

# Decision



Employment  
Relations Tribunal

**Title of Matter:** LABOUR OFFICER on behalf of the Dependents of the Deceased, Rakeshwar Sharma (Applicant)  
v  
STONE DESIGNS INTERNATIONAL LIMITED (Respondent)

**Section:** Section 6 *Workmen's Compensation Act 1964*

**Subject:** Compensation for death arising out of accident

**Matter Number(s):** ERT WC 105 of 2016

**Appearances:** Ms R Kadavu, for the Labour Officer  
Ms N Choo, R Patel Lawyers on behalf of the Respondent

**Date of Hearing:** 9 February 2017, 10 February 2017, 13 March 2017, 10 May 2017

**Before:** Mr Andrew J See, Resident Magistrate

**Date of Decision:** 3 June 2019

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**KEYWORDS:** Section 5 *Workmen's Compensation Act 1964*; Claim for Compensation; Death arising out of accident.

**CASES CITED:**

*Fife Coal Co Ltd v Young* (1942) AER HL 85

*Fiji Industries Limited v Ateca Dretirewa* (Civil Appeal 15/92)

*Fiji Sugar Corporation Ltd v Labour Officer* [1995] FJHC39; Civil Appeal No 0010 of 1994, 17 February 1995.

*Labour Officer v Post Fiji Ltd* [2017] FJET 3; ERT WC97.2016 (13 February 2017)

*Raiwaqa Buses Ltd v Labour Officer* [2011]FJHC174; HBA23.2008 (18 March 2011)

*The Labour Officer v Wood& Jepsen Surveyors and Engineers* [2013] FJET 4;

*Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu* [1994] FJHC 180; (9 December 1994)

*Wati v Emperor Gold Mining Company Ltd* [2007] FJCA 20

**Background**

[1] This is an application made for worker's compensation in accordance with Sections 5 of the *Workmen's Compensation Act 1964*. The application filed on 12 August 2016, has been made on

behalf of the dependants of Rakeshwar Sharma who it was claimed suffered a heart attack at his workplace and subsequently died some time later at the Navua Hospital on 11 April 2014.

[2] In the response filed by the Respondent on 11 October 2016, it is stated inter alia:-

- (i) The Respondent concedes the Deceased was employed with the Respondent from 18<sup>th</sup> April 2013 until 9<sup>th</sup> April 2014 in the capacity of a painter.
- (ii) There was no written contract but a verbal arrangement whereby the Deceased's employment involved only painting jobs around the Respondent's premises...
- (iii) The Deceased was placed on payroll of the Respondent few months after being engaged and was paid on hourly basis.
- (iv) That shortly after being employed by the Respondent, on or around August 2013, one Ronnie Hyer requested if he could temporarily hire the Deceased to work on Mr Hyer's premises at Villa 144 Great Harbour Drive.
- (v) The Respondent and Mr Hyer's (sic) agreed that the wages of the Deceased will be paid by the Respondent for this period, so the wages could be adequately recorded in Respondent's book, however an invoice would be raised by Respondent issued to Mr Hyer's (sic) for reimbursement of the wages paid to the deceased. ....
- (vi) The Deceased was advised vide letter dated 9<sup>th</sup> April 2019, that his services were no longer required and he was expected to commence employment with Mr Hyer from 10 April 2014.
- (vii) On the 9<sup>th</sup> April 2014, the deceased was paid his weekly end salary. However due to his illiteracy, the Deceased could not comprehend the contents of the said letter and arrived to work at the Respondent's premises on 10<sup>th</sup> April 2014.
- (viii) Since the Deceased was already at work on the 10<sup>th</sup>, he was not sent home but allowed to stay back and attend to minor painting jobs. The Deceased was verbally made to understand that from 11<sup>th</sup> he was to commence work on Mr Hyer's project.
- (ix) On 11<sup>th</sup> April 2014, the Deceased did commence work at Mr Hyer's place and reportedly suffered from a cardiac arrest and was taken to Navua Hospital by Mr Hyer where he was pronounced dead.

### **The Case of the Labour Officer**

Ms Madhu Lata

[3] The first witness to give evidence on behalf of the Applicant was Ms Madhu Lata, a Labour Inspector who was charged with the task of investigating the death. The witness identified the

*Notice by Employer of Accident Causing Death to a Workman (Form LDC1)* that was provided to the Ministry of Labour on 19 May 2014. Within Part II of that Form, it was noted that the medical practitioner stated that the death arose out of a cardiac arrest from acute myocardial infarction. It was stated within the form, that the nature of the injury was “Physical Stress – Death Was Work Related”. According to the witness, the Employer was forwarded a notice of claim, however responded through its insurer, by disputing liability. In cross examination, the Witness indicated that she had physically attended the premises of Stone Designs International Limited (“**Stone Designs**”) and had found that the business was operating out of a villa. Ms Lata explained that her office was initially advised of the death of the Worker from one of his family members, although stated that she subsequently received a report of the death from Stone Designs following a request that had been provided to that company for information.

