IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2017-092-004123
[2018] NZDC 26802

WORKSAFE NEW ZEALAND
Prosecutor

v

LOCKER GROUP (NZ) LIMITED
Defendant

Hearing:	8 November 2018
Appearances:	A J Simpson for the Prosecutor B Harris for the Defendant
Judgment:	8 November 2018

NOTES OF JUDGE R J McILRAITH ON SENTENCING

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[1] The defendant, Locker Group (NZ) Limited, has entered a guilty plea in November 2017 to a charge under ss 48(1) and (2)(c) and 36(1)(a) of the Health and Safety at Work Act 2015: specifically, that being a PCBU it failed to ensure so far as was reasonably practicable the health and safety of a worker who worked for the PCBU, namely Mr Benouahlima, while the worker was at work in the business or undertaking, namely operating the RAS pan folder, and this failure exposed the worker to a risk of serious injury.

[2] Locker Group failed to ensure the health and safety of Mr Benouahlima in respect to operating that RAS pan folder. It was reasonably practicable for the company to:

(a) Ensure that the RAS pan folder was guarded in accordance with AS/NZS 4024 or an equivalent or higher standard.

(b) Ensure the identification of and management of hazards by way of an adequate, written, safe operating procedure for the pan folder.

[3] The maximum penalty for the offence is a fine not exceeding $1.5 million.

[4] On sentencing, amendments to the charging document were sought and were not opposed. The amendments:

(a) Amend Particular (a) from "Ensuring that crush hazards on the RAS Flexiband Metal Folding Machine / Press were guarded in accordance with AS/NZS 4024 or an equivalent or better standard" to "Ensure that the RAS pan folder was guarded in accordance with AS/NZS 4024 or an equivalent or higher standard".

(b) Amend Particular (b) from "Ensure the provision of a safe system of work, including identifying hazards and managing risks and documenting a safe operating procedure" to "Ensuring the identification of and management of hazards by way of an adequate, written, safe operating procedure for the RAS pan folder".

As I say, those amendments are made by consent.

Background facts

[5] To briefly turn to the facts, and for that purpose I refer to the summary of facts provided, the defendant Locker Group is a New Zealand registered company that is in the business of manufacturing and selling perforated metal and mesh products for the construction and architectural industry, based in East Tāmaki in Auckland. The defendant is of course a PCBU, being a person conducting a business or undertaking. It purchased a second-hand RAS Flexiband Metal Folding Machine and installed it in its premises in November 2014. It completed a risk assessment of that machine in January 2015 before it was put into use. That assessment identified potential hazards

such as crushing hazards, and considered possible changes to the machine. The machine was ultimately approved for use.

[6] The company engaged independent safety consultants to come to its premises to inspect and review machinery for safety and compliance by way of a critical risk audit in February 2015. The machine involved was not commissioned at that time and was not reviewed as part of that audit. A WorkSafe inspector carried out an assessment of the company's site in April 2015. The purpose of that assessment was to complete a spot check on manufacturing processes employed. A small number of the total machines present were checked, including a guillotine, a press and a forklift, with no issues identified. The inspector does not recall seeing this particular machine during this inspection.

[7] The RAS machine is used for folding sheet metal. It can be either used in automatic mode or manual mode. The set-up of the machine allows for metal to be bent or folded using moveable steel tools to complete a bend or fold to the required specifications. The dimensions for a fold are entered through a control panel. The machine then uses those dimensions to automatically position its backstops, against which metal sheets are placed. The backstops allow for standard sheets of metal. The sheet metal to be folded is then placed into the machine by one or two operators from the front of the machine, and pushed against the backstops. That ensures that the metal is correctly aligned for the programmed fold.

[8] The folding operation is then controlled by an operator pressing the left and right foot pedals in a single, shrouded double-pedal unit. Prior to folding, the sheet metal is clamped and placed by the upper clamp beam. This is a two-stage operation when operating in manual mode. The first stage is initiated by pressing and releasing the left pedal once. This lowers the clamp beam to a position 20 millimetres to 25 millimetres above the sheet metal, leaving a clearance to manipulate the sheet. The gap is large enough to accommodate a person's fingers and hands.

