

**ORDER PERMANENTLY PROHIBITING PUBLICATION OF
COMMERCIALY SENSITIVE AND FINANCIAL INFORMATION
RELATING TO SKYLINE BUILDINGS LIMITED, WHICH HAS BEEN
REDACTED FROM THIS DECISION**

**IN THE DISTRICT COURT
AT MANUKAU**

**I TE KŌTI-Ā-ROHE
KI MANUKAU**

**CRI-2019-092-007340
[2020] NZDC 10681**

WORKSAFE NEW ZEALAND
Prosecutor

v

SKYLINE BUILDINGS LIMITED
Defendant

Hearing: 11 March 2020

Appearances: A Simpson and Kirtland for the Prosecutor
K McDonald and M Hutcheson for the Defendant

Judgment: 12 June 2020

**RESERVED DECISION OF JUDGE P S GINNEN
[On Sentence]**

[1] Faauuga Seve has worked as a factory hand for Skyline Buildings¹ for over 12 years. He is a machine operator, forklift driver and truck delivery driver.

[2] On 19 July 2018 Mr Seve was stationed on the Brake Press, a machine that he had operated many times before without incident. On this day, however, his right hand got caught in the Brake Press and was crushed. As a result, the tips of his right index and middle fingers were amputated. Skyline Buildings has accepted that it failed to

¹ The defendant, Skyline Buildings Limited

comply with a duty to ensure the health and safety of its workers so far as reasonably practicable, and that failure exposed workers to a risk of serious injury. Guilty pleas have been entered to charges laid under ss 36(1)(a), 48(1) and 48 (2)(c) of the Health and Safety at Work Act 2015 (“the Act”).

Background Facts

[3] Skyline Buildings is a small family owned and operated business that designs and manufactures garages, sheds, sleepouts and other buildings. The two directors are brothers Christopher and Peter Cook. Their father Ernest Cook founded Skyline Buildings in 1956. Christopher and Peter Cook work for the business full time and are involved in all the areas of Skyline Buildings work, including running the factory where 8 staff work.

[4] The machine that injured Mr Seve is a Chalmers & Corner 35 ton Brake Press (the Brake Press). Skyline had bought it second hand in 1993. Mr Seve was trained to operate the Brake Press when he started working for Skyline Buildings. He was one of only two employees who were trained, and only the two trained employees were permitted to operate it.

[5] The Brake Press was used regularly to make flashing, which involved folding panels of sheet metal. The operator put a piece of sheet metal into the die. They then operated the shrouded foot pedal by pushing it the whole way down. The operator kept their foot on the pedal and after a delay of two seconds, the press cycle and the tool came down creating a shape in the sheet metal. The operator then took their foot off the pedal and the tool went back up. The sheet metal was taken out of the Brake Press, turned around and placed back in to create a shape on the reserve side.

[6] The Brake Press had a send/receive photo eye safety beam (the sensor beam). When enabled the sensor beam disengaged the clutch if the beam was interrupted, for example if a piece of metal flicked into it or a worker’s hand was close to the crush hazard. The sensor beam was controlled by a key switch located on the control panel at the front of the Brake Press. When the key was switched to the left (green) side, the sensor beam was enabled. However, an operator could override or disable the sensor

beam by turning the key from the left side to the right (red) side. When the sensor beam was disabled, a red light illuminated informing the operator that the sensor beam was no longer functional.

[7] Operators would frequently disable the sensor beam while making flashing. This was because either the metal or their hand would interrupt the sensor beam causing the Brake Press to jam. When this occurred, the operator could no longer use the foot pedal to raise the tool. To clear the jam the operator turned the key to the right (disabling the sensor beam), pressed the foot pedal, and raised the tool back up. The operator would then have to enable the sensor beam by manually turning the key back to the left.

[8] While it was intended that the Brake Press was operated with the safety beam enabled, Skyline Buildings was aware that operators were required to disable the sensor beam when changing die and clearing jams during the flashing process. The operators, including Mr Seve, were informally trained on the operation of the Brake Press, however there were no formally recorded procedures in place for its operation, including procedures for making flashing, clearing jams or operating the Brake Press with the sensor beam disabled. Skyline Buildings admitted that no formal risk assessment had been carried out on the Brake Press but said that an informal assessment had been undertaken. It had identified the inherent danger in operating the Brake Press, and erected signs near it (and other machinery) that cautioned workers of crushing risks and directed them to take certain safety measures.

