IN THE HIGH COURT OF FIJI AT LABASA
CIVIL JURISDICTION

Civil Action No. 06 of 2013

BETWEEN : **LOTE SARO** of Siberia, Labasa, Operator and Saw Doctor

PLAINTIFF

AND : **FIJI FOREST INDUSTRIES LIMITED** a limited liability Company having its registered office at Malau, Labasa

DEFENDANT

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : **Mr S. Prasad for the Plaintiff**
Mr A. Ram and Mr K. Ratule for the Defendant

DATE OF HEARING : **6 and 7 February 2017**

DATE OF JUDGMENT : **27 July 2017**

JUDGMENT

Introduction

1. On 4 September 2013, Plaintiff caused Writ to be issued with Statement of Claim claiming for special damages, general damages, loss of FNPF contribution, interest and costs arising out of injuries sustained by the Plaintiff in an accident during the course of his employment on 28 March 2014.

2. On 18 September 2015, and 6 October 2015, Defendant filed Acknowledgement of Service and Statement of Defence respectively.

3. On 3 December 2015, Plaintiff field Reply to Statement of Defence.

4. On 11 January 2016, and 8 February 2016, Plaintiff and Defendant filed Affidavit Verifying List of Documents respectively.

5. On 7 March 2016, Plaintiff filed Notice to Produce.

6. This matter was called on 9 August 2016, when Defendant's Counsel sought time to have Plaintiff medically examined and this matter was adjourned to 19 August 2016, for further directions.

7. On 19 August 2016, the Acting Master directed Defendant complete discovery and thereafter to convene Pre-Trial Conference (**"PTC"**) and file Minutes of PTC by 25 August 2016 and adjourned this matter to 25 August 2016.

8. On 25 August 2016, Defendant's Counsel informed Court that Defendant's insurer wants Plaintiff to be medically examined when this matter adjourned to 5 September 2016.

9. On 5 September 2016, Defendant's Counsel informed Court that Plaintiff has been medically examined and they are waiting for report and this matter was adjourned to 14 September 2016.

10. On 14 September 2016, Defendant's Counsel informed Court that he received Medical Report on 8 September 2016, and was granted leave to file Supplementary Affidavit Verifying List of Documents and this matter was adjourned to 26 September 2016.

11. On 15 September 2016, Affidavit Verifying Defendant's Supplementary List of Documents was filed.

12. On 26 September 2016, Acting Master directed parties to hold PTC and file Minutes of PTC and adjourned this matter to 12 October 2016.

13. On 12 October 2016, Acting Master granted parties further time to hold PTC and file Minutes of PTC and adjourned this matter to 24 October 2016 and thereafter to 27 October 2016.

14. On 25 October 2016, Plaintiff filed Minutes of PTC.

15. On 27 October 2016, Acting Master directed Plaintiff to file Order 34 Summons and Copy Pleadings and adjourned this matter to 21 November 2016, for mention.

16. On 4 November 2016, Plaintiff filed Order 34 Summons and Copy Pleadings and this matter was fixed for trial on 6 and 7 February 2017.

17. The trial proceeded on 6 February 2017, and concluded on 7 February 2017.

18. At conclusion of trial both parties were directed to file Submissions with Judgement to be delivered on Notice.

Issues to be Determined

19. The issues that need to be determined are as follows:

(i) Whether Defendant owed duty of care to the Plaintiff?
(ii) Whether Defendants breached duty of care owed to the Plaintiff?
(iii) Whether Defendant's breach caused Plaintiff injuries which resulted in Plaintiff suffering pain, special and general damages?
(iv) Whether Plaintiff was contributory negligent?
(v) What is the quantum of damages?

Documentary Evidence

20. The following documents have been put in evidence by the parties:

Exhibit No.	**Document**
P1	Certified True Copy of Birth Certificate of Lote Saro, Plaintiff;
P2	Photocopied copy of Accident Investigation Report dated 28 March 2014;
P3	Original Medical Report dated 29/07/15 from Labasa Hospital;
D1	Photocopy Medical Report dated 8/9/16 from Taloga Orthopedic Clinic;
D2	Copy of Pay Record from 28/3/14 to 14/6/15.

Plaintiff's Case

21. Plaintiff gave evidence himself and called one (1) more witness.

22. Plaintiff during examination in chief gave evidence that:-

(i) He was born on 15 July 1977 (Exhibit P1);

(ii) On 28 March 2014, he was employed by Fiji Forest Industries Ltd, the Defendant as a saw doctor and his duties included sharpening the saw, welding, changing saw blade, grinding the place that was welded, and hammering saw to straighten it up;

(iii) He does not have any qualification for being saw doctor but has document written by Head of Saw Doctors;

(iv) He was paid $4.62 per hour and reason why Defendant was saying that he was paid $4.49 per hour is that when he was being trained to be saw doctor he was paid $4.49 per hour and from the time he was employed as saw doctor he was paid $4.62 per hour;

(v) He worked for Defendant for nine (9) years before he was appointed saw doctor;

(vi) His position in company would change every year so that he could know all the jobs and upskill his work and he was aiming for post of foreman or supervisor;

(vii) If he became supervisor his wages would be about $6.25 per hour;

(viii) On 28 March 2014, he came to work at 4.30pm when his supervisor Eroni, told him that the cleaners Saimone and Poasa, did not turn up for work and if he could do cleaners job;

(ix) He initially refused to do the cleaners job but when his supervisor said to him as to how will the company operate if he did not do the job and after he thought about his family being affected if he did not do the job, he agreed to do cleaners job;

(x) He started work at 4.30pm by cleaning the surface and headrig saw and surface contains saw dust and pieces of wood which is cleared first before they enter pit;

(xi) They use the biggest saw;

(xii) When the saw is operating water is used to wet the saw and timber, so that saw does not get hot and break and timber is kept soft.

