Decision

Employment Relations Tribunal

Title of Matter:	**LABOUR OFFICER on behalf of the estate of Penaia Mateo (Applicant) v Nasinu Town Council (Respondent)**
Section:	**Section 8 *Workmen's Compensation Act* 1964**
Subject:	**Compensation for permanent and partial incapacity**
Matter Number(s):	**ERT WC 19 of 2017**
Appearances:	**Ms R Kadavu, for the Labour Officer** **Ms V Waqa, Mr P Varea and Ms S Kant,for the Respondent**
Date of Hearing:	**10 November 2017** **30 January 2019.**
Before:	**Mr Andrew J See, Resident Magistrate**
Date of Decision:	**3 June 2019**

KEYWORDS: Section 8 *Workmen's Compensation Act* 1964; Claim for Permanent and Partial Incapacity.

CASES CITED:

Fiji Sugar Corporation Ltd v Labour Officer [1995] FJHC39; Civil Appeal No 0010 of 1994, 17 February 1995.
Labour Officer v Post Fiji Ltd [2017] FJET 3; ERT WC97.2016 (13 February 2017)
Raiwaqa Buses Ltd v Labour Officer [2011]FJHC174; HBA23.2008 (18 March 2011)
The Labour Officer v Wood& Jepsen Surveyors and Engineers [2013] FJET 4;
Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu [1994] FJHC 180; (9 December 1994)

Background

[1] This is an application made for worker's compensation in accordance with Section 8 of the *Workmen's Compensation Act* 1964. The application filed on 25 April 2017, claims that "on 4 June 2014, while at work collecting rubbish from a Kinoya residence, the Worker's full right arm suddenly felt heavy and fingers started bending towards each other and after medical examination he was informed that he suffers from neural leprosy".

[2] A *Notice by Employer of Accident Causing Injury* (Form LDC1) was filed by the Employer on 22 December 2014[1]. The Employer at that time, provided the Ministry with two medical reports from the Tamavua Twomey Hospital and the Makoi Health Centre, confirming that the Worker was suffering from a deteriorating neurological condition in his right arm and forearm leading to semi-paralysis and marked muscle wasting of the affected limb. The Employer's correspondence of that same date further goes on to state:

> *The medical prognosis dated 29 October 2014 state(s) the condition can be spontaneous or secondary to injury and aggravated by strenuous and physical type of employment.*
>
> *Mr Mateo is no longer an employee of the Council, however the Medical reports are confirming that the injuries sustained was a direct result of the nature of work he was involved in whilst employed by the Council.*

[3] Somewhat confusingly, in a Response provided to the Application dated 10 May 2017 and filed on 12 June 2017, it is claimed that the Respondent cannot confirm the circumstances that gave rise to the Worker's injuries, nor is it able to determine whether the Employer is liable to pay compensation under the *Workmen's Compensation Act* 1964. When the matter was first called on before the Tribunal on 22 June 2017, Ms Waqa sought further time for the Employer to liaise with its insurer, who had undertaken a report in relation to the position that the Employer should adopt in relation to liability. It is not for this Tribunal to involve itself in contractual arrangements between a defendant Employer and its insurer. The Tribunal has noted the report that was provided and is not persuaded by the information within it. The underlying thrust of that report is that the Employer should argue that the Worker was suffering from a pre-existing condition that "could have been aggravated later which lead (sic) to muscle weakening."

[4] The Worker passed away on 27 July 2017, after suffering from chronic progressive myocardial infarction.

The Case of the Labour Officer

Dr Frank Underwood

[5] The first witness to give evidence was Dr Frank Underwood who is the Chief Medical Officer at the Ministry of Health. As part of his evidence, Dr Underwood was referred to a medical report which he provided on 1 June 2015, where he stated that the Worker had been suffering from disc degeneration, partial disc herniation and nerve root compression, that he said was likely caused by repetitive trauma which his employment would have likely contributed. Dr Underwood told the Tribunal that when providing a whole body permanent impairment assessment of the Worker on 27 August 2015, he had regard to the reports of Dr Nakolinivalu, who had diagnosed that Mr Mateo was suffering from neural leprosy,[2] a medical report from Dr Viniasi dated 29 October 2014 who had assessed a neurological condition of the Worker's forearm and a medical report of Dr Rahalkar dated 10 September 2014, coinciding with the conduct of a magnetic resonance imaging (MRI) scan that was taken at that time.

