

**IN THE EMPLOYMENT RELATIONS COURT AT SUVA**

**CENTRAL JURISDICTION**

**CIVIL JURISDICTION**

ERT Case No: ERCC 13/20

**BETWEEN:**

**SNEH ANJEELA LATA aka SNEH ANGILA  
LATA on behalf of RAVI DUTT**

**APPELLANT**

**AND:**

**NAUSORI TOWN COUNCIL**

**RESPONDENT**

Date of Hearing : 6 June 2023  
For the Appellant: Messrs. Singh  
For the Respondent: Mr. Vulaono  
Date of Decision: 18 July 2023  
Before: Levaci SLTTW, J

**J U D G M E N T**

***(APPEAL FROM EMPLOYMENT RELATIONS TRIBUNAL)***

**Cause and Background**

1. This Applicant, on behalf of the dependents of the deceased, Appeals against the decision of the Employment Relations Tribunal (hereinafter referred to as 'ERT') on its findings that the although the Applicant's deceased husband collapsed of heart attack and died whilst in employment, he was not doing what his employer expressly or impliedly employed him to do. The ERT dismissed the case.

2. The deceased was employed with the Respondent since 21 August 1996 until 27 June 2014, the date of his demise. At the time of his death he was 46 years of age.
3. The deceased was normally employed as a driver with the Respondent from 7am to 5pm from Monday to Thursday and 7am to 4pm on Friday and sometimes on the weekend from 6pm to 11pm, mostly around every 3 months.
4. On the date of his death, the deceased was working overtime from 6pm to 9pm at Ratu Cakobau Park grounds under the instructions of the Respondent spraying sand from one spot to another on the ground. The deceased was at another part of the ground where soccer was played when he collapsed and later died.
5. The post mortem report showed that the Deceased died of acute antero-Lateral myocardial infarction, a severe coronary artery disease. The report stated that his heart showed a left anterior descending artery of 99% occlusion at 48 mm from its origin and severely calcified. The heart section revealed infarct on the anterior wall of the left ventricle.

### **Grounds of Appeal**

6. The Appellant has filed four grounds of appeal and the issues of determination are as follows –
  - a. *Whether or not the Employment Relations Tribunal erred in law and in fact in ruling that deceased death and or injury causing his death was one which did not arise out of the employment of the worker?*
  - b. *Whether or not the tribunal erred in law and in fact in not considering the medical opinion of Doctor Tikonaiyau's medical opinion which confirmed that the death of the deceased was work related?*
  - c. *Whether the Tribunal erred in law and in fact in not considering the expert medical evidence of Doctor Tikonaiyau that there was no evidence on the issue that the deceased actually collapsed whilst playing soccer?*
  - d. *Whether or not the tribunal erred in law and in fact in reaching to a conclusion that the workers death was not work related?*

### **Law on Appeal**

7. Section 220 (1) of the Employment Relations Act 2007 stipulates that –

'220 (1) The Employment Relations Court has jurisdiction –

(a) To hear and determine appeals conferred upon it under this Promulgation and any other written law.'

8. Section 225 of the Employment Relations Act 2007 stipulates that an Appeal to the Employment Relations Court is as of right from a decision of the first instance of the ERT.
9. Section 22 (1) of the Workmens Compensation Act empowers the High Court to hear an Appeal under the Workmens Compensation Act. It states as follows –

#### *Appeals*

22.-(1) Subject to the provisions of this section, or of section 12, or of subsection (2) of section 33, an appeal shall lie to the Supreme Court from any order of the court.

Provided that the Supreme Court may, if it thinks fit, extend the time for appealing under the provisions of this section notwithstanding that the time for appealing has elapsed.

