

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cv. 2007/02055

BETWEEN

THE NATIONAL INSURANCE BOARD OF  
TRINIDAD AND TOBAGO

CLAIMANT

AND

THE NATIONAL INSURANCE APPEALS BOARD OF  
TRINIDAD AND TOBAGO

DEFENDANT

**BEFORE THE HONOURABLE MADAM JUSTICE DEAN-ARMORER**

**APPEARANCES**

Mr. R. Nanga for the Claimant.

Ms. K. Fournillier and Ms. Jackman for the Defendant.

**JUDGMENT**

***Introduction***

1. This is a claim for Judicial Review. Both parties are entities established under the *National Insurance Act*<sup>1</sup> (“*the Act*”). The claimant is the National Insurance Board (“NIB”) and the defendant is the National Insurance Appeals Board (“NIAB”). The claimant seeks judicial review of the defendant’s decision to allow the appeal of Mrs. Kewarie Kassie, who claimed death benefits in respect of her deceased husband, Beharry Kassie. The claimant has contended that the impugned decision ought to be quashed on the grounds of irrationality and illegality. In this judgment the court considered whether the decision ought to be quashed on the stated grounds.

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<sup>1</sup> National Insurance Act Ch. 32:01

### ***Procedural History***

2. On the 29<sup>th</sup> June, 2007, the Honourable Justice Tiwary-Reddy granted leave to the claimant the NIB to apply for the judicial review of the decision of the NIAB made on 19<sup>th</sup> March, 2007 ordering the applicant to pay Death Benefits to the appellant Kewarie Kassie consequent on the death of Beharry Kassie, her husband.
3. Following the grant of leave, the NIB filed its claim form on 11<sup>th</sup> July, 2007. The claim was supported by the affidavit of Kendra Thomas, Legal Officer in the employ of NIB. A supplemental affidavit was later sworn by Ms. Thomas and was filed on the 20<sup>th</sup> of June, 2007. The decision of the NIAB was annexed to Ms. Thomas' supplemental affidavit.
4. Four affidavits were filed on behalf of the NIAB.

The deponents were

- Dr. Rohit Doon.
- Priscilla Sam – Acting Registrar of the NIAB.
- Eugene Tsoi-a-Fatt – Chairman of the NIAB.
- Supplemental Affidavit of Priscilla Sam.

### ***Facts***

5. Both the claimant (the NIB) and the defendant (NIAB) are bodies created under the provisions of the *Act*<sup>2</sup>. The functions of the NIB include the processing and adjudication of claims and in particular, for the purpose of these proceedings, claims for survivor's benefits and death benefits.
6. The NIAB is a body constituted by section 60 of the *Act*<sup>3</sup>. The NIAB is responsible for deliberating on appeals from decisions of the NIB.
7. On 24<sup>th</sup> June, 2004, the NIB adjudicated on the claim made by Kewarie Kassie. The undisputed facts are that Mrs. Kassie made an application to the NIB for death benefits

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<sup>2</sup> National Insurance Act Ch. 32:01.

<sup>3</sup> Ibid.

following the death of her husband Beharry Kassie. It was not disputed that Mr. Kassie had been employed as a lorry loader with the Tunapuna/Piarco Regional Corporation and that he fell ill and died while assisting a driver to move a wrecked vehicle.

8. The application of Mrs. Kassie was supported by copies of the birth and death certificates of the deceased, the marriage certificate of Mr. and Mrs. Kassie. The death certificate stated the following as the cause of death:

*“acute left ventricular failure dilated cardiomy opaty ishaemic heart disease ...”*

9. The NIB disallowed Ms. Kassie’s claim for the death benefit. Their decision was based on the advice of the claimant’s medical advisor who indicated that Mr. Kassie’s death was the result of a pre-existing medical condition and was not as a result of injury arising out of and in the course of employment.

10. Mrs. Kassie lodged a Notice of Appeal on 9<sup>th</sup> November, 2005. The NIAB relied on the opinion of the Chief Medical Officer, Dr. Rohit Doon, who expressed the view that Mr. Kassie’s death was caused by the strenuous activity in which he had been engaged on the day of his passing.

