IN THE DISTRICT COURT
AT CHRISTCHURCH

CRI-2014-009-7034
[2015] NZDC 12612

WORKSAFE NEW ZEALAND LIMITED
Prosecutor

v

VIP FRAMES AND TRUSSES LIMITED
Defendant

Hearing: 6 July 2015

Appearances: L Moffat for Prosecutor
J Shingleton for Defendant

Judgment: 10 July 2015

RESERVED JUDGMENT OF JUDGE S J O'DRISCOLL

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[1] The Defendant has pleaded guilty to two charges brought by Worksafe New Zealand. I read their written submissions prior to going into Court on 6 July 2015 and heard submissions by both the Prosecutor and Defendant on that day. I then reserved my decision on sentence.

[2] The relevant sections to the first charge are s 6 and s 50(1)(a) of the Health and Safety in Employment Act 1992:

> **50 Other offences**
>
> (1) Every person commits an offence, and is liable on conviction to a fine not exceeding $250,000, who fails to comply with the requirements of—
>
> (a) a provision of Part 2 other than section 16(3) or

...

6 Employers to ensure safety of employees

Every employer shall take all practicable steps to ensure the safety of employees while at work; and in particular shall take all practicable steps to—

(b) provide and maintain for employees a safe working environment; and

(c) provide and maintain for employees while they are at work facilities for their safety and health; and

(d) ensure that plant used by any employee at work is so arranged, designed, made, and maintained that it is safe for the employee to use; and

(e) ensure that while at work employees are not exposed to hazards arising out of the arrangement, disposal, manipulation, organisation, processing, storage, transport, working, or use of things—

(i) in their place of work; or

(ii) near their place of work and under the employer's control; and

(f) develop procedures for dealing with emergencies that may arise while employees are at work.

[3] The relevant section to the second charge is section 25(3)(a) of the Act:

25 Recording and notification of accidents and serious harm

...

(3) If there occurs any serious harm or accident to which this subsection applies, the employer, self-employed person, or principal concerned must,—

(a) as soon as possible after the occurrence becomes known to the employer, self-employed person, or principal, notify WorkSafe of the occurrence;

Facts

Charge 1 – s 6 failure to take all practicable steps

[4] The Defendant, VIP Frames & Trusses Limited, pleaded guilty to failing to take all practicable steps to ensure the safety of its employee Lyndon Russell

Frederick while at work. It failed to take all practicable steps to ensure that Mr Frederick was not exposed to hazards arising from working with nail guns.

[5] The Defendant operates a large manufacturing business producing pre-fabricated steel and wooden building frames and trusses for the construction industry. There are several production lines which operate to produce the wooden building frames including the component table and both standard and non-standard nailing bed stations where employees are required to operate nailing guns. The Defendant has approximately 80 employees.

[6] Mr Sim was employed by DKW (a personnel company) who had placed him with the Defendant company 5 days prior to the accident. The injured worker, Mr Frederick, was an employee of the Defendant at the time of the accident.

[7] On 29 January 2014, Mr Sim was working with a nail gun on the component table, the easiest type of nailing work. After lunch he was moved to the standard nailing bed to continue his training. As Mr Frederick worked with a nail gun along one side of the frame, Mr Sim worked with another nail gun directly opposite Mr Frederick on the other side of the frame. This practice is called "cross-nailing".

[8] Mr Sim failed to correctly line up his nail gun and misfired. The misfired nail travelled several metres across the frame hitting Mr Frederick in the chest.

[9] Mr Frederick was transferred to hospital. Two ultrasounds were required to ascertain whether the nail had nicked or punctured the heart. Mr Frederick suffered a puncture to the pericardium, narrowly missing his heart and sustained a punctured lung. Surgery was required to remove the nail. There was bruising on his chest where the nail penetrated the skin.

[10] Worksafe New Zealand's investigation into the incident revealed that the Defendant did have health and safety systems in place, however, the company was in breach of s 6 of the Health and Safety in Employment Act 1992 (HSEA) in that it failed to take all practicable steps to ensure the safety of Mr Frederick at the material time while at work.

Charge 2 – s 25(3)(a) failure to notify

[11] The second charge is not related to the charge above and arises as part of the investigation into the first incident. Worksafe reviewed the accident register of the Defendant company. That register showed that the Defendant company failed to notify the Regulator of a serious harm accident as required by s 25(3) of the HSEA.

