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 CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CRI-2020-009-002284
[2020] NZDC 18926

WORKSAFE NEW ZEALAND
Prosecutor

v

HELLERS LIMITED
Defendant

Hearing:	14 September 2020
Appearances:	K South for the Prosecutor J Lill and M Claughton for the Defendant
Judgment:	14 September 2020

DECISION OF JUDGE B P CALLAGHAN ON SENTENCING

---

[1] The defendant company being a PCBU (Person Conducting a Business or Undertaking) appears for sentence having pleaded guilty to a charge under ss 48 and 36 of the Health And Safety At Work Act 2015 and that it being a PCBU having a duty to ensure as far as reasonably practicable, the health and safety of the workers while at work, including [redacted] the victim, it did fail to comply with that duty and exposed the worker to the risk of death or serious injury while the worker was operating a LASKA mixer grinder.

[2] The charge sets out the particulars failing to comply with the duty and saying that it was reasonably practicable for Hellers Limited to have ensured an effective risk assessment of the machine was conducted and developed, implemented and monitored and reviewed, an effective safe system of work for the machine that covered all aspects of the operation of the machine including maintenance and cleaning. I acknowledge the representatives of the company in Court today.

[3] The maximum penalty in this new legislation is $1.5 million. The company pleaded guilty virtually at the outset and that stands to its credit. Numerous documents were filed prior to sentencing and I have had regard to those, particularly the summary of facts, the submissions, the victim impact statement, Mr Stevens' affidavit, the restorative justice outcome which was the subject of some debate this morning whereby the company offered to pay the sum of $60,000 to the victim by way of emotional harm reparation as it has now been explained to me, that has been accepted and I am told that has been paid.

[4] In the submissions it seemed to be suggested between the prosecutor and the defendant that $50,000 may be the amount the court should award but in fact it was $10,000 more.

[5] I just make the point, at this stage, least it should be thought that I had overlooked it, also in that restorative justice meeting, the company's representative confirmed the company support for the victim, which it has done in many ways, and I will look at those in a minute, but also offering to make the difference up for a prosthetic hand to a standard that the victim may require if it indeed is going to cost more than what ACC would allow.

[6] The victim had been employed by the defendant for six years as a smallgoods process operator and was second in charge of the smallgoods area. On 11 March 2019 he was in charge of this department and engaged in cleaning the LASKA mincer grinder machine, a machine which had to be cleaned every day. Only some workers were authorised to clean the machine; he was one of them.

[7] The process for cleaning the machine involved putting it in *clean* mode. In this mode the arms and auger rotate and stop for approximately three seconds before repeating the cycle. The machine was not isolated during the cleaning process but the standard practice at the site was for the moving parts to be stopped by activating one of the three interlock guards. Once one of the guards had been moved, activated, the machine could only be restarted by putting the guard back in place and selecting *restart* on the panel.

[8] Workers had developed a practice of using a stepladder placed in front of the machine to clean and operate the machine. The stepladder allowed the workers to access the hopper without necessarily opening an interlock guard. If the worker was standing at the raised platform at the rear of the machine instead, then the interlock fence on the rear side of the hopper prevented them from reaching into the mixing hopper without lowering the fence. This tripped the interlock fitted to the fence, stopping the dangerous parts moving. This unsafe process that I mention above was known to the company.

[9] The victim on this day put the machine into *clean* mode and attempted to press the *stop* button on the keypad on the machine instead of activating the interlock guard. Believing he had stopped the machine he reached into it with his right hand in order to scrape up meat caught between the rotating paddle bar arm and the inside wall of the hopper. It had in fact not stopped and it just paused as part of its cleaning cycle.

[10] When the victim reached into the machine he caught four fingers between the dangerous moving parts of the mixing panels in the inside of the hopper, the result was that four fingers of his right hand were immediately amputated. Workers at the site gave first aid, recovered the fingers but they could not be reattached successfully.

