THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2018-02355

BETWEEN

JOSEPH FARRELL

Claimant

AND

CENTIPEDE OFFSHORE INTERNATIONAL MANPOWER SERVICE LIMITED

Defendant

Before the Honourable Madame Justice Margaret Y Mohammed
Date of Delivery 25 March 2024

Appearances:

Mr Kent Samlal instructed by Mr Robert Abdool-Mitchell Attorneys at law for the Claimant
Mr Keston McQuilkin instructed by Ms Andrea Orie Attorneys at law for the Defendant.

JUDGMENT

INTRODUCTION

1. The Claimant was employed by the Defendant as a Floorman (labourer) on 23 August 2015. He has brought this action against the Defendant seeking damages for injuries which he claimed he sustained while he was working offshore on the Ocean Victory platform ("the platform") .

2. The Claimant's case was that on the material day he was attempting to loosen a pin from a shaft connected to a drilling riser as directed by his supervisor. He was using a sledgehammer and he asked his supervisor for the assistance of a rig welder to apply heat to loosen the pin or if another worker could take over so he could take a rest as he was feeling tired. However, his supervisor denied his request. The Claimant continued using his sledgehammer for 20 minutes until he was directed to take his lunch break. During the lunch break the Claimant attempted to get up from his chair and whilst doing so he immediately started experiencing pains shooting down both his legs together with a burning sensation in his lower back. The Claimant reported to the Safety Department Representative (SDR) who told him to lie down in the Hospital station.

3. Two days after the incident, on 25 August 2015, the Claimant was transported off the platform via helicopter to the Piarco International Airport for medical attention. He received medical attention from the Defendant's medical practitioners on the same day.

4. The Claimant contended that as a result of the use of the sledgehammer on 23 August 2015, he sustained the following injuries: disc bulge in the lumbar spine at L5/S1 with resulting nerve root compression; severe neurogenic claudication in both legs; bilateral foraminal stenosis at L5/S1; and pain in his legs.

5. The Claimant contended that his injury was due to the negligence of the Defendant, its servants and/or agents as they: ordered and/or instructed the Claimant to continue hitting the pin with the sledge hammer to dislodge or loosen it when it was unsafe to do so because it was stuck and could not be dislodged or loosened by this method; failed to heed the Claimant's concerns and seek the intervention and assistance of a rig welder who could apply heat or allow another worker to take over from the Claimant so that he could take a rest as he had been constantly pounding for 20 minutes and was tired; failed to devise, institute or to ensure the institution

of a safe system of work; failed to provide adequate supervision and/or guidance whilst the Claimant was performing his duties; failed to make proper arrangements to have the pin heated instead of utilizing the Claimant to pound it in an effort to loosen it; failed to assign an adequate number of persons to the task of loosening the pin from the shaft; failed to warn or alert the Claimant of the inherent dangers associated with the prolonged use of a sledgehammer; failed to take reasonable care to ensure that the Claimant would be reasonably safe in the execution of his duties as an employee; failed to take reasonable care to prevent injury or damage to the Claimant from unusual dangers associated with his duties which the Defendant ought to have known existed; failed to take all reasonable and effective measures whether by way of periodic examination, inspection, supervision or by any other means to ensure that the Claimant did not over exert himself by pounding a seized pin which was in a condition to cause injury to the Claimant; failed to provide adequate warning to the Claimant in relation to an existing danger in order to prevent him from using a sledgehammer for a prolonged period when it was unsafe to do so; failed to take any or adequate care for the safety of the Claimant; failed to provide adequate training to the Claimant for a job of this nature; failed to take preventative and/or protective measures to identify the hazards present, by conducting a thorough risk assessment of the task; failed to inform the Claimant of the procedures (if any) which were put in place to safeguard against the risks to his health and safety and/or any preventative and protectives measures identified to mitigate the risk posed to the Claimant by hammering the seized pin; exposed the Claimant to risk or damage or injury which the Defendant knew or ought to know existed; failed in all the circumstances to discharge the common duty of care owed to an employee, in particular to the Claimant.

