

IN THE HIGH COURT OF KIRIBATI 2014

CIVIL CASE NO. 30 OF 2011

	[IOAKIM TEARAWA	PLAINTIFF
	[
BETWEEN	[AND	
	[
	[ATTORNEY-GENERAL IRO MINISTRY OF	
	[LINE AND PHOENIX GROUP	DEFENDANT

Before: The Hon Chief Justice Sir John Muria

5 May 2014

Mr Raweita Beniata for Plaintiff

Mr Birimaka Tekanene for Defendant



JUDGMENT

Muria, CJ: By his writ issued on 15 March 2011 against the defendant, the plaintiff has claimed damages for injuries sustained as a result of an accident in Kiritimati Island. The plaintiff's claim was brought under tort and *Workmen's Compensation Ordinance* (Cap 102). The claim under tort was dismissed as the plaintiff conceded that he could not succeed under it. The plaintiff's claim under the *Workmen's Compensation Ordinance* is still on foot. He claims damages for partial permanent incapacity arising out of the accident on 7 June 2005.

BRIEF BACKGROUND

The plaintiff was employed by the defendant in Kiritimati Island, first as an unskilled carpenter in 1994, in the Ministry of Line and Phoenix Islands Development. In 1998 he was promoted to the position of Tradesman (Carpenter) and in 2002 he was promoted to the position of Skilled Tradesman.

On 7 June 2005, the plaintiff and 10 other workers were in the back of the truck transporting galvanized pipes to the Cassidy airfield. The truck veered to the side of the road causing the pipes to loosen and fell from the left side of the truck. One of the pipes hit the plaintiff's left arm causing him to fall off the truck on to the side of the road. The plaintiff was injured and was hospitalized at the Kiritimati Island Hospital for eight days and rest at home for three weeks before returning to work.

INJURIES

The plaintiff was treated at Kiritimati Island for injuries to the left arm and shoulder. The injuries were said to have caused persistent weakness, numbness and incapacity to the left arm. The plaintiff claims that he suffered injuries to the thoracic spine, lumbar spine, both knees, lacerations and psychiatric upset.

CLAIMS AND ISSUES

As a result of the injuries sustained the plaintiff claims that he suffers 12% permanent partial incapacity. He claims the sum of \$5,000.00 under section 8 of Cap 102.

There are two issues to be determined by the Court in this case. First, whether injuries caused the plaintiff to suffer permanent partial incapacity so as to reduce his earning capacity. Secondly, what is the quantum of damages, if any, to which the plaintiff is entitled.

CONSIDERATION AND DETERMINATION

The defendant concedes that the plaintiff was employed at the time of the incident and that he suffered injuries at the time during the course of his employment. The defendant's case is that the plaintiff is not entitled to damages because the plaintiff has not suffered permanent partial incapacity from injuries sustained during the accident.

Section 8 of the *Workmen's Compensation Ordinance* relied on by the plaintiff is crucial in this case. The section provides as follows:

"8(1) Where permanent partial incapacity results from the injury the amount of compensation shall be –

- (a) *In the case of an injury specified in the Schedule such percentage of the compensation which would have been payable in the case of permanent total incapacity as is specified therein as being the percentage of the loss of earning capacity caused by that injury; and*
- (b) *In the case of an injury not specified in the Schedule, such percentage of the compensation which would have been payable in the case of permanent total incapacity as is proportionate to the loss of earning capacity permanently caused by the injury”.*

Whether the plaintiff suffered permanent partial incapacity is a question of fact. It can be ascertained from the medical reports on the plaintiff, as well as from the physical body conditions experienced by the plaintiff himself. In the present case, four (4) medical reports were done on the plaintiff's injuries. All four medical reports attested to the loss of sensation in the medial aspect of the plaintiff's left arm due to severe damage of the nerve supplying the area. The damage to the nerve has been described as permanent. The percentage of incapacitation has been put at 12% by Dr Oten whose report dated 8 August 2005, on the plaintiff's injuries shows:

- “1. Weakness of the left hand gripping with painful supination of the forearm*

2. *Numbness and lost of sensation to the left medial upper arm*
3. *Swollen, numbed and edematous posterior neck with reduced neck extension to 10 degree only*
4. *Multiple healing scars at the left abdomen and anterior surface of both knees*
5. *Lower back pain.*

In summary his percentage of incapacitation is approximately 12%".

Dr Tekanene's report dated 13 February 2006, on the plaintiff acknowledges that:

"The loss of sensation in the medial aspect of his left arm may be due to damaged superficial nerves".

Dr Tekanene, however, opined that the loss of sensation did not interfere with the function of the left arm.

Dr Itaaka's report dated 26 July 2009 on the plaintiff shows that the plaintiff:

"still has anesthesia effect on the two areas (the medial posterior aspect of left arm and posterior aspect of the right upper shoulder plate".

In his opinion, Dr Itaaka stated that the findings were consistent with the plaintiff's injuries he suffered during the accident in 2005 which severely damaged the nerve supplying the area affected.

