Copy sent to Rel Gully 22 3 19

IN THE DISTRICT COURT
AT ROTORUA

I TE KŌTI-Ā-ROHE
KI TE ROTORUA-NUI-A-KAHUMATAMOMOE

CRI-2018-063-000648
[2019] NZDC 1977

WORKSAFE NEW ZEALAND
Prosecutor

v

CLAYMARK LIMITED
Defendant Company

Hearing:	31 January 2019
Appearances:	A Longdill for the Prosecutor B Harris for the Defendant Company
Judgment:	31 January 2019

NOTES OF JUDGE P W COOPER ON SENTENCING

Introduction

[1] The introductory part of this sentencing relates to the defendant in respect of both complainants. The defendant company is charged with two charges. Firstly, in relation to an incident at the defendant's Kopu site in respect of Mr Jonathan Andersen on 29 December 2016, a charge that company breached the Health Safety at Work Act 2015 by failing to ensure so far as was reasonably practicable the health and safety of workers while at work, Jonathan Andersen in particular, in the operation of a Weinig Planer machine and that that failure exposed Mr Andersen to risk of death or serious injury.

[2] Secondly, in relation to an injury to Zachary Pinder at the defendant's Rotorua site on 16 March 2017, a similar charge in relation to the operation of a Paul 14 Optimiser crosscut saw machine.

Background

[3] The background to this is that the defendant company is a manufacturer and distributor of timber products with sites at Kopu, Rotorua and elsewhere in New Zealand. It operates a substantial business, employing approximately 600 workers.

[4] In respect to the Kopu incident, Johnathan Andersen was employed as a machinist at the defendant's Kopu site. He is an experienced machine operator. On 29 December 2016, he was operating the Weinig planer machine. He noticed that the infeed conveyor of timber into the machine had stopped. He went into the unlocked planer enclosure, lifted the interlocked hood guarding the cutter block heads of the planer and found that a large shard of timber was causing a blockage in the planer. The conveyor had stopped but the cutter block heads were still able to spin. After attempting unsuccessfully to dislodge the blockage using a compressed air nozzle and a push stick, he reached into the machine and grabbed the shard of wood and when it came free, it forced his hand into the unguarded bottom planer head. His right hand was drawn into the planer and amputated through the metacarpals.

[5] The specific failures in respect of this incident, so far as the standards required of a company are concerned, is that:

(a) The cutter block guard which is provided for the machine to guard the exposed bottom head of the planer was not fitted to the machine at the time;

(b) There was no formalised written pre-inspection checklist;

(c) Although there were informal pre-operational machine checks, there was no system to ensure regular inspection of the planer to ensure the

guards were present and functional, and there were shortcomings in the training in respect of the operation of the machine;

(d) The hazard register did not adequately identify the hazard in this case and interlocks were not in place and the training procedure regarding the interlocks was inadequate.

[6] In relation to the Rotorua incident, on 16 March 2017, the victim Mr Pinder was working at the outfeed section of the Optimiser machine. He was one of a number of workers engaged with that machine. There was a problem with the sensors on the machine which sort the wood into different lengths resulting in the wood piling up. Mr Pinder was occasionally throwing wood across to another worker to stack. On one occasion, this dislodged a chain from one of the chain drives operating the conveyors transporting the timber. He climbed over the outfeeds barrier, which is about 750 millimetres high, to where the chain was exposed and put the chain back onto the chain drive. He did this with his hand while the Optimiser was running. His glove became entangled in the chain and the tops of three of his fingers were amputated.

[7] The specific failures in relation to this incident were:

(a) The guarding of the area the nip points to the chains on the outfeed of the Optimiser was inadequate;

(b) Risk management in relation to the risks presented by the chain drives on the outfeed was inadequate and there were no documented safe procedures to follow a chain on the drive becoming dislodged;

(c) There were shortcomings in maintenance and training regarding the emergency stop buttons, but these were not crucial to how this incident developed.

