IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0016 OF 2006S
(High Court Civil Action No. HBC0054 of 1998L)

BETWEEN: RAJ WATI

Appellant

AND: EMPEROR GOLD MINING COMPANY LIMITED

Respondent

Coram: Ward, President
Scott, JA
McPherson, JA

Hearing: Tuesday, 13th March 2007, Suva

Counsel: S.K. Ram for the Appellant

Dr. Sahu Khan]
S. Sahu Khan] for the Respondents

Date of Judgment: Friday, 23rd March 2007, Suva

JUDGMENT OF THE COURT

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[1] Mr Bharam Deo Pande died in Tavua Hospital at about 8:30 pm on 24 February 1995. He was aged 45 or 47 years old at his death. A claim for compensation or for damages for negligence was made by the deceased's widow on her own behalf and on behalf of the children of the marriage of whom there are four. The claim was heard and determined in the High Court by Honourable Mr Justice Finnigan, who on 16 November 2005 dismissed it with costs. This is the widow's appeal against that decision.

[2] A statutory right to compensation is conferred on workmen by the Workmen's Compensation Act, Cap. 94. Section 5(1) of the Act provides in the first place:

> ***"(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter provided, be liable to pay compensation in accordance with the provisions of this Act..."***

There is no dispute that since 8 July 1992 until his death on 24 February 1995, the deceased was employed by Emperor Gold Mining Company Limited ("Emperor"). During that time he was employed as a supervisor at the mine and at his death he was working underground at level 16 in Smith Shaft. On the day of his death, he had left home, as he usually did, at about 6:30 a.m.. It is not clear from the material precisely when he started work that day; but by 7:30 he was asking Fonorito Josaia to provide timber to Level 16. Mr Josaia was the section manager, later Mine Captain, in that area of the mine, and the deceased had been working under his control ever since his recruitment by Emperor some 2 years and 7 months previously.

[3] The deceased worked until midday that day when he took his lunch break at a place near where the underground cage or lift reached Level 16. He had eaten his lunch and was resting when at about 12:30 pm he suffered severe chest pains; his workmates called Emergency Services and in the meantime proceeded to massage his chest. The Emergency Services team descended to Level 16 and took the deceased up to the surface, where he was examined at the dispensary.

[4] Mr Lagilagi, who was the Emergency Service Officer on duty on that day, together with his assistants, took the deceased's pulse and breathing rate. His pulse was normal but his breathing was poor. At the dispensary, he was examined by Dr Nailatikau, who arranged for him to be transferred to Tavua Hospital. He was

admitted there at 4.10 pm and came under the care of Dr A K Ishri. When his wife arrived at the hospital, the deceased was sleeping; but when he woke up she gave him a drink of water. He asked her about their children; but he later died suddenly at about 8:30 pm that evening despite efforts to revive him.

[5] There is no direct evidence of the cause of death because a post mortem examination was not carried out. But the evidence of all of those with medical skills who attended the deceased on the afternoon of 24 February 1995 was that he had suffered a heart attack, and his death was certified as due to myocardial infarction. Finnigan J was satisfied that the deceased was suffering from "undiagnosed heart disease which was associated with pulmonary illness", and that his death was caused by myocardial infarction, which his Lordship described as muscle death in the heart. The appellant in her notice of appeal challenged this finding on the footing that there was no evidence to support it. However, if that is so, then there is no evidence at all of the cause of Bharam Deo Pande's death and the appellant therefore failed to prove that, within the meaning of s.5(1) of the Act, "personal injury by accident arising out of and in the course of the employment" was caused to the deceased. In our view, his Lordship's conclusion on this aspect of the claim was correct and there is no justification for disturbing it on this appeal.

