REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2013-03285

BETWEEN

JOHN DESMOND SAMUEL

Claimant

AND

PETROLEUM COMPANY OF TRINIDAD AND TOBAGO

Defendant

Before The Honourable Madam Justice Margaret Y Mohammed

Dated the 29th February 2016

Appearances

Mr. T Dassyne instructed by Mr. L Chariah for the Claimant

Ms. R Ceasar instructed by Ms. Manisha Lutchman of Messrs Alexander, Jeremie & Co for the Defendant

JUDGMENT

1. The Claimant was employed with the Defendant for 33 years from 1976. On the 15th August 2009 he claimed that he injured his back while dismantling a 3 inch spool from the Number 3 heater at the Number 1 CRU ("the job") which was located on the South Area of the Defendant's refinery at Pointe-a- Pierre ("the said job site"). He has instituted the instant action seeking damages for the Defendant's negligence and/or breach of statutory duty and/ or common law duty. He has pleaded particulars of special damages in the sum of $384,578.57 as his loss of earnings, and future loss of earnings in the sum of $ 173,808.00. He also claimed general damages.

2. The Claimant averred that on the 15th day August, 2009 during the 7 am to 3 pm shift, he was directed by his then immediate supervisor/foreman, Mr. Indar Ragoonath ("Mr. Ragoonath") to perform the job. All the tools to be used by workmen were stored in a toolbox with the crew for each shift having their own toolbox. The tool to be used for the job consisted of a ¾ inch /combination spanner ("the said spanner") and in the event that the said spanner could not loosen a nut, an extension value wheel spanner ("the extension spanner") which served as an attachment for the said spanner was to be used.

3. On the said day, the Claimant retrieved the said spanner from the toolbox and he and his co-worker, Mr. Alfred Harry ("Mr. Harry"), attended the said job site and commenced the job. Whilst attempting to loosen a nut and bolt using the equipment provided by the Defendant, the Claimant experienced a sharp pain in his neck, right shoulder and particularly in his lower back ("the incident"). The Claimant informed his co-worker, Mr. Harry, about the pain he felt in his back but he was unable to inform Mr. Ragoonath since he was not at the said job site when the job was being performed. The Claimant returned home after the work day ended without informing Mr. Ragoonath about the incident.

4. On the next day which was the 16th day of August, 2009 the Claimant averred that he informed Mr. Ragoonath about the pain he felt in his back after the incident. Mr. Ragoonath advised the Claimant to report to the control room where he was to remain for the remainder of his work pass, which was scheduled to end on the 1st day of September, 2009.

5. As a result of the increasing and extreme pain that the Claimant was experiencing, on or about the 17th day of August, 2009 he visited the Timekeeper of the Defendant and complained about his pain since his immediate supervisor, Mr. Ragoonath, was not present. The Claimant was given a 'Visit the Doctor' form by the Timekeeper. On the 17th August 2009 the Claimant was seen by Dr Harrison, a doctor employed by the Defendant, who advised that he be placed on restricted duty with no bending or lifting. Dr Harrison also recommended that the Claimant obtain an X-Ray and

advised him to return on the 20th August 2009. The Claimant obtained the X –Ray and provided it to Dr Harrison who recommended that he be seen by the medical superintendent. The Claimant was attended to by the medical superintendent, Dr Ferreira, who referred him to the superintendent in charge of the Claimant's department, Mr. Shem Lewis ("Mr. Lewis"), who informed the Claimant that he was not aware of the incident until the 17th August 2009 when the Claimant spoke to him.

6. On the 29th September 2009 the Claimant attended a meeting with personnel from the Defendant along with his union representative. As a result of the continuing pain the Claimant attended the San Fernando General Hospital and Dr Mulrain. He also attended a number of physiotherapy sessions during the period 27th January 2010 to 2nd June 2011. In February 2010 the Claimant was informed of an appointment for him to be seen by a doctor at the Defendant's premises in March 2010. He visited Dr Harrison on the 1st March 2010 who informed him that the Defendant's usual practice is that an injured employee of the Defendant must be referred for medical assessment within 4 days of any accident on the Defendant's compound.

7. The particulars of negligence upon which the Claimant grounded the Defendant's breach of its duty of care to him were: (a) the Defendant failed to provide adequate manpower, plant and machinery to accomplish the job assigned to the Claimant; (b) the Defendant failed to provide a safe system of work in order to perform the job; (c) the Defendant failed to provide adequate supervision and/or assistance to the Claimant to perform the job; (d) the Defendant failed to take any and/or any reasonable steps after the injury of the Claimant and/or to attempt to alleviate same; (e) the Defendant failed to and/or provide any adequate medical treatment to the Claimant; and (f) the Defendant failed to investigate and/or enquire as to the nature of the incident in a timely manner.

8. The particulars of the breach of the Defendant's statutory duty pleaded by the Claimant were:

i. Failing to provide and/or maintain a system of work that is, so far as is reasonably practicable, safe and without risks to the Claimant's health[1];

ii. Failing to make arrangements for ensuring, so far as is reasonably practicable, the safety and absence of risks to the Claimant's health in connection with the use and/or handling, of tools and/or equipment[2] ;

iii. Failing to provide adequate and suitable protective clothing or devices of an approved standard to the Claimant who in the course of employment is likely to be exposed to the risk of bodily injury and the provision of adequate instructions in the use of such protective clothing or devices[3] ;

iv. Failing to provide such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the safety and health at work of the Claimant[4];

v. Failing to provide and/or maintain a working environment for the Claimant that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards amenities and arrangements for his welfare at work[5];

9. The Defendant disputed the Claimant's version of the incident. It contended that the Claimant never complained of any injury on the 15th August, 2009, but instead complained to his co-worker Harry on the 13th August, 2009 that he felt "a pull in his back". The Defendant also contended that the Claimant failed to comply with its injury reporting procedure since he failed to report his injury to his supervisor at the end of his shift on the 15th August, 2009. The Defendant further contended that the job which the Claimant was assigned was a routine one for which no explanation was necessary. It denied that it breached its common law and statutory duty of care to the Claimant and therefore it is not responsible for any damages which the Claimant

[1] (Section 6(2)(a) Occupational Health and Safety Act ("the Act)
[2] (Section 6(2)(b) the Act)
[3] (Section 6(2)(c) the Act)
[4] (Section 6(2)(d) the Act)
[5] (Section 6(2)(f) the Act)

alleged. It also pleaded that if the Claimant was injured then he contributed to his injuries.

10. The Defendant averred that the Claimant was one of its temporary employees who were employed as a craftsman in the Maintenance Services Section of the Mechanical Maintenance Sub Division of the Refining Division in August 2009. In August 2009 the Claimant worked alongside Mr. Harry and Mr. Ragoonath was their coordinating foreman. Mr. Sakir Backan ("Mr. Backan") was the Claimant's supervisor holding the post of Acting Maintenance Coordinator in the Maintenance Department. The Claimant reported to Mr. Backan when he worked on weekdays on the 3:00 pm to 11:00pm shifts and on weekends on the 7:00 am to 3:00 pm shift or 3:00 pm to 11:00 pm shift. On weekdays for the 7:00 am to 3:00 pm shifts only the Claimant reported directly to the Maintenance Supervisor, Mr. Lewis who was acting in the position at the time.

11. The Defendant pleaded that on Thursday 13th August, 2009 the Claimant was rostered to work on the 3:00 pm to 11:00 pm shift along with Mr. Harry. The Claimant and Mr. Harry were instructed by Mr. Ragoonath to remove a spool from the No. 1. CRU Heater. Mr. Ragoonath left the vicinity of the work area to obtain certain parts to complete the task. Whilst Mr. Harry and the Claimant were removing the studs Mr. Harry experienced some difficulty and utilized an extension spanner to provide extra leverage. The Claimant indicated to Mr. Harry that he too was having difficulties and that he felt "a pull in his back". Mr. Harry suggested to the Claimant that he use extra leverage and the Claimant utilized an extension spanner for extra leverage to remove the studs. Subsequently, Mr. Ragoonath returned to the work site with other equipment and the Claimant, Mr. Harry and Mr. Ragoonath completed their work for the day. After the shift completed the Claimant *mentioned* to Mr. Ragoonath that he felt a pain in his back. However, the Claimant did not complain during or after the 3:00 pm to 11:00 pm shift on the 13th August, 2009 of any injury to his back from a work related accident to Mr. Harry, Mr. Ragoonath, Mr. Backan or to Mr. Lewis.

