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IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

M. 4/84

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IN THE MATTER of the Accident Compensation Act 1972

- a n d -

IN THE MATTER of an Appeal pursuant to Section 168 of the said Act

BETWEEN The Estate of A RUTT (Deceased)
(Reference ACA 25/82)

APPELLANT

A N D ACCIDENT COMPENSATION CORPORATION

RESPONDENT

Judgment: 21 June 1984

Hearing: 21 June 1984

Counsel: R.B. Stewart for Appellant
B.S. Paki for Respondent

ORAL JUDGMENT OF CASEY J.

The late Mr Rutt died in Tonga on 1979 as a result of a heart attack while he was waiting for a plane to take him back to New Zealand. He was engaged on a sales visit to a large area of the Pacific on behalf of his employer, and the evidence indicated that he had covered some 60 customers over a period of nineteen days at places as diverse as Port Moresby, Honiara, Nandi, Suva, Pago Pago and Tonga. A claim was made under the Accident Compensation Act but was declined and it also rejected an application for review on 18th June 1981. An appeal was taken to the Appeal Authority and was dismissed on 29th August 1983. The estate applied under s.168 of the Accident Compensation Act, 1972 (which was the appropriate provision then in force) for leave to appeal to the High Court and this application was in turn dismissed by the Authority on 28th November, on the ground that there was no question of law involved nor any other

reason why the matter should be referred to the High Court. As could be expected, a large part of the Authority's decision on the appeal turned on the medical evidence and the application of the provision of s.2(b) of the Accident Compensation Act, providing that personal injury by accident does not include "damage to the body or mind caused by a cardio-vascular or cerebro-vascular episode unless the episode is a result of effort, strain or stress that is abnormal, excessive or unusual for the person suffering it, and the effort, strain or stress arises out of and in the course of the employment of that person."

The task of the Authority therefore was to determine the following issues:-

1. That Mr Rutt died as a result of effort, strain or stress;
2. That it was abnormally excessive or unusual for him;
3. That it arose out of the course of employment; and
4. That he was an employee.

There is no argument about the last two matters but for the Appellant Mr Stewart contends that the learned Appeal Authority approached the matter ignoring altogether the second requirement that the effort, strain and stress was abnormal for the late Mr Rutt. He detailed the itinerary and visits he was required to make, which largely emerged from the evidence of Mr Bott, the company's export manager. He said how this was only Mr Rutt's third trip of this nature, his previous visits to the Pacific having occurred at much longer intervals and apparently involving a much easier schedule. After commenting that there was little evidence concerning his activities from the time he left New Zealand, the Authority referred to Mr Bott's evidence and summarised it in a general way, and he then went on to cite at pages 3 and 4 a lengthy extract with fuller details of the situations the deceased encountered and the activities that he carried out on behalf of the company. The authority concluded at p. 5 that it seemed clear the troublesome area was at the early part of the visit in New Guinea, and after

that the number of calls eased off. He referred to Mr Rutt's apparent state of health immediately before the episode which caused his death in the afternoon of 19th November and then proceeded to a discussion of the medical evidence. This obviously involved a difference of opinion between Professor Lubbe and Dr Coombes. As I understand it, the former felt that such a coronary episode could be the result of preceding stress even though there was a substantial delay between it and the attack itself, whereas Dr Coombes' view was that there had to be a very much closer relationship between the episode and the stress. The Authority pointed out there was a gap of some seven or eight days between what occurred in New Guinea and the death and said there was nothing to suggest an excessive strain once the business in the former country had been concluded. At p. 7 he said:-

> "In the final analysis I must consider what evidence there is of stress. I have already cited that of Mr Bott which does very little more than suggest that there was some difficulty experienced with some customers in New Guinea."

He went on to say that this was expected and then he referred to other episodes, and the general tenor of his comments summarised at p. 7 is that whatever stress or effort there was did not amount to much, and that they involved no more than the usual stresses and strains attached to international travel, all super-imposed on a pre-existing cardiac condition. He concluded by saying that the evidence painted a picture of a man sent on a journey which for a comparatively short time was likely to be troublesome. There was minimal evidence of effort, stress or strain and it was no more than a case of being busy for a period with some troublesome customers, and he was tired. He commented that those engaged in professional business like this are constantly in such a situation. He added in the final paragraph:-

> "I might be prepared to accept Professor Lubbe's thesis if there were acceptable evidence of effort, stress or strain. In my view there is no such evidence but only minimal indication that the deceased may have been a little tired for a short time. I am satisfied that the temporal relation-

> ship is important so that if there were any stressful period, it was well separated from the time of death."

In the application for leave to appeal brought before the Compensation Appeal Authority the decision turned on the fact that it was the Authority's task to evaluate the evidence; the Judge preferred Dr Coombes' view, and in all respects his conclusions were findings of fact and not of law. Certainly, the final comment in the passage I have just quoted from his judgment about the temporal relationship would indicate that he favoured Dr Coombes' opinion; but nevertheless, it still leaves me in some doubt whether this was in fact the case, following so closely on the possibility of accepting the contrary view expressed by the Professor. Mr Stewart says that in finding there was no acceptable evidence of effort, stress or strain to fit in with that theory he was, with respect, ignoring the finding at p. 6 of his judgment, implying that the business in New Guinea some days earlier gave rise to such a strain. I think Mr Stewart's comment has some merit. I also share his view that on considering the learned Appeal Authority's remarks at p. 7 in their entirity, it is difficult to escape the conclusion that he was directing his mind only towards the existence of strain or stress objectively regarded. Although he found Mr Rutt engaged in a busy schedule and encountered the usual strain and stress attached to international travel, I am uncertain from the judgment whether he really took into account the other essential feature and asked whether or not such stresses as he undoubtedly found to exist in his schedule of visits - even though they were rather less than those present earlier in New Guinea - were abnormal for him.

At the end of the day, and after hearing Counsel's submissions, I feel there is sufficient merit in Mr Stewart's submissions to warrant the application for leave to appeal being granted. It may well be that had the learned Appeal Authority expressed himself differently, there could have been no doubt about the conclusion reached on the decision refusing leave to appeal - namely, that he had decided the case solely on the assessment and evaluation of evidence and

nothing more than questions of fact were involved. But as I read them, he failed - perhaps only inadvertently - to relate his comments at p.7 in a specific way to the deceased subjectively, and this might mean that he did not apply the proper legal test required by the Act; not only must Mr Rutt have died as the result of effort, strain or stress, but it must also have been abnormal, excessive or unusual for him. The reservations he seemed to have entertained in favour of Professor Lubbe's evidence, when set against his earlier comments about the stressful nature of the New Guinea visit, suggests also that he may not have given sufficient consideration to that as a factor, and leaves it open to some doubt which of the medical specialists he really preferred.

On the whole, I think this is a case where the Court is justified in granting leave because of the doubts I have endeavoured to express. I think the final part of s.168(2) of the Act is appropriate, authorising leave if for any other reason the question involved is one which ought to be submitted to the High Court for decision. Leave is granted accordingly, with costs reserved.

McCasey J.

Solicitors:

Simpson Grierson, Auckland, for Appellant
Accident Compensation Corporation, Wellington, for Respondent