South Australian Industrial Relations Court

Loizides v S.A. Ice Supply Pty Ltd [2005] SAIRC 66 (19 August 2005)

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Loizides v S.A. Ice Supply Pty Ltd **[2005] SAIRC 66**

INDUSTRIAL RELATIONS COURT (SA)

LOIZIDES, Vasilios

v

S.A. ICE SUPPLY PTY LTD

JURISDICTION: Prosecution

FILE NO/S: AMC-05-3608 (1986 of 2005)

HEARING DATES: 19 July 2005

JUDGMENT OF: Industrial Magistrate R E Hardy

DELIVERED ON: 19 August 2005

CATCHWORDS:

Prosecution - Guilty Plea - Failure to ensure safety of a worker who died as a result of carbon monoxide poisoning and pre-existing heart disease whilst operating a forklift truck in enclosed freezer premises - Failure to undertake risk assessment and hazard identification - Mitigating factors - Early plea of guilty indicating contrition - Some attention previously given to OH&S but not to the carbon monoxide factor - S 19(1) Occupational Health, Safety and Welfare Act, 1986.

Softwood Holdings Ltd v Stevenson [1997] SAIRC 39

REPRESENTATION:

Counsel:

Complainant: Ms M Guy

Defendant: Mr P Foreman

Solicitors:

Applicant: Crown Solicitor's Office

Respondent: Foreman Mead

1 The Defendant company is charged that:

"On the 11th day of April 2003 at Woodville in the said State, being an employer, failed to ensure so far as was reasonably practicable that its employee, namely Craig **McAlister**, was, whilst at work, safe from injury and risks to health:

Contrary to s 19(1) of the *Occupational Health Safety & Welfare Act,1986*.

Particulars

1. At all material times the defendant carried on business as a supplier of bagged ice.

2. At all material times Craig **McAlister** ("the employee") was employed by the defendant as a truck driver and forklift operator.

3. The defendant entered into a contract to lease space in a freezer cold store ("the freezer") for the purpose of storing bags of ice. The lease allowed the defendant full use of the lessor's internal combustion engine ("LPG") forklift truck ("the forklift").

4. As part of his duties, the employee was required to operate the forklift in the freezer.

5. On 11 April 2003 the employee was exposed to a risk to health when he was exposed to carbon monoxide from the exhaust of the forklift being operated in the freezer.

6. The defendant failed to provide and maintain so far as was reasonably practicable a safe system of work in that it:

(a) failed to carry out a hazard identification and risk assessment in relation to the use of the forklift in the freezer; and

(b) failed to ensure that there was a safe work procedure in relation to the use of the forklift in the freezer."

2 The defendant company has pleaded guilty to this charge.

3 The facts are as alleged in the complaint. In addition I note that the employee **McAlister** died whilst using a forklift truck in the freezer premises at Woodville leased by the defendant from the lessor G & H Processed Vegetables. The forklift truck was itself the property of the lessor and the defendant was permitted full use of it. The forklift was driven by an internal combustion engine fuelled by LPG. There is no dispute about the fact that this engine, like other internal combustion engines, produced carbon monoxide from its exhaust. The particulars of the complaint allege that the deceased employee was exposed to a risk to health from the carbon monoxide from the forklift exhaust being operated in the freezer room.

4 The freezer room was used by the defendant to store bagged ice. The dimensions of the freezer room were approximately 15 metres by eight metres. Access was gained to the interior of the freezer room through a sliding door large enough to accept the forklift and its load. In normal use the forklift would remove a pallet of bagged ice and take it outside the freezer to be placed on a truck.

5 The deceased had been working for the defendant as a contractor up to about two weeks prior to his death. He was at that time made a permanent employee. The deceased possessed a forklift licence for loading his six-pallet truck with ice for deliveries. It took about 30 to 45 minutes and about half of this time was spent in the freezer or in or around the freezer truck. The sliding freezer door remained open during this process as the deceased shuttled in and out with each load.

