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

Decision

Title of Matter:	LABOUR OFFICER v POST FIJI LIMITED	(Applicant) (Respondent)
Section:	Section 8 Workmen's Compensation Act	
Subject:	Compensation for permanent partial impairment resulting from accident	
Matter Number(s):	ERT WC 97 of 2016	
Appearances:	Ms R Kadavu for the Labour Officer on behalf of Mr Babu Chand Ms J Jattan for the Labour Officer as Respondent Applicant	
Date of Hearing:	13 January 2017	
Before:	Mr Andrew J See, Resident Magistrate	
Date of Decision:	13 February 2017	

KEYWORDS: Sections 5 and 8 Workmen's Compensation Act (Cap 94); Claim for Compensation; Permanent and partial impairment; Recovery of Compensation for Injury; Arising out of course of employment. Meaning of "Injury by accident".

CASES CITED:
Fiji Sugar Corporation Ltd v Labour Officer [1995] FJHC39; Civil Appeal No 0010 of 1994, 17 February 1995.
Raiwaqa Buses Ltd v Labour Officer [2011]FJHC174; HBA23.2008 (18 March 2011)
Travelodge Fiji Limited Suva v The Labour Officer [1994] FJHC 180; Hba0001j.93s (9 December 1994)
Wati v Emperor Gold Mining Company Ltd [2007] FJCA 20 ABU0016U.2006S (23 March 2007)

Background

1. This is an application made for worker's compensation in accordance with Sections 5 and 8 of the *Workmen's Compensation Act* (Cap 94). The Applicant Labour Officer stated that the deceased Worker was employed as a permanent relieving Mail Opening Clerk with the Respondent Employer. It is commonly established that the Worker, now deceased, had suffered a stroke to the left hand side of his body while on annual leave from work on 27 November 2011. On 26 July 2012, the Respondent Employer retired Mr Chand from work on medical grounds, effective from 30 August 2012. The Worker passed away on 21 March 2014. The Labour Officer now makes a claim in this Tribunal, for the payment of compensation in the

amount of $24,000, for an 80% permanent partial incapacity assessment that it says arises out of the stroke as initially suffered.

The Case of the Applicant

2. The first witness to give evidence for the Applicant was Ms Angeline Raj, an Assistant Labour Officer (Compensation) employed by the Ministry of Labour. According to Ms Raj, the Labour Officer was initially notified of the stroke suffered by the Worker that had taken place on 22 November 2011, some nine months later on 14 August 2012.[1] Ms Raj said that she was involved in the preparation of a Notice of Claim sent to the Respondent on 31 August 2012, [2]and the further demand setting out the statutory entitlement claimed of $24,000.00. The second witness was Dr Rauni Tikoinayau, an Occupational Physician with the Ministry of Labour. Dr Tikoinayau gave evidence that he undertook a medical assessment on Mr Chand reliant on the *Internal Guidelines for Medical Permanent Impairment on Individuals* (American Medication Association 5th Edn). He said that the Worker had suffered a right cerebral stroke that caused him paralysis and weakness of the limbs on the left side of the body and he was lacking functional capacity to deal with daily duties. According to Dr Tikoinayau, at the time he examined the Worker, he had formed the view that the Worker had reached maximum medical improvement (MMI)[3]. The doctor was of the view that the cause of the right cerebral stroke was due to work stress and the fact that he was suffering from hypertension. The doctor was of the opinion that the Worker was on sick leave, during the period in which he had suffered a stroke.[4]

3. Under cross examination, Dr Tikoinayau said that his medical report was informed by information received from his client and the spouse of the Worker. Dr Tikoinayau was asked to consider other factors that may have given rise to the stroke including the Worker's history of hypertension and his age. The doctor was asked whether the Worker would have been taking medications to control his condition and he responded, "yes a lot". The doctor said that this would have given rise to issues such as headache and dizziness. The medical view of Dr Tikoinayau was that at the time of presentation, the Worker was suffering from clinical dementia and needed to be assisted in basic life issues, such as showering, toileting and dressing himself. The next witness called by the Claimant was Mr Jope Rusiate, who was working as a Team Leader at Post Fiji during the relevant time. Mr Rusiate had earlier provided the Labour Office with a Statement that was admitted into proceedings as Exhibit L5.[5] According to Mr Rusiate, the Worker had been responsible for receiving and dispatching of mail. Mr Rusiate recounted to the Tribunal that on one occasion that he could see that the Worker was not well. He said that "he was very sick and not fit for work". According to Mr Rusiate he advised him to go back to the doctor for further treatment and that he gave him a leave form and said to refer to the Manager Mails to arrange transport to the hospital. Mr Rusiate said five hours later he noticed that the Worker was still at work. He said that I asked him "why you still here ?" and he said that the Worker replied that the Manager had directed an officer to provide him with "one Panadol". Mr Rusiate said that he was aware that sometimes the Worker had experienced headaches at work. On cross examination, Mr Rusiate clarified the tasks involved in the Worker's duties. This seemed to entail, the opening of mail bags and the distribution of

