Corrected Decision

Employment Relations Tribunal

Title of Matter:	**LABOUR OFFICER on behalf of Mohammed Azim**	**(Applicant)**
	v	
	SMART CHEF (FIJI) LTD	**(Respondent)**
Section:	**Section 8 *Workmen's Compensation Act* 1964**	
Subject:	**Compensation in the case of permanent partial incapacity**	
Matter Number(s):	**ERT WC 122 of 2018**	
Appearances:	**Ms R Kadavu, for the Labour Officer** **Mr S Nath, General Manager Operations, on behalf of the Respondent**	
Date of Hearing:	**30 April 2019**	
Before:	**Mr Andrew J See, Resident Magistrate**	
Date of Decision:	**3 June 2019**	

KEYWORDS: Section 8 *Workmen's Compensation Act* 1964; Claim for Compensation in case of Permanent and Partial Incapacity .

CASES CITED:

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)

Background

[1] This is an application made for worker's compensation in accordance with Sections 8 of the *Workmen's Compensation Act* 1964. The application filed on 26 March 2018 , claims that on 18 February 2015, the workman Mr Mohammed Azim, suffered an injury whilst undertaking carpentry duties at the workplace. The particulars of the claim for injury based on a permanent partial impairment of 8 percent, state that the injured worker was holding a steel pole propped to scaffolding, when it rolled on his shoulder.

[2] The medical information provided by the Labour Officer within its Disclosure Documents, show that the worker was discharged from the CWM Hospital following the accident, whereby he was diagnosed with an anterior vertebral body fracture.

[3] A *Report for Permanent Medical Impairment* prepared by Dr Tikoinayau of the Ministry of Employment, Productivity & Industrial Relations, undertook a final assessment of the Worker on 25 January 2017 and calculated the percentage Impairment of the whole person, as being at 8 percent. Based on the formula contained at Section 8(1) of the Act, the calculated statutory entitlement for such injury, where it arises out of the employment, is $4,747.81[1].

The Case of the Labour Officer

[4] Ms Virisila Ratu, was the first witness called by the Applicant in her capacity as the Labour Inspector who undertook the investigation of the accident. According to Ms Ratu, the Employer notified the Ministry on 1 April 2015 and thereafter she prepared a Notice of Claim based on the statutory formula as provided for within the legislation. The second witness called was Dr Tikoinayau, who confirmed his assessment of the permanent impairment.

[5] The worker, Mr Mohammed Azim gave evidence to say that he had worked at Smart Chef in 2015 and had provided a Statement to the Labour Office on 30 October 2017[2]. According to the Worker, on the day of the incident, he had advised his 'boss' that he needed help to lift a beam and was advised to organise with some other employees to help him with the task. Mr Azim told the Tribunal that the men did assist, but let go of the beam, that ended up striking his back. In cross examination, Mr Nath for the defendant employer, put to the Worker that his injury was exacerbated following the accident, by undertaking heavy lifting work since that time. Mr Azim rejected that proposition.

The Case of the Employer

[6] The Employer has provided two submissions to the tribunal in defense of its position. The first dated 24 January 2019 and the second following the conduct of the hearing on 30 April 2019. case. Within the submission dated 24 January 2019, the Company lays the blame on the injured worker for "not assembling the safety equipment fully." It is said that such an event would not have occurred had the worker followed company safety procedure. It was also argued that such breach of procedure was a violation of the terms of the worker's employment contract with the company. The submissions dated 30 April 2019, do no more than repeat the same arguments that were earlier advanced.

Was Mr Azim a Workman for the Purposes of the Act?

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

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1 See Exhibit L3.

2 See Exhibit L5.

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.

[8] The Tribunal is satisfied that at the time of the injury, Mr Azim was a workman for the purposes of Section 2.

Was the Respondent the Employer of the Workman?

[9] 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;

[10] There is no dispute before the Tribunal, that the Employer was not captured by the definition at Section 3 of the Act.

Did the Worker Suffer a Compensable Injury?

[11] 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 ....

[12] It appears well accepted that there are three requirements to satisfy Section 5(1) of the *Workmen's Compensation Act* 1964.[3] These are:-

(i) Personal injury by accident;

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

(ii) Arising out of employment;
(iii) In the course of employment.

