack of it.

Many of the early cases related to **Vicarious Liability** - for example where, a co-worker was incompetent. You may look them up but some of the relevant cases include: -

**Bartonshill Coal Co V Reid: HL 1858**

**Wilsons and Clyde Coal Co Ltd V English: HL 1938**

**Eckersley v Binnie and Partners 1988**

**Basingstoke & Deane Borough Council v J Sainsbury plc (1998)**

**Skidmore v. Dartford & Gravesham NHS Trust UKHL 2003**

**Farraj And Another V King's Healthcare NHS Trust (KCH) And Another: CA 13 Nov 2009**



The Eckersley v Binnie and Partners case (1988) is of particular interest. In that case Lord Justice Bingham ruled that a-

**Competent Person** would be expected to display the qualities which an ordinary member of his profession would have .... but the law "*does not require of a professional man that he be a paragon, combining the qualities of a polymath and a prophet.*"

Interesting guide to the extent to which 'competence' should be considered?



And what do we mean by “**other qualities**”? This is not defined in the law or ACoP. It could for example refer to “**attitude**” and/or “**physical ability**” (for certain tasks) etc?

So - **MHSWR** does give an idea of what we should be looking for regarding ‘Competence’ but its definition could be open to various (logic - not to say, legal) interpretations?

**PUWER** states that competence involves - “*knowledge, experience and ability*”

**CoSHH** - discusses “competence” at various sections (in fact that word is mentioned 21 times in CoSHH/ACoP etc).

**CoSHH** does refer to the **MHSWR** definition discussed above but it also expresses its own views on certain aspects:-

At **Regulation 9** for example where discussing the competence of designers, commissioners and examiners and testers of Local Exhaust Ventilation it states that they “*must have adequate knowledge, training and expertise in examination methods and techniques*”.

**Regulation 10** - relating to the undertaking of Exposure Monitoring the ACoP to that section states that a *competent person* should have: -

- appropriate training and experience in monitoring exposure;
- familiarity with relevant monitoring standards and methods published by HSE and professional bodies;
- adequate knowledge of occupational exposure limits and monitoring strategies;
- adequate continuing professional development;
- a commitment to providing sensible and proportionate advice.

**Regulation 6** relating to the undertaking of Risk Assessments - the ACoP requires that to be competent a person undertaking this work they must: -

- know how the work activity uses, produces or creates substances hazardous to health;
- have the knowledge, skills, training and experience to make sound decisions about the level of risk and the measures needed for prevention or adequate control of exposure;
- have the ability and the authority of the employer to collate all the necessary, relevant information.

There is a general theme emerging that “Competency”, at its basic definition, involves: -

- Knowledge
- Experience
- Ability

## Questions #1?

Where does ‘Training’ fit in with this?

It is clearly included in several of the elements of the competency definitions above.

But does **Training** confer competency?

To be even bolder, does an appropriate **Qualification** confer ‘competency’?

Can you be considered ‘Competent’ with relevant **Experience** alone?

What is **Ability** ... And more importantly - how would we assess it?

Maybe we should take each element of the basic Competency definition (above) in turn and put it under the spotlight?

## Knowledge?

We’ll make a start with the Oxford English Dictionary which states:-

*“Facts, information, and skills acquired through **experience** or **education**; the theoretical or practical understanding of a subject.”*

The British Courts really like the Oxford Dictionary - so that was a good place to start.

**Knowledge** can be gained by formal education/training but also through “experience”. Some ‘older heads’ might call the latter one ‘wisdom’?

Clearly though **Training** is one readily acceptable and, importantly ..... partly measurable route to gain, or to add to, **knowledge**.

In a straightforward simplistic sense knowledge can be assessed through formal examinations and other methods of testing.



Assessing/measuring **ability** and **experience** however presents a greater challenge.

Finally, another nuanced way to use this word “Knowledge” however is found in HSE guidance where they often refer to the competent person having:-

*“the knowledge, as to when it would be necessary to obtain external help and advice”.*

Warren Buffet (see front page) would almost certainly agree with HSE on this.

In this sense, HSE are using the word “knowledge” almost synonymous with *“understanding”* or *“comprehension”*.