12. Two days after, on Saturday 15th August, 2009 the Claimant and Mr. Harry were rostered to work the 7:00am to 3:00 pm shift. The Claimant and Mr. Harry were instructed by Mr. Ragoonath to perform the job which they completed. While the Defendant admitted that Mr. Ragoonath was not present with the Claimant and Mr. Harry for the entire shift as he left them for several intervals and returned, it averred that he was there at the beginning and at the end of the shift at which point the Claimant enquired of Mr. Harry and Mr. Ragoonath whether they knew anyone who was in the business of "rubbing or pulling back". The Defendant denied that the Claimant indicated that he had any pain in his back or that he had a work related injury to his back to either Mr. Harry or Mr. Ragoonath or his supervisor Mr. Backan on the 15th August, 2009.

13. The Defendant also averred that on Sunday 16th August, 2009 the Claimant attended work for his shift from 7:00 am to 3:00 pm alongside Mr. Harry and they worked under Mr. Ragoonath. The Claimant worked his entire shift and made no complaints to Mr. Harry, Mr. Ragoonath or to Mr. Backan about any pain in his back or any work related accident.

14. According to the Defendant's Defence, Mr. Ragoonath first became aware that the Claimant was allegedly involved in a work related accident on the 17th August, 2009 when Mr. Backan called him to enquire whether the Claimant had been in any accident on the 15th August, 2009 since Mr. Lewis had just prior to that, called Mr. Backan to enquire about the same. The Defendant further averred that if the Claimant had informed Mr. Ragoonath on the 16th August, 2009 that he was experiencing pain in his back after a work related accident, Mr. Ragoonath would have immediately proceeded to the control room to contact an ambulance to take the Claimant for medical attention and he would not have advised the Claimant to report to the control room to remain for the remainder of his work pass, for some 15 days, as Mr. Ragoonath did not possess the authority to give the Claimant such instructions and this was against the Defendant's policy when any injury was reported.

15. The Defendant's injury reporting procedure was that an accident at work must be reported to the employee's Supervisor either immediately or within 24hours. Upon reporting, the Supervisor completes a "Request for Medical Attention Form P-753" ("RMA Form"). The Defendant's policy after an injury was reported to a Supervisor was for the employee to be taken or sent to the Nurses' Station or Medical Centre. The Defendant averred that if the Claimant had reported the incident to Mr. Ragoonath, the latter would have called the ambulance for the Claimant and reported the incident to Mr. Backan who would have completed the RMA Form.

16. The Defendant admitted that the Claimant visited the Timekeeper. However its case was that the Claimant was given a RMA Form by the Timekeeper and not a "Visit the Doctor" Form. The Defendant stated that on the 17th August, 2009, the Claimant was working in the Tube Bundle Shop and reporting to the Supervisor in the Tube Bundle Shop and not Mr. Ragoonath on that day. The Defendant maintained that the position of 'Timekeeper' was not one of a supervisory nature. The Claimant's actions in informing the Timekeeper about his pains did not and could not have fulfilled the Defendant's injury reporting procedure and the Claimant would have been aware of this at all times.

17. The Defendant also pleaded that on the 17th August 2009 the Claimant was seen at the Guaracara Park, Point-a-Pierre Medical Center by Dr Harrison who conducted a physical examination of him and questioned him about the nature of his injury and how it occurred. At this visit, Dr Harrison noted that the Claimant did not have the necessary RMA Form which was required under the Defendant's policy for injury reporting for medical treatment. Despite its absence, the Claimant was still treated, medication prescribed and further treatment ordered in terms of an X-ray and physiotherapy. Dr. Harrison recommended that the Claimant be placed on restricted duty, with no bending or lifting.

18. The Defendant further averred that on Monday 17th August, 2009 the Claimant reported to work and did not report any work related accident to Mr. Ragoonath, Mr.

Backan or Mr. Lewis. The first time that any persons in a supervisory capacity in relation to the Claimant became aware that the Claimant claimed to have been in a work related accident was on Monday 17th August, 2009 when Mr. Lewis saw the Claimant at the office and enquired of him as to the reason why he was not working. The Claimant informed Mr. Lewis that he had just been to the Medical Department where he was being treated for an accident that occurred on the 15th August, 2009.

19. Upon speaking to the Claimant and learning of the alleged accident, Mr. Lewis telephoned Mr. Backan to enquire whether he was aware that the Claimant had a work-related accident on the 15th August, 2009 and Mr. Backan indicated that he did not. Mr. Backan then called Mr. Ragoonath to enquire whether the Claimant was involved in an accident on the 15th August, 2009 and Mr. Ragoonath informed him that on the 15th August, 2009 the Claimant did not inform him that the Claimant was injured whilst at work. Mr. Lewis then convened a meeting with the Claimant, Mr. Ragoonath, Mr. Backan and Mr. Abu Mohammed, Head Manager, Senior Superintendent, Maintenance Services. At this meeting the Claimant gave details of the alleged accident and Mr. Backan was instructed to investigate the alleged accident.

20. The Defendant's position was that the Claimant was an employee of the Defendant for some 33 years when the accident occurred and had 30 years in the Maintenance Department. The Claimant possessed the necessary skill and knowledge to perform the job since he was employed as a plant fitter and the basic duties of a plant fitter included connecting and replacing pipes and using various tools. To be employed as a plant fitter a person must be competent to make up and break up flanges which required the plant fitter to be able to remove/unscrew studs/nuts. Both the Claimant and Mr. Harry had over ten years' experience each as plant fitters and they had safely performed tasks of that nature on many occasions. It was therefore not necessary to explain how to do the job nor did they require constant supervision as it was one that both employees were very familiar with. The job that the Claimant was assigned was not one that would have posed any risks to the Claimant's health and would not have resulted in the severity of the injury as pleaded.

21. The Defendant also pleaded that no special device or protective clothing was required to perform the job that the Claimant was assigned that allegedly resulted in his injury, other than what was provided for him. The Defendant had provided the Claimant with full Personal Protective Equipment (PPE) which consisted of a safety helmet, safety shoes, fire retardant coverall and safety glasses. It was mandatory for the Claimant to wear full PPE. The Claimant was also provided with all necessary tools in the tool box that was assigned to his work crew to perform the tasks assigned to him, including the maul, the extension spanner and the said spanner. In the event that a required tool was not contained in the tool box, the Defendant had an Internal Stores Department that housed all manner of tools, devices and equipment, including safety equipment, from where the employee could retrieve the necessary tool. The Claimant, like all other employees of the Defendant was required to undergo training in Health, Safety and the Environment.

22. At the pre-trial review the parties agreed to deal with the issue of liability at the trial. Based on the pleadings the issues which arose for determination are as follows.

    (a) Did the Claimant complain of any injury to his back on the 15th August 2009?
    (b) Did the Claimant comply with the Defendant's injury reporting procedures?
    (c) Has the Claimant proven that his back injury was due to the Defendant's carelessness?
    (d) If yes to (c) Is the Claimant partially responsible for his own injuries?

23. The Claimant was the sole witness on his behalf. He also relied on the medical reports of Dr. Rasheed Adam which were admitted into evidence via a hearsay notice. The Defendant had seven witnesses namely Mr. Harry, Mr. Ragoonath, Mr. Lewis, Mr. Randolph Archbald, Ms. Theonie Andrews, Dr Harrison and Dr David Jackson.

