IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: **ERCA 31 of 2019**

BETWEEN: **ROAD SEALNG SERVICES LIMITED**

APPELLANT

AND: **LABOUR OFFICER** on behalf of the dependents of the deceased **BRIAN TUBAILAGI WORK**

RESPONDENT

Appearances: *Mr. N. Tofinga for the Appellant.*

Ms. V. Doge for the Respondent.

Date/Place of Judgment: *Friday 29 September 2023 at Suva.*

Coram: *Hon. Madam Justice Anjala Wati.*

JUDGMENT

A. Catchwords:

Workmen's Compensation Claim – whether the death of the worker was work related – previous heart disease suffered by worker and known to the employer – the employer still employed the worker for heavy machinery work – medical evidence indicated that the work contributed to the death of the worker- in absence of any contrary medical report, it was open to the Tribunal to come to a conclusion that the death of the worker was contributed by the work he did – the appellate court has no basis to flaw that finding.

Cause

1. The Labour Officer had brought a claim for compensation against the employer under the Workmen's Compensation Act 1964. After the trial, the Tribunal ordered the employer to pay compensation to the Labour Officer on behalf of the dependents of the worker, in the sum of $17,335.00 within 28 days of the judgment (15 October 2019).

The Tribunal had also ordered costs against the employer in the sum of $1,000.00 to be paid within 28 days from the date of the judgment.

2. The employer appeals the decision of the Tribunal on 3 grounds contending that the Tribunal erred in law and in fact in:

    1. *Endorsing the claim made by the Ministry of Labour's doctor, Dr. Rauni Tikoinayau whose testimony was only a surmise that the deceased worker "may have suffered from workplace related stress" based on medical records that were more than 3 years old.*

    2. *Determining without any reason that the deceased worker's lifestyle (smoking and kava consumption) contributed to 25 percent of his demise.*

    3. *Relying on the medical assessment of the Ministry of Labour's doctor, Dr Rauni Tikoinayau who is biased by virtue of his position and appointment.*

3. Brian Tubailagi Work was employed as a digger operator by Road Sealing Services Limited. 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 hospital. The employer alleged that the death was not work related as the worker was said to be a heavy smoker and drinker.

4. I will very briefly reflect on the position and evidence of the parties as outlined in the Judgment of the Tribunal.

Claimant's Case

5. 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.

6. 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 Officer, 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.

7. 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.

8. At the relevant time, Mr. Qiodravu was a Labour Officer, 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 Officer 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 for compensation to the employer, seeking payment in accordance with section 6 of the Act.

9. 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.

10. Mr. Natubavivi was also employed at the Valley Road project by the 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 form 8.00am to 5.00pm. According to the witness, the weather at that time was very hot.

11. 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.

12. During cross examination, the witness conceded that the deceased was a heavy smoker and consumed kava. The witness was asked whether he aware that the deceased had been suffering a heart condition, to which he replied, yes.

13. 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.

Employer's Case

14. Mr. Kalokalo had worked in his capacity as the Respondent's Human Resources/ 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.

15. 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 6 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 Officer 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.

16. 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.

17. In re-examination, the witness clarified the nature of the digger operator's duties and advised that there were rest periods, from the machinery, when awaiting for trucks to bring gravel.

Tribunals Finding

18. The Tribunal identified the elements of the claim. It stated that the Labour Officer had to establish that there was a:

(a) personal injury by accident,
(b) arising out of, and
(c) in the course of employment.

19. The Tribunal stated that *Pathik J* in the *Fiji Sugar Corporation Limited v Labour Officer [1995] FJHC 39; HBA 0010j.94b [17 February 1995]* set out in detail what was to be meant by the expression ""injury by accident". It remarked that 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. It noted that there was no dispute that the deceased suffered from a heart attack whilst at the work camp. It concluded that there was a personal injury by accident.

20. In determining whether the worker's death arose out of his employment, the Tribunal relied on the case of Pathik J. in *Travelodge Fiji Limited Suva v. The Labour Officer for Karalaini Diratu [1994] FJHC 180*. It stated that this case set out the relevant considerations when determining whether or not a worker suffered an accident arising out of employment. His Lordship Justice Pathik had relied on Lord Sumner's characterization in *L & YR v Highley]1917] AC 352 at 372* 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 yes, the accident arose out of his employment. If no, 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."

21. The Tribunal found the worker died from cardiac arrest, after experiencing chest pains whilst resting in camp. The Tribunal stated that the Labour Officer needed to establish that the death arose out of the employment activity. The Tribunal said that employment activity need not be the sole contributing factor, but just a significant contributor to the cause of death.

