IN THE DISTRICT COURT
AT MANUKAU

CRI-2014-092-000830
[2015] NZDC 17730

WORKSAFE NEW ZEALAND LIMITED
Prosecutor

v

DRAEINAIL CONSTRUCTION LIMITED
Defendant

Hearing: 3 August 2015

Appearances: E Jeffs for the Prosecutor
C Hlvaac for the Defendant

Decision: 11 September 2015

FURTHER DECISION OF JUDGE C S BLACKIE
AS TO IMPOSITION OF FINE

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[1] This case was originally before the Court for a sentencing hearing on 3 August 2015. On that date, I delivered orally the initial part of my sentencing decision relating specifically to the award of compensation to the victim, who was injured as a result of an incident at his work on or about 23 July 2013 at the landings in Mangere, Manukau. I determined that the defendant company, Draeinail Construction Ltd, was to pay the sum of $45,000 by way of reparations.

[2] Having made a determination in respect of reparations, I reserved for further consideration the imposition of an appropriate fine in respect of the charge to which the defendant had pleaded guilty.

[3] This supplementary decision must be read as following on from the decision recorded in my sentencing notes, dated 5 August 2015.

[4] In assessing the quantum of a fine, an important point to note is the disparate purposes served by a fine and by reparation. As Harrison J observed in the case of *Police v Ferrier*, 18 November 2003, Auckland High Court, CRI-2003-204-195:

> "A fine is essentially punitive. It is a pecuniary penalty imposed by and for the State. By contrast, an order for reparation is compensatory in nature, designed to recompense an individual or family for financial loss or emotional harm suffered as a result of another's offending. The two are conceptionally different and serve disparate purposes".

[5] When it comes to imposing a fine, the Court must consider ss 7 and 8 of the Sentencing Act in Health and Safety in Employment Act prosecutions but more specifically the factors set out in *Hanham and Philp,* which include:

(i) Identification of the operative acts or omissions at issue.

(ii) An assessment of the nature and seriousness of the risk of harm occurring, as well as the realised risks.

(iii) The degree of departure from the stance prevailing in the relevant industry.

(iv) The obviousness of the hazard.

(v) The availability, cost and effectiveness of any means to avoid the hazard.

(vi) The current state of knowledge of the risks and the nature and severity of the harm that would result.

[6] The full Court in *Hanham and Philp* also provided guidance for the setting of a starting point in respect of health and safety prosecution. The starting point in low culpability cases was a fine up to $50,000. In medium culpability cases, a fine between $50,000 and $100,000. In high culpability cases, a fine between $100,000 and $170,000 and at the top end, in the extremely high culpability cases, a fine between $175,000 and the maximum, $250,000.

[7] In assessing the starting point of a fine, consideration has to be given to such aggravating factors as previous convictions and adverse safety record. On the other hand, consideration has to be given to mitigating factors, such as co-operation, remedial action, favourable safety records, offers to make amends and reparation. Having arrived at the starting point, the Court should then make an appropriate discount for a guilty plea.

[8] For Worksafe, it is submitted that the starting point in this particular case should be in the range of $125,000 to $150,000.

[9] In support of that sentencing range, Worksafe traversed each specific factor referred to in *Hanhan and Philp.*

Identification of Operative Acts or Omissions – The Practical Steps

[10] It was submitted:

(a) That the particular hazard involved in this instance was the stability of the front face of a trench. A side trench shield has been lowered into the trench and protected workers from the risk of the side walls collapsing; however, it did not protect them from the hazard created by the front face of the trench. The defendant failed to put any other control measures in place in respect of the front face of the trench, despite the height of the face exceeding 1.5m.

(b) The front face of the trench was not clean or consistent. The 22.5 tonne excavator was positioned approximately 50 – 200mm from the edge of the front face, closer than the safe distance recommended by the Approved Code of Practice for Safety in Excavation and Shafts for Foundations (ACOP) – specifically s 4.3.4(a). The relevant legislative provisions, including the ACOP are as follows:

Regulation 24 of the Health and Safety in Employment Regulations 1995:

24 Excavations with Face of More Than 1.5m High

(i) Subject to sub-clause (2), every employer shall take all practical steps to ensure that, where any face of any excavation is more than 1.5m high, that face is shored.

