NP
Disposed

IN THE DISTRICT COURT
AT HAMILTON

I TE KŌTI-Ā-ROHE
KI KIRIKIRIROA

CRI-2018-024-000551
[2020] NZDC 18038

WORKSAFE NEW ZEALAND
Prosecutor

v

PUKE COAL LIMITED
Defendant

Hearing:	31 August 2020
Appearances:	B Finn for the Prosecutor S Bonnar QC for the Defendant
Judgment:	31 August 2020

NOTES OF JUDGE R G MARSHALL ON SENTENCING

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[1] The defendant company Puke Coal Limited has pleaded guilty to a charge laid under the Health and Safety Work Act 2015 pursuant to ss 48 and 36 of that legislation. The charge reads that the company "had a duty to ensure so far as reasonably practical the safety of its workers while they were at work in the business or undertaking, namely the opencast mining operation known as Puke Coal and failed to comply with that duty and that failure exposed workers, including Jayde Kora to the risk of death or serious injury".

[2] The particulars of the charge were that "it was reasonably practical for Puke Coal Limited to regularly obtain geotechnical information about the opencast mine as extraction progressed and have that information analysed by a competent person such as a geotechnical engineer to ensure the stability of the slope design at the mine in

relation to ground stability". The offence is a category 1 offence and has a maximum of a $1.5 million fine.

[3] The summary of facts which has been agreed reads that the defendant company is a limited liability company incorporated on 3 August 2011. It has one shareholder and sole director, a Mr Kenneth Campbell. The defendant company operated a fleet of machinery and also operated a coal crushing screening plant. Back on 17 August 2017 the company had more than 25 employees, including a Mr Kora who was injured in a rock fall incident on 17 August 2017.

[4] It is agreed that the defendant company's offending and/or failure in the present case was not causative of the rock fall incident which led to Mr Kora's injuries. The opencast mine operated by the defendant company is southwest of Huntly some 11 kilometres. It has been in operation for 20 years and more recently as an opencast mine. The mine is on land owned by the defendant company and the defendant company must comply with Health and Safety at Work (Mining Operations and Quarrying Operations) Regulations 2016 in addition to its duties and obligations under the Health and Safety at Work Act 2015.

[5] The original mine there closed in 1967 so the defendant company in operating an opencast coalmine was working ground over historic underground workings. That is a relevant factor in terms of ground or strata instability and it is accepted that ground or strata instability was an ongoing hazard or issue at this site.

[6] Mr Campbell controlled and managed the mining operation. He is an experienced miner of some 20 years. In the course of the WorkSafe investigation he acted as the representative and spokesperson for the defendant company.

[7] Mr Kora was employed as a mine worker. Employees at the mine were engaged as utility workers which meant that they carried out more than one role over the course of their work. Mr Kora had a background as a machinery operator in the forestry sector for some 20 years and so was experienced. He had, however, never worked in coalmining before. Prior to 17 August 2017 Mr Kora had been employed by the defendant company for about eight weeks. He operated diggers throughout that

period but only operated the particular excavator he was using on 17 August 2017 for four to five days before that date.

[8] At 7 am on 17 August a mine manager conducted an inspection of the mine including the coalpit and saw nothing amiss. That was Mr Swindell. Mr Kora set about later in the day recovering coal using the excavator. He was working at the coalface at ground level operating an excavator or digger. Mr Campbell was working from a bench above Mr Kora's position and he was also operating an excavator. Another mine worker was working on a bench above Mr Campbell, once again operating an excavator. A further mine worker was working at the base level where Mr Kora was working. That was Mr Nepia, who was 15 to 20 metres away from him. He was the closest worker to Mr Kora when the slip occurred.

[9] At approximately 1.50 pm that day a slip event occurred 50 metres to the left of where Mr Kora was working. A large amount of slip material came down from the upper part of the working slope to the ground level of the working area. Some of that rubble including a large boulder travelled to the right and struck Mr Kora's excavator.

