

**IN THE DISTRICT COURT
AT MANUKAU**

**CRI-2015-092-006915
[2016] NZDC 3446**

WORKSAFE NEW ZEALAND
Prosecutor

v

PREPARED PRODUCE LIMITED
Defendant

Hearing: 11 February 2016

Appearances: E Jeffs for the Prosecutor
N Pye for the Defendant

Judgment: 3 March 2016

RESERVED DECISION OF JUDGE P RECORDON

[1] Prepared Produce Limited has pleaded guilty to three charges of failing to take all practicable steps to ensure the safety of an employee while at work contrary to section 6 and 50(1)(a) of the Health and Safety in Employment Act 1992 (“the Act”).

[2] The defendant has also pleaded guilty to three charges of failing to notify the Regulator of an occurrence of serious harm in breach of sections 25(3)(a) and 50(1)(b) of the Act.

Charge 1 and 2 – ending CRN 2296 and CRN 2297

[3] These charges relate to an incident on 26 July 2013 when the Defendant's employee *Malelei* suffered serious harm while operating the 'belt slicer' at work. Mr Malelei went to clear a blockage on the slicer, the slicer's rollers pushed his hand into the machine, his fingers came into contact with the rotating slicer blades and amputated his right middle finger at the first joint and the tip of his ring finger.

[4] The defendant failed to notify the Regulator.

Charge 3 and 4 – ending CRN 2298 and CRN 2299

[5] These charges relate to an incident on 8 November 2014. The Defendant's employee, *Taimikovi*, suffered serious harm while operating the belt slicer at work. The belt slicer jammed, and when he went to clear the blockage his hand was dragged into the machine and his fingers came into contact with the rotating slicer blades.

[6] Mr Taimikovi suffered a partial amputation of his right ring, middle and index fingers.

[7] The Defendant also failed to notify the regulator that Mr Taimikovi had suffered serious harm.

Charges 5 and 6 – ending CRN 2300 and CRN 2301

[8] Relate to an incident on 22 November 2014 when the Defendant's employee, *Singh*, suffered serious harm at work. Mr Singh was operating a 'new belt slicer' when it jammed. Mr Singh went to clear the blockage, the conveyor belt took his hand and the rotating slicer blades amputated the tip of Mr Singh's right index and middle fingers.

[9] The Defendant again failed to notify the regulator.

[10] The leading case on the approach to sentencing in health and safety prosecutions is the *Department of Labour v Hanham and Philp Contractors Limited* HC Christchurch CRI-2008-409-0000002, 18 December 2008. The approach to sentencing for offending under s 50 HSE is summarised at [80].

- (a) Both s 51 HSE and the Sentencing Act are relevant to the sentencing process.
- (b) The sentencing process involves three main steps:
 - (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 fine.
- (c) Given that reparation and fines serve discrete statutory purposes both should ordinarily be imposed. This is however subject to the fact that when there is a lack of financial capacity restricting the ability to pay both, the payment of reparation takes priority.
- (d) The first step is therefore to fix reparation. This includes consideration of the statutory framework, taking into account an offer of amends and the financial capacity of the offender.
- (e) The second step is to fix the amount of the fine following the methodology established in *Taueki*. This involves fixing a starting point on the basis of the culpability for the offending and then adjusting the starting point upwards or downwards for aggravating or mitigating circumstances relating to the offender.
- (f) It is suggested that the starting points should be generally fixed according to the culpability as follows:

- (i) Low culpability: A fine of up to \$50,000
 - (ii) Medium culpability: A fine of between \$50,000 and \$100,000
 - (iii) High culpability: A fine of between \$100,000 and \$175,000
- (g) The starting point is then to be adjusted for any relevant and mitigating factors relating to the offender.
- (h) Financial capability to pay the fine is a relevant consideration.
- (i) The third step is to assess whether the overall burden of the reparation and fine is proportionate and appropriate.

