

**SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS  
JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE  
PARAGRAPH [INSERT NUMBER].**

**<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html>**

**IN THE DISTRICT COURT  
AT ASHBURTON**

**I TE KŌTI-Ā-ROHE  
KI HAKATERE**

**CRI-2018-003-000076  
[2018] NZDC 19342**

**WORKSAFE NEW ZEALAND  
Prosecutor**

**v**

**PRECISION ANIMAL SUPPLEMENTS LIMITED  
Defendant**

Date: 10 September 2018  
Appearances: E Jeffs for the Prosecutor  
J Lill for the Defendant  
Judgment: 10 September 2018

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**ORAL JUDGMENT AND SENTENCING NOTES OF JUDGE A C ROBERTS**

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[1] Precision Animal Supplements Limited is for sentence today on a charge that between 4 April 2016 and 31 March 2017, a period very close to a year, that being the person in charge of business, failed to ensure as was reasonably practicable, the health and safety of workers who worked for the company while the workers were at work in that business and that failure exposed those workers to a risk of serious illness.

[2] The particulars are detailed in the charging document. It was reasonably practicable for the company to have:

- (a) Developed, documented, implemented and communicated an adequate safe system of work.
- (b) Provide and maintain a safe work environment that minimised the exposure of the workers to substances hazardous to health.
- (c) Adequately monitored the ongoing health of workers to identify any changes in their health status due to exposure to substances hazardous to health.

**SUMMARY OF FACTS:**

[3] The summary of facts I have read. The company is a producer of a range of specialist mineral pellets for bovines. It is located here in Ashburton. It employs six workers at the factory including the manager. The materials used at the factory include wheat, broil, peas, barley, canola, molasses, lime and a range of trace materials. Wheat and barley are delivered and transferred from silos by an auger and bucket lift and fed into a hammer mill which crushes to create a mix of cracked grain and powder which is stored in bulk piles inside the factory. The batching process involves the bulk materials being scooped up from piles within the factory by an open cab front end loader. The product is weighed and added to the batching bin. Trace minerals, salts and other granola and powdered supplements are poured into the batching bin by hand.

[4] The palletizing process involves the batch material being tipped into the palletizer hopper. The ingredients are subject to high pressure through a dye which forces them to bind together to form pallets before being cooked and bagged. The hammer mill, the batching process and the palletizing process create large amounts of visible dust. The hammer mill produced the majority of the dust and after worker complaints including refusing to work, it was operated at night. The surfaces of the factory are covered by invisible dust and the factory workers have a significant quantity of dust present on their clothing, faces and hair.

[5] As part of establishing, the company engaged a health and safety consultant. That person is registered with the New Zealand Safety Council and an accredited safety auditor. The consultant assisted the company with developing its health and safety system. The company underwent onsite audits in 2013, 2014, 2015 and February 2017. The dates over which the offending occurred fall within that last period. There were recommendations from the audits emanating from the consultants. The health and safety consultant engaged did not have the experience in health risk management or hazardous substances risk management.

[6] Most of the products manufactured by the company contain substances hazardous to health. An analysis of the safety data sheets for 53 substances revealed:

- (a) 45 are a substance hazardous to health as defined by the relevant legislation.
- (b) 34 are toxic substances as defined by legislation.

[7] At no time was the issue of hazardous substances raised by the health and safety consultant engaged by the company nor was there need for access to safety data sheets for the products handled by the company identified to it.

[8] On 9 March, a complaint was made to WorkSafe. This was in 2017. An inspector attended on 31 March and an investigation commenced. In summary, the investigation identified:

- (a) Substantial failures by the company in managing the exposure of its workers to substances hazardous to health. The company had failed to identify the exposure of its workers to substances hazardous to health as a risk and consequentially did not develop a safe system of work for the worker exposed to those substances.
- (b) The company failed to obtain, review or make available to its workers the safety data sheets for the substances it was using. The workers had raised concerns regarding a lack of knowledge but no action was taken.

- (c) The company failed to provide a safe work environment that minimised the exposure of workers to substances hazardous to health. The company identified 'dust' as a significant risk in its risk register and had extraction ventilation installed. This was insufficient to remove the dust effectively.

