IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009HCV06457

BETWEEN	**FITZROY REID**	**CLAIMANT**
AND	**WEST INDIES ALUMINA COMPANY LIMITED (WINDALCO)**	**DEFENDANT**

Ms. Carol Davis for the claimant

Mr. Christopher Kelman instructed by Myers Fletcher & Gordon for the defendant

Heard:

December 14 and 15, 2011, January 16, February 10 and July 31, 2012

PERSONAL INJURIES-EMPLOYER'S LIABILITY-SAFE SYSTEM OF WORK

SIMMONS, J

[1] On the 5th January 2007 the claimant who was employed to the defendant as a Trade Helper, sustained injuries whilst he was removing tubes from a heater situated at the defendant's plant. It is alleged that these injuries were sustained when a crimping tool which was being picked up by the claimant fell from his grasp as a result of the rocking of the heater cover on which he was standing.

[2] He has claimed damages for negligence or breach of contract. The particulars as pleaded are as follows:

i. Failing to take any precautions for the safety of the claimant while he was engaged upon the work;

ii. Exposing the claimant to risk of damage or injury of which they knew or ought reasonably to have known;

iii. Failing to provide a safe place of work for the claimant;

iv. Ordering the claimant to do millwright work, in circumstances in which he had no and/or no proper millwright training;

v. Causing the claimant to use a crimping tool while standing on an unstable surface.

[3] The particulars of his injuries are:

i. Undisplaced fracture of the left patella;

ii. Internal stabilization of the fracture;

iii. Marked wasting of the left quadriceps;

iv. Poor gait;

v. Intermittent pain and tenderness of the medial joint line;

vi. Permanent impairment of 5% of the whole person or 10% of the lower limb.

The Defence

[4] The defendant has asserted in its defence that the task assigned to the claimant was not one which required specialized training. It has also stated that the training which Mr. Reid received as a trade helper was sufficient to enable him to safely carry out the assigned task.

[5] The defendant has taken issue with the claimant's account of how the accident occurred and has stated that the accident was caused either solely or partially by the claimant's negligence. The defendant has also stated that on the day in question, the claimant was working with Mr. Devon Lewin when the crimping tool fell out of his hand**.** It is alleged that the Claimant failed to hold the

said tool securely and in the manner in which he was trained. It also alleged that he placed the crimping tool in an unsecure position on top of the heater rather than on the ground. The particulars of the claimants negligence are stated to be:-

i. Failing to handle and use the crimping tool in the manner in which he was trained;

ii. Failing to hold the crimping tool securely and holding it in an unsafe manner by holding the point in his hand;

iii. Causing the crimping tool to slip from his hand by failing to handle it securely;

iv. Failing to act in accordance with his safety training; and

v. Failing to act as a careful prudent workman.

Claimant's evidence

[6] The claimant's evidence is that on the day in question he was asked by his supervisor Mr. Christopher Davy, to remove tubes from a heater situated at the EVAP section of the defendant's plant. This task was described by him as a millwright's work. He further states that he had not been trained to do that type of work. He and Mr. Devon Lewin, another trade helper, were working together. At the time, the claimant had been employed to the defendant for approximately twelve years. Mr. Lewin was said to have had approximately the same level of experience as the claimant.

[7] Mr. Reid indicated that in order to carry out the task to which he was assigned he had to stand on the bottom of the heater which is shaped like a saucer. There is no dispute that this "saucer" sits on a stand which is about three to four feet high. The area in which the men were working was described as being hot. The claimant stated that whilst the saucer is not hot it rocks. His evidence is that in order to remove the defective tubes he used a crimping tool to

“wedge” the edge of the tube and Mr. Lewin would hit the bottom of that tool with a sledge hammer. He described the crimping tool as being heavy with a sharp point with a nut guard at the bottom which is situated above a nut.

[8] He also stated that the crimping tool had been placed in the bottom of the “saucer” by Mr. Lewin. His evidence is that whilst he was bending down to pick it up the “saucer” rocked, and the crimping tool fell out of his hand and hit his left knee. Prior to the accident the tool had been sharpened by Mr. Lewin. He continued with the job despite being in severe pain. He was seen by the defendant’s doctor later that day and by Dr. Minott who he said operated on his knee.

