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BITTING vs. KEARNEY NATIONAL, INC.
95-02-2342

DATE OF VERDICT/SETTLEMENT: April 15, 2002 to May 3, 2002

TOPIC: PRODUCTS LIABILITY - DEFECTIVE HIGH VOLTAGE ELECTRICAL SWITCH GEAR - IMPROPER SHUT-DOWN PROCEDURE - HIGH VOLTAGE ELECTRICAL SHOCK TO ELECTRICIAN - BURNS TO 26% OF BODY - 17 SKIN GRAFTS - HERNIATED LUMBAR DISCS - NEUROPSYCHOLOGICAL INJURIES - EMOTIONAL DYSCONTROL SYNDROME

SUMMARY:

Result: \$3,850,000 Gross Verdict

EXPERT WITNESSES:

Plaintiff's: Walter S. Farley, Jr., from Fairless Hills.: Plaintiff's electrical engineer.

[Rosette C. Plotkin](#) from Philadelphia.: Plaintiff's neuropsychologist.

[Frederick A. DeClement](#) from Philadelphia.: Plaintiff's burn specialist.

James F. Bonner from Philadelphia.: Plaintiff's rehabilitation specialist.

[Arthur S. Brown](#) from Camden, N.J.: Plaintiff's plastic surgeon.

[Brian Sullivan](#) from Philadelphia.: Plaintiff's forensic economist.

Defendant's: William W. Olive, Jr., from Dunwoody, Ga., and Francis Wells from Nashville, Tenn.: Defendant's electrical engineers.

ATTORNEY:

Plaintiff's: [George J. Badey, III](#), and [Michael H. DiGenova](#) of Sheller, Ludwig & Badey in Philadelphia for plaintiff.

Defendant's: [Joseph Cullens](#) of Cullens & Cullens in Cartersville, Ga., and [Edward German](#) of German, Gallagher & Murtaugh in Philadelphia for defendant Kearney National, Inc..

[Kristopher Keys](#) of PECO Legal Department in Philadelphia for defendants PECO Energy and Hygrade Food Products Company.

JUDGE: Esther R. Sylvester

RANGE AMOUNT: \$2,000,000-4,999,999

STATE: Pennsylvania

COUNTY: Philadelphia County

INJURIES:

PRODUCTS LIABILITY - DEFECTIVE HIGH VOLTAGE ELECTRICAL SWITCH GEAR - IMPROPER SHUT-DOWN PROCEDURE - HIGH VOLTAGE ELECTRICAL SHOCK TO ELECTRICIAN - BURNS TO 26% OF BODY - 17 SKIN GRAFTS - HERNIATED LUMBAR DISCS - NEUROPSYCHOLOGICAL INJURIES - EMOTIONAL DYSCONTROL SYNDROME

FACTS:

The male plaintiff in this products liability action was a 43-year-old electrician working on electrical switch gear at the Hygrade Food Products plant in Southwest Philadelphia when he sustained a high voltage electrical shock. The plaintiff alleged that the electrical switch, manufactured by the defendant Kearney National,

Inc., was dangerously defective. The plaintiff also named PECO Energy and Hygrade Food Products Company as codefendants in the case, contending that their negligence contributed to the accident. The manufacturer of the larger panel box which contained the electrical switch was dismissed from the case based upon the statute of repose. The defendants Hygrade Food Products and PECO Energy reached a confidential settlement with the plaintiff prior to trial, but remained on the verdict form. The case was tried under strict liability theory against the defendant manufacturer of the electrical switch gear.

The evidence indicated that on October 11, 1993, the plaintiff was working on 13,200 volt electrical switch gear manufactured by the defendant Kearney National and located at the codefendant Hygrade Food Products plant. The plaintiff was installing a fuse into the electrical switch at the time of the accident. The plaintiff contended that the switch was defective since although the large handle on the outside of the switch was in the down, or 'off,' position and the position of the handle actually stated that the switch was 'open' (and thus would have no electrical current), unbeknownst to the plaintiff, the internal components had been stuck in the closed position so the plaintiff came in direct contact with 13,200 volts of electricity.

The high voltage switch gear contained a Kirk Key Interlock system, designed to shut down the system through a series of keys which must be opened in proper sequence. The day before the plaintiff's injury, while the plaintiff was at the plant for routine maintenance of the switch gear, a Hygrade supervisor had pulled a switch handle out of sequence causing a short circuit and causing fuses to blow. The supervisor was able to pull the switch out of sequence because the lock cylinder was removed from the switch handle due to a key breaking off in the lock. Evidence showed that Hygrade had ordered replacement parts to replace the locks, but the parts had not yet arrived at the time of the plaintiff's accident.

The routine maintenance performed by the plaintiff the day before the accident involved the defendant PECO Energy sending out two employees to shut down power to the building. Prior to shutting down the power from the street, the PECO employees came into the plant to confirm that power to the equipment itself was off, and they then placed a 'lock-out tag' on the handle. A lock-out tag is a safety device affixed to switch handles to insure that no one can throw the switch to turn power on while an electrician is working elsewhere on the equipment.

