

**IN THE DISTRICT COURT
AT MANUKAU**

**I TE KŌTI-Ā-ROHE
KI MANUKAU**

**CRI-2017-092-003528
[2019] NZDC 4843**

WORKSAFE NEW ZEALAND
Prosecutor

v

INSULPRO MANUFACTURING LIMITED
Defendant

Hearing: 18 December 2018

Appearances: A Simpson for the Prosecutor
S Bonnar QC for the Defendant

Reasons for Judgment: 14 March 2019

REASONS FOR DECISION OF JUDGE J C MOSES

[1] The defendant company Insulpro Manufacturing Ltd (Insulpro) pleaded guilty to one charge under ss 37, 48(1) and (2)(c) Health and Safety at Work Act 2015 (HASWA) as follows:

Being a PCBU that manages or controls a workplace, namely the company's facility in East Tamaki, Auckland, failed to ensure so far as was reasonably practicable, that the workplace and anything arising from the workplace, namely an Autefa Topliner CL4002 Cross Lapping machine in operation there were without risks to the health and safety of any person, including Laki Ngaluafe.

Particulars of defendant's duty:

Inzone Industries Limited failed to ensure the workplace and the cross lapper were without risk to the health and safety of any person by failing to:

Install appropriate guarding to the cross lapper on the right-hand side of the outfeed conveyor belt.

Particulars of the risk:

Entrapment and / or crush injury as a consequence of exposure to the machine's moving parts.

[2] The maximum penalty for this offence is a fine not exceeding \$1.5 million.

[3] At sentencing on 18 December 2018, I fined the defendant \$206,719 and awarded the informant costs of \$1092.83. I said I would subsequently issue reasons in full. These are those reasons.

[4] The facts are agreed.

[5] Insulpro is a company that manufactures insulation. It owns two premises where it conducts that business. This case concerns their premises at Birmingham Street, East Tamaki, Auckland.

[6] Laki Ngaluafe is the victim in this matter. He is employed as a process operator at the Birmingham Street site.

[7] The Birmingham Street factory operates 24 hours a day for five days a week. It processes polyester fibre imported from South East Asia and turns it into products such as insulation, wall coverings, ceiling tiles and acoustic panels. Part of that process involves the use of a cross lapping machine. The cross lapping machine involved in the incident is an Autefa Topliner CL4002. It was manufactured in 2005 and installed by Insulpro prior to 2012. The cross lapper takes the fibre coming from the carding machine and transforms it into woven layers. The fibre is layered back and forth (cross lapped) over itself by a series of belts to build up the material as a sheet or webbed to a desired thickness. It is then conveyed out of the machine by an outfeed conveyor belt to the oven where it is heated and compressed into insulation. Most of the time the cross lapper processes white polyester fibre, but approximately once a month black fibre is processed through the machine and it is necessary to clean any residual white fibre from the cross lapper before that is started.

[8] On 28 June 2016, Mr Ngaluafe was working as a process operator on the cross lapper. Mr Sioeli Tuanaki was working as the night shift supervisor at the Birmingham Street facility. At the start of the shift the white fibre left over from the previous shift was cleaned from the cross lapper. Cleaning the machine at the start of a shift is a normal practice. The machine was then set up to produce a run of black fibre. Once operational, the workers found that some residual white fibre was still contaminating the run of black fibre.

[9] At approximately 3.45 am, Mr Tuanaki and Mr Ngaluafe attempted to remove the residual white fibre. Initially they were standing to the right-hand side of the outfeed conveyor belt of the cross lapper, using a fibre gun to pick out the residual white fibre. The fibre gun has a long metal shaft that spins around when the trigger is pulled, winding the fibre around the shaft. That was the standard practice for the removal of stray fibres from the material exiting the cross lapper. Notwithstanding the use of the fibre gun, a clump of white fibres was continuing to drop from the cross lapper onto the black material exiting the machine. Mr Ngaluafe went underneath the outfeed conveyor belt and into the body of the machine in an attempt to clear the clump of white fibres from the cross lapper. The cross lapper was not shut down prior to him doing so. Mr Ngaluafe initially tried using the fibre gun to clear the clump of white fibres from underneath the machine. When that did not work he used his hand to pull the white fibre out while the machine was paused between direction changes.

[10] Mr Ngaluafe did not get his hand out of the belt in time before it reactivated and his arm was caught between the belt and the rollers at the back of the machine. As a result both Mr Ngaluafe's arm and wrist were broken and required surgeries. Mr Ngaluafe prepared a statement on 16 November 2018, indicating that his wrist has recovered.

Victim impact statement

[11] There was no official victim impact statement prepared however, as indicated Mr Ngaluafe prepared a statement which he provided to the defendant company, dated 16 November 2018. It set out his recovery, and the assistance provided to him by

Insulpro. Of note is that the company has assisted the victim financially which has been of significant assistance to Mr Ngaluafe.

