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WILLIAM HAZELMAN

v.

FIJI INDUSTRIES LIMITED

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[COURT OF APPEAL, 1972 (Gould V.P., Marsack J.A., Spring J.A.), 12th, 30th October]

Civil Jurisdiction

Workmen's compensation—permanent partial incapacity—difference between scheduled and other injuries—in case of non-scheduled injury on workman to show reduced earning capacity—question of onus in relation to amount of wages actually received after incapacity—finding of Supreme Court that magistrate's conclusion not supported by fit evidence—question of law for Court of Appeal—Workmen's Compensataion Ordinance (Cap. 77) ss.3, 8(1) (a), 8(1) (b)—Court of Appeal Ordinance (Cap. 8) s.12(1) (d).—Workmen's Compensation Act 1925 (15 & 16 Geo. 5, c.84) (Imp.) s.9(3) (1)—Acts Interpretation Act 1924 (N.Z.) s.5(j).

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Appeal—second appeal to Court of Appeal on question of law—magistrate's conclusion from primary facts—finding of Supreme Court that conclusion not supported by fit evidence—question of law—Court of Appeal Ordinance (Cap. 8) s.12(1) (d).

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In a claim for compensation under the Workmen's Compensation Ordinance in respect of an injuiry resulting in permanent partial incapacity, if the injury is not one specified in the Schedule to the Ordinance (in which case it would fall to be dealt with under section 8(1) (a) then, under section 8(1) (b), it is for the workman to establish that his disability reduces his earning capacity in any employment he was capable of undertaking at the time of the accident.

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Semble: Where, after incapacity has been caused by such an injury a workman accepts employment at a lower wage than he earned before the accident the onus is upon the employer to show (if it is so alleged) that the workman could earn greater wages in some other employment.

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Where the Supreme Court, sitting on appeal from the Magistrate's Court, finds that there was no fit evidence to support the magistrate's decision, that is a conclusion which may be examined as a matter of law on further appeal to the Court of Appeal.

Cases referred to:

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British Launderers Research Association v. Central Middlesex Assessment Committee [1949] 1 All E.R. 21; 65 T.L.R. 103.

Hemms v. Wheeler [1948] 2 K.B. 61; 64 T.L.R. 236.

Heathcote v. Haunchwood Collieries Ltd. [1918] A.C. 52: 117 L.T. 677.

Dover Navigation Co. Ltd. v. Craig [1939] 4 All E.R. 558; 55 T.L.R. 169.

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Barr v. Attorney-General [1967] N.Z.L.R. 611.

White v. London & North Eastern Railway Co. [1931] A.C. 52; 144 L.T. 1.

A Appeal from a judgment of the Supreme Court sitting in appellate jurisdiction from a judgment of the Magistrate's Court on an application for an order under the Workmen's Compensation Ordinance.

K. C. Ramrakha for the appellant.

B. N. Sweetman for the respondent company.

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The facts sufficiently appear from the judgment of Spring J.A.

30th October 1972

The following judgments were read:

C SPRING J.A.:

This is an appeal against the decision of the Supreme Court of Fiji which in its appellate jurisdiction allowed an appeal from the Magistrates Court of Fiji. Court of Appeal Ordinance (Cap. 8) Section 12(1) (d) limits such an appeal to a question of law only. The facts shortly stated are: The appellant, William Hazelman was the applicant in the Magis-
D trates Court for an order under the provisions of the Workmen's Compensation Ordinance (Cap. 77) against his employer, the abovenamed respondent in respect of injuries caused by an accident arising out of his employment on the 21st July, 1969. The appellant, while working in the respondent's mill room at Queens Road, Suva, Fiji, walked towards the motor room, tripped over an hose and fell and fractured both elbow joints. At the time the appellant was earning an average weekly wage of $38.38.
E Notice of the accident was given on the 27th July, 1969. The appellant returned to his former employment after undergoing medical treatment and remained therein for a short time before he was dismissed. The appellant stated he could not lift heavy objects as he did not have the strength in his arms which he had previously enjoyed; finally, the appellant — after 'hunting around for a job' — was employed as a watchman on the Wharf at an average wage of $15 a week.

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In the Magistrates Court, evidence was given by Dr. Ramrakha that the appellant had suffered permanent disability of 20% (which assessment he considered a modest one) due to loss of earning capacity caused by the injury. Dr. Hemming gave evidence that he assessed the disability at 12% but in arriving at his assessment he stated he had not really con-
G sidered the appellant's earning capacity. This was the only evidence called.

