IN THE STATUTORY TRIBUNAL, FIJI ISLANDS
SITTING AS THE EMPLOYMENT RELATIONS TRIBUNAL

Ex Tempore Decision

Title of Matter:	**Kemueli Raikadroka**	**(Complainant)**
	v	
	Consort Shipping Line	**(Respondent)**
Section:	**Section**	**5**
	***Workmen's Compensation Act* 1964**	
Subject:	**Claim for Compensable Injury**	
Matter Number:	**ERT WC No 11 of 2010**	
Appearances:	**Mr A Prakash for the Applicant**	
	Ms S Narayan for the Respondent	
Date of Hearing:	**28 November 2017**	
Before:	**Mr Andrew J See, Resident Magistrate**	

Background

1. This matter was previously heard before Samuj LT, but a decision was not issued prior to her concluding in her role. As a result and with the concurrence of the parties, this Tribunal has now reached a decision having regard to the initial Application by an Injured Worker to seek compensation payable to him, made at the time in accordance with Section 8 of the *Workmen's Compensation Act*(Cap 94)and filed in the Employment Relations Tribunal on the 18th of February, 2010; and the subsequent material filed by the parties including:

    - the Statement of Defence of the Defendant Employer Consort Shipping Line Limited filed on 12th of August, 2010;
    - The Applicant's Response filed on the 8th of September, 2010;
    - A copy of the Applicant's Submission filed on the 19th of March, 2014;

- A copy of the Respondent's List of Documents filed on the 28th of October, 2013. (As per that list, transcript of proceedings has been made available in the Court file dated the 29th of October, 2013. A copy of which have been provided to the clients at the beginning of this review conference earlier this afternoon).

2. In addition, the Tribunal has also had regard to the various Exhibits that form part of the proceedings, including the medical report from the Lautoka Hospital dated the 22nd of November, 2012 and earlier medical certificates issued on the 5th of January 2007 and 5th of February 2007. The Tribunal has also had regard to a third medical report including the Form LD Form/C/1 patient particulars. In that respect, I am referring to Part Two of that form, certified by a Dr.Mareko on the 18th of February 2009.

3. In relation to that form, the Tribunal accepts the submissions put by the Counsel for the Employer, that the Employer itself did not forward a copy of that form to the Labour Office, as it otherwise may have appeared.

Analysis

4. In cases of this type, in the first place, the focus of the parties needs to be Section 5 of the *Workmen's Compensation* Act 1964. I shall refer to the legislation as that Act, because there has been no change to the relevant provisions since 2010,that makes an impact on the decision made.

5. Section 5(1) of the Workmen's Compensation Act provides as follow:

> *"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"*

6. There are three requirements to satisfy Section 5(1) of the *Workmen's Compensation* Act. These are the need for a person injured by accident; that the person is injured by an accident arising out of employment; and that it occurs in the course of employment. Pathick J in *Fiji Corporation v. the Labour Officer* [1995] FJHC39, set out in detail what was to be meant by the expression 'injury by accident'. In the relevant case before this Tribunal, the evidence of personal injury by accident is made clear within the transcript of the earlier proceedings conducted by Samuj Legal Tribunal.

7. The case of the evidence of the injured worker Mr. Kemueli Raikadroka, is at pages 3 to 20 of the Transcript. In the case of the Chief Officer and the Relieving Master Mr.

Laisiasa Gonewai, at page 24 of the Transcript. And in the case of the Chief Officer and Master, Mr. Samuela Bulimetuira, at pages 31 – 33 of the Transcript.

8. Whilst the Tribunal accepts that there is some lack of clarity in relation to the version of events that was provided by the injured worker, it nevertheless accepts the fact that the account of events first given by the worker at page 3 of the Transcript, would accord with the version of events given by Mr. Gonewai at page 24, insofar as the worker did slip on the floor of the vessel and was apprehended by the Chief Officer and Relieving Master, on the floor, coinciding with an event of that kind. The subsequent events that followed, saw the injured worker reporting his injury to the Employer, albeit that it does not appear that such a report made its way to its administrative offices in Suva.

9. The Tribunal is nonetheless satisfied that the reporting of the injury to the Chief Officer and Relieving Master Gonewai and also the recognition by Chief Officer and Master Bulimetuira, is sufficient reporting of an event of this type by the worker. The worker did present, as the Medical Evidence reflects on the medical certificate dated the 13 of October, 2006,to a medical officer reporting an injury and as the further medical report of Dr.Mareko provides by way of evidence at page 51 and 52, that there was evidence of the worker being treated as an outpatient at the CWM Hospital for an injury.

10. Subsequently, when Dr.Mareko did assess the worker in 2007, it was clear that the worker had injuries to his hip. As a matter of record at page 49 of the Transcript, Dr.Mareko says that the injuries sustained by the worker, appear to be consistent to those complained of during the period 2007 to 2012.

