IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 25 of 1983

Between:

FIJI ELECTRICITY AUTHORITY — Appellant

- and -

LABOUR OFFICER (on behalf of RAMESH PRASAD) — Respondent

Mr. B.C. Patel for the Appellant
Mr. S.P. Sharma for the Respondent

Date of Hearing: 16th November, 1983
Delivery of Judgment:

JUDGMENT OF THE COURT

Henry, J.A.

This is an appeal under Section 12(1)(c) C/A Act. It is confined to questions of law. Ramesh Prasad (whom we shall call the employee) was injured in an accident which, it is conceded, arose out of and in the course of his employment with appellant Board. An action for compensation was brought on his behalf by the Labour Officer. The injury was to the employee's left eye. According to the only medical evidence the employee suffered from partial incapacity to the extent of 35% of the vision of his left eye. The medical opinion is that the condition of the eye will deteriorate and there is a definite possibility that, due to degeneration of the optic nerve, he might lose his sight altogether.

The employee gave the date of his birth, but, unfortunately, the year appears to have been wrongly recorded. He began employment with appellant on January 18, 1977 as a meter reader and a member of the permanent staff. He will, in due course, qualify for a pension. Since the accident the employee has continued to be employed as a meter reader at the usual rates of remuneration. He has suffered no loss of earnings as a result of the injury, and, will, so long as he remains in his present employment, continue to earn the rates of pay applicable to such work. He is not now allowed to drive his employer's vehicles. He said that, though not allowed to drive, he had received all other benefits. Since meter readers work in pairs he is now the passenger when working in rural areas but in city work they work in "singles", and, whilst others get vehicles he goes on foot. The employee said :

> " Apart from this the injury has not affected by earning capacity. There is no other work I could do which I now cannot. It is a big group, FEA, I have not tried for other work. There are lots of other jobs which I cannot now do, e.g. welding which I have done for myself.
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> I have an up to date driving licence. I drive my own car. FEA are aware of this. FEA's ban was a precautionary measure for their benefit they said. "

The employee was educated to Form IV but he did not get "Fiji Junior". After school and before he undertook his present employment he worked "only on the farm."

The case was heard in the Magistrate's Court at Lautoka. The claim was dismissed. The Magistrate said :

" Incapacity is used in several ways in the Act, meaning that a workman is disabled, simpliciter, or disabled partially or totally from going to his employment or doing the same work. He may be compensated for his loss of or reduction in wages.

In the instant case there is no loss of wages at all; save that the Accused cannot drive FEA vehicles, there is no change. If the Accused had felt that prohibition strongly presumably he could have quit and there may have been a Workmen's Compensation Act claim. The Court does not accept that the Accused has lost a promotion opportunity and there is no evidence that he will do so in the future. "

On appeal to the Supreme Court the appeal was allowed. The finding in the Supreme Court is made clear in the following passage in the judgment :

" I do not think that the Magistrate was correct when he found there was no loss of earning capacity because the workman was still employed at the same wages. This ignores possible chances of promotion, or seeking better employment at higher wages which may be prejudiced by the injury suffered. And by analogy with Section 8(1)(a) of the Act and for the reasons I have stated I would find that the workman is entitled to workmen's compensation calculated on the basis of 260 times 14% of $48.81, that is $1,776.68. "

The grounds of appeal are :

"1. The Learned Judge erred in interpreting Section 8(1)(b) of Workmen's Compensation Act (Cap. 94)in holding that the loss of earning capacity of the Respondent resulting from the injury should be calculated by multiplying the percentage of physical loss of vision with the percentage of incapacity, namely, 40% for loss of sight of eye provided in Schedule to the Act.

2. The Learned Judge erred in deciding that it would be against the intent of the Act for the Court to make calculation of the loss of earning capacity based on evidence relating to such loss of earning capacity.

3. The Learned Judge ought to have held, having regard to the evidence, that the Respondent had failed to show loss of earning capacity as a result of the injuries sustained by him. "

The Workmen's Compensation Act (Cap. 94) will be referred to as "the Act". The evidence is clear, and it has not been contended to the contrary, that the employee has suffered an incapacity of a permanent nature, but before such an injury can be compensatable, it must be, "such incapacity as reduces his earning capacity in any employment which he was capable of undertaking at (the time of the accident)". These words are taken from the definition of "partial incapacity" in Section 3 of the Act. In Ball v. William Hunt & Sons Ltd. [1912] A.C. 496 at pp. 499-450 Earl Loreburn L.C. said :

> " In the ordinary and popular meaning which we are to attach to the language of this statute I think there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch. I think this view is in accordance with previous decisions of the Court of Appeal. The principle is carefully discussed in Cardiff Corporation v. Hall. (1) And certainly the opposite view would leave a workman uncompensated for what may be very real and direct consequences of an injury. "
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> (1) [1911] 1 K.B. 1009.

