A

LABOUR OFFICER (on behalf of
PITA CAMA VUSONIYASI)

v.

HORNIBROOKS OVERSEAS PTY LTD

B

[COURT OF APPEAL (Roper, J. A., Mishra, J. A., O'Regan, J. A.)]

Civil Jurisdiction

C Date of Hearing: 24 October 1985
Date of Judgment: 8 November 1985

(Workmen's Compensation—eye injury—award for permanent partial incapacity—diminution of earning capacity—to be an award of single lump sum—award not just for loss at date of accident but for whole of working life—incorrect to apply percentages in schedule based on one eye—should relate to total loss of sight, not to loss of sight of one
D *eye—no scope for "wait and see policy".*

S. P. Sharma and A. Ahmed for the Appellant
R. Krishna for the Respondent

Appeal against a decision of the Supreme Court which had heard an appeal from an award on 29 November 1983 by the resident Magistrate at Nadi that Pita
E Cama Vusoniyasi (workman) was entitled to an award of compensation of 11% of total wages for 260 weeks.

The Supreme Court had upheld the appeal on the footing that the Court was in no position to assess compensation.

F Before the Magistrate there was substantial agreement between the parties e.g. as to employment, entitlement to compensation and the weekly rate of the workman's pay viz. $68.20 p.w., and that the claim was based on loss for 260 weeks. The injury was to one eye.

The only question then to be decided was the percentage loss to be paid on such basis.

G

At the hearing, an eye specialist who had treated the workman assessed his loss of earning capacity at 11% total.

The Court noted that the injury was not one falling within the Schedule to the Act; and when Counsel agreed that the only question before the Court was the per-
H centage loss to be paid "they referred to an assessment pursuant to S. 8(1)*(b)*" where permanent partial incapacity resulted. And it followed Counsel accepted the incapacity as reducing the workman's earning capacity in any employment which he was capable of undertaking at the time of accident.

In the Schedule the percentage loss of earning capacity caused by total loss of sight is 100%; in respect of the loss of the sight of one eye it is 40%. A

Against the award of the Magistrate, the employer respondent appealed, claimed the Magistrate had erred. It prayed for a substituted award viz.

".....$780.26 (calculated on the basis of 11% of 40%=4.4% i.e. 260x4.4 of $68.20...." B

At the hearing of the appeal to the Supeme Court Counsel for the appellant said the medical witness before the Magistrate had in reality given evidence of a reduction in seeing capacity; that without evidence that earning capacity had been reduced there should be a rehearing to take further evidence. Respondents' Counsel had agreed. C

The learned Judge ordered a rehearing on the footing that the Court was in no position to assess compensation. The Appeal Court expressed the opinion that the views of Counsel quoted indicated a misconception of the purpose and ambit of S. 8(1)*(b)* .

Held: An award pursuant to S. 81*(b)* can be properly made without specific evidence that the earning capacity of the applicant had been reduced. D

S. 8(1)*(b)* is designed to provide workmen entitled to compensation by injury not specified in the schedule to compensation for the loss of earning capacity *permanently* caused by the injury being for loss that will probably be suffered over the whole of their working life. Such loss is to be compensated by a single lump sum payment. There is no scope for a "wait and see" policy by the use of the review procedure and suspensory orders. E

In cases where there is no specific evidence of reduced earnings, the Court has to do its best in assessing compensation for the effect the injury will have in reducing the opportunities for employment in the future.

F

The instant case was such a case: the learned magistrate was right in making the assessment on the available evidence.

Courts have long accepted medical evidence as to the extent of such loss. See e.g. *Ellison v. Union Steamship Co. of New Zealand Ltd.* (1939) N.Z.L.R. 223. An opinion by the Supreme Court to the effect that such evidence was inadmissible was erroneous. G

A contention that the Magistrate should have taken 11% of 40%, being the percentage laid down in the schedule for the loss of an eye and not of 100% was put forward in the Supreme Court.

This was incorrect. See per Henry J.A. delivering the Judgment of the Court in *Labour Officer v. Fiji Electricity Authority* (29 FLR 55) H

No good purpose could be served by having the case further considered. There was uncontradicted medical evidence justifying the award made by the Magistrate (see above).

A Appeal allowed.

Award of Magistrate restored.

Cases referred to:

Labour Officer v. Fiji Electricity Authority 29 FLR 55

B *Maloney v. Munt Cottrell* (1923) G.L.R. 469

Hazelman v. Fiji Industries Ltd. 18 F.L.R. 156

Ellison v. Union Steamship Co. of New Zealand Ltd. (1939) N.Z.L.R. 223

Fairman v. Grey Valley Collieries (1943) N.Z.L.R. 368.

Hurrey v. The King (1943) NZLR 278

C O'REGAN, Judge of Appeal.

Judgment of the Court

This case was originally heard by Mr J. Tomlinson Resident Magistrate at Nadi on 29th November. 1983. It was a claim for workers' compensation on behalf of Pita Cama Vusoniyasi who had suffered an injury to his right eye in the course of his D employment by the respondent.

