

1936

Present : Fernando A.J.

IN THE MATTER OF AN APPEAL UNDER SECTION 43 OF THE
WORKMEN'S COMPENSATION ORDINANCE
No. 19 OF 1934.

ALICE NONA *et al.* v. WICKREMESINGHE.

425—S. C. (Special).

Workmen's compensation—Death of 'bus driver by ignition of petrol—Accident in course of employment—Computation of wages—Overtime pay included in wages—Ordinance No. 19 of 1934, ss. 2 and 3.

A 'bus driver employed by the appellant lost his life as the result of the ignition of petrol while it was being pumped to a tank under the seat of the driver. The ignition was caused by a match struck by a passenger who was occupying a seat next to the driver,—

Held, the death was caused by an accident arising out of and in the course of employment within the meaning of section 3 of the Workmen's Compensation Ordinance, No. 19 of 1934.

Payment for working overtime is part of wages that should be taken into account in assessing the compensation payable.

THIS was an appeal, under section 48 of the Workmen's Compensation Ordinance, No. 19 of 1934.

Jagodage William was employed by the appellant as a 'bus driver. While petrol was being pumped into the tank which was under the seat of the driver, a passenger who was seated on the seat by the side of the driver lighted a match. This ignited the petrol and caused the death of William. The widow and the minor children of William claimed compensation under section 3 of the Workmen's Compensation Ordinance, No. 19 of 1934. The Commissioner ordered the appellant to pay Rs. 1,350. From this order he has appealed.

Gratiaen, for the appellant.—The accident was caused by an act in breach of a statutory regulation. Hence the appellants are not liable to pay compensation. See *Moore & Co. v. Donnelly*, *Fife Co. v. Sharp*, and *Fife Coal Co. v. Fyfe*¹; *Castells v. Addie & Sons Collieries, Ltd.*²

In calculating the wages the Commissioner had included an item "the batta earned by him which is at the rate of 50 cents for every third day in the month". There is no evidence to show whether this was part of the salary, under the definition of "wages" in section 2 of the Ordinance, no travelling concession can be included in computing the wages. Hence the award of the Commissioner is excessive.

¹ (1921) 1 A. C. 329.

² (1922) 1 A. C. 164.

Senaratne (with him *A. L. Jayasuriya*), for the respondents.—There is no evidence to show that the death was the result of an action in breach of a statutory regulation. Even if it had been in breach of a statutory regulation it is not that of the deceased, it was the act of a third party. Hence the cases cited by the other side would not apply.

With regard to the item "batta", it is a finding of fact, and there is no appeal from the decision of the Commissioner on facts under section 48. The learned Commissioner had found that this amount was paid from the books. There is in evidence that this amount was paid when the driver worked in the night. It cannot be said that this amount was for the expenses of meals or travelling. Hence clearly it does not come within a travelling concession and the learned Commissioner had rightly included it under wages as a benefit paid by the employer to the workman.

Cur. adv. vult.

September 18, 1936. FERNANDO A.J.—

The Commissioner appointed under the Ordinance ordered the appellant to pay to the respondents a sum of Rs. 1,350 as compensation due to them on the ground that the death of Jagodage William had been caused by an accident arising out of and in the course of his employment.

Counsel for the appellant argued first that the accident did not arise out of his employment, but the authorities cited by him show that before he can succeed on this point, it must be proved that William the employee in question was acting in breach of a statutory regulation, and thus was himself responsible for the accident. Counsel has referred me to condition 8 of the conditions as to structure and equipment of minor petroleum installations which requires that the licensee shall take all due precautions for preventing unauthorized persons from having access to any dangerous petroleum, or to any receptacle which contains or has recently contained dangerous petroleum. This condition has to be performed by the licensee, the seller of the petroleum, but casts no duty on the purchaser, and I am not satisfied that the hose with which petroleum is pumped into a car is a receptacle within the meaning of this condition. It is a matter of common knowledge that the hose is in fact handled by almost every purchaser of petroleum, and it is difficult to believe that if such handling is a breach of the condition, it would be so openly allowed. In these circumstances, I must hold that the finding of the Commissioner, that the accident arose out of and in the course of his employment, was correct.

Counsel also argued that the amount of compensation awarded was excessive, inasmuch as the Commissioner wrongly included in the wages earned by the deceased an allowance which had been paid to him as "batta". The evidence, however, does not show that this was a travelling allowance. The appellant in the course of his evidence stated, "When a driver works at night I pay him batta 50 cents. This is a 'santosum', not an agreed allowance". He also produced his book of daily expenditure showing amounts of batta paid to the deceased. In computing the wages earned by the deceased, the Commissioner added to his monthly salary, "the batta earned by him which is at the rate of 50 cents for every third day in the month". The books are not before me, but I understand the Commissioner to mean that he was satisfied on the

evidence, and from the books, that a sum of 50 cents had been paid to the deceased every third day during the months that he was employed. There is no appeal to this Court from the finding of the Commissioner except on a question of law (see section 48 (3)). On the material before me, I am not prepared to say that the Commissioner was wrong when he found that in fact the deceased had been paid 50 cents every third day during the months he was employed. If he had been paid this sum regularly, there is nothing to show that, that sum was intended to cover travelling, that is to say, the cost of travelling. On the other hand the nature of the employment, driving a bus, shows that the deceased when he travelled, did so on his employer's omnibus, and could not have incurred any expenditure in so travelling. Nor is there any evidence to show that the allowance was intended to cover the cost of any meals which the deceased had to find during such travelling. I would therefore hold that the allowance in question was part of the wages received by the deceased as overtime, that is to say, because on every third day he worked more than ordinary number of hours.

I hold against the appellant on both these questions and accordingly dismiss the appeal with costs.

Appeal dismissed.