[9] The second stage is initiated by pressing and releasing the left pedal again. This lowers the clamp beam to a position where it contacts and holds the sheet metal

in place. Activating the right pedal then operates the folding beam from below, and the metal is bent to the final specification.

[10] On 7 April 2016, Mr Benouahlima, a 25-year-old machine operator employed by the company, was operating the machine to fold sheet metal. He was assisted by another employee. The employees were operating the machine together from approximately 10.00 am in the morning. It was being run in manual mode with Mr Benouahlima operating the machine controls using the pedals. At approximately 10.40 am, Mr Benouahlima was positioning the metal sheet inside the machine to line it up with the backstops. He lowered the clamp beam to the first stage above the sheet metal. The gap between the clamping beam and workpiece was 20 to 25 millimetres.

[11] Mr Benouahlima activated the pedal again while holding the sheet metal with his hands positioned under the clamping beam. The clamp beam closed and eight of his fingers were crushed between the clamp beam and the sheet metal. His co-worker released the clamp beam using the same left pedal. Mr Benouahlima was transferred to hospital where he underwent emergency surgery.

[12] WorkSafe was notified of the accident on the same day. Inspectors attended and commenced an investigation. A prohibition notice was issued on 11 April. That prohibition notice was lifted in December 2016 as it was complied with after modifications were made to the machine.

[13] In terms of exposure to risk of serious injury, Mr Benouahlima was exposed to the hazard of crushing of hands and fingers between the descending clamp beam and the fixed sheet metal. The second stage of the clamp beam operation could be and was activated while Mr Benouahlima's fingers were in the crushing area underneath it.

[14] As a result of his fingers being crushed by the clamp beam, Mr Benouahlima suffered serious injury. He initially sustained partial amputation crush injuries to the level of proximal interphalangeal joints of eight fingers, with fracture, tendon and nerve-end injuries. Both his thumbs remained intact. After significant specialist medical work, the final amputation of his right index finger occurred in April 2017. Following further surgery, a further five of Mr Benouahlima's fingers were amputated.

These were the left index and little fingers and the right index, ring and little fingers. As a result of his fingers being crushed in the machine, the function of Mr Benouahlima's hands is permanently impaired.

[15] The crushing hazards associated with entrapment between fixed and moving parts of machinery are of course well known and widely understood by industry generally. As a PCBU, the company was obliged to ensure, so far as it was reasonably practicable, the health and safety of workers who worked for it while the workers were at work. The following actions were reasonably practicable for the company to have taken:

(a) To ensure that the RAS pan folder was guarded in accordance with AS/NZS 4024 or an equivalent or higher standard.

(b) To ensure the identification of and management of hazards by way of an adequate, written, safe operating procedure.

[16] Since the incident, the company has made significant changes to the machinery involved. The guarding changes made after the incident included the installation of additional foot pedal controls and a light curtain in front of the machine. The operator now activates the first stage of the clamping beam while standing outside the light curtain using new fixed foot pedals. The light curtain stops operation of the machine if the operator or anyone else approaches the crushing area between the sheet metal workpiece and the upper clamping beam before the gap between the two is reduced. The descent of the clamping beam only occurs while the operator's foot is depressing the pedal.

[17] Once the gap has reduced to less than six millimetres and is too small to allow access for fingers, the light curtain deactivates and the operator may then approach the machine and manoeuvre the sheet metal into its final position before folding. After then leaving the area, the operator presses a second pedal to complete the second stage of the clamping process, which is then followed by the final fold.

[18] It is noted that the company has co-operated with WorkSafe New Zealand throughout its investigation of the incident, and that the company, while previously receiving improvement notices which were complied with, has not previously appeared before the Courts.

Sentencing approach

[19] In terms of the approach to sentencing in health and safety matters, there is no dispute between counsel as to the approach. Section 151 of the Health and Safety at Work Act 2015 provides that in sentencing an offender for an offence under s 48, the Court must apply the Sentencing Act 2002 and have particular regard to a number of matters. Those matters include the risk of and the potential for illness, injury or death that could have occurred, whether death, serious injury or serious illness did occur or could reasonably have been expected, the safety record of the offender to the extent it shows whether any aggravating feature is present, the degree of departure from prevailing standards in the sector or industry, and the offender's financial capacity or ability to pay a fine.

