IN THE DISTRICT COURT
AT INVERCARGILL

CRI-2017-025-002290
[2018] NZDC 3667

WORKSAFE NEW ZEALAND
Prosecutor

v

NIAGARA SAWMILLING COMPANY LIMITED
Defendant(s)

Hearing: 13 February 2018

Appearances: E Jeffs for the Prosecutor
J Lill for the Defendant

Judgment: 28 February 2018

JUDGMENT OF JUDGE B A FARNAN
[AS TO SENTENCE]

Introduction

[1] The defendant has pleaded guilty to one charge under s 48(1) and (2)(c) Health and Safety at Work Act 2015 (HSWA).

[2] In pleading guilty, the defendant company has acknowledged breaching the duty under s 36(1)(a) which imposes a requirement on all persons conducting a business or undertaking (a PCBU) to ensure the health and safety of their workers so far as reasonably practicable. The maximum penalty for a corporate entity, such as this defendant, is a fine of $1.5 million.

[3] This sentencing was before me on 13 February 2018. I had read the written submissions received from counsel for both the prosecution and the defendant prior to

coming into Court. At the hearing, I heard oral submissions from both counsel and then reserved my decision on sentence.

Background

[4] Niagara Sawmilling Company Limited (the defendant) is a limited liability company and employer. It has been operating since 1954. It operates two sites; a main processing site at Kennington, Southland, and a finishing and distribution plant at Ashburton. It employs approximately 170 staff, 120 of whom are based at Kennington.

[5] Mr Tama Siolo (who was the victim in this matter) was a worker for the defendant. He worked at the Kennington premises as a machine operator. He started working as a temporary worker on 1 July 2016 and became permanently employed by the defendant on 1 September 2016.

[6] The defendant operates a grader/trimmer line. The machinery involved in this incident is known as the "spiral roll case" and is operated in the defendant's sawmill operation at Kennington. The process which is undertaken is that the timber travels on a series of chains and rollers up to the re-saw and then to the spiral roll case before sliding down onto an unscrambler which separates the timber before it travels onto the lug loader deck to the bin sorter.

[7] Mr Siolo's role was monitoring the turn down on the grader/trimmer line, including ensuring the timber travelled along the rollers so that it was level when it reached the next area and did not snag.

The incident

[8] On 17 October 2016 Mr Siolo commenced work at 6.00 am. He attended the sawmill pre-start meeting and then went to his workstation for the start of production. That morning, there were some problems with the timber snagging and Mr Siolo's supervisor stopped one of the feed chains. This allowed Mr Siolo to clear the backlog of timber which meant there was less product flow and resolved the issue.

[9] At about 7.00 am, Mr Siolo observed a small piece of timber alongside the spiral roller. He reached his hand in to dislodge it. His glove was drawn into a gap between the metal roller and the metal checker plate decking. He pulled his hand out. A colleague saw the ripped glove and turned the machine off.

[10] As a result of this incident, Mr Siolo's right index and middle fingers had been partially amputated. He was taken to Southland Hospital and underwent immediate surgery but his fingers were unable to be re-attached. He also suffered a shoulder injury.

Approach to sentencing under the HSWA

[11] The principles set out in *Department of Labour v Hanham & Philp Contractors Limited*[1] under the Health and Safety and Employment Act 1992 (HSEA) remain generally applicable. In *Hanham* the three-step approach to sentencing was based upon the well-established principles set out in *R v Taueki*[2]. The steps are as follows:

(a) Assessing the amount of reparation;
(b) Fixing the amount of the fine;
(c) Making an overall assessment of the proportionality and appropriateness of the total imposition of reparation and the fine.

[12] Under the HSWA, the Court now has the ability to make a variety of ancillary orders outlined in Part 4, Subpart 8 of the Act. Amongst other things, these cover a variety of matters such as "adverse publicity orders" and orders to pay the regulator's costs in bringing a prosecution.

[13] Given that these additional orders are now available, the prosecution had suggested that an additional step be inserted between steps two and three of the traditional sentencing framework. I consider this additional step to be appropriate and now turn to consider the four steps in the sentencing process.

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[1] *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095; (2008) 6 NZELR 79 (HC).
[2] *R v Taueki* [2005] 3 NZLR 372 (CA).

Step one – assessing the quantum of reparation

[14] The HSWA does not affect ss 32-38A Sentencing Act 2002. Section 32 provides that the Court may impose a sentence of reparation if the offender has, "through or by means of" its offending caused a person to suffer emotional harm and loss consequential on any physical harm.

