IN THE DISTRICT COURT
AT ROTORUA

CRI-2014-077-000255

WORKSAFE NEW ZEALAND
Informant

v

ABB MAINTENANCE SERVICES LIMITED
Defendant Company

Hearing:	6 October 2014
Appearances:	J Eng for the Informant R McIlraith for the Defendant Company
Judgment:	6 October 2014

NOTES OF JUDGE J J WEIR ON SENTENCING

---

[1] The defendant company, ABB Maintenance Services Limited, has pleaded guilty to one charge laid under ss 15 and 51A Health and Safety in Employment Act 1992 in that being an employer, it did fail to take all practical steps to ensure that no action or inaction of any employee while at work harmed any other person, namely Greg O'Neill.

[2] At the outset I want to record my appreciation to both counsel for their comprehensive and well researched written submissions which they have filed in support prior to this matter being heard in Court today. Unfortunately, I have been on leave and had the pleasure of dealing with this matter as one of my first exercises on my return from leave. I am anxious that the matter be disposed of today however, because Mr O'Neill, the person who was injured is present in Court, as indeed as I understand is a person from the defendant company. I accordingly therefore intend

to proceed with the sentencing exercise today, but reserve the right to make any relevant additions or alterations, particularly in the field of grammar and matters of that nature.

[3] The prosecution arises out of an incident that occurred during the September 2013 shutdown at the Kinleith Pulp and Paper Mill situated at Tokoroa, which is owned by Carter Holt Harvey Pulp and Paper Limited. The defendant company, ABB Maintenance Services Limited, is contracted by Carter Holt Harvey to provide routine maintenance services at the mill. This includes planning, facilitating and supervising the routine maintenance during two annual shutdowns at the mill each year. There is a third company involved. That is Midland Scaffolding and Rigging Limited, known as Midland, and that has a contract to supply scaffolding, rigging and personnel services to Carter Holt Harvey. The victim of the accident, Mr Greg O'Neill, was employed by that company, Midland, on a temporary contract at the time of the accident. He had worked in the rigging and craning sector for 10 years at the time of the accident. He had worked at the mill in the past and had completed two unit standards, namely 3789 and 15757.

[4] During the shutdown, one aspect of work scheduled was welding repairs to the chassis of the paper machine. Some of the paper machine's paper rolls had to be removed to allow access to the chassis for that purpose. The largest paper roll is a 32 tonne couch roll which sits in its own bay within the paper machine wire section. That couch roll has secondary equipment in and around it, including an item of machinery known as the "roll doctor". This is a large fabricated metal beam running the width of the paper machine and its purpose is to extract water from the couch roll when it is in operation. This roll doctor beam weighs approximately three tons and is normally secured in place on a fabricated plinth by eight fixing bolts. That plinth sits 840 millimetres above the bed of the paper machine. During the shutdown, the couch roll was taken out.

[5] On 9 September, a team of contractors co-ordinated by an ABB employee, a Mr Lee, unbolted the roll doctor and moved it back approximately 50 millimetres on its plinth to make room for the couch roll to be taken out. Mr O'Neill and his co-worker were not part of the team who unbolted and removed the roll doctor.

Unfortunately, no one took steps to notify other people working on the site that the roll doctor was no longer secured to its plinth.

[6] On 11 September, Mr O'Neill was part of a team involved with the machine. Mr Lee, from ABB, held a toolbox meeting on 12 September, the day of the accident. He outlined safety issues that had arisen over the previous night and talked about the tasks that would be done that day.

[7] I accept the submission made by Mr McIlraith that Mr Lee, in his position, had a number of different groups of people to attend to and the meeting, whilst in some ways specific did not deal with the position with regard to the unbolted roll doctor. What was said was that he had informed Mr O'Neill and Mr Ransfield that there was a gantry crane available to use to assist in the lifting operation that had to take place. As it turned out, the gantry crane could not be positioned directly above the felt roll for the vertical lift. The felt roll was the item of machine that was being lifted out. As a result of that, Mr O'Neill and Mr Ransfield set up what is known as two come alongs to manoeuvre the roll doctor during the lift. A come along is a manually operated chain block, lever block or lifting chain which can be used to pull a load and to apply or release tension.