[8] So far as the sentencing approach and methodology to cases like this is concerned, the recent guideline judgment of the High Court in

Stumpmaster v Worksafe New Zealand[1] confirms the four-step process the Court is required to take:

(a) The first step is to assess the amount of reparation to be paid to the victims;

(b) The second is to fix the amount of the fine by reference to the guideline bands referred to in that case and having regard to the aggravating and mitigating factors in the case;

(c) To determine what orders under ss 152 to 158 Health Safety at Work Act that may be required;

(d) Lastly, to make an overall assessment of the proportionality and appropriateness of the combination of sanctions referred to in the preceding three steps. This includes a consideration of the financial capacity and ability of the defendant to pay.

[9] The purpose of Health Safety at Work Act is important. Its main purpose is to secure the health and safety of workers in workplaces and workers should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work as is reasonably practicable. The Health Safety at Work Act and the *Stumpmaster v WorkSafe* case make it clear that the principles and purposes of sentencing under the Sentencing Act 2002 are appropriate and applicable and this includes the need to deter and denounce a defendant's conduct and the type of conduct generally, the need to hold a defendant accountable, not just to the complainants but to society in general, to promote in the defendant a sense of responsibility and to provide for the interests of victims, also acknowledging that an improvement in safety procedures by the defendant is very much a desirable outcome.

[1] *Stumpmaster v WorkSafe* [2018] NZHC 2020.

Kopu incident – Mr Jonathan Andersen

[10] Dealing firstly with the Kopu incident where Mr Andersen was injured, CRN17075500184. The first step is to assess the reparation. This has two aspects; actual financial and consequential loss and emotional harm. I have read Mr Andersen's victim impact statement and I have seen him present that in Court this morning. Without going into all the detail in that statement, it is clear that this incident has had a profound effect physically, financially and emotionally on Mr Andersen and his family. He has suffered a partial amputation of his right hand. He has lost all of his fingers and his thumb on that hand. He has had to undergo extensive surgery and hospitalisation. He has suffered an obvious permanent disability and disfigurement. He has also suffered significant emotional harm. He is suffering from post-traumatic stress disorder and complex regional pain syndrome. His injury has impacted on his enjoyment of life and his self-worth. Some six months after the accident, his son was born and he feels very acutely the impact of his injury on his ability to interact with his son in the way that he would have wanted to.

[11] The prosecution submits that the emotional harm reparation for Mr Andersen should be in the order of $50,000 to $60,000. Ms Longdill, in her submissions, refers to a number of cases; *Worksafe New Zealand v John Austin Ltd,*[2] *Worksafe New Zealand Limited v Miller Foods Limited,*[3] *Worksafe New Zealand Limited v Alliance Group Limited,*[4] *Worksafe New Zealand Limited v The Three H Company Limited.*[5] These are sentencing examples supporting the range that she submits is appropriate.

[12] Mr Harris, for the defendant, refers to cases of *MDIE v EF Products Limited,*[6] and *Worksafe New Zealand Limited v Locker Group Limited.*[7] He also refers to *Niagara Sawmilling Company* case referred to in the *Stumpmaster* judgment. He

---

[2] *Worksafe New Zealand v John Austin Ltd* [2016] NZDC 6797.
[3] *Worksafe New Zealand v Miller Foods Ltd* [2018] NZDC 5948.
[4] *Worksafe New Zealand v Alliance Group Ltd* [2018] NZDC 20916.
[5] *Worksafe New Zealand Limited v 3H Company Limited* DC Morrinsville CRN18039500032 (unreported), 17 October 2018.
[6] *MDIE v EF Products Ltd* DC Dunedin CRI-2012-012-004088, 25 June 2013.
[7] *Worksafe New Zealand v Locker Group Ltd* DC Manukau CRI-2017-092-004123, 8 November 2018.

submits that reparation for emotional harm in respect of Mr Andersen should be in the order of $40,000 to $50,000.

[13] In relation to consequential loss, Mr Andersen has been on ACC since the accident and the defendant has topped his ACC payment voluntarily and so reparation is not sought in respect of this.

