Neutral Citation: [2014] IEHC 172

THE HIGH COURT

2012 7104 P

BETWEEN

BOGUSLAW MADAJCZYK

PLAINTIFF

AND

MULTI-ROOFING SYSTEMS LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Irvine delivered on the 28th day of March, 2014

Background

1. The plaintiff in these proceedings is a married man who was born on 18th December, 1958 and currently lives in Poland. In these proceedings, he claims damages in respect of personal injuries allegedly sustained by him in the course of his employment with the defendant, with whom he commenced work in 2005.

2. While employed by the defendant company, the plaintiff worked principally as a roof and wall cladding operative. He routinely applied cladding to the roofs and walls of a wide range of buildings then under construction, throughout the country.

3. The plaintiff maintains that the system of work operated by the defendant was unsafe and that it was his participation in that operation that has caused the injuries to which I will later refer. His most significant complaints are that:-

> (i) He was required to lift, transport, manoeuvre and install panels which were excessively heavy and that he had to do so without adequate assistance. Regardless of the weights of the materials to be installed, he said that no more than two workers were ever deployed to any cladding operation when at times three or four men were required.
>
> (ii) He maintains that he was required to carry out such work in conditions that made the excessively heavy work even more hazardous. In this regard, he alleged that he had to carry cladding sheets over uneven terrain and that he was put under intense pressure in terms of the amount of work that the had to complete on any given day.
>
> (iii) He maintains that he was given inadequate training and instruction as to how to safely carry out his duties.

4. The defendant denies all allegations of negligence and maintains that any injuries or physical problems that the plaintiff may have were not occasioned as a result of any negligence on its part. Alternatively, if any of his injuries are as a result of his former work practices, the defendant maintains that these were occasioned as a result of his own negligence in failing to take care for his own safety.

5. I do not intend to set out in any great detail the evidence of the parties and their witnesses. I will do no more than refer in skeletal form to some of the more significant aspects of the evidence.

6. The plaintiff told the court that he worked for the defendant company on many different construction sites between the years 2005 and 2010. In the course of that work he had to fit insulation panels of different sizes and weights to the walls and roofs of industrial buildings then under construction.

7. When working on roofs, he would have to fix metal insulation panels to the prepared skeleton of the building. These panels, he maintained, weighed anything between 60kg and 120kg. While the panels themselves were raised to the roof level mechanically, they were not always placed at the correct designated location. As a result, workers would have to move the panels significant distances putting them under immense physical stress.

8. The plaintiff maintained that many of the panels he had to fit to various roof structures were too heavy to be moved by a two man team and that three if not four men would have been needed to render the operation safe. He told the court that on one occasion when working on a project in Naas, one of the panels which he estimated as weighing between 120kg and 150kg was so heavy that he and his fellow worker dropped it. As a result he had to contact his employer who then sent out an additional worker to assist and retrieve the panel.

9. In relation to the walls of these buildings, the plaintiff and his fellow team worker would have to lift, carry and install panels weighing anything between 80kg and 150kg. Some of these panels had to be fixed to the wall above shoulder height. He told the court that many of the longer panels needed three if not four people to move them safely.

10. The plaintiff said that he was required to work eight hours a day and that there was constant pressure to complete the work allocated. His team of two workers was expected to achieve the same productivity as that which another firm would expect a four man team to accomplish in any given day. Sometimes, due to the environment in which they were working, a panel would have to be carried in such a manner that its weight could not be evenly distributed between the two workers. At other times, the panels had to be transported across uneven ground again putting pressure on those carrying the panels.

11. The plaintiff in the course of his evidence told the court that he had complained to his employers about the difficulty of the work to which he had been assigned and that he had made it known that he felt the work was too heavy for two people. However, he was not given any further assistance and it seemed to him that not only were his complaints ignored but anytime he made a complaint, he was subjected to even greater demands.

12. The thrust of the plaintiff's evidence was supported by that of two fellow workers namely, Mr. Miriusz Burzynski and Mr. Dariusz

Przyborek.

