

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



Decision

Title of Matter: LABOUR OFFICER on behalf of the Dependents of the Deceased, Ashwin Lalit Singh (Applicant)
v
DAYAL'S LOGGING & EARTHMOVING CONTRACTORS (Respondent)

Section: Section 8 *Workmen's Compensation Act 1964*

Subject: Compensation for death arising out of accident

Matter Number(s): ERT WC 97 of 2016

Appearances: Ms R Kadavu for the Labour Officer as Applicant on behalf of the dependents of Mr Ashwin Lalit Singh
Mr A Dayal, on behalf of the Respondent

Date of Hearing: 14 December 2017

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 6 February 2018

KEYWORDS: Section 5 *Workmen's Compensation Act 1964*; Claim for Compensation; Death arising out of accident; Recovery of Compensation for Injury; Arising out of course of employment. **Meaning of "Injury by accident"**.

CASES CITED:

Civil Aviation Authority of Fiji v Labour Officer [1993] FJHC 38.
Civil Aviation Authority of Fiji v Labour Officer [1994] FJHC 89;
Fiji Sugar Corporation v Labour Officer [1995] FJHC 38;
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)
The Labour Officer v Wood & Jepsen Surveyors and Engineers [2013] FJET 4;
Travelodge Fiji Limited Suva v The Labour Officer [1994] FJHC 180; (9 December 1994)
Vunimoli Sawmill Limited v Labour Officer and Dominion Insurance Company Limited Civil Action No HBC 018 of 2005;

Background

1. This is an application made for worker's compensation in accordance with Sections 5 of the *Workmen's Compensation Act 1964*. The Applicant Labour Officer stated that the deceased Worker was employed by the Respondent Employer as a mechanic. At the time of the worker's

demise on 3 June 2016, it is not in dispute that the worker was undertaking repair works to a D6 Caterpillar Bulldozer, the property of the Respondent that had been deployed at a work site at Nasautoka, Tailevu. It is alleged that whilst undertaking those works, that the operator of that vehicle inadvertently engaged its operation, crushing the deceased and causing his death through:-

- Severe crushed traumatic chest and abdominal injury;
- Severe traumatic head injury; and
- Multiple traumatic injuries.

2. It is a matter of record, that the owner of the bulldozer, Mr Atwan Ashik Dayal, notified the accident to the Labour Office by submitting the LD Form C1, as required by Section 14 (2) of the *Workmen's Compensation Act* 1964. On 10 June 2016, the Labour Officer forwarded a Notice of Claim to the Respondent Employer, giving notice that a claim for workmen's compensation was to be made. That claim was issued to the Employer on 15 August 2016, where a demand in the amount of \$36,142.08 was made on behalf of the dependants of the deceased.¹

3. In response to that demand, the Respondent wrote to the Ministry in the following terms:

As per your claim Received by my company on 15/8/16, I hereby Respond and inform you that The Deceased named Aswin(sic) Lalit Singh was employed as a part time mechanic with our company. Therefore we don't agree with the claim sent to me from Ministry of Industrial Relations. According to the claim stated our machine was parked in the position and it showed no movements therefore if a 20 tonne machines crushes a person what the result will does not show in your claim. Now my company will carry out through (sic) investigation in this case and fork out the reality, We will provide full evidence of grounds that we hold.

My company will liaise with Fiji Police Force other witness and provide other valuable information.

Yours faithfully

*Atwan Ashik Dayal
Director*

The Case of the Labour Officer

4. The first witness to give evidence for the Applicant was Mr Viliame Lobau who at the time of the incident was engaged as a Supervisor for a contracting company 'On Time Feeders'. The witness told the Tribunal that he had earlier provided a statement to the Ministry in relation to his knowledge of the deceased and asked that line 6 of the statement be modified so to read that On-Time Feeders was the main contractor at a job and would hire the bull-dozer from Dayal's Logging and earthmoving. Within that statement, the witness attests to the fact that the deceased "used(sic) to come with Mr Bala² (Director-Dayal's Logging) to do repairs on the bulldozer when it broke down and they use to go back together when the repairs were

¹ See Section 17(1)(c) of the Act.