The learned Magistrate in his judgment said :—

> "It is common ground in this claim that the injury sustained by the Applicant is one which is not specified in the Schedule to the Ordinance and it therefore follows that the percentage of partial incapacity
H must be proportionate to the loss of earning capacity permanently caused by the injury. It also follows that in making his assessment the examining doctor must pay regard to the Applicant's loss of earning capacity. The wording of the subsection is quite unequivocal in this respect."

The learned Magistrate found that the compensation to be paid by the respondent should be based on 20% incapacity as found by Dr. Ramrakha. A

The respondent appealed to the Supreme Court and the learned Judge held that the information in the record was insufficient for a finding to be made on the issue as to whether or not the respondent suffered a permanent partial incapacity. Accordingly, the appeal was allowed and an order made remitting the case for a re-hearing before another Magistrate.

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The learned Judge in the course of his judgment said :—

> "If the injury appears in the schedule that injury is deemed to result in permanent partial incapacity and under Section 8(1) (a) the percentage of incapacity shown in the Schedule in relation to the injury sustained becomes the percentage of the loss of earning capacity, and that percentage of 208 weeks' earnings is the amount of compensation payable. Permanent partial incapacity must first be established, but referring to the definition section if the injury is specified in the schedule, then permanent partial incapacity is deemed to result. If the injury is not specified in the schedule then clearly permanent partial incapacity is not deemed to result and must be established. In order to establish this, the workman must show that he has suffered a permanent incapacity which reduces his earning capacity in any employment he was capable of undertaking at the time of the accident."

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On this appeal, the appellant is limited to questions of law and he has challenged the correctness of the decisions of the Supreme Court on the following grounds :—

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> "1. Having regard to all the circumstances, the learned trial Judge erred in not assessing the permanent partial incapacity as at 20%, or in the alternative at 12%, or alternatively;
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> 2. The learned trial Judge ought to have assessed such incapacity as arose from the evidence and given judgment in favour of the appellant;

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> 3. The Appellant's right to compensation having been established the learned trial Judge ought to have held that the onus was on the respondent to establish that it was not liable at all;
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> 4. The learned trial Judge erred in law and in fact in construing the provisions of the Workmen's Compensation as a question of incapacity for work since such a construction would render the law meaningless;

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> 5. In any event, there was sufficient evidence to assess liability, and the learned trial Judge erred in not assessing the same."

Grounds 1 and 4 overlap and it will be convenient to summarise the argument of counsel for appellant thereon. He submitted that in construing Section 8(1) (b) of the Ordinance, it should be correlated as far as possible with Section 8(1) (a) which deals with Schedule injuries and the percentage of incapacity; that the Court should, in the case of non-schedule injuries, accept the medical evidence as to the physical dis-

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ability of the workman and assess compensation under Section 8(1) (b) by equating it as far as possible with Section 8(1) (a); that the learned Judge erred in law in saying that in order to establish permanent partial incapacity under Section 8(1) (b), the workman must show that he has suffered a permanent incapacity which reduces his earning capacity in any employment he was capable of undertaking at the time of the accident.

On the other hand, Mr. Sweetman argued that the definition of partial incapacity in the Ordinance clearly stated that partial incapacity was directly related to a loss of earning capacity and that a medical assessment of the physical disability suffered by a workman at his work did not ipso facto entitle the workman to compensation in terms of the Ordinance. He submitted that in the case of a workman suffering a non-schedule injury if no agreement could be reached between the employer and the workman then it would be for the court to decide if the workman has suffered a loss of earning capacity permanently caused by the injury; that, while the medical evidence was important, there was insufficient other evidence before the Court to justify the learned Judge in making an assessment of compensation.

"Partial incapacitiy" is defined in Section 3 of the Ordnance as follows :—

> " 'Partial incapacity' means, where the incapacity is of a temporary nature, such incapacity as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the incapacity, and, where the incapacity is of a permanent nature, such incapacity as reduces his earning capacity in any employment which he was capable of undertaking at that time:
>
> Provided that every injury specified in the Schedule to this Ordinance, except such injury or combination of injuries in respect of which the percentage or aggregate percentage of the loss of earning capacity as specified therein against such injury or injuries amounts to one hundred per centum or more shall be deemed to result in permanent partial incapacity:"

The relevant portion of Section 8 read :—

> "(1) Where permanent partial incapacity results from the injury the amount of compensation shall be —
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> (a) in the case of an injury specified in the Schedule to this Ordinance, such percentage of two hundred and eight weeks' earnings as is specified therein as being the percentage of the loss of earning capacity caused by that injury; and
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> (b) in the case of an injury not specified in the Schedule to this Ordinance, such percentage of two hundred and eight weeks' earnings as is proportionate to the loss of earning capacity permanently caused by the injury."

