2011 IL App (1st) 093307-U

No. 1-09-3307

SIXTH DIVISION
December 23, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DAVID DASBACH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 05 L 10281
	)	
AMERICAN COMMERCIAL LINES, LLC,	)	Honorable
	)	Randye A. Kogan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Robert E. Gordon[1] and Justice Garcia concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was not entitled to a judgment notwithstanding the verdict because all the evidence, when viewed in its aspect most favorable to plaintiff, did not so overwhelmingly favor defendant that the verdict rendered against defendant could not stand. Reasonable

[1] Presiding Justice Robert E. Gordon replaced Justice Robert Cahill, a member of the original panel on this appeal, upon Justice Cahill's death on December 4, 2011.

inferences of defendant's negligence could be drawn from the established facts and circumstances concerning whether a barge latch was defective before the barge was turned over to the stevedore, whether defendant should have known of the defect, whether defendant should have known a longshoreman would not avoid the hazard by using practical alternatives, and whether plaintiff's injuries were proximately caused by defendant's negligent breach of its duties.

¶ 2 Defendant American Commercial Lines, LLC. (American), a barge owner, appeals an $800,000 jury award for plaintiff David Dasbach, an injured longshoreman who filed this negligence suit under the Longshore and Harbor Workers' Compensation Act (Act), 33 U.S.C. §905(b) (West 2000). Defendant argues it was entitled to a directed verdict or a judgment notwithstanding the verdict (judgment n.o.v.) because: (1) plaintiff failed to prove that a latch on the barge was defective before the barge was turned over for unloading operations; (2) there was no evidence defendant had notice of a defective latch before the turnover; (3) the defective latch was open, obvious and anticipated by plaintiff; and (4) there was no evidence that plaintiff's injuries were proximately caused by defendant's negligence.

¶ 3 For the reasons that follow, we affirm the judgment of the circuit court.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff was employed as a longshoreman by Holcim, Inc., a wholesale cement distributor and stevedore. On June 26, 2001, plaintiff and his co-worker Robert Dobkowski were unloading cement from a barge owned and operated by defendant. The barge had eight rolling covers over its cargo hold. Each rolling cover was held in place by latches called toggle

locks. In order to unload defendant's cargo, plaintiff had to open the toggle locks and roll open the covers. According to plaintiff, two toggle locks were too tight to open manually, so he used a pry bar and injured his back opening one of the toggle locks. Plaintiff sued defendant for negligence under the Act, alleging that: the toggle lock was improperly adjusted; the defective condition of the lock existed before defendant turned the barge over to plaintiff's employer for unloading; defendant had actual or constructive knowledge of the defect; and the defect caused plaintiff's injury.

¶ 6 The jury trial in this matter was conducted over nine sessions in January 2009. At the jury trial, several witnesses testified concerning the proper maintenance of toggle locks and procedures for unloading cargo. Moreover, various doctors and medical professionals testified concerning the extent of plaintiff's injuries. Expert economists testified concerning the value of plaintiff's lost earnings, medical care and costs.

¶ 7 Pertinent to this appeal, Robert Dobkowski, plaintiff's coworker, testified that he had worked as a longshoreman for Holcim for 30 years. Using pictures and a videotape, he showed the jury how cement was unloaded from barges. On a roll-top barge, the covers had wheels that rolled along a track to open and close. To open the covers, longshoremen would unlatch the toggle locks that held the covers closed, anchor a cable to the dock, hook the cable onto a cover, and move the barge to get the covers to roll open and slide or fold under each other. This would expose about one-third of the cargo-hold. Then, using the nozzle of a vacuum attached to a crane, cement would be suctioned out of the cargo hold and into 25-ton capacity tanks on the dock. As the cement was unloaded, the empty side of the cargo hold got lighter, so that end of

the barge would rise in the water. As a result, the covers on the higher end of the barge would roll downhill and butt up against the covers on the lower end of the barge. When a tank on the dock was full, the cement would be blown up into a silo. Meanwhile, customers' tank trucks would drive up to the dock, and the longshoremen were responsible for quickly loading the trucks with cement from the silos.

¶ 8 After the barge was emptied, a worker would pull the crane out, replace the nozzle on the vacuum with a four-inch hose, and then go down into the cargo hold, scrape the floor and hand-vacuum the remaining cement. It took about 10.5 hours to unload a barge of cement. If the process exceeded that amount of time, workers had to explain any problem that caused the time delay on a barge report.

¶ 9 Dobkowski testified that workers were not expected to strain themselves to open a toggle lock by hand but should evaluate the situation and use a pry bar if they thought they might hurt themselves. If a pry bar did not work, a crane was another option, but the workers were under time constraints. Workers opened toggle locks by hand, but "every once in a while," "maybe once a shift," a lock was too tight to open by hand so workers would use a pry bar. Those tight locks bore visible burn marks, bubbled paint or rust, which indicated that the lock had been adjusted by heating and then bending the metal lock to get a tighter seal. Dobkowski never called a supervisor to talk about any problems opening a toggle lock. If he could not open a lock with a pry bar, he would move the crane over to the shore, put a chain on the end of the crane, bring the crane back out over the barge, move the barge so that the toggle lock was under the crane, hook the other end of the chain to the lock, and then lift the lock up with the crane. It took

about ten minutes to move the crane and move the barge to the right spot under the crane. Holcim never gave him any specific instructions about how to open the toggle locks; he learned how to do it by watching other workers.

