IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 155 of 2012

BETWEEN	:	PITA ILAISA WAQA
		Plaintiff
AND	:	STANDARD CONCRETE INDUSTRIES LIMITED
		Defendant
AND	:	DOMINION INSURANCE LIMITED
		Third Party
Coram	:	The Hon. Mr Justice David Alfred
Counsel	:	Mr. D. Singh for the Plaintiff Mr A. Pal for the Defendant Ms. N. Choo for the Third Party
Dates of Hearing	:	23 and 24 January, 2017
Date of Judgment	:	3 February, 2017

JUDGMENT

1. This is a claim for damages for personal injuries.

2. According to the Statement of Claim, the Plaintiff was employed by the Defendant as a welder. On 6 June 2009, the Plaintiff in the course of his employment, was assisting fellow workers in manually closing the lid of a stone crusher (crusher) when the lid fell and crushed 2 fingers of his left hand, causing him injury, loss and damage.

N.B

I am referring to the machine concerned as "crusher" in this judgment.

3. The particulars of negligence alleged against the Defendant were the following:

   (a) Failing to provide a crane or other lifting machine to open and close the lid of the crusher.

   (b) Failing to provide chains etc or other mechanisms to open and close the lid.

   (c) Failing to provide a safe system of work pursuant to s. 9(2)(a) of the Health and Safety at Work Act, 1996 (HSW).

   (d) Exposing the Plaintiff to a risk of injury of which they knew or ought to have known.

   (e) Failing to provide the Plaintiff with a safe place of work, safe plant or equipment.

4. Particulars of injuries and special damage sustained were appended.

5. The Statement of Defence avers that the Defendant provided a safe place of work and suitable machines and safety equipment. It contends that at the material time, the Plaintiff and two other workers were pushing the lid of the crusher to close it. "The Plaintiff off balanced himself and grabbed the inside portion of the crusher with his left hand while the said lid was closing and his fingers got caught between the lid and the metal edge of crusher".

6. The Defendant further alleges that any injury sustained by the Plaintiff was caused by his own negligence, which were, inter alia, as follows:

   (i) Came to work under a hangover.

(ii) Failed to listen to instructions of other workers when closing the lid.

(iii) Kept struggling to stand steady and grabbed the inside of the crusher.

(iv) Failed to take the day off when he was incapable of working due to his hangover.

7. The Third Party in its Amended Statement of Defence to the Third Party Notice said it declined to indemnify the Defendant because the latter acted contrary to the terms of the insurance policy. The Defendant had failed to supply proper equipment to its employees.

8. Among the breaches allegedly committed by the Defendant were the following:

(a) Failed to provide a safe and secure work environment and one without risks.

(b) Failed to comply with the HSW Act.

(c) Failed to comply with s. 34 of the Factories Act and s.8 of the Workers Compensation Policy.

9. The Third Party further contends the Defendant did not provide suitable equipment to open and close the lid and got the workers to manually close the lid which posed a threat to the safety of the employees.

10. The Minutes of the Pre-Trial Conference record, inter alia, the following:

Agreed Facts

(1) The Defendant obtained from the Third Party insurance cover which was intended to indemnify the Defendant against "claims resulting out of accidents, injuries and so on, subject to the parties complying in terms of the Insurance Cover".

Disputed Facts

(1) Whether on 6 June 2009, the Plaintiff whilst closing the lid was injured.

(2) Whether the Plaintiff contributed to the incident.

(3) Whether the Defendant was negligent.

Issues to be Determined

(1) Was the injury due to the negligence of the Defendant.

(2) Did the Defendant breach its duty to the Plaintiff.

(3) Is the Plaintiff entitled to loss of future earnings.

(4) Is the accident covered by the Insurance Policy.

(5) Whether the Third Party is bound to indemnify the Defendant.

(6) Whether the Third Party was justified in declining the Defendant's claim.

11. The hearing commenced with the Plaintiff (PW1) giving evidence. He said he had a Form 5 level education and a certificate in welding and fabrication. He was employed by the Defendant since January 2009 to do welding and other jobs.

