IN THE STATUTORY TRIBUNAL, FIJI ISLANDS
SITTING AS THE EMPLOYMENT RELATIONS TRIBUNAL

Workmen's Compensation Case No 77 of 2010

BETWEEN: **EREMASI RATULEVU**

Applicant

AND: **WOODS & JAPSEN SURVEYORS & CONSULTANT ENGINEERING**

Respondent

Counsel: **Mr R.S. Khan, for the Applicant**
Mr G. O'Driscoll, for the Respondent

Date of Hearing: **Wednesday 30 October 2013**

Date of Decision: **11 November 2013**

DECISION

PERSONAL INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT– Section 5(1) Workmen's Compensation Act (Cap 94); Death of employee.

Background

1. The Applicant Labour Officer has made a claim for workmen's compensation for Mr Eremasi Ratulevu (deceased), who died on 13 January 2005 at home while resting after having his lunch during a work break.[1]

[1] See LD Form C1 dated 16 March 2005.

2. The claim is made reliant on Section 5(1) of the Workmen's Compensation Act (Cap 94), in that it is contended that the deceased's death, was a "personal injury by accident arising out of and in the course of (his) employment" as caused to him.

3. The Respondent employer, being represented by its insurer, argues that the death of the worker has come about as a result of natural causes and is therefore not a personal injury of the type contemplated by Section 5(1) of the Act.

The Case of the Applicant

4. The first witness to give evidence for the Applicant was Ms Madhu Lata, a Labour Inspector, who was involved in various matters pertaining to the prosecution of this case. Ms Lata gave evidence in relation to the investigation process that was adopted that gave rise to the decision to prosecute, that included:-

    - Requesting of Statement from Employer;
    - Requesting of Statement from Co-Workers;
    - And gaining a medical report, that seeks to give an opinion as to the cause of death and if it is work related.

5. When questioned by the Tribunal, Ms Lata advised that there was no report gathered by the Labour Office relating to the worker's physical job demands.[2]

6. The second witness to give evidence on behalf of the Applicant was Dr Samuela Kailawadoko. Dr Kailawadoko holds the position of Sub-Divisional Medical Officer for Rewa.

7. Dr Kailawadoko was referred to the Certificate of Death of the worker, that showed the cause of death to be "cardiac arrest"[3]

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[2] This would be regarded as a fundamental element of any analysis required to take place, so as to establish some causal connection (if any) between the 'accident' and requirements of the job demands undertaken by the worker.

[3] Exhibit A3.

8. Dr Kailawadoko gave evidence that a cardiac arrest is basically a heart condition. The condition comes about due to an obstruction to blood vessels, affecting the blood flow.

9. Dr Kailawadoko was shown and asked to comment upon two medical reports that he had completed. The first, an undated one, he says was prepared some time around 2006[4]. The second report was dated 10 December 2007.[5]

10. In the report dated 10 December 2007, Dr Kailawadoko wrote:

> *Therefore, considering the severity of his heart diseases and the strenuous activities that the deceased was being exposed to while performing survey works on the new Nausori Bridge, I have no doubt that the workload itself had significantly contributed to the onset of the fatal heart attack that morning causing the death of the deceased.*
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> *Although, the deceased was taking his short lunch break that was unfortunate in this circumstance, I still believe that the triggering factor to the fatal heart attack morning was the workload that the deceased was being exposed to immediately prior to the attack.*

11. In response to the questioning from Ms Khan in relation to theses comments, Dr Kailawadoko justified his conclusion as follows:-

- The deceased worker was suffering from a known heart condition;
- The link to the death and his work was that he was subjected to more than excessive demands.
- He was a confirmed case of coronary heart disease and his heart was not in a condition to provide for the demands required of the body.

12. In cross examination, Dr Kailawadoko's evidence was:

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4 Exhibit A2.