[9] Exposure monitoring was conducted in July 2017 on two workers. This identified that inhalable grain dust greatly exceeded the workplace exposure standards. The company provided face masks, gloves and overalls. The masks did not meet the required standard for respiratory protective equipment given the substances used. The company was on notice of some of the potential effects of the dust.

[10] In September 2014, the company engaged Life Care Consultants to carry out health monitoring. The lung function monitoring identified that four of the eight workers had lung function below normal range. Despite this, the health monitoring process was not engaged again until WorkSafe's investigation commenced. Workers repeatedly raised concerns regarding the level of dust in the factory. Workers reported to WorkSafe ongoing health effects including hoiking up black dust and an incessant cough.

[11] Health monitoring completed after WorkSafe became involved took place on 1 May 2017. This involved four workers, three of whom had lung function below the normal range. This included one worker who had tested normal in 2014 but whose lung functioning was now below normal.

#### **STANDARDS AND GUIDELINES:**

[12] As to the standards and guidelines, there is an agreed code of practice standard and guidelines setting out steps that should have been taken to ensure safe work with hazardous substances including the WorkSafe New Zealand Practical Guide: Working Safely with Hazardous Substances, in June 2016. This is a reference guide for employers who manage small businesses. It records the importance of being aware of the harm caused by exposure to hazardous substances including breathing in dust.

[13] A full assessment would involve:

- (a) Making a list of all substances used.
- (b) Determining whether the substances are hazardous or not.
- (c) Determining who could be exposed.
- (d) Determining how people could be exposed.
- (e) Determining the degree of exposure.

[14] After this assessment is conducted, the next step is to decide the best way of keeping staff safe. The best way, of course, to prevent harm is to get rid of or eliminate the hazardous substances. If this cannot be done the employer should ensure that people are exposed as little as possible by engineering controls such as ventilation, administration controls such as job rotation and providing personal protective equipment, particularly for breathing.

[15] The practical guide also notes the importance of monitoring the health of staff and monitoring exposure to substances. Training of staff is also important.

[16] The Department of Labour approved Code of Practice for the Management of Substances Hazardous is also available. That code provides general guidance on:

- (a) Carrying out the workplace assessment, identifying substances, reviewing information about hazards, determining the degree of exposure, assessing the risk of health, reviewing the assessment (a competent person should carry out the assessment).
- (b) Selecting options for preventing or controlling exposure to substances hazardous to health.
- (c) Safety data sheets and labels.

- (d) Means of monitoring exposure to substances hazardous to health.

[17] The failure to ensure health and safety fell squarely on the shoulders of this company. It was obliged to ensure as reasonably practicable, the health and safety of the workers employed while the workers were at work in the business. It was reasonably practicable for the company to have developed, documented, implemented and communicated an adequate and safe system of work. Such a system should have involved the use of competent persons and references to safety data sheets and included:

- (a) The identification of hazards arising to exposure.
- (b) An assessment of risks associated with exposure.
- (c) The identification of suitable controls that gave workers the highest level of protection.
- (d) By monitoring worker compliance with controls.
- (e) Systematic reviews of those systems.

[18] It also had the obligation of providing and maintain a safe work environment minimising exposure to substances by:

- (a) Designing and installing an adequate ventilation system.
- (b) Providing suitable respiratory protection.
- (c) Undertaking exposure monitoring to ensure no worker was likely to be exposed.

[19] Within the summary of facts, it is detailed the company failed to ensure that these workers were not exposed to a risk of serious illness. It is too recorded here the company has no previous convictions.

## VICTIM IMPACT STATEMENTS:

[20] There on file victim impact statements. These I have read. In the main, with no disrespect, these three statements are from older men. The discomfort and the symptoms they experience is graphically there recorded. The stress of these symptoms they experienced has had an impact on their personal lives. In form, it has underscored the fact that health and safety in the Health and Safety at Work Act 2015 places on the employer the obligation to ensure their health and safety.