(ii) Sub-clause (1) does not apply where –

(a) The face is cut back to a safe slope; or

(b) The material in the face is of proven good standing quality under all reasonably foreseeable conditions of work and weather; or

(c) By reason of the nature of the work and the position of any employee in the vicinity, there is no danger to any employee; or

(d) If provision of shoring is impracticable, or unreasonable by reason of the nature of the work and the employer takes all practicable steps to ensure that other precautions are taken to make the face as safe as possible in the circumstances.

Section 4.3.1.2 of the Approved Code of Practice for Safety in Excavation and Shafts for Foundations (ACOP) states:

4.3.1.2 Excavations 1.5m or Deeper

Excavations greater than or equal to 1.5m deep are particularly hazardous and must be shored unless:

(a) The face is cut back to a safe slope and the material in the face will remain stable under all anticipated conditions of work and weather; or
(b) Shoring is impracticable or unreasonable and safe precautions certified by a registered engineer to be adequate, have been taken.

Section 4.3.4 of ACOP states:

Mechanical plant, vehicles or heavy loads must not approach closer than:

(a) 600mm from the edge of an excavation which is battered to a safe slope; or

(b) What would be the edge of the face if battered to a safe slope unless the actual face is specifically shored to allow for the full effect of the additional load.

(c) Mr Smith had not worked in trenches at this depth previously. He was not inducted to the site, nor was he provided with any written job hazard analysis or safety analysis connected to the work he was to undertake.

(d) The following practical steps should have been taken by the defendant:

(i) To have identified the front face of the trench as a hazard.

(ii) To have ensured that a specific job safety analysis was prepared and completed in collaboration with Dempsey Wood Civil Ltd, prior to the commencement of the installation work.

(iii) To have ensured that a safe work methodology was prepared, used and communicated to workers prior to the work commencing.

(iv) To have ensured that the front face of the trench was adequately benched, battered, shored or deemed safe by a competent personal registered engineer (ACOP).

(v) To have ensured that the workers in the area were in safe positions.

(vi) To ensure that the excavators did not approach closer than 600mm from the edge of the excavation (ACOP).

The Nature and Seriousness of the Risk of Harm Occurring as Well as the Realised Risk

[11] The risk of Harm is very significant and could include the loss of life. The realised harm to Mr Smith in this particular case was very serious.

Degree of Departure from Industry Standards

[12] Worksafe submits:

(a) Controls for ensuring the safety of people working in the trench are well publicised and well known. Regulation 24 of the Health and Safety in Employment Regulations 1995 and the ACOP both draw attention to the hazards of excavations over 1.5m high.

(b) Despite the requirements of the Regulations and the recommendations of ACOP, the defendant failed to ensure that the front face of the trench was adequately benched, battered, shored or deemed safe by a registered engineer. The excavator was also positioned far closer to the front face of the trench than the 600mm recommendation if the face had been battered to a safe slope.

(c) The defendant's failure to ensure that the regulations and industry guidelines were followed marks a significant departure from industry standards.

Obviousness of the Hazard

[13] In this regard, Worksafe submits:

(a) The need to protect people working within a trench greater than or equal to 1.5m deep is an obvious and well known hazard.

(b) The defendant recognised the hazards of the side walls of the trench but failed to identify the front face of the trench as a similar hazard.

(c) The risk created by allowing a 22.5 tonne excavator to be positioned between 50 and 200mm of the front face, while employees were working in close proximity was or should have been obvious.

The Availability, Cost Effectiveness and the Means to Avoid the Harm

[14] It is submitted:

(a) The costs of identifying the hazard, preparing a specific job safety analysis and ensuring the Worksafe methodology was followed would have been negligible.

(b) The cost of benching, battering, shoring or putting in place a physical shield was neither onerous nor cost prohibitive.

The Current State of Knowledge of the Risks, Nature and Severity of the Harm and the Means Available to Avoid the Hazard or Mitigate the Risk of its Occurrence

[15] Worksafe submits:

(a) That within the construction industry, all concerned would be well aware of the risks of failure to effectively control the hazard of the face of an excavation project and

(b) The likelihood of serious harm occurring as a result.

[16] Ms Jeffs, for Worksafe, relied on a number of cases to support the submission that the starting point for a fine would be in the vicinity of $125,000 to $150,000. More specifically, she relied upon:

(a) *Department of Labour v Burgess Crowley Civil Ltd*, DC Nelson, CRI-2008-042-002264, 13 October 2008.

