IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2005 HCV 1810

BETWEEN	WALTER DUNN	CLAIMANT
AND	GLENCORE ALUMINA JAMAICA LIMITED (t/a West Indies Alumina Company (Windalco))	DEFENDANT

Miss Carol Davis for Claimant

Miss Malaica Wong and Miss Lisa Russell instructed by Myers Fletcher and Gordon for the Defendant

Negligence – Employer's Liability – Experienced employee sustaining chemical burns – Flooded work area – Whether employer failed to ensure correct safety footwear worn – Whether employee contributorily negligent – Whether uncovered drain unsafe - Proximate cause of injury
Damages – whether loss of overtime wages are recoverable

27th 28th March and 9th April 2008

BROOKS, J.

"I don't use shovel", declared Mr. Walter Dunn, with a hint of disdain, in answer to a question in cross-examination. Mr. Dunn is a Grade 1 millwright employed to a company trading in Jamaica under the name "West Indies Alumina Company" (Windalco). He was emphasizing that he was not a labourer; that he was a skilled, experienced employee of Windalco. Yet, on 27th January 2004, Mr. Dunn undertook a very dangerous manoeuvre while at Windalco's plant. He attempted to cross an area, flooded with a corrosive liquid, by walking atop a piece of equipment. He

slipped while doing so. Unfortunately, the place where he slipped was above a recessed area on the floor, called a "sump basket", which had been left uncovered. His left foot went into the flooded sump basket and he sustained chemical burns in the area of his ankle. He blames Windalco for having allowed the situation which caused his injury. Windalco, in turn, states that Mr. Dunn was the author of his own misfortune, not only because of his dangerous manoeuvre, but because he failed to wear the safety rubber boots which were required for that area.

The questions for the court to consider are:

1. whether Windalco failed in its duty to provide a safe place or system of work for Mr. Dunn;

2. whether Windalco failed in its duty to provide Mr. Dunn with the appropriate safety equipment;

3. whether Mr. Dunn ought to have placed himself in that situation; and,

4. what was the proximate cause of Mr. Dunn's injury?

I shall first give a more comprehensive description of the factual situation and then consider each question in turn.

The facts

There are very few disputes as to fact in this case. I shall address them during the course of this opinion. This unfortunate incident occurred after the end of the work shift. Mr. Dunn was preparing to go home when

his supervisor and team–leader Mr. Wayne Ledgister telephoned him and asked him to check on, and correct if possible, a problem with a piece of equipment in the Ball Mill called a drag conveyor. The problem had apparently developed after the shift had ended. Though he could have refused, Mr. Dunn did not. Mr. Ledgister was not surprised. He said that Mr. Dunn was a dependable worker and because of the relationship that the two had, Mr. Ledgister expected Mr. Dunn to do as he had been asked.

Mr. Ledgister was not at the plant when he had called Mr. Dunn. He did not know the nature of the problem with the drag conveyor, nor did either man know, at the time of the call, that the floor of the Ball Mill was flooded with the liquid substance which they name "slurry". It had not been flooded during the course of the day. The slurry is a mixture of sodium hydroxide (caustic soda) and bauxite. Both men, however, regarded a problem with the drag conveyor as an emergency, requiring urgent attention. It should be noted that a problem with the drag conveyor is not necessarily associated with flooding of the Ball Mill with slurry.

It is also important to note that Mr. Dunn had been working at the plant since 1989. He had worked himself up from Grade 3 to Grade 1 mechanical millwright and had had fifteen years experience in this highest level of millwrights.

Mr. Dunn went to the Ball Mill area. He observed smoke from the area by the main drag conveyor drive. That was a sign that there may be a possibility of a fire occurring on the drive. He made checks outside, but that did not reveal the problem. He made his way into the Ball Mill building. He was alone there. He realized that the floor of the Ball Mill was flooded with slurry. He knew that slurry is a dangerous substance which can burn.