[9] On the 10th January 2007 some five days after the accident, the claimant stated that he was required to return to work. His evidence is that he was picked up at home by the defendant’s driver and was given a crutch which he said was taken away two weeks later. As a result he had to “hop around the plant in pain”. His evidence is that the defendant paid the bills for his physiotherapy for a few weeks and when they stopped he still continued to go for treatments. He did so up to late 2007.

[10] The claimant also indicated that he was laid off in March 2007 and has been unable find employment since that date.

[11] In cross examination, he stated that he has worked with the defendant as a trade helper for twelve years and that he was always called to do re-tubing of the heaters. On the day of the accident he was not engaged in re-tubing but was replacing tubes that had gone bad. He described it as being part of the work involved in heater maintenance. Heater maintenance according to his evidence is done by millwrights and trade helpers. Mr. Reid indicated that he had about ten years experience in the removal and replacement of heater tubes at the defendant’s plant.

[12] He also indicated that this was not the first time that he had been engaged in the removal of tubes whilst standing on the heater cover and said that on the day in question he did not need anyone to tell him what to do as he had the necessary experience to carry out the task to which he was assigned. The claimant also indicated that the task in which he was engaged was not a millwright's job but one in which a trade helper and a millwright are supposed to work together. He indicated that he was not trained in the removal and replacement of tubes but "just go there and pick up".

[13] The claimant described the heater cover as being very heavy. It is round with an X in the middle. Whilst working, he places one foot on the edge and the other in the middle. He also stated "I always stand like this on heaters of this design". The edge is about three inches wide and the partition about one inch. His evidence is that there were no scaffold boards on the heater cover on the day in question.

[14] The heater cover is said to have rocked as a result of the ground being uneven and the fact that Mr. Lewin was also standing on it. Mr. Reid maintained that the "saucer" always rocked. He said that the rocking of the saucer was so forceful that it caused the crimping tool to fall from his grasp whilst he was bending down to retrieve it from the bottom of the heater cover where it was allegedly placed by Mr. Lewin. The point of the crimping tool is alleged to have come into contact with his knee resulting in injury. His words are as follows: *"The heater bottom rock when I bend down to pick up the crimping tool and that is how the crimping tool get to fall out of my hand".* He denied that Mr. Lewin had passed the crimping tool to him and said that the crimping tool fell on his knee.

[15] The claimant also stated that the defendant held safety meetings every Monday and that his attendance was required. He stated that the purpose of those meetings was to inform employees how to do their jobs safely.

[16] With respect to the period after the accident the claimant stated that he was assigned light duties by the defendant and was not required to do anything

that required him to move about on foot. He also said that he never worked whilst he was in pain.

[17] The defendant called Mr. Devon Lewin and Mr. Christopher Davy to give evidence on its behalf.

[18] Mr. Lewin stated that he is a heater repairman and that a large part of his work involves heater maintenance. He learnt this job through a system of apprenticeship. His evidence is that he performs assigned tasks with the assistance of trade helpers.

[19] On the day of the claimant's accident the witness stated that he was an experienced trade helper and was the lead man on the job to which the claimant was assigned. That job involved the removal of tubes from heater 13-3-H-4. He said that it was understood that he would hold the crimping tool whilst the claimant was to knock its base with a sledgehammer. He described the crimping tool as a solid bar measuring four and one half to five feet in length with a tapered section at one end and a handle at the other. The heater cover was said to be resting on a stand with four legs. The factory floor was made of concrete. Mr. Lewin indicated that two scaffold boards were to be placed across the top of the cover to provide a platform for workers to stand.

[20] Mr. Reid was said to have gone onto the heater cover and was standing on the scaffold boards. The witness indicated that he handed the crimping tool to him and Mr. Reid placed the bottom of the crimping tool against the partition of the heater cover whilst holding the pointed end in his hand. Mr. Lewin stated that he was about to ascend the steps to get onto the heater cover when he saw the crimping tool fall out of the claimant's hand and *"touch"* his knee. He said that he saw a mark on the claimant's knee but did not see any blood. They continued to work for about half an hour.

[21] The witness also stated that he did not notice any rocking of the heater cover. His evidence is that the stand was sitting firmly on the ground. He

indicated that the defendant's safety standards require that it is seated firmly or else the work cannot be done. Mr. Lewin's evidence is that at the time when the crimping tool fell he was not on the heater cover. The weight of the crimping tool was said to be about ten pounds.