(xiii) He worked on the surface until 6.00pm and after that he went down to the pit with Manoa assisting him to carry the ladder into the pit;

(xiv) Ladder was placed inside the pit from where the conveyor belt is located up to the opening of the top and the opening of the pit on top is rectangular shaped with length being approximately ten (10) feet and width being approximately three and half (3.5) feet;

(xv) Pit is approximately ten (10) feet deep;

(xvi) There is small square hole with all sides being approximately two and half feet (2.5 ft);

(xvii) When he went down the pit he could not stand straight and had to squat;

(xviii) There was water and saw dust inside the pit and water level was upto his knee and pit was dark and smelly;

(xix) When inside the pit he asked Manoa to pass him the bucket and he passed seventy (70) to eighty (80) buckets of water to Manoa using one bucket;

(xx) Bucket had rope tied to it and after he filled the bucket he lifted it up for Manoa to pull the bucket using the rope and throw water into the drain;

(xxi) Before they had a pump installed in the pit which sucked water and saw dust and transferred to the drain from when it was deposited into the sea;

(xxii) Pump was not being used at time of accident because he was told that pump has gone for repairs and was under repair for more than one (1) year and when pump was under repair the pit was cleaned the way he did on date of accident;

(xxiii) There was a hole in the pit where the pump was situated;

(xxiv) When he was passing the water, water spilt on him in the process;

(xxv) After taking out seventy to eighty buckets of water, there was saw dust left with little bit of water and the saw dust upto half way between his ankles and his knee;

(xxvi) He took out the saw dust using spade about the size of his hand and by putting it on the conveyor belt located inside the pit which takes the saw dust to the drain;

(xxvii) Conveyor belt was not in operation when he took out the water;

(xxviii) Manoa would turn on the conveyor belt on his request and Manoa would also turn it off when he asked him to do so;

(xxix) The place was very unsafe; was dark and smelt bad;

(xxx) At the time of accident he slipped when he was working and when he tried to brace himself, his right hand was on the cement and his left hand went under the conveyor belt which was in operation;

(xxxi) When his left hand went under the belt it got twisted, felt a click on his shoulder and he used his strength to pull his hand out and he knew his left hand got twisted because he could hear bones breaking;

(xxxii) When he pulled his hand out his palm was on the other side and his left hand below the elbow was hanging;

(xxxiii) He then yelled to Manoa to turn off conveyor belt and throw down the ladder because he was injured;

(xxxiv) There was no guard on the conveyor belt;

(xxxv) After the ladder was put down he struggled to climb the ladder to the top and Manoa ran to the showroom to make phone call;

(xxxvi) At that time he was wearing shorts and vest and his clothes were dirty and smelling bad;

(xxxvii) He did not wear safety boots because the area he worked was wet;

(xxxviii) He with the assistance of Manoa, had his bath and changed his clothes;

(xxxix) After Manoa called for transport from showroom he waited for about fifteen (15) minutes before the company vehicle arrived and he was informed by night supervisor that transport took another sick person to hospital;

(xl) After transport came he was taken to Labasa Hospital where he was:-

(a) taken to emergency unit in a wheelchair;

(b) X-ray was carried out on instruction of doctors present;

(c) After the x-ray report came he was admitted in men's ward;

(d) Doctors then gave him injection and straightened his left hand and put plastic/plaster;

(e) He was admitted for four (4) days from 28 March 2014 to 31 March 2014, and was given injection and tablets;

(f) He did not feel anything when his hand was straightened because he had been given injection;

(g) When he was being transported to the hospital he felt a lot of pain because his broken bones were rubbing;

(xli) He went back to hospital on 7 April 2014, when he was re-admitted and taken to the theatre where plates were placed inside his hand with eight (8) screws on one side and four (4) on the

other side, which procedure was carried out by doctors from abroad;

(xlii) He was discharged on 10 April 2014;

(xliii) On 28 April 2014, he went back to hospital because one of the plates inserted was giving him pain;

(xliv) On 28 April 2014, his hand was operated when one plate was removed and he was discharged on 29 April 2014;

(xlv) After being discharged on 29 April 2014, he did not go to hospital for clinics;

(xlvi) After the accident he started work with Defendant Company around May 2015, and during that period he was paid by Defendant for thirty-six (36) hours a week;

(xlvii) When he went back to work he initially started work as security officer at $4.62 per hour and at time of trial was employed as quality controller at $4.66 per hour and had no loss of wages;

(xlviii) If he would have remained as saw doctor his aim was to become foreman or supervisor;

(xlix) Foreman's pay with Defendant was $6.25 per hour and he did not know as to what was Supervisor's salary;

(l) Poasa and Saimoni, the cleaners did not return to work for Defendant after 28 March 2014 (date of accident);

(li) He does not know if Labour Department inspected place where accident happened;

(lii) After the accident major changes took place in area and has been improved in that pump has been installed and there is light inside the pit;

(liii) The items recommended by Ministry of Labour in its report (Exhibit P2) has been carried out by the company;

(liv) He cannot lift heavy things with his left hand;

(lv) Prior to accident he used to play soccer, do housework, chop firewood, do farming and weeding and now he cannot do these like before;

(lvi) He spent about $150.00 as travelling costs to hospital. He was paid for thirty-six hours per week when his normal time was forty-five (45) hours per week and he is seeking damages for pain and suffering, loss of amenities of life, loss of chances of promotion, interest and costs.

23. During cross-examination Plaintiff:-

(i) When asked about difference in his date of birth in hospital record being 15 May 1978 is different to what is stated in his birth certificate (15 July 1977) he stated he had his date of birth changed at Birth and Death Registry to 15 May 1978 and his new birth certificate is at his home;

(ii) Agreed that he joined Defendant company on 14 June 2005, and until time of accident he was a trainee and that during that time he was rotated in different jobs but stated that he remained in that position to upskill and knew that job very well;

(iii) Apart from upskilling his work as saw doctor, he worked as machine operator and tailsman;

(iv) Agreed that he was given roster for him to know where he will work following week and from that he would know where he is to work and in which department;

(v) On 20 March 2014, he was not given any roster and Supervisor told him that one (1) staff did not come to work so he had to do after noon shift on Friday;

(vi) Stated that, that week he was working in the showroom and Supervisor told him that Saimoni and Poasa were absent for a couple of days and he wanted him to do their job;

(vii) Prior to 28 March 2014, he was working on that job for four (4) days and he came to work at that place after three (3) years;

(viii) Stated that he worked in the hendrick pit three (3) years before and at that time pump was installed;

(ix) Denied that Manoa was operating the hendrick saw on 28 March 2014, and stated that Manoa operated the conveyor belt;

(x) Stated that he came back to clean the pit after a long time;

(xi) Agreed that when water is being taken out conveyor belt is switched off and when he started taking out saw dust he asked Manoa to switch it on;

(xii) Agreed that they were to wear safety boots and when it was put to him that safety boots have good grips he stated that on slippery surface there is a possibility that it will slip;

(xiii) Agreed that when he was in the pit bailing water out/shovelled saw dust out he did not wear safety boot;

(xiv) Did not agree that by not wearing safety boots he breached company rules and stated that the pit is not a place one would wear safety boots to and all cleaners who go inside the pit do not wear safety boots;