Facing the situation just described, Mr. Dunn was not properly equipped for the manoeuvre that he was about to embark upon. He was wearing company-issued **leather** boots. The required equipment for that area is the company-issued **rubber** boot. Windalco had posted signs and regularly reminded employees in that area to use the rubber boots. Rubber boots provide protection against the slurry. Despite this Mr. Dunn pressed ahead.

His explanation is given in his witness statement, at paragraph 9.

> "...given that I had been advised that this was an emergency, and that I was to proceed immediately...I was walking on the safety cover for the chain for the drag conveyor. This is about 2 feet wide, and it was above the level of the liquid on the mill floor. I had almost reached...when my foot slipped and went into a sump basket on the floor".

This brings me to the first of the issues in dispute. Though Mr. Dunn worked in that area on a daily basis, he had not been wearing rubber boots for months. It was not that he had not been issued with them. It was because Mr. Dunn had been suffering from gout; a medical condition which

made wearing the rubber boots uncomfortable. Mr. Ledgister knew of this breach of the oft emphasised standard safety measure. He testified that he repeatedly told Mr. Dunn to wear the proper gear. Mr. Dunn denies this and testified that because his condition was known, there was tacit approval of his wearing the incorrect footwear.

I accept Mr. Dunn's testimony as being more probable. There is evidence that from time to time, employees, even Mr. Ledgister himself, would venture into the Ball Mill without donning the rubber boots. There is also critical evidence that Mr. Ledgister was not as strict as he could have been in demanding compliance with the safety procedures. He explained in cross-examination that he had been recently promoted to the post of team-leader and that he "didn't want to rock the boat" with employees.

The second major area of dispute is whether this situation was an emergency. Mr. Fitzroy Hibbert, the process team-leader, did not regard a problem with the drag conveyor as an emergency. He explained that whenever the drag conveyor malfunctions, its work can be and is done manually, using shovels. Mr. Dunn accepted that the drag conveyor's work could have been done manually, though not by him.

I accept that Mr. Hibbert would have had a different stance on this issue. He had a different area of responsibility. His point of view is

different from the persons who have direct responsibility for maintaining and repairing this equipment. Both Mr. Dunn and Mr. Ledgister regarded a malfunction of the drag conveyor as an emergency.

Liability

In considering the issue of liability it is important to recount Windalco's responsibility to its employees. It must provide competent staff, safe equipment, a safe place of work and a safe system of work. (See *Wilsons and Clyde Coal Co. Ltd v English* [1938] A.C. 57 at 78 and 86) The first requirement does not apply in the instant case.

Did Windalco provide safe equipment?

There is no dispute that Windalco provided Mr. Dunn with the appropriate safety equipment. There is also no dispute that there were quarterly safety meetings and Monday morning shop talks re-emphasising safety issues. The issue is whether Windalco failed in its duty to Mr. Dunn by insisting that he wear the required boots. This is a question of supervision. Here, Mr. Dunn's experience becomes relevant. In *Baker v T. Clarke (Leeds) Ltd.* (1992) P.I.Q.R. 262, Stuart-Smith, L.J. said at page 267:

> "...it is not necessary...for an employer to tell a skilled and experienced man at regular intervals things of which he is well aware **unless there is reason to believe that that man is failing to adopt the proper precautions or, through familiarity, becoming contemptuous of them.**" (Emphasis supplied)

Miss Davis, on behalf of Mr. Dunn, cited the case of *Nolan v Dental Manufacturing Co. Ltd.* [1958] 2 All ER 449 in support of the principle that the employer's failure to insist on compliance with safety requirements is a basis for liability. Paul, J. in that case said at page 454 D:

> "I hold that, if there had been a strict order and supervision, the probability is that the injury would not have happened by reason of the accident. **I do not think that the plaintiff was the kind of man who, in spite of strict orders and supervision, would have tried to dodge them on every occasion.**" (Emphasis supplied)

