IN THE DISTRICT COURT
AT NORTH SHORE

CRI-2017-044-001909
[2018] NZDC 900

WORKSAFE NEW ZEALAND
Prosecutor

v

STUMPMASTER LIMITED
Defendant

Hearing: 19 January 2018

Appearances: C O'Brian for the Prosecutor
S Graham for the Defendant

Judgment: 19 January 2018

NOTES OF JUDGE P J SINCLAIR ON SENTENCING

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[1] On 30 May 2016, a woman was seriously injured after she was struck by a palm tree that was felled onto the footpath by a worker of Stumpmaster Limited, who was aboring on a neighbouring residential property. Consequently, Stumpmaster was prosecuted by WorkSafe New Zealand Limited and has pleaded guilty to one charge under ss 48 and 36 Health and Safety at Work Act 2015, for failing to ensure that the health and safety of persons, including the victim, was not put at risk from work carried out by it. It is my task to sentence Stumpmaster today.

Facts

[2] At the time of the incident, Stumpmaster traded as Tree King and carried out residential aboricultural work. It had three workers. James Isaacs is the sole director and a worker for Stumpmaster. Tendo Izanagi was an aborist/team leader for Stumpmaster at the time of the incident.

[3] On 19 April 2016 Stumpmaster provided a quote for work, including the trimming and reducing of various trees and the removal of a three to five metre Washingtonia palm tree, located at the front garden at an address in Waitemata Road, Hauraki, Auckland. The site is located at the end of a cul-de-sac in a residential area.

[4] On 30 May 2016, Stumpmaster commenced work at the site. At about 9.30 am, Mr Izanagi was trimming trees along the driveway area while standing in the neighbouring driveway. Sarah Blinkhorn, the occupier of the neighbouring address approached Mr Izanagi and spoke to him about the work. As a result of this discussion, Mr Izanagi decided to only work on the client's side of the fence.

[5] After initial pruning in the driveway, Mr Izanagi began placing cuts into the trunk of the palm tree in preparation for felling it onto the grass verge in front of the site. Around that time Ms Blinkhorn walked out of her driveway with her dog. She stopped at the end of the driveway to check the letterbox and then walked onto the footpath. Mr Izanagi completed the cuts on the palm tree. The palm tree fell to the ground and the branches struck Ms Blinkhorn. She was knocked to the ground and trapped underneath the fronds. Mr Izanagi and Mr Isaacs used a chainsaw to cut the tree into sections, which were lifted to free Ms Blinkhorn. Ms Blinkhorn suffered injuries, including fractures and lacerations and was hospitalised for six days.

Recent increase in maximum penalties

[6] In response to the Pike River disaster which resulted in 29 fatalities, as well as a growing concern about the high number of deaths and serious injuries in the New Zealand workplace, a major reassessment of health and safety legislation was conducted. This resulted in the Health and Safety at Work Act, coming into force in April 2016. The Act substantially increased penalties for significant breaches of workplace health and safety obligations. The aim is to insentivise compliance with these obligations.

[7] The charge Stumpmaster is to be sentenced on carries a maximum penalty of $1.5 million. The equivalent charge under the previous legislation carried a maximum penalty of $250,000. Under the former Act, the leading case on the

approach to sentencing in health and safety prosecutions was *Department of Labour v Hanham & Philp Contractors Limited*[1], which prescribed a three-step approach: first, to assess reparation; secondly, to assess a fine; and thirdly, to make an overall assessment of the proportionality and appropriateness of the reparation and fine. It is arguable that the new Act requires a further step before the assessment of proportionality; the assessment as to whether any other orders are appropriate.

Approach to sentencing

[8] WorkSafe and Stumpmaster agree on the approach I must take to this sentencing. Sections 22 and 151 of the Act set out the criteria I must apply when determining sentence on this charge. I must bear in mind the purposes and principles of sentencing. Accountability, denunciation and deterrence are prominent principles for this sentencing. The need to assess the gravity of Stumpmaster's culpability and be consistent with other like sentencing decisions is also important.

[9] Regard must be had to the purpose of the Act, which is to provide a balanced framework to secure the health and safety of workers and other persons by protecting against harm and eliminating or minimising risk. I must also have regard to the following:

(a) The risk of, or potential for, injury, illness or death that could have occurred.