¶ 10 On the day plaintiff was injured, Dobkowski was the crane operator and was scraping the floor in the front section of the cargo hold when he heard plaintiff throw a pry bar onto the cover and then yell or grumble. When Dobkowski finished scraping the floor, he got out of the barge and saw plaintiff standing on the dock rubbing his back. Plaintiff said he hurt his back opening one of the toggle locks on the barge. Dobkowski looked at both locks on the cover in question and noticed they were both bent and had burn marks. Plaintiff finished his shift that day and continued to work for sometime thereafter despite the pain from his injured back.

¶ 11 Plaintiff testified that he started working as a longshoreman for Holcim in 1996. He worked the shift from midnight to 8 a.m. with Dobkowski as his partner, and it was generally just the two of them unloading the barges and loading the trucks until 4 or 6 a.m. Sometimes eight or ten trucks were lined up waiting to be loaded. The truck drivers often were paid by the ton, so the longshoremen had to load the trucks as fast as possible so the drivers could leave. In June 2001, Holcim was busy, and plaintiff was working seven days a week. He learned how to open the roll-top covers by watching other workers on the job; he never received any instructions from defendant. Toggle locks were opened by hand if possible, but sometimes it was necessary to use a pry bar. A worker could not surmise whether a lock would be difficult to open simply by looking at the condition of lock. Plaintiff estimated that he had to use a pry bar to open toggle locks about 30-40% of the time. "Every once in a while" workers would have to use a

crane to open the toggle locks. There was no protocol to telephone a supervisor if a worker was having problems opening a toggle lock, and plaintiff never made such a call.

¶ 12 On the day he was injured, the covers on the front of the barge were open when he started his shift. While Dobkowski was suctioning cement from the front end of the barge hold, plaintiff was loading trucks. About 3 a.m., plaintiff went to open the toggle locks on the middle section of the barge in preparation for unloading. He tried to open the locks that connected the number four and five covers by hand, but "it didn't work." He got down off the barge and retrieved a pry bar from the dock. That bar, however, was flared on one end and "didn't really seem to grab" the lock. Plaintiff returned to the dock and retrieved a wider pry bar "that seemed to work on it." The locks, which were rusted and bent and had burn marks and bubbled paint, were hard to open. First he tried the wider pry bar on the lock on the dockside, but it did not open. Then he tried the wider pry bar on the riverside lock, which did open. He returned to the dockside lock and tried to open it with the pry bar. He was straining "a little bit" and the lock opened but he experienced a pain in his back that almost felt like being stuck with a large pin. When he was pulling on the pry bar, he did not think he was going to hurt his back. He did not stop before he hurt his back because it "was just one those things" and "just happened so fast."

¶ 13 Back on the dock, when Dobkowski had finished vacuuming the cement from the front end of the barge, plaintiff told him that one of the locks was tough and plaintiff had hurt his back. Dobkowski went to look at the locks. Plaintiff continued to work and finished his shift. One or two days later, when plaintiff next saw the assistant manager, plaintiff reported the injury and said the barge had bad toggle locks. Plaintiff failed to report the injury immediately because

he thought his back would get better. His back, however, got worse, and plaintiff sought medical treatment three months after the injury. He was able to return to work for a while, but his condition regressed, and he left work again to undergo multiple medical procedures and surgeries. Ultimately, he could no longer work as a longshoreman and had to take a less strenuous job at a substantially lower wage. Plaintiff also described how his injury affected his daily life and prevented him from doing many of the activities that he had previously enjoyed.

¶ 14 Joseph Lynch, a manager of Holcim, was plaintiff's supervisor at the terminal in Lemont, Illinois. Lynch never received any material from defendant regarding the recommended use of a center-pull method to open the barge covers. 2001 was a busy time for Holcim's Lemont operation, and employees were instructed to unload barges as quickly and safely as possible. It took between eight to twelve hours to unload cement. Employees were not assessed a penalty if they exceeded what Lynch deemed a reasonable amount of time to unload cargo. Holcim's Lemont terminal, as the "flag ship of the company," was expected to "show[] them that we could unload the barges at the fastest rate as possible but also the safest as possible."

¶ 15 Lynch testified that Holcim employees should telephone management if they ran into an issue unloading a barge that they could not resolve in a safe manner, and Holcim did not expect employees to strain with a pry bar to open a lock. Lynch acknowledged, however, that no employee ever telephoned him about a problem opening a toggle lock. If an employee could not open a lock by hand or with a pry bar, then he should telephone management, which would try to use a "chain [f]all" to try to free the lock. Lynch, however, did not describe the chain fall method or how long it took. Lynch explained that Holcim did not approve of the use of the

crane to open a toggle lock because Holcim was afraid of damaging the shipowner's cover or toggle lock. Although nothing in plaintiff and Dobkowski's report concerning the barge at issue mentioned any problem with the equipment or toggle locks, Holcim expected workers to report only the problems that caused delays.

