IN THE DISTRICT COURT
AT TIMARU

I TE KŌTI-Ā-ROHE
KI TE TIHI-O-MARU

CRI-2023-076-000087
[2024] NZDC 5879

WORKSAFE NEW ZEALAND
Prosecutor

v

THOMPSON ENGINEERING (2002) LIMITED
Defendant

Hearing:	14 March 2023
Appearances:	S Cossey for the Prosecutor S Crosbie and S Riley for the Defendant
Judgment:	14 March 2023

NOTES OF JUDGE B P CALLAGHAN ON SENTENCING

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[1] The defendant company Thompson Engineering (2002) Limited has pleaded guilty to a charge under sections 36(1)(a), 48(1) and (2)(c) of the Health And Safety At Work Act 2015, in that it did fail to comply with a duty, as far as reasonably practicable, to ensure the safety of workers, in that it failed to comply with that duty and exposed individuals, but in this case, one employee a Mr Paseka, to the risk of serious injury, which occurred.

[2] The particulars of the charge are detailed as:

> It was reasonably practicable for Thompson Engineering (2002) Limited to have:

(i) Ensured the machine was adequately guarded to the standard described in AS/NZS 4024, or Equivalent or higher.

(ii) Ensured the machine's safe operating procedures were updated to reflect any modification to the machine.

[3] The company pleaded guilty to the charge on 21 November 2023, and it is accepted that the full available discount for a guilty plea be made available. There is some issue about other discounts which I will turn to in a moment, which are personal to the company and are to be taken into account as part of personal mitigating matters.

[4] As with prosecutions in sentencings such as this, there is an inordinate amount of material provided to the Court; numerous cases for the guidance of the Court but it is trite to say at the end of the day each case must be determined on its own facts bearing in mind the parameters or guidelines set out in other cases. Having said that the decision in *Stumpmaster v WorkSafe New Zealand* have provided guidance to the Court since its release in 2018 as to where fines at the end of the day should be set and in this case both counsel accept that this falls within the medium culpability range which provides for fines between $250,000 and $600,000 and I do not have any issue that the circumstances come within that range.[1]

[5] There is a victim impact statement that I have read. There are lengthy submissions, summaries of fact and in particular a restorative justice record of a meeting in which company representatives were there, as well as Mr Paseka.

[6] I add here that it is quite clear the company has acted responsibly towards the victim right from the immediate time of the accident although there is some complaint, I think, from Mr Paseka's wife/partner that there was not a lot of contact after the incident and the surgery and Mr Paseka's recovery; but that was explained by the company representative as on the basis, understandably, that Mr Paseka was always a private person and the company felt that it should respect that privacy. I can understand that, but the company has not been slow in coming forward with other financial assistance and indeed has paid a large amount of reparation already both as

[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020; [2018] 3 NZLR 881.

for emotional harm and for actual costs including shortfall in his ACC payments. He has a position with the company and the company is funding a course for him as an apprentice carpenter. The relationship appears to be a harmonious one and ongoing.

[7] It is not possible nor desirable in a decision such as this, to touch on all the factors that have been mentioned by each counsel both in support of the prosecution and in support of the defence insofar as the sentencing is concerned.

[8] In brief, at the time of the incident the victim was fabricating purlin brackets. Now this task involved cutting brackets to the required length from a six-millimetre steel thick bar, drilling holes in the bracket then pressing each bracket to bend it slightly. The machine used for this is known as a Scotchman 6509 Punch & Shear Machine, which was fitted with a press jig attachment designed for use on multiple punching shear machines within the defendant's workshops and it had been in use with the punch and shear machines for over 20 years.

[9] Normally the Scotchman machine used was a Scotchman 5075, but it was out of service for repairs and so the victim, without any training, used the press jig used on that machine on the Scotchman 6509. He had not attached the press jig previously nor had he made brackets out of this machine.

[10] He had completed a run of 18 out of 20 required brackets when he inserted an unpressed bracket between two plates of the press jig. He pressed the foot pedal of the machine when his hand was between the two plates of the jig. The top plate came down crushing his hand. The end result was that he had surgery in Christchurch and he had been helicoptered to Christchurch after one of the officers of the company took him to the local hospital.