5 Exhibit A4.

- That in cases such as this, the deceased should have undergone a post mortem examination, though he was not sure whether or not this had occurred on this occasion.
- In most cases of heart attack, the event normally takes some time to build up; either months or years.
- He was not aware that the deceased had suffered an earlier heart attack in 1994, though did know that he was frequently in attendance at the Medical Centre visiting a known heart specialist.
- That after a heart attack, the heart doesn't ever really recover.

13. In response to the questioning by the Tribunal, Dr Kailawadoko advised:
    - He had approximately 10 years experience in the provision of Workers' Compensation Medical Reports, in which he may provide one or two reports per year.
    - He did not know the physical demands of a Survey Technician.
    - Would not know whether the workload of a Survey Technician would have been a stressful one.
    - That the deceased would have attended he clinic usually every month, to visit the heart specialist.

The Case of the Employer

14. Mr O'Driscoll advised the Tribunal that he would not be calling any witness evidence, as he believed that the critical issue for determination was whether or not, the death of the work, was work related.

15. In his written submissions Counsel sought to rely on Section 38 of the Act, insofar it too sets out a right for entitlement to compensation.[6]

[6] Though a closer examination of that provision when read with Section 41 and the Schedule of Prescribed Diseases, renders that provision irrelevant to these proceedings. A chronic heart disease is not a prescribed disease for the purposes of the Act.

16. Mr O'Driscoll assisted the Tribunal by providing a copy of the Request for Opinion memorandum forwarded to Dr Kailawadoko,[7] that in turn provided more context to the sequence of events that took place.

17. Within the Memorandum dated 13 October 2005, the contents of which were not put to challenge, the writer states:

- The deceased had worked as a Survey Technician since 2001.
- His work involved a range of land survey.
- According to his two workmates, they worked most of the time in the extreme hot sunny day and during rainy weather they worked in the office.

18. The Medical Officer was asked for his medical opinion, as to:-

(i) Whether or not the deceased nature of work in any way contributed or accelerated his death;

(ii) Whether or not the deceased nature of work contributed or accelerated to the disease which subsidiary (sic) led to his death; and

(iii) Whether or not the demise was a natural one.[8]

Did the Worker Suffer a Personal Injury by Accident For the Purposes of the Act ?

19. Section 5(1) of the *Workmen's Compensation Act* (Cap 94) 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[9], his employed shall,*

[7] See Exhibit E1.

[8] Refer Exhibit E 1.

[9] In the absence of a gender neutral expression, we will assume that the language of the legislation was otherwise intended to be just that.

subject as hereinafter provided be liable to pay compensation in accordance with the provisions of this Act ....

20. In *Wati v Gold Mining Company Ltd,*[10] a Full Court of the Fiji Court of Appeal, said as follows:

> *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 McNaughten (sic) said in Fenton v Thorley and Co Ltd. [1903] AC 443, 448:*
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> *"... 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."*
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> *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."*
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> *[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] HCA 25; (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.*
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> *Because of the impact of these legislative amendments, it will do no one any good*

[10] [2007] FJCA 20

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) [1996] HCA 31; 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."

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.

21. So the position of the Court of Appeal seems quite clear. To restate:

> *"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.*

Was the Deceased's Death Caused by Accident Arising Out of And In the Course of Employment ?

22. It appears well accepted that there are three requirements to satisfy Section 5(1) of the Workmen's Compensation Act (Cap 94).[11]

23. These are:-

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

[11] *Raiwaqa Buses Ltd v Labour Officer* [2011]FJHC174

Personal Injury by Accident

24. Dr Kailawadoko was of the view that the deceased's work as a surveyor may well be related to his fatal heart attack.[12] As mentioned earlier, in his evidence in chief, he indicated that the worker,

> *" was a confirmed case of coronary heart disease and his heart was not in a condition to provide for the demands required of the body.*

25. Despite the fact that the witness conceded he did not have a full understanding of the physical demands of the deceased worker's job, I am content in the view that his work in some way contributed to the exacerbation of this condition.