- [4] Ms Lata told the Tribunal that she went to Mr Hyer’s residence, but that he was not available on two occasions. Ms Lata stated that she did nonetheless take two statements from workers from Stone Designs, who spoke of their understanding of the management arrangements<sup>1</sup>. Ms Choo of Counsel, showed the Witness a ‘termination letter’ dated 9 April 2014<sup>2</sup>, where it states as follows:

*Dear Rakeshwar,*

*I am sorry but we have no more painting jobs for you. Your employment with us will end on Wednesday the 9<sup>th</sup> of April, coinciding with the end of this pay cycle.*

*As per our discussions you will now go work for Ronnie Hyer at Villa 144 Great Harbor Drive,*

*We wish you much luck in the future and will tell you if we ever need any more painting.*

*Sincerely*

*Russ Baumann  
Managing Director*

- [5] Ms Lata stated that at no point during the investigation had she been shown or seen the termination letter. In re-examination, the Witness reiterated that she had received the Form LDC1 from Stone Designs and it clearly bears the signature of its Managing Director dated 19 May 2014. The Witness was also referred by Ms Kadavu, to a letter that had been received by the Respondent on 22 July 2015<sup>3</sup>, in which the Managing Director of Stone Designs, Mr Russell Baumann, claimed that:

- 1. Mr Rakeshwar Sharma was not working for us on the day of his untimely death.**
- 2. Mr Rakeshwar Sharma’s death was not work related. He had no physical stress in his job.**
- 3. Mr Rakeshwar Sharma was single with no dependents.**

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<sup>1</sup> See Statement of Avinesh Dutt dated 29 September 2014.

<sup>2</sup> Exhibit R1 at Folio 1.

<sup>3</sup> On reflection the Tribunal finds this correspondence is self-serving. Why would an Employer who claims to no longer be the Employer, bother itself with claims about the physical stress in his new job or whether he had dependents or not, for the purposes of the Act?

Dr Rayoni Tikoinayau

- [6] Dr Rayoni Tikoinayau is an Occupational Physician engaged at the Ministry of Labour. Dr Tikoinayau provided a Death Case Medical Opinion on behalf of the Ministry and concluded that the heavy lifting that the deceased was reported to have undertaken at the time of the onset of his chest pain, could have triggered his cardiac arrest and therefore it is likely that the death was work related<sup>4</sup>. The medical expert explained for the Tribunal the way in which myocardial infarction is brought about and was of the view that physical exertion increases the cardiac activity, that in turn could give rise to a cardiac arrest.
- [7] During cross examination, Counsel for the Respondent put it to the Witness, that he was not a cardiologist and that there was no evidence that the Worker had a significant previous medical history. Dr Tikoinayau accepted that proposition and clarified the way that lifestyle factors and work stress, including physical stress, brought atherosclerosis that impacts on blood flow to and from the heart.

Mr Avinesh Dutt

- [8] The next witness called to give evidence for the Labour Office, was Mr Avinesh Dutt. Mr Dutt told the Tribunal that he lived in the same area as the deceased and claimed that the deceased had been working with Stone Designs in 2010, however left after one year<sup>5</sup>.

Ms Rajeshwari Chand

- [9] Ms Chand is the elder sister of the deceased and is an Early Childhood teacher. In her evidence, Ms Chand told the Tribunal that on the day of her brother's demise, that she received a telephone call from 'Paro' from Stone Designs. According to the Witness, upon learning that her brother had been taken to the Navua hospital she was subsequently contacted by her other brother Nilesh, to advise that the deceased had passed away. The Witness was of the understanding that Paro and Ronnie Hyer had taken the deceased to the hospital, but that only Nilesh remained with him at his final stages. According to the Witness, after her brother's funeral, "Ronnie gave me some documents" and told me that "this is now settlement done between Ronnie Hyer and Stone Designs"<sup>6</sup>.
- [10] During cross examination, Ms Choo asked Ms Chand, if she knew who 'Paro' was working for and the Witness said that she knew he was staying near their home. Ms Chand admitted to having "filled in the claim for compensation"<sup>7</sup> and understood at the time of her brother's death that he had been working for Ronnie Hyer. Ms Chand was shown copies of tax invoices issued by Stone Designs to Ronnie Hyer seeking payment for wages of Rakesh Sharma (See Exhibit L3). These documents were subsequently provided to the Labour Office by Ms Chand. According to Ms Chand, after her brother's death, her brother Nilesh went to Stone Designs and retrieved a bag and shoes in the company's possession. Ms Chand said that the deceased was the breadwinner for their mother, as her father had passed away in 2011.