[6] It is convenient at this stage to review the law governing workmen's compensation. Legislation in the form of that contained in the Act Cap 94 was first enacted in Britain in 1897 and has been the subject of judicial interpretation on many occasions both there and elsewhere in places where its provisions have been adopted. Decisions of the Courts have long since settled that, as Lord Macaaghten said in ***Fenton v Thorley and Co Ltd***. [1903] AC 443, 448:

> ***"... the expression "injury by accident" seems .... to be a compound expression. The words "by accident" are, I think, introduced parenthetically as it were to qualify the words "injury", confining it to a certain class of injuries, and excluding others, as, for instance, injuries by disease or injuries self-inflicted by design."***

[7] The exclusion of injury arising from disease did not long survive in that unqualified form. In ***Brintons Limited v Turvy*** [1905] AC 230 anthrax contracted while working with an animal fleece was held to be a compensable injury by accident. See also ***Dover Navigation Co Ltd v. Isabella Craig*** [1940] AC 190, where the disease was yellow fever contracted from a mosquito bite on board ship in a West African port. In this way, disease came to be recognised as capable of forming a personal injury "by accident."

[8] The speech of Lord Wright in ***Dover Navigation Co and Craig*** confirms that, in construing provisions in the form of s.5(1) of the Act, two requirements must be satisfied. The expression "in the course of employment" means that the injury must have happened during the employment. The expression "arising out of", when coupled with the conjunctive "and" in that provision, means that the injury must also be associated with some incident of the employment. In Australia since 1926, the disjunctive "or" has by amending legislation been substituted for the word "and" in this statutory collocation, while the word "injury" has been extensively redefined. However, as Fullager J said in ***Kavanagh v Commonwealth*** (1960) 103 CLR 547, 558, a consideration of the earlier cases shows that the effect of requiring a causal connection between injury and employment "is always attributed to the words "out of" and not to the words "in the course of". The former imports causation; the latter words do not. See also ***Kavanagh v Commonwealth*** (1960) 103 at 547, 556, per Dixon CJ.

[9] Because of the impact of these legislative amendments, it will do no one any good to be taken in detail through the vast amount of authority that has been accumulated in Britain and Australia on these expressions. We nevertheless find it useful to refer to what was said by Brennan CJ, Dawson and Gaudron JJ in ***Zickar v MGH Plastic Industries Pty Ltd*** .(1996) 187 CLR 310, 315 – 316, concerning the prototype legislation:

> ***"Under the English Acts, the consequence of the progress of a disease did not constitute 'personal injury by accident' unless some event that occurred in the course of the employment contributed to that consequence. The cases drew a distinction between injuries to which employment has contributed and injuries which are solely a consequence of progressive disease."***

[10] We consider that this statement briefly, but accurately, reflects the state of the law not only as it was in England, but as it is in Fiji under the Act.

[11] There is one further matter of law to be considered before turning to the facts relevant to the appeal. The critical expression in s.5(1) of the Act has been set out above. From that point, however, the legislative provision runs on with the words:

> ***"... and, for the purposes of this Act, an accident resulting in the death or serious or permanent incapacity of a workman shall be deemed to arise out of and in the course of his employment,*** *notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to this employment or of any orders given by or on behalf of his employer, or that he was acting without instruction from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business..."*

Fastening on the words reproduced here in bold type, the appellant contends that the requirements to be fulfilled in order to attract the operation of s.5(1) are such that, once the death of a workman is proved to have happened by accident, the onus is on the employer to show that it did not arise out of and in the course of the employment.

[12] We are unable to accept this submission in all its width and simplicity, and this for two reasons. In the first place, it seems to us clear that the function of the "deeming" provision in bold type is to create an irrebuttable presumption that (subject to the ensuing provisions) the accident arose out of and in the course of employment, but that it does so only where one or more of the sequential circumstances in fact accompanied it; that is, that it involved contravention of a

regulation, or of orders from the employer, or that it was done without instruction from the employer. In other words, the deeming provision is confined in its operation to displacing the effect of the sequential circumstances specifically mentioned in s.5(1) of the Act. It is not intended to and does not operate as a general presumption that an accident causing death or serious or permanent incapacity to a workman is always and irrebutably presumed to be one that arises out of and in the course of the employment. If that were the case, it would quite independently deprive the twin requirement "out of **and** in the course of the employment" of its entire meaning and function.

