IN THE DISTRICT COURT
AT DARGAVILLE

CRI-2014-011-000328
[2015] NZDC 8853

WORKSAFE NEW ZEALAND
Prosecutor

v

COMBER & SEYMOUR LIMITED
Defendant

Hearing: 19 February 2015

Appearances: Ms Jeffs for the Prosecutor
C Muston for the Defendant

Judgment: 19 February 2015

NOTES OF JUDGE G DAVIS ON SENTENCING

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[1] Comber and Seymour Limited appear before the Court today for sentence having pleaded guilty to one charge of failing to take all practical steps to ensure the safety of its employee, a Mr Seymour, while at work in that it failed to ensure that Mr Seymour was not exposed to a hazard, namely a fall from heights while carrying out roofing work.

[2] The charges bought pursuant to ss 6 and 50 subs (a) Health and Safety in Employment Act 1992 and that carries with it a maximum penalty of a fine not exceeding $250,000. The background to the offending is set out in a caption summary and it is important that that be narrated in reasonably full detail.

[3] The company was contracted to replace a roof on a building located in the broader Dargaville area. The company employed two people to assist in that

process, namely, Mr Seymour and a Mr Lowe. On 27 March Mr Seymour was working on the roof with Mr Lowe, Mr Seymour stepped on the top of a corrugated PVC roof panel or a skylight and fell through the skylight approximately three metres to 3.5 metres onto a concrete floor. As a result of the fall Mr Seymour suffered serious harm.

[4] Amongst his injuries were a broken nose, a cut to his forehead, seven broken ribs, a punctured lung, multiple brain bleeds and double vision. He spent a month in the Intensive Care Unit followed by a further two months in general hospital rehabilitation. On 28 March 2014 the health and safety inspector attended the work site. The inspector noted that there was no fall through protection in place on the roof to prevent falls through the roof. There were four skylights on the roof and there was also no fixed edge protection to prevent falls from the edge of the roof. Sections of the PVC on the roof had not been isolated. There was no safety mesh or other soft landing systems in place.

[5] The summary of facts records that there are best practice guidelines for working at heights in New Zealand which are accepted as being an industry standard for work of this nature. That is the facts that I have to proceed to sentence on today.

[6] What is not in dispute is that as a consequence of the fall Mr Seymour suffered significant and long-lasting injuries and those injuries will take a considerable amount of further rehabilitative work and to that extent the Court extends to Mr Seymour its greatest sympathies. One trusts that he will, in the fullness of time, be able to undertake a full recovery.

[7] The function for the Court today is to proceed with the sentencing exercise in respect of the company. It is important to note that while I have referred to Mr Seymour as being an employee of the company he was also a director of the company. Although, I have not heard any evidence today as to how the company's business was conducted and what role Mr Seymour may have played in dealing with health and safety issues in a general sense as part of the company's operations let alone the specific work that he may have undertaken on 27 March in his capacity as

a director or an officer of the company. The importance of that point will be clarified shortly.

[8] The sentencing exercise for the company requires the Court in the first instance to look at the provisions of the Sentencing Act 2002 and also to be guided by case law which has been discussed in submissions today. Amongst other aspects the principles and purposes set out in the Sentencing Act 2002 include holding the company accountable for what it has done or in this instance, what it has failed to do.

[9] Secondly, the principles and purposes in the Sentencing Act 2002 require the Court to denounce and deter behaviour or failure to take necessary steps. In other words, send a message out to the public that health and safety in employment and the safety of employees, in particular, must be given the upmost priority by employers and where that fails to take place a deterrent message must be sent by the Court. The reason for that is primarily to protect employees from failures on the part of companies or employers to take the necessary steps to ensure safety in employment.

[10] As Mr Muston said there is also a case called *Department of Labour v Hanhan and Philps Contractors Limited* that the Court must have in the back of its mind in proceeding to sentence. It is effectively described as being a guideline case and as Mr Muston has indicated the function of the Court here is threefold. Firstly, it must assess reparation and the quantum of any reparation that is to be paid to the victim. Secondly, it must assess and impose a fine. In doing so, the Court is required to look at the specific culpability of the company and to set that fine.

[11] I note as a preliminary matter the *Department of Labour v Hanhan and Philps Contractors Limited* case noted that where there is low culpability a fine of up to $50,000 may be imposed, where there is medium culpability a fine of between $50,000 and $100,000 may be in imposed and when there is high culpability a fine of between $100,000 and $175,000 may be imposed.