[15] The sentence of reparation must be a principal focus and is the first main step in the sentencing process. The sentences of reparation and fines serve distinct and discrete purposes. The assessment of reparation must be made taking into account s 32 of the Sentencing Act, including any offer of amends made by the offender, and the offender's financial capacity[3].

[16] In this case the prosecution submits that reparation in the region of $30,000 to $35,000 for emotional harm under s 32(1)(a) and $160 reparation for consequential loss under s 32(1)(c) is appropriate. The prosecution accepts that the defendant paid Mr Siolo the sum of $5000 on 22 November 2017 and has to date made up the 20 percent shortfall in ACC payments for Mr Siolo's lost income. However, the prosecution submits that the amount of $30,000 reparation they are promoting should be additional to the $5000 already paid to Mr Siolo (making a full reparation payment of $35,000).

[17] In concluding that the amount of $30,000 is an appropriate reparation payment, the prosecution refers to the physical and emotional harm suffered by Mr Siolo which is detailed in his victim impact statement and includes:

(a) Mr Siolo's right index and middle fingers were partially amputated and unable to be re-attached. He had to have additional reconstructive surgery in December 2016;

(b) The injury to Mr Siolo's right hand has affected his independence, including difficulties doing basic tasks, an inability to play the guitar, or to engage in sporting activities with his children, including boxing;

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[3] *Department of Labour v Hanham & Philp Contractors Ltd,* above n 1, at [32]-[35].

(c) The injuries have affected his intimate relationship with his partner;

(d) Mr Siolo initially blamed himself for the incident, feeling shameful and stupid, which had an impact on his self-confidence;

(e) Additionally, Mr Siolo has put on weight due the physical and emotional impact of the incident. Previously he had worked hard to lose weight. He has experienced lack of sleep;

(f) Ultimately Mr Siolo describes the incident as "life changing, leaving him maimed, disfigured and scarred." He has also had to make the difficult decision to remove his point finger to the knuckle if the reconstructive surgery is not successful, although at the sentencing hearing Mr Siolo advised the Court that decision has not yet been made.

[18] The prosecution refers to various cases where the victims suffered similar injuries. The reparation payments in those cases ranged in sums between $20,000-$38,000.[4]

[19] The defendant submits that reparation is compensatory in nature. Its purpose is to compensate for the emotional and physical harm caused to Mr Siolo. The defendant acknowledges the harm caused to Mr Siolo as a result of the accident and refers to the ACC shortfall top-up made by the defendant as well as the $5000 voluntary reparation payment.

[20] The defendant submits that an amount of reparation in the vicinity of $20,000 is appropriate, and is in line with the most severe injury in *WorkSafe NZ v Prepared Produce Limited*[5] referred to in the defence submissions. The defendant submits that such a payment would be consistent with other cases and takes into account the payment that has already been made. The cases relied upon by the defendant variously refer to payments of between $18,500-$20,000.[6] However, I note that these cases,

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[4] *WorkSafe NZ v PG & SM Callaghan Ltd* [2017] NZDC 27814; *WorkSafe NZ v ITW New Zealand* [2017] NZDC 27830; *WorkSafe NZ v Timbershade Blinds Ltd* [2016] NZDC 15833; *WorkSafe NZ v New Zealand Timber Ltd* [2015] NZDC 19471.

[5] *WorkSafe New Zealand v Prepared Produce Ltd* [2016] NZDC 3446.

[6] *WorkSafe NZ v Timbershade Blinds Ltd,* above n 4; *WorkSafe NZ v Industrial Tube Manufacturing Company Ltd* DC Hamilton CRI-2014-019-1977, 20 August 2014.

including *Prepared Produce Limited,* were brought under the earlier legislation when the Courts tended to award lower levels of reparation.

[21] The facts of this case in terms of injuries sustained by Mr Siolo are very similar to the case of *Callaghan,* in which the victim had his middle and ring finger completely amputated, and his little finger partially amputated in an auger using a rotating blade. One finger was able to be reattached but Judge Maze still referred to the injuries as being significant. The Judge did not make an award of reparation as the defendant company had already made significant payments to the victim totalling about $60,000, but noted that both counsel agreed that a likely reparation figure in the region of $30,000 would have been within the range adopted in similar cases.[7]

[22] In this case Mr Siolo was not able to have any of his fingers re-attached and he has also suffered a shoulder injury. I agree with Judge Maze's assessment in *Callaghan* and consider the amount promoted by the defendant in this case is too low. Conversely, the figure promoted by the prosecution is at the higher end of the range of what should be imposed.

