IN THE DISTRICT COURT
AT HASTINGS

CRI-2014-020-002485
[2015] NZDC 5754

WORKSAFE NEW ZEALAND
Prosecutor

v

GUNAC HAWKE'S BAY (1994) LIMITED
Defendant

Hearing: 16 February 2015

Appearances: S Backhouse for the Prosecutor
L Blomfield for the Defendant

Judgment: 16 February 2015

NOTES OF JUDGE D A ONGLEY ON SENTENCING

[1] The company Gunac Hawke's Bay (1994) Limited has pleaded guilty to a charge laid under s 6 and 50(1)(a) Health and Safety in Employment Act 1992 in that, being an employer, it failed to take all practicable steps to ensure the safety of its employee, Mr Kerrisk, while at work, by failing to take all practicable steps to ensure that he was not exposed to the hazard of working with solvents in a confined space.

[2] The company is a waterproofing company that provides services to the building industry. On 7 April last year, Mr Kerrisk was instructed to resurface the interior of two grain silos with a bitumen-based product called Novaglass Rapid Primer. The main toxic component of the primer is toluene and the label states that it should not be used in confined spaces. Mr Kerrisk was experienced in applying the primer but not in working in a confined space with it. He wore a respirator that had interchangeable filters, one for dust and one for solvent. He did not have the solvent

filter at the site and he used the dust filter, the only one available. He did not have a buddy or a supervisor to check that he was safe in the course of the work.

[3] The work was carried out at Twyford Egg Farm Limited, the director of that company checked on him at 12.30 pm when Mr Kerrisk was okay and an employee checked on him at 4.30 pm when he was found to be immobile. He was found unconscious, covered in bitumen product, pale, cool and unresponsive. An ambulance was called. His legs had spasms while he was in the ambulance. He suffered a loss of concentration and short term memory loss. He did not recall collapsing and did not remember anything after that until he was in the emergency department.

[4] Fortunately, the toxic effect was not as serious as it might have been; he was given a nebuliser and discharged the same day. The diagnosis was that he had suffered from the toxic effect of carbon monoxide. No further treatment was required and it is understood that he has returned to full health.

[5] In an inquiry by WorkSafe New Zealand, Mr Meehan, the director of the company was interviewed. He readily acknowledged that there had been no hazard assessment made for coating the interior of the silo. He said that the company relied on the principal's hazard assessment. It should have made its own assessment. It had not trained employees in confined space work and, because the company had a good safety record, management may have become too relaxed about risk when undertaking a job of this kind.

[6] WorkSafe obtained the medical records of the neurologist. The loss of consciousness was caused, it was thought, by the inhalation of fumes without the proper respirator. There was no evidence of ongoing neurological damage. Mr Kerrisk had no experience in working in a confined space with the product and told the investigator that he could not recall doing such a job previously. He remains employed by the company. He says he has been fully supported by the company. He was given paid time off and suffered no financial loss. He was not hospitalised for any length of time and there is no evidence of any ongoing anxiety about the consequences of the accident.

[7] I turn to the submissions of counsel. The prosecutor refers to the purposes and principles of sentencing. Sentencing in this area must take account of denunciation of risk-taking of this kind, both in general and so far as the defendant is concerned; calling the offender to account for the harm done and both specific and general deterrence. Deterrence is an outstanding factor in sentencing for industrial accidents. The Court is guided by *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095; (2008) 6 NZELR 79 (HC). The matters that need to be taken into account in sentencing are addressed in the judgment in that case.

[8] The first question is the amount of reparation. Mr Kerrisk did not wish to engage in the restorative justice process nor to make a victim impact statement. He is fully satisfied with the support that he has received from his employer and it goes without saying, bears no animosity or ill will. He does not ask for payment of reparation. The Court nevertheless has to address the question.

[9] The prosecutor has referred to a number of cases in which reparation has been ordered in sums between $1,000 and $17,000 in circumstances which are different and in some cases markedly different from this case. The prosecutor submits a figure for reparation in the region of $6,000. The defendant, which is not averse to paying reparation, suggests something in the region of $2,500 to $3,000. I think in this case, the $2,500 is an appropriate award for reparation, where the employee suffered the shock of what happened to him but did not have any hospital treatment other than admission and discharge on the same day and has no ongoing symptoms either physical or mental.

[10] The second and more substantive matter is fixing the fine. *Hanham & Philp* sets out a scale in which the band for an offence of medium culpability is a fine between $50,000 and $100,000. Both counsel are agreed that it falls within the medium culpability band.

