IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CASE NUMBER: **HBC 14 of 2009**

(Original Case Number: 3 of 2003 (Nadi Court)

BETWEEN: **EMPEROR GOLD MINE**

APPELLANT

AND: **LABOUR OFFICER** for and on behalf of the dependants of the deceased **BARMA NAND**.

RESPONDENT

Appearances: *Mr. A. K. Narayan and Ms. Samantha for the Appellant.*

Ms. Lee for the Respondent.

Date/Place of Judgment: *Tuesday 2 October 2018 at Suva.*

Coram: *Hon. Madam Justice Anjala Wati.*

A. ***Catchwords:***

WORKMEN'S COMPENSATION ACT – Statutory duty of the Magistrate to give written decision and reasons for findings on contested legal and factual issues – A Magistrate errs in law and in fact in failing to do so - Whether claim statue barred –Whether the failure to make the claim within 12 months occasioned by mistake or some other good cause or as a result of the failure of the employer to have given the notice of the death within one week as required by law - Whether the death of the worker was work related – Whether the claim should be allowed.

B. ***Legislation:***

1. ***Magistrates Court Rules 1945 ("MCR"): Rule 4.***

2. ***Workmen's Compensation Act 1964 ("WCA"): ss.13; 14(2).***

C. ***Cases:***

1. ***Pettitt v. Dunkley (1971) 1 NSWLR 376.***

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1. The employer Emperor Gold Mine has filed an appeal against the order of the Nadi Magistrates' Court of 21 March 2007. The order against the employer arose out of a claim under the WCA.

2. The deceased Barma Nand had started work with the employer on 7 October 1997. He had worked for Emperor Gold Mine for 11 days and died on the 12th day at work. He died in the early morning hours of 18 October 1997. At the time he died, he was working 50 meters underground with other workers. His work was that of a Carpenter. Barma Nand was a Carpenter by profession.

3. The claim was heard on a defended basis from 22 June 2005 to 9 January 2006. The Magistrates Court did not give any oral or written judgment on the question of liability and quantum. It did not decide any legal and factual issues raised by the parties. All it did was to enter judgment in favour of the claimant. The court minutes of 21 March 2007 reads:

"Judgment for $24,000 for the Labour Department for victims".

4. Subsequently, counsel for the employer wrote on various occasion asking for copies of the written judgment but to no avail. When the employer did not find any other way to convince the court to deliver the judgment, it instructed its counsel to file an appeal, by which period, the time to file an appeal had expired. Leave was therefore sought and granted for an appeal to be filed out of time.

5. The substantive appeal was listed before his Lordship Tuilevuka, J. His Lordship considered it prudent for the matter to be dealt with by me. The parties had agreed that I should deal with the matter.

6. The grounds of appeal are that the court erred in law and in fact:

   1. ***In finding liability to pay compensation under the WCA against the weight of the medical evidence supporting the employer's case that the deceased workman's death did not arise out of and in the course of employment and/or that the work was not a contributing factor in his death.***

   2. ***In making a finding on the liability in absence of the reasons.***

   3. ***In not evaluating, considering and analyzing the evidence adduced in the trial.***

   4. ***In finding liability under the WCA when the claim was statute barred.***

   5. ***In finding liability when it should have applied the formula under s. 6(a) of the WCA.***

7. I will first deal with grounds 2 and 3 through which the appellant complains that the court did not consider, evaluate and analyse the evidence and made a finding on liability without undertaking that exercise and without giving the reasons.

8. I agree with Mr. Narayan that when the matter was heard on a contested basis and the parties had raised contentious issues in fact and in law, such as whether the injury was work related and whether the claim was within the statutory timeframe *(which had to be decided in reference to the facts),* the court ought to have analysed the evidence and made findings of fact and law and provided the reasons for the same.

9. The legal issue that was raised was the question of time limitation, which, if decided in favour of the appellant, would have resulted in the claim being dismissed. Such a finding in law was very important. When the Court did not carry out the exercise of evaluating the evidence and

arriving at a finding, it erred both in law and in fact. The judgment is therefore bad in law and ought to be set aside.

10. In Fiji, it is the statutory requirement of a Magistrate to give written decision with reasons for the findings. The legal mandate appears in Rule 4 of the MCR which states:

"Every judgment or decision must-

(a) be written by the presiding Magistrate in English language;

(b) contain the points for determination;

(c) contain the decisions and the reasons for those decisions; and

(d) be signed by the Magistrate before delivery.