[12] According to the agreed Summary of Facts, the register recorded that on 20 August 2013, Ronald Heaphy (an employee of Advanced Personell contracted to the Defendant) sustained a thumb fracture when using a nail gun at the Defendant's place of work.

[13] Defence Counsel's submissions and the affidavit of Christopher Ian McIntosh, the operations manager for the Defendant, curiously set out that Mr Heaphy was off work for 28 days after having sustained a foot fracture during a fall at work. However, it appears that the injury was indeed a thumb fracture.

[14] Both Counsel are agreed that the accident caused Mr Heaphy to sustain "serious harm" as defined in the Act and should have been notified to the regulator.

Approach to Sentencing

[15] The approach to sentencing under s 50 of the Act is summarised in the leading case of *Department of Labour v Hanham and Philp Contractors Limited and others* (2008) 6 NZELR 79 (HC), a decision of the full court of the High Court.

[16] That case sets out at [80] that the approach to sentencing should include the following steps:

- Step one: assessing the amount of reparation
- Step two: fixing the amount of the fine
- Step three: making an overall assessment of the proportionality and appropriateness of the total imposition of reparation and the fine.

CHARGE 1 – failure to take all practicable steps (ss 6 and 50(1)(a))

STEP ONE: Assessing the quantum of reparation

[17] Section 32(1)(b) of the Sentencing Act provides that the Court may impose a sentence of reparation if the offender has, "though or by means of" its offending, caused a person to suffer emotional harm or loss consequential on any physical harm.

[18] The sentence of reparation must be a principal focus and is the first main step in the sentencing process. The sentences of reparation and fine serve distinct and discrete purposes. The assessment of reparation must be made taking into account s 32 of the Sentencing Act 2002, any offer of amends made by the offender, and the offender's financial capacity.[1]

[19] The Prosecutor submits that reparation in the region of $10,000 may be appropriate. The Prosecutor relies on *Department of Labour v Mainzeal Property & Construction Ltd* (DC Upper Hutt CRI-2005-076-2040, 27 April 2006) where the victim lost 70-80% of the hearing in one ear when a nail gun was misfired, lodging a nail in his jaw. The Court determined that the extent of the hearing loss and the permanent effect of the injury were not matters which carried compelling weight in the sentencing process itself. Nevertheless $16,000 was awarded in reparation.

[20] The Defence submits that no order of reparation should be made on account of an award of $6,000 by the Employment Relations Authority (ERA) for hurt, humiliation and loss of enjoyment. Counsel submits that the amount was determined pursuant to a hearing with evidence from Mr Frederick and his partner. Counsel suggests that the District Court will not have had the same opportunity as the ERA to hear the actual evidence of emotional harm.

[21] As at 8 June 2015, $6000 has not yet been paid to Mr Frederick but at the sentencing hearing the defendant indicated the amount was owing and payable to the victim. There is no real distinction whether the amount is an offer of reparation by

[1] *Hanham and Philp* at [32] to [35].

the defendant or an award by the ERA. I am told the amount awarded is being held in trust by the victim's lawyer. The $6,000 only covers a portion of his $18,000 legal bill so far.

[22] An issue that I raised with counsel is the fact that the victim is now taking his case to the Employment Court. As I understand it, such a hearing will result in a de novo hearing in the Employment Court. I indicated to counsel the difficulty that should I proceed with sentencing then I could not take into account any increase in any award that the Employment Court might make. Mr Shingleton's position was that sentencing should proceed and the Employment Court could then take into account any order for reparation that this Court might make.

[23] I could not find any case law where the ERA has ordered compensation to a victim prior to HSEA sentencing. Counsel did not provide me with any cases.

[24] I have not seen the ERA determination but the Defendant's employee, Mr McIntosh, has sworn an affidavit indicating the award related to the company's breach of duty (arising from the accident) and how the breach affected the victim emotionally.

[25] If the ERA made an order to cover the emotional consequences of the accident to the victim and the Defendant has paid or is prepared to pay the amount to the victim then this is not a matter I can ignore. I therefore proceed on the basis that the defendant will pay the victim $6000 towards emotional harm as a result of the injuries suffered to the victim.

[26] *Physical injuries:* The exact physical injury suffered to the victim is not clear. Mr Frederick says in a victim impact report he suffered a puncture to the pericardium, narrowly missing his heart and sustained a punctured lung. Surgery was required to remove the nail. There was bruising on his chest where the nail penetrated the skin. The Defence does not accept that Mr Frederick suffered "serious harm injury" as asserted by the Prosecutor. In my view the injury was serious; it had the potential to be fatal. Any embedding of metal coming from an

explosive force which comes into contact or in close proximity to the heart and lungs of a person is a serious harm injury.