Dr Tembo reviewed the plaintiff's medical condition on 10 January 2010. In his opinion the nature of the nerve injury to the left arm was such that -

"full recovery from anesthesia effect is unlikely".

The plaintiff's affidavit evidence, in paragraph 19, further reiterates the effect of the injuries on his body. He states:

"Whenever I use the spade, my strength is less. I am only able to dig for a short period of time and then I have to rest. Whenever I climb the building, I am afraid to climb using my hands, as sometimes it is painful. I cannot climb how I used to climb. When I lay the bricks I have to use my right hand to lay the bricks and this is slower than I used to be. Whenever I carry wood, bricks or other materials, my left arm is easily tired and I have to rest for a few minutes".

Despite the reported medical condition of the plaintiff, the learned Solicitor General maintains that the plaintiff has not suffered permanent partial incapacity such as to reduce his earning capacity. The basis for the defendant's argument is that despite the injuries suffered, the plaintiff was promoted to a leading hand earning a higher salary than before the accident. Learned Counsel submitted that the plaintiff's ability to continue working has not been affected. He is still marketable and he can compete for a much higher position than that which he held before and at the time of the accident.

One of the elements of permanent total incapacity in an employment world is the permanent total reduction in the employee's earning capacity. Likewise a permanent partial incapacity is the permanent partial reduction of the employee's earning capacity. The degree of the reduction in earning capacity is measured against the percentage of the incapacity.

I think it is also true to say that even if it is found that the plaintiff has suffered permanent partial incapacity, he still has to show that his incapacity has caused him a loss in his earning capacity. Put another way, the plaintiff has to show that his capacity to earn after the accident has diminished in respect of work he was capable of undertaking at the time of the accident. For the plaintiff the work he was capable of undertaking at the time of the accident was carpentry. He was a Skilled Tradesman (Carpentry) at the time of the accident in 2005 earning an average monthly salary of \$458.16.

Did he lose his capacity to earn as a Skilled Carpenter after the accident? It is here that the learned Solicitor General argued that the plaintiff is not entitled to compensation because he has not lost his earning capacity despite the injuries he suffered. The question, therefore, is has the injury reduced the plaintiff's physical condition such as to result in his earning capacity being lost or diminished?

In the present case, my view is that the injury neither prevented the plaintiff from being able to work nor prevented him from getting work

suitable in the circumstances. In other words, he has not lost his earning capacity.

In keeping with the language and spirit of the statute, I prefer to express the test in this case as the plaintiff's incapacity must be such as it results in a loss or reduces his earning capacity in the work in which he was engaged at the time of the accident. This is not a magical wand but it is a test of reality. Medical reports are tools of help but the Court still has the sole burden to decide if the plaintiff's injury results in a loss or reduction in his earning capacity in the work that he was doing at the time of the accident.

The plaintiff relied on the case of *Fiji Electricity Authority –v- Labour Officer on behalf of Ramesh Prasad* (1983) (27 November 1983) Fiji Court of Appeal decision. In that case the plaintiff was injured in the eye resulting in a permanent partial incapacity in his left eye. The plaintiff continued to work and earning the same salary as at the time of the accident. However the Court found that the plaintiff has lost his chances of promotion and diminished his capacity to undertake some types of work including those involved in his present employment. He was no longer marketable. In my view, the present case is distinguishable from *Ramesh Prasad*.

In the present case, however, not only that the plaintiff was earning the same salary as he earned at the time of the accident, he was even promoted to the position of Leading Hand in his employment, earning a

higher salary. In expounding the test in the *Ramesh Prasad* case, the Court of Appeal said:

“To this extent, the fact that his earnings in his present employment have not diminished, is not relevant. The difference is between actual earning in his employment at the time of the accident and capacity to earn after the accident in any employment which he was then capable of undertaking. It is the latter which is the test”-

Applying that test to the present case, the evidence demonstrates that the plaintiff has not lost the capacity to earn after the accident. On the contrary, he was promoted in 2010 as a Leading Hand in his trade as a carpenter, earning a higher salary than he previously received.

I think it is also important to note that it is not only the physical condition of the plaintiff that must be borne in mind. It is also his ability and opportunity to put his diminished powers in his left hand (accepting that it is 12% incapacity) to work that must be considered. If the plaintiff has shown that due to his diminished powers or his 12% incapacity he was unable to secure opportunities to put his reduced powers of working to effect, then there would be justification to say that his earning capacity has been lost or diminished. However no evidence to show that his wage-earning capacity has been lost or diminished in the present case.

The plaintiff's case is that his injury has caused him to suffer permanent partial incapacity resulting in his loss or reduction in his earning capacity. However, in my view, the evidence falls far short of establishing that claim in the present case.

Despite the strong argument by Mr Beniata of Counsel for the plaintiff, on the evidence before the Court, I am not satisfied that the plaintiff's claim as been made out in this case. The plaintiff's claim for \$5,000.00 damages for loss or reduction of earning capacity due to injury he sustained in 2005 is dismissed.

ORDER: Plaintiff's claim is dismissed.

Dated the 31st day of July 2014



SIR JOHN MURIA
Chief Justice