13. Mr. Burzynski worked with the defendant between the years 2005 and 2009. Like the plaintiff, he was also involved in the cladding of roofs and walls on a number of major developments. He did much the same work as the plaintiff. Mr Burzynski confirmed that when working on one such project in Blanchardstown, they were using panels which weighed between 70kg and 100kg. They were never given a third man to assist them in terms of any operation and the rate of work expected of them was, to use his own words "extremely fast". At times, because of misplacement of packs of panels at roof level, workers would have to carry them 20, 30 or maybe 50m.

14. In relation to the weight of wall panels, he confirmed that these would be between 80kg and 120kg, depending on the material involved.

15. Mr. Burzynski accepted that he had never injured himself working in the manner which he described to the court and that he had not missed any work through illness. He agreed that wall panels, once placed within their intended frame, did not have to be supported but just held in position until such a time they were fixed to the wall. He agreed that the safety officer employed by the main contractor would patrol the construction site and accepted that at no time in the course of his employment had any safety officer intervened to query the safety of any cladding operation in which he was involved. He also confirmed, in the course of cross examination that he was suing the defendant company for unfair dismissal.

16. Mr. Przyborek told the court that he had worked with the defendant between May 2005 and October 2008. He agreed that he had been shown how to lift weights. He was the plaintiff's co-worker on the day they dropped a panel on the construction project in Naas in 2005.

17. Mr. Przyborek stated that panels used on many roofs weighed between 70kg and 100kg and he confirmed that at times they would have to be moved maybe 30m to 50m prior to installation due to the fact that when they were brought up mechanically to the roof, they were deposited in the incorrect location. While there were sometimes six or eight roofers present on any given job, he told the court that only two of them were ever involved in the cladding operation. Mr. Przyborek said that the heavier panels could not be safely carried by two men. Under cross examination he accepted that he had been made redundant in 2008 but had nonetheless since sought to be reemployed by the defendant.

18. Mr. Semple, Consulting Engineer, told the court that if the plaintiff's evidence was factually correct as to the weight of the insulation sheets that two men were required to move, he was satisfied that the defendants were in breach of their statutory obligations. Sheets which were particularly long, for example those which were 1Om would need three if not four people to carry them safely as they would sag in the middle. Further, it was only safe for workers to carry heavy weights if they were taking the weight close to their body. They should not have been exposed to work that would require them to carry heavy insulated sheets the distances contended for by the plaintiff and the work should have been planned to avoid this. Mr. Semple agreed that if the defendants had a practice of requiring men to carry insulation panels weighing between 130kg and 150kg, you would expect this type of dangerous practice to be noticed by the site's safety officer.

19. As to his injuries, the plaintiff told the court that before he commenced work with the defendant, he had worked as a tool manufacturer for a number of years in Poland. He had never had any difficulty in relation to his neck or shoulders. Further, from the time he commenced work with the defendant in 2005 he had never missed any work nor sustained any acute injury prior to June 2010. Indeed he told the court that his symptoms commenced gradually in June 2010 when he developed pain in his right shoulder and neck. He took a week off work due to his pain and discomfort after which he returned to work until 24th July, 2010, when he took his annual leave. During his annual leave, the plaintiff drove back to Poland and in the course of this trip his neck and shoulders become extremely painful. As a result he got some medical treatment before returning to Ireland.

20. Following the plaintiffs return to Ireland, he worked with the defendants throughout the second half of August 201 0 and continued until the first week of October when he felt he could no longer manage the physicality of the job. His doctor referred him for an MRI scan. This suggested discopathy at the levels of C4/5 and C6/7 in the cervical spine. There was considerable disc space narrowing and mild degenerative end plate changes present at C6/7. There was also a moderate sized broad based disc ostephyte at C6/7 with moderate foramina} narrowing with likely impingement on the exiting nerve root. Some minor spondylotic changes at C4/5 were also reported. The medical advice he received following this scan was that he should not continue with physical work for fear that he would further aggravate the his neck and shoulder complaints.

21. The plaintiff remained in Ireland until Christmas 2010 at which stage he decide to go back to Poland where treatment was cheaper. There he had a further MRI scan in February 2011, this time in relation to his lumbar spine and this showed degenerative changes at the levels of L4/5 and L5/S1. In respect of his overall complaints he was recommended physiotherapy, mobilisation and medication and this was carried out between 17th February, 2011 and 17th March, 2011.