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<sup>4</sup> See Folio 17 of the Applicants' Disclosures.

<sup>5</sup> The evidence of this Witness is hard to comprehend. If anything it works against the case of the authority.

<sup>6</sup> The documents relate to a series of invoices between Stone Designs and Mr Hyer, where the deceased was 'outsourced' to Mr Hyer as part of some form of labour hire arrangement.

<sup>7</sup> The Tribunal understands that this must relate to a claims processing procedure administered by the Labour Office.

## The Case of the Respondent

### Mr Russell Baumann

[11] Mr Baumann was the Managing Director of the Respondent, Stone Designs. Mr Baumann explained the nature of that business, which was essentially in the sourcing and installation of stone counter tops and also had an associated business operating under the name of Paradise Design, that operated as a wholesaler and retailer for kitchen and bathroom fit-outs. The Witness told the Tribunal, that his company presently employs around 50 employees. According to Mr Baumann, the deceased had previously worked for him before 2008 and left for a year or two, before coming back and asking for work. Mr Baumann told the Tribunal that in 2013, the deceased returned to work for just 12 months and then “Ronnie Hyer asked me could he come to his place”. Mr Baumann was referred by his Counsel to the termination letter (Exhibit R1) that he said was provided to the deceased on 9 April 2014. The Witness was shown a calculation of the pay entitlements for the deceased up and until the day prior to his demise<sup>8</sup> and stated that the Form LDC1 was only filled in by the company, at the insistence of the Labour Office.

[12] Mr Baumann claimed not to have provided the termination letter at the time of the request for other information from the Labour Office (See Exhibit R2), as it had not been requested. The Managing Director said that whilst the deceased was working for his company, he was rarely sick and absent from work and he had “never noticed anything wrong with him”. At the completion of the giving of his evidence, Mr Baumann was subsequently recalled to provide clarification regarding the Invoices that had been identified by Ms Chand. In that respect, Mr Baumann claimed that there was no such arrangement in place with Mr Hyer on or after 9 April 2014.

[13] At the conclusion of Mr Baumann’s evidence, the Tribunal was not satisfied with its understanding of the labour hire arrangements, so Mr Hyer was subpoenaed to give evidence in proceedings.

### Ronald Michael Hyer

[14] Mr Ronald (Ronnie) Hyer is a self-employed business person residing in the United States and Pacific Harbour, Viti Levu. According to Mr Hyer, he became aware of the deceased Mr Sharma and knew that he was working at Stone Designs as a painter. Mr Hyer gave evidence that he was advised by Russell Baumann that he had a “great painter” and that he was running out of work for him at the factory and home. The Tribunal heard that the agreed method of payment would be that Mr Hyer would report the number of hours of work that Mr Sharma was deployed, that Mr Hyer would be invoiced and pay the amount owing and that Stone Designs would pay direct into the deceased’s account. The Witness was shown Folios 13 to 16 (Exhibits L3(a) to (d)) and explained that upon invoice, he would make payment at Stone Designs Office. According to Mr Hyer, “ I didn’t pay the Worker, I understood direct deposit.”

[15] Ms Kadavu asked of the Witness, how it was that the deceased came to work at his home on the day of his demise. Mr Hyer said that he was contacted by Mr Baumann and “the arrangement was in my understanding exactly the same”. On the day in question the deceased “showed up at 8.00 am to paint the house”. Mr Hyer told the Tribunal that some time later, a worker by the name of Parmesh came upstairs and said “Ronnie, Ronnie, the painter is having problems”. The Witness stated that two of his workers brought the deceased into the house and that he was sweating profusely with a high heart rate. The Witness stated that the deceased was in distress asking for his mother and brother and that he was taken to the Navua hospital. Mr Hyer said that when he arrived with Mr Sharma to admissions that he was attended to by several visiting

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<sup>8</sup> See Folios 7 and 11 of the Applicant’s Disclosures.

doctors, however there was no medication at the hospital to reduce the fibrillation<sup>9</sup>. Mr Hyer said that after two hours, he was advised at the hospital that Mr Sharma was ok and that the hospital would be transporting him to Suva. Mr Hyer said that he proceeded to drive to Suva and that as soon as he arrived,<sup>10</sup> he had received a phone call from Parmesh to say that Mr Sharma had passed away. The Witness stated that the following morning, he was contacted by a worker from Stone Designs who said that they were “wanting a statement and also a bag”. According to Mr Hyer, he phoned Stone Designs and said “slow down”. Mr Hyer told the Tribunal that he thought it was “amazing” that Stone Designs claimed to have terminated Mr Sharma’s employment only two days prior to this incident. The Witness said that at no stage during any subsequent email correspondence between himself and Mr Baumann was there any mention of the deceased having been terminated two days prior.