Reparation

[11] In *Department of Labour v Hanham & Philip Contractors Ltd*, at [31]-[39], the High Court made it clear that sentences of reparation and the imposition of a fine serve distinct statutory purposes. Reparation is compensatory in nature and designed to recompense an individual or family for loss, harm or damage resulting from the offending, compared with a fine which is essentially punitive in nature. The High Court expressed the view, at [64], that when considering to what extent the order for reparation should be taken into account under s 40(4) of the Sentencing Act 2002 when fixing the fine, given the disparate purposes which underpin the sentences of reparation and fines, a reduction in the appropriate level of fine by the total amount of the reparation ordered is not generally appropriate, unless for reasons of financial capacity. The statutory purposes of denunciation, deterrence and accountability would not be achieved if fines were reduced by the amount of the reparation on a 1:1 ratio. However, the view was given that a discount of 10 to 15 per cent in the level of the fine is reasonable to recognise the order for reparation of an offender of adequate means, at [69].

[12] There is no doubt that making an assessment as to the reparation is a difficult process as it is not an easy task to assess the emotional impact of any particular injury: see generally *Ministry of Business Innovation and Employment v Riverlands Eltham Ltd* DC New Plymouth, CRI-2012-043-001504, 23 January 2014. However, in *Riverlands Eltham Ltd* Judge Courtney noted that some assistance can perhaps be gained by comparison of the injury in question with injuries and awards in other similar cases. *Riverlands Eltham Ltd* involved a victim whose right middle finger was amputated down to his first knuckle. In the sentencing decision reference is made to the following cases and awards:

- (a) *AFFCO New Zealand Ltd v Muir (Department of Labour)* [2008] 6 NZELR 281 (HC) – this decision involved a severe crushing and laceration resulting in the amputation of the victim’s left index finger that was surgically amputated at the second joint. The reparation paid was \$15,000 as agreed between the informant and the defendant company. As it had been agreed it was not subject to scrutiny in the District Court or the High Court. However, both Courts endorsed the figure.
- (b) In *Department of Labour v Polarcold Stores Ltd* DC Dunedin CRN 08012501380, 31 March 2009 the victim suffered fractures to two fingers, the ring finger was badly torn and crushed and amputated to the second knuckle. Reparation of \$15,000 was the sum agreed as being appropriate between the informant and the defendant company.
- (c) In *Department of Labour v Fonterra Co-Operative Group Ltd* DC Hawera CRI-2011-021-001101, 7 March 2012 the victim’s middle finger was injured resulting in amputation exposing the bone. The victim was off work for two months. Reparation of \$12,500 was ordered.
- (d) In *Department of Labour v Griffins Foods Ltd* DC Papakura CRI-2009-055-002437, 29 June 2010, the victim had the end of his right

little finger cut off. This resulted in three operations. A reparation award of \$10,000 was granted.

- (e) In *Department of Labour v Tegel Foods Ltd* DC Christchurch CRI-2011-009-004955, 27 September 2011 the victim's left ring fingertip was amputated to the first knuckle and there were injuries to the rest of the hand. Reparation of \$5,000 was awarded. This was a sum that was agreed as appropriate between the informant and the defendant company.

[13] Judge Courtney considered these authorities and noted that, especially with respect to the *Griffins* case which was decided four years previous, the relative value of money will have decreased over time. It was considered that \$12,500 reparation was appropriate.

[14] *WorkSafe New Zealand v Fletcher Steel Ltd* [2015] NZDC 8262 saw the Court award \$20,000 in reparation where the victim had his left ring finger amputated below the first knuckle, and a partial de-gloving of his left middle finger where he only regained 40 percent movement. The victim spent 6 nights in hospital and has ongoing medical issues as a result of the attempted reattachment. It should be noted that in this case the victim was aggrieved by the perceived lack of interest by the defendant company, he was not made aware of the findings of the internal investigation, he had not received a visit or a phone call to ascertain how he was. The victim stated that for him the worst part of the experience was how he had been disregarded by the company.

[15] In *WorksSafe New Zealand v Industiral Tube Manufacturing Company Ltd* DC Hamilton, CRI-2014-019-001977, 20 August 2014, the victim suffered a serious injury to his fingertip when it became caught by unguarded moving parts of a machine. As a result the victim required the amputation of the top of his right index fingertip to just above the first finger joint which required a two night stay in hospital. The victim noted that he had ongoing issues with his finger with extremities of hot and cold causing pain. He also drew attention to how it affected him more on an emotional level, causing him to be self conscious, embarrassed and shamed. It

impacted how he relates to his family unit and other people. The Court awarded \$15,000 in reparation.

