IN THE DISTRICT COURT
AT TIMARU

CRI-2015-076-000934
[2016] NZDC 9468

WORKSAFE NEW ZEALAND
Prosecutor

v

TRANSPORT WAIMATE LIMITED
Defendant

Hearing: 24 May 2016

Appearances: S Petricevic for the Prosecutor
N Beadle for the Defendant

Judgment: 24 May 2016

NOTES OF JUDGE J E MAZE ON SENTENCING

[1] Transport Waimate Ltd faces two charges, one a breach of the regulations by failing to ensure that the now deceased manager had a current certificate of compliance and one a breach of the Health and Safety in Employment Act by failing to take all practicable steps to ensure that the manager was not exposed to hazards.

[2] The late Mr Baldwin died as a result of injuries received at Gordons Valley Lime Works in March 2015 after he became trapped in crushing machinery. The failures identified in the prosecution include:

- that the defendant company did not ensure that, or failed to ensure that no employee was working unsupervised or alone on the quarrying plant,

- failed to ensure that regular audits of plant machinery were undertaken and hazards identified,

- failed to ensure that dangerous parts of the machinery were fitted with fixed guards, compliant with these standards, so constructed and arranged, that operators could not reach into the machinery during normal use, maintenance or cleaning,

- failed to ensure that maintenance on machinery was not undertaken while the machinery was running and

- failed to ensure that effective controls were in place for an operator to stop the top motor in an emergency.

[3] In relation to the qualification charge, it is said that the defendant company failed to ensure the appropriate qualification was obtained before appointing that person as manager and failed to ensure that the appointment of the quarry manager was notified to WorkSafe as required by the regulations.

[4] In summary, it amounts to allegations of inadequate and non-compliant guards on machinery with belts, chain and sprocket drives, and shafts, used with poor lighting, and with inadequate guarding, which, in combination, allowed the operator to access the machinery while it was working. The risks were compounded by a lack of emergency procedures so that the machinery could be stopped in an emergency, and compounded by the deceased working alone, increasing his risks and further compounded by the lack of qualification of the deceased for the job. I am not really given any information as to whether, in practical terms, that was a complete lack of qualification. I am assuming that there was some attempt to meet the standards rather than a total failure in that regard but, of course, the regulations are clear as to requirement for certification and notification.

[5] When assessing those failures the defence points to the fact that efforts had been made by the owner and the deceased to identify hazards, but it is acknowledged freely that it now is obvious that those steps were grossly inadequate.

[6] I have had the benefit of hearing the victim impact statement read today and there can be absolutely no challenge to the all too common remarks by Judges that any attempt at fixing reparation in these circumstances is wholly inadequate. It can only be an attempt to make provision for those who must continue with their lives without the support of the deceased victim. There are any number of quotations presented in sentencing submissions in this area from fellow Judges in this Court and in the High Court expressing their sense of inadequacy in that exercise and I am no different.

[7] It is clear that in sentencing I must prioritize provision for the victim family, accountability, responsibility and deterrence. The safety and employment record in this country has been very poor overall in the past, and efforts are constantly being made to ensure that legislation provides firmly for the standards expected of those who employ others, particularly in hazardous occupations. So while one can cast back to inspections in 2005 or efforts in 2010, it is important to remember that standards are constantly being raised in the interests of reducing failings that have been all too evident in the past.

[8] *Department of Labour v Hanham & Philp Contractors Ltd* [2009] 9 NZELC 93, 095; (2008) 6 NZELR 79 (HC) sets out the proper approach. I am obliged to attempt to assess reparation. As I have said already that is a notoriously difficult exercise. I am obliged to fix the starting point of the fine having regard to the banding based on levels of culpability in *Hanham & Philp* and finally I am required to undertake any necessary fine adjustment.

