

HONG KONG / JUDGMENT

RAI UMESH v. CARSON ENGINEERING LTD

COURT

District Court

DECIDED

28 May 2007

CASE / FILE NUMBER

DCEC28/2006

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bjbj 0Amn DCEC 28 of 2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION EMPLOYEES COMPENSATION CASE NO. 28 OF FORMTEXT 6

BETWEEN RAI UMESH Applicant and CARSON ENGINEERING LIMITED Respondent

Coram: Deputy District Judge Abu B. bin Wahab Date of Hearing: 22 May 2007 Date of Handing
Down Judgment: 28 May 2007

JUDGMENT

The Applicant claims compensation under Sections 9(1)(b) (permanent partial incapacity), 10 (temporary incapacity) and 10A (medical expenses) of the Employees Compensation Ordinance, Cap. 282 (the Ordinance). By a Notice dated 29 March 2007 the Respondent admitted liability. The only issue left was quantum. Miss Wong, Counsel for the Respondent, admitted before me the amounts claimed under Section 10 and 10A. The respective amounts are \$29 (after giving credit for \$102,257 already paid) and \$4,370. I give judgment to the Applicant for these amounts. The bone of contention is quantum for the Section 9 claim. By a certificate dated 15 February 2006, the Employees Compensation (Ordinary Assessment) Board (the Board) assessed the Applicant s loss of earning capacity permanently caused by the injury to be 3% (see Form 7 at Trial Bundle page 141). Concomitant with his Section 9 claim, the Applicant has lodged an appeal against the Board s assessment (the Appeal). I dismiss the Appeal. I accept the calculation put forward by Miss Wong and make an award under Section 9 for \$28,252.80 (\$9,810 x 96 x 3%). To sum up, the awards I make in favour of the Applicant are: Section 9 - \$28,252.80 Section 10 - 29.00 Section 10A - 4,370.00 \$32,651.80 I order that interest be paid at judgment rate on the aforesaid

sum of \$32,651.80 from 6 January 2005 (date of accident) to the date hereof and thereafter at judgment rate until payment in full. The Respondent succeeded in showing that the entitlement to Section 9 compensation is as per its calculation. The Applicant, however, succeeded in his claim under Section 10 and 10A (see paragraph 3 above). I think it fair that each party should bear its own costs. I make an order nisi that each party is to bear its own costs. There will be certificate for Counsel. The Applicant's own costs will be taxed in accordance with Legal Aid Regulations. I will now deal with the reasons for my decision regarding the Section 9 claim. The Applicant, a Nepalese male, came to Hong Kong in 1996. He is married but his wife and daughter remain in Nepal. Since coming to Hong Kong, the Applicant has been working as a labourer at construction sites through the introduction of his Nepalese friends. He can only speak a little English and Cantonese. He cannot read English or Chinese. The Applicant has no special skills except that he is a bit of a musician. He can play the keyboard and drums. It is not clear, however, what particular keyboard musical instrument the Applicant can play. Once or twice a year, the local Nepalese community holds functions and the Applicant gets to play his music for reward of \$1,000 to \$1,500 per performance. The Applicant was born on 8 July 1976 and was about 28.5 years old at the time of the accident to which this case relates. The Applicant described the nature of the work he was doing at the material construction site. He had to move heavy metal weights. Sometimes he had to carry these to levels above ground. His work would involve carrying weights of 25 kilogrammes each. The evidence is not too clear whether he had to carry such a weight in 1 hand only (be it left or right) at one time (i.e. total weight of 25 kilogrammes) or he had to carry one weight in each hand at the same time (i.e. total weight of 50 kilogrammes). At any rate, the Applicant said in evidence he had to carry/move such weights over a period of 5 to 6 hours a day. At around 5 p.m. on 6 January 2005 the Applicant fell from height during work. Later that night he sought medical treatment at the Accident and Emergency Department of the Tuen Mun Hospital. The medical findings were L wrist swelling and tenderness. Fingers movement, sensation and circulation normal. X-ray showed fracture of L wrist scaphoid bone (see Medical Report at Trial Bundle page 31. It is beyond dispute that the Applicant hurt his left wrist and that in the medical findings just quoted means left).