Restorative justice

[12] A restorative justice conference did not take place however, Mr Ngaluafe did agree to meet with representatives of Insulpro to informally discuss the accident. At the meeting, Insulpro expressed its remorse to him and offered its apology for failing to do all that it could to keep him safe. Insulpro have paid Mr Ngaluafe the sum of \$15,000 for the suffering and stress he has suffered. In addition, Insulpro have made top up payments to the ACC payments made to Mr Ngaluafe so that he was not out of pocket as a result of the accident.

Approach to sentencing

[13] It is now accepted that the Court should approach sentencing in line with the guideline judgment of *Stumpmaster v WorkSafe New Zealand* which confirmed that the approach to sentencing under the HSAWA involves four steps:¹

- (a) Assessing the amount of reparation;
- (b) Fixing the amount of the fine by reference first to guideline bands and then having regard to aggravating and mitigating features;
- (c) Determining whether further orders under ss 152-158 HSAWA are required;
- (d) Making an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed under the preceding three steps (including consideration of ability to pay and the financial capacity of the defendant).

[14] In relation to the starting point for a fine, the Court in *Stumpmaster* identified four guideline bands of culpability as follows:

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

- (a) A (low culpability; up to \$250,000)
- (b) B (medium culpability; \$250,000 to \$600,000)
- (c) C (high culpability; \$600,000 to \$1 million)
- (d) D (very high culpability; \$1 million plus)

Reparation

[15] As indicated in paragraph 11, Insulpro has paid the sum of \$15,000 for emotional harm to Mr Ngaluafe. It has paid an additional sum of \$1199.10 to him to top up his earnings. No additional reparation by way of emotional harm is sought and I make no additional order.

Fine - culpability assessment factors

[16] The informant submits that the following factors which are specified in s 151 HSAWA are relevant to assess the starting point for the fine:

- (a) The identification of the operative acts or omissions – the practicable steps.

WorkSafe submit that there was no guarding on the right-hand side of the outfeed conveyor and that Mr Ngaluafe was therefore able to “duck” under the outfeed conveyor and crawl into the body of the cross lapper and access moving parts. They submit that if appropriate guarding had been in place on the cross lapper this would have prevented access underneath the outfeed conveyor belt and into the body of the cross lapper. Insulpro submit that this is not a case where the company had negligently failed to address a known lack of a guarding issue. The machine was extensively guarded, and there had never been a previous occasion where an employee had entered the body of the cross lapper while it was operational, by ducking under the outfeed conveyor belt and crawling into the internal workings of the

machine. They also submit that there was no risk of a worker being inadvertently drawn into, trapped or crushed by moving machinery on the cross lapper. Whilst they accept the company had identified one potential additional “pinch point” in an earlier review in 2016, steps were underway to install additional guarding to address that issue and that particular “pinch point” was not implicated or involved in any way in the present incident.

The nature and seriousness of risk of harm

[17] WorkSafe point to the fact that the risk of harm from workers being drawn into, trapped or crushed by moving machinery is serious and the realised harm was significant with Mr Ngaluafe’s arm and wrist being broken and requiring surgeries. Mr Ngaluafe had previously been directed by a supervisor to go under the cross lapper to clean the outfeed belt, but on those occasions the machine had always been stopped. Given that Insulpro had not adequately guarded the cross lapper and workers had been directed under it, the likelihood of an incident occurring was in the WorkSafe submission, almost inevitable. Insulpro submit that whilst acknowledging there is a risk of serious harm to workers if machinery is inadequately guarded, the risk of a worker entering the machine in the manner that Mr Ngaluafe did on this occasion was low. The standard operating procedures which included the use of a fibre gun were in place and enabled workers to undertake their duties with the cross lapper safely. It is acknowledged by Insulpro that moderately serious harm did occur here.

The obviousness of the hazard

[18] WorkSafe submit the need to guard moving parts of machinery is an obvious and well known hazard. WorkSafe submits that Insulpro had not identified the risk that a person would enter the machine while it was running in the way Mr Ngaluafe did, though it had identified that other guarding was required on the right-hand side of the cross lapper. It also points to Insulpro’s knowledge of the risk as a result of a previous incident in 2009. Insulpro submit that while access to moving parts of machinery is a well known and obvious hazard generally, the particular hazard here involving access to moving parts inside the body of a cross lapper, in circumstances

where access could only be achieved by a worker ducking underneath a waist high outfeed conveyor belt and crawling into the body of the machine itself was not obvious at all. It submits that the particular hazard was not obvious at all and relies on the fact that there had been several previous reviews and inspections, including inspections by MBIE / WorkSafe inspectors, all of which had not identified the need for additional guarding to prevent a worker accessing the inner workings of the machine as Mr Ngaluafe did. They do not accept that the hazard was obvious.

Departure from industry standard

[19] WorkSafe submit that the risks associated with unguarded machinery are obvious and well known in the manufacturing industry and that Insulpro's conduct departed from a number of industry standards and guidelines available. It submits that the departure from clear prevailing standards was significant and aggravates its culpability. Insulpro submit that the present case does not represent a significant departure from industry standards. Whilst acknowledging that there are various standards and guidelines which were referred to by WorkSafe, none of those address the specific circumstances which arose in the present case. Insulpro submit that if it was in fact a significant departure from clear and prevailing industry standards, it was reasonable to expect that experienced health and safety consultants, regulatory inspectors who had inspected the machine would have identified the need for such guarding during the course of several inspections and reviews that had taken place from 2013 to 2016.

