NOTE: THIS JUDGMENT HAS BEEN REDACTED SO AS TO CONFORM WITH THE REQUIREMENTS OF AN ORDER MADE IN THE DISTRICT COURT AT CHRISTCHURCH ON 30 OCTOBER 2020

IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CRI-2019-009-003805
[2020] NZDC 22415

Worksafe
Prosecutor

v

EDR Contracting Limited
Defendant(s)

Hearing:	29 September 2020
Appearances:	N Szeto for the prosecutor O J Lund for the defendant
Judgment:	30 October 2020

REDACTED SENTENCING NOTES OF JUDGE G M LYNCH

Introduction to the charge

[1] EDR Contracting Limited is an earthworks, drainage and roading company (hence the name EDR) delivering civil construction services throughout the Canterbury region, and has the contract for the Townsend Road extension between Southbelt and Johns Road, South West Rangiora. Part of that work involves installing stormwater drainage.[1]

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[1] By agreement the sentencing notes have been redacted regarding the victim's name and the financial information provided by the defendant for sentencing.

[2] On 16 April 2019 EDR engaged Canterbury Concrete Cutting NZ Ltd (ConCut) to cut through the wall of a 180-mm-thick open-topped concrete sump-like manhole or chamber in a trench as part of the stormwater drainage work. ConCut were engaged when EDR realised it only had the capacity to make a 150-mm cut. While "AA", the ConCut employee tasked to undertake the work, was cutting the concrete with a concrete cutting saw he hit some steel (not an unexpected event) and while readjusting his grip on the saw he slipped and fell forward, and his right hand came into contact with the saw blade severing three fingers.

[3] As a consequence, EDR is now for sentence on a charge of failing to ensure the health and safety of AA in its capacity as a PCBU, that is a person conducting a business or undertaking.[2]

What happened on 16 April 2019?

[4] The job itself involved cutting two very large holes on opposite sides of the 2.5m x 2.5m deep concrete chamber to fit piping for the stormwater reticulation.[3] The area to be cut-out had been marked out by EDR. The chamber was accessed by stepping over a trench and then onto or over the shield protecting the chamber and then onto a tied off internal trench ladder before descending into the chamber on a ladder positioned for that purpose. This was a domestic-type ladder with a damaged foot bent inward. While access to the chamber had not been discussed with AA, an EDR employee helped AA get his gear down into the chamber before leaving him to get on with the job; and looking at the photograph of the set-up it was the logical way down into it in any event. That said, the route into and out of the chamber was not without risk.

[5] The chamber had water in it up to ankle depth, and roughly 30-50mm more after the accident. It is of course not unusual for water to be present in concrete cutting operations, but it is a hazard to be managed.

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[2] Sections 48(1), 48(2(c); and 36(1)(a) Health and Safety at Work Act 2015 (HSWA).
[3] The photographs in the agreed summary of facts shows the chamber and the worksite as far as it involved AA.

[6] AA arrived on the site at approximately 11.30am and was provided what was described as a "generic" health and safety induction by the EDR site foreman and shown the chamber he was required to work in. The induction involved EDR's foreman taking AA through EDR's standard induction forms, health and safety forms, identifying work being undertaken at the site which may impact on AA's work, and completing a checklist. AA was required to conduct a risk assessment/task analysis for his concrete cutting work. The requirement to conduct a risk assessment/task analysis was ticked off on EDR's health and safety induction checklist, but it was not seen by the EDR foreman or discussed between AA and the foreman. EDR's foreman thought AA was going to do the task analysis before he started work, but took no steps to ensure that this was done.

[7] AA used a petrol-powered concrete cut-off saw creating a cut to a depth of 150mm, and then used a hydraulic- powered concrete saw to complete the cut through the concrete (180mm). I understand that the petrol-powered saw was preferred by AA for the initial cut as it has more power than the hydraulic saw. Other ConCut employees had used only the hydraulic saw for earlier concrete cutting on similar chambers on the site. It was while using the hydraulic saw that AA hit some steel, and having readjusted his grip, slipped. AA put out his hand to stop his fall into the saw, but his right hand went into the blade and immediately severed the three fingers of his right hand. AA was able to get back up the ladder unassisted and call for help.