11. The above requirement is compulsory and therefore had to be adhered to. The Magistrate had no powers in law to ignore or not comply with the above provisions. I therefore set aside the order of the Magistrates Court as an order which is bad in law. I think I should repeat what Asprey JA stated in the case of ***Pettitt v. Dunkley (1971) 1 NSWLR 376 at 382***:

" ...where in a trial ... there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the case dependent for their application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt as to how those various factual issues or principles have been resolved, then, in the absence of some strong compelling reason, the case is such that the judge's findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached, and the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose. If he decided in such a case not to do so, he has made an error in that he has not properly fulfilled the function which the law calls upon him as a judicial person to exercise and such a decision on his part constitutes an error of law".

12. Having set aside the judgment of the lower court on this basis, I can either refer the matter for a re-trial before another court or treat the appeal as a re-hearing of the issues. Both counsel have requested that I re-hear the matter based on the evidence before me. Mr. A. K. Narayan has contended that credibility is not an issue in this case. Ms. Lee also agreed to the contention.

13. It is now more than 20 years since the workman had died and sending the file back will cause more delay. I concur with the counsel on this that given the evidence in the court record, I should venture into deciding the issues raised and make a finding on liability and quantum as well. I will however concentrate on the issues which arise in the grounds of appeal.

14. I must however remark that the evidence of the witnesses have not been recorded in a complete format. The court records also have missing exhibits. Counsel have provided me with some important exhibits which were tendered in court. Both counsel agreed that the documents given to me were those that were tendered during the trial. Counsel however could not find all the exhibits. They also do not have the same in their records. In the larger interest of justice, I have to decide on the matter given the records and the existing exhibits.

15. The first issue that I need to examine is whether the claim was brought within the statutory timeframe. S. 13 of the WCA as was applicable to the matter then reads as follows:

"Proceedings for the recovery under this Act for compensation for an injury shall not be maintainable unless notice of the accident has been given by or on behalf of the workman as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such an accident has been made within twelve months from the occurrence of the accident causing the injury or, in the case of death, within twelve months from the time of death:

Provided that-

(a) ...;

(b) the failure to make a claim for compensation within the period above specified shall not be a bar to the maintenance of such proceedings if it is proved that –

(i) the failure was occasioned by mistake or other good cause; or
(ii) the employer failed to comply with the provisions of subsection (1) or (2) of section 14,

so, however, that no proceedings for the recovery of compensation shall be maintainable unless the claim for compensation is made within a period of six years from the date of the accident.

Underlining is mine.

16. It is very clear from s. 13 that the claim for compensation ought to have been made within 12 months from 18 October 1997. If the claim is not made within 12 months, the claimant has to show that the same was not done because of mistake or other good cause or that the employer failed to comply with s. 14(1) or (2) of the WCA. Since the workman had died in this case, the provision applicable is s. 14(2) which states that:

"When the death of a workman from any cause whatsoever is brought to the notice of, or comes to the knowledge of his employer, the employer shall, within one week thereafter, give notice thereof in the prescribed form to the Permanent Secretary. Such notice shall state the circumstances of the death of the workman if they are known to the employer".

17. It is very clear from the evidence of the employer and the documentary evidence as well that the employer gave notice of the death to the Permanent Secretary, Suva on 24 October, 1997 by furnishing a covering letter and a L.D. Form C/1. The Notice was therefore sent within 6 days of the death of the employee.

18. The Labour Office takes two different factual positions in its argument. Its first position is that a notice of claim being L.D. Form C/2 ***("Form C/2")*** was sent to the employer on or around 17

December 1997. However, the claimant could not establish through its witness that such a claim was served on the employer. The claimant's witness was also given a chance to bring to court the register which records service of documents, despite that no such evidence could be produced. It was then stated by the witness that he really does not know whether Form C/2 was sent at all. The witness, in my finding could not prove that the claim was made on 17 December 1997.

19. The exhibits show that a claim dated 5 April 2000 was initiated by L.D. Form C/6 ***("Form C/6").*** This is the first claim that the employer admits receiving but by then the time frame of 12 months had expired. On 18 August 2000, the Labour Officer wrote to the employer and stated that a Form C/6 dated 5 April 2000 had been sent to the employer with a covering letter and that no response had been received till that point. Vide that letter the Labour Officer requested for a response.

20. What is clear from that letter is that reference is made to Form C/6 and not Form C/2 which means that the first claim that was sent was on 5 April 2000 being Form C/6 and not Form C/2 because if the latter was served, reference would have been made to this in the letter as well.

21. Ms. Lee argued in reference to the letter by the employer dated 2 January 1998. A letter was actually sent by the employer to the Labour Office on this date in which the first line reads *"Thank you for your letter dated 19/12/97 to the Manager Tuvatu Gold Mine"*. Ms Lee stated that this letter makes reference to the Labour Officer's letter of 19 December 1997. She contended that the employer could not make reference to this letter if it was not served with Form C/2.