I draw a distinction between Mr. Dunn and Mr. Nolan on the basis that Mr. Dunn deliberately ceased wearing the proper footwear because of his condition. I find that Mr. Ledgister's failure to insist that Mr. Dunn wear the required boots was not because of indifference, or because he thought that Mr. Dunn was contemptuous of the requirement, but because of his empathy for Mr. Dunn's medical condition. I find, however, that it is that empathy that goes the root of Mr. Dunn's decision. In answering a suggestion that Mr. Ledgister had objected to his flouting of the rules, Mr. Dunn said in cross-examination:

> "I do not agree that Mr. Ledgister objected to my wearing leather boots, he is the person who handed me jobs every day and he is the person that sent me in the area."

Had Mr. Ledgister enforced compliance with the rule, Mr. Dunn would not have developed a casual attitude to the wearing of the correct footwear in this area which Windalco designated a "wet area".

I find that Windalco did provide the proper equipment, adequate explanation of the requirement to wear it and general supervision of compliance, but adopted a sub-standard approach in respect of Mr. Dunn. Mr. Dunn though poignantly aware of the danger which he faced going into the Ball Mill as he did, nonetheless he took the route which he did, because of a lax standard.

Did Windalco provide a safe system of work?

The evidence concerning Windalco's requirement that employees wear safety gear, as described above is undisputed. There was no evidence concerning required procedure in the event that there was a flooded floor, but certainly Mr. Dunn's appreciation of the danger, does not indicate any unsafe system. The aspect of the system which is of concern is contained in the evidence of Mr. Ledgister. He says at paragraph 19 of his witness statement:

> "**Although the sump basket should remain covered, it is plant practice to leave it open throughout the day's operations**. This is because residue from plant operations is collected in the basket which is cleared several times a day. Once the basket is open the cover remains in a vertical position, and it is therefore unlikely one would not realise the basket was uncovered." (Emphasis supplied)

It is here that Windalco's failure to follow the required procedure results in danger to its employees. The danger is not only in the likelihood of stepping into the uncovered sump basket, which is a drain area, but

leaving it uncovered also provides a trip-and-fall hazard. The vertical cover would also provide such a hazard. Mr. Dunn testified that there was no indication that the sump basket in question was uncovered. He denied suggestions to the contrary. In my view it is immaterial whether the cover was vertical or not. He had slipped; he had no control over where his foot went at that time. The warning that a vertical cover would normally have provided was irrelevant at that time. The danger which the uncovered sump basket provided proved to be injurious to Mr. Dunn in its flooded state. His foot went at least eight inches down into the slurry.

Did Windalco provide a safe place of work?

My comments concerning the open sump basket would apply to the issue of whether the plant was a safe place of work for Mr. Dunn at that time. I find that the flooded environment did not make the Ball Mill unsafe. It was not a permanent state of affairs; it was transient even though not unusual. Mr. Hibbert was aware of the situation; he had been trying to clear the clogged slurry line which had caused it. Based on the safety requirements for footwear in that area, I do not think that it was necessary for him to have prevented access to the area while he worked. Employees had been instructed that the Ball Mill was a "wet area" and required the wearing of rubber boots.

Whether Mr. Dunn ought to have placed himself in that situation?

Answering this question is essential to whether Mr. Dunn should bear some of the responsibility for his injury. Even though he regarded it as an emergency situation, it was not one without precedent. There was an alternative if the drag conveyor had become incapacitated; manual labour could have been employed. Also, he could have waited and dealt with the matter at another time, or he could have put on the proper gear and returned. His response was not a reflex action as was the case in *Goodwin v West Indies Glass Co. Ltd.* C.L. G. 149 of 1993 (delivered 30/9/1996). In that case Mr. Goodwin was injured when he instinctively tried to catch a falling mould, on which he had been working. The danger to Mr. Dunn's person would have been obvious to him as it would have been to any reasonable employee in his position. (See *Badger v Ministry of Defence* [2006] 3 All ER 173 at page 176 j) The question though, is whether the situation required Mr. Dunn to take the course that he did. I find that it did not.