(xv) Did not agree to suggestion that he would have been able to balance better if he had safety boots on and stated that safety boots should not be worn because it is wet;

(xvi) When it was put to him he should have safety boots because of conveyor belt he stated that he should not have because it was wet and his leg will be smelly;

(xvii) Stated if he was working under the conveyor belt he would ask conveyor belt to be switched off;

(xviii) Agreed that he was using his right hand to shovel saw dust and at that time conveyor belt was on and stated that conveyor belt cannot be stopped because it takes the saw dust away;

(xix) When it was put to him that he could have loaded conveyor belt with saw dust and then turned it on he stated it cannot happen because conveyor belt will be overloaded and will not move;

(xx) Agreed that when conveyor belt was in operation he slipped and his left hand went under the conveyor belt and that if he would not have slipped accident would not have happened;

(xxi) Stated that he is right handed but uses both hands;

(xxii) When it was put to him that there is no need for guard where the conveyor belt is he stated that if sawdust from bottom of conveyor belt is to be removed then conveyor belt can be turned off and guard removed before cleaning;

(xxiii) Stated that guard can be placed on the bottom one as top one is where saw dust is placed but stated it was all his idea and Defendant will never put the guard and until day of trial there was no guard;

(xxiv) Stated that he was working in the pit on 28 March 2014, and not three days before and that he did not see Manoa clean the pit;

(xxv) Denied that he caused injury to himself and stated that when he was getting up his hand got caught on conveyor belt;

(xxvi) Stated that result would have been same whether he was wearing or not wearing safety boots;

(xxvii) Stated that he had been improving in his work and has always been alert and they were never told that they had to wear footwear inside the pit;

(xxxviii) Stated that Poasa nearly injured himself but only his shovel was broken and at that time there was light in the pit;

(xxix) Stated that he was told not to wear safety boots inside the pit from time he started work and other workers never wore safety boots inside the pit;

(xxx) Stated that he was paid $4.49 per hour when he was Assistant Saw Doctor and when he became Trainee Saw Doctor $4.62 per hour kicked in;

(xxxi) Stated that at time of accident he was paid $4.62 per hour;

(xxxii) Agreed that after the accident he was paid two third of his wages by Defendant which was for thirty (30) hours and not thirty six (36) hours;

(xxxiii) When it was put to him that when he refused to work on 25 September 2014, he was paid $4.49 per hour he stated that he was paid $4.69 per hour;

(xxxiv) Stated that he went and saw Dr. Taloga in September last year;

(xxxv) Agreed that he can do things he could do before, like buttoning his shirt, work on the farm; play soccer;

(xxxvi) When it was put to him that he does not feel any pain at all from his hand he stated that he can feel the pain;

(xxxvii) When it was put to him that according to Dr. Taloga, there is nothing wrong with him and he was perfectly fine he showed his shoulder when the left shoulder looked tiny bit thinner than the right shoulder;

(xxxviii) Agreed that Defendant paid his FNPF contribution on two third wages paid to him.

24. In re-examination Plaintiff:-

(i) Stated that it was more convenient to work in the pit without safety boots;

(ii) Stated that Defendant never told any cleaner to wear safety boots or not;

(iii) Stated that he was alert and that if there was a guard placed he would not have been injured;

(iv) Stated that you can slip whether you wear shoes or not;

(v) Agreed that he was paid for thirty (30) hours per week and not thirty-six (36) hours per week;

(vi) Stated he was paid wages at all times;

(vii) Stated that he went back to work in May 2015.

In response to clarification from Court that when there was no light in the pit, then how come Plaintiff saw the saw dust Plaintiff responded that he

could see beam of light coming from the top to the base but the surrounding area was all dark.

Counsel for both parties refused to ask any further question in respect to clarification sought by Court.

25. Plaintiff's second witness was Mr Maloni Bulanauca of Quarters 37, Labasa Hospital, General Surgeon (PW2).

26. Mr Bulanauca during examination in chief gave evidence that:-

(i) He is based at Labasa Hospital as a General Surgeon and he has following qualification which is same as his Medical Superintendent:-

(a) MBBS - 2001;

(b) Post-graduate - Masters in General Surgery (2010);

(c) Registered with Ministry of Labour for disability assessment;

(ii) He was employed at Lautoka Hospital, Health Centre in Lau, Colonial War Memorial Hospital, Christchurch Public Hospital and Palmerston North Hospital, New Zealand and at Labasa Hospital;

(iii) He saw Plaintiff on 28 March 2014, being date of accident and on 29 July 2015, prepared Medical report in respect to Plaintiff's WPI (Exhibit P3);

(iv) Confirmed that Plaintiff was admitted during the period 28 March 2014 to 31 March 2014, 7 April 2014 to 10 April 2014 and 28 November 2014 to 29 November 2014;

(v) Agreed that Plaintiff told him that he was injured when Plaintiff's left hand went into the conveyor belt;

(vi) Forearm has two long bones named radius and ulna and digital 1/3 radius in his report means it was closed fracture and nothing could be seen outside;

(vii) Plaintiff went through manipulation under anaesthesia to make him sleep and they tried to set the bones as straight as they could when Plaintiff was asleep;

(viii) Plaintiff was recommended to have plates and screws inserted because bones were not staying as straight which they call unstable fracture and other form of structure a stable fracture with unstable fracture being more serious;

(ix) On 8 April 2014, overseas Surgeon by the name of Paul Ballestrous conducted open reduction surgery in his presence whereby he fitted two (2) plates being one (1) with seven (7) holes for seven (7) screws and the other with six (6) holes for six (6) screws;

(x) Plaintiff was discharged on 10 April 2014, and after that attended clinics and was on pain relieving medication;

(xi) Plaintiff complained about his difficulty in range of motion and of discomfort;

(xii) On 27 November 2014, surgery was conducted by Mr Lolfer a visiting surgeon under anaesthesia whereby one of the two plates was removed;

(xiii) Neurological deficit in paragraph 5 of his report means significant nerve damage which Plaintiff did not have;

(xiv) The wound scars measuring nine to ten centimetres gives the surgeon access to fracture site and when he reported it was "not bothersome" he referred to as not causing any functional deficit;

(xv) Plaintiff was reviewed by him on 15 July 2015;

(xvi) Agreed that Plaintiff had cosmetic deficit or problem and stated that when they assessed scar, cosmetic deficit was taken into consideration;

(xvii) When it was put to him that Plaintiff indicated to him (last line paragraph 5 of Exhibit P3) that he wanted to be saw doctor he stated that at best he could remember it was Plaintiff's preference and could not recall if Plaintiff told him that Plaintiff had better prospect as a security officer;

(xviii) He used AMA Guide for the assessment and he assessed scar at 3% using the Guide;

(xix) In respect to Extension 40 degrees *le*% = 40% in his report he stated that they examined joint on either side of fracture and as a result total came to 13% and when it is combined with scar percentage total WPI comes to 16%;

(xx) On a scale of one (1) to ten (10) with one being least and ten being the highest Plaintiff's pain would have been in the range of eight (8) to ten (10);

(xxi) It is likely that if Plaintiff chops firewood he could still have pain and he could still hurt his limb or damage his hand;

(xxii) Agreed that if Plaintiff plays soccer and falls on his left hand then Plaintiff is likely to injure that hand.

