IN THE DISTRICT COURT
AT PALMERSTON NORTH

I TE KŌTI-Ā-ROHE
KI TE PAPAIOEA

CRI-2022-054-002669
[2023] NZDC 25709

WORKSAFE NEW ZEALAND
Prosecutor

v

DUNLOP DRYMIX LIMITED
Defendant

Hearing: 19 October 2023

Appearances: E Dallas and K Sagaga for the Prosecutor
B Harris for the Defendant

Judgment: 19 October 2023

NOTES OF JUDGE J KREBS ON SENTENCING

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[1] A factory preparing concrete plaster asphalt and other similar product has been operational in Feilding for many years. In July 2021, following the receivership of a previous owner of the business, the operation was purchased by the defendant Dunlop Drymix Limited.

[2] The man who was to become the victim here had worked in the factory for five and a half years or more at the time of the incident on 26 November 2021. Most of that experience had been with the previous owner.

[3] At the time the defendant took over the operation the defendant responsibly arranged for a hazards assessment to be undertaken. This identified risks around machinery and equipment and the defendant had identified the need to include further controls around certain equipment including the incline conveyor which caused the injury to the victim in this case. Until something more permanent could be arranged temporary safety equipment was put in place on the first day the defendant took over the business.

[4] The incline conveyor was a piece of equipment which included a conveyor belt used to transport the mixed dry product from the area where it had been mixed in a hopper through a room and into the area where it could be bagged. It was a very fundamental piece of equipment, and its operation did not require any interaction or operation by any members of staff. The conveyor belt was either on or it was off. It did its job, as I say, without the need for any interaction.

[5] The victim was in a relatively senior role in terms of the factory staff. On the morning of 26 November he began work for the day. His principal job was in batching and mixing the products, making sure the correct additives were included in the mixture in the right proportions. He was the only worker operating this particular area of the factory on the day during the day shift.

[6] At 7 o'clock that morning he carried out some preliminary tasks and then decided that he would clean the incline conveyor. At that point it was protected or should I say workers were protected from it by the placement of cones, some temporary barriers and some hazard signs. He removed those to clean the dust away from the conveyor at a time when it was not operational.

[7] Realising that he needed to do more he left the conveyor and returned with a metal hose which had compressed air coming from it. He had intended to blow further dust and dirt from the conveyor belt. While he was doing that he dropped the metal airpipe in the machinery and instinctively reached in to retrieve it. Unfortunately, for reasons which are not explained to me by either counsel or in the summary of facts, the incline conveyor was by this stage operating.

[8] As he reached in to collect the airpipe his fingers became caught between the belt and one of the rollers. In his own words he tried to pull back from the roller, but the roller and belt had his fingers too tightly and he was unable to pull his hand out. It dragged him into the machine and at one point he feared he would lose his life.

[9] In a very chilling passage of his victim impact statement, he describes the pain and how the pain stopped when his arm was torn from his shoulder.

[10] At that point and in a remarkable display of stoicism he was able to run from the room where this had occurred and make the accident known to other staff members. He is complimentary of the level of immediate first aid provided by other staff members who were able to stem the bleeding. Given the significance of the trauma the injury could if not handled properly have been fatal through loss of blood.

[11] Emergency services attended the scene. Despite later surgical efforts his arm could not be reconnected and he is now without his arm apart from a small amount of bone.

[12] The company defendant is prosecuted under the Health and Safety at Work legislation because it is alleged that they had failed to provide reasonably practicable protection for the victim and other workers. It is alleged that the company should have provided, maintained and monitored compliance with an effective safe system of work for cleaning and maintaining the conveyor including carrying out an effective risk assessment with effective controls and to have developed and implemented a standard operating procedure.

[13] Secondly, it is alleged that the company should have ensured that the conveyor was safe to use, and clean including being fitted with an effective guarding system in accordance with industry standards.

[14] Thirdly, it is alleged the company should have provided workers with effective training and instruction about safely cleaning the conveyor.

[15] To this charge the company has pleaded guilty at an appropriate time. The question today is the penalty to be imposed together with any other orders that are appropriate. The maximum fine for the offence is $1.5 million.

[16] I have received submissions from both counsel for WorkSafe and from Mr Harris, barrister of Auckland, who is counsel for the company.

[17] Both agree that the first step that I must undertake is to assess what emotional harm reparation ought to be ordered. The parties are in agreement that it is never possible to put a money figure on the emotional harm suffered in accidents such as these. In times gone by there has been a scale, but we have moved on from such a blunt system and now what is required is some consideration of the range of difficulties which flow from the injury in comparison with other cases.

[18] The parties are agreed that the amount which ought to be ordered is the sum of $70,000. From that I must deduct the sum of $10,000 which has been voluntarily paid by the company to their credit at an initial stage. So the order I will make is for emotional harm reparation in the sum of $60,000.