² As it transpired, several of the witnesses referred to Mr Atwan Dayal, by the 'nickname', Mr Bala.

completed”.³ Further, Mr Lobau wished that Line 10 of his statement be corrected, to say that Mr Dayal was the Manager not Director.

5. The witness told the Tribunal that he had been working at Nasautoka for On-Time Feeders as a works supervisor, where logging works had been undertaken. Mr Lobau said that the Dayal’s Logging and Earthmoving Contractors had been hired by On-Time Feeders to pull the logs and to load for transport. The witness indicated that it was the machinery that had been hired. When asked by Counsel, “what happens if the machine needs repairing whilst working?”, the witness responded, that “he did not know anything about faults..(that) only bosses know about fixing problems”, but that on those occasions, the deceased would come with Mr Dayal. Mr Lobau said he came to know the deceased worker Mr Singh, as he was the only one that was carrying out repair works. When asked was the witness aware as to whether the deceased had been employed by On-Time Feeders, he responded that he had “no idea”. According to the witness, on the day of Mr Singh’s demise, the deceased worker had been carrying out repair works on the roadside. The witness told the Tribunal that he had no knowledge of the contractual arrangements that existed between On-Time Feeders and Dayal’s Logging and Earthmoving.

Mrs Kamlesh Lata

6. The next witness to give evidence was the mother of the deceased worker, Mrs Kamlesh Lata. Ms Lata said that the deceased was her eldest son and worked for the Respondent Employer as a mechanic. The witness indicated that her son had been working for Dayal’s for approximately 4 to 5 months, prior to his death. According to Ms Lata, her son would be picked up by Dayal’s at the start of the working week on Monday and dropped back home after being in camp, on the Friday or Saturday. When asked specifically who would pick up the worker, Ms Lata responded that the owner “Baya Dayal use to come by himself”. The witness told the Tribunal that her son would be paid \$60 a day and that Mr Dayal would bring cash money, sometimes paying her son directly, “but mostly giving it to me”. According to the witness, sometimes the wife of Mr Dayal would come as well, “have a glass of juice and then go”. Ms Lata told the Tribunal that on the day her son died, that Mr Dayal came to her house and that “he was shivering and crying”. The witness said that Mr Dayal gave to her the wages of the deceased.
7. Under cross examination, it was put to the witness that she had received \$1000.00 from Mr Dayal to assist with funeral expenses and that the monies handed to her were not for wages. The witness rejected that proposition. In re-examination Ms Lata clarified that Mr Dayal was quite clear when he would pass over wages to her, that it was monies due to her son.

Gynesh Prasad Sharma

8. Gynesh Prasad Sharma had provided a statement to the Ministry on 14 June 2016. According to the witness in 2016, he had been working for Mr Bala of Dayal’s Logging and Contractors. The witness said that he was based in Tailevu and had worked for the company for two years. Mr Sharma said that he was responsible for felling and clearing trees in bulldozers. The witness said that he had known the deceased worker, as they had worked in this same company together for approximately 3 to 4 months. According to the witness, the deceased had worked for the company as a bulldozer mechanic. The witness said that he was aware that the deceased was paid \$60 per day and that he himself had received \$30 per day.

³ See Statement provided on 11 December 2017 as contained within the Supplementary Applicant’s Disclosures.

9. According to Mr Sharma, he had received no payslips from the employer and that there was no written contract in place. Mr Sharma stated that “we were all paid the same way in cash”. Under cross examination, the witness was unable to read the statement that he had signed for the Ministry. During cross examination, Counsel for the Employer, Mr Dayal put to the witness that he had not been working with the company since February 2016 and that he had not been working at the Nasautoka site. The witness was adamant that he had been working for the employer at that site and indicated that he had camped in the koro. The witness conceded under cross examination that he had not been working at the site at the time of the incident but said he had been advised of the incident by a third party.

