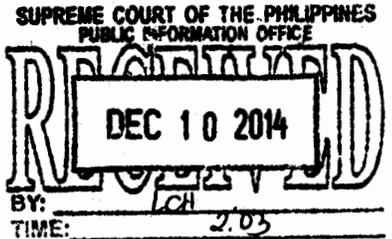




Republic of the Philippines
Supreme Court
Manila
THIRD DIVISION



NOTICE

Sirs/Mesdames:

Please take notice that the Court, Third Division, issued a Resolution dated November 12, 2014, which reads as follows:

“G.R. No. 207420 (NYK-FIL Shipmanagement, Inc., Josephine A. Francisco/TMM Co., Ltd., Tokyo, Japan vs. Elpidio A. Dela Cruz). – The transmittal letter dated October 20, 2014 of the Court of Appeals (CA), Manila, elevating to this Court the CA rollo and original records of this case is NOTED.

The instant Petition for Review on *Certiorari*¹ assails the Decision² dated July 30, 2012 and Resolution³ dated May 31, 2013 of the Court of Appeals (CA) in CA-G.R. SP No. 118449.

Elpidio A. Dela Cruz (Elpidio) was hired by NYK-FIL Shipmanagement, Inc. (NYK), for and in behalf of its principal, TMM Co., Ltd., to assume the position of a boatswain⁴ on board the vessel *Grand Pacific*. He joined the vessel at the Port of Kashima, Japan on June 13, 2006. His contract covered a period of nine (9) months and his monthly salary was US\$566.00.⁵

On January 5, 2007, big waves lashed while Elpidio and his fellow crew members were laying out the mooring wire at the forward section of the vessel. Elpidio fell backwards and hit the steel railings. He suffered excruciating pain. Upon examination, the vessel’s Able Seaman discovered a contusion or a lump in Elpidio’s back near his waist.⁶

¹ Rollo, pp. 3-27.

² Penned by Associate Justice Ricardo R. Rosario, with Associate Justices Elihu A. Ybañez and Leoncia Real Dimagiba, concurring; id. at 35-47.

³ Id. at 68.

⁴ Defined as “an officer on a ship whose job is to take care of the main body of the ship and all the ship’s equipment” < <http://www.merriam-webster.com/dictionary/boatswain> > (visited on November 6, 2014)

⁵ Rollo, p. 36.

⁶ Id.

When the vessel once again reached Port Kashima, Elpidio was taken to the hospital. He underwent X-ray and CT scan examinations. Per Medical Report⁷ dated March 6, 2007, Elpidio suffered from *contusion of back with suspicion of lumbar intervertebral disc hernia*. Despite the foregoing findings, Elpidio was declared fit for sea duty and was merely given analgesics and external wet dressings. However, the hospital recommended the conduct of a Magnetic Resonance Imaging (MRI) Scan upon his return to the Philippines after the expiration of his contract, which was then still a month away. Elpidio continued working for another 45 days as the vessel proceeded to the Persian Gulf to load oil.

On April 29, 2007, Elpidio returned to the Philippines. NYK referred him to the Metropolitan Medical Center (MMC) under the management of Dr. Robert D. Lim (Dr. Lim). Elpidio underwent X-ray and MRI scans, and thereafter, physical therapy under the care of Dr. Rodolfo V. Frez (Dr. Frez), an orthopedic surgeon.⁸

Elpidio claimed that sometime in July of 2007, Dr. Lim's medical staff informed him of the cessation of his physical therapy treatment. Elpidio was advised to go to NYK's office if he has any other concerns. A certain Jing Perez and a Crewing Manager in NYK's office then informed Elpidio that because of the injuries he sustained, he should no longer lift heavy objects. Elpidio inquired from them if the doctor, who attended to him, had made any disability assessment. The two answered that they did not have information regarding the matter. Elpidio was advised to rest.⁹

On July 12, 2007, Dr. Frez assessed that Elpidio suffered from *herniated disc disease*, but which was resolved. Elpidio's low back pains were reduced through the intake of non-steroidal anti-inflammatory drugs and the conduct of physical therapy. Dr. Frez's plan for Elpidio included a *complete rehabilitation therapy* and the continued intake of *non-steroidal anti-inflammatory drugs as necessary*. Dr. Frez advised Dr. Lim that Elpidio may be given a fit to work status.¹⁰

On even date, Elpidio executed a Certificate of Fitness for Work¹¹ releasing NYK from liabilities arising from the injuries he sustained while on board the *Grand Pacific*. Dr. Mylene Cruz-Balbon (Dr. Balbon), Assistant Medical Coordinator of the Marine Medical Services in MMC,

⁷ CA rollo, p. 49.