[27] *Financial costs:* Following the accident, Mr Frederick did not return to work. He later received a text message advising that he had been locked out of the premises. The company did not follow this with a letter. Any further correspondence was between ACC and the company in terms of his medical entitlements. Any ACC payments were not initiated until three weeks after the accident, until the company filled in the relevant documentation. The three weeks pay totalled approximately $800.00.

[28] *Emotional harm:* The Victim Impact Statement sets out that the accident has had a strong effect on Mr Frederick and his partner (Sue Feeney) by causing high levels of stress and arguments, mainly over money. In addition there are other matters since the accident that have contributed to emotional harm suffered by the victim; Mr Frederick received abuse phone calls, text messages and some verbal messages from other staff members. Close friends at work, some of whom he has worked with for years, have also taken a stance not to talk or communicate to him. Mr Frederick and his partner have seven children between them, all living at the same address.

Similar cases

[29] In *Affco New Zealand Limited v Muir* (2008) G NZELR 281 reparation of $15,000 were ordered. A freezer hand had his gloved left hand drawn into an area between the edge of a conveyer belt roller and the frame. He subsequently lost the left index finger at the second joint.

[30] In *Department of Labour v Fonterra Co-Operative Group Ltd* (DC Hawera CRI-2011-021-1101) reparations of $12,500 were ordered when an employee reached into an unguarded part of a machine and had the tip of her finger amputated.

[31] There was no evidence as to how long Mr Frederick was off work and what the ongoing effects of the injury are, both physically, emotionally and in terms of his ability to work in the future.

[32] I do not accept the proposition that where the ERA makes an award I am precluded from making an order for emotional harm. I must be guided by the legislation I am acting under, namely the HSAE 1992. I must be guided by decisions of Higher Courts that have set down principles I must apply and I must be guided by decisions of Higher Courts in terms of appropriate orders for reparation. This is based on the principle of consistency in s 8(e) Sentencing Act 2002. The ERA is not required to follow the same legislation or decisions in making their award.

[33] I conclude that taking into account the $6000 already awarded by the ERA overall reparation of $15,000 would be appropriate. Accordingly, I order reparation of $9,000 to be paid to the victim.

STEP TWO: Assessing the quantum of the fine

[34] The assessment of a starting point for the fine involves an assessment of culpability within the following scale:[2]

- Low culpability: fine of up to $50,000
- Medium culpability: fine between $50,000 and $100,000
- High culpability: fine between $100,000 and $175,000
- Extremely high culpability: fine greater than $175,000+

[35] Factors relevant to the assessment of culpability [*Hanham and Philp* at [54]] are:

- Identification of the operative acts or omissions at issue. This will usually involve the clear identification of the "practicable steps" which the Court finds it was reasonable for the offender to have taken in terms of s 2 of the Act;
- An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk;

[2] *Hanham and Philp* at [57].

- The degree of departure from standards prevailing in the relevant industry;
- The obviousness of the hazard;
- The availability, cost and effectiveness of the means necessary to avoid the hazard;
- The current state of knowledge of the risks and of the nature and severity of the harm which could result;
- The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

Finding a starting point – failure to take all practicable steps (ss 6 and 50(1)(a))

[36] There is clearly a divergence in the submissions of counsel as to the appropriate starting point. The Prosecutor submits that the appropriate starting point for the s 6 charge (nail gun charge) is a fine of $90,000 being at the high end of the medium band of culpability.

[37] The Defendant submits that the appropriate starting point for the fine is $30,000 in the upper low culpability range.

Identification of the operative acts or omissions – the practicable steps

[38] The Prosecutor submits that the particular hazard involved in this incident was a nail gun. This is an inherently dangerous tool that requires significant controls to be put in place if it is to be operated safely.

[39] Worksafe's investigation identified 7 significant practicable steps should have been taken by the Defendant. I was told that after discussions between the parties and by its plea, the Defendant has accepted that it failed to take practicable steps. These were:

(a) To have ensured that the standard operating procedure for nail guns was adequate;

(b) To have prohibited the practice of cross-nailing;

(c) To have ensured the production line was operated to allow operators sufficient time to check that no one is in the line of fire before compressing the trigger;

(d) To have ensured that the Defendant's training program, designed to ensure trainees progress from the most basic to more complex tasks appropriately, according to competency, was followed by employees and contractors.