In that case, the victim died after being trapped in a collapsed drainage trench. The Judge noted that there was no established plan in place. The view was held that it was an obvious hazard, the risk of harm was significant and the defendant could have taken further steps to ensure that people were unable to enter the trench. A starting point of $125,000 was adopted, with a final fine of $35,000 being imposed after discounts for an early guilty plea, mitigating circumstances and the financial circumstances of the defendant company.

(b) *Department of Labour v Callum Malloy Ltd*, DC Hamilton, CRI-2008-075-000962, 10 November 2008.

The defendant company was laying concrete pipes as storm water drainage when the wall of the trench collapsed, fatally injuring an employee. The company accepted that it had failed to take a number of practical steps. When assessing culpability, the Court noted the defendant company made an error of judgement and fixed culpability at a moderate level. A starting point of $150,000 was assessed as appropriate, being reduced to a final fine of $30,000 following deductions for an early guilty plea, mitigating factors and, again, the financial circumstances of the company.

(c) *Department of Labour v McIndoe Plumbing Company Ltd*, DC Hamilton, CRN 1007350008 and CRN 1007350009.

The defendant's employee suffered fatal injuries when a trench wall collapsed. The defendant was charged with two offences under the Regulations; failing to take all practicable steps to ensure the face of the excavation was shored (24(1)) and failing to lodge a notice that it intended to commence a notifiable work (26(2)). The Court adopted a starting point in both charges of $100,000. A fine of $40,000 was imposed following deductions for an early guilty plea and other mitigating factors.

[17] Ms Jeffs acknowledged that there were no aggravating factors present in the current offending and also that the defendant would have the benefit of a reduction to

the starting point to reflect the reparations ordered, co-operation with the authorities, a favourable safety record and remedial action. Finally, it was acknowledged that the defendant would be entitled to a full 25% discount for the early guilty plea.

Defence Submissions

[18] On behalf of the defendant, Mr Hlvack made comprehensive submissions supported by a number of authorities. He addressed each of the contributing factors referred to in *Hanham and Philp* in the following manner:

Practical Steps

[19] Counsel submitted that whereas the prosecution referred to six practical steps that the defendant failed to take, when analysed there was significant overlap and that, therefore, the Court should really only consider three key features when assessing the degree of culpability, the features being:

(a) Failure to adequately mitigate the front face of the trench as a hazard.

(b) Failing to ensure that the excavator did not approach closer than 600mm from the edge of the excavation and

(c) Failure to prepare a specific job safety analysis prior to the commencement of the work.

Although Regulation 26 requires that where any face of an excavation is more than 1.5m high and the face of any excavation must be shored unless exceptions apply, nevertheless there are a number of exceptions, including that the face is cut back to a safe slope or that the material in the face is of "proven good standing quality under all reasonable conditions of work and weather". The ACOP states that excavations greater or equal to 1.5m must be shored unless exceptions apply. The ACOP allowed for the fact that other practical steps may be available, indicating that appropriate precaution was a matter of judgement. In any event, the ACOP applied more specifically to foundation excavations

[20] If anything, the defendant's failures are systemic. The defendant did inspect and assess the end face in the morning of the accident and concluded it was stable

and of good standing. This later proved incorrect but it is, nevertheless, submitted as being a one-off error and not reckless or negligent. Therefore, the defendant's oversight must be at the low end of the scale of systemic failure.

[21] Further, it was not practicable to slope or step the higher trench, as it would have meant the digger operator would not have been in a position where he could see the workers in the trench. As it was, the digger was not in operation at the time of the collapse and subsequent investigations have not established that the digger caused or contributed to the trench collapse.

[22] Though it would have been practicable to shore the front face of the trench by use of a trench shield, the other steps identified by the informant, such as benching or battering the slope, restricting the location of workers within the trench and restricting the proximity of the digger to the edge of the excavation, were not practicable.

[23] Although no specific job safety analysis was undertaken for the particular task in hand, the defendant had prepared one job safety analysis relating to trenching. Individual tasks were to be analysed separately. Even so, it is unlikely that a specific job safety analysis would have had any impact on the outcome in this case.