6. The Claimant asserted that while he was present and participated in the Defendant's health and safety training, namely the daily safety meetings, performance of risk assessments, duty toolbox meetings, daily task based risk assessments and safety measures and he was aware of the Defendant's safety booklet outlining its safety

policies and procedures, he was not sufficiently informed of the risks involved in the performance of his duties. He also asserted that he took adequate care for his own safety by asking for assistance but this request was denied. He also denied giving any history of a previous injury to one of the Defendant's doctor's, Dr Rupert Indar Jnr ("Dr Indar").

7. The Claimant also pleaded that the Defendant breached Article 30 (a) and 30 (b) of its Collective Agreement[1] ("the Collective Agreement") with the Oilfield Workers Trade Union, which provides that an employee who suffers personal injury arising out of an accident during the course of his employment with the company shall be paid full pay for such absence. Full pay for this purpose is the total amount the Worker would have received had he actually worked. All other payments for such injury shall be in accordance with the Workmen's Compensation Ordinance and the Company shall cover the cost of any and all treatment necessitated by a work related injury.

8. The Defendant did not dispute that at common law and by statute it has a duty to provide a safe system of work for the Claimant. It contended that the Claimant's injury was not work related but was caused wholly by or contributed to by his negligence.

9. The Defendant's version was that the Claimant reported to its medical practitioner on 23 August 2015, that he was sitting in the Galley having dinner when he felt a pain in his lower back. This was the first time he felt pain in his lower back for the day. He reported using a sledgehammer earlier in the day but denied that there was any trauma earlier in the day when he was using the sledgehammer and he could not recall any event that caused pain. The Claimant also reported that he went back to work and the pain got worst.

[1] Trial Bundle Volume 3 at page 641

10. The Defendant contended that the Claimant knew/or was exposed to and participated in the daily safety meetings, performance of risk assessments, duty toolbox meetings, daily task based risk assessments and safety measures and booklet. The Defendant also asserted that the Claimant would never have been forced to complete potentially hazardous work and that all safety measures were properly communicated to the Claimant.

11. The Defendant also contended that the Claimant's injury was caused by or contributed to by his own negligence, as he failed to take any or adequate care for his own safety, continued to hit the pin with the sledgehammer knowing that it could or would cause him injury, disregarded the established stop-work policy which he was well informed of and failed to request assistance to loosen the pin.

12. The Defendant's position was that consistent with Article 30 of the Collective Agreement it paid the Claimant's medical bills and was prepared to undertake payment of the requisite surgery, which was declined by the Claimant in lieu of physiotherapy. It denied that as a result of its negligence the Claimant is entitled to the cost of a future surgery and put the Claimant to strict proof that the future surgery is as a result of an incident for which the Defendant is liable.

THE ISSUES

13. There are two issues on liability for the Court to determine, namely: (a) whether the Defendant beached its duty of care to the Claimant by acting and/or failing to act in a manner to prevent the Claimant from being injured in the workplace; and (b) did the Claimant contribute to his injury and if so to what extent.

14. If the Claimant is successful in proving liability the consequential issue to determine is what measure of damages should be awarded to the Claimant.

LIABILITY

15. It was submitted on behalf of the Claimant that the Defendant was liable for his loss arising from his injuries, as the latter had paid the Claimant's medical bills and it admitted that it was prepared to pay for the Claimant's surgery pursuant to Article 30 of the Collective Agreement. Counsel argued that this amounted to an acceptance of the Claimant's claim that he was injured in the course of his employment and that the only issue to be determined is the quantification of the Claimant's damages.

16. It was also submitted on behalf of the Claimant that the Defendant breached its duty of care to him by failing to have a safe place of work for him as he was made to perform a potentially dangerous task; when he requested assistance his supervisor refused; and the Claimant was not well advised on the safety policies of the Defendant. The Claimant argued that as a result he suffered his injury.

