Decision

Employment Relations Tribunal

Title of Matter:	**LABOUR OFFICER on behalf of Chandar Sen**	**(Applicant)**
	v **FIJI SUGAR CORPORATION LIMITED**	**(Respondent)**
Section:	**Section 8 *Workmen's Compensation Act* 1964**	
Subject:	**Compensation in case of permanent and partial incapacity**	
Matter Number(s):	**ERT WC 10 of 2018**	
Appearances:	**Ms R Kadavu, for the Labour Officer** **Mr N Tofinga, Fiji Commerce and Employers Federation**	
Date of Hearing:	**17 August 2018; 1 October 2018.**	
Before:	**Mr Andrew J See, Resident Magistrate**	
Date of Decision:	**26 June 2019**	

KEYWORDS: Section 8 *Workmen's Compensation Act* 1964; Claim for Compensation in case of Permanent and Partial Incapacity .

CASES CITED:

Fiji Sugar Corporation Ltd v Labour Officer [1995] FJHC39; Civil Appeal No 0010 of 1994, 17 February 1995.
Moti Chandra & Company Ltd v Credit Corporation (Fiji) Ltd [2013] FJCA 129 .
Raiwaqa Buses Ltd v Labour Officer [2011]FJHC174; HBA23.2008 (18 March 2011)
Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu [1994] FJHC 180; (9 December 1994)

Background

[1] This is an application made for worker's compensation in accordance with Sections 8 of the *Workmen's Compensation Act* 1964. The application filed on 7 February 2018, claims that on 12 August 2014, the workman Mr Chandar Sen, suffered an injury whilst undertaking his duties as a locomotive driver for the Respondent Employer. The particulars of the claim for injury based on a permanent partial impairment of 45 percent, state that the injured worker had disembarked from his locomotive and was crossing a drain in a cane field, when he stood on a

rock, injuring his foot. The foot in turn became infected; the Worker contracted sepsis and subsequently required the amputation of his left leg below the knee.

[2] A *Report for Permanent Medical Impairment* was prepared by Dr Tikoinayau of the Ministry of Employment, Productivity & Industrial Relations on 26 March 2015 and a 'final assessment' undertaken that calculated the percentage Impairment of the whole person, as being at 45 percent. Based on the formula contained at Section 8(1) of the Act, the calculated statutory entitlement for such injury, where it arises out of the employment, is $24,000.00[1].

The Case of the Labour Officer

The Labour Inspector

[3] The first witness to give evidence on behalf of the Labour Officer, was Ms Fazlin Nisha, who advised that upon being notified of the injury by the Worker, that she contacted the Employer on 16 March 2015 and asked that it complete the LD Form C1, *Notice by Employer of Accident Causing Injury*[2]. According to the Witness, the details of the injury were referred to the medical examiner for assessment, and a determination made of a permanent incapacity of 45 percent whole body. Ms Nisha told the Tribunal that at the time the Worker incurred his injury, he had been wearing "croc shoes and socks" rather than safety boots and that he had the permission of his supervisor Mr Tevita to do so, due to the fact that his feet were susceptible to diabetic foot infection. In cross examination, the Witness was asked by Mr Tofinga, if the investigation revealed whether or not the Worker's shoe had been pierced by a stone to give rise to the injury. Ms Nisha was not able to confirm the precise details of the injury.

The Medical Expert

[4] The next witness called by the Labour Officer was Dr Tikoinayau, who told the Tribunal that he had conducted a physical examination of the Worker and confirmed that Mr Sen's below knee left leg amputation, was due to the fact that he had stepped on a stone, that in turn caused sepsis to his foot, that ultimately led to the amputation. Dr Tikoinayau was clear, that the pre-existing diabetic condition of the Worker would have complicated the initial injury. Mr Tofinga sought clarification from the medical examiner in relation to the sequence of events giving rise to the Worker's admission into hospital and Dr Tikoinayau confirmed that initially Mr Sen had been admitted to hospital with foot sepsis in August 2014 and was discharged on 3 September 2014. Dr Tikoinayau confirmed that the Worker was further admitted to hospital on 6 September 2014 and finally discharged on 30 September 2014 following surgery. The Witness conceded that he was unable to provide any further clarification as to how the initial injury came about, but explained what he believed to be the relationship between the event, the sepsis and the ultimate surgical amputation.