[8] The discussion in the summary of facts of how the accident happened doesn't quite line up with AA's Victim Impact Statement. The summary records that as AA pushed in on the saw and his foot slipped, the change in angle caused the blade to kick back and the three fingers to be severed. In the Victim Impact Statement AA states he commenced the bottom cut and hit some steel and when he repositioned his hands ("a typical procedure I'd do in this situation") he remembered slipping and falling into the saw and "put my hands out to stop my body falling into the saw". The Victim Impact statement is AA's recollection of what occurred and where it does not accord with the summary, I have preferred the Victim Impact Statement. However, what is common to both the summary and Victim Impact Statement is AA slipping before his hand went into the blade.

[9] EDR staff members nearby provided initial first aid treatment. AA's fingers were recovered and placed in a plastic bag with ice. There was some delay with the ambulance arriving, so a ConCut director drove A to hospital. Unfortunately, it was decided that there would be minimal benefit or outcome to AA from reattaching the fingers and AA underwent surgery to close his wounds.

The impact of the injury

[10] AA required ongoing treatment and had 25 days off work. AA initially returned on light duties with ConCut before returning to normal duties, however he ultimately resigned from ConCut in November 2019 having found that the work was just too hard on his body. Since resigning AA has been on a Jobseekers benefit and in part-time fitness instructing work, with a resultant reduced household income. AA recorded that he had unsuccessfully applied for a number of positions, but had been unsuccessful for a combination of reasons, in some cases because he was over-skilled, or due to loss of dexterity in his right hand, and, in others, by reason of the fact he had suffered a work-place accident itself. On a brighter note, AA completed a Personal Training course which has resulted in the part-time work.

[11] The Victim Impact Statement dated 26 August 2020 was well written and very helpful. I will not repeat everything AA addressed, however I will highlight some aspects of it. The loss of the fingers made the most basic of tasks difficult; going to the bathroom, holding utensils, getting dressed, playing with the children and doing chores around home, things that were once taken for granted. Playing the guitar, something AA enjoyed is no longer possible, but on a more sombre note was the effect on his eldest daughter who was 5 at the time of the accident who was scared of his hand and who did not want to come near AA or have him pick her up from school. The trauma has required the child to undertake counselling. AA's mental health has also suffered, as he explains, and it is perfectly understandable why that was so. AA is right-handed and has had to adopt a new method of writing. He misses the grip strength of his hand and is embarrassed and anxious about the look of the hand. He states that due to this he often avoids handshakes.

[12] That is a short summary of what was a lengthy, but entirely appropriate, Victim Impact Statement, and it is of course stating the obvious to record that the effects of this accident are going to be life-lasting.

[13] It is important to record that AA was well supported by ConCut following the accident, who also topped up his ACC payments so that he received his full pay while off work. In the sentencing notes for ConCut (which I will return to shortly) it was observed that AA's partner was particularly grateful for the ongoing visits, phone calls, food and gifts. The support was not only for AA but for the entire family. ConCut's remorse was discernibly genuine and AA's partner acknowledged that this assisted with the progress AA had made up to that point.

[14] Stephen Tait, one of the two directors and shareholders in EDR, phoned AA several times following the accident, relaying the company's sympathy and remorse. EDR also provided AA with a gift basket and continued to check in with him by phone for weeks after the accident to see how he as getting on with his rehabilitation and recovery. [4]

EDR's safe systems of work – a summary

[15] EDR has a dedicated health and safety manager and had in place a documented formal hazard and risk management system. The company has daily "toolbox" meetings before work commences, where safety issues are discussed, and the foreman conducts weekly site checks. There are also compulsory health and safety meetings for the staff. In relation to subcontractors and visitors coming onto a work site, they are provided with a health and safety induction and must "sign in". AA was inducted by the site foreman as I discussed earlier.

What were the practicable steps EDR should have taken to ensure A's safety while operating a cutting saw in the chamber at their workplace?

