**IN THE DISTRICT COURT**
**AT WHANGAREI**

**I TE KŌTI-Ā-ROHE**
**KI WHANGĀREI-TERENGA-PARĀOA**

**CRI-2022-088-001223**
**[2022] NZDC 25414**

**WORKSAFE NEW ZEALAND**
Prosecutor

v

**NEWEY MACHINERY LIMITED**
Defendant

Hearing: 19 December 2022

Appearances: A Simpson for the Prosecutor
H Pride for the Defendant

Judgment: 19 December 2022

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**NOTES OF JUDGE P RZEPECKY ON SENTENCING**

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[1] Newey Machinery Limited faces sentence for one charge of failing to ensure the health and safety of its workers, exposing them to a risk of serious injury or death. In essence, the charge relates to an incident where the victim, their employee, was trying to troubleshoot issues with a debarker and reached into a gap between rollers which then closed and trapped his wrist. The victim's skin was pulled back. Additionally, he suffered a compound grade 2 fracture of his forearm with a dislocated wrist and he has had to have surgery to insert plates. In summary, Newey has pleaded guilty to failing to ensure appropriate machine guarding, failing to provide adequate training and failing to have a safe system of work in place.

[2] There is an extensive summary of facts which has been presented, but that is summarised in the WorkSafe submissions dated 5 December 2022 and I adopt that

summary, which I understand from the submissions filed on behalf of Newey, is accepted. The summary is as follows.

[3] In brief, the defendant is a limited liability company and a PCBU. The defendant was incorporated on 15 October 2020 solely for the purpose of contracting to CFGC to run an A4 debarker at Northport. CFGC owns an A5 and an A7 debarker. The defendant was engaged to operate the A5 debarker. The victim was employed by the defendant as a machine operations supervisor. The A5 debarker involved in this incident removes bark from logs. There were design and operation similarities between the A5 and A7 debarkers however, the A7 debarker was newer than the A5 debarker and had more guarding. Two people are required to operate the A5 debarker. They do so by operating machines at either end of the debarker. One person feeds logs onto the debarker at the infeed end. The log moves along towards the knife rings (between the in and outfeed rollers) which are activated by sensors and closes around the log. A second person then collects the debarked logs from the outfeed end.

[4] Prior to commencing operations, CFGC engaged Marsden Point Welding to add guarding to the A5 debarker. Marsden Point Welding did not give any additional advice relating to the guarding on the A5 debarker. Instead, it built the guarding that Newey and CFGC requested based on their observations of the A7 debarker's guarding. The modifications included building guarding panels which covered both the in and outfeed rollers. The A5 debarker arrived on site in October 2020 and operations began in March 2021.

[5] In September 2020, the victim went down to Taranaki and received between two to four days training on the A7 debarker. His training was not formalised in any way. It occurred a number of months prior to him commencing work on the A5 debarker.

[6] Following this, the victim continued to be involved with establishing the debarking operation at Northport. He co-ordinated the arrival of the A5 debarker to the laydown site outside of Northport and had oversight on the way it was put together. the victim also participated in the commissioning of the A5 debarker and its relocation

into Northport. The victim did not receive any formal training on the A5 debarker but he was involved in its set up at every stage.

[7] On 23 June 2021, the victim and another worker were working together debarking logs using the A5 debarker. The victim was located at the infeed end of the debarker and the other worker at the outfeed end. A log was loaded into the debarker which did not come out. The victim went to stand by the outfeed rollers to check for air leaks. As the other worker started the rollers the victim reached into the gap between the upper and lower rollers, which activated the mechanism to close the rollers. The rollers closed and trapped the victim's wrist. The rollers caught the skin on the forearm and peeled back a triangular shaped section. The victim sustained a compound grade 2 galeazzi fracture that required surgery and plates. He also suffered a dislocated wrist which required relocating.

[8] The A5 debarker was assessed by an expert post-accident and it was determined it was not adequately guarded.

