IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2004 HCV 03020

BETWEEN	WINSTON HALL	CLAIMANT
AND	GLENCORE ALUMINA JAMAICA LIMITED	DEFENDANT

Mr. Sean Kinghorn and Miss Deidre Coy instructed by Kinghorn and Kinghorn for Claimant

Mr. Christopher Kelman and Mr. Dale Palmer instructed by Myers Fletcher and Gordon for the Defendant

Negligence – Employer's Liability – Casual labourer sustaining lower back injury – Whether worker sustaining back injury while on a previous tour of duty with the employer – Whether job required protective equipment - Whether employer negligent

7th October and 24th November 2008

BROOKS, J.

Mr. Winston Hall was employed as an hourly-paid casual labourer at Glencore Alumina Jamaica Limited for a number of years. His employment was not continuous but was on a frequent cyclical basis. He ceased working for Glencore in December 2003 after he suffered an injury to his back. He asserts that Glencore is to blame for his injury and he has brought this claim to recover damages for negligence.

Glencore, on the other hand, denies that it was negligent in any way. It asserts that if Mr. Hall suffered an injury, as he claims, by lifting with a

shovel, some precipitate material, which he was deployed to remove, there is nothing which it could have done to prevent the injury. It says that it took all reasonable care to maintain a safe system of work and perhaps Mr. Hall's injury is as a result of his own fault.

The issue to be decided is whether Glencore was negligent in its duty to protect Mr. Hall from injury. The onus is on Mr. Hall to prove Glencore's negligence. He must do so by showing on a balance of probabilities that it failed to provide one or more of the following; safe employees for him to work with, 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 pp. 78 and 86.)

Mr. Hall's description of the event is contained in paragraph 15 and 16 of his witness statement:

> "15. While [removing the lime scale], coming up to break time at quarter to 10, I realize that when I go down using the shovel to take up the lime scale and bring it up back, I heard something burst in my back. I then used my hand to feel around my back to see if anything burst.
>
> 16. I had the shovel in my hand and I had to use it to balance me because I was going to fall. I use my other hand to stretch around my back...."

Thereafter he describes the pain he felt and the way he went about getting treatment for it.

Both sides agree on the basic facts:

1. The job which Mr. Hall was deployed to do required him to use a shovel to remove lime scale precipitate from an area and deposit it in a tank nearby. The job sometimes required him to use a sledgehammer to break up the dried precipitate into smaller pieces, before removing it;

2. Mr. Hall had been shown how to carry out his task and how to lift and remove the precipitate. He had been provided with goggles, gloves, rubber boots and ear muffs, but not a back brace;

3. He had been carrying out that task during his various tours of duty for over six months;

4. Mr. Hall complained of sustaining an injury on the job on November 11, 2003 for which he received treatment, medication and two weeks sick leave;

There was, however, a difference between the parties as to whether Mr. Hall had suffered a back injury before and after that date. In his witness statement, Mr. Hall stated that he had not. Paragraph 49 of his witness statement contains the following sentence; "I had no previous complaints in relation to pain on the job. I also had no previous complaints about heavy lifting or anything like that". Mr. Hall's description of events between November 11 and December 31, 2003, when he ceased working for Glencore, does not indicate that he did any other work, or suffered any further injury after the incident on the 11th November. He seemed to have been consumed by the injury that he had suffered on that date and was seeking relief from the suffering that it was causing him.

That testimony was not contested in cross-examination. In fact, Mr. Hall testified in cross-examination that he had no incidence of pain in the six months preceding his injury on November 11. In Glencore's case, however, one of its witnesses, a Dr. Owen James testified that Mr. Hall sustained low back strain in February 2003 and was treated with physiotherapy. He also said that Mr. Hall had another incident in April, 2003, involving back injury. Dr. James also testified that on December 15, 2003, Mr. Hall exacerbated the injury he had sustained on November 11. This he did, according to Dr. James, by using a sledgehammer. Mr. Hall's Counsel Mr. Kinghorn, in cross-examining Dr. James, did not contradict Dr. James on this testimony and in fact seemed to accept the doctor's evidence with regard to those earlier as well as the later episodes of injury.

Dr. James was however not speaking from his personal experience. He had not personally examined or treated Mr. Hall until almost two months after the incident, but was referring to records kept at Glencore's offices. Dr. James' testimony on the point was: "my personal examination did not indicate that [Mr. Hall] had any pre-existing injury, but there are records to indicate that he did." His evidence was that those records are kept by the senior nurse in charge of the health centre at Glencore. In light of Mr. Hall's

testimony, I cannot accept this information from Dr. James as reliable evidence. It is in fact hearsay.

So what is it that Glencore could have done or done differently to avoid Mr. Hall's injury? Mr. Kinghorn representing Mr. Hall submits that Glencore should have provided Mr. Hall with a back brace. Counsel submitted:

> "[Glencore], despite acknowledging [Mr. Hall's] pre-existing back injury and despite the knowledge that a back brace could prevent further injury or even prevent any injury at all, failed and/or refused to provide [Mr. Hall] with a back brace."

Apart from the issue of a "pre-existing" injury, with which I have already dealt, there is, however, no medical or other expert testimony to support that submission. It is true that Dr. James did say that a back brace could prevent injury in some cases. He testified that back braces were issued by Glencore on the recommendation of a specialist. The doctor, however, stated that he did not recommend the use of a back brace as a matter of course because it sometimes gave the wearer a false sense of security which could lead to injury.

Dr. Nesbeth who attended on Mr. Hall after his injury recommended that he should use a back brace. This however was after the fact. Dr. James agreed that a back brace would "give support to the muscles in the middle and lower back to **prevent further injury and to promote healing of the**

injury" (emphasis supplied). The medical evidence therefore supports the use of a back brace **after** an injury has occurred. There is nothing therefore, to indicate that Glencore failed to provide proper safety gear.

Was there any deficiency in Glencore's system of work? In the cross-examination, Mr. Hall agreed that it is he who decides how much material is in the shovel and consequently the weight of the material in the shovel. He also accepted that he was experienced in doing that job, having been engaged in carrying it out, on and off, over the 6 months preceding the date of his injury. He had been shown how to carry out his job by the person to whom he reported; an employee whom he knew only as "Jacko". Mr. Hall confirmed in cross-examination that he would not lift a load (with the shovel) that he was not comfortable with. That evidence does not indicate any deficiency on Glencore's part in terms of the method of work required of Mr. Hall or the system that it required him to use.

The other elements specified by the court in *Wilsons and Clyde Coal Co. Ltd. v English* cited above, are not relevant in this case.

In the absence of evidence to indicate that Glencore should have issued a back brace, I find that Mr. Hall has not made out a case that Glencore failed to do something, which it ought to have done, to protect him from injury while carrying out the task which he had to perform.

The result would have been quite different if Mr. Hall had testified that he had suffered previous back injury and had been sent back to work without the implementation of Glencore's disability management protocol. That protocol was designed to prevent the situation where an employee, such as Mr. Hall, could have been sent back to a job where the use of a sledgehammer could have "exacerbated" (to use Dr. James' term) his injury. If those were the facts, I would have found that Glencore negligently failed to provide a safe system of work for Mr. Hall. In rejecting Dr. James' evidence concerning injuries sustained by Mr. Hall previously and subsequently, to November 11, 2003, I cannot so find.

It is ordered therefore that:

1. Judgment for the Defendant on the claim;

2. Costs to the Defendant to be taxed if not agreed.