Did the Worker Suffer A Personal Injury by Accident?

[13] Pathik J in *The Fiji Sugar Corporation Limited v Labour Officer*[4] set out in detail what was to be meant by the expression "injury by accident". The Employer's own submissions concede that the Worker was taken to the CWM Hospital following the accident. The discharge summary from that hospital, indicates that Mr Azim had suffered from an anterior vertebral body fracture. This first limb is therefore satisfied.

Was the Worker's Accident Arising Out of Employment?

[14] Pathik J in *Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu*[5], 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*[6] 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 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.*

[15] 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.*

[16] The Worker was injured whilst undertaking work at a worksite in his capacity as a carpenter. In his statement provided to the Labour Officer dated 30 October 2017, he stated that:

> *We were building the shade for the company in Tamavua… while lifting the steel beam with two other staff to put it on top of the post when the two staff suddenly move out and because of the weight I could not lift and the steel beam hit my back.*

[17] The Tribunal is satisfied that this limb is established.

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4 [1995] FJHC 39; Hba0010j.94b (17 February 1995)
5 [1994] FJHC 180
6 (1917) AC 352 at 372

In the Course of Employment

[18] 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"*

[19] The Tribunal is satisfied that these two elements have been met. The Employer has conceded that the Worker had been deployed to the job site and he was engaged in activities on behalf of the company. It is immaterial to this point, whether it is alleged that the Worker was following relevant safety procedures, there is no evidence of what those procedures were and in any event unless the allegation was one of serious and wilful misconduct or deliberate self injury, the primary obligation imposed on business for the health and safety of its workers falls on the business, not the workers.

Other Issues

[20] The Employer's case seems to rely on the fact that the Worker had not properly constructed the scaffolding on site, prior to commencing work, however has failed to link that fact, even if it could be established, with the issue of the workers lifting a steel pole, without any other form of support (such as a sling, elevated working platform or whatever). Neither has the Employer been able to provide any evidence as to what procedures should have been in place for the manual lifting of the pole. It is noted within the Applicant's Disclosures that in a statement provided by a Mr Mohammed Akhil to the Ministry on 5 December 2017, that he stated:

> *I was present at the scene of injury…There was about 3-4 people with him while lifting the metal. I was also one of them. There was less man power on that day. We requested for more manpower and crane which we were not provided with. … No safety belt and helmet provided… The manager was aware of the incident but they did not take any action.*

[21] Whilst it is accepted that this is only hearsay evidence, as the witness was not called to give evidence, it certainly was a statement taken by the Ministry as part of its investigation and the issues raised support the views of the Tribunal that the correct method of lifting the pole, was an issue that was not established by the Employer. In any event, that is not the primary issue. The principal obligation for the safety of workers at work under the *Health and Safety at Work Act* 1996, rests with the Employer, not the employee. In relation to liability for workplace accidents under the *Workmens Compensation Act* 1964, the only exclusion in such cases for not meeting any statutory claim, comes about in the case of serious and wilful misconduct that causes the accident, or in the case of deliberate self injury[7].

[7] See Section 5 of that Act.

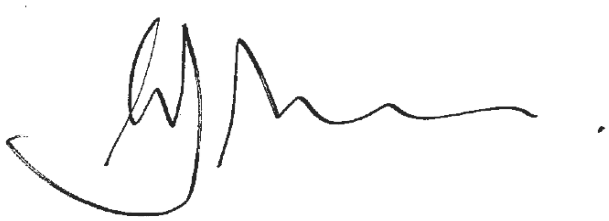
[22] The Employer has not established any defense so as to avoid liability. The basic facts remain, an accident took place, whilst the worker was undertaking his ordinary work, doing something his Employer had requested him to do. The Employer has established no reason why it is not liable for the compensation. Cases of this type, that are resisted without a proper appreciation of the law, simply cause unnecessary costs to all concerned. In this regard, the Tribunal will summarily assess costs to be awarded to the Ministry in the amount of $1500.00.

Decision

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

(i) The Respondent pay compensation to the Labour Officer on behalf of the injured Worker, the amount of $4,747.81, within 28 days hereof.

(ii) The Respondent pay costs to the Labour Officer, summarily assessed in the amount of $1500.00, within 28 days hereof.



Mr Andrew J See
Resident Magistrate