

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CRI-2019-090-004482
[2021] NZDC 1477**

WORKSAFE NEW ZEALAND

Prosecutor

v

THOR ELECTRICAL AND MAINTENANCE LIMITED

Defendant

Hearing: 25 September 2020

Appearances: D Dow for the Prosecutor
N Beadle for the Defendant

Judgment: 25 September 2020

NOTES OF JUDGE E P PAUL ON SENTENCING

[1] This is a prosecution brought by WorkSafe New Zealand against Thor Electrical and Maintenance Services Limited. Mr Dow acts for WorkSafe New Zealand, Mr Beadle acts for the defendant company. The company has pleaded guilty and is now for sentence on charge of failing to ensure the safety of workers of Thor Electrical, and one charge of failing to ensure the health and safety of other persons. The maximum penalty for each charge is \$500,000.

[2] The particulars of the offending are the Health and Safety at Work Act 2015 creates obligations for persons conducting a business or undertaking which are referred to as PCBUs, Thor Electrical is a PCBU.

[3] Under s 36(1)(a) of the Act Thor Electrical is required to ensure so far as is reasonably practicable the health and safety of its workers. Under s 36(2) of the Act Thor Electrical is required to ensure so far as is reasonably practicable the health and safety of other persons. Thor Electrical has failed to comply with its duties to ensure the health and safety of workers or to ensure the health and safety of other persons by failing to take the following reasonably practical steps:

- (a) Providing safe working procedures including procedures requiring appropriate testing for employees to following carrying out work.
- (b) Ensuring that employees had adequate knowledge, experience for the type of tests required to identify a transposition of mains.
- (c) Providing employees with appropriate testing equipment to identify a transposition of mains and training them how to use it properly.
- (d) Ensuring correct procedures were in place to identify and remedy errors such as a transposition of mains.

[4] Thor Electrical's failure to comply with its duties has resulted in an electric installation which was connected to mains power left in a live state for seven days.

[5] I note three persons including the sole director received electric shocks as a result of this action and fortunately there was no ongoing injury and so there is no reparation sought in this particular prosecution.

[6] The facts are somewhat lengthy but inform the Court in terms of the ultimate outcome of sentencing today. Obviously Thor Electrical is a registered limited liability company. The sole director and shareholder is Mr Clinton Eastwood. I note Mr Eastwood is present in court today.

[7] In September 2018 Thor Electrical was engaged by Stead Construction Limited to install a builders' temporary supply unit at a construction site in Henderson. A BTS connects the mains power supply to a series of regular 230 volt power points which allows access to mains power.

[8] On 21 September 2018 Mr Forster and Mr Derrick attended the site on behalf of Thor Electrical to install the BTS. At the time Mr Foster was a registered electrician, Mr Derrick his apprentice. Mr Foster used a fluke meter to test the cables for polarity in order to identify which capable was phase and which was neutral and marked them accordingly. Mr Foster incorrectly identified those cables without realising his error he connected the cables to the BTS. When an electrician such as Mr Foster completes high risk prescribed electrical work on an installation they are required to issue a certificate of compliance in accordance with the regulations, and Mr Foster was doing high risk prescribed electrical work.

[9] Once the work had been completed Mr Foster advised Mr Eastwood it was done. Mr Eastwood contacted Sels Electrical Inspectors Limited to engage an inspector to inspect that work. Mr Johnston an electrical inspector attended the site on 26 September. He had two roles, firstly to inspect the work to ensure it had been done in accordance with the regulations and the installation on which the work had been done is and would be when enlivened electrically safe.

[10] It is apparent Mr Johnson conducted that inspection negligently. He failed to undertake any polarity testing at either step of the process as required. His failure meant he did not detect the transposition error caused by Thor Electrical. He also failed to cite a completed certificate of compliance prior to conducting the inspection and he asked Mr Eastwood to email him that certificate.

[11] The certificate Mr Eastwood emailed through to the inspector had not been completed by Mr Foster, rather it was a pre-populated certificate which had been generated by Mr Eastwood from a template and had not been modified at all.

[12] The combination of incorrectly completing the work and a negligent inspection meant that once the installation was enlivened it was in a transposed state and remained so for seven days. In short everything was live.

[13] When Stead Construction workers returned to the site on 2 October 2018 one received an electric shock from a metal container unit on the site. He called his manager who attended the following day who also received a similar electric shock.

Mr Eastwood was then called, attended and he himself received an electric shock. Mr Eastwood's method of testing for that was not compliant and he like the other victims of the electric shock placed his hands on the container and received a shock.

[14] A Vector technician was secured by Mr Eastwood who conducted a polarity test and identified the issue. That technician immediately disconnected the installation from the mains power.

[15] The work required was subsequently completed by Thor Electrical up to the correct standard following which the installation was again inspected. It must have passed the inspection and was then connected up. Mr Eastwood reported this incident to WorkSafe on 4 October 2018. I should note at this point Thor Electrical has no previous convictions, certainly none in terms of WorkSafe.