The Court was told from the Bar that there has been re-reported decision in Fiji on this question.

Applying the general rule of construction that the language of an Act of Parliament is to be read according to its ordinary grammatical construction, it is clear that where the injury is not one specified in the Schedule to the Ordinance, it is for the workman to establish, where the disability is of a permanent nature, that such disability reduces his earning capacity in any employment which he was capable of undertaking at the time of the accident.

I cannot accept Mr. Ramrakha's submission that in construing Section 8(1) (b) it is necessary to correlate it with Section 8(1) (a) and the Schedule injuries and percentages therein mentioned. Further, I reject his submission that in considering whether a workman who has suffered injuries is permanently partially incapacitated one should have regard to the medical assessment of the physical disabilities suffered by the workman and that alone. It would be doing violence to the language used by Legislature to equate Section 8(1) (b) with Section 8(1) (a) as counsel for the appellant has urged.

Therefore, I respectfully accept the argument of Mr. Sweetman that where the injury is not specified in the schedule permanent partial incapacity is not deemed to result and to establish this the workman must show that he has suffered a permanent incapacity which reduces his earning capacity in any employment he was capable of undertaking at the time of the accident. I respectfully agree therefore, with the interpretation given by the Supreme Court of the definition of partial incapacity and Section 8(1) (b) in the Ordinance. Accordingly, I would reject grounds of appeal numbers 1 and 4.

I now turn to consider Grounds 2, 3 and 5 which overlap.

Counsel for the appellant submitted that there was insufficient evidence before the Magistrates Court that the appellant had suffered permanent partial incapacity which establish that the appellant's earning capacity in any employment which he was capable of undertaking had been reduced, and that the learned Judge should have assessed compensation and given judgment for the appellant and not directed a re-hearing before another Magistrate.

On this appeal this Court is limitied to questions of law, and it is a question of law whether the conclusion drawn by the learned Magistrate is one which could reasonably be drawn from the primary facts. As Denning L. J. said in *British Launderers' Research Association v. Central Middlesex Assessment Committee and Anor* [1949] 1 All E.R. 21 at p. 26: —

> "The conclusion is a conclusion of law on which an appellate tribunal is as competent to form an opinion as the tribunal of first instance."

In Hemns v. Wheeler [1948] 2KB 61 at p. 65 Tucker L.J. said —

> "It is for the county court Judge to find the facts and to draw the inferences from those facts. But that it is always a question of law which will warrant the interference of this Court whether there was any evidence to support his findings of fact and whether the inferences he has drawn are possible inferences from the facts found."

It is proper therefore that I should examine the record and endeavour to ascertain as a matter of law whether the conclusion arrived at by the

learned Judge which was in effect a finding that there was no fit evidence to support the learned Magistrate's decision in the court below was justified. In the Magistrate's Court little evidence was given. The appellant stated :—

> "My average earning was $38.38 per week before the accident. After that had trouble getting job. I now a casual worker at wharf. I cannot do lifting properly. I now average $15.00 per week."

In cross examination he said :—

> "After accident I off about 4 weeks and then went back to same job but not lift anything heavy e.g. of anything jammed, I used to be able to free it. But could not after accident."

Again, in cross examination he said :—

> "I the overseer. I paid my old rate of pay for a few weeks or a month. Manager sacked me — tester not do his job and the Manager blew me up — Manager sacked me.
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> After that I hunted round for job. If they gave me back my old job I could do it — but no hard work. No I don't think I could do the job. I was doing heavy work — but the other could do the heavy work my job to supervise and record. Yes, I could do the job adequately. I now work on wharf itself — security and watchman. I have tried to use my arm but not have same strength as before. If my original job now offered me I could do it."

In re-examination he said :—

> "I have tried to use my arm but not have same strength as before. If my original job now offered me I could do it.
>
> I now work at wharf. In old job I also did some physical work — now I could not do it, i.e. hard work. That is why I got less pay now. I have seen Doctor."

Medical evidence was called from Dr. Ramrakha who certified the respondent fit for work on the 15th October, 1969, while admittedly in a letter of the 10th Deecmber, 1970, he indicated that his assessment of 20% was an assessment of physical disability, yet in a letter of the 23rd of December, 1970, Dr. Ramrakha says that his assessment was due to the appellant's loss of earning capacity.

In my view, there was evidence that the appellant had suffered a fracture of both elbow joints which precluded him from lifting heavy weights; further there was evidence that as a result of such injuries he had been dismissed from his pre-accident employment and after some lapse of time succeeded in obtaining employment at a reduced wage. The question is: Did such incapacity which was a permanent nature, reduce the appellant's earning capacity in any employment which he was capable of undertaking at that time?