[16] The defendant referred to *Department of Labour v Kiwi Steel NZ Limited* DC Manukau, CRI-2010-092-003171, 27 May 2011. In this decision the victim suffered de-gloving of his right index finger, a laceration of his right thumb and loss of his right thumb nail. The Court fixed emotional harm reparation at \$15,000 due to the physical and mental trauma the victim suffered and as he was offered no assistance in relation to rehabilitation by his employer and his employment was terminated as a result of his injuries. Also, as was similar in this case, Kiwi Steel failed to notify the relevant authorities of the victim's injuries.

[17] The defendant also referred to *Big Tuff Pallets Limited v Department of Labour* HC Auckland, CRI-2008-404-000322, 5 February 2009, which saw Justice Harrison make an award of \$20,000 to a victim who had suffered partial amputation of three fingers. In *Big Tuff Pallets Limited* the victim was unable to return to his employment due to the psychological trauma they suffered as a result of the accident.

[18] The prosecutor referred to the additional cases of *Worksafe New Zealand v Grove Hardware Limited* DC North Shore CRI-2014-044-003282, 11 November 2014 and *WorkSafe New Zealand v Fletcher Steel Limited* DC Auckland CRI-201500002388, 5 August 2015.

[19] In *Grove Hardware* a 17 year-old victim suffered the partial amputation of his left middle and index fingers at the middle joint and severed a nerve on his left ring finger. The Court awarded \$20,000 in reparation.

[20] In *Fletcher Steel* the victim suffered an avulsion amputation of his left thumb. He returned to work, on light duties, after 6 months. The Court awarded \$17,500 in reparation.

[21] The application of the above law will be addressed with respect to each victim in turn.

Mr Malelei

[22] Referring first to Mr Malelei and his victim impact statement. Mr Malelei is right handed and as a result of the accident has experienced the loss of first distal of ring finger and middle finger (right hand) and damage to index finger nail bed. This has affected his ability to work. He notes he cannot perform several daily functions efficiently, such as: holding and gripping, using simple tools such as a chopping knife, operating everyday hand tools and using everyday gadgets such as phones and electronic devices. Following the accident Mr Malelei suffered from serious pain, and he continues to suffer from stump pain, pins and needles, tingling, severe pain when touching hot or cold objects and feels pain when he accidentally hits his finger tip. Mr Malelei feels he now has reduced earning capacity as he is unskilled and is now disadvantaged by the fact he can't do jobs that require a full functioning right hand.

[23] Mr Malelei could not return to work for two months after the injury and he believes he was told, when he returned to work, that they no longer wanted him. As a result he engaged a lawyer and returned to work. This only lasted for three months before he was told to leave without any, in his opinion, reason or fault. He could not afford to engage a lawyer again. Significantly, Mr Malelei feels he was bullied to leave; he lost his fingers as well as his job and was blamed for the accident. His relationship has suffered due to the extreme financial hardship that resulted, he is embarrassed when people see his fingers, he no longer can enjoy rugby and even gardening and DIY work is painful.

[24] Mr Malelei is now working with a scaffolding company. However, he feels pain and cannot use a spanner and therefore does not know how long he will last.

[25] The Prosecutor's submissions were in line with those in the victim impact statement. It was submitted that a reparation order of \$15,000 would be appropriate.

[26] Counsel for the defendant has submitted that the victim has made a good recovery. It is noted that the defendant has claimed they attempted to contact the victim after the accident, however the contact details they had for him were not

correct. It is acknowledged by the defendant that there was a communication breakdown where the victim believed he had been fired. They clarified the situation and Mr Malelei returned to work. However, the victim's employment was terminated but this was due to employment issues which included threatening staff and these employment issues were unrelated to the accident. Counsel for the defendant also believes that a reparation order of \$15,000 would be appropriate.