11. The decision of the NIAB was delivered on 19<sup>th</sup> March, 2007. The following is extracted from the decision of the NIAB:

*“The Chief Medical Officer heard the details of the activity which the appellant was engaged in ... that is to say working as a Lorry Loader and assisting in lifting a vehicle onto a wrecker, which in so doing he collapsed and died ... after hearing the facts ... the Chief Medical Officer concluded that the activity of lifting a vehicle onto a wrecker would have precipitated the appellants’ heart attack which eventually led to death.*

*Based upon the advice of the Chief Medical Officer the Tribunal concluded that the death was caused as a result of an accident which arose out of and in the course of the appellant’s employment ...”*

Accordingly, the NIAB allowed the appeal.

11. The documents placed before the NIAB were presented in the Report of Appeal which included a brief history of the appellant's case and the Record of Appeal which was comprised of the following documents:
- a. the application for death benefit.
  - b. the Notice of Appeal.
  - c. the Board's letter of 5<sup>th</sup> June, 2006
  - d. a letter of 1<sup>st</sup> March, 2004 from the Piarco Regional Corporation.
  - e. a copy of Mr. Kassie's death certificate.
  - f. the Board's Minute Sheet containing the Medical Advisor's Report.
  - g. the appellant's letter withdrawing her claim for survivor's benefit.

The appeal was listed as a Medical Appeal.

12. Chief Medical Officer Dr. Rohit Doon was a member on the panel of the NIAB. He provided the reasons which informed his decision by way of his affidavit filed herein on 18<sup>th</sup> July, 2008. At paragraph 9, Dr. Doon stated that after hearing submissions on both sides, he was asked to advise the Tribunal on the evidence before it as to the cause of Mr. Kassie's death.

13. Dr. Doon stated his understanding of his task in this way:

*"The challenge before me ... was to interpret the cause of death as contained in the death certificate and assess whether Mr. Kassie died as a result of a pre-existing heart condition or whether the lifting of the vehicle caused his death"*<sup>4</sup>

Dr. Doon stated further that he considered the opinion of the Board's Medical Advisor. The Board's Medical Advisor expressed his view in this way:

*"The ... insured was probably suffering from a heart condition and the acute left ventricular failure may have been precipitated by the episode at work though I note that ... wife stated that insured complained of feeling ill before leaving for work ..."*<sup>5</sup>

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<sup>4</sup> See paragraph 10 of the affidavit of Dr. Rohit Doon filed on 18<sup>th</sup> July, 2009.

<sup>5</sup> This document was included in the Record of Appeal exhibited as PS 3 to the affidavit of Priscilla Sam.

The opinion of the Medical Advisor was handwritten on a minute sheet, which was copied and included in the Record of Appeal<sup>6</sup>.

14. Dr. Doon expressed his view on the opinion of NIB's medical advisor.

*"In my opinion the Board's Medical Advisor was on the right track. He was alluding to the possibility that the activity in which Mr. Kassie was engaged in precipitated his death ..."*<sup>7</sup>

15. Dr. Doon provided a medical definition of "ischemia" and stated that is a chronic condition and can be exacerbated by heavy physical activity"<sup>8</sup>.

16. At paragraph 15, Dr. Doon stated that there was no medical evidence as to the precise extent of Mr. Kassie's pre-existing heart condition. Dr. Doon expressed his view in this way:

*"Based on my medical experience and knowledge, I took the view that both the task which he was engaged in at the time when he collapsed and his pre-existing heart conditions were factors related to his death. However it was clear to me that the physical activity of assisting with lifting the heavy vehicle ...precipitated his death ..."*

Dr. Doon concluded at paragraph 16:

*"Since death coincided with the lifting of the heavy vehicle, I concluded that Mr. Kassie died at that time because he was lifting the heavy vehicle ..."*

17. The Record of Appeal also included a report from the Transport Foreman, Tunapuna/Piarco Regional Corporation. This letter stated that Mr. Kassie had been called upon, in the course of his employment, to lift a derelict vehicle onto a wrecker. Mr. Kassie collapsed while lifting the vehicle and was pronounced dead upon his arrival at the health centre.

