

Decision



Employment
Relations Tribunal

Title of Matter: LABOUR OFFICER on behalf of the Dependents of the Deceased, Brian Tubailagi Work (Applicant)
v
ROAD SEALING SERVICES LIMITED (Respondent)

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

Subject: Compensation for death arising out of accident

Matter Number(s): ERT WC 115 of 2018

Appearances: Mr J Lanyon and Ms M Hussain, Law Solutions
Ms R Kadavu, Labour Office

Date of Hearing: 13 November 2018, 2 September 2019

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 15 October 2019

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

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)

Labour Officer v Fiji Meat Industry Board [2018] FJET9; ERT WC 107 of 2016 (12 February 2018).

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; (11 November 2013)

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 5 of the *Workmen's Compensation Act 1964*. The application filed on 21 March 2018, claims that on 11 June 2013, the deceased suffered a personal injury by accident arising out of and in the course of his employment. At the time of his demise, the deceased was employed as a digger by the defendant company. Whilst staying at the defendant's campsite and undertaking work in

Sigatoka, the Worker suffered from a congestive cardiac failure and died before reaching the local hospital. The Employer alleges that the death was not work related as the Worker was said to be a heavy smoker and drinker¹.

The Case of the Labour Officer

Dr Rauni Tikoinayau

[2] The first witness to give evidence for the Labour Officer was Dr Tikoinayau, who is an expert medical officer engaged by the Ministry to undertake all assessments on workers compensation injury and death cases. Dr Tikoinayau has extensive experience and qualifications in occupational medicine. Dr Tikoinayau had been called upon to provide a medical assessment of the Worker, and to give an opinion as to the cause of his death and whether or not it was work related. The medical witness told the Tribunal that the Worker had been suffering from ischemic heart disease as well as hypertension and that the fatality came about as a result of a congestive heart failure. Reliant on the job information provided to him by the Labour Office, Dr Tikoinayau indicated that the vibrating impact of heavy machinery, coupled with heat, sun glare, dust and effort, would have had the combined effect of placing stress on the heart of the deceased, that in turn gave rise to the heart attack.

[3] During cross examination, the medical expert acknowledged that his assessment report was completed three years after the death of the Worker and said that the documents he relied upon when reaching his view, were the investigating officer's report, as well as the death certificate. Dr Tikoinayau accepted that the Worker had pre-existing ischemic heart disease, though was nonetheless of the opinion that the cardiac failure was work induced.

Labour Officer Qiodravu

[4] At the relevant time, Mr Qiodravu was a Labour Officer (Workers Compensation), employed at the Ministry of Employment, Productivity & Industrial Relations. Mr Qiodravu advised the Tribunal that he had been informed of the Worker's death through the deceased's son, and then made contact with the company seeking to commence his investigation. According to the Labour Officer, the Respondent company had failed to notify the Labour Office of the fatality as required under the Act. Mr Qiodravu gave evidence that he had conducted his investigation, acquired a report from the medical assessor as to the cause of the death and then subsequently forwarded a claim of compensation to the Respondent, seeking payment in accordance with Section 6 of the Act. During cross examination, the witness was challenged as to the working hours undertaken by the deceased and conceded that the work times identified in a statement provided by a former co-worker Mr Natubavivi, may not have been accurate.

Mr Waisale Natubavivi

[5] Mr Natubavivi was also employed at the Valley Road project by the Respondent employer. The witness gave evidence that he had provided a statement to the investigating officer that described the conditions of work and the lengthy hours that were worked by the construction team, on the new Valley Road. The Witness stated that at the time of his demise, the Worker had been undertaking the role of a machine operator and driver. In his evidence, Mr Natubavivi stated that whilst working on that project, he worked seven days a week from 8.00am to

¹ See Respondent's (Defendant's) Answer to Notice filed on 23 July 2018.

5.00pm. According to the witness, the weather at that time was very hot. Mr Natubavivi told the Tribunal that on the night of his demise, the workers had been sharing some bowls of grog and then "something happened". The Witness stated that the deceased was suffering from "pain in the stomach" and several of the workers sought to take him to the Sigatoka hospital. According to the Witness this all took place in the presence of the works supervisor Mr Singh and the employer was notified of the event. During cross examination, the Witness conceded that the deceased was a heavy smoker and consumed kava. The Witness was asked by Mr Lanyon was he aware that the deceased had been suffering a heart condition, to which he replied, yes. During re-examination Mr Natubavivi stated that the supervisor had requested the workers on the project to work overtime and that they in turn would follow that request.

The Case of the Employer

Mr Jeremiah Kalokalo

- [6] Mr Kalokalo had worked in his capacity as the Respondent's Human Resource/Admin Officer since 2006 and told the Tribunal that he knew the deceased during the period 2010 to 2013. According to the Witness, when the worker commenced his employment with the Respondent, the company was unaware that he had heart problems. Mr Kalokalo said that the Worker was related to the Director of the company and was offered a job. According to the Witness, in 2012, the deceased was taken to the Labasa Hospital after suffering a related episode and was rested from work for six months. The Witness indicated that his "boss gave him (a) second chance (and) put (him) on light duties". Mr Kalokalo gave evidence that in relation to the working hours, that the intention was that workers would only work Monday to Fridays and return to Suva on the weekends. Although he stated, "sometimes, they were asked if they wanted to volunteer to work on Saturday". The Human Resource Office indicated that ordinarily workers were engaged for 39 hours per week and then undertook overtime of their own accord. Mr Kalokalo told the Tribunal, that the worker's duties were that of stockpiling, a process whereby raw materials were offloaded from trucks, so that they could be later mixed with emulsion to form an asphalt mix.
- [7] During cross examination, the Witness agreed that after the earlier episode in Labasa, that the company was aware of the deceased's health condition, however reinforced that it was the deceased's own choice and request that he be engaged as a digger operator. In re-examination, the Witness clarified the nature of the digger's duties and advised that there were rest periods, from the machinery, when waiting for trucks to bring gravel.