6 On the day of the accident the deceased was engaged on what were called housekeeping duties within the freezer and the door was kept shut. He was expected by the defendant to keep pallets tidy and stacked efficiently and to use the forklift for this purpose. The deceased was discovered collapsed in the driver's seat of the forklift with the motor still running. The cause of death was found by the coroner to be the combined effects of carbon monoxide intoxication and possible cardiac arrhythmia. The level of carbon monoxide in the deceased's blood was high but not in the fatal range and might have been sufficient to cause unconsciousness. When he was discovered he was wearing no more than a t-shirt and shorts and the freezer door was closed. It was presumed by the prosecution that the deceased thought it necessary to keep the door closed in order to maintain temperature. Research indicates that persons with coronary heart disease like the deceased are particularly sensitive to carbon monoxide.

7 However whilst testing might not have revealed dangerous CO levels, there were substantial levels of CO in the deceased's blood.

8 There was no evidence of an assessment of CO levels prior to 11 April 2003.

9 It is alleged in the particulars of the complaint that the defendant failed to carry out a hazard identification and risk assessment in relation to the use of the forklift in the freezer. That process ought to have covered CO emissions and ventilation and in particular whether it was safe to use this forklift in this particular freezer. It ought to also have covered the matters of appropriate clothing, the safe period to stay inside and when and for how long the door ought to remain open.

10 The defendant had access to information relating to carbon monoxide poisoning from the Workplace Services website. It was also available in hard copy. It refers to the fact that carbon monoxide poisoning is the most common single cause of poisoning in industry. It is a colourless, odourless, non-irritating gas with no inherent warning properties and accordingly its presence is usually undetected. Sources include the exhausts of internal combustion engines including those fuelled by LPG and the health effects range from headache through to collapse. More importantly the information warns against the use of forklift trucks in areas where adequate ventilation cannot be guaranteed.

11 I am told that it is therefore not possible to find out whether levels are dangerous without testing or monitoring but the CO levels will depend on such matters as the age of the engine, how it was maintained and how hard it had been working. Carbon monoxide builds up in an enclosed area and ventilation is important. It was acknowledged that the accident was unusual and unexpected but certainly not unforeseeable given the information available about enclosed spaces and LPG engines. Currently the defendant company used an electrically powered forklift inside these premises. Previously it had assumed that the deceased was aware through his training about the use of an LPG forklift in an enclosed space. However, no instructions had been given by the defendant to the deceased about the need to leave the door open and whenever the deceased was working the door had been seen to be open.

12 Mr Foreman who appeared for the defendant made several submissions, which I will deal with in turn.

13 He said that the defendant company was a small concern. There were two working directors and seven permanent employees. The principally responsible director attended court and has extended its

sympathies to the deceased's family. The defendant company has been fully cooperative with the department and formally extended its sympathies to the deceased's widow.

14 I am told that the defendant company, which has only limited experience in this industry, takes Occupational Health and Safety issues very seriously. Nevertheless, I was told that it is a small company with limited time and resources to undertake the full-scale OH&S that a larger company might engage in. Nevertheless prior to the accident, the defendant had upgraded plant and equipment. It had also undertaken and achieved hazard analysis and critical control point accreditation. I accept theses submissions but observe that the size of the company is immaterial in the context of ensuring the safety of employees. The requirements of s 19 bear equally on all employers.

15 The accreditation referred to above analysed every step of production for hazard control and other every step of production. I am told that that process highlighted other safety issues in the manufacturing and distribution process, which were in turn addressed by the directors. I accept this. However the CO factor was clearly not isolated.

16 I am told that the defendant company chose the freezer premises carefully with safety in mind. The lessor was also hazard analysis accredited and that was a factor as well.

