IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

CIVIL APPEAL NO. 8 OF 1981

Between:

FIJI ELECTRICITY AUTHORITY — APPELLANT

- and -

LABOUR OFFICER ON BEHALF OF VITALE RAMASI — RESPONDENT

Mr. P.I. Knight for the Appellant.
Mr. A.M. Rabo for the Respondent.

## J U D G M E N T

This is an appeal from the judgment of the Magistrate's Court, Suva, in which it was held that the appellant was liable under the provisions of the Workmen's Compensation Act to compensate Vitale Ramasi for an injury sustained by him in the course of his employment. Judgment for the sum of $1,547.83 was given against the plaintiff in favour of the respondent acting for and on behalf of the said Vitale Ramasi.

A "Statement of Agreed Facts and Questions of Law for Determination" was filed in the Court below.

The said Vitale Ramasi, whom I shall hereinafter refer to as 'the workman', injured his right eye in the course of his employment with the appellant.

The injury sustained by him was perforation of the cornea of his right eye causing prolapse of the iris through the wound. There is now a resultant scar with anterior synechiae which has resulted in permanent partial loss of vision and astigmatism which requires correction by spectacles to allow him a best vision of 6/9.

The figure of 6/9 means that the workman can read at 6 metres something which a normal person can read at 9 metres (6/6 is the reading for perfect vision ). Without corrective spectacles the workman's vision in his right eye is 6/36. In optometry a reading of 6/9 is regarded as permanent incapacity of 11% on a scale ranging from zero percent for 6/6 vision to 40% for total loss of sight of one eye.

After discharge from hospital the workman resumed work and has to date continued his employment with the appellant in the position he held at the time of his accident. He has suffered no loss or reduction of wages.

The workman did not wear spectacles before his injury and is believed to have had normal vision.

The questions of law which the Magistrate's Court was asked to determine are as follows :

"1. Is the partial loss of sight of an eye "loss of sight of eye - 40%" as specified in the Schedule to the Act when read in conjunction with Section 3 and Section 8.

2. Alternatively is the injury sustained by the workman a schedule injury for which the correct incapacity is 11%.

3. Alternatively, is compensation payable to the workman under the provisions of section 8(1)(b) of the Act when read in conjunction with the definition of partial incapacity in section 3 of the Act.

Type 2 The learned Magistrate answered the first question in the affirmative and did not find it necessary to consider the two alternative questions.

From this decision the appellant now appeals on the following grounds :

"1. The learned magistrate erred in law in finding that the injury suffered by the Applicant was an injury specified in the schedule to the Workmen's Compensation Act.

2. The learned magistrate erred in law in finding that the injury suffered by the Applicant resulted in an incapacity which reduced his earning capacity in any employment which he was capable of undertaking at the time of the accident and that he therefore suffered permanent partial incapacity as defined in Section 8(1)(b) of the Workman's Compensation Act."

Miss Fong for the appellant in the Court below made a written submission to the Magistrate's Court. It is a lengthy submission and indicates that she has done considerable research but she has not been able to find a case on all fours with the instant case. She has located one case decided by the High Court of Allahabad - Northern Railway v. Hukum Chand Jain 1967-11-LL 369 H.C. All. which I will be referring to later. The full report of this case is not available.

Mr. P.I. Knight for the respondent in the Magistrate's Court made an oral submission.

The dispute between the parties is whether partial loss of sight is a scheduled injury for which compensation is payable under section 8(1)(a) of the Workmen's Compensation Act or whether it is a non scheduled injury for which compensation may be payable under section 8(1)(b) of the Act

if the injury has resulted in loss of earning capacity.

These provisions are as follows :

"8-(1) Where permanent partial incapacity results from the injury the amount of compensation shall be -

(a) in the case of an injury specified in the Schedule, such percentage of two hundred and sixty weeks' earnings as is specified therein as being the percentage of the loss of earning capacity caused by that injury; and

(b) in the case of an injury not specified in the Schedule, such percentage of two hundred and sixty weeks' earnings as is proportionate to the loss of earning capacity permanently caused by the injury:

Provided that in no case shall the amount of compensation in respect of permanent partial incapacity be greater than twelve thousand dolla nor less than such percentage of one thousand five hundred dollars as represents the loss of earning capacity arrived at in accordance with paragraph (a) or paragraph (b).