10. This is an Appeal against the decision of the ERT to dismiss and refuse compensation to the dependents of the deceased under the Workmans Compensation Act 1975.
11. An Appellate court will be slow to interfere with the factual findings of an original court unless they are plainly wrong or drew wrong inferences from the facts and the Appellate court need not exercise jurisdiction to interfere with the Tribunal's decision only because it exercised its discretion in another way (see Tuckers Employees and Staff Union –v- Goodman Fielder International (Fiji) Limited ERCA No. 28 of 2018). The Appellate Court will review a decision where from the face of the record the Court finds that the Tribunal has blatantly erred in facts or law and has acted in ultra vires or has failed to consider a pertinent issue raised before the Tribunal.
12. The Appellate Court will not overturn a decision of the Tribunal unless the above factors have been met. Consideration is made to the observations of Lord Reid in Benmax-v- Austin Motors Co Ltd [1955] ALL ER 376 at 329 :

'I think the whole passage, refers to cases where the credibility or reliability of one or more witnesses has been in dispute and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. That be right, I see no reason to doubt anything said by Lord Thankerton. But in cases where

there is no question the credibility or reliability of any witness, and in cases where the point in dispute is the proper inferences to be drawn from proved facts, an appeal court is generally in as good a position in evaluating the evidences as the trial judge, and ought not to shrink from that task, though it ought of course to give weight to his opinion...' (underlining my emphasis).

13. As was said by Pathik J in Fiji Sugar Corporation Ltd –v- Labour Officer [1995] FJHC 27; Hba0004,93b (3 February 1998) when he paid heed to the dicta of Lord Shaw in Clark –v- Edinburgh Tramways Corporation [1919] UKHL 303; (1919) S.C (HL) 35 where it was stated –

'... in my opinion, the duty of the appellate Court in these circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantage, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case – in a position, not having those privileges, to come clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my mind that the Judge with those privileges was plainly wrong then it appears to me to be my duty to defer his judgment.'

14. Thus in the case of Carpenters Fiji Limited –v- The Labour Officer and on behalf of Katarina Esita and Others [1984] 30 FLR 26 J.A Speight VP, Mishra J.A and O'Reagan J.A had this to say –

'As was said by Slessor L.J in White Ebbw Vale etc Co. [1936] All ER. 1221 at 1222 –

'The question which arises upon this appeal is whether the county court judge was or was not entitled to draw an inference of fact from certain facts which appeared in the evidence. The principles upon which he has to proceed are very clearly stated by Lord Birkenhead in the case of Lancaster –v- Blackwell Collier Co. Ltd at p 406 where he says this:

The principles which have to be applied to facts like these are now well settled, they have been declared in numerous occasions by your Lordships and they may be very easily summarized. If the facts which are proved give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture, then of course the applicant fails to prove his case, because it is plain that the onus in these matters is upon the application. But where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities in their respective value, and where a reasonable man might hold that the more probable conclusion is that for which the applicant contends, then the arbitrator is justified in drawing in his favour.'

## Workmen Compensation Act and its principles

15. Section 5 of the Workmens Compensation Act No.25 of 1975 (referred to as the 'Act') stipulates the basis on which the Court may grant compensation for an injury or death. The provision states -

*Employer's liability for compensation for death or incapacity resulting from accident*

5-(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter provided, be liable to pay compensation in accordance with the provisions of this Act and, for the purposes of this Act, an accident resulting in the death or serious and permanent incapacity of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instruction from his employer, if such act was done by the workman for the purposes of and in connexion with his employer's trade or business.

Provided that-

- (a) the employer shall not be liable under this Act in respect of any injury which does not incapacitate the workman for a period of at least three consecutive days from earning full wages at the work at which he was employed;
  - (b) if it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed;
  - (c) Provided that where the injury results in death or serious and permanent incapacity, the court on consideration of all the circumstances may award the compensation provided for by this Act or such part thereof as it shall think fit.
- (2) No compensation shall be payable under this Act in respect of any incapacity or death resulting from a deliberate self-injury;
- (3) No compensation shall be payable under this Act in respect of any incapacity or death resulting from personal injury, if the workman has at any time represented in writing to the employer that he was not suffering or had not previously suffered from that or a similar injury, knowing that the representation was false.