[12] It is accepted by the company that this is a situation where the culpability levels are described as being medium so the fine range the company says should be between the $50,000 to $100,000 range. There is some difference there between the

informant who says the culpability is at the upper level of that range and it should be at $100,000 and the company says that it is at the bottom end of that range, $50,000. The Court's task is to set the quantum for the fine and explain why it is set at that level.

[13] The third stage of the exercise is to step back and to look at the ability of the company to pay the reparation and the fine and to assess whether or not the fines and the reparation should be adjusted in light of the company's financial capacity. So that is the process that I am going to embark on today.

[14] Turning firstly to the reparation amounts. I have a number of documents that have been handed to me that are important. Firstly, there is a victim impact statement prepared by or on behalf of Mr Seymour. It notes that there have been a number of financial costs that he has had to bear and his wife has had to bear. They include a number of trips by Mrs Seymour to the hospital in Whangarei and to Auckland to assist in the rehabilitation process. That has included accommodation costs and other associated costs arising out of Mr Seymour and Mrs Seymour's travel to and from Auckland and Whangarei as required.

[15] More significantly though, if one puts to one side just for the moment the financial costs, there have been a number of personals costs to Mr Seymour and they note that he has, in recent times, experienced significant frustration arising out of the injuries that he has suffered. That included total amnesia for about 71 days after the accident. He describes himself as not being able to remember anything; he is suffering significant fatigue as a result of the accident and is unable to do a number of the activities that he had previously taken for granted.

[16] He has come to Court today with two walking sticks but he describes himself as requiring to hold on to something when he gets up off the floor, he has been experiencing double vision and is now not able to drive or, I am told, to watch TV. He requires the assistance of his wife to help him with day to day personal activities and I am told also that as a consequence of that Mrs Seymour has had to shut down a florist business that she was previously operating. That is some of the personal impacts that the accident has taken on Mr Seymour and Mrs Seymour.

[17] The Court, in the *Department of Labour v Hanhan and Philps Contractors Limited* decision that I have made reference to also pointed out that the purpose of reparation was to make good by way of financial compensation as much as that is able to be achieved by monetary payments alone. In contrast a fine is punitive in its nature and it is designed to serve the statutory purposes of denunciation, deterrence and accountability that I have made reference to.

[18] Having seen the material filed in the victim impact statement and the recent report from the eye specialist I am satisfied that the injuries that Mr Seymour sustained as a consequence of the fall are significant. I am also satisfied that they will be long-lasting and that his rehabilitation is likely to be ongoing and for a significant period of time.

[19] When one looks at those factors I take the view that reparation should be significant and I set a figure of $50,000 is to be paid to Mr Seymour. The High Court in the *Department of Labour v Hanhan and Philps Contractors Limited* case also made the point that reparation is to take priority over fines unless there would be special circumstances that make a sentence of reparation inappropriate.

[20] I enquired of the informant as to what investigations it had undertaken to determine the day to day role that Mr Seymour had taken in the operation of the company and I am told that there were no enquiries undertaken so to that extent it is very difficult for this Court to assess whether or not reparation should not be made the priority that the health and safety and employment regime has specifically contemplated. In other words, are there special circumstances here. In the absence of evidence, to say that there has been some form of contributory negligence on the part of Mr Seymour both as employee and as director, I cannot satisfy myself that those special circumstances such that I am of the view that reparation should take priority over any fine that I am about to impose.

[21] I turn now to consider the question of any fine. The information has filed, with its submissions, a best practice guideline for working at height in New Zealand. That guideline is dated April 2012, although, I am told in submissions today, earlier documents of a similar nature have been prepared. The informant, I am told,

conducted a number of seminars with those working in the industry including in the Dargaville area once these guidelines had been finalised and it is acknowledged in the document that there was widespread consultation to prepare these guidelines with members of the industry.

[22] To that extent it is important to put the guidelines in some context. Investigations show that working at height account for more than 50 percent of falls and from less than three metres and approximately 70 percent of falls are from ladders or roofs. The factors the guidelines say contributing to the injuries sustained from working at heights include a lack of or inadequate planning and hazard assessment, inadequate supervision, inadequate training for the task being carried out, incorrect protection or equipment choices, incorrect use or setup of equipment including the personal protective equipment and unwillingness to change the way the task is carried out when a safer alternative is identified and suitable equipment being unavailable.

[23] There are three steps that are considered to fall upon the company here. The first is to identify when a job can be done without exposing a person to a hazard or to eliminate the hazard all together. Secondly, if elimination is not practical then other should be taken to isolate people from the hazard. That includes using working platforms, guardrails, edge protection scaffolding, elevated work platforms, mobile scaffolding and the like. If neither elimination nor isolation is practical then steps should be taken to minimise the likelihood of any harm resulting. This means considering the use of work positioning systems or travel restraint rails or safety harnesses or something of that nature.