The Schedule to the Act contains a comprehensive list of injuries and fixes the "percentage of incapacity" in respect of each item in the Schedule. Each percentage stated is the percentage loss of earning capacity which a person is deemed by law to have suffered as a result of the injury to which the percentage relates. It is immaterial whether a person who has suffered a scheduled injury loses no earning capacity at all or has, in fact, suffered a much higher percentage of loss of earning capacity. For the purposes of the Act he has suffered the percentage stated in the schedule and is only entitled to compensation based on that percentage.

Injuries to the eye are listed in the Schedule of the Act as under :

| | Percentage of Incapacity |
|---|---|
| Loss of eye - eye out | 40 |
| Loss of sight of eye | 40 |
| Loss of lens of eye | 30 |
| Loss of sight of, except perception of light | 40 |

The last mentioned item can only refer to loss of sight of one eye. An earlier item refers to "Total loss of sight" which is 100% incapacity or total loss of earning capacity.

Miss Fong argues that "loss of sight of eye" does not only mean "total loss of sight of eye". Partial loss of sight she argues is a scheduled injury and that section 8(1)(a) of the Act applies.

Mr. Knight on the other hand argues that "loss" in its context means "total loss" and that partial loss of sight is not a scheduled injury. It is, he admits, an unscheduled injury but compensation is only payable if there has in fact been a loss of earning capacity caused by the injury. Section 8(1)(b) of the Act, he contends would in such an event have application.

A further alternative argument raised by Miss Fong is that the workman should be entitled to 11% instead of the 40% stated in the schedule for "loss of sight of eye". There is no merit in that argument. If the injury is a scheduled one, the percentage of incapacity is that fixed by law. There is no provision in the Act for any lesser percentage to be considered when assessing compensation to cover say partial loss of sight or hearing, although the percentage might be used as some guide in the case of a non scheduled injury where loss of earning capacity has been established.

The definition of "partial incapacity" in section 3 of the Act has to be considered and is as follows :

> "'partial incapacity' means, where the incapacity is of a temporary nature, such incapacity as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the incapacity, and, where the incapacity is of a permanent nature, such incapacity as reduces his earning capacity in any employment which he was capable of undertaking at that time:
>
> Provided that every injury specified in the Schedule to this Act, except such injury or combinatio of injuries in respect of which the percentage or aggregate percentage of the loss of earning capacity as specified therein against such injury or injuries amounts to one hundred per cent or more shall be deemed to result in permanent partial incapacity."

It is clear from this definition that the degree of incapacity of a workman suffering an injury in the case of a non scheduled injury is that which "reduces his earning capacity in any employment which he was capable of undertaking at that time" i.e. at the time he was injured. The degree of incapacity is a question of fact to be ascertained and when ascertained compensation can then be assessed based on the injured workman's "earnings" as defined in the Act.

Where it is a scheduled injury, however, the proviso to the definition makes it clear that the injuries, specified in the schedule, other than those where incapacity is stated to be 100% or result in more than 100% (i.e. a combination of scheduled injuries) shall be deemed to result in permanent partial incapacity to the extent specified against the injury or injuries.

I come now to consider the Magistrate's judgment; it contains several errors, but there is one error which

neither counsel appears to have noticed. Having found as a fact that the workman's partial loss of sight was scheduled injury he then refers to section 8(1)(a) of the Act which he purports to quote.

What he quotes however, is part of (a) and part of section 8(1)(b) which refers to non scheduled injuries. It is clear that the Magistrate intended to quote (a) because he went on to hold that the workman was "entitled to be compensated at the percentage prescribed in the said Schedule in accordance with section 8(1)(a)". That finding required the Magistrate to assess compensation on 40% incapacity. The sum of $1,547.83 he allowed was clearly not assessed in accordance with his finding. On a gross wage of $54.12 a week, 40% of 208 weeks earnings would be $4,503.78.

I do not know how the Labour Department arrived at the figure of $1,547.83 which the Magistrate accepted. It does not appear to have been based on 11% permanent incapacity. It does not appear to be a figure agreed by counsel and the Magistra had no evidence on it. It was the figure mentioned in the Application.

The Magistrate also stated in his judgment :

> "It is unthinkable that the legislature would have excluded partial loss of sight thereby disabling a person in the position of the Applicant from recovering compensation under the Act. I am further strengthened in my view when one sees that there is even provision in the schedule for "loss of lens of eye.....30%".