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1 See Injury Calculation Form dated 19 July 2016.

2 The Employer does not appear to have filled out this form, as

Chandar Sen

[5] Chandar Sen gave evidence to say that he had worked with the employer for 36 years and that he had been employed as a locomotive driver from 2014. During the giving of his evidence, the Witness advised that he was undertaking operations on the day of the injury, when he "jumped off" the locomotive and got hurt. It was claimed that he had told another driver of his injury and after reaching the mill went to hospital.

[6] During cross examination, Mr Tofinga challenged the Worker as to the accuracy of his initial statement provided to the Labour Office, where he indicated that the date of the injury was 8 September 2014. The Witness conceded that the initial date given was made in error. Mr Tofinga further challenged the Witness as to why he would be required to disembark from the locomotive to organise the checking and signing of cane loads and put to Mr Sen, that this was a job undertaken by the pointsman. Mr Sen clarified his role in signing the ticket book used to record the transfer of the cane assignment and the need for him on occasions to disembark the vehicle. In his evidence, the Witness told the Tribunal that he had been allowed to wear 'croc shoes' rather than safety boots for approximately three years. It was put to the witness that there were inconsistencies in the way in which he recounted how the injury to his foot took place, whether it occurred crossing a drain or jumping off the train[3]. Mr Sen, maintained a broadly similar account of events, that he was crossing a drain at the time of the injury.

[7] In re-examination the Witness clarified the fact that his supervisor was aware of the injury, although claimed at the time that he did not have a 'pink form' which was the injury report form.

Etuate Naqara

[8] Mr Naqara had been employed by the Employer for approximately 21 years and at the time of the incident had been working as the Locomotive Pointsman. The Witness had earlier provided a Statement to the Labour Officer dated 18 March 2016 and prior to that, was a joint signatory to a statement given to the Employer on 2 April 2015. At hearing, the evidence of Mr Naqara was on all fours with that of the Worker, insofar as he told the story of Mr Sen falling in a drain while endeavouring to get a load ticket. Yet it is worth pointing out, that in the earlier statement jointly provided with Mohammed A V Buksh on 2 April 2015, it was stated that "Chandar Sen did not even told (sic) his point man that he got hurt somewhere and even the T/A when he came back from pick up.[4]"

[9] At hearing, the Witness claimed that Mr Sen had called their supervisor to advise of the incident seeking assistance for the Worker to be transported to hospital, although said he was informed that there was no transport available. In cross examination, the Witness confirmed to Mr Tofinga, that he did not see the injury take place, nor could he understand what transpired in the course of the telephone conversation, as it was being conducted in Hindi. The Witness also confirmed that on previous occasions both Messrs Naqara and Sen would drink yaqona with the

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[3] Compare and contrast the Statement dated 17 November 2014 (Exhibit E2), where the Worker claims "while I was walking I fell inside the drain", to that further Statement dated 18 May 2016, where he states "while crossing the drain I stepped on a piece of rock".

[4] See Exhibit E3.

farmers whilst transporting their cane and here again it is important to note the contents of the earlier statement provided on 2 April 2015, where it states:

> *According to Etuate , Chandar Sen got off the loco and went to talk to the farm owner Kumresson in regards to his can been harvested and while having his chat he (Chandar Sen) was drinking grog in the cane field while his point man was sitting in the loco… …. The sad part is that, that was our last afternoon shift and he (Chandar Sen) DID NOT EVEN told his point man that he got hurt somewhere and even the T/A when he came back from pick-up*

This extract, is in marked contrast to that later statement provided by Mr Naqara to the Labour Office on 18 March 2016, where it states:

> *As I was checking the locomotive, Chandar Sen fell in the drain that was beside the locomotive. In the process he stepped onto a stone and injured his leg. After this we returned to the Mill and informed our Sardar Mohammed of Chandar Sen's injury.*

The Case of the Employer

Mr Tevita Sekicola

[10] Mr Sekicola was the Agriculture Services Manager, Ba for the Employer. The Witness told the Tribunal that he did not fill in any form in notification of the incident, as it needed to be made within 24 hours of the incident taking place. The Witness said that he understood from the report that was taken at the time the claim was being made, that Mr Sen had been drinking yaqona with farmers and that it was understood not to be a work related incident.