[11] He had parts of his three fingers amputated and as I mentioned in submissions, is hopeful that a prosthetic finger or fingers can be attached when the healing process is completed. So he had hand fractures as well due to the crush injuries but the end result, and he appears to have recovered from that, but is missing parts of his three fingers and they are identified in the photograph which is contained in the submissions.

[12] In this day and age it is surprising to see a machine being operated, even if it was a replacement one because of the normal one not being in use, not to have the guard fitted. It was not fitted. The mechanism of the Scotchman 6509 whereby you press the foot pedal to operate it means that the response is a lot quicker than the machine that was normally in place. Mr Paseka had not been given any instructions or tuition as to what he should do. Certainly the company had its safety policies in place although there is some commentary about not having updated it sufficiently well to cover this machine. It seems that Mr Paseka was just asked to use this machine, or if not actually asked, expected to without any adequate training.

[13] I read in the defence submissions that the offence here does not relate to inadequate training and, therefore, that reduces the culpability, but of course, it must relate to lack of training for this replacement machine because there was, as I read the information, not any. So at the time of the accident it is clear the defendant did not have any engineering validation or verification that the press jig was safe to be used with the Scotchman 6509. I am told that the foot pedal used on the Scotchman 5075 meant there was a slower reaction to the machine or by the machine and indeed it (the Scotchman 5075) could not be used in the same way.

[14] Hazards of using a press jig attachment I am told, were not identified in either of the hazards register and a risk assessment had not been completed for using the Scotchman 6509. So in my view there was a complete oversight and absence of any duty in respect of the procedure of attaching the jig, absence of training and, of course, the absence of a guard.

[15] So I accept, as I said at the outset, that the culpability is within range that both counsel have suggested, in the medium culpability range. It is where it sits, and the prosecution say that it sits at the upper level at $500,000 and the defendant argues a lower level of $400,000. Mr Crosbie has pointed me to a decision of a brother Judge *WorkSafe New Zealand v Marshall Industries Ltd* which in a similar situation possibly more serious where the Judge reached a starting point of $400,000.[2] Of course every case, as I said at the outset, varies and in this case the oversights were quite blatant I

[2] *WorkSafe New Zealand v Marshall Industries Ltd* [2018] NZDC 4498.

would have thought and I am firmly of the view that the culpability is higher than $400,000. It is in that range up to $500,000 and at the end of the day one can never be precise but I would have thought circumstances here called for somewhere in the region of $440,000 to $460,000 and having said that I adopt a midpoint of $450,000 which I think reflects the culpability.

[16] I have already indicated, in my view, that emotional harm reparation of $35,000 in total is appropriate of which $30,000 has been paid and I would order that $5,000 in addition to the $30,000 already paid be paid acknowledging the other payments that the defendant has made.

[17] There is no doubt the defendant is entitled to a guilty plea discount of 25 per cent. There is a previous good safety record and I accept that that should be an allowance of five per cent for that. Reparation would attract an allowance again of five per cent as would the remedial steps taken; five per cent. There is an argument and a dispute as to whether the defendant is entitled to any extra discount for cooperation. In some cases it is allowed, in others it is not.

[18] When I view here the genuine remorse that the company has had and not wanting to double deduct the issue of credit for reparation it is remorse in which it has illustrated by the steps it has taken to assist Mr Paseka with retraining, together with the cooperation with the investigation noting that the company has now put in place measures to ensure that this will not happen again, which I think is significant. I would allow in total another five per cent which would total overall discounts of 45 per cent. From $450,000 that would equate with an end fine of $247,500 and standing back and looking at the matter overall, I think that together with the reparation to be paid including the reparation that has been paid, is a reasonable outcome objectively in respect of the sentence here.

[19] So the company will be, having been convicted, will be fined $247,500, an emotional reparation harm payment of $5,000 in addition to the $30,000 already paid and any other reparation paid and that includes paying for the apprenticeship course for four years which I understand is already in progress. There will be an order for costs to the informant of $2,206.66.

[20] The summary of facts can be used by WorkSafe and distributed.

[21] I would like to thank counsel for their comprehensive submissions which have been helpful to me to conclude this matter.

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Judge BP Callaghan
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 21/03/2024