16. In order to determine the award of compensation, the following elements must be met:

- (i) there must be a personal injury to the workman by accident;
- (ii) the personal injury arose out of an employment;
- (iii) the accident occurred during the course of employment.

17. The Workmen's Compensation Acts 1925 to 1938 by Willis 32 ed defines "accident" in the context of "personal injury by accident" as follows:

"The word "accident" does not necessarily involve the idea of something fortuitous and unexpected as formerly held (HENSLEY v WHITE [1899] UKLawRpKQB 227; (1900) 1 Q.B. 481, ..... It includes injury caused by over-exertion in the ordinary course of employment.'

18. In Fenton v. Thornley [1903] UKLawRpt AC 48; [1903] A.C. 443, 5 W.C.C. 34 Digest 266, 2264 the workman met with an accident when moving something heavy and therefore the term 'accident' was used in ordinary sense to mean unlooked for mishap or an untoward event which is not expected or designed.

19. In Clover Clayton & Co Ltd –v- Hughes [1910] HL 238 the worker was tightening a nut by a spanner and died from aneurysm of the aorta. The trial judge found that the death was caused by a strain arising from the ordinary work of the man operating upon the condition of the body rendering the strain fatal. Lord Mc Naughten held that 'injuries by accident meant nothing more than 'accidental injury' or 'accident'.

20. In the case of Oates –v- Earl Fitz –Williams Collierie Co (1939) ALL ER 198 where a workman suffering from heart disease became seriously ill while at his work and died shortly afterwards. The editorial note stated –

'The Court of Appeal reiterated that the proof of extra exertion or strain is not essential to the recovery of compensation but there must be evidence of physiological injury or change due to the work upon which the workman was engaged at or about the moment of his death.'

21. In Fife Coal Company Limited –v- Young [1940] AC 47 a workman who was a packer in a coalmine adopted a kneeling position on his right knee was suffering from 'dropped foot', a paralysis of the muscle of the leg caused by pressure on the peroneal nerve which prevent dorsiflexion of the foot and was held to be an injury caused by an accident in the course of employment. In that case Lord Aitkin stated-

'a man suffers from rupture, an aneurism bursts, the muscular action of the heart fails, while the man is doing his ordinary work, turning a wheel or a screw, or lifting his hand. In such cases it is hardly possible to distinguish in time between the 'accident' and injury, the rupture which is accident is at the same time an injury from which follows at once or after a lapse of time death or incapacity. But the distinction between the two must be observed ...'

22. In analyzing these pre-1946 UK cases (1946 being the year that UK amended its workmen compensation laws), Court of Appeal in Hong Kong in the latest decision of Yu Kwok Wa Suing by his Next Friend Lee Tsui Shan –v- China Telecom Global Ltd [2023] HKCA 75 J.A Lam had this to say –

'The analysis of pre-1946 UK cases referred to by Mr Leong show that where the injury from a disease or a particular vulnerability of the body has been triggered, contributed to, or accelerated by some particular act of work, the injury may properly be called injury by accident caused to the employee within the meaning of the Workmens Compensation Act. They do not show the injury from a disease or a particular vulnerability of the body may in itself be regarded as an accident or should be without more be presumed to be injury by accident simply because it was suffered by an employee during working hours.' (underlining my emphasis).

23. In the abovementioned case from Court of Appeal in Hong Kong Lam JA then determined that an approach to distinguish the terms 'accident' and 'personal injury' was the correct approach as was discussed in authoritative decisions referring to LKK Trans Ltd –v- Wong Hoi Chung (2006 )9 HKCFAR 103 in the preposition that the provision requires a causal connection between the employment and the accident (so that the accident arises out of the employment) and between the accident and injury suffered by the workman.
24. In the Courts in Fiji, the approach remains the same since the pre-1946 UK cases with the following local cases depicting the continued application of the law as follows –
- (i) FSC –v- Labour Officer for Bibi Hazra [1995] FJHC 39;HB 0019J; 94B (17 February 1995) the workman Abdul Kadir had been an employee of FSC for 34 years and was in charge of the maintenance of tramline when he began to be admitted in hospital intermittently for chest pains, hypothyroidism and hypertension. On 20 March 1988 he suffered another heart attack and was readmitted and discharged. On 6 April 1988 in the morning he was brought to hospital after complaining of back pains and after injection he returned home and came back in the afternoon when he had severe chest pain. Whilst being attended to by a doctor he fell forward and later declared dead. It was held that the injury was a personal injury by accident and that the injury arose in the course of employment as he was working when he suffered from chest pains and was taken to hospital.
- (ii) In Labour officer for Luisa Legalevu –v- Fiji Ports Authority 6 of 1983 FCA in determining the term 'occurring in the course of employment' stated –