Pravin Dayal

10. The first witness called for the Respondent Employer was Mr Pravin Dayal, who stated that he was a former Site Manager. At the relevant time in June 2016, the witness stated that he had been working for On-Time Feeders at Nausatoka. Mr Dayal told the Tribunal that he was looking after the job site for On-Time Feeders. The witness said that “we were working under On-Time Feeders”, looking after operation of machinery and looking after log tallies. When asked by Counsel for the Respondent, was he a supervisor for On-Time Feeders or Dayal’s, the witness said that he was managing work for On-Time Feeders. Mr Dayal said that a machine was loaned to On-Time Feeders on a dry hire basis. Mr Dayal said that the agreement between the parties was a mutual agreement. The witness told the Tribunal that Dayal’s gave the machine to On-Time Feeders to load and log. The witness said that there was only one machine, a Bulldozer D6 that was on hire. Mr Dayal claimed that the operator of that machine, a worker by the name of Apete, worked for On-Time Feeders.
11. At this juncture, the Tribunal ordered the temporary withdrawal of the witness, in order that there could be clarification from Counsel as to what appeared to be the conflicting evidence as provided in an earlier statement and included within the Applicant’s Supplementary Disclosures.⁴ Counsel for the Respondent first asked the witness to clarify why within his written statement, he had indicated that he had been working for Dayal’s. The witness told the Tribunal that he had been working for Dayal’s when they had been contracting to Fiji Hardwood. Though he gave the impression through his answer that this meant he was not employed at the time of the incident in question, with Dayal’s, but rather with On-Time Feeders. The witness told the Tribunal that there was no documentation in relation to this agreement. Mr Dayal told the Tribunal that the other two employees (referring to the deceased and to the machine operator), were part-time employees of On-Time Feeders.
12. In cross examination by Ms Kadavu, the witness was asked to clarify, when did he commence to work with On-Time Feeders?, his response was, “ I can’t tell you”. The witness then said that he had been working with Dayal’s as per the statement that he had provided. He was asked, how long he had been working with On-Time Feeders and then replied, that there was no written employment contract in place. Mr Dayal said that as Site Manager, he was looking after operating of machinery. When asked by Counsel, what evidence did the witness have that the two part time employees Apete and the deceased were working for On-Time Feeders?, Mr Dayal responded, that they were the main contractor. During re-examination, the witness told the Tribunal that payment of wages were distributed by Dayal’s after the monies had been paid by On-Time Feeders.

⁴ See document as filed on 11 December 2017 at Tab3.

13. At the conclusion of the re-examination, the Tribunal sought to ask Mr Dayal some further questions. Firstly, Mr Dayal was asked to provide a more detailed account of his earlier work history and how he became involved with the Respondent Employer.
14. After much time, Mr Dayal told the Tribunal that he had been running a business called Autars Earthmoving Works and that he had entered into a contract with Mr Atwan Dayal. Mr Dayal claimed that this contract lasted for several months, after which he claimed that On-Time Feeders approached Autars. Mr Dayal then corrected himself and claimed that the owner of On-Time Feeders had approached Dayal's. The witness claimed that Mr Dayal had told him, that On-Time Feeders had approached him for the 'dry hire' of his D6 machinery and had been told that it was mutually agreed for the Nasautoka job.
15. At this stage and after the witness had been warned of the consequences if he was found to be misleading the Tribunal, he then stated that "I had no work (and) then I decided to join Dayal's". The witness said that he was given a job; that he made a phone call to Mr Dayal and was given a job. Mr Dayal then provided to the Tribunal, the relationship between the contractors and principal at the time. He indicated that the principal client was Nasautoka Village, who in turn had contracted On-Time Feeders to undertake the tree clearing. In turn, On-Time Feeders engaged Dayal's and that Mr Dayal had been an employee of that company engaged as the Site Manager for machinery operations. Mr Dayal said that there was only the one machine deployed by Dayal's at that site.
16. According to Mr Dayal as the Site Manager, he organised for the transportation of a D6 that had been engaged earlier on a job for Fiji Hardwood to that site. Mr Dayal stated that the operator of the machine at Fiji Hardwood, who had been engaged as an employee of Dayal's, was a man by the name of Apete. Mr Dayal told the Tribunal, that On-Time Feeders could not find an operator for the machinery, so that they requested that Apete be hired at Nasautoka, to do the job. The witness said that he had seen Mr Atwan Dayal hand wages to Apete and admitted never seeing anyone from On-Time Feeders give any money to Mr Dayal. The witness claimed that he oversaw the workplace health and safety on site, but said there was no formal work instruction in place for the repair of machinery.
17. The witness told the Tribunal, that on the day of the death of deceased, the winch on the D6 machine was slow to pull trees and so he asked Apete and the deceased worker to take the machine to the repairing area and to have a look at the oil level of the winch. The witness claimed that the repairing area was in an area where he could not see the workers doing the repair work. According to the supervisor, he was made aware of the accident, when he saw others were running toward the machine and said that it was discovered that the machine was not stopped whilst the repairs were taking place. Mr Dayal conceded that Dayal's had no formal workplace health and policy in place at the site.
18. Mr Dayal was questioned as to the method in which he was paid and he stated that he was paid sometimes cash in hand and other occasions directly into his bank account. The witness said that the money was coming from On-Time Feeders. Mr Dayal was told by the Tribunal that he was to inform the Makoi Police Post should he change address from that in which he was presently residing in Suva City.