27. During cross-examination PW2:-

(i) Stated that he last saw Plaintiff on 15 July 2015, and that he is not an Orthopedic Surgeon;

(ii) When he was asked if he attended Orthopaedic Surgeons Conference (**"OSC"**) in 2016, at Hexagon Hotel, Nadi he stated that it was Workmen's Compensation Workshop by Ministry of Labour (**"MOL"**) to train new assessors and not OSC and no OSC was held in Fiji for years 2015 or 2016 and he attended training by MOL in 2005;

(iii) Stated that he was not aware that Mr Taloga saw Plaintiff one year after his report;

(iv) In reference to Mr Taloga's medical report (Exhibit D1) he stated that "adherent" means something is adhered to or in contact and holding back;

(v) Stated that you have "scars" when wound goes through full thickness of skin and scar not tender means you will not be able to feel pain and with every insertion you have lose sensation;

(vi) When it was put to him that in his report he used not bothersome which meant it did not have any effect he stated that bothersome was functional and cosmetic was to be considered in the percentage;

(vii) Agreed that he said it was not causing any functional deficit;

(viii) Agreed that if you do not use limb, muscle wasting would occur and in reference to Mr Taloga's report that there was no muscle wasting he stated that it is possible;

(ix) In reference to Mr Taloga's report he stated that Mr Taloga gave 0% for scarring but he did not agree to same;

(x) In reference to Mr Taloga's report in respect to Wrist Extension where he gave 60 degrees he agreed that there could be possibility of improvement after his report when he gave 40 degrees;

(xi) In reference to Mr Taloga's report and his report he agreed that it is possible that there could be improvement after his report in respect to radial deviation from 13% to 20%, ulna deviation from 23% to 30% and Pronation from 60 degrees to 80 degrees;

(xii) Stated the degree of improvement stated in Mr Taloga's report can be achieved;

(xiii) Disagreed with suggestion that when plate and screw is fixed hands get stronger than normal and stated that the objective of fixing plates and screw is anamotical fixation of fracture like every implant body reacts to it.

Defendants Case

28. Defendant called Mr Emosi Taloga of 17 Paul Sloan Street, Bayview Heights, Suva, Orthopedic Surgeon as its First Witness (DW1).

29. In examination in chief DW1 gave evidence that:-

(i) He saw Plaintiff who had an accident in the factory and prepared his report on 8 September 2016 (Exhibit D1);

(ii) He obtained the detail of how Plaintiff got injured and when Plaintiff returned to normal as stated in his report from what Plaintiff told him and from Plaintiff's medical report;

(iii) He was told by Plaintiff that Plaintiff wakes up with a "dead left upper limb";

(iv) Examination of patient started when Plaintiff walks into the clinic and he observes what patient does which is how patient walks, takes off his shoes/clothes and sits on examination table and after that he focusses on area to be examined and in this case was Plaintiff's left upper limb;

(v) In this case he noticed two (2) longitudinal scars which was not raised above normal skin and was not tender because when he tapped or pressed it, it was not painful;

(vi) In this instant, there was no muscle wasting;

(vii) Wrist Flexion (inside movement) and Wrist Extension (outside movement) either way was 60 degrees radial/ulna deviation at 30 degrees were either way with closed fists was 20 degrees and 30 degrees respectively;

Forearm Pronation and supination were both at 80 degrees. Elbow Flexion was 0 degrees to 140 degrees and 0 degrees is when you put your hand straight and 140 degrees when you bend it. There are two types of movement, one being active when patient moves arm himself/herself and the other being when you have to do it without telling the patient;

(viii) Radial deviation at 20 degrees and ulna deviation at 30 degrees are basically normal;

(ix) Wrist Flexion at 60 degrees, Forearm Pronation/supination at 80 degrees are also normal;

(x) X-ray of left arm showed consolidated fractures which means it is healed and you cannot see fracture and in case of united fracture, when you can see fracture and new bone is reaching fracture site;

(xi) When there is fracture of forearm radius metal plates and screws are used;

(xii) His finding is that injury has healed well, motion of forearm was normal and there is no residual permanent impairment;

(xiii) In reference to Mr Bulanauca's report he stated that:-

(a) In time person's situation can improve and you have to follow-up over a period of time to ensure maximum medical improvement;

(b) One cannot do assessment for WPI when person is still improving;

(c) In Fiji there is a guideline known as Dr Timski table which is used in reference to AMA Guide 5th edition;

(d) Mr Bulanauca's report says it is not bothersome;

(e) He disagrees with assessment for skin impairment at 3%;

(f) In the Guide upper limb extremity is only 18%;

(g) The percentage given in Mr Bulanauca's Report (Exhibit P3) is correct but cannot be converted to WPI;

(h) Upper limb is part of whole body and there is a special table in the guide for upper limb assessment;

(i) Elbow Motion Impairment has improved from time Mr Bulanauca's assessment and his assessment;

(j) Degrees mentioned in Mr Bulanauca's report (except for skin impairment) could have improved before he did the assessment;

(xiv) There is no residual impairment for the Plaintiff.