What was the proximate cause of Mr. Dunn's injury?

There was some discrepancy as to the depth of the sump basket. Mr. Ledgister said that it was about 18 inches deep. Mr. Hibbert said it was less than the depth of a trench at the plant, which is 12 to 18 inches deep. Mr. Hibbert went on to say that the depth of the sump basket is less than the

height of a rubber boot, "so it is hardly likely that you would be injured [if you stepped in a sump basket]". This testimony is consistent with Mr. Dunn's testimony. He said in his witness statement, that if "the sump basket had been covered as it should have been, my foot would not have gone down into the sump basket and I would not have been burnt". His evidence was that the, then standard, rubber boot, came up about one foot above the ankle. It does not seem that Mr. Dunn's foot went beyond about 8 inches deep into the slurry. That would seem to support Mr. Hibbert's testimony about the depth of the sump basket. It is also important to note that Mr. Dunn's burns were mostly above the ankle. I accept Miss Davis' submission that the injury occurred by the slurry flowing over the top of the leather boot and into the boot. I find that the depth of the sump basket contributed to the injury.

The burden of proof is on Mr. Dunn to satisfy the court on a balance of probabilities that his injury was caused by Windalco's negligence. I find that he has done so. The cause of his injury is his entering the flooded area with incorrect footwear, undertaking a dangerous manoeuvre, and accidentally slipping while doing so. Had he been wearing the correct boots, he would have been able to traverse the flooded floor without danger. Had he accidentally stepped into an open sump basket while wearing the rubber

boots he would not have been injured as it does not seem that the sump basket was deeper than the boot was high. I also find that had the sump basket not been open, Mr. Dunn's injury would have been less severe.

The cause of his injury therefore is to be divided between Windalco's failure to insist that he wore the correct footwear, the open sump basket and his dangerous choice of handling the emergency. On this finding I would apportion liability to Windalco, at 75%.

I shall now consider the matter of damages.

General Damages

The injury to Mr. Dunn's foot was "circumferential burn of the distal quarter of the leg and dorsum of the leg". It was calculated to be 3% of his body surface. He was hospitalized for approximately three weeks during which time he underwent surgery. The operation involved taking skin from his thigh and grafting it on to the injured site. The surgeon, Dr. Venugopal, testified that the operation was necessary to optimize the range of motion at the injury site. The operation was successful. Mr. Dunn's recovery was uneventful and his condition improved impressively. It was however associated with pain and itching at both the injury and donor sites. The doctor explained that these symptoms were not unusual and that the pain would normally be sudden and unpredictable.

Dr. Venugopal assessed Mr. Dunn's permanent partial disability (PPD) at 5% of the whole person. The disability, he said, was as a result of the pain and itching. The doctor opined, however, that it is possible for both conditions to improve with time and even disappear completely. Mr. Dunn testified that though his condition had improved significantly, he still gets pain from time to time and a stinging sensation in the foot. Though he said that he is no longer able to play football, go for long walks or go dancing because of the injury, this was not supported by the doctor's evidence who said that there is no disability as far as mobility is concerned.

There were very few reported burn cases involving the foot. Indeed, in one of the cases cited by Miss Davis the injury was not a burn but a degloving injury with exposed tendons and bones of the foot. This was the case of *Thomas and Stoner v Shaw and another* 5 Khan 61. In *Thomas* the eleven year old plaintiff had a large contaminated injury. Skin grafts were required. He was left with 2% whole person PPD and was unable to run and play games as he had before. The award of general damages was $750,000.00 in July 1999. This converts to just under $1,800,000.00 using the Consumer Price Index for February 2008 (121.5). Though the permanent disability is less than Mr. Dunn's, it appears that young Thomas' injury was worse.