This statement was made when the Magistrate was considering the meaning of "loss of sight of eye". It was one reason which led him to conclude that "loss of sight" must also include "partial loss" of sight. The Magistrate overlooked the fact that the legislature has not excluded from the Act any injury to a workman which in fact causes permanent loss of earning

appreciated that fact.

The Magistrate also erred in his reasoning when he relied on an extract from Srivastava's Workmen's Compensation Act 1923 3rd Edition at p.418 where the learned author discusses the note to the schedule in the Indian Act, which is similar to the note in the schedule to the Fiji Act, which states:

> "Total permanent loss of use of a member shall be treated as loss of member".

The learned author at the end of the extract says :

> "So if the vision of an eye is completely and permanently lost, it will amount to the "loss" of an eye".

The extract he quoted was no authority to support the Magistrate's view that "loss" also means partial loss. The author was discussing total loss of use of a member including an eye which must, because of the note, be treated as loss i.e. physical loss.

In the Indian Act items 25 and 26 in the schedule of injuries were as follows :

| | | |
|---|---|---|
| 25 | Loss of one eye without complications - the other being normal | 40% |
| 26 | Loss of vision of one eye, without complications or disfigurement of eye-ball the other being normal. | 30% |

The Allahabad High Court in Jain's case reasoned that complete loss of vision must be included in item 25 on a proper consideration of the Note to the Schedule on the reasoning that an eye is a member used for sight and complete loss of sight amounts to complete loss of use which according to the note is to be deemed equivalent to loss of one eye.

The Court then proceeded to reason that item 26 cannot also refer to complete loss of sight as that would

render it mere surplusage. Its reasoning was strengthened by the fact that item 26 specified a lower percentage from which the Court considered it could be concluded that item 26 must necessarily refer to less than complete loss of sight. The outcome of this reasoning was that the Court's finding entitled the workman to compensation based on 30% incapacity where in fact he had only a 10% disability.

The Allahabad High Court appears to have ignored the fact that item 25 refers to the physical loss of an eye - it follows there must be total loss of sight of that eye as a result. Item 26 covers loss of vision in an eye but not physical loss of an eye. The Indian legislature's interest in complications or disfigurement provides a possible explanation for the slightly differential rates. Presumably it was considered that a man with an empty eye socket might have more difficulty in obtaining employment than a man with two eyes one of which had no vision at all, there being no complication or disfigurement. Whatever the explanation may be, Jain's case is distinguishable and can have no persuasive authority in the instant case.

The schedule in the Fiji Act is very much more explicit and detailed when dealing with eye injuries than the schedule in the Indian Act. It is made clear that "loss of eye" can only mean physical loss of the eye ball. That is evident by the deliberate use of the words "eye out".

"Loss of sight of eye" can only refer to total loss of sight of eye. The percentage of incapacity for "loss of eye - eye out" or "loss of sight of eye" is a fixed 40% in each case.

The reasoning used in Jain's case, if applied in Fiji, would mean, as Mr. Knight points out, that a workman who suffered permanent partial loss of sight to the extent of 1% could claim compensation based on 40% permanent incapacity.

The Fiji legislature goes even further and covers loss of lens of one eye 30%. This is a provision for partial but not complete loss of vision. There is also another instance of non total loss of vision which the legislature treats as equivalent to total loss of sight namely :

> "Loss of sight of, (eye) except perception of light" 40%.

If the legislature had not in section 8(1)(b) of the Act covered injuries not specified in the schedule there might have been some moral justification for seeking to interpret "loss of sight" to mean and include "total and partial loss of sight". The injury suffered by the workman was not in fact "loss of sight" of his right eye on the clear meaning of the words "loss of sight". There can be no legal justification for holding that "loss of sight" means "any loss of or partial loss of sight" in its context where the Act equates the "loss of sight of eye" to the physical loss of an eye.

The note in the schedule - "Total permanent loss of use of member shall be treated as loss of member" refers to all items in the schedule. "Loss of sight of eye" cannot be treated in Fiji Act as"mere surplusage" if it means "total loss of sight of eye" as the Indian High Court were able to hold in Jain's case.

Where there is total loss of sight because the eye cannot be used, the note merely confirms what the legislature has specifically provided. In respect of an eye the schedule covers two situations where an injured worker has lost "the use of a member".

The note does however cover situations where there is no specific provision. To take an extreme case from the first item in the schedule :

"Loss of 2 limbs - 100%."