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1 See LD Form C1 (Exhibit L1) and note that the time frame ordinarily for the lodging of such notice is 14 days in accordance with Section 14 (1) of the Act.

2 See LD Form C2 (Exhibit L2).

3 See Paragraph 11 of the report at Exhibit L4.

4 It is noted in the Employer's Closing Submissions that the Worker had exhausted all of his sick leave entitlements.

5 Mr Rusiate during proceedings asked that the final paragraph of that Statement be excluded as his evidence, on the basis that it was not intended by him to be included within the document. The Tribunal notes and accepts that alteration.

its contents to various parts of the organisation. According to Mr Rusiate, if the volume of work was excessive, there were additional staff who could be allocated to assist the Worker in his duties. The final witness called by the Claimant Labour Officer was the widow of the deceased Worker. Ms Nillata had also earlier provided a Statement for the purposes of the claim and this was tendered into evidence as Exhibit L6. The Respondent Employer elected not to cross examine this witness during her evidence.

Case of the Employer

4. The first witness called by the Employer was Ms Lusiana Nuqanuqa, who at the relevant time was the Manager of Training for the Respondent, but from March 2016, now is Head of Human Resources (HR). Ms Nuqanuqa initially gave evidence as to how the Worker had become a permanent staff member and said that in 2011, he was identified as a 'high risk' employee during a process of medical screening. According to the Head of HR, the usual process once an employee is identified as 'high risk' is that they are counselled in relation to dietary conditions, medications and proper exercise. The witness said that after the counselling had taken place, the Worker had taken five day's sick leave in August 2011, and efforts were made to put him on a light duties program. This she says, included a work restriction of no lifting of heavy bags. Ms Nuqanuqa told the Tribunal that the Worker sought an extended period of annual leave and long serve leave in September 2011 (80 days) and was referred to the extract of the Attendance Book that shows that the Worker had been marked as absent for annual leave on the 22 November 2011.[6] The witness stated that the Worker was admitted into hospital and was then taken to have been on inpatient sick leave and then subsequently terminated on the basis of medical grounds.[7] In relation to the initial FORM LD C1 completed by the Respondent, according to the witness, this was not fully completed by the Employer on the basis that the Worker was on leave and the claim once forwarded to the Insurer, was deemed to be non-work related accident. Under cross examination, Ms Nuqanuqa conceded that the Worker was a known hypertensive. The witness indicated that there was no explanation for the delay in notifying of the accident, other than her Head of Human Resources at the time, had only told her to fill the form in and send it off, well after the initial 14 day period. The second witness called by the Defendant Employer was Ms Rozmin Rasheed, who was an employee of the Respondent's insurer. Ms Rasheed indicated that she had received the Applicant's claim on behalf of Post Fiji and indicated that it was declined on the basis that the Worker had been on annual leave and that he had suffered from a pre-existing condition.

Did the Worker Suffer a Personal Injury by Accident For the Purposes of the Act ?

5. Section 5(1) of the *Workmen's Compensation Act* (Cap 94) provides as follows:

> *If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workmen, his employer shall, subject as hereinafter provided be liable to pay compensation in accordance with the provisions of this Act ....*

6. It appears well accepted that there are three requirements to satisfy Section 5(1) of the Workmen's Compensation Act (Cap 94).[8] These are:-

   (i) Personal injury by accident;
   (ii) Arising out of employment;

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6 See Exhibit E1.

7 See folio 2 of Exhibit E3.

8 *Raiwaqa Buses Ltd v Labour Officer* [2011]FJHC174; HBA23.2008 (18 March 2011)

(iii) In the course of employment.