(b) Whether death, serious injury or illness occurred or could reasonably have been expected to have occurred.

(c) Stumpmaster's safety record.

(d) The degree of departure from prevailing standards in the tree felling industry, including an assessment of what was reasonably practicable in the circumstances to ensure health and safety.

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[1] *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 90 NZELC 93,095, (2008) 6 NZELR 79

(e) Finally, an assessment of Stumpmaster's financial capacity or ability to pay a fine.

Reparation order

[10] So I turn to the first step in the sentencing exercise and assess reparation. As a result of being struck by the branches of the palm tree and knocked to the ground, the victim Ms Blinkhorn suffered multiple fractures including rib fractures and re-fractures to her right elbow and right ankle. She also sustained lacerations to her back from the sharp palm fronds, which required sutures. Ms Blinkhorn spent six days in hospital. She is a 68-year-old retiree, living with her partner in her own home. Prior to the incident, she went to the gym four times a week, jogged and ran a home catering business. She describes her lifestyle as changing dramatically following the incident. Movement in her elbow is limited, compromising her ability to attend to daily functions. She is in constant pain and unable to jog, although she can now walk on her injured ankle. She continues to receive physiotherapy and pain management treatment.

[11] Ms Blinkhorn describes the emotional harm as the most debilitating effect of the incident. She has a fear of falling on hard surfaces and breaking her bones, she suffers panic attacks and anxiety, which impacts on her interactions with family and friends.

[12] WorkSafe submit a reparation order of $20,000 is appropriate. Stumpmaster submits a reparation order of $15,000 would be appropriate. Stumpmaster advises that it made a reparation payment of $1650 to the victim relating to the replacement of her dentures. Stumpmaster is insured.

[13] Emotional harm is difficult to quantify financially. As discussed in *Big Tuff Pallets Limited v Department of Labour*,[2] *it is an intuitive exercise, its quantification defies finite qualification. The objective is to impose an amount which is just in all the circumstances.*

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[2] *Big Tuff Pallets Limited v Department of Labour* (2009) 7 NZELR 322

[14] I have been assisted in setting a reparation figure by reviewing the decisions of *WorkSafe New Zealand v Rangiora Carpets Limited.*[3] *WorkSafe New Zealand v Totally Rigging Limited.*[4] *WorkSafe New Zealand v Waikato Institute of Technology.*[5] and *Ministry of Business, Innovation and Employment v KLS Roofing Limited.*[6]. The reparation figures in those decisions ranged from $10,000 to $30,000. The injuries and the ongoing effects suffered by the respective victims were similar to those suffered by Ms Blinkhorn. I consider a reparation amount of $18,500 is appropriate to compensate for emotional harm, taking into account the ongoing impact on Ms Blinkhorn.

Fine – assessing culpability using bands?

[15] The next step is to determine the appropriate fine. In *Hanham & Philp* where the Court was addressing charges carrying a maximum penalty of $250,000 under the former legislation, the Court set out three culpability bands:

(a) Low culpability, up to $50,000.

(b) Medium culpability, between $50,000 and $100,000.

(c) High culpability, between $100,000 and $175,000.

The Court noted that a greater fine may be required in cases of extremely high culpability.

[16] Following the commencement of the new Act, the maximum penalties have increased six-fold. Accordingly, the culpability bands need to be adapted to reflect the legislative increase in fines. However, it is settled law that sentencing is not purely a mathematical exercise. In this case, it is not simply a matter of multiplying by six what otherwise would have been the appropriate starting point.

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[3] *WorkSafe New Zealand v Rangiora Carpets Limited* [2017] NZDC 22587
[4] *WorkSafe New Zealand v Totally Rigging Ltd* [2016] NZDC 21266
[5] *WorkSafe New Zealand v Waiktato Institute of Technology* DC Hamilton CRI-2014-019-005332, 10 November 2014
[6] *Ministry of Business, Innovation and Employment v KLS Roofing Limited* [2014] NZDC 9

[17] WorkSafe proposes a four-band approach in determining the fine:

(a) Low culpability, a fine of up to $400,000.

(b) Medium culpability, a fine of between $400,000 and $800,000.

(c) High culpability, a fine of between $800,000 and $1.2 million.