In considering this question only limited assistance can be derived from a consideration of legislation in other jurisdictions. In England, for example, Section 9(3) (1) of the Workmen's Compensation Act, 1925 says :— A

"(3) The rules for calculating the weekly payment in the case of partial incapacity shall be —

(i) If the maximum weekly payment would, had the incapacity been total incapacity, have amounted to twenty-five shillings a week or upwards, the weekly payment in case of partial incapacity shall be one-half the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount *which he is earning or is able to earn in some suitable emplyoment or business after the accident.*" B C

In *Heathcote v. Haunchwood Collieries Limited* [1918] A.C. 52 at page 56 Lord Dunedin said :—

"I have no doubt that although prima facie what a man is defacto earning must be taken into consideration first, yet it would be perfectly possible for those who objected to that figure being taken to urge and show that the amount he was earning was not really what he might earn if he took proper steps to get the most remunerative employment he could find. I have not a doubt that that inquiry would be perfectly competent; but I think it is in accordance with common sense that if you find a man actually at work you would always begin at least with the consideratаion of the figure which he was actually earning." D E

Lord Atkinson at page 57 said :—

"That the object to be effected by the words 'which he is earning or is able to earn in some suitable employment' was to prevent an employer being mulcted by an injured workman either refusing to work at all, or deliberately taking a wage less than he could have got; and it certainly appears to me that once you have a man in employment earning a wage it is for those who allege that that is not bona fide — that he is taking less than he could get and thereby imposing a greater burden upon his employer — to prove it." F G

In *Willis 'Workmen's Compensation' 35 Edn.* at p. 307 the learned authors say "The workman's ability to earn must be proved by the employer who alleges it." Admittedly the wording of the English Statute is different from that in force in Fiji. The words 'any employment' used in the Fijian Ordinance are much wider than the words 'some suitable employment' used in the English legislation and the reason for the use of such words in Fiji could well be that the opportunities of obtaining employment are considerably less here than in larger communities. However, be that as it may, in my view the reasoning of the learned law Lords in Heathcote's case can be applied with equal force to this particular case. H

No evidence was called by the respondent to show that the appellant had not at all times acted bona fide; admittedly, his employment as a watchman was at a lower wage, but could one say that he had ability to earn greater wages in any other employemnt? No evidence was called to support this contention. The appellant stated he had been 'hunting' around for a job. It would have been perfectly competent for the employer to call evidence, if such was available, to show that the applicant's earning capacity had not been reduced. This was not done.

In *Dover Navigation Co. Ltd. v. Craig* [1939] 4 All E.R. 558, Lord Wright at page 563 said :—

> "It has been established by various decisions of this House that the Workmen's Compensation Act is a remedial measure, intended to give rights beyond those the common law gives, and that it is a practical measure expressed in non-technical language, to be construed according to the ordinary sense of mankind."

In *Barr v. Attorney-General (1967) N.Z.L.R.* 611 at page 613 Mr. Justice Blair in commenting on the statement of Lord Wright says :—

> "Though this does not mean that the Court may stretch the language of the statute in order to give relief, I think that the Court must under the Act place 'such fair, large and liberal construction and the interpretation as will best ensure the attainment of the objects of the Act . . . . . according to its true intent and spirit' (s.5 (j) Acts Interpretation Act 1924)."

With respect to the learned Judge there was, in my view, ample medical evidence that the appellant had suffered a permanent physical impairment and a reduction in financial return from employment. I find therefore that the reasonable conclusion to draw from the proved facts is that the appellant suffered a permanent partial incapacity and accordingly I answer that question — did such incapacity which was of a permanent nature reduce the appellant's earning capacity in any employment which he was capable of undertaking at the time — in the affirmative.

There were some other matters raised by the learned Judge upon which I should comment. In the course of his judgment the learned Judge said that in order to establish whether a workman has been permanently partially incapacitated, consideration must be given, inter alia, to such matters as —

(1) A detailed study of exactly what his pre-accident employment entailed.

(2) A detailed study of his capabilities.

(3) An examination of all employments which he could have undertaken at the time of the accident as result of those capabilities.

(4) A consideration of the availability of such employment at the time of the accident.

(5) What employment he is now capable of doing.

(6) The state of the labour market in those employments.

(7) A comparison of his earning capacity in such employment compared with his pre-accident earnings.