Nature and Seriousness of the Risk

[24] It is accepted that the risk of injury occurring in these circumstances were medium and the realised risk was great. However, the risk, overall, had been significantly mitigated by the placement of the trench shield in the excavation, albeit without a front end shield. The defendant's behaviour should not, therefore, be considered cavalier.

Degree of Departure From Industry Standards

[25] There was no dispute that there was a failure against both the regulations and ACOP. However, both documents allow for a degree of judgement. Further, the ACOP relied on is specifically in relation to excavation in shafts for foundations. As

this trench was neither a foundation nor a shaft, although the ACOP has some relevance, it should not be treated as an industry standard.

[26] The ACOP, itself, provides methods of shoring with illustrative of examples. However, no example is given as to how to protect the shorter end faces.

[27] The defendant contended that consideration should be given to the safety equipment available within the industry. The equipment was hired from Trenchmate. The equipment provided related to the sides of trenches but there was no such equipment for the leading end of trenches. Following the accident, the defendant made enquiries of Trenchmate and was eventually able to source a leading end trench shield. Nevertheless, it was not common practice within the industry to shield the leading end of a trench when undertaking this type of work.

[28] In recent times, the defendant has arranged for a front end trench shield to be specifically made for it at a cost of $7,538.20.

Obviousness of Hazards

[29] Although the excavated side faces of a trench may collapse, end trench faces do not pose the same degree of risk.

Availability, Cost and Effectiveness of a Means to Avoid Hazards

[30] As already indicated, an end faced trench shield is not commonly available and is largely impractical. The cost of such a shield specifically made for the defendant amounted to $7,538.20.

Current State of Knowledge or Risk and Nature of Harm

[31] It is accepted that the risk of harm from a collapsing excavated face is well-known.

Current State of Knowledge of Means to Avoid Risk or Mitigate Risk

[32] For availability of a means for bracing, the front face of the trench was not readily available.

[33] As to the overall assessment culpability, the defendant accepts it was culpable in failing to appreciate the risk of the front face collapsing and favouring visibility of the digger driver over the required set back and assessment consideration. With the benefit of hindsight, they should have taken steps to shore the front face of the trench and had such a step been taken, the injuries suffered by the complainant would have been prevented. Nevertheless, the defendant did turn its mind to safety considerations and was required to balance multiple risks. In the industry generally, the front face of a trench is not considered a significant hazard. Although it is now accepted that there was a systemic failure, this should be regarded as at the lower end of the scale and that therefore, when properly viewed, culpability should be assessed at the low to medium end of the scale when the appropriate starting point for a fine is in the sum of $50,000.

[34] When mitigating factors are taken into account, the end fine should be in the vicinity of $26,250.

DISCUSSION

[35] Clearly, there is a significant discrepancy between the prosecution and the defence as to an appropriate range for a starting point. The prosecution submits that the facts of this case should attract a starting point of between $125,000 and $150,000, whereas the defendant, on the same set of facts, submits a starting point in the vicinity of $50,000.

[36] That said, there is general agreement as to the discount available for mitigating factors and, further, a full 25% discount for an early guilty plea.

[37] Looking at the facts of this case in the round, I am drawn to a level of culpability closer to that submitted by the prosecutor. The agreed summary of facts

makes mention of six practicable steps that the defendant failed to take. Whereas the defendant submits there is significant overlap in these steps, in essence the degree of failure remains the same, irrespective of how many individual steps can be expressed.

[38] In my view, the defendant has attempted to diminish the extent of its failures. Given the potential for harm to occur, the obviousness of the harm, the ability of the defendant to comply with the practicable steps, as demonstrated by their actions after the accident, it would not have been particularly onerous for the defendant to undertake the required actions in the first instance.

[39] With respect to the nature and seriousness of the risk, it must be regarded as significant. As demonstrated in a number of the cases cited by the prosecution, with respect to collapsing trenches, the loss of life can easily result. Although the defendant did have some protections in place, these were clearly insufficient, given the potential for harm.

[40] Both parties agree that the Regulations and the ACOP are relevant. There can be doubt that the actions of the defendant were in breach. In the face of these provisions, the defendant argues that the ACOP should not be treated as the industry standard, given that this was not a foundation excavation. In my view, this argument should carry minimal weight, especially as the defendant failed to offer any evidence or information about why this excavation is any less hazardous, or should be treated with any lesser degree of care.