¶ 16 Bradley Dickerson, a barge maintenance coordinator employed by defendant, testified that toggle locks were adjusted by heating and bending them in order to get the proper amount of tension so that the cover would close completely and pull tight the rain seal, which would get worn over time. Toggle locks also required adjustments if they got stretched out over time due to mishandling of the covers or damage to the covers from bumping into another barge during transit. It was defendant's responsibility to fix damaged covers. A toggle lock was properly adjusted if it could be opened by hand. Dickerson acknowledged, however, that the third time he was asked the same question during his deposition he said that he would adjust a lock tight enough so that someone would have to use a pry bar to open and close it. An adjustment that required a worker to use a crane to open it was unacceptable. Defendant learned about problems or repair issues on a particular barge from reports filed by dockworkers, cleaning crews, inspection crews and towboat crews. Defendant also conducted random inspections. Dickerson acknowledged that not all adjustments or repairs to toggle locks were recorded in the barge overview reports.

¶ 17 Paul Book was defendant's vice president of fleet operations and barge maintenance. Book testified that defendant recommended that the proper procedure to open and close a roll-top cover was to connect a pull cable to a crane and the center of the cover. This center-pull

method would keep the cover wheels in their tracks. Also, only one cover should be pulled at a time or else stress would be placed on the toggle locks and different parts of the barge cover. Holcim, however, did not use this center-pull method.

¶ 18 Book also testified regarding how defendant got notice of repairs or problems on a particular barge from inspections or reports. Defendant's cleaning and inspection vendors had a blanket authorization to make repairs on the barges and then send the invoices to defendant for compensation. Consequently, vendors had an incentive to look for and make repairs to increase their revenue. After each cargo shipment was unloaded, the cargo hold of the barge was cleaned by an outside vendor, which would open and close the roll-top covers and look for any problems, including toggle locks.

¶ 19 Regarding the history of the barge at issue in this case, Book testified about where it was handled, delivered, loaded, unloaded and repaired. Specifically, after the toggle lock at issue in this case was adjusted in October 2000, five cargo shipments were loaded and unloaded before the barge was loaded in May 2001 with the cement at issue in this appeal. This meant that the barge's toggle locks would have been opened or closed eight times during that time period.

¶ 20 Although an entry in the barge history indicated that repairs were done on May 6, 2001, defendant could not find any invoice or record that would have detailed those repairs. According to a repair invoice from May 8, 2001, a vendor sealed some leaks in the barge, pumped water out of it, and found about 25 gallons of old corn in a wing tank. Records indicated that the old corn was from a shipment about three cargo loads ago. A May 10, 2001 invoice listed charges for pumping out water and resetting the covers and cover wheels. According to Book, the lack of an

invoice for any toggle lock repair in May 2001 indicated that the vendors did not note any problems with the toggle locks before the cement was loaded on May 9, 2001. After the barge left Holcim's dock on June 26, 2001, it underwent a cleaning, and the relevant invoice did not list any repairs to toggle locks. Furthermore, an invoice from July 2001 showed no toggle lock repairs, and a July 2001 inspection report indicated the covers and toggle locks were checked and were operable.

¶ 21 Book acknowledged that a May 6, 2001 entry on the barge history indicated that the barge was at a facility for a repair but defendant could not find any invoice or record related to that repair. Book also acknowledged that sometimes the performance of maintenance and repairs failed to meet defendant's expectations, such as when the old shipment of corn was left in the wing tank for several months despite subsequent cleanings and inspections. Furthermore, no documents showed that the toggle locks connecting the number four and five covers were opened and closed during the visual inspections that occurred before plaintiff's injury. Book also acknowledged that the vendor hired in July 2001 was hired to do dry dock underwater repairs, not to repair toggle locks.

¶ 22 Cloyce Burrows owned a barge cleaning and repair business, and defendant constituted about 60% of his business. Toggle locks usually got too tight due to strain on the covers. If the rain seal was bent, toggle locks usually got too loose and had to be adjusted by heating and bending the lock. The adjustment was time consuming. If a lock was properly repaired, a worker should be able to open and close the lock by hand and without a pry bar. Even after a toggle lock was properly adjusted, it still might be necessary to use a pry bar to open it if the

barge had hit another large object or if the covers were not opened properly. Burrows thought Holcim's method to open the roll-top covers pulled them at the wrong angle.

¶ 23 Defendant's expert witness, William Carrier, was an independent marine surveyor, and defendant constituted 15-20% of his business. He opined that there was no problem with the toggle locks prior to the delivery of the barge to Holcim. The amount of tension on a properly adjusted toggle lock was such that the average person could open and close the lock by hand with minimal effort. If a worker had to use a pry bar to open a toggle lock, the tightness could have been caused by an improper adjustment or by a cover that had been shifted sideways. He criticized Holcim's side-pull method for opening the roll-top covers. According to Carrier, the correct method, which was more time consuming, was to pull the covers one at a time from a center line pull. He opined that Holcim's side-pull method put an excessive strain on the toggle locks. However, on cross-examination, Carrier acknowledged that the wheels welded to the covers were in a wheel box and could move from side to side about an inch in either direction to compensate for any imperfections in the wheel tracks. This allowed the pulled covers to stay straight while the wheels moved underneath them. Carrier also acknowledged that other stevedores used the same side-pull method used by Holcim. According to defendant's repair records after the incident, no problems were found with the toggle locks and no repairs were made immediately thereafter.