The Incident

[9] On the afternoon of 19 July 2018 Mr Seve was stationed at the Brake Press. He placed a piece of sheet metal into the Brake Press, stood back and activated the foot pedal to bring the tool down to the metal. As he took his foot off the pedal his arm interrupted the sensor beam causing the metal to jam. He followed his usual process of turning the key to the right and disabling the sensor beam.

[10] After disabling the sensor beam, Mr Seve picked up the piece of flashing, turned it over and placed it in the Brake Press. He did not turn the key to re-engage

the sensor beam. He was holding the flashing in his right hand and began operating the foot pedal. The tool lowered to the flashing, crushing and trapping his right hand in the Brake Press. He was taken to Middlemore Hospital by ambulance. The tips of his right index and middle fingers were amputated as a result of the incident.

[11] Mr Seve needed nearly four months off work to recover from his injuries. He returned to work for Skyline Buildings on 12 November 2018 in his previous role.

After the incident

[12] WorkSafe² investigated after the incident. It found that the Brake Press did not comply with the AS/NZS 4024 machinery safety standard and issued a prohibition notice prohibiting the operation of the Brake Press until it complied. The prohibition notice remains in place as the Brake Press is no longer in use. Prohibition notices were also issued preventing the operation of two other machines found not to comply with AS/NZS 4024 machinery safety standard. WorkSafe engaged Framework Design Limited (Framework) to carry out an expert assessment of the Brake Press and the two other machines. Framework found a number of issues with the Brake Press and concluded that the following were the highest risk:

- (a) Severe crushing/severing of body parts could occur unless a high degree of care is taken by the operator (and others in the area); and
- (b) The ends of the Brake Press are relatively open, i.e. not properly guarded, so crushing parts can be reached into (accidentally or intentionally) from the sides.

[13] Along with improvements to guarding, the Framework report states there could have been a stricter system for the use of the override key so that the Brake Press safety systems was never overridden unnecessarily.

[14] Skyline Buildings engaged Framework to conduct an expert risk assessment of its plant. A number of recommendations were made and on a follow-up visit,

² WorkSafe New Zealand

Framework confirmed suitable guarding and safety improvements had been made to a high standard.

[15] WorkSafe's investigation established:

- (a) No risk assessment had been carried out on the Brake Press or other plant at the site;
- (b) At the time of the incident the defendant did not have a hazard register for the site;
- (c) Skyline Buildings advised WorkSafe it was the responsibility of everybody in the organisation to identify hazards within their areas. There was no formal process for this and it customarily occurred during the weekly factory meetings;
- (d) Mr Seve told WorkSafe he had seen things in the factory he thought were unsafe (including on the Brake Press) but that he had not told anyone about them as he thought it was the supervisor's job;
- (e) The Brake Press was not guarded to the required AS/NZS 4024 standard or equivalent and Framework advised the sensor beam would not meet the requirements of AS/NZS 4024.2014;
- (f) Operators were required to disengage the sensor beam when changing die and clearing jams. In regard to the key system, Framework stated:
 - (i) To limit the possibility of deliberate unnecessary over-riding; the key should be kept under strict supervision. The use of any form of safety guard override system (e.g. key switch) must be strictly supervised. The key that is used for the override should be kept under control by a responsible person and only ever used for specific tasks such as during set-up; and