[8] Mr O'Neill and Mr Ransfield anchored two come alongs to the roll doctor and attached them to either end of the fault felt roll. Unfortunately, during the lift, the application of force via the come alongs caused the unbolted roll doctor to be pulled off its plinth, landing on Mr O'Neill and trapping his right leg. The emergency first aid was administered at the scene until an ambulance arrived and transferred him to Waikato Hospital. Unfortunately his right leg was later amputated below the knee.

[9] In the summary of facts it alleges, and is not disputed by the defendant, that neither Mr O'Neill or Mr Ransfield had been told that the roll doctor had been unbolted from its plinth. There were no signs, tags or other notification to inform workers in the vicinity that the roll doctor was unbolted and not secured to its plinth. To all intents and purposes, it appeared to be a permanent fixed part of the paper machine.

[10] The effect on Mr O'Neill has been significant. He is 52 years of age and lives in Hamilton with his wife. As a result of the accident, he was in Waikato Hospital for three weeks, during which period of time his right leg was amputated below the knee in a series of operations. He received a series of skin grafts from his thigh to rebuild the stump. When he was released from hospital, he was confined to a wheelchair at home for about four months while the stump healed enough for the fitting of a prosthetic limb. Unfortunately, his stump has still been changing shape and healing, as a result of which the prosthetic leg became very uncomfortable and he could not wear it again. He has recently undergone further surgery to rebuild the stump and to clean up his skin grafts, hopefully with the end result making walking more comfortable. At the time the victim impact statement was completed, which was on 19 September, he was still confined to a wheelchair and had been for the last couple of weeks. At that point in time, he was looking at about another six weeks before he could start walking again.

[11] I acknowledge Mr O'Neill's presence in Court today. He appears with the aid of crutches and it is clear that he is facing an ongoing battle in terms of being able to wear a prosthetic leg. The victim impact statement refers to the fact that he is a keen fisherman and prior to the accident spent a lot of time at the beach with his wife and pet dogs. It goes without saying that since the accident, he has been unable to walk on the beach and fishing has been near impossible because of the wheelchair. He went fishing on one occasion with his brother on his boat and he fell into the boat. He has been unable to drive himself anywhere in the car and has been mostly stuck in the house with other people having to run around after him. His employment is to a significantly lesser degree now. This is of course as a result of the significant injury that he has suffered.

[12] He goes on in some detail referring to the financial loss that he has been subject to. He estimates that he has lost more than $40,000 in wages over the last year, as he was working as a contractor for three different employers at the time which ACC does not take account of. He continues to receive a percentage of his wages from ACC since the accident. He says that the injury has had a big impact on his relationship with his wife and he has to rely on her now to do many more things for him than was usual. He says that the accident has had a profound impact on him

both physically and psychologically. He says that the small things that have a big impact on him that really knock him back psychology are the things that he keeps discovering on an ongoing basis that he cannot do and that he wants to do.

[13] The Court's approach to sentencing in this area is dictated by the case of *Department of Labour v Hanham & Philp Contractors Limited* (2009) 9 NZELC 93,095, a decision out of a full High Court consisting of Randerson J and Panckhurst J. In that decision, reference is made to ss 12-14 Sentencing Act 2002, which makes it clear that there are two matters that need to be considered; that is both reparation and fines, and the Court has to consider the relationship between reparation and fines. It is said that firstly, reparation and fines are separate sentences in their own right and a sentence of reparation must be imposed if it is available, unless this would result in undue hardship for the offender or there are special circumstances making a sentence of reparation inappropriate. It is further stated that the Court may not decide to impose a fine if satisfied the offender will not have the means to pay it, and further, where it appears to the Court that the offender has the means to pay a fine or to make reparation but not both, the Court must sentence the offender to make reparation.