17. Counsel for the Defendant submitted that paragraph 8 of the Amended Defence clearly set out the Defendant's position on the payment of medical bills and was without prejudice to and/ or without an admission that the Defendant was liable for the Claimant's injury, as the Defendant's position has always been that the injury was not work-related. Counsel also submitted that even if the Claimant's injury was a work-related injury, it did not automatically mean that the Defendant is liable at common law and/or by statue, as the Claimant was still required to prove that the Defendant was negligent in causing the injury which he has failed to do.

18. At common law an employer has a non-delegable duty to take reasonable care for the safety of his employee. This includes maintaining and providing a safe system of work, providing and maintaining safe equipment, providing competent employees, and establishing and enforcing a safe place of work[2]. In discharging this common law duty, an employer has the responsibility to take care to reduce the risk involved in

[2] Clerk and Lindsell on Torts 20 ed para 13:07

the particular undertaking as far as reasonably possible[3], to take reasonable care for the employees' safety and not to subject them to unnecessary risk or injury.

19. **Clerk & Lindsell on Torts[4]** sets out the elements which a Claimant must prove to establish a Defendant's liability for negligence as:

    (1) The existence of a duty of care situation, i.e. one in which the law attached liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in question on the class of person to which the Claimant belongs is actionable;

    (2) Breach of the duty of care by the Defendant, i.e. that he failed to measure up the standard set by law;

    (3) A causal connection between the Defendant's careless conduct and the damage;

    (4) That the particular kind of damage to the particular Claimant is not so unforeseeable as to be too remote."

20. At the trial, the onus was on the Claimant to prove that: (a) the Defendant's payment of his medical bills and the agreement to pay for his operation pursuant to Article 30 of the Collective Agreement was an admission of liability by the Defendant; and (b) the Claimant's injury on the platform was due to the failure by of the Defendant to provide a safe system of work as detailed in his particulars of negligence which he pleaded.

21. In order to determine the issue of liability the Court is required to apply the guidance set out in **Horace Reid v Dowling Charles and Percival Bain[5]** cited by Rajnauth–Lee J

[3] Per Lord Herschell: Smith v Baker &Sons (1891) AC 325

[4] 21st Edition at Para 8-04

[5] Privy Council Appeal No. 36 of 1897

(as she then was) in **Mc Claren v Daniel Dickey**[6]. The Court has to satisfy itself on which version of events is more probable in light of the evidence. To do so, the Court is obliged to check the impression of the evidence of the witnesses on it against the: (1) contemporaneous documents; (2) pleaded case; and (3) inherent probability or improbability of the rival contentions.

22. The Court must also examine the credibility of the witnesses based on the guidance of the Court of Appeal in the judgment **The Attorney General of Trinidad and Tobago v Anino Garcia**[7], where it stated that in determining the credibility of the evidence of a witness any deviation by a party from his pleaded case immediately calls his credibility into question.

23. I will first deal with the Claimant's contention that the payment of his medical bills and the agreement to pay for the Claimant's surgery by the Defendant was an admission of liability.

24. I am of the view that the Claimant failed to prove his allegation that the Defendant breached Articles 30(a) and (b) of the Collective Agreement, as he failed to lead any evidence to support this aspect of his claim and his evidence in cross examination demonstrated his lack of credibility as he refused to accept that he did not include any evidence to support this aspect of his claim.

25. Further, the Claimant testified in cross examination that the Defendant paid his medical bills to see Dr Roopnarine, Dr Indar and for physiotherapy for 3 months. He also accepted that the Defendant stopped paying his medical bills when he decided to explore alternative avenues apart from the surgical procedure which was recommended by the Defendant's medical personnel. Indeed, the Claimant admitted in cross examination that he did not explore other options to surgery such as herbal medication or visiting a chiropractor.

[6] CV 2006-01661
[7] Civ. App. No. 86 of 2011 at paragraph 31

26. Even with respect to the surgery the Claimant did not state in his witness statement that he informed the Defendant that he had accepted the option of surgery.