[22] He stated that he was the senior person on the job. Mr. Lewin also stated that persons are trained on the job and once a job is being undertaken the lead person instructs the others as to its execution.

[23] In cross examination, he said that in January 2007 he was upgraded to a grade 3 millwright. He also stated that a grade 4 is a trade helper. He indicated that he was trained on the job and had not passed any examinations to be qualified as a millwright. When paragraph 6 of his witness statement in which it was stated that in January 2007 he was an experienced trade helper was put to him, he stated that he did not remember that paragraph. By way of explanation he said that at the time he was being paid as a grade 3 millwright although employed as a trade helper. He said, *"I never went into detail. I was employed as a trade helper but on the work I get upgraded as a grade 3".*

[24] Mr. Lewin stated that it was customary for a millwright and a trade helper to do heater maintenance although a senior trade helper could also work with another trade helper.

[25] He indicated that if no scaffold boards are placed in the heater cover the defendant's safety rules dictate that no work is to be done. On the day in question he did not go onto the heater cover. He agreed that the removal of tubes is a millwright's work and should be done with the assistance of a trade helper. He described the crimping tool as a metal bar about five feet long with a sharp point at the end.

[26] The witness denied placing the crimping tool in the bottom of the heater cover and stated that the claimant placed it on the top of the partition. He also indicated that Mr. Reid held the top of the crimping tool. His account of the

accident is that the crimping tool fell in the bottom of the heater cover and turned and injured the claimant. He saw no cut or blood. The witness opined that had the crimping tool been placed in the bottom of the heater cover it would not have fallen. He also stated that the heater cover weighs a couple of tons and required the use of three chain blocks for its removal. It was his view that due to its weight it could not rock.

[27] Mr. Davy stated that he is a Lead Repairman in the Production Support, Maintenance Department of the defendant. That job he said entails all aspects of heater maintenance. He indicated that he is trained as a grade 1 millwright which is the highest level of training as a millwright.

[28] He indicated that the removal of heater tubes is not specialized millwright's work and can be done by trade helper with either a millwright or a more experienced trade helper. He said that such work is concerned with the non moving parts of the plant and as such can be undertaken by persons who are less experienced and not trained as millwrights. He indicated that it was not unusual for the claimant and Mr. Lewin to be left on their own to remove tubes as they both possessed the required level of competence.

[29] With respect to training the witness indicated that when persons are employed in the maintenance department they start as trade helpers. They would be assigned to work with a millwright or a more experienced trade helper. Training he said was by a system of apprenticeship and after approximately three to five years if one possesses the aptitude, they would then be enrolled in the Block Training System.

[30] He indicated that the claimant would have been trained in tube removal and had been involved in heater re-tubing which is the most extensive heater repair task as it involves the removal and replacement of all of the tubes. A heater it was said could contain up to nine hundred tubes.

[31] With respect to the allegation that the heater cover rocked whenever persons stood on it, the witness stated that whilst it is not impossible, it is improbable as it weighs approximately three quarters on a ton. He went on to say that he could not perceive of it rocking.

[32] Where the flooring is concerned Mr. Davy stated that it is straight. He continued by saying that it is paved and is gently sloped to facilitate the movement of fluid. The legs of the stand on which the heater cover was placed he said, sit firmly on the ground.

[33] In cross examination he said that he is a grade 1 millwright which is the most senior. He indicated that in order to be qualified, trade helpers are required to go through apprenticeship. Only regular employees are eligible for Block Training. Regular employees are required to have basic academic qualifications.

[34] On the 5th January 2007, he assigned the job in which the claimant was engaged, to Mr. Lewin who was the job leader. Mr. Hibbert was the team leader.

[35] He indicated that the claimant was engaged in the removal of tubes on the day in question and not re-tubing. He explained that if it was the latter task that was being undertaken a millwright was required to be on the job. He said that tube removal is one of the simplest tasks and there would be no need for a millwright's supervision. Re-tubing on the other hand could last two to three weeks and a millwright would be present on at least one of the shifts. Mr. Davy indicated that Mr. Lewin because of his competence usually manages one shift.

[36] With respect to the heater cover being placed in a rectangular stand, Mr. Davy said that the heater cover is circular and shaped like a basin. When it is placed in the rectangular stand it would fit perfectly, as he explained a circle has several chords (any line that touches a part of a circle) and there would be four chords. He explained that the frame of the stand is square in shape although its height is rectangular.

