

1962

Present : T. S. Fernando, J.

S. PARUPATHY, Appellant, and THE ADDITIONAL CONTROLLER
OF ESTABLISHMENTS, Respondent

S. C. 7 of 1961—*Workmen's Compensation Application C. 2/5/58*

Workmen's Compensation Ordinance (Cap. 139)—Section 3—Accident—"Arising out of employment"—Act done by workman with employer's tacit permission—Liability of employer.

A workman, who was employed under the Government in the capacity of an office labourer, died by accidental electrocution when he opened a refrigerator. It was not denied that the accident arose in the course of deceased's employment. The application of the deceased's widow for compensation was refused on the ground that the deceased had no right, in the course of his duties, to open the refrigerator. The evidence led at the inquiry showed, however, that the deceased had been tacitly permitted, and indeed been expected, to have access to the refrigerator.

Held, that the accident arose "out of the workman's employment" within the meaning of section 3 of the Workmen's Compensation Ordinance.

"Where an employer, in spite of a prohibition of a practice imposed by himself, has tacitly permitted the practice to be followed, 'winked', as it is called, at the disregard of his orders, he cannot be permitted to shield himself from liability."

A PPEAL under the Workmen's Compensation Ordinance.

E. R. S. R. Coomaraswamy, with *E. B. Vannitamby*, for the applicant-appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 11, 1962. T. S. FERNANDO, J.—

One Sinnathamby Sivapuniam was employed under the Government in the capacity of an office labourer at the Divisional Agricultural Office, Trincomalee. He died by accidental electrocution on 10th April 1958. Electrocution resulted from an attempt by Sivapuniam to open a refrigerator which was in the dispensary attached to the office of the Veterinary Surgeon which is situated in the same building as the Divisional Agricultural Office. At the time of this unfortunate accident, it would appear that this refrigerator was being operated by means of a connection unauthorised by the Government's electricity supervisor. There was no earth connection to this refrigerator and it is admitted that its operation in this way was highly dangerous. Why the officers of the Government whose business it was to maintain this refrigerator permitted the unauthorised connection has not been investigated, but this manner of unauthorised operation appears to have gone on for some time.

As office labourer the deceased's work was that of an odd-job man. He had, *inter alia*, to carry letters to the post-office and to other Government offices. When there was no peon or messenger available, he attended to the work of messenger as well. He attended to the sweeping of the office and its compound and did "out-door" work. According to the testimony of the administrative officer, if a clerk or other officer required a packet of cigarettes or a glass of water it was part of the duties of the deceased to fetch them.

Although the veterinary surgeon stated that none save himself, his peon and the vaccinator had a right of access to the refrigerator, it was disclosed in evidence that water was also normally kept in this refrigerator by the deceased who was in the habit of fetching cooled water from it for the use of officers who called for water. The Food Production overseer, Nadarajah, had seen the deceased going towards the refrigerator shortly before the accident with a glass in his hand. Not long after that the deceased was seen lying fallen at the foot of the refrigerator clutching its door as well as a broken glass. Nadarajah concluded that the deceased met with his death in opening the refrigerator for the purpose of obtaining water, but he was unable to say who it was who wanted the water on this occasion. No officer came forward to say that he had requested the deceased to fetch him some water. It does not matter, in my opinion, whether the deceased was on this occasion fetching water for an officer working at the Agricultural Office or pouring it out for himself. It appears to have been the practice to store water in bottles in this refrigerator for the use of all officers without distinction based on rank.

It is interesting to note that the Administrative Officer of the Divisional Agricultural Office, when he reported the accident, after inquiry, to the Director of Agriculture, stated that "the accident occurred *in the course of the deceased's employment* as an office labourer in the office". The language employed in the report is relevant when one bears in mind that the liability to pay compensation under the Workmen's Compensation Ordinance arises under section 3 where injury is caused by accident arising out of and *in the course of his employment*. When this Administrative Officer gave evidence at the statutory inquiry on the application made by Sivapuniam's widow for compensation, he explained that by the above description given in his report he meant that the accident occurred during office hours and whilst the deceased was in service! I have experienced some difficulty in appreciating this subsequent refinement in explanation.

The application for compensation was dismissed, and the dismissal appears to have resulted from the finding by the Deputy Commissioner that the deceased had not been given permission to open or meddle with the refrigerator, i.e., in other words, that the deceased had no right in the course of his duties to open the refrigerator which was maintained by the Government principally for the storage of vaccines.

The question the Commissioner was called upon to decide was whether death was caused by accident arising out of and in the course of the workman's employment. Where an employer, in spite of a prohibition of a practice imposed by himself, has tacitly permitted the practice to be followed, "winked", as it is called, at the disregard of his orders, he cannot be permitted to shield himself from liability—see per Lord Atkinson in *Barnes v. Nunnery Colliery Co., Ltd.*¹ Such evidence as has been led at the inquiry on the application I am concerned with here shows that the deceased was permitted, and indeed expected, to have access to the refrigerator. He was, therefore, exposed to a peril arising out of his employment. It was not denied that the accident arose in the course of the deceased's employment. The dismissal of the application, therefore, resulted from the misdirection on the part of the Deputy Commissioner that the mere transgression of the practice laid down by the veterinary surgeon had the effect of taking the deceased outside the benefits conferred by the Workmen's Compensation Ordinance. The transgression in the circumstances of this case did not have the effect of taking the conduct of the deceased outside the sphere of his employment.

I would set aside the order dismissing the application and hold that issue No. 1 (Did the deceased die as a result of an accident arising out of and in the course of his employment under respondent?) should have been answered in the affirmative. As the amount of compensation has not been determined, I direct that the proceedings be now remitted to the Commissioner for that determination. The applicant is entitled to the costs of the inquiry already held and the costs of this appeal.

Order set aside.