26. As the earlier medical opinion of Dr Kailawadoko stated:

> *With respect to the contributing factors that could have precipitated his death from my practical knowledge about his extensive cardiac pathologies, I feel that his work as a surveyor may well be related.*[13]

27. Having regard to the opinions of Dr Kailawadoko and the fact that the Employer provided no competing medical opinion, I am satisfied based on this evidence, that the deceased did suffer a personal injury by accident. Consistent with the requirement set out by the Court of Appeal in *Wati's* case, the uncontroverted medical evidence of Dr Kailawadoko, was that he had no doubt,

> *that the workload itself had significantly contributed to the onset of the fatal heart attack that morning causing the death of the deceased.*[14]

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12 See Exhibit E2.

13 Ibid.

14 See Exhibit A4.

28. The ongoing exposure to the workload, was the 'event' that occurred in the course of employment, that contributed to that consequence.

Arising Out of Employment

29. Pathik J in *Travellodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu*[15], sets out the case law as it affects the various limbs under examination. In relation to the second limb, His Honour relied on Lord Sumner's characterisation in *L & YR v Highley*[16] 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.*

30. As Exhibit E1 reveals,

> *According to the two workmates they worked most of the time in the extreme hot sunny day...*

31. Section 9 of the *Health and Safety at Work Act* 1996 provides:

> *(1) Every employer shall ensure the health and safety at work of all his or her workers.*
>
> *(2) Without prejudice to the generality of subsection (1) of this Section, an employer contravenes that subsection if he or she fails-*
>
> > *(a) to provide and maintain plant and systems of work that are safe and without risks to health;*

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15 [1994] FJHC 180

16 (1917) AC 352 at 372

(b) to make arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage or transport of plant and substances;

(c) to provide, in appropriate languages, such information, Instruction, training and supervision as may be necessary to ensure the health and safety at work of his or her workers and to take such steps as are necessary to make available in connection with the use at work of any plant or substance adequate information in appropriate languages -

(i) about the use for which the plant is designed and about any conditions necessary to ensure that, when put to that use, the plant will be safe and without risks to health; or

(ii) about any research, or the results of any relevant tests which have been carried out, on or in connection with the substance and about any conditions necessary to ensure that the substance will be safe and without risks to health when properly used.

(d) as regards any workplace under the employer's control -

(i) to maintain it in a condition that is safe and without risks to health; or

(ii) to provide and maintain means of access to and egress from it that are safe and without any such risks;

(e) to provide and maintain a working environment for his or her workers that is safe and without risks to health and adequate as regards facilities for their welfare at work; or

(f) to develop, in consultation with workers of the employer, and with such other persons as the employer considers appropriate, a policy, relating to health and safety at work, that will -

(i) enable effective cooperation between the employer and the workers in promoting and developing measures to ensure the workers' health and safety at work; and

(ii) provide adequate mechanisms for reviewing the effectiveness of the measures or the redesigning of the said policy whenever appropriate.

(3) .....

(4) .....”

32. I am not satisfied that in this case, the Employer, provided a work environment that was safe and without risk to the worker’s health. This was an employee who in the preceding years had taken in excess of 30 days sick leave.[17] The worker had a

[17] That amount of sick leave should ring warning bells to any employer.

known heart disease and was attending the local heart specialist on a monthly basis. It should have been more than clear to the Employer, given the worker's high utilisation of sick leave, that some risk assessment should have taken place as to the possible risk of ongoing accident or injury to the worker given his heart condition.

33. For example, the deceased's position could have been modified, his hours of work reduced; extra measures put into place to provide additional rest periods etc. There is no evidence of any of this taking place whatsoever. He also perhaps could have been encouraged to limit himself to office tasks.[18]

34. On that basis, I am of the view that the accident by injury did arise out of employment. As Dr Kailawadoko stated,

> *"it certainly is a possibility that could be considered if we link his work and the triggering factor to the deceased's fatal heart attack".* [19]

In the Course of Employment

35. In the case of the third limb of Section 5(1) of the Act, again in *Travellodge,* 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*
> *(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]

[18] Of course, that opens up other considerations in relation to relevant skills, the obligations of an employer to redeploy a worker in such situations and perhaps, the question of termination of contract.