12. On 6 June 2009, he started work at 7.30am. He was at the workshop and was called to attend to a breakdown at the crusher. The loader opened the lid of the crusher and PW1 then did his job which was welding a plate which was contributing to the breakdown. As the plate was inside the crusher he had to go inside it to do the welding.

13. The boss asked him to help the other workers to close the lid of the crusher. The lid is very heavy. The loader was busy somewhere else. Six workers including PW1 closed the lid. The left sleeve of his overalls caught on the bolt which was beside the opening of the crusher. He almost fell. He lost his balance and gripped on the opening. At that time the lid fell and crushed 2 fingers of his hand.

14. He managed to pull his hand through the gap. The crusher breaks down so many times in the day. This was the first time he helped them to close manually. After the incident, the Defendant installed a block tackle and pulley system to lift the lid. It was not part of his duty to assist in closing the steel lid. There was a platform round the crusher on which the workmen can walk. He was standing at the back of the crusher.

15. At this juncture, Counsel for the Defendant and the Third Party confirmed they did not object to Dr.Taloga's report.

16. PW1 continued he did not return to work because his hand still gave pain. He could not find another job for 2 years because of the loss of 2 fingers, which made it hard to lift heavy things. His right hand is the dominant hand. At the material time, he was paid $115 per week. The Defendant deducted the FNPF contribution. PW1 incurred $200 medical expenses and $200 transport expenses.

17. Under cross examination by Counsel for the Defendant, PW1 said he never received training to open the stone crushers. He worked on machines and the crusher when the supervisor asked him to. He did not operate on other machines. That was the first time on the crusher.

18. PW1 said he was not drunk. He was not asked by the supervisor to be sent home. He lost his balance because the sleeve of his overalls caught on the bolt. Working on the crusher was not part of his normal duties. His boss, Onisimo informed him to work on the crusher. Before the incident there were no railings round the crusher and no safety signs thereon.

19. PW1 said he was looking for jobs for 2 years and was now working for Vatukoula Gold Mine since January 2013. He is an assistant miner. It is an underground mining site and he assists the miner in boring holes in the rock by holding the drill. He works 8 hours a day and is paid fortnightly wages of $390.

20. During cross examination by Counsel for the Third Party, PW1 said the Defendant did not give additional training. A lack of safety precautions at the accident site resulted in his injury. The boss, Onisimo asked him to shut the lid. They were rushing the workmen because of the production and the business. The boss knew how heavy the lid was. Railings were erected after the injury. A pulley now opens and shuts the lid. This was

never provided before. No one had warned him of the danger of the lid opening and closing.

21. In re – examination, PW1 said he had never before gone into the crusher. They struggled to close the lid. With this the Plaintiff closed his case.

22. The Defendant opened its case by calling Kitione Kotoisuva Raratabu, (DW1), the manager, health, safety, environment and compliance since 20 November 2006.

23. All 3 Counsel now confirmed that the Agreed Bundle of Documents (AB) are admitted but subject to cross examination.

24. DW1 said he was not on the site on the date of accident. The Notification Form was signed and filled up by him on information he received. The internal investigation Report was filled up by Onisimo, the plant manager. DW1's findings after the accident were that crusher is an old machine which can only be closed manually. Since 2006 this was the only accident involving this crusher. The Defendant had insurance coverage for their employees. At the time of the accident the Third Party was the Defendant's insurer.

25. The second witness, was Jotish Kumar Tonny (DW2), employed by the Defendant for the past 13 years. He was working on the day in question. He saw the Plaintiff sleeping on a chair in the changing room around 7.35 am, and smelt liquor near the Plaintiff.

26. During cross examination by Counsel for the Third Party, DW2 said he assumed the Plaintiff had been drinking.

27. The final witness, DW3, was Vakacegu Nemani, employed by the Defendant as a supervisor. He said everyday they check the machines before starting work. On that day the Plaintiff was sleeping in the workshop and he informed Onisimo that the Plaintiff should go home.