(e) To have ensured that trainees were adequately supervised and regularly assessed before any task progression to ensure that they are competent.

(f) To have put in place appropriate procedures to ensure that all nail gun operators comply with industry best practice and guidelines.

(g) To have an up to date hazard register that correctly identifies all known hazards associated with the use of nail guns.

The nature and seriousness of the risk of harm occurring as well as realised harm

[40] The nail gun fires with significant force and would cause serious damage to any body part it came into contact with. It is conceivable that depending on the organ/arteries hit, the resulting injuries could be fatal.

[41] The Prosecutor submits that the realised harm to Mr Frederick was serious. His heart was missed by only millimetres and the nail punctured his lung and required surgery to remove it.

[42] I regard the risk of serious harm when a nail gun is used inappropriately as potentially harmful and the nature and seriousness of the actual harm in this case as serious.

The degree of departure from standards prevailing in the relevant industry

[43] There is a dispute as to whether the prohibition of cross-nailing is an "industry standard". Mr McIntosh at para [23] of his affidavit deposes it is not.

[44] The Court received further submissions from Counsel for the Defendant shortly before the sentencing date which sought to draw the Court's attention to the comments of Judge Blackie in *Worksafe New Zealand v Treescape Limited* DC Manukau CRI-2014-092-006693, 26 June 2015.

[45] The case involved an employee working for the defendant arborist company, who was operating a wood chipper to dispose of tree debris. The machine in question consisted of a metal chute leading to in-feed rollers for the purpose of directing tree debris towards rotating cutting (clipper) blades. The employee noticed that several small branches had not been picked up by the in-feed rollers and used his right foot to kick the branches into the rollers. At the same time his left foot skidded on some loose gravel, causing him to lose balance and for his right foot to be pulled in by the in-feed rollers towards the rotating chipper blades. He was unable to grab the control bar of the chipper to stop the rollers and, as a result, his right foot was pulled into the chipper. He suffered serious harm to his right leg which had to be amputated below the knee joint.

[46] Mr Shingleton sought to draw the Court's attention to the comments of Judge Blackie as to the dearth of technical data submitted by Worksafe NZ. The defendant pleaded guilty and in doing so accepted that there was a guarding failure in respect of the chute of the wood chipper. However, the defendant's culpability depended partly on the degree of departure from industry standards. The defendant had ensured that the physical proportions of the chipper complied with the manufacturer's guidelines and the American standards by being 850mm long. However, Worksafe NZ held that Australian Standard AS 4024 was applicable to New Zealand arborists and that required the chute to be 1500mm. The length of the chute mattered because it acted as a guard between the in feed rollers and the machine operator.

[47] The defendant said that it was far from clear that AS4024 was applicable to New Zealand users. The company, like many other businesses in the ariboculture industry, relied on an ensured compliance with NZ Ariboculture ACOP as the primary legal standard for safety in industry, as well as the American standards. NZ Ariboculture ACOP did not refer to AS 4024 as a standard that Treescape needed to adopt or comply with in relation to safety of the chipper, nor did it specify any chute length. The defendant accepted that the guidelines for safe use of machinery published by Worksafe in May 2014 established AS4024 as the current state of knowledge for safety of machinery in New Zealand.

[48] On 16 December 2013, when the accident occurred, it was far from clear that AS 4024 was the applicable industry standard because the Worksafe guidelines were not yet published and there was no publicity as to the proposed changes. Moreover, other guidelines for guarding and safe use of machinery included only cursory references to AS 4024 and did not suggest compliance with the standard was a mandatory requirement.

[49] The defendant company had complied with every other health and safety standard that there was. Still, they accepted that their failure to extend the chipper was not altogether excusable and submitted a starting point of $60,000 which the Judge ultimately adopted.

[50] I distinguish *Treescape* from the present case. The present matter is not one of inadvertent departure arising from confusion about a technical detail of the industry standard, as was the case in *Treescape* (at [48]).

[51] Worksafe NZ's "Guidelines for the Safe Use of Mechanically Powered Nailers and Staplers" details the projectable hazards created by the use of nail guns and the need for employers and operators to ensure that nail guns are never pointed at either themselves or other workers. The risk of injury from a nail gun misfiring is significant. Those Guidelines recommend at 11.6 that the area behind the target is clear of people and that the surface behind the target will stop fired nails.