¶ 24 Carrier agreed that if the front end of the barge was empty and the number four and five covers were past the middle of the barge, the barge would be listing so that the front end of the barge would be higher than the back end. In that situation, the number four and five covers

would be going downhill so that the forces on those two covers would cause them to push or rest against each other, provided that the wheels and tracks were properly maintained. Carrier acknowledged that although he testified at trial that a properly adjusted lock should be able to be opened by hand, his written opinion in this case stated that most properly maintained toggle locks required the use of a pry bar to open and close them.

¶ 25 Defendant moved for a directed verdict, and the trial court took the motion under advisement. During the lengthy jury instructions conference, the parties argued extensively about the law and the correct instructions concerning defendant's duty and the alleged negligence. Relevant to this appeal, the trial court instructed the jury:

> "[T]he Defendant must warn the Plaintiff's employer of a hazard on the barge or a hazard with respect to the barge's equipment if: *** the hazard was one which the stevedore employer did not know about and which would not be obvious to or anticipated by a reasonably competent longshoreman in the performance of his work.
>
> Even if the hazard was one about which the Plaintiff knew or which would be obvious or anticipated by a reasonably competent longshoreman, the Defendant must exercise reasonable care to avoid the harm to Plaintiff if the hazard is one which Defendant knew or should have known, the Plaintiff would not or could not avoid by using practical alternatives under the circumstances."

Defendant did not challenge the jury instructions in a posttrial motion and does not allege on appeal that the jury was improperly instructed.

¶ 26 The jury found for plaintiff and against defendant and assessed $800,000 in total damages, itemized as: $300,000 for past and future loss of a normal life; $500,000 for past and future pain and suffering; $500,000 for past and future medical expenses; and $700,000 for past and future lost earnings. The award reflected a 60% reduction of damages due to the negligence attributable solely to plaintiff. Thereafter, the trial court entered a judgment on the jury's verdict for $800,000.

¶ 27 Defendant renewed its motion for a directed verdict and moved for judgment n.o.v. Defendant argued that plaintiff failed to prove that: (1) there was an unreasonable tension or defect in the toggle lock before defendant turned the barge over to plaintiff's employer for unloading operations; (2) defendant had knowledge of the alleged defect before the barge was turned over; (3) the alleged defect was not obvious and would not have been anticipated by a reasonable, competent longshoreman under similar circumstances; and (4) plaintiff's injuries were proximately caused by defendant's negligent conduct. The trial court denied the motion, and defendant appealed.

¶ 28 II. ANALYSIS

¶ 29 Because defendant seeks a judgment n.o.v., defendant must demonstrate that the evidence adduced at trial, when considered in the light most favorable to plaintiff, "so overwhelmingly favors [defendant] that no contrary verdict based on the evidence could ever stand." *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). A motion for judgment n.o.v. "presents 'a question of law as to whether, when all the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of

evidence to prove any necessary element of the [plaintiff's] case.' " *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006), quoting *Merlo v. Public Service Co. of Northern Illinois*, 381 Ill. 300, 311 (1942). The standard for entry of judgment n.o.v. is a high one, and such entry is inappropriate if reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented. *York*, 222 Ill. 2d at 178. In ruling on a motion for judgment n.o.v., the court does not weigh the evidence or reassess the witnesses' credibility. *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992). A trial court should not enter a judgment n.o.v. if there is any evidence establishing a substantial factual dispute or the determination regarding conflicting evidence is decisive to the outcome of the trial. *Maple*, 151 Ill. 2d at 454. A decision on a motion for judgment n.o.v. is subject to *de novo* review by this court. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999).

¶ 30 In this case, plaintiff's allegations of negligence invoked the turnover duty theory of liability. Negligence is imposed pursuant to the Act if there is a violation of the shipowner's turnover duty owed to the longshoreman; this duty concerns the condition of the ship when stevedoring operations begin and includes a duty to warn. *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92, 99-100 (1994). Absent actual knowledge of a hazard on a vessel, the duty to remedy or warn the stevedore of the hazard may attach only if the exercise of reasonable care would place upon the shipowner an obligation to inspect for or discover the hazard's existence. *Id*. Shipowners fulfill their duties as to turning over the structure of the ship when they exercise ordinary care under the circumstances to turn over the vessel in good enough condition that an expert and experienced stevedoring contractor, who is aware of reasonably expected dangers,

can carry on cargo operations with reasonable safety by using ordinary care. *Howlett*, 512 U.S. at 98-99; *Prinski v. Blue Star Line Marine, Ltd.*, 341 F. Supp. 2d 511, 517 (E.D. Pa. 2004). The shipowner's obligation under the turnover duty is commensurate with its access and control, and while the shipowner's duty as to the cargo area is limited to latent defects, the shipowner has a general duty of reasonable care as to the ship and its equipment. *Prinski*, 341 F. Supp. 2d at 517.

¶ 31 In deciding whether a shipowner has satisfied its turnover duty, the trier of fact must determine whether there was a hazard or dangerous condition that the shipowner had a duty to address in inspecting the vessel. *Id.* The duty extends to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety and to warn the stevedore of hidden dangers that would have been known to the shipowner in the exercise of reasonable care. *Scindia Steam Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156, 166-67 (1981). Negligence, rather than unseaworthiness, is the controlling standard where longshoremen are concerned." *Howlett*, 512 U.S. at 105.

