EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT WHANGAREI

CRI–2017–088–002981
[2018] NZDC 4766

WORKSAFE NEW ZEALAND
Prosecutor

v

AVON INDUSTRIES LIMITED
Defendant

Hearing: 22 February 2018

Appearances: L Moffitt for the Prosecutor
P White for the Defendant

Judgment: 21 March 2018

RESERVED JUDGMENT OF JUDGE D J ORCHARD

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[1] The defendant, Avon Industries Limited, has pleaded guilty to one charge laid under s 48(1) and (2)(c) and 36(1)(a) Health and Safety at Work Act 2015 (HSWA). The specific allegation is that being a PCBU (defined in s 17 of the Act as a person (which includes a company) conducting a business or undertaking), it failed to ensure, so far as was reasonably practicable, the health and safety of workers who worked for it, including [the victim], while the workers were at work in the business at 31 Pipiwai Road, Kamo, Whangarei and that failure exposed the workers to a risk of serious injury.

[2] The relevant provisions of the Act are set out hereunder:

> **48 Offence of failing to comply with duty that exposes individual to risk of death or serious injury or serious illness**
>
> (1) A person commits an offence against this section if—
>
> (a) the person has a duty under subpart 2 or 3; and
>
> (b) the person fails to comply with that duty; and
>
> (c) that failure exposes any individual to a risk of death or serious injury or serious illness.
>
> (2) A person who commits an offence against subsection (1) is liable on conviction,—
>
> (c) …to a fine not exceeding $1.5 million.
>
> **36 Primary duty of care**
>
> (1) A PCBU (person conducting a business or undertaking as defined in s 17 of the Act) must ensure, so far as is reasonably practicable, the health and safety of—
>
> (a) workers who work for the PCBU, while the workers are at work in the business or undertaking;

[3] These provisions are informed by s 3 of the Act:

> **3 Purpose**
>
> (1) The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by—
>
> (a) protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant; and
>
> (b) providing for fair and effective workplace representation, consultation, co-operation, and resolution of issues in relation to work health and safety; and
>
> (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting PCBUs and workers to achieve a healthier and safer working environment; and
>
> (d) promoting the provision of advice, information, education, and training in relation to work health and safety; and
>
> (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and

(f) ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and

(g) providing a framework for continuous improvement and progressively higher standards of work health and safety.

(2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.

[4] The summary of facts is agreed.

Background to the offence

[5] The defendant Avon Industries Ltd (Avon) is a limited liability company. Its premises are in Kamo, Whangarei. As part of its operation it carries out hot-dip galvanising. This includes galvanising lengths of chain and a bespoke machine for which there is no operating manual is employed in that particular process.

[6] The process involves dipping items into a bath holding molten zinc. The bath is 6700 millimetres long, 1200 millimetres wide and 2000 millimetres deep. The walls of the bath stand 970 millimetres high from the floor. The temperature of the zinc is around 450° to 465° celsius. The machine used for this process is composed of a long frame of approximately the same dimensions as the zinc bath. There are wheels at either end which operate as in-feed and out-feed wheels for the chain. The chain is fed in over the in-feed wheel, dipped into the molten zinc and comes out over the wheel at the other end. The out–feed wheel is suspended over a water bath into which the chain is fed as it emerges from the molten zinc. As just described, this is a frame and so the zinc is largely uncovered. There is an obvious risk of workers being splashed by the zinc during the process and they wear protective clothing to guard them from injury. It was common ground at the hearing that the nature of the process meant that it was difficult to guard workers from injury through splashing by any mechanical means, such as shields or screens.

[7] On 11 October 2016, the day of the accident which has given rise to this charge, [the victim] was acting as the supervisor in charge of the chain galvanising process. He noticed that the chain on the in-field wheel had jammed and that another worker had shut off the machine. It was common ground that occasionally the chain did jam as it went over the wheel but the defendant insisted and I understand the prosecution does not take issue with this, that this was always remedied by running the wheel in reverse.

[8] For some reason that was not explained [the victim] decided that reversing the wheel would not work. He did not actually try to free the chain by that method. Instead he climbed up onto the frame of the machine and stood on the platform that runs horizontally across one third of the machine. He used his gloved right hand to try and shake the chain free but slipped and his left foot went through the gap in the machine frame underneath the shute which runs from the in-feed wheel into the zinc bath. [the victim] then fell onto his backside on top of the machine frame and his left foot then went into the zinc bath. Molten zinc poured over the top of [the victim]'s safety boot and inside it before he was able to pull his foot out of the bath.

