EDITORIAL NOTE: PERSONAL/COMMERCIAL DETAILS ONLY HAVE BEEN DELETED.

IN THE DISTRICT COURT
AT WELLINGTON

CRI-2014-085-013982
[2017] NZDC 17527

WORKSAFE NEW ZEALAND

v

NORTHPOWER LIMITED
WELLINGTON ELECTRICITY LINES LIMITED

Hearing: 10 August 2017

Appearances: L Moffitt for the prosecutor
G Gallaway for the first defendant
R Brown for the second defendant

Judgment: 10 August 2017

NOTES OF CHIEF JUDGE JAN-MARIE DOOGUE ON SENTENCING

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[1] Northpower Limited and Wellington Electricity Lines Limited ("WEL") have each pleaded guilty to a charge brought under s 163D(1)(a) of the Electricity Act 1992, which provides:

> **163D Other offences**
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> (1) Every person commits an offence and is liable on conviction to a fine not exceeding… $250,000 in the case of a body corporate, who–
>
> (a) intentionally or negligently does or causes or permits to be done any work on any works or electrical installation or electrical appliance in a manner that is dangerous to life

[2] On 27 May 2014 [the victim], a Northpower trainee, was the victim of an arc flash event caused during the decommissioning of bias panel equipment at a berm substation on Old Karori Road ("the Old Karori Road substation"). The

decommissioning work was conducted over live terminals. [The victim] supported the bias-panel transformer while another Northpower employee unbolted it. As [the victim] moved the transformer a support bracket behind it became dislodged and fell into the live 400V terminal connections. This resulted in an arc flash; a short circuit which releases an uncontrolled burst of energy.

[3] [The victim] was seriously harmed, sustaining deep burns to his right thigh and superficial burns to his face, buttocks and upper legs.

[4] The impetus for the work at the Old Karori Road substation was a series of bias panel failures in WEL's assets beginning in 2013. WEL owns the local distribution network in the greater Wellington region, supplying electricity to roughly 165,000 homes and businesses. WEL does not undertake work on its assets. Northpower is WEL's field service provider, responsible for fault response and maintenance of the local distribution network. Accordingly, in July 2013 WEL initiated a programme whereby Northpower would decommission the bias panel equipment in all substations.

[5] The original methodology for this work required it to be done de-energised, involving customer power being switched off while the work was undertaken. This was expected to take approximately 35 weeks. The defendants tested and trialled a revised methodology, expected to take approximately 14 weeks, whereby the high voltage side of the transformers remained live while the work was carried out on the de-energised bias panels. The defendants resolved to employ the revised methodology where appropriate.

[6] Northpower created a work plan for the decommissioning work, which was peer reviewed by WEL and approved by Northpower and WEL managers. The work plan included hazard controls such as requiring rubber mats be installed as a mechanical insulation barrier between the live and de-energised parts. There was an alternative plan for work to be done de-energised where it could not safely be carried out in accordance with the work plan.

[7] By 27 May 2014 bias panel removals had been safely completed in 56 building and 36 berm (roadside) substations. Work on 28 of the berm substations was carried out live, with the remaining eight done de-energised.

[8] The Old Karori Road substation had a different configuration to many other substations. The live terminals were underneath, rather than adjacent to, the work. The hazard controls in the work plan were not appropriate for this configuration and the work should not have been conducted live.

[9] Northpower acknowledges that it breached the Electricity Act by:

(a) Not undertaking an adequate site specific risk assessment of the Old Karori Road substation.

(b) Not de-energising the Old Karori Road substation for the duration of the decommissioning work.

(c) Undertaking the decommissioning work on the Old Karori Road substation while it was energised and that [the victim], a trainee employee, was within 0.5 metres from live conductors in contravention of the standard.

[10] WEL acknowledges that it breached the Electricity Act by not:

(a) Documenting the hazard assessment, that occurred prior to the decommissioning work being undertaken, in a single document.

(b) De-energising the Old Karori Road substation while the work was undertaken.