[37] Mr. Davy also stated that the crimping tool is to be lifted vertically and weighs a maximum of fifteen pounds. About four feet of the crimping tool is safe for handling. He said that it would be unsafe to put the blunt end of the crimping tool towards the person standing on the heater cover and vice versa.

[38] The locus was visited on the 16th January 2012. A crimping tool similar to that being used in January 2007 was seen. A round heater cover and a rectangular stand were also seen in the area in which the accident was stated to have occurred. The claimant confirmed that these items were similar to those that were being used on the day in question. The cover was approximately eighty one and one half inches in diameter and the stand was forty inches.

[39] Mr. Davy was further cross examined with respect to observations made at the locus. He stated that the crimping tool is about five feet long and the handle is below the one foot part that is used and is about four feet long. That part is relatively smooth and not as shine as the point which is made of a different material. The part for handling is designed to slide up and down in the hand. He indicated that in order for this to be done the grip would have to be loosened.

[40] The witness also stated that the round heater cover is designed to be used with a round stand which holds it securely. He also stated that the heater cover weighs close to two tons. This knowledge he says was derived from the type of equipment that is required to move the cover.

[41] On the application of counsel for the claimant the witness statement of Fitzroy Hibbert dated the 17th August 2011, was admitted in evidence as a hearsay document pursuant to ***rule 29.8 (3)*** of the ***Civil Procedure Rules 2002.***

[42] Mr. Hibbert in his witness statement stated that he is a Team Leader employed to the defendant. In January 2007 he was Team Leader for Area One of the Refinery Operations Department which was responsible for operations and heater maintenance.

[43] He indicated that the heater maintenance crew included millwrights and trade helpers. Millwrights were said to lead on particular jobs and were supported by trade helpers. Trade helpers were trained on the job whilst working under the supervision of a trained millwright.

[44] The witness also stated that a team leader has the overall responsibility for his area and assigns the various jobs. A job leader he said is sufficiently senior to assign tasks and to take charge of particular jobs and may fill in for the team leader in his absence.

[45] In January 2007, Mr. Hibbert stated that he organized a routine heater maintenance job and assigned Mr. Devon Lewin and the claimant to that task. Mr. Lewin was said to be an experienced trade helper under whose supervision the clamant was working.

[46] He stated that scaffold boards would be placed on the heater cover to provide to platform on which the men were to stand. He also stated that the heater cover which is conical in shape is placed on a rectangular stand which rests firmly on the factory floor. He opined that it is highly unlikely that it would have shifted while the claimant was standing on it. He also indicated that he inspected the site of the accident later that day and neither the stand or the heater cover appeared to be unstable.

Claimant's Submissions

[47] Miss Davis submitted that at common law an employer owes a duty of care to an employee. She referred to the case of ***Wilson & Clyde Coal Company v. English*** **[1938] AC 57** at **78**, where Lord Wright said:

> "The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfillment to employees, even though selected with due care and skill. The obligation is threefold - "the provision of a competent staff of men, adequate material, and a proper system and effective supervision"; I repeat the statement of the duty by Lord M'Laren quoted with approval by Lord Shaw in *Black v. Fife Coal*

Co., and again approved in the *Lochgelly* case."

[48] Counsel also made reference to the Jamaican cases of ***Delroy O'Connor v. West Indies Alumina Company*** Claim No. 2006 HCV 03551 (delivered June 1, 2010) and ***Anthony Reid v. Mac's Pharmaceutical and Cosmetics Limited*** Claim No. 2006 HCV 04385 (delivered January 8, 2010).

[49] In ***O'Connor v. West Indies Alumina Company*** , E. Brown, J. (Ag.) as he then was, cited with approval the case of ***Davie v New Merton Board Mills Ltd and Another*** [1959] A.C. 604, 620 in which Viscount Simonds said:

> *"My Lords, I would begin, as did Lord Parker L.J., with a reference to the familiar words of Lord Herschell in* ***Smith v Charles Baker amp; Sons*** *[1891] A.C. 325, 362 , in which he describes the duty of a master at common law as "the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk," words that are important in prescribing the positive obligation and in negativing by implication anything, higher. The content of the duty at common low, thus described by Lord Herschell, must vary according to the circumstances of each case. Its measure remains the same: it is to take reasonable core, and the subject-matter may be such that the taking of reasonable, care may fall little short of absolute obligation.*

