Decision

Employment Relations Tribunal

Title of Matter:	**LABOUR OFFICER on behalf of Mere Maija Glagovs**	**(Applicant)**
	v	
	SHAIREEN NISHA trading as Mughlai Restaurant	**(Respondent)**
Section:	**Section 8 *Workmen's Compensation Act* 1964**	
Subject:	**Compensation for permanent and partial incapacity**	
Matter Number(s):	**ERT WC 130 of 2018**	
Appearances:	**Mr P Kumar, Patrick Kumar Lawyers**	
	Ms R Kadavu, Labour Office	
Date of Hearing:	**Thursday 25 July 2019, Saturday 17 August 2019**	
Before:	**Mr Andrew J See, Resident Magistrate**	
Date of Decision:	**4 November 2019**	

KEYWORDS: Section 7 *Workmen's Compensation Act* 1964; Claim for Compensation; Permanent 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)
Labour Officer v Fiji Meat Industry Board [2018] FJET9; ERT WC 107 of 2016 (12 February 2018).
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; (11 November 2013)
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 Sections 5 of the *Workmen's Compensation Act* 1964. The application filed on 26 March 2018, claims that on 3 June 2016, the Worker suffered a personal injury by accident arising out of and in the course of her employment. The claim made on behalf Ms Glagovs, is that she slipped on the floor whilst working in the kitchen at the Mughlai Restaurant. The uncontradicted evidence of Dr Taloga a

specialist orthopaedic surgeon, is that the Worker suffered a minimally displaced intra-capsular neck of right femur fracture and as a result, now is incapacitated at 39 per cent of the whole person. Based on the statutory formula contained within the Act, a claim of 39 per cent WBI equates to a compensatory sum of $14,796.28.

[2] At the outset, it should be noted that the Employer was given the opportunity on 1 February 2019, to have the Worker submit to an Independent Medical Examination. The parties were thereafter directed to conduct a compulsory conference in order to canvas the possibility of resolving the claim by way of agreement. For whatever reasons, disappointingly this did not take place.

Evidence at Hearing

[3] The first Witness called to give evidence was **Dr Emosi Taloga**, a consultant orthopaedic surgeon, based at the CWM Hospital. Dr Taloga's evidence was that he provided a medical report for these proceedings on 23 May 2018[1], in which he relied on:

- patients notes;
- medical examination; and
- X-ray undertaken at the day of examination.

[4] Dr Taloga gave his medical opinion based on the American Medical Association Guide to the Evaluation of Permanent Impairment 5th edition, both as to the degree of impairment and to the fact that the injury sustained by the Worker was consistent with a fall in the manner in which she described. During cross examination, the medical expert indicated:-

- That this type of fracture and complications sometimes presents after the immediate event;
- That some of the complication has arisen out of the dislocation of a screw, that was affixed to the hip joint.

[5] The next witness to give evidence was the investigating labour officer, Mr Kelemete Qiodravu. The Witness told the Tribunal:-

- That the Worker had visited the Labour Office before a statement was taken;
- The Employer was requested to complete a Notice of Accident Form (LDC1);
- That he interviewed the Worker.

[6] A further investigating officer, Ms Anushika Lata, gave evidence on behalf of the Labour Office. In her evidence, Ms Lata stated that:

- She continued the investigation commenced by Mr Qiodravu; and
- Organised the final medical assessment to be undertaken, prior to having the demand for payment served on the Employer.

[7] The next witness was the Worker, Ms Mere Maija Glagovs. In her evidence Ms Glagovs stated that:-

[1] See Annexure 15 of the Applicant's Disclosures.

- In 2016 she worked at the Mughlai restaurant owned by the Employer;
- In that role she worked in the front and back of restaurant and that her duties included frying eggs and patties; washing dishes and peeling potatoes;
- She had provided a statement to the Labour Office (Ex L7), indicating that on the day of the injury she was frying patties, and that her supervisor was cooking at the next stove beside her, when he inadvertently spilt cooking oil on the floor.
- During the lunch hour rush, a pot of rice that was cooking on that stove, spilt over and tipped a frying pan with oil spilling onto the floor and onto the Worker.
- This made the floor slippery and because she was wearing 'flip flops', that contributed to her fall;
- A co-worker working beside her, tried to assist to get her up on a chair;
- The main owner of the restaurant didn't see what had happened to her at that time;
- She waited for her daughter to come and collect her as the female owner insisted that someone come and collect her;
- Two women from a neighbouring Home and Living store, assisted her to a taxi and she went straight to the Health Centre at Nausori;
- Following attendance at Nausori she was ultimately referred to the CWM Hospital, where she was required to have surgery and a metal screw inserted into her hip to provide support and allow movement;
- She was discharged from the CWM Hospital on 12 June 2016.