[9] [The victim] suffered serious harm in the form of deep burns to his left foot and ankle. Ultimately he had to undergo a skin graft and he spent 21 days in hospital. In his victim impact statement [the victim] described the extreme pain that he suffered from the burn and from the treatment which that burn necessitated. The injury had a significant impact on his life and continued to do so until the end of November 2017 when he finally ceased making regular visits to the Burn Centre at Middlemore Hospital. His injury has continued to impact on his ability to go for walks of any distance and to perform the tasks he used to do such as mowing lawns and working on restoring cars and bikes. He continues to experience tingling pins and needles and a sore heel in the injured foot. He did not want to return to galvanising work and began a new job in March 2017.

[10] In the immediate aftermath of the accident the director of Avon, [the company director], who appears to be the managing director of the firm on a day-to-day basis, discovered that a week prior to the accident [the victim] had been seen by a supervisor to get onto the side of the galvanising bath and had been rebuked for so doing. [The

company director] said in his affidavit dated 15 February 2018 that he was dismayed to learn of this and also by the fact that the information had not been passed on to him. He says that had he known of that event he would have instituted disciplinary action against [the victim]. I also note that it was suggested by [the victim] that other employees, and [the company director] himself, had on occasion taken the actions that led to [the victim]'s accident. [The company director] firmly rejected that assertion and the prosecution did not pursue it. I am proceeding on the basis that, at the time of the accident, [the company director] was unaware that [the victim] or anyone else had ever engaged in the actions which led to this incident and that the evidence does not establish that anyone, apart from [the victim], ever had.

Particulars of failure

[11] The prosecution asserted and the defence accepted that, prior to the accident it was *reasonably practicable* (as defined by s 22 of the Act) to have:

(i) Conducted a systematic risk assessment of the chain rig and the chain galvanising process;

(ii) Undertaken a systematic process to identify and apply any appropriate safeguards and safety control measures in respect of the chain rig and chain galvanising process to ensure workers are given the highest level of protection against harm;

(iii) Developed, documented, implemented and communicated a safe system of work in respect of the use of the chain rig and chain galvanising process to its workers;

(iv) Adequately trained its workers, monitored compliance and enforced a safe system of work in respect of the use of the chain rig and chain galvanising process.

Approach to sentencing

[12] I adopt the approach to sentencing set out in *WorkSafe New Zealand v Budget Plastics (New Zealand) Limited*.[1]

[1] *WorkSafe New Zealand v Budget Plastics (New Zealand) Limited* [2017] NZDC 17395

[13] This confirmed a three-step approach to sentencing based upon the sentencing principles in *R v Taueki*.[2] These steps are:

(i) assessing the amount of reparation,

(ii) fixing the amount of the fine,

(iii) making an overall assessment of the proportionality and appropriateness of the total imposition of reparation and the fines.

[14] At this point I note that there is only one point upon which the prosecutor and the defendant are not agreed and that is the starting point for the fine. I will come to that later but I note that, while ultimately it is the Court's responsibility to ensure that any order made is appropriate I am satisfied in this case that the amounts agreed upon between the parties are in fact appropriate.

Reparation

[15] The prosecutor submitted and the defendant agrees that emotional harm reparation in the order of $30,000 is appropriate. In the first instance the prosecution submitted that there should be an ACC "top-up" representing the difference between the accident compensation payments made and the wages that would have been made to [the victim] had the accident not occurred. It transpired that the company had already made that payment.

[16] I fix reparation in this case at $30,000.

Fine

[17] Worksafe has submitted that a starting point of $600,000 is appropriate for the fine.

[2] *R v Taueki* [2005] 3 NZLR 372 (CA)

[18] Avon submits that the starting point should be between $450,000 and $500,000.