27. In my opinion, the Claimant's evidence in cross examination supported the Defendant's case, as he accepted that he also did not state in his pre action letter to the Defendant that he was willing to undergo surgery and it was incumbent on him to inform the Defendant. Therefore, the Claimant knew that the Defendant was willing to pay for his surgery and it was incumbent on him to notify it of his interest.

28. Therefore, the credible evidence from the Claimant was that the Defendant did not breach Article 30(a) and (b) of the Collective Agreement, as it paid the Claimant's medical bills until he decided to seek other options for surgery, which he failed to do and he never thereafter informed the Defendant that he wanted to pursue the option of surgery.

29. On the other hand, the Defendant's case was that the payment of the Claimant's medical bills and agreement to pay for his surgery was without prejudice to and without an admission that the incident occurred as suggested by the Claimant or that the Defendant was culpable, as the Defendant's position has always been that the injury was not work-related. Indeed, with respect to the future surgery of the Claimant, the Defendant's Amended Defence did not deny that the Claimant requires surgery. The Defence was that the Defendant was prepared to pay for the Claimant's surgery but he declined and indicated that he would pursue physiotherapy. The Defendant also pleaded that the Claimant is not entitled to the cost of a future surgery as a result of the Defendant's negligence.

30. The Defendant's position was supported by its witnesses as Dr Indar's evidence was that he recommended surgery for the Claimant. Mr Reynold Diaz, the Health and Safety Manager of JSL International Limited ("JSL"), the company which provided accounting, payroll, human resources and health and safety services for the Defendant stated at paragraph 20 of his witness statement that:

> "It is the Defendant's procedure that if an employee claims to be ill while on the platform and requests to be removed arrangements will be made to have them brought on shore and to be taken for medical attention. The Defendant provides this service regardless of whether the complaint is as a result of a work-related injury or not." [8]

31. Mr Diaz's evidence was not undermined in cross examination. His evidence was corroborated by paragraph 18 of the witness statement of Mr Sheldon Haynes, Human Resources Manager of JSL. At paragraph 16 of Mr Haynes' witness statement he stated that the injury which the Claimant was complaining of as a result of the task performed on the platform was never classified as a work related injury. This aspect of his evidence was not undermined in cross examination.

32. In my opinion, the weight of the evidence supports a finding that the Defendant did not breach Article 30 (a) and (b) of the Collective Agreement, as it paid the Claimant's medical bills up to when he decided to seek alternative options of treatment. The payment of those bills was without prejudice to the Defendant's admission of liability that the Claimant's injury was work related. The Defendant knew that the Claimant required surgery but did not accept that it was because of its negligence.

33. I now turn to the Claimant's contention that the Defendant is liable for his injury as it failed to provide a safe system of work.

34. Although the Claimant pleaded that the Defendant failed to devise, institute or ensure the institution of a safe system of work; provide adequate training to the Claimant for a job of this nature; and take preventative and/or protective measures to identify the hazards present by conducting a thorough risk assessment of the task, he did not set out any evidence in his witness statement that the safety training and

[8] Page 84 of the Trial Bundle – Volume 2.

instructions which the Defendant provided did not prepare him for the risks associated with the task he was doing with the sledgehammer.

35. The Claimant testified in cross examination that when he was hired by the Defendant as a Floorman he was trained in safety which informed him of the safe ways to perform his tasks both on land and offshore. He agreed that part of his duties and responsibilities as a Floorman was to actively participate in pre-tour meetings with the drilling crew for all non-routine drilling operations and safety matters. He was also required to call a timeout for safety whenever an unplanned hazard or a change in the expected result was observed and ensure all the policies and procedures were adhered to while carrying out his assigned duties, which included the Defendant's safety policies and procedures.