Ms Resina Lewaio

[11] Ms Lewaio is an Industrial Nurse working at the Fiji Sugar Corporation. Nurse Lewaio was shown various documents from Mr Tofinga, that were patient records from the Ba Mission Hospital. The Witness was able to review a history of medical illness of the Worker that included diabetes and foot sepsis. In cross examination, Nurse Lewaio admitted to having not commenced work for the Employer until February 2018. The Witness stated that there was no way of telling from the hospital records, whether or not Mr Sen's diabetes was appropriately managed or not.

Aseri Tawake

[12] Mr Aseri Tawake is the Human Resource and Safety Officer working for the Employer. Mr Tawake gave evidence that the company doctor had written to Mr Sen on 26 September 2014, to ascertain whether or not he was fit to continue his duties. In his evidence, Mr Tawake said that he was not in Ba at the time of the incident, although he was aware of the Workers' history of employment with the Employer and had understood that he had been told to wear special shoes in order not to aggravate his diabetic condition. In cross examination, the Witness made

clear that he was not aware of any action that the Employer had taken in relation to the special safety footwear requirements of the Worker, nor did he have any knowledge as to when Mr Sen had first been diagnosed with diabetes, or where he sustained his injury. Mr Tawake indicated that he was not aware of any previous dealings that the former HR Officer Mr Goundar had in relation to this matter.

Analysis of the Law

Was Mr Chandar Sen a Workman for the Purposes of the Act?

[13] Section 2 of the *Workmen's Compensation Act* 1964 defines workman (Worker) to mean:

> *any person who has, either before or after the commencement of this Act, entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, or otherwise, whether the contract is expressed or implied, is oral or in writing, whether the remuneration is calculated by time or by work done, and whether by the day, week, month or any longer period:*
>
> *Provided that the following persons are excepted from the definition of "workman":-*
>
> *(a) a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, not being a person employed for the purposes of any game or recreation and engaged or paid through a club;*
> *(b) an outworker;*
> *(c) a member of the employer's family dwelling in the employer's house or the curtilage thereof; or*
> *(d) any class of persons whom the Minister may, by order, declare not to be workmen for the purposes of this Act.*

[14] The Tribunal is satisfied that at the time of the injury, Mr Sen was a workman for the purposes of Section 2.

Was the Respondent the Employer of the Workman?

[15] Section 3 of the Act, reads:

> *"employer" includes the Government and any body of persons corporate or unincorporate and the personal representative of a deceased employer, and, where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person; and in relation to a person employed for the purposes of any game or recreation and engaged or paid through a club, the manager, or members of the managing committee of the club shall, for the purposes of this Act, be deemed to be the employer;*

[16] The Employer is caught by the definition at Section 3 of the Act.

Did the Worker Suffer a Compensable Injury?

[17] Section 5(1) of the *Workmen's Compensation Act* 1964 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 ....*

[18] There are three requirements to satisfy Section 5(1) of the *Workmen's Compensation Act* 1964.[5] These are:-

(i) Personal injury by accident;
(ii) Arising out of employment;
(iii) In the course of employment.

Did the Worker Suffer A Personal Injury by Accident?

