Corrected Decision

Employment Relations Tribunal

Title of Matter:	**LABOUR OFFICER on behalf of Abdul Munaf (Applicant) v SUVA PROPERTY MANAGEMENT AND MAINTENANCE LTD (Respondent)**
Section:	**Section 8 *Workmen's Compensation Act* 1964**
Subject:	**Compensation in case of permanent partial incapacity**
Matter Number(s):	**ERT WC 28 of 2018**
Appearances:	**Ms T Vosawale, for the Labour Officer** **Mr R Lal, Company Director, on behalf of the Respondent**
Date of Hearing:	**Wednesday 8 August 2018**
Before:	**Mr Andrew J See, Resident Magistrate**
Date of Decision:	**18 March 2019**

KEYWORDS: Section 8 *Workmen's Compensation Act* 1964; Claim for Compensation; Compensation in case of permanent and partial incapacity; 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 for Karalaini Diratu [1994] FJHC 180; (9 December 1994)

Background

[1] This is an application for workers' compensation arising out of a personal injury suffered by Abdul Munaf on 8 December 2015. As a result of the injury, the Worker incurred a 12% whole of body permanent partial incapacity. The case is a relatively simple one. Mr Munaf was engaged as a Cherry Picker Operator[1] by the Respondent Employer[2] and was on the day of his injury, despatched by his

[1] A 'Cherry Picker' is a hydraulic elevated work platform.

Employer to provide 'cherry picker' services to assist a painting crew that had been deployed to paint the Filling Station at the Mobil Oil Australia Pty Ltd (Mobil) Terminal at Walu Bay. According to Mr Atunaisa Vukialau, a Terminal Operator engaged by Mobil, when Mr Munaf arrived at the terminal, he was advised that "the job was called off" as he had been "told by management not to engage them that day". It seems undisputed that these two men thereafter engaged in a conversation regarding a faulty power steering belt within Mr Vukialau's private motor vehicle. According to the evidence of both men, Mr Vukialau asked Mr Munaf to inspect the vehicle and the Worker made a telephone call to his Employer seeking permission to do so and thereafter proceeded to fix the faulty engine belt.

[2] According to the injured Worker, he contacted Mr Lal, the Company Director, who told him "to just do it". Mr Vukialau, also gave evidence to that effect, although said that he could not understand the telephone conversation between Mr Munaf and the other person, as it was in Hindi. What thereafter transpired, was that whilst Mr Munaf had his hand adjusting the belt of the vehicle, inadvertently the engine was turned on by Mr Vukialau, causing the belt to rotate and leading to the traumatic amputation of Mr Munaf's index and middle fingers. According to Mr Munaf, he was transported to the CWM Hospital by workers who were on the scene at that time and was unable to work for approximately one month post operation. Dr Tikoinayau, an Occupational Physician from the Ministry of Labour, assessed the Worker on 3 March 2017 and confirmed the degree of whole body impairment at 12 percent.

The Case of the Employer

[3] Mr Lal, challenges why the Employer should be liable for this accident, when he claims the Worker was acting in a private capacity outside of the work relationship and without his authority. In correspondence forwarded to the Labour Office by the Employer on 21 June 2017, Mr Lal wrote:

> *Please be advised we categorically reject his claim as Mr Abdul Munaf was instructed to perform his duty as a Cherry Picker Operator and he chose on his personal will to fix someone's personal vehicle when he got injured. As such the company will not accept any liability arising out of the same, Mr Abdul Munaf is fully aware of this and you may discuss with him regarding the same.*

[4] Further, in a response to the Application provided by the Employer filed on 25 June 2018 , Mr Lal wrote:

> *We reiterate our stance as per our letter of 23/6/17 (refer attached – Annex 9 of Application. Please also note in good faith we paid Abdul in his sick leave period.*
>
> *I categorically deny calling Abdul to work on 8/12/15 as stated by him. Please refer to his statement Annex 10 Page 14 of the application. Please find attached copy of my Vodafone Bill to substantiate this blatant lie.*

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[2] This is the occupation described by the Employer within the LD Form C1, which is the notice form, required to be sent to the Ministry, when a worker suffers a workplace injury at work. (See Applicant's Disclosures/Discovery of Documents).