Mr Taimikovi

[27] With respect to Mr Taimikovi's victim statement it is noted that as a result of the accident he has had the tip of his right index, middle and ring fingers amputated. He is right handed. Mr Taimikovi states he can no longer work with his right hand, as he can no longer grip, pull or push. He cannot perform daily functions such as holding a knife, hammer, spanner or gardening tools and cannot grip the steering wheel of the car effectively. Operating everyday gadgets is painful and he is struggling to learn to operate gadgets with his left hand. He can no longer operate the machine at work. It is painful when his stumps are touched directly and he finds it hard to grip or press switches. Mr Taimikovi was in hospital for a number of days and he had to attend physio which was painful. Mr Taimikovi continues to suffer from stump pain, the end of fingers are sensitive to touch, he feels extreme pain if accidentally touches something hot, cold or sharp, or applies pressure. Mr Taimikovi feels his earning capacity is reduced as he is unable to progress from unskilled to skilled jobs. He feels he is not being offered as much work since the accident which has reduced his earnings.

[28] Mr Taimikovi notes that he is frustrated with how he will not be able to advance his career, he is miserable when he considers he will not be able to buy a house, he is suffering from disruptions from sleep, he gets upset and angry with his disfigured hand and this causes his wife and children to suffer. Mr Taimikovi can no longer play rugby due to pain, he cannot pursue his dream to play the guitar, his relationships with his children and younger siblings have suffered as he cannot engage in activities he previously did with them such as cooking and playing sports. He notes he is unable to enjoy company with his friends, he cannot drink kava with them, play sport, go to the beach and go to barbeques. His social life has been spoilt.

He no longer goes to church and he cannot engage in activities such as cultural practice which require the use of fully functioning fingers. Financially, Mr Taimikovi notes he can no longer support his parents and his future plans which involved going overseas to see relatives have been ruined.

[29] The Prosecutor's submissions are as per the victim statement. It is submitted the appropriate order would be one of \$20,000.

[30] Counsel for the defendant note that Mr Taimikovi was initially in hospital overnight and had to return for a week due to cellulitis. Counsel for the defendant submitted that Mr Taimikovi had a graduated return to work, four months after the accident, with the help of the defendant. The defendant also assisted the victim when asked, such as by paying his holiday pay in advance so he could get his car fixed. It was also submitted that the reduction in hours for Mr Taimikovi is due to the downturn in business. This, in combination with the fact Mr Taimikovi has taken time off work has meant his earnings have been reduced.

[31] Counsel for the defendant believes a reparation order of \$18,000 would be appropriate. This submission was made with reference to *Big Tuff Pallets Limited* where \$20,000 was awarded. It was submitted that Mr Taimikovi has not suffered psychologically to the same extent as the victim in *Big Tuff* was unable to return to work due to the psychological trauma he had suffered and therefore a slightly lower order is justified.

Mr Singh

[32] Starting with Mr Singh's victim impact statement, Mr Singh has had the tip of his right index and middle finger amputated. He is right handed. Following the accident Mr Singh suffered serious pain. He can no longer lift heavy weights; he feels pain in his fingers and cannot pull with full capacity. Mr Singh cannot perform everyday functions such as opening cans, using knives and using hand tools as his index finger does not provide the necessary strength. Mr Singh notes his writing skills have been affected, he cannot type as his fingers are shortened and the tip becomes sore and he cannot use his mobile properly. Mr Singh suffers from stump

pain, he feels severe pain when touching any hot or cold objects and his finger joints remain stiff and painful. Mr Singh feels his employment opportunities have been reduced. Mr Singh states that he lost his job with the company and has not been able to get another job which has caused financial difficulty.

[33] Mr Singh notes he is very self conscious of his hand and feels employers will not employ him due to it. Mr Singh is Sikh and cannot wrap his turban due to grip strength and pain. He can no longer participate in gym activities or enjoy the sports he used to play due to the pain he suffers. Mr Singh is very frustrated due to the accident.

[34] After the accident his wife had to start work. His mother came to help look after his children, however, she passed away when in New Zealand. He blames himself for her death.

[35] Mr Singh states that no one from the company ever contacted him after the accident.

[36] The Prosecutor's submissions are as per the victim impact statement. It is submitted that a reparation order of \$17,500 would be appropriate.