[11] The victim's impact statement describes the pain he suffered at the time, the effect on him since and, again, a number of those matters were reiterated at the restorative justice conference.

[12] He confirmed that he has received 100 per cent of his wages from Hellers for the first year and after that they have continued to top up his ACC payments.

[13] The victim stated in his victim impact statement that the COO of the company had visited him in hospital often and contacted him frequently during the year.

[14] In the restorative justice meeting, he talked about his loss of independence, he, his family, including four year old son and elderly parents living with him, he talks about his social isolation and his embarrassment.

[15] At the restorative justice conference the defendant's representative again apologised to the victim and his family, yet indeed this led to the discussion regarding the $60,000 reparation which was accepted and paid.

[16] Also, the company at that meeting reiterated its supportive approach to the victim by talking about the prospect of a job with the company in the future, which looks like it may well be taken up and the victim was told that the wages could be converted into a salary package to ensure he did not lose out as a result of losing overtime.

[17] The victim, in his victim impact statement, talks about depression that has followed, apart from the physical pain the fact he was receiving weekly counselling and talks about the understandable limitations on his ability to do physical jobs around the place and no doubt one could imagine tasks for one's own care as well.

[18] The Health and Safety at Work Act 2015 in s 151 requires the sentencing court to have regard to s 7-10 of the Sentencing Act 2002, the purpose of the legislation itself, the risk of potential for injury that could have occurred, and whether serious injury could have been reasonably expected to have occurred, the safety record of the offender, the degree of departure from prevailing standards in the offender's industry and the offender's capacity to pay a fine to the extent that it has the effect of increasing the amount of the fine.

[19] The guideline judgment in 2018 was *Stumpmaster v WorkSafe*, a case that is well-known to all those in this area of the law.[1] The approach the court confirmed in that case is that the court's tasks is to assess the amount of reparation first, fix the

[1] *Stumpmaster v Worksafe* [2018] NZHC 2190.

amount of fine by reference to guideline bands, to take into account aggravating and mitigating factors, whether any orders under s 152-158 of the Act are required and then stand back, make an overall assessment of the proportionality and appropriateness of the penalty imposed on the offending company.

[20] Step one; the High Court found that whilst the legislation had increased the level of fines, this did not mean reparation levels should be lessened because the harm remains unchanged. At step two the starting point as to the guideline bands involves an assessment of culpability and there are four bands; low culpability, medium culpability, high culpability and very high culpability.

[21] The court also concluded that the factors in *Department of Labour v Hannam & Philp Contractors* were still relevant which are the factors set out at [37] of that judgment.[2]

[22] Step three allows WorkSafe to apply for the orders under s 152 and 158 and there is here an application, not disputed, as to a portion of payment of the costs of the prosecution.

[23] Step four is the overall assessment, proportionality and the appropriateness of the penalties when the court stands back and looks at the overall impact on the defendant.

[24] Included in this is the financial capacity of the offender to pay.

[25] In this case the issue of reparation has, in a defacto way, already been settled and WorkSafe take no issue with the fact that $60,000 reparation is the appropriate sum. Initially in submissions the sum of $50,000 had been canvassed but the defendant company has gone a step further and increased that and indeed paid it.

[26] In making the allowance for reparation, I consider also one has to look at that in the context of the overall support offered by the defendant, and indeed made by the

---

[2] *Department of Labour v Hannam & Philp Contractors Ltd* (2009) 9 NZELC 93, 095, (2008) 6 NZELR 97 (HC).

defendant, including payment of salary wages, offered to help with the prosthetic hand if required and general emotional support, especially in the earlier days.

[27] In respect of the fine, the prosecution submits that the defendant's culpability falls towards the higher end of the medium culpability band in *Stumpmaster,* which is between $250,000-$600,000 suggesting a fine of $500,000. The defence submits that the culpability falls under the middle of this band and an appropriate starting point $350,000 to $400,000.