22. Ms. Lee in fact has not guided the court properly. Form C/2 was issued on 17 December 1997 and the letter which the employer made reference to is dated 19 December 1997. The Form C/2 and the letter from the Labour Office is not the same document so the employer's reference to the letter does not insinuate that it received that Form C/2. It is for the Labour

Office to establish to my satisfaction that the claim was made within the 12 months. I do not find that it was so done as the Labour Office has not satisfied me that Form C/2 was served on the employer.

23. The second position that the Labour Office takes is that it did not file the claim within 12 months as it was still waiting for some important information from the employer and for the medical opinion from Lautoka Hospital. If this is the position taken by the Labour Office, how can it then contend that the claim by Form C/2 was made within 12 months? I find it surprising for such an alternative argument to be raised which contradicts the position of the Labour Office. By raising this alternative argument, the Labour Office accepts that Form C/2 was never served on the employer. Be that as it may, let me deal with the Labour Office's concerns that the delay in making the claim was for a good cause.

24. The first reason proffered as a good cause is that the employer had failed to provide the statement of the supervisor of the deceased Mr. Sekove. It is not disputed that all other relevant information was provided by the employer in August 1998. If the Labour Office wanted the statement of one Sekove, then it was the duty of the investigating officer to have gone to the employer and asked to interview or to take a statement from Mr. Sekove. It cannot just make a blanket request for a statement from the employer and sit on the file knowing that the time limitation under the statute had kicked in. There is no satisfactory explanation provided in the evidence why the claim could not proceed without Sekove's statement or why the Labour Office did not act expeditiously and obtain a statement from Mr. Sekove. It need not have waited for Mr. Sekove to give a statement on his own or at the instance of the employer. The employer had complied with its statutory obligation to give to the Labour Office the notice of death within a week leaving the Labour Office to do their part. I do not find that this is a good reason or cause to have delayed the matter.

25. The second reason is that the Labour Office was waiting for the medical opinion. This is a dishonest assertion. The documentary evidence show that the first time a request for the medical opinion was made was on 31 January 2000. This is after the expiry of the time period

to make a claim. The Labour Office has not provided a good and satisfactory reason why the request was not made immediately when the employer had notified it about the death and also given the reasons for the death.

26. I therefore do not find that the Labour Office had satisfied me that it has met one of the criterion stated in s. 13 (b) of the WCA to be able to make a claim within 6 years instead of 12 months. The claim is therefore statute barred under s. 13 of the WCA and I dismiss the same. I will however deal with the other ground of appeal which is in relation to the cause of the death.

27. The employer had contended that the deceased workman's death did not arise out of and in the course of employment and/or that the work was not a contributing factor in his death. The employer says that a finding ought to have been made in this regard which the court below failed to carry out. I agree with counsel that a finding in this regard was pertinent.

28. I will refer to the evidence and make a finding on whether the claimant has established and satisfied me that the death arose in the course of the employment or was contributed by the work the deceased carried out.

29. There were three medical reports tendered in court. I will make reference to each one in turn. The first medical report was the post-mortem report which only stated that the deceased died of ***"acute myocardinal infarction"***. It further states:

"All the three coronary arteries showed artery disease. There is a thrombotic occlusion of the left anterior descending artery 3.5cm from its origin. The right coronary artery shows diffuse disease with severe narrowing. The myocardium shows areas of fibrosis".

30. The post-mortem report does not state whether the death arose out of or in the course of the employment or that the work contributed to the same. In that regard the report was not subject to contention by either party. The two subsequent medical reports from two different doctors make reference to the post-mortem report.

31. The second medical report was given by Dr. Michael Lowe on 23 March 2000. Dr. Lowe was a consultant physician in Lautoka Hospital. He did not come to court to testify as he had migrated by then. His evidence was under major medical challenge and contradicted by a cardiologist Dr. Isoa Bakani. Dr. Deo Narayan came to court to tender the report of Dr. Lowe. Dr. Narayan was also a consultant physician.

32. Neither Dr. Lowe nor Dr. Narayan are cardiologists and/or specialize in heart disease. It was agreed by Dr. Narayan that Dr. Bakani was the only specialist cardiologist in Fiji at the time. I find that the evidence of Dr. Lowe could not be tested or tried and as such I cannot place weight to the same in comparison to the evidence of a specialist Dr. Bakani. Dr. Lowe's report reads:

"I am writing with regard to Mr. Barma Nand, a 53 year old man who died while at work on 18 October 1997. Mr. Nand worked as a carpenter at Tuvatu Gold mine. On the day of his death, he commenced work at 5pm, and had a half hour food break at 12 pm then continued to work until 4am. His work was situated 50metres underground, and consisted of cutting timber supports.