¶ 32 The shipowner is liable for the consequences of its negligence even if there is concurring negligence by the stevedore. *Matthews v. Ernst Russ Steamship Co.*, 603 F.2d 676, 680 (7th Cir. 1979). A longshoreman can recover the total amount of his damages from the vessel if the shipowner's negligence was a contributing cause of the injury, even if the stevedore was partly to blame. *Id.*

¶ 33 A. Existence of a Defect Before the Barge was Turned Over

¶ 34 Defendant argues plaintiff failed to prove that the defective condition of the toggle lock existed at the time the barge was turned over to Holcim for cargo unloading. See *Cameron v. Consolidated Grain and Barge Co.*, 654 F.2d 468, 472-73 (7th Cir. 1981) (because the turnover duty is discharged once the vessel is turned over to the stevedore in sufficient condition, a plaintiff bringing a suit under the Act has the burden to demonstrate that the defect that caused his injury existed at the time the vessel was turned over, and did not develop afterwards).

¶ 35 After a careful review of the evidence adduced at trial, as set forth above, we cannot find that the evidence on this issue so overwhelmingly favored defendant that the jury's verdict against defendant cannot stand. It was reasonable for the jury to conclude that, before the barge was turned over to Holcim, either the toggle lock at issue had been improperly adjusted by defendant or its agents or they failed to properly adjust the toggle lock after an event occurred that necessitated the resetting of some covers and placed increased tension on the lock.

¶ 36 The trial testimony established that the toggle locks at issue had been adjusted at some time before the turnover because the locks were bent and had burn marks and bubbled paint. Moreover, the testimony showed that the toggle lock in question was too tight to open by hand and difficult to open with a pry bar. The jury also heard conflicting testimony among the defense witnesses regarding the proper amount of tension that should be on a toggle lock after an adjustment. That testimony varied from a worker being able to open and close the locks by hand only, or both by hand and with pry bar, or tight enough to require a pry bar, or never tight enough to require a crane. There was no written standard.

¶ 37 Both of the toggle locks that connected the number four and five covers looked adjusted,

but defendant produced only one record from October 4, 2000 regarding the adjustment of one of those locks. It would have been reasonable for the jury to determine that there should have been at least one additional record relative to the repair of the other toggle lock. Although defendant's records indicated that some type of repairs were done on the barge on May 6, 2001, shortly before the barge was loaded with the cement destined for Holcim, no invoice or accounting entry regarding the nature of those repairs was found or produced. The jury also heard testimony that the rain seals over the cargo wore out over time, so toggle locks were adjusted to ensure that the covers closed tightly enough to keep out the rain. The jury could have reasonably inferred from the foregoing evidence that the toggle locks were improperly adjusted so that an unreasonable amount of force was required to open them.

¶ 38 In addition, the jury could have determined that an event occurred, after the cement was loaded and while the barge was under defendant's control, that caused tension on the toggle locks. The testimony established that collisions, bumps or damage to the barge during transit could cause the roll-top covers to shift and necessitate the resetting of those covers. The barge's records indicated that after the barge was loaded on May 9, 2001, with the cement that was destined for Holcim's Lemont terminal, repairs were made on May 10, 2001, which included resetting the roll-top covers, *i.e.*, putting the cover wheels back onto their tracks. Thereafter, the barge was towed and arrived at the Holcim dock on June 24, 2001. From the time the barge covers were reset on May 10, 2001, until delivery to Holcim, the barge was in the control of defendant or its agents.

¶ 39 The jury could have concluded that the event that necessitated the resetting of the cover

wheels for covers three, six and seven on May 10, 2001, also caused covers four and five to shift and thereby caused the locks connecting the four and five covers to be difficult to open due to an unreasonable amount of tension. The four and five covers were not reset, and it was not necessary to open or close the toggle locks on the four and five covers to reset the other covers. After the unloading of the cement at Holcim, the barge underwent inspection and repairs in July 2001. The July 2001 records did not specifically indicate any repairs to toggle locks but did reflect welding of three and one-half feet of corrugation on the covers. Furthermore, although much of the writing was illegible, the July record also seemed to indicate that three feet of track was repaired. There was enough evidence for the jury to conclude that, between the time the barge was loaded and before it was delivered to Holcim for unloading, something occurred to knock some of the covers off of their tracks and damage the covers so that they had to repaired after unloading.

¶ 40 The jury could have reasonably inferred from the testimony that when defendant knew the barge's cover wheels were misaligned and needed to be reset, which was done on May 10, 2001, defendant also knew that pressure may have been placed on the toggle locks as well. Such knowledge of possible damage to the toggle locks would have required defendant to inspect the locks before the barge was released to Holcim. No such inspection, however, was noted in the barge history or repair documents.

¶ 41 Although defendant argued that Holcim's side-pull method of opening the roll-top covers could have caused the toggle lock hazard, the jury heard testimony that many stevedores used the same method, defendant never sent Holcim instructions or diagrams about defendant's center-

pull method, and the cover wheels had some room to move from side to side and, thus, allow the pulled covers to stay straight. Moreover, there was testimony that the listing of the barge after the front was unloaded caused the number four and five covers to roll downhill and rest against each other. It would have been reasonable for the jury to infer that such a shift of the force on the covers might have relieved any pressure on the toggle locks that resulted from the side-pull method of opening the covers. In any event, where both the shipowner and the stevedore are negligent, the shipowner is liable for the full amount of the longshoreman's damages, reduced only by the percentage of damages caused by the longshoreman's own negligence. *Hill v. Reederei F. Laeisz G.M.B.H.*, 435 F. 3d 404, 413 (3d Cir. 2006).