[16] In cross examination, Mr Hyer stated that he had known the deceased from the time that he had been working at Mr Baumann’s house in 2013 and understood that he was one of his workers. Ms Choo took the Witness to the invoices raised by Stone Designs<sup>11</sup> and said that it may have been possible that there were other occasions in which the deceased had worked at his home under this arrangement, for which he did not have invoices. Mr Hyer clarified what transpired when the deceased arrived at his home on 11 April 2014 to paint the downstairs and explained that he was shown the area to paint. According to the Witness, it had not been determined what was going to be the extent of the works, as the deceased had a heart attack whilst setting up. Mr Hyer was asked by Counsel, what became of the other two men who had assisting transporting the deceased to the hospital on the day in question and advised that ‘Paro’ had died and Parmesh now worked at a resort”. The Witness was taken to his earlier written statement provided to the Ministry (Exhibit L4), where it suggested that the incident took place at around 8.15am and was asked to explain why the hospital report gave the arrival time at the hospital as 10.20am. Further, Counsel put to the Witness, that the time of death was identified as 2.45pm and that this four hour period did not coincide with the version provided by Mr Hyer, where he claimed to have driven to Suva after Mr Sharma was stabilised. The Witness maintained his version of events insofar as the sequence was concerned. Ms Choo asked of the Witness, did he consider calling Mr Baumann and advising him of the death, to which the witness replied that he had and was told, “Is it a bad joke?”

[17] Mr Hyer denied having provided Ms Chand with invoices on the day of her brother’s funeral and also denied stating to her at that time, that the deceased was an employee of Stone Designs. In relation to the termination letter (Exhibit R1), the Witness told the Tribunal, that he had no idea that Mr Sharma had been terminated in his employment on 9 April 2014. Mr Hyer conceded that he could provide no other evidence supporting the arrangements he said were in place. In relation to the deceased’s ‘black bag’, Ms Choo referred the Witness to the earlier version of events that he provided in a statement to the Labour Office, as to how the bag was retrieved and despite the apparent inconsistency, stated that he stood by that statement. The Witness was taken to an email communication between himself and Mr Baumann on 15 April 2014 at 5.37pm ( Exhibit R1) and it was put to him, that he had given the bag to Erik, an employee of

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<sup>9</sup> The Tribunal is not entirely convinced of that fact, as the Medical Report of Dr Kaurasi of the Navua Hospital dated 12 May 2014, speaks of giving the deceased “one dose of defibrillation”.

<sup>10</sup> During the giving of this evidence, the Tribunal understood it meant for the purposes of meeting the transported patient to the hospital in Suva. It is noted within Exhibit R4, that in his Facebook post, Mr Hyer claimed to have “left to do a few things”.

<sup>11</sup> Exhibit L3.

Stone Designs. Mr Hyer, responded by saying that he was not aware of any bag at the time<sup>12</sup>. Mr Hyer further confirmed that in the statement he provided to the Ministry some three years later, that he maintained he still had no knowledge of the bag. The Witness was further referred to the email communication of 15 April 2014 at 5.37pm Exhibit R1), where he wrote:

*“let’s let the sleeping dog lie and approach the situation properly should it become necessary”.*

[18] Mr Hyer conceded that he was in collusion with Mr Baumann, as his friend. Ms Choo referred the Witness to the email communication of 16 April 2014 at 6.46pm, where he wrote to Mr Baumann and Ms Foster:

*The truth was easy ..Now you have a mess.. He had left your shop to come work at my house.. He was not an employee of Stone Interiors now was he my employee... easy and simple answer. If he had been your employee at any time... he had benefits even after death.. and THAT was what they were looking for .. They just needed comforting and direction.*

[19] And further where he wrote on 15 April 2014 at 7.39pm:

*I would never tell anyone that you were paying him on your payroll and say that he was just working for me.. Deals off bud.*

[20] Ms Choo put to the Witness that this was just an effort to ‘push the blame’. Mr Hyer did not accept that proposition. Further, Counsel provided the Witness with extracts from his Facebook postings of that same day (Exhibit R4), where he wrote:

*This morning I had to take my friend and painter Ricas to the hospital with chest pain. He has been working here at the house off and on for at least a year. They got him stabilized. I talked to him and left to go do a few things. They called soon after I left to say he had just passed away. ..30 years old and a good sweet guy.. Gonna miss you Ricas.. Tough day.*

[21] Counsel challenged the Witness as to the statement that the deceased had been working with him for over a year and again it was put to Mr Hyer, that he had engaged Mr Sharma as his employee. Mr Hyer rejected that notion and restated that there was simply no evidence to show that he was his employer. In re-examination, Mr Hyer said that at no stage did he provide the documents to Ms Chand on the day of the funeral, but admitted that they were given to the family at the ‘13 day ritual’ following the death. The Witness reinforced that he had only come to know Mr Sharma through his employment with Stone Designs and the arrangement that was in place was the only one that he knew. In relation to the request by an employee of Stone Design that he provide a statement and return a bag belonging to the deceased, Mr Hyer stated *“that he can definitely recall Erik coming to the house asking for a statement to defend liability, but cannot recall if he gave him a bag”.*

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<sup>12</sup> This evidence appears contradictory from the Evidence in Chief, where Mr Hyer had stated that the day following Mr Sharma’s demise; he was contacted by a worker from Stone Designs who said that they were “wanting a statement and also a bag”.