7. Pathik J in *The Fiji Sugar Corporation Limited v Labour Officer*[9] set out in detail what was to be meant by the expression "injury by accident". Citing the 32nd Edition of Willis' *The Workmen's Compensation Acts 1925 to 1938,* his Honour referred to the passage within that text, where the definition of accident was considered at page 8 and it is stated:

> *The word 'accident' does not necessarily involve the idea of something fortuitous and unexpected as formerly held. ..it includes injury caused by overexertion in the ordinary course of employment...*

8. His Honour referred to the case of *Fife Coal Co Ltd v Young*[10] where it was held by Lord Aitkin, that

> *It is necessary to emphasize the distinction between "accident" and "injury", which in some cases tend to be confused... it is now established, however, that apart from external accident, there may be what no doubt others as well as myself have called internal accident (underline mine for emphasis)..... 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 screw, or lifting his head. In such cases, it is hardly possible to distinguish in time between accident and injury. The rupture which is accident is at the same time injury, from which follows at once, or after a lapse of time, death or incapacity.*

9. Finally, Pathik J within his decision, referred to the case of *Fiji Industries Limited v Ateca Dretirewa,*[11] where Ashton-Lewis J was reported to say:

> *Thus it would appear that the law has developed to the point where there is now no requirement that the event causing the injury is unexpected or not designed, it being sufficient that the injury itself (ie the heart attack) is unexpected or not designed by the worker.*

10. Twelve years later, in *Wati v Emperor Gold Mining Company Ltd,*[12] a Full Court of the Fiji Court of Appeal, stated

> *Lord McNaughten (sic) said in Fenton v Thorley and Co Ltd. [1903] AC 443, 448:*
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> *"... the expression "injury by accident" seems .... to be a compound expression. The words "by accident" are, I think, introduced parenthetically as it were to qualify the words "injury", confining it to a certain class of injuries, and excluding others, as, for instance, injuries by disease or injuries self-inflicted by design."*
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> *.... The speech of Lord Wright in Dover Navigation Co and Craig confirms that, in construing provisions in the form of s.5(1) of the Act, two requirements must be*

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9 [1995] FJHC 39; Hba0010j.94b (17 February 1995)

10 (1942) AER HL 85 at 91

11 (Civil Appeal 15/92)

12 [2007] FJCA 20

satisfied. The expression "in the course of employment" means that the injury must have happened during the employment. The expression "arising out of", when coupled with the conjunctive "and" in that provision, means that the injury must also be associated with some incident of the employment. In Australia since 1926, the disjunctive "or" has by amending legislation been substituted for the word "and" in this statutory collocation, while the word "injury" has been extensively redefined.

However, as Fullager J said in Kavanagh v Commonwealth [1960] HCA 25; (1960) 103 CLR 547, 558, a consideration of the earlier cases shows that the effect of requiring a causal connection between injury and employment "is always attributed to the words "out of" and not to the words "in the course of". The former imports causation; the latter words do not. See also Kavanagh v Commonwealth (1960) 103 at 547, 556, per Dixon CJ.

Because of the impact of these legislative amendments, it will do no one any good to be taken in detail through the vast amount of authority that has been accumulated in Britain and Australia on these expressions. We nevertheless find it useful to refer to what was said by Brennan CJ, Dawson and Gaudron JJ in Zickar v MGH Plastic Industries Pty Ltd .(1996) [1996] HCA 31; 187 CLR 310, 315 - 316, concerning the prototype legislation:

> *"Under the English Acts, the consequence of the progress of a disease did not constitute 'personal injury by accident' unless some event that occurred in the course of the employment contributed to that consequence. The cases drew a distinction between injuries to which employment has contributed and injuries which are solely a consequence of progressive disease."*

We consider that this statement briefly, but accurately, reflects the state of the law not only as it was in England, but as it is in Fiji under the Act.

Was the Worker's Stroke a Personal Injury by Accident Arising Out of and In the Course of Employment ?

Personal Injury by Accident

11. Dr Tikoinayau examined the Worker at his home on 3 September 2013. Firstly, the evidence of Dr Tikoinayau was that there seemed to be a correlation between the stroke that occurred and the work of the Worker. While there was not any direct evidence of a good understanding of the actual physical demands of the work, it was accepted that the evidence of the Occupational Physician was derived from several sources, including the Medical Opinion Investigation Template provided to him by the Labour Office on 29 August 2013. The conclusion of the medical expert was that he assumed a relationship between stress, work and the Worker's hypertensive state. While it is noted that the Template provided to the Physician stated at Section F that the Worker had been on a period of leave from 20 September 2011, Dr Tikoinayau had the incident described at page 1 of his report, as being that the Worker had "suffered Stroke while at work". I am cognisant of the fact that the Worker had been placed on a light duties program by the Employer and had been identified in a medical screening by the Employer as being a health risk in 2011. There is simply no evidence though to support the view, that an event during the Worker's employment, contributed to the consequence that led to the progress *of an illness or disease*. In this case the worker's hypertension. The correlation

between the alleged workplace stress and the progression of the hypertension suffered by the Worker, has not been established.