¶ 42 Defendant argues the only reasonable inference to be drawn from the May 10, 2001 vendor repair record, which indicated that the number three, six, and seven covers had to be reset because the wheels were off track, was that any tension on the toggle locks was relieved or corrected by the resetting of those covers. We do not agree.

¶ 43 Despite testimony concerning defendant's proficient inspection, maintenance and invoice practices, there was evidence for the jury to determine that the inspectors, whom defendant relied upon for maintenance and repair work, failed to follow defendant's inspection requirements. The barge was cleaned and repaired on May 6, 2001, but then on May 8, 2001, just before the cement bound for Holcim was loaded, another vendor attempted to repair some leaks, pumped water out of the barge, and removed from a wing tank about 25 gallons of old corn that should have been unloaded in February 2001. Given this evidence, it would have been reasonable for the jury to believe that defendant's inspectors were not competent.

¶ 44 Because the witnesses' testimony in this case conflicted, the question of whom to believe and what weight to give the evidence was a decision for the finder of fact. It is the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide the weight to be given the witnesses' testimony. *Maple*, 151 Ill. 2d at 452. For these reasons, we cannot conclude that defendant was entitled to a judgment n.o.v. based on the evidence presented at trial concerning the existence of the defect before the turnover.

¶ 45 B. Evidence of Defendant's Actual or Constructive Notice

¶ 46 Defendant argues that it was entitled to a judgment n.o.v. because there was no evidence that defendant had actual or constructive notice of a defective toggle lock before the barge was turned over for unloading. See *Cameron*, 654 F.2d at 471-72 (to support a claim under the Act, the plaintiff must prove, at least, that the defendant should have discovered the hazard through a reasonable inspection).

¶ 47 Defendant contends plaintiff offered no proof that defendant was negligent in relying on third-party vendors to clean, repair and inspect its barges. Defendant required those vendors to follow defendant's inspection procedures, which included a requirement to inspect the toggle locks each time a barge was brought in for cleaning and repairs. The barge at issue was cleaned four times between October 2000 and May 2001, so its covers and toggle locks would have been opened and closed at least twice during each cleaning. Moreover, the covers would have been opened and closed for loading and unloading, and defendant relied on the loading docks to report problems with the barges. Finally, vendors made repairs to the barge shortly before and after it

was loaded with the cement destined for Holcim, and another vendor performed repairs immediately after the barge left Holcim's dock. Defendant argues there was no indication in the invoices and repair records of any problems with the toggle locks, even though the vendors were required to inspect those locks and had blanket authority to make any repairs they deemed necessary.

¶ 48 After reviewing all the evidence in the light most favorable to plaintiff, we cannot find that the evidence on the issue of notice so overwhelmingly favored defendant that the jury's verdict against defendant cannot stand. Defendant had notice before plaintiff's injury that its vendors had failed to comply with defendant's inspection standards; specifically, the vendors failed to discover and remove an old shipment of corn. Even defense witness Book acknowledged that the vendors did not always meet defendant's expectations.

¶ 49 It was reasonable for the jury to conclude that defendant either knew about the excessive tension on the toggle locks or should have discovered the hazard through a reasonable inspection. The missing records concerning the nature of the May 6, 2001 repair could have informed defendant of the defective toggle lock. In addition, the jury could have concluded that defendant and its agents adjusted the toggle locks too tightly where there was conflicting testimony from the defense witnesses about defendant's standard concerning the proper amount of tension on a toggle lock.

¶ 50 Based on the evidence, the jury could reasonably have concluded that defendant's vendor should have inspected and discovered a defect in the toggle lock on May 10, 2001, when the vendor reset covers three, six and seven, but the vendor failed to do so. There was evidence that

the toggle locks on covers four and five did not have to be opened when the vendor reset covers three, six and seven. Knowledge that some covers had been knocked off their tracks should have alerted defendant and its agent to the possibility that the toggle lock at issue may have been damaged or that increased tension was placed on the lock.

¶ 51 It is the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide the weight to be given the witnesses' testimony. *Maple*, 151 Ill. 2d at 452. We cannot conclude that defendant was entitled to a judgment n.o.v. based on the evidence presented at trial concerning defendant's notice of the defect before the turnover.

¶ 52 C. An Open, Obvious and Anticipated Defect

¶ 53 Defendant argues it was entitled to judgment n.o.v. because the tension on the toggle lock was open, obvious and anticipated by plaintiff. Specifically, defendant states that plaintiff was an experienced longshoreman and he commonly encountered toggle locks that were too difficult to open by hand and, thus, required the use of a pry bar or sometimes even a crane. Defendant asserts that, when plaintiff attempted to open the toggle lock with the second pry bar, the amount of tension on the lock was open, obvious and anticipated by him but he failed to use the crane, which was a practical and efficient alternative.