(c) Including, within the Work Plan, the following instructions:

(i) that the Work Plan should not be undertaken if there was a variation in the layout of the substation; and

(ii) that if there was any reason why the steps in the Work Plan could not be followed, the work should stop.

(d) Identifying site specific risks to Northpower.

Purposes and principles

[11] The parties suggest this is first prosecution under s 163D of the Electricity Act. The parties submit that *Department of Labour v Hanham & Philp Contractors Ltd* ("*Hanham & Philp*"),[1] the leading case on sentencing in health and safety prosecutions under the Health and Safety in Employment Act 1992, is nevertheless helpful in this case. I agree. The offence in question is a safety focussed regulatory offence, and the principles and methodology in *Hanham & Philp* may therefore be adapted to the present case.

[12] In *Hanham & Philp* a full bench of the High Court noted that the object of the Health and Safety in Employment Act was to prevent harm in the workplace.[2] Similarly, the purposes of the Electricity Act stated at s 1A include:

> (c) to protect the health and safety of members of the public in connection with the supply and use of electricity in New Zealand; and…
>
> (e) to provide for the regulation of electrical workers.

[13] To achieve those objects, I have regard to the purposes and principles in the Sentencing Act 2002. Significant weight is given to the purposes of denunciation, deterrence and accountability for the harm done.[3] I also consider the following principles to be of particular relevance: the degree of culpability of the offenders and the effect of the offending on the victim.

[14] I also give consideration to the seriousness of the type of offence in comparison with other offences and the general desirability of consistency in sentencing levels.

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1 *Department of Labour v Hanham and Philp Contractors Limited* (2008) 6 NZELR 79 (HC) (2009) 9 NZELC 93,095 (HC).
2 At [40].
3 At [40].

[15] In sentencing the defendants I adopt the three step approach from *Hanham & Philp*, as assented to by the parties. The steps are:[4]

(a) assessing the amount of reparation to be paid to the victim;

(b) fixing the amount of the fine; and

(c) making an overall assessment of the proportionality and appropriateness of the total imposition of reparation and fine on each of the defendants.

Reparation

[16] I turn to the first step, reparation, which is the principal focus of the steps. Section 32 of the Sentencing Act provides that the sentence of reparation may be imposed to compensate victims of offending who, due to the offending, have suffered:

(a) Loss of or damage to property; or

(b) Emotional harm; or

(c) Loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.

[17] I heard directly from [the victim] who read his statement to the Court.

[18] [The victim] experienced serious physical and emotional harm as a consequence of the defendants' offending. The arc flash caused serious burns to the back of his right thigh and superficial burns to his buttocks, face, and upper legs. Some of the injuries required skin grafts and [the victim] had to wear compression clothes for some time after the incident. As a result [the victim] had difficulty continuing his training towards his electrical certification in the year following the

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4 At [80].

incident. [The victim] told me today that he has since finished the work that he has to do to qualify as an electrician.

[19] [The victim] endured significant pain during his recovery. He found walking, climbing stairs, putting on his socks, and even sitting to have been difficult and painful.

[20] [The victim] also said the deep emotional harm caused to him as a consequence of the defendants' breach was even more difficult to deal with. Firstly, his legitimate concern at the time of his recovery that the burns, in particular those to his face, would cause long-term scars. More importantly perhaps were the frequent panic attacks he endured, which have subsided in their regularity since December of last year. [The victim]'s statement described the experience, noting one particular occasion where a panic attack caused him to pass out.

[21] [The victim] also expressed frustration with the time it has taken to resolve this matter. I am sympathetic to his concerns; however the defendants cannot be regarded as blameworthy for that delay or frustration as I come to the calculation of reparation.

[22] This matter went to a restorative justice conference on 26 July 2017. I understand this was a positive meeting. The defendants apologised to [the victim] and offered to pay a combined amount of $20,000 in reparation to him by the time of this hearing. That sum has since been paid.

Prosecution submissions

[23] The prosecution submits that an award of $30,000 to $40,000 in reparation to [the victim] is appropriate.