[21] The features here are quite unique. There is no strictly relevant sentencing authority. The submission is a starting point on sentence would be within the realm of \$500. This is the informants' contention. Concessions attaching to a payment of reparation, engagement with restorative justice and cooperation with the investigation would see that starting point reduced. Finally, the concession attaching to plea which would result all in a fine within the ambit and region of \$337,500.

[22] On behalf of the defendant company it is advocated the starting point should fall around the \$300,000 mark, that the lack of previous convictions, the remorse as evidenced by voluntary payments of \$8000 already made in recognition of the remedial steps taken subsequently by the company would end in a fine in the region of \$157,500. The financial circumstances, however, realistically compromise the defendant. The ability to pay is another issue. What is here offered is a payment by way of fine in the realm of \$60,000 to \$80,000 payable over three or four years.

[23] In the course of the sentencing process, the High Court decision of *Stumpmaster v WorkSafe New Zealand* details the undertakings to be considered or the aspects to be considered.<sup>1</sup> The first is reparation. I acknowledge again the directors have committed to a payment of \$8000 split between the three individuals who attended restorative justice. \$3000 each, \$2000. On behalf of the defendant, the submission is the payment by way of reparation had not been sought by the prosecution at the point it was made. It is an offer, the defence contend, made to recognise the consequences to the three individuals.

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<sup>1</sup> *Stump Master Ltd v WorkSafe New Zealand* [2018] NZHC 2190.

[24] The informant has filed additional materials that also have appended the victim impact statements. Herein we have summarised the impact on the individuals.

has a lot of trouble with his eyes. They are painful. They tear up regularly and he used to wake with them stuck together filled with gunk. He described (this is with reference to the victim impact statement) how the minerals within the factory would, "Burn my nose." He has a nagging cough and breathing difficulties. He has been working in these conditions for four and a half years.

[25] Mr describes being short of breath and wheezy. He suffers a lot of stomach issues, sore eyes and feels like to him there is sandpaper in his ears. He coughs during the night. Such is the extent of this affliction he and his wife sleep in separate rooms.

[26] Mr describes how his eyes are effected he says, "Like conjunctivitis," on 60 percent of the mornings when he wakes. This was before the full masks had been provided. He said he had a sore, irritated nose on a weekly basis. He too suffers from stress as to what might eventually develop.

[27] This type of award is inherently difficult to quantify. In terms of those I will refer to as the victims, no amount of money would serve to compensate them for the consequences they have suffered with and will continue to deal with. There is a further order for reparation required. The informant submits that perhaps an additional \$3000 for each individual might be appropriate.

[28] Some assistance is available within the *WorkSafe New Zealand v Hutt Construction 2013 Ltd* and *Delaney* case.<sup>2</sup> There, individuals were exposed to asbestos during a building demolition. The exposure of the individuals here is a hazard they dealt with and is far elevated from that there apparent in that case that I have mentioned, *WorkSafe New Zealand v Hutt Construction* and *Delaney*. Each of these three men were, during the course of their daily employment and engagement, immediately proximate to the hazard. It is not a case here where the wind is blowing these contaminates to another area. They are there and so is the hazard. I consider that some elevation on top of the existing payment should be made. I consider an

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<sup>2</sup> *WorkSafe New Zealand v Hutt Construction 2013 Ltd* [2016] NZDC 3652.



additional \$2000 to both \_\_\_\_\_ and \_\_\_\_\_ and \$1000 to \_\_\_\_\_ to be proper and appropriate.

**EXTENT OF FINE:**

[29] The next issue is the extent of the fine. The informant submits the culpability must fall within the upper end of the medium culpability band. That band accommodates offending with fines ranging between \$250,000 and \$600,000. On the defendant's part, the submission is that culpability should properly be seen to be at a low-end level of the same medium band. The appropriate start I repeat from the defence perspective is a fine in the vicinity of \$3000,000.

[30] I turn now to the assessment factors. the operative act or omissions. The informant contends it was fundamental. Despite complaints from the workers the hazard was not properly addressed. The system is in place, the processes engaged were inadequate. The very plea the informant submits recognises more was properly demanded, more to ensure worker health, their welfare and to minimise exposure to substances hazardous to health. The defendant again acknowledges a shortfall and now with the engagement of specialists, qualified and recognised specialists, has implemented changes and improvement.