Evidence of Mr Avikash Dutt

[5] Mr Avikash Dutt gave evidence on behalf of the Employer and stated that he was the contact person on behalf of the Employer who was involved in liaising with clients and dispatching workers to meet various works orders. The witness claims that he had received a call from Mobil to provide assistance for an "emergency job"[3]. Mr Dutt stated that he then despatched Mr Munaf, but later was contacted "from my boys from Mobil" advising of the accident at the terminal. During the course of giving his evidence, Mr Dutt explained to the Tribunal that the hire services provided by Suva Property Management and Maintenance Ltd were undertaken by a separate related company, Vinod Hire Services[4].

Recalling of Atunaisa Vukialau

[6] The Tribunal had some reservations in relation to the evidence given by Mr Dutt and for that reason recalled Mr Vukialau, specifically to clarify who he had ordinarily dealt with at Suva Property Management and Maintenance regarding equipment hire. The Witness stated that he had never of the name 'Avikash Dutt' and told the Tribunal that on the day in question, he had made contact with a Prem Singh, to request that a cherry picker operator be despatched.

Directions Issued by the Tribunal

[7] Because of the various claims made by the Employer and the effort that was made during proceedings to distant itself from liability in this matter, the Tribunal issued various directions aimed at securing relevant information pertaining to the employment relationship between Mr Munaf and the Respondent Employer, the works contracts with Mobil and the activities of Vinod Hiring Services. Specifically, the Employer was directed to deliver the following:-

a. The Despatch Book for the period 7-8 December 2015.
b. The original times and wages records of all employees for the pay period including 7-8 December 2015 ie for
    i) Suva Property Management and Maintenance Ltd
    ii) Vinod Hire Services
c. The original duplicate copy of the Works Order provided from Mobil (Fiji) Pty Ltd in relation to the painting works for the Filling Station, undertaken by the Defendant Employer on 7 and 8 December 2015. (Including any documentation relating to additional or supplementary requests arising out of that works request.

[8] In response to these Directions, the Employer wrote by undated letter:

> *As requested by the Employment Tribunal please be advised that we have not been able to locate the following document in our Archieves (sic)*
>
> - *Dispatch Register*

[3] The Tribunal finds this somewhat difficult to understand why this would have been an "emergency job", given that Mr Vukialau gave evidence that Mobil had decided to postpone the work on that day.

[4] The Employer did not seek to elaborate on this point and the Tribunal remains sceptical of the nature of this evidence.

- *Payroll*
- *Purchase Order – Mobil Fiji Ltd*

However, we do confirm Abdul Munaf been (sic) advised by our Manager Avikash Dutt to come to work on the said day.

[9] The Tribunal is very sceptical of the conduct of the Employer and its failure to comply with the Directions as had been issued. All of the documentation as requested, runs at the core of the business activities. In the case of the time and wages records, there are statutory requirements to maintain that information for a period of six years. The credibility of the Employer in such circumstances, remains in doubt and the evidence of its witness Mr Dutt, also considered of dubious quality.

Was Mr Munaf a Workman for the Purposes of the Act?

[10] Section 2 of the *Workmen's Compensation Act* 1964 defines workman 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.

[11] The Tribunal is satisfied that at the relevant time, Mr Munaf was a workman for the purposes of Section 2.

Was the Respondent the Employer of the Worker ?

[12] 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;

[13] The Tribunal finds that Mr Munaf was an employee of Suva Property Management and Maintenance Ltd[5] and the Employer was captured by the definition at Section 3 of the Act.

Did the Worker Suffer a Compensable Injury?