36. The Claimant also testified that he knew that he was required to report any incidents, potential hazards or abnormal situations and participate in weekly safety meetings and pre-tour meetings as required. He was also required to actively participate in drilling operations and safety drills as and when required. He agreed that he was aware of the Defendant's safety booklet which would have been included in a part of his safety training and he had a duty to report to his supervisor or a manger any health and safety issues. He agreed that he could stop work at any point in time if a health and safety issue arose and that task-based risk assessments were performed as a part of the Defendant's health and safety policies and procedures. He explained that the risk assessments indicated how a particular task was supposed to be safely done and any hazards that may have arisen in relation to the performance of that task. He was also required to take part in tool box meetings which are held at the start of every work day, where discussions are held regarding the operations of the day and the safety controls that are supposed to be in place for each job.

37. The Claimant agreed that all of the aforementioned safety policies and procedures were done prior to the incident on 23 August 2015. He agreed that when an incident

occurred the workers were required as a part of the Defendant's health and safety policies to complete a written report of the incident and submit it to the Defendant's representative or the Health and Safety Department within 6 hours of it occurring. He stated that he knew that work can be stopped immediately by any person who has reason to believe that there was a serious and imminent danger to himself or others and any stoppage must be immediately reported to the Defendant's representative and reports lodged with the Health and Safety Department. He was also aware that there was a refusal to work policy, which protected an employee who refused to work in unsafe conditions and dictated that the employer shall pay the employee at the regular or premium rate. The Claimant accepted that there was a task based assessment for the particular activity done on the day of the incident.

38. Based on the Claimant's evidence in cross examination, prior to undertaking the task with the sledgehammer on the material day the Claimant was very familiar with all the Defendant's safety procedures. He was fully aware that he could stop work immediately and lodge a report with the representative of the Health and Safety Department. He was well acquainted with the risks involved with the task he was assigned to do. In my opinion, these admissions by the Claimant in cross examination undermined the credibility of the Claimant's case that he was not sufficiently informed of the risks of the task he was doing on 23 August 2015 or that he had to continue putting himself at risk of injury by continuing to work on the said task.

39. Further, the Claimant's admissions in cross examination supported the Defendant's case and corroborated the evidence of Mr Diaz who stated that based on the Defendant's health and safety handbook, toolbox meetings and task based risk assessment meetings were held at the start of every work day or shift to review the day's operations and implement safety controls if necessary. These meetings were always documented and could be used as an opportunity for employees to provide feedback on any health and safety concerns they may have. In relation to the task based risk assessment, he stated that it was to be performed for all tasks and a risk

assessment was to be completed, approved and signed by all persons involved in the particular task before the job commenced.

40. Mr Diaz testified in cross examination that he was not on the platform on 23 August 2015, therefore he could not confirm whether there were any toolbox meetings or task based risk assessment meetings or whether the Claimant had attended any such meeting or what jobs were designated that day. In my opinion, this lack of knowledge did not undermine the Defendant's case given the admissions made by the Claimant in cross examination.

41. In any event, the Claimant also testified in cross examination that it was not the first time he was engaged in the task of pounding out pins as he was familiar with it. He accepted that he did not provide any evidence that the use of a sledgehammer to pound out the pins was an unsafe practice and there was no evidence that the use of the sledgehammer for 20 minutes to pound out pins was unsafe.

42. Indeed, the Claimant's evidence in his witness statement was that despite feeling tired he continued hammering at the pin for 20 minutes before he stopped. The Claimant also stated in his witness statement that his supervisor refused his request for assistance. He also stated in cross examination that he was part of a crew of two persons in addition to the supervisor. He agreed that he did not name the supervisor or the other person who was working with him and that he did not call any witnesses to support his case of how the incident occurred.

43. In my opinion, it was more probable that the Claimant knew if he felt unsafe in doing the task with the sledgehammer he could stop, but he did not do so as he knew it was a safe task. The Claimant also knew that he could have stopped and let the other person continue with the task, but he did not do so as he continued for another 20 minutes which clearly demonstrated that he knew it was a safe task. Indeed, it was more probable that the Claimant did not make any report as he knew the task was safe and that he did not name the supervisor or the other worker or even call them

as witnesses to give evidence because he knew that their evidence would not support his case.