The case, as presented to the learned magistrate had been reduced to a very narrow compass by an agreement between counsel. the burden of which is recorded in the case on appeal:

> "Agreed evidence. That the applicant is a workman. was injured in an accident arising out of and in the course of his employment. He was a carpenter E employed by HTL and his pay was $68.20 per week. The claims is based on loss for 260 weeks. The respondent consortium is now winding up and the applicant is out of work and in the village.
>
> The only question before the Court is on amount i.e. the percentage loss to be paid based on his wages for 260 weeks.
>
> F The only evidence required is the doctor on the assessment of the percentage to use."

The medical evidence was given by Mr Esimeli Waqabaca. an eye specialist for some ten years previously. who treated the injured workman over a period of some six months at the end of which he could do not more for him. In his opinion the vision of the right eye was reduced and his sight permanently impaired. And he G assessed his loss of earning capacity as 11% of total.

The injury was thus not one falling within the schedule to the Act and to which subsection 1*(a)* of section 8 applies. It accordingly follows that when counsel agreed that the only question before the Court was "the percentage loss to be paid...." they were referring to an assessment of compensation pursuant to subsection 1*(b)* of section 8. Both those subsections have to do with assessment of compensation "where H permanent partial incapacity results"—see subsection (1) of section 8. It also follows that in agreeing as they did. counsel accepted that the applicant's incapacity was such as reduced his earning capacity in any employment which he was capable of undertaking at the time of the accident—see the definition of "partial incapacity" in subsection (1) of section 3 which so far as it is relevant provides:

" 'Partial incapacity' means.....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 the time of the accident." A

In evidence were two certificates furnished by Dr Waqabaca. The first, given on 5th May, 1982 (before proceedings were launched), reads:

"Pita Vusoniyasi, Fijian male 1949 attended on 22/4/82 for final assessment and found to have suffered 11% incapacity to his injured eye." B

The second, given in response to a request for elucidation and amplification, reads:

Workmen's Compensation—Pita Cama Vusoniyasi Your reference ASN: 1849/91 dated 20.10.82

The working out of each eye injury permanent incapacity is usually based on binocular visual efficiency i.e. both visual acuities included. Hence our base would be 100%. Likewise the 11% given was based on 100% binoculars visual efficiency and never 11% of 40%. C

We have to take into account his binocular vision and not the uniocular vision alone i.e. the effect of the injury on the injured eye too which is called binocular vision. D

I do hope this will clarify the matter once and for all."

In his evidence before the learned magistrate Dr Waqabaca restated this approach. Until he gave evidence however, he had not been requested to nor had he made any assessment of "the loss" of the applicant's "earning capacity permanently caused by the injury" (see section 8(1)*(b)*), his previous opinion being concerned only with the extent of physical disability. At the hearing, stated that the loss of earning capacity also to be "11% of 100%". E

In the schedule to the Act it is provided that the percentage of the loss of earning capacity caused by total loss of sight is 100 and that such percentage in respect of the loss of the sight of one eye is 40. These percentages were drawn to the attention of Dr Waqabaca in cross-examination. Indeed with his experience in the workmen's compensation field he no doubt was already well aware of them—and he was adamant that, for the reasons he had given, his assessments of both the loss of vision and the loss of earning capacity permanently caused by the injury in the instant case related to the total loss of sight and not to the loss of sight of one eye. F

In the light of this uncontradicted evidence we do not find it surprising that the learned magistrate held that the award should be 11% of the total wages for 260 weeks. From his determination, however, the respondent appealed to the Supreme Court. Its sole ground of appeal was: G

"That the learned trial magistrate erred in law and in fact in applying an erroneous method of calculation of compensation payable to the Respondent/Applicant."

And it prayed that the award be substituted by "an award of $780.20 (calculated on the basis of 11% of 40% = 4.4% i.e. 260 × 4.4 of $68.20 . . . .)". H

At the hearing of the appeal Mr Shah, counsel for the present appellant, is recorded as saying that, in the court of first instance, the medical witness had purported to

give evidence of a reduction in earning capacity but that in reality his evidence that his earning capacity had been reduced there could not have been a proper finding that such earning capacity had been reduced and that there should be a rehearing to take such evidence as the parties might see fit to adduce. We were told from the bar that counsel for the present respondent agreed with those submissions. The learned Judge is recorded as having said that he thought that Mr Shah's concessions were proper. He did not, however, immediately order a rehearing. He reserved judgment and in due time he delivered a judgment in which he considered and dealt with the issues involved. But, in the end, he ordered a rehearing on the footing that the Court was in no position to assess compensation. The course he took was originally suggested by both counsel and if he had not dealt with the issues thrown up by the appeal, we would not, in those circumstances, have entertained the appeal from his decision.