[37] Counsel for the defendant has submitted that Mr Singh was taken to hospital by one of the defendant's supervisors who kept in contact with Mr Singh. Although the defendant was saddened to hear of the death of Mr Singh's mother, the emotional trauma Mr Singh feels cannot be laid at the feet of the defendant. It is submitted a reparation order of \$15,000 is appropriate.

Discussion

[38] Previous authorities show that these types of injuries consistently attract awards of \$15,000 to \$20,000.

[39] With respect to Mr Malelei the decision of *WorkSafe New Zealand v Fletcher Steel Ltd* [2015] NZDC 8262 is noted. Here the Court made an award of \$20,000

where the victim had his left ring finger amputated below the first knuckle, and a partial de-gloving of his left middle finger where he only regained 40 percent movement. However, as we see with Mr Malelei, the victim in this case felt the worst part of the experience was how he felt he had been disregarded by the company. Mr Malelei states he feels he was blamed for his injury, he feels he was bullied to leave his job and there was a clear lack of contact or concern by the defendant company which contributed to his confusion and undoubtedly caused him additional stress over a difficult period of his life.

[40] Reading the submissions of the defendant, it is not hard to have sympathy for the victim and what he said in his victim impact statement. It is not difficult to see why Mr Malelei feels blamed for the accident, as essentially it appears that this is what the defendant attempted to do and this is why they failed to make changes to protect the lives of their other employees. It is considered a reparation award of \$18,500 is appropriate.

[41] With respect to Mr Taimkikovi, it is clear that the impact this injury has had on him is severe. It appears he is struggling to find enjoyment in any of the activities he previously did. He states his relationships with his friends, his family, his wife and his children have all been affected by his injury and it is clear this has significantly impacted him. Furthermore, again there seems to be an issue with communication from the defendant company which has contributed to the emotional impact this accident has had on the victim. He feels he is not getting as much work due to the accident. The defendant says the reduction in work is due to a downturn in business.

[42] There appears to be issues with transparency with the company. At a time when the victim will quite understandably be anxious with respect to his future career prospects, this lack of transparency is going to contribute to the ill feelings felt by the victim and the emotional impact this accident has upon him. I would also note that, again, there seems to be little concern shown by the company or support given to the victim, following the accident.

[43] For Mr Taimikovi an award of \$20,000 is appropriate given the significant emotional impact this accident has had on him.

[44] With respect to Mr Singh, he has stated in his victim impact statement that after the accident the company did not co-operate and he ended up losing his job soon after ACC stopped paying. Defence submissions did not address this point. It is clear that the accident has significantly impacted Mr Singh and the relationship he has with wife and children. He is worried that people will look at his hand and will not employ him due to it. He is clearly anxious about his future and his ability to financially and meaningfully contribute to his family and their livelihood. Again, it is significant to note that Mr Singh has said no one contacted him after his accident. It seems clear that the company made him feel isolated and alone following the accident and did not assist him, emotionally or physically, following his injury.

[45] For Mr Singh an award of \$18,500 is considered appropriate.

Fines

Submissions

[46] The prosecutor has made the following submissions with respect to the starting point of each fine:

- a. Malelei (CRN – 2296) - \$85,000
- b. Taimikovi (CRN – 2298) - \$110,000
- c. Singh (CRN – 2300) - \$90,000

[47] Neither of the belt slicer's were adequately isolated to prevent an operator's hand been drawn into the hazardous area of the rotating cutter. There was a guard in place on each machine but these were not of adequate length.

[48] The prosecutor submits the defendant was put on notice after the first incident and this justifies a higher starting point for the subsequent charges CRN-2298 and CRN-2300. The defendant also failed to put into place procedures dealing with factors such as how to manage a jam and to ensure that its employees were aware of the hazards.

[49] It appears none of the victims were properly trained in using the belt slicers.

[50] The prosecutor submits that the following practicable steps should have been taken with respect to each charge:

- (a) Ensured an effective system was in place to identify and assess new and existing hazards;
- (b) Installed a guard of sufficient length;
- (c) Put in place a documented safe operating procedure that included the steps to be taken in the event of a jam;
- (d) Provided comprehensive training.

[51] It is submitted by the prosecutor that the risk of harm and realised harm is significant and serious.

[52] With respect to departure from industry standards, it is submitted that there was a significant departure from industry standards.