22. Mr. Hemant Thakore, Consultant Orthopaedic Surgeon told the court that various examinations have confirmed that the plaintiff has degenerative changes in his acromio-clavicular joint on the right side with narrowing of the articular surface. He has tendonitis of the rotator cuff tendon on the right side but with no obvious tear. He has similar but less extensive changes in the left shoulder joint. The plaintiff also has chronic degenerative changes in the cervical spine. Because of these changes and the symptoms which they are causing, he was satisfied that the plaintiff is not fit for the type of heavy work which he had been carrying out with the defendant prior to October 2010. He confirmed that the plaintiff had reported to him that his symptoms were of gradual onset and commenced in June 2010.

23. Unfortunately, to add to the plaintiffs medical complications, in April2012 the plaintiff was diagnosed as having contracted the Hepatitis C virus. He has regrettably progressed to the point that he has cirrhosis of the liver and is currently in receipt of Ribaviron and Interferon treatment. It is accepted that regardless of his neck and shoulder condition, because of his Hepatitis C status, he would be unable, in any event at this point time to continue with work in the construction industry.

24. Accordingly, the plaintiff claims damages for pain and suffering to date as well as pain and suffering into the future. He claims a loss of earnings from October 2010 up until the present time. He does not make any claim for future loss of earnings.

The Defendant's Evidence

25. Mr. Noel McCarthy, Contracts Manager with the defendant, told the court that it was his obligation to oversee all site works. In respect of each job he decided what would be required in terms of equipment and personnel. Before any crew would be sent out to a site all safety issues would be addressed. He told the court that a roofing crew would usually include three to four men depending on the size of the panels to be used in any roof structure. Three men might be required to lift the heavier panels but two men were

sufficient for completing the fixing of the panels. He rejected the plaintiff's assertion that two men were ever expected to carry the type of weights which the plaintiff had referred to in the course of his evidence.

26. Mr. McCarthy denied that workers such as the plaintiff were put under particular pressure in terms of the amount of work they had to carry out. He told the court that if the construction company was unhappy with progress on site they would inform him that a larger crew was required and this would be provided. It would make no sense and it would be uneconomic for the company to provide a smaller crew than was required on any job.

27. Mr. McCarthy told the court that a roof drawing was done for every contract and that this would show precisely where each box of panels was to be positioned when brought to roof level. The roofing crew was responsible for mechanically hoisting and positioning the insulation panels at these locations. Assuming the crew operated in accordance with the drawing, there should have been no need to carry for insulation panels to be carried anything like the distances described by the plaintiff and his co worker.

28. Ms. Jean Farrell, the defendant's safety officer would prepare a method statement for each job. That method statement was required by the main contractor and had to be agreed with its safety officer before the defendant could start work on site. This would set out precisely how each operation would be completed. Mr. McCarthy was absolutely satisfied that if the defendant's employees had been engaged in manhandling panels that were too heavy or awkward to manoeuvre that he would have been contacted by the main contractor and he told the court that this had never happened. He agreed that cladders worked in two man teams and he maintained that two man teams were appropriate for much of the lighter work which was done by the plaintiff and his fellow workers. The plaintiff, he said was particularly skilled in dealing with zinc and PVC flashing and this type of work only required two men. For this reason he stated that the plaintiff was not regularly engaged in the heavier type of cladding work which required greater numbers. He agreed that the longer wall cladding insulation panels would have required three men to move them safely but he asserted that such help was always available.

29. Mr. McCarthy and Ms Farrell both advised the court that the size of every panel to be fitted by the defendant company was known in advance of the project. Indeed, wall panels were cut where possible to a size so as to avoid excessively lengthy or heavy panels needing to be moved around by its employees. If however if a panel was bigger than 4m, it was always the case that three men, including the two cladders, would assigned to such task. Contrary to what had been alleged by the plaintiff Mr. McCarthy stated that on quite a few occasions, the plaintiff would have been part of a three or four man crew.