Mr. Nand had no previous medical history and did not complain of any symptoms on the day of his work. His cause of death from the post mortem examination was listed as "Acute myocardinal infarction".

There is no doubt that strenuous, prolonged physical work can cause myocardinal infarction in someone who already has narrowing of the coronary arteries secondary to atherosclerosis. Although he has no previous history of heart disease, asymptomatic atherosclerosis is common in Fiji, and is the likely cause of his death. However, my professional opinion is that his physical work aggravated his likely underlying medical condition. I therefore conclude that his death was partly work related".

33. The pertinent part of Dr. Bakani's report reads:

"...If the fatal heart attack was to have been related to work, the event should have been:

1. *occurred as the result of physical stress of work.*
2. *physical stress be much more than in ordinary activities.*
3. *cardiac event will have to be time related to physical stress i.e the heart attack should have occurred during stress or not long after.*

The deceased suffered a major and fatal heart attack while resting when the heart was in stable and normal resting state. The post-mortem showed that the deceased has "severe and multiple" coronary artery disease which indicated that the disease had been present for a long time. The fatal heart attack was due to a recent clot in a major diseased artery that blocked itself cutting-off bloody supply to the left ventricle. The heart muscle (myocardium) also showed areas of fibrosis i.e pale, unhealthy and poor functioning muscle from chronic lack of normal blood supply or minor localized heart attack.

It is abundantly clear and is therefore my view that the deceased died as a result of a major and fatal heart attack at rest and not work related. The heart attack was due to the presence of severe and multiple coronary artery disease that had been present for a long time. Exercise and physical activities are preventative to the development of coronary artery disease. The blood clot that blocked the coronary artery and caused the heart attack is a common event in the presence of severe coronary disease. Naturally such an event would have occurred at anytime and anywhere either at rest, at work or during sleep. The deceased was sitting on a timed-bomb. In Fiji coronary artery disease and sudden death from it, is not only common among the adult Indian male but also the peak incidence is between the ages of 45 and 60 years. The deceased was 53 years old".

34. The only basis on which the applicant says that Dr. Bakani's evidence cannot be accepted is that the report states that the heart attack occurred when the deceased was resting. The claimant says that the evidence was that the deceased was not resting at the time. I do not think that it is material to decide whether the deceased was resting.

35. The medical report makes it very clear that the due to the progressed stage of the disease, the deceased could have still died when he was resting and that he was sitting on a timed-bomb. So whether the deceased worked or not, he was bound to die due to the disease. In that regard, I am not satisfied on the balance of probability that the death was contributed by the work of the deceased. Dr. Bakani's medical report was otherwise largely unchallenged.

36. It is also important to make an observation that the claimants own witnesses had given evidence which contradicted each other. One of its witness at page 19 of the records stated that work had stopped at 3am. The deceased is said to have died between 4 to 4.30 am. This indicates that since 3am to the time of his death the deceased was not working. I am not going to make a finding on the witness I am going to believe as my finding would largely depend on the credibility of the witnesses. I have not had that advantage of seeing the demeanor and deportment of the witnesses to make a finding on credibility. Nevertheless, I repeat that there is no such need for that finding to be made.

37. On the day in question, the deceased was carrying out carpentry works in that he was fixing posts to create a wall to prevent the stones from falling. The work was underground and the witnesses have said that it was hot. The working hours were from 4pm in the afternoon to approximately 3am to 4am. The claimant could not establish with satisfactory medical evidence as to what was untoward about the situation to have caused the death of the deceased. In that regard, on the evidence before me, I cannot find that the death was work related.

38. On the question of the quantum that should have been claimed, the counsel for the claimant agreed that the claim should have been for $20,550.40 and not $24,000. This aspect is of little significance in light of my findings on the principal issues, nevertheless, an important aspect that the lower court ought to have decided. I will not address the issue of whether the wife and the children of the deceased were dependent on him as the issue was not raised on appeal.

39. In the final analysis, I make the following orders:

(a) The appeal is allowed and the decision of the Nadi Magistrates Court is set aside in whole.

(b) The claim under the WCA against the employer is dismissed.

(c) Each party must bear their own costs of the proceedings.

Anjala Wati

JUDGE

02.10.2018

To:

1. *AK Lawyers for the Appellant.*
2. *Office of the Solicitor General, Lautoka.*
3. *Lautoka HBC 14 of 2009.*