Did the Claimant complain about any injury to his back on the 15th August 2009?

24. The Claimant submitted that the Claimant's consistent and unshaken evidence was that he did not feel "a pull on his back" on the 13th August 2009 but instead on the 15th August 2009 when he made this complaint to Mr. Harry.

25. The Defendant's position was that the Claimant did not complain to Mr. Ragoonath that he injured his back on the 15th August 2009. He told Mr. Ragoonath about a back pain on the 13th August 2009 but he did not complain that he had injured his back on the job.

26. To resolve this issue the Court examined the evidence of the Claimant, Mr. Harry and Mr. Ragoonath.

27. According to the Claimant's witness statement, on the 15th August 2009 he reported to work for the 7:00 am to 3:00 pm shift directly to Mr. Ragoonath his immediate foreman. Mr. Ragoonath drove him and Mr. Harry to the job site and instructed them to perform the job. After lunch Mr. Ragoonath dropped off the Claimant and Mr. Harry to start the job and he did not return which was usual. As the Claimant was pulling down on the said spanner he felt a sharp, shocking pain in his lower back. He told Mr. Harry about the pain he felt while trying to loosen the stud. He did not tell Mr. Ragoonath since he was not on the job site. At the end of the shift he was still feeling pain in his back so he went home.

28. In cross-examination the Claimant stated that Mr. Harry was not his friend but he was his co-worker and he could speak with him in a relaxed manner. He stated that he did not know of any reason that Mr. Harry or Mr. Ragoonath would tell an untruth with regard to him. He accepted that he worked without interruption from July 2009 to the 15th August 2009 and he agreed that he worked with Mr. Harry on the 13th August 2009 but he denied that he told Mr. Harry that he felt a pain in his back on that day.

He also denied that on the 15th August 2009 he asked Mr. Harry and Mr. Ragoonath about someone who could "pull or rub back".

29. Mr. Harry was a Plant Fitter with the Defendant in its Plant Fitting/ Maintenance Services Department. He was employed with the Defendant for 37 years, with 30 years as a temporary basis and 7 years on a permanent basis. Mr. Harry's evidence was that on the 13th August 2009 he and the Claimant were assigned to work under Mr. Ragoonath and their supervisor was Mr. Backan. They were instructed to remove a spool from the No. 1 CRU Heater. Mr. Ragoonath left the area to obtain certain parts to complete the task. He and the Claimant loosened the studs which involved manually pushing down a lever/ spanner to unscrew the studs. Whilst removing the studs he experienced some difficulty and proceeded to get an extension spanner to provide extra leverage to remove the stud. On his return from obtaining the extension spanner the Claimant mentioned to him that the studs were difficult to break and he felt "a pull in his back". Despite this Mr. Ragoonath returned with a flange and they completed the job. In cross-examination, his evidence that the Claimant told him that he "pulled his back "on the 13th August 2009 remained unchanged.

30. Mr. Harry also stated that on the 15th August 2009 both he and the Claimant were rostered to work on the 7 am to 3pm shift. They were instructed to perform the job. Both he and the Claimant broke the studs from the spool using the said spanners. The spool was removed and the job completed. Although Mr. Ragoonath did not stay with them for the entire shift, he visited them several times during the shift and was present at the end of the shift. At the end of the shift the Claimant asked both he and Mr. Ragoonath if they knew any person who could "pull or rub back" and he indicated he did not. In cross- examination he stated that at the end of the shift on the 15th August 2009 while he, the Claimant and Mr. Ragoonath were in the changing room the Claimant asked both he and Mr. Ragoonath if they knew a person to "rub back" and they said "no".

31. However, having observed Mr. Harry in cross-examination, it appeared that he had difficulty in recalling the events of 2009 since he was hesitant to answer questions

and a number of times questions had to be repeated and he still did not provide answers. The unreliability of his evidence on the day which the Claimant mentioned that he felt a "pull in his back" was borne out by two matters he revealed in cross-examination. He said that on the 15th August 2009 he and the Claimant removed a gas spool and then they moved a burner from the same plant. There was no such evidence in his witness statement neither in Mr. Ragoonath's and the Claimant's. Further the contemporaneous document which was the "Refinery Maintenance Coordinator Request and Feedback Log" for the 15th August 2009[6] showed that the only job for that day at the No 1 CRU Heater was "to drop gas spools". Secondly, he said that the Claimant worked with him on the 16th August 2009 but he could not recall what task they did since he said that he could only remember the 13th and 15th of August 2009.

32. Mr. Ragoonath stated in his witness statement that he was employed with the Defendant for 45 years and in 2009 he was an Acting Foreman in the Plant Fitting Department. On the 13th August 2009 he assigned the Claimant and Mr. Harry to remove gas spools from the No 1 CRU Heater. After he assigned the task he left them to obtain parts for completion of the job. On his return he provided some blanks and flange and the job was completed. Towards the end of the shift the Claimant mentioned to him that he had a pain in his back and he wanted to use the bathroom. The Claimant did not indicate to him anytime during the shift that he had a work related injury and he needed medical attention and he did not say that the pain in his back was as a result of the work he has been doing. His position was unchanged in cross-examination.

33. On the 15th August 2009, Mr. Ragoonath stated that the Claimant and Mr. Harry were the plant fitters assigned to him. One of the assignments he gave both of them was to perform the job. After he assigned the job he left and returned to check on them a few times during the shift. At the end of the shift he picked them up and when he was preparing to leave work on the 15th August 2009 the Claimant asked him if he knew of anyone in Marabella who can "pull or rub back". Mr. Ragoonath indicated that he

[6] Item 52 - Defendant's Unagreed Bundle of documents filed 25th November 2015

knew of someone but he was unable to indicate the person's location. He denied that the Claimant complained anytime during the shift that he felt "a pull in his back".

34. In cross-examination, Mr. Ragoonath stated that the Claimant told him that he had a pain in his back on the 13th August 2009 and when the Claimant did so it was *only* in his presence. He said he worked with the Claimant on the 16th August 2009 but he was not asked any details of the task assigned to the Claimant. He also confirmed that the only work the Claimant and Mr. Harry did on the 15th August 2009 was the job. However at first he agreed that he had received a call from someone after lunch about removing a heater but later he changed his position when he said that they also removed a burner. He did not know if the Claimant sought medical attention on the 15th or 16th August 2009 but he was certain that the Claimant worked at the refinery on the 16th August 2009.

35. Of the different accounts I agree with the Claimant's account that he did complain to Mr. Harry on the 15th August 2009 that he felt a "pull in his back" for three reasons. Firstly, the Claimant's evidence on the date was consistent. Secondly, the Claimant's account was more plausible than Mr. Harry's and Mr. Ragoonath's version. In my view, it is more plausible that the Claimant would have made a request for someone to "rub or pull back" at the end of the same day that he felt "the pull in his back" than wait some two days after. Thirdly, while both Mr. Harry and Mr. Ragoonath's consistent evidence was that the Claimant mentioned that he felt "a pull in his back" on the 13th August 2009, Mr. Harry's evidence was unreliable in light of the inconsistencies about the 15th August 2009.

Did the Claimant comply with the Defendant's injury reporting procedure?

36. The Claimant argued three points under this issue namely that (i) he was unaware of any injury reporting procedure of the Defendant; (ii) if he failed to comply with the Defendant's injury reporting procedure it should not be counted against the

Claimant's credibility and (iii) in any event he told his immediate supervisor, Mr. Ragoonath that he felt "a pull in his back" on the 16th August 2009.

37. The Defendant argued that the Claimant was well aware of its injury reporting procedure since he admitted to having previous accidents while in its employ. The Claimant failed to comply with the procedure and he did not even make any attempt to do so on the 15th August 2009. The first time the Defendant became aware of the Claimant's alleged injury was on the 17th August 2009 when Mr. Lewis enquired of the Claimant as to the reason he was not working.