30. Mr. Salwomir Niewinski, the defendant's site manager, stated that the plaintiff had come recommended to the defendant as an experienced cladder and that he did really good work particularly with zinc and PVC flashing. He refuted the plaintiff’s assertions and that of his co workers as to the weights and materials they alleged they were required to lift, manoeuvre and transport on a regular basis. Before every job an assessment was made by the defendant as to the number of cladders required. This was made by reference to the weights of the panels to be moved and the time frame within which the operation had to be completed. He agreed that cladders normally worked in pairs but maintained that additional roofers were included in crews depending on the weights of the panels to be fitted. Two people were regularly sufficient to deal with flashing or PVC membranes but panels that were 6m to 8m in length would need more than two men. He said it would be impossible for two men to lift panels between 130kg and 150kg. If they did, he felt it would be their own fault as such a lift would be absolute madness. When asked about the panel that the plaintiff maintained had been dropped on the Naas project he said he had no knowledge of such an event but if it had occurred it was his view that the plaintiff was responsible for trying to undertake a task which he knew could not be accomplished safely. The fact that on his account a worker was immediately sent to the site to help retrieve this panel was proof that help was always at hand if needed. All the worker had to do was phone the defendant's office and additional help would be sent.

31. Mr Niewinski, confirmed Mr. McCarthy's evidence to the effect that a method statement was prepared addressing the details of every job that had to be carried out. At times, the number of men required for particular roofing or cladding operation would be included. He said it would make no sense from a commercial or safety perspective to send a smaller team than was required to any site. Mr. Niewinski readily accepted that the work of a cladder employed by the defendant was hard work. However, he denied that the plaintiff was ever told to carry excessively heavy wall or roof panels. On many sites, there were significant numbers of the defendant staff who would readily have helped out if the plaintiff found himself needing assistance. He reckoned that 80% of operations only needed a two man crew.

32. Ms. Jean Farrell, the defendant's safety officer, told the court that following the commencement of his employment with the defendant company the plaintiff was sent on a training course to get his "safe pass". He received manual handling training. This would have taught him how to assess the risks attached to moving any particular load and also how to carry out any proposed lift with safety. The plaintiff was also given mobile platform training and had a ticket permitting him operate a teleporter. He held a construction skills certificate and had a ticket to work on roofs and wall sheeting. Not only was the plaintiff well versed in cladding he was also a certified bank's man.

33. In respect of the plaintiffs complaints that he was asked routinely to carry excessively heavy panels, Ms Farrell stated that this was not the case. In relation to most contracts she would make contact with the draftsman and decide what size panels were required and they would mostly be cut to size to ensure that excessively heavy panels did not need to be manhandled by employees.

34. Ms. Farrell told the court that she writes a method statement for each job and agrees it with the contract's manager. She details every task that is to be performed, how it is to be executed and the sequence in which the work is to be carried out. Sometimes the number of workers required for the job is included but often this does not happen because the numbers of workers of various types required on the site from day to day would varies. Ms Farrell said that depending on the dimensions of the panels to be fitted a three man crew might be sent out to a site for some portion of the contract. An extra man might be needed for only one of a number of days when a few big panels might have to be installed. When excessively large panels needed to be fitted, these, she said, were all hoisted and lifted into position mechanically as had occurred on one of the Tesco sites.

35. Safety was not only an issue for the defendant company, according to Ms. Farrell. The safety officer of the main contractor would have to approve all of the paper work in respect of every job to be carried out by the defendant. Further, the safety officer would call her if any of the defendants employees were noticed to be working in contravention of safety standards and they would not permit anybody to engage in the type of practices described by the plaintiff.

36. Ms. Farrell readily agreed that the plaintiff usually worked as part of a crew of two men. She said that many of the cladding operations involve light work and no third person is required. However, for the laying of the roof, an extra man would join the cladding operatives to facilitate the movement of the requisite panels.

37. Ms. Farrell stated that the plaintiff never complained to her about either the amount of work he had to carry out on any given day

or the weights of panels which he was expected to lift. She had discussions regularly on site with the company's employees and she got feedback from them in respect of any concerns that they had. In turn, she would voice any concerns which had been expressed to her by the site's safety officer. Not only did the plaintiff not complain to her about the weight of the panels but the plaintiff himself acted as interpreter for most of the other workers in the course of these what she described as "tool box" talks.

