

HONG KONG / JUDGMENT

CHEUNG WAI HUNG v. BILLION PROJECT LTD

COURT

District Court

DECIDED

10 July 2007

CASE / FILE NUMBER

DCEC331/2003

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bjbj DCEC331/2003 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION EMPLOYEES COMPENSATION CASE NO. 331 OF 2003

BETWEEN CHEUNG WAI HUNG Applicant and BILLION PROJECT LIMITED Respondent

Coram: Deputy District Judge K Lo in Court Date of Hearing: 10 July 2007 Date of Delivery of
Judgment: 10 July 2007

J U D G M E N T

Background

This is an employees compensation claim by the Applicant, who alleged that he was injured on 26 April 2002 whilst working in the course of employment with the Respondent. He now claims compensation under sections 9, 10 and 10A of the Employees Compensation Ordinance (the ordinance). The Respondent was absent today. In fact, he has not responded to the proceedings herein except filing an answer. In the answer, the Respondent denied that the Applicant was in his employment at the material times and/or that he was injured whilst in the course of employment. Applicant s case According to the Applicant who was aged 25 at the time of the accident, on 20 October 2001 both parties had entered into a delivery service contract (the Contract) . According to this Contract, the Respondent is responsible for the provision of the vehicle, all expenses in relation to the repair and maintenance of the vehicle, including but not limited to, oil fee, parking fee, etc. The Contract further provides that the Applicant shall provide such delivery service between 7.30 am to 6.30 pm each day, and that if the Applicant was late in

starting work for the day, the Respondent shall be entitled to such damages for loss of business for the day. It was also provided in the Contract that the Applicant shall be responsible for any loss and damages to the vehicle resulting from his own negligence. Again, the Contract stipulates that all traffic penalty tickets issued, not due to fault of the Applicant, shall be paid by the Respondent. The Contract also provides that the Respondent shall decide when the vehicle was to be sent for regular checks. Parties agree also that they need to terminate the Contract with one month's notice. Applicant said under the Contract, he was entitled to 30% of the delivery charges charged to clients and the Respondent would get 70% of the same. However, Applicant said the Respondent guaranteed the Applicant the minimum delivery charges he would get from the Contract was \$8,000 per month. Applicant in Court today said that during the Contract period, he could not deliver goods for other parties. He further says that the goods he delivered for the Respondent were the sand materials used in construction. Applicant said that each day he would go to the Anderson Quarry to collect the vehicle parked there and provided by the Respondent for use at work. After each day's work, he had to return the vehicle to the same place. During the day, he would follow instructions of the Respondent, deliver goods from the quarry to, and unload at, designated construction sites. The Accident The Applicant said on the day in question after he had arrived at the construction site near Lei Yue Mun, Kwun Tong, Kowloon, he got off the car to the rear of the vehicle and tried to detach the tailboard to unload the goods. He discovered that the coupling of the tailboard was not well maintained and could not be loosened. He therefore used a hammer to hit the same, intending therefore to detach the tailboard. During the process, a small metal piece flew into his left eye and his left eye was injured. He was later taken to the Accident and Emergency Department of the United Christian Hospital for treatment. Treatments and injuries Applicant said due to the eye injury sustained in the accident he was granted the following sick leave periods, i.e. 26 April 2002 to 29 May 2002, 3 July 2002 to 16 October 2002, 13 February 2004 to 23 February 2004 and 5 March 2004 to 3 April 2004, totalling 181 days. He had produced all sick leave certificates from United Christian Hospital for these periods to this court. Applicant said during these sick leave periods he was paid nothing by the Respondent. Applicant said further that subsequent to the operation and treatment to his left eye, the eyesight of his left eye was not as before. He said prior to the accident, he enjoyed perfect eyesight with no need for any spectacles. As a result of the eyesight problem he had said he could not return to his job as a driver. He had also incurred medical expenses totalling \$2,580. Again, he has exhibited all receipts from United Christian Hospital covering the said sum. He said he now worked as a painting worker earning \$6,000 per month. The Applicant was found suffering from:

- (a) redness and laceration over left eye's conjunctiva;
- (b) tender swelling and abrasion over left lower eyelid;
- (c) linear wound at inferior sclera of left eye;
- (d) left hyphaema and inferior vitreous haemorrhage. The Respondent's case In the answer, the Respondent denied the Applicant was his employee at the material times and/or that the Applicant met the accident arising out of or in the course of employment.