[10] An emergency response was immediately initiated. Mr Nepia went to Mr Kora's aid. He was trapped in the excavator cab. He lent across, turned the machine off and staff members stayed with Mr Kora until ambulance personnel arrived. He then received medical treatment. Once he was assessed by medical personnel and freed from the machine he was transferred by air ambulance to Waikato Hospital. He sustained a broken neck, fractured skull and a tear to his frontal lobe. He continues to suffer from those injuries.

[11] A conservative estimate of the volume and mass of rock that slipped was some three cubic metres and approximately seven tons. In an attempt to identify the possible cause of the rockfall WorkSafe commissioned a report from an external expert. That expert was unable to say definitively what caused the rockfall and it is agreed that the defendant company's offending or failure in the present case was not causative of the rockfall incident which led to Mr Kora's injuries.

[12] I have already referred to the regime and duties and obligations the company operated under. In terms of the Health and Safety at Work (Mining Operations and Quarrying Operations) Regulations 2016 those regulations define a principle hazard as:

> (a) In a mining operation is one that could create a risk of multiple fatalities in a single accident or series of recurring accidents at the mining operation in relation to a number of factors.

[13] Also listed there is "ground or strata instability" which is the relevant factor here.

[14] The company is required to implement and maintain a Health and Safety management system for the mining operations that complies with that regulation and also is required to have a principle hazard management plan.

[15] Rule 71(2) deals with ground or strata issues and in particular continuous modelling testing and updating where required of the ground or strata support methods as required and the collection analysis and interpretation of relevant geotechnical data including monitoring of operations and excavations where appropriate. Here, following the identification of ground or strata instability at the Puke Coal Mine, that is a principle hazard the defendant company was required to ensure that a principle hazard management plan existed for ground or strata instability and that a geotechnical assessment was completed by a competent person, to determine the level of ground or strata support required to safely conduct the mining operation.

[16] The company's plan for that in November 2016 did identify stability issues, set out a controlled processes as daily inspection, ensure any signs of instability are identified and appropriate action taken and also geotechnical assessment to assist with the design of works to ensure the stability of those works.

[17] The WorkSafe inquiry disclosed a departure from industry standards and guidelines and that no up to date geotechnical assessment of the specific incident area had been carried out before work commenced in that area. In terms of the regulation

there was no continuous modelling, testing and updating of the ground or strata support methods. There was no collection, analysis and interpretation of relevant geotechnical data available to the defendant company. Further, the defendant company failed to ensure that the geotechnical information obtained during the operation of the opencast mine was consolidated with information in the mine's geotechnical model and continuously used to update and assess the suitability of the slope given the ground instability at the mine.

[18] The defendant company had failed to comply with its primary duty of care to its workers under s 36(1)(a) of the Act, including Mr Kora, and in doing so exposed workers to the risk of death or serious injury.

[19] The summary of facts records the defendant company has no prior convictions or criminal record and that the defendant co-operated with the WorkSafe investigation.

[20] The sentencing criteria is set out in s 151(2) of the Act. That provides that the court must have regard to ss 7 to 10 of the Sentencing Act 2002 and comply with that Act, also s 3 of the Health and Safety at Work Act which sets out the purposes of the Act and then a number of other factors such as the risk of the potential for illness, injury or death that could have occurred; whether the death, serious injury or serious illness occurred or could reasonably have then expected to have occurred; the safety record of the person; the degree of departure from prevailing standards in the person's sector or industry is an aggravating feature and the offender's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[21] There is no dispute from the prosecution and defendant company that the sentencing methodology is set out in the guideline judgment of *Stumpmaster v WorkSafe New Zealand*.[1] That sets out a four-step sentencing process:

(a) to assess the amount of reparation to be paid to the victim;

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

(b) to fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors;

(c) to determine whether orders under s 152 to 158 of the Act are required; and

(d) making an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

[22] The first step, step 1, is assessing quantum of reparation. Reparation may be imposed in relation to loss or damage to property, emotional harm and relevant consequential loss or damage under the Sentencing Act. It has been accepted in this case that the rockfall or slip that occurred on 17 August 2017 resulting in Mr Kora's serious injuries was not caused by the defendant's offending.