[24] The prosecution refers to *Big Tuff Pallets Ltd v Department of Labour*, where Justice Harrison noted:[5]

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[5] *Big Tuff Pallets Ltd v Department of Labour* HC Auckland, CRI-2008-404-000322, 5 February 2009 at [19].

> Fixing an award for emotional harm is an intuitive exercise; its quantification defies finite calculation. The judicial objective is to strike a figure which is just in all the circumstances, and which in this context compensates for actual harm arising from the offence in the form of anguish, distress and mental suffering. The nature of the injury is or may be relevant to the extent that it causes physical or mental suffering or incapacity, whether short-term or long-term.

[25] The prosecution relies on three cases in particular:

[26] *WorkSafe New Zealand v Meycov Foods Ltd trading as Rutherford & Meyer,*[6] which involved burns to the victim's arm described as "a mutilating injury" from which she was unlikely to ever fully recover.[7] The victim was off work for at least nine months.[8] An award of $45,000 was made.[9]

[27] *Department of Labour v Fletcher Steel Limited t/a Fletcher Reinforcing,*[10] where the victim was awarded $30,000. The victim had burns to the right flank of his stomach leading to a "major cosmetic disability". Northpower also relies on this case.

[28] *WorkSafe New Zealand v BR and SL Porter,*[11] in which the victim's head, neck, arms, buttock and leg were burned resulting in permanent disfigurement, for which an award of $55,000 was made.

Defence submissions

[29] Northpower submits an amount of $25,000 is consistent with similar cases. In support of this proposed figure Northpower relies on the following cases:

[30] *Department of Labour v Power Jointing Limited,*[12] where an award of $10,000 was made for electrical burns to 10 per cent of the victim's body. The skin

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6 *WorkSafe New Zealand v Meycov Foods Ltd trading as Rutherford & Meyer* [2015] NZHC 1180.
7 *WorkSafe New Zealand v Meycov Food Limited (trading as) Rutherford & Myer* DC Wellington CRI-2014-096-002069, 12 November 2014 at [3].
8 At [6].
9 At [16].
10 *Department of Labour v Fletcher Steel Limited t/a Fletcher Reinforcing* DC Manukau, CRN-07092504217, 18 March 2008.
11 *WorkSafe New Zealand v BR and SL Porter* DC Tauranga, CRI-2014-070-001606, 5 August 2014.
12 *Department of Labour v Power Jointing Limited* DC Christchurch, CRI-2009-009-15246, 25

on his hands was permanently damaged.He suffered depression and his family life became strained. WEL also relies on this case.

[31] *WorkSafe New Zealand v McKechnie Aluminium Solutions Limited*,[13] where the victim experienced serious burns to his foot, requiring skin grafts and superficial burns to his left arm, hand, chest and head. The victim had two weeks off work and was embarrassed by the accident. An award of $15,000 was made.

[32] *Department of Labour v Williams*,[14] where an award of $25,000 was made to a victim of electrical burns to his left hand and hip. Those burns required skin grafts and caused lifelong pain issues.

[33] Northpower makes the following further submissions relating to my assessment of the quantum of reparation:

> (a) According to their and ACC's records [the victim] was off work for six weeks, rather than the three to four months referenced in his victim impact statement.
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> (b) [The victim] was able to continue the paperwork component of his electrical certification during that period, though Northpower accepts [the victim] lost practical experience.
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> (c) [The victim] was wearing non-regulation track pants under his PPE which melted during the incident, and his injuries would have been less serious had he been wearing appropriate clothing.

[34] WEL submits that an award of approximately $10,000 is appropriate.

[35] Cases relied on by WEL are *WorkSafe New Zealand v Silver Fern Farms Limited*,[15] where exposure to a live cable causing temporary blindness and burns led

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February 2010.

13 *WorkSafe New Zealand v McKechnie Aluminium Solutions Limited* [2015] NZDC 16087.

14 *Department of Labour v Williams* DC Dunedin, CRI-2010-012-3953, 17 February 2011.

15 *WorkSafe New Zealand v Silver Fern Farms Limited* [2016] NZDC 11861.

to $12,500 reparation, and *Department of Labour v Power Services Ltd*,[16] where the same reparation figure was made in relation to an electrical incident causing nine days hospitalisation for burns to the victim's hand and elbow, resulting in permanent loss of mobility in one hand.