[20] A full Court of the High Court has recently considered the approach to sentencing under s 48. The Court in *Stumpmaster v WorkSafe New Zealand* confirmed a four-step process that I must follow.[1] Those steps are as follows:

(a) Step 1: Assess the amount of reparation to be paid to the victim.

(b) Step 2: Fix the amount of the fine by reference, first, to a starting point using the guideline bands, and then having regard to aggravating and mitigating factors.

(c) Step 3: Determine whether further orders under ss 152 – 158 of the Act are required.

(d) Step 4: Make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

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

Reparation

[21] The first step I must therefore go through is assessing the quantum of reparation. In its written submissions, WorkSafe had appropriately divided reparations between payments for emotional harm, payments for financial loss and payments for ACC top-ups. Mr Harris on behalf of the company has helpfully provided as an addendum to his submissions, and I understand that it was also attached to the restorative justice report, a schedule of payments that have been made to Mr Benouahlima by the company.

[22] In that regard, I then refer to two other important documents. Firstly, I have been provided with a victim impact statement from Mr Benouahlima. I have read thoroughly through that statement, including all its attachments. So, Mr Benouahlima, the fact that I do not read it all out, please do not assume that I have not read it all. All I am going to say about the victim impact statement is that it sets out Mr Benouahlima's circumstances and how he now lives in Auckland and how he came here from France several years ago. He talks about his work at the company, which he commenced on a working holiday visa. He talks about the incident as it occurred and the injuries that he has suffered, along with the financial impact and emotional impact that he has suffered. Turning particularly to the emotional harm that Mr Benouahlima has suffered, he has explained in helpful detail the activities that he undertook in France and also in New Zealand prior to the injury, and how those have been affected by the accident.

[23] I have been provided with an extensive amount of medical material, confirming the injuries which I outlined earlier from the summary of facts.

[24] The second important document I have is the restorative justice conference report. The parties participated in restorative justice on 11 July this year. Once again, I do not propose to go through in great detail what is set out in that report, but simply confirm that the parties willingly engaged in a restorative justice process that appears to have been very beneficial. Of particular importance to me, and it is a very positive feature of this case, is that Mr Benouahlima has continued to work for the company and the company has ensured that he is now in a position where he has been able to

continue working and that the disability he now has with his hands has been entirely accommodated in that job.

[25] As I say, attached to both the restorative justice report and the defence submissions was a schedule of expenses that have been met by the company, and Mr Harris helpfully set out in his written submissions the steps that the company has taken to assist Mr Benouahlima and his family following the incident. I set them out because it is, as Mr Harris submitted, a very good example of an employer who takes such responsibilities to heart and acts very responsibly in terms of a victim of a workplace accident. So, I will set out those steps because they stand as a beacon. They include:

(a) Payment of wages and ACC top-ups from the date of the accident until May 2016.

(b) Payment of taxi and travel costs for all medical appointments and personal matters for Mr Benouahlima and his partner.

(c) Regular monthly top-ups, intended to provide a top-up for any shortfall on ACC and to assist with any immediate medical costs.

(d) Engagement and payment for special immigration help to assist with Mr Benouahlima's impending departure from New Zealand, given his work visa status and his injuries. That engagement helped to assist Mr Benouahlima and his partner to stay in New Zealand, as they had hoped.

(e) In close conjunction with the work visa issues, the company was able to formulate and offer a new position to Mr Benouahlima, as I have just mentioned. He accepted that role and is now continuing in it.

(f) The company paid for flights and travel costs for Mr Benouahlima's family to fly to New Zealand from France.

(g) A lump sum payment intended to be an emotional harm payment was made to Mr Benouahlima in March this year. That was in the amount of $20,000.

(h) As I have noted earlier, a formal restorative justice process also took place.

