# Decision

**Employment Relations Tribunal**

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| **Title of Matter:** | **LABOUR OFFICER on behalf of Sukend Prasad (Applicant)**<br>**v**<br>**Carpenters Fiji Ltd (Respondent)** |
| **Section:** | **Section 8 *Workmen's Compensation Act* 1964** |
| **Subject:** | **Compensation in case of permanent partial incapacity** |
| **Matter Number(s):** | **ERT WC 82 of 2018** |
| **Appearances:** | **Ms Kadavu, for the Labour Officer**<br>**Mr Krishna, Krishna and Co, for the Respondent Employer** |
| **Date of Hearing:** | **12 July 2019** |
| **Before:** | **Mr Andrew J See, Resident Magistrate** |
| **Date of Decision:** | **22 November 2019** |

**KEYWORDS: Section 8 *Workmen's Compensation Act* 1964.**

**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 8 of the *Workmen's Compensation Act* 1964. The application filed on 24 September 2018, claims that on 22 October 2015 that the Worker, a driver, was checking the proper stacking of stowage inside a stationary truck, when he accidentally fell from the vehicle at a height of 1.22metres, suffering a fracture to his hip. The Labour Officer claims the amount of $23,295.64, calculated based on a whole body permanent impairment of 39 per cent. It is noted within the Answer to the Application filed on 30 January 2019, the Respondent Employer, states that "*if the Applicant did suffer injury at work (which is denied) the extent of injury suffered is denied by the Respondent and requires a decision of the tribunal as to the amount of*

*compensation payable by the Respondent to the Applicant under the Act, in respect of the said injury*". For that reason and given at trial there is no contest to the fact that a workplace accident did not take place, that the Tribunal had sought to truncate proceedings and consider only the medical evidence, in order to ascertain whether any compensation flows from that incident[1].

**The Medical Evidence**

Dr Mark Rokobuli

**[2]** The first witness to be called to give evidence on behalf of the Labour Officer was Dr Mark Rokobuli, an Orthopaedic Surgeon, based at the Lautoka Hospital. Dr Rokobuli was the author of a medical report dated 24 October 2017 and had earlier undertaken an assessment of the Worker, on 1 December 2016. According to the Witness, in forming his medical opinion as to the degree of permanent impairment suffered by the Worker as a result of his fall, he had regard to the WorkCover Guide, the AMA Guide[2], medical reports and previous clinical assessments. Dr Rokobuli explained the nature of the sub-trochanteric fracture (located at the neck of the femur) that was suffered by the Worker as a result of the fall and said that post-surgery, the Worker had suffered some muscle wasting of the lower limb, as a result. According to the Witness, the Worker had received an implant to fix the fracture[3] and now had a 3cm limb length discrepancy. As part of the assessment process and as the *Final Assessment for Impairment* dated 24 October 2017 reveals, Dr Rokobuli, had undertaken an examination of the circumference of the Worker's major muscles, including his quadriceps and calves and tested for muscle strength. It was the surgeon's view that, the Worker was also suffering from peripheral nerve deficit.

**[3]** During cross examination, the Witness explained by way of diagram[4], how the implant was in place and agreed with the proposition that the facture had healed. Dr Rokobuli explained to the Tribunal the way in which the lower extremity impairments were calculated and with the consent of the Worker, repeated some of the measurements associated with his findings. Based on this further review, the Witness stated that whilst the Worker's range of movement and atrophy had improved, there remained a lower limb discrepancy.

Dr Emosi Taloga

**[4]** Dr Emosi Taloga, is an Orthopaedic Surgeon who was engaged by the Employer to provide a medical opinion as to the degree of permanent impairment suffered by the Worker. According to Dr Taloga, he provided a medical report on 20 April 2018, in which he had determined that there was no limb length difference, nor muscle wasting of the lower limb[5]. The doctor was of the view that in relation to the active and passive movements associated with flexion, external and internal rotation, that there was no apparent impairment. Dr Taloga said that the x-ray provided to him as part of his assessment, showed that the hip fracture had healed and that there was no loosening of the implant. It was the Witness's view that based on the *American Medical Association Guide to Assessment of Permanent Impairment Evaluation* (5th edition), that there was no permanent impairment suffered by the Worker.

**[5]** Dr Taloga told the Tribunal that he did not agree with the assessment provided by Dr Rokobuli and gave one example where he believed that the calculations that had been made were erroneous. For example, Dr Taloga was of the view that in Dr Rokobuli's report dated 24 October 2017, the calculation of 13 lower extremity impairment (LEI) in the case of a 3 cm limb length discrepancy, did not coincide with the formula contained within Table 17.4 of the AMA Guidelines.

[1] The parties did not comply with the Directions to submit closing submissions and on that basis, the evidence before the Tribunal will be considered as it is available.

[2] American Medical Association Guide to Assessment of Permanent Impairment Evaluation (5th edition)

[3] A dynamic hip screw (DHS) with 5 cortial screws.

[4] See Exhibit L2.

[5] See Applicant's Disclosure Documents.

**[6]** Dr Taloga opined that based on a review of the calculations, he could only derive an LEI of 13, that would translate to a 5 per cent of whole person impairment. The Witness stated that he did not undertake any measures of quadricep muscle atrophy, nor did he undertake any assessments of muscle strength, but was of the view that there was no permanent impairment based on the range of motions of the Worker. In response to questions by the Tribunal, Dr Taloga stated that at the time of his medical examination, the Worker appeared somewhat unco-operative and considered that he was 'over presenting' his symptoms.

