

**IN THE DISTRICT COURT
AT HASTINGS**

**I TE KŌTI-Ā-ROHE
KI HERETAUNGA**

**CRI-2022-020-000577
[2023] NZDC 11324**

WORKSAFE NEW ZEALAND
Prosecutor

v

SILVER FERN FARMS LIMITED
Defendant

Hearing: 2 June 2023
Appearances: E Jeff for the Prosecutor
J Lill for the Defendant
Judgment: 2 June 2023

NOTES OF JUDGE D J McDONALD ON SENTENCING

[1] Silver Fern Farms Limited on 2 August 2022 pleaded guilty to one charge of being a PCBU having a duty to ensure as far as reasonably practicable the health and safety of workers failed to do so in respect of Mr Brian Wilson who suffered a serious injury. That charge carries a maximum potential fine of \$1.5 million.

[2] Before I commence my sentencing remarks proper, I acknowledge Mr Wilson here today. I am pleased that he has attended to hear both the submissions made to me by counsel for WorkSafe and for Silver Fern and my decision on sentencing. As both counsel have said and as I now say, nothing I will do today can bring you back to what you were before this incident. It is important I also acknowledge the presence of senior management and a board member of the defendant company Silver Fern. It

demonstrates the seriousness that they take of this prosecution and the seriousness with which they view what they must do to assist Mr Wilson.

The Facts

[3] The defendant, Silver Fern Farms Limited, is a New Zealand-wide food processing company with sites throughout New Zealand, it includes the plant at 226 Fraser Road. The company employs some 6,500 persons overall, at the peak season 900 at the Fraser Road plant.

The Machine

[4] The machine involved in causing serious injury to Mr Wilson was a hydraulically powered meat separating extruder designed and used to separate the meat from the bone of animals being processed. The output from the machine was the meat and a bone cake. There were safety measures in place to ensure, when operating in its normal function, workers could not access the pressing chamber because it was enclosed by a cylindrical sleeve, a white plastic guard held in place by a discharge pipe and the interlocked safety bar. When lifted, the interlocked safety bar caused the machine to cut out.

[5] However, the interlocked safety bar could be put back down and the machine turned on without the removal of the white plastic guard, discharge pipe or cylindrical sleeve in place permitting access to the pressing chamber while the ram was operable. There was no feature of the interlocked safety bar design that caused it to detect the presence or absence of the white plastic guard.

[6] On the day of the incident, 22 February 2021, an electrician at the defendant company was carrying out maintenance work on the machine and required the machine to be operated during the testing. The electrician asked Mr Wilson to turn the machine on. The machine had not been reassembled since it was cleaned, as it was awaiting a quality control inspection and the pressing chamber was left unguarded and open.

[7] Mr Wilson pushed the interlocked safety bar down without the white plastic guard in place and turned the machine on, causing the machine parts to move including the hydraulic arm. While the machine was operating, the hydraulic arm was moving backwards and forwards. As the ram cycled, Mr Wilson saw some residue on the hydraulic ram head. Mr Wilson used a paper towel to try and wipe the residue from the front of the ram head. While doing this, his hand became caught between the ram head and the end plate, resulting in the ram crushing his right hand.

[8] Mr Wilson was taken to the Lower Hutt Hospital, where his right hand was amputated at the wrist. His right hand was Mr Wilson's dominant hand.

[9] Although that is the facts and it may to some reading it consider that Mr Wilson was to blame for this, he was not. The machine should have been safe despite what was being carried out on it by way of maintenance or cleaning or whilst it was working. I emphasise, as I will and already have done, that in its normal operation this was a perfectly safe machine.

Approach to sentencing

[10] The approach to sentencing in this area is now well known. Regard must be had to s 151(2) of the Health and Safety at Work Act 2015 and the purposes and principles of sentencing contained in ss 7 and 8 of the Sentencing Act 2002.

[11] The now accepted guideline judgment for sentencing is that set out in *Stumpmaster v WorkSafe New Zealand*.¹ The High Court there confirmed there is a four step approach to the sentencing process:

- (a) assess the amount of reparation to be paid to the victim;
- (b) fix the amount of the fine by reference first to the guideline bands and then having regard to the aggravating and mitigating factors;

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

- (c) determine whether further orders under ss 152–159 of the Act are required;
- (d) make an overall assessment of the proportionality and appropriateness of imposing sanctions under the first three steps.

[12] I will follow, obviously, that sentencing guideline.

Step 1 Reparation

[13] Reparation is compensation to Mr Wilson for the emotional harm of losing his right hand. He has had read to me today his two victim impact statements, the first dated 4 October 2022, the second 26 May 2023. He is 50 years old. He has spent almost his entire working life in the meat industry. The impact of the loss of his right hand has been devastating.