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1 See Applicant's Disclosures at Folio1.

2 See Annexure 4 to the Applicant's Disclosures.

[6] When referred to his Impairment Assessment medical report dated 27 August 2015[3], Dr Underwood stated that he had reached his view based on the *New South Wales Workmen's Compensation Guidelines 5th Edition* as provided by the Australian Medical Association. According to Dr Underwood, the Worker was suffering from a neuro degenerative disorder and osteo arthritis, that was likely caused by repetitive trauma. Dr Underwood was of the view that the work performed by Mr Mateo would have contributed to the exacerbation of his condition.

[7] During cross examination, it was put to the witness that the Worker had previously served in the military overseas and was asked whether the conditions in the army could have contributed to the onset of the Worker's illness. It was accepted that the physical working conditions of army life, could have also contributed to the degenerative illness experienced by the Worker prior to his demise.

Medical Report from Dr Alan Biribo (CWM)

[8] By consent of the parties, the Labour Office tendered a further medical report that had been prepared by Dr Alan Biribo of the Colonial War Memorial Hospital. Dr Biribo's report confirmed that he had examined the Worker on 9 June 2014, when he attended the hospital's neurological clinic and presented with neck pain, right side brachialgia (arm pain), right index and middle finger paresthesia (tingling and numbness) and right arm weakness.

The Case of the Employer

Mr Taniela Kepa

[9] The first witness called to give evidence on behalf of the Employer, was Mr Taniela Kepa, who was the Worker's supervisor prior to his illness. Mr Kepa explained the work of employees in the field and explained how there had been no instruction for the Worker to be lifting heavy tree branches without assistance. It was clarified by the Witness that a backhoe would assist workers engaged in the Council's 'Green Section', when they were removing fallen tree branches. Mr Kepa gave evidence that he was not present when the Worker suffered an injury at work, although came to know of the incident later that day, when a report came through.

Mr Albert Rosa

[10] Mr Rosa was the former Human Resource Officer at the Nasinu Town Council. The Witness had been in that role for three years up and until May 2017, was responsible for human resource (HR) activities as well as the handling of workmen's compensation claims. According to Mr Rosa, the then injured worker had first been employed within the Council's carpentry team, before being transferred as a drain worker and later as a member of the Waste Collection team.

[11] Mr Rosa indicated that his involvement post the incident, saw him completing the relevant forms for submission to the Ministry. The Witness was of the view that a backhoe machine would have assisted workers when performing the task of removing green waste.

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[3] See Annexure 13.

Was the Worker a Workman for the Purposes of the Act?

[12] Section 2 of the *Workmen's Compensation Act* 1964 defines workman (Worker) to mean:

> *any person who has, either before or after the commencement of this Act, entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, or otherwise, whether the contract is expressed or implied, is oral or in writing, whether the remuneration is calculated by time or by work done, and whether by the day, week, month or any longer period:*
>
> *Provided that the following persons are excepted from the definition of "workman":-*
>
> *(a) a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, not being a person employed for the purposes of any game or recreation and engaged or paid through a club;*
> *(b) an outworker;*
> *(c) a member of the employer's family dwelling in the employer's house or the curtilage thereof; or*
> *(d) any class of persons whom the Minister may, by order, declare not to be workmen for the purposes of this Act.*

[13] The Tribunal is satisfied that Mr Mateo was a workman for the purposes of Section 2.

Was the Respondent the Employer of the Workman?

[14] Section 3 of the Act, reads:

> *"employer" includes the Government and any body of persons corporate or unincorporate and the personal representative of a deceased employer, and, where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person; and in relation to a person employed for the purposes of any game or recreation and engaged or paid through a club, the manager, or members of the managing committee of the club shall, for the purposes of this Act, be deemed to be the employer;*

[15] There is no doubt that the Employer was captured by the definition at Section 3 of the Act.

Did the Worker Suffer a Compensable Injury?