## Was the Deceased a Workman for the Purposes of the Act?

[22] Section 2 of the *Workmen's Compensation Act 1964* defines workman (Worker) to mean:

*any person who has, either before or after the commencement of this Act, entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, or otherwise, whether the contract is expressed or implied, is oral or in writing, whether the remuneration is calculated by time or by work done, and whether by the day, week, month or any longer period:*

*Provided that the following persons are excepted from the definition of "workman":-*

*(a) a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, not being a person employed for the purposes of any game or recreation and engaged or paid through a club;*

*(b) an outworker;*

*(c) a member of the employer's family dwelling in the employer's house or the curtilage thereof; or*

*(d) any class of persons whom the Minister may, by order, declare not to be workmen for the purposes of this Act.*

## The Employment Status of the Deceased

[23] Mr Baumann in his evidence, indicated that the deceased commenced working for him in 2008. The Statement of Ms Rajeshwasi Chand provided to the Labour Office on 23 April 2014, confirms that fact<sup>13</sup>. From the combined evidence, it would seem that Mr Sharma, worked for several years as an employee of Stone Designs and thereafter resigned in or around 2011, where according to his sister, he stayed home for two years. In 2013, the Respondent claims to have re-engaged Mr Sharma under a verbal arrangement and he was placed on the payroll<sup>14</sup>.

[24] It would appear that on at least four occasions, Stone Designs issued invoices to Mr Hyer for works performed by Mr Sharma<sup>15</sup>. The period of those works is from 1 August 2013 to 24 October 2013, although it seems that there is some duplication of the dates and charges<sup>16</sup>. The Labour Office did not provide to the Tribunal the Time and Wages records of the Respondent for this period. That would have been one useful source to have verified the employment status of the deceased at the various time periods in question. In any event, the Respondent claims that a termination letter was provided to the deceased on 9 April 2014, bringing to an end the employment contract. The claim is, that the Worker could not read and so did not understand the thrust of what the correspondence contained. It was submitted by the Respondent, that the deceased returned to the workplace the following day and was allowed to remain, although on 11 April 2014, he commenced work for Mr Hyer.

[25] Mr Hyer on the other hand, stated that he assumed that the same arrangement as had been previously in place, was to apply and that he was to be invoiced for the works by Stone Designs. The only other complication to the analysis, is that the Employer now claims that it had

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<sup>13</sup> See Applicants Supplementary Disclosures filed on 1 February 2017.

<sup>14</sup> See Factual Nexus provided by the Respondent within its Closing Submissions filed on 22 June 2017.

<sup>15</sup> See Exhibits L3(a) to (d).

<sup>16</sup> Note that Exhibits L3(b) and (d) bear the same Invoice No 00001558, despite having different money amounts.



terminated the employment arrangement with the deceased on 9 April 2014. If that was the case, then it begs the question whether Mr Sharma was acting as an independent contractor to Mr Hyer. There is certainly no evidence to suggest that he was his employee. The Tribunal does not accept that all of a sudden Mr Sharma had decided to start up work as an independent contractor. That makes no sense at all, particularly if one was to accept the Respondent's version of events, that the deceased was not even aware of the implications of the termination letter given to him, because he could not read. The Tribunal does not accept that the employment contract between Mr Sharma and Stone Designs had come to an end. There are a couple of reasons for making this finding.

#### *The Termination letter dated 9 April 2013*

- [26] First and foremost, within the Response that was provided to the application, the Respondent stated that because of the deceased's illiteracy, he could not comprehend the contents of the said letter. Why then was it written in the terms that it was? Consider the second sentence to that letter, where it states, "*As per our discussions you will now go work for Ronnie Hayer (sic).....*". If it was the case that Mr Sharma could not read, it would make no sense to include those words within that letter. More practically, any arrangement between Mr Hyer and the deceased, if there was to be one, would have been part of a completely separate discussion. The letter very much looks like a self-serving attempt to coincide with Mr Baumann's version of events. Ms Lata, the Investigating Officer said at no time was this termination letter brought to her attention by the Respondent. Mr Baumann claims that it was not asked for within the email request made to the company by Mr Qiodravu in his email communication dated 1 May 2014,<sup>17</sup> however the Tribunal finds that explanation less than credible.