44. The Claimant also stated in his witness statement that during the lunch break in the Galley, as he attempted to get up from his chair he started experiencing pain shooting down his legs and a burning sensation in his lower back which he reported to the SDR who told him to lie down.

45. Mr Haynes' evidence was that where an incident occurs on the platform a report form is to be completed and that the report from the SDR about the Claimant did not mention that the Claimant's pain was caused by the use of the sledgehammer nor was it classified as a work injury related.

46. The Diamond Injury/Illness Report dated 24 August 2015 ("the SDR Report") was completed by the SDR, Mr Gerardo Figueroa. The material part stated that:

> "An employee came to the hospital last night complaining of lower back pain that radiated down his left leg. The employee stated he was in the Galley having dinner when the pain started. The employee went back to work and the pain got worse. The employee informed the SDR. The employee stated he was using a sledge hammer earlier that day but denied any trauma, and cannot recall a specific event that could have caused the pain. The employee did not fall. Employee was given OTC Ibuprofen and was advised to remain inside resting. The employee was also advised to return if any changes in his condition occurred.
>
> The employee returns to the hospital this morning for same complaint. The employee is alert and oriented with a GCS of 15. He is ambulatory and moves all extremities with full range of motion. Pain is intermittent and limited to the mid-lower back at this time. Upon examination, no obvious signs of trauma noted. No swelling, no redness, no bruising. No neurological deficits

at this time. Patient was given OTC Ibuprofen and advised to rest. Patient has requested to be sent in for further evaluation. Dr Robin contacted and confirmed treatment."

47. The Claimant pleaded in his Reply that he did not have this conversation with the Defendant's medical practitioner. However, from the evidence the only person who gave the Claimant medication and medical attention on the platform was the SDR, who was the Defendant's representative. However, the Claimant did not lead any evidence in his witness statement refuting this aspect of the SDR Report. Instead, paragraph 3 of the Claimant's witness statement supported key aspects of the SDR Report which stated that the incident occurred at 5pm and the Claimant's witness statement stated at or about 4pm he was using the sledgehammer and then made his request of the supervisor. Further, the Claimant stated in his witness statement, that he experienced the pain after lunch when he attempted to get off of his chair. The SDR Report described the meal as dinner and not lunch. Having regard to the time of the alleged incident, dinner and not lunch was the more likely meal. The Claimant also stated in his witness statement that he reported the pains to the SDR and that he was advised to lie down in the hospital, however, he could not. He was given pain medication and sent to his quarters.

48. The SDR Report recorded the approximate time of the incident, when the Claimant's pains began, where the Claimant first experienced it, that he was using a sledgehammer on the day and the treatment received. The SDR even recorded a second visit by the Claimant to the rig hospital which the Claimant did not mention.

49. In my opinion, it was more probable that the report of the SDR was accurate as the Claimant must have had a conversation with someone on the platform about his back pains and must have said the cause, because the Defendant was informed of his back pain complaint. It is more probable that the Claimant told the SDR of the circumstances leading to his pain as he sought treatment from him and the Claimant

did not report the incident to the union representative. The Claimant's responses in cross examination as to whether he reported the incident to the shop steward or the union representative were inconsistent and therefore lacking in credibility as at first he stated that he did, then he changed his answer and indicated that there was no representative present.

50. Both parties called medical experts to support their respective cases and both experts provided medical reports. Mr Haynes' evidence was that the Claimant was first seen by the Defendant's doctor, Dr Robin Roopnarine who first examined him and then referred him to Dr Indar. There were 4 reports by Dr Indar during the period 27 August 2015 to 12 October 2015.

