ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF WITNESS/VICTIM/CONNECTED PERSON(S) PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

IN THE DISTRICT COURT
AT WHANGAREI

I TE KŌTI-Ā-ROHE
KI WHANGĀREI-TERENGA-PARĀOA

CRI-2022-088-001222
[2023] NZDC 10132

WORKSAFE NEW ZEALAND
Prosecutor

v

CFGC FOREST MANAGERS (NZ) LIMITED
Defendant

Hearing:	19 May 2023
Appearances:	A Simpson for the Prosecutor M King for the Defendant
Judgment:	19 May 2023

NOTES OF JUDGE D J MCDONALD ON SENTENCING

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[1] CFGC Forest Managers (NZ) Limited on 20 March 2023 pleaded guilty to one charge that on or about 26 June 2021 at Northport, being a PCBU failed to ensure so far as reasonably practicable the health and safety of workers in that it failed to, one, ensure a machine guarding assessment of the A5 debarker was completed by a competent person prior to its operation in New Zealand and, two, ensure the machine guarding on the A5 debarker met the requirements of AS/NZ 4024 prior to operating it in New Zealand.

The Facts

[2] An agreed summary of facts has been filed. It runs to 15 pages which include two coloured photographs. I will make a direction at the end of my sentencing comments that a copy of the full summary of facts can be made available to the fourth estate to see if they have use for it.

[3] Ms Simpson for WorkSafe has helpfully summarised the facts in her written submissions. I now read and incorporate that summary into my sentencing remarks.

[4] The defendant, CFGC Forest Managers (NZ) Limited is a limited liability company and a PBCU. The defendant is a forest management and export company. The defendant purchased two machines from overseas, an A5 and an A7 debarker. Newey Machinery Limited was engaged by the defendant to operate the A5 debarker at its Northport site. Both are PBCUs in respect of that site. The victim, [redacted], was employed by Newey as a machine operations supervisor.

[5] The A5 debarker involved in this incident removes bark from logs. Two people are required to operate it. One person feeds logs onto the debarker at the infeed end. The log moves along towards the knife rings between the in and outfeed rollers which are activated by sensors and close around the log. The second person then collects the debarked logs from the outfeed end.

[6] Prior to the two machines commencing operations, CFGC engaged Marsden Point Welding to add guarding to the A5 debarker. Marsden Point Welding did not give any additional advice relating to the guarding on the A5 debarker. Instead, it built the guarding that Newey and CFGC requested based on their observations of the A7 debarker's guarding. The modifications included building guarding panels which covered both the in and outfeed rollers.

[7] The A5 debarker arrived at site in October 2020 and began operating in March 2021. In September 2020, the victim went down to Taranaki to receive between two to four days' training on the A7 debarker. This training occurred a number of months prior to him commencing work on the A5 debarker.

[8] On 23 June 2021, the victim and another worker were working together debarking logs using the A5. The victim was located on an excavator at the infeed end of the debarker and the other worker at the outfeed end. A log was loaded into the debarker which did not come out. The victim went to check for an air leak. The other worker started the rollers and the victim waited to see if he could hear or see an air leak. While the rollers were operating, the victim reached into the gap between the upper and lower rollers which crossed the light beam that activates the mechanisms to close the rollers. The rollers closed and trapped the victim's wrist. The rollers caught the skin of his forearm and peeled back a triangular shaped section. [redacted] sustained a compound grade 2 Galeazzi fracture that required surgery and plates. He also suffered a dislocated wrist which required relocating.

[9] The A5 debarker was assessed by an expert post-incident and it was determined that it was not adequately guarded.

Statutory Framework

[10] The statutory framework for sentencing for this type of offence is set out in s 151(2) of the Health and Safety at Work Act 2015 (the Act). The guideline judgment for sentencing in this area under s 48 of the Act is *Stumpmaster v WorkSafe New Zealand*.[1] That decision sets out four steps that are to be followed in the sentencing process:

(a) Assess the amount of reparation to be paid to the victim.

(b) Fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors.

(c) Determine whether further orders under ss 152—159 of the Act are required.

(d) Make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps. This includes

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

consideration of the defence financial capacity—if pleaded by the defendants.

[11] Both counsel in their very detailed and helpful written submissions have followed those steps. Obviously, I will do the same.