30. During cross-examination DW1:-

(i) Agreed that him and Mr Bulanauca attended same training for assessment of personal injury;

(ii) Agreed that when Plaintiff went to his clinic he got plaintiff to unbutton and button his shirt;

(iii) When it was put to him that he did not get Plaintiff to do press-ups he stated that it was not part of the examination;

(iv) When asked if Plaintiff said he had pain in his hand he stated that pain is not part of assessment and if person complains of pain then you have to see where pain is coming from;

(v) Stated that timing for doing a report will depend on type of injury as to whether it is minor or major and in some cases may take upto two (2) years;

(vi) Stated that in respect to Plaintiff's case report should be done around one (1) to one and half (1 1/2) years;

(vii) Stated that percentage given by Mr Bulanauca at time of his report would be correct;

(viii) Stated that length of scar is not mentioned and he did not consider scar for assessment;

(ix) Did not agree to the suggestion that foreign element planted on someone will show;

(x) Did not agree to suggestion that plate had not been removed because the bones need support;

(xi) Stated that plate is removed only if there is infection or it is bothering the person and for Plaintiff only one plate was removed because the other plate was not bothering him;

(xii) Confirmed that his report stated that Plaintiff is completely healed;

(xiii) Stated that 16% calculation by Mr Bulanauca is for upper limb only and not WPI;

(xiv) Agreed that you do not need much power to button or unbutton.

31. In re-examination DW1:-

(i) Stated that size of scar does not matter and if you notice it being painful or bothersome then you consider it and in Plaintiff's case it was not so;

(ii) Stated that he did not agree that plates being still there shows that support is needed because plate is there to splint the fracture and hold it in place and once fracture is healed then it is patient's choice whether to have it removed or not but in case of infection patient has no choice and plate must be removed;

(iii) Stated that plate is made of medical steel and can stay until person's lifetime;

(iv) When it was put to him that Mr Bulanauca made an error by putting percentage for upper limb as WPI and was asked to explain he stated that:-

(a) When you look at Table 16 - 31 Page 496 of AMA Guide it shows percentage for upper limb impairment and total comes to 16%;

(b) Upper limb impairment is not WPI;

(c) You have to go to another table to convert upper limb percentage to WPI which Mr Bulanauca did not do;

(v) Agreed that Mr Bulanauca used upper body percentage as WPI instead of using upper body percentage to determine WPI.

32. Defendant's second witness was Manoa Vaturogo of Korovou, Siberia Operator (DW2).

33. DW2 during examination in chief gave evidence that:-

(i) He had been employed by Defendant for fourteen (14) years and currently he operates hegner saw and as part of his job he sometimes cleans machines;

(ii) He cleans rig saw and hegner saw;

(iii) He also worked at head rig saw;

(iv) He is provided with safety equipment including safety boots which he wears within the premises during working hours;

(v) On 28 March 2014, he was on night shift and was working with Plaintiff to clean the head rig saw at the pit;

(vi) Head rig saw is placed on top and the residue and whatever comes down from the saw falls down into the pit

(vii) When they started to clean the head rig saw pit:-

(a) Plaintiff went down the pit and he stayed on top;

(b) Plaintiff requested him to switch on the conveyor belt which he did;

(c) After five (5) to ten (10) minutes he heard Plaintiff shouting to him to turn the switch off which he did;

(d) Plaintiff then requested him to assist Plaintiff and he could see that Plaintiff was holding Plaintiff's hand and Plaintiff was injured;

(e) He assisted Plaintiff to the top, tried to change his clothes, contacted Supervisor and Security to arrange transport for Plaintiff;

(viii) Before 28 March 2014, he worked with Plaintiff in the same area;

(ix) He cleaned inside the pit and he never got hurt;

(x) He does not know actual area inside the pit but stated it is very congested;

(xi) You need to have conveyor belt on when you are cleaning the pit to convey wastes from inside the pit to outside;

(xii) When asked as to why waste is not loaded first, then conveyor belt is turned on, he stated that conveyor belt will not accommodate weight of debris because it is mixed with water;

(xiii) Prior to 28 March 2014, Plaintiff had gone inside the pit to clear the area on 26 and 27 March 2014, and Plaintiff knows how to work in the Pit;

(xiv) When it was put to him the procedure is always same he stated "no" and said because at the time the suction pump was not operating;

(xv) Agreed that when suction pump was not working same procedure was used;

(xvi) Rightfully you supposed to wear safety boots when working inside or outside the pit but where they were cleaning they do not put on shoes because it is wet and stinky down the pit;

(xvii) It was his decision not to wear shows because only one pair of safety boots was provided and if you wore and came out you may have to go

home as it was normal for cleaners including Plaintiff to not to wear shoes.

34. During cross-examination DW2:-

(i) Agreed that at first you bail out water from the pit, then conveyor belt is switched on to take out saw dust/water;

(ii) Agreed that space inside the pit is very small, pit had no light and because the pump was sent for repair, it left a hole;

(iii) Agreed that it was easier for people to take off shoes on top and go inside the pit to work without shoes on because it was easier and safer to do so, company did not say anything;

(iv) Agreed that Management of Defendant company knew that everybody went to work inside the pit without shoes and that Management knew that there was not light inside the pit;

(v) Agreed that the place was very dangerous place to work.

35. During re-examination DW2:-

(i) Stated that he is not part of Management team;

(ii) Agreed that prior to 28 March 2014, he and Plaintiff worked in the same pit;

(iii) Stated that Plaintiff was the first one to get hurt in that area and he never got hurt in the pit.

36. Defendant's third witness was Sakiusa Tabaunitoga Kaukimoce of Vunivau, Labasa, Retired Human Resource Officer (DW3).

37. During examination in chief DW3 gave evidence that:-

(i) He had been employed by the Defendant for twenty-two (22) years having retired last year (2016);

(ii) He started employment as Risk Management Officer and later promoted as Training Officer and then as Human Resources Officer (**"HR Officer"**);

(iii) His duty as HR Officer included recruiting employees, maintaining HR Policy, give notice to employees and maintaining employees records;

(iv) During his time as HR Officer, there was an employee by the name of Lote Saro who joined Defendant on 14 June 2005, as an employee who later worked in saw mill, then appointed as assistant rig-saw operator and he was aligned to become trainee saw doctor;

(v) He could not recall for what period Plaintiff was trainee saw doctor but was sometime in January 2014;

(vi) He is aware about Plaintiff's accident from accident report received by him from the supervisor;

(vii) After the accident Plaintiff was paid for twenty-seven (27) weeks at the rate of thirty (30) hours per week which is two third of salary as is required by law;

(viii) Plaintiff worked forty-five (45) hours per week at rate of $4.49 per hour with his gross weekly wages being $202.05 and after deducting $16.16 as FNPF contribution Plaintiff's net pay was $185.89 per week;

(ix) Plaintiff resumed employment on 25 September 2014, and during his absence Defendant paid FNPF contribution;

(x) Plaintiff's wages prior to accident was $4.49 per hour and net amount paid to Plaintiff when he was not at work was $3,358.34 and his FNPF contribution amounted to $292.03;

(xi) The net wages Plaintiff should have received for the period was $5,018.92 and FNPF contribution would be $436.43;

(xii) The total net wages loss for Plaintiff was $1,804.98 which included FNPF contribution to be made by Defendant;

(xiii) In terms of Defendant's policy, employees are to have safety boots, overalls and hard hats and Defendant supplies them hand gloves and dust masks;

(xiv) He was part of Defendant's management team for the period 2012, 2013 and 2014;

(xv) Everyone working at head rig saw were given safety equipment such as safety boots, overalls and hand gloves;

(xvi) In 2014, those working inside the head rig saw pit were to wear safety boots and hand gloves;

(xvii) No guard is placed inside the head rig saw pit because it is a collector;

(xviii) When it was put to him that evidence by Plaintiff was management knew that employees did not wear safety boots but did not do anything he stated management did not know.