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<sup>6</sup> Exhibited as "P.S.:4" to the supplemental affidavit of Priscilla Sam filed on 15<sup>th</sup> March, 2010.

<sup>7</sup> See paragraph 12 of Dr. Doon's affidavit.

<sup>8</sup> Ibid at paragraph 13.

## ***Submissions***

18. Learned attorneys-at-law presented written submissions, which were subsequently supplemented by oral submissions.
19. The Court has found it necessary to summarise the in-depth submissions on behalf of the claimant. Learned Counsel for the claimant, in his written submissions restated his grounds. In respect of the ground of illegality, Learned Counsel argued as follows:
- That the respondent incorrectly stated the issue before them<sup>9</sup>.
  - That Dr. Doon’s findings did not find their way into the NIAB’s decision and this constituted a critical error on the part of the respondent<sup>10</sup>
  - Dr. Doon acted outside of Regulations 19 and 20 of the ***National Insurance Appeals Regulations***<sup>11</sup>, which define his role and functions<sup>12</sup>.
  - Learned Attorneys questioned the explanation provided by the chairman Eugene Tsoi-a-Fatt and submitted that the respondent failed to take into account the findings of the C.M.O..
  - Learned attorneys submitted that the Chairman failed to consider the death certificate and argued that the NIAB was obliged to accept the cause of death as stated on the death certificate and that the findings of the respondent were inconsistent.
  - On that basis Learned Counsel argued that the findings of the respondent were irrational in this way:  
*“... the lack of medical evidence before the respondent and the contents of the death certificate ... certificate based on the material that was before the respondent, no reasonable body could have arrived at the decision that the cause of death was accidental ... .”*<sup>13</sup>

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<sup>9</sup> Written submissions on behalf of the claimant paragraph 6.

<sup>10</sup> Ibid at paragraph 8.

<sup>11</sup> National Insurance (Appeals) Regulations Chap. 32:01

<sup>12</sup> Written submissions on behalf of the claimant paragraph 9.

<sup>13</sup> *ibid*

- Learned Counsel argued that the decision was contrary to section 46(3)(c)(i) of the *Act*<sup>14</sup>, because the deceased did not die from a work-related injury.
- Learned Counsel for the claimant argued that the decision ought to be set aside because it was against the weight of the evidence and argued that the overriding consideration of the respondent for the finding that death was accidental was based upon the advice of Dr. Doon<sup>15</sup>.
- Learned Counsel argued that the C.M.O. went beyond his role in determining that death was caused by lifting the vehicle to the exclusion of the cause of death on the death certificate<sup>16</sup> and that the NIAB took into account the opinion of the C.M.O. and failed to consider the contents of the death certificate<sup>17</sup>
- The claimant contended that the decision was contrary to law, on the ground that the C.M.O. acted outside of his powers.

### ***Law***

Section 46 of the *Act*<sup>18</sup> sets out benefits payable in respect of insured persons. At section 46(3), the *Act*<sup>19</sup> provides:

*“subject to this Act, employment injury benefit shall be paid to or in respect of persons insured under section 37 and such benefit may be in the nature of*

*(c) a death benefit where the insured person dies as a result of the injury.”*<sup>20</sup>.

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<sup>14</sup> National Insurance Act Ch. 32:01.

<sup>15</sup> Written submissions for the claimant paragraph 48.

<sup>16</sup> Written submission of the claimant paragraph 50.