28. DW3 said the lid weighs 50 kg and 3 people are needed to close the lid. Manual pushing of the lid has been done since 1998. The practice is still going on after the accident. They are now using the chain block but manpower is still necessary to close the lid nicely.

29. At this juncture all 3 Counsel confirmed that the Kumar's Investigation Report and coloured photographs are agreed and admitted but subject to cross – examination.

30. DW3 continued that photograph 2 showed there was no sign, on the day of the accident or at all. He was not present when the Plaintiff was injured. There had been no other accident with the crusher. The Defendant gives every workman safety boots, helmets, overalls and safety glasses. It do not give them anything to protect their hands. Giving them handgloves will not help them when they are working on the crusher as the gloves are of leather or cotton and if anything drops the gloves will not help protect their hands.

31. Under cross – examination by Counsel for the Plaintiff, DW3 said they push the cover from behind. It weighs more than 50 kg.

32. When cross examined by Counsel for the Third Party, he said he saw the Plaintiff sleeping in the workshop before 10am. He told the plant manager to send the Plaintiff home because he was unfit to work. Before the accident they pushed the cover every day. They never used the metal loader. After the accident they used a chain block and installed safety measures. There were no cautionary warnings about the machine. There were no railings, before the accident, from 1998.

33. Photo 6 shows the caution notice installed after the accident. They were still pushing the cover inspite of the Divisional Manager saying the loader should have closed. They were not using the loader.

34. When re – examined DW3 said it was not practical to use the loader to close the lid.

35. With that the Defendant closed its case and the Third Party began its.

36. The first witness was Anirudh Kumar, TW1. He is the owner of Kumar Private Investigation Services, which was retained by the Third Party to investigate the accident. He visited the scene, took photos and interviewed the Plaintiff. He prepared the report with his findings. This is document 8 of the AB. It was prepared on 14 November 2012.

37. He was appointed (by the Third Party) in 2012 and visited the scene of the accident and interviewed the witnesses in 2012. His findings are that the Plaintiff's injuries are due to the non – compliance by the employer. Pulling the lid by the loader is not safe. The Defendant should install a block and tackle or an electronic device to open the lid. It should use the loader to release the chain and close the lid. His investigation revealed the loader was busy on some other job and the workers had to manually close the lid, which was made of hard metal. There was no medical report of the Plaintiff being drunk. The injury was due to the lack of safety.

38. During cross – examination by Counsel for the Plaintiff TW1 said he interviewed the witnesses 3 years 2 months after the accident and wrote his final report 3 months later. The scene of the accident had changed by then. There was no block and tackle in place.

39. When cross – examined by Counsel for the Defendant, TW1 said the statements from the witnesses were not taken on oath. He conducted an independent investigation himself.

40. At this juncture, Counsel for the Plaintiff and the Defendant consented to the letter from the Third Party dated 18 June 2013 becoming an Agreed and Admitted Document.

41. The next witness was Joeli Seniuci Radio, TW2, the Third Party's claims manager. He said the Third Party denied liability based on condition 8 of the Policy.

42. When cross examined by Counsel for the Plaintiff, he said they did not examine the crusher before the policy was issued. The policy covers injury by accident. There are no

definitions of accident or reasonable precautions in the policy. Condition 8 was not stated in those which the Defendant was not insured against.

43. During cross – examination by Counsel for the Defendant, he said the Third Party accepts it was an accident but it refused cover because of a breach of section 9 of the Health and Safety at Work Act 1996 (HSW). S. 9(4) of the Act lays down a penalty but they have not got any correspondence to confirm the Defendant was penalised. The Third Party also relied on s. 34 and s. 80 of the Factories Act to refuse the claim. They did not check with the statutory body whether the Defendant had breached the Law.

44. In re – examination, he said they denied the policy based on s. 9(2) (a) of the HSW Act, because the Defendant used workers and not a machine.