[8] In cross examination, the Witness was challenged in relation to her claim that she had been working regular hours of work and whilst acknowledged that some of the signatures produced on the time sheets were hers (see timesheets at Exhibit E2), did not accept that they adequately represented her hours of work. During cross examination, the Worker initially conceded that the day of injury was to be her last day of work with the Employer and then later denied that she had been told this by Ms Nisha.

[9] The next witness called to give evidence was Gulsger Jamal Shahban, who was the owner of the flat in Nausori, where the Worker resides. The Witness told the Tribunal that:

- On the day in question he came home to his wife, who had discovered the Worker crying and calling out in pain and so together, they took Ms Glagovs to the Nausori Hospital;
- That he needed to aid her walking to and from the car.[2]

[10] Ms Shereen Nisha Khan, was the partner of Mr Shahban, who also gave evidence that she had seen the Worker on the morning of the day of the incident and later that afternoon found her in a lot of pain, lying on the floor and could not walk. During cross examination, the Witness stated that in that afternoon, she noticed that the Worker had come home by taxi and that someone had brought her into the home.

[11] The daughter of the Worker, Ms Miriam Austra Qutonilaba was asked to give evidence and she told the Tribunal:-

- That she had worked cooking and undertaking front of house duties for the Employer;
- That she had worked in that role for approximately three weeks, in a part time capacity; and

[2] See Statement provided at Ex L8.

- That she received a telephone call from her mother on the day of the incident around midday and that when she arrived at the restaurant, she took her to the Nausori Health Centre and on the Sunday, the Suva Hospital.

The Case of the Employer

[12] Ms Shaireen Nisha is the owner of the Mughlai restaurant and says that she no longer was operating the restaurant at the premises where the accident took place. In her evidence, the Witness stated:-

- During 2016 at the relevant time, that she had engaged 2 permanent staff and a couple of temporary staff;
- That the Worker had commenced employment in the last week of May 2016 ;
- That the position was advertised in the paper for a temporary job;
- She estimated that the Worker was only employed for approximately 7 days and in that time worked normally 3 hours, with only 2 or 3 days for 8 hours[3].
- That the Worker's performance was not appropriate for the workplace that on one occasion she wasted food stuffs by throwing out a basin of tamarin, thinking that it was dirty water and that she acted aggressively at work, that made her feel insecure.
- She recalled the day 3 June 2016, when the incident took place and said that "I asked Mere to pour oil from small pot to fry pan" and that she poured oil and started to fry patties, she slipped and fell on the floor. .."she fell on her bum".. I went to her she was on sitting position".
- Following the incident, I asked her if she was hurt and she said that she was fine, that "she just needed massage".
- For one hour after the incident, she was peeling garlic and we insisted that she go home after that, as it was her last day;
- That she had offered to take her to the doctor, however she declined and said that she just needed massage;
- Eventually, the Worker's daughter came and they left around 4.00pm; and
- That when she left the restaurant, the Worker was not limping;

[13] According to the Witness, after the incident the Worker called her on the Saturday and was angry that she had been stopped coming to work. It was claimed, that the Worker called her again from the hospital on the Monday and "was a bit emotional and needed money". Ms Nisha said that she went to the hospital and gave her $100.00.

[14] During her Evidence in Chief, the Witness said on the day of the accident, that she was standing at the door approximately 3 to 4 metres away from the Worker. The Witness said:

"I saw oil on the floor… After I have her hand, I saw oil on the floor…didn't see her spill oil".

[15] The final witness to give evidence was Ms Seema Achari a co-worker of Ms Glagovs, who gave evidence that she was working at the restaurant in 2016 and was involved in washing, cutting chickens and peeling garlic. The Witness was asked to describe the attributes of the Worker and proceeded to advise the Tribunal that she wore slip on sandals and not shoes in the kitchen. During the course of the giving of her evidence, the Witness initially told the Tribunal that she had seen the Worker fall in the car park. The Tribunal was very concerned about the way in which questions

[3] That evidence is not consistent with the sample of timesheets produced (Exhibit E2).

were being led by Counsel and much debate and withdrawal of the Witness ensued. Ms Achari told the Tribunal that she had not seen the Worker fall in the restaurant. The Tribunal was so concerned with the evidence and the conduct of this case, that it called for the transcript recording, so that the evidence of the Witness could be reviewed. The Witness was subsequently warned of the implications of deliberately misleading the Tribunal and after a further adjournment, she altered her evidence in a very significant way.

[16] Ms Achari told the Tribunal that she did witness the Worker fall once in the kitchen and that she told her, "to tell the boss", but claimed Ms Glagovs said she was ok. The Witness also then stated, that she did see the Worker fall in the car park as well. During cross examination, the Witness could not recall where in the car park the Worker had fallen. The Witness said that she could not recall when the Worker fell in the restaurant. The Witness then claimed that the Worker fell as there was "something on the floor" and claimed that she was just beside Ms Glagovs at this time. The Witness then clarified when pressed, that it was oil on the floor.