[14] I note at the outset that, as indicated by Mr McIlraith from the bar, the defendant company is not insured for reparation, as can often be the case in these prosecutions, and therefore will be meeting the full cost of reparation itself. Secondly, Mr McIlraith indicated that the company frankly acknowledges that it has the ability to pay a fine and there is no financial information before the Court with regard to any impecuniosity or matters of that nature.

[15] I turn now to the first step, which is consideration of reparation and its quantum. The best description of this type of analysis is contained in *Big Tuff Palletts Ltd v Department of Labour* (2009) 7 NZELR 322 (HC) where Justice Harrison observed that fixing an award for emotional harm is an intuitive exercise, as quantification defies finite calculation. The judicial objective is to strike a figure which is just in all the circumstances and which in this context compensates for actual harm arising from the offence in the form of anguish, distress and mental

suffering. The nature of the injury is or may be relevant to the extent that it causes physical or mental suffering or incapacity, whether short term or long term.

[16] The informant relies principally upon a decision by Judge Maude in *Department of Labour v Carter Holt Harvey Ltd* DC Whangarei CRI-2012-088-1679, 9 October 2012. In that case, the victim's right leg was amputated above the knee following a workplace accident. The victim suffered severe and serious physical pain and ongoing emotional harm. In that case, the Court referred to five cases that have been cited by counsel, and the defendant company was ultimately ordered to pay out $50,000 by way of reparation.

[17] In Mr McIlraith's written submissions, he referred to that case as well and referred to the fact that in that case the victim was a 50 year old person with 10 children and acknowledged that whilst Mr O'Neill is a similar age to the victim in this case, he does not have the same number of dependants. That indeed has to be the case, but I take the point made by Mr Eng, for the informant, that the number of dependents essentially comes down to a matter of responsibility for the ACC aspect of matters rather than reparation. I do note that in that particular case the defendant company had done everything they could possibly do to meet the victim's needs and that they had, by way of example, maintained his job for him, ring-fenced him from the possibility of redundancy and indicated that his job would always be available to him in whatever form. That of course does not reflect the relationship between Mr O'Neill and the defendant company, because there is no particular contractual relationship. But it is relevant that his employment with his employer has been significantly affected and, broadly speaking, it could not be said that he is or would be in as favourable a position as the victim in this cited case.

[18] In that case, Judge Maude also referred to another case of *Department of Labour v Brian Crawford Contracting Ltd* DC New Plymouth CRI-2012-043-000601, 6 July 2012, which involved a 25 year old man who lost a leg. That case involved a reparation payment order of $50,000, but compensation had already been paid by the defendant to the victim in the sum of $45,000.

[19] Another case mentioned was *Department of Labour v LCG Ltd* DC New Plymouth CRI-2008-043-003886, 11 March 2009, where the victim lost two legs. He had been a sportsman and he received a figure of $70,000.

[20] On the other side of the equation, there are cases such as *Department of Labour v South Road Quarries Ltd* DC Hawera CRI-2010-021-000531, 18 August 2010, where an award of $30,000 was made in emotional harm reparation to the victim for pelvic leg crush injuries which resulted in the amputation of the victim's left leg above the knee. I note in that case, however, that that was a figure adopted by the sentencing Judge as a result of submissions made to him by the informant seeking an award of $30,000.

[21] Another case referred to is *Department of Labour v A1 Contractors Ltd* DC Hastings CRN1004150093, 11 April 2011, although I found that to be of limited assistance.

[22] I return therefore to the observations by Justice Harrison and it is that approach that I have attempted to bear in mind when I look at the nature of the injuries suffered and the effect that it has had on Mr O'Neill, as fully outlined in his victim impact statement, and endeavouring to compare like with like, an almost impossible situation.