[19] I must then consider what level of fine I should impose, and I must begin by assessing a starting point.

[20] Previous authorities and guideline decisions in particular the case of *Stumpmaster v Worksafe New Zealand* set out a range of bands assessed as to culpability.[1] Cases involving low culpability a starting point of up to $250,000 is suggested as reasonable. For medium culpability $250,000 to $600,000, for high culpability $600,000 to a million and for very high culpability $1 million and more.

[21] The prosecution here argue that the culpability ranges the very upper end of the medium culpability range and suggest a starting point of $600,000. The defence argues that that is too high, that whilst the case plainly sits within the medium culpability band, by reference to other authorities the starting point is far more in the range of perhaps $450,000.

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

[22] It is difficult to find cases which are on all fours and any attempt to do is futile. What needs to be addressed is the degree of culpability here by reference to what actually occurred and by reference to what actually occurred in other cases.

[23] A comparison with other concrete industries here is not particularly helpful. Comparisons with cases that involve the use of conveyor belts and the injuries which might flow from them is more important.

[24] Ms Sagaga and Ms Dallas point to the case of *WorkSafe New Zealand v Carter Holt Harvey Ltd* being a 2018 case from the District Court as a close example.[2] In prosecution submissions that case is summarised as follows:

> On the day of the incident the victim was instructed to manually align a conveyor belt which was normally done automatically by the machine. This required the victim to reach into the machine with his torso resting on the frame of the machine and his feet off the floor so he could reach bolts on the underside of the belt. Part of the machine suddenly moved and collided with the victim causing his chest and shoulder region to be crushed. The Court noted it was almost a surprise that the victim had not died given the severity of his injuries. The Court found the defendant failed to guard the machine, secure the machine against inadvertent movement and develop and implement procedures for manually tracking the belts. The Court found that the need for the victim to put his whole body at risk made the case more serious than one where the victim assessed the machinery using their hands or lower part of their arm. A starting point for the fine was set at $600,000 being on the cusp of medium and high culpability.

[25] In the case of *WorkSafe New Zealand v Alliance Group* the victim was operating a screw conveyor and opened the sliding cover to access and clear blockages from the box section.[3] In doing so his hand came into contact with a rotating screw and his hand was amputated. The Court found that failing to adequately guard the machine was a fundamental breach even though it may not have been anticipated by the defendant, that a worker would have wanted to put their hand in the machinery.

[26] The Court was also influenced by the fact that the victim had only been employed with the defendant five days with little or adequate training in respect of the machine when determining culpability. There the starting point for the fine was set at $550,000.

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[2] *WorkSafe New Zealand v Carter Holt Harvey Ltd* [2018] NZDC 22605.
[3] *WorkSafe New Zealand v Alliance Group Ltd* [2018] NZDC 20916.

[27] There are many cases referred to in the authorities and cases referred to by the defendant.

[28] In my view the starting point contended for by the prosecution is too high. The comparison with *Carter Holt Harvey Ltd* demonstrates that what happened in that case was more significantly serious. The defendant there directed the defendant put himself at risk thereby aggravating the seriousness of the case.

[29] A similar issue arose in *Alliance Group Ltd* in that the defendant went to clean a moving machine.

[30] The case here is nearly as serious as the *Alliance Group* in my view. What alters the seriousness is the fact that the worker here had been employed in the same business, operating the same equipment for five and a half years. It is not a case where he was new and had not been properly inducted or educated as to the dangers.

[31] That said, the defendant knew of the risks and knew what its newly taken over workers were exposed to. In my view significantly more should have been done than simply the erecting of cones and some tape and some signs around that piece of equipment.

[32] The company has admitted that that was the case and admitted that they should have put in place proper procedures and admitted that there should have been better and more effective training around this very obvious hazard which was identified on the first day the company took over operation of this factory.

[33] The starting point is a fine of $540,000. From that I deduct the deductions which have essentially been agreed. Previous good character exists here to a significant level and a five per cent deduction is allowed together with a five per cent deduction for co-operation with the investigation.

[34] There was no doubt that the defendant company has been remorseful and has done everything it possibly can to assist the victim. That is demonstrated by the ongoing payment of wages for a number of months, followed by the top up for the

balance the defendant will receive from ACC which will continue until the end of this year. That is effectively keeping the victim in his full wage for more than two years following the incident. That behaviour in my view is commendable of the company.

[35] The discount for guilty plea of 25 per cent must be allowed as must a five per cent discount to recognise the reparation payments which have been ordered.

[36] Total discounts then of 45 per cent are available to the company here.

[37] The resultant fine then is one of $297,000. I have already made the order of emotional harm reparation in the sum of $60,000 and there will be an award of costs in the sum claimed which are not disputed by the company in the sum of $3,877.27.

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Judge JG Krebs
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 24/11/2023