(d) Extremely high culpability, a fine of between $1.2 million and $1.5 million.

[18] There have only been a handful of sentencings in the District Court under the new Act and I have reviewed most of these. The pertinent features of those decisions, including a brief description of the incidents, assessment of culpability, starting points, discounts and end sentences, are contained in a table annexed to this decision.

[19] The recent District Court decisions appear to follow two approaches. One group does not refer to culpability bands, the other group does. In *Rangiora Carpets Limited,* Judge Gilbert was of the view that six bands would be more workable than four, placing:

(a) Low culpability, between $0 and $150,000.

(b) Low to medium, between $150,000 and $350,000.

(c) Medium, between $350,000 and $600,000.

(d) Medium to high, between $600,000 and $850,000.

(e) High, between $850,000 and $1.1 million.

(f) Extremely high, between $1.1 million and up.

[20] As Judge Gilbert observed, the inclusion of further bands from *Hanham* provide a more workable framework than WorkSafe has suggested. I prefer the band approach, as this promotes consistency. However, at the risk of sounding like Goldilocks, I consider the four-band framework too few, but the six-band proposal too many. In my view five bands would be more appropriate, placing:

(a) Very low culpability, between $0 and $200,000.

(b) Low culpability, between $200,000 and $400,000.

(c) Medium culpability, between $400,000 and $600,000.

(d) High culpability, between $600,000 and $1.1 million.

(e) Very high culpability, above $1.1 million.

[21] From a review of the authorities under the previous and new Acts, very few cases fall within the lowest culpability band and only one, *Department of Labour v Pike River Coal Ltd.*[7] falls within the extremely high culpability category. The majority of cases fall within the low to medium and medium to high culpability bands. I consider three sentencing bands between $200,000 and $1.1 million would be sufficient to address the majority of offending.

[22] There is no appellate authority in respect of sentencings under the new Act and I acknowledge that banding exercises are not the province of the District Court. Ultimately it will be for the Appellate Courts to provide guidance in this area.

Stumpmaster's culpability

[23] WorkSafe submits Stumpmaster's culpability is medium to high and should sit towards the higher end of its proposed medium culpability band, proposing a starting point of $700,000.

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[7] *Department of Labour v Pike River Coal Ltd* DC Greymouth, CRI-2012-018-000822, 5 July 2013

[24] Stumpmaster submits its culpability straddles the low to medium band as set out by Judge Gilbert in *Rangiora Carpets* and submits an appropriate starting point is in the region of $350,000.

[25] In assessing culpability, I take into account the factors set out in ss 151 and 22, which I have already referred to. I also take into account the seven matters outlined in *Hanham & Philp.*

[26] Stumpmaster failed to ensure the health and safety of other persons was not put at risk by the arboricultural work it was carrying out, specifically tree felling in a residential area. In my view, the risks of and potential for serious injury, illness or death from tree felling work, are well known in the arboriculture industry. Stumpmaster accepts that the potential for accidents relating to arboricultural work is high.

[27] Here, actual harm was suffered by Ms Blinkhorn and there was a potential for a fatality. I do not accept Stumpmaster's submission that the degree of harm was moderate. In my view, fractures and lacerations requiring hospitalisation are serious injuries. In any event Stumpmaster has pleaded guilty to a charge of exposing persons to serious injury.

[28] Stumpmaster submits that there was not a complete departure or failure to apply the prevailing standards, that it did take steps. Stumpmaster submits it is *more a case whereby staff did not use adequate controls.* Stumpmaster advises both Mr Isaacs and Mr Izanagi hold relevant qualifications to their industry. The company has invested time and costs in producing a QSE management system incorporating health and safety and an emergency procedure policy to provide guidance for staff in circumstances where accidents occur on site. The company holds a certification for health and safety and has been audited by ACC for WorkSafe safety management practices, receiving a primary award.

[29] Stumpmaster adds that it undertook a site assessment, identified the risks, submitted a notification to WorkSafe and adopted control measures of using road safety cones by placing them in a triangular formation at the front of the property.

Stumpmaster acknowledges that the inclusion of tape or a barrier attached to the cones would have reduced the risk of a pedestrian entering the zone by creating a physical barrier as opposed to a visual one. However, Stumpmaster submits that Mr Isaacs' assessment of the likelihood of a hazard occurring was reasonable and that when all factors are considered the risk and/or potential for injury occurring was at a moderate level.