[16] Although EDR plainly had a number of safety processes and relevant documentation in place, it is accepted that the working environment AA was in, the

[4] Affidavit of Stephen Robert Tait 13 August 2020.

concrete chamber, had not been assessed as a confined space and no risk assessment had been undertaken by either EDR, or for that matter, by ConCut. Because no task analysis had been completed, the hazard of working in a confined space was not identified, and nor was the hazard of slips, trips and falls inside the chamber.

[17] The practicable steps EDR should have taken, and particularised in the charge itself, are as follows:

(a) developed, implemented, monitored and reviewed an effective safe system of work;

(b) Consulted, cooperated and coordinated activities with ConCut regarding the risks relating to concrete cutting in the manhole or chamber;

(c) Ensured an effective risk assessment/task analysis was carried out and appropriate controls were in place;

(d) Ensured workers had a safe means of entering and exiting the manhole or chamber;

(e) Ensured that water was removed from the manhole or chamber before work commenced; and

(f) Ensured that effective emergency procedures were in place before work was undertaken.

[18] The remedial steps taken following an accident like this are often illustrative of what should have happened prior. Since the accident EDR made the following changes:

(a) Non-compliant ladder domestic ladder replaced with new industrial strength ladder;

(b) Task analysis completed by Concut and EDR;

(c) Rescue from deep manhole using safety harness on worker before entering;

(d) Certified lifting strop/chain;

(e) Gas detector;

(f) Entry plan, emergency plan/extraction;

(g) Utilising a spotter for works;

(h) Use of the hydraulic saw over petrol-powered;

(i) If a petrol-powered saw is used, atmospheric testing must be done before it is used;

(j) Spotter to be used when working in manhole and rescue plan in place; and

(k) Confined space entry forms to be complete for each entry.

ConCut sentencing

[19] ConCut was sentenced by Judge McMeeken on 19 February 2020. Ideally, as the judge observed, EDR should have been sentenced at the same time, however discussions were continuing between WorkSafe and EDR as to resolution of the charges, which eventually resulted in a single charge representing EDR's failings as a PCBU with duties to AA working on their site.

[20] For the reasons explained in the decision, ConCut was sentenced to pay $23,400 reparation to AA, a $229,921 fine from a start point of $350,000; and $1,433.16 in costs.

[21] The reparation order needs some further explanation. Judge McMeeken fixed the total reparation to be paid to AA at $35,000, WorkSafe having contended for an

order for $37,000 was appropriate, while ConCut submitted for an order of $20,000. It appears that to ensure that sentencing could proceed, and for AA to get some reparation sooner rather than later, ConCut agreed to pay ⅔ (the $23,400) leaving EDR to pay the balance of $11,600. However, WorkSafe submits that ConCut's agreement to pay that proportion is not a reflection of its level of culpability, rather it was pragmatism at play.

The submissions on sentencing – a brief summary of the respective cases

[22] WorkSafe argues that EDR's culpability is in the medium band and seeks:

(a) Reparation in the sum of $11,600, to achieve Judge McMeeken's intention that the total order be $35,000;

(b) A fine in the range of $365,000; and

(c) An order for costs of $2369.93 (this having been agreed between the parties).

[23] Ms Lund argues that EDR's offending falls within the low end of the culpability scale and seeks:

(a) Reparation in the sum of $11,600;

(b) A fine of $50,000 (given EDR's means to meet a fine) to be paid in instalments; and

(c) The agreed order for costs of $2369.93.

[24] In relation to the fine, Ms Lund submitted that EDR's offending falling within the low end of the culpability scale, required a starting point of $300,000, but not only did there need to be discounts of 50% applied for the mitigating features as explained in the submissions, regard also must be had to EDR's [redacted] to pay a substantive fine. It was for those reasons then that a fine of $50,000 was argued for.

Restorative justice

[25] Restorative justice was directed and EDR representatives would have attended, however, AA did not wish to participate. AA was not obliged to attend and there are a number of valid reasons why a victim might decide not to attend. Accordingly, no criticism of AA is intended, or to be inferred. EDR is nonetheless entitled to have its willingness to attend a restorative justice conference recognised, and I will incorporate it in my assessment of the company's remorse.