[23] Taking into account the $5000 already paid by the defendant, a fair award in my view, given the nature of Mr Siolo's injuries, is the sum of $27,000. In addition, there is the sum of $160 for consequential loss which both counsel agree should be paid.

Step two – assessing the quantum of fine

[24] The assessment of a starting point for the fine involves what has, since the *Hanham* decision, been an assessment of culpability bands, generally "low", "medium" or "high", but at [57] *Hanham* did not preclude a fourth band for cases where "extremely high" culpability existed, where a fine greater than $175,000 could be considered.

There has not yet been a sentencing decision of a higher court which has considered the higher penalties under the current legislation (now $1.5 million, previously

[7] *WorkSafe NZ v PG & SM Callaghan Ltd,* above n 4, at [12].

$250,000 for the equivalent offence).

[25] There have, however, been various District Court decisions which do not bind this Court but which suggest culpability bands that take into account the much-increased penalties. I refer in particular to His Honour Judge Gilbert's decision in *WorkSafe NZ v Rangiora Carpets Limited*.[8] In *Rangiora Carpets,* the Judge referred to six possible culpability bands, with the "medium" band having a starting point of $350,000-$600,000 and the "medium/high" band having a starting point of $600,000-$850,000.[9]

[26] However, as stated by Her Honour Judge C M Ryan in *WorkSafe NZ v The Tasman Tanning Company Limited:*[10]

> [132] …There is wisdom, in my view, in the iteration of about four bands, striking a balance between consistency and flexibility.
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> [133] That is particularly so given the wide range of offences and offenders pursuant to HSWA and for which a more rigid categorisation of sentencing bands may not be able to be imposed.
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> [134] Sentencing Judges will, just as they have done when applying the bands or starting points stipulated in tariff cases, consider whether an offence falls into the lower, middle or upper range within the band they find is applicable.
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> [135] Accordingly, bearing in mind Parliament's concern that previously imposed penalties were too low, and aware that there is no post-*Hanham* appellate guideline judgment, I propose to follow the four-band approach in *Hanham* with appropriate modifications to consider the increase in penalty. I adopt the four bands suggested by Ms Petricevic and set out in paragraph 85 above.

[27] The four proposed sentencing bands by the prosecution in *The Tasman Tanning Company* were as follows:

(a) Low culpability: A fine of up to $400,000;

(b) Medium culpability: A fine between $400,000 and $800,000;

(c) High culpability: A fine between $800,000 and $1.2 million;

(d) Extremely high culpability: A fine between $1.2 million and $1.5 million.

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[8] *WorkSafe NZ v Rangiora Carpets Ltd* [2017] NZDC 22587.
[9] At [34].
[10] *WorkSafe NZ v The Tasman Tanning Company Ltd* [2017] NZDC 24398.

[28] I am reminded also of Her Honour Judge Maze's comments in *Callaghan* that it is not for this Court to issue binding authorities despite, I would comment, this Court's efforts on other occasions to achieve a fair outcome when dealing with increased penalties.

Prosecution submissions

[29] The prosecution submits that the defendant's failure should be assessed against the following four culpability factors, as identified in ss 22 and 151 of the HSWA, as follows:

(a) The risk of, and the potential for, illness, injury or death that could have occurred;
(b) Whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred;
(c) The degree of departure from prevailing standards in the sector/industry as an aggravating factor; and
(d) The cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

[30] The prosecution submits that the defendant's culpability is moderate to high. The defendant failed to ensure the health and safety of its workers in respect of the risks posed by the trapping hazard between the moving spiral roller and checker plate decking. Further, the prosecution submits it was reasonably practicable for the defendant to:

(a) Ensure there was an effective system to assess and monitor risks associated with the grading trimmer line plant - the defendant had engaged an external health and safety specialist who had identified ongoing hazards, but the defendant's (then) health and safety adviser disagreed with the external specialist's recommendations. The fixed guard did not comply with the relevant guarding standard. The defendant should have carried out a detailed hazard identification and risk assessment which should have been implemented in full, with a further system of monitoring the effectiveness of guarding of the grading trimmer line plant to ensure the

guarding was fit for purposes and prevent inadvertent access by workers to moving parts of the machinery.

