

Verdicts & Settlements

Worker involved in forklift mishap left a quadriplegic

Type of action: Premises liability

Injuries alleged: Permanent quadriplegia resulting from C5-C7 spinal cord fracture

Name of case: Pelletier v. Main Street Textiles, et al.

Court/case #: U.S. District Court, No. 03-10130 NMG

Tried before judge or jury: Jury

Name of judge: Nathaniel M. Gorton

Amount of verdict: \$0 (defense verdict)

Date: May 5, 2005

Demand: \$9.5 million

Highest offer: \$0

Most helpful experts: Judson Welcher, biomechanical engineer, Long Beach, Calif.; Paul Dreyer, mechanical engineer, Allentown, Pa.; David Minard, graphic artist, Boston

Attorneys: Michael A. Fitzhugh, Barbara L. Horan and Adam J. Foss (paralegal), Fitzhugh, Parker & Alvaro, Boston (for the defendants)

Defense argued plaintiff's theory on accident had inconsistencies

Defense verdict

The plaintiff was injured on the defendants' premises, a textile mill in Fall River, while operating a forklift owned and controlled by an independent contractor hired by the defendants for transfer of fabric weaving looms from an old facility to a new mill.

Given the low clearances of the looms' dimensions, the forklift utilized by the employer was not outfitted with an overhead cage. The plaintiff, who was not working in a low clearance area at the time, sustained injuries when he was moving a large steel A-frame.

The defendants contended that they did not know, or have reason to anticipate, that the plaintiff would use the forklift outside low clearance conditions, and also contended that the plaintiff had failed to properly secure the A-frame to the forklift's front forks.

The plaintiff claimed that he had properly secured the load and as he sought to reverse the direction of his forklift, the uneven floor in the mill caused it to sway. The forklift's tires spun momentarily due to excessive oil on the floor, gained traction, and ultimately resulted in a "slingshot" effect.

The plaintiff contended that this caused a sudden rearward acceleration that threw him forward and caused his hand to hit a tilt control lever on the console, which then caused the forks to tip downward, making the A-frame slide off and strike him on the head.

As a result of the accident, the plaintiff sustained a permanent C5-C7 fracture of his spinal cord, and was rendered a quadriplegic.

The plaintiff had not been able to collect workers' compensation because, unknown at that time to the defendants and the plaintiff, the employer had let its policy lapse shortly prior to the accident. The plaintiff had no financial remedy beyond his Social Security disability payments. A pretrial ruling barred the defendants from introducing evidence of this fact, which they



contended was evidence of the plaintiff's motivation in pursuing this action against them.

The plaintiff's theory of liability was based on the defendants' alleged failure to warn of dangerous conditions at the mill, which, he claimed, was the uneven and oil-soaked floor that contributed to his losing control of the forklift and its load falling on his head.

An additional theory of liability was the defendants' alleged failure to enforce their own safety policies, which required that all outside contractors comply with OSHA requirements. The plaintiff's employer had been cited by OSHA as a result of its investigation into the accident. Although the defendants were not issued any citations, the plaintiff sought to render the defendants "controlling employers" within the meaning of OSHA regulations, which would have rendered them liable for the OSHA violations committed by the plaintiff's employer.

The plaintiff also contended that

the forklift lacking a guard was a per se violation of OSHA, and that its mere existence on the premises and availability violated not only OSHA, but the defendants' own written safety policies.

The defendants argued that the general conditions in the mill were well known to the plaintiff, who had worked on the site for eight months prior to his accident. The defendants also contended that the plaintiff's work in low overhead clearance areas was authorized by OSHA regulations, and his subsequent misuse of the forklift was undertaken without their knowledge and consent, and thus they were not negligent under a "knew or should have known" theory.

The OSHA issue was the subject of numerous pretrial motions in limine and motions filed during the trial. The plaintiff was ultimately allowed to introduce evidence that the defendants had received previous OSHA citations during that agency's audit that occurred at the mill six months prior to the accident and during the

time period when the plaintiff's employer was performing its work.

The defendants then introduced the actual citations to demonstrate that they were for items that had no relationship to the conditions alleged by the plaintiff.

The plaintiff was allowed to present expert testimony to establish the accident's occurrence in the manner contended by the plaintiff. A computerized simulation was rendered using a two-dimensional program, and the simulation was then used as the basis for an animation, both of which were the subject of an unsuccessful *Daubert* challenge by the defense.

The defendants' expert then presented video footage of subsequent tests done with the forklift and an examination of the computer program used by the plaintiff's expert. The rebuttal demonstrated that using the biomechanical values in the computer program utilized by the plaintiff's expert would have re-

sulted in an event completely inconsistent with the version proffered by the plaintiff.

The defendant also utilized schematics by a second defense expert and photographs taken by the OSHA investigator hours after the accident, which demonstrated that the blood spatter evidence could not be reconciled with the plaintiff's expert's animation.

The third defense expert testified that the plaintiff's method of securing the load was not consistent with safe rigging practices. The expert also rebutted the "sudden acceleration" theory of the plaintiff.

The defense also called to the stand a coworker of the plaintiff, who testified that during a hospital visit, the plaintiff apologized for the accident and allegedly made statements indicating it was his own fault, contradicting his subsequent deposition and trial testimony.

The jury deliberated four hours and then returned a verdict in favor of both defendants.