[13] The second reason for rejecting the submission is the presence in s.5(1) of the word "accident". The presumption created by the words in bold type is dependent for its operation on proof by the claimant of an "accident" resulting in death or permanent injury. So much is indeed acknowledged in para. 2.1 of the appellant's written submissions. The question whether there has been personal injury by accident is, according to Fullagar J in ***Commonwealth v. Hornsby*** (1960) 103 CLR 588, 597, "a question distinct from, and logically anterior, to the question whether what has happened arose out of or in the course of the relevant employment." Speaking in ***Kavenagh v. Commonwealth*** of cases in which death or incapacity results from "physiological change", such as coronary conclusion, that was the development or culmination of an antecedent morbid condition in the body of the worker, his Honour remarked (at 560):

> ***"The true position in such cases is that compensation cannot, in the absence of some special provisions such as those considered in Sharpe's Case be recovered unless the "physiological change" was associated with some episode or incident in the worker's employment – such as lifting a heavy weight or hurrying up a steep slope. It is therefore literally true to say that, in the absence of any such episode or incident, the worker fails to establish "personal injury by accident arising in he course of his employment." But the real truth in such a case is expressed not by saying that the worker has suffered personal injury by accident outside the course of his employment, but by saying that the worker has not suffered personal injury by accident at all."***

See also 554 – 555 per Dixon CJ.

[14] The result in the present case is that if the appellant proved no more than that her husband died at the place of his employment during working hours, she failed to prove the "accident" that is an indispensable prerequisite to the application of s.5(1) of the Act.

[15] In saying this we pass over a passage near the end of Dr Ishri's memorandum (ex 1) dated 7 December 1995, in which he says or concludes that the heart attack suffered by the deceased was "precipitated by excessive strenuous work" and that stress at work was therefore an aggravating though not the causative factor. His Lordship commented that the Labour Officer had given Dr Ishri some facts "which I find not proved in evidence." The notice of appeal (ground 2) complains that the learned trial judge erroneously held that the document (ex.4) prepared by the Labour Officer (Mr D Chand) was hearsay, and further that the document could not be used as proof of its contents. Neither Mr Chand nor Dr Ishri gave evidence at the trial. On behalf of the defendant Emperor, Dr Sahu Khan specifically objected at the trial to ex.4 being admitted as evidence of its contents. He said he accepted it as part of the record but was not accepting its contents. His Lordship received the exhibit on that footing. It is impossible for the appellant now to assert that its contents were admitted as evidence of their truth. To the extent that the facts in ex.4 were not proved to be true they are hearsay and cannot be used to support Dr Ishri's opinion ex.1.

[16] Mr Chand's document ex.4 was in the nature of a report on or reference dated 21 November 1995 of the deceased's case, which was directed to the Subdivisional Medical Officer at Tavua. It includes the statement that the deceased's work involved him in the handling of "concrete blocks, bags of cement, and logs of timber". This work is described in ex.4 as manual labour, which the deceased's

workmates are reported as saying was "strenuous." This may well have been the source of Dr Ishri's reported statement in ex.1 that the deceased was engaged in "excessive strenuous work." If so, the deceased's workmates did not themselves give evidence about it at the trial. In any event, this description of the deceased's work was contradicted by Mr Josaia, the Mine Captain, in the evidence he gave at trial. He said the deceased did not handle concrete blocks or bags of cement or timber logs. As a supervisor the deceased was not required to do the work himself. The "gear" that was loaded or unloaded at Level 16 consisted of timber "blocks" or beams 1 metre long which were placed in mobile trolleys. These pieces of timber do not seem to have been further described. They may possibly have been used for timber framing or pit props; but the shaft is only 2x2 metres, so that, according to Mr Josaia, there were no "logs" of timber at Level 16 that the deceased would or could have been handling. His Lordship was impressed by Mr Josaia as a witness, whom he described as being "professional, accurate and knowledgeable" in his evidence. Having seen and heard him giving it, the learned judge said he accepted his evidence in full.