Arising Out of Employment

12. For the sake of completeness, I will deal with the second and third limbs. In relation to the second limb, Pathik J in *Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu*[13], relied on Lord Sumner's characterisation in *L & YR v Highley*[14] to apply the following test:

> *".... 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 what 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 the 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.*

13. It is this area that the Tribunal has some difficulty in accepting that the event as being one arising out of the Worker's employment. The Worker had been absent from work for a period of approximately two months prior to the stroke occurring. Even if it was the case that at least on one occasion, the evidence of the Applicant was that the Employer had not followed proper and responsible protocols in allowing the worker to leave work when he was genuinely unwell, that single event in my view cannot be so connected to the stroke some three months later, that it would fall within this second pre-requisite required under the Act. The Employer had sought to place the Worker on light duties and to restrict the work that he was physically required to undertake. Such a situation is at odds with that found in the case of *Labour Officer v Wood & Jepsen Surveyors and Engineers*[15] where no such modifications of duties had taken place. The worker was not at work at the time, when he suffered the RT cerebral infarct with LT hemiplegia. It is noted that the Final Medical Assessment prepared by Dr Tikoinayau dated 23 October 2011, suggests that he was. That is simply incorrect. Yes the Worker was identified as a person requiring the attention of the Employee in terms of the health management obligations of its employees. Though it appears, save for the event where the Worker appears to have remained at work when he may have been too unwell to work, that this issue was being monitored. An Employer can be placed in an unenviable position. At one level, it needs to ensure the health and safety of its employees and to make sure that all workers are physically fit to meet the demands of the job. At the other level, should a company not seek to adjust and modify duties, but to simply claim that the Worker should be terminated due to an inability to fulfil such physical demands, could render such conduct discriminatory for the purposes of Section 75 of the Promulgation. I am of the belief that while on an extended period of leave from work, it is difficult to say that the accident occurred during the employment of the Worker. Yes, he was still an employee, but given he had been on leave for a considerable period of time, creates some difficulty in accepting that nexus. The event took place at the Worker's home. There is no evidence of what transpired at his home for the considerable period that he was off work. The second limb has not been established.

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13 [1994] FJHC 180 Hba0001j.93s (9 December 1994)

14 (1917) AC 352 at 372

15 [2013] FJET 40; Workmen's Compensation Case 77 of2010 (11 November 2013).

In the Course of Employment

14. If there was any doubt, it is the third limb that would put to bed any further question. Again reliant on the decision in *Travelodge*, Pathik J stated:

> *The two conditions which must be fulfilled before an accident can be said to have occurred "in the course of employment" are:*
>
> *(a) the accident must have occurred during the employment of the workman and*
> *(b) 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"*

15. At the time of the stroke, the Worker was not engaged to do something which the Employer could and did expressly and by implication employ him to do or order him to do. There was no event that the Applicant could rely upon that was so proximate to the injury that could be attributed for that purpose. Had that been the case, then the issue and result may be different. The case of the claimant has not been made out in relation to this limb.

Conclusions

16. There is an insufficient establishment of the causal connexion between the Worker's work and the stroke that he suffered at the time that it occurred. There is simply no evidence to establish why the Worker's work could have been directly related to the exacerbation of any condition and then of course, one triggered by an event where he was doing something that the Employer wanted him to do. Had the stroke taken place coinciding with the taking of leave and had there been better evidence of the nature of the work and the physical demands of the job, perhaps a different evaluation of issues could have taken place. Based on the evidence and case before the Tribunal though, no such state of affairs exists. The claim for compensation must fail for those reasons.

Decision

It is the decision of this Tribunal that:

(i) The claim for compensation is dismissed.
(ii) The Respondent Employer is at liberty to make application for costs within 21 days hereof.

EMPLOYMENT RELATION TRIBUNAL
OFFICIAL

Mr Andrew J See
Resident Magistrate