[30] In my view, Stumpmaster's departure from prevailing standards was reasonably significant. Stumpmaster attended to some health and safety measures, but clearly those measures were inadequate. It is accepted that on 27 May 2016 the company submitted a notification of the hazardous work to WorkSafe in accordance with its obligations under the regulations, and prior to commencing work on site both Mr Isaacs and Mr Izanagi undertook a site assessment for risk which identified pedestrians as a potential hazard. However, while pedestrians were identified as a potential hazard, Mr Isaacs was of the view that the risk was not high due to the location of the site in a quiet residential cul-de-sac, particularly in comparison to work being conducted in an area involving large volumes of traffic. In my view, this assessment was flawed.

[31] While it used road cones to identify a hazard zone to any potential pedestrian, it did not complete the necessary steps and follow the industry guidelines under the approved code of practice issued by WorkSafe. I consider Stumpmaster should have better identified appropriate controls to manage the risk to public during the tree felling process. In particular, it should have:

(a) Ensured an effective exclusion zone of two tree lengths was in place around the tree felling operations to isolate the public from the fall zone.

(b) Used either a solid barrier or tape between the cones to create a physical barrier to the exclusion zone.

(c) Used clear warning signs.

(d) Had Mr Isaac, who was on site elsewhere, looking out for members of the public.

(e) Clearly marked a safe diversion route.

[32] In my view, it was reasonably practicable for the defendant to attend to this. Stumpmaster had appropriate equipment available to mark out an effective exclusion zone. It had signage, extendable barriers and tape in its vehicle at the site. In any event, the cost of implementing adequate controls either in terms of time or resources would not have been significant or disproportionate to the risk of harm to others. The staff were aware of the equipment available to mitigate the risk. The equipment was not used, and it should have been.

[33] Taking into account all of these factors, where does Stumpmaster's culpability fall within the bands?

[34] Sentencings to date under the new Act have attracted starting points in the range of $300,000 to $650,000 for moderately culpable offending.

[35] I consider cases under the former legislation continue to be useful in determining a defendant's level of culpability, though the corresponding penalty will of course be higher.

Relevant authorities

[36] In *WorkSafe v Waiariki Institute of Technology*[8] a tutor at a forestry training institute was demonstrating felling a tree to a group of students. The place where the students were told to stand was closer than the two tree lengths rule, and the tree fell in an unintended direction and struck the tutor. A starting point of $90,000 was adopted for the charge relating to the safety of employees, and $50,000 for a charge relating to the safety of students.

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[8] *WorkSafe v Waiaraki Institute of Technology* [2015] NZDC 13775

[37] In *WorkSafe New Zealand v Petiole Vanu*[9] the defendant, who ran a tree felling business, was removing five 31 metre trees from a property close to an 11,000-volt power line and railway line. There was no approved traffic management plan and no measures taken in respect of working around live power lines. A tree was partially felled, resulting in the tree leaning towards the road, power lines, and railway lines. The tree fell onto the power lines and road. No one was hurt. A starting point of $90,000, referred to as being at the top of the medium band of culpability, was set.

[38] In *WorkSafe New Zealand v Jenkins Earthworks Limited.*[10] the defendant was carrying out demolition work at a residential property. The company failed to contain debris within the property, and the back wall of a shed, cladding, and cement board fell into the neighbouring property. The Court adopted a starting point of $75,000.

Fine

[39] I concur with WorkSafe that the culpability assessment is similar to that of *Vanu* and *Waiariki*. However, I do not consider this necessarily places Stumpmaster's offending in the medium to high band, setting a starting point in the region of $700,000. This would effectively result in a nine-fold increase. I consider Stumpmaster's culpability is within my proposed medium culpability band but towards the middle. I set a starting point of $450,000 to $500,000.

[40] I now address the aggravating and mitigating factors relating to Stumpmaster. Stumpmaster has no previous convictions. Therefore, no uplift is required.

Mitigating factors

[41] Turning to the mitigating factors, both WorkSafe and Stumpmaster agree that Stumpmaster is entitled to a reduction of the starting point to reflect mitigating features present in this case.

