Decision

Employment Relations Tribunal

Title of Matter:	**LABOUR OFFICER on behalf of Kitione Nadaro (Applicant)** **v** **Fiji Sugar Corporation (Respondent)**
Section:	**Section 6 *Workmen's Compensation Act* 1964**
Subject:	**Compensation in fatal cases**
Matter Number(s):	**ERT WC 61 of 2018**
Appearances:	**Ms R Kadavu, for the Labour Officer** **Mr N Tofinga, Fiji Employers Federation, for the Respondent Employer**
Date of Hearing:	**1 July 2019; 11 July 2019**
Before:	**Mr Andrew J See, Resident Magistrate**
Date of Decision:	**23 October 2019**

KEYWORDS: Section 6 *Workmen's Compensation Act* 1964; Compensation for injury in fatal cases.

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 Section 6 of the *Workmen's Compensation Act* 1964. The application filed on 3 July 2018, claims that on 26 January 2016, that the deceased passed away due to a strangulated right inguinal hernia and small bowel obstruction. At the time of his demise, the Worker had been engaged by the Respondent as a Welder Offsider, assisting in the carrying out of welding and fabrication works.

[2] The Employer has contested the application for compensation, on the basis that it does not believe that the injury to the Worker arose out of or in connection with his employment.

The Case of the Labour Officer

Seini Vale

[3] The first witness to be called to give evidence on behalf of the Labour Officer was the wife of the deceased, Ms Seini Vale. According to the widow of the deceased, her husband had complained of a pain in the stomache whilst at the workplace on 19 January 2016, he passed away on 25 January 2016. Ms Nadaro stated to the Tribunal that she was of the view the reason that her husband passed away was because of heavy lifting, combined with the fact that her husband had been suffering high blood pressure. The Witness stated that most of the time, her husband would complain of having headaches that she believed was associated with the high blood pressure. The Witness attested to the contents of a Statement that she had earlier provided to the Labour Office and this was admitted as part of her Evidence in Chief[1]. When asked by Counsel for the Labour Office, how was it that the Witness knew that her husband had been lifting heaving items at work on the day he was taken to hospital, Ms Vale replied, because she had been told the same by a co-worker who came to her home and advised her of that fact.

Sivianiolo Vibose

[4] Mr Vibose was a welder, who was employed by the FSC. According to the Witness, he use to assist the deceased and stated that the work they undertook involved lifting of heavy machinery. The Witness said that he worked with the deceased for about one year and that the lifting would include items such as a 14kg chopper and 24 kg hammer. Mr Vibose told the Tribunal that on the day that the deceased had stomache pains at work, that he was the first aid personnel who came to his attention. The Witness identified an earlier statement that he provided to the Labour Office[2] and this was tendered as evidence in proceedings. It was acknowledged by Mr Vibose that workers may wear weight belts to support the lower back when lifting and that for older employees, they sometimes would undertake grinding duties to lessen the need to be involved in the heavy lifting associated with welding. In cross examination of the Witness, Mr Tofinga ascertained that the hammer weight was 40 kg and that the safe lifting guidelines allowed for the manually lifting of loads up to 25 kg[3].

Pauliasi Matawalu

[5] Mr Matawalu is an Assistant Labour Officer at Ba, who has been engaged in the Ministry since 2016. The Witness told the Tribunal that that the Ministry was made aware of the death of the Worker following the Employer's filing of the LDC1 that was received on 12 April 2016. According to the Assistant Labour Officer, an investigation undertaken by the Ministry revealed that the worker had been involved in the heavy lifting of iron at the workplace. During cross examination, the Witness conceded that he was only the person with carriage of the matter at this point in time and that the initial investigation was undertaken by another officer.

Dr Rayoni Tikoinayau

[6] Dr Tikoinayau is the Medical Assessor within the Ministry of Labour. The doctor is well credentialed in occupational health medicine. The medical expert produced a medical report for the Ministry reliant on the medical certificate at the time of death, statements of the spouse and workers, a summary from the investigating officer and a medical report from the Lautoka

[1] See Statement of Seini Vale dated 12 April 2016.

[2] See Statement of Sivaniolo Vibose dated 24 May 2016.