[28] The operative omissions identified in the charge particulars are that the defendant failed to ensure an effective risk assessment of the machine was conducted and failed to develop, implement and monitor and review an effective safe system for the machine that covered all aspects of its operation including maintenance and its cleaning. The machine was fitted with guarding that was fully compliant with ASNZS4024. The expert engaged by WorkSafe found that the improvements required did not relate to machinery safety features such as guarding or interlocks, but health and safety management processes and that is a point made by defence counsel in submissions written and oral today and this morning it was pointed out to me what Mr Stevens had mentioned in his affidavit of the earlier health and safety assessments carried out by consultants and this had been prior to this incident at a cost of $43,000 and this particular process, the subject of the charges today, had not been dealt with.

[29] The culpability in this case lies in failing to identify the risk that workers might circumvent the machine's safety features through an effective risk assessment and also secondly by failing to mitigate the risk by developing safe systems of work which incorporate the machine's operating manual procedures. Thirdly, there was a failure to implement and monitor compliance with those procedures.

[30] In this case the machine in itself operated according to its manual and was a safe machine, it was the processes that were employed to clean it outside the machine's manual and known by the company that effectively led to what had occurred. In submissions I pointed out that in our discussion that the hazards register noted that employees using the ladder which was used should keep their feet on the ladder and counsel pointed out that was to ensure they did not fall into the hopper, but clearly I

think anybody with a reasonable foresight of company operations in circumstances like this must be taken to have known with the ladder being used in the cleaning process and the non-deactivation of the machine would or could well lead to incidents such as the unfortunate one that happened.

[31] So I say that because one has to look at the actual risk and the actual harm caused. It is somewhat ironic that the ladder was used to make the cleaning system safer, but a system that did not automatically deactivate the machine's operation, which is a commonplace risk reduction tool. So there was always a risk of serious injury using this method and a serious injury, a life-changing injury occurred.

[32] The prosecutor has pointed out the following industry guidance's for standards for working with machines or machinery including the *WorkSafe Best Practice Guidelines for Safe Use of Machinery*, May 2014, the manufacturer's operating manual, *Health and Safety in Employment Regulations* and *MBIE Ergonomics of Machine Guarding Guide*, June 2013 and clearly the defendant failed to comply with the guidance by allowing workers to clean the machine in the way it was being done.

[33] To me, standing back, understanding the operating of the machine as it has been described to me, the hazard was always there and it was relatively obvious I would have thought.

[34] I note that this was not an unsafe machine per se. The costs of remedying the hazard were not in my assessment that it was unreasonable for it to be done and the current state of knowledge in any industry using machinery like this involving an interface with people working with it, do always provide potential hazards and the emphasis of the legislation is to ensure that employers do all that is reasonably necessary to ensure that such incidents do not happen.

[35] As I have said, I agree with the defence that a distinction can be drawn between a machine that is safe as opposed to the practice of those using it making it unsafe and this is a case of the latter. But I also accept on a counterbalancing argument the prosecution submission that the machine's operating manual in itself, if nothing else, warned against the risks of deviating from approved methods of use.

[36] Counsel have filed lengthy submissions on numerous cases to provide a guidance to starting point for the fine based on the culpability band which is accepted. Cases are a guide only and at the end of the day the matter becomes one of judgment.

[37] I do note that in the cases that I have been referred to and have referred to myself that I just note for some guidance that in *WorkSafe v Addiction Foods*, a decision of Judge Ingram, there an employee was trained on a new machine, different to this of course and the process, she was not supervised for a period afterwards to show that she was proficient.[3] The process required the worker to change a role of film in the machine, in attempting to do so the worker got the film stuck in the rollers and attempted to push the feed/stop button, pushed the wrong button causing high temperature ceiling bars to close in on her fingers and thumb and it was found that a guard had, at some stage, been removed to enable this to happen. She suffered severe burns rendering two fingers and a thumb useless. The company had previously had WorkSafe inspectors carry out assessments of their machine but a risk in relation to the particular machine had not been identified and in that case a starting point of $400,000 was found to be appropriate.

