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

IN THE DISTRICT COURT
AT WAITAKERE

I TE KŌTI-Ā-ROHE
KI WAITĀKERE

CRI-2018-090-002322
[2019] NZDC 24736

WORKSAFE NEW ZEALAND

v

CENTRAL SITEWORKS LIMITED

Hearing: 29 January, 29 April and 10 December 2019[1]

Appearances: C O'Brien and C Pille for WorkSafe New Zealand
C Mansell for the Defendant on 29 January 2019
No appearance for the Defendant on 10 December 2019

Judgment: 12 December 2019

RESERVED NOTES OF JUDGE J JELAS ON SENTENCING

Orders made

[1] At the final sentencing hearing,[2] the following orders were made:

(a) A reparation order in favour of [the victim] in the sum of $35,000.

[1] The sentencing hearing on 29 January 2019 was adjourned part-heard. It was agreed with counsel that in light of the late filing of the affidavit of D G Lane dated 29 January 2019, determination of the defendant's financial capability to pay reparation, fine, or other orders made, could not proceed. However, it was agreed that sentencing could proceed to the extent that steps 1, 2 and 3 (in part) as set out in *Stumpmaster and Ors v WorkSafe NZ* [2018] NZHC 2020 could be determined. A second sentencing date was set for 17 April 2019 at 11.45 am with timetabling orders made for the filing of additional information and submissions. The April sentencing hearing was adjourned after Ms Mansell withdrew as counsel for the defendant. Further delays resulted from the defendant company being placed in liquidation.

[2] 10 December 2019.

(b) No fine was imposed.

[2] No fine has been imposed against Central Siteworks Limited (CS) because of its financial predicament. CS was placed into liquidation in May 2019. The report from the liquidators[3] indicates it is most unlikely any fine will be paid. WorkSafe acknowledged the financial reality of the situation and accepted no fine should be imposed.

The prosecution

[3] The defendant company, Central Siteworks Limited (CS), has accepted responsibility for offending under ss 35(1)(a) and 48(1) of the Health and Safety at Work Act 2015 (HSWA). CS has accepted being a person conducting a business or undertaking (PCBU).[4] The particulars of CS's failure were failing to assess the workers were competent to undertake the forestry operation. Secondly, to ensure that the workers engaged to undertake the forestry operation or tree felling work were competent to undertake such work. The maximum penalty for this offence is $1.5 million.

Background facts

[4] A site commonly known as the Hunter Road Block was to be developed. A company was employed to undertake the earthworks on the site. That company approached and contracted CS to undertake the removal of trees from the site. CS is a limited liability company.[5] CS in turn contracted [name deleted – the arborist] to undertake the tree removal work. [The arborist] was known to CS as an experienced arborist. [The arborist] in turn subcontracted his crew to carry out the tree removal work. The crew consisted of four others of which [the victim] was one. [The victim] had the responsibility of tree faller.

[5] The site was large and contained a stand of unpruned and unthinned regenerated radiata pines. The pines were spread over the undulating land of the block.

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[3] Rodgers Reidy Liquidators Report dated 10 June 2019.
[4] HSWA ss 17-19
[5] Incorporated 24 April 2013. The sole director and shareholder of CS is Dion Lane.

The trees that required felling were around eleven years old and with an approximate height of 20 metres. Many were growing at irregular angles. The estimated time for felling and extraction of trees was approximately 12 months. Neither [the arborist] nor any of his crew had previously undertaken forestry work. While many had undertaken smaller scale tree removal, none of them had undertaken forestry work or had experience extracting or removing large scale wood lots.

[6] [The victim] had not been trained and did not hold any forestry or agricultural qualifications.[6] [The arborist] who was in charge of the crew, had no agricultural or forestry qualifications. Neither [the arborist] nor [the victim] had any objective assessment of their competency with tree felling, in a forestry situation.

[7] On 11 April 2017, the crew were clearing trees on the site. [The victim] and [the arborist] were thinning trees while other crew members were acting as spotters or delimbing trees. [The victim] was in the process of felling a tree when he felt the tree starting to go. [The victim] turned his back in order to get out of the way. He was hit from behind and fell on a nearby stump. His chainsaw was located a metre or two away from him. He was conscious but in pain. He suffered significant injuries.

Approach to sentencing

[8] In the *Stumpmaster* decision, the Court identified a four step sentencing process, the four steps being:

(a) Assess the amount of reparation to be paid to the victim.

(b) Fix the amount of fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors.

(c) Determining whether further orders under ss 152 to 158 of the HSWA are required.

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[6] [The victim]'s prior work experience included set building which included felling some trees for use as models in movies and pruning pohutakawa trees using climbing gear.