[16] The approach to sentencing in these matters as well known and is set out in the decision of *Stumpmaster v WorkSafe New Zealand*.¹ There is a four step process which must be employed. The first step for the Court is to determine reparation, there was no ongoing injury here so no reparation is sought. The second step is affixing the appropriate fine. For the prosecution Mr Dow has said the starting point is informed by the following factors:

- (a) Firstly, identification of the operative acts or omissions at issue and the prosecution say there were four operative omissions:
 - (i) Under the heading *Safe Working Procedures* they say Mr Foster did have an adequate understanding of the testing he was required to carry out, he did not complete the mandatory tests.
 - (ii) The required certificate prepared for the work was deficient for in a number of respects. In breach of the regulations for example. It incorrectly ticked that an independent earth test had been completed when it had not.

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

- (iii) These deficiencies highlight a significant failure by Thor to have in place procedures which ensured the required paperwork was completed appropriately.
- (iv) The prosecution noted Mr Eastwood in his interview stated he did things this way purely because Thor Electrical's template for the certificate had his name on it. The prosecution submits this illustrates a systemic issue or failure in Thor's actions. Thor did not have in place any procedure requiring the electricians conducting the work to record the results of their tests.

[17] The prosecution are critical on a failure to have Tool Box meetings with staff to discuss health and safety issues and comment on the approach to those which were undocumented involving a discussion after work.

[18] The prosecution also point to knowledge and experience of testing required and that Mr Foster did not complete most of the mandatory tests, and in fact the defence have highlighted that again in their submissions.

[19] In terms of access to testing equipment and knowledge of how to use it Thor failed to ensure its workers had the correct testing equipment to be able to carry out the mandatory work. It appears Thor certainly had the equipment but Mr Foster clearly either did not have it in his possession or employ it when he carried out the work.

[20] Also subsequent to the incident in terms of fault finding procedures although Mr Eastwood knew people who had already received electric shocks from the installation he did not undertake any form of risk assessment, and it appears his first action was to touch the same area with his bare hands and he received an electric shock.

[21] The prosecution also point to the nature and the seriousness of the risk of harm and they say the risk was very high, the transposed installation connected to mains power can result in death or serious injury, and that is not seriously disputed by defence. It was fortunate actual harm in this case was minimal.

[22] In terms of departure from industry standards the prosecution pointed out the manner in which the certificate was completed was not only deficient but they say fraudulent at least misleading. It should have been completed by the registered electrician Foster, clearly that was not the company's practice at the time.

[23] In terms of the obviousness of the hazard, hazards arising from live electricity are well recognised. Polarity testing is mandatory because transposition is an obvious hazard and, again, I doubt defence have any dispute with that.

[24] In terms of the availability cost and effectiveness of avoiding the hazards the prosecution say reasonable practical steps are not onerous, implementing procedures to ensure work done which did not create risk would be expected of any company.

[25] The prosecution have referred to a number of similar cases in terms of fixing a starting point and say this falls at the high end of the medium Band in *Stumpmaster v WorkSafe New Zealand* in terms of culpability and invite the Court to fix a starting fine of \$200,000 for both offences.

[26] The prosecutor today accepts Thor's previous good record, co-operation with the investigation and some remedial actions taken at 20 per cent discount could be justified off that starting point. Also accept 15 per cent for guilty plea which would reduce the nominal fine to one of \$140,000. The prosecution have sought what in my view are significant costs \$18,000 but do not appear to insist upon that today.

[27] In terms of the proportionality assessment today Mr Dow accepts with the impact of COVID-19 and the account supplied by the defendant company there may be some movement for proportionality, movement by reduction in any financial award.

[28] For the defence Mr Beadle has addressed me. The defence have focussed on Thor's employee electrician Mr Foster's failings in not undertaking the testing as required. Mr Beadle has amplified that today. Mr Foster as a registered electrician is subject to policing by the relevant board and that board has a significant number of requirements he is required to comply with, and certainly he failed to comply in his work on this occasion.

[29] Mr Beadle has submitted Thor's culpability is low and relies on a number of factors which he has set out in his submissions commencing at page 5, and Mr Beadle's noted Mr Foster was a registered electrician and is still registered with the board. He reminds me only registered electricians are to undertake the prescribed work that was involved in this incident. That they by law must fulfil the competency programme prescribed by the board they must do that every two years. The board has an approved competence programme which is gazetted and, again, Mr Beadle has highlighted that in his oral submissions today.

[30] In paragraph 8 of Mr Beadle submissions he refers to the board's website which comments one of the most important and fundamental responsibilities of an electrical practitioner as having the skills, knowledge and understanding to properly test for work. This expertise differentiates a professional licensed practitioner from an every day person, as a licensed person you have been granted the right to carry out restrictive work that others cannot do, these people are relying on your skills and you in turn have an obligation to be competent with testing procedures. Testing is one of the most important parts of the job but it is not hard or time consuming, and that really echoes to an extent the prosecution submission, the practical steps to overcome the hazard that occurred are not onerous in the circumstances.