[14] Mr Andersen has also been impacted indirectly by the circumstances surrounding Mrs Andersen having to give up her employment. She is a person who is within the definition of a victim in terms of s 4 Sentencing Act and there has been a consequential loss to the family in that she was compelled to give up her employment to care for her husband. This was unpaid for a period of time and the family lost income. She subsequently was acknowledged as a caregiver and remunerated for that, but there has been a loss of $2482 approximately, being the difference between her previous earnings and her present earnings as a caregiver. The position in relation to consequential loss for someone in Mrs Andersen's position is somewhat complex and I agree with counsel that rather than make an order for specific reparation for her, an appropriate course of action would be to assess the impact of her loss of employment as part of the total emotional impact on Mr Andersen and the family.

[15] The assessment of emotional harm, that is putting a figure on the impact of the sort suffered by Mr Andersen, is a very difficult exercise and is very case specific. So although other cases that have been referred to are helpful, it is really the specific case before the Court that we must focus on. I have regard to the particular circumstances of this case and the authorities referred to by counsel. I also note that the defendant has paid Mr Andersen $10,000 voluntarily. Part of that was subject to tax and it was the defendant's intention that Mr Andersen receive in effect a nett $10,000, but that is not how it worked out.

[16] I assess the figure for emotional harm for Mr Andersen at $52,000. Therefore, the balance for which an emotional harm reparation order is required to be made in respect of Mr Andersen is $42,000.

[17] In respect of fixing of the amount of fine, both the prosecution and the defence agree that this case falls within the middle band of culpability as set out in the *Stumpmaster* case which has a range of $250,000 to $600,000. The issue is where in the band does Mr Andersen's case fall. Ms Longdill submits that after referring to various authorities, the starting point should be $575,000. Mr Harris, for the defendant, submits that the starting point should be $500,000.

[18] In assessing the starting point, the Court is required to look at the operative acts or omissions and what was reasonably practicable as far as steps the defendant could take to address the issues. This has already been referred to somewhat. Ensuring that the planer was adequately guarded, ensuring a safe system of work, in particular formalising the pre-start checks to ensure that the machine guards were in place, and providing adequate interlock means, procedures and training were straightforward steps the defendant could have taken to mitigate the risks.

[19] Secondly, the severity of the risk of harm; risk of harm from unguarded machinery, in particular the cutter block head in this case. It hardly needs to be stated. The risk of harm was serious and the actual harm that resulted was serious. Similarly, the obviousness of the risk, there is really no question that it was obvious. A guard had been supplied by the manufacturer, it was present on site, but for some reason was not in use. The means to avoid the hazard, again this is obvious; ensure that the guard was in place, and have a safe system of work in relation to pre-start checks. Whether this was a significant departure from industry standards, it is accepted that it was.

[20] Looking at the various cases referred to by counsel and assessing the facts of this specific case, I take the starting point to be $550,000. This is in line with the case of *Worksafe New Zealand v Alliance Group* which has some parallels to the present case. The prosecution seeks an uplift for what it submits to be the company's poor safety record. Section 151(2)(e) provides that the Court can take into account that a company has a poor safety record and that includes the defendant having received improvement notices to the extent that this shows whether any aggravating factor was present. In 2015, the company received six improvement notices relating to guarding of machinery at the Katikati site arising from inspections on 3 December 2015 and 4 December 2015. It received other improvement notices in respect of other matters

in July and August 2017. The company has a number of sites and employs approximately 600 workers and although in counsel submissions Ms Longdill has provided an abstract as to what was behind the improvement notice, without more specific and greater detail regarding the circumstances surrounding the issue of those improvement notices, I would not be prepared to increase the starting point in relation to the case concerning Mr Andersen and the Kopu site. The position though is different in the case of Mr Pinder for reasons I will mention later.

[21] From that starting point of $550,000, the defendant company is entitled to a reduction for mitigating factors. I assess those to be as follows:

(a) Reparation, five percent;

(b) Remorse, five percent.