#### *The Request to Complete the Form LDC1*

- [27] The request to complete the Form LDC1, *Notice By Employer of Accident Causing Death to a Workman*, that was made by the Labour Office to the Respondent on 1 May 2014, is quite a straight forward one. The correspondence commences, "I refer to the above named workman (deceased) an employee of your company who passed away on 11.04.14.....I am currently investigating this matter and request that you fill the required LD form C/1 notification form and forward the same to our office..".
- [28] In response to this request, the Respondent completed the form and submitted it on 19 May 2014. Within that form, the Respondent entered its name as the Employer and included the name of its insurer. In addition, the Respondent provided a report from the Navua Hospital as an attachment to the description of the accident/death and the document was duly signed by Mr Russell Baumann as the Managing Director. It begs the question, if the owner of a company with 50 employees genuinely believed that he was no longer the employer of the deceased and he had been terminated in his employment, it would have been a very simple exercise to provide proof of that situation by submitting the termination letter at that time and on that basis refusing to complete the Form LDC1. This did not take place.
- [29] According to the deceased's sister Ms Chand, in her written statement<sup>18</sup> she understood the duties of her brother to include "*the painting of villas, doing finishing touches, he also worked in the workshop. He even did work at the owner's villa when instructed to*". The Tribunal is satisfied that the deceased was an employee of Stone Designs International Limited at the time

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<sup>17</sup> See Exhibit R2.

<sup>18</sup> See Applicants Supplementary Disclosures filed on 1 February 2017.

of his demise and that he had been working under an outsourcing arrangement that had been entered into between Mr Hyer and that company. The Tribunal is satisfied that the deceased was a workman for the purposes of Section 2 of the Act.

### **Was the Respondent the Employer of a Deceased Workman?**

[30] Section 3 of the Act, reads:

*"employer" includes the Government and any body of persons corporate or unincorporate and the personal representative of a deceased employer, and, where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person; and in relation to a person employed for the purposes of any game or recreation and engaged or paid through a club, the manager, or members of the managing committee of the club shall, for the purposes of this Act, be deemed to be the employer;*

[31] For the reasons provided above, the Tribunal is satisfied that the Respondent is the employer for the purposes of Section 3 of the Act.

### **Did the Worker Suffer a Compensable Injury?**

[32] Section 5(1) of the *Workmen's Compensation Act 1964* 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, his employer shall, subject as hereinafter provided be liable to pay compensation in accordance with the provisions of this Act ....*

[33] It appears well accepted that there are three requirements to satisfy Section 5(1) of the *Workmen's Compensation Act 1964*.<sup>19</sup> These are:-

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

### **Did the Worker Suffer A Personal Injury by Accident?**

[34] Pathik J in *The Fiji Sugar Corporation Limited v Labour Officer*<sup>20</sup> set out in detail what was to be meant by the expression "injury by accident". Citing the 32<sup>nd</sup> Edition of Willis' *The Workmen's Compensation Acts 1925 to 1938*, his Honour referred to the passage within that text, where the definition of accident was considered at page 8 and it is stated:

*The word 'accident' does not necessarily involve the idea of something fortuitous and unexpected as formerly held. ..it includes injury caused by overexertion in the ordinary course of employment...*

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<sup>19</sup> *Raiwaqa Buses Ltd v Labour Officer* [2011]FJHC174; HBA23.2008 (18 March 2011)

<sup>20</sup> [1995] FJHC 39; Hba0010j.94b (17 February 1995)

[35] His Honour referred to the case of *Fife Coal Co Ltd v Young*<sup>21</sup> where it was held by Lord Aitkin, that

*It is necessary to emphasize the distinction between "accident" and "injury", which in some cases tend to be confused... it is now established, however, that apart from external accident, there may be what no doubt others as well as myself have called internal accident (underline mine for emphasis).... A man suffers from rupture, an aneurism bursts, the muscular action of the heart fails while the man is doing his ordinary work, turning a wheel screw, or lifting his head. In such cases, it is hardly possible to distinguish in time between accident and injury. The rupture which is accident is at the same time injury, from which follows at once, or after a lapse of time, death or incapacity.*

[36] Finally, Pathik J within his decision, referred to the case of *Fiji Industries Limited v Ateca Dretirewa*,<sup>22</sup> where Ashton-Lewis J stated:

*Thus it would appear that the law has developed to the point where there is now no requirement that the event causing the injury is unexpected or not designed, it being sufficient that the injury itself (ie the heart attack) is unexpected or not designed by the worker.*

[37] Twelve years later, in *Wati v Emperor Gold Mining Company Ltd*,<sup>23</sup> a Full Court of the Fiji Court of Appeal, stated