Discussion

[36] I am cognisant of Justice Harrison's statement that fixing an award for emotional harm is an intuitive exercise. All counsel have accepted that to be the case. I nevertheless have regard to those decisions referred to me by the parties in their submissions, outlined earlier.

[37] [The victim] has experienced significant physical and emotional hardship as a consequence of the defendants' offending. I regard the physical harm caused to [the victim] to be consistent with the decisions referred to me by the defendants. The prosecution cases generally feature injuries of a life-long and more serious nature.

[38] [The victim] has experienced a period off work, when he otherwise would have gained practical experience toward his electrical qualification. I give little weight to Northpower's submission that he was able to continue the paperwork component during that period, as he still lost practical experience. That loss continued into the resumption of [the victim]'s employment as the compression clothing that he had to wear was non-regulation.

[39] Northpower notes that [the victim]'s burns would have been less serious had he not been wearing non-regulation clothing under his PPE on the day of the incident. I do not consider this relevant to my assessment of reparation. The defendants were responsible for ensuring this sort of situation never arose in the first place through adequate training and in proper oversight by his supervisor.

[40] [The victim] has also endured significant emotional harm due to his injury that has had a prolonged effect on his wellbeing. [The victim]'s emotional hardship

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[16] *Department of Labour v Power Services Ltd* DC Invercargill CRI-2011-025-2104, CRI-2011-025-2105, 16 December 2011.

is more pronounced than that of many victims in the cases referred to me by the defendants.

[41] Having regard to these consequences of the defendants' offending, the cases referred to in the parties submissions, and the $20,000 already paid to [the victim] by the defendants I set reparation at $30,000. I find that a further payment of $10,000 is appropriate.

Apportionment

[42] The prosecution and Northpower both submit that reparation be apportioned equally among the defendants. WEL submits it ought to be apportioned 25 per cent for them, and 75 per cent for Northpower.

[43] Apportionment of reparation between co-offenders is determined according to their degree of culpability.[17]

[44] Northpower submits that theirs and WEL's culpability is equal because:

(a) WEL imposes extensive health and safety requirements on Northpower, and initiated the programme for Northpower to decommission the bias equipment; and

(b) An adequate site specific hazard assessment was not completed or documented prior to the work being undertaken by either defendant. The key failing which led to the accident was the failure to identify the particular configuration of the Old Karori Road substation and implement the work plan in accordance with the revised methodology.

[45] WEL submits they are less culpable than Northpower as:

(a) [The victim] was Northpower's employee;

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[17] *WorkSafe New Zealand v Benchmark Homes Canterbury Ltd* [2016] NZDC 7093 at [55]; *R v Auckland Council* [2016] NZDC 21363 at [22].

(b) Northpower had control of the site of the incident;

(c) Northpower had contractual responsibility for health and safety at the substation; and

(d) Northpower employees deviated from the work plan without WEL's permission or knowledge.

[46] Previous decisions indicate that a co-defendant with less control over a situation may be less culpable than the other co-defendant.[18]

[47] I do not regard it as reflective of WEL's culpability that they initiated the programme. It is a natural feature of the relationship between the defendants that WEL will initiate programmes to undertake work on their assets that Northpower must carry out.

[48] WEL stresses that Northpower's employees deviated from the work plan, however WEL's agreed summary of facts records that WEL breached the Electricity Act in part because the work plan did not include instructions that it should not be undertaken if there was a variation in the substation layout and that the work should stop if for any reason it could not be followed.

[49] Both defendants' breaches involved inadequate risk or hazard assessments: Northpower on the day in respect of the Old Karori Road substation itself and WEL generally insofar as they did not document the hazard assessment in a single document.WEL also failed to identify site specific risks to Northpower.

[50] In view of these considerations I regard an apportionment of 60 per cent for Northpower and 40 per cent for WEL is appropriate, having particular regard to the fact that Northpower was in control of the site where the incident occurred.