'There is no dispute that the deceased was suffering from Ischaemic heart disease. Therefore the question here is whether the work contributed to his death. Applying the principles enunciated above including the dicta in the various cases and bearing in mind the facts and the medical evidence the accident did arise out of employment. I find, as did the learned Magistrate, that there was a strong evidence, on a balance of probabilities that the nature of the work the deceased did cause a physiological change and accelerated the accident.'

- (iii) In the case of Carpenters Fiji Limited –v- The Labour Officer and on behalf of Katarina Esita and Others [1984] when the deceased suffered from a limp on the last few hours of work, arriving at home and later suffering a headache leading to coma, the medical report confirmed he suffered from a burst of aneurism from his brain causing his untimely death. The court said:

'It was for the Widow to produce evidence to affirm that the work of the deceased in the course of his employment furthered his probable risk of death.'

- (iv) In Fiji Sugar Corporation Limited –v- the Labour Officer for and on behalf of Daya Wati and others of Bans Bahadur, deceased [1995] FJHC 27, Hba0004].93b (3 February 1995) an Appeal from the Magistrates Court where the Appellant was found liable and the Respondent granted compensation with costs where the deceased had been admitted twice in 1982 and 1990 and was having chest pains. On return from work early and at 11pm that night he died. He had reduced cigarette intake, he was eating healthy and complaining of tiredness. At the time of his death the deceased was working as a tea and messenger boy for a considerable time. The High Court (on Appeal) determined that the personal injury of myocardial infarction was an accident that did not occur during the course of employment and stated –

'On the lapse of time in Whittle (Supra) where Slessor LJ at p 1223 stated 'But there can be no general principle that a man must die immediately he had received the strain; it is a question of fact to be decided on the evidence and the medical evidence' Hence there is no evidence of any strain as a tea boy or other miscellaneous work which he did.

..With respect I cannot see how the learned magistrate could possibly have come to the conclusion that the deceased death arose out of and in the course of his employment. There is nothing in the evidence to prove that the work the deceased did that day in any way caused or contributed to his death. The application should have been dismissed.'

### Analysis of Grounds of Appeal

25. The Court finds that the Grounds (b), (c) (d) are relevant and thus will determine them accordingly. They are as follows –
- b. Whether or not the tribunal erred in law and in fact in not considering the medical opinion of Doctor Tikonaiyau's medical opinion which confirmed that the death of the deceased was work related?*



- c. *Whether the Tribunal erred in law and in fact in not considering the expert medical evidence of Doctor Tikonaiyau that there was no evidence on the issue that the deceased actually collapsed whilst playing soccer?*
- d. *Whether or not the tribunal erred in law and in fact in reaching to a conclusion that the workers death was not work related?'*

26. From the decision of the learned magistrate, she had correctly identified the three grounds that must be established for the purposes of the provisions of section 5 of the Workmen's Compensation Act 1975.