[19] See second last paragraph of Exhibit E2.

[20] I presume now this language refers to all workers, both male and female.

36. A worker allowed by his Employer to attend home to take lunch, would in my view still be at work, providing that he did no more than partake in his lunch with the intention of promptly returning to his workplace. That is, this would be incidental to his employment. [21]

37. Unless the activities of the lunch break transform the situation into something outside of the employment relationship, I can see no reason why to find otherwise.[22] Menzies J in *Commonwealth v Oliver*[23] citing Jordan CJ in the Full Court of the Supreme Court of New South Wales in 1944, repeats the words:

> *If the terms of the contract of employment provide that the worker, during the course of the stipulated working day, may cease work for one or more short periods for the purposes of resting or refreshing himself, and he (the employer not objecting) on such an occasion occupies the period between the cessation of one period of work and the commencement of another by remaining in his workroom, it is, to say the least of it, possible to regard him as being in the course of his employment during the whole of the period that he so remains - as still doing something which can be regarded as being incidental to his employment.*

38. The death of the worker came about during the course of his working day. The worker was on a short lunch break. The activity of taking lunch in these circumstances, is not one, that would break the causal connexion between work and the accident.

39. I am satisfied that the requirements of this limb have been met.

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21 As a risk management issue, there are many good reasons why an employer would not allow workers to travel home for lunch.

22 For example, a worker who returned home to lunch and then proceeded to climb onto his roof to attend to some domestic duties and subsequently injured himself by falling from the roof, would not be still at work for the purposes of the Workmens Compensation Act.

23 [1962]HCA 38

Conclusions

40. In light of the above, the elements of Section 5(1) of the Act have been made out.

41. During proceedings, Mr O'Driscoll conceded that there was no dispute in relation to dependants. Ms Khan had wanted to adduce evidence from the deceased's wife, though it was not deemed to be necessary. As such, the Tribunal intends to award some level of compensation to Ms Ratulevu.

42. If it was no longer safe to deploy the deceased into the workplace, as a result of his heart condition, then some decision along those lines needed to be made. If the worker was no longer fit to work, that issue should have been addressed. If the worker needed to be redeployed to non-field work outside of the hot Rewa sun, then similarly that issue needed to be faced. If the consequence of all of this, was that there was no longer any option but to retire the worker on medical grounds, then that should have taken place.[24]

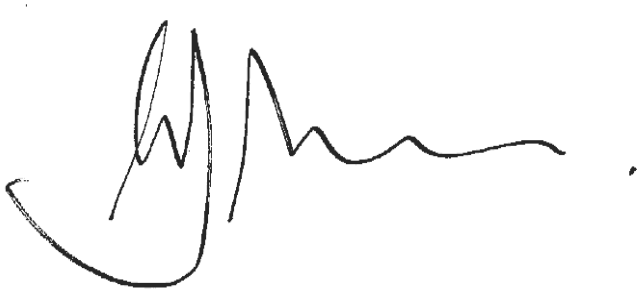
43. While the causal connexion between the work and the death is not overwhelming, on the balance of probabilities, it nonetheless exists. Dr Kailawadoko has been conducting these workplace medical reports for the past 10 years, his unchallenged medical opinion must therefore guide the Tribunal on this occasion.

44. I am prepared to award Ms Mereoni Ratulevu, on behalf of the dependants of the deceased, an amount of $7,500.00.

[24] Though there is a fine balance between the rights of a worker to remain in employment and decision to positively discriminate against the worker on the basis of his or her inability to be able to meet the inherent physical requirements of a job.

Decision

The Tribunal orders that the Applicant be awarded an amount of $7,500.00, as compensation to the dependants of the deceased, payable within 28 days.



Mr Andrew J See
Resident Magistrate