[22] I will just pause there to repeat in relation to remorse something that I said earlier. The defendant is entitled to acknowledgement and a reduction in the sentence for its very responsible attitude and assistance given to Mr Andersen in topping up his wages and in making the voluntary payment of $10,000 at an earlier stage. The defendant company was not obliged to do that and it is a tangible demonstration of the defendant's remorse.

(c) Co-operation with the investigation warrants a reduction of five percent; and

(d) The remedial steps taken also warrant a reduction of five percent.

[23] Those reductions add up to 20 percent, or $110,000, and from that point, the company is entitled to a further reduction of 25 percent in terms of the Supreme Court decision *Hessell v R*[8] which brings the fine down to $330,000. I assess that as the appropriate fine in respect of the case relating to Mr Andersen's accident.

---

[8] *Hessell v R* [2019] NZSC 135.

[24] I also note that it is accepted that in the case of Mr Andersen, the defendant company should pay half of the cost of prosecution which is agreed to be $9305.09, half of that, $4652.50.

[25] Lastly, I turn to look at the proportionality assessment as required by the *Stumpmaster* case. Reparation of $52,000, with the balance of $42,000 being now due to the complainant, a fine of $330,000 and costs of $4654.50 in my view is a proportionate response to the offending and is within the capacity of the defendant to pay.

[26] So the defendant company will be convicted and ordered to pay reparation to Mr Andersen of $42,000. It will be fined $330,000 and ordered to pay costs of $4654.50 in respect of the case involving Mr Andersen; that is CRN ending 0184.

[Court adjourns]

Rotorua incident – Mr Zachary Pinder

[27] In respect of Mr Pinder's case, dealing firstly with the question of reparation, Mr Pinder has been on ACC and the defendant company has topped up his payments and no further payment is required in respect of loss of income. There is also a very successful restorative justice process where it was agreed that the company would pay Mr Pinder $24,000, which it has done.

[28] The first issue is whether that $24,000 meets the appropriate sum for reparation assessed by the Court and while the restorative justice process needs to be recognised, what also needs to be recognised is that overall the Court has the responsibility in fixing what is the appropriate reparation in the case.

[29] I have read Mr Pinder's victim impact statement and I have seen him present that statement in Court this morning. He suffered a partial amputation of three fingers on his right hand, the middle, ring and little fingers. He required surgery immediately after the accident, that was in March 2017, and further surgery in July 2017. He has suffered other health setbacks in recent times and all this has had a compounding effect

on Mr Pinder. What I have to do is try and isolate out and assess the emotional harm in respect of the incident, the subject of the charge.

[30] There is an obvious disability and disfigurement with its attendant emotional impact. Mr Pinder has also suffered from nightmares and sleep disruption as a result of reliving the event and to its credit, the defendant company has assisted Mr Pinder in accessing counselling to deal with this and Mr Pinder is grateful for that.

[31] Mr Pinder has a weakness in his right hand and is anxious about his future and how this is going to impact on his employment prospects. He is grateful for the support he has received from the defendant and it is fair to say that he is doing his best to get on with his life with their help.

[32] The prosecution submits that the appropriate amount for emotional harm reparation for Mr Pinder would be in the order of $30,000 to $33,000 of which $24,000 has already been paid.

[33] Ms Longdill refers to the cases of *Worksafe New Zealand v ITW New Zealand*,[9] *Worksafe New Zealand v Niagara Sawmilling Company Ltd*,[10] and *Worksafe New Zealand v Marshall Industries Ltd*[11] as sentencing examples which support her submissions.

[34] So taking into account the $24,000 already paid, she submits that a reparation order of $6000 to $9000 is appropriate. Mr Harris, for the defendant, submits that a further $1000 to $5000 is appropriate.

[35] Looking at the particular circumstances of Mr Pinder's case, I assess the total emotional harm reparation figure to be $28,000 and this requires an order of $4000 to top up the $24,000 already paid. So there will be a reparation order in favour of Mr Pinder in the sum of $4000.

---

[9] *Worksafe New Zealand v ITW New Zealand* [2017] NZDC 27830.
[10] *Worksafe New Zealand v Niagara Sawmilling Company Ltd* [2018] NZDC 3667.
[11] *Worksafe New Zealand v Marshall Industries Ltd* [2018] NZDC 4498.