27. The learned magistrate then went on to state, when analyzing the evidences –

*'The medical file of the deceased was not produced in Court however Exhibit 4 noted that the worker smoked about cigarettes and drank alcohol. The defacto partner's statement noted the deceased smoked about 10 cigarettes a day and drank alcohol occasionally.*

*Dr Tikoinayau agreed in cross-examination that playing soccer could also be classified as physical exertion. He however stated that his opinion was made on the information provided to him in that the worker was shifting sand from one place to another and he could not comment on the issue of whether the worker actually collapsed whilst playing soccer.*

*The evidence of the two workmates stated that the worker was playing soccer after the work for the day had finished and that it was normal for the council workers to play soccer after work. The medical opinion of Dr De Asa noted 'According to the autopsy report, the cause of death was a build of plaque his coronary artery – left anterior artery (99%)'. This evidence was not disputed by Dr Tikonaiyau and he stated that Dr De Asa's report supported his findings. This tribunal is of the view that given the lifestyle of the worker and the findings of the autopsy report, the injury could have been triggered by any physical exertion. Dr Tikonaiyau did agree that playing soccer could be classified as physical exertion.*

*This Tribunal finds that it could not be said with any certainty that the injury was one which arose out of the employment of the worker.'*

28. Dr Tikoinayau medical report which was tendered as Exh 4 during trial:

**'Events leading to Death**

*He was doing manual working overtime when he collapsed and died.*

## Opinion

### Facts are:

- a) *He was a smoker and also consumed alcohol;*
- b) *His work as a driver can be stressful at times*
- c) *He also did overtime work for the council and was doing manual work when he collapsed and died;*
- d) *Post mortem results showed severe CAD.*

### Assessment

*There is no doubt he had coronary artery disease which is a lifestyle condition. But he died while performing manual work during overtime. My opinion is that his physical exertion aggravated his coronary artery condition resulting in his collapse and death. Death was work related.'*

- 29 From Dr Tikonaiyau cross-examination, he accepted that any form of exertion would have triggered the injury causing the deceased to arrive at an untimely death. There is evidence, which the Tribunal accepted that the Deceased was playing soccer immediately prior to collapsing.
30. This evidence has not been challenged which the Court accepts that the Deceased was playing soccer for 5 minutes immediately prior to collapsing on the grounds.
31. However prior to this, it is not disputed that the Deceased had been spraying sand on the ground from 6pm to 9pm lasting a period of 3 hours, which was manual labour. From the statement of Mr. Qalilawa, the deceased had did this in the past but not consistently. It is not disputed from evidences that, there was an exertion of work, a physiological change, beyond that for which was required of the work he had consistently performed as a driver.
32. The Employer was unaware that the Deceased had played soccer as it was not part of the work he was tasked to perform. This is clear from the claim filed and the history relayed to the medical practitioner when preparing the medical report. The facts established that the deceased was tasked with work to spray the grounds.
33. When taking into consideration the evidences which established the facts, the Court arrives at the conclusion that the Deceased had in fact exerted himself with work he was tasked with, which was a physiological change in his task, given the existing disease of myocardial infarction resulting in him collapsing on the soccer field and thereby resulting in his untimely death. Again, there was a probable risk that playing soccer continued the exertion, but was not the only cause of exertion.
34. The Court therefore finds that the Tribunal had indeed failed to turn its mind to Dr Tikonaiyau evidence to properly arrive at its inferences from the facts and that it was wrong to conclude that there was no certainty as to whether the Deceased had

suffered injury from an accident at work based only on the ground when there was evidence that the Deceased in fact had worked overtime with a job task that exerted himself thereby rendering himself to physiological changes.

35. The Court finds that the Appeal on grounds 2 and 3 succeed.

#### Grounds 1 and 4

***Whether or not the Employment Relations Tribunal erred in law and in fact in ruling that deceased death and or injury causing his death was one which did not arise out of the employment of the worker?***

***Whether or not the tribunal erred in law and in fact in reaching to a conclusion that the workers death was not work related?'***

36. For the purposes of Grounds 1 the Court found that the ground 1 and ground 4 be dealt together as they addressed the same issues.

37. The learned Magistrate in her decision stated –

*'There is evidence that shows that the work had finished. The worker did not have dinner but he joined other workers to play soccer. It is whilst playing soccer that he collapsed and taken to hospital. He was transferred to CWM where he passed away.*

*The Tribunal finds whilst the incident occurred whilst the worker was in employment, it cannot be said that the worker was doing what his employer expressly or impliedly employed him to do.*

*Therefore this Tribunal finds that the workers death was not work related for the foregoing reasons.'*

According to Section 5 of the Workman's Compensation Act, the onus is on the Widow to show that the accident which caused the injury or untimely death occurred in the course of employment.