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[18] *R v Auckland Council* [2016] NZDC 21363 at [33]; *Department of Labour v Bitumen Supplies Limited* DC New Plymouth, CRN 3034006460,6461, 17 September 2003 at [28].

Loss of or damage to property

[51] [The victim] seeks reimbursement of $30 for clothing that was destroyed by fire during the incident. WEL has offered to meet that cost and I direct that they do so.

Fine

[52] I now turn to the second step: fixing the amount of the fines for Northpower and WEL.

[53] *Hanham & Philp* establishes three bands of culpability. The starting point depends upon an assessment of which band the defendants' culpability falls within. The figure is then adjusted having regard to relevant aggravating and mitigating factors.

[54] The bands are:

(a) low culpability: a fine of up to $50,000;

(b) medium culpability: a fine between $50,000 and $100,000; and

(c) high culpability: a fine between $100,000 and $175,000

[55] Extremely high culpability may require a fine between $175,000 and the maximum.

[56] The assessment of the defendants' culpability will include:[19]

(a) Identification of the operative acts and omissions at issue.

(b) An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.

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[19] *Department of Labour v Hanham and Philp Contractors Limited* (2008) 6 NZELR 79 (HC) (2009) 9 NZELC 93,095 (HC) at [54].

(c) The degree of departure from standards prevailing in the relevant industry.

(d) The obviousness of the hazard.

(e) The availability, cost and effectiveness of the means necessary to avoid the hazard.

(f) The current state of knowledge of the risks and of the nature and severity of the harm which could result.

(g) The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[57] The operative acts or omissions of the defendants are set out at [9]-[10], above. I fully accept Northpower's submission that they were of a negligent, rather than intentional, nature.

[58] The defendants' breaches risked harm caused from exposure to live electricity. That is a serious risk and consequences can be fatal. It was a risk that was realised here with the injuries to [the victim].

[59] WEL has referred in their submissions to steps they and Northpower had taken to minimise the risk. These steps included the development of the work plan, an alternative work plan for de-energised work, and testing the work plan on de-energised equipment. I again emphasise that WEL's agreed summary of facts records one of their breaches to be that the work plan lacked express instructions not to undertake the work plan if there was a variation in substation layout and that the work should not be undertaken if for any reason the work plan could not be followed. I therefore give little weight to WEL's submissions as to the minimisation of the risk. The risk, which was serious, nevertheless arose and was realised.

[60] I now turn to consider the degree of the defendants' departure from prevailing standards in the electrical industry.

[61] The prosecution submits that the defendants' conduct is a significant departure. They submit that the industry is well aware of the risk of serious harm arising from exposure to live electricity. The prosecution identifies the relevant industry standard to be AS/NZS 4836:2011, which states that safety shall not be compromised because of operational pressure to carry out the work.

[62] WEL disputes that AS/NZS 4836:2011 is the relevant industry standard. WEL submits that that standard is concerned with "electrical installations", defined in s 2 of the Electricity Act to be "fittings beyond the point of supply". WEL notes that the substation in this case is more appropriately regarded as "works", which:[20]

> (a) means any fittings that are used, or designed or intended for use, in or in connection with the generation, transformation, or conveyance of electricity; but
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> (b) does not include any part of an electrical installation.

[63] WEL submits that this misidentification "tends to show the Prosecutor's general lack of understanding of the standards and requirements of the electricity industry."

[64] WEL nevertheless concedes that the industry is heavily regulated. While they point to the work plan as consistent with that regulation, they acknowledge that the work plan omitted explicit instructions to stop working where the work plan could not be followed to avoid the risk that arose here.

[65] The next factor to consider is the obviousness of the hazard. The obviousness of the hazard of live electricity has been recognised before by the Court[21] and I agree with the prosecution's submissions to that effect.

[66] WEL submits, to the contrary, that "the Court in *Department of Labour v Power Services Ltd* noted that the fact there is an incident involving electrical cables does not automatically mean culpability is high."

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[20] Section 2.