**NATURE AND SERIOUSNESS OF THE HARM:**

[31] The informant contends with this submission. I concur. The risk of harm was serious indeed. 20 of the 53 substances in batch sheets used in a process contained ingredients associated with serious illness. Some ingredients were being used on a daily basis. Three of the four workers tested had lung functioning below a normal range.

[32] The defendant contends that not too great a store should be placed on the lung function test. The blood test for contaminant materials shows no elevated levels. In the absence of medical evidence, there is insufficient information for a negative inference to be drawn. It is acknowledged that the employees were exposed to a risk of serious illness that may or may not manifest itself in future.

[33] I cannot accept that submission. I fall back on the victim impact statements. When I read about the breathing issues, the hoiking up of black dust, the incessant cough, the cough in the morning and the lumps it forms, "Like a putty and its smell," along with the eye problems in the morning are real and genuine complaints. The consequences should not, in my judgment, be watered down. The harm I have is at a serious level positioning.

#### **INDUSTRY STANDARDS:**

[34] The industry standards I referred to at the outset: the departure from industry standards is a consideration nonetheless. New proved codes of practice for the management of substances hazardous to health in the place of work in the WorkSafe Practical Guide: Working Safely with Hazardous Substances were issued in 1997 and 2016 respectively. The defendant, I acknowledge, did engage a health and safety professional. It is now acknowledged he was out of his depth. He lacked the necessary expertise for the exercise. The defendant contends that little weight should be placed on this factor. I do not agree with that submission either.

#### **OBVIOUSNESS OF THE RISK:**

[35] The dust issue was a long-term problem and a significant one. Given the worker complaints, concerns should have been given greater attention. The defendant acknowledges it is now alert to the issue but the risk posed by wheat and lime is not such as established as attaching to asbestos. In my determination, the risk was blindingly obvious. The complaints from workers, the individuals literally working at the coal face should have been accorded greater attention.

#### **PRACTICAL STEPS TO ENSURE WORKERS' HEALTH AND WELLBEING:**

[36] These were basic and fundamental. Undoubtedly, there would have been costs, but nonetheless, they should have resulted in this problem being addressed some considerable time ago.

[37] As I indicated as counsel addressed me, I did not consider that any of the authorities provided me to be of great or direct assistance. The *WorkSafe New Zealand*

*v Hutt* and Delaney case involved, as I say, a property demolition that company that commenced on 26 January. Asbestos was found to be present on the 28 January. Thus, it was but days before the issue was addressed. While the substances with the case in hand were different, culpability must sit at an elevated level to the extent fixed in the *WorkSafe New Zealand v Hutt Construction* and Delaney case of \$55,000.

Given the realities here prevailing, the nuisance, if I can term it that, was there for these individuals to deal with on a daily basis. The process created a dust that was already a recognised risk. Having now had the benefit of submissions, having heard from counsel, I consider a placement within the medium culpability scale to be at a moderate to high pitch. In all the circumstances, I would have thought otherwise appropriate was a fine of \$400,000.

[38] As to mitigating factors, reparation has been paid already on a voluntary basis. I have no reason to believe that there will be any stall with regard to the balance. Cooperation with the investigation I see as drawing, as is suggested, a 10 percent concession and a full concession for a plea: 25 percent. I have not gone through and itemised the individual reductions that will thereafter apply. I have embarked on a process which identifies exactly where I see culpability lying. The informant has also asked for a costs order. That sum is \$4740, 30 percent of WorkSafe's external legal fees.

**FINANCIAL CAPACITY:**

[39] I have the affidavit of Andrew Friend. That is dated 27 July.

In the circumstances, because of financial reasons, I am imposing a fine of \$70,000.

[40] I am ordering the defendant to pay costs: \$4,740.

[41] Those names of the individuals whose medical issues that I referred to when I nominated the individuals should not be published.

A handwritten signature in black ink, appearing to read 'A C Roberts', written in a cursive style.

A C Roberts  
District Court Judge