38. According to the Claimant on the 16th August 2009 he went to work and informed Mr. Ragoonath that he had injured his back on the 15th August 2009 and that he was still in pain. Mr. Ragoonath told him that he should report to work, but instead of going to the usual job site he should go to the control room and stay there until his work pass finished on the 1st September, 2009. On the 17th August 2009 the Claimant stated that he was still in pain and to him it appeared to be getting worse. As he was not given a "Visit to the Doctor" form and he could not locate Mr. Ragoonath to give him one, he visited the Timekeeper who was more senior than him. The Timekeeper was also the person the other workers would usually go to if they had a complaint to make and the foreman was not around. The Timekeeper gave him a "Visit to the Doctor" form which he took to Dr Harrison. Dr. Harrison asked him several questions about how he was injured, and he explained Dr Harrison told him that he should not bend or lift anything while at work or at all and that he needed to have an X-ray done at the Augustus Long Hospital. He was given a form to have the X-ray done and to return on the 20th August 2009. After he had the X-ray done he returned to Dr Harrison who told him that he had to be seen by the medical superintendant. He was given another form to take with him. He was seen by Dr Ferreira who was the medical superintendant at the time. Dr Ferreira told the Claimant that he needed to see Mr. Lewis who told him that he did not even know about the accident until the Claimant informed him.

39. In cross-examination the Claimant stated that he did not know the Defendant's injury reporting procedure but in his opinion if he told his co-worker it was for his co-worker to inform his boss. However while he was adamant that he was unaware of the Defendant's injury reporting procedure he was certain that the Timekeeper was the proper person to report it to and that since he reported it to the Timekeeper on the 17th August 2009 he had complied with the Defendant's injury reporting procedure. However he did not know if the Timekeeper was at work on the 15th August 2009. He also admitted that he thought that his injury was serious but that he did not think about making an official report. He admitted that while he knew that there were telephones in the control room where he was resting, he did not use it to make an official report but chose to rest instead.

40. The Claimant also admitted that he had previous accidents at work where the Defendant accepted responsibility but in those cases the proper injury reporting procedure was not followed. In one incident he admitted that he fell backwards when moving a table and broke the fall with his finger and that a previous fall caused a lump on his back.

41. Mr. Ragoonath's evidence was that on the 16th August 2009 the Claimant was assigned to work with him on the 7 am to 3 pm shift. At no time during the shift the Claimant reported that he had a pain in his back. He said that the Defendant had a written policy in relation to accidents or injuries which was that the employee must report an accident immediately to his supervisor. The written policy was found in the Injury Reporting Procedure in the Defendant's Health, Safety and Environment ("HSE") Booklet and that the Claimant ought to have been aware of the policy since employees were reminded of it almost every week at safety meetings that plant fitters attend in the Department. He denied that he advised the Claimant to report to the control room and stay there until the end of his work pass which was to end on the 1st September 2009. His position was that if the Claimant had told him that he had an injury it was his habit or practice to call an ambulance immediately even if the employee did not want an ambulance. He also denied that he had the authority to

permit the Claimant to remain in the control room until the end of his work pass which was 15 days since it may have resulted in him facing disciplinary action. On the 17th August 2009 he was informed by Mr. Backan that the Claimant had advised him that he was injured at work on the 15th August 2009.

42. In cross-examination, Mr. Ragoonath stated that he and the Claimant were on good terms. Mr. Backan assigned work and he worked on the same shift as the Claimant on the 13th, 15th, 16th and 17th August 2009. However during the weekdays for the 7 am to 3 pm shift the Claimant reported to the shop supervisor and not Mr. Backan and on weekend he reported to Mr. Backan. The Defendant's injury reporting procedure was in certain documents and the policy was that the accident should be reported immediately. If the supervisor was not present then a report can be made to any of the Defendant's personnel. The employees were supposed to know the Defendant's injury reporting procedure since temporary employees were told of it at safety meetings which were held once a week or as necessary, but they were regular. At the safety meetings employees had to sign attendance registers. However, he was not aware if the Claimant was sent to safety meetings since August 2009 was the first time that he worked with him. There was training for temporary employees and part of the training was to explain the injury reporting procedure. He stated that if a person was injured at work he could report it to a co-worker if the foreman was not present.

43. Mr. Ragoonath also stated that he did not have the authority to allow someone to remain in the control room until the end of their work pass and he could not leave a worker to sit when he knew there was work to be done. He also stated that although the medical centre is open on Monday to Friday, if someone was injured on a weekend the ambulance is called to treat the person and the injured person would be taken to the Augustus Long hospital. He stated that there were tool box meetings and safety meetings once a week or as necessary. If a person was sick he could not tell. It was not necessary to have a document to seek medical attention since it was common practice to get it afterwards.

44. The totality of Mr. Ragoonath's evidence was that he was aware that the Defendant had a written policy for reporting injuries on the job. The policy was that it should be reported immediately. Part of the employees' training was exposure to the injury reporting procedure, but he did not know if the Claimant was exposed to such training. He did not have the authority to allow anyone to stay in the control room for any extended period of time, but he had the authority to use more workers than what was required for a job. In my view, while Mr. Ragoonath may have been uncertain of where the Defendant's injury reporting procedure could be found, he was certain that there was such a procedure.

45. The Claimant's colleague Mr. Harry's evidence was that he was aware from weekly safety meetings which he attended that the Defendant had a policy that any accident or injury at work was to be reported to the supervisor immediately. In cross-examination he added that when he attended safety meetings he signed a register.

46. Mr. Lewis was the Maintenance Superintendant for Plant Fitting for the Defendant. His evidence was that the Defendant's injury reporting procedure was that the employee must report it immediately to his supervisor and that the written policy was found in the Defendant's HSE booklet. In cross-examination he went further by stating that the said policy was available on the Defendant's intranet and hard copies were located within the Defendant's premises. However he was unable to say if there was a hard copy in the control room. His evidence was also that the first time he became aware of the Claimant's allegation that he was injured on the 15th August 2009 was on the 17th August 2009 when he spoke with the Claimant.

47. Mr. Randolph Archbald was the acting Head Health, Safety and Environment Refining and Marketing in the Health, Safety and Environment Department of the Defendant. His evidence was that the Defendant's policy on accident and injury reporting procedures were contained in a booklet which was on the Defendant's intranet. However he was unable to indicate if the Claimant had undergone any safety training and he could not indicate the exact nature of the training the Claimant underwent in 2002. He confirmed that the first time anyone in a supervisory capacity

became aware of the Claimant's allegation that he was injured on the 15th August 2009 was on the 17th August 2009 when Mr. Lewis spoke with the Claimant. He also gave evidence that if an employee of the Defendant was injured at work the procedure was for the employee to communicate with his supervisor or someone else in the department.

48. Ms Theone Andrews was a Human Resource Analyst in the staying staffing section of the Human Resources Department of the Defendant. Her evidence was that the Claimant's work records showed that he worked for 20 days in August 2009 which was contrary to his allegation that he did not work after the 15th August 2009 due to his back injury which he got while at work.

49. Dr Harrison's evidence was that it was the Defendant's policy in 2009 that an injured employee must be referred for medical assessment within twenty four to forty eight hours of any accident on the Defendant's facilities. In my view this was different from the Defendant's policy of the employee's obligation to immediately report any injury at work to his supervisor.

50. The common thread which ran through the evidence of all the Defendant's witnesses was that there was an injury reporting procedure where an injured employee had to inform his supervisor immediately and that this procedure was communicated to its employees through various means either in safety meetings, in a booklet, or via the intranet.

51. The Defendant's injury reporting procedure as set out in the HSE orientation booklet[7] stated that the accidents at work were to be reported to the employees' Supervisor, the Site Nurse station where available, or if it was necessary to visit the Medical Centre or Augustus Long Hospital, the Supervisor would prepare a RMA form and the employee would take the Original (pink) and Duplicate (blue) with him. All accidents were to be reported to the Health and Safety Department promptly.