[16] Section 5(1) of the *Workmen's Compensation Act* 1964 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, his employer shall, subject as hereinafter provided be liable to pay compensation in accordance with the provisions of this Act ....*

[17] It appears well accepted that there are three requirements to satisfy Section 5(1) of the *Workmen's Compensation Act* 1964.[4] These are:-

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

Did the Worker Suffer A Personal Injury by Accident?

[18] Pathik J in *The Fiji Sugar Corporation Limited v Labour Officer*[5] set out in detail what was to be meant by the expression "injury by accident". The medical report provided by Dr Frank Underwood dated 1 June 2015, states that Mr Mateo's injuries (cervical spodylosis, disc degeneration with partial disc herniation and nerve root compression) were consistent with severe osteoarthritis, which was likely caused by repetitive trauma – which his employment would have contributed toward. This first limb is therefore satisfied.

Was the Worker's Injury by Accident Arising Out of Employment?

[19] Pathik J in *Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu*[6], sets out the relevant considerations when determining whether or not a worker suffered an accident arising out of employment. His Honour relied on Lord Sumner's characterisation in *L & YR v Highley*[7] 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.*

[20] As his Honour further stated:

> *The expression is not confined to the mere "nature of the employment" as formerly held in several cases, but it "applies to the employment as such - to its nature, its conditions, its obligations, and its incidents.*

[21] According to the statement provided to the Labour Office by the Worker on 7 August 2014:

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4 *Raiwaqa Buses Ltd v Labour Officer* [2011]FJHC174; HBA23.2008 (18 March 2011)
5 [1995] FJHC 39; Hba0010j.94b (17 February 1995)
6 [1994] FJHC 180
7 (1917) AC 352 at 372

We were collecting rubbish from the Kinoya roadside when the incident happened. I was doing this work for the past three months when suddenly my full right arm felt crippled and always paining. We were collecting waste materials from the road side.. assisting the digger in putting rubbish on the rubbish truck – waste materials like timbers, logs, scrap metal which were heavy to lift. .. All of a sudden my full arm felt heavy and my fingers started bending

[22] These symptoms are consistent with Dr Biribo's medical examination. Both medical officers are of the view that the symptoms of the Worker were as a consequence of his work activities. This second limb is made out.

In the Course of Employment

[23] In *Travelodge,* 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"

[24] The Tribunal is satisfied that these two elements have been satisfied. The Employer initially had conceded that the injuries were work related and then after consultation with its insurer, sought to resile from that position. Even if it was the case that a backhoe machine was available to assist with the heavy lifting of materials, if it was the case that the workers were not to be involved in heavy manual handling tasks, that should have been made clear to them during the course of the supervision of their activities. There is no evidence whatsoever that this edict had been issued to the Workers, other than the claim by Mr Kepa that a backhoe was available to lift branches. The Tribunal is satisfied that the case of the Labour Officer has been made out. There was no competing medical evidence provided by the Employer, even though it had a very lengthy time to prepare for its case.

Conclusions

[25] The case of the Applicant is made out and the estate of the Worker entitled to the compensation payable in the amount of $24,000.00. This amount is consistent with the maximum amount available under Section 8 (1)(b) of the Act, prior to the introduction of the further amendments to the revised compensation amounts coming about in 2015[8]. The relevant datum point, is what was the compensation available at the date of injury, not at the time the claim was initiated. In addition, in accordance with Order 32 rule 8 of the *Magistrates Court Rules* 1945, interest shall be awarded as and from the date the application was filed, being June 2016. An interest amount calculated at the rate of 5 percent per annum for 730 days (being the date from which the application was filed), shall also be awarded in the amount of $2,400.00.

[8] See *Workmen's Compensation (Amendment) Act* 2015.

[26] The Tribunal has summarily assessed costs in this matter at $1,500.00.

Decision

[27] It is the decision of this Tribunal that:

(i) The Respondent pay compensation to the Labour Officer on behalf of the estate of Penaia Mateo, in the amount of $26,400.00, within 28 days hereof.

(ii) The Respondent pay costs to the Labour Officer in the amount of $1500.00, within 28 days hereof.

Mr Andrew J See
Resident Magistrate