The view expressed by cousel and approved of by the Judge, in our view, portended a misconception of the purpose and ambit of section 8(1)*(b)*. An award pursuant to the subsection can properly be made without evidence that the earning capacity of the applicant has been reduced. Indeed the law reports abound in cases which show such to be the case. The subsection is designed to provide workmen who by reason of injury not specified in the schedule, who otherwise meet the prescriptions of the Act, with compensation for "the loss of earning capacity *permanently* caused by the injury". The emphasis is ours. Compensation not just for such loss at the date of accident or at the date of hearing but for loss that will probably be suffered over the whole of their working life. And, that loss is to be compensated by a single lump sum payment. Accordingly there is no scope for a "wait and see" policy by the use of the review procedure and suspensory orders such as are available in other jurisdictions and which by virtue of section 18 of the Act would have been available in this country if there was provision for the payment of the compensation by periodical payments. As to the position in other countries and the procedures available or devised by the Court we refer to the interesting survey in *Fairman v. Grey Valley Collieries* (1943) N.Z.L.R. 368 at 371–373.

In cases, therefore, where there is no evidence of reduced earnings at the date of hearing, the Court has to do its conscientious best to assess compensation for the effect the injury will have in narrowing the opportunities for employment in the future—see *Fairman v. Grey Valley Collieries* (supra) at p. 373. The instant case was such a case and the learned magistrate was right in making the assessment on the available evidence. Indeed having regard to the manner in which the parties joined in presenting it no other course was open to him.

In assessing compensation for the loss of opportunities for employment in the future, the Courts have long since accepted medical evidence—as was tendered and accepted in this case—as to the extent of such loss. Again the books abound with instances—see, for instance, in this country, *Hazelman v. Fiji Industries Ltd* 18 F.L.R. 156 and, in New Zealand, *Ellison v. Union Steamship Co. of New Zealand Ltd.* (1939) N.Z.L.R. 223. In the latter case O'Regan J., dealing with this topics at p. 225, had this to say:

> "....Here, there is no evidence that the injured man has been offered employment at a reduced wage, but the medical estimate of the injury, expressed in money, can only be regarded as evidence of loss of earning—capacity, and, indeed, the defendant company has made its estimate on that basis.

The principle explained in *Maloney v. Munt, Cottrell, and Co., Ltd.* [1923] G.L.R. 469, is applicable in every case where there is evidence of reduced earning-capacity. If the injured man has, in fact, obtained employment at reduced wages, that is at least prima facie evidence that his earnings have been reduced permanently to the amount he is in fact receiving, and it may not be necessary to invoke medical evidence unless the presumption of permanent injury is to be rebutted. If the injured man has not resumed work and there is no prospect of re-employmemt at a reduced wage, then the medical evidence of the extent of his loss is the only available guide to the Court."

In his judgment Kearsley J. said:

"Mr Shah also concedes, again rightly in my view, that if the opthamologist did express an opinion as to loss of 'earning capacity' it was not admissible in evidence as such an opinion was outside his apparent field of expertise."

In so saying we hold him to be in error. First, the medical opinion in this case—and in this type of case generally—is sought as to the probable "loss of earning power permanently" as explained in *Fairman's* case *(supra)*. Secondly, on principle and by dint of inveterate practice such evidence is admissible.

In its appeal to the Supreme Court the respondent contended that the learned magistrate should have made his assessment by taking 11% of 40%—the percentage ordained by the Schedule for the loss of an eye and not 11% of 100%—the schedule percentage for the loss of total vision. The basis for which it contended had been adopted by Dyke J. in a case which came on appeal to this Court *sub. nom. Labour Officer v. Fiji Electricity Authority* 29 FLR 55 in which Henry J.A., delivering the judgment of the Court said:

"In our view this method of calculation is erroneous in law insofar as it is based on schedule percentages. Such percentages do not bear any particular relationship to the question in this case (or in others) which is what is the value or amount of his loss by reason of the diminution of his capacity in any employment he was capable of undertaking at the time of his accident."

That opinion concluded the point so far as the Supreme Court and the Magistrate's Court were concerned and should have determined the fate of the appeal in the Supreme Court. We note in passing that the view expressed in that case accorded with the unanimous decision of a Court of five Judges of the Court of Appeal of New Zealand in *Hurrey v. The King* (1943) N.Z.L.R. 278.

In our view no good purpose can be served by having this case further considered by the Magistrate's Court. The parties charted their own course by the agreed basis upon which they presented their case to the learned magistrate. There was uncontroverted medical evidence justifying the award that was made. Such evidence did not infringe the decision of this Court in *Labour Officer v. Fiji electricity Authority* (supra). That it did not do so was clear from the evidence of Dr Waqabaca as to his approach and his reasons for it. A further consideration is the fact that the workman received his injury over four years ago and notwithstanding the respondent's acknowledgment in the notice of appeal to the Supreme Court that an award of at least $780.20 was warranted, he has not received a single cent by way of compensation. Further consideration of the matter would but compound that undesirable state of affairs. And, in any event, there is no good or sufficient reason for such further consideration.

A The appeal is allowed and the award of the learned magistrate is restored. The appellant is entitled to the costs of appeal, the same to be taxed if not agreed upon.

Appeal allowed.