38. Dr. O'Neill, Orthopaedic Physician, who examined the plaintiff on behalf of the defendant, told the court that the plaintiff has long standing severe degenerative changes in his neck and shoulders. He said that the plaintiff has a broad based disc bulge in his cervical spine which is impinging upon the seventh cervical nerve root. These changes were not caused by any direct or indirect acute musculoskeletal injury or overuse. Dr O'Neill advised that the plaintiffs degenerative disc disease, as identified in the MRI scans of his neck, right shoulder and lower back, is irreversible and that the nerve root infringement which is causing him numbness in some of the fingers of the right hand is a secondary manifestation of his degenerative changes..

He also advised the court that a tear of the rotator cuff, unless there had been an acute event and there was none such in this case, normally occurs as a consequence of degenerative change. Dr O'Neill agreed on cross examination that heavy work at a high rate over a five year period would aggravate any such changes and would likely precipitate the patient's symptoms.

Decision
39. The burden of the proof is on the plaintiff to establish as matter of probability that the system of work he was asked to operate by his employer was negligent and that it was this negligence that has caused him the injuries of which he complains.

40. Having considered the evidence of the parties, most of which was in conflict in respect of the material allegations of negligence, I am not satisfied as a matter of probability that the defendant failed to provide the plaintiff with a safe system of work. I do not accept his evidence that he was required to carry or manoeuvre excessively heavy roof panels without adequate assistance. I also reject his complaint that he did not receive adequate training or that the amount of work expected of him on a day to day basis was such as to amount to negligence.

41. In resolving the conflict between the parties I greatly preferred the evidence tendered on the defendant's behalf to that given by the plaintiff and his witnesses. Apart from my overall impression as to the credibility of the respective witness, in seeking to resolve the conflict in the evidence, there were a number of matters that weighed heavily against the plaintiffs allegations that he and his fellow cladding operatives were the victims of widespread bad practice on the part of the defendant in terms of the weights of panels that they were expected to lift, manoeuvre and transport in the course of their work.

42. The defendant company, over all of the relevant period, worked as a roofing subcontractor on many major construction projects managed by highly respected building firms such as Walls and Rohan Construction. It was not in dispute that on all major construction sites, such as those depicted in the plaintiffs photographs, there would be what was described as an on site safety officer. It is common case that the main contractor's safety officer is responsible for the safety of all personnel on the site regardless of whether they are employed by the main contractor or a subcontractor or may be on the site for some other reason. They are charged with ensuring that all work on the site is carried out safely and in a manner that will not expose the workers or anyone else on site to a risk of injury. The job of the safety officer includes patrolling the site and identifying any unsafe practice. They have the power to serve warning notices on subcontractors or direct that work cease on site if they consider any work practice is dangerous. I should also say in this regard that I accept the defendant's evidence that it was never cautioned by any safety officer for the manner in which their employees were required to work when installing cladding on any of the sites where the plaintiff worked during his employment

43. In the aforegoing circumstance I cannot accept the Defendant's evidence that he was required on a regular basis to carry and manoeuvre panels of the description and weight for which he contends. Firstly, given that cladding work involves the handling of highly visible materials in an open environment, I am convinced that any such practices could not have escaped detection by the on site safety officer. Further, for a whole range of reasons I am satisfied that once detected any such practices would not have been tolerated by the safety officer. The main contractor has a range of statutory obligations that would make it liable in respect of injury caused by any dangerous practice permitted on site. Also, if such dangerous practices were to be deployed by the defendant, apart from the potential risks thereby generated for its employees and the likely legal consequence of such actions, it would also be putting its professional reputation and its prospects of obtaining further large roofing contracts at real risk.