[50] In ***Anthony Reid v. Mac's Pharmaceutical and Cosmetics Limited***, the court found that the claimant was forty percent liable for the accident on the basis that he was careless when he put his hand into the chute of the defendant's machine in an attempt to clear a blockage. F. Williams, J. stated:

"The applicable principles of law are well known. They are (the more important of them), accurately summarized in the following statements and excerpts: -

(1) The duty of an employer, at common law, is to take reasonable care for the safety of his/her/its employees - see, e.g., ***Davies v New Merton Board***

Mills Ltd. *[1959] 1 All ER, 346 . This duty includes a requirement to provide a safe system of working and a safe place of work.*

(2) An employer is expected to provide "competent staff, safe equipment, a safe place of work and a safe system of work", per Brooks, J in ***Walter Dunn v Glencore Alumina Jamaica Ltd. (t/a West Indies Alumina Company (Windalco) , 2005 HCV 1810*** *, delivered on April 9, 2008.*

(3) "The obligations are threefold, as I have explained (i.e., 'the provision of a competent staff of men, adequate material, and a proper system and effective supervision"' per Lord Wright in ***Wilson's & Clyde Coal Co. Ltd. v English*** *(1938) A.C. 57, 84 .*

(4) "The common law places a duty on the employer to provide a safe system of work for his employee, and further to ensure that the system is adhered to", per Campbell, J in ***Schaasa Grant v Dalwood & Jamaica Urban Transit Company Ltd., 2005 HCV 03081****, delivered June 16, 2008, (page 5, para. 13).*

(5) "The duty to supervise includes the duty to take steps to ensure that any necessary item of safety equipment is used by them", per Lord Greene in ***Speed v Thomas Swift & Co. Ltd.*** *[1943] K.B. 557, 567 .*

(6) It has also been observed that "safety obligations are placed on an employer for the purpose of protecting not only workmen who are careful, but also those who are careless", per Rattray, J in ***Hutchinson v Sunny Crest Enterprise Ltd. ,*** *suit no. C.L. 1999/H017****,*** *delivered in October, 2001. So, these principles are well known and may be easily stated. The challenge normally arises in their application to the facts and circumstances of each case; no two cases ever being exactly alike."*

[51] Counsel analyzed the evidence given by the claimant and Mr. Lewin as they are the only persons who were present at the time when the accident occurred. She submitted that the Court should accept the Claimant's version of how the injury occurred as Mr. Lewin was not a witness of truth. Particular reference was made to the discrepancies in his evidence in relation to his level of employment.

[52] It was also submitted that in light of the medical evidence that the claimant's patella was fractured it was highly unlikely that the crimping tool had only touched the claimant's knee as was stated by Mr. Lewin. Counsel also submitted that if as Mr. Lewin had said, the point of the crimping tool had hit the claimant's knee his trousers and his knee would have been cut.

[53] Miss Davis also submitted that the defendant failed to provide a safe system of work when Mr. Lewin and the claimant who were both trade helpers were assigned to do heater maintenance. In this regard she relied on paragraph 7 of the witness statement of Mr. Hibbert and Mr. Lewin's evidence in cross examination. She also stated that the claimant was not being supervised at the time when the accident occurred as Mr. Hibbert was absent and Mr. Davy said that the claimant was "not totally correct" when he referred to him as his supervisor.

[54] The court was also urged to find that the fact that the area was hot and water was probably dripping on the day of the accident made the system of work unsafe. In addition, it was argued that the placement of the round heater cover in a square stand which had not been designed to accommodate it was also unsafe.

[55] Submissions were also made with respect to the safety of the crimping tool. Counsel directed the court's attention to the fact that it does not have a handle. She submitted that a " much safer system would be the provision of a proper semi circle rounded handle which would make it much easier to grip and secure the crimping tool when it is being picked up for carrying". It was also

submitted that the shine part of the crimping tool made it unsafe as it could slip through the hands of the user especially if they were wet either from water or perspiration. Miss Davis also argued that the failure to provide knee pads amounted to a failure to provide a safe system of work.

[56] Counsel urged the court to reject Mr. Davy's evidence that the claimant held the crimping tool by its point and to find that he was not negligent. She also asked the court to consider the fact that the crimping tool fell from the claimant in circumstances where he was required to hold it with wet rubber gloves.