[7] Document 65 of the Defendant's Unagreed Bundle

52. In my view, the Claimant was not a witness of truth when he said that he was unaware of the Defendant's injury reporting procedure. It was not plausible that the Claimant who had 33 years' service with the Defendant and who was very knowledgeable on the nature of his job, did not know that there was a procedure for reporting an injury which occurred at work and the nature of this procedure. Indeed the mere fact that he knew that in his previous incidents at work that the proper procedure was not followed lend validity to the assertion that the Claimant was well aware of the correct and incorrect injury reporting procedure for him to make such a definitive assertion in his cross-examination.

53. Additionally, the Claimant's evidence in cross-examination contradicted his evidence in his witness statement that he reported the injury to Mr. Ragoonath on the 16th August 2009. Based on the Claimant's evidence clearly he did not. Further, he stated that he did not know the procedure for reporting injuries on the job yet he reported it to the Timekeeper on the 17th August, 2009 however, he gave no explanation why he failed to report it to the Timekeeper on the 15th August 2009 since he said Mr. Ragoonath was not present.

54. In my view, the Defendant's injury reporting procedure was premised on the employee reporting his injury immediately to a supervisor or someone who was senior in authority. As such there is a distinction to be drawn between informing a co-worker, in this case Mr. Harry, about a "pull in his back" or even asking his supervisor Mr. Ragoonath about knowing anybody who " rub back" and reporting the injury to a supervisor such as Mr. Ragoonath, Mr. Backan or Mr. Lewis. There was also no evidence that the Timekeeper was someone who was senior to a supervisor. I therefore find that the Claimant was aware that the Defendant had an injury reporting procedure and he failed to comply with it since he failed to report his injury to Mr. Ragoonath on the 15th August 2009, which was the day he said he was injured, or any other senior person in the Defendant's employ.

Has the Claimant proven that his back injury was due to the Defendant's carelessness?

55. **Clerk & Lindsell on Torts**[8] sets out the elements that a Claimant must prove to establish a Defendant's liability for negligence namely: (1) the existence of a duty of care situation, i.e. one in which the law attached liability to carelessness; (2) careless behaviour by the Defendant; (3) a causal connection between the Defendant's careless conduct and the damage; (4) foreseeability that such conduct would have inflicted upon the particular Claimant the particular kind of damage of which he complains…; (5) the extent of the responsibility for the damage to be apportioned to the Defendant where others are also held responsible; and (6) the monetary estimate of that extent of damage[9].

56. The onus is therefore on the Claimant to prove causation on a balance of probabilities[10]. He must prove that if it was not for the Defendant's wrongful conduct he would not have sustained the harm or loss in question. The Claimant must establish at least this degree of causal connection between his damage and the Defendant's conduct before the Defendant will be held responsible for the damage[11].

57. In this claim the Claimant is alleging that the Defendant, his employer, failed to provide a safe system of work which caused his injury whilst in the course of his employment. The nature of the employer's duty is encapsulated under the common law and statute, **the Occupational Safety and Health Act**[12] ('the Act'). In an employer / employee relationship there is a duty on both parties where the issue of risk and safety are concerned. An employer has a duty to take reasonable care for the safety of its employees. Lord Wright in **Wilsons and Clyde Coal Co v English**[13] described the employer's duty as:

[8] 17th Ed
[9] Para 7-04
[10] Bonnington Castings v Wardlaw [1956] AC 613; see also Wisher v Essex Area Health Authority [1988] AC 1047 (per Lord Bridge at 1087); Gregg v Scott [2005] UKHL 2
[11] Munkman: Employer's Liability at Common Law, Chapter 3 para 3.12.
[12] Chapter 88:08
[13] [1939] AC 57

"the provision of a competent staff of men, adequate material and a proper system and effective supervision."[14]

58. In **General Cleaning Contractors Limited v Christmas**[15] Lord Oakley described the employer's duty as:

> "In my opinion, it is the duty of the employer to give such general safety instruction as a reasonably careful employer who has considered the problem presented by the work would give to his workmen. It is, I think, well known to employers, and there is evidence in this case that it was well known to the appellants, that their workplace are very frequently, if not habitually, careless about the risks which their work may involve. It is, in my opinion for that very reason that the common law demands that employers should take reasonable care to lay down a reasonably safe system of work. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts. They have to make decisions on narrow window sills and other places of danger and in circumstances in which dangers are obscured by repetition."

59. While the employer does not undertake that there will be no risk, where there are risks it undertakes that they will be reduced so far as is reasonable. On the other hand the employee accepts the inherent risks that cannot be avoided by the exercise of such reasonable care and skill on his employer's part. An employee who is aware that there are special risks to him which may make injury inevitable may undertake to run those risks without there being recourse to his employer should injury occur[16]. Devlin LJ in **Withers v Perry Chain Co. Ltd**[17] described the employee's choice as:

[14] At page 78
[15] [1953] AC 180
[16] Munkman: Employer's Liability at Common Law, Chapter 4 para 4.60.
[17] [1961] 1 WLR 1314,

"The relationship between employer and employee is not that of schoolmaster and pupil ... the employee is free to decide for herself what risks she will run ... if the common law were to be otherwise it would be oppressive to the employee by limiting his ability to find work, rather than beneficial to him."

60. In **Hatton** v **Sutherland**[18] at para 34 Hale LJ in upholding **Withers** said:

"In principle the law should not be saying to an employer that it is his duty to sack an employee who wants to go on working for him for the employee's own good"[19].

61. Section 6 of the Act sets out the general duties owed to an employee by an employer as:

"(2) without prejudice to the generality of an employer's duty under subsection (1), the matters to which that duty extends include in particular –

(a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of equipment, machinery, articles and substances;
(b) arrangements for ensuring so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling , storage and transport of equipment, machinery, articles and substances;
(c) the provision of adequate and suitable protective clothing or devices of an approved standard to employees who in the course of employment are likely to be exposed to the risk of head, eye, ear, hand or foot injury, injury from air

[18] [2002] 2 ALL ER 1
[19] Paragraph 34

contaminant or any other bodily injury and the provision of adequate instructions in the use of such protective clothing or devices;

(d) the provisions of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the safety and health at work of his employees;

(e) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;

(f) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards amenities and arrangements for their welfare at work; and

(g) compliance with sections 7, 12, 37, 46, 75 and 76, Parts III and IX and such other duties that may be imposed on him by this Act."

62. Section 15 of the Act sets out the circumstances where an employee is statutorily bound to refuse to work in certain situations as when:

(a) there is serious and imminent danger to himself or unusual circumstances have risen which are hazardous or injurious to his health or life;

(b) any machine, plant, device or thing he is to use or operate is likely to endanger himself or another employee;

(c) the physical condition of the workplace or the part thereof in which he works or is work is likely to endanger himself;

(d) any machine, plant, device or thing he is to use or operate or the physical condition of the workplace or part thereof in which he works or is to work is in contravention of this Act or the Regulations made under it and such contravention is likely to endanger himself or another employee.

63. According to Section 10 of the Act, the employee has a statutory duty to take reasonable care for his safety and that of his co-workers. It provides that:

(1) It shall be the duty of every employee while at work –

(a) to take reasonable care for the safety and health of himself and of other persons who may be affected by his acts or omissions at work;
(b) as regards any duty or requirement imposed on his employer to cooperate with him so far as necessary to ensure that duty or requirement is performed or complied with;
(c) to report to his employer, any contravention under this Act or any Regulations made thereunder, the existence of which he knows;
(d) to use correctly the personal protection clothing or devices provided for his use;
(e) to exercise the discretion under section 15 in a responsible manner; and
(f) to ensure that he is not under the influence of an intoxicant to the extent that he is in such a state as to endanger his own safety, health or welfare at work or that of any other person.