[52] The Defence submits that because cross-nailing is not expressly prohibited by any industry standard, this reduces the company's culpability.

[53] No material was submitted by either Counsel as to whether the practice of cross-nailing is commonly used, endorsed or prohibited by the "industry".

[54] Regardless of what term is used, cross nailing is a practice which places someone in the area behind the nail gun target surface. It clearly contravenes the guideline and must be seen as a method which significantly departs from industry standards. It was not a "minor" deviation.

[55] Accordingly, the Defendant failed to put in place procedures to ensure that all nail gun operators comply with that guideline. This was not the case as the Defendant allowed the practice of cross-nailing to continue. This meant that when Mr Sim failed to correctly line up his gun, the fired nail travelled several metres and hit Mr Frederick in the chest. There was no procedure to prevent an accident in the event of such a misfiring.

[56] I suggest that this case clearly demonstrates the danger in such a practice and why Worksafe states cross-nailing should not occur. I think that there may be some ambiguity in the material that is available to employers on this issue. If the term "cross-nailing" is a common term used in industry (particularly in workshops as opposed to building sites) then it should be made clear that cross-nailing is a prohibited practice. On the other hand instructions that a nail gun should not be pointed at anyone might be seen to be too vague and general. Yet, such a simple statement is clear and the reason is obvious - a nail gun is a potentially lethal tool.

[57] The other failures appear to be those of training, supervision and hazard identification. The Defence does not accept that improving these would have reduced the risk of this particular accident.

[58] In my opinion, and as is the case in most health and safety incidents, no one failure is determinative. This is why the statutory goal of "excellence in health and safety" requires broad prevention and identification strategies.

[59] The defence submits that prohibiting cross-nailing was the *only* factor which would have effectively reduced the risk to Mr Frederick. However, I think that the inadequate training and supervision of Mr Sim, a new employee, also created a risk that was present regardless of the purpose for which he was using the nail gun – during cross-nailing or some other task. Clearly, the failures are multiple and the effect of the risk of harm was cumulative.

[60] The Defendant Company now have a no cross-nailing policy on the factory floor.

The obviousness of the hazard

[61] A nail gun is an inherently dangerous piece of equipment that if misfired can act like a weapon. This is an extremely obvious hazard.

The availability, cost and effectiveness of the means necessary to avoid the hazard

[62] There is little/no cost involved in ensuring safe operation of nail guns. Training, supervision, hazard identification and prohibiting the practice of cross-nailing would have effectively reduced the risk of this type of incident.

The current state of knowledge of the risks and of the nature and severity of the harm which could result

[63] In my view the current state of knowledge about the means available to avoid the hazard is set out above.

The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence

[64] The current state of knowledge is set out above with regards to the safe operation of mechanically powered nailers and staplers. While the practice of cross-nailing is not expressly prohibited I note, that such a practice puts any operator in direct contravention of the guidelines, as during cross-nailing the area behind the target is *not* clear of people.

Similar cases

[65] Of the three appeals considered in *Hanham & Philp*, that relating to Cookie Time Limited is the most comparable. In that case, the victim had been employed by the company for about six years prior to the accident. As part of the production process she operated a conveyor belt system. She went underneath the machinery to clean some material she had noticed while the belt was in operation. While cleaning a roller, the cleaning rag she was using became caught between the belt and roller. While attempting to recover the rag, the victim's hair became caught and, as she attempted to extricate herself, her right arm was dragged into the trapping point. The victim sustained a mid-shaft fracture of her right arm radius bone. She stayed in hospital for one week, was not able to return to work for three months and had only 80 to 85 per cent use of her arm eight months after the accident. The hazard was well understood, and could have been avoided by the fitting of a guard (which was installed after the accident).

[66] On appeal by the Department, the High Court adopted the starting point of $100,000 submitted by the Prosecution, and then applied a discount of 30 to 33 per cent for the company's early guilty plea, and a further 15 per cent for other mitigating factors. These included the order of reparation and the compensation paid prior to sentencing. The Court expressed the view that an appropriate fine would have been $50,000.

[67] In *Arbour Reman Ltd v Department of Labour* (2010) 8 NZELR 57 an employee's hand was badly injured when he was lubricating a still operational band saw. The employee had used the band saw on only one occasion before the accident. The victim required 5 days in hospital and surgery to repair and reattach two fingers. Arbour Reman Ltd argued that the starting point of $85,000 was excessive.