- (ii) If the machine is used in a state with safety devices overridden, a more visible indication of that state could be provided, e.g. a red flashing strobe light.
- (g) At the time of the incident, there was no written procedure in place for the operation of the Brake Press;
- (h) Mr Seve was one of only two people qualified to use the Brake Press. He advised WorkSafe that there were not any written safety guidelines for the Brake Press and that he had only been told verbally by his supervisors about using the Break Press safely. It was established that the verbal processes were ad hoc:
 - (i) Skyline informed WorkSafe the operator must inform the supervisor if there is a jam so the supervisor could clear it;
 - (ii) Mr Seve told WorkSafe that the process for clearing jams was to tell his current supervisor when pieces of metal jam. He said the supervisor comes and helps out but that sometimes he takes the jammed piece of metal out by himself as he knows what to do. Mr Seve also advised that his supervisor knows he turns the key to the right when unjamming the metal;
 - (iii) Mr Seve told WorkSafe his former supervisor Wayne Pearce told him to use the key when the machine is stuck and then to clear the flashing that was stuck; and
 - (iv) Mr Pearce informed WorkSafe that the sensor beam needed to be turned off for specific tasks such as changing the die and resetting the machine if the sensor beam is broken. He explained that if there was a jam and the tool stopped at the bottom of the stroke, you turn the light barrier off, touch the pedal and it went to the top of the stroke where the machine automatically stops and then you turn it back on again.

- (i) Skyline Buildings provided staff with a copy of “*Skyline’s Site Safety Manual*”. This was provided to Mr Seve in 2005 on commencement of his employment. The manual has not been updated since 2005.
- (j) There was signage present to illustrate hazards and risks in the workplace.
- (k) Skyline Buildings did not have a copy of the manufacturer’s operating instructions for the Brake Press.

[16] WorkSafe concluded that Skyline Buildings had failed in its duty to ensure the health and safety of its workers, so far as was reasonably practicable. It was reasonably practicable for Skyline Buildings to have ensured the health and safety of its workers by:

- (a) Undertaking an adequate risk assessment to identify the hazards and risks associated with the Brake Press.
- (b) Ensuring the Brake Press was adequately guarded in accordance with AS/NZS 4024 or equivalent standard.
- (c) Ensuring that the key that allowed the sensor beam to be overridden was appropriately controlled.
- (d) Developing, documenting, implementing and monitoring a safe system of work for the operation of the Brake Press.

[17] Skyline Buildings cooperated with WorkSafe throughout its investigation. Having engaged Framework to conduct an expert risk assessment of its plant, Skyline Buildings implemented extensive additions and alterations to its health and safety management systems. It spent over \$60,000 in doing so. This expenditure was additional to what was suggested in Framework’s expert assessment (as commissioned by WorkSafe).

Mr Seve's victim impact statement dated 24 January 2020

[18] Mr Seve is 57 years old. He was born in Samoa and moved to New Zealand in 1996. He has lived in Auckland with his wife and three children since then. Since his hand was injured, his lifestyle has changed. He struggles with normal things like buttoning up his shirt and holding things like pens is hard. It is hard for him to grip anything with his right hand. When he writes things down, at times his right hand would freeze, and it would hurt. He takes Panadol to ease the pain.

[19] Mr Seve has attended physiotherapy which required 10 to 20 visits to the Manukau City Centre. He has hand movement exercises to continue at home.

[20] The cost of Mr Seve's doctor appointments and treatments were met by ACC. Skyline Buildings paid for the ambulance fees and topped up the 20% shortfall in Mr Seve's ACC payments. Skyline Buildings also made a one-off payment of \$5,000 before tax in July 2019. Mr Seve received \$3,020 after tax.

[21] Mr Seve returned to full time work in his previous role on 12 November 2018.

[22] Christopher Cook referred to a mutual relationship of trust and support between Mr Seve and the Directors of Skyline Buildings.³ He said a care package had been provided to Mr Seve and his family. He also said Mr Seve recently recommended his close friend for a role at Skyline having fully endorsed it as a positive and rewarding place to work.

Skyline Buildings

[23] The financial position of the company could best be described as perilous. An affidavit by Skyline Building's accountant sets out the financial position of the company in some detail. WorkSafe filed an affidavit by Sandra Lee, who is employed as a finance team leader at WorkSafe. She reviewed the financial statements for Skyline Buildings for the years ending 31 March 2017, 2018 and 2019. She concluded

³ Affidavit of evidence of Christopher Lindsay Cook dated 19 February 2020

that there is limited to no capability of the company to pay a fine without further financial support from shareholders, associated parties or a third party.

