IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2019-00249

Between

DWAYNE COMMA

Claimant

AND

OLDENDORFF CARRIERS

TRINIDAD AND TOBAGO

Defendant

Before the Honourable Madam Justice Carol Gobin

Date of Delivery: 31st March 2023

Appearances:

Mr. Farai Hove Masaisai instructed by Mrs. Jennifer Farah Tull for the Claimant

Mr. Keston McQuilkin instructed by Ramnarine Mungroo for the defendant

1. This is a claim for damages by an employee against his employer for breach of the duty of care to provide a safe system of work.

2. The Claimant Mr Dwayne Comma ***(hereinafter referred to as the "Claimant")*** was employed permanently since 2012 as a Payload Operator with Oldendorff Carrier Trinidad and Tobago ***(hereinafter referred to as "the defendant")***. His work week schedule was two days from 6am to 6pm, the morning shift, then two consecutive days from 6pm to 6am, the evening shift, with the next two days off. The practice was not to have a payload operator work more than three hours at a time. After that period, he would be relieved for two days.

3. The Claimant's case is that on the 17th February, 2018 he reported for work for his 6:00 am to 6:00 pm shift on the Pontoon Marcus. The Claimant made visual inspections of the Payloader L18#3-1

(hereinafter referred to as the "Payloader") for external damages and leaks. After coming to the conclusion that the Payloader seemed to be in good condition he proceeded to enter the machine, fastened his seatbelt and began to operate building cargo heaps for the crane. About twenty (20) minutes after he had been operating the Payloader, he began experiencing discomfort in his back. He drove the Payloader to a safe area within the hatch where he tried adjusting the seat to a comfortable position. When he pulled the lever located on the left side of the seat, it did not move to the reclining position.

4. The claimant informed his banksman at the time, Mr. Leron Jacob, as well as his supervisor that the seat was very uncomfortable because he could not adjust it, but he was instructed to continue operating the Payloader from 6:40 am to 10:00 am and then again from 1:00 pm to 3:00 pm. After his shift, the Claimant made a note in the Payloader log book about the seat and he made a verbal report to a Mr. Aswal Khan Supervisor, and the Senior Mechanic on duty.

5. He subsequently reported for work on the 25th of February 2018 for his 6:00 am to 6:00 pm shift. He did his inspections of the Payloader and proceeded to the cargo hold and began operating. He experienced the same discomfort and burning pain in his back from the seat not being unable to adjust to the recline position. He made a note again in the logbook and made a verbal report to his supervisor, Jamil Redhead. Even as he was heading to the car park at the end of the shift he continued to feel pain in his back and neck. He continued experiencing discomfort for the next two days, which were his off days.

6. On the 28th February, when he reported for work for the 6:00 am to 6:00pm shift at Poontoon Marcus, he was not assigned Payloader duties but was required to assist his banksman Mr Daniel Byer to remove the seats of the Payloader for air condition inspection. This involved some physical pulling. He described it as a strenuous task. In the course of removing the seats for air condition inspection, it was discovered by the claimant and Mr. Byer that the Payloader seat was still dysfunctional after visual inspection even after the two reports that had been made on the 17th and 25th of February, 2018. A report was made once again to Mr. Aswald Khan. At the end of the shift as he was changing his work coveralls he began to experience a continuous sharp pain on the side of his back in the area of his scapula. Around 5:30 pm that day the Claimant continued to experience the continuous sharp pain on the left side of his back in the area of his scapula. It became so severe, it resulting in him having to go home. The pain increased to such an extent that he believed he required medical attention and he was taken to Westshore Medical Emergency for

assessment. It was determined that he suffered from severe muscle spasm to the neck and spine resulting in his chest and the area surrounding his heart having several abnormalities.

7. On the 16th day of April, 2018, the Claimant visited Dr. Rasheed Adams to review his M.R.I reports. He was informed that he had a neck sprain with cervical disc C45 disc changes, disc narrowing and mild protrusion and low back sprain with disc bulges from L23-L5S1 with narrow foramina and would therefore require physiotherapy. The claimant was referred to the Port-of Spain General Hospital to make arrangements for physiotherapy.

8. The claimant claims that the injuries he sustained were as a direct cause of the defendant's negligence and/or breach of duty of care in that they failed to provide a safe work environment; a safe system of work; failed to ensure that the Payloader L18 #3-1 was safe for operation by employees; failed to rectify the faulty lever on the seat of Payloader L18#3-1 after being made aware by the Claimant thereby exposing the claimant to a risk of damage or injury of which they knew or ought to have known and failing to have any risk assessment done.