[68] Central to the issue was the hazard of manually lubricating the band saw while it was operational. It was found that Arbour had failed to take practical steps such as ensuring that only trained employees were permitted to use the band saw, ensuring that the band saw was fitted with a suitable adjustable guard to prevent employees from contacting the operating saw blade, and installing an automatic

lubrication mechanism so that manual lubrication was not required to be undertaken by an employee. The District Court Judge's starting point of $85,000 was upheld. Adjustments were made to the discount for mitigating factors. The $20,000 reparation ordered by DC was not challenged.

[69] In *Worksafe NZ v Riverlands Eltham Ltd* DC New Plymouth CRI-2014-021-349, 17 October 2014 the injured employee was 17 years old and working his third and fourth shift at the Defendant's plant. The victim was cleaning a hoof nail removal machine and there was no adjustable guard or safety barrier fitted to the front of the machine to prevent access to the rotor while the machine was in operation. He accidentally activated a foot pedal and his left hand was caught and trapped into the machine up to his wrist. The victim was not employed to work on the machine, however, on his first day of work due to internal staffing issues he was designated to the slaughterhouse floor and shown how to use the machine by another employee. No training record was completed. He was left to clean the machine alone when the incident occurred. Judge Walsh made particular note (at [44]) that the hazard of leaving an unsupervised and undertrained employee to clean a machine which needs to be operational was obvious. A starting point of $90,000 was adopted.

[70] *Proform Plastics Ltd v Department of Labour* [2013] NZHC 583 involved a successful appeal from a District Court starting point which was too high. The employee of Proform, Mr T, was operating a router machine when the blade of the machine stopped. He believed the blade had stopped because it has returned to the "home" position of the cycle. Mr T attempted to cut away scrap of product from the blade but it unjammed and injured his wrist requiring 3 stiches. Proform pleaded guilty to an offence under s 50(1)(a) and should have installed a guard to prevent the employee reaching that part of the blade and an interlock device.

[71] The District Court Judge adopted a starting point of $80,000. The High Court held that was too high as the case was "medium culpability" and Mr T did not suffer serious injury. A starting point range of $60,000-$70,000 was warranted. The High Court set a starting point of $67,500, discount of 30% mitigating factors, discount 25% for guilty plea, making an end fine of $35,500.

[72] The defence have referred me to *Department of Labour v Mainzeal Property & Construction Ltd* DC Upper Hutt CRI-2005-076-2040, 27 April 2006 as authority for submitting a starting point of $30,000. In that case a subcontractor who was directly above another employee of the Defendant travelled through compressed hardy sheet and found a 90mm gap through which it travelled unobstructed and struck the victim under the left hand side of his chin, travelling through his neck and lodging in his jaw under his left ear. It also missed major arteries, vocal cords and nerves and surgery was required to remove it. The victim reported 70-80% loss of hearing and took 10 days off work. The Judge considered the new maximum fine of $250,000 however I note that the case predates the band guidelines in *Hanham & Philp* and is therefore of limited help in establishing a starting point for the current offending.

The starting point

[73] The Prosecutor submits that the inherently dangerous nature of a nail gun places this in a more serious category than a typical guarding case and a strong deterrent message needs to be sent to all those who operate dangerous power tools that have the potential not only to harm the operator but others as well. This is even more serious considering that Mr Sim was a new employee, having started only 5 days prior to the incident.

[74] Defence Counsel submits that the Defendant Company "was not cavalier about Health and Safety and had appropriate processes in place, just they were not best practice level." Having considered Mr McIntosh's affidavit I accept the company takes its obligations seriously.

[75] In reference to s 5 of the HSEA, the object of the Act is, inter alia, promoting excellence in health and safety management (s 5(a)) and defining hazards and harm in a comprehensive way (s 5(b)). Thus, it is not enough that the Defendant had what it considers "appropriate processes in place". These processes were obviously deficient in that they failed to ensure that the Defendant took all practicable steps available to it to discharge its legal obligations.

[76] I have always regarded the actions of an employer after an accident as significant for two reasons. First, it is a mitigating factor that after an accident an employer has put in remedial steps that may reduce the risk of similar or other accidents. In some cases these steps may have involved significant cost to an employer while in other cases such costs may have been minimal.