*Lord McNaughten (sic) said in Fenton v Thorley and Co Ltd. [1903] AC 443, 448:*

*"... the expression "injury by accident" seems .... to be a compound expression. The words "by accident" are, I think, introduced parenthetically as it were to qualify the words "injury", confining it to a certain class of injuries, and excluding others, as, for instance, injuries by disease or injuries self-inflicted by design."*

*.... The speech of Lord Wright in Dover Navigation Co and Craig confirms that, in construing provisions in the form of s.5(1) of the Act, two requirements must be satisfied. The expression "in the course of employment" means that the injury must have happened during the employment. The expression "arising out of", when coupled with the conjunctive "and" in that provision, means that the injury must also be associated with some incident of the employment. In Australia since 1926, the disjunctive "or" has by amending legislation been substituted for the word "and" in this statutory collocation, while the word "injury" has been extensively redefined.*

*However, as Fullager J said in Kavanagh v Commonwealth [1960] HCA 25; (1960) 103 CLR 547, 558, a consideration of the earlier cases shows that the effect of requiring a causal connection between injury and employment "is always attributed to the words "out of" and not to the words "in the course of". The former imports causation; the latter words do not. See also Kavanagh v Commonwealth (1960) 103 at 547, 556, per Dixon CJ.*

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<sup>21</sup> (1942) AER HL 85 at 91

<sup>22</sup> (Civil Appeal 15/92)

<sup>23</sup> [2007] FJCA 20

*Because of the impact of these legislative amendments, it will do no one any good to be taken in detail through the vast amount of authority that has been accumulated in Britain and Australia on these expressions. We nevertheless find it useful to refer to what was said by Brennan CJ, Dawson and Gaudron JJ in Zickar v MGH Plastic Industries Pty Ltd .(1996) [1996] HCA 31; 187 CLR 310, 315 - 316, concerning the prototype legislation:*

*"Under the English Acts, the consequence of the progress of a disease did not constitute 'personal injury by accident' unless some event that occurred in the course of the employment contributed to that consequence. The cases drew a distinction between injuries to which employment has contributed and injuries which are solely a consequence of progressive disease."*

*We consider that this statement briefly, but accurately, reflects the state of the law not only as it was in England, but as it is in Fiji under the Act.*

[34] The medical certificate issued by the Navua Hospital on 14 April 2014 indicates that the condition leading to the death, was a cardiac arrest. In the subsequent medical report provided by the Navua Hospital dated 12 May 2014, it states that the patient presented with sudden onset central chest pain, profuse sweating and dizziness. The report notes that Mr Sharma had stated that these symptoms began while he was doing some heavy lifting at his place of work, between 0800 and 0900 hours. The report also noted that in the electro cardiograph monitoring, it showed that the deceased had been suffering from ventricular tachycardia, an irregular beating of the heart. That report stated that the cause of death was assessed to be Cardiac Arrest from an Acute Myocardial Infarction that was complicated by Ventricular Tachycardia<sup>24</sup>.

[35] This first limb is satisfied.

#### Was the Worker's Death by Accident Arising Out of Employment?

[36] Pathik J in *Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu*<sup>25</sup>, sets out the relevant considerations when determining whether or not a worker suffered an accident arising out of employment. His Honour relied on Lord Sumner's characterisation in *L & YR v Highley*<sup>26</sup> to apply the following test:

*"... Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment. To ask if the cause of the accident was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or, conversely, was an added peril and outside the sphere of the employment, are all*

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<sup>24</sup> During the evidence of Dr Tikoinayau, it was understood that Ventricular Tachycardia was a form of irregular and rapid heart beating.

<sup>25</sup> [1994] FJHC 180

<sup>26</sup> (1917) AC 352 at 372

*different ways of asking whether it was a part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was whereby in the course of that employment he sustained injury.*

[37] As his Honour further stated:

*The expression is not confined to the mere "nature of the employment" as formerly held in several cases, but it "applies to the employment as such - to its nature, its conditions, its obligations, and its incidents.*

[38] Again because of the conflicting evidence of the parties, some degree of forensic examination of this point is required.

*What Was the Worker Doing at the time of his Demise?*

[39] Mr Hyer gave evidence that the deceased was preparing to commence his painting tasks on the day of his demise. The following questions and responses arose out of cross examination.