Atwan Ashik Dayal

19. Mr Atwan 'Bala' Ashik Dayal is the owner of Dayal's Logging & Earthmoving Contractors. The witness told the Tribunal that he was the owner of two D6 bulldozers and a truck used to operate the business. The witness conceded that his machinery was depleted at Nasautoka, but said that he could not tell the Tribunal what happened at the time of the incident, because he was not there. When asked, "What can you say about (the deceased) Ashwin Lalit Singh, the witness responded "that he use to work for me, though I can't recall the dates". Mr Dayal told the Tribunal that before the incident he had the two machines that he owned, on hire at a location near the 'RKS' School.
20. Mr Dayal stated in evidence, that the deceased came to work for him at a site managed by a company called Contech and at that time he was earning \$60 a day. The witness then told the Tribunal that in relation to the work at Nasautoka, that the deceased was working for another company, as "I didn't have any money at that time". Mr Dayal told the Tribunal that On-Time Feeders hired the machine at the relevant time and when asked who paid the wages, stated:

When the person who hires the machine doesn't have money.. asks me to pay and then adjustments would be made in the payments
21. Mr Dayal of Counsel then put to the witness that the deceased's mother had said that he had gone to her home and gave her wages for her son. The witness admitted to having done this, but claimed that the monies were those received by him from On-Time Feeders. That is, this was the monies paid to Dayal's for the hire of the machines, some of which was then paid in wages. Mr Dayal agreed that there was no written contract with On-Time Feeders. At this juncture, the witness commenced to give contradictory and what appeared to be intentionally misleading evidence. In relation to the LD Form C1, the witness first told the Tribunal that staff from the Labour Office had asked him for details in order that the form could be completed and then he signed it. In the next question by Counsel, the Respondent then stated that the signature on the second page of the document was not his. Mr Dayal then told the Tribunal that he didn't understand the questions asked within the form, but that he was asked to fill it in.
22. At this juncture, Mr Dayal was asked to withdraw from the witness box in order that the Tribunal caution Counsel as to the conduct of his client. Upon the resumption of his evidence, Mr Dayal stated that he not present at the worksite on the day of the incident, but said that the person who had hired the machine was aware of it.
23. Under cross examination, the witness was asked to recall the circumstances in which he had completed the LD Form C1. The witness maintained that he did not understand about the form. When asked why he was now denying that the deceased had worked for him, when the LD Form C1 indicated otherwise, he responded that he didn't deny that the deceased had been working for him, only that he was not working for him at the time of the incident. Mr Dayal conceded that the deceased had been working for him as a part -time mechanic, yet when the machine was hired to On-Time Feeders, he told him that he didn't have money for repairs. Mr Dayal claimed that this was the responsibility for the person hiring the machine.
24. When questioned about the payment of monies to the parents of the deceased on behalf of their son, Mr Dayal stated:

Sometimes I use to give wages from my pocket because On-Time feeders did not do the payments...because logs were not scale by Forestry Department. . so they asked me to do payment for wages and they would do the adjustment from my payments.

25. Counsel for the Labour Office challenged this explanation, given that Mr Dayal had earlier indicated that he did not have sufficient monies to pay wages. In response, Mr Dayal indicated that on occasions he would receive monies from his son in America. The witness told the Tribunal that he had paid \$1000 to the deceased's parents from monies received from his son and then stated:

I have paid wages and then me and my wife gave extra \$1000

26. When asked by Counsel, why On-Time Feeders didn't pay directly for any funeral expenses, the witness replied, "it was from my son.. he asked me to pay". Mr Dayal then stated that the reason why On-Time Feeders didn't pay their own staff directly, was because the company was based in Suva. Mr Dayal, then stated:

When On-Time Feeders didn't have money..employees would come to my house looking for money.