<sup>17</sup> Ibid paragraph 51

<sup>18</sup> National Insurance Act Ch. 32:01

<sup>19</sup> Ibid

<sup>20</sup> Ibid

20. Section 37(1) provides:

*“Every employed person ... shall be insured in the manner provided by this Act and Regulations against personal injury caused ... by accident arising out of and in the course of that person’s employment.”<sup>21</sup>*

In their written submissions, learned attorneys-at-law referred to Regulation 19 of the *National Insurance (Appeals) Regulations*<sup>22</sup> which provides:

*“19. (1) Before an appeal involving questions of a medical nature is determined, the Chief Medical Officer shall advise the Chairman either orally or in writing on*

- a. whether or not the appeals tribunal should obtain further expert medical advice;*
- b. who should furnish this advice; and*
- c. whether the appellant’s doctor or the Board’s medical adviser should be invited to attend.*

*(2) Where evidence of a medical nature is given to a medical appeals tribunal the Chief Medical Officer shall evaluate this evidence and explain it to the other members.*

*20. Where a medical practitioner gives evidence before a medical appeals tribunal all questions of a medical nature shall be put to him by the Chief Medical Officer who shall submit to the medical appeals tribunal a report on the medical issues involved.*

*32. An appeals tribunal is not bound by the strict rules governing the admissibility of evidence, but where the appellant or other witnesses are available to give evidence, on question of fact in issue they must be called, and a statement intended to support such evidence is inadmissible in such event.”<sup>23</sup>*

### ***Reasoning and Decision***

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<sup>21</sup> *ibid*

<sup>22</sup> National Insurance (Appeals) Regulations Chap. 32:01

<sup>23</sup> National Insurance (Appeals) Regulations Chap. 32:01



21. In this application for judicial review the claimant relies on two grounds:
- that the decision of the NIAB was illegal having regard to the provisions of section 46 of the “*Act*”; and
  - the decision was irrational.
22. The claimant contends further that in its deliberations the NIAB took into account irrelevant considerations and/or failed to take into account relevant considerations.

### ***Irrationality***

23. The test of irrationality for the purposes of judicial review continues to be that outlined by Lord Diplock in *CCSU v Minister for the Civil Service*<sup>24</sup>
- By “irrationality” I mean what can now be succinctly referred to as “wednesbury unreasonableness...”. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*<sup>25</sup>.
24. In my view, the impugned decision falls far short of the *CCSU* test. The process of reasoning which informed the NIAB’s decision may be found in the affidavit of the C.M.O., Dr. Rohit Doon.
25. It is clear from the affidavit of Dr. Doon that the C.M.O. accepted the cause of death as that stated in the medical certificate. Applying his own experience to the stated cause, Dr. Doon concluded that a pre-existing medical condition may have been exacerbated by heavy physical activity. Dr. Doon explained that the exercise of lifting the vehicle required the heart to work harder to support the heavy exertion. In my view it is incorrect, as suggested by the claimant, that Dr. Doon departed from the cause of death as stated on the certificate. In my view it is a more accurate analysis that Dr. Doon made inferences and conclusions on the basis of the cause as stated in the certificate.

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<sup>24</sup> [1985] A.C. 374.

<sup>25</sup> *Ibid* at page 410.

26. The NIAB acted on the advice of the C.M.O. In my view, the explanation provided, far from being in defiance of logic and accepted moral standards, is perfectly logical and compliant with accepted moral standards. In my view therefore, the claimant has failed to meet the high threshold of proving that the decision was irrational.

### ***Illegality***

27. The test of illegality was also formulated by Lord Diplock in *CCSU*<sup>26</sup>

*“By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it ...”*<sup>27</sup>.

28. The relevant statutory provisions which governed the decision-making power of the respondent are sections 37, 46 and 62 of the *Act* as well as the provisions of the *National Insurance Appeals Regulations*.<sup>28</sup>

29. In their submissions on the ground of illegality learned attorneys for the claimant relied heavily on regulation 19 and 20 of the *National Insurance Appeals Regulations*<sup>29</sup>. The claimant’s attorneys contended that these regulations define the role and function of the C.M.O., when sitting on a medical appeal.