⁸ Rollo, p. 37

⁹ Please see "*Sinumpaang Salaysay*," CA rollo, pp. 53-56, at 54.

¹⁰ Id. at 110.

¹¹ Id. at 111.

also issued a medical report¹² indicating that Elpidio is “now asymptomatic” and fit to work. He was advised, however, “to observe proper back mechanics to minimize recurrence of back pain[s].”

On January 17, 2008, Elpidio filed a complaint for disability benefits, reimbursement of medical expenses, illness allowance, damages and attorney’s fees against NYK, Josephine A. Francisco, and TMM Co., Ltd.¹³

Thereafter, on September 6, 2008, Elpidio consulted another orthopedic surgeon, Dr. Nicanor F. Escutin (Dr. Escutin), who prepared a Disability Report¹⁴ stating that the former is permanently-disabled and *unfit for sea duty*. The said report partially reads as follows:

PERTINENT PHYSICAL EXAMINATION

GENERAL SURVEY: Conscious, coherent, ambulatory, uses a back brace

BACK EXAMINATION:

- Straightening of lumbar area / Tenderness on deep palpation at the low back
- Difficulty of raising self from lying position
- Bending/twisting is difficult and painful
- Leg raising test up to 25 degrees
- Numbness, weakness of the lower extremity
- Cannot tolerate prolonged standing and sitting
- Cannot walk for a long distance without feeling of back pain

FINAL DIAGNOSIS

- **HERNIATED NUCLEOUS PULPOSUS¹⁵ T6/T7, L5/S1**
- **NERVE RADICULOPATHY¹⁶ S1**
- **VERTEBRAL HEMANGIOMA,¹⁷ T1 & T3**

¹² Id. at 109.

¹³ *Rollo*, p. 6.

¹⁴ *CA rollo*, pp. 51-52.

¹⁵ A condition in which part or all of the soft, gelatinous central portion of an intervertebral disk is forced through a weakened part of the disk, resulting in back pain and nerve root irritation. <http://www.nlm.nih.gov/medlineplus/ency/imagepage/9700.htm> (visited on November 6, 2014)

¹⁶ **Radiculopathy** is a condition due to a compressed nerve in the spine that can cause pain, numbness, tingling, or weakness along the course of the nerve. x x x

x x x x

Risk factors for radiculopathy are activities that place an excessive or repetitive load on the spine. Patients involved in heavy labor or contact sports are more prone to develop radiculopathy than those with a more sedentary lifestyle. A family history of radiculopathy or other spine disorders also increases the risk of developing radiculopathy.

x x x x

Radiculopathy is caused by compression or irritation of the nerves as they exit the spine. This can be due to mechanical compression of the nerve by a disc herniation, a bone spur (osteophytes) from osteoarthritis, or from thickening of surrounding ligaments.

http://www.medicinenet.com/radiculopathy/article.htm#what_is_radiculopathy (visited on November 6, 2014)

¹⁷ A hemangioma is a noncancerous, slow-growing tumor, made of newly formed blood vessels. <http://livehealthy.chron.com/vertebral-hemangioma-1046.html> (visited on November 6, 2014)

DISABILITY RATING:

x x x His MRI showed that he sustained slipped disc at level T6/T7 and L5/S1 which are pressing on his nerve roots. x x x He had physical therapy for almost a year but there was no improvement on his condition. He ha[s] now numbness of his lower extremity. He should have undergone operation (Laminectomy/Dissectomy) to remove the protruding disc pressing on his nerve roots. Since he has not undergone any surgical procedure, his condition would worsen if he [would] continue working as a seaman.¹⁸

On May 5, 2010, Labor Arbiter Lilia S. Savari (LA Savari) dismissed Elpidio's complaint. LA Savari declared that Elpidio had belatedly filed his complaint and consulted his own doctor more than one year after he was declared fit to work. Elpidio's activities were no longer within NYK's control and supervision. Hence, it cannot be conclusively stated that Elpidio's disability was the direct result of the accident he had sustained while on-board the *Grand Pacific*.¹⁹