45. With that the Third Party closed its case and Counsel began their oral submissions.

46. Counsel for the Plaintiff submitted the Defendant failed to provide a safe system of work. The accident was an untoward event. There was no contributory negligence by the Plaintiff. The Defendant is 100% to blame. There was a duty of case owed and it was breached resulting in damage to the Plaintiff. The risk was foreseeable.

47. Counsel turned to the damages. He said they should be:

    (i) $10,400 for loss of earning capacity ($20 x 52 x 10)

    (ii) $35,000 for general damages

    Costs should be $5,000

48. Counsel for the Defendant then submitted. He said general damage should be $10,000. Damages for the impairment should be $5,000 as the injuries were not to the dominant hand. There should be no award for future pain and suffering. There should also be no award for future loss of earnings, because the Plaintiff was now earning more. There should be nothing given for even partial loss of earning capacity. He conceded there was 156 weeks of past loss of earnings which came up to $17,940 ($115 per week) and loss of

FNPF for the same period which would come to $1435.20. As there was no documentary proof provided there should be no special damages awarded.

49. As for liability, the Plaintiff was contributenly negligent to the extent of 25%, so he should get 75% of the quantum. The Defendant was negligent because there were no warning signs and the process, of closing and opening the cover, adopted by the Defendant had the possibility of risk.

50. With regard to the claim against the Third Party, Counsel said the Defendant bought insurance, informed the Third Party of the accident and 4 years alter the accident the Third Party says the claim is declined for non – compliance with condition 8. There is nothing in the policy to say that non – compliance with condition 8 entitles the Third Party to repudiate liability. In document 8 "what you are not insured for" does not state that if you do not take reasonable precautions, the Third Party can repudiate liability. The Third Party never proved that the Defendant had breached the section and penalties had been imposed by the court. Counsel submitted that the Third Party had no basis to repudiate liability and should indemnify the Defendant against all sums it is ordered to pay the Plaintiff. It should also pay the costs of the Third proceedings at $5,000.

51. Counsel for the Third Party now submitted. There was no dispute, that the insurance policy covers accidents but that is subject to its strict terms and conditions. The Plaintiff and the Divisional Manager said there was a rush to proceed and they made the Plaintiff close the lid and not wait for the mechanical loader. There was a gross failure on the part of the Defendant and the Third Party was not obliged to indemnify it. It is correct that the policy does not state that if reasonable precautions are not taken, the Third Party can repudiate liability. The Third Party costs to the Defendant should be $2 – 3,000.

52. At the conclusion of the arguments, I informed I would take time to consider my decision. Having done so, I now deliver my judgment.

53. As this is a workplace accident, the decision relating thereto, just like a decision relating to a running down accident, depends on the facts of the case. There is not, in my opinion any norm on how these negligence matters are to be determined. Suffice it for me to say that the decision in this case will turn on the pivot of who was responsible for the occurrence of the accident.

54. It is clear from the evidence that the Plaintiff was instructed to carry out the work concerned. He was wearing overalls supplied by his employer, the Defendant. While carrying out that work, his overalls caught on a part of the crusher and in the agony of the moment to prevent himself from falling off the platform he was standing on, he held onto the opening of the crusher and when the lid descended, two fingers of his left hand were crushed. Up to this crucial point, I am unable to discern any sign of any negligence on the part of the Plaintiff. That this is also so in the eyes of the Defendant can be seen from their various attempts to bolster their defence by alleging that the Plaintiff was suffering from a hangover at the material time. I hasten to say that not an iota of medical evidence was provided to substantiate this allegation. Once I find as I do, that there was no evidence to even remotely suggest that the Plaintiff was suffering the after effects of drinking alcohol or of any negligence on his part, the defence falls to the ground. Thereafter, there is nothing to allege against the Plaintiff by way of contributory negligence.

55. Indeed, the testimony from all sides, in my opinion, simultaneously inculpate the Defendant while exculpating the Plaintiff from blame for the accident.

