IN THE EMPLOYMENT RELATIONS COURT AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: **ERCA 13 of 2018**

BETWEEN: **RAM DUTT & SONS**

APPELLANT

AND: **THE LABOUR OFFICER for and on behalf of SASHI RAJ**

RESPONDENT

Appearances:	*Mr. N. Padarath for the Appellant.*
	Mr. Chauhan for the Respondent.
Date/Place of Judgment:	*Thursday 4 July 2024 at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*

JUDGMENT

Catchwords:

Workmen's Compensation Act Cap. 94 – Appeal – Whether the injury arose out of employment – it was open to the tribunal to make a finding that the worker had exerted himself at work which caused him the dizziness and resulted in him falling and sustaining injuries- medical evidence was that exhaustion and fatigue can cause dizziness- on a civil standard of proof, the requirement that the injury arose out of employment was established.

Cause and Background

1. This is an appeal by the employer against the decision of the tribunal arising out of a workmen's compensation claim. The tribunal found that the workman Sashi Raj had suffered personal injury by accident arising out of and in the course of his employment and as a result ordered the employer to pay to the workman $17,771.52 in compensation.

2. The worker was employed as a driver. His evidence was that on 9 March 2010, he left his home in Ba around 1.00 am to come to Suva with a ten wheeler truck full of nails. The truck had about 300 boxes of nails. Each box was about 25kgs.

3. He was not given a delivery boy to assist in unloading 300 boxes. He says he did that all by himself at various outlets.

4. After finishing work, he came to Kinoya Powerhouse car park to unload empty pallets. It was a very hot day. He was in the process of unloading when he felt dizzy. He came to sit in the truck. It was about 2.00 to 3.00 pm in the afternoon. He does not know what happened after that. When he woke up, he was in CWM Hospital.

5. He was discharged from CWM Hospital on 1 April 2010 and admitted to Tamavua Rehabilitation Hospital. He was discharged from Tamavua Rehabilitation Hospital on 2 July 2010.

6. At CWM Hospital, the workman was diagnosed with a Cervical Spinal Cord Lesion. On admission to Tamavua Rehabilitation Hospital, he was found to be *"alert, and oriented to time, place and person. His higher mental examinations were normal. An indwelling urinary catheter and cervical collar were noted. He had marked stiffness in his cervical spine limiting the range of motion in all planes. Both his upper limbs were flaccid in tone and there were no active movements present. Muscle tone in lower limbs was slightly reduced with a muscle power of 2/5. He had bilateral foot drop. Sensory function was found to be impaired from C5 level".* **(Medical Report Page 15 of the Records).**

7. On discharge the workman was assessed to have 64% impairment.

Appeal

8. The employer has raised 3 grounds of appeal. The employer says that the tribunal erred in law and in fact in:

    1. *Holding that the employer is liable when there was no evidence to establish how the injury of the worker arose.*

    2. *Failing to consider the authority of* ***Wati v Emperor Gold Mining Company Limited (2007) FJCA 20*** *which interpreted the meaning of section 5(1) of the Workmen's Compensation Act and as such, the Tribunal did not consider the true meaning of the term "arising out of employment".*

    3. *In holding that the medical report tendered established that the injury had occurred out of the employment when the report only went to the extent to assess the injury the applicant had received and it did not assess how the injury had occurred which did not satisfy section 5(1) of the Workmen's Compensation Act.*

Evidence/Law and Analysis

9. All the grounds of appeal collectively require an examination of whether the tribunal had correctly come to a finding on how the injury occurred: *whether it arose out of the employment?*

10. The evidence of the worker was that he had travelled from Ba to Suva at 1.00 am. By 2.00 to 3.00 pm he had alone unloaded 300 boxes of nails to various outlets. Each box weighed about 25kgs.

11. The employer had not provided any assistance to the workman. With such huge amount of nails to unload, the workman was entitled to have a delivery boy sent with him. The contention that the workman was entitled to a delivery boy was not refuted by the employer. The delivery

boy was not provided. The employer therefore expected the driver to perform all the work alone. He had with him another truck driver but that driver had his own truck to drive. There is no evidence that the other truck driver helped the workman. The workman testified that the other driver did not want to help in unloading the nails as that was not part of his work.