[17] In the result his Lordship rejected the submission that the heart attack was caused by stress. There was ample evidence enabling him to do so. It was submitted that Emperor had encouraged or allowed the deceased to work excessive overtime. In fact, however, analysis of the list of hours worked (ex.2) shows that over the preceding six months the deceased had worked only about 2 hours or less per week in overtime. The admissible evidence accepted by this Lordship does not support the hypothesis that the deceased's duties were stressful or unduly strenuous. His Lordship concluded that stress caused by the employment was not a contributing factor in the death of the deceased.

[18] What, then, caused his death? Emperor's case was that the deceased's heart attack arose essentially from the fact that he was a heavy smoker. There was evidence that the deceased used to smoke 25 or more cigarettes per day. Mr Josaia claimed to

have seen him smoking three or four cigarettes in an hour in the course of interviews with him about matters of work. Smoking was permitted underground. The deceased's recorded attendances on Dr Nailatikau at the mine dispensary were regular. Almost all of them were for the treatment of coughs, asthma or bronchitis. The claimant's wife agreed that the deceased had a bad cough, but was inclined to downplay the extent of his smoking. She said he was not a heavy smoker; but let slip in cross-examination that the deceased smoked "first thing" on waking up at 5.00 in the morning and that he had 4 or 5 cigarettes after arriving home in the evening.

[19] Dr I R Bakani CBE is a leading cardiologist practicing in Suva. He prepared an extensive report admitted as ex. 6, and he gave evidence and was cross-examined at the trial. His opinion is summarised in the conclusion to his report ex 6 as follows:

> ***"It is my view therefore that the deceased died of heart attack as a result of the natural progression of his coronary atherosclerosis the development of which had been greatly accelerated by heavy smoking. The heart attack was not precipitated by strenuous physical activity as he was resting at the time and the attack is considered to be the result of the natural progression of coronary atherosclerosis. Chronic stress is not a provocative cause of acute heart attack."***

It was the evidence of Dr Bakani in particular that satisfied his Lordship that the deceased suffered from heart disease which was associated with his pulmonary illness, and that it was the resulting myocardial infarction that caused his death. His Lordship was entitled to accept the oral and written opinion of this leading specialist in preference to the report of Dr Ishri based on the Labour Officer's report about matters that were not proved in evidence.

[20] The consequence in our opinion is that the claimant failed to prove that her husband's death was an "accident" within the meaning of s.5(1) of the Act. It is probably not necessary to go so far as to find positively that the death was caused or contributed to by his smoking, although the material at trial certainly justifies such a

conclusion. It is enough to say that the evidence failed and fails to demonstrate that his work caused or contributed to his death in any way that is relevant for establishing liability on the part of Emperor under the Act. In this respect it differs from ***Fiji Sugar Corporation Limited Labasa v The Labour Officer*** (17 February 1995), in that there, Pathik J was persuaded that the Magistrate had properly found that the employee Mohan Lal's work had caused or contributed to his death. Here the claimant has no such finding in her favour.

[21] As well as the claim for worker's compensation the learned Judge of the High Court also dismissed the claim for damages brought against the defendant. This might be thought to be inevitable once the compensation claim failed. In addition to proving that the deceased's work contributed to his death, it was incumbent on the plaintiff to prove that there was negligence on the part of the employer which caused his heart attack and ensuing death. See ***Indira Wati v Attorney-General and Others*** (March 9, 2007; CA: Ward P; Barker, Scott JJA). It was not shown here that the defendant omitted to do anything in the way of providing a safe workplace or facilities that would have prevented the death of Bharam Deo Pande at the time or place at which it took place.

[22] The appeal therefore fails. It does so essentially because of the absence of proof of the prerequisites for both forms of claim to succeed. We say this with some regret because the deceased's widow and children have been left without the financial support that he previously provided to his family. Having regard to the period of ten years or so that elapsed before these claims were brought to trial, it is not surprising that witnesses who might have been able to testify were no longer available or could not be located. Even making some allowance for these difficulties, however, proof of the plaintiff's claim failed in several respects that were necessary to its success.

[23] The appeal against the judgment is dismissed with costs that are fixed at $500.

Ward, President

Scott, JA

McPherson, JA

Solicitors:

Samuel K Ram Solicitors, Ba for the Appellant
Sahu Khan and Sahu Khan, Solicitors Ba for the Respondent

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