[23] In dealing with the quantum of the fine, there are three separate categories of culpability:

(a) Low culpability, involving a fine of up to $50,000;

(b) Medium culpability, involving a fine of between $50,000 and $100,000; and

(c) High culpability of a fine between $100,000 and $175,000.

[24] Fine levels higher than $175,000 may be necessary in cases of extremely high culpability. The maximum sentence of course is a fine of $250,000.

[25] Factors relevant to the assessment of culpability identified in *Hanham & Philp* are as follows:

(a) Identification of the operative acts or omissions at issue. These involve an assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.

(b) The degree of departure from standards prevailing in the relevant industry.

(c) The obviousness of the hazard.

(d) The current state of knowledge on the risks and of the nature and severity of the harm which could result.

(e) Finally, the current state of knowledge of the means available to avoid the hazard or mitigate the risk or its occurrence.

[26] The informant submits that the nature and seriousness of the risk was relatively high and of course resulted in amputation. The informant also submits that the defendant's departure from industry standards is relatively significant, as it did not identify the unbolted roll doctor as a hazard. The informant submits that the hazard of injury or amputation from an unsecured piece of machinery, such as a roll doctor, is obvious in an area where workers are working and are using fixed machinery as anchor points. The informant says that the defendant had the means available to avoid the hazard at its disposal. The informant submits that signs, tags or some other notification to inform workers in the vicinity that the roll doctor was unbolted could have prevented the harm if they had been in place at the time of the incident, and the informant further submits that the measures required when weighed against the risk of serious harm or injury were neither onerous nor costly. Indeed, quite apart from the issue of notices or signs being affixed to the relevant item of machinery, this incident would have been avoided if mention had been made of the status of the machine at the toolbox meeting held on the morning of the incident.

[27] The informant therefore submits that bearing in mind all of those factors, the offending is of medium culpability and suggests a starting point in the range of between $60,000 to $75,000 to reflect that fact. In line with the principles of *R v Taueki* [2005] 3 NZLR 372, the prosecution then invites the Court to consider the issue of aggravating features and mitigating features. There are no aggravating features frankly conceded by the informant and the informant suggests that there should be a discount in the vicinity of 10 to 15 percent in line of the principles outlined at paragraphs [69] to [74] of *Hanham & Philp*.

[28] Mr McIlraith, for the defence, in relation to the issue of the fine, on behalf of his client, acknowledges that there was a communication breakdown between numerous parties involved in the shutdown, including all three of the related companies, namely Carter Holt Harvey, Midland and the defendant company. But he submits that this has to be looked at in the context of the fact that the defendant company had no knowledge that the Midland riggers would use the roll doctor as an anchor point. Indeed, during the course of his oral submissions, it was pointed out that the roll doctor in fact is a very delicate machine, although it is a huge machine, because of the function that it has in the production of paper and for it to be used as an anchor point in a lifting operation is really completely out of the question.

[29] He also says that the defendant company was performing a co-ordinator role over a number of expert contractors and was not an expert at rigging. That is clearly the case. He then goes on to submit that Carter Holt Harvey's processes did not require the roll doctor to be identified as unsecured as it was secured by its weight. Again that may well be the case, but in my view, and indeed he does not dispute this point, that the fact that any item of machinery, particularly a heavy item of machinery, is unsecured, should be a factor that is known to anyone who has had anything to do with that machine.

[30] He also submits that Mr O'Neill had completed unit standards, but this was only to a level of 26 credits whereas a minimum of 68 credits was required for a core competency rigging standard. The submission is made that Mr O'Neill therefore was not qualified to plan and prepare basic rigging work as he was doing on 12 September. That indeed might be the case, but it seems to me that whether or not

he was qualified to do this particular job in terms of the NZQA standards, any person in their right mind would have made a different decision if they had known that this particular item of machinery was unsecured. The fact that he was not therefore qualified to the required 68 credits is of marginal relevance in my view. He submits that the culpability fits into the low category and compares it to a case known as *Department of Labour v Aquaheat Industries Limited* DC Lower Hutt CRI-2010-091-002631, but that case is different on its facts and involved the loss of a victim's digits as a result of him putting his hand where he should not have put it.