38. During cross-examination DW3:-

(i) Stated that Plaintiff joined Defendant as casual worker and later was made permanent and in late 2013 or early 2014, was promoted as assistant saw doctor;

(ii) Stated that at time of Plaintiff's injury he was working as trainee saw doctor and job included looking after his saws, head rig saw pit where his saw was and at times he had to clean the pit and change saws;

(iii) When it was put to him and Defendant employed cleaners named Poasa and Saimoni to clean the pit he stated that, that duty is rostered and they do clean but it is part of saw doctor's job;

(iv) Agreed that there was a need to have suction pipe in the pit so that water and saw dust can be sucked out;

(v) Stated that he was not really sure if there was no suction pipe in the head rig saw pit on 28 March 2014;

(vi) In reference to Accident Report:-

(a) He sent the report to MOL;

(b) First page of the report was prepared by night supervisor;

(c) Read the recommendations;

(d) He did not know for how long suction pump was not there;

(vii) Stated that amount of water and saw dust inside the pit will depend on the shift on the day and is cleaned after the shift;

(viii) When it was put to him that on 28 March 2014, water was upto knee level and had to be bailed out first he stated that when pump breaks down;

(ix) Stated that Defendant supplied one (1) pair of safety boots to each employee;

(x) When asked if he expects workers to go down with shoes he stated "they can";

(xi) When asked that if he expected workers to come out and work rest of shift with wet shoes on he stated that, if workers are soaked wet, they are sent home;

(xii) Stated that it is possible to go down without shoes and put on shoes when they come but safest way is to wear boots while working;

(xiii) When it was put to him that Defendant's Second Witness said practice was to take off shoes before going down the pit he stated that procedure is to wear safety boots and he is not aware of the practice;

(xiv) Stated that he is not aware of his subordinates were aware of that practice;

(xv) Stated that he understands it is a cramped place and agreed that on 28 March 2014, there was no light in the pit;

(xvi) When it was put to him that it was not really a safe place to work at that time when there was no pump and there was plenty of water he stated that it was not the first time pit was cleaned by the workers and he did not agree;

(xvii) Stated that in September 2014, Plaintiff was employed as security officer and they could have moved him back but his medical certificate stated he had to do light duty;

(xviii) Stated that after one year Plaintiff was appointed as Trainee Quality Control Officer (**"TQCO"**) which required him to test timber with machines and test moisture contents;

(xix) Stated that Plaintiff was still employed as TQCO;

(xx) When asked if Plaintiff would have been given the old job back if Plaintiff was fit he stated that that position had been filled by the time Plaintiff came back to work;

(xxi) When asked if there was no injury Plaintiff would have continued as Assistant Saw Doctor he stated that would have been based on monthly performance assessment which indicate whether they need to get promoted or shifted;

(xxii) Stated that they assess performance by putting points from one (1) to ten (10) which is summarised at the end of the month and he thought Plaintiff's performance was at five (5) being on border line;

(xxiii) When it was put to him that average worker needs to be promoted he stated that average worker needs to be trained;

(xxiv) When asked if mask was given to people working in the pit he stated that it depends on the pit and since saw dust is wet no mask is needed;

(xxv) Stated that saw dust is removed after every shift and they did not provide dust mask;

(xxvi) Stated he goes down the pit when maintenance is carried out, say every three (3) months;

(xxvii) Stated that floor of pit is made of concrete and agreed that it gets slippery when wet;

(xxviii) When it was put to him that Defendant never gave second set of boots to person going down the pit he stated that they give gum boots;

(xxix) When it was put to him that on 28 March 2014, no gum boots were given to cleaner he stated it could be but supervisor should have given gum boots.

39. During re-examination DW3:-

(i) Stated that he believed in 2014, Plaintiff was trainee saw doctor;

(ii) Stated that to be promoted from trainee saw doctor to saw doctor one is required to go through a set of practical training on saw maintenance and lining regarding saw doctor's expertise;

(iii) Stated that after accident when Plaintiff was employed as security officer he did not lose any wages and it was increased;

(iv) When asked if Plaintiff is getting much better wages as TQCO he stated that he retired in August 2016, and he is not aware of increase in Plaintiff's pay;

(v) Stated that he did not think that Plaintiff got increment before his retirement;

(vi) When asked if Plaintiff fulfilled his monthly assessment requirements would Plaintiff be promoted as Supervisor or foreman he stated that from time Plaintiff came back to work and based on his performance he would not promote Plaintiff as Supervisor but he could be a leading hand;

(vii) Stated that workers working inside the pit should be wearing safety boots.

Whether Defendant Owed Duty of Care to the Plaintiff

40. It is well settled that employers owe duty of care to its employees to provide safe system of work and to protect its employees from foreseeable risk and dangers.

41. The common law duty has also become a statutory duty pursuant to Section 9 of the Health and Safety at Work Act 1996 which provide as follows:-

"9.(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;

(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, inappropriate 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."

42. The Plaintiff was an employee of Defendant when Plaintiff was involved in an accident in the course of his employment and as such Defendant owed him a duty of care to provide safe system of work which is free of danger and risk to the Plaintiff.

Whether Defendant breached duty of care owed to Plaintiff

43. After analysing the evidence of Plaintiff, DW2 and DW3 and the Submissions filed, I have no hesitation inholding that Defendant breached its duty owed

to Plaintiff by failing to provide Plaintiff safe place and safe system of work and reason for my finding are as follows:-

(i) Defendant failed and/or neglected to have the suction pump repaired expeditiously. Defendant had the suction pump repaired only after Plaintiff had an accident and was injured;

(ii) Defendant failed and/or neglected to provide proper lighting inside the pit;

(iii) Management of Defendant company was aware that the employees who went down to clean the head rig saw pit did not wear any safety boots or gum boots and it was a practice in Defendant's factory. This was the evidence of Defendant's second witness. Defendant's third witness tried to contradict Defendant's second witness by saying Management did not know about this practice. This Court accepts second Defendant's evidence as correct;

(iv) The area to be cleaned was very congested and employees had very little space to work on;

(v) As for Defendant's policy for employees to wear safety boots or gum boots when they go down the pit, this Court has said time and again stated that having safety policies and procedures is one thing and enforcing them is the other.