9. At the trial the Claimant gave evidence along with co-workers Messrs Darnell Byer, Mathis Andrews, and expert Dr Rasheed Adams was called to prove his personal injuries. The particulars of injuries were identified as:

    - **Severe Muscles Spasm to the neck and spine;**
    - **Abnormalities surrounding the chest and heart;**
    - **Neck sprain with cervical disc C45 disc changes;**
    - **Disc narrowing and mild protrusion and low back sprain with disc bulges from L23-L5S1 with narrow foramina that would require physiotherapy;**
    - **Paravertebral muscle spasm secondary to aggravating pre-existing spinal condition;**
    - **Diminished neck and low back mobility;**
    - **Neck and low back sprain on spondylosis;**
    - **Continuation of prescribed treatment;**

Defendant's case

10. It is the defendant's case that the inspection conducted on the Payloader by the Claimant on 17th February, 2018 was conducted in accordance with the Company's daily inspection procedure of

the Payloader. This inspection included an inspection of the seat area and was required to be conducted before the Claimant or any other Payloader Operator assumed control/operation of the vessel.

11. They claimed that they had no record of the Claimant identifying any issues with the seat after his inspection on the first day. The defendant did admit that their records reflect that on the 17th February 2018 the Claimant at approximately 11:00 hrs informed the Defendant's Operation Supervisor Jamil Redhead that his back was hurting and that he thought it was caused by a defective seat in the Payloader. They deny however ever receiving an oral report from the Claimant that the Payloader Seat was not reclining or allegedly caused injury to the Claimant.

12. The Defendant contended that their records reflected that the report to the Defendant's Operation Supervisor Jamil Redhead by the Claimant was made on 17th February 2018. They further claimed that there was no report in the logbook on 25th February 2018 that the Payloader Seat was not reclining or allegedly caused injury to the Claimant. The defendants claim that from its records Mr. Aswal Khan the defendant's Payroll Supervisor who was on duty between 16th to 23rd February 2018 never received an oral report from the Claimant.

13. The Defendants claim that it did all that was reasonably practicable to ensure that the Claimant had a safe place of work/and or a safe system of work and that the negligence which the Claimant claimed was wholly caused and/or contributed by the Claimant. They claimed that they:

    a. Conducted daily inspections of the Payloader;
    b. Designed and implemented a Maintenance Plan for the Payloader that provided for maintenance to be conducted either every shift, after each Operation, daily, monthly and yearly;
    c. Employed a permanent basis crew whose responsibility required them to respond to any safety violations and/or issues with the Payloader;
    d. That the crew remained at all times fully equipped to respond to any safety violations and/or issues with the Payloader;
    e. Trained the Payloader Operations in or around May, 2016 which included undertaking all pre-start, running checks and shut down procedures.
    f. Designed and implemented a safe system of work that;
        i. Required the claimant to work no more than four (4) hour intervals;

ii. Did not require the Claimant to remain seated in the Payloader and/or to operate the Payloader for any continuous periods or for the entirety of his shift;

g. Designed and implemented the Payloader Operations Responsibilities which applied in conjunction with the Operation and Maintenance Manual and required the Claimant to follow at all times. That the Payloader Operations Responsibilities provides as follows:

e) Adjust the seat so that there is full pedal travel while the operator's back is against the back of the seat. Failing to have a full seat position will prevent the engine to start."

14. The Defendant relied on the evidence led from Messrs. Francis Bridgewater, Aswal Khan, Shawn Barrow as well as Dr Kerry Benjamin.

15. The Defendant accepted that there was a duty of care to provide a safe place of work/and or a system of work. The issues I had to decide were whether the reclining function of the Payloader seat was defective and whether the defect caused the Claimant's back injuries, neck strain, lower back strain, muscular spasm and loss of lordosis.

16. Before I indicate my findings on these issues I must address the issue of the adequacy of the pleadings as to causation. This was a matter which was raised by me in the course of the management of the case as well as at the trial. Since that time I have more closely considered the pleading and am now satisfied that the cause of the injury was clearly pleaded. The case on causation was pleaded at the following paragraphs;

[6] Approximately twenty (20) minutes after the Claimant began operating the Payloader, he began experiencing discomfort in his back so he drove the Payloader to a safe area within the hatch after which he tried to adjust the seat to a comfortable position. However, the seat did not recline when the claimant pulled the lever located on the left side of the seat.

[8] The Claimant was directed to continue operating the Payloader from 6:40 am to 10:00 am and then from 1:00 pm to 3:30 pm. Upon being relieved of duty by one Mr. Darnell Byer who he informed of the seat not reclining, the Claimant proceeded to the gallery where he noted in the Payloader log book his findings

about the seat of the Payloader and made a verbal report to a Mr. Aswal Khan Supervisor Mechanic on duty.