[14] WorkSafe submitted \$55,000 as reparation for emotional harm is appropriate, Mr Lill for Silver Fern \$50,000. That has now become all but academic. Silver Fern Farms have paid to Mr Wilson \$50,000 which is currently in a solicitors trust account for his sole benefit. Silver Fern have also contributed further sums of money by way of ensuring that Mr Wilson gets the top of the range prosthetic for his hand, well above that which would be available under the ACC legislation. Further assistance to Mr Wilson has been made. All of that takes it well above what WorkSafe were seeking of \$55,000.

[15] Given that, there is no need for me to make a reparation order today; one, in effect, has already been paid.

Step 2 Fine

[16] I then turn to the fine. *Stumpmaster* sets out four bands that offending falls into:

- (a) Low culpability, the start point up to \$250,000.
- (b) Medium culpability, starting at \$250,000 and going to \$600,000.

- (c) High culpability, starting at \$600,000 and going to \$1 million.
- (d) Very high culpability, starting point \$1 million up to \$1.5 million the maximum.

[17] Both counsel have submitted to me that Silver Fern Farms Ltd culpability falls within the medium culpability band, that is \$250,000 to \$600,000. Where WorkSafe submit, when one looks at the culpability assessment factors, it falls towards the top of that medium culpability at \$500,000 to \$600,000, Mr Lill for the company submits that it is in the middle, \$400,000.

[18] It is necessary, therefore, for me to briefly go through the culpability factors that I find relevant.

[19] The operative causes or omissions. The reasonable practical steps that were not taken, where the machine was not adequately guarded, to ensure that at all times the ram was not in motion.

[20] That has now been done, as is set out in the affidavit of Mr Mitchell, the Group Health and Safety Manager of the defendant company. It was at some cost.

[21] As I have said, it was safe in normal operation. It was unguarded when the hinges holding the Teflon plate were removed, the screws, which meant that the interlocked bar could swing forward. When cleaning and maintenance was normally done, the machine was turned off; however, in this case when testing after maintenance the machine needed to be turned on. The plastic guard had been removed. No process or procedure was in place to ensure the safety to the obviousness of the hazard.

[22] Whilst not common for the sequence of events that occurred here which caused the injury to Mr Wilson, it would have been and should have been obvious that whilst testing was being done, no worker should have been close to the moving parts at all. The degree of departure was moderate.

[23] The machine was compliant. Having said that, no machine should have been left unguarded at any time without other procedures being in place to protect the workers from serious injuries.

[24] The obviousness of the hazard. Once the machine was turned on, unguarded, it would have been obvious to anyone that it was dangerous. What was uncommon were the two events here which was not anywhere near normal. It is impossible, in my view, to make such machines 100 per cent safe except, I suppose, by never running them. I do not find that the hazard was that obvious.

[25] The degree of harm. The risk of harm here was limited. I was reminded today of the comment in *Stumpmaster*, there was no real risk of death. That, of course, is not to diminish or downplay in any way the injury to Mr Wilson and the effect that it has had on him.

[26] A number of cases have been referred to me by both counsel. They are helpful. The fines range from \$400,000 to \$550,000. However, assessing a fine is quite fact specific. Taking all those matters into account, I consider a fine of \$450,000 as a start point is appropriate.

[27] I look at personal matters. Silver Fern have some previous convictions. They are modest. For a company as large as it is, operating in the field that it does, I would say that it is commendable that they have so few convictions; however, as Mr Lill submitted, they do not come to the Court with clean hands. WorkSafe submit a five per cent increase in relation to previous and I agree with that, making it \$472,500 in their favour.

[28] The company should get a full discount for their plea of guilty. They pleaded guilty as soon as practicable and I apportion 25 per cent.

Remorse

[29] There is a great deal of remorse within the company for what occurred and the impact of it. That is demonstrated by the efforts that the company has taken and will

continue to take in relation to Mr Wilson, reparation was paid without being ordered, 10 per cent.

Co-operation and remedial matters

[30] I consider five per cent for that, making a reduction of 40 per cent off the starting point which includes the five per cent increase. That makes a fine of \$283,500.

Costs

[31] There is no dispute as to that. There will be an order for costs in relation to WorkSafe for half their legal fees of \$694.03.

[32] I make an order as is normal in these cases that the summary of facts can be released to interested parties including the Fourth Estate.

[33] I am grateful, which I acknowledge, for the very full submissions made by both counsel and to Mr Mitchell for his affidavit which assisted me to understand better how this machine worked.

Judge DJ McDonald

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 20/06/2023