27. Ms Kadavu then asked Mr Dayal did he recall receiving a claim form from the Labour Office, seeking compensation for the death of the worker. In response, he said that "whatever forms are with my lawyer". The Tribunal intervened at this juncture and sought clarification from the witness in relation to the Document 6 within the *Applicant's Disclosures*, which was a response to the claim for compensation prepared by Dayal's Logging & Earth Contractors. The witness told the Tribunal that he had someone help him prepare the document, although admitted to having told him what to write. Mr Dayal said his business is still in operation, although claimed that the machines were "still at home". In relation to the incident, the Tribunal asked Mr Dayal what had occurred. The witness stated that the machine was parked outside a house when he was informed of the incident. Mr Dayal stated that he had seen the machine parked. The witness claimed to have been informed of that fact following the incident by a person named Vili⁵, who he identified as still being present in the court room. The Tribunal recalled Mr Viliame Lobau in order to clarify that issue. Mr Lobau told the Tribunal that he was not at the scene of the accident, nor did he tell Mr Dayal that the machine was not operating at the time of the incident.

Closing Submissions of the Respondent Employer

28. The Respondent Employer filed Closing Written Submissions on 12 January 2018, the thrust of which was to provide comparative case law in relation to worker's compensation matters. Those cases were as follows:-

- *Vunimoli Sawmill Limited v Labour Officer and Dominion Insurance Company Limited* Civil Action No HBC 018 of 2005;
- *The Labour Officer v Wood& Jepsen Surveyors and Engineers* [2013] FJET 4;
- *Fiji Sugar Corporation v Labour Officer* [1995] FJHC 38;

⁵ This was Mr Viliame Lobau, who had earlier given evidence to the Tribunal in his capacity as a Supervisor for On-Time Feeders.

- *Civil Aviation Authority of Fiji v Labour Officer* [1994] FJHC 89;
- *Civil Aviation Authority of Fiji v Labour Officer* [1993] FJHC 38.

Was the Deceased a Workman for the Purposes of the Act?

29. Section 2 of the *Workmen's Compensation Act* 1964 relevantly 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.

30. The Tribunal is satisfied that the deceased was a workman for the purposes of Section 2. He was not employed on a casual basis and it seems uncontroversial that he was paid \$60 per day and would be paid on a weekly basis by Mr Dayal. There is no denial that Mr Dayal would pay wages to the worker and there has been no suggestion within any evidence of any of the parties that this was done on a casual basis. There are no other relevant categories of case that would cause the deceased to be excluded from Section 2 of the Act, by virtue of any of the provisos within sub-section 1.

Was the Respondent the Employer of a Deceased Workmen?

31. In the case of whether or not Dayal's is an employer, the definition of that term is found within Section 3 of the Act, where it 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;

32. The Tribunal is of the view that Mr Dayal was the employer of the deceased at the relevant time. The evidence of Ms Kamlesh Lata is preferred to that of both Mr Pravin Dayal and Mr Atwan Dayal. The Tribunal believes that the LD Form C1 was filled in by Mr Atwan Dayal with a complete understanding of the seriousness of the event that had occurred. Within that form he

identified as the Employer of the deceased. Mr Dayal claimed that the deceased was his former employee, although claims that at the Nasautoka jobsite, that he was then working for the contractor. Yet the evidence is that Mr Dayal had a close association with the deceased, having transported him to and from work and being the person who was seen in his company when the deceased attended repair work for Dayal's. Mr Dayal would pay wages to the worker's family and despite claiming that he was doing this on behalf of the On-Time Feeders, there is no evidence of that taking place. Mr Dayal admitted to having paid wages even when this was the responsibility of On-Time Feeders. The Tribunal accepts the evidence of Ms Lata, that on the day of her son's death, that Mr Dayal did come to the house with her son's wages. At the time of the incident the Tribunal is satisfied that the deceased was an employee of Dayal's or that he was a person *let on hire to another person by the person with whom the workman has entered into a contract of service*, for the purposes of the definition of that term is found within Section 3 of the Act. The Tribunal does not accept that On-Time Feeders gave wages to Mr Dayal for distribution to its own employees. The Tribunal accepts that Mr Dayal may have paid his wages from the proceeds of his hire agreement to On-Time Feeders, but there is nothing at law that turns on that fact.