[31] Thor accepts as it must that it was wrong to provide Mr Foster with a completed certificate, Mr Foster should have done that himself. Clearly it is required by the regulations. Thor accepts that was a practical step the company should have insisted upon.

[32] Also Mr Beadle points out Mr Foster used a fluke metre at his knowledge, then a mega monitor was required to undertake proper testing and Mr Foster did not take one with him. The company says there were two A/log meters available to Thor workers. Mr Beadle goes on to point out the transposition was plainly an error and failing to undertake proper testing anticipated by the statutory scheme because an inspector was statutory required to check the work was compliant, before livening the line. Mr Beadle does point out the line could not be livened until Mr Johnson, the inspector, had checked the work and certified it was safe. It was Mr Johnson who livened the line, not Thor. Mr Beadle accepts on behalf of Thor that does not excuse

their errors but it plainly, he says, mitigates any risk of harm arising from them. The risk of harm is material, determining culpability.

[33] In terms of the maximum fine Mr Beadle has submitted only 20 per cent should be imposed, being \$100,000. Certainly there were submissions by Mr Beadle inviting the court down the pathway of looking at Thor rather than a company, but as a sole trader. I have declined to go down that pathway with Mr Beadle. It is a novel approach. There is no authority for it and it would fly in the face of the charge the company has pleaded guilty to, in full knowledge of the penalties involved in this charge. Certainly the defence and the prosecution are in agreement in terms of mitigation, clearly the company comes to the court having never been prosecuted before by WorkSafe. They were compliant and cooperative. Mr Eastwood for the company responded immediately to the incident and some remedial work has been undertaken in terms of the company's practises, such as toolbox meetings and recording those and also insistence on certificates being completed by the relevant electrician undertaking the work. So for that like the prosecutor, a 20 per cent discount is sought and 15 per cent for the guilty plea, given this matter was resolved relatively close to trial.

[34] It now falls to me to determine the company's culpability and therefore the fine in this statutory régime. The main factors which inform my assessment of culpability here are as follows.

- (a) Firstly, there was a failure by Thor's employing Mr Foster to carry out the mandatory testing. Clearly he is a registered electrician and he is obliged to do that. But equally Thor is the employer and cannot abdicate its responsibility to Mr Foster.
- (b) Secondly, the certificate of compliance, critical in my view to the livening of the work was done very much on a proforma basis without the relevant electrician being involved and I do consider this particular factor as significant in demonstrating if not recklessness, a high level of carelessness on the part of the company. I accept small businesses do to an extent rely on trust when there is a small workforce but in the

environment of the electrical industry with the heightened hazards, that simply cannot be so, particularly where certificates are relied on by others in terms of the hazardous nature of the work.

- (c) Also there appears to have been something of a careless work approach and that is evidenced by the absence of toolbox meetings which is pretty fundamental in the building and construction industry.
- (d) Also the correct testing of equipment although possessed by the company was simply not employed on the day and it should have been. That falls to the company.
- (e) Fifthly, the nature and seriousness of the risk is manifestly obvious and I need say no more about that.
- (f) Finally, and that is the sixth factor I take into account, the practical steps to avoid the hazard in this case are not particularly onerous, it simply requires the use of the correct equipment which was available and testing of the work done correctly and safely which seems to be a minimum requirement of all these registered electricians. It particularly must be a requirement of an electrical company which holds itself out as undertaking this very work by registered electricians.

[35] I get a strong sense that a combination of perhaps trust and convenience played a significant part in the lack of testing and accountability employed by Thor which resulted in this incident and also in Thor's subsequent actions.

[36] Having said that, I do not accept the prosecution position that this falls at the high end of the medium culpability band in *Stumpmaster*. At most I would see it falls at the middle of the medium culpability. That would inform a fine of \$140,000. I have no difficulty accepting total discounts for mitigating factors and guilty plea of 35 per cent. That would reduce the starting fine by \$49,000 to one of \$91,000.

[37] I then have to stand back as I am required to and consider the appropriateness of that level fine for this company. One cannot ignore the adverse consequences on small companies of COVID, the stopping of work or limited work and the uncertainty that the future holds for all members of our community including small businesses/small companies. It is difficult to assess, given those uncertainties, even with the assistance of the company's financials, as to where impecuniosity falls in terms of an appropriate figure reducing the fine. It seems to me there is an acceptance that there should be a figure and by my best estimates I have determined a further discount of a fine by 15 per cent is appropriate. That would take the total fine to one of \$77,350.

[38] That will be imposed in this way. On each charge the company will be fined \$38,675 which comes to a total of \$77,350.

[39] Solicitor's costs will also be imposed, that cannot be avoided but I do not accept that \$18,000 is appropriate in all the circumstances and I order the company to pay a portion of the solicitor's costs which will be \$3,000.

ADDENDUM:

[40] The company will need to make arrangements with the fines office to pay the fines and solicitors' costs by way of instalments over time.



E P Paul
District Court Judge