(d) Make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

Reparation – for emotional harm

[9] [The victim] suffered a significant injury as a result of the accident. His number 8 rib was shattered into splinters when his body landed on the tree stump. Upon impact, other ribs broke into bigger pieces, some of which perforated his lungs. He was diagnosed as suffering a flail chest injury with multiple rib fractures and a punctured lung. He undertook a new treatment programme. He underwent a three and a half hour operation to remove the rib splinters. Two pieces of titanium mesh were then screwed to each side of his rib cage through the bone fractures to heal the ribs. He spent nine days in hospital.

[10] It took [the victim] six months to recover from the initial injury. When he then began work, it took him a further three or four months before he was able to work full time. In total, he had approximately ten months off work. He has been able to return to physical work in the outdoors albeit with a new employer. This is his preferred work environment.

[11] [The victim] will not make a full recovery. The injuries he sustained have aggravated a pre-existing shoulder injury. He does not have full power in an arm and shoulder which he anticipates will be an issue in the future. As a result, he has not been able to return to his pleasure activity of surfing which he has undertaken all his adult life and achieved a level of success in. In the past, [the victim] has competed in New Zealand National Surf Championships and previously on the position of first in Auckland Surfing Championships. He previously was made appearances on the amateur and semi-professional surf competition circuit. Although he stopped competing some time prior to the accident, he would regularly surf in his leisure time.

[12] [The victim] has been optimistic in his outlook following his injury. He describes his inability to surf as follows:

> Eventually I had to accept that surfing was no longer a viable option for me and I took up trail bike riding which has given me a similar adrenalin rush to surfing but is not the same.
>
> The last time I surfed I never imagine that I would never be able to surf again. I have deep feelings of concern and regret which do sometimes lead to frustration when I either see people surfing or hear my friends talking about surfing.[7]

[13] While reparation is not sought, it is clear from the Victim Impact Statement and the record of the Restorative Justice Conference, that [the victim] suffered financial loss as a result of the injuries. In the Restorative Justice Conference, he estimated to have incurred financial losses in the range of $4000 and $5000. This is understandable given he only received the minimum entitlement under the Accident Compensation Corporation (ACC) provisions due to his short employment period with CS prior to the accident. Further, there was a two week stand down period when he was not entitled to receive any payment. The payment level he received was the lowest based rate which is approximately half what he was paid when contracting with CS. Further, it took two to three months before his ACC payments commenced. During that time, he was supported financially and emotionally by his parents.

[14] A financial payment was recently made by CS to [the victim] after the Restorative Justice Conference. Payment of $1700 (gross payment) was made, representing the loss of income during the two week stand down period before ACC was paid.

[15] It is clear the accident has had a significant impact on not only [the victim], but on his supportive parents, both emotionally and financially. It is clear all these factors would have had a significant impact on [the victim]'s emotional wellbeing. As he states in his Victim Impact Statement, the fact he can no longer surf has led him, at times, to have deep feelings of concern and regret which sometimes lead to frustration. It is also clear that [the victim] is the type of person who has endeavoured to remain positive throughout this ordeal despite the significant challenges he has faced. He has been able to return to work in a work environment that he most enjoys and has found an alternative sport which goes some way to meeting his leisure time passions. He has, however, suffered a significant injury which impacted him for some time, endured

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[7] Victim Impact Statement, p 3.

the stress of financial insecurity, and had to be buffeted by his parents in the process of re-engaging in the workforce. I do not consider his positive approach to life to be a factor mitigating in favour of CS. Various cases have been submitted which, in my view, support a reparation payment in the vicinity of $35,000 to $40,000. It must be emphasised that the level of amount set should not in any way be equated with the injuries sustained or other ill effects. The level that I will set is my best endeavours to ensure consistency with other cases, having evaluated the particular circumstances of this offending. I set the level of reparation at $35,000.

[16] No reparation is sought for any consequential losses suffered.

Level of fine

[17] WorkSafe submits that under the guideline bands set out in *Stumpmaster*[8], that CS's culpability falls between the medium and high culpability bands. WorkSafe submits a starting point fine of $600,000 is appropriate.

[18] Ms Mansell submitted the culpability of CS is better assessed as of medium culpability with a lower starting point fine. She emphasised the reliance CS placed on [the arborist] to appropriately assess his own capabilities and those of his crew.

[19] *Stumpmaster* confirmed the earlier four guideline bands for assessing culpability and in turn the start point sentence. Those four bands are as follows:

(a) Low culpability – starting point of up to $250.000.

(b) Medium culpability – starting point of $250,000 to $600,000.

(c) High culpability – starting point of $600,000 to $1 million.

(d) Very high culpability – starting point of $1 million plus.

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[8] At [35].

[20] The reasonably practicable steps CS failed to take to avoid risk of injury to [the victim] were undertaking an initial assessment of the Hunter Road Block work which included determining the nature and scope of the tree felling work required. Secondly, to ensure the workers contracted to undertake the tree felling and clearing operation were competent and able to undertake the work.