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

33. 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

34. It appears well accepted that there are three requirements to satisfy Section 5(1) of the *Workmen's Compensation Act 1964*.⁶ These are:-

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

35. Pathik J in *Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu*⁷, also sets out the case law as it affects the various limbs under examination. In relation to the second limb, His Honour relied on Lord Sumner's characterisation in *L & YR v Highley*⁸ 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.

Was the Worker's Death by Accident Arising Out of and In the Course of Employment?

⁶ *Raiwaqa Buses Ltd v Labour Officer* [2011]FJHC174; HBA23.2008 (18 March 2011)

⁷ [1994] FJHC 180

⁸ (1917) AC 352 at 372

Personal Injury by Accident

36. The Certificate of Death contained within the Applicant's Disclosures sets out the cause of death of the deceased as:

Severe crushed traumatic chest and abdominal injuries, sever traumatic head injury, multiple traumatic injuries, fatal heavy duty associated accident

37. The Tribunal accepts the death of the deceased took place whilst he was repairing the winch to the Caterpillar D6 Bulldozer.

Arising Out of Employment

38. In relation to the second limb, Pathik J in *Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu*⁹, 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 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.

39. The Tribunal accepts that the deceased and the machine operator had been asked to repair the winch, by the Site Supervisor Mr Dayal. The Tribunal accepts that the worker had been engaged in employment by Dayal's at the time of the incident.

In the Course of Employment

40. 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"*

41. The Tribunal is satisfied that at the time of the deceased being crushed by the operation of the bulldozer, he had been engaged to do something which the Employer did expressly and by implication employ him to do, or order him to do.

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

¹⁰ (1917) AC 352 at 372

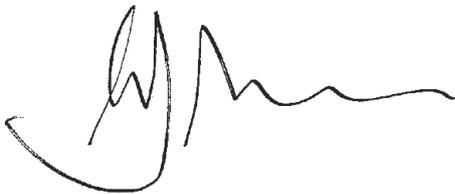
Conclusions

42. There is a clear causal connexion between the Worker's death and his employment. He was engaged by Dayal's and directed to repair the winch of the machine. The machine should have been switched off at the time in which the deceased was attending to any repairs. According to the Dayal Site Supervisor it was not. The primary responsibility for the health and safety of the worker, rests with the Employer. There was no safe system of work in place, no formal procedures utilised for the undertaking of the maintenance task and no effective system of supervision in place. The Employer is totally responsible for what has transpired. In cases of this type the formula for calculation is that set out within Section 6 of the Act that states, *where death results from the injury- (a) if the workman leaves any dependants wholly dependent on his earnings, the amount of compensation shall be a sum equal to two hundred and eight weeks' earnings.*
43. Consistent with the demand for payment made on the Respondent Employer in accordance with Section 17(1) (c) of the Act, the calculated gross weekly earnings of the deceased was \$173.76 per week. When multiplied by 208 weeks earnings, that calculated entitlement is \$36,142.08.¹¹ The Labour Officer has rightly claimed this amount from the Respondent and the Tribunal orders that this amount now be paid.

Decision

It is the decision of this Tribunal that:

- (i) The Respondent Dayal's Logging & Earthmoving Contractors is ordered to pay compensation to the Labour Officer on behalf of the dependants of Ashwin Lalit Singh in the amount of \$36,142.08.
- (ii) The compensation amount is to be paid within 28 days hereof.
- (iii) The Applicant is at liberty to make application for costs within 21 days hereof.



Mr Andrew J See
Resident Magistrate

¹¹ This is a statutory entitlement and there is no reason to deviate from that formula regardless of the various authorities that have been provided by the Respondent. Those cases are clearly distinguishable. There is no doubt whatsoever of the direct causal relationship between the death and the work of the deceased. In the present case, the employer also failed to discharge its basic workplace health and safety obligations.