[26] There have been helpful discussions between WorkSafe and Mr Harris with respect to the reparation sought by WorkSafe. As it transpires, contrary to the written submissions, counsel are in agreement that there is no longer any financial loss or ACC top-up amount sought on behalf of Mr Benouahlima. Indeed, it appears that in fact the top-up payments that have been made may have exceeded the actual shortfall.

[27] The issue that remains is of course that of a payment of emotional harm reparation. As I noted earlier, the company has paid earlier this year an amount of $20,000 to Mr Benouahlima, which it considers goes a considerable way towards the amount of emotional harm reparation that should be ordered. The company has made clear in Court this morning, as it did in its written submissions, that it is comfortable with paying a further $10,000 on top of that.

[28] Mr Harris encourages me to take into account two factors: firstly, that in addition to those payments there has been a top-up of ACC that may have exceeded any loss, and secondly, while PAYE may have been deducted from the $20,000 payment made in April this year, that is a matter that may be revisited. In that regard, I specifically note that the $20,000 payment was a payment of emotional harm reparation. As such, in my view it ought not to have been subject to a PAYE deduction. It is my hope that Mr Benouahlima in conjunction with the company can engage with the Inland Revenue to reverse that situation.

[29] Accordingly, it is Mr Harris's submission that, taking into account the $10,000 proposed today and along with the $20,000 that has been paid, and factoring in the payments made that I have set out earlier, there is no need for any additional order of emotional harm reparation.

[30] WorkSafe takes a slightly different view. WorkSafe certainly, as appropriate, has commended the company for the steps it has taken to assist Mr Benouahlima after the accident, but it does nevertheless, as is appropriate given case law, suggest that an additional amount could be ordered to make a slightly higher payment of emotional harm reparation.

[31] In my view, however, reflecting on the steps that have been taken by the company and the overall support it has provided, no more than $10,000 needs to be ordered.

Level of fine

[32] The second step is for me to consider the level of fine. Sentencing under the Act follows the approach of considering factors relevant to assessment of the defendant's culpability that were set in *Department of Labour v Hanham & Philp Contractors Ltd* some time ago.[2] I propose to go through each of those issues and consider WorkSafe's submissions in that regard.

[33] Firstly, the identification of the operative acts or omissions at issue, and the actions that were reasonably practicable for the company to have taken. WorkSafe notes that the company failed to provide a system of guarding on the machines such that an operator's fingers or hands could not be crushed, and points to the reasonably practicable steps that I have outlined earlier.

[34] Second, with respect to the risk of and the potential for illness, injury or death that could have occurred, WorkSafe submits that the risk of an accident was high. The edge of the sheet metal was held in place by the operator. Step 2 of the clamping process could be and was activated by depressing a foot pedal while an operator's fingers were under the clamp.

[35] Third, whether death, serious injury or serious illness occurred or could reasonably have been expected to have occurred, WorkSafe notes that serious injury

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[2] *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095; (2008) 6 NZELR 79 (HC).

would be expected to occur if a metal clamp descended on a victim's fingers. In this case, serious injury did of course occur to both Mr Benouahlima's hands, ultimately with the amputation of five fingers and a significant loss of function.

[36] Fourth, the degree of departure from prevailing standards in the sector or industry. WorkSafe points to the generally understood risk of unguarded machinery and the obviousness of that, along with best practice guidelines.

[37] Fifth, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to that risk. WorkSafe points to the fact that some cost is of course associated with compliance, but notes that is simply an inevitable aspect of compliance.

[38] After consideration of those culpability factors, WorkSafe submitted that the company's culpability is moderate and falls towards the high end of the middle band of culpability identified in *Stumpmaster v WorkSafe New Zealand.* It therefore submits that a starting point in the range of $500,000 to $600,000 should be taken for a fine. WorkSafe refers to a number of precedent cases, including *WorkSafe New Zealand v Niagara Sawmilling Company Ltd*, *Department of Labour v Hanham & Philp Contractors Ltd* and *Arbor Reman Ltd v Department of Labour*.[3]

[39] Mr Harris takes issue with the start point. While he agrees that the middle band is correct, he places the start point at a different part in that band. When I have asked Mr Harris to talk me through specifically why that is his view, he has emphasised what was written in his written submissions, which is to stress to me that with respect to the issues of culpability, obviousness and foreseeability, that this company did take significant steps to assess all machinery at its factory, and there were visits and inspections from various experts, including WorkSafe, at relevant times before the accident.