17 Nevertheless the procedure, which is the subject of this complaint, was not specifically addressed. The defendant assumed that the deceased, because he held a forklift driver's licence, was fully aware of the training requirements and health and safety issues such as the use of forklifts in a confined space and within freezers. It is my view that such an assumption is dangerous and certainly not sufficient to satisfy the onus cast by s 19, particularly when the work environment provided by the employer creates its own unique set of circumstances and risks with which the employee must be acquainted.

18 I am told that the forklifts were part of the facilities that were provided at the premises and had in turn been in use for some time without incident. My view is that this might be so but there remains a duty incumbent upon the employer to ensure that all equipment used by employees is of a suitable nature and condition. Further, the fact that there had been no previous incident might be no more than chance and does not obviate the necessity to fully assess a risk posed to employees, even if there had been no prior incident.

19 I am told that clothing was offered to the deceased but declined on grounds that he had his own. It was left to the drivers to determine what they wore. The workers had been required to spend no more time than was absolutely necessary in the freezer. Mr Foreman said that it was very difficult to spend a great deal of time in such freezers, especially dressed as the deceased was, as they were 16 or 17 degrees below freezing point. He said that it was difficult to know what had happened and to understand where the deceased was working and why the door was closed. Shutting the door was not the deceased's normal practice.

20 That may be so but the fact remains that there was no safe working practice for the activity undertaken by the employee. It might be assumed that he closed the door himself but he was not so likely to do so had he been properly advised and trained.

21 Mr Foreman said that the deceased did not disclose any health problems he had to the defendant company and had he done so there was no way that he would have been employed to drive heavy vehicles.

22 I accept this to be so and this failure might well have contributed to the death of the employee who because of his medical health was more sensitive to CO poisoning but the fact is that even if the employee had been absolutely healthy, he was still at risk of collapse, unconsciousness, or death due

to CO exposure.

23 It was submitted that the offence was at the lower end of the scale of seriousness bearing in mind the defendant's general approach to safety issues and its requirement for a licensed and experienced operator and the somewhat unusual circumstances.

24 I do not agree with this submission. Whilst the defendant had addressed some safety issues and had a general awareness of them, and had set conditions for the operators of machinery, I do not accept that the circumstances are unusual for CO poisoning or that culpability is at the lower end of the scale. The point is that CO poisoning is life threatening and the defendant had not addressed the risk caused thereby to its employees.

25 The defendant was fully cooperative with the Workplace Services Inspectors. There were no prior offences alleged. There was immediate compliance with improvement notices served subsequent to the accident after undertaking risk assessment. Premises were subsequently reconstructed with monitoring devices for carbon monoxide and an electric forklift was introduced at the Woodville premises for much of the work at those premises.

26 I take all of the foregoing into account. In all the circumstances it is my view that this was a serious offence. The defendant had simply not appreciated let alone addressed or sought to rectify the hazard posed by the use of the forklift in the freezer. It ought to have done so. Information was readily available to it in printed form, which bore directly upon the circumstances in which the risk was posed and the deceased was caused to work. It had also failed to ensure that there was a safe work procedure in relation to the use of the forklift in the freezer.

27 I take these submissions into account subject to the comments I have made above in relation to them. Where I have made no comment I accept the submissions of Mr Foreman.

28 In my view a penalty of $55000 is justified for this offence. I take into account the defendant's plea of guilty at the earliest possible opportunity for which I think a discount of 20 per cent is appropriate and which leaves the penalty at $44000.

29 At the time of hearing the defendant's business had been sold to a competitor. This decision had been made based upon trading losses and a decision to quit the business. The full financial position was not known at the time of hearing but the defendant's accountant has provided a statement which indicates that the final accounts are still being prepared and the circumstances are such that following the realisation of the assets there will be insufficient funds to meet the liabilities of the business. The directors of the business were in the process of finding funds to discharge the liabilities of the company's commercial creditors.

30 It was submitted by Mr Foreman that pursuant to s 13 of the *Criminal Law (Sentencing) Act 1988* I ought not make an order requiring the defendant to pay a pecuniary sum.