[3] See Regulation 42 of the *Health and Safety at Work (General Workplace Conditions) Regulations* 2003.

Hospital. Dr Tikoinayau told the Tribunal that the cause of death of the Worker was as a result of small bowel obstruction, brought about by strangulated hernia. In the medical assessor's opinion the Worker had no pre-existing condition and was otherwise fit[4]. Dr Tikoinayau said that the injury was consistent with the heavy lifting of a 44 gallon drum[5].

[7] In cross examination, the Witness was challenged as to why he believed that the Worker had been moving a drum at the time of his injury and the doctor clarified that this was information that he ascertained out of the witness statement provided within the investigation report. Dr Tikoinayau explained the surgical procedure that was required to address a strangulated hernia and indicated that ordinarily should the operation be successful, the Worker would have been expected to have been released when there were no complications. The Witness stated that the Worker developed complications when recuperating at home. The medical expert speculated that this complication could have come about due to an undetected organism left behind during the surgical procedure. Dr Tikoinayau conceded that at the time in which he provided his medical assessment report, he made no inquiry as to whether or not the Worker had been wearing a lifting belt to support and prevent any body strain and clarified that a minor reducible hernia can remain fairly benign unless strangulated, at which time it blocks blood supply and ruptures. In re-examination, Dr Tikoinayau expressed the view that whilst a lifting sash may have provided support to the back, it was not going to provide much assistance to the abdominal area.

The Case of the Labour Officer

Inia Nateba

[8] The first witness to give evidence on behalf of the Labour Office was Mr Inia Nateba, who was employed in the tramline maintenance team at the FSC. The Witness identified a statement that he had signed at the request of the Employer, where it was implied that the Worker had been suffering from a pre-existing condition at the time of his demise. That statement was tendered as evidence in proceedings[6], however it should be noted at the outset that the contents of that document are largely hearsay.

Viliame Bond

[9] The second witness to give evidence on behalf of the Employer was Mr Viliame Bond, an Assistant Safety Officer, Raiwai Mill, FSC. The Witness described the general policies and protocols governing health and safety at the mill and spoke of the procedures involved in lifting heavy objects, that required proper bending and squatting techniques, the use of back support and the fact that workers cannot lift heavy weights without being trained. The Witness gave evidence in relation to the safety induction training conducted by the Employer and the OHS committee infrastructure that actively works in the monitoring and improvement of health and safety at work. The Witness told the Tribunal that there was a protocol for the reporting of injuries at work, including the recording of the incident in an Accident and Injury Register Book. Mr Bond said that there was no record of the injury that had been later reported and that he was never aware of a situation before, where a person had been injured at work and there was no record of that event. The Witness was asked to peruse the 2015-2016 OHS Committee Minutes and said that in the relevant period that there was no record of any discussions pertaining to the injury of Mr Nadolo[7].

[4] That evidence seems in contrast to the wife's perception, that her husband had been constantly suffering from headaches that she believed had been attributed to high blood pressure.

[5] See Medical report tendered as Exhibit L5. (Folio 16 of Applicants Disclosures).

[6] See Exhibit E1.

[7] See Exhibits E3 (a) and (b).

[10] During cross examination the Witness advised the Tribunal that he was not the safety officer at the time of the event and was only able to describe the policies and procedures that governed similar events.

Davendra Prasad

[11] Mr Davendra Prasad is the Employee Relations Manager at the FSC. The Witness was shown a statement prepared by Sarwan Kumar a former employee, now deceased and told the Tribunal that a copy of this document had been placed on the file of the deceased worker. The Tribunal was prepared to have the statement admitted into proceedings, but its probative value is no more than hearsay evidence[8].

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

[12] 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.*

[13] The Tribunal is satisfied that Mr Nadaro was a workman for the purposes of Section 2.

Was the Respondent the Employer of the Workman?

[14] 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*

[8] See Exhibit E4.

managing committee of the club shall, for the purposes of this Act, be deemed to be the employer;

[15] 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?

[16] 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....*

[17] It appears well accepted that there are three requirements to satisfy Section 5(1) of the *Workmen's Compensation Act* 1964.[9] 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?