EDR the company

[26] I was assisted by the affidavit (13 August 2020) from Mr Stephen Tait one of the two directors and shareholders of EDR. It is fairly lengthy, so I don't intend to summarise everything Mr Tait discussed in it. The purpose of the affidavit was to provide some essential background information about EDR's formation and, for want of a better expression, its work ethics. EDR expanded over several years from its initial 3 staff members (along with the 2 directors) to a staff of around 18 on the back of the Christchurch Rebuild. I am satisfied from what Mr Tait has said (and which is unchallenged) that EDR has always taken health and safety seriously and had health and safety systems in place at the time of AA's accident. Mr Tait, however, accepts that these systems could have been better and EDR has since taken steps to improve these systems further.[5]

[27] EDR is a company committed to supporting its local community and Mr Tait summarised its donations to, and support of, sporting and charitable organisations. I accept that this is a company that is, to use a perhaps overused expression, a good corporate citizen.

[28] While I will deal with EDR's financial position later in the context of the ability to pay or service a fine, Mr Tait discussed the [redacted] due to the impact of "lowest conforming tenders". As Mr Tait explained: "Lowest price conforming tenders have created a culture within the industry of extremely low tender price submissions from many contractors". Mr Tait attributed the [redacted] to securing [redacted] projects

[5] Affidavit of Stepehn Ribert tait 13 August 2020 at [12].

and that now to be added into the mix is the ongoing financial fallout of COVID-19. Accordingly, Mr Tait confirmed that EDR had [redacted] which has advised [redacted].[6]

[29] Mr Tait expressed deep responsibility for AA's accident, did not seek to blame him for it, and outlined EDR's contact with AA following the accident. Mr Tait observed that he felt keenly the reference by AA in the victim impact statement to the effect the damage to his hand had on his daughter. Mr Tait states that he frequently discusses the accident with all staff to ensure that they are aware of the dangers they face in the high hazard industry in which they work and concluded stating:[7]

> I have been committed to enforcing compliance of EDR's Health and Safety procedures at work and I felt deeply responsible for our systems failing AA on the day of the incident. As a result, I have dedicated the last 2 years to improving internal systems and implementing more in-depth health and safety training sessions at our monthly staff meetings to ensure no accidents occur again.

Approach to sentencing

[30] While this is a sentencing under the HSWA, the purposes and principles of sentencing under the Sentencing Act 2002 nonetheless apply. Here the purposes most relevant are to hold EDR to account for the harm done, promote in it a sense of responsibility, and to denounce and deter its conduct. While it is plain that EDR does not need specific deterrence given its response to the offending, general deterrence is nonetheless relevant. While they are important purposes of sentencing, I don't overlook the other purposes of sentencing under the Sentencing Act, and nor the principles of sentencing, which include the need to take into account the gravity of the offending, the culpability of the defendant, the seriousness of the offence as indicated by the maximum penalty, the effects of the offending on the victim and the need for consistency in sentencing. However, nor do I overlook another important principle of sentencing which is to impose the least restrictive outcome.

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[6] Affidavit of Stephen Robert Tait above n4 at [34]-[35]; and [44].
[7] Ibid at [53]-[54].

[31] Counsel for both WorkSafe and EDR refer to *Stumpmaster v WorkSafe New Zealand*[8] which confirmed a 4-step process to guide the Court on sentencing:

(a) Assess the amount of reparation to be paid to the victim, AA;

(b) Fix the amount of the fine by reference to the guideline bands and the aggravating and mitigating factors of the offending;

(c) Determine whether further orders under ss 152-158 of the Act are required. Apart from the agreed costs, no other orders are sought; and then

(d) Make an overall assessment of the proportionality and appropriateness of the total penalty imposed on the defendant.