Aggrieved, Elpidio appealed to the NLRC insisting on his entitlement to US\$110,000.00 disability benefits under the International Bargaining Forum Japan Seamen's Union/Associated Marine Officers & Seamen's Union of the Philippines - International Mariners Management Association of Japan Collective Bargaining Agreement.²⁰

On October 18, 2010, the Second Division of the National Labor Relations Commission (NLRC) affirmed²¹ LA Savari's decision on the ground that "it is the company-designated physician [who] should either assess [the] disability or declare [the] fitness to work of a seafarer."²² The NLRC subsequently denied Elpidio's motion for reconsideration.²³

The CA thereafter granted Elpidio's petition which challenged the NLRC's ruling. Elpidio was awarded US\$110,000.00 as permanent total disability benefits, "10% of which shall be given as and for attorney's fees."²⁴

In the herein assailed decision, the CA declared that "[t]he determination of fitness for sea duties is not the exclusive prerogative of the company physician."²⁵ The contrary opinion of the seafarer's own doctor of

¹⁸ CA rollo, pp. 51-52.

¹⁹ Id. at 33-40.

²⁰ Id. at 57-86.

²¹ Id. at 22-28.

²² Id. at 27.

²³ Id. at 30-31.

²⁴ Rollo, p. 46.

²⁵ Id. at 42.

choice “may be used as basis in determining the extent of [a seafarer’s] injuries and his [or her] entitlement to disability benefits.”²⁶ Further, the reports of NYK’s company-designated doctors “were not absolutely certain that [Elpidio] was at [that] time already fit to resume sea duties.”²⁷ The doctors’ advice for Elpidio to observe proper back mechanics to minimize the recurrence of back pains only proved that he had not yet fully recovered from his injuries. Elpidio cannot realistically follow the doctors’ advice if he would continue working as a boatswain.²⁸

Unperturbed, NYK now alleges that the CA erred in (a) giving credence to the findings of Dr. Escutin, who was belatedly consulted once after more than one year from the issuance by the company-designated doctors of Elpidio’s fit to work certificate,²⁹ and (b) awarding attorney’s fees without stating the basis therefor.³⁰

The Court affirms but modifies the CA’s decision.

*Maersk Filipinas Crewing, Inc./Maersk Services Ltd. v. Mesina*³¹ is instructive anent how the court should consider the assessments of company-designated doctors *vis-à-vis* those of doctors chosen by the seafarers themselves, *viz*:

In determining the work-causation of a seafarer’s illness, the diagnosis of the company-designated physician bears vital significance. After all, it is before him that the seafarer must initially report to upon medical repatriation pursuant to above terms. Nevertheless, the company physician’s assessment does not evince irrefutable and conclusive weight in assessing the compensability of an illness as the seafarer has the right to seek a second opinion from his preferred physician.

The conflicting findings of the company’s doctor and the seafarer’s physician often stir suits for disability compensation. As an extrajudicial measure of settling their differences, the POEA-SEC gives the parties the option of agreeing jointly on a third doctor whose assessment shall break the impasse and shall be the final and binding diagnosis.

While it has been held that failure to resort to a third doctor will render the company doctor’s diagnosis controlling, it is not the absolute and automatic consequence in all cases. This is because resort to a third doctor remains a mere directory not a mandatory provision as can be

²⁶ Id. at 43.

²⁷ Id. at 44.

²⁸ Id. at 27.

²⁹ Id. at 11.

³⁰ Id. at 20.

³¹ G.R. No. 200837, June 5, 2013, 697 SCRA 601.

gleaned from the tenor of Section 20(B)(3), POEA-SEC³² itself. Further, the right of a seafarer to consult a physician of his choice can only be sensible when his findings are duly evaluated by the labor tribunals in awarding disability claims.

Hence, it has been held that if serious doubt exists on the company designated physician's declaration of the nature of a seaman's injury, resort to prognosis of other competent medical professionals should be made. In doing so, a seaman should be given the opportunity to assert his claim after proving the nature of his injury. This proof will in turn be used to determine the benefits rightfully accruing to him.³³ (Citations omitted and underscoring ours)

Otherwise stated, the assessment of company-designated doctors need not be controlling even when the parties did not seek the evaluation by a third doctor of the seafarer's condition.