[31] Reference was made to another case known as *Ministry of Business, Innovation and Employment v Carter Holt Harvey Pulp and Paper Ltd* DC Tokoroa CRI-2012-077-1371, 11 June 2013. In this case, once again an employee of Midland was working on scaffolding on a pipe bridge at Kinleith. Whilst constructing the scaffolding, the employee accidentally opened a valve which resulted in the employee suffering from severe burns from sulphuric acid. Carter Holt Harvey was unaware of the valve's presence and, as such, had taken no steps to address the hazard it presented. The Court considered that be that as it may, the defendant company should have known it was there and Carter Holt Harvey in that case had acknowledged its culpability by way of its guilty plea and the remedial steps taken. In assessing culpability, the Court determined that Carter Holt Harvey's lack of knowledge of the valve was important, and they had taken the remedial steps quite quickly. In that case, the Court determined that Carter Holt's liability was in the upper end of the lower range and set the starting point at $45,000.

[32] In my view, this case is more egregious than that, because there was clear knowledge of the state of the item of machinery. In other words, the roll doctor was known to have been unbolted from its plinth and for that reason and that reason alone, the defendant's culpability has to be set higher than that comparative case and what it could argue significantly higher. The *Aquaheat Industries Limited* case, as I recall, set the starting point at $35,000 in circumstances where once again, in my view, the culpability was significantly lower.

[33] Once the start point has been determined, the next exercise that has to be taken account of following the principles outlined in *Taueki* is consideration of any

mitigating factors, and Mr McIlraith has outlined a number of mitigating factors which I accept. Firstly, he has submitted that a discount should be given for remorse and reparation. That is clearly the case. I also accept that consideration must be given to the defendant's co-operation with Worksafe and also further consideration, favourable consideration, must be given to the defendant company's extensive safety processes and the remedial steps taken as a result of this very unfortunate accident. I also take account of the fact that the defendant company took what limited steps it could do to offer its support to Mr O'Neill, bearing in mind the nature of its relationship with him. Finally, I take account of the fact that the defendant company has an excellent safety record in proportion to the scale and risk involved in its business.

[34] Mr McIlraith has suggested that a very arithmetical approach should be taken to this but, in his oral submissions, accepted that the approach in *Ballard v Department of Labour* (2010) 7 NZELR 301 (HC) is but one approach and other approaches have been used by the High Court, most recently by Justice Duffy in the case of *Department of Labour v Eziform Roofing Products Limited* [2013] NZHC 1526. In that case, when she looked at mitigating factors, such as an offer of reparation, remedial action to prevent future occurrence of such accidents, the defendant company's favourable safety record and its co-operation with the department, she found that a discount of no more than 30 percent would be appropriate. That is in itself effectively twice what the informant submits as an appropriate discount. I have to say that I was impressed by the submissions made by defence counsel in relation to mitigating factors and I take account of that now in my final award.

[35] Insofar as the figure of reparation is concerned, in my view the appropriate award is one of $50,000. Insofar as the fine is concerned, in my view the start point should be one of $60,000. I discount that by 30 percent to take account of the factors raised by Mr McIlraith, which, by my calculation and subject to consideration and approval by counsel, leaves a balance of $42,000. The company is clearly entitled to a discount of 25 percent for its indicated plea of guilty, which by my calculation involves a further discount of $10,500. The end sum therefore, by my calculation, in terms of the fine, is $31,500.

[36] Once again, I record my thanks to you for your submissions and thank you for attending, Mr O'Neill.

J J Weir
District Court Judge