31 That provision is as follows:

"13. (1) The court must not make an order requiring a defendant to pay a pecuniary sum if the court is satisfied that the means of the defendant so far as they are known to the court, are such that -

(a) the defendant would be unable to comply with the order; or

(b) compliance with the order would unduly prejudice the welfare of dependants of the defendant ,

(and in such a case the court may, if it thinks fit, order the payment of a lesser amount).

(1a) In considering whether the defendant would be able to comply with the order, the court should have regard to the fact that defendants may enter into arrangements under Division 3 of Part 9 for an extension of time to pay pecuniary sums or for payment by instalments.

(2) The court is not obliged to inform itself as to the defendant's means, but it should consider any evidence on the subject that the defendant or the prosecutor has placed before it."

32 In this matter the only evidence before me that the defendant would be unable to comply with the order is that of the defendant company's accountant that "as a result of the sale (of the company) and it's poor trading history Directors are currently seeking finance personally in order that all debt obligations of the company can be met as there will be insufficient funds available". The company accounts had not been finalised at the date of hearing but the company accountant still was able to hold that view. The company was not yet in liquidation but the directors were seeking funds to pay out creditors from their own means. It was intended to wind the company up after the debts were paid. There was no residual business and no residual capacity to earn or derive any income and there were to be no other assets available to it. It was suggested that at the end of the day the only debt owed by the company would be the fine or compensation I am to order today. In any event compensation was to be preferred to any fine to be imposed.

33 Mr Foreman submitted that on that basis there were grounds for the application of s 13. He said that there was no reasonable expectation that the company would generate income sufficient to satisfy the court orders.

34 The prosecution however maintained that the true financial position was not clear and it would be difficult for the court to make a finding under s 13 in that it could not be satisfied that the defendant was unable to comply with any order and it was a matter best left to the Fines Recovery Unit when the true picture was known. The company was still in existence and had not yet gone into liquidation. There was no final financial statement and the defendant was still able to enter into arrangements to pay by instalments.

35 I accept the prosecution submission. As matters stand at the present time there is no more than the opinion of the company accountant that any fine and compensation will not be met. Whilst it is perhaps likely that the events predicted by Mr Foreman will occur, it is not enough for me to be satisfied that the defendant will be unable to comply with the order and I therefore decline to apply s 13.

36 It has also been requested by the prosecution on behalf of the widow of the employee and his two children that pursuant to s 53 of the *Criminal Law (Sentencing) Act*, compensation be ordered to each in respect of grief. I see no reason not to do so. Indeed there is sound precedent for such awards and I refer to the decision of Senior Judge Jennings in his decision on appeal in *Softwood Holdings Ltd. v. Stevenson* [1997] SAIRC 39. Grief was said to be a well-known part of the human condition and the court could take note of it without the necessity for evidence save perhaps for its obvious presence in the Victim Impact Statement. Having reference to that statement I have no doubt that a wife of 21 years' standing and the two children aged 14 and 10 at the time of the death of the employee have suffered compensable grief.

37 The quantum of compensation is not a simple issue to determine but applying the reasoning of the Senior Judge in the above matter I am of the view that compensation in the sums of $8000 for the widow Suzanne Kaye **McAlister** and $4500 for each of the children of the marriage Ben and Dylan **McAlister**, is able to be assessed and is appropriate.

38 I therefore order that there be a conviction and a fine of $44000.

39 Additionally, I order that the defendant pay compensation pursuant to s 53 of the Sentencing Act

to; Suzanne Kaye **McAlister** in the sum of $8000 and to each of, Dylan and Ben **McAlister** in the sum of $4500.

40 Additionally, the defendant is to pay court costs on the summons of $108, levy of $35 and counsel fee payable to the Crown Solicitor's Office of $750.

41 That is a total of $ 61893 to be paid within 28 days.