There is no point in having policies and procedures in place when such policies and procedures are not enforced and no action is taken against employees who do not follow such policy or procedure. In many cases employees adopt a practice which is convenient to them and the management turn a blind eye to it and let employees continue with their practice.

Whether Plaintiff Contributed to His Injury

44. The principle in respect to issue on contributory negligence was stated in **Gani v. Chand & Ors. [2006] Civil Appeal No. ABU0117 of 2005 (10 November 2006)** by Fiji Court of Appeal as follows:

"The basic principle of contributory negligence is that, when a court is awarding damages to the plaintiff for injuries caused by the defendant, it may reduce the award if the plaintiff can be shown to have contributed to the injury by some negligence on his part. However, whilst the liability of the defendant arises from a duty towards the plaintiff, the assessment of contributing negligence is not based on a similar duty on the plaintiff towards the defendant. It was explained by Lord Simons in Nance v. British Columbia Electric Railway Co. Ltd [1951 AC 601, 611:

"The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured part to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the injury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

...this, however, is not to say that in all cases a plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully.

45. Except for the fact the Plaintiff did not wear safety boots when he went down to clean the head rig pit, Defendant has not produced any evidence to show the Plaintiff contributed to his injury in any way whatsoever.

46. Defendants own witness (DW2) gave evidence that it was the practice in Defendants factory that when employees went down to clean the head rig saw pit, they left their shoes on top and went inside the pit without shoes and the management of Defendant Company knew about it.

47. Defendant's evidence was that Plaintiff was the first person who was injured inside the pit. This does not make Plaintiff contributory negligent.

48. This Court therefore finds that the accident occurred due to negligence of the Defendant Company by failing to provide safe system and by failing to take reasonable care that accidents such as that happened on 28 March 2014, do not happen and was not contributed by Plaintiff in anyway whatsoever.

Special Damages

Travelling, Medical and Hospital Expenses

49. It is surprising to note that Plaintiff in Plaintiff's Submission claimed much less travelling, hospital and medical expenses then what is claimed in the Statement of Claim. It is apparent that Plaintiff's Solicitors plucked the figures from the air and inserted in the Statement of Claim. Since Plaintiff has made Submissions for the sum of $254.00 and not $600.00 as appears in Statement of Claim and given the fact that the Defendant did not challenge the amount claimed this Court awards a sum of $254.00 to Plaintiff for travelling, hospital and medical expenses.

Other Miscellaneous

50. Plaintiff claimed for miscellaneous expenses in the sum of $100.00 (witness expenses etc.). This Court does not think it is appropriate to award miscellaneous damages as no such damage should be claimed by the Plaintiff. The costs of witness will form part of any costs awarded by Court.

51. Legal practitioners should clearly take note that special damages can only be claimed for what the party has incurred and/or lost and not something which they can "pluck" from the air.

Loss of Earning and Fiji National Provident Fund

52. This Court accepts DW3's evidence that:-

(i) At time of accident Plaintiff was paid $4.49 per hour;

(ii) From 29 March 2014 to 24 September 2014, Plaintiff was paid two third of his wages;

(iii) Plaintiff resumed duty on 25 September 2014, at same wage rate;

(iv) The total loss of wages (including FNPF) for Plaintiff for the period 24 March to 24 September 2014 was $1,804.98.

53. Hence, the total claim allowed for special damage is $27,752.67 which is made up as follows:

Travelling/Hospital & Medical expenses:	$ 254.00
Loss of wages	1,660.58
Loss of FNPF:	
Plaintiff's contribution	144.80
Defendant's contribution	144.80
	$2,204.18

General Damages

54. Plaintiff claim damage for pain and suffering, loss of amenities of life and loss of future earnings.

Pain and Suffering

55. Plaintiff's counsel relied on the following cases for award of damages under this head:

(i) **Rawaitale v Tropic Forest Joint Venture Co. Ltd** [2011] FJHC 281; HBC 176.2004 (20 May 2011);

(ii) **Narayan v Narayan** [2003] FJHC 193, HBC 22.2003L (8 September 2009);

(iii) **Mako & Anor. v Broadbridge** FJCA31; ABU 63 of 2011 (30 May 2003).

Defendant's Counsel relied on:-

(i) **BW Holders Ltd v Vuli** [2010] FJCA 16; ABU 0089 of 2008 (26 February 2010);

(ii) **Jabeed Ali** [2014] 367; Civil Action No. 2 of 2013 (13 May 2014);

(iii) **Dainivalu v Nair** 2014 FJHC 559; HBC06.2012 (30 July 2014).

56. In **Rawaitale's** case the Court found that:-

(i) Plaintiff suffered a very severe injury to his right hand which is Plaintiff's dominant hand;
(ii) Plaintiff was considerably disabled and was unable to engage in any gainful employment or do any work like writing or gardening by his right hand;
(iii) When Plaintiff's right hand was crushed it resulted in an open fracture of his index, middle, ring and little finger;
(iv) Plaintiff's wound had healed but he was unable to make a fist.

In this case Court awarded forty thousand dollars ($40,000.00) for pain and suffering and loss of amenities of life.

57. In **Narayan's** case, Plaintiff was involved in a motor vehicle accident and the Court found that:-

(i) Plaintiff was unconscious for twenty-four (24) hours and was hospitalised for two (2) weeks;
(ii) Bones were removed from part of Plaintiff's left leg and plate was inserted in his left hand;
(iii) Plaintiff suffered fracture to his left patella and left distal radius;
(iv) Plaintiff was assisted by his wife in bathing and going to washroom and he could not sit cross-legged.

In this case the final judgment was delivered by his Lordship Justice Inoke (as he then was) on evidence and submission heard by the Trial Judge and not by his Lordship.

The Court awarded a sum of eighty thousand dollars ($80,000.00).

It appears that the award was on high side which is not in conformity with awards in similar cases.

This Court has stated time and again that even though the awards in each case will depend on its own facts and circumstances judicial conformity dictates that the awards for similar injuries and medical condition should not differ drastically. To do so will create confusion amongst legal practitioners and the Court.