[17] When asked about the car park incident, the Witness then said she could not recall what caused the Worker to fall in the car park and did not know how serious the injury was. In re-examination, the Witness said that she could not recall the Worker coming to work the following day and "forgot" how many days the two former employees worked together at the restaurant.

[18] When questioned by the Tribunal, the Witness said that she couldn't recall anything about the Worker falling in the car park. She stated, "I remember one in kitchen but the one in car park can't remember. When asked, why you said car park, the Witness said, "I heard that someone had said that". The Tribunal said, "So you didn't see her fall in the car park?" and the Witness, responded, "No".

Was Ms Glagovs a Worker for the Purposes of the Act?

[19] 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 accepted 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.*

[20] The Tribunal is satisfied that the Worker was a workman for the purposes of Section 2.

Was the Respondent the Employer of the Worker?

[21] Section 3 of the Act, reads:

> *"employer" includes the Government and anybody of persons corporate or unincorporated 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;*

[22] 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?

[23] 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....*

[24] 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?

[25] 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 evidence of Dr Taloga was that the Worker had suffered a minimally displaced intra capsular neck of right femur fracture. The injury and medical evidence has not been contradicted. This limb is established.

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

[26] 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*

[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

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.

[27] 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.

[28] The Worker was undertaking kitchen duties at the time of her fall. The evidence is quite clear from the Employer and her staff, that the Worker slipped on an oil spill in the kitchen of the restaurant. She was undertaking cooking duties at that time. The Tribunal is satisfied that this second limb has been made out.

In the Course of Employment

[29] 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"

[30] The Tribunal is satisfied that these two elements have been satisfied. Both of the Employer's witnesses saw the Worker fall whilst undertaking her tasks. She was performing work under the instruction of her employer and these two conditions have been met. As a result, all three limbs of the relevant statutory test are satisfied.

Conclusions

[31] The Worker suffered an injury at work. The medical evidence supports that the injury was consistent with the fall as it occurred. The Worker claimed to have been paid $90.00, to $95.00 a week, however the Employer's time and wages records (Exhibit E2), reveal that the daily hours varied from between 3 to 6.5 hours a day. Why the Labour Officer has based a claim on 48 hours a week in such circumstances, is just hard to fathom. Either way, the Tribunal is not particularly persuaded by documents that are tendered when they are not in their original state. The claim of the Labour Officer is based on the Worker receiving a rate as provided for under the *Wages (Hotel and Catering Trades)* Regulation 2015 at the rate of $3.04 per hour, based on a 48 hour week. The Worker does not appear to have been paid at the appropriate rate based on the 2015 Regulation. The Tribunal is also not satisfied that the Worker was engaged for six days a week at eight hours per day. It is more than likely, that the Worker was engaged for no more than on average, 5 hours a day for 5 days a week. In relation to the tenure of employment, the Tribunal accepts the evidence of the Worker that she was likely to have had ongoing employment. The Worker admitted that the signature that was contained within the time and wages records, acknowledging hours worked was hers. If that is the case, on some occasions the Worker has

accepted that she has only worked 3 hours per day[8]. It is impossible to prosecute a case, claiming 48 hours a week, when the Worker herself admits to not working those hours.

[32] Reliant on the statutory formula at Section 8 of the Act, the following calculations can be made:

(a) 260 weeks earnings (based on 25 hours per week)= $19,760.00
(b) Degree of incapacity = 39%
(c) Compensation payable = $7,706.40

[33] A compensation amount in the sum of $7,706.40 is therefore awarded against the Employer in satisfaction of the claim. The Tribunal has summarily assessed costs in this matter at $1,000.00.

Other

[34] These sorts of accidents are avoidable. Employers must ensure that Workers engaged in kitchens where food is being prepared, not only should wear enclosed shoes but that these should preferably have rubber soles, in order to safeguard against slips and falls. The hazards in kitchens are numerous, and these need to be identified as part of the risk management activity, regardless of the size of the small business operation. Issues such as burns, slips and falls, cuts from sharp utensils, etc. are commonplace in this industry and they need to be brought to the attention of Workers at the time of their engagement and effectively monitored. Clearly, oil spills need to be attended to immediately. That is, work stopped and that hazard addressed.

Decision

[35] It is the decision of this Tribunal that:-

(i) Shaireen Nisha pay compensation to the Labour Officer on behalf of Mere Maija Glagovs, in the amount of $7,706.40, within 28 days hereof.

(ii) Shaireen Nisha pay costs to the Labour Officer in the amount of $1000.00, within 28 days hereof.

EMPLOYMENT RELATION TRIBUNAL OFFICIAL

Mr Andrew J See
Resident Magistrate

[8] The time and wages records were not complete and showed that the Employer had not been paying the Worker the correct hourly rate.