[24] Mr Cook expressed regret that the health and safety of workers were put at risk due to failings of Skyline Buildings. He said he has always taken pride in being a good employer and never envisaged finding himself in this situation. The repercussions from the incident and the subsequent WorkSafe investigation have significantly impacted on his physical and mental wellbeing, which have had a flow-on effect on his family.⁴

The approach to sentencing

[25] Section 151(2) of the Act sets out the sentencing criteria to be applied:

151 Sentencing criteria

(2) The court must apply the Sentencing Act 2002 and must have particular regard to—

- (a) sections 7 to 10 of that Act; and
- (b) the purpose of this Act; and
- (c) the risk of, and the potential for, illness, injury, or death that could have occurred; and
- (d) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and
- (e) the safety record of the person (including, without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person) to the extent that it shows whether any aggravating factor is present; and
- (f) the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and
- (g) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[26] The purpose of the Act is to provide for a balanced framework to secure the health and safety of workers and work places by doing those things set out in s 3(1). Regard must be had to the principle that workers and other persons should be given

⁴ Affidavit of evidence of Christopher Lindsay Cook dated 19 February 2020

the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant, as is reasonably practicable.⁵

[27] The High Court has confirmed a four-step process for sentencing in health and safety prosecutions in *Stumpmaster v WorkSafe New Zealand*.⁶

- (a) Assess the amount of reparation;
- (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 152-158 of the Act are required; and
- (d) Make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps. This includes consideration of the defendant's ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant.

Assessing reparation

[28] Reparation may be imposed in relation to loss or damaged property, emotional harm and relevant consequential loss or damage.⁷

[29] Mr Seve did not suffer loss or damage to his property. Relevant consequential loss or damage has been addressed by Skyline Buildings topping up Mr Seve's ACC payments, and Mr Seve's return to full time work. The assessment of reparation is in relation to the emotional harm suffered by Mr Seve.

⁵ Section 3 Health and Safety At Work Act 2015.

⁶ *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

⁷ Section 32 Sentencing Act 2002.

[30] The High Court has observed that imposing reparation for emotional harm is an:

...intuitive exercise, its quantification defies finite calculation. The judicial objective is to strike a figure which is just in all the circumstances, and which in this context compensates for actual harm arising out of the offence in the form of anguish, distress and mental suffering.⁸

[31] WorkSafe submits that an award of about \$24,000 would be appropriate to reflect the emotional harm suffered by Mr Seve, resulting in an overall reparation amount of approximately \$27,000 when the net payment of \$3,020 that has already been made to Mr Seve is taken into account.

[32] Skyline Buildings considers that to be disproportionate in the circumstances and submits that an order be made for between \$14,500 and \$17,000, which would result in a total reparation of between \$17,500 and \$20,000.

[33] Both parties provided cases about workers who suffered partial amputations of their fingers in machinery incidents. WorkSafe made submissions identifying facts that point to the current case being more serious than the cases cited. Skyline Buildings made submissions identifying facts that point to the current case being less serious. The reparation amounts ranged from \$15,000, awarded in *Industrial Tube Manufacturing Company* in 2014⁹ and *Timbershade Blinds Limited* in 2016.¹⁰ At the higher end \$35,000 was awarded in *Marshall Industries* in 2018.¹¹ The range is indicative of the intuitive exercise required when calculating a monetary value for an aspect of the human condition.

[34] I have reviewed the cases. I must consider the circumstances of this particular case. Mr Seve's hand was crushed and trapped in the Brake Press, an indisputably shocking and painful incident. The tips of the index and middle fingers of his right hand were amputated. He required four months off work to recover. He attended numerous physiotherapy sessions and has hand exercises to do at home. Eighteen

⁸ *Big Tuff Pallets Ltd v Department of Labour* HC Auckland, CRI-2008-404-322, 5 February 2009 at [19].

⁹ *WorkSafe New Zealand v Industrial Tube Manufacturing Company Limited*, CRI-2014-019-001977, 20 August 2014.

¹⁰ *WorkSafe New Zealand v Timbershade Blinds Limited* [2016] NZDC 15833.

¹¹ *WorkSafe New Zealand v Marshall Industries Limited* [2018] NZDC 4498.

months after the incident he reported that the he still experiences pain sometimes and takes Panadol to ease the pain. The functionality of his hand is still compromised. The incident occurred later in his working life. He is 57 years old, working in a manual job that requires a degree of physical labour.

[35] I am of the view that the reparation amount that is just in all the circumstances is \$27,000. \$3,020 has already been paid to Mr Seve. Accordingly, I make a reparation order of \$24,000.