[77] Second, the actions of the employer after an accident can demonstrate what the actions of a good employer should have been before the accident. The Defendant (employer) has introduced a number of measures in this case to ensure there is no repetition of the accident that injured Mr Frederick. These include adopting a strict no cross-nailing policy and attaching a copy of an updated hazards register and signage placed near the lines and nail gun operation sites. In addition all nail gun operators are required to complete a "Paslode Nail Safety Course". A questionnaire is now completed by staff and Mr McIntosh says he now also runs a workshop for new staff including use and maintenance of nail guns.

[78] In addition, Mr McIntosh has set out a number of other changes at para [25] of his affidavit which he says demonstrates a genuine commitment to adopting a best practice approach to health and safety. Some of these relate to nail guns while others relate of other health and safety issues. Mr McIntosh says this will increase the health and safety expenditure by around $150,000.00 per year.

[79] The Defendant is to be commended for making these changes. They do provide evidence of the Defendant's commitment in this area but I simply make the point that is it a pity that an accident had to occur before the changes were made

[80] Taking all the matters I have mentioned into account the appropriate starting point here is $85,000 fine for the s 6 charge.

Aggravating Features

[81] The Defendant has no prior convictions and no uplift is sought for any particular aggravating factors relating to the breaches.

Mitigating Features

[82] The Prosecutor submits that a reduction to the starting point for mitigating factors is appropriate. The Prosecutor accepts that a discount of between 10 to 15 percent is available to the Defendant for their offer of reparation and any reparation ordered.

[83] The Prosecutor further accepts that the Defendant is entitled to a discount for cooperation with Worksafe and for remorse.

[84] The Defendant submits that there should also be a discount in view of the fact that the company has no prior convictions.

[85] From the starting point I deduct the following discounts for mitigating factors:

> 15% discount for reparation (taking into account the ERA award as well as the $9,000 reparation).
>
> 20% discount for cooperation, remorse, previous good record and remedial steps taken since the accident.

[86] From the starting point of $85,000 I reduce the fine by 35%. This means there is a provisional fine of $55,250.

Guilty Plea

[87] The Defendants entered a late guilty plea three weeks before trial and I am therefore prepared to reduce the provisional fine by 15%.

[88] The Defendant will be fined $46,962.50 on charge 1.

CHARGE 2 - failure to notify (ss 25(3)(a) and 50(1)(b))

Finding a starting point

[89] At the hearing there was an issue whether I should uplift the fine on charge 2 or whether the fine on charge 2 should be a separate and discrete fine. The two charges are not similar nor are they related in time or circumstance. For this reason I intend to impose a separate fine on charge 2 but at the end of the day will then consider the totality principle.

[90] On the charge of failing to notify, the Prosecutor submits that they were unable to investigate this incident or prosecute any substantive charges as a result of the Defendant's failure to notify within six months available to commence any prosecution. The Prosecutor therefore seeks a separate starting point and fine to act as a deterrent and ensure that all duty holders notify the regulator in accordance with their obligations under the Act.

[91] The Prosecutor submits that an appropriate starting point for the s 25 charge (failure to notify) is a fine of $60,000 being at the low end of the medium band of culpability. By contrast, the defence submits that the culpability of the company is at the lowest end and there are no aggravating factors.

[92] The defence submits that the company failed to report the accident, not because it had any intention of avoiding its responsibilities, or that it had no knowledge of its responsibilities; but because it incorrectly thought reporting the accident to the actual employer of the victim, who was a temporary worker, constituted sufficient reporting.

[93] Section 25(3)(a) is clear that notification must be given to Worksafe NZ, or in this case as it was at the time of the accident, OSH ("the Secretary").

[94] The Defence seeks a convict and discharge on the charge for failure to notify, or in the alternative, a starting point of $20,000.

Case law

[95] The defence cite *Villages of New Zealand (Pakuranga) Ltd v Department of Labour* 7 NZECCC 98,074; (2005) 2 NZELR 617 in support of the submission the company should be convicted and discharged. In that case the Appellant was successful in an appeal against a $5,000 fine for failing to notify an incident where an employee had suffered a serious harm accident at work. The employer had initially thought that the injury – a hurt wrist – was a sprain and therefore not sufficiently serious to require notification. Subsequently it was discovered that the employee's wrist was fractured.

[96] The High Court accepted that the Appellant company had been genuinely mistaken about the nature of the obligations but in all other ways were compliant in recording the incident and had an otherwise good safety record. The appellant was convicted and discharged.