[9] Newey face a fine of up to $1.5 million. The approach to sentencing offending is contained in s 48 of the Health and Safety at Work Act 2015 (The Act). The correct approach is to:

(a) assess the amount of reparation;

(b) secondly, fix the fine by reference first to the guiding line bands and then, having regard to aggravating and mitigating factors,

(c) determine whether further orders under ss 152—158 of the Act are required

(d) make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps. This includes consideration of the defendant's ability to pay and

also whether an increase is needed to reflect the financial capacity of the defendant.[1]

[10] Further guidance is found in s 151 of the Act.

**Reparation**

[11] Starting with reparation, a sentence of reparation is permissible under s 32 of the Sentencing Act 2002. A sentence of reparation is available where a victim has suffered emotional harm. The information contained in the victim impact statement is useful to assess the harm caused to a victim. From the victim's impact statement, I highlight the following:

(a) He continues to experience weakness in his left arm.

(b) The plates used to treat his arm are irritating and cause discomfort. He is considering an additional surgery to have them removed. That will take around six weeks of recovery time.

(c) The victim feels a sense of responsibility for the accident as he missed an opportunity to add guarding and he was the one who decided to access the machine while it was still live.

(d) The victim feels a sense of guilt and shame when he thinks about the accident, so he has some psychological issues in relation to it.

[12] There is also a report, dated 2 December 2022 from the facilitator of the restorative justice conference. The report establishes a very worthwhile meeting between the victim and the owners of Newey, Mr and Mrs Newey. It has allowed the victim to express many of the complicated emotions that he felt following the accident, including a degree of self-blame, and, no doubt, this will help him move ahead.

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

[13] WorkSafe, in its submissions, seeks reparation of $20,000 as appropriate. It accepts that this should be apportioned equally between Newey and CFGC. Newey agrees with WorkSafe's submission and it notes that Newey has already made payments amounting to $8,000 to the victim to top up his ACC payments. Newey also provided the victim with transport to and from medical appointments.

[14] I note the cases referred to me by WorkSafe and Newey, which tend to support a sentence of reparation at about this level for this degree of seriousness. The exercise requires the Court to, effectively, monetise the pain and suffering of a worker who has suffered a serious and, more than likely life changing injury, and this is a solemn yet unsatisfactory way to measure human suffering. The assessment is not a direct science and I note that the High Court has observed that imposing reparation for emotional harm is an intuitive exercise. Its quantification defies calculation:[2]

> The judicial objective is to strike a figure which is just in all the circumstances and which, in this context, compensates for actual harm arising out of the offence in the form of anguish, distress and mental suffering

[15] In this case, the victim is likely to suffer further, as I have said, and there will be rehabilitation, there will be time off work, and he faces the inherent risks of undergoing further surgery. In these times of rising costs, it is questionable whether previous cases are actually a safe guideline. So, taking all these factors into account, I did consider whether the victim deserves a higher level of payment sought by that of WorkSafe however, on balance, I am satisfied that the payment of $20,000 is reasonable under all of the circumstances and will order reparation at that level.

[16] That brings me to the issue of apportionment. WorkSafe seeks to have the payment apportioned 50/50 with CFGC. I have discussed this with both counsel today because, although CFGC has been charged, it has not been convicted and WorkSafe speculates that it may enter into an enforceable undertaking with CFGC, which will take account of a contribution towards reparations. But none of this is presented at anything like approaching certainty and there is no evidence presented by WorkSafe as to the solvency or operation, including insurance position, of CFGC, so I have thought twice before ordering apportionment. In my exchange with Ms Pride, counsel

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[2] *Big Tuff Pallets Ltd v Dept of Labour* HC Auckland CRI-2008-404-000322, 5 February 2009.

for Newey today, her submission is that there should be an apportionment but that that could be somehow conditional and I will consider that and make a condition at the end of this judgment.

[17] I note that Newey has, to its credit, already supported the victim by topping up his income compensation payments, but I detect that there is agreement from both parties that this is for consequential losses and, therefore, should not affect the payment of reparations in addition at all, so those payments are not to be set off.