12. The workman's evidence was that he did all the nail unloading alone. It was only when he came to Kinoya Powerhouse car park where the other driver was parked that the other driver helped in unloading the empty pallets.

13. The evidence clearly establishes that the worker had exerted himself. He had been driving such a long distance from as early as 1.00 am. His evidence could not be impeached as to the time he left Ba. The employer said that he started driving at 4.00 am. The employer ought to have produced the driving record of the worker if it wanted to refute the worker's contention. Surely the driving record would be in the possession of the employer and not the worker. The worker had fallen sick and was taken to CWM Hospital. He never returned to work after that time. He could not have taken the driving record with him to the hospital. It would have been left in the truck he was driving.

14. The driver had worked for more than 12 hours and with such strenuous work, he was bound to feel dizzy. Doctor Pratima Singh gave evidence that exhaustion can be a cause of dizziness. Although it could not be pointed out that it really did cause the dizziness, it was open to the court below to find on a balance of probability that had it not been for that exhaustion, the worker would not have felt dizzy and fallen, receiving the injuries he did.

15. The court did say that Dr. Pratima Singh's evidence was not disturbed. What it insinuated from that finding was that her evidence on how the worker possibly felt dizzy was not disturbed. It was in the cross examination evidence that it was established that exhaustion is a possible cause for dizziness.

16. Dr. Pratima Singh said that the workman did not have pre-existing medical conditions. She was asked in cross-examination:

"Q: So in this particular scenario doctor, I put to you in Mr. Raj's situation, he was working on that particular day, he was physically active, he was unloading boxes and he was sitting down and standing up, in this particular scenario how is it likely or one of the probabilities that he will suffer dizziness, like what would cause that sudden dizziness, as you said like suddenly getting up will cause dizziness, what would trigger the sudden dizziness?

A: Dr. Singh: One of the cause could be heat exhaustion ....

Q: Mr. Padarath: Heat exhaustion?

A: Dr. Singh: And fatigue...and fatigue can cause that."

17. I too am of the view that it was more probable then not that the long hours of drive and the strenuous activity on a hot day caused the fatigue and exhaustion to the workman. This workman was not a sick man. He did not have any pre-existing medical conditions. What then could suddenly cause the dizziness? He was not even sitting for long hours?

18. The exact cause of dizziness need not be established. The civil standard of proof on balance of probability does not require that the cause of dizziness be established beyond reasonable doubt. What probably caused the dizziness is sufficient.

19. It was incumbent on the employer to ensure that the workman was not put under such physical pressure and exhaustion. The employer ought to have considered the health and safety of the worker. It is clear from the evidence that the employer did not cater for the employee's situation to be accompanied by someone to assist him.

20. If the workman did not work the way he did, his evidence was that he would have lost his job. He performed without the delivery boy out of fear of losing his job. He cannot be blamed for working so hard. He performed over and beyond what he should have done only because the employer expected and required him to carry out the work that day.

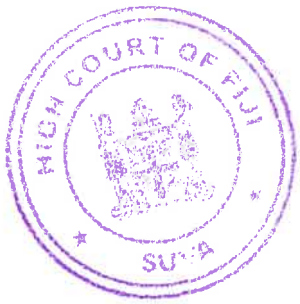
21. On other days, the employer used to provide a delivery boy who would have assisted in the unloading of the nails. This time it was left to one man performing the task; the same man had driven for long since morning. The workman's additional and extra hard work caused him the dizziness. I find that it was his work that caused him the injuries.

22. I do not find any merits in the collective grounds of appeal.

Final Orders

23. In the final analysis, I dismiss the appeal. I uphold the orders of the tribunal and order that the sum of $17,771.52 be paid to the worker with post judgment interest at 4% for 2 years *(date of trial judgment to date of appeal hearing)* within 21 days.

24. The employer should pay costs of $5,000 to the worker within 21 days.



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Hon. Madam Justice Anjala Wati

Judge

04.07.2024

To:

1. ***Samuel K. Ram, Barrister and Solicitor, Ba for the Appellant.***
2. ***Ministry of Employment, Productivity and Industrial Relations for the Respondent.***
3. ***File: Suva ERCA 13 of 2018.***