Analysis

Since there was no other witness at the time of accident, this court was only assisted by the Applicant. Having the benefit of seeing and hearing the Applicant in court, this court did not see any reason why this court should not accept the evidence of the Applicant as to how the accident occurred. And the court found, therefore, as a fact that the accident did occur in the way the Applicant related to this court. Liability There is produced to this court For Wan Fook Mo Sing Bao Hop Tung between the parties. Under the Contract, clearly, the Applicant had described himself as an independent contractor. In the case of *Chan Kwok Kin v Mok Kwan Hing & Anor* [1990] 2 HKC65, 70-71, it was said that: The subjective beliefs and intention of, or labels used by, the parties are of no appreciable weight. The matter must be decided objectively. Here it is not in dispute that the Applicant was guaranteed \$8,000 a month as the service provider. The Applicant was to report punctually for work with the Respondent. He was to drive the designated vehicle provided by the Respondent who would be responsible for all repair and maintenance and even traffic penalty tickets and parking, etc. The Applicant would drive to designated spots and deliver the goods as per the time schedule arranged by the Respondent. All delivery orders were provided by the Respondent and the Applicant was not allowed to deliver goods for others. In other words, the Applicant acted as the exclusive driver of the Respondent and the Respondent had the total control of the way the Applicant did the job, i.e. when, where and how. The Applicant would be penalised for late reporting for duty. The Applicant was also paid net of expenses for running and repair and maintenance of the vehicle. In the often cited case of *Market Investigations Limited v Minister of Social Security* [1969] 2 QB 173, pages 184 to 185, cited by counsel for the Applicant, Cooke J said, The fundamental test to be applied is this: Is the person who has engaged himself to perform these services performing them as a person in business on his own account. If the answer to that question is then the contract is a contract for services. If the answer is , then the contract is a contract of services. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relevant weight which the various considerations should carry in a particular case. The most that can be said is that control will, no doubt, always have to be considered, although it can no longer be regarded as the sole determining factor; and the factors which may be of importance are such factors as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risks he takes, what degree of responsibility for investment and management he has, and whether and how far his opportunity of profiting from sound management in the performance of his task. Applying the test in *Market Investigations Limited*, clearly the Applicant in this case was at the material time the employee of the Respondent. It matters not that he had subjectively described himself as an independent contractor at the time he signed the Contract, the fact remains that objectively in applying the test aforesaid he was an employee of the Respondent. The Contract admitted by the Respondent as subsisting between the parties at the date of accident, i.e. the letter from Respondent s former solicitors to the Applicant s former solicitors dated 14 February 2003, confirmed the arrangement between the Applicant and the Respondent. I therefore find as a fact the Applicant was injured while in the

course of employment with the Respondent. Compensation Amount Section 9 Compensation The Applicant was aged 25 years old at the time of accident. Under section 7 of the Ordinance, the Applicant is entitled to either a lump sum equal to 96 months pay or 96 x \$21,000 whichever is less. In the Certificate of Review of Assessment dated 28 October 2003, the loss of earning capacity permanently caused by the injury was assessed to be 35%. Neither party had appealed against the assessment, therefore, the assessment should be adopted. According to the Applicant, under the Contract, he was entitled to at least \$8,000 per month, he now claims compensation at that rate. The Respondent accepted that the Contract was in existence at the time of accident. Accordingly, this court accepted that the monthly earnings of the Respondent at the material times was \$8,000 per month. Compensation under this head is 35% x 96 months x \$8,000 = \$268,800.00. Section 10 Compensation During sick leave periods, the Applicant did not receive any payments. The compensation under this section was therefore: From To Amount entitled under this head 26.04.2002 29.05.2002 (HK\$8,000 x 5/30 + =HK\$7,053.80 HK\$8,000 x 29/31) x 4/5 03.07.2002 16.10.2002 (HK\$8,000 x 29/31 + =HK\$22,090.32 HK\$8,000 x 2 + HK\$8,000 x 16/31) x 4/5 13.02.2004 23.02.2004 (HK\$8,000 x 11/28) x 4/5 =HK\$2,514.28 05.03.2004 03.04.2004 (HK\$8,000 x 27/31 + =HK\$6,214.19 HK\$8,000 x 3/30) x 4/5 _____ Total = HK\$37,872.59 ===== Compensation under section 10A I find the Applicant s claim for medical expenses \$2,580 approved. They were comprised as follows:

- (a) hospitalisation, 26 April 2002 to 3 May 2002 3 July 2002 to 8 July 2002, 13 February 2004, totalling \$966.
- (b) following-up treatments, and medicine in Ophthalmology Department 11 x \$44 per consultation + \$60 per consultation x 17 + \$110 = \$1,614, totalling therefore \$2,580. Compensation under this section is \$2,580. Summary I therefore order the Respondent to pay the Applicant compensation as follows:

- (a) Section 9, compensation, \$268,800.00;
- (b) Section 10, compensation, \$37,872.59;
- (c) Section 10A, compensation, \$2,580.00; Making a total of \$309,252.59. I order also that the Respondent shall pay the Applicant interest on the aforesaid awarded at half judgment rate from date of accident until date of judgment and thereafter at full judgment rate on the aforesaid award till date of payment. As for costs of this action, the same shall be paid by the Respondent to the Applicant, taxed if not agreed, the Applicant s own costs to be taxed in accordance with Legal Aid regulations. (K Lo) Deputy District Judge Mr Eric C H Heung, of Messrs Tung, Ng, Tse & Heung, assigned by Director of Legal Aid for the Applicant Respondent in person, absent PAGE - PAGE ES-CRT10/10.7.2007/DN DCEC331/2003/ Judgment A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 9! @a\$ & `#\$ & `#\$!Z{' Fhvr !Z{' Normal.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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