Assessing the fine

[36] The second step is to fix the amount of the fine payable by Skyline Buildings. In *Stumpmaster* the High Court set out four guideline bands for culpability:

- (a) Low culpability – up to \$250,000;
- (b) Medium culpability – \$250,000 to \$600,000;
- (c) High culpability – \$600,000 to \$1,000,000;
- (d) Very high culpability – \$1,000,000 plus.

[37] WorkSafe submitted that the present offending should be assessed as towards the higher end of the medium culpability band and a starting point in the region of \$550,000 is appropriate.

[38] Counsel for Skyline Buildings submitted that its culpability lies at the lower end of the medium band and a starting point in the vicinity of \$300,000 to \$350,000 should be adopted.

[39] In terms of assessing culpability the High Court confirmed the well-known list of relevant considerations from the guideline judgment under earlier legislation *Hanham & Philp*.¹² There are further considerations set out in s 151 of the Act.

¹² *Department of Labour v Hanham & Philp Contractors Ltd* [2008] 6 NZELR 79.

Identification of the operative actions or omissions – what was reasonably practicable?

[40] Skyline Buildings accepts the operative omissions resulting in the incident. It accepts it did not formally record a risk assessment of the Brake Press but says it did undertake an informal assessment. The inherent danger in operating the Brake Press had been identified. Signs were put up near it and other machines that cautioned workers of crushing risks and directed them to ensure only authorised workers could operate machinery, including the Brake Press, to keep hands away from moving parts, that safety devices and guarding were to remain in place at all times, and personal protective equipment was to be worn at all times.

[41] Skyline Buildings accepts, in hindsight, that the Brake Press was not adequately guarded and that it did not adequately control the key that overrode the safety beam. It also accepts that it did not develop, implement and monitor a formally documented safe system of work for the operation of the Brake Press. However, it submitted that it did have in place an informal system of work that it considered kept workers safe, which are detailed in counsel's submissions.

[42] A factor that must be considered is that on 15 September 2017, some ten months before the incident, an experienced WorkSafe inspector inspected the machinery on site and Skyline Buildings' health and safety management systems. She made the following findings:

- (a) She could not identify any actionable health and safety issues at the site;
- (b) She could not identify any issues with the machinery at the site; and
- (c) No follow up from WorkSafe was required.

[43] This is completely contrary to the findings of the WorkSafe investigation after the incident. It was submitted that it was entirely reasonable for Skyline Buildings to rely on the WorkSafe inspector's earlier report, and that there must be a reasonable

degree of trust and confidence in WorkSafe as a health and safety regulator when it provides reports of this nature.

[44] At the hearing WorkSafe submitted that little weight could be placed on the WorkSafe inspector's earlier report. I was referred to the formal written statement of the inspector where she stated:¹³

I observed the press brake which at the time of the visit was not in operation as the operator was on leave and that no other worker was able to operate it. Mr Gregory however, pointed out that there is [sic] light curtains in place and informed that the curtains automatically shut down the machine when operator's body/limbs enter the restricted area.

[45] WorkSafe also pointed out that the assessment of the health and safety systems by the WorkSafe inspector were in a different area from that where the Brake Press operated. Finally, I was reminded that the duty to ensure the health and safety of workers falls on the PCBU, not on WorkSafe.

[46] It is clear where the duty lies and where liability falls in these cases. Skyline Buildings has responsibly pleaded guilty to the charges on that basis. However, the fact that a WorkSafe inspection had only ten months previously failed to identify any hazards must surely be a relevant consideration when assessing Skyline Building's culpability. The inspector did not see the Brake Press in operation, but neither did she ask to do so before completing her report.

[47] The purpose of the Act is to provide a balanced framework to secure the health and safety of workers and work places by amongst other things promoting the provision of advice, information, education and training in relation to work health and safety.¹⁴ This is not the case of a company ignoring WorkSafe advice, quite the opposite. Skyline Building's reliance on the WorkSafe inspector's report was reasonable in the circumstances and reduces their culpability under this heading and the next.

¹³ Paragraph 12, Formal Written Statement of Sarah Tulai, annexure "B" to affidavit of Christopher Lindsay Cook dated 19 February 2020.