51. Dr Indar is a medical doctor practicing as a Consultant Orthopaedic and Spinal Surgeon. Dr Indar first examined the Claimant in relation to his back and leg pain on 27 August 2015. According to the medical reports of Dr Indar report dated 27 August 2015, there was no history of trauma or injury relative to the Claimant's back pains. An X ray was ordered with it showing significant decrease of lordosis and flattening of the spine. In September 2015, Dr Indar examined the MRI and in his medical report dated 1 September 2015, he stated that " his problem appears to be pre-existing significant degeneration at the L5/S1 and it is clear he may have exacerbated same." As a first treatment option, physiotherapy and rehabilitation was recommended. At a follow up visit on 14 September 2015, the Claimant's pain had not subsided, at this point Dr Indar recommended that physiotherapy be continued and that surgery was a last resort. At the last follow up on 12 October 2015, Dr Indar recommended surgery to decompress the spine.

52. Dr Indar's evidence in cross examination did not undermine his findings in his medical reports that the Claimant had a pre-existing disc bulge. He testified in cross examination that in August 2015, the Claimant was referred to him by Dr Robin Roopnarine who indicated that the Claimant was suffering an injury and some lower

back pain. He stated that on his first examination of the Claimant he noted the Claimant's medical history and there was no history of lower back pain issues. However, the Claimant complained of lower back pain that had been ongoing for the past few weeks. He agreed that he had not documented the cause of the lower back pain or inquired whether the Claimant had sustained the injury complained of in the workplace or by falling down, but stated that due to the nature of the Claimant's complaints he ordered an X-Ray of the area which showed a significantly decreased lordosis, which he stated was normally a sign of someone with back pain, muscle spasm or chronic degeneration.

53. Dr Indar also acknowledged the subjective nature of disc degeneration and the spectrum of symptoms that could come with it, noting that persons with the conditions enjoy varying levels of mobility and pain. He also indicated that the use of a sledgehammer could cause exacerbation of disc degenerative disease. He also reiterated physiotherapy and rehabilitation were the first line of care with surgery being a last resort option.

54. The Claimant's medical expert was Dr Richard Spann, a Neurosurgeon. His medical reports on the Claimant were dated 13 January 2016, 23 March 2016, 4 September 2017, 8 March 2019, 20 March 2019, 20 November 2019, 14 October 2021 and 13 March 2023.

55. Dr Spann's medical reports stated that the Claimant presented to him, with a history of lower back pain, for the first time on 13 January 2016. The Claimant expressed to him that the onset of his symptoms were related to an incident at work involving a sledgehammer. He stated that the Claimant experienced leg pain which settled gradually, but recurred during physiotherapy sessions and at home with the physiotherapy exercises advised by his physiotherapist. Upon examination, Dr Spann noticed evidence of nerve root irritation, consistent with nerve root compression. In September 2015, a MRI was performed which demonstrated a disc bulge at L5/S1

with resulting foraminal stenosis. A repeat MRI was ordered showing disc bulge at L5/S1 with compression of the exiting nerve roots in February 2016, following which the Claimant was advised of the surgical and non-surgical options available to him as well as the predicted timeframe for recovery for both options.

56. One of Dr Spann's medical report was dated 23 March 2016. In it he stated that he had seen the Claimant on 13 January 2016 and that the Claimant had indicated to him that his symptoms of lower back pains for over five months were related to an injury which he sustained at work while using a sledgehammer.

57. Further, in September 2017, another MRI scan was done showing bilateral foraminal stenosis at L5/S1. Dr Spann indicated to the Claimant that surgery would decompress the spine, relieving his symptoms. He indicated the risks to the Claimant including bacterial infections and the twenty percent chance of him having to retire medically unfit.

58. The material parts of Dr Spann's report dated 8 March 2019, stated that the Claimant had been under his care since January 2016 for the treatment of his lumbar spine condition arising from work related injury. He also stated that the Claimant continued to experience symptoms consistent with nerve root compression and back muscle dysfunction which is all part of the nature of his condition. Notably, Dr Spann also stated that the Claimant had no symptoms related to a back injury prior to this injury, never took sick leave for spine related problems in the over 19 years he spent in the industry and that if his condition was pre-existing he would have been on sick leave quite frequently over the years.