While I agree that it may be necessary in some cases for a court to embark on an investigation of some or all of the above matters, I would hesitate to lay down any firm rule that in every case for compensation which comes before the Court in respect of claims under Section 8(1) (b) all of the above matters must be investigated before an award of compensation can be made.

White v. L. & N. E. Railway Company [1931] A.C. 52 was a case where the appellant who was totally incapacitated by an injury by accident arising out of and in the course of his employment by the respondents whilst working as a fitter in the erecting department of their works, on becoming fit for light work, was employed by the respondents in the gauge department of their works. A claim by him for compensation in respect of the difference between his pre-accident earnings and his present earnings was opposed by the respondents on the ground that the full week's work in that department was five and a half days, but that owing to trade conditions the department was only working five days, and that, if the appellant had worked a full week, as he was physically capable of doing, his earnings would have exceeded his pre-accident earnings.

Lord Atkin said at page 65 :—

> "My Lords, the argument for the employer proceeds on the assumption that to ascertain the wages an injured workman earns or is able to earn after the accident it is necessary to adjust the wages he actually is earning by reference to a normal standard of wages which in possibly different trade conditions he would be able to earn . . . . . "

> "The wages which a man is in fact earning at any particular time are determined by the industrial conditions of that time. To ascertain a 'norm' to which the actual wages are to be adjusted would impose upon the arbitrator in most cases an enquiry indefinite, lengthy and expensive. Over what period of time is the norm to be ascertained, is it to be judged by time, or by rate, or by actual earnings? Unfavourable conditions are met in some trades by reduction of hours, in others by reduction of rates. Earnings may be affected in some works by inadequate equipment, inefficient organisation, or unskilful management. I find it difficult to suppose that the arbitrator is called upon to engage in so elusive a problem."

Should a consideration of the matters expressed by the learned Judge be required in any particular case, questions of onus of proof could well arise as between employer and workman, but no argument thereon was addressed to this Court and accordingly it is unnecessary for me to make any finding thereon.

For the reasons I have endeavoured to give I have differed from the finding of the learned Judge on the issue as to whether the appellant

suffered a permanent partial disability. The question now is what should be done about the assesment of compensation. In my view it does not detract from the evidence of the doctors that they used the schedule as a guide when their evidence is directed to the physical disability only and does not touch the other relevant considerations such as wages actually earned since the accident, availability of work and the like. The learned Magistrate in making his assessment would have had regard to the assessments of the Doctors; he would have considered also the appellant's evidence that he had suffered over 50% loss in wages in accepting a wage of only $15 a week. The appellant had suffered a fracture of both elbows and Dr. Ramrakha considered his assessment of 20% a modest one; on the other hand the appellant said he might be able to earn higher wages than $15 a week.

However, in my view, difficult though the task may be, the Court should endeavour to assess compensation once it has been established that the workman has suffered an accident at work which has resulted in permanent partial incapacity.

Giving the best consideration that I can to the whole case I conclude that the assessment of 20% arrived at by the learned Magistrate was as fair and reasonable as could be made on the evidence and in my view it should be maintained.

Therefore I would allow the appeal set aside the order of the Supreme Court and restore the judgment of the learned Magistrate which the Court is informed from the Bar, will result in judgment for the appellant in the sum of $1,596.61.

I would allow the appellant his costs of this appeal.

MARSACK J.A.

I have had the advantage of reading the full and careful judgment of Mr. Justice Spring and am in substantial agreement with that judgment and the reasons given for it.

As I see it, this Court has to determine whether or not the learned Judge erred in law in arriving at his judgment, and if so in what respect. As has been pointed out by Spring, J.A. in his judgment, it is a question of law whether the Judge has drawn correct inferences from the proved and admitted facts. The learned Judge based his decision on a finding that the evidence adduced was insufficient to prove that appellant had suffered a permanent partial incapacity.

In my view the accepted evidence led with reasonable certainty to the conclusion that appellant had suffered a permanent partial disability, and that by reason of that disability appellant's earning capacity in any employment he was capable of undertaking was reduced. If this view is correct the judgment in the Court below cannot stand.

The only point remaining then for determination is the amount of compensation properly payable to appellant in respect of the permanent partial incapacity. For the reasons set out in the judgment of Mr. Justice Spring I agree that the assessment made by the learned Magistrate can

be supported. Accordingly I would allow the appeal, with the consequence set out in that judgment. A

GOULD V.P.

I have had the advantage of reading the judgment of Spring J.A. and am in entire agreement with his reasoning and conclusions.

All members of the court being of the same opinion the appeal is allowed, the magistrate's judgment restored and there will be the order for costs proposed by the learned justice of appeal. B

Appeal allowed.