[21] CS had an incomplete health and safety plan for the Hunter Road Block. The document provided to WorkSafe in the course of its investigation identified general hazards associated with tree felling. The health and safety plan was incomplete in that it failed to identify or recognise specific hazards associated with the Hunter Road Block and the work to be undertaken.

[22] [The arborist], who was employed by CS to undertake the tree removal work and who was in charge of the subcontracting crew, had not previously worked in forestry or a wood lot prior to accepting the contract for the Hunter Road Block. [The arborist]'s crew had experience in removing small trees. No crew member had any forestry work experience involving the extraction and removal of a large-scale wood lot.

[23] While [the arborist] had experience as an arborist, CS made no further inquiries or an assessment of his competency to undertake the particular work required at the Hunter Road Block. [The arborist] had no arboriculture or forestry qualifications. CS in turn made no assessment or inquiries regarding the competence of the contracting crew [the arborist] employed. The crew's lack of experience is noted above. [The victim] himself told WorkSafe investigators that since the accident he realises how unqualified he was for the work and if he was to return to the industry, he would need to undertake training.

[24] A competence assessor engaged by WorkSafe[9] reviewed the crew's prior work experience and work undertaken at the site. The assessors conclusion was that none of the crew would be considered competent to undertake forestry work. The lack of assessment of the work to be undertaken and the lack of assessment of those employed to undertake the work is in this particular case, significant. The risk of serious injury

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[9] Roger Gale.

when working in the high risk forestry industry is obvious and well known. It is well recognised that the forestry industry is a high risk operation. The hazards are obvious.

[25] The employment by CS of [the arborist] and his crew reflects a complete failure by CS to turn their mind to their responsibilities under the HSWA. The casualness of the employment of [the arborist] and his crew reflect a high level of disregard to responsibilities under the HSWA. Industry standards and guidelines for forestry are well known. The approved Code of Practice for Safety and Health in Forestry Operations requires every person undertaking forestry work to be either under documented training or close supervision or deemed competent. CS appears to have had a lack of appreciation or understanding for the requirements for working in the forestry industry. The standard guidelines for working in forestry work are, however, readily available. I find CS's departure from the standards to be a significant aggravating factor in assessing its culpability. The hazards are obvious. As already noted, this is a high risk work environment and fatalities and serious injuries in the forestry industry have been well publicised over many years. CS must have or ought to have known the potential for serious injury to a worker if industry standards were not complied with.

[26] I do not consider there were significant financial barriers in order to achieve compliance with the HSWA. While there would be some costs associated, those costs would be normal work-related costs. No bespoke training or plans were required, just a simple application of industry norm and standards.

[27] Having regard to these factors, I accept WorkSafe's submission that CS's culpability falls in the range between the medium and high bands as noted above. The complete failure to undertake a risk assessment and to employ persons appropriately qualified for well-known high-risk work, in my view indicates a high degree of culpability. CS cannot avoid responsibility by pointing to [the arborist]. CS has the responsibility of ensuring [the arborist], and in turn his crew, held appropriate qualifications and had undertaken training. No such inquiries were undertaken. The initial contracting of [the arborist] reflects CS's recklessness.

[28] Given these factors, I consider the start point sentence of $600,000 is appropriate.

[29] WorkSafe have acknowledged that there are factors for which CS is entitled to credit for. They include co-operation with WorkSafe through their investigation. Co-operation of inquiries of this type should be encouraged and credit should be given. Further, WorkSafe acknowledge that credit for reparation should also be given. While it is not known if reparation will be paid, some acknowledgement will be given for payment of reparation on the basis CS never denied reparation should be paid. Finally, credit for early recognition of wrong doing through a guilty plea should also be given. Having regard to those factors, I nominally fix the end fine to be $405,000.

Ancillary orders

[30] No ancillary orders are sought.

Central Siteworks Limited (In liquidation)

[31] CS has been placed in liquidation during the sentencing process. On 31 May 2019 the shareholders of CS passed a resolution placing the company in liquidation. The first liquidator's report of 10 June 2019 has been filed with the Court. The statement of affairs attached to the liquidator's report (as at 31 May 2019), records fixed assets with a book value of $65,000 and debtors of $659,000. Creditors include Inland Revenue ($160,000) and other creditors ($580,000). Ms Pille for WorkSafe responsibly acknowledged it is highly unlikely any fine ordered would be repaid. She further accepted that CS's liquidated state is a relevant factor in determining whether a fine should actually be imposed.

[32] On the information provided I consider CS's financial situation is dire. It is most unlikely a fine will ever be repaid. At best, the reparation order might be repaid. On that basis, there will be no final order imposing a fine.

Outcome

[33] The reparation sum of $35,000 is ordered to be paid to the victim.

[34] No fine will be imposed due to CS being in liquidation.

[35] No other ancillary orders are sought or made.

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Judge J Jelas
District Court Judge

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In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.