[23] The prosecution accept that where it cannot prove that a workplace accident resulting in a fatality or injury was caused by the relevant Health and Safety at Work Act offending, generally reparation is not sought or ordered and here it is not. The prosecution does recognise in circumstances financial contributions can voluntarily be made by an offender to an injured worker in those circumstances.

[24] Here on behalf of the defendant company Mr Bonnar has set out in his submissions that there were voluntary contributions and the prosecution does not seem to dispute them:

(a) Firstly, they topped up Mr Kora's salary from his ACC entitlement to 100 per cent until he left the defendant company's employment in January 2018. That approximated close to $6,500.

(b) Secondly, in January 2018 an ex gratia payment of $1,000 was made to Mr Kora.

(c) Thirdly, they had provided free accommodation to Mr Kora from the slip event to January 2018. That house was vacated then and is now

rented out at some $300 per week, the benefit the defendant company says to Mr Kora is approximately $6,000.

(d) Unfortunately since January 2018 the relationship between the defendant company and Mr Kora has completely broken down. It is agreed that no reparation is sought or further reparation payable to Mr Kora.

[25] Step 2 is assessing the quantum of the fine. Under the recent Court of Appeal case of *Moses v R*, it is a two-step process now where a starting point is identified which includes the aggravating and mitigating factors of the offence.[2] The second step is the aggravating and mitigating factors personal to the offender, together with any guilty plea credit, are accumulated together as a percentage from the starting point.

[26] The High Court decision in *Stumpmaster v WorkSafe New Zealand* sets out four guideline bands to assess culpability. There is low culpability with starting points up to $250,000. The second band is medium culpability in the range of $250,000 to $600,000. High culpability from $600,000 to $1 million. Very high culpability, the last band, which is $1 million plus.

[27] It is further accepted that the *Department of Labour v Hanham & Philp Contractors Limited* still sets out the well-known list of relevant factors to be considered in assessing culpability.[3] These are known as the *Hanham* factors.

[28] The first is to identify the operative acts or omissions at issue and the practical steps it was reasonable for the offender to have taken in terms of s 22 of the Act. Here they are set out in the charging documents and I have already referred to the obtaining of the geotech information and subsequent analysis by a competent person in relation to ground stability.

[29] The second is the nature and seriousness of the risk of harm occurring as the realised risk, whether death, serious injury, serious illness occurred or could

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[2] *Moses v R* [2020] NZCA 296.
[3] *Department of Labour v Hanham & Philp Contractors Limited* (2008) 6 NZELR 79.

reasonably have been expected to have occurred. Here the submission from the prosecution is the defendant's failure exposed its workers at the mine, around about 25 at the relevant time, to the risk of death or serious injury.

[30] The prosecution suggested that the injuries to Mr Kora to a very limited extent could be taken into account in the absence of a causative link. That was disputed by the defendant company in its submissions presented by Mr Bonnar where there is no evidential link then they should not be taken into account. Here, the extent that I do take them into account is only that they may be illustrative of the risk of death or serious injuries that could occur from the defendant company's failure to obtain the necessary reports and analysis.

[31] The next issue is whether the degree of departure from the prevailing standards in the person's industry, here it is accepted that there was a failure. The submissions from the defendant company relate to the fact that the frequency of reports is not specified as such but on the other hand where the defendant company did reasonably obtain a report reportedly to meet the addressing of the principle hazard in its plan it was in a materially different context, it was a resource consent variation not directly applicable to key health and safety mining issues, so that really was a lost opportunity to obtain a report that could have assisted in addressing the principal hazard that I have earlier referred to.

[32] The next is the obviousness of the hazard. That speaks for itself.