64. An employer's duty extends to taking into account any special weakness or peculiarity of the employee of which the employer knows or ought to know. In **Coxall** v **Goodyear Great Britain Ltd**[20]**,** Simon Brown LJ, noted that employers might remain liable for injury from falls if, for instance, they retained as spidermen employees whom they knew to suffer intermittently from vertigo or epileptic fits.

65. The Claimant argued that he received no instructions on how to remove the gas spool. There was no appreciation/ recognition by the Claimant's foreman, Mr. Ragoonath that the removal of a gas spool overhead in a confined space could carry different risks to an employee compared to the removal of a gas spool nearer to the ground. The Defendant's servants/ or agents did not carry out a risk assessment, supervise or instruct the Claimant how to do the job.

[20] [2003] ICR 152

66. On behalf of the Defendant it was submitted that (i) the Claimant was provided with protective gear, all relevant tools and was trained how to use them for the job; (ii) the Claimant was performing a routine task with low risks and as such it did not warrant any further care than that taken by the Defendant; (iii) the presence of Mr. Ragoonath was not required and even if he was there he could not tell what tool was to be used for the job by looking at it; (iv) it properly investigated the Claimant's complaint; (v) it provided adequate medical treatment and (vi) there was no nexus between the Claimant's injury and the incident on the 15th August 2009 since most of the injuries the Claimant suffered were chronic.

67. In my view the Claimant has failed to successfully prove that his injury to his back on the 15th August 2009 was due to the Defendant's negligence for the following reasons.

68. Firstly, the Claimant was provided with the requisite tools and training for the job. The Claimant's evidence was that on the 15th August 2009 he and Mr. Harry had their own toolbox which was provided by the Defendant and apart from the tools the Defendant provided him with a coverall. In cross –examination he admitted that the extension spanner was in his tool box and that he was familiar with the tools. He stated that all fitters employed by the Defendant used the extension spanner when a nut and bolt was difficult to break, and that he had learnt this from observing other fitters perform similar jobs and from practical training when he learnt to use spanners and different types of tools. He went on to explain that a fitter would resort to using the extension spanner when pressure was applied and it was difficult to break the nut and bolt. On the 15th August 2009, he resorted to using the extension spanner to get more leverage. He said that he chose to use the extension spanner after realizing that the stud was tight. He acknowledged that in determining the appropriate spanner to be used the circumstances of the job had to be considered such as available space and tightness of the nut. He acknowledged that pulling on a spanner was a usual activity for him and that depending on the position he was in he would brace himself when using it.

69. The Claimant also admitted knowing that the Defendant had a Health and Safety Manual but he denied being aware of the Defendant's Health and Safety policy on tools and machinery which stated that persons using machinery must either be trained or competent to use it. He admitted that he attended 5 meetings in his 33 years of service which included toolbox meetings. He also stated that he knew that if he thought that a job was hazardous he had the right to refuse to perform it.

70. Even Mr. Harry confirmed that he and the Claimant were provided with the appropriate tools. Further he confirmed that on the 15th August 2009 there was sufficient space where he and the Claimant were working to use the said spanner to loosen the difficult studs, but he chose the extension spanner because it was easier to use. This was confirmed by Mr. Ragoonath whose evidence was that the main tool to be used for removing spools consisted of the said spanner and if that could not loosen the spool, the appropriate tool was the extension spanner and a maul and that those tools were in the Claimant and Mr. Harry's tool boxes. In cross-examination he stated that the said spanner was not the correct tool to be used in the circumstances but he knew that many fitters used it.

71. Based on the Claimant's evidence, I was convinced that he was highly knowledgeable and very experienced in his job as a plant fitter. In my view the detailed explanation given by the Claimant confirmed that he was fully aware when and how to use the extension spanner tools in different circumstances.

72. Further, the Claimant pleaded at paragraph 4 (iii) of the Statement of Case that the Defendant failed to provide adequate and suitable protective clothing or devices of an approved standard to him who in the course of employment was likely to be exposed to the risk of bodily injury, and the provision of adequate instructions in the use of such protective clothing or devices. However during cross-examination he admitted that he had access to protective gear such as coveralls, glasses, helmets, gloves and boots. In my view, the Claimant demonstrated that he was provided with the appropriate tools, protective gear and equipment by the Defendant for the job and this

inconsistency between the Claimants's pleaded case and his evidence weakened the credibility of his claim.

73. Secondly, the job was routine with low risks which the Claimant was aware of and he was very knowledgeable in performing it and as such there was no need for any risk assessment by the Defendant. The Claimant's evidence was that the first three inch spool which he and Mr. Harry started to dismantle was about 6 feet above the ground just above his head. There were many pipes around above, below, to the side and in between the location of the three inch spool and there was little space to move. Based on the tools the Claimant saw other workers use for a similar job, the Claimant took out the said spanner from the toolbox since to him this was the usual tool all workers used to dismantle a 3 inch spool. Both the Claimant and Mr. Harry worked on loosening the stud. The Claimant had to pull up and Mr. Harry pushed down on the said spanner to loosen and disconnect the stud. They were doing this amongst the pipes so his body was at angle in between the pipes. He also learnt from observing other senior workers that when nuts and bolts like the three inch spool were stuck they needed to use the extension spanner which the Defendant provided and which he saw Mr. Harry using on that day.

74. In cross examination, the Claimant admitted that he worked with the Defendant for over 33 years and that he was upgraded from a Class B fitter to a Class A fitter. He accepted that during his employment he underwent performance appraisals. He stated that he knew his job well although he was a temporary fitter who worked on a rotational basis. He admitted that he had previously removed studs which are the job he was instructed to do on the 15th August 2009 and that during his 33 years of working for the Defendant he had broken down similar pipes many times. He was clear that he could have assisted pipe fitters who were junior to him. The Claimant also stated that there was no problem with the pipeline, the tools or the bolt save and except that it was tight. While he stated that on the 15th August 2009 he was working in a confined space, he admitted that he was not standing within the network of pipes but outside.

75. Based on the Claimant's evidence he was very familiar with the type of work he had to do to perform the job, which in my view amounted to a routine task for him. Further, the Claimant's movement was not as limited as he sought to portray which in my view did not increase any degree of risk or danger to him since he was well aware that if he believed that a task assigned to him was too risky he could have refused to perform it.

76. Mr. Harry's evidence confirmed the low risk of the job. He stated that Mr. Ragoonath did not give them any details how to perform the job since it was routine and they had done a similar job on the 13th August 2009. Both he and the Claimant broke the studs from the spool using the spanners. The spool was removed and the job was completed. Although Mr. Ragoonath did not stay with them for the entire shift he visited them several times during the shift and was present at the end of the shift.

77. Mr. Ragoonath also shared the opinion that the job he gave the Claimant and Mr. Harry was routine and did not require constant supervision. Mr. Lewis in cross-examination stated that there were different risks associated with different tasks and that a removal of a gas spool that was elevated as opposed to one that was on the ground had a higher degree of risk. In my view, Mr. Lewis' evidence on the degree of risk associated with job was of little value since he was not the person who assigned it neither was he present at the job site. His opinion was purely speculative when compared to Mr. Ragoonath who was present and who also assigned a similar task to the Claimant and Mr. Harry two days before on the 13th August 2009 which was not disputed.

78. Thirdly, the Claimant failed to satisfy the Court that the presence of the foreman Mr. Ragoonath would have reduced the risk of the job. In cross-examination the Claimant admitted that in order to determine if the bolt was tight, it had to be broken and that the tightness of the bolt could not be determined by just looking at it. He said that his supervisor usually supervised him on the jobs and Mr. Ragoonath had supervised him at least twice before. However, he admitted that even Mr. Ragoonath could not have

determined that the bolt was tight by just looking at it. Therefore, based on the Claimant's evidence, the failure by his supervisor to be present when he was working on the tight bolt could not have caused his injury since even Mr. Ragoonath would not have known the bolt was tight by observing it.