## Ability?



What does The Oxford say about “ability”?

Quite simply - *“skill to do something”*.

It is true that you will often see in HSE guidance the words skill and ability as almost interchangeable.

What does Oxford say about “skill”?

Well it states, *“the ability to do something well”*!!

Blending the two together.

*“Ability”* is the *“skill to do something well”*. To which should probably be added *“to the level or standard required”*?

*“Ability is what you’re capable of doing.  
Motivation determines what you do.  
Attitude determines how well you do it.” - Lou Holtz*

In setting “Ability” - as with “Experience” we therefore have to know the “level or standard” required for the task ..... before we can test if the individual possesses sufficient “Ability”?

And, how would you propose ‘testing/assessing’ “Ability”?

In many professional areas; (eg airline pilots but also HGV and Bus drivers etc) this is done by refresher training/practical testing/updating skills etc and ..... importantly by routine auditing of that individual’s ..... abilities while performing the relevant task.

In almost all professions it is a requirement for the individual to commit to Continuing Personal Development (CPD).

## Questions #2?

How ‘Competent’ does a person have to be?

We know the 3 basic elements which make up ‘Competence’ but what level or standard is required?

Clearly that will depend on what the task is, its importance (in Health and Safety terms) and the level of risk involved.

For example, the degree and level of competence required to undertake office risk assessments would be quite different from that required to undertake risk assessment of divers working on an offshore undersea welding operation.



### Risk Assessments are Key.

They are always the sound foundation for setting the level of competency required and risk assessments determine ‘Proportionality’ ie they ensure that the level/standard of competence demanded is ‘relevant’ to the task and/or workplace.

From there it should be straightforward matter to set out the training, information, instruction and supervision levels and standards required to achieve the degree of competency demanded of the task or operation.

Unfortunately - and a bit of generalising here - there appears to be a lack of good understanding with the LEV sector of this topic.

### Training

So where does **Training** fit in with all of this if, as we indicated earlier it does not in itself confer ‘competence’?

One way to consider ‘Training is as “*an activity required to take someone from an existing level of knowledge and understanding to the level required*”. It also provides practical experience (which is to some extent assessed).

Training will not in itself confer ‘competence’, neither will ‘Qualifications’.

HSE has previously stated the obvious that:-

*“training is an important part of competence”.*

I would also add that the same often goes for “qualifications” which can be considered as ‘**evidence** of training completed to a set standard’ rather than proof of competence.

## Some (Obvious?) Conclusions

- The base definition, widely accepted for Competency is that it is a blend of:-
  - Knowledge
  - Ability
  - Experience
- Every job function, task, operation, activity etc being undertaken should have a level of competence required, defined and ascribed to it. Which requires assessment in advance of the task being undertaken
- Risk assessments should consider and set the levels of competencies required and are key to ensuring appropriate 'proportionality'
- Training does not, in itself, make you competent. Nor do Qualifications. Training should be considered as a means of taking an individual from one level of Knowledge to the level assessed as being required. Qualifications provide an independent verification of the level of Knowledge attained in a particular subject area.
- Experience does not make you competent. Beware of engaging contractors or new staff on "Experience" alone. Experience - properly tested and evaluated is a critical element ..... but too often 'claimed experience' turns out to be ..... a 'dud' 😞
- Ability is critical to being able to declare competency ..... it is not the easiest of the elements to measure or assess but that should not be used as an excuse not to!
- Ability can be assessed and should be!
- "Qualification" may provide *some* indication of competency but a qualification is not in itself a guarantee of Ability..... or relevant experience .... or competence. It does at least show an indication of 'commitment' to gaining professional competence?
- In practice however, it is often been left to the courts to decide whether a person was competent ..... or not ..... but that way is retrospective and not wholly satisfying to the present!

- And, - do remember that in dealing with Competency - particularly in the Criminal Courts there is the unusual situation where, in British Law that it is for the accused to prove to the Court's satisfaction that they are Competent rather than the Prosecutor having to prove their incompetence. The "*reversal of the burden of proof*".
- Next Newsletter will discuss some of the practicalities in assessing "Competencies! Watch this space.



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