"Loss of 2 limbs" in this context means physical loss of 2 limbs. Where there is permanent "loss of use" of 2 limbs for any reason whatsoever not caused by actual physical loss, the note applies and the worker is treated as if he had in fact physically lost two limbs.

The schedule is very much concerned with partial "loss of member". Reference need only be made to the loss of an arm at the shoulder, 90%, down to the loss of "pulp of a little finger", 2%, the legislature has specified percentages of disability for total and partial loss of an arm.

"Loss of sight" in the schedule means and can only mean "total loss of sight".

The factual situation in the instant case is that the workman has not "lost" the sight of his right eye. He can still see with his right eye. His sight however has been impaired by the injury which has scarred his eyeball. It would in my view be quite impracticable to attempt to fix percentages for any impairment of vision.

The learned Magistrate should have answered both the first two questions of law requiring determination in the negative.

The third question is the one which he did not seek to answer. Had he attempted to do so he would have found, as I have found, that the statement of agreed facts agreed by counsel for the parties does not contain sufficient agreed facts to enable compensation if payable to be assessed.

No witnesses were called by either side not even the workman whose evidence is essential to enable the Court to determine whether there has been any loss of his earning capacity and if so to assess compensation for a non scheduled injury.

It was agreed that the workman was injured in the course of his employment and that he has permanently lost partial sight of his right eye. Dr. Hawley assessed his incapacity at 11% but that was not an assessment of loss of earning capacity. His assessment of 11% permanent incapacity m be accepted as 11% impairment to his normal vision. The top of the optometric scale is 40% which is the same percentage of incapacity mentioned in the schedule for loss of sight of an eye. The 11% could be used as a guide as I mentioned earlier if it is found that the impairment to the worker has in fact reduced his earning capacity.

The Magistrate found as a fact that the workman's total permanent incapacity was 33%. This was not an agreed fact but Miss Fong in her written submission mentione that the workman's permanent incapacity without corrective glasses was 33%. This statement was not evidence and should have been ignored by the Magistrate.

As the injury the workman suffered was not one specified in the schedule what had to be determined pursuant to section 8(1)(b) was "the loss of earning capacity permanently caused by the injury" if any. By virtue of the definition of "partial incapacity" the loss of earning capacity had to be determined by considering what employment the worker was capable of undertaking at the time of his accident. The Act uses the words "capable of undertaking not "performing". It may be that the worker was not capable of performing any other work than that of a linesman.

The Magistrate was never in a position to assess compensation if it was payable and this Court is likewise in no position to do so.

The parties did agree that the worker had as a result of the injury permanently lost 11% of the normal vision in his right eye. This left only one other issue to determine - a question of fact - did that impairment to his vision reduce the worker's earning capacity "in any employment which he was capable of undertaking at that time?" To decide that issue evidence should have been produced by the appellant.

Regrettably the matter will have to go back to the Magistrate's Court for rehearing . As I am aware that the Magistrate who heard the application is shortly taking up another position, if he has not already done so, I direct that the application be reheard before another Magistrate.

This judgment may assist the Labour Department to decide whether there is any evidence available to establish that the worker has in fact suffered actual loss of earning capacity as a result of the injury to his eye. The worker is still employed in the same position he held when he was injured with no loss of wages. The situation may be that he is able to continue as a linesman until he retires. This, if a fact, is not conclusive evidence that the worker has not lost any earning capacity but it presents a considerable hurdle for the applicant to overcome in establishing the worker's right to compensation.

While scheduled injuries are by law deemed to cause incapacity and reduction in earning ability, it is difficult to envisage a situation where the loss of one tooth could reduce a workman's earning capacity. Nevertheless "total loss" of 1 anterior tooth or 1 posterior tooth is 4% incapacity in the first case and 1% in the other.

In my view the extensive list of scheduled injuries has given rise to the popular belief amongst workers that any injury at all suffered by a worker in the course of his employment should be compensated. This belief is understandable but the legal position is that if the injury is a non-scheduled one there must be actual loss of earning capacity before compensation is legally payable. If there is no such loss compensation is not legally payable.

The Appeal is allowed. The judgment against the appellant is set aside and the application remitted back to the Magistrate's Court for rehearing.

I make no order as to costs. The respondent is representing a Government Department and the appellant a statutory body - a quasi Government body.

R.G. Kermode

(R.G. KERMODE)

JUDGE

SUVA,

15 JANUARY, 1982.