Defendant's Submissions

[57] Mr. Kelman also analyzed the evidence of the claimant vis- a- vis that of the witnesses for the defence. He submitted that the claimant's evidence on critical issues had been discredited and as such he was not a reliable witness. Particular reference was made to his witness statement in which he stated that on the 5th January 2007 he was directed to do the work of a millwright for which he had no training and his evidence in cross examination that he had been doing the assigned task for ten years prior to that date. Counsel also referred to his testimony that he did not need to be told how to do that task.

[58] Counsel also referred to the claimant's evidence in chief that he had to work the week after the accident whilst in pain and that he had to hop around the plant without crutches some weeks later and his evidence in cross examination that he was assigned light duties.

[59] In these circumstances, the court was asked to reject the evidence of the claimant that the crimping tool was heavy and that the heater cover rocked. Counsel submitted that the weight of the heater cover as stated in evidence made it unlikely that it rocked.

[60] Mr. Kelman also submitted that the defendant's witnesses were more reliable and were not discredited in cross examination.

[61] Counsel whilst acknowledging that the defendant as the claimant's employer owed a duty of care to him argued that it had discharged that duty. He referred to ***Charlesworth & Percy on Negligence,*** 9th edition at 788 where a system of work was defined in the following terms:

> *"A system of work is the term used to describe (i) the organization of work; (ii) the way in which it is intended the work shall be carried out; (iii) the giving of adequate instructions (especially to inexperienced workers); (iv) the sequence of events; (v) the taking of precautions for the safety of workers and at what stages; (iv) the number of such persons required to do the job; (vii) the part to be taken by each of the various persons employed; an (viii) the moment at which they shall perform their respective tasks".*

[62] Mr. Kelman pointed out that the learned authors also indicated that the duty on the employer is not to provide perfection. He referred to the case of ***David Lawrence v. Nestle – JMP Jamaica Limited*** Suit No. C.L. 2002/ L019 (delivered July 31, 2008) in support of this point. In that case the claimant was injured twice whilst he was employed to the defendant. In the first incident he hit his knee whilst reaching for some goods from a shelf. On the second occasion he slipped and fell whilst pulling a dolly with goods. Mangatal, J. found that the claimant was an experienced worker at the material time and even though the system of work was not perfect, it was adequate in the circumstances.

[63] Reference was also made to the case of ***Winston Hall v. Glencore Alumina Jamaica Limited,*** Claim No. 2004 HCV 03020, (delivered November 24, 2008). The claimant in that case suffered an injury to his back whilst using a shovel to remove some material. The defendant was not found to be liable.

[64] Counsel also relied on the case of ***Vinnyey v. Star Paper Mills Ltd.*** [1965] 1 All E.R. 175. In that case the claimant was injured when he slipped and fell whilst moving a pallet. Prior to that he had been instructed to clear up some viscous fluid that had flooded the area. He and another workman were

provided with squeegees to clean up the fluid and a fork lift truck to move the pallets. He decided to clear a wider area of the floor by moving pallets before using his squeegee. The court held that it was not reasonably foreseeable that a workman would be injured whilst performing such a simple task and that the equipment and the instructions given were adequate. There was therefore no breach of duty on the part of the defendant.

The law

[65] It is settled law that an employer owes a duty to an employee to take reasonable care for his safety. In ***Paris v. Stepney Borough Council*** [1951] A.C. 367 at 384 Lord Oaksey said:

> *"The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case. The fact that the servant has only one eye if that fact is known to the employer, and that if he loses it he will be blind, is one of the circumstances which must be considered by the employer in determining what precautions if any shall be taken for the servant's safety. The standard of care which the law demands is the care which an ordinarily prudent employer would take in all the circumstances. As the circumstances may vary infinitely it is often impossible to adduce evidence of what care an ordinarily prudent employer would take. In some cases, of course, it is possible to prove that it is the ordinary practice for employers to take or not to take a certain precaution, but in such a case as the present, where a one-eyed man has been injured, it is unlikely that such evidence can be adduced. The court has, therefore, to form its own opinion of what precautions the notional ordinarily prudent employer would take".*

[66] This duty includes the following:

i. The provision of a safe place of work;

ii. The provision of a safe system of work;

iii. The employment of competent employees and supervision;

iv. The provision and maintenance of adequate plant and equipment.