11. The second element of Section 5(1) of the Act, requires that the injured person's employment, in effect gives rise to the injury. Pathick J in *Travelodge Fiji Suva v. The Labour Officer for Karalaini Diratu* [1994] FJHC 180 relied upon the following tests:

> '…*Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because where it was not part of the employment to hazard, to suffer, or to do, cannot well be the cause of an accident arising out of the employment. To ask if the cause of the accident was within the sphere of the employment, or was one of ordinary risks of the employment, or reasonably incidental to the employment, or, conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was whereby in the course of that employment he sustained injury.'*

12. The Tribunal is satisfied that the injured worker was engaged in lawful duty at the time in which the accident occurred. So much is apparent by the evidence that was given by the Chief Officer and Relieving Master, Laisiasa Gonewai. At the time in which the accident took place, that witness's evidence was that he had instructed the worker to go toward one end of the vessel. It was during that instruction that the worker slipped and fell.

13. Finally the expression "course of the employment" again reliant on the decision of *Travelodge*, sets out the condition that not only must the accident must have occurred during the employment of the worker but that it must have occurred while he was doing something which his employer could and did expressly or by implication, employ him to do, or order him to do.

14. There is no evidence whatsoever that the injured worker was not working during his employment, during hours which he was engaged to perform his duties. And insofar as the third limb is concerned, the worker was doing something which the employer did expressly employ him or order him to do.

15. For that reason the Tribunal finds that all the elements of a compensable injury as required by Section 5 of the *Workmen's Compensation Act* have been met.

16. For the sake of completeness, the Tribunal just wants to say a few things in relation to the case of the Employer. It is noted in the evidence of Mr. Hector Smith, Lead Superintendent, particularly in Transcript at pages 70-71, but also at page 73, that the Employer is of the view that the motivating factor for the claim being made by the injured worker, was almost retaliatory in nature; insofar as the worker had failed to turn up to work and had been terminated on that basis.

17. The fact whether or not the worker was ultimately terminated for not reporting to work, in ordinary circumstances, remains quite separate from an analysis of whether or not the Employer is liable for compensation pursuant to Section 5 of the Act. The evidence that has been earlier cited by the Tribunal, provides sufficient justification to come to that conclusion.

18. The Tribunal also has had regard to Mr. Hector Smith's appreciation of the safeness of the deck floor at the time of the incident on the 12th of October 2006. And while it was noted that Mr. Hector Smith has said that it is part of their duty (meaning the worker's) and their work requirements to ensure that they keep this area clean at all times, the primary obligation for workplace health and safety under the relevant laws in Fiji, rests with the employer. (In relation to the relevant law, the Tribunal is referring to the *Health and Safety at Work Act* 1996.

19. One final issue in relation to the Employer's case, relates to the evidence provided by Adrial Prasad, the Manager of Finance and Corporate Services for the Respondent

Company. That witness offered the opinion that during the course of the worker's employment, that he was a quite free and fine person. I refer to Page 91 of the Transcript and the view that through his entire employment "he is a free and fine person with no major medical issues".

20. Well that might have been the case, up and until the time of the incident on the 12th of October 2006, but thereafter the medical evidence of Dr.Mareko is accepted and relied upon by the Tribunal in assessing the liability of the Employer. This therefore then turns to the question, what is the compensation that should be determined in cases of this type? Section 8(1)(b) of the Act provides, in the case of an injury not specified in the Schedule, such percentage of two hundred and sixty weeks' earnings as is proportionate to the loss of earning capacity permanently caused by the injury should be awarded.

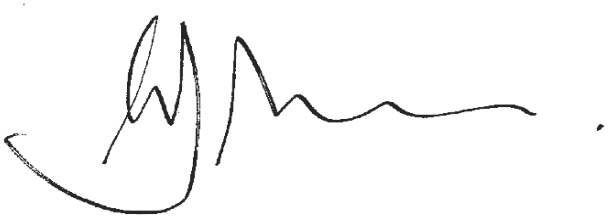
21. The Tribunal notes that the calculation in the amount of $2,340.00 has been made by the Labour Officer, having regard to a 10% permanent or partial incapacity. It is noted that the wage earnings within LD Form/C/1, are identified as Gross Cash Wage of $86.00 a week. In the communication sent by the Labour Officer to the Employer on 23rd of January 2009, the formula for the calculation of the amount $2,340.00 is set out. That figure relies on a Gross Weekly Earnings of $90.00 per week multiplied by the 260 week earnings provided from Section 8 of the Act, that gives an amount of $23,400.00. A 10% degree of incapacity renders the compensation amount payable based on that amount, a figure of $2,340.00.

22. There is no other evidence disputing the calculation of the gross wage as prepared by the Labour Office. The Tribunal accepts that statement as being consistent in the calculation of entitlement.

Decision

The Tribunal orders that the:-

(i) Respondent Employer pay the Applicant the amount of $2,340.00 within 21 days.



Mr Andrew J See
Resident Magistrate