[21] *WorkSafe New Zealand v Silver Fern Farms Ltd* [2016] NZDC 11861 at [14]; *WorkSafe New Zealand v CE & R Limited* [2017] NZDC 2547 at [19].

[67] I accept that, but that proposition has no bearing on the fact that the hazard was obvious; a fact I will have regard to in fixing the starting point of the defendants' fines, in accordance with Judge MacDonald's later statement in *Power Services* that "culpability itself must be looked at in the circumstances that exist."[22]

[68] Both defendants submit that the decision of [the witness], Northpower's other employee working in the Old Karori Road substation during the incident, not to terminate the work despite his knowledge of the requirements of the work plan was a contributing factor to the incident and is relevant to the assessment of the defendants' culpability. Northpower notes that [the witness] had, on the day before the incident, terminated work when it could not be completed safely in accordance with the work plan.

[69] Both the prosecution and WEL refer to Justice Duffy's observations in *Department of Labour v Eziform Roofing Products Limited*.[23] Her Honour found that conduct by victims may "mitigate otherwise seriously culpable conduct on the part of the employer" if that conduct displays an intentional or wilful disregard for safety practices.[24] On the other hand, if the injured employee was foolish or careless "little, if any weight" may be attached to that conduct in order to mitigate the defendants' culpability.[25]

[70] The defendants rely on the conduct of Northpower's employee [the witness], rather than of the victim [the victim], to mitigate their culpability. Justice Duffy does refer in *Eziform Roofing Products* to the importance that fines imposed "act as a real deterrent on employers to avoid workplace accidents, including those involving the foolishness and carelessness of employees."[26]

[71] The prosecution emphasises the lack of instructions in the work plan regarding how to respond if the layout varied or if the work plan could not be followed. Northpower in its own submissions referred to [the witness] "mistakenly"

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22 *Department of Labour v Power Services Ltd* DC Invercargill CRI-2011-025-2104, CRI-2011-025-2105, 16 December 2011 at [27].
23 *Department of Labour v Eziform Roofing Products Limited* [2013] NZHC 1526.
24 At [52].
25 At [52].
26 At [52].

using the wrong methodology. I have particular regard to these points in finding that [the witness]'s actions did not meet the standard of conduct required to mitigate the defendants' culpability.

[72] Finally, I consider the availability, cost and effectiveness of the means necessary to avoid the hazard. These included undertaking adequate risk and hazard assessments, observing the minimum approach distances prescribed for trainee employees, and including clear instructions within the work plan. These steps were available and would have involved minimal cost.

Starting point

[73] The prosecution submits that an appropriate starting point is a fine of $150,000 for each defendant, representing culpability in the upper end of the high culpability band.

[74] In support of this figure the prosecution relies on the following cases: *WorkSafe New Zealand v Blackham Boote Real Estate*,[27] *WorkSafe New Zealand v Arthur Ernest Britton and Britton Housemovers Limited*,[28] *Department of Labour v Safe Air Limited*,[29] and *Department of Labour v Icepak Coolstores Limited*.[30]

[75] The defendants make the following submissions regarding those cases:

(a) The maximum penalties in *Blackham Boote* and *Britton* were $500,000. The starting points of $130,000 and $150,000, respectively, in those cases accordingly represented medium, rather than high, culpability.

(b) *Safe Air* and *Icepak Coolstores*, where there were starting points of $125,000 and $140,000, respectively, involved fatalities in factual circumstances not analogous to those in the present case.

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27 *WorkSafe New Zealand v Blackham Boote Real Estate Ltd* [2015] NZDC 4857.

28 *WorkSafe New Zealand v Arthur Ernest Britton and Britton Housemovers Limited* [2015] NZDC 2101.

29 *Department of Labour v Safe Air Limited* [2012] NZHC 2677.

30 *Department of Labour v Icepak Coolstores Limited* DC Hamilton, CRI 2009-109-011343, 15 December 2009.