56. I therefore hold the Defendant is wholly liable for the accident and enter judgment for the Plaintiff on a 100% basis.

57. I shall now proceed to assess the damages. I bear in mind that the damages that are apposite to a particular claimant must be decided by the trial judge in the light of the

evidence led by the Plaintiff. Awards given by other courts for similar injuries only serve as a guide to indicate a trend.

58. Here the Plaintiff suffered amputation of 2 fingers of his left hand, which was not his dominant hand, (see Dr. Taloga's medical report dated 11 August 2011). In my opinion a sum of $15,000 as general damages for pain and suffering and loss of amenities would be both appropriate and adequate compensation.

59. For a notional / nominal future partial loss of earning capacity I shall award the sum of $2,000. There shall be no damages for any loss of future earnings.

60. I accept the Defendant's Counsel's concession of $17,940 for past loss of earnings and $1,435.20 for loss of FNPF and shall award the same. I come finally to the special damages. It is trite that these have to be specifically pleaded and proved. Although there was a paucity of proof, nevertheless I am entitled to rely on the maxim of public policy which is expressed in Latin as "de minimis non curat lax" which is translated in English as "The law does not concern itself with trifles". On this score I shall award the Plaintiff $200 as special damages for medical and transport expenses.

61. I shall award the Plaintiff costs against the Defendant which I summarily assess at $2,500.

62. I will now consider the Defendant's claim against the Third Party. Carefully perusing the policy, from which this claim stems, I see that "Dominion agrees to indemnify you (Defendant) by payment if (A)ny workman employed by you shall sustain any personal injury ..... by accident ..... and you shall be liable to pay compensation for such injury .....".

63. There is no denying that the Plaintiff was employed by the Defendant and that he sustained personal injury by an accident.

64. In my opinion, the Third Party's attempt to rely on condition 8, to repudiate liability collapses for 2 reasons: viz

(i) It is not provided anywhere in the policy that the Third Party can repudiate liability if there is a failure by the insured (Defendant) to take all reasonable precautions

(ii) It is precisely to cover such a contingency that the Defendant pays a premium to the Third Party as the consideration for the Third Party covering it in the event that contingency occurs. It would then be untenable for the Third Party to say they are not covering the Defendant as they are purporting to do by their letter of the 18th June 2013 (Document 9 of the AB).

65. In the event, I am unable to accept the Third Party's contention. I therefore find and I so hold that the Third Party is obliged to indemnify the Defendant against the Plaintiff's claim, as the Third Party had agreed to do right from the inception of the policy.

66. In the result, I make the following orders:

(A) The Defendant is to pay the Plaintiff:

(i) $15,000 as general damages;

(ii) $2,000 as damages for nominal partial loss of earning capacity;

(iii) $17,940 for past loss of earnings;

(iv) $1,435.20 for loss of FNPF contributions;

(v) $200 as special damages

(vi) Interest on the general damages at 6% per annum from date of service of the writ to date of judgment;

(vii) Interest on the special damages at the rate of 3% per annum from the date of accident to the date of judgment;

(viii) Interest on the judgment sum at the rate of 4% per annum from the date of judgment to the date of payment;

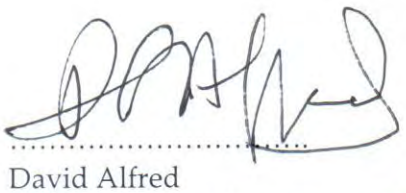
(ix) Costs, summarily assessed at $2,500

(B) The Third Party is to indemnify / pay the Defendant:

(i) All sums paid by the Defendant to the Plaintiff under (A) above within seven (7) days thereafter together with interest on the judgment sum at the rate of 4% per annum from the date of payment (by the Defendant to the Plaintiff) till the date of indemnity / payment by the Third Party to the Defendant.

(ii) Costs of these Third Party proceedings summarily assessed at $2,000.

Delivered at Suva this 3rd day of February, 2017.



David Alfred
JUDGE of the High Court of Fiji.