[53] It is submitted that the need to guard moving parts of machinery is an obvious and well known hazard and that the defendant had been put on notice following the first accident.

[54] The prosecutor submits that the cost of installing a guard was neither onerous nor cost prohibitive, given the risk of serious harm or injury. It is further submitted that the cost of an effective system to identify and assess new and existing hazards, a Safe Operating Procedure, and comprehensive training for its employees would be negligible.

[55] It is submitted by the prosecutor that the industry is well aware of the risks of a failure to effectively isolate a cutting hazard.

[56] It is submitted that it is irrelevant that the victim's may have contributed to their individual accident – *Department of Labour v Eziform Roofing Products Limited* [2013] NZHC 1526 at [52].

[57] With respect to each section 25(3)(a) charge – failure to notify, it is submitted that a fine in the region of \$50,000 is appropriate.

[58] It is submitted that a discrete fine is appropriate for these charges to act as a general deterrent. It is also submitted that the Court may choose to uplift for the second and third charge of failing to notify as occurred in *Kiwi Steel New Zealand Limited*.

[59] Mitigating factors:

- (a) The prosecutor submits that on the basis of *Hanham & Philip* a discount of 10% on the fine would be appropriate.
- (b) It is further submitted that a further 15 to 20 percent discount is available as the defendant is a first offender and has fully cooperated with the investigation.

[60] The prosecutor submits a discount of 25 per cent is available for the guilty plea.

[61] The prosecutor notes that it is appropriate to reduce the fines for the breach of s 25(3)(a) charges on the basis of the totality principle.

[62] With respect to culpability defence submits:

- (a) Although the hazard is obvious, it had been minimised as:
 - (i) The machines had a guard, an emergency stop button, only trained operators were to use the machines, and the second machine had a lever to clear any blockages.

- (b) It is submitted that the defendant never envisaged an employee putting their hand into the machine to clear the blockage.
- (c) The defendant submits that they believed the first defendant was intoxicated/under the influence of drugs and therefore put the accident down to this.
- (d) The defendant submits that following the second incident they became aware that the possibility of employees putting their hand in the machine to clear a blockage was not a one-off drug induced accident.
- (e) The defendant therefore replaced the slicer and believed they minimised the hazard.
- (f) It is submitted with the benefit of hindsight the defendant accepts the practicable steps identified in the Summary of Facts.

[63] With respect to industry standards, it is accepted that these require machines to be guarded and employees to be trained adequately. The defendant disputes whether the victims were ever trained to use the machines as the victims seem to suggest.

[64] The defendant submits that the cost to guard the machine would have been \$20,000 which was prohibitive for a machine that cost \$2,500.

[65] The defendant submits the risk of harm was less serious with the new belt slicer, however accepts that the victims suffered serious harm.

[66] The defendant has made the following submissions with respect to the starting point of each fine:

- (a) Malelei (CRN – 2296) - \$50,000
- (b) Taimikovi (CRN – 2298) - \$70,000

(c) Singh (CRN – 2300) - \$60,000

[67] With respect to the failing to notify charges the defendant submits that a starting point for the first charge is one of \$30,000, \$50,000 for the second charge and \$60,000 for the third charge.

[68] The defendant submits the discount for mitigating factors for the s 6 charges are, for the first charge one of 10% and 15% for the second and third accidents as remedial steps were taken.

[69] With respect to the s 25(3) charges, a total discount of 10% should be applied for the first and second accidents for the defendant's cooperation and remorse and 15% for the third accident taking into account the remedial steps the defendant has taken since.

[70] It is submitted that a discount of 15% should be applied to the fine for the payment of reparation.

[71] It is submitted that the defendant is entitled to a discount of 25% for the guilty plea.

Failing to take all practicable steps to ensure the safety of an employee while at work contrary to ss 6 and 50(1)(a) of the Health and Safety in Employment Act 1992

[72] With respect to setting the fine on the charges of failing to take all practicable steps, the initial step is to fix the starting point of the offending and then adjusting the starting point upwards or downwards for aggravating or mitigating circumstances relating to the offender.