[9] On the assessment of reparation initially at least, there was a dispute between counsel as to the consequential financial loss, but it seems that has now been resolved. In any event, for the avoidance of doubt, I accept Mr Beadle's calculations in that regard. It now seems that there have been some other expenses identified. There is one area where, as Mr Beadle says, he does not want to be seen to be (my word) chiselling about this expense or that expense, but he says that overall, issue would not be taken with an emotional harm award of $75,000 and a consequential loss award of $25,000.

[10] The informant seeks a higher starting point for the emotional harm award and says in particular that the attendance of the deceased's widow at the scene of the accident is a factor which should be seen as increasing the amounts payable to reflect emotional harm arising directly from the incident. Mr Beadle argues strongly that it is not my place in the District Court to significantly develop what has become a tariff (again my words, not his). He reminds me that there have been seven cases in the last two years where the highest point has been $75,000 for emotional harm. The informant points to the Pike River award at $110,000 and seeks an even greater award in effect here. My task is to follow, to the extent that I can, guidance which is given by other cases. Where there has been no appeal or where amounts of awards have been changed on appeal then clear conclusions can be drawn. I do not accept the informant's submissions in this regard. I accept that the tariff in this area is at $75,000 for emotional harm and I accept the offer of a further $25,000 for consequential loss, making a total reparation award of $100,000. I have no difficulty in fixing the emotional harm at the maximum at $75,000 precisely because I am taking into account the appalling circumstances of the deceased's death and the exposure and emotional consequences to his widow from that. So I fix the amount of the reparation at $75,000 for emotional harm and $25,000 for consequential loss.

[11] I turn then to the question of the fine. I accept entirely the list of aggravating features pointed out by the informant. The matters raised as attempts to assess risk do not seem in any way mitigating. I recognise it may well have been done. I do not challenge that but the fact of the matter is that I would put the risks and failures here at the 'obvious' level. The prosecution submission that this was an accident waiting to happen must be correct. It seems to me of little moment whether I treat the breach of the regulations as an aggravating feature of the s 6 charge, increasing the amount by 10 percent, or whether I treat it separately. It seems preferable that it is treated as an aggravating feature. The approach I adopt without challenge from counsel, is to convict and discharge on the breach of the regulations, with that being an aggravating feature to reflect that breach on the s 6 safety charge. Both counsel seem to accept that a 10 percent increase is appropriate for that.

[12] The difficulty is to where to fix the starting point for the fine. It is proper to regard this as within the high culpability range but at the lower end of that range. I

do not accept the informant's submissions placing it higher on the scale than that. Taking into account the qualification charge, I accept the submissions made that the starting point should be at $110,000.

[13] The next point of dispute between the parties is the discount for making amends. The prosecution refers me to *Department of Labour v Eziform Roofing Products Ltd* NZHSE [2013] in which Her Honour, Duffy J said that:

> Mitigating factors such as offer of reparation, remedial action, favourable safety record and cooperation with the investigation, quotes would ordinarily have led to an overall maximum discount of somewhere between 20 to 30 percent depending on whether a five percent credit was given to each factor or something over and above that.

[14] Her Honour substituted what had been a 35 percent discount for a 30 percent discount as a maximum. And so Ms Petricevic says that a discount of 30 percent is available. Mr Beadle submits that the discount at that point should be at 35 percent and says that Eziform Products was the reduced discount because remorse had already been taken into account in fixing the reparation and I am referred to paragraphs 56 to 58. Mr Beadle must be correct; the available discount is 35 percent for those factors. That, calculated on a $110,000 fine is $38,500. There is no dispute that a discount for plea at 25 percent is applicable and broadly that is $18,000.

[15] So, the overall balance then becomes a fine of just over $53,500 and the reparation at $100,000. In the interests of rounding the matter to an appropriate level, the defendant company is convicted and discharged on the regulations offence, convicted and ordered to pay reparation of $100,000 on the safety charge and fined $54,000.

ADDENDUM

[16] The prosecution asks that I record that part of the reparation is a reflection of future consequential loss.

J E Maze
District Court Judge