[76] I agree with these submissions. *Safe Air* involved the "inadequately thought through modification of an otherwise safe system" wherein the victim was drawn into the intake of an aircraft engine.[31] *Icepak Coolstores* concerned the sole employee of the defendant company (effectively the trading entity of the employee) who "must have realised at some stage that his expertise in this field was being tested to the limits and that he should clearly have sought professional assistance from a specialist engineer in respect of the work he was undertaking…"[32] I do not regard either defendants' conduct in this case to have taken on such characteristics or to have had as grave consequences as in those cases.

[77] Northpower submits that the breaches and starting point in *Department of Labour v Williams*[33] are helpful, referring to a starting point of $75,000 adopted in that case. I note, however, that while the informant suggested starting points of $75,000 and $50,000 for the two defendants,[34] the starting points adopted by the Court were in fact $60,000 and $50,000.[35] Culpability of the co-defendants was assessed to be in the medium band: "given the abject failure of the [defendants] to identify and communicate what was clearly an obvious potential hazard with obvious and potential risks".[36]

[78] WEL refers to two cases. First, *Department of Labour v Power Services Ltd*.[37] There a starting point of $60,000 was reached in relation to work mistakenly carried out on an energised line, as the wrong line had been de-energised. As a point of difference, the victim's conduct in that case was regarded as a mitigating factor.

[79] WEL also refers to *WorkSafe New Zealand v Hamilton Flooring Ltd*.[38] There a starting point of $65,000 was reached in relation to an incident where the defendant's failure "[came] down to not reminding the workers to strictly follow the well known work sequence." As a point of difference, WEL emphasises there were

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31 *Department of Labour v Safe Air Limited* [2012] NZHC 2677 at [53].
32 *Department of Labour v Icepak Cool Stores Limited* DC Hamilton, CRI 2009-109-011343, 15 December 2009 at [73].
33 *Department of Labour v Williams* DC Dunedin, CRI-2010-012-003953, 17 February 2011.
34 At [35].
35 At [55].
36 At [55].
37 *Department of Labour v Power Services Ltd* DC Invercargill, CRI-2011-025-2104, CRI-2011-025-2105, 16 December 2011.
38 *WorkSafe New Zealand v Hamilton Flooring Ltd* [2016] NZDC 15489.

further failures in *Hamilton Flooring* for which there are not analogous failures in this case. For example, the defendant there had not provided job safety analysis or work methodology statements to the victims.

[80] I consider *Williams* is relevant as it involved obvious potential hazards and risks. I regard the departure from standards that occurred here to be more in the nature of an oversight than a mistake, as in *Power Services*, as the defendants have recognised greater direction ought to have been provided about responding in the situation that gave rise to the incident. I also consider that the departure was more than a failure to remind workers to strictly follow a well known sequence, as in *Hamilton Flooring*.

[81] In view of these considerations, and having regard to the factors discussed above, I find both defendants to fall within the medium culpability band. I assess a starting point of $75,000 for Northpower and $65,000 for WEL.

Aggravating and mitigating factors

[82] The prosecution submits there are the following aggravating factors: [The victim] was young and a trainee; the defendants were experienced and knowledgeable; the defendants had been put on notice by prior arc flash incidents and interactions with the regulator; and Northpower had four prior arc flash incidents resulting in harm to employees.

[83] The defendants submit there are no aggravating factors warranting a separate uplift.

[84] I consider the aggravating factors identified by the prosecution have informed my assessment of the starting points and do not warrant separate uplifts. For example, the defendants' experience and knowledge is a factor relevant to my assessment of their deviation from industry standards and the obviousness of the hazard. Further, Northpower's prior arc flash incidences are not aggravating factors, as they did not result in convictions; something the prosecution has acknowledged in noting Northpower's previous convictions are neither relevant nor recent.