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[9] *WorkSafe New Zealand v Petiole Vanu* [2016] NZDC 6046
[10] *WorkSafe New Zealand v Jenkins Earthworks Limited* [2015] NZDC 14506

[42] In *Hanham & Philp* the Court stated: *Without seeking to establish any hard and fast rule a discount of up to 10 to 15 percent is reasonable to recognise the order for reparation.* Similarly, in Department of *Labour v EziForm Roofing Products Ltd*[11] the Court held that mitigating factors such as an offer of reparation, remedial action, a favourable safety record, and co-operation with the informant would ordinarily lead to an overall maximum discount of somewhere between 20 to 30 percent.

[43] Here, an order of reparation is to be made. There is no argument that Stumpmaster was fully co-operative with the WorkSafe investigation. Mr Isaacs attended a voluntary interview, provided a full statement and assisted with the investigation. He tended a letter of apology to the victim. I accept Mr Isaacs on behalf of Stumpmaster has shown genuine remorse. Following the incident, Mr Isaacs was proactive in bringing this accident to the attention of the industry. He submitted a draft article outlining the incident and it is anticipated that article may be published and circulated within the industry this year. Stumpmaster has revised its operations and it no longer undertakes work that would likely expose Mr Isaacs or any future employees to a similar incident. The company has had an unblemished record during its eight year operation. The company maintains comprehensive health and safety policies and was recognised by ACC for its safety standards.

[44] I agree with the WorkSafe and Stumpmaster that a global reduction of 30 percent to reflect these factors is appropriate.

[45] Stumpmaster pleaded guilty at an early stage. Bearing in mind the factors discussed in *R v Hessell*[12] I allow a discount of 25 percent.

[46] So at this stage, I reach a provisional fine of between $236,000 and $262,500.

Costs order

[47] Under part 4 subpart 8 of the Act, the Court has the ability to make other orders. No specific orders are sought other than costs in respect of the prosecution.

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[11] *Department of Labour v EziForm Roofing Products Ltd* [2013] NZHC 1526
[12] *R v Hessell* [2010] NZSC 135

The prosecutor seeks $1,203.75, being 50 percent of WorkSafe's legal costs. It submits that this is just and reasonable order for costs and refers to three recent decisions under the Act, where awards of costs have been made.

[48] Stumpmaster in its written submissions does not oppose an order of costs of that amount being made. However, it reminds the Court that in some instances costs have not been awarded, specifically referring to Her Honour Judge Maze's comments in *Lindsay Whyte Painters*,[13] wherein she refused an application for costs on the basis that no evidential basis had been laid to enable her to exercise her discretion. Her Honour commented that *there seems to be a presumption that costs will be awarded, which is not what s 152 expresses.*

[49] Section 152 provides that the prosecution may make an application for an offender to pay a just and reasonable sum towards the cost of the prosecution, including the cost of investigating the offending and any associated costs.

[50] I consider an order for costs is appropriate here. However, there has to be a balance between the task force recommendation that, "This would help to ensure that the system is not supporting the poor performance of the worst offenders," against Stumpmaster's co-operation with WorkSafe and its financial resources. In my view, a costs order in the sum of $1,000 is appropriate.

Overall assessment

[51] Finally, I am required to consider whether the overall assessment of reparation, orders and fine is proportionate and appropriate. Given the six-fold increase in fines under the Act this step is attracting considerably more focus than under the previous legislation.

[52] WorkSafe has responded to financial information provided by Stumpmaster with an affidavit filed by Mark Keenan, employed by WorkSafe as a financial controller. Mr Keenan is of the view, after analysing Mr Alec Isaacs' affidavit and the historical profit and loss accounts from March 2015 to September 2017, that

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[13] *Lindsay Whyte Painters and Decorators Limited* [2017] NZDC 28091

Stumpmaster would be in a position to meet a fine in the region of $100,000 if paid in instalments over a period of four to five years. Stumpmaster submits given its present financial position that it would be able to pay a fine of $20,000.

[53] In *Mobil Refrigeration Specialists Limited v Department of Labour*[14] Heath J emphasised the need for a defendant to provide clear evidence of financial incapacity where that is claimed. He directed that full disclosure of all material facts is required.