[97] The case of *The Supply Chain Ltd v Department of Labour* HC Auckland CRI-2008-404-124, 29 September 2008 involved an appeal against fines for three convictions under the HSEA, one of which was a breach of s 25(3)(a). A general labourer in a meat processing factory operated by the Appellant company suffered a severe laceration to his right thumb as he was cutting animal bone when using a bandsaw. He was hospitalised for four days and spent three months off work before returning to light duties.

[98] The High Court stated that the gravity of the offending was less than medium but higher than low. Stevens J adopted a starting point in respect of the lead s 25(3)(a) offence of $20,000 and discounted 33% for guilty pleas, the previous good record of the appellant company and follow-up action to ensure notification and disciplinary action against the supervisor who failed to notify.

[99] The Prosecutor relies on *Department of Labour v Kiwi Steel New Zealand Limited* DC Manukau CRI-2010-092-3171, 27 May 2011 in support of the starting point of $60,000. In *Kiwi Steel* the Defendant company pleaded guilty to three charges of failing to notify under s 25. These offences spanned several years. Their

defence was similarly mistaken belief; they understood serious harm injuries were amputations of limb or deaths. In that case the systematic breaches and the Defendant's lack of credibility warranted strong sanction.

Starting point

[100] In this case the Defendant has pleaded guilty to one charge under s 25. The company knew the accident involved serious harm but reported the accident to the wrong person (the employer as opposed to Worksafe). On the basis of the affidavit before me, Mr McIntosh has accepted that what the company did was wrong but claims there was no intention to avoid the company's responsibilities or hide from potential consequences of the accident.

[101] The fact the accident was reported decreases the culpability of the Defendant from the position had the accident not been reported to anyone at all. I accept the company now knows the true position and the company is unlikely to reoffend in this way again.

[102] I agree that on this charge the Defendant's culpability is lower than asserted by the Prosecutor. However, the company has avoided a possible prosecution from the failure to disclose the accident to the true organisation that disclosure should have been made to.

[103] One of the purposes of sentencing is general deterrence and other companies need to be aware of both the requirement to disclose accidents and who should receive such disclosures. Companies must know the law and know that breaches will be taken seriously by the Court.

[104] I am not prepared to simply convict and discharge the Defendant on charge 2. In my view there should be a starting point of $15,000.

Aggravating Features

[105] There are no aggravating features to this charge.

Mitigating Factors and Guilty Plea

[106] The defence submits that this is a case of genuine mistake and the company never intended to hide the incident. The Defendant has now put in place procedures to ensure that whenever an accident does occur, whereby harm is incurred, Worksafe NZ is immediately informed.

[107] The defence also submits that there should be an overall discount of 50% for the company's good record, remedial steps, cooperation with the Prosecution and for the early guilty plea.

[108] I propose that the reduction should be comprised of a 15% discount for cooperation, remorse, previous good record and remedial steps taken since the accident. This leaves a provisional fine of $12,750.

[109] From the provisional fine I propose a 15% discount for the late guilty plea, leaving an end fine of $10,837.50.

Summary

CHARGE 1 – s 6 failure to take all practicable steps

REPARATION: $9,000

Starting point (culpability – high end medium band) $85,000

-15% discount for reparation ordered (taking into account ERA award as well as reparation)

-20% discount for cooperation, remorse, lack of prior convictions, remedial steps taken

Provisional fine: $55,250.00

-15% discount for guilty plea

END FINE: $46,962.50

CHARGE 2 – s 25(3)(a) failure to notify

Starting point (culpability – low end of low band) $15,000

-15% discount for cooperation, remorse, lack of prior convictions, remedial steps taken

Provisional fine: $12,750.00

-15% discount for guilty plea

END FINE: $10,837.50

STEP THREE: Overall Assessment

[110] The total of fine and reparation imposed must be proportionate to the circumstances of the offending, and appropriate to achieve the sentencing principles of accountability, denunciation and deterrence.

[111] I have considered the totality principle both in relation to the fine and reparation on charge 1 and the fine and reparation on charge 1 and charge 2. I do not believe these amounts breach the totality principle taking into account the fact there are two sets of charges, the potential for a fatality to have occurred in the nail gun charge, the maximum penalty provided for in the legislation ($250,000.00) and the need for accountability and deterrence.

[112] In summary the order for reparation on charge 1 is $9,000.00

[113] The fine on charge 1 is $46,962.50

[114] The fine on charge 2 is $10,837.50.

S J O'Driscoll
District Court Judge

Reserved decision delivered by me this 15th day of July 2015

L. B. Miles
Deputy Registrar
Christchurch District Court