**Ms Choo:                   What was the plan, what was he going to do?**

**Mr Hyer:                   Had yet to be determined... while setting up he had a heart attack.**

**Ms Choo:                   No Heavy Lifting? (referring to the medical report from Navua Hospital)**

**Mr Hyer:                   I don't care what the medical report or what he said before he died.**

[40] According to the medical report provided by the Navua Hospital, Mr Sharma had stated that his symptoms "began while he was doing some heavy lifting at his place of work". Unfortunately, the Investigation that was undertaken by the Labour Office failed to particularise exactly what was being done at the time in which the worker fell ill. This is a fundamental piece of the jigsaw and it is imperative that the Ministry ensure that it captures such information for the purposes of its investigations. It seems most likely that the deceased was going to perform painting duties. Whether the deceased was preparing scaffolding, moving ladders or moving other heavy items out of the way in preparation for the task, is just not clear on the evidence. Nonetheless, it appears that Mr Sharma was undertaking preparation activities under the guidance of Mr Hyer at the time of his demise, although as no statements were taken from either Messrs Paro or Parmesh who were also at the premises at that time, it is not something that the Tribunal can make any conclusive findings about. Regardless, the Tribunal accepts that the deceased had been involved in heavy lifting associated with his employment, at the time of the onset of his heart attack.

[41] In cases of this type, the Employer has the responsibility to deploy its workers to undertake tasks at its own risk. It is the Employer's responsibility to ascertain whether or not its workers are fit to undertake the tasks for which they are deployed. In this regard, the consequences that flow, where no such precaution is exercised, falls on the employer, not the employee. As the Tribunal has already determined that these works were part of an outsourcing arrangement between Stone Designs and Mr Hyer, the onset of the heart attack arose out of the employment. If the terms of that arrangement were breached, for example, where the deployed worker was undertaking tasks that were not envisaged within the terms of the outsourcing agreement, such as, that it was specifically agreed that the employee should avoid

heavy lifting, then that is an issue of contract. If a third party was required to indemnify the Principal against any loss for injury or illness, again that is an issue at contract. Neither case creates any defense within the statutory scheme provided. The second limb has been satisfied.

### In the Course of Employment

[42] In *Travelodge*, Pathik J stated:

*The two conditions which must be fulfilled before an accident can be said to have occurred "in the course of employment" are:*

*(a) the accident must have occurred during the employment of the workman and*

*(b) it must have occurred while he was doing something which "his employer could and did, expressly or by implication, employ him to do or order him to do"*

[43] The Tribunal is satisfied that these two elements have been satisfied. There appears no doubt that the deceased Worker had been deployed to work at the residence of Mr Hyer and that he had been directed to undertake preparation activities, that appear to have involved heavy lifting, prior to commencing the painting of the downstairs of his property. Such an arrangement is caught by Section 23 of the Act, that ensures the liability for compensation in such circumstances remains with the Principal to that contract.

### **Conclusions**

[44] Having regard to the totality of the evidence before it, the Tribunal is satisfied that the claim for compensation has been made out and that the deceased's mother is a dependent for the purposes of the Act. There are a couple of other issues here that cannot go without some comment. Firstly, the Labour Office has failed to comply with the Directions of this Tribunal to file Closing Submissions. Given the time period that has passed, the Tribunal had no intention of waiting any longer for these. The Ministry cannot pick and choose when it will and won't submit to the Directions of this Tribunal. It is simply unacceptable that the family of the deceased have had to wait so long for the resolution of this matter.

[45] Further, the email communications between the Respondent and Mr Hyer as contained within Exhibit R1, are a dreadful reflection on both parties. That a worker's life can form the basis of such ugly discussions, where both parties are wanting to avoid any responsibility for the death of a worker at work, particularly in these circumstances, is a very sad state of affairs.

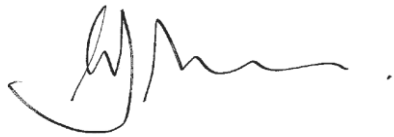
[46] The Tribunal accepts that the deceased's mother was dependent on his earnings at the time of his demise. The Tribunal does not accept that the sister, Ms Chand was dependent on his earnings and there is no evidence to that effect. The case of the Labour Officer is made out and in accordance with the formula set out within Section 6 (a) of the Act as it was in place, an amount of \$24,000.00 will be awarded. In addition, in accordance with Order 32 Rule 8 of the *Magistrates Court Rules 1945*, interest shall be awarded as and from the date the application was filed, being June 2016. An interest amount calculated at the rate of 5 percent per annum for 1075 days up and until the date of this decision, shall also be awarded in the amount of \$3,666.00. A set off of \$666.00 will be deducted from that interest calculation, on the basis that the Respondent should not be held responsible for the delays of the Ministry in finalising its

submissions. Further, as the Labour Office has caused undue delay in the finalisation of this matter, each side shall bear their own costs.

**Decision**

[47] It is the decision of this Tribunal that:

- (i) The Respondent pay compensation to the Labour Officer on behalf of the dependent of Rakeshwar Sharma, in the amount of \$27,000.00, within 28 days hereof.
- (ii) Each party shall bear their own costs.



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