[85] The prosecution submits there should be a reduction of 25 per cent taking into account the following mitigating factors: offer of reparation, remedial action, favourable safety record, and cooperation with the investigation. The prosecution refers to these factors in citing *Department of Labour v Eziform Roofing Products Limited*.[39] There, Duffy J held that an overall maximum reduction between 20 and 30 per cent would ordinarily be appropriate for those factors.[40]

[86] Northpower submits that a 30 per cent reduction for mitigating factors is appropriate while WEL submits that a 45 per cent reduction may be available. The mitigating factors suggested by the defendants are those identified in *Ballard v Department of Labour*.[41] WEL relies on the specific reductions in that case, where Stevens J made the following adjustments:[42]

(a) offers to make amends and reparation – 15 per cent;

(b) cooperation with the Department of Labour in its investigation and prosecution – 10 per cent;

(c) remorse shown by the appellant for the offence and the harm caused – 5 per cent;

(d) remedial action taken to prevent the recurrence of the circumstances – 5 per cent; and

(e) favourable safety record – 10 per cent.

Offer to make amends and reparation

[87] The defendants have paid $20,000 in reparation to [the victim]. The defendants have also offered [the victim] further counselling and this offer remains open. [The victim] has expressed that he has already received help and just wants to put things behind him.

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39 *Department of Labour v Eziform Roofing Products Limited* [2013] NZHC 1526.
40 At [58].
41 *Ballard v Department of Labour* (2010) 7 NZELR 301.
42 At [41]-[42].

[88] In recognition of the defendants' offers to make amends and reparation, I consider a 10 per cent reduction is appropriate.

Cooperation with WorkSafe

[89] For their cooperation with WorkSafe I consider that the defendants are each entitled to a five per cent reduction.

Remorse

[90] The defendants have expressed genuine remorse for the harm [the victim] has suffered as a result of their offending. I note in particular the affidavit of Gregory Skelton, WEL's CEO, where he has expressed his personal remorse for the psychological impact [the victim] has suffered. I consider a further five per cent reduction is appropriate for this factor.

Remedial Action

[91] The defendants have taken many remedial steps since the incident at the Old Karori Road substation to address the hazard posed by working with live electricity.

[92] Northpower has invested in a works management system requiring planning steps and risk assessment before work can proceed. It has produced a Live Works Manual, in conjunction with WEL, which explicitly outlines which work can be safely carried out live on lines such as those involved in the decommissioning work which gave rise to the incident here. It has engaged an independent group to undertake an assessment of its safety programme and culture, as well as working with that group to improve training on safety matters.

[93] WEL has undertaken an investigation into the incident, as well as reviewing the protection systems that were in place at the Old Karori Road substation. It has reviewed its procedures and as a consequence provides work method selection checklists to contractors concerning live/de-energised work management; has updated its arc flash policy; and has created a health and safety coordination plan for contractors so work planning is discussed and risks are managed.

[94] I consider the remedial steps taken by both defendants following the incident at the Old Karori Road substation to be substantial, entitling them each to a further 10 per cent reduction.

Favourable safety record

[95] The defendants have favourable safety records. Northpower submits it has no relevant or recent previous convictions, which the prosecution accepts. WEL submits it has no previous convictions.

[96] I assess a further reduction of five per cent for each of the defendants is appropriate.

Guilty pleas

[97] Northpower and WEL are each entitled to the full 25 per cent reduction for their early guilty pleas.

Mitigating factors: conclusion

[98] I find that each defendant is entitled to the following reductions:

(a) offers of make amends and reparation – 10 per cent;

(b) remorse – five per cent;

(c) cooperation with WorkSafe – five per cent;

(d) remedial action – 10 per cent; and

(e) favourable safety records – 5 per cent.

[99] That is a total reduction of 35 per cent for each defendant. Applying the further 25 per cent reduction for their guilty pleas, the final fine assessed for Northpower is $30,000 and for WEL is $26,000.

Overall assessment

[100] The final step I must take is an overall assessment of the proportionality of the reparation and fines imposed to the circumstances of the offenders and their offending. In doing so I consider the total imposition of reparation and fine on the defendants, as well as their means to pay. Neither defendant has raised issues with their financial capacity. There is nothing else before me to suggest that any adjustments are necessary.

Conclusion

[101] The first defendant Northpower is fined $30,000. It is ordered to pay [the victim] reparation of $6,000.

[102] The second defendant WEL is fined $26,000. It is ordered to pay [the victim] reparation of $4,030.

Jan-Marie Doogue
Chief District Court Judge