Step 1 – Reparation

[12] The assessment of emotional harm is one primarily with reference to the victim's impact statement which I have. [redacted] suffered a serious injury to his wrist. He partially blames himself for the injury he sustained. He should not. He now works as a logging truck driver for Newey Machinery Limited, the same company that has also been prosecuted as a result of this incident. That company was sentenced after having pleaded guilty on 19 December 2022 in this court. Judge Rzepecky found that a $20,000 reparation payment should be made, split equally before CFGC and Newey. He ordered Newey to pay $10,000. Both WorkSafe and CFGC lawyers submit the reparation in this case should be the same, $10,000. I agree. I make an order that CFGC pay [redacted] $10,000 for emotional harm reparation. There is no consequential loss to [redacted].

Step 2 – The Fine

[13] In setting the fine, I will set out the starting point for the offence, then the personal aggravating, if any, and mitigating factors in relation to the defendant.

[14] In *Stumpmaster*, four bands were set out depending on the culpability assessment made by the sentencing judge. They are:

(a) Low culpability, starting point up to $250,000.

(b) Medium culpability, starting point $250,000 to $600,000.

(c) High culpability, starting point $600,000 to $1,000,000.

(d) Very high culpability, starting point $1,000,000 plus.

[15] In setting the level of the starting point for the fine, regard must be had to the relevant factors set out in s 151(2) and the list set out in *Hanham*.[2] I have read and considered the written submissions of counsel as well as the cases that they have each referred to.

[16] Because consistency in sentencing is a primary consideration in the Sentencing Act 2002, I start as a starting point of this consideration what Judge Rzepecky determined. He said that a start point for the fine of $400,000 was appropriate. WorkSafe submit the same starting point should be adopted for this defendant. In particular, I refer to 7.38 of Ms Simpson's written submissions to me. She submitted to me today that there was no difference in culpability between the two companies. They had different parts to play but they were equally culpable.

[17] Ms King for the defendant submitted both in her written submissions and again today that the defendant is less culpable. In particular, I refer to 7.27 of her written submissions where she said and emphasised again today orally that the victim was employed by Newey, Newey and the victim were involved in the building and commissioning of the A5 debarker prior to its arrival at the Northport site, CFGC had less ability to control the risk and less control over the site with Newey responsible for the day-to-day operation of the debarker facility. Ms King submitted again today that this was a novel machine for the defendant, that they relied heavily on Newey's expertise and that the defendant had sought out an expert to instruct proper safety measures for the machine.

[18] Ms Simpson submitted that I should adopt the same starting point of $400,000. Ms King submitted $300,000.

[19] Having considered all of the matters raised orally today and in counsels' written submissions, I consider that there should be no difference between what Judge Rzepecky considered the start point to be and what should be the start point in this case. That is what I adopt. I set the start point for the fine of $400,000.

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[2] *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79 (HC).

[20] I now look at personal matters. There are no aggravating personal factors in relation to the company which calls for an uplift.

[21] I then look at matters in the company's favours. That is, in mitigation. They pleaded guilty as soon as possible. They should get full credit for that of 25 per cent. They have been ordered to pay reparation of $10,000 and so they should get a further five per cent discount for that. They fully co-operated with WorkSafe after the incident. They should get five per cent for that. I consider there is remorse on behalf of the company and five per cent should be given for that. Remedial steps were taken, including shutting down the machine for a considerable period of time and subsequent loss of income. What the company did was ensure the machine so far as possible following this incident was safe for any person working on it and I consider despite WorkSafe saying five per cent that 10 per cent should be given for that. They have a previous good record. They have no convictions at all. A further five per cent for that means a 55 per cent discount off the fine.

[22] If one starts at a $400,000 fine and gives a 55 per cent discount, that is $220,000, and I hope counsel check these figures, that makes a fine of $180,000.

Step 3 – Ancillary Orders

[23] There is no dispute as to the ancillary orders between Ms Simpson for WorkSafe and Ms King for the company. Ms King accepts that there should be contribution to WorkSafe's costs. They both agree that they should be $3,830.38 which is the order I make.

[24] Judge Rzepecky suppressed the victim's name. That is sought in this case. As Judge Rzepecky has made an order, it would be quite inappropriate for me not to make one. I therefore do so. There will be a suppression of [redacted] name and any matters that may lead to his identification.

[25] The final order I make is that the summary of facts with the appropriate redactions can be released if it is sought to the fourth estate and any other interested parties.

Conclusion

[26] There will be reparation to the victim of $10,000. There will be a fine imposed upon the defendant company of $180,000. There will be costs paid by the company to WorkSafe of $3,830.30. I make an order suppressing [redacted] name and I direct where appropriate for the release of the summary of facts.

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Judge DJ McDonald
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 20/06/2023