Compensation for permanent partial incapacity is governed by Section 8(1)(a) and (b) which provide as follows :

> "8.(1)(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
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> (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:
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> Provided that in no case shall the amount of compensation in respect of permanent partial incapacity be greater than twelve thousand dollars 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 employee did not suffer an injury specified in the schedule, but, if the definite possibility of the loss of sight, had, before the determination of this case, become a reality, compensation would have been payable under Section 8(a) at the rate of 40% of total. As the loss is no higher than a definite possibility it does not come within Section 8(a). The claim must, therefore, be determined under Section 8(b).

The issue in this appeal is whether or not there was evidence upon which the learned Judge could find that :

> " (a) The permanent injury to the employee's left eye reduced his earning capacity in any employment which he was at the time of the accident capable of undertaking; and,

(b) if so, was he correct in assessing compensation at the sum of $1,776.81. "

It is important to note that it is not a question of what a workman is earning at the time of an accident but it is the effect the accident has on his capacity to earn in any employment he was then capable of undertaking. In the case of a schedule injury the quantum is fixed. Once the injury is established an amount of the appropriate percentage follows but, in respect of a non-schedule injury, (which this is) it is a question of fact in each case.

In the present case medical evidence was necessary to establish the diminution in the function of the injured eye, that is to say, to establish the extent to which the physical capacity of the employee has been affected. The medical evidence is :

" My assessment on 24.1.79 was the A suffered from partial incapacity, 35% of vision of left eye. I did another malingering test before hand.

In my opinion having examined A over a period ending on 24.1.79 his sight will probably deteriorate. I have warned him that he might lose his sight altogether due to degeneration of the optic nerve. This is a definite possibility.

35% is of his vision without glasses. This would adversely affect a person driving.

A one-eyed person is under a driving disability. 35% is his disability in respect of left eye of driving. "

The evidence established quite clearly that the employee was restricted in undertaking any work which involved driving a vehicle. Although somewhat vague (and he was not cross-examined on the point) he said there were

lots of jobs he cannot now do. He mentioned in particular welding work. It is true that he earns as much in his present employment notwithstanding his disability but even then, as earlier shown, his capacity to undertake some types of work, including some involved in his present employment, has been materially diminished. To this extent, the fact that his earnings in his present employment have not diminished, is not relevant. The difference is between actual earning in his employment at the time of the accident and capacity to earn after the accident in any employment which he was then capable of undertaking. It is the latter which is the test.

The learned Judge made findings of fact, findings of fact which cannot be questioned in this Court. These findings are :

> "(1) That there was a 35% loss of vision of the left eye and that the workman could suffer total loss of sight in time. There was thus a real element that the employee might, on the general market for his work ability, become a one-eyed man.
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> (2) That he had possible chances of promotion.
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> (3) That he had possible chances of seeking better employment at higher wages. "

It was found that all these factors may be prejudiced by the injury suffered. These findings were not challenged on the basis that, as a matter of law, they could not be supported. However, considerable discussion took place on a claim that, in fact, the employee did not lose a chance of promotion to supervisor by reason of his eye defect. The employee claimed that he did. The learned Judge did not make a specific finding on this but looked at the picture as he saw it and concluded that there were possible chances of promotion which might be affected by the physical condition (present and future) of the employee. This was a matter of fact for the Supreme Court.

In our opinion the Supreme Court came to a correct conclusion that the employee had shown a diminution in his capacity to earn in respect of work which he was capable of undertaking at the time of the accident. No question of onus of proof arises. The next question is whether or not this Court should interfere with the assessment made. It is a matter which is not capable of exact arithmetical calculation. A workman is not to be forced to cease employment, offered or continued at the same rate, and to place himself on the open market, or, remain in his employment while seeking other and better jobs. It is sufficient if he has proved to the satisfaction of the Supreme Court (on his appeal) that his eligibility, as an employee, in any employment within his capacity, has been diminished.

We turn next to the quantum compensation payable. The learned Judge assessed the amount by accepting the schedule percentage of loss of an eye, which is 40% of total, and, he then accepted the medical assessment of the physical loss at 35%. The resulting percentage of total incapacity, by arithmetical calculation, was 14%. There is no dispute as to the correct weekly sum for total incapacity - so 14% of that sum for the appropriate number of weeks was awarded.

In our view, this method of calculation is erroneous in law insofar as it is based on schedule percentages. Such percentages do not bear any particular relationship to the question in this case (or in others) which is what is the value or amount of his loss by reason of the diminishment of his capacity in any employment he was capable of undertaking at the time of his accident.

We have carefully considered the incapacity as found by the learned Judge and we are of opinion that the amount is a fair measure of compensation. The appellant has not shown us that the amount as an award is too high.

The appeal is dismissed with costs to be fixed by the Registrar.

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Vice-President

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Judge of Appeal

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Judge of Appeal