[40] With respect to the specific machinery, he notes that the company carried out a risk assessment of the machine on 13 January 2015. That risk assessment identified

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[3] *WorkSafe New Zealand v Niagara Sawmilling Company Ltd* [2018] NZDC 3667; and *Arbor Reman Ltd v Department of Labour* (2010) 8 NZELR 57 (HC).

the possibility of crushing injuries and considered possible improvements around light sensors, but it was deemed to be difficult to implement and ultimately the machine was put into use. WorkSafe's own investigations with the manufacturer and with German industry concluded that when the machine is operated in manual mode, as it was here, the light sensor protections that may otherwise have been available in automatic mode would not have assisted.

[41] Mr Harris also pointed to the fact that the company had contracted with a reputable Australian service company known as Sheetmetal Australia. I find this to be a particularly important point in terms of assessment of culpability. On two occasions before the accident, Sheetmetal Australia flew specialists across to New Zealand to carry out maintenance on the machine. Those inspections were carried out and were expressly undertaken so as to ensure that the machine performed to the manufacturer's specifications. Neither of those servicing visits flagged concerns or queries about the adequacy of guarding, the currency of Australia or New Zealand standards, or any apparent risks with normal operations.

[42] Mr Harris, therefore, while accepting the assessment that taking into account all the culpability factors culpability could be considered moderate, and that it therefore falls in the medium culpability band in *Stumpmaster v WorkSafe New Zealand*, submits that the appropriate starting point is not one between $500,000 to $600,000 but instead one between $350,000 to $425,000. In other words, his submission is that the fine should start at a figure up to the mid-range of that band.

[43] Setting a start point in these cases is never an exact science. I am familiar with the cases that counsel have cited and familiar with assessment of culpability generally in these cases. I do not propose to refer to particular cases in an attempt to make comparisons. What I am simply going to do is confirm that in my view the start point is slightly less than that submitted by WorkSafe and slightly more than that submitted by Mr Harris. In my view, the appropriate start point is one of $450,000.

[44] The reason that I have concluded that it is not as high as $500,000, which counsel accept is an unremarkable start point for culpability in this type of offending, is because of the steps I have outlined before, and in particular, the involvement of

expert Australian contractors in assisting with the maintenance of this machine prior to the incident.

[45] I now turn to whether there are aggravating or mitigating factors. There are no aggravating factors. There are, of course, mitigating factors. There has been discussion between counsel in terms of the percentage discount to be provided for those mitigating factors, and there is common ground that an appropriate discount is one of 30 percent. That discount takes into account the following factors:

(a) Firstly, remorse. There is no dispute here that the company is genuinely remorseful, and I acknowledge the presence of senior management in Court today.

(b) Second, there is no dispute that in terms of co-operation the company has co-operated fully with the WorkSafe investigation.

(c) Third, in terms of safety record the company has a good safety record and is entitled to a discount in that regard.

(d) Fourth, in terms of remedial steps the company has taken significant remedial steps.

(e) Fifth, and in my view very importantly, in terms of reparation the company has provided extensive support to Mr Benouahlima, as I have outlined earlier, and has always indicated a willingness to pay reparation.

[46] Those factors, as I say, all add up to a discount of some 30 percent. 30 percent from $450,000 is a discount of $135,000, which takes us to a fine of $315,000.

[47] The company is then entitled to a 25 percent discount for its guilty plea, which sees a deduction of $78,750, taking us to an end point of a fine of $236,250.

[48] The company has not raised any financial capacity issues in terms of its ability to pay that sum, and I note that with respect to reparations it is not insured, so it will be meeting all reparation costs as well as the fine.

[49] Standing back, I consider that that is an appropriate outcome: the payment of a further $10,000 of reparation and a payment of a fine of $236,250.

[50] The only final matter for me to address is the issue of costs. WorkSafe has sought a contribution to its costs of $3700. I consider that to be an appropriate amount and order accordingly.

R J McIlraith
District Court Judge