In the instant petition, the final diagnosis of Dr. Frez and Dr. Balbon, on one hand, and Dr. Escutin, on the other, did not substantially differ from each other. Both essentially indicated "*S1 Radiculopathy*," "*T6/T7 Disc Bulges*," "*L5/S1 Disc Protrusions*," and "*Vertebral Hemangiomas*." The doctors, however, did not make the same assessment as to Elpidio's fitness for sea duty. Dr. Frez and Dr. Balbon found Elpidio fit for work, but advised complete rehabilitation therapy and the observance of proper back mechanics. On his part, Dr. Escutin indicated in his report that despite the administration of physical therapy, Elpidio's condition had worsened. Surgical procedures as laminectomy/dissectomy could have removed the protruding disc pressing on Elpidio's nerve roots. Since the procedures were not performed, Elpidio can no longer work as a boatswain.

The Court agrees with the CA in giving more evidentiary weight to the assessment of Dr. Escutin. Dr. Frez and Dr. Balbon belied their own

³² SECTION 20. COMPENSATION AND BENEFITS

x x x x

(B) COMPENSATION AND BENEFITS FOR INJURY OR ILLNESS

x x x x

3. Upon sign-off from the vessel for medical treatment, the seafarer is entitled to sickness allowance equivalent to his basic wage until he is declared fit to work or the degree of permanent disability has been assessed by the company-designated physician but in no case shall this period exceed one hundred twenty (120) days.

For this purpose, the seafarer shall submit himself to a post employment medical examination by a company-designated physician within three working days upon his return except when he is physically incapacitated to do so, in which case, a written notice to the agency within the same period is deemed as compliance. Failure of the seafarer to comply with the mandatory reporting requirement shall result in his forfeiture of the right to claim the above benefits.

If a doctor appointed by the seafarer disagrees with the assessment, a third doctor may be agreed jointly between the employer and the seafarer. The third doctor's decision shall be final and binding on both parties. (Underscoring ours)

³³ Supra note 31, at 615-616.

declarations that Elpidio is fit to work when they advised complete rehabilitation therapy, intake of non-steroidal anti-inflammatory drugs when needed, and the observance of proper back mechanics. If Elpidio had completely recovered from his injuries, the foregoing would have been dispensable. Further, Elpidio's claim that he was advised to rest by NYK personnel was not disputed by the latter. It is not surprising therefore that it took a while before he filed a complaint for disability benefits.

In *Crystal Shipping, Inc. v. Natividad*,³⁴ this Court defined permanent and total disabilities in the following manner:

Permanent disability is the inability of a worker to perform his job for more than 120 days, regardless of whether or not he loses the use of any part of his body. x x x.

Total disability, on the other hand, means the disablement of an employee to earn wages in the same kind of work of similar nature that he was trained for, or accustomed to perform, or any kind of work which a person of his mentality and attainments could do. It does not mean absolute helplessness. In disability compensation, it is not the injury which is compensated, but rather it is the incapacity to work resulting in the impairment of one's earning capacity.³⁵ (Citations omitted)

In Elpidio's case, records do not show that he was re-employed as a boatswain by NYK or by any other manning agency after his return to the Philippines in April of 2007. This is the most eloquent proof of his permanent disability.³⁶

The Court, however, finds the CA's award of attorney's fees as without sufficient basis. Elpidio had not amply proven his entitlement to it. NYK had shouldered the cost of Elpidio's medical examinations and physical therapy. Although Elpidio did not fully recover from his injuries, the Court cannot ascribe bad faith on the part of NYK.

WHEREFORE, premises considered, the Decision dated July 30, 2012 and Resolution dated May 31, 2013 of the Court of Appeals in CA-G.R. SP No. 118449 are **AFFIRMED** with the **MODIFICATION** that

³⁴ 510 Phil. 332 (2005).

³⁵ Id. at 340-341.

³⁶ Supra note 31, at 619-620.

the award of attorney's fees is **DELETED**. (*Peralta, J., on leave; Perlas-Bernabe, J., designated as Acting Member per Special Order No. 1866 dated November 4, 2014.*)”

Very truly yours,


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12/1/14

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