¹⁴ Section 3(1)(e).

The degree of departure from prevailing industry standards

[48] The risks associated with unguarded machinery are well known and there is extensive industry guidance available on how to manage these risks. Skyline Buildings accepts, again in hindsight that it departed from the standards referred to by WorkSafe. It does not accept, however that the degree of departure from those standards was significant or aggravating given that it had policies and procedures in place at the time of the incident, workers understood and were trained on Skyline Buildings health and safety management system and, again the WorkSafe inspector had relatively recently confirmed that WorkSafe had no issues with the health and management system.

[49] A number of elements of the ‘informal system of work’ that Skyline Buildings considered kept their workers safe are detailed in its submissions. However, it is accepted that it did not develop, implement and monitor a formally documented safe system of work for the operation of the Brake Press.

[50] Mr Seve told WorkSafe he had seen things in the factory he thought were unsafe, including the Brake Press. He said he never told anyone as his understanding was that that was the supervisor’s role. That is consistent with Samoan respect for the authority of a supervisor. A robust health and safety culture requires formally documented processes that clearly identify all workers’ roles and responsibilities for health and safety. Skyline Buildings was of the view that its informal system of work was understood by all workers. Mr Seve’s statement to WorkSafe is a telling indication that that was not the case.

The obviousness of the hazard

[51] The hazard was obvious. Skyline Buildings was aware the Brake Press frequently jammed and that workers were required to disable the sensor beam to clear the jams. Further, hazards associated with machinery are significant and well known to the manufacturing industry generally.

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

[52] The means necessary to avoid the hazard were available and cost effective. There is no suggestion that cost was a factor contributing to Skyline Building's omissions. The submission that Skyline Buildings had not appreciated that the Brake Press was not guarded in compliance with the relevant standards is accepted.

The risk of potential harm and the realised harm – s 151(2)

[53] It is accepted by Skyline Buildings that operation of the Brake Press poses a risk of injury, namely crushing of body parts and that this risk was realised when Mr Seve's hand was crushed and required the amputation of the tips of two fingers.

Assessment of culpability

[54] Numerous cases in relation to where Skyline Building's culpability ought to sit were provided and discussed by counsel in their submissions. I have considered the cases. I do not intend to analyse each of them here.

[55] Skyline Buildings submitted that its culpability was lower in each of the cases, primarily because it had relied on the WorkSafe's inspector's earlier report; that risks were identified about the Brake Press and training and controls put in place, albeit not formally recorded; and that the defendant in the cited cases had more resources to address health and safety systems or have previously appeared before the Court under the Act. I accept that these are relevant considerations.

[56] Skyline Buildings also provided cases of some comparable incidents, where the Court had assessed the starting point for a fine was between \$300,000 and \$350,000.

[57] In this case, I am troubled by the fact that Skyline Buildings was aware that metal jammed frequently in the Brake Press and that operators had to override the safety feature to clear the jam. This was risky behaviour that ought to have alerted Skyline Buildings to the need, at the very least, to undertake a formal risk assessment, which may have identified the problems that led to Mr Seve being injured.

[58] The fact of the WorkSafe inspector's report identifying no issues is relevant, as discussed above. However, she did not see the Brake Press in operation, or ask to do so. Since she did not observe the Brake Press in operation, she did not observe the key being turned to disable the sensor beam when the machine jammed. There is no evidence that this aspect of clearing the jammed machine was discussed. A formal risk assessment of the Brake Press, of the kind that Framework undertook, would have identified the heightened risk and Skyline Buildings would have been in a position to mitigate the risk.

[59] Taking into account all of the factors, I find that the starting point for the fine falls in the middle of the medium band of culpability. I find that the culpability is higher than that submitted by Skyline Buildings, but lower than that submitted by WorkSafe. The appropriate starting point is \$400,000.

Aggravating and mitigation factors

[60] Skyline Buildings submitted there are no aggravating factors. WorkSafe submitted that the degree of departure from prevailing standards is an aggravating factor to which the Court must have particular regard,¹⁵ but this factor had already been considered in submissions about the appropriate starting point, and accordingly should not be double counted as an aggravating factor.