In the unreported case of *Kirk Barrett v Glencore Alumina Jamaica Ltd.* 2005 HCV 05127 (delivered 11th June, 2007) Mr. Barrett suffered a similar injury to Mr. Dunn's. The injury was to a larger area to Mr. Barrett's ankle area than Mr. Dunn's, though there was no evidence of PPD. The award of $1,950,000.00 made in June 2007 converts to just over $2,200,000.00 in today's money. I would award Mr. Dunn less than Mr. Barrett due to the smaller area involved in the injury.

Miss Wong, representing Windalco, submitted that the appropriate award for Mr. Dunn would be $1,000,000.00 in the event that the court came to consider the matter of damages. I find that the case which she cited in support of the submission *Banks v Clarke and another* 4 Khan 138, did not involve injuries as serious as Mr. Dunn's and there was no medical assessment of permanent disability. I find that the appropriate award for pain and suffering and loss of amenities to Mr. Dunn should be $1,750,000.00. The apportioned award would be $1,312,500.00.

Special Damages

Windalco paid Mr. Dunn his regular salary for the time that he was away from work. The period was 27th January 2004 to a date in early January 2005; a total of 51 weeks. He however claims compensation for

loss of overtime and double time that he was accustomed to earning prior to the injury.

> "There is no general automatic right to overtime in Jamaica. Overtime is only payable if the employee has a contractual or statutory right to it and the employer has a correlative contractual or statutory obligations (sic) to pay it."

So said Clarke J. (as he then was) in *Junior Doctors Association and others v Minister of Health and others* (1990) 27 J.L.R. 148 at page 154 I. Both counsel in the instant case, acknowledged that there is no entitlement to overtime. Miss Davis, however, referred to evidence that Mr. Dunn was accustomed to earning both overtime and double time and submitted that he should be compensated for the loss of that income. His loss, she said, was not only for the time that he was incapacitated but also for the time, after he returned to work, that he was placed in the Safety Department and removed from millwright duties.

Acting on the principle that Mr. Dunn should be placed in the position that he would have been in, had the injury not occurred I find that Mr. Dunn has made out a case for an award of overtime and double time during the time of his incapacity. On his return to work, however, the company had the right to assign him where it would. If it did not assign him to a location which would earn him overtime, he could not have complained. He provided evidence that, for almost all of 2003, he earned gross overtime

earnings at $105,268.48 and gross double time earnings of $57,518.79. The period is roughly equivalent to the time for which he was incapacitated. The figures may therefore be used in the calculation of the loss. I would, however, discount those figures by a third to account for contingencies, including the risk that Mr. Dunn's gout could have had him moved to a location where he would not have earned overtime. That results in a discounted total of $108,524.84. This figure would also have to be reduced to account for income tax and other statutory deductions. I shall use a round 30% to account for those. The reduction would therefore be $32,557.45. The loss suffered by Mr. Dunn, on this calculation, would be $75,967.39. I would award that sum. To that figure should be added $2,000.00 which is the agreed cost of a medical report. The apportioned award would be $58,475.54.

Conclusion

Windalco was negligent in the situation in two distinct ways. It failed to insist that Mr. Dunn wear the required footwear in the Ball Mill area and it left a sump basket uncovered at the time of the incident. Mr. Dunn's training and experience made him aware of the danger which the flooded Ball Mill floor presented. He therefore contributed to his injury by

undertaking a dangerous manoeuvre. He is therefore 25% contributorily negligent.

The awards of damages must therefore be adjusted accordingly.

The order therefore is:

Judgment for the Claimant with damages assessed as follows:

General Damages $1,312,500.00

Interest is awarded on that figure from 5/7/2005 to 22nd June 2006 at 6% per annum and from 23rd June 2006 to 9th April 2008 at 3% per annum.

Special Damages $58,475.54

Interest is awarded on that figure from 27th January 2004 to 22nd June 2006 at 6% per annum and from 23rd June 2006 to 9th April 2008 at 3% per annum.

Costs to the Claimant, to be taxed if not agreed.