702 Phil. 717

FIRST DIVISION

[G.R. No. 198501, January 30, 2013]

KESTREL SHIPPING CO., INC./ CAPT. AMADOR P. SERVILLON AND ATLANTIC MANNING LTD., PETITIONERS, VS. FRANCISCO D. MUNAR, RESPONDENT.

D E C I S I O N

REYES, J.:

This is a petition for review on *certiorari* assailing the Decision[1] dated January 28, 2011 and Resolution[2] dated September 6, 2011 of the Court of Appeals (CA) in CA-G.R. SP No. 110878.

The facts leading to the filing of this petition are undisputed.

On March 23, 2006, petitioner Kestrel Shipping, Inc. (Kestrel), on behalf of its principal, petitioner Atlantic Manning, Ltd., and respondent Francisco Munar (Munar) forged a six (6)-month employment contract designating Munar as pump man for M/V Southern Unity. As pump man, his duties include: (a) operating, maintaining and repairing power-driven pumps, valves and related machinery; (b) transferring materials to and from vessels and terminal storages; (c) transferring liquids by siphoning; (d) installing hoses and pipes between pumps and containers that require filling or emptying; (e) maintenance of pump rooms and similar spaces; (f) assisting in the cleaning of tanks, crude oil washing, gas inerting, purging of tanks and wage sampling of cargo; (g) checking and recording cargo temperature; and (h) operating tank heating equipment. [3]

On October 12, 2006, after Munar assisted in manually lifting the ship's anchor windlass motor that weighs about 350 kilograms, he started to limp and experience severe pain in his lumbar region. On October 18, 2006, Munar was admitted at the Entabeni Hospital in Durban, South Africa. According to his attending physician, Dr. Soma T. Govender (Dr. Govender), the x-ray and magnetic resonant image (MRI) of Munar's lumbar spine showed degenerative changes, which required him to take pain medication, use pelvic traction, and undergo physiotherapy. In his medical report4 dated October 19, 2006, Dr. Govender stated that:

> I arranged for him to have lumbar spine x-rays and this showed that he had degenerative changes especially of the lower lumbar spine in the L3/4 and L5/S1 region with degenerative changes noted bilaterally. I proceeded to do a MRI of the lumbar spine to exclude an acute prolapsed disc and this confirmed degenerative changes of the lumbar spine extending from the

> L2/3 region and L3/4 and the worst affected levels appeared to be L4/5 and L5/S1.
>
> x x x x
>
> I have admitted him for a course on intensive conservative management in hospital. He has been commenced on pelvic traction and been given pain medication, which includes Narcotic analgesia, muscle relaxants, and anti-inflammatories. I have also commenced him on a course of physiotherapy and hopefully with this conservative mode of treatment he should show sufficient improvement to obviate any spinal surgery.[5]

On October 24, 2006, Dr. Govender issued another medical report[6] where he stated that while Munar's improved condition allowed him to travel, he would require assistance in carrying his things and should be lying down for the entire duration of the trip. Munar should undergo further treatment and management in a spine rehabilitation facility but if he would not register a positive response thereto, he must undergo surgery. Specifically:

> Mr. Munar is currently recovered from the acute pain syndrome that he first presented with. Although he has not recuperated completely he has progressed to the state were he will be able to travel back to the Phillipines (sic) with assistance. He will require assistance with regard to his baggage transfers and he should also be accommodated on the aircraft so that he can lie down, as this would minimize the amount of pressure on his lumbar inter-vertebral disc and minimize the nerve root compression. It is reasonable to assume that the heavy lifting that forms part of his daily work duties has contributed significantly to the abnormalities demonstrated on his lumbar spine MRI scans. x x x.
>
> Mr. Munar will require further treatment and management in the Philippines. I would recommend a further course of conservative treatment for a few more weeks. If this does not settle he may then require surgical intervention with decompression of the areas of stenosis (narrowing) and removal of the disc fragments that are compressing the nerve roots and a possible fusion of his lower back. However, this will depend on the response to the conservative treatment and his recovery after such surgery may take up to 3 months.[7]

Dr. Govender also declared Munar unfit to perform his usual sea duties:

> Whether he has further surgery or not, it will not be possible for Mr. Munar to continue performing the "heavy manual duties" that [his] job requires any longer, as this could exacerbate his lumbar spine problem. From this perspective he is medically unfit to continue such duties. x x x[8]

On October 28, 2006, Munar was repatriated.

On October 30, 2006, Munar was admitted at the Chinese General Hospital. For two (2) weeks, he underwent intensive physiotherapy and was attended to by the following doctors: Dr. Tiong Sam Lim (Dr. Lim), a spine surgeon; Dr. Antonio Periquet (Dr. Periquet), a specialist on physical rehabilitation medicine; and Dr. Fidel Chua (Dr. Chua) of Trans Global Health Systems, Inc. to whom Kestrel referred his case for evaluation. [9]

On November 17, 2006, Dr. Chua issued a medical report,[10] stating that Munar did not respond positively to the treatment and recommending that he undergo laminectomy and dissectomy, procedures which would entail a recovery period from four (4) to six (6) months:

> The above patient had 2 weeks intensitive (sic) physiotherapy but no improvement. I had conference with Dr. Tiong Sam Lim (spinal surgeon) and Dr. Antonio Periquet (rehabilitation medicine) and strongly suggest patient to undergo Laminectomy & dissectomy which will approximately cost PHP 120,000.00 to PHP 150,000.00 barring complication.
>
> Recuperation will take 4-6 months from date of operation.[11]

On December 2, 2006, Munar had surgical intervention.

On December 20, 2006, he was discharged from the hospital. In his medical report[12] of even date, Dr. Chua diagnosed Munar as suffering from herniated disc and that while the surgery was successful, Munar should continue physiotherapy:

> The above patient discharged today from Chinese General Hospital. He underwent Laminectomy and Dissectomy last December 2, 2006. Since he is from La Union, he may continue his physiotherapy in his hometown.
>
> At