[36] In relation to fixing the amount of the fine and taking into account the matters I have to consider in assessing culpability and where this case falls within the culpability band, it is accepted by counsel that this case is within band 2 of the culpability bands in the *Stumpmaster* case and the issue is where exactly in that band does it fall.

[37] Looking at the factors the Court is required to take into account, first of all, the operative acts or omissions and what is reasonably practicable:

(a) There was a need to ensure that there was adequate guarding on the outfeed of the Optimiser; and

(b) There was a need to ensure that there was a documented safe system at work for the operation of the Optimiser and those were steps which were reasonable practicable steps for the defendant coming to take to mitigate the risk in this case.

(c) The nature and severity of the risk of harm and the harm actually resulting, and there was a serious risk of harm from the unguarded nip point on the chain drive and clearly serious harm actually resulted;

(d) The hazard was an obvious one and the means to avoid that hazard were available, namely to ensure that the Optimiser was completely guarded or to do what actually happened in this case when the company changed the setup at the outfeed to do away with the chains altogether.

[38] It is accepted that there was a departure from industry standards in this case.

[39] The prosecution submit that the starting point for a fine in this case should be $450,000 and refers to the *Stumpmaster* case, particularly *Niagara Sawmilling Company Ltd* and *Worksafe New Zealand v Allflex Packaging Limited*[12] in support of that submission.

---

[12] *Worksafe New Zealand v Allflex Packaging Ltd* DC Manukau CRI-2017-092-14520, 25 October 2018.

[40] The defendant submits that the appropriate starting point should be $400,000 and refers to the case of *Worksafe New Zealand v Marshall Industries Limited.*

[41] I accept Mr Harris' submission that *Worksafe v Marshall Industries Limited* is analogous, at least insofar as the industry is concerned and, broadly speaking, so far as the culpability is concerned also. I take the starting point to be $400,000.

[42] In the case of Mr Pinder's accident, I accept the prosecution's submission that there should be an uplift for the safety record factor in s 151(2)(e). First of all, there are the improvement notices to which I have already referred, but these are really part of the context where the most significant feature is the fact that only three months before Mr Pinder's accident, there was an accident to Mr Andersen at the Kopu site involving unguarded machinery, and this should have put the defendant company on notice that it needed to undertake a companywide assessment of unguarded hazards. I increase the starting point by 10 percent because of that factor. That takes the starting point to $440,000.

[43] The defendant is entitled to a reduction for mitigating factors. First of all, there is mitigation available to the defendant in respect of payment of reparation. That reduces the amount by five percent. Secondly, there is recognition for what is genuine remorse and that genuine remorse has been demonstrated by the company's actions towards Mr Pinder in topping up his income and in making the voluntary payment it has and in participating in the restorative justice programme. So a reduction of five percent in that regard is appropriate.

[44] A reduction of five percent in respect of remedial steps is something which has been a matter of some contention. Ms Longdill submits that there should be no such reduction. In this case, I accept Mr Harris' submission that there should be such a reduction. I think that the defendant company has gone further than simply remedying a defect and has completely reworked the outfeed setup so as to do away with the chain drive altogether and I think that warrants a reduction of five percent. Lastly, co-operation of the authorities results in a reduction of five percent. So those 20 percent reductions amount to $88,000 from the starting point of $440,000. From

that point, the defendant is entitled to a 25 percent reduction for its plea of guilty, again another $88,000.

[45] The company accepts that the figure for costs sought by the prosecution, half of $9303 is appropriate and those costs are awarded.

[46] Finally standing back and looking at the totality of the sanctions imposed, the total burden of the fine, the costs and the reparation and the defendant's capacity to pay, I am satisfied that the fines, costs and reparation that I have referred to are appropriate in all the circumstances.

[47] The end result will be, the company will be ordered to pay the reparation to Mr Pinder of $4000, fined $264,000, costs of $4654.50 and Court costs of $135.

P W Cooper
District Court Judge