[73] Through their guilty plea Prepared Produce Ltd has accepted they failed to take all practicable steps which were identified as:

(a) Ensuring an effective system was in place to identify and assess new and existing hazards;

- (b) Installing guards of sufficient length;
- (c) Putting in place a documented safe operating procedure that included the steps to be taken in the event of a jam; and
- (d) Providing comprehensive training.

[74] With respect to the degree of culpability, this has to be assessed by viewing the circumstances in which the incident occurred. Consideration needs to go to how obvious the risk was, steps taken to identify and assess it, and efforts to eliminate it: *Affco New Zealand Ltd v Department of Labour* HC Wellington, CRI-2008-483-12, 17 September 2008 at [25].

[75] Consideration also needs to go to the degree of departure from the industry standard. Here there was a significant departure from the industry standard.

[76] An inadequately guarded belt slicer poses an obvious risk to employees. The need for adequate guarding is self-evident. The absence of appropriate guarding to protect employees represents a continuing failure. It was foreseeable that an employee could be injured from an obvious hazard.

[77] Following the first accident the employer should have been put on notice and responded appropriately. Their reaction of attempting to deny responsibility and put the blame squarely on the victim was grossly negligent and it would be appropriate for this to be reflected in the fines for the second and third accidents.

[78] Although the company did replace the machine between the second and third accident, consideration must go to the fact that the accident on the second machine was again on a machine that was not adequately guarded and the company had still failed to take steps to ensure that there would not be another incident such as hazard identification, installing a proper guard, putting in place a safe operating procedure and providing comprehensive training.

[79] Each victim suffered from serious harm. Compared with other work place accidents where limbs or lives are lost these injuries might not be said to be the most

serious of consequences. However, it is clear that each victim has been substantially affected, both physically and emotionally. In other cases where the amputation of a finger/s has occurred it has been described as falling into the moderately serious range (see for example *Affco* at [28]). This is just one factor to consider when determining culpability.

[80] The defendant was a first time offender.

Mr Malelei

[81] The prosecutor has taken the approach that the starting point should be \$85,000. This puts the fine in the upper range of the medium culpability band. Counsel for the defendant has submitted that the appropriate starting point is \$50,000, putting culpability at the upper end of low culpability or the lower end of medium culpability.

[82] I find that culpability for the first accident falls within the medium band and attracts a starting point of \$75,000.

[83] There are no aggravating factors present. It is appropriate that there is a discount of 15% for the reparation and a further 20% for the defendant being a first time offender and for fully co-operating with the investigation. This gives a discount of 35% before the guilty plea. It is not appropriate to award any additional discount for remedial steps in relation to this accident.

[84] The fine, in relation to failing to take all practicable steps to ensure the safety of an employee while at work contrary to ss 6 and 50(1)(a) of the Health and Safety in Employment Act 1992 and the accident involving Mr Malelei (the first accident) is as follows:

- (a) Starting point = \$75,000
- (b) Less 35% mitigating = \$48,750
- (c) Less 25% guilty plea = \$36,562.50

Mr Taimikovi

[85] The prosecutor has submitted the starting point should be \$110,000. This puts their culpability at the lower end of the high culpability band. Counsel for the defendant has submitted that a starting point of \$60,000 is appropriate. This is at the lower end of the band for medium culpability.

[86] Taking into consideration the fact that the defendant was on notice following the first accident and had taken no steps in response, I find that the starting point is \$100,000. This puts the offending just within the band of high culpability.

[87] In addition to the mitigating factors noted in relation to the first accident, I am satisfied an additional 10% discount is appropriate to acknowledge the defendant did replace the machine as a result of the accident, taking some remedial steps.

[88] The fine, in relation to failing to take all practicable steps to ensure the safety of an employee while at work contrary to ss 6 and 50(1)(a) of the Health and Safety in Employment Act 1992 and the accident involving Mr Taimikovi (the second accident) is as follows:

- (a) Starting point = \$100,000
- (b) Less 45% mitigating = \$55,000
- (c) Less 25% guilty plea = \$41,250

Mr Singh

[89] The prosecutor has submitted a starting point of \$90,000 is appropriate, putting culpability at the upper end of the medium band. The defence has submitted that a starting point of \$60,000 is appropriate, putting culpability at the lower end of the medium band.