5. He was treated with (close reduction and percutaneous screw fixation on 11/1/05. (removal of screw on 19/10/05. (physiotherapy from 14/2/05 to 28/6/05 (24 sessions) (occupational therapy from 30/6/05 to 13/12/05 (42 sessions) It was reported that at the end of treatment, he had: (about 50% improvement subjectively (left wrist was painfree at rest (pain was aggravated on wrist movement/ No significant improvement. (range of movement of left wrist and thumb were full. (Power grip 33 kg (right 52 kg). (Lateral pinch 8 kg (right 13 kg). (Unable to resume his previous work tasks in construction/ still below his job demand. The above is quoted from the Joint Medical Report (Joint Medical Report) of Dr. Lam Kwong Chin (Dr. Lam) and Dr. Lee Po Chin (Dr. Lee) at Trial Bundle page 39 to 47 (See paragraph 15 below. See all other relevant medical reports at Trial Bundle page 31 to 38). I understand the end of treatment to refer to the discharge of the Applicant from the Occupational Therapy Department of Tuen Mun Hospital in mid-December 2005 (see Trial Bundle page 34 and 37). After this, the Applicant was referred back to orthopaedic clinic for chronic left

wrist pain (Joint Medical Report paragraph 18 at Trial Bundle page 42). It is noted that the fracture of the left wrist scaphoid bone was the provenance of the Applicant's pain and disability. This fracture was found fully healed on 4 May 2005 (see medical report at Trial Bundle page 38 and paragraph 9 of Joint Medical Report at Trial Bundle page 41). The Applicant was examined and interviewed by Dr. Lam and Dr. Lee on 25 October 2006. As a result, the Joint Medical Report was compiled. The Applicant's complaints to the 2 doctors were:

1. Left wrist with pain and electrifying sensation at scaphoid area. Particular (sic) during cold weather and
2. Left wrist weakness. Could not lift object over 5 kg. (Joint Medical Report at Trial Bundle page 43). The Applicant repeated the same complaints when giving evidence before me. There was no external deformity or swelling for the left wrist. A 1 cm scar over volar surface at scaphoid area was found (Joint Medical Report at Trial Bundle page 44). X-rays of the left wrist were taken and reported as: Bony alignment is normal. Bone density is within normal limit. There is no abnormal bony outgrowth or marginal osteophytosis. No recent fracture or dislocation is noted. Joint spaces are normal with no evidence of bony erosion. No abnormal soft tissue swelling noted. Comment: No bony lesion is detected at left wrist (Joint Medical Report at Trial Bundle page 45). Dr. Lam and Dr. Lee agreed that the wrist condition was a stable one and the scaphoid fracture had healed well. They considered that no specific treatment or surgery was required. The views of the 2 doctors then differed:
12. Dr. Lam notes that Mr. Rai is still affected by the residual pain. He would have difficulty with heavy work in the construction sites. However, he should still be able to have lighter manual jobs, like lighter type of manual labourer, casual labourer, cleaning worker, shopkeeper, messenger, security guard, or jobs of similar nature. Dr. Lee opines that Mr. Rai retains a very good range of movements of the left wrist. The radiographs show that the fracture has healed anatomically. There is also no radiographic evidence of carpal instability. Therefore, any residual pain is likely to be due to scarring and is unlikely to be significant. It will also gradually improve with continued usage. Dr. Lee opines that Mr. Rai should be able to return to work in the construction site labourer (sic) with mild impairment of work efficiency
16. Dr. Lam rates the impairment due to the residual pain and weakness of the left wrist at 3% of whole person. Dr. Lee estimates the impairment of the whole person to be 2% based on residual stiffness of the right (sic) wrist (Joint Medical Report at Trial Bundle page 47. Parties agree there is a typographical error here and that right wrist should really read left wrist). Dr. Lam went on to assess the Applicant's loss of earning capacity to be 5% but Dr. Lee assessed it to be 2%. In *Tang Shau Tsan v Wealthy Construction Company Limited*, CACV 58 of 2000, Rogers JA expressed the view that the opinion of medical doctors (and occupational therapists) in relation to earning capacity is inadmissible. The learned judge went on to say that such statements of opinion were confusing at best and meaningless at worst. The learned judge said that it was for the court to draw its own conclusions as to earning capacity. Mayo VP found himself in agreement with such observations and continued to say

that it was not permissible for doctors (and occupational therapists) to give opinions relating to the labour market a subject upon which they were not competent to express an opinion. Although that case was concerned with assessment of damages in a personal injuries action, the views on inadmissibility of statements of opinion from medical doctors on earning capacity have been adopted in employees compensation cases (see, for example, *Kwan Yee Chor v Hung Fau Metal Construction Company Limited and others*, (2002) 2 HKLRD 768). I will ignore the views of Dr. Lam and Dr. Lee concerning loss of earning capacity.