[24] In my view, when one looks at this particular situation the hazard, namely, working on a roof and the potential to fall through the roof or the skylight is obvious. The company, it appears, has failed to undertake the necessary steps to either eliminate the hazard or to isolate people from the hazard. It is accepted at the time this incident occurred that there were no written health and safety manuals or guidelines that the company operated by and there is no evidence before me today to suggest that prior to undertaking the roofing repair work the company or its employees undertook any specific site assessment to either eliminate or to isolate the

hazards that were evident on the job and as I have said it appears that the risks associated with anybody working from height are obvious and would have required some specific attention being given to it by the company. That, as I have indicated, the company has failed to do.

[25] The consequence is that each of Mr Seymour and the other employee, Mr Lowe, were exposed to the risk. When one looks at those factors I assess the culpability of the company as being high and I assess the culpability as being at the very end of the medium culpability range. The starting point for any fine should therefore be, in my view, $100,000.

[26] The informant accepts that there are no aggravating features associated with the company that would warrant the fine being increased. The question then becomes what mitigating features are there that would warrant the fine being reduced and in my view there are appropriately a number of mitigating features that would warrant the fine being reduced. Firstly, there is the guilty plea that has been entered and I will come back to that shortly. Secondly, there is cooperation with the authorities in relation to the investigation and the prosecution. Thirdly, there has been some remedial action put in place to prevent further incidents occurring and I will touch on that shortly and fourthly, there is a favourable safety record.

[27] Turning to consider those particular matters, I am of the view that the cooperation with the authorities is a matter that would warrant a significant discount being applied here. There is no suggestion at all that there were delays in notifying the authorities. There is no suggestion at all that the company has in any way tried to cover up any actions or inactions on its part. I am prepared to reduce the fine by 15 percent to reflect the cooperation that the company has provided to the authorities.

[28] Further to that, I note that after the accident the company engaged the services of a Craig Wallman who has prepared, on behalf of the company, a comprehensive occupational health and safety management plan. That was completed on 1 August 2014. Some five months after the incident. I accept that given Mr Seymour's injuries, it would have taken some time for that to be prepared.

I am prepared to reduce the fine by a further $10,000 to record the steps that the company has taken in the period since the incident occurred.

[29] Further to that, I am satisfied that the company has a favourable safety record. It does not appear to have come to the attention of the authorities in the past and that, in my view, warrants a further reduction by $5000 to recognise that favourable safety record.

[30] I am also of the view that credit needs to be given for the entry of a guilty plea. The guilty plea was entered at the earliest possible opportunity. That guilty plea was entered by notice on behalf of the company and the consequence of that was that it appears the matter was called on only one previous occasion before the matter has been set down for sentencing. A further reduction in the fine of 25 percent or $17,500 should also be made in my view. That would leave a preliminary end point of $52,500 for the fine.

[31] The third stage of the enquiry is to then consider whether the payment of reparation and the fine that I have made reference to is something that is able to be managed by the company and whether or not there needs to be further adjustments in those amounts.

[32] Full accounts have been prepared by the company and to that extent it is accepted by the informant that the company is in a difficult financial possession. There are assets that exist in the company and there are some savings in term deposits. In all, including the upcoming sale of the company and its assets, there is somewhere in the order of $62,000 that would be available to the company to meet both fines, reparation and the costs associated with winding the company up. One does not have any details as to what the winding up costs would be for the moment.

[33] Further to that, I am told that the company has a public liability insurance policy but the insurance company is, for the moment, refusing to pay out any claim that has been made by the company. The claim has not been rejected in full but there are issues that need to be worked through and may in turn need further work being done between the insurance company and the company itself for any claim to be

accepted. That then raises the question as to whether the reparation amounts would in fact be paid.

[34] I am of the view, therefore, that the fine should be reduced further because in my view there is considerable uncertainty as to the financial position of the company to meet its costs associated with the sale of the business and the winding up and there is also very clear doubts in my mind that the company will have the insurance claim on it. That is not to say I am expressing a view as to whether it should be on it or not, that will be for another Court on another day it appears. I am of the view, therefore, that the fine should be reduced by a further $22,500 to recognise the difficult financial position that the company is in.

[35] Therefore, that would leave, in my view, an end result where the company is directed to pay reparation of $50,000 to Mr Seymour and a fine of $30,000. Priority is to be given to the payment of reparation. Whether that be in the first instance by way of an insurance claim or in the second instance whether it be by way of assets that exist in the company.

G Davis
District Court Judge