44. In coming to my conclusion that the defendant did not expect its workers routinely, or indeed at all, to lift, manoeuvre or transport panels of the weights contended for by the plaintiff, I think it is relevant to take into account that neither the plaintiff or his two co-workers who gave evidence on his behalf ever suffered any acute injury in the course of their employment. Neither did they have any time off work as a result of any injury sustained during all of the time they were working for the defendant. If the defendant was operating a system that was as cavalier in terms of its employee's health and safety, as advised by the plaintiff, I think his work record and that of his colleagues would likely reflect this state of affairs. Neither, do I believe that the plaintiff and his fellow workers, being skilled workmen, would have stayed with the defendant firm during what were relatively good years for the construction industry if they were forced to work in the type of conditions advised by the plaintiff. Further, Mr. Przyborek's evidence that he has expressed an interest in being reemployed with the defendant is again of some slight weight when seeking to resolve the conflict in the evidence as to the conditions of employment operated by the defendant.

45. The medical evidence established that the plaintiff has widespread degenerative changes in his neck, back and shoulder. These changes made him vulnerable to injury if required to engage in heavy lifting or other significant manual handling. Indeed it was for this reason that he was advised to stop working lest he experience an acute event. The fact that, notwithstanding the plaintiffs physical vulnerability, he did not experience any acute event during his five years of employment is again of some slim marginal weight in coming to the conclusion that he was not exposed to the types of work practices to which he referred in evidence.

46. From the evidence of Ms. Jean Farrell, who I have to say I felt was an extremely impressive witness, I am satisfied that the plaintiff was adequately trained such that he ought to have been able to maintain his own safety when deciding whether or not it was possible in any given set of circumstances to safely lift any of the panels or equipment required in the course of his employment. I am also satisfied that he was trained to know when he needed additional assistance to safely lift particularly cumbersome panels and I accept her evidence that, contrary to the plaintiffs own evidence, he did not complain about the weights of panels he was customarily asked to fit and neither did he request additional help for such purposes.

47. While it may have been occasionally necessary for the plaintiff and his fellow workers to carry panels over uneven ground, neither he nor Mr Semple gave any evidence as to how this might be avoided. Further, the plaintiff did not refer to any occasion when he believes that he may have injured himself as a result of working under such conditions and hence this relatively peripheral complaint cannot sound in any finding of negligence against the defendant.

48. I am also satisfied from the evidence of Mr. Niewinski that the work most commonly carried out by the plaintiff was that which involved zinc and PVC flashing which would not have been physically very demanding. I also accept his evidence that the plaintiff would have been involved in other types of cladding which is extremely heavy work and that this type of work is not always suitable for everyone depending upon their physical strength and capabilities.

Conclusion
49. To conclude, the plaintiff has not satisfied me, on the balance of probabilities that whilst employed by the defendant he was required to lift, manoeuvre and transport insulation panels which were of excessive weight. I am also satisfied that he was adequately trained for the purposes of maintaining his own safety in the course of his employment as a cladding operative. While his job was demanding in terms of productivity, I do not believe that the plaintiff was put under the type of pressure or asked to carry out his duties in circumstances that would lead me to conclude that the defendant's system of work should be considered unsafe.

50. Regrettably, the plaintiff has widespread degenerative changes in his neck, shoulder and back. At times, the work he was expected to do was heavy and for a man with such changes that type of work, as was confirmed by Mr. Thakore, may well have precipitated his symptoms or aggravated the degenerative changes in those areas. However, the fact that his work may have affected him in this adverse fashion does not entitle him to compensation from the defendant as he has not established that the work practices of the defendant were negligent or in breach of their statutory obligations.

51. No two people of the same age, particularly as they get older, will enjoy the same physical strength or capacity for heavy manual work. Their fitness, physical make up and other characteristics, such as whether they have degenerative changes in their spine, will determine the point at which they will become symptomatic if they continue to expose their body to the stress of heavy physical work. Some may have to give up this type of work much earlier in life than their counterparts. I believe that this is what happened to the plaintiff in this case. He had long established degenerative changes in his neck, shoulder and back. He had no physical symptoms until June 2010. Then without any acute event occurring he gradually became symptomatic when doing precisely the same work as other cladding operatives for whom the work did not cause them any particular physical problems. Accordingly I am satisfied that the plaintiff's injuries are not as a result of any negligence or breach of duty on the part of the defendant and for this reason that his action must fail.