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

- [8] 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 accepted 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.

[9] The Tribunal is satisfied that the deceased was a workman for the purposes of Section 2.

Was the Respondent the Employer of a Deceased Workman?

[10] 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;

[11] There is no doubt that the Employer was captured by the definition at Section 3 of the Act.

Did the Worker Suffer a Compensable Injury?

[12] 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....

[13] It appears well accepted that there are three requirements to satisfy Section 5(1) of the *Workmen's Compensation Act 1964*.² 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?

[14] Pathik J in *The Fiji Sugar Corporation Limited v Labour Officer*³ set out in detail what was to be meant by the expression "injury by accident". The medical certificate issued on 11 June 2013, stated that the disease or condition directly related to death, was congestive heart failure, due to ischemic heart disease and hypertension. There is no dispute that the deceased suffered from a heart attack whilst at the work camp.

² *Raiwaqa Buses Ltd v Labour Officer* [2011]FJHC174; HBA23.2008 (18 March 2011)

³ [1995] FJHC 39; Hba0010j.94b (17 February 1995)

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

[15] Pathik J in *Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu*⁴, 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*⁵ 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.

[16] 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.

[17] The Worker died from a cardiac arrest, after having experiencing chest pains whilst resting in camp. To satisfy this second limb, all that is required is that the Labour Office can establish that the death arose out of the employment activity. It need not be the sole contributing factor, but just a significant contributor to the cause of death. In this case, Dr Tikoinayau in his capacity as a medical expert gave evidence to support that conclusion. This he says was the conclusion that he reached, regardless of whether or not the Worker was a smoker or consumer of yaqona. The underlying cause of death was the ischemic heart disease and hypertension. The fact that the Worker had been known by the Employer to have suffered a previous heart related event and was require to recuperate for a six month period, should have put the Respondent on notice, that the Worker may not have been physically fit to undertake the tasks of a machine operator, without further risk of injury to his health.

[18] In the absence of any medical evidence submitted by the Respondent, the Tribunal is satisfied that this second limb has been made out.

In the Course of Employment

[19] 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"

⁴ [1994] FJHC 180

⁵ (1917) AC 352 at 372

[20] The Tribunal is satisfied that these two elements have been satisfied. The medical evidence of Dr Tikoinayau has attributed the onset of the cardiac arrest with his work. The Tribunal finds that there is sufficient nexus between the time in which the event took place and the deceased's working hours, to draw such a conclusion. The fact that the Worker was in camp at the time, strengthens the finding that the accident did occur during the employment of the workman. It is likely in any event, that the term 'employment' in this context, be not confined to the literal working hours, meaning that the accident was confined to the actual time period in which the work was performed, but only that it occurred during the employment of the worker. That is, that it was brought about whilst being employed. The second element of the third limb, only requires that the functions that were being performed by the Worker, in this case the machinery operations, were sanctioned by the Respondent. The evidence of Mr Kalokalo is sufficiently clear in this respect. As a result, all three limbs of the relevant statutory test are satisfied.

Conclusions

[21] It seems common ground that the Worker at the time of his demise was a heavy smoker and frequent consumer of yaqona. It is noted that Dr Tikoinayau nonetheless has attributed the cardiac arrest to the impact that work had on the deceased's hypertension and ischemic heart disease. In some respects there are similarities to that in *Labour Officer v Wood & Jepsen Surveyors and Engineers*⁶ where some reduction in compensation was made for lifestyle issues. In the present case, the Worker was known by the Respondent to be suffering from a heart condition. What should have taken place, was a risk assessment undertaken in order to ascertain whether the deceased was physically fit to meet the demands of the job. If that required an assessment of the impact of the heavy machinery vibrating equipment, the exposure to outside work and the like, then that is what should have taken place to avoid the possibility of injury by accident.

[22] If the Respondent had no light duties available for the worker, then the obvious result was that the employment relationship should be brought to an end. The claim seeks payment of 208 weeks wages equivalence in the amount of \$23,140.00. The Tribunal will deduct 25 per cent from this amount, due to the likely contribution that the lifestyle factors played on the Worker's demise.

[23] A compensation amount in the sum of \$17,355.00 is therefore awarded against the Employer in satisfaction of the claim. The Tribunal has summarily assessed costs in this matter at \$1,000.00.

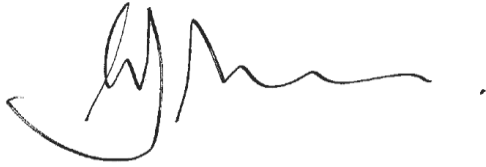
Decision

[24] It is the decision of this Tribunal that:-

- (i) The Respondent pay compensation to the Labour Officer on behalf of the dependants of Brian Tubailagi Work, in the amount of \$17,335.00, within 28 days hereof.

⁶ [2013] FJET 40; Workmen's Compensation 77.2010 (11 November 2013)

- (ii) The Respondent pay costs to the Labour Officer in the amount of \$1,000.00, within 28 days hereof.



Mr Andrew J See
Resident Magistrate