## Analysis of Issues

**[7]** If one contrasts the medical reports of Dr Rokobuli (24 October 2017) to that of Dr Taloga (20 April 2018), the most obvious distinctions are set out in the **Table 1** below:

| Dr Rokobuli | Dr Taloga |
|---|---|
| 3 cm limb length discrepancy | Nil limb length discrepancy |
| Measureable muscle atrophy | No measurements taken |
| Muscle strength assessed 92 LEI | No muscle strength assessed |
| Peripheral nerve deficit 5LEI | No observation |
| Range of Motion 57 LEI | Flexion 100%, external rotation 30%, internal rotation 20%, abduction 60%, adduction 20%, extension 10%. |
| Conclusion 30% WPI (revised) | Conclusion 0-8% WPI (revised) |

**[8]** There are a couple of issues arising out of the medical expert reports. Firstly, it would seem that Dr Taloga had adopted a less interventionist approach to his examination, in so far as he did not see the need to undertake certain measurements, such as muscle wastage and strength. Dr Taloga had also stated that it was not possible to comment on Dr Rokobuli's evaluation of peripheral nerve deficit, when it was not clear to which peripheral nerve the observation related. Clearly the difference in approaches taken to the assessments, have yielded different conclusions. Dr Rokobuli has twice measured a limb length discrepancy, whereas Dr Taloga claimed that no such difference existed. Dr Taloga's approach seemed heavily reliant on the degree of movement that the Worker had and the fact that the X-ray showed healing and no displacement of the implant.

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

**[9]** 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.*

**[10]** There is no dispute that Mr Prasad, is a workman (worker) for the purposes of Section 2.

Was the Respondent the Employer of the Workman?
**[11]** 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;*

**[12]** This is not an issue in dispute. The Worker was employed by the Respondent, who is the Employer captured by the definition at Section 3 of the Act.

**Did the Worker Suffer a Compensable Injury?**
**[13]** 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....*

**[14]** It appears well accepted that there are three requirements to satisfy Section 5(1) of the *Workmen's Compensation Act* 1964.[6] These are:-

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

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

Did the Worker Suffer A Personal Injury by Accident?

**[15]** Pathik J in *The Fiji Sugar Corporation Limited v Labour Officer*[7] set out in detail what was to be meant by the expression "injury by accident". Whilst the Respondent had initially answered the Application, by denying an injury at work, this seems a rather impractical view of things, given that there was medical consensus that the Worker had submitted to surgery to have a dynamic hip screw implanted, as a result of the fracture of the proximal right femur[8]. The first limb is satisfied.

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

**[16]** Pathik J in *Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu*[9], 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*[10] 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.*

**[17]** 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.*

**[18]** The *Notice By Employer Of Accident Causing Injury* (LDC1) states that at the time of the accident, the Worker was "checking proper stacking and stowage of courier cargo". The Tribunal accepts that the injury arose out of the employment.

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*

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7 [1995] FJHC 39; Hba0010j.94b (17 February 1995)

8 The Employer's form LDC1 is also acknowledgement that a workplace accident had taken place.

9 [1994] FJHC 180

10 (1917) AC 352 at 372

*(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"*

**[20]** 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 the task which had been undertaken and the manner in which it had been approached, was not something that the Worker should not have been doing, whether by expressed or implied instruction.

## Conclusions

**[21]** The difficulty in this case, is attempting to reconcile the competing views of the orthopaedic surgeons. The Tribunal is satisfied that the medical examination undertaken by Dr Rokobuli, was more precise than that performed by Dr Taloga. That is not to say that Dr Taloga's approach may not have been a suitable one to take, but when contrasted to the other, shows the different findings that arise as a consequence of that fact. One area that surprises the Tribunal arising out of all of this, was the difference in observations recorded in relation to limb length discrepancy. Dr Taloga recorded no discrepancy, whereas on two occasions, including on the day of hearing, Dr Rokobuli recorded discrepancies of between 3 to 4 cm. The Tribunal prefers the evidence of Dr Rokobuli on that basis. The error in calculation as identified by Dr Taloga has the effect of moderating the total percentage impairment downwards from 39 to 30 WBI.

**[22]** Dr Taloga is of the view that the Worker was over presenting his symptoms and that may very well have been the case in relation to the peripheral nerve deficit; however, muscle atrophy measures are less able to be dismissed in that way. The Tribunal nonetheless accepts that muscle strength measures could be less reliable, if it was the case that the Worker was not positively co-operating during the examination. It should be noted that the Worker attended the hearing room on crutches and appeared to be suffering from a degree of discomfort in his body movements. The Tribunal is not inclined to believe that the Worker was over presenting his symptoms and accepts the moderated assessment undertaken by Dr Rokobuli at 30 per cent whole body/person impairment.

**[23]** Based on the revised impairment calculation, the Tribunal has recalculated the claim, consistent with the statutory formula and awards an amount of $17,919.60.

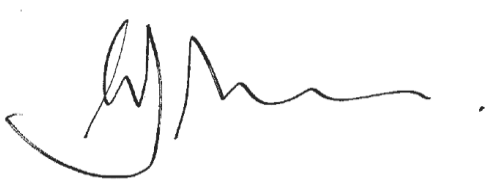
**[24]** Costs shall be summarily assessed in the amount of $1,500.00.

**Decision**

**[25]** It is the decision of this Tribunal that:

(i) The Respondent Employer pay compensation to the Labour Officer on behalf of Sukend Prasad, in the amount of $17,919.60 within 28 days; and

(ii) The Respondent Employer pay costs to the Labour Officer in the amount of $1,500.00 within 28 days.




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