58. In **Broadbridge's** case the Plaintiff was involved in a motor vehicle accident and had following injuries and treatment:-

(i) Close fracture of the right ulna and fracture of right hip joint;
(ii) Had minor injuries on his face which were sutured;
(iii) Fracture of right ulna was plated and did not cause any medical problem thereafter;
(iv) Was placed in traction and was in great pain in succeeding weeks while he was in traction which was removed on 14 May 1991;
(v) Right leg became significantly shorter than left leg;
(vi) Plaintiff was in considerable pain when he was discharged from hospital on 24 May 1991;
(vii) Physiotherapist could still feel projecting head of the femur and another x-ray was taken and Plaintiff was re-admitted;
(viii) With some difficulty and discomfort, Plaintiff was flown to New Zealand for hip replacement;
(ix) Had permanent limp and developed a bad back.

The Trial Judge awarded seventy-five thousand dollars ($75,000.00) which was reduced to sixty thousand dollars ($60,000.00) by Court of Appeal.

59. In **BW Holdings Ltd** case, Plaintiff:-

(i) Suffered fracture of right distill radius and her hand was placed in full cast of plaster;

(ii) Received treatment and it was likely that fracture would unite in six (6) weeks;

(iii) Could resume her duties in three (3) months;

Court of Appeal increased award from fifteen thousand dollars ($15,000.00) to twenty thousand ($20,000.00) for pain and suffering and loss of amenities of life.

60. In **Jabeed's** case, Plaintiff fell into a ditch after his head was hit by an iron rod sticking out from canopy of van. Medical evidence was that:-

(i) Plaintiff suffered laceration on his head which was not deep to the skull;

(ii) L2 spinous process and 6 cm x 0.2 cm forehead laceration which was sutured;

(iii) Dislocation of L2 and spinous process of L2 was also fractured but not displaced.

The Court awarded forty thousand dollars ($40,000.00) for pain and suffering.

61. The Fiji Court of Appeal in **Chand & Anor. v Amin;** Civil Appeal No. ABU0031 of 2012 (2 October 2015) case cited at paragraph 23(ii) stated as to how damage is to be assessed for pain and suffering in very simple terms as follows:-

*"The assessment of damages under this head depends upon the consequences to the individual plaintiff (**Bresatz v Przibilla** (1962) 108 CLR 541 at 548 cited in Law of Torts by **Balkin & Davis** 5th ed. at 11.28). In **Hail v Rankin** [2001] QB 272 the English Court of Appeal had acknowledged monetary inflation to be considered while making the awards. However the amounts decided on in previous cases can be considered no more than as a guide, and any particular determination must depend on such factors as the intensity of the pain felt by the plaintiff and its likely duration (Balkin & Davis (supra) at 11.28)."*

57. In this instant, Plaintiff's left hand went under the conveyor belt and bones near the wrist were crushed.

58. Mr Bulanauca (PW2) and Mr Taloga's (DW1) report and evidence was not inconsistent with each other except for skin impairment percentage and WPI percentage.

59. This Court accepts Mr Taloga's evidence that Mr Bulanauca instead of calculating WPI in reference to the table on guide in respect to upper limb percentage used upper limb percentage as WPI.

60. This Court also accepts Mr Taloga's evidence that Plaintiff's WPI is at zero percentage and Plaintiff has recovered fully and his left hand is healed.

61. This Court accepts Mr Bulanauca's assessment of Plaintiff's pain being 8 soon after the time of accident on a scale of 1 to 10 with 1 being the least and 10 the highest.

62. After analysis Plaintiff's medical evidence of PW2 and DW1 this Court awards a sum of $40,000.00 for pain and suffering.

Loss of Amenities of Life

63. This Court does not accept that Plaintiff has loss of amenities of life and his injury has been healed and is normal.

Loss of Future Earning and Earning Capacity

64. Having accepted Mr Taloga's evidence that Plaintiff's condition is now normal and there being 0% WPI this Court finds that Plaintiff had not lost any earning capacity and whether he would have been appointed foreman or supervisor would have depended on his performance.

65. This Court makes no award for damages for loss of future earning and earning capacity.

Interest

66. I think it is just and fair that both on special and general damages be assessed at six percent (6%) per annum.

Cost

67. I have taken into consideration that the trial lasted for almost two (2) days; both parties called witnesses and parties have filed submissions.

Conclusion

68. This Court holds that:

(i) Defendant owed a duty of care to the Plaintiff.

(ii) The Defendant breached their duty of care owed to the Plaintiff.

(iii) Plaintiff's injury was caused as a result of the accident and breach of duty of care by Defendant;

(iv) Plaintiff was not negligent or contributed to his injury.

69. Defendant is to pay the Plaintiff a sum of $46,822.00 in special and general damages including interest up to the date of Judgement which said sum is made up as follows:

Special Damages [paragraph 53]		$ 1,914.58
Interest at 6% per annum from 28/3/14 *(date of Accident)* to 27/7/17 *(date of Judgment) (1218 days)*		$ 383.42
		$**2,298.00**
General Damages		
Pain and Suffering	$40,000.00	
Interest at 6% per annum from 8/9/15 *(date of Writ of Summons)* to 27/7/17 *(date of Judgment)* (*688 days)*	$ 4,524.00	
		$44,524.00
Total		**$46,822.00**

70. Since Plaintiff is still employed and his FNPF contribution was to be paid to FNPF, this Court will have no alternative but to order payment for loss of FNPF contribution to FNPF, instead of Plaintiff. This FNPF contribution is paid as one lump sum when it is paid gradually and as such it is just and fair to award interest at four percent (4%) instead of six percent (6%)

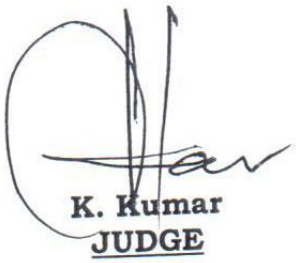
Orders

70. I make following Orders:

(i) Defendant do pay Plaintiff the sum of $46,822.00 including interest;

(ii) Defendant do pay a sum of $289.60 together with interest thereon at the rate of 4% per annum from 30 March 2014 to date of payment to Fiji National Provident Fund on account of Plaintiff;

(iii) Defendant, do pay Plaintiff cost of this action assessed in the sum of $3,500.00.



K. Kumar
JUDGE

At Suva
27 July 2017

Sarju Prasad, Esquire for Plaintiff
Gibson & Co. for Defendant