59. Dr Spann's later reports stated that the Claimant's disc bulge worsened in a subsequent MRI scan in November 2019, and the Claimant suffered decreased mobility due to worsening leg and back pains which largely kept him confined to the house. Dr Spann gave evidence that even if the Claimant had done the surgery as suggested, there would have been an 80% chance of the Claimant being able to

return to work but a 20% chance of him not being able to work. This was also compounded by evidence of there being a 98% chance of relieving the Claimant's symptoms.

60. Dr Spann admitted in cross examination that the Claimant had reported to him that the symptoms he was suffering from was due to an injury he sustained at work while using a sledgehammer. He accepted that he did not have any way to determine if the information relayed to him by the Claimant about the cause of his injury was accurate. Dr Spann explained that he first diagnosed the Claimant as suffering with a disc bulge which could have possibly healed spontaneously in a few months without the need for surgery. He also indicated that if the Claimant had a disc bulge it could be exacerbated by physical activity. He explained that the Claimant did not have a disc herniation as that would occur if there was some sort of trauma inflicted on the spine. Dr Spann testified that a person can have an asymptomatic disc bulge and while the Claimant did not have any symptoms requiring him to make any request for sick leave that did not mean that the disc bulge was not pre-existing.

61. It appeared to me that Dr Spann's evidence in cross examination contradicted his report dated 8 March 2019, and he supported the Defendant's position that the Claimant had a pre-existing disc bulge and that the Claimant's injury was not due to his work with the sledgehammer on the material day.

62. In my opinion, the Claimant failed to prove that his injury was due to the negligence of the Defendant for the following reasons.

63. First, the Claimant's version of how the incident happened was not plausible. The Claimant's evidence was that there was another worker present while he was doing the task and he asked for assistance. There was no reasonable explanation to account for the failure of the unnamed supervisor instructing the Claimant to continue, although, there was another worker present. Indeed, if the Claimant's version of events was accurate, the Claimant provided no evidence to explain his

failure to stop doing the task as he was well versed in all the safety policies, including the stop work policy and making a report to the Health and Safety Department. There was no evidence that he contacted the union representative to complain about the unsafe instructions from the unnamed supervisor. In my opinion, it was more probable that if the Claimant's version was accurate he would have taken all those steps instead of continuing with the task for another 20 minutes.

64. Second, the failure by the Claimant to call the other worker who was with him and his supervisor to give evidence to support his version raised doubt as to the credibility of the Claimant's version.

65. Third, the contemporaneous document namely the SDR Report did not support the Claimant's assertion that his injury was work related. In my opinion, if the Claimant was injured on the job it was more probable that he would have told the SDR and the Defendant's doctors as he saw them shortly after the incident.

66. Fourth, the medical evidence did not support a finding that the Claimant's use of the sledgehammer on the day of the incident caused his injury or exacerbated his degenerative disc. The totality of the medical evidence was that the Claimant's disc bulges which were revealed by the MRI were degenerative and that a person with a degenerative condition of the disc could be asymptomatic and carry on their life normally without incident.

67. Fifth, the Claimant did not lead any evidence that the use of the sledgehammer for the task by him was potentially dangerous, that he was performing a potentially dangerous task or that he over exerted himself using the sledgehammer.

68. Sixth, the Defendant's case that it did not breach Article 30 (a) and (b) of the Collective Agreement as it paid the Claimant's medical bills and was prepared to pay for his surgery until he decided to seek alternative treatment options was without prejudice to the incident that caused the Claimant's injuries, and was supported by

the evidence of its witnesses and even corroborated by the Claimant's evidence in cross examination.

69. In light of the aforesaid findings of fact, I am of the view, that the Claimant failed to prove that the Defendant was negligent and /or breached its statutory duty and I therefore dismiss his claim. There is no need to address the issue of damages.

ORDER

70. The Claimant's action is dismissed.

71. I will hear the parties on costs.

/s/ Margaret Y Mohammed
Judge