[18] That brings me to the fine, which I must determine according to the guidelines set out in the decision of *Stumpmaster*. It is something of an interesting exercise because Newey is no longer trading so the Court's ability to impose a fine is probably moot and that seems to be agreed between WorkSafe and Newey. *Stumpmaster* sets out four levels of culpability and there appears to be some agreement that this fits within the middle band of fines in the level of $250,000 to $600,000. The relevant factors in sentencing as confirmed by *Stumpmaster* are:

(a) the identification of operative acts or omissions at issue, and that will usually involve the clear identification of the practical steps which the Court finds it reasonable for the offender to have taken in terms of s 22 of the Act;

(b) an assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk;

(c) the degree of departure from standards prevailing in the relevant industry;

(d) the obviousness of the hazard;

(e) the availability, cost and effectiveness of the means necessary to avoid the hazard;

(f) the current state of knowledge of the risks and of the nature and severity of the harm which could result; and

(g) the current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence;

[19] In its submissions, WorkSafe suggests that:

(a) the risk was significant and the harm occasioned was substantial;

(b) the combination of inadequate guarding and insufficient training meant there was a high risk of death or serious injury;

(c) Newey's conduct departed significantly from industry standards;

(d) the risk of harm ought to have been easily anticipated and appropriately managed; and

(e) the cost of guarding and training was not prohibited, so the consequences of a failure were significant but the actual costs of trying to avoid those was not. There is ample guidance on the risk of insufficiently guarded machines, so this is a road well-trod.

[20] Newey accepts that the following factors are present:

(a) Newey accepts that there were deficiencies in its procedures and that there were practicable steps it could have taken;

(b) Newey accepts there was a serious risk of harm and foreseeability of this risk however, Newey highlights that the actual harm caused does not factor into the culpability assessment;

(c) Newey accepts that the risk was foreseeable because the debarker was not sufficiently guarded;

(d) Newey accepts that it failed to meet the required machine guarded standards;

(e) Newey recognised that the risks were obvious and that it relied too much on its no boots on the ground policy. I think that related to the fact that the machine should not have been operating if you were outside of the control room, as I understand it; and

(f) Newey accepts that it had the means to address the hazard.

[21] This is intended as a summary of both parties' position. WorkSafe suggests that Newey's culpability falls into the medium culpability band and that a starting point of around $450,000 is appropriate. Newey broadly agrees with the factors that aggravate the offending but argues that it should fall in terms of fine into the lower medium band with a starting point of about $350,000. Both counsel referred me to a number of cases in submissions intending to justify their respective positions. Each case must be decided on its particular facts. The cases are helpful but not determinative.

[22] Having considered all of the cases relied upon by the parties, and there were quite a few, I consider that *WorkSafe v Mainland Poultry Ltd* is the closest and perhaps most influential today on what level the fine should be.[3] The victim's thumb was amputated following an accident undertaking cleaning duties in the egg breaking and separating area. The machine uses rotating blades to move egg shells into a tank. There was a latch to allow inspection of egg shell blockages and this latch was easily opened without tools. Under the latch was a bucket to catch liquid. The victim's colleague noticed that the bucket was full and, without turning off the machine, emptied the bucket. The victim noticed the bucket was missing and went to replace it. She held the latch open with her left hand, however, her thumb was caught between the latch and rotating blade and amputated.

[23] It was agreed that the offending fell into the medium culpability band and that the following were considered relevant to MPL's culpability level:

(a) the absence of an effective risk assessment to identify the issues with the latch;

[3] *WorkSafe New Zealand v Mainland Poultry Ltd* [2022] NZDC 9562.

(b) risk of serious physical injury;

(c) a relatively discrete yet material departure from industry standards; and

(d) a known and obvious hazard.

[24] The Judge noted that there were safety processes in place and this did not involve a total absence of risk assessment. A starting point of $400,000 was adopted by the Court.