(b) Ensure the grading timber line plant was adequately guarded to ensure dangerous parts are not inadvertently accessed - the trapping point was within easy reach of a worker at the workstation. The fixed guard that was installed did not extend to the left of the workstation, which is where Mr Siolo had his accident. The prosecution submits that if a fixed guard was impractical, there were other alternatives available and, additionally, it would have been appropriate to install an interlock on the gates, which would mean that reliance was not placed on workers manually pausing the spiral roll case.

(c) Ensure that effective procedures for clearing timber blockages are implemented and monitored as to the process around clearing jammed timber although incidents were recorded in the Hazard Register, the process was not properly implemented or monitored. The defendant did not monitor how workers cleared jams to ensure that the process was followed and was effective. This, the prosecution submits, is particularly relevant, given the production target meant it was particularly important for the defendant to ensure that production was not being prioritised over following health and safety processes.

[31] Taking into account these culpability factors, and the relevant authorities,[11] the prosecution submits that a starting point in the vicinity of $600,000 is available to the Court.

Defence submissions

[32] In response to the prosecution's submissions, the defendant submits that while it did not follow Mr Brown's recommendation in respect of the timber grader (for which the company has been criticised by the prosecution), that was due to the

[11] *WorkSafe NZ v Budget Plastics Ltd* [2017] NZDC 17395; *WorkSafe NZ v Atlas Concrete Ltd* [2017] NZDC 27233; *WorkSafe NZ v PG & SM Callaghan Ltd,* above n 4; *WorkSafe NZ v ITW New Zealand,* above n 4; *Department of Labour v Hanham & Philp Contractors Ltd,* above n 1; *WorkSafe NZ v Meycov Foods Ltd t/a Rutherford & Meyer* [2015] NZHC 1180; *Arbor Reman Ltd v Department of Labour* (2010) 8 NZELR 57.

defendant's then health and safety manager being concerned that implementing Mr Brown's recommendation would create a more serious hazard to workers, which is a reasonable basis, the defendant submits, to depart from Mr Brown's recommendation.

[33] However, the defendant accepts that on the day of the accident, one end of the guard installed was inadequate to prevent operators (in this case, Mr Siolo) from reaching into the machine if a worker decided to try and quickly adjust or remove a piece of wood, as Mr Siolo did that day.

[34] The defendant submits that there is some merit in considering Judge Gilbert's six-band approach in *Rangiora Carpets,* although acknowledges that the District Court should not attempt to create its own tariff decision for HSWA offending until it is decided by the appellate courts.

[35] Having regard to the criteria in s 151 HSWA, the defendant submits that the following factors are relevant in assessing a starting point:

(a) This is not a case where the machine had no guarding at all. There was guarding but it did not meet the required standard. Workers could still reach into the dangerous parts of the machine;
(b) Prior to the incident, the defendant had undertaken a full site risk assessment and had already implemented some changes, including guarding, at a cost of around $338,000. It also restructured its health and safety team and added more staff to the team; instituted regular staff meetings which discussed health and safety; trained supervisors; developed annual schedules for undertaking risk assessments and hazard identification; and installed CCTV to monitor health and safety;
(c) The production bonus, the defendant submits, had limited relevance as the accident only resulted in a small stoppage;
(d) The defendant accepts that the guarding did not comply with industry standards;
(e) The level of training given to Mr Siolo was going beyond industry standards;

(f) This was not a case where a death, as opposed to a risk of injury, would reasonably be expected to occur, and was not a situation where multiple victims or members of the public were at risk;
(g) While acknowledging Mr Siolo suffered a very serious injury, the defendant submits that when assessing culpability, the Court needs to consider and recognise the wide range of even more tragic workplace accidents.

[36] Ultimately, the defendant submits that its culpability in this case is on the cusp of the lower medium and medium bands proposed by Judge Gilbert in *Rangiora Carpets,* and an appropriate starting point is around $350,000.

Assessment – starting point

[37] In my view, the offending in this case is broadly similar to those in *WorkSafe NZ v ITW New Zealand* and *WorkSafe NZ v PG & SM Callaghan Ltd.*

[38] In *ITW NZ,* a worker's hand was crushed by a press that was inadequately guarded. Culpability was considered to be in the medium range, as the incident was foreseeable and the degree of departure from industry standards "reasonably significant."[12] Judge Mackintosh set a starting point of $450,000.

[39] In *Callaghan,* a worker's hand was drawn into an unguarded v-belt and pulley system of an auger when he stepped over the shaft of the auger and lost balance. The auger was partly guarded. The worker's hand middle and ring fingers were amputated and little finger partly amputated. The worker had been trained and instructed not to step over the shaft. Judge Maze assessed the defendant's culpability as medium and viewed the departure from industry standards as "significant" and the costs of remedy "neither onerous or prohibitive."[13] A starting point of $400,000 was adopted.