[9] On the 25th day of February 2018, the Claimant reported to work on Pontoon Marcus for the 6:00pm to 6:00am shift where he was told by his shift supervisor that a loader man was needed on the shuttle at about 6:40pm. The Claimant made a visual inspection of the Payloader for damages and leaks after which he proceeded to the cargo hold and began operating it building cargo heaps for the crane. The Claimant operated the Payloader that day from 7:10pm to 1:05 am without relief and once more experienced the discomfort in his back from the seat of the Payloader being unable to recline. The Claimant once more noted that the seat needed to be fixed in the Payloader logbook and made a verbal report to the supervisor, Jamil Redhead.

[10] The Claimant then proceeded out of the cargo hold and off the Shuttle ship to do crew change. While changing his coverall, the Claimant continued to experience the discomfort in his back and neck that began in the faulty Payloader seat and the discomfort persisted even when he reached the carpark. The Claimant continued to experience this discomfort throughout the next two days while he was off, that is the 26th and 27th February, 2018.

[11] On the 28th day of February 2018, the Claimant reported to work for the 6:00 am to 6:00pm shift at Pontoon Marcus. The Claimant assisted Darnell Byer in removing the Payloader seats for air-condition unit inspection. While doing this, the Claimant and Darnell Byer discovered that the reclining lever for the seat of the Payloader was still dysfunctional despite the notes made by the Claimant on the 17th and 25th day of February, 2018 and this was once more reported to Aswal Khan.

17. In the paragraphs above, the reclining malfunction in the seat of the Payloader which the Claimant was required to operate was clearly identified as the cause of the injury. On the same day when he was first exposed to the danger, the Claimant complained about it, identifying the defect and the immediate impact on his health. By 28th February 2018 his pain had been so severe that he

required medical attention. A medical certificate from West Shore Medical dated 28th February 2018 confirmed a diagnosis of cervical muscular spasm.

18. On closer consideration it seems to me that the Claimant pleaded the material facts to establish causation, a link between the defective machine and his alleged pain and suffering. While it was not entirely clear to me how the defective mechanism could lead to the specific injury. This was not because of the inadequacy of the pleading, it was because of my own lack of appreciation of how the defect affected the operation, and the operator's posture. I am now satisfied that the material facts having been pleaded, the claimant did not need to provide evidence in the pleadings as to how a Payloader generally operates, how the seatbelt affects the operator's performance and how the malfunctioning recliner would have caused the spasm. It was entirely appropriate for the claimant to produce evidence to support those facts which were simply that he was performing his usual activities, he felt pain and discomfort, he almost immediately made the link between the defect in the machinery and the pain and discomfort. Expert medical evidence was called on both sides, and in the end the issue for the Court was whether the evidence established on a balance of probabilities, the most likely cause of the injury, in other words how it happened.

19. The Defendant taking a cue from the Court submitted that the material facts of causation were not pleaded. In particular, the Defendant submitted that on the evidence a new issue arose as to whether the accident was caused by jolting, while wearing the seat belt in course of the usual operations or by the defect in the recliner. This too was a matter raised by me. Evidence of jolting was in fact only introduced in the witness statement and at first I was concerned about the relevance of it and the impact on causation. When I returned to consider it more carefully I concluded that this evidence did not constitute a departure from the pleaded case nor was it an attempt to introduce new facts on the critical issue of causation. I came to the view that it supported and fortified the claimant's case on causation. The claimant has been firm in the pleading and the evidence that the defect in the reclining mechanism was the problem. Evidence of the operation and the explanation of how the jolting occurs, did not affect the pleading as to the cause of injury, indeed it better explained the importance of the reclining function in the seat and it is significant that the best evidence of it came from the defendant's witness, Dr Kerry Benjamin. As I understood it at the end of the day, jolting would occur once the driver is operating the machine with the backrest up and his seatbelt on. This comes with the operation. It is easy to understand how when one looks at the photographs of the mass of material that has to be moved. The fact of the practice of no more than three hours spells for any operator suggests a sensitivity

to the physical stress involved. The evidence of jolting better explained the importance of having the reclining function in working order. It is the reclining function which reduces or minimizes the effect of the stress on the back which can lead to lordosis or other injury.

Findings of Fact

20. I have considered the evidence of the parties and find for the claimant that the seat of the Payloader was defective—the recliner function was not working.