30. It must be observed from the outset that by its plain ordinary meaning, regulation 20 is entirely irrelevant to these proceedings. Regulation 20 (set out in full above) pertains to an appeal where:

*“ a medical practitioner gives evidence before a medical appeals tribunal  
... ”*<sup>30</sup>

It is clear from a perusal of the Record of Appeal that no medical practitioner gave evidence before the medical tribunal. This regulation is therefore irrelevant.

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<sup>26</sup> Supra [1985]A.C. 374.

<sup>27</sup> Ibid at 410

<sup>28</sup> National Insurance (Appeals) Regulations Chap. 32:01

<sup>29</sup> ibid

<sup>30</sup> National Insurance (Appeals) Regulations Chap. 32:01 reg. 20.

31. The claimant relies also on regulation 19, which addresses advice that ought to be provided by the C.M.O. to the Chairman in cases of medical appeals. There is no evidence to suggest that there was no compliance with this provision. In my view the claimant has failed to establish non-compliance with this regulation.

32. The regulation which in my view guides the respondent in its conduct of medical appeals is regulation 21, which provides as follows:

*“In any appeal involving questions of a medical nature the medical appeals tribunal shall be guided on the medical issues by the advice and explanations given by the Chief Medical Officer ...<sup>31</sup>”.*

33. The fact that the NIAB complied with regulation 21 is borne out in their decision<sup>32</sup>:

*“The Chief Medical Officer heard the details of the activity which the Appellant was engaged in after hearing the facts, the Chief Medical Officer concluded that the activity of lifting a vehicle unto a wrecker would have precipitated the Appellant’s heart attack ...*

*Based on the advice of the Chief Medical Officer the Tribunal concluded that the death was caused as a result of the accident which arose out of and in the cause (sic) of the Appellant’s employment ...”*

The Tribunal was required to be and were in fact guided by the advice of the C.M.O.

34. The claimant has contended that the decision of the NIAB was flawed for illegality in that it was contrary to section 46(3)(c)(ii) of the *Act*. This section must be read together with section 37, which provides for insurance for personal injury caused by accident. Section 46(3)(c)(ii) provides for the compensation available where the personal injury results in death.

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<sup>31</sup> National Insurance Appeals Regulations reg. 21.

<sup>32</sup> Exhibited as “f” to the supplemental affidavit of Kendra Thomas.

35. By his interpretation of the death certificate as well as his interpretation of the advice of the claimant's medical advisor, the C.M.O. inferred that Mr. Kassie (deceased) suffered a sudden heart attack which arose out of and in the course of his employment. This was a finding of fact, the correction which does not fall within the jurisdiction of a reviewing court. It is trite law that a court does not act in an appellate capacity when hearing application for judicial review. It does not fall to this Court to substitute its own views for that of the C.M.O. If it cannot be said that the decision maker failed to understand the legal limits of its decision-making power or failed to exercise its power within those limits, the ground of illegality ought to fail as it does in these proceedings.
36. I turn now to consider whether the impugned decision should be quashed on the ground that the NIAB took into account irrelevant considerations and failed to take into account relevant considerations.
37. By their submissions, learned attorney-at-law for the claimant argued that the decision was against the weight of the evidence and that the respondent relied on the evidence of Dr. Doon.
38. The Court will set aside a decision where there is an absence rather than an insufficiency of evidence. Weight of evidence remains a matter for the inferior court. See *R v Nat Bell Liquors Ltd*<sup>33</sup>.
39. In so far as the claimant complains that the NIAB acted on the advice of Dr. Doon it is necessary only to have recourse to regulation 21 to assert that the NIAB was correct in so doing.

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<sup>33</sup> *R v Nat Bell Liquors Ltd*<sup>33</sup> [1922] 2 A.C. 128

40. In my view, the claimant has failed to substantiate any of its stated grounds. The claim for judicial review ought to be and is hereby dismissed. It is hereby ordered that the claimant pay to the defendants costs.

Dated this 24<sup>th</sup> day of April, 2012.

M. Dean-Armorer  
Judge<sup>34</sup>

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<sup>34</sup> Judicial Research Assistant  
Judicial Secretary

Ms. Kendy Jean  
Mrs. Irma Rampersad