Step 1: Reparation

[32] Judge McMeeken in the ConCut sentencing determined that the appropriate total order for reparation was $35,000, with ConCut meeting ⅔ of that order. Neither WorkSafe nor EDR take any issue with that assessment. Accordingly, it is agreed that EDR is to pay the balance of $11,600. Having reviewed the awards in the cases referred to by counsel I agree, but make the observation that now days awards of reparation rather pale against the level of fines imposed. While I appreciate that fines need to have a sting in the tail, otherwise unscrupulous employers (EDR not being in this category) might see fines as a cost of doing business justifying slack health and safety practices. AA might also view $35,000 for the significant injury and the life-long harm it will cause as being rather on the light side. Having said that, the assessment that EDR should meet a total of $35,000 has not been challenged by WorkSafe, and accordingly, to stay in step with the ConCut sentencing, I determine that the balance of $11,600 is what EDR is to pay by way of reparation to create the total reparation to AA of $35,000.

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

Step 2: Fine

[33] WorkSafe contends that EDR's culpability falls within the high end of the *Stumpmaster* medium culpability band[9], a band that has a starting point between $250,000 to $600,00, and accordingly submit that a starting point for the fine should be $500,000.

[34] Ms Lund submits that EDR's culpability falls within the low end of the medium *Stumpmaster* band and that a starting point of $300,000 for the fine is appropriate.

[35] In assessing the quantum of fine, I follow the orthodox sentencing approach in *R v Taueki*[10] by fixing a starting point based on the culpability of the offending and then adjust this for the aggravating and mitigating factors of the defendant. In assessing culpability of the offending, I consider the matters set out in *Department of Labour v Hanham and Philp Contractors Ltd.*[11]

Operative acts or omissions

[36] The operative acts and omissions here are accepted by EDR and form the particulars of the charge I have already set out. There is no need to repeat them.

Nature and seriousness of the risk of harm occurring and realised risk

[37] WorkSafe submits that there were a number of real risks in the current situation, including:

(a) The risk of cutting, or other serious injury, where the risk was actually realised;

(b) Risks that arise in confined spaces, in particular, the risk of carbon monoxide poisoning given the use of the petrol-powered saw in the confined space; and

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[9] *Stumpmaster* above n3 at [35](b).
[10] *R v Taueki* [2005] 3 NZLR 372; (2005) 21 CRNZ 769.
[11] *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79.

(c) The lack of safe entry and exit points which could give rise to a risk that a worker could not be safety extracted from the work space in the event of an emergency.

[38] Ms Lund, on behalf of EDR, accepts the seriousness of the risks identified, but observes that it was AA's election to use of the petrol-powered saw that made the chamber a "confined" space for the purposes of the industry guidelines. To this end, while acknowledging the clear lack of communication between the parties, Ms Lund submits that EDR is slightly less culpable than would have been the case had it known that AA's intention was to use a petrol-powered saw. However, given that it was only following obtaining expert evidence that EDR accepted that the chamber became a confined space on the introduction of the petrol-powered saw, there is no guarantee EDR would have interfered had it known AA intended to use that particular saw.

The degree of departure from prevailing standards

[39] Worksafe's "Introduction to the Health and Safety Act 2015 Special Guide" at February 2019 (and the previous version) provides that a PCBU must provide a safe system of work by:

(a) the systematic examination of tasks to identify risks associated with carrying it out;

(b) the identification of safe methods to eliminate or minimise identified risks; and

(c) the setting of safe methods to carry out the task.

[40] Worksafe's "Working with Other Businesses" at September 2017 provides that a PCBU will fulfil its duty to consult and co-operate if they identify the health and safety risks that need managing and agree together which PCBU is best placed to control each risk, clearly define responsibilities and actions and explain these to everyone, and carryout reasonable and proportionate monitoring.

[41] WorkSafe submit that while EDR had a number of prudent processes in place to reduce risks faced by its workers, it failed to adequately communicate with ConCut and AA once he was on site and the effect of that was safety issues were not picked up prior to AA going on site. In particular, WorkSafe highlight that had proper communication taken place, AA's use of a petrol-powered saw would have been identified, and therefore EDR would have identified that the site involved a confined space. However, I have already addressed the likelihood of that happening. WorkSafe further submits that proper communication with AA would have led to EDR being aware that water was lying in the chamber and posed a safety issue. Further, EDR failed to abide by well-known safety standards with regards to the safety of its workers getting in and out of the chamber, and in relation to the confined space, EDR failed to comply with the following industry guidelines:

(a) WorkSafe "Quick Guide – Confined Spaces: Planning Entry and Working Safely in a Confined Space," August 2017;

(b) WorkSafe "Fact Sheet – Confined Spaces: Planning Entry and Working Safely in a Confined Space," January 2016; and

(c) WorkSafe "Fact Sheet – Carbon Monoxide: Invisible and Deadly," January 2017.