21. The cause of pain, weakness and discomfort in the left hand of the Applicant is the fracture to the scaphoid bone. This had, however, healed by May 2005 (see also paragraph 14 and 18 above). When seen by Dr. Lam and Dr. Lee in October 2006, the Applicant was making about the same complaints as he had been making before the fracture had healed. When he was before me in May 2007, he recited the same complaints. Just what is still causing the Applicant pain, discomfort and weakness in the left hand? It appeals to me that the only basis for Dr. Lam expressing his opinion as contained in paragraph 12 of the Joint Medical Report (see paragraph 19 above) is the complaints voiced by the Applicant. I consider such basis most unconvincing particularly in view of matters stated in paragraphs 16 to 18 above. The opinion of Dr. Lee as contained in paragraph 13 of the Joint Medical Report (see paragraph 19 above) is supported by x-ray reports and radiographs. I prefer and accept the opinion of Dr. Lee. It follows that I do not accept the evidence of the Applicant where it conflicts with this opinion of Dr. Lee. I further prefer and accept Dr. Lee's estimate of impairment of the whole person to be 2% based on residual stiffness of the left wrist.
22. In February 2006, the Board assessed the Applicant to suffer from 3% loss of earning capacity. In October of the same year, the condition of the Applicant was that any residual pain is likely to be due to scarring and is unlikely to be significant. It will also gradually improve with continued usage...Mr. Rai should be able to return to work in the construction site labourer (sic) with mild impairment of work efficiency (see paragraph 19 above). There was an estimated 2% impairment of the whole person (this is of course not to be equated with loss of earning capacity). It behoves me to determine, inter alia, the percentage of the loss of earning capacity of the Applicant under Section 9(1)(b) of the Ordinance. I must also bear in mind that in assessing compensation under Section 9(1) of the Ordinance, regards must also be had to section 9(1A) which requires the court to take into consideration the special circumstances of the applicant (*Chan Kam v Standard Chartered Bank Hong Kong Trustee Ltd.* (1991) 2 HKLR 455. See also *Lau Man Keung v Yiu Wing Construction Co. Ltd.*, CACV 2232 of 2001. See criticism of *Chan Kam*, supra, in (1989) HKLJ 248). Miss Wong, Counsel for the Respondent, is willing to accept 3% loss of earning capacity. I am willing to adopt this figure though I find it a bit on the generous side. I find it thus because, based on the opinion of Dr. Lee, the Applicant's condition must have improved since he was seen by both Dr. Lam and Dr. Lee in October 2006. My adoption of the 3% figure means that the Appeal cannot succeed. I do not think this figure of 3% would be substantially less than the percentage of the loss of earning capacity permanently caused by the injury in the special circumstances of the employee (see Section 9(1A) of the Ordinance. See also paragraph 10

and 11 above). The work of the Applicant as a labourer in construction site does not require any special skill and the impact of his injury on him can only have insignificant effect on his work. There are no special circumstances of the Applicant here and if there are, I do not find the figure of 3% to be substantially less (see also paragraph 29 of the judgment in Lau Man Keung, supra). In view of matters stated in the immediate preceding paragraph, the approach in calculating the percentage of loss of earning capacity in Hong Kong Paper Mills Ltd. v Chan Hin Wu (1981) HKLR 556 as modified in Lui Kwong Yan v Shu Hing Decoration Works and anr. (1993) 1 HKLR 168 is not appropriate and is not used in this case. (See also the approach of the Court of Appeal in Lau Man Keung, supra, paragraph 28 of the judgment. Parties in this case agree that if the Hong Kong Paper Mills- Lui Kwong Yan formula is adopted, the percentage of loss of earning capacity will be 33.8%. For this purpose, parties agree the pre-accident wage of the Applicant to be \$9,810 and the wages for work the Applicant is now capable of doing but assessed at the date of the accident to be \$6,500. $9,810 - 6,500$ divided by $9,810$ and turned into a percentage yield 33.8%.) The award for the Applicant in this claim under Section 9(1)(b) of the Ordinance is calculated thus: $9,810 \times 96 \times 3\%$, yielding the amount of \$28,252.80. (\$9,810 represents the agreed monthly wages/earnings of the Applicant; given the age of the Applicant at the time of the accident, he is entitled to 96 months earnings if there had been permanent total incapacity; 3% represents the percentage of compensation the Applicant is entitled to since there is permanent partial incapacity: Section 7 and 9(1)(b) of the Ordinance. If the percentage of 33.8% is used, the amount arrived at will be \$318,315.)

Abu Bakar bin Wahab Deputy FORMTEXT District Court Judge Representation: FORMTEXT Mr Henry Wong of Messrs. Henry H.C. Wong & Co. for the Applicant Miss Abigail K.Y. Wong instructed by Messrs. Chong & Partners for the Respondent

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