

**IN THE DISTRICT COURT
AT KAIKOURA**

**I TE KŌTI-Ā-ROHE
KI KAIKŌURA**

**CRI-2021-006-000763
[2022] NZDC 15424**

WORKSAFE NEW ZEALAND
Prosecutor

v

DANIEL NICHOLAS ANDERSON
Defendant

Hearing: 15 July 2022
Appearances: T Braden for the Prosecutor
R Harrison for the Defendant
Judgment: 15 July 2022

NOTES OF JUDGE R E NEAVE ON SENTENCING

[1] The defendant faces two charges under Health and Safety and Work Act. In particular, he is charged that on 12 March 2020 at Kaikoura being a person conducting a business, and having a duty, so far as reasonably practicable to ensure the health and safety of his workers, failed to comply with that duty and exposed his worker to a serious risk of injury and in particular, [REDACTED], who lost an eye as a result of the defendant's failing. That is a charge that carries with it a maximum fine of \$300,000 which indicates the seriousness of the offending.

[2] There is a lesser offence of failing to notify the regulator of the event. That is rather less important in the overall scheme of things.

[3] The defendant, it should be said, and I will state at the outset, has pleaded guilty promptly. Once full disclosure was able to be made and discussions occurred and he will receive the maximum credit in that respect.

[4] The summary of facts records that [REDACTED] who was the defendant's employee, suffered a serious injury at work after a piece of metal entered his eye while he was erecting a fence causing him to lose the sight in that eye, his right eye. The defendant was operating an agricultural fencing business as a sole trader in the Kaikoura area.

[5] [REDACTED] was aged 17 years old at the time of the incident and he had been working for the defendant since the year before, when he was aged 16. There was no written employment agreement and the victim was paid wages for the hours that he worked as a fencer. Together with another of the defendant's employees, who himself was only aged about 21 [REDACTED] and this other employee, Mr Knowles, were working at a local farm erecting a fence.

[6] As part of erecting some fenceposts, [REDACTED] was required to clean out a hole in a vertical strain post with a steel chisel and a metal builder's hammer. This would then provide some bracing.

[7] As [REDACTED] was hitting the head of the chisel with a hammer, after doing so about 10 times, a small piece of metal, presumably off the chisel, has flown off and penetrated his right eye. [REDACTED] touched his eyebrow area, noticed blood on his hands and simply thought that he had cut himself. Mr Knowles noted that the victim's eye was appearing "weird" as he described it, and it seemed to him that [REDACTED] pupil was leaking out of his eye.

[8] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[9] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[10] [REDACTED] was not wearing any safety glasses at the time. He said there was some sunglasses in the truck although that was not at the site he was working but there were no safety glasses around. A former employee indicated there may have been an unopened set of safety glasses in the toolbox but [REDACTED] was unaware of them.

[11] There are a number of relevant hazards in this kind of work and indeed the defendant's own hazard or risk register lists the possibility of eye injury or puncture wounds as a result of the use of small hand tools and chisels and the like, yet there was no appropriate protective equipment.

[12] In his own safety plan, the defendant is essentially committed to ensuring that workers understand the safe use of plant and equipment. Furthermore, to ensure that personal protective equipment (PPE) is used, and that that is monitored and obviously to record accurately accidents et cetera. The risk of injury is identified as high and is foreseeable and that must be correct. Eventually WorkSafe was notified; not by the defendant, but by [REDACTED] mother and the investigation commenced.

[13] The summary of facts record that [REDACTED] had not had any health and safety instructions from the defendant, and the defendant confirmed in the investigation he had not provided this instruction, thinking that it was common sense. I interpose that may be true insofar as it goes, but it does not, in any way, obviate the need for an employer to ensure that people realise what their obligations are and what might be common sense to one, is not necessarily common sense to another, and that is why there is the need for maintaining appropriate systems. The previous employee confirmed that the defendant had not told him what safety gear to use and when to wear it. He had just acquired that from past experience but of course the difficulty is here, we had a young man who was just starting out and had not had the opportunity to acquire the level of knowledge and experience that an older worker might have done.

[14] It seems there were no safety glasses available; the victim was not aware of his need to wear them and even if he had, it does not seem that there was anything properly available to him. Whilst the defendant did provide some on the job training, it does not seem that that involved anything by way of provision of appropriate safety gear and instructions as to when to wear them and how to use them.

[15] The defendant observed in relation to the PPE that it was common sense and that he was not the worker's mother and he was not going to tell them what to wear. Whilst one can understand that sentiment, at the end of the day employers do have obligations in this respect, and to that extent if they have to mother their employees, sometimes that just simply goes with the territory. That is all the more of the case when the workers are young and inexperienced, as was the case here.

[16] According to the summary of facts, when spoken to, the defendant said that he felt it was not worth buying a lot of PPE as it was too expensive. He said that he was too small, I think that is in terms of the scale of his operation for that sort of carry on, and that if he spends too much money in that respect, his overheads would rise and the competition would take his work. He confirmed he did not enforce the requirements in his written health and safety plan to wear steel cap boots, which again is evidence of his attitude towards this health and safety regime. He had not provided instructions, as I say, as to what to do by way of PPE. The defendant confirmed he was aware of the manufacturer's recommendation to wear eye protection when using the chisel. The summary of facts records the relevant guidelines and safety routines, but I think that is pretty much implicit in what I have just said.

[17] Following the incident, the defendant advised he was no longer employing workers, although the defendant did provide employment for [REDACTED] for some time after the incident, and he was the last of the workers who he eventually had to lay off as his business shrank.

[18] The defendant himself accepts that his attitude was cavalier and while it is undoubtedly true that there is a responsibility on everyone to take obvious steps in respect of their own safety, nonetheless we have the situation here where the worker was extremely young and extremely inexperienced. The victim's co-workers were not

a lot more experienced and it is one thing for an employer who has spelled things out and made clear his expectations to complain about the actions of his employees; it is not so for someone who has done neither of those things.

[19] The risk was highly foreseeable and the likelihood of injury was significant and likely to be a serious injury. The steps that could have been taken were easily achievable and at minimal cost, and there was a lack of any real supervision and that becomes even more important when you consider the inexperience of the workers. Essentially this case, I think, identifies quite a large proportion of all the recognised factors as being relevant in assessing the level of culpability in health and safety matters.

[20] I have had helpful submissions, both from Mrs Braden for the prosecutor and Mr Harrison for the defendant.

[21] Unfortunately the audio ceased recording at this point and I, obviously, do not recall my remarks. The sentence imposed will therefore have to speak for itself.



R E Neave
District Court Judge