Culpability bands

[19] While I accept that it is not for the District Court, a Court of first instance, to set tariffs at the same time I regard the culpability bands suggested by His Honour Judge T J Gilbert in *Worksafe New Zealand v Rangiora Carpets Limited*[3] a useful guide. As His Honour said, a multiplicity of bands aids greater consistency in sentencing. I set out those culpability bands below:

Culpability Band	**Fine**
Low	$0 to $150,000
Low/Medium	$150,000 to $350,000
Medium	$350,000 to $600,000
Medium/High	$600,000 to $850,000
High	$850,000 to $1,100,000
Extremely High	$1,100,000 +

[20] I am mindful of the provisions of s 151 which are reproduced hereunder:

> **151 Sentencing criteria**
>
> (1) This section applies when a court is determining how to sentence or otherwise deal with an offender convicted of an offence under section 47, 48, or 49.
>
> (2) The court must apply the Sentencing Act 2002 and must have particular regard to—
>
> (a) sections 7 to 10 of that Act; and
>
> (b) the purpose of this Act; and
>
> (c) the risk of, and the potential for, illness, injury, or death that could have occurred; and
>
> (d) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and

[3] *Worksafe New Zealand v Rangiora Carpets Limited* [2017] NZDC 22587 at paragraphs [31] and [34].

(e) the safety record of the person (including, without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person) to the extent that it shows whether any aggravating factor is present; and

(f) the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and

(g) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

Sentencing Act 2002

[21] I consider that the following sentencing purposes should predominate in this case:

(a) Section 7(1)(c) to provide for the interests of the victim of the offence (this has already been done through the order for reparation).

(b) To hold the defendant accountable for the harm done to the victim, s 7(1)(a) of the Act.

(c) To deter the defendant and other persons from committing similar offences.

[22] I am mindful of the principles of sentencing set out in s 8 Sentencing Act 2002 and regard ss 8(a), (b), (e), (f) and (g) as having some application in this case.

[23] In oral submissions, the defendant's counsel emphasised the difficulty of guarding against the risks of workers being burned by molten zinc by mechanical means. It is impracticable for the company to erect effective screens. Since the accident the frame has had a heavy wire mesh placed over it with apertures for the chain to enter the molten zinc and to exit it. It was explained that this is far from satisfactory as the zinc hardens around the aperture and is difficult to remove.

[24] The defendant also emphasised that [the victim] had been "told off" when he had climbed onto the frame the week before and put that forward as the company taking action on the infraction.

[25] My view is that neither of these matters are helpful to the defendant.

[26] The more difficult it is to guard against a risk by mechanical means the more important it becomes to guard against it by such means as training, supervision, monitoring and discipline. This is particularly so where the potential for death and/or serious (not to say excruciatingly painful) injury is great. The acknowledged failure in these areas is consequently particularly culpable.

[27] Likewise the defendant's supervisor seeing the defendant engage in precisely the behaviour which a week later led to this injury fixes the company with knowledge of that behaviour. I consider that the supervisor's response and therefore the company's was totally inadequate given the recklessness of the behaviour and the very obvious potential for disaster. As [the company director] says in his affidavit: if he had known, he would have disciplined the defendant but knowledge should also have triggered the actions itemised in the particulars referred to in paragraph [11] hereof. It did not.

[28] I have noted the comments of His Honour Judge Taumaunu in *WorkSafe New Zealand v Atlas Concrete Limited*[4] but even so the level of culpability in this case is in the medium/high bracket. I accept the prosecutor's submission that an appropriate starting point for a fine can be no less than **$600,000**.

Adjustments

[29] I accept that an uplift of 10 percent is appropriate to reflect the defendant's prior convictions, as is acknowledged by the defendant. I also accept that a reduction of 25 percent is appropriate to reflect the payment of reparation, co-operation/remorse and remedial action taken by the defendant. A further reduction of 25 percent is also allowed to reflect the defendant's early guilty plea. The defendant is therefore fined

[4] *WorkSafe New Zealand v Atlas Concrete Limited* [2017] NZDC 27233 at paragraph [55].

the sum of **$371,250**. While little information has been placed before the Court as to the size of the defendant's operation, its financial position and ability to pay a fine, the information the Court does have suggests that as a small to mid–size operation, the prosecutor clearly is satisfied that an award of the amount sought will have a sufficient impact on the defendant to provide a deterrent effect and common–sense suggests that at this level will bite a small to medium–sized operation.

[30] Finally an order pursuant to s 152(a) HSWA towards the payment of Worksafe's costs in bringing the prosecution of $1584.50 is made. That amount represents 50 percent of Worksafe's recorded legal costs and is agreed by the defendant.

D J Orchard
District Court Judge