[18] Pathik J in *The Fiji Sugar Corporation Limited v Labour Officer*[10] set out in detail what was to be meant by the expression "injury by accident". The medical report provided by Dr Tikoinayau stated that the worker suffered a strangulated hernia, causing bowel obstruction. The first limb is satisfied.

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

[19] Pathik J in *Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu*[11], 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*[12] 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.*

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9 *Raiwaqa Buses Ltd v Labour Officer* [2011]FJHC174; HBA23.2008 (18 March 2011)
10 [1995] FJHC 39; Hba0010j.94b (17 February 1995)
11 [1994] FJHC 180
12 (1917) AC 352 at 372

[20] 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.*

[21] There is no first-hand account of what the Worker was doing when he suffered his injury. Yes, he was at work. Mr Vibose claims that the Worker had been taken to the FSC nurse, however the Employer has produced no records to that effect. The Tribunal accepts on balance that the Worker suffered an injury during the course of his working day and it satisfied that the work environment contributed to the onset of his condition.

In the Course of Employment

[22] 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"*

[23] The Tribunal is satisfied that these two elements have been satisfied. The injury took place during the employment and there is no contrary evidence to suggest that at the time of reporting his pains to the first aid officer, that the Worker was doing anything other than what he was employed to do.

Conclusions

[24] This is an interesting case, as there is some evidence that is mounted by the Employer to suggest that the deceased had been suffering from a pre-existing medical condition and that perhaps the Worker had been in at least one set of discussions with Mr Nateba, that he should have been seeking medical assistance for that condition. That was not the direct evidence of Mr Nateba however and the vague and ambiguous language of his statement provided into evidence, makes it difficult to rely too heavily on any suggested conversations that may have taken place.

[25] What the Tribunal cannot understand, is why a worker who was taken to the hospital by an Employer on 19 January 2016 whilst suffering pains in the stomach region whilst at work, could not provide better evidence as to what the deceased had been actually doing at the time that he submitted to his injury. Surely, if the Worker passed away seven days later, the Employer would have reviewed the events of that day and produced some type of health and safety incident report to that effect. The deceased Worker passed away on 26 January 2016. Two days later, the OHS Meeting minutes, make no mention of that event, nor its members turn their mind to the events that had transpired. That is most concerning.

[26] According to the undisputed evidence of Mr Nateba, the Worker had been taken to the Employer's industrial nurse. That is where the paper trail should have commenced and that is

where the Employer should have undertaken an incident report, to determine whether the injury was work related and if so, how and why it came about. None of this took place.

[27] The Tribunal is of the view that the case of the Labour Officer has been made out and that the Employer must pay the dependents of the deceased, the compensation amount of $36,834.72. An additional interest amount up to the time of this decision will be made, based on 5 per cent per annum. That amount is $2,406.87. An Order to give effect to the total compensation amount of $39,241.59 will be made available to the parties.

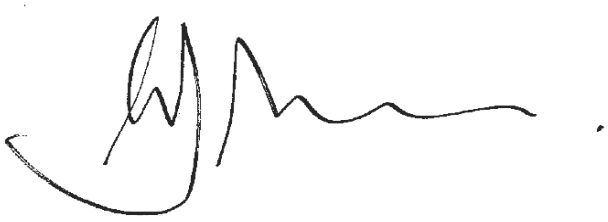
[28] There is one final issue that the Tribunal wishes to address and that is the lack of regard that the parties have had for the filing of materials. This is a case that is prosecuted on behalf of the Ministry. The Ministry is regarded as a model litigant and should conduct itself as such. If it is the case that timelines cannot be met, the appropriate protocol would be to make an application in proceedings, to seek an extension of time. The Ministry is acting on behalf of persons who rely on it to conduct itself professionally and in accordance with the practices and procedures of the Tribunal. Recent delays and demonstrations of disregard from the Ministry staff in several cases, do nothing to assist the Tribunal and the effective delivery of justice.

[29] Each party is to bear its own cost

Decision

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

(i) The Respondent Employer pay compensation to the Labour Officer on behalf of the dependents of Kitione Nadaro, the amount of $39,241.59 within 28 days hereof.



Mr Andrew J See
Resident Magistrate