[61] There are mitigating factors, for which WorkSafe and Skyline Buildings have agreed positions about the appropriate reductions. I agree with the positions adopted and make the following discounts:

- (a) A 5% discount for Skyline Buildings' previously good health and safety record. The company appeared before the Court once in relation to safety matters over 30 years ago, on charges under the Machinery Act 1950. That is the only blemish in the history of a company that has been in operation since 1956 and does not reduce the discount for a previous good health and safety record;

¹⁵ Section 151

- (b) A 5% discount for Skyline Building's full cooperation with the investigation.
- (c) A 5% discount for reparation; and
- (d) A 5% discount for remorse. The affidavit evidence of Mr Christopher Cook addresses this, and the ongoing impact of the incident and investigation on him and his family. I acknowledge that Christopher Cook and Peter Cook attended the sentencing hearing in person. My impression of them was that their remorse was genuine, as was their concern for Mr Seve, who has been described as a valued member of the Skyline Buildings team.

[62] There was a divergence of position about the discount that ought to be applied for the remedial steps taken by Skyline Buildings.

[63] In *Stumpmaster* most of the defendants had taken remedial steps. The High Court commented:

In determining whether credit should be given for this, there was little effort made to correlate what was being done to the nature and level of the underlying deficit that led to the accident. In other words, were the reformative steps going an extra mile, or at the other extreme merely correcting what were woeful deficits that should never have existed in the first place?

[64] WorkSafe acknowledged the steps that the defendant took by way of remedial action, which went above and beyond what was suggested in Framework's expert assessment that had been commissioned by WorkSafe.

[65] Skyline Buildings spent over \$60,000 on the remedial steps, notwithstanding its poor financial position. Viewed in that context, I agree that the expenditure shows Skyline Building's willingness and dedication to improve its practices beyond mere remedial steps and reflects the care for its workers expressed by Christopher and Peter Cook. A 10% discount for the remedial steps taken is appropriate.

[66] Skyline Buildings is entitled to a 25% discount for entering a guilty plea at the first reasonable opportunity. The total of the discounts available to Skyline Buildings is 55%. The \$400,000 fine is therefore reduced by \$220,000 resulting in a fine of \$180,000.

Determine whether further orders are required

[67] WorkSafe is entitled to apply for an order that the defendant pay a sum that it thinks just and reasonable towards costs of the prosecution (including the costs of investigating the offending and any associated costs).¹⁶

[68] WorkSafe seeks an award of \$2,491.95, being 50% of the prosecutor's legal costs. No contribution is sought in relation to investigation costs. Skyline Buildings agrees that the sum sought by WorkSafe is appropriate. I make an order awarding costs to WorkSafe of \$2,491.95.

Proportionality assessment

[69] The final step is a consideration of the proportionality and appropriateness of the sanctions imposed by the previous steps. This includes an assessment of Skyline Building's ability to pay, and also whether an increase is made to reflect the financial capacity of the defendant. I find that the combined package of sanctions set out above are appropriate and proportional, but for an assessment of Skyline Building's ability to pay.

[70] Affidavit evidence has been filed by Christopher Cook and John Harris, who has been the accountant for Skyline Buildings for the last 10 years. Mr Harris's services have included preparing the company's annual accounts and annual tax returns; budget and forecasting as required from time to time; general management services required from time to time; and restructuring advice. Having provided that range of services he is well placed to provide evidence about the financial circumstances of Skyline Buildings and its ability to pay a fine. His affidavit attaches

¹⁶ Section 152(1).

Skyline Building's financial statements for the years ending 30 June 2017, 2018 and 2019. [Redacted.]

[71] Having examined the financial performance of the company over the last two years and taking into account things that will likely impact on the current financial year, Mr Harris's view was that Skyline is unable to pay a fine without borrowing monies secured over the property owned by related property entity [Redacted].

[72] I note that the affidavit by Mr Harris was affirmed on 19 February 2020, before the full country lockdown imposed in response to COVID-19, and the significant economic downturn experienced by industries across New Zealand. The ongoing economic consequences for the country are not fully known yet and there is no evidence about the impact on Skyline Buildings specifically. However, it must be acknowledged that the financial assessment referred to above occurred before these unprecedented events.