21. In assessing the evidence and the credibility of the parties and their cases the obvious starting point was the plausibility of the respective cases. Did the claimant make this up or was the seat defective, and are the Defendant's employees at the time simply trying to assist the company by their denials of the reports and the defect. The claimant had been a permanent employee on the job since 2012. He had been involved in a serious accident sometime in 2014. He returned to work with no evidence of malingering or complaints about his performance. I have to infer he was doing his job and I daresay happy to have it. The admission of at least one contemporaneous report on the 17th February 2018 adds to the credibility of his case. The absence of greater detail in the logbook entry made by him does not negatively affect his credibility. Rather it does so in relation to the Defendant. The claimant would only go so far as to make a complaint and to record a back pain, because he made the connection between the defect and his obvious injury. The Defendant's attempt to claim a lack of detail or ignorance of the details did not help its case. The note, as bare as it is, was sufficient to put the Defendant on notice that an employee had reported an injury which called for immediate attention and corrective action in the discharge of its duty of care. I am not convinced that the Defendant did not receive the further reports.

22. I accept the claimant's evidence that he made further reports. Under cross examination, Mr. Aswal Khan admitted that the Claimant did indeed follow the correct procedure in terms of making a complaint about the defective chair. He also admitted that these written reports of the supervisors were indeed passed onto management. In light of this, I accept the evidence of the Claimant that he did make a report in particular the defect in the reclining mechanism soon after he started to operate the machine. The Defendant's claim that the safety protocols which were in place and sufficient is rejected. The nature of the defect was such that it would not have been discoverable upon a mere visual inspection. That is because the protocols require him to ensure that he is sitting with his back firmly against the backrest to ensure that the machine can move. The claimant would not have known that the lever was defective until he sat on the chair, experienced some

discomfort and then when he attempted to rectify the problem. It was at that stage that it would have become apparent.

23. It having been brought to the attention of the defendant, it was fit for it to see to rectify this issue. Mr. Bridgewater under cross examination also admitted that an investigative team was assigned to deal with the complaint, however this team was not formed. This confirms, at no point did the defendant attempt to rectify the issue of the defective lever. It did not seem to deal with it seriously. But the evidence about an investigative team being assigned to investigate does seem to be an overreaction to a complaint about a non-functioning recliner device, even if it was never formed in the end. It is not credible. All that was required was an immediate inspection from a mechanic or engineer to determine whether there was a defect as reported. Video footage taken much after the 28th February is of little assistance. It is not sufficiently contemporaneous.

24. The defendant's evidence of the records of a "full service" did not assist its case. I find it significant that none of the defence witnesses stated directly in evidence that the reclining function was operational. They skirted the issue in their evidence in chief and I found them to be evasive in the cross examination. Further because the defendant adopted the defence of not receiving a report other than a one-line note in the log book –the witnesses did not specifically deny instructing Mr. Comma to continue operating with the defect. Indeed, I find that he was so instructed.

25. On the issue of causation, I find on the evidence it has been established that the Claimant sustained injury due to the defect in the reclining lever. The cause of the claimant's injury was supported by the evidence of Dr. Kerry Benjamin who when asked by me to explain what he meant by "a faulty seating arrangement" in his report responded that the claimant was complaining about the discomfort caused by the seating in terms of a loader. In his report, Dr Benjamin stated that a job a such as the claimant's would usually cause "jolting". A factor which can certainly bring on a neck and back strain situation. However, Mr. Benjamin specifically in his evidence under cross examination cleared up the issue that if it was not for the seat being moved out of position i.e. (out of the normal reclining position) the claimant would not have experienced the discomfort that he did.

26. In his words, the seat being moved out of position "would change the curvature of the spine and the jolting in those positions which can cause a strain of the neck muscles…. and the low back muscles to cause pain… A faulty seat would require the claimant to move the whole seat backwards to get to the normal position which would ultimately put the spine in an abnormal

position subjecting him to the strain." The fact that the claimant would have been in this seating position for an extensive period of time according to Mr. Benjamin is known to put the strain on the muscles of the back. Having heard this evidence as well as that of Dr Adams, I accept the claimant's case that the defective chair resulted in his personal injuries. It is notable that the Defendant has suggested no alternative cause of the Claimant's injury.