[14] 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 ....*

[15] There are three requirements to satisfy Section 5(1) of the *Workmen's Compensation Act* 1964.[6] These are:-

(i) There needs to be a personal injury by accident;
(ii) Arising out of employment; and
(iii) In the course of employment.

Did the Worker Suffer A Personal Injury by Accident?

[16] Pathik J in *The Fiji Sugar Corporation Limited v Labour Officer*[7] set out in detail what was to be meant by the expression "injury by accident". The Worker had two fingers traumatically amputated and was rushed to the CWM Hospital. There appears no dispute between the parties that the Worker had suffered a personal injury by accident.

Was the Worker's Injury Arising Out of Employment?

[17] In *Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu*[8], Pathik J, 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*[9] 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*

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5 The Tribunal relies on the concession that is made by the Employer completing the Form LDC1.
6 *Raiwaqa Buses Ltd v Labour Officer* [2011]FJHC174; HBA23.2008 (18 March 2011)
7 [1995] FJHC 39; Hba0010j.94b (17 February 1995)
8 [1994] FJHC 180
9 (1917) AC 352 at 372

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…….

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. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute 'arising out of the employment apply."

[18] Mr Munaf gave evidence that as part of his duties, he was required to undertake minor mechanical repairs for the Employer. The injury occurred as a direct consequence of that activity. The second limb is satisfied[10].

In the Course of Employment

[19] 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"

[20] As the Employer's undated letter provided to the Tribunal in response to the Directions issued on 9 August 2018 makes clear, "we do confirm that Abdul Munaf been (sic) advised by our Manager Avikash Dutt to come to work on the said day". Further, the Worker claims that he telephoned Mr Lal, the Director, to seek permission to repair the power steering belt, who in reply said, "do it". Mr Vukialau also gave evidence of a telephone conversation having occurred, in which he understood that Mr Munaf was seeking permission from his Employer to assist with the minor repair. Whilst Mr Lal disputes this version of events and had provided what he says was "my Vodafone Bill to substantiate this blatant lie"[11], it is hard to deduce anything from that record, of any meaning. The telephone number of that record was 9906488 and is in the name of Ravin Chand. Mr Munaf gave evidence that he had 'missed called[12]' Mr Lal's telephone number, whereupon he returned the call. According to the injured Worker, at the relevant time Mr Lal was operating with the telephone number 9906488 and he was operating with the telephone number 9587956.

[21] The Vodafone bill that has been provided by Mr Lal does not appear to show whether or not he had received any missed calls. Mr Lal has also not provided the telephone record of outgoing calls

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10 It does not matter whether this work formed part of the ordinary work of the Employer or not. The worker was being paid as an employee to attend the Terminal and was given the permission from his Employer to assist one of its client's employees, with private vehicle maintenance.

11 See correspondence received by the Tribunal on 25 June 2018.

12 A 'missed call' is a means of ringing another person's telephone number, where the intention is for the recipient to return the call on the basis that the other party has no phone credit or does not want to be charged for the call.

from that phone number. The Tribunal prefers the evidence of Mr Munaf and Mr Vukialau in this regard and is of the view that for whatever reason, the Employer gave his permission for the Worker to perform the minor repairs that led to the accident.

[22] As all three limbs have been satisfied the case of the Employer is made out. In accordance with the formula set out within Section 8 of the Act (including its Schedule), the Worker is entitled to compensation in the amount of $9,322.56. The Tribunal will summarily award the Labour Office costs arising out of the prosecution of this matter, including witness expenses, in the amount of $1,200.00.

Decision

[23] It is the decision of this Tribunal that:-

(i) The Employer pay to the Labour Office within 21 days, compensation for the injury suffered by the Worker, in the amount of $9,322.56.

(ii) The Employer pay to the Labour Office, costs in the amount of $1,200.00, within 21 days.

Mr Andrew J See
Resident Magistrate