Obviousness of the hazard

[42] There were 3 real substantive risks here:

(a) The risks associated with using a petrol-powered saw in a confined space;

(b) The risk of undertaking concrete cutting work when there was water in the chamber; and

(c) The access and extraction issue and the risk that flows from that.

[43] Each of these risks and the consequences of harm arising from them were obvious.

Availability, cost and effectiveness of the means necessary to avoid the hazard

[44] Both parties accept that there were readily available means to avoid the hazard, and that for little additional cost, mechanisms could have been put in place to avoid the very hazard that arose in the situation. As I discussed earlier, the steps EDR took post-accident (and appropriately so) illustrate what could have been done prior to the time of this accident.

The current state of knowledge of the means available to avoid or mitigate the risk

[45] I have dealt with this already under the departure from prevailing standards heading and will not repeat it.

Comparable cases

[46] Not surprisingly, there are few directly comparable cases and care needs to be taken not to strain the application of other sentencing cases where, for every similarity, there can be a factor to set it apart from the present case. While counsel have referred me to a number of sentencing decisions there is also the sentencing of ConCut to take into account as well, and neither counsel for WorkSafe or EDR suggest it has no relevance.

[47] WorkSafe contends that AA's actions are not a contributing factor and given EDR's culpability is towards the higher end of the medium culpability band, and relying in particular on the PCBU cases: *WorkSafe New Zealand v Kuehne & Nagel Ltd*[12] *and WorkSafe New Zealand v Alderson Poultry Transport Ltd and Tegel Foods Ltd*[13], a starting point fine of $500,000 is appropriate.

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[12] *WorkSafe New Zealand v Kuehne & Nagel Ltd* [2018] NZDC 20761
[13] *WorkSafe New Zealand v Alderson Poultry Transport Ltd and Tegel Foods Ltd* [2019] NZDC 25091

[48] Ms Lund submits that, notwithstanding that the site was controlled by EDR and that it was EDR that contracted ConCut to come onto its site to undertake the work, its culpability is in the low end of the medium band and certainly could not properly be assessed as higher than ConCut's medium culpability, as WorkSafe contend. Accordingly, that is why Ms Lund contends for a start point fine of $300,000.

[49] The tension in all this is that EDR employed the leading Canterbury, if not the South Island, provider of concrete cutting services to undertake the job it did not have the gear to do, and to a degree it is understandable that they might rely on that expert company to get on with its job and do it safely. However, it remained EDR's duty to provide a safe site, communicate adequately with someone like AA working on their site, and at the very least, consult with AA as to his intended plan in cutting the concrete.

[50] Much has been made of the water in the chamber. However, not only is concrete cutting an inherently dangerous undertaking, it won't be a surprise even to a layperson that a chamber or sump which is part of trenching work might have water in it (and here it was there to be seen before the work commenced) and that during hydraulic saw cutting the level of water might rise. Water is always present in concrete cutting, it cannot be eliminated. Further, it is stating the blindingly obvious that water creates a slipping hazard. Someone of AA's skill and experience would not have needed to have that spelt out to him. AA was wearing entirely appropriate footwear but did not use a wet vac to extract water from the chamber either before or during the concrete cutting. As Ms Lund observed, even if EDR had removed the water before the work commenced, AA was going to introduce more water to the chamber in a job that was going to take some time. Accordingly, AA was the person best placed to manage the hazard. Where EDR fell down was in its failure to have a discussion with AA. That said, it is not known what AA would have said or done had he been asked about extracting the water either before or during the concrete cutting.