[33] Next the availability, costs and effectiveness of the means necessary to avoid the hazard. It is accepted that the defendant company would have the means and state of knowledge to avoid or mitigate the risk of occurrence by obtaining a report. The current state and knowledge of the risks and the nature and severity of harm that could result in a current state of knowledge of means available to avoid the hazard or mitigate the risk if it is current. Once again the risks were known prominent.

[34] The prosecution pitch this in the middle of the medium culpability band, that is band 2, and they submit that a starting point of between $400,000 to $425,000 would be appropriate. The defendant's submissions which also agree it falls within band 2,

medium culpability, pitch it at a lower level. The defendant company in its submissions has considered the case of *WorkSafe New Zealand v Blackstump Logging Limited* in arriving at a starting point of $300,000.[4]

[35] In my view I assess it at just below the mid-level of the medium band and would pitch this as its starting point, given the factors relating to the *Hanham* factors and sentencing factors earlier referred to at $350,000. There are no aggravating factors that are personal to the defendant company. The defendant seeks further credits for remorse and voluntary contributions to Mr Kora of 10 per cent. The prosecution seeks five per cent. Previous good record, emphasis is placed on that and a credit sought of 10 per cent. The prosecution indicate five per cent. Co-operation of the defendant company, it is agreed that a five per cent allowance should be made.

[36] For a guilty plea a full 25 per cent is sought. I do appreciate that initially this started off with a number of charges and over a period of time through various negotiations it was refined to the single charge, and in fact that was amended prior to a guilty plea being entered and sentencing proceeding today. The prosecution recommend 15 to 20 per cent. In my view, a sufficient credit can be reflected in the 20 per cent allowance. I also note the agreed five per cent for co-operation. I am prepared to allow 10 per cent for the previous good record the company had been running for many years incident and injury free and the remorse expressed through the sole director was meaningful in my view, but I allow five per cent for that.

[37] Those credits come to some 40 per cent which would reduce the overall starting point of $350,000 by $140,000.

[38] Step 3 is whether any ancillary orders are sought. The prosecution seeks $5,000 towards the costs. That is not disputed by the defendant company in its submissions through Mr Bonnar and there will be an ancillary order for costs award in that amount.

[39] The proportional assessment is the last step where it is necessary to weigh up the amount of the fine with the financial capacity of the company. The company's

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[4] *WorkSafe New Zealand v Blackstump Logging Ltd* [2020] NZDC 5105.

position is financially, on the face of it, dire. The prosecution has filed supplementary submissions which accept really the fact that there is limited prospect of the defendant company being able to pay any substantial financial penalty imposed by the court. Effectively, since the accident time the operations of the opencast mine ceased and has not recommenced. It is apparent from evidence cited by the prosecution, or supplied to the prosecution from the defendant company, that it is heavily indebted and in a precarious financial position and will be wound up in the near future.

[40] The company has continued to operate a landfill business at site but although the turnover seems to indicate a large volume of sales it is still running at a loss. It is understood that these will be kept on foot until the businesses are sold, that is the landfill business.

[41] There are two freehold assets of land worth $1.2 million, $1.7 million respectively. That could be sold to assist any fine, but it would be competing for payments against other debtors that have guarantees held over them, such as banks, and it is obvious that the liabilities far exceed the asset value. The defendant company's submission is that no fine or a nominal fine should be imposed. With the prosecution, they accept, as I say there is a limited prospect of the defendant being able to pay any substantial financial penalty imposed by the court.

[42] I am of the view that a fine does need to be imposed in relation to the defendant company despite its dire financial position. There is still a degree of uncertainty as to what the final financial position will be, although I accept it is likely to be dire. I heavily discount the end fine of $210,000 to $21,000. Further, there will be the costs award in favour of the prosecution of $5,000.

[43] I further direct that a copy of the summary of facts be made available to the press and summary copying fee is waived.

[44] There is an order that specific financial accounts or information relating to the defendant company are not to be searched without order of the Court.

[45] That will be $21,000 fine plus court costs of $130 Mr Bonner.

Judge RG Marshall
District Court Judge

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