[90] In comparison to the previous two fines, culpability must be assessed as higher than with Mr Malelei. Although they have purchased a new machine, they still had been put on notice that their equipment and practices are causing harm to their employees. The defendant has however taken some action; therefore a starting point slightly below Mr Taimikovi is appropriate. The appropriate starting point is \$85,000. The same discounts are appropriate as given for Mr Taimikovi.

[91] The fine, in relation to failing to take all practicable steps to ensure the safety of an employee while at work contrary to ss 6 and 50(1)(a) of the Health and Safety in Employment Act 1992 and the accident involving Mr Mr Singh (the third accident) is as follows:

- (a) Starting point = \$85,000
- (b) Less 45% mitigating = \$46,750
- (c) Less 25% guilty plea = \$35,062.50

Failing to notify the Regulator of an occurrence of serious harm in breach of ss 25(3)(a) and 50(1)(b) of the Health and Safety in Employment Act 1992

[92] The final step requires consideration of the fine to be imposed on each of the failing to notify charges.

[93] In their written submissions the prosecutor has submitted a fine of \$50,000 is appropriate on each charge, with consideration going to an uplift for the subsequent charges.

[94] Counsel for the defendant has submitted a starting point of \$30,000 for the first charge, \$50,000 for the second and \$60,000 for the third charge are appropriate.

[95] The general approach taken is for s 25 charges to be reduced to reflect totality: see generally *The Supply Chain Ltd v Department of Labour* HC Auckland CRI-2008-404-124, 29 September 2008.

[96] In *Department of Labour v Kiwi Steel NZ Ltd* DC Manukau, CRI-2010-092-3171, 27 May 2011 the defendant faced four charges under s 25(3)(a) relating to a number of accidents. It was considered significant that the failure to notify was repetitive (at [19]). Similarly, the defendant had claimed they were not aware of the need to notify. Judge Blackie noted that any penalty post *Hanham and Philip* will attract significantly higher penalties than previously. For the charges that related to accidents post *Hanham and Philip* Judge Blackie assessed culpability as medium and approaching high and set the starting point at \$60,000 and \$80,000 respectively.

[97] The starting point for the first s 25(3)(a) charge is to be \$40,000. This acknowledges their culpability must be assessed as being relatively low. For the second and third charges the appropriate starting points are taken as \$55,000 and \$70,000 respectively.

[98] This would give fines of:

(a) Charge 2:

(i) Starting point = \$40,000

(ii) Less 10% previous convictions and assistance = \$36,000

(iii) Less 25% guilty plea = \$27,000

(b) Charge 4:

(i) Starting point = \$55,000

(ii) Less 10% previous convictions and assistance = \$49,500

(iii) Less 25% guilty plea = \$37,125

(c) Charge 6:

(i) Starting point = \$70,000

(ii) Less 10% previous convictions and assistance = \$63,000

(iii) Less 25% guilty plea = \$47,250

[99] It is considered appropriate to reduce these to reflect totality. Looking at authorities there seems to be no structured basis for reduction to reflect totality. However, it is considered that it would be appropriate to reduce each fine by 25%. This would give the following fines:

(a) Charge 2 = \$20,250

(b) Charge 4 = \$27,843.75

(c) Charge 6 = \$35,437.50

Conclusion

[100] The reparation and fines are as follows:

(a) Mr Malelei:

(i) Reparation (CRN 15092502296) = \$18,500

(ii) Fine – practicable steps (CRN 15092502296) = \$36,562.50

(iii) Fine – failure to notify (CRN 15092502297) = \$20,250

(b) Mr Taimikovi:

(i) Reparation (CRN 15092502298) = \$20,000

(ii) Fine – practicable steps (CRN 15092502298) = \$41,250

(iii) Fine – failure to notify (CRN 15092502299) = \$27,843.75

(c) Mr Singh

- (i) Reparation (CRN 15092502300) = \$18,500

- (ii) Fine – practicable steps (CRN 15092502300) = \$35,062.50

- (iii) Fine – failure to notify (CRN 15092502301) = \$35,437.50

- (d) Totals:
 - (i) Reparations = \$57,000

 - (ii) Fines = \$196,406.25

P Recordon
District Court Judge