

HONG KONG / JUDGMENT

LEUNG SHUI LING v. LAM WOON

COURT

District Court

DECIDED

28 March 2007

CASE / FILE NUMBER

DCEC1311/2004

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bjbj DCEC 1311 /2004 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION EMPLOYEES COMPENSATION CASE NO. 1311 OF 2004

IN THE MATTER OF AN APPLICATION BETWEEN :- LEUNG SHUI LING Applicant and LAM
WOON Respondent

Coram: Deputy District Judge W. C. Li in Court Date of Trial: 16th March 2007 Date of Handing Down Judgment: 28th March 2007 J U D G M E N T The Applicant was employed by the Respondent to carry out decoration work at Ground Floor, Nos. 117-119 Jaffe Road, Wanchai, Hong Kong, and on 15 July 2004 at about 4.30 p.m., the Applicant, in the course of employment with the Respondent, fell from a ladder onto the ground and injured his right wrist. The Respondent admitted that the Applicant was his employee and was carrying out decoration work at the time of the accident. The Respondent did not admit that the Applicant had an accident on 15 July 2004 and that the Applicant gave him notice of an accident on 15 July 2004. The Applicant testified that while doing carpentry work on a ladder on 15 July 2004, he lost his balance and fell off a ladder and injured his right hand. There were 4 other workers including the carpentry master, Mr. Ko Wing Keung, and the Respondent himself were present at the scene of the accident. Notice of the accident was given to the Respondent at the time of the accident. The Applicant fell onto some metal air conditioning pipes and caused a loud crash in the fall. The Respondent came over and asked if he was alright, and the Applicant told the Respondent that his right hand was injured, in pain and could not hold or lift up any tool, and he showed the Respondent his injured right hand. The Respondent told him to see a bonesetter. He only used medicinal oil to rub his swollen hand that day and went to see a government doctor the following day. The Applicant testified that he asked the Respondent if he had taken out any insurance policy and the Respondent replied . The Applicant stated to the Labour Department that he fell down because the ladder was not stable. A letter was sent by the Labour Department but the Respondent failed to file and return a Form 2 regarding this accident. A letter dated 16 February 2005 from the Labour Department showed that the Respondent was convicted of failing to take

out an effective employees compensation insurance policy for the Applicant. The Applicant called Mr. Ko Wing Keung as a witness and he testified that he was present and witnessed the Applicant falling off a ladder in the course of his work on 15 July 2004 at the place of work at Ground Floor, 117-119 Jaffe Road, Wanchai, Hong Kong. A medical report from Dr. Wong Chee Leong of Tuen Mun Hospital dated 20 July 2004 recorded that the Applicant fell from a ladder and landed on his out stretch right hand while on duty on 15 July 2004 . On liability, there was ample evidence to show that the Applicant was employed by the Respondent and the accident occurred on 15 July 2004 during and in the course of the Applicant s employment with the Respondent. The accident occurred while the Applicant was working with other workers, and the Respondent was also present and had personal knowledge of the same. The Respondent was prosecuted and convicted for the offence of not taking out employees compensation insurance policy for his workers. According to the medical report of Dr. Yong Kong Fan, an orthopaedic expert, the Applicant suffered a fracture of the distal radius from the accident. Dr Yong noted that the Applicant was educated only up to primary level and had been in the decoration carpentry work for over 20 years and his job required him to lift heavy objects weighing up to 50-60 pounds in the course of climbing ladders to work at height and at floor level. In the examination, Dr. Yong found the Applicant to be right handed, that the Applicant complained of pain, stiffness and weakness of the right wrist, and he could not lift objects of about 5 kgs for several minutes. Dr. Yong also found that the Applicant had limited range of motion with respect to radial deviation of the right wrist compared to his left. This would have significant effect on his job requiring lifting action as well as handling heavy instruments like electric saw and power drill. There was also weakness of his wrist at radial deviated posture. Dr. Yong found that the Applicant had reached maximal medical improvement and no further treatment was needed. The prognosis for his wrist was fair and there would likely be some residual pain, stiffness and weakness, and Dr. Yong assessed the Applicant to have a 3% loss of earning capacity due to the residual pain, stiffness and weakness of his right wrist. In view of the injury and its effect on the Applicant, Dr. Yong believed that the Applicant would not be able to return to pre-accident occupation as a carpenter in the decoration trade. The Medical Assessment Board assessed the Applicant to have suffered 1% impairment in loss of earning capacity for a fractured right wrist resulting in residual pain. The Applicant filed an appeal against the assessment. The assessment of 1% impairment by the Assessment Board did not adequately reflect the actual impairment in loss of earning capacity of the Applicant. The Applicant s injury was not specified in the First Schedule and in assessing his permanent impairment in loss of earning capacity, I took into account the fact that the Applicant was no longer capable of returning to his pre-accident employment of working in decoration carpentry work which he had been for over 20 years. I also took into account his age, he was 43 at the time of the accident, and the fact that he had no other skill and was only educated up to primary school level in China. When an injured employee is no longer capable of returning to his pre-accident employment, the court should ascertain what employment he was capable of undertaking with his impairment and what earnings he should reasonably be expected to be paid with such employment. Physical condition is not the only factor affecting the earning capacity of a person. (*Yip Fong Ming v Joint-Effort Engineering Co. (1989) 1HKC 505*) At the time of the accident, the Applicant earned HK\$21,000.00 per month. After his recovery from the accident, he