[19] Pathik J in *The Fiji Sugar Corporation Limited v Labour Officer*[6] set out in detail what is meant by the expression "injury by accident". The Medical Certificates provided by the Labour Officer in the *Applicant's Disclosures* filed on 9 May 2018, together with the medical records provided by the Employer at Exhibit E4, reveal the following. That the Worker was:-

- Admitted to the Ba Mission Hospital on 28 August 2012, suffering from diabetic foot sepsis, diabetic mellitus II and diabetic peripheral neuropathy.
- Admitted to the Ba Mission Hospital on 17 August 2014 suffering from left foot sepsis and was still admitted on 19 August 2014.
- Admitted to the Lautoka Hospital on 8 September 2014 and discharged on 16 September 2014, with left leg sepsis.
- Provided with a medical certificate from 16 September to 26 September 2014, having been said to have suffered from lower leg amputation.
- Admitted at the Lautoka Hospital from 30 September 2014 to 5 October 2014, suffering from stump sepsis.
- Admitted at the Lautoka Hospital from 15 October 2014 to 17 October 2014, for a further stump closure procedure.

The Employer does not dispute that the Worker was admitted to the Ba Hospital on 17 August 2014, suffering from left foot sepsis. There is also no dispute that he was later transferred to the Lautoka Hospital for a foot debridement which eventually resulted in a below knee foot amputation. The Employer does dispute the cause of injury and claims that the circumstances that gave rise to the sepsis and ultimate amputation, came about because of a pre-existing condition of the worker. The Worker claims to have presented to the Ba Hospital on the day of the injury, but there is no medical evidence of this, only the later medical report provided by Dr Koroi, indicating that Mr Sen was admitted to hospital on 17 August 2014 and reported of having incurred an injury several days earlier. Mr Naqara gave evidence to the fact that the Worker did suffer an injury at work on 12 August 2014 and whilst he did not witness the event, did tell the

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5 *Raiwaqa Buses Ltd v Labour Officer* [2011]FJHC174; HBA23.2008 (18 March 2011)
6 [1995] FJHC 39; Hba0010j.94b (17 February 1995)

Tribunal that he understood the leg of his co-worker to be injured. Mr Naqara also attested to the fact that the Worker made a call to his supervisor at that time, reporting the incident and seeking assistance to be transported to the hospital. Whilst there has been a previous inconsistent statement provided by Ms Naqara, the Tribunal has formed the view that the Worker did report the injury to Mr Naqara on 12 August 2014 and did return to work for several days thereafter, until being admitted to the Ba Mission Hospital on 17 August 2014. Insofar as the prior inconsistent statements are concerned, in *Moti Chandra & Company Ltd v Credit Corporation (Fiji) Ltd*[7], the Court of Appeal recognised the importance of a court evaluating the competing accounts of events, having regard to a witness's demeanour and linguistic ability when giving subsequent oral evidence. Unfortunately this is an area that could have been explored more from an evidentiary viewpoint, at trial. Having regard to all of the relevant facts and factors, there was nothing within Mr Naqara's oral evidence to suggest that his later account of events was not proximate to that which took place. That is, that the Worker suffered some minor injury to his foot on 12 August 2014.

Based on the medical records provided by the Employer[8], The Tribunal finds that the Worker did suffer an injury by accident to the sole of his left foot, that gave rise to the sepsis and ultimately the amputation of his left leg below the knee.

Was the Worker's Accident Arising Out of Employment?

[20] The next consideration is whether what Mr Sen was doing at the time of the accident, arises out of his employment. The Employer suggested that it was the role of the Pointsman to disembark from the locomotive and liaise with farmers in relation to any paper work associated with the transportation of the cut cane. It was stated by Mr Tofinga and the company records confirm, that the Worker had left the locomotive and may have been drinking yaqona with some farmers in the field. The Employer submits that this was a departure from the Worker's work activities, and broke the nexus between the injury and his work. Some of the evidence that the Employer has provided is not best evidence and would be regarded as hearsay evidence in relation to this point. The fact remains that the Worker was working at the time when he seems to have fell into the drain or stepped on a stone. The evidence of the co-worker Mr Nagara, supports that of Mr Sen and appears to have been made without any motivation. It needs to be accepted on that basis.

[21] Pathik J in *Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu*[9], sets out the relevant considerations when determining whether or not a worker suffered an accident arising out of employment. His Honour relied on Lord Sumner's characterisation in *L & YR v Highley*[10] 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*

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7 [2013] FJCA 129 at [20].
8 See Exhibit E4.
9 [1994] FJHC 180
10 (1917) AC 352 at 372

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.