[54] Stumpmaster has placed before the Court adequate information on which to make a reasonably informed decision about the impact of the imposition of a fine. Stumpmaster has submitted an affidavit by Mr Alec Isaacs, retired accountant and father of James Isaacs, which refers to financial information and projections for the company.

[55] Mr Isaacs states that at the time of the incident there were four to five workers involved in tree cutting and stump grinding. Commercial premises were rented by the company in Rosedale. That lease expired in April 2016, and Stumpmaster relocated to Dome Valley. Since the company relocated it has downscaled, restructured its operations using a one-person model. In 2017, the company sold its trading name (Tree King) to a former employee for the sum of $30,000, which is being paid in monthly instalments, the last payment being in June 2018. The company sold the arboricultural services sector of the business and now mainly offers stump grinding and light earthworking services. Mr Alec Isaacs is of the view that the company was trading profitably up until its relocation but in the first six months of 2017 it experienced a significant decline in its financial performance suffering a loss of over $40,000.

[56] Stumpmaster disposed of surplus equipment resulting in a revenue injection into the company which has been used to repay shareholder advances. However, recently it purchased a Terex loader and attachments at a cost of $184,000 plus GST. Stumpmaster pays Mr Isaacs a gross salary of $60,000 per annum.

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[14] *Mobil Refrigeration Specialists Limited v Department of Labour* HC Hamilton CRI-2009-419-94, 29 March 2010

[57] Mr Isaacs Snr assesses Stumpmaster would expect to make a profit of $1,283 per month, with a cash surplus of $933 per month. He is of the view based on the financial accounts, that the company is now trading at a very modest profit level and is likely to continue trading at this level in the foreseeable future. He states that Stumpmaster could pay a very modest fine and continue to operate but that if the Court imposed a significant fine it would likely mean the company would have no alternative but to cease trading. Finally, Stumpmaster submits that an order to pay a fine by way of instalments over four to five years as proposed by Mr Keenan is "unusual" and inappropriate, as the company may no longer be trading in four or five years.

[58] I am satisfied that a fine of between $236,250 to $262,500 would be fatal to Stumpmaster and that it would no longer be able to trade. A fine of that amount would not in my view satisfy the purposes and principles of sentencing including imposing the least restrictive sentence in all the circumstances. Stumpmaster has an unblemished record. In my view, it would be a disproportionate response to impose a fine of this amount for this incident. While it is acknowledged that a fine should act as a deterrent and bite, it should not devour a company.

[59] I echo His Honour Judge Gilbert's sentiments when he says it would only be in quite exceptional cases involving repeat offending or the most egregious of breaches that the Court would impose a sentence with the knowledge that it would force a business to cease its operations. I accept Stumpmaster is a modest operation. However, I concur with Mr Keenan that a monthly finance repayment of $4800 in relation to the purchase of the Terex loader will stop from October 2018 which will provide a cash surplus and enable Stumpmaster to service a fine. The order can be made to accommodate that.

[60] Accordingly, on the basis of my overall assessment, I reduce the fine and impose one of $90,000.

Final orders

[61] So to conclude, I make the following orders:

(a) Reparation of $18,500 to be paid forthwith.

(b) A fine of $90,000 to be paid at the rate of $5000 quarterly, the first payment to be made on 25 October 2018.

(c) Costs to WorkSafe of $1000.

P J Sinclair
District Court Judge

Name of case	Brief description of accident	Culpability assessment	Starting point	Discounts	End sentence
Budget Plastics	Partial amputation of a worker's hand caught in an unguarded auger.	Moderate	$400,000 to $600,00	55%	$100,000
Rangiora Carpets	Victim fell off mezzanine floor through a false ceiling and broke her arm, shoulder, collar bone and pelvis and received a cut to her head.	Moderate	$300,000	55%	$157,500
Tasman Tanning Company	Worker exposed to hydrogen sulphur gas. Rendered unconscious, suffered concussion and effects of gas inhalation.	High	$700,000	55%	$380,000
Dimac Contractors Limited	Digger struck live power line. Five workers at risk. No one harmed.	High end medium	$650,000		$90,000
Lyndsay Whyte Painters	Victim fell off roof. Suffered multiple complex facial lacerations and fractured elbow.		$300,000	60%	$50,000
Tannenberg ITW New Zealand	Amputation of little ring and middle fingers from inadequately guarded machine.	Medium	$450,000		$236,000