38. From the evidences, the labour officer confirmed that the deceased was in employment at the time of death and relied upon the medical report which confirmed that the death was work related. The deceased supervisor gave evidence that the deceased collapsed on the grounds and the deceased colleague gave evidence that the deceased together with other employees were playing soccer voluntarily, without any instruction or direction to do so.
39. Based on the evidences relied upon by the widow and the analysis regarding the cause of death, despite the deceased collapsing on the soccer ground after playing

soccer, his participation in the soccer game for 5 minutes was not the original or initial cause of the exertion which caused physiological changes and that the exertion had originated from his work which he was tasked to do that resulted in 3 hours of spraying sand on the grounds. Therefore the accident was the contributory effect to the injury of the Deceased resulting in his death.

40. The Court therefore finds from the evidences that it is clear that the Tribunal had erred in facts and law and that the Court finds that there is evidence to establish that the Deceased had suffered from injury from accident as work related.
41. Despite the Tribunal turning its mind to the fact that the soccer played that night was not instructed to or directed by Respondent, the Tribunal failed to consider that the deceased had just completed works on the grounds when he collapsed. The timing of his death occurred after his work, however he suffered injury whilst at work during his course of employment. Furthermore, I find fortitude in the case below.
42. In Midwest Tractors (Fiji) Limited –v- The Labour Officer ERCA 22 of 2015 where the worker has been employed by the Respondent in 1997 and in 2009 he collapsed in the office washroom and was immediately taken to Nadi Hospital where he was pronounced dead on arrival. He was found to have suffered from an enlarged heart, occlusion of 70% of the left and right coronary arteries, hypotrophy of the left ventricle and congestion in the liver and kidneys. The doctor who gave his medical report and gave his testimony did not know that the patient was an alcoholic and chain smoker, did not work overtime or longer hours than normal and had a desk job. Hon. Madam Justice Wati stated-

'I find that the Tribunal failed to analyze the evidence of the Doctors properly which led him to arrive at the conclusion that is not supported by evidence. I find that Dr Tupou's evidence does not have any probative value and that it should be disregarded. The conclusion arrived at that the condition of the worker was contributed by the nature of his work is not supported by proper medical evidence as such I find that the workers death was not work related.'

### **Award for Compensation**

43. Given that the Court has now found that the Tribunal erred in fact and law, the Court can award compensation to the widow.
44. In section 6 of the Workmen's Compensation Act provides that where a death results from an injury suffered in an accident during the course of employment any dependents wholly or partially dependent on his earnings may be awarded compensation.

45. According to the statement of the widow, she was working as a market vendor and her eldest child was married and her second eldest was working full time and therefore her third child was still a school student and wholly dependent on the earnings of the deceased together with the widow.
46. The deceased mother was also dependent on his earnings although she resided with a second son.
47. The Court will therefore award the compensation to the third child of the widow as the widow was able to prove through her statements that her third child from her first marriage was partially supported by the Deceased.
48. The Court will also grant compensation to the Deceased mother as having partially depended on the deceased earnings.
49. The evidence submitted by the Employer and not contested, which this Court accepts, is that the gross earnings of the Deceased was \$264.82 per week and that he had earned \$55,082.56 for 208 weeks. The calculation is that the workman was to be compensated \$24,000.00 in total.
50. The Court accepts this evidence on a balance of probabilities and finds that it proves the amount of compensation to be awarded.

### Orders

51. The Court will:

- (i) That Grounds of Appeal succeed;
- (ii) That compensation be awarded to the Deceased widow for and on behalf of the third child and the Deceased mother as partial dependents for a total sum of \$24,000;
- (iii) Post judgment interest at 5% per annum;
- (iv) Costs against the Respondent for \$500.



.....  
SLTTW Levaci  
Judge