¶ 54 Because shipowners may reasonably expect that longshoremen will anticipate and avoid obvious dangers, shipowners generally are not liable for injuries caused by hazards that would appear open and obvious to reasonable and prudent longshoremen. *Matthews*, 603 F.2d at 679. The plaintiff bears the burden of proving that the hazard was neither open and obvious nor

anticipated. *Carrillo v. Indiana Grain Division, Indiana Farm Bureau Cooperative, Inc.*, 149 Ill. App. 3d 135, 140-41 (1986); *Howlett*, 512 U.S. at 106.

¶ 55 Defendant argues that the open, obvious and anticipated nature of a hazard is a complete defense to liability for alleged negligence based on the shipowner's turnover duty in cases brought under the Act, and Illinois courts do not recognize an exception to the open and obvious defense. Alternatively, defendant argues that any exception to the open and obvious defense is a narrow one that imposes liability when the longshoreman had no alternative but to proceed with work in the face of the hazard or to leave his job, or where his only alternatives were unduly impracticable or time-consuming.

¶ 56 To support its argument that Illinois does not recognize any exceptions to the open and obvious defense, defendant cites *Carrillo*, 149 Ill. App. 3d at 139-41, which did not mention any exception to the open and obvious defense when it reviewed whether the jury was properly instructed. In *Carrillo*, a longshoreman was injured when he stood on a barge's hatch cover and the hatch cover opened unexpectedly due to a defective latch. *Id*. at 137-38. The longshoreman sued the stevedore, which in turn filed a cross-claim for indemnity and contribution against the shipowner. *Id*. at 137. The jury rendered a verdict in favor of the longshoreman and shipowner and against the stevedore. *Id*. at 137-38. The *Carrillo* court held that the jury instructions properly put the burden of proof upon the stevedore, as the third-party plaintiff, to show that the longshoreman's injuries were caused by a hidden or latent defect that was actively or constructively known to the third-party defendant shipowner but not reasonably discoverable by the stevedore. *Id*. at 140-41.

¶ 57 Defendant's reliance on *Carrillo*, however, is misplaced. The analysis in *Carrillo* was limited by the parties' argument that the hazard was hidden and latent. Consequently, the *Carrillo* court had no occasion to address any exceptions to the open and obvious defense. Therefore, we do not accept defendant's argument that, under Illinois case law, the open and obvious nature of a condition categorically precludes liability. See also, *Wright v. Adonis Compania Naviera, S.A.*, 59 Ill. App. 3d 108, 113-14 (1978) (although this court determined that the responsibility for unloading the cargo had passed to the experienced stevedore at the time the plaintiff was injured, this court considered the merits of the plaintiff's argument that, even though the slippery condition of the bundles of steel may have been open and obvious, the shipowner could nonetheless be found negligent because the danger was unavoidable).

¶ 58 We note that federal cases have discussed a few exceptions to the open and obvious defense. Some cases state that a shipowner may be held liable under the Act for open and obvious hazards if the longshoreman's only alternative to facing the danger was to leave the job or face penalties for causing delay. *Teply v. Mobil Oil Corp.*, 859 F.2d 375, 378 (5th Cir. 1988); *Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1248 (5th Cir. 1997). Some cases state that a shipowner may be held liable if the longshoreman's only alternative to facing the hazard was unduly impractical or time-consuming. *Hill*, 435 F.3d at 410; *Morris v. Compagnie Maritime Des Chargeurs Reunis, S.A.*, 832 F.2d 67, 71 (5th Cir. 1987); *Moore v. M/V ANGELA*, 353 F.3d 376, 381 (5th Cir. 2003); *Jupitz v. National Shipping Co. of Saudi Arabia*, 730 F. Supp. 1358, 1363 (D. Md. 1990). Cases also state that a shipowner may be held liable if the longshoreman

would be likely to work through the hazard rather than mitigating it. *Hill*, 435 F.3d at 412; *Kirsch v. Plovidba*, 971 F. 2d 1026, 1030-31 (3d Cir. 1992).

¶ 59 Here, the jury was instructed, concerning the obvious and anticipated nature of the hazard, that:

> "Even if the hazard was one about which the Plaintiff knew or which would be obvious or anticipated by a reasonably competent longshoreman, the Defendant must exercise reasonable care to avoid the harm to Plaintiff if the hazard is one which Defendant knew or should have known, the Plaintiff would not or could not avoid by using practical alternatives under the circumstances."

Defendant did not challenge the accuracy of the jury instructions either in a posttrial motion or on appeal. Consequently, we review defendant's claim that he was entitled to a judgment n.o.v. in the context of the instructions that were given to the jury.

¶ 60 Even assuming, *arguendo*, that the defective condition of the lock was open, obvious and anticipated by plaintiff, the evidence, when viewed in the light most favorable to plaintiff, was sufficient for a jury to reasonably conclude that defendant failed to avoid the harm to plaintiff because the hazard was one which defendant should have known plaintiff would not avoid by using a crane or other practical alternatives under the circumstances.

¶ 61 Halting the unloading procedure to hook up a crane to open a toggle lock in this situation would have been time consuming. Plaintiff was trying to open the toggle locks of the four and five covers so that the back end of the barge would be ready for unloading as soon as Dobkowski had finished unloading the cement from the front end of the barge. In order to use the crane to

open the toggle lock, plaintiff would have had to interrupt Dobkowski, who was using the crane to vacuum cement from the front end of the cargo hold. Then, plaintiff would have had to move the crane over to the dock, attach a chain to the crane, move the crane back over the barge, and move the barge so that the toggle lock was directly under the crane. It was a busy time at Holcim, and plaintiff worked at its flagship facility, which was expected to "show them" that it could unload barges at the fastest rate possible. Only plaintiff and Dobkowski were working the midnight shift and, in addition to quickly unloading the barge, they were also responsible for quickly filling customers' tank trucks as they drove up to the dock.