79. Mr. Ragoonath's evidence was that since the job he had assigned was routine the Claimant and Mr. Harry did not require constant supervision. After he assigned the job he left and returned to check on them a few times during the shift and at the end of the shift he picked them up. In cross –examination Mr. Ragoonath repeated that due to the simple routine nature of the task he assigned the Claimant and Mr. Harry on the 13th and 15th August 2009 he did not need to tell them how to do it. He stated that some of the pipes were on the ground and some were overhead and that the space was confined.

80. In my view, based on the Claimant's evidence he knew that the job which he and Mr. Harry were assigned to perform on the 15th August 2009 was simple and routine since he knew that he had performed a similar task two days earlier on the 13th August 2009. The Claimant also knew that risks associated with the job were low and there was no need for Mr. Ragoonath to supervise them since that would not have diminished the risk associated with the job.

81. Fourthly, the Claimant failed to satisfy the Court that the Defendant did not investigate his complaint. One of the pleaded particulars of negligence was that the Defendant failed to investigate and/or enquire as to the nature of the incident in a timely manner. According to the Claimant he spoke with Mr. Lewis on the 17th August 2009 when Mr. Lewis told him that was the first time he had heard that the Claimant was involved in a work related incident. He spoke to Mr. Lewis again on the 20th August 2009 since a supervisor's report on the incident had to be done and Dr Ferreira had directed him to speak with Mr. Lewis. After he met and spoke with Mr. Lewis he did not hear from anyone from the Defendant until the 25th September 2009 when he received a letter from the Human Resources Department asking him how he had gotten injured on the job and they requested a meeting with him. He attended the

meeting with his union representative. They met with the Industrial Relations Manager who represented the Defendant and he indicated how he injured his back. In March 2010 he was informed by Dr Jackson that his injury was not a work related injury. In cross examination, the Claimant stated that he did not accept the findings of the OSHA report ("the OSHA report") dated the 26th July 2010 on the incident since there was no visit to the job site.

82. The Defendant's letter dated 25th September 2009[21] confirmed the Claimant's evidence that he was invited to a meeting with his union representative to discuss his injury complaint.

83. Mr. Lewis' evidence was that he found out from the Claimant that he had injured his back on the job on the morning of the 17th August 2009 and he called Mr. Backan to enquire if he was aware of any accident which took place during the 7:00 am to 3:00 pm shift on the 15th August 2009. He then convened a meeting on the same day with the Claimant, Mr. Ragoonath and Mr. Backan to gather information on the incident. He enquired in the Claimant's presence of Mr. Ragoonath if he was aware that the Claimant had a work related incident on the 15th August 2009 and Mr. Ragoonath indicated that he was not aware. He then instructed Mr. Backan to prepare a supervisor's report. He received a query from the medical department on the 25th August 2009 for the reason the Claimant was not referred to the Medical Department with the proper forms i.e. the RMA Form. The said form was eventually done for the Claimant but it was delayed due to the investigation into the incident and the form was only signed on the 14th December 2009.

84. In cross-examination Mr. Lewis admitted that he took notes in the meeting but they were neither disclosed nor attached to his witness statement. The Claimant relied on the authority of **Deonarine Rampersad v Rentokil (Trinidad) Limited** [22] and submitted that the Court should draw an adverse inference from the failure by the Defendant to produce the notes on the basis that they would have shown that Mr.

[21] Document 4 of the Agreed Bundle of documents
[22] Civ Appeal 121 0f 2006

Ragoonath failed to dispute the Claimant's story when he was given the first opportunity to do so. I am not prepared to make such adverse inference since if the notes were so crucial to the Claimant proving his claim then he had the opportunity to make an application for specific disclosure at the pre-trial stage since the Claimant who was present in the meeting would have observed Mr. Lewis taking notes throughout the meeting.

85. Mr. Ragoonath's evidence corroborated Mr. Lewis' version of the events of the 17th August 2009 with respect to his enquiry about knowledge of the Claimant's complaint, the incident and the meeting. Further, Ms. Theone Andrews' unchallenged evidence was that the Claimant was invited to a meeting to discuss his alleged injury.

86. According to the OSHA report the investigation into the incident was conducted during the period 7th November 2009 to the 13th April 2010. The investigator spoke with the Claimant on three occasions. Mr. Ragoonath, Mr. Harry and persons from the HSE Department were also interviewed. The reason in the OSHA report for not visiting the job site was due to the nature of the injury and the effluxion of time.

87. In my view, while the Claimant did not accept the findings of the OSHA report on the sole basis that the job site was not visited, this did not mean that the Defendant failed to investigate the incident in a timely manner. Indeed the evidence was that an investigation was conducted and concluded in less than 9 months after the Defendant became aware of the Claimant's complaint. Further, I accept the explanation for the investigator not visiting the job site since the condition of the job site could have changed due to the effluxion of time.

88. Fifthly, the Claimant failed to prove that the Defendant did not provide adequate medical treatment in the circumstances. According to the Claimant on the 17th August 2009 he visited one of the Defendant's doctors, Dr Harrison at the dispensary near Guaracara Park where she asked him several questions about how he got injured. He was not examined and she did not do any test on him but he was told not to bend or lift anything while at work or at all since this would have made the situation worse

and he would be in more pain. Dr Harrison also told him that he needed to do an X-ray at the Augustus Long Hospital and from that she would then be able to tell him what injuries he suffered. He was given a form to take with him to have the X-ray done and he was told to return on the 20th August 2009. After the X-ray was done he returned to Dr Harrison with it. She reviewed it and he was told that he needed to see the medical superintendent and he was given another form to take to the latter. He took the form to Dr Ferreira who was the medical superintendent at the time but he was told that he needed to see the superintendent in charge of his department, Mr. Lewis. When he spoke to Mr. Lewis, he was told that the latter was unaware that he was injured on the job. After his work pass ended on the 1st September 2009 he was not given approval to get treatment from a Defendant's doctor. Therefore he attended the San Fernando General Hospital around the 16th September 2009 where he was seen by a doctor and he joined the Orthopaedic Outpatient Clinic. During the period 15th March 2010 to 14th July 2010 he visited Dr Mulrain who prescribed medication and referred him to physiotherapy at Gulf View Medical Centre where he had 8 sessions. As far as he was aware the Defendant paid for his visits to Dr Mulrain.

89. In cross-examination the Claimant expressed surprise that Dr Harrison stated that on his visit of the 17th August 2009 he had requested her to send him to a specialist. He also denied that he told the Defendant's doctors that he had his "back cracked" by a chiropractor.

90. According to Dr Harrison she saw the Claimant on the 17th August 2009 at the Defendant's Medical Centre at Guaracara Park and he indicated to her that while he was working on the Saturday (15th August 2009) taking out "gas spool" he experienced pains to his back and the pains continued after work. She noted that the Claimant did not report the incident to his supervisor and he did not bring in any RMA Form on that day. She stated that the Claimant requested a specialist for his back. She examined him and noted that there was a tender area and swelling at level L4 and L5. She also ordered an X-ray.

91. On the 20th August 2009, Dr Harrison reviewed the Claimant again but he still had not brought in the appropriate forms which would deem his injury as arising from a work related accident. The Claimant was a temporary employee and was only entitled to medical treatment at the Defendant's medical department if the injury arose from a work related accident. Despite the absence of the appropriate forms she still examined and treated the Claimant on the first and second appointment but the medical superintendent's permission was needed for further treatment in the absence of the forms.

92. In cross-examination Dr Harrison confirmed that the Claimant was never denied medical treatment but she acknowledged that due to the absence of the RMA Form an assessment had to be done to determine if the Claimant's injury was work related.