[11] In order to identify where it should fall, there are a number of factors that need to be taken into account in assessing culpability. First is the identification of the operative acts or omissions. The prosecutor says, and it is accepted, that the

company did not undertake a hazard assessment and so it failed to identify that using the solvent in a confined space, the grain silo, was a hazard. Consequently it failed to ensure that the employee was trained in confined space work, nor did it devise a safe operating procedure. It provided a solvent filter for the protective equipment but there was no arrangement to ensure that the proper filter was available at the time and was used. There was no second employee positioned in order to ensure Mr Kerrisk's safety. They are all matters of high culpability, but may be balanced against the fact that this was an isolated incident. It is rather different from a situation where an employee habitually engages in this type of work. This was a culpable failure mitigated by the fact that the company had a clear record and engaged experienced employees, but failed to assess that this was a job that required additional care.

[12] As to the nature and seriousness of the risk of harm, again that was significant, because if the employee had continued to suffer solvent inhalation without being detected, although there is no precise evidence, it would seem likely that he may have suffered brain damage or that the incident could even have been fatal. There was four hours between the first and second observation when he was found unconscious. It is not known for how long he had been in that state. He said that he felt dizzy towards the end of the job. When he was found unconscious he was covered in the primer so had apparently collapsed while applying it. His short term memory loss prevented any estimate of how long he had been unconscious. The risk of harm was high. The actual harm was mercifully overcome by his being rescued and treated.

[13] The degree of departure from standards prevailing in the community. The material refers to an Australian standard and to the WorkSafe guidelines and fact sheet. The standards refer in more detail to the means of avoiding the failures that I have earlier mentioned. They involve risk assessment, training, protective equipment, a proper retrieval system and a standby person to check on the welfare of the employee. In hindsight, this man should at least have been checked regularly while he was applying the coating.

[14] It is noted also that the safety data sheet for the material that was being supplied warns of serious damage to health by prolonged exposure through inhalation.

[15] The next fact that has to be taken into account is the obviousness of the hazard. It was obvious, in hindsight, but it was overlooked in circumstances that prevailed.

[16] The next factor is the availability, cost and effectiveness of the means necessary to avoid the hazard. The means were available and there would not have been any significant cost in providing a safe operating procedure and training. The remaining matters concerned the current state of knowledge of the risks and the current state of knowledge of the means available to avoid the hazard. In this case, the risk and the means to avoid it were uncomplicated.

[17] The prosecutor refers to various cases in this band, with starting points between $60,000 and $100,000. The prosecutor accepts that there may be a credit of about 30 percent, for remorse five percent, remedial action five percent, co-operation five percent, and reparation 15 percent. There is no method of calculation of the mitigating features. The prosecutor and defence are agreed that the total should be about 30 percent and that a prompt guilty plea warrants a further reduction of 25 percent. It appears in these cases, that these reductions are added together and are not applied separately as they would be in a sentencing case under the Crimes Act where the mitigating features are applied first and then 25 percent of the result is taken. In short, it is agreed that the total reduction from the starting point yet to be established is about 55 percent.

[18] In its submissions, the company accepts almost all of these matters. The directors of the company and all the employers were most upset by this occurrence and the company management was genuinely remorseful and completely open with the investigator. The company says that during its 20 years of operation, before this incident, it had an exemplary health and safety record. All of its employees held a Site Safe passport and since the incident the company has engaged Site Safe to complete thorough audit of its health and safety systems. It has taken the incident

very seriously and it has fully supported the employee since. It says that it is now its policy not to carry out confined space work involving solvents at all. I have taken those matters into account and indicated that the reparation will be $2,500.

[19] The defence submissions also refer to various cases. I have read some of the relevant cases but do not propose to analyse them. As to the risk and obviousness of the hazard, it is mentioned that the work was not of a kind that the company regularly undertook which may explain, without excusing, the failure to identify the hazard. The primer itself had been used for many years without incident and the company and employees may have become less vigilant about the product's use than they ought to have been, having had the experience of using it for a long time without any problems.

[20] Counsel Ms Blomfield, for the company, submits that the starting point should be below the midpoint of the band between $50,000 and $100,000. It is suggested that the starting point might be $70,000. The prosecution suggests that it should be $80,000 that is more towards the high point. There is a balance between the risk of the injury that might have occurred and the one off or isolated failure by the company to identify and recognise that risk. While not wishing to necessarily take an average of the submissions that are made, it seems to me that this case fits comfortably in the centre of the band and that an appropriate starting point would be $75,000. Applying the cumulative mitigating features that have been referred to, that is 55 percent, the fine imposed is $33,750. The total amount of fine and reparation being $36,250.

D A Ongley
District Court Judge