The plaintiff contended that placement of the lock-out tag on the switch handle by PECO confirmed for the plaintiff that the switch was 'open' and, therefore, no power could travel to the fuse compartment. Testimony indicated that the plaintiff also placed his own lock-out tag on the handle to further insure that the handle could not later be inadvertently moved to the 'closed' or 'on' position after PECO removed its lock.

After the plaintiff completed his routine maintenance on the day before his injury, PECO Energy sent out two other employees to switch the power back on at the street. At that time, the PECO employees removed the PECO lock-out tag, but the plaintiff's lock-out tag remained on the handle. The plaintiff contended that the presence of his lock-out tag on the switch handle assured him that no power could travel to the fuse compartment. Since there were no fuses available at Hygrade, the plaintiff was required to leave the site in order to obtain the fuses and come back the next day.

When the plaintiff returned to the site on the day of the accident, he saw the large, main, bottom switch handle on the outside of the switch in the 'open,' or off position, and saw his lock-out tag still on the switch handle. The plaintiff was placing one of the replacement fuses into the box when he contacted the live electrical current. Testimony indicated that the plaintiff was blown back from the equipment with a 13,200 volt electrical jolt which entered his body through his hands and exited through his leg.

Witnesses testified that the plaintiff's body actually caught fire and was burning from the current, his clothes were partially burned off and some melted into his

skin. Hygrade workers put out the flames. However, the plaintiff suffered extensive third and fourth degree burns over 13% of his body, and second and third degree burns over 26% of his body. The plaintiff was transported to St. Agnes Burn Center where he received the Last Rights of the Roman Catholic Church and remained in intensive care for almost a month.

The plaintiff's physicians indicated that the plaintiff has been left with permanent scarring, early development of cataracts and neuropathy/pain in both arms and both legs. He underwent 17 operations to graft skin onto the chest, arms and neck. He also suffered loss of sensation on his skin, herniated discs of the lumbar spine, and neuropsychological injuries including memory losses and Emotional Dyscontrol Syndrome, which he claimed ultimately caused the breakup of his marriage of 29 years. The plaintiff's past medical expenses were stipulated as \$379,904. The plaintiff also claimed \$318,116 to \$371,751 in lost wages.

The defendant manufacturer denied that its product was defective and contended that the accident was caused by the actions of others, including the plaintiff, who failed to independently check the switch gear for electrical current before beginning to install the fuses. The defense argued that removal of the Kirk Key locks represented an unforeseeable substantial change to and misuse of the equipment.

The jury found the defendant Kearney National, Inc. (the manufacturer) 40% negligent, the defendant Hygrade 40% negligent, and the defendant PECO Energy 20% negligent. The plaintiff was awarded \$3,500,000 in damages and his ex-wife was awarded \$350,000 for her loss of consortium claim. Posttrial motions are pending.

COMMENTARY:

The jury received a lesson in high voltage electrical equipment in order to understand how the plaintiff's injury occurred and determine the appropriate apportionment of liability among the parties responsible. Because PECO Energy and Hygrade Foods had already reached a confidential settlement with the plaintiff prior to trial and the case proceeded under a strict liability theory, the plaintiff argued that no evidence on the issue of comparative negligence should be admissible. However, the court allowed evidence of the plaintiff's alleged negligence in failing to independently test the equipment or take other safety measures as this evidence went to the issue of 'causation.' The court did not permit the affirmative defense of assumption of the risk, ruling that reasonable minds could not differ that the plaintiff was under the legitimate assumption that the power to the fuse compartment was off.

The settlement agreement with PECO and Hygrade was the subject of much dispute leading up to as well as during the trial. During most of the trial, the court refused the defendant manufacturer's requests that it be permitted to inform the jury of the settlement. However, after plaintiff's closing arguments, the court permitted counsel for Kearney National to tell the jury in closing statements about the settlement agreement. The ruling was based on a Pennsylvania Supreme Court ruling which allows such evidence when a settlement involved a so-called 'Mary Carter' agreement (an agreement wherein one or more of the defendants reached an agreement with the plaintiff, but retains some interest in the outcome of the litigation). PECO's settlement agreement called for it to be released and share in the proceeds of any award against the defendant manufacturer. PECO and Hygrade also agreed to assign its rights of contribution and indemnification against the defendant manufacturer to the plaintiff.

There was also an issue involving alleged spoliation of evidence by one of the defendant manufacturer's experts who allegedly (without permission and away from the cameras videotaping the inspection of the switch gear) reached directly into the switch gear box, pressed down hard on the frame and 'freed' the jam which had allegedly caused the switch handle to remain in the 'open' (off) position. After the jam was freed, the switch handle worked properly. The plaintiff claimed that evidence was destroyed and the parties deprived of an opportunity to conclusively determine the exact nature of the condition which led to the malfunction.

The case was previously tried with a directed verdict in favor of two defendant manufacturers, based on findings that the plaintiff was an unintended user of the equipment (the plaintiff was not an officially licensed electrician and this was the first time that he ever installed fuses on this type of equipment) and the equipment had been substantially modified by removal of the Kirk Key locks. The first jury apportioned liability as 50% PECO; 10% Hygrade Foods and 40% comparative negligence against the plaintiff and awarded \$2,300,000 in damages. The Pennsylvania Superior Court reversed granting of the directed verdict in favor of Kearney (the switch manufacturer) and remanded the case for this trial on all issues as to the remaining defendants.

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