[41] The defendant submitted that a shield to the leading edge of trenches was difficult to obtain and is not common within the industry. However, beyond the defendant's submission, no evidence was adduced as to the accepted industry practice. I am not so persuaded. I consider that the actions of the defendant were a significant departure from the industry standard. Commonsense suggests that the hazard was obvious and the risk of harm significant.

[42] As a further point in mitigating its responsibility, the defendant submitted that the means of bracing the front end of the trench was not readily available. I do not

accept that to be the true position. Remedial actions clearly indicate that there was an ability to obtain a front end shield. If not, with modest expenditure, an appropriate device for protecting the front end of a trench could be built or erected. Such a device might be capable of multiple usage.

[43] The defendant goes on to ask the Court to take into account that it was tasked with a balancing act of risks. This may well be so but, again, the defendant's remedial actions suggests that there were ways available whereby it they could have mitigated the multiple risks at the same time, rather than weighing off one against the other, such as through the use of the larger excavator and the obtaining of the front end trench shield.

[44] It must be acknowledged that the defendant did take a number of steps to ensure the safety of those on site and, certainly, it cannot be said that it had a blatant disregard for the safety of its workers. However, given the obviousness of the risk and the means available to mitigate the risk, the culpability in this case is far higher than defence counsel has suggested.

[45] In many ways, Draeinail is in a similar situation to that in *Department of Labour v Callum Malloy Ltd*, where the defendant company was dependent upon its director's (Callum Malloy's) assessment of the situation. There was no basis to doubt that Mr Malloy was being absolutely honest when he said that based on his experience in that area over many years, he believed the situation to be more stable than it was. That was in his judgement. Similarly, with Mr Dorizac. But there was, as it turned out with Mr Dorizac, a significant error of judgement, to a degree that leads me to a finding of culpability at the moderate level. In *Department of Labour v Callum Malloy Ltd*, the Judge set the starting point for a fine at $150,000. That case did, however, involve a fatality and the degree of the "error" might be considered somewhat higher than in the present case. Looked at overall, and as favourably as I can for the defendant, I consider an appropriate starting point for a fine in this case to be $100,000.

Mitigating Factors

[46] As against the starting point of $100,000, I adopt the normal procedure in respect of mitigating factors which, as I have said, are largely undisputed in this case. Accordingly, the defendant is entitled to the following discounts:

(a)	For reparations payable	10%
(b)	Co-operation with investigating authorities	10%
(c)	Previous safety record	5%
(d)	Remorse and remedial action	5%
	Total	30%

[47] Therefore, the amount of the fine is reduced to $70,000 from which the defendant is entitled to a further reduction of 25% on account of its early guilty plea. The fine payable is therefore $52,500.

Conclusion

[48] The outcome in respect of these proceedings is that the defendant pay:

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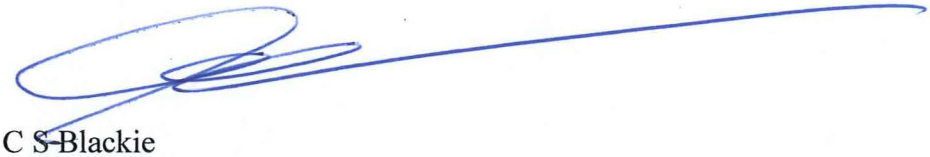
(a)	Reparation	45,000
(b)	Fine	52,500
(c)	Court costs	130

[49] The final step in accordance with the decision of *Hanham and Philp* is that the Court should consider the financial capacity of the defendant. In this case, no evidence has been adduced as to the financial position of the defendant, other than in counsels' submissions where it is stated that the defendant is a small, closely held, contracting company. It has significant investment in plant, although much of it is under finance arrangements. It is capable of paying the fine of the amount suggested (in the submissions $26, 250), although some time to pay may be required.

[50] This is not a case where I consider it is necessary to further reduce the fine payable on account of the defendant's financial circumstances. In *Callum Malloy Ltd*, the defendant was found to be a "one-man-band" and, therefore, further reduction in the ultimate fine was made.

[51] I confirm the fine of $52,500, with leave to pay by instalments, to be fixed by the Registrar.



C S Blackie
District Court Judge