27. I find support for my approach to causation in the guidance of ***Drake v Harbour [2008] EWCA Civ 25***, in which Lord Justice Longmore opined at para 15:

> ***[15] "It is convenient to deal with causation first. It seems to me that in the case where negligence has been found and the damage which has occurred is the sort of damage which one might expect to occur from the slightly different context of Roadrunner v Dean [2003] EWCA Civ 1816 para 29, [2004] 11 EG 140, [2004] 1 EGLR 73)" … be prepared to take a reasonably robust approach to causation".***

Assessment of Damages

28. The claimants relied on three cases in support of the claim for general damages. I am of the view that the cases ***Andre Marchong v Trinidad and Tobago Electricity Commission CV 2008-04045*** and ***Ramesh Sam v Tropical Power Limited CV2008-03126*** are sufficiently similar in that the injuries sustained in those cases are similar to the ones endured by the claimant in the case at bar. In ***Marchong*** the claimant in that case suffered from soft tissue injury and lumbar spasm which resulted in some narrowing of the lateral recess at L4-L5 with possible impingement of the traversing L5 nerve root and early disc desiccation at the L5/S1 level, back pain radiating down the leg and pain on prolonged sitting. The sum of $60,000 was awarding for general damages. In the ***Sam***, the claimant suffered from mild swelling and paraspinal muscle spasms, restriction of movement at the lower spinal region, spondylotic changes in lower lumbar regions and L4-L5 disc bulge. The sum of 75,000 was awarded for general damages.

29. As to his pain and suffering, the Claimant suffered pain shortly after he sat in the recliner position, and began to experience worsening pain and discomfort on the 28th February, 2018 where he was rushed to the West Shore Medical Emergency for assessment. He was diagnosed by the doctor on duty at the time, Dr Verma, as suffering from severe muscle spasms to the neck and spine which resulted in his chest and the area surrounding his heart having several abnormalities. He was given muscle relaxers, painkillers and three days sick leave. His pain persisted and he was prescribed

stronger painkillers, and more sick leave was granted. On Dr. R. Narine's advice he was referred to Dr. Rasheed Adams for further assessment and also referred to the M.R.I Centre in St. Clair. The claimant underwent a MRI scan at St. Clair M.R.I Centre where he was informed after the assessment that he had a neck sprain with cervical disc C45 disc changes, disc narrowing and mild protrusion and low back sprain with disc bulges from L23-L5S1 with narrow foramina. On the evidence I am not persuaded that chest or heart abnormalities could have resulted from the defective machinery. Further it seems unlikely that the narrowing and other disc changes could have manifested from so recent an incident.

30. The pain treatment continued and he began physiotherapy. I am satisfied that for several weeks in the period immediately after the incident the Claimant suffered excruciating pain but from the several reports of his doctors and therapists he improved over time. As I understand it there will be residual discomfort in the future and that there will be some impact on his amenities. That as result of his injuries sustained he will continue to experience pain, suffering and loss of amenities.

31. The claimant also claims that he has sustained a diminution and/or loss of his earning capacity and is now handicapped on the labour market but there is no evidence of such since the claimant has provided no evidence of any attempts to the claimant that as a result of his injuries he will not be employable in the future. He claimed the sum of $1,000,000 for future loss of earnings.

32. The report dated 12th November, 2018 of Dr. Rasheed Adam detailed that the claimant was showing signs of improvement in his neck and low back and that the examination showed some diminished neck and back mobility. He went on to state then that the claimant at this time was not fit to return to work as a heavy machine operator. The report of 6th May 2019 however, clearly indicated that the claimant was not medically fit to return to work at that moment as a heavy machine operator but with improvement he may be able to function in his original capacity as a heavy machine operator. This was significantly inconsistent with Dr. Adam's subsequent report of 17th February, 2020 which stated that there was no improvement in his condition and that he was unable to return to work but can resume light duties. Given that Doctor Adam's reports are based on subjective information provided by the claimant, the court concludes that there was some exaggeration on the part of the claimant as to the extent of his disability. I consider a reasonable award for loss of salary should cover the period from the 1st of March 2018 to three months after the doctor's report which indicated when he would be able to return to work i.e. the 31st July 2019. This figure amounts to $295,409.00 (the claimant's average monthly salary of $17,377.00 x

17months). I reject the defendant's submission that the claimant has failed to provide his wages as this information must lie within its knowledge.

33. The defendants belated attempt to rely on the effects of the pre-existing injury is rejected as this was never pleaded as part of the Defendant case.

34. **<u>Determination</u>**

I. There shall be judgment for the Claimant;

II. The Defendant is ordered to pay damages assessed as follows;

a. Special Damages in the sum of $11,005.00 for doctor's visits and consultations

b. Loss of income on sick leave from 28th Feb 2018 to 31st July 2019 i.e. $295,409.00 (the claimant's average monthly salary of $17,377.00 x 17months).

c. General damages in the sum of $100,000 for his pain and suffering;

iii. The Defendant is ordered to pay the claimants costs on the prescribed scale.