[22] As his Honour further stated:

The expression is not confined to the mere "nature of the employment" as formerly held in several cases, but it "applies to the employment as such - to its nature, its conditions, its obligations, and its incidents.

[23] The event would be caught by the incidental nature of the work activity. In this case, the Worker was waiting for several carts to be hooked to the locomotive. The loads needed to be checked before any signature was provided. It is accepted by the Tribunal, that ordinarily, the disembarking to collect a consignment ticket for example, would seem to be an incidental task, despite the fact that it may have been an activity that was ordinarily performed by a pointsman. If the Worker whilst waiting for some task to complete, did drink some yaqona with farmers and then returned to his locomotive, as undesirable as that conduct may be, it still would not without more, break the nexus between the event and the employment. It nonetheless goes without saying, that employees who are being paid to perform duties, should not be consuming yaqona during working hours. Whether disciplinary actions should have flowed from such conduct, are separate considerations as to whether a worker is entitled to workers compensation for the purposes of the Act. Despite some misgivings, the Tribunal is satisfied that this limb is established.

<u>In the Course of Employment</u>

[24] 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"

[25] The Tribunal is satisfied that these two elements have been met. The Worker was travelling in a cane locomotive undertaking his role and performing a task his employer required him to do. Whether he should have got out of the locomotive or not, the departure into the cane field appears to have only been only for a passing period of time, in circumstances where the Worker was waiting for other steps to be taken before he could continue to the mill. There is nothing farfetched in these circumstances. The injury occurred in the course of the Worker's employment.

Conclusions

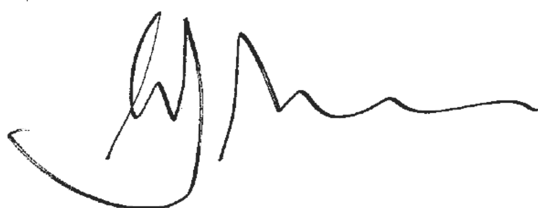
[26] The Tribunal accepts that the Worker had a long history of diabetes and that he was pre-disposed to diabetic foot infection, as a consequence of his health condition[11]. The Worker should not have been walking on un-level terrain, given he was not capable of wearing safety boots. This should have been an instruction that was clearly issued to him, particularly if the Employer deemed that he was fit enough to undertake the inherent requirements of the position. Where an Employer is going to deploy a Worker into an outdoor work environment, well aware that he is incapable of wearing safety boots, then that is an issue for the Employer. The Worker exacerbated a pre-existing condition, the consequence which led to him contracting sepsis and the loss of his left leg, below the knee. Whether that health outcome would have occurred independently of the incident on 12 August 2014, was an issue that was not pressed fully by the Employer during the trial, nor fully explored in the Employer's Legal Submissions dated 11 June 2019[12]. The point is though, that the Worker injured his foot that gave rise to the chain of events that followed. The 'egg shell skull rule' must apply in such circumstances. The exacerbation of the injury was brought about by the initial standing on a stone, causing damage to the sole of the left foot that was susceptible to diabetic ulcers[13]. The Tribunal is satisfied that the claim against the Employer meets the requirements of the Act and the calculation based on a permanent impairment assessment of 45 percent whole person impairment (WPI), has been made out.

Decision

[27] It is the decision of this Tribunal that:

(i) The Respondent pay compensation to the Labour Officer on behalf of the injured Worker, in the amount of $24,000.00, within 28 days hereof.

(ii) The Respondent pay costs to the Labour Officer, summarily assessed in the amount of $1000.00, within 28 days hereof.



Mr Andrew J See
Resident Magistrate

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11 The medical records indicate that the Worker was suffering from a diabetic infection of his right foot as early as 2012.

12 Whilst it is noted that the Employer attributes the amputation to the Worker's own failure to control his condition and his failure to have stayed in the train and wore safety boots; the primary duty for ensuring the last two points, rested with the Employer.

13 See medical examination sheet on 17 August 2014.