22. The Tribunal stated that Dr. Tikonayau in his capacity as a medical expert gave evidence to support that conclusion regardless of the worker being a smoker or consumer of yaqona. The Tribunal said that the underlying cause of death was the ischemic heart disease and hypertension. The Tribunal stated that the fact that the worker had been known by the employer to have suffered a previous heart related event and was required to recuperate for a six month period, should have put it 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.

23. The Tribunal concluded that in the absence of any medical evidence submitted by the employer, it was satisfied that the Labour Officer had established that the injury arose out of the employment.

24. The Tribunal also found that the worker was in the course of his employment as he was within his working hours when he suffered the pain and died as a result of the pain which was caused by his work.

25. The Tribunal remarked that it seemed a common ground that the worker at the time of his demise was a heavy smoker and frequent consumer of yaqona, but it 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. The Tribunal stated that in some respect this case was similar to that of the *Labour Officer v Wood & Jepson Surveyors and Engineer's [2013] FLET 4; Workmen's Compensation 77.2010 (11 November 2013)* where some reduction in compensation was made for lifestyle issues.

26. The Tribunal said that in the present case, the worker was known by the employer to be suffering from a heart condition. The Tribunal said that what should have been undertaken was a risk assessment 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. The Tribunal concluded that if the employer had no light duties available for the worker, then the obvious result was that the employment relationship should be brought to an end.

27. On compensation, the Tribunal stated that the claim sought payment of 208 weeks wages equivalent in the amount of $23,140.00. The Tribunal said that it will deduct 25 percent from this amount, due to the likely contribution that the lifestyle factors played on the worker's demise.

28. A compensation amount in the sum of $17,355.00 was therefore awarded against the employer in satisfaction of the claim. The Tribunal had summarily assessed costs in the sum of $1,000.00.

Analysis

29. I will deal with all the grounds of appeal collectively. The worker was suffering from ischemic heart disease as well as hypertension. The employer knew that the worker suffered from a heart condition. In that situation it ought to have been careful and obtained a medical clearance that the work of the worker would not aggravate his heart disease.

30. It allowed the worker to continue work as a digger operator which aggravated his condition. The only medical evidence available to the Tribunal was 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.

31. In absence of any other medical evidence it was open to the Tribunal to accept the evidence of Dr. Tikoinayau that the work of the deceased contributed to the death of the deceased. The Tribunal did accept that the worker's condition was pre-existing but the finding it had to come to was whether his work exacerbated his condition leading to his death.

32. The Tribunal found that it did and hence it found that the compensation in the sum of 75 percent of the statutory liability should be paid. I cannot flaw that finding in absence of any reliable evidence that the heavy machinery work could not have worsened the existing heart condition of the deceased.

33. The medical report of the doctor may have been 3 years old but that cannot be impeached on that basis. There has to be contrary medical evidence to impeach the medical evidence available to the Tribunal. In any event I am not shown that the medical

witness would have arrived at a different finding if a medical report was made at the time of the death. The employer did not show to me the relevant considerations missing at the time of the making of the report or the irrelevant considerations made. I therefore find that the issue of delay in the medical report is nothing short of an attempt by the employer to cover its flaws on its inability to provide medical evidence to counter the evidence of the medical witness.

34. There is bias alleged against Dr. Tikoinayau as he is a medical officer engaged by the Ministry to undertake all assessments on worker's compensation injury and death cases. I am surprised that Mr. Tofinga raises this without having adduced any satisfactory medical evidence to impeach the evidence of Dr. Tikoinayau.

35. Dr. Tikoinayau may be appointed by the Ministry to assess all its workmen's compensation claims but he has an extensive experience and qualification in occupational medicine. On that basis he is being engaged by the Ministry. If a party wishes to bring contrary medical evidence, they are at liberty to do so. Having not done so, the allegation of bias does not stand any factual basis.

36. The employer is also complaining about the 25 percent reduction the Tribunal made to the final award of damages. This was done to reflect the worker's lifestyle and habits which gave rise to the heart condition he had. I do not find anything legally improper in what the Tribunal did. The effect of the reduction is that the employer had to pay less compensation. This is something that benefits the employer and I see no reason for the grievance on the facts of the case given that the worker had a condition which was exacerbated by the work he carried out on the day leading to his death.

Final Orders

37. I do not find any merits in the grounds of appeal and as such I dismiss the same.

38. I order costs against the employer in the sum of $5,000.00 to be paid within 21 days.

39. I order that the judgment of the Tribunal be complied with within 21 days.

....

Hon. Madam Justice Anjala Wati

29.09.2023

To:

1. ***Mr. N. Tofinga, Suva for the Appellant.***
2. ***Ministry of Employment, Productivity and Industrial Relations for the Respondent.***
3. ***File: Suva ERCA 31 of 2019.***