[38] I assess that case as slightly less serious than the one before me because, in this case, there had been no interference with a guard for example, which would have deactivated the machine as I understand it, but it was a different process but the point is that that is relatively close to the type of injury and with one placing one's hand into a machine that has not been deactivated.

[39] I consider a starting point higher than the defence but not as high as the prosecution and it is somewhere in the region I think in the case I mentioned, $400,000 to $450,000. As I said earlier it is really a question of judgment.

[40] Had the company not been aware of the facts surrounding the hazard then I probably would have kept that closer figure to $400,000 but in my assessment a starting point of $430,000 is appropriate.

---

[3] *WorkSafe v Addiction Foods* [2020] NZDC 13929.

[41] There are no aggravating features for the company. The company has acted in a positive and understanding way to the victim and his family since the incident. There is the offer over and above what the lawyers had mentioned of $60,000 which has been paid. There has been personal support, particularly in the earlier times from the management when the defendant was in hospital, and afterwards and the company has maintained the defendant's wages, paying I think close to about $10,000 at the date in Mr Stevens' affidavit to assist with the makeup of the salary over and above the ACC payment. It has substantially changed its health and safety plans including staff instructions and training and has taken steps to reduce further workplace hazards including non-commissioning of this machine both here in Christchurch and in its Wiri factory.

[42] Ms South, for WorkSafe this morning, recalculated its submission in respect of discounts for the company allowing for a total allowance of the fine of 50 per cent being made up of a high level of remorse and reparation, 10 per cent, remedial steps that had been taken and there has been a substantial amount of money paid by the company, identified in Mr Stevens' affidavit and 10 per cent for that, five per cent for its previous good safety record and of course the 25 per cent for the early guilty plea.

[43] The defence submission is effectively along the same lines except defence ask me to make a further allowance of five per cent for cooperation with the investigation.

[44] That would make, from the defence point of view, 10 per cent for remorse and reparation, 10 per cent for remedial steps, five per cent for the previous good record and five per cent for cooperation. That, together with the guilty plea allowance would mean a 55 per cent reduction. I have had in mind but did not verbalise that remedial steps taken by the defendant include requiring senior management to supervise the cleaning of the machines, engaging three external consultants to review health and safety practices and policies and recommend improvements, establishing a full-time health and safety manager role as well as health and safety advisors implementing a safety conversation programme to improve worker engagement and the amount that I referred to earlier was the costs have been some $3 million to safety improvements. That is in addition to decommissioning the machines.

[45] As an overview, just let me say this, that the company seems to have done just about everything a responsible employer could have done after this very unfortunate accident insofar as assisting the worker and ensuring his rehabilitation will be met with employment at the end which it appears from the restorative justice outcome, this would occur.

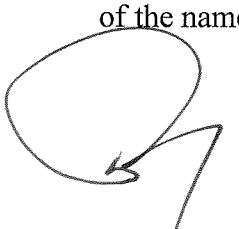
[46] That leads me to the view that I think the cooperation by the company, just generally with the investigation, does warrant the amount sought on behalf of the defendant which would be a total of 55 per cent. That would result in an end fine of $193,500.

[47] There is also an order for costs being sought of $618.61.

[48] Looking at the fine, the reparation amount of $60,000 and the costs, I do not think it offends against proportionality and I think overall, as I view it, it is an appropriate outcome.

[49] So in the circumstances, upon the guilty plea, the company having been convicted will be fined $193,500 and court costs. There will be an order for costs of the prosecution of $618.61. Reparation of $60,000 is ordered but noted that that has already been paid.

[50] There will be a final order for the suppression of the victim's name, the summary of facts can be released to the media if requested but subject to the redactions of the name of the victim being suppressed.



B P Callaghan
District Court Judge