[73] Sandra Lee for WorkSafe asserted that there are generally three areas to consider for servicing a fine, being working capital; sale of fixed assets; and advances from shareholder or finance from third parties. [Redacted.]

[74] Significantly, she concluded that it is her opinion that there is limited to no capability to pay a fine without further financial support from shareholders, associated parties or a third party.

[75] There was some discussion about her conclusion at the hearing. Counsel for WorkSafe confirmed that she is not advocating for funds to be transferred by shareholders to meet payment of the fine. This is a responsible submission.

[76] On behalf of Skyline Buildings counsel highlighted the payment of \$5,000 (before tax) made to Mr Seve, which was a voluntary payment for which insurance was not utilised. The company also spent over \$60,000 in the upgrade to its health and safety system. The company could not afford an instalment payment of a fine. A fine of any amount would place the future viability of the company in jeopardy, which

in turn would risk Mr Seve's ongoing employment and the employment of the other employees of the company.

[77] The relatively recent High Court decision of *YSB Group*¹⁷ set out important principles in assessing the effect of financial capacity upon the level of fine that should ultimately be imposed:

- (a) It is important to determine a provisional fine or starting point before adjustment to reflect the defendant's financial capacity;
- (b) Fines may be paid in instalments but should not be ordered for any undue length of time and that 12 months is normally an appropriate lengthy maximum period;
- (c) A fine ought not to place a company at risk;
- (d) A fine should be large enough to bring home the message to directors and shareholders of corporates; and
- (e) One must avoid a risk of overlap that in a small company the directors are likely to be the shareholders and therefore remain losers if a severe sanction is imposed on a company. The Court must be alert to make sure it is not in effect imposing a double punishment.

[78] In *YSB Group* there was evidence of the defendant company's financial circumstances which in the District Court led the Judge to reduce a fine of \$309,375 to an end fine of \$100,000. In making the reduction the District Court Judge had said:

I am particularly mindful, with respect to the principles I have outlined a moment ago, that one ought to be careful not to put the company in a position where it would in fact go out of business by imposing an unrealistic fine.

I am satisfied that the fine that I would otherwise have awarded, which is a fine of \$309,375 should be reduced to reflect the financial situation of the company and its ability to pay. The final fine that will therefore be imposed is a fine of \$100,000.

¹⁷ *YSB Group Limited v WorkSafe New Zealand* [2019] NZHC 2570.

[79] At the appeal *YSB* argued that the fine imposed should have been no more than \$15,000. This argument was rejected based on evidence that *YSB* had paid \$418,000 to shareholders since the date of the offending incident and proposed to pay \$255,000 to directors. The shareholders and directors were the same persons. The High Court's view was that those persons should not be paid ahead of the fine and the \$100,000 fine was upheld.

[80] The current case is distinguished from the *YSB Group* case in that there have not been shareholder's funds of any significance paid out by the company and there are no shareholder funds waiting to be paid out in the future.

[81] I accept that Skyline Buildings is simply unable to pay a fine. It cannot be a just or fair result for the company to go out of business, thus ending the employment of Mr Seve and his coworkers, as a punishment for health and safety failings that have since been addressed.

[82] In the circumstances of this particular case I order that no fine is to be paid by Skyline Buildings.

Conclusion

[83] Accordingly, the outcome is that Skyline Buildings is ordered to pay \$24,000 in reparation to Mr Seve and \$2,491.95 to WorkSafe as a contribution to its costs. In light of the perilous financial position of the company, I am satisfied that the sanctions are proportionate and appropriate.

Orders for suppression/non-publication

[84] Skyline Buildings sought suppression of publication of commercially sensitive financial and commercial information provided in these proceedings. WorkSafe took a neutral position. I am satisfied that a permanent order for suppression of that information is appropriate. Accordingly, orders are made for the suppression of and forbidding the publication of the following:

- (a) Paragraph 24 of the affidavit dated 19 February 2020 by Christopher Lindsay Cook and the affidavit dated 19 February 2020 of John Gordon Harris;
- (b) The affidavit dated 25 February 2020 of Sandra Ann Lee;
- (c) Paragraphs 97 to 102 of Skyline Building's submissions dated 4 March 2020.

Judge P Ginnen
District Court Judge

Date of authentication: 12/06/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.