¶ 62 Although plaintiff and Dobkowski admitted that they had used the crane in the past to open difficult toggle locks, their supervisor testified that using the crane to open toggle locks was an unacceptable procedure because Holcim was concerned about damage to the shipowner's covers or toggle locks. The supervisor recommended a chain fall procedure, but there was no testimony explaining that procedure and how long it took. Moreover, no other witness mentioned the chain-fall procedure as a possible alternative. It was approximately 3 a.m. at the time of the incident at issue here, and no supervisor was at the dock. If plaintiff, who was not supposed to use the crane, could not open the lock with a pry bar, his only alternative seemed to be to telephone management and inform them that he was unable to resolve the problem of opening a difficult toggle lock. Neither plaintiff nor Dobkowski ever made such a telephone call, and their supervisor confirmed that no employee had ever telephoned him to resolve a problem about opening a toggle lock. Although the longshoremen were not assessed a penalty if it took longer than expected to unload a barge, they were expected to document whatever

problem had caused the delay.

¶ 63 The testimony supported a conclusion that it was reasonable for a longshoreman to expect to be able to open toggle locks either by hand or with the use of a pry bar. Plaintiff's initial attempts to open the difficult locks failed due to the smaller diameter of the first pry bar he used. Moreover, defendant's characterization on appeal that plaintiff struggled to force the lock open with the second pry bar is not accurate. According to the record, plaintiff said that he "gave it a shot" and was straining "a little bit," but when he was pulling on the pry bar, he did not think he was going to hurt his back. He did not stop before he hurt his back because it "was just one those things" and "just happened so fast." The jury heard the testimony, and we will not usurp the jury's role to discern the credibility of the witnesses and draw inferences from the conflicting evidence. Although there was testimony that Holcim's workers were not expected to strain against a toggle lock to the point of injuring themselves, it was reasonable for the jury to conclude, in accordance with the jury instructions they were given, that defendant should have expected that workers, who were under time constraints, were more likely to try to open a difficult lock with a pry bar than halt unloading operations to hook the crane up to the toggle lock.

¶ 64 Viewing all the evidence in the light most favorable to plaintiff, we cannot conclude that defendant was entitled to a judgment n.o.v based on the defense that the defect was open, obvious and anticipated by plaintiff.

¶ 65 D. Proximate Cause

¶ 66 Defendant argues it was entitled to a judgment n.o.v. because there was no evidence that

plaintiff's injuries were proximately caused by defendant's negligence. Defendant complains that plaintiff's case was based on guessing what went wrong rather than actual knowledge. Defendant also argues that plaintiff failed to rule out the possibility that the tension on the toggle lock was caused by Holcim's improper side-pull method of moving the barge covers.

¶ 67 Viewing all the evidence in the light most favorable to plaintiff, the jury could reasonably conclude that defendant's negligence proximately caused plaintiff's injury. Plaintiff injured his back opening a toggle lock that was too tight to open by hand, and he knew that it was the unreasonable tension on the lock that caused his injury. Moreover, plaintiff's testimony was corroborated by his coworker's testimony.

¶ 68 Many stevedores used the same side-pull method used by Holcim in this case, and there was no evidence that defendant ever communicated its center-pull method to Holcim. Furthermore, the testimony indicated that the ability of the cover wheels to adjust about one inch in either direction could allow the covers to stay straight as they rolled open. In addition, there was testimony that the listing of the barge after the front end was unloaded caused the number four and five covers to roll downhill and rest against each other. Consequently, the jury reasonably could have decided that any tension that might have been placed on the locks as a result of Holcim's side-pull method was inconsequential after the barge was listing and the force on the number four and five covers had changed.

¶ 69 Even if the unreasonable force required to open the lock resulted from a combination of Holcim's cover handling procedure and unreasonable tension that existed at the time of the turnover, the jury's verdict was proper. Where both the shipowner and the stevedore are

negligent, the shipowner is liable for the full award. *Matthews*, 603 F.2d at 680. Viewing all the evidence in the light most favorable to plaintiff, we cannot find that defendant was entitled to a judgment n.o.v. based on the issue of proximate cause.

¶ 70 III. CONCLUSION

¶ 71 After reviewing all the evidence in the light most favorable to plaintiff, the evidence does not so overwhelmingly favor defendant that the verdict against defendant based on that evidence could never stand. This case, like many cases involving an unwitnessed accident, rises or falls on the credibility of the witnesses and the interpretation of the evidence. See *Hendricks v. Riverway Harbor Service St. Louis, Inc.*, 314 Ill. App. 3d 800, 807 (2000). This court cannot substitute its judgment for that of the jury as to the credibility of witnesses or the inferences to be drawn from the evidence. The evidence established that there was a substantial factual dispute, and the determination regarding the conflicting evidence was decisive to the outcome of this trial. For these reasons, we conclude that the trial court did not err in denying defendant's motion for a judgment n.o.v. We affirm the judgment of the circuit court.

¶ 72 Affirmed.