93. Dr Harrison's contemporaneous notes of the 17th August 2009 stated that the Claimant complained of pains to the back while taking out "gas spools" at work on Saturday (the 15th August 2009). The pains continued after work. The back pains were not reported to his supervisor and the RMA Form was not brought in. The Claimant requested to see a specialist and he had no allergies to medication. She examined him and observed that he was mobile and walking with a normal gait. The Claimant's back was examined and she noted that there was a tender area in the lower back. She noted the swelling at level L4-L5 and that he had a scar on the right side of his back. She prescribed medication of voltaren and X-ray of the lumbar spine and restricted duty at work- no lifting or bending, she recommended a review with X-ray and then physiotherapy. Her notes at the review on the 20th August were that she reviewed the report on the X-ray from Dr Omar Khan, Radiologist and she noted that the Claimant still needed to bring in the RMA Form and that the injury must be deemed a work related injury before the Claimant can proceed to get an MRI for the back.

94. In my view, the details contained in the contemporaneous notes could not have been fabricated by Dr Harrison. She could not have noted the tenderness of the Claimant's back and the scar on the right side of the back if she did not physically examine him.

This was in direct conflict with the Claimant's evidence who insisted that she did not examine him. In my view, the Claimant's evidence that he was not physically examined on the 17th August 2009 by Dr Harrison was untrue. I also accept that it was the Claimant who requested that she send him to see a specialist since the contemporaneous notes demonstrated that he requested to see a back specialist and the doctor's note dated the 20th August 2009 showed that the Claimant indicated that he had his back "cracked".

95. Dr Harrison's evidence was corroborated by Dr David Jackson who stated that if no accident form was provided the Claimant would still have been treated pending any investigation that the injury was work related.

96. In my view, there was no evidence that the Claimant was outright denied any medical attention by Dr Harrison when he presented himself at the Guaracara Medical Centre on the 17th August 2009 and the 20th August 2009 even without the appropriate forms. Indeed the Claimant admitted that Dr Harrison recommended that he should not lift or bend anything at work and she provided him with the appropriate form to obtain an X –ray at the August Long Hospital. To me Dr Harrison's conduct was not consistent with the Claimant's allegation that the Defendant failed to provide adequate medical treatment. Indeed it was the Claimant's evidence that the Defendant paid his medical bills from March 2010 to July 2010 (i.e. for Dr Mulrain and his physiotherapy sessions) and this only ceased when the Defendant did not deem his injury work related. I cannot find fault with this approach by the Defendant since the OSHA report was dated 28th June 2010 which deemed the injury not work related. Therefore the Claimant was not denied medical treatment by the Defendant's medical department and elsewhere while the OSHA investigation was ongoing.

97. Sixthly, the medical evidence failed to demonstrate that there was a nexus between the Claimant's injury and the incident. In cross-examination the Claimant admitted that he was informed that he was diagnosed with osteoarthritis before the incident and he readily admitted he had spondylosis. The Claimant argued that his complaints of

back pain only occurred after the 15th August 2009 and the Defendant led no evidence that the pre-existing spondylosis would have caused him pain prior to the 15th August 2009. The Claimant sought to rely on the medical report by Dr Rasheed Adam dated the 18th July 2013 ("the Adam report') to support his claim that on the 15th August 2009 he injured his back while at work. The last paragraph of the Adam report stated:

> "the injury as described by Mr. Samuel would produce a neck and low back strain syndrome. However the cervical and lumbar spondylosis was pre-existing. The strain syndrome in addition to causing neck and low back pain caused also cervical and lumbar nerve root involvement. His neck and low back pain has continued to the present time and it is likely that it may continue for an indefinite period, however may be helped by physiotherapy and medications."

98. The Claimant argued that the Court should attach weight to the Adam report since the doctor had no incentive to conceal or misrepresent the facts and the information contained therein was bolstered by the evidence of Dr Harrison. The Claimant did not call Dr Adam as a witness but instead he filed a hearsay notice to have the medical reports admitted into evidence. There was no counter notice filed by the Defendant challenging the Claimant's hearsay notice. In determining the weight to be attached to the Adam report the Court was guided by section 41 of the **Evidence Act**[23] which provides :

> "41. (1) Without prejudice to the generality of section 22, where in any civil proceedings a statement contained in a document is proposed to be given in evidence by virtue of section 37, 39, or 40 it may, subject to any Rules of Court, be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the Court may approve.
>
> (2) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 37, 39 or 40 the Court may draw any reasonable inference from the circumstances in which the statement was made or otherwise

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came into being or from any other circumstances, including, in the case of a statement contained in a document the form and contents of that document.

(3) In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of section 37, 38, or 39 regard shall be had to all the circumstances from which any inference can reasonably be drawn as to accuracy or otherwise of the statement and, in particular –

(a) in the case of a statement falling within section 37(1) or 38(1) or (2), to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts;"

99. While the Adam report formed part of the Claimant's evidence, I have attached little weight to it since Dr Adam first evaluated the Claimant on the 22nd June 2013 some 4 years after the Claimant's allegation of the incident. There was opportunity for many intervening factors which could have affected the Claimant's back during such a prolonged period. There was no evidence that he examined the Claimant's previous medical records concerning his previous fall which resulted in the lump on his back. The information concerning the cause of the injury upon which Dr Adams based his diagnosis was only from the Claimant which in my view would have been self serving and did little in assisting the Court in determining whether the Claimant's injury to his back was due to the Defendant's negligence on the 15th August 2009. The Adam report was untested since he was not present to be cross-examined.

100. On the other hand, according to Dr Harrison the radiologist report revealed that there was no bony injury identified and but there was osteoarthritis due to aging. The report did not reveal that the Claimant had a recent injury. She explained that if the Claimant had lordosis which was a decrease in the natural curvature of the back this would be revealed from an X-ray and that it would have to be very minor for the X - ray not to reveal this. She stated that if an injury was acute it would manifest itself at the same time and that a chronic injury could manifest later.

101. In my view, in light of the evidence that the Claimant had a previous back injury since Dr Harrison noted a scar on his back during her initial physical examination, he suffered from osteoarthritis, and there was no evidence from the X-ray report of any bony injury nor of any recent injury it was highly implausible that the injury which the Claimant complained of on the 15th August 2009 was caused by the incident.

Disposition

102. I have found that the Claimant injured his back on the 15th August 2009 while at work. The Defendant complied with its responsibility of providing the appropriate tools, protective gears, clothing and training to the Claimant to fully equip him for the job. The risks associated with the job were low and since the Claimant was provided with the appropriate tools, training and gears by the Defendant to perform the job and he knew the risks associated with it which he willingly took; the Defendant is not responsible for his injury. Further, the Claimant was well aware of the Defendant's injury reporting procedure. However he failed to comply with it in circumstances where he had ample opportunity to do so. As such the Claimant's injury was quite properly not deemed a "company accident" by the Defendant and therefore it is not liable for the Claimant's injury. In the circumstances, I can find no carelessness on the Defendant's part in the Claimant's injury. Having made the aforementioned findings it is unnecessary that I deal with any further issues of contributory negligence.

103. The prescribed costs rule is set out in Part 67.5 which provides:

> "(1) The general rule is that where rule 67.4 does not apply and a party is entitled to the costs of any proceedings those costs must be determined in accordance with Appendices B and C to this part and paragraphs (2)-(4) of this rule.
>
> (2) In determining such costs the "value" of the claim shall-
>
> (a) In the case of a claimant, be the amount agreed or ordered to be paid;

(b) In the case of a defendant-

i. Be the amount claimed by the claimant in his claim form; or

ii. If the claim is for damages and the claim form does not specify an amount that is claimed, be such sum as may be agreed between the party entitled to, and the client liable to, such costs or if not agreed, a sum stipulated by the costs as the value of the claim ;or

iii. If the claim is not for a monetary sum, be treated as a claim for $50,000.00".

104. The Claimant pleaded special damages in the sum of $384,578.57 and damages for loss of future earnings in the sum of $173,808.00. Pursuant to Part 67.5 (2) (b) (i) the minimum sum claimed by the Claimant was $558,386.57. In this regard, costs are assessed in the sum of $75,879.99.

Order

105. The Claimant's action is dismissed.

106. The Claimant is to pay the Defendant's, the costs of the action in the sum of $75,879.99.

Margaret Y Mohammed
Judge