managed to find work from August 2006 onwards in repairing the wood work in pianos, and earned about \$96,000.00 per month. According to Section 7 of the Employees Compensation Ordinance, Cap. 282 (), the multiplier for an employee between 40 and 56 years old at the time of the accident is 72 months. In the circumstances of this case, I took the view that Sec. 9(1)(A) of ECO was applicable and compensation should be assessed as is proportionate to the loss of earning capacity permanently caused by the injury in any employment which, having regard to those special circumstances, the employee was capable of undertaking at that time. In assessing Sec. 9 compensation, I would adopt the Hong Kong Paper Mills formula (Hong Kong Paper Mills Ltd v Chan Hing Wau (1981) HKLR 556). Hence the compensation under Sec. 9 is assessed at :- $\text{HK\$}21,000.00 - \$9,600.00 = \$11,400.00 / \$21,000.00 \times 100\% \times \$21,000.00 \times 72 = \text{HK\$}820,800.00$. The sick leave of the Applicant according to Form 7 was from 16 July 2004 to 10 March 2005, a total of 238 days. This was endorsed by the Assessment Board and further confirmed to be a reasonable period of sick leave by Dr. Yong. The medical certificates for sick leave were submitted and in the absence of contrary evidence, these were to be conclusive evidence of temporary incapacity (Ng Kwok Keung v Wing Sum Construction & Engineering Co Ltd & anors DCEC No. 1367 of 2003). Hence compensation under this head is assessed at $\text{HK\$}21,000.00 \times 238/30 \times 4/5 = \text{HK\$}133,280.00$. The claim for medical expenses of HK\$1,160.00 under Sec. 10A supported by receipts is awarded in full. Judgment is therefore entered for the Applicant against the Respondent in the sum of HK\$955,240.00 together with interest at half judgment rate from the date of the accident, i.e. 15 July 2004, to the date of handing down of this judgment, and further interest at judgment rate from the date of handing down to the date of full payment to the Applicant. I also order that the Respondent is to pay the Applicant's costs of this action, to be taxed if not agreed, with certificate for counsel. This cost order nisi is to be made absolute 14 days after Judgment been handed down. (W.C. Li) Deputy District Judge Representation: Mr. Joeson Wong instructed by Messrs. Au Yeung, Cheng, Ho & Tin for the Plaintiff. T U V (#p# (#p# (#p# (#p# &`#\$ >\*6D P{ \$ :i#z \*mT zo/<`0,: xC&1 ({m8 =J+> P0} 84ZB W~7gb ^CuNy\$O W~7g xC&1 ({m8 =J+> .&`z n*U & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title 9!5 q 9!5 q 9!5 q Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 28 October 2026 · Esheria