[51] While the summary states that AA's foot slipped on the ground when pushing in to make the cut and that this caused the blade to kick out, that is not what AA says in his victim impact statement. AA does not say that the saw kicked back. AA said he hit some steel and repositioned his hands on the saw grip and then remembered

slipping and putting his hands out to stop himself falling on the saw. It is possible that the water in the chamber contributed to AA slipping, but it was a hazard that would have been apparent to him and did not require EDR identifying it to him, and the fact remains that he could have slipped in either 5mm or 50mm of water. It would have been helpful had there had been more assistance on what actually caused AA to slip, the industry practice on the extraction of water during concrete cutting in a chamber or sump like this; and what volume of water is acceptable during concrete cutting work like this. While this facet of the investigation is not as clear as WorkSafe would contend it is, that was not the only failing here, which must not be lost sight of.

Conclusion on culpability and the start point fine

[52] Stepping back and looking at it as a whole, I agree with Ms Lund that in the particular circumstances EDR's culpability is towards the lower end of the medium culpability band. Having reviewed all of the cases counsel have referred to me, in my assessment the appropriate start point fine is $300,000.

Aggravating factors

[53] The parties accept that there are no aggravating features.

Mitigating features

A summary of the respective cases on the deductions to be made

[54] WorkSafe submit that in total the start point fine can be discounted by 27% with the following deductions:

(a) 2% for reparation;

(b) 5% for remedial steps taken; and

(c) 20% for the guilty plea taking into account the delay in entering the guilty plea.

[55] Ms Lund submits that a discount of 50% is available to the defendant as follows:

(a) 7.5% for EDR's good safety record;

(b) 5% for arranging insurance/reparation;

(c) 7.5% for cooperation with investigation/remorse;

(d) 5% for remedial steps; and

(e) 25% for the guilty plea.

Discussion on the appropriate deductions:

Previous good character/safety record

[56] Good character and a good safety record over a number of years more often than not go hand in hand. It is unlikely that a defendant in EDR's position could call on recognition for its previous good character unless it also had a good safety record. Section 9(2)(g) of the Sentencing Act provides for good character. There is no good reason why a defendant company cannot claim it. The s 9 Sentencing Act factors are not excluded in sentencing matters like this. They are factors the court is required to take into account. I would deduct $25,000.

Remorse and reparation

[57] In my assessment these factors may be conveniently considered together. There is some remorse here, illustrated by what EDR did immediately after the accident, and apparent from what Mr Tait says on behalf of EDR in his affidavit which I discussed earlier. The fact that EDR, in the form of the 2 directors, was willing to attend restorative justice is also indicative of remorse and how seriously EDR have taken AA's accident. Ms Szeto argued that remorse needed to be exceptional which was a difficult threshold to meet. Section 9(2)(f) of the Sentencing Act puts no such caveat on remorse, rather it requires the court to take into account "any remorse shown

by the offender". Accordingly, I do not accept that argument, however I accept that remorse must at least be genuine, and more than the bare acceptance of responsibility inherent in a guilty plea.[14] I am satisfied that a foundation for a deduction for remorse is made out here.

[58] Reparation is a vexed issue because a responsible company, a company with the sort of character I have already given EDR credit for, will hold an insurance policy for reparation. Further, credit is being sought for something a prudent company would do as a matter of sound business practice; but against that, as discussed in the hearing, not all companies do.

[59] WorkSafe was anxious for any recognition of reparation EDR is ordered to pay not to exceed the sum its insurer will actually pay to AA, relying on *Stumpmaster* for the principle that any credit should not be greater than 1:1. Accordingly, WorkSafe would contend that an allowance for reparation paid to AA by EDR's insurer should not exceed the $11,600 it has agreed to pay. The difficulty with that is ConCut agreed (largely for pragmatic reasons) to pay ⅔ of the $35,000 Judge McMeeken identified as the appropriate overall reparation amount to be paid to AA by ConCut and EDR. That there happens to be two defendants and that they have entered into an arrangement to pay differing portions of the reparation (not reflecting their culpability) cannot be used to erode the credit that would ordinarily follow. I would deduct $30,000 for remorse and payment of reparation.

Remedial steps and cooperation with WorkSafe

[60] Both WorkSafe and EDR invite an allowance of 5% for taking remedial steps, notwithstanding that taking those steps was doing something that it was obliged to do from the get-go to meet its obligations and duties under the HWSA. Victims might understandably be troubled by defendants being awarded for taking steps that may have prevented their accident and harm. However, in some respects EDR has plainly gone above and beyond simply remedying what an effective health and safety systems would have identified pre-accident.