Means available to mitigate the risk

[20] Insulpro accept that it had the means to mitigate the risk by installing additional guarding, had the risk been identified before the accident.

Starting point

[21] WorkSafe submits that the defendant's liability falls towards the top end of the medium culpability band set out in *Stumpmaster* and that a starting point in the vicinity of \$500,000 is appropriate. Insulpro submit that the present case falls within what was described in *Stumpmaster* as a "slip up from a business otherwise carrying on its duties

in the correct manner,” and submits that it is only the fact that moderately serious harm was actually caused to Mr Ngaluafe which elevates this case from the low culpability band to the bottom of the medium culpability band. It is submitted on behalf of Insulpro that the appropriate starting point in the case is a fine of no more than \$300,000.

Setting the starting point

[22] I have been referred to a number of cases by counsel. I agree with the submissions made in general by Insulpro that the cases referred to by WorkSafe are in one way or another more serious than the present case. Without analysing each individual case, it is my view that each of the cases either are more serious by way of the seriousness of the injury to the worker and/or the fact that the cases involved “an obvious hazard” which was more obvious than that in the present case and/or involved additional features such as inadequate training and instruction to workers. In particular, I do not agree with WorkSafe that the hazard was obvious in light of the information that I have that a number of reviews had been carried out by experienced people who had not identified that particular hazard which led to this injury occurring.

[23] I place the defendant’s culpability in the low to medium range of the fine set out under medium culpability. I see this case in a similar vein to that which was described in the case of *WorkSafe New Zealand v Nutrimetrics International (New Zealand) Ltd* where the Court found that, “There was a safe operating procedure in place for the cleaning of the machine, risk assessments had been conducted and this was not a company taking an irresponsible approach to safety in its workplace.” I am satisfied that adequately describes the situation here. I therefore set the appropriate starting point as a fine of \$350,000.

[24] Insulpro submit that there should be no uplift for the previous conviction that the company has under the Health and Safety in Employment Act 1992 which dates from 2009. It submits that the circumstances of the previous offence were dissimilar to the present circumstances and involved a different site and a different machine, and also submits that the company was under a previous ownership and management at the time and significant remedial steps have been taken since the 2009 incident. I am

of the view however that a small increase of five percent is appropriate. The previous conviction related to a worker at the Insulpro's Dunedin factory having both arms trapped when cleaning the outfeed conveyor belt of a carding machine / crosslapper from inside and below while the machine was running. In my view a five percent increase which amounts to \$17,500 is appropriate which takes the overall starting point to that of \$367,500.

[25] Insulpro are entitled to a number of reductions from that starting point. I accept that there is remorse on the part of the company as is set out in Mr McLey's affidavit. I accept that the company's remorse is sincere and genuine which is reflected not only in the words of Mr McLey but also demonstrated by the company's actions, including the support that has been provided to Mr Ngaluafe. It is accepted by WorkSafe New Zealand that Insulpro has co-operated fully in the investigation. Furthermore, I accept that the company has carried out significant remedial action since the accident took place which includes:

- (a) Additional guarding to prevent access to under the outfeed tray.
- (b) Upgrading of lockout, tag out procedures.
- (c) Updating standard operating procedures with an emphasis on machinery safety, guarding and operator awareness.
- (d) Reviewing and revising pre-starts and safety briefings.
- (e) Completion of the machinery risk assessment of all plant which identified several potential safety improvements which had been implemented.
- (f) Improvements to traffic and pedestrian management.
- (g) Increasing the frequency of safety inspections.
- (h) An increased focus on near miss reporting.

- (i) Strengthening of worker participation and representation in safety management.
- (j) Holding safety days for workers.
- (k) The running of health and safety roadshows for 12 other related workplaces.

[26] As a result of these factors, I find that Insulpro are entitled to the following reductions:

- (a) Remorse: 10 percent.
- (b) Co-operation: 5 percent.
- (c) Reparation: 5 percent.
- (d) Remedial action: 5 percent.

[27] From the overall starting point of \$367,500 the company is therefore entitled to a reduction of 25 percent or \$91,875 from that starting point, for those factors listed in paragraph 25. In addition, the company is entitled to a further 25 percent reduction on account of the guilty plea which was entered at the first appropriate occasion. From the figure of \$275,625 the company is therefore entitled to a further 25 percent reduction or \$68,906.

[28] There is no dispute by Insulpro that the WorkSafe New Zealand are entitled to payment of costs of \$1092.83.

Conclusion

[29] For the reasons indicated, Insulpro are fined the sum of \$206,719 and in addition costs are to be paid to WorkSafe New Zealand in the sum of \$1092.83.

Judge JC Moses
District Court Judge

Date of authentication: 14/03/2019

In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.