Safe place of work.

[67] In order to satisfy this requirement the place of work must have such protective devices as experience has shown to be desirable in other places of the same or similar kind. This duty according to the learned authors of ***Charlesworth & Percy on Negligence 10th Edition*** at page 694 is *"… fulfilled by providing a place as safe as care and skill can make it, having regard to the nature of the place of work".*

Safe system of work

[68] It is also settled that an employer is liable for injuries sustained by an employee where that injury is a result of its failure to institute a safe system of work.

[69] In considering whether such a system exists, the court is required to consider such factors as the organization of the work, the taking of safety precautions and the number of persons required to execute the assigned task as well as the level of expertise that is required. The nature of the work is also relevant and matters such as the need for supervision must also be considered.

[70] The issue of whether the defendant has discharged its duty is a question of fact. The court must however bear in mind that this duty is not an absolute one and does not require perfection. In ***General Cleaning Contractors Ltd. v. Christmas*** [1953] A.C. 180 at 195, Lord Tucker said that it is a duty *"… to take reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation. In deciding what is reasonable, long established practice in the trade, although not necessarily conclusive, is generally regarded as strong evidence in support of reasonableness".*

[71] Having instituted a safe system of work, an employer must also take reasonable steps to ensure that it is followed. This may be accomplished by a system of supervision. However it was recognized in ***Qualcast (Wolverhampton) Ltd. v. Haynes*** [1959] A.C. 743, that an experienced workman does not need to be warned about risks with which he is familiar. In that case the claimant who was described as an experienced moulder, was injured whilst handling a ladle of molten metal in a foundry. He was not wearing protective spats that had been provided and the metal splashed on his foot. It was held that the claimant was so experienced that he needed no warning that there was a risk of injury if he did not wear the spats. At page 760, Lord Denning said:

> *"What is a 'proper system of work' is a matter for evidence, not for law books. It changes as the conditions of work change. The standard goes up as men become wiser."*

His Lordship went on to state at page 762 that

> *"…there was no negligence on the part of the employers in regard to this particular workman. He knew all there was to know, without being told; he voluntarily decided to wear his own boots…"*

[72] The defendant in this matter is a company engaged in the production of bauxite and alumina. Its plant consists of both moving and unmoving parts and is said to be hot. There is no dispute that the various processes being undertaken in the operations of the defendant may expose its employees to certain dangers. It is also not disputed that the defendant had instituted a number of safety measures including the provision of safety gear and the holding of safety meetings every Monday in order to prevent or reduce the risk of injury to its employees.

[73] There has been no challenge to the claimant's assertion that he was injured in the course of his employment. The parties are however at variance as

to the circumstances which led to the claimant sustaining those injuries. Was this due to the defendant's failure to provide a safe system of work? Was the claimant injured as a result of his own negligence and if so, to what extent?

[74] The determination of liability in this matter is a question of fact and rests on the court's assessment of the credibility of the evidence of the witnesses. The main facts in dispute are: (i) whether the claimant was trained to do the job in question; (ii) whether he was being supervised; (iii) whether the stand on which the claimant was standing shook; (iv) whether the safety gear provided by the defendant was adequate and ; (v) whether the crimping tool provided for the claimant's use was unsafe.

[75] In assessing the credibility of the claimant I find that the discrepancies in his evidence on the issue of training and the manner in which he was dealt with by the defendant after the accident to be material to the determination of the issues in this case. I find that he is not a witness of truth. Where the defendant's witnesses are concerned, counsel for the claimant directed the court's attention to Mr. Lewin's evidence that he was a grade three millwright when in fact he was a trade helper and asked the court to find that he is not a witness of truth. Mr. Lewin by way of explanation stated that he was paid a millwright although he was a trade helper. This discrepancy in my view does not affect his credibility. The credibility of Mr. Davy has not been undermined in any way and the evidence of Mr. Hibbert has not been tested by cross examination. I will therefore have to give his evidence such weight as I think it deserves.