[25] It is clear that Newey had taken steps towards identifying risks and indeed, put some guarding in place. While the victim had some training it was limited and on a different machine. The risk in this case was significant, which is shown through the harm suffered by the victim. This case is not like the decision in *Atlas Concrete* where the victim actively disregarded standard operating procedures. In this case I find that the starting point of the fine at $400,000 would be appropriate.

[26] WorkSafe suggests that the following discounts, looking at step two of the sentencing process, are available:

[27] Five per cent for good record.

[28] Five per cent for co-operation with the investigation.

[29] Five per cent for remorse.

[30] Five per cent for reparation.

[31] Five per cent for remedial steps taken.

[32] 25 per cent for the guilty plea.

[33] Newey argues for the same discount. So that is a total discount of 50 per cent. I accept the submissions of the parties on this point, so the fine shall be $200,000 and note that Mr and Ms Newey appear to have taken a very responsible attitude, having

embarked on some assistance to the victim and also the restorative justice process and are in court today, even though it is a company that is being charged, they continue to show a meaningful response.

[34] In addition to a fine Newey will contribute to the cost of prosecution. WorkSafe claims $3,830.38, which has been accepted by Newey.

[35] The final step of sentencing under the Act is to consider the total imposition on the offender. The total imposed must be proportionate to the circumstances of the offending and the offender. The circumstances of the offender includes the offender's ability to pay a fine.

[36] I note that any adjustments made on a proportionality basis are adjustments made to the fine and do not affect the amount of the reparation. Both their accountants, who have provided reports in this case, one for the prosecution; one for the defence, both are of the opinion that the defendant does not have the capacity to pay a fine either by a lump sum or instalment. Newey has ceased trading and being wound up. The evidence shows that it has net liabilities of almost $36,000. The reason for winding up is set out in the affidavit of Mr Newey. It appears that it has lost its contract to operate the log debarking plant and that seems to have predated even being charged, otherwise it would have appeared to be a cynical attempt to avoid paying a fine if being set up like that. Although, it does not look like that is really what has happened here, it is just part of the circumstances that the company is no longer in that contractual relationship with GFGC.

[37] Newey argues that the fine should be reduced to nil, given its impecuniosity and the fact that it cannot pay by instalments as it has ceased operating. Under the circumstances, I accept that a total reduction is available and the most pragmatic outcome, otherwise a fine is just going to be a nuisance. It is really a moot point. Newey has no assets and therefore, there is no way in which they can pay, even by instalments, and I refer to s 14 of the Sentencing Act 2002.

[38] I now come to sentence. Newey will be sentenced as follows:

[39] There will be reparations paid to the victim of $20,000. Reparation payment of $20,000 will be split between Newey and GFGC however, there needs to be a condition on that. If, at this stage, as I said earlier, GFGC is not convicted and has not entered into an enforceable agreement with WorkSafe furthermore, its culpability has not been determined by the court, by ordering an equal split, I would simply be attempting to resolve that proportionality of culpability when GFGC was not represented in court and not able to make submissions.

[40] So, I make the reparation order on the condition that Newey will immediately pay $10,000 to the victim. Should there be no similar contribution from CFGC by 1 May 2023 this matter can be brought back to court by WorkSafe and I will make an order that Newey pay the balance to the victim should that be necessary. Of course, it is no secret that this is being funded by Newey's insurance company and I am sure that they would take a responsible approach should there be any issue as far as GFGC is concerned in the future. Otherwise, as part of sentence, Newey is ordered to pay WorkSafe claim costs of $3,830.38.

[41] Finally, Newey is fined $200,000 but this is reduced to nil in recognition of Newey ceasing to trade and its insolvent position.

[42] Ms Simpson has just raised in issue in relation to the identity of the victim. He sought to have his identity supressed from the judgment and I order that his name should be anonymised in the judgment and I will simply refer to him as the victim when the judgment is issued.

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Judge PR Rzepecky
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 22/12/2022