[40] Having gained particular assistance from *ITW NZ* and *Callaghan* in terms of company factual situations, my view is that this is offending that should be described

[12] *WorkSafe NZ v ITW New Zealand,* above n 4, at [35].
[13] *WorkSafe NZ v PG & SM Callaghan Ltd,* above n 4, at [16].

as medium or slightly lower, and that an appropriate starting point is somewhere in the range of $450,000 to $600,000, but at the lower end of that range. That is within the medium range.

[41] In this case guarding was in place but clearly did not meet the required standards. It could be argued that the situation for Mr Siolo was no better than if there was no guarding whatsoever. This situation is analogous with a swimming pool being three-quarters fenced but unfenced for the remaining quarter.

[42] Additionally, while the (then) health and safety manager's reason for not following the independent expert's recommendation is explained as being due to the fact it would create a more serious hazard, there is no evidence before me to support that contention.

[43] Therefore, taking into consideration all of the matters I have referred to, together with counsel's submissions, I conclude that the appropriate starting point, before an uplift for aggravating features and a discount for the mitigating factors and guilty plea is applied, is $500,000. I am of the view that the defendant's offending, for the reasons already discussed, is within the medium range. This fits within the medium range promoted by Judge Gilbert in *Rangiora Carpets* but also fits within the medium range of the bands determined in *Hanham*. The medium band in *Hanham* was $50,000 to $150,000. The fines have now increased to six times what they were under the previous legislation. If I equalise those fines by a factor of six, the medium range for *Hanham* becomes $300,000 to $600,000. This offending, being serious, fits within the higher end of the increased range.

Uplift for previous convictions

[44] Both the defence and prosecution agree that the defendant's three previous convictions (in 2003, 2011 and 2015) are a relevant aggravating factor.

[45] The prosecution submits a 25% uplift is appropriate, whereas the defence submits that is excessive and that a 5-10% uplift is more in line with the cases. However, I note that when the defendant was last convicted in 2015, Her Honour

Judge Cook applied a 10% uplift for the defendant's similar previous health and safety breaches.

[46] In my view, an uplift greater than 10% is therefore required and I apply a 15% discount. Therefore, from a starting point of $500,000, I increase the fine by 15% (being $75,000) to make an end starting point of $575,000.

Personal mitigating factors

[47] The defendant submits there should be a 30% discount for mitigation on the basis of cooperation; remedial steps including continuous improvements to health and safety (at significant expense); and remorse including the voluntary reparation payment made to Mr Siolo and the support provided in getting him back to work.

[48] From the end starting point of $575,000, I allow a global discount of 25% for these mitigating factors outlined above. This is not, in my view, out of line with the cases. This amounts to a deduction of $143,750 and results in a provisional fine of $431,250.

[49] The defendant entered an early guilty plea. I therefore give the defendant the full discount of 25% (an additional deduction of $107,813). This then results in a fine of $323,437.

Step three – ancillary orders

[50] The prosecution seeks costs. This case has involved extensive submissions about sentencing bands from both counsel, which has been necessary due to the relatively recent enactment of the HSWA. I consider a modest order for costs is just and reasonable.

[51] I therefore make an order for costs and direct the defendant to pay the amount of $278, being the costs of external counsel. In this case I do not exercise my discretion to require the defendant to pay what are effectively costs related to in-house counsel's time.

Step four – overall assessment

[52] The total reparation and fine imposed must be proportionate to the circumstances of the offending, and appropriate to achieve the sentencing principles of accountability, denunciation and deterrence.

[53] I have considered the totality principle both in relation to the fine and reparation. I do not believe these amounts breach the totality principle taking into account the facts of this case where Mr Siolo suffered a very serious life-changing injury, the maximum penalty provided for in the legislation ($1.5 million) and the need for accountability and deterrence.

[54] In this case, there are no concerns about the defendant's financial capacity which may affect its ability to comply with the sentence.

Sentence

[55] Accordingly, I impose the following sentence:

(a) An order for reparation payable to the victim of $27,000.00;
(b) An order for consequential loss payable to the victim of $160.00;
(c) A fine of $323,437.00;
(d) Costs in the amount of $278.00 payable by the defence to the prosecution;
(e) The amounts ordered to be paid in (a) to (d) above are payable within 28 days of the date of this document.

B A Farnan
District Court Judge