[76] Having assessed the evidence and observed the witnesses my findings are as follows:

i. Trade helpers are trained by a system of apprenticeship;

ii. The claimant was trained by the defendant as a trade helper;

iii. The claimant was engaged in tube replacement on the day in question which did not require the direct supervision of a millwright;

iv. That the claimant was being supervised by Mr. Lewin who was an experienced trade helper;

[77] With respect to the evidence of how the accident occurred, only the claimant and Mr. Lewin were present. The claimant's evidence is that he was standing on the heater cover and bent down to pick up the crimping tool which was resting in the bottom of the said heater cover. Mr. Lewin started to climb onto the heater cover causing it to shake and as a result the crimping tool fell from the claimant's hand and injured his knee. Mr. Lewin's account is that he handed the crimping tool to the claimant who placed it on the partition of the heater cover which is very narrow. The crimping tool fell from that position and "touched" the claimant's knee.

[78] The claimant has said that there were no scaffold boards in place on the day of the accident. The burden is on the claimant to prove that the defendant failed to provide a safe system of work. Mr. Hibbert, the team leader for the job to which the claimant was assigned spoke to the fact that scaffold boards are routinely placed on the heater cover to provide a platform on which the workmen could stand. Mr. Lewin on behalf of the defendant stated that if the boards were not in place no work should be done. Mr. Lewin has maintained that he did not go onto the heater cover that day. As such I find that he is unable to say whether or not there were scaffold boards in place on the heater cover that day. The claimant's evidence in relation to this issue remains unchallenged. I therefore find that there were no scaffold boards on the heater cover on the day of the accident.

[79] In order to make a determination on this issue, I bear in mind the evidence of the claimant that he has some twelve years of experience as a trade helper and that he attended the safety meetings that were held by the defendant every Monday morning. I have inferred from this evidence which was agreed by both parties, that the safety of its employees was an important consideration for the defendant. I have also accepted Mr. Hibbert's evidence that the placement of the

scaffold boards on the heater cover was aimed at providing a safe platform on which the defendant's employees could stand. I also accept his evidence that scaffold boards are routinely placed on the heater cover and that of Mr. Lewin that no work should be done if they are not in place. Having accepted the claimant's evidence that they were not in place on the day of the accident I find that the defendant failed to provide same. However, I also find that he failed to take proper precautions for his own safety when he proceeded to embark on the task to which he was assigned and was therefore negligent.

[80] It must now be considered whether the claimant's accident occurred as a result of the defendant's failure to provide the scaffold boards. In this regard I bear in mind the claimant's evidence that the crimping tool fell from his hand as a result of the shaking of the heater cover. At no time has it been alleged that he lost his footing as a result of the absence of the scaffold boards. On a balance of probabilities, I find that the claimant has failed to prove that his injuries were sustained as a result of the failure of the defendant's failure to provide the said boards.

[81] There has been no challenge to the defendant's evidence that the heater cover weighed somewhere between three quarters of a ton and two tons. The defendant's evidence is that three chain blocks had to be used to effect its removal. Mr. Lewin's evidence is that due to its weight it could not rock. Mr. Davy said that he could not perceive it rocking and Mr. Hibbert stated that it was highly unlikely. He went on to say that he inspected the site after the accident and neither the heater cover nor the stand appeared to be unstable. In the circumstances, I reject his evidence that the heater cover shook as a result of Mr. Lewin climbing onto it or at all. I accept the evidence of the defendant's witnesses as to its weight and the likelihood of it shaking. I also accept Mr. Davy's evidence that it could be safely placed in the square stand. On a balance of probabilities, I find that Mr. Lewin's account of how the accident occurred is more credible.

[82] The evidence of both parties indicates that safety meetings were held and that certain equipment provided for the use of the defendant's employees. Submissions have been made by the claimant's attorney that knee pads ought to have been provided for the claimant's use and that the defendant's failure to do so amounted to negligence. No evidence has been provided that knee pads would have been appropriate or desirable for the type of work in which the claimant was engaged. The claimant has therefore failed to prove that the defendant's omission to provide the claimant with knee pads amounts to a failure to provide safe system of work.

[83] With respect to the submissions made by Miss Davis in respect of the design of the crimping tool, there is no evidence to suggest that any crimping tool is designed in the way suggested by counsel or that any other tool could be used to accomplish the particular task. The claimant has not in my view established that the defendant has by the provision of this tool failed to provide a safe system of work.

[84] In the circumstances it is my finding that the defendant did all that was necessary to provide a safe system and place of work and that the accident occurred as a result of the claimant's negligence.

[85] Judgment is awarded to the defendant with costs to be taxed if not agreed.