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[14] *Moses v R* [2020] NZCA 296, at [24].

[61] I have discussed earlier the steps EDR took post-accident to meet it obligations and duties under the HWSA and will not repeat them. EDR's cooperation with WorkSafe in my assessment needs to be considered at this juncture as well. I put to one side the delay over accepting that the chamber was a confined space on the introduction of the petrol-powered saw. With the benefit of what might be 20/20 hindsight, it is obvious. That it was not for EDR at the time, is reflected in the fact they went to the expense of obtaining expert advice. Accordingly, I weigh that against EDR readily accepting and addressing other identified failings. I would deduct $7500.

Guilty plea

[62] Finally, the guilty plea discount. The primary reason for the delay in entering the guilty plea was EDR seeking expert advice on the confined space issue. While I have already expressed a view about that, EDR were entitled to do so and I don't overlook that they accepted and did not challenge the other failings identified by WorkSafe. COVID-19 then intervened adding to the delay, however when the matter was resolved, the 3 original charges were amalgamated in a single charge. However, this should have been resolved earlier than it was. I would deduct $67,500 for the guilty plea.

Conclusion on fine

[63] From the start point of $300,000 and with total deductions of $130,000 the end point for the fine is $170,000.

Step 3: Other orders

[64] The parties agree that $2,369.93 in costs should be awarded. No other orders are sought.

Step 4: Proportionality

[65] If I understood the oral submissions on this point correctly and have not conflated some of the points made, Ms Lund invited me to reduce the fine on the basis of proportionality, by essentially asking me to apply a small business discount to

recognise EDR as a small family owned and operated company. That would be a slippery slope to embark upon. In the absence of authority to provide that sort of discount it is best to deal with this in the context of EDR's ability to meet a fine of this magnitude.

[66] The ability to pay a fine is a relevant consideration. While I am satisfied that the outcomes I have identified, considered together, are proportionate and would not require any adjustment in the ordinary course, I remind myself that section 40 of the Sentencing Act provides that the Court must assess a defendant's ability to pay a fine and permits the Court to either reduce or increase the fine according to the defendant's financial capacity.

Paragraphs [67]-[71] redacted.

[72] WorkSafe accept that financial incapacity may warrant a departure from the overall fine imposed. This is far from an exact science with just so many variables at play at a time of significant economic uncertainty and not just in the construction industry. I agree with Ms Lund that in these circumstances a conservative approach is called for. Having reviewed and reflected upon the competing positions advanced by Mr Buttle and Mr Shaw, in my assessment a fine of $75,000 can be met by EDR. Accordingly, I now reduce the indicated fine of $170,000 to $75,000.

[73] What I have not been told is whether it would be impossible for EDR to meet that obligation over a say 5-year period. That would be a $15,000 per annum commitment. I am satisfied that with effective budgeting, and if necessary trimming operating costs, the payments will be sustainable. Accordingly, I now fix the fine at $75,000 and authorise EDR to meet the fine if it chooses by instalments over an up to 5-year period.

Suppression

[74] Ms Lund applies for suppression of the financial information relating to EDR's ability to pay a fine. Publication might of course impact on its ability to secure

contracts if it was thought within the industry that they were in a perilous position. They are not, but the impression needs to be avoided, and accordingly I make the order.

[75] WorkSafe applies for name suppression of AA's name pursuant to s 202 of the Criminal Procedure Act on the grounds that he is the complainant in the offence and publication of his name would cause undue hardship to him. Suppression was ordered in the ConCut sentencing. It follows that I make the same order here.

Conclusion and orders

[76] EDR is formally convicted and sentenced to a fine of $75,000, reparation to AA of $11,600; and costs of $2,369.93. An order is made suppressing the financial information relating to EDR's ability to pay a fine; and consistent with the order made in the ConCut sentencing, suppressing publication of AA's name, or details which would identify him.

[77] I thank counsel for their assistance which has been appreciated.

G M Lynch
District Court Judge