

**IN THE STATUTORY TRIBUNAL, FIJI ISLANDS**  
**SITTING AS THE EMPLOYMENT RELATIONS TRIBUNAL**

ERT Dispute No 66 of 2009

**BETWEEN:** TANIELA VOSALEVU

**Grievor**

**AND:** TIEGAN CONSTRUCTION LIMITED

**Employer**

**Counsel:** Mr A Chand, for the Applicant  
Ms P Narayan, for the Respondent

**Date of Hearing:** Monday 28 October 2013

**Date of Decision:** 15 November 2013

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**DECISION**

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**PERSONAL INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT - Section 9 Workmen's Compensation Act (Cap 94); Temporary Incapacity of an employee.**

**Background**

1. The Applicant was employed by the Respondent as a Steel Fixer.
2. On or about 29 March 2006, the Applicant was using a steel grinder to cut steel, when the grinder blade broke and a piece of blade flew and hit the Applicant's testicles, thus causing severe injury.
3. The Applicant was taken to Vunisea Hospital where he was admitted for one week. He was subsequently transferred to the CWM Hospital, Suva.

4. On 14 July 2010, as there being no appearance from the Employer, the then Chief Tribunal awarded compensation against the Employer, in the Amount of \$18,000.00.<sup>1</sup>
5. On 10 August 2011, that judgment was set aside by consent of the parties.
6. The Matter first came back on for hearing on 11 April 2012, though at that time, as there was no final medical report available to assist in the assessment of the impairment, the parties provided the Tribunal an outline of case only, with the Applicant giving his evidence in chief.
7. As the Applicant had failed to attend a Urologist appointment, that seemed to be a central requirement in order to assist in the assessment of impairment, a further deferment of proceedings was required.
8. The Respondent also sought to use the opportunity to amend its response to the applicant. Leave to do so was granted on 21 June 2012.
9. In the ensuing period, the Applicant was required to attend a medical appointment.
10. On 17 August 2013, the matter was recalled for further review and ultimately set down for hearing on 28 October 2013.

### **The Case of the Applicant**

11. The Case of the Applicant is one that appears to have initially been commenced under the Workmen's Compensation Act (Cap 94), though under the mistaken belief that a claim in general damages for pain and suffering was available under that Act.

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<sup>1</sup> It is a little unclear the formula that was relied upon at that time.

12. The Respondent's insistence that the exact remedy being sought be particularised, is a basic and necessary requirement in any claim before a court and it was for that reason that Mr Chand was required to ensure that his client submit to a medical examination, in order to set up a claim for either compensation on the basis of total incapacity<sup>2</sup>, partial incapacity<sup>3</sup> or temporary incapacity<sup>4</sup> under the Act.
13. The Applicant gave evidence in proceedings, with the assistance of a translator.
14. Taniela Vosalevu works as a labourer, presently with the Fiji Water Authority. He is 31 years of age and went to school to Form 4. Prior to being engaged with the Employer, the Applicant had worked as a steel fixer for a construction company for a period of 11 months. He says that on 29 March 2006, he had been working for the employer assisting in the building of a house. He was to make some cuttings of a bar that was out of position. He says that there was steel lying on the ground. He went to get a grinder from a storeroom bay. He says that he was not informed that the grinder he was given was having problems. On the first cutting that morning, he said the blade broke. "I can remember as far as that." According to the witness, after the accident he was unconscious and only "came back" in hospital after one day. He said that he spent one week in the Vunisea Hospital and a further one week at the CWM Hospital. He says after being discharged from hospital that he went home and just lay down. That he was advised by the doctor not to do any heavy lifting, nor to play sport.
15. The witness, claimed that he had residual problems with pain toward the left hand side of the groin and that he was affected during the cold season. According to Mr Vosalevu for the first 12 months after the accident, he attended hospital once a month and thereafter did not.

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<sup>2</sup> Section 7

<sup>3</sup> Section 8

<sup>4</sup> Section 9

16. On cross-examination, the witness conceded that there was no real obstacle preventing him from working following the accident. He freely admitted working at another construction company and then having a lengthy period away from paid employment, while he worked at farming in his village.
17. Mr Vosalevu says that his current duties require him to undertake physical tasks, such as earth digging.

#### **Medical Evidence of Dr Sireli Kaloucava**

18. Despite some difficulties obtaining Dr Kaloucava who had prepared the medical report on behalf of the CWM Hospital, he was able to give his evidence by telephone. In his report dated 20 November 2012, Dr Kaloucava states that the worker.

*Has been re-assumed and told that most likely the traumatic injury to his testis has resolved.*

19. Dr Kaloucava noted that the Applicant had suffered an extensive injury brought about by either open laceration or traumatic close soft tissue issue. He opined that the laceration would take between 4 to 6 weeks to heal, but outside of that, could not see that there was any residual impact arising out of the accident.

#### **Did the Worker Suffer a Personal Injury by Accident for the Purposes of the Act?**

20. Section 5(1) of the Workmen's compensation Act (Cap94) provides as follows:

*If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workmen<sup>5</sup>, his employed shall,*

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<sup>5</sup> In the absence of a gender neutral expression, we will assume that the language of the legislation was otherwise intended to be just that.

*subject as hereinafter provided be liable to pay compensation in accordance with the provisions of this Act . . .*

21. It appears well accepted in *Raiwaqa Buses Ltd v Labour Office* [2011] FJHC174 that there are three requirements to satisfy Section 5 (1) of the workmen's compensation Act (Cap 94). These are:

- (i) Personal Injury by accident;
- (ii) Arising out of employment;
- (iii) In the course of Employment

22. The Form 7 'Respondent's Amended Answer to Notice',<sup>6</sup> admits that the Worker was injured on 29 March 2006 whilst in the course of his employment. On that basis and having regard to the evidence available, I am satisfied that the requirements of Section 5 (1) of the Act are made out.

#### **Has the Worker Suffered Permanent or Temporary Incapacity?**

23. This is not a case that deals with permanent total incapacity for the purposes of Section 7 of the Act. Section 3 of the Act sets out the following terms.

"Partial Incapacity" means:

- (i) Where the incapacity is of a temporary nature,
  - Such incapacity as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the incapacity.
  
- (ii) Where the incapacity is of a permanent nature,
  - Such incapacity as reduces his earning capacity in any employment, which he was capable of undertaking at that time.

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<sup>6</sup> Dated 22 June 2012.

“Total Incapacity” means

such incapacity, whether of a temporary or permanent nature, as incapacities a workman for any employment which he was capable of undertaking at the time of the accident resulting in such incapacity.

24. The Medical Summary provided by the CWM Hospital’s Dr Josese Vuki dated 13 March 2009, provides

*For over 3 years (the worker) continued to experience painful (Rt) testis wherever he exposed (sic) to stressful and heavy activities*

25. This opinion accords with the current evidence of the witness, that he is still exposed to some level of discomfort when engaged in heavy duties or during the ‘cold season’.
26. If the worker continues to complain of such pain, then on one hand, it would suggest that his case is based on his ongoing partial impairment. The worker says this comes about during heavy lifting, though it is noted that Dr Kaloucava believed that this may have come about due to other health reasons, such as a possible hernia. On that basis and having regard to the other matters raised, I am more inclined to consider this application in the context of it being one based on the temporary partial incapacity of the worker.<sup>7</sup>

### **Role of Section 9 of the Act**

27. Section 9 enables the Tribunal to order a lump sum calculated having regard to the probable duration and probable changes in the degree of incapacity of the worker.

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<sup>7</sup> Particularly for the three year period identified within the medical report of 13 March 2009.

28. I note the restrictions contained within the first proviso at paragraph (a), that no lump sum calculation under this provision can exceed the entitlement otherwise available under either Sections 7 or 8 of the Act. Within those provisions, it is noted that a statutory ceiling is imposed on the maximum and minimum amount of compensation available. That it is, it cannot be more than \$32,000, nor less than the percentage of earnings for the five year period (52 x 5 + 260 weeks), based on the formula  $\$6,000/\$32,000$ , ie 18.75%.

29. At the time of the accident, the worker's average weekly earnings was \$120.15.

### **Role of the Employer in Recovery of Worker**

30. The Tribunal notes the position of the Employer within its Amended Answer to Notice dated 19 June 2012, where it states:

*a. The Claimant did not immediately inform his immediate supervisor and foreman of the injuries and the Respondent became aware of the Claimant's injuries on 30 March 2006 and had the Claimant transported to Kavala Health Centre then to Vunisea hospital, Kadavu and subsequently to CWM Hospital in Suva.*

*b. The injuries sustained by the Claimant is caused by the sole negligence of the Claimant in that he was assigned to cut reinforcing steel of 16mm diameter and to use a manual re bar bolt cutter (sis) which is the proper tool to use when cutting reinforcing steel of this diameter. To hasten his work, the claimant without authorisation used an electrical grinder, which was not set up properly to cut steel, as the blades were larger in diameter than what would fit inside the protective guard of that grinder.*

31. The Employer may benefit in revising its own understanding of the primacy of the employer's obligation in guaranteeing the health and safety of its worker's in the workplace. This accident raises a range of issues, that whilst they may not need to

be directly settled on this occasion, should provide a strong lesson to all those charged with the responsibility of health and safety at work.

32. In the first place, one must question the arrangements in place that would allow worker's access to the use of plant, in cases where they clearly do not have the full technical and working understanding of that plant.
33. Nor is there any evidence before me, of what if any protective clothing and equipment was being worn by the worker at that time. Grinding machine accidents are quite common place and one of the key reasons for this is a lack of supervision and training of the worker. It is not uncommon for shattered grinding wheels to smash through protective visors causing fractured skulls and severe facial injuries, significant lacerations to the body and on some occasions death.
34. In such circumstances and against the uncontroverted evidence of the worker that all he recalls following the accident, was waking up in the Vunisea Hospital, it is hard to comprehend an employer relying on the response that:

*The Clamant did not immediately inform his immediate supervisor and foreman of the injuries*

35. If the nature of the worker's injuries were significant enough so as to hospitalise him for a two week period, it is hardly unremarkable that following the incident the worker did not report the injury, particularly if he was unconscious. Further and because the Employer has deliberately not chosen to call any evidence whatsoever, there is no evidence of any rehabilitation program that was deployed by the Employer following the worker's return to the workplace, to accommodate any residual complaints or concerns that he was experiencing, particularly in relation to the physical demands of his position.
36. This was a serious workplace incident, it warranted a serious employer response to it. There is no evidence of what that response was, if any.



37. In any event, on this occasion, this is a matter that has as its sole focus, the rights and entitlements of the parties under the Workmen's Compensation Act (Cap 94).

### **Calculation of Compensation**

38. Based on the medical report provided by the CWM Hospital on 13 March 2009 and the evidence of the Worker, I am satisfied that some degree of temporary partial incapacity existed. The medical report indicated that the worker was experiencing discomfort for a three year period. The worker still believes that there is some ongoing discomfort. It is unfortunate that Dr Kaloucava did not attend the Tribunal in person as he was required to do. Medical personnel in cases of this type play an important role in assisting the Tribunal understand the nature and impact of any injury suffered by a Worker at work. While Dr Kaloucava's telephone evidence was assisting, it could have been far better presented in person.<sup>8</sup>
39. I am prepared to determine that at least for a three year period the worker was being affected by this injury. The fact that he returned to work so closely following the accident is not influential in my considerations. A worker who needed the income may return to work, albeit not fully fit to undertake her or his role. The Employer should have ascertained the worker's fitness and capacity, in the context of its rehabilitation obligation, there is no such evidence of this. I am prepared to award a lump sum on the assumption that for some period of time, the worker experience a lack of capacity to work in a physical demanding way, as a consequence of his injury.<sup>9</sup>
40. I find that the Worker is entitled to compensation in the amount of \$5,000.00.<sup>10</sup> That is, that the Worker should be directly paid that amount as compensation for the

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<sup>8</sup> The parties too should ensure that a subpoena is effectively served, in order to compel attendance.

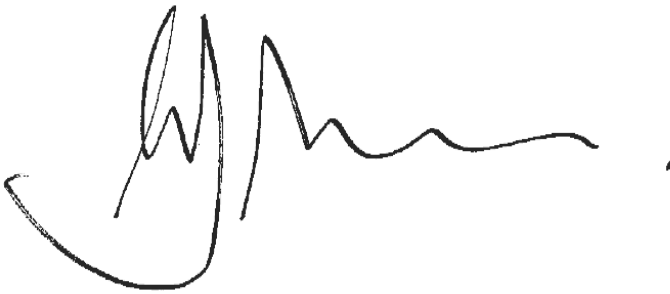
<sup>9</sup> This may have manifest in his reluctance to assume paid employment; by a lack of motivation; or just genuine discomfort that discouraged him from pursuing paid employment vigorously.

<sup>10</sup> Based on 3 years wages equating to \$17550.00 and assuming a temporary incapacity of approximately 25% of his working time over that 3 year period.

temporary partial incapacity.

### **Decision**

- (i) The Tribunal orders that the Applicant be awarded an amount of \$5,000.00, as compensation in accordance with Section 9 of the Act; such money is to be paid into the High Court Civil Registry, in accordance with Section 12(3) of the Act, within 28 days.
  
- (ii) The Applicant is free to make application in relation to costs within 28 days hereof.

A handwritten signature in black ink, appearing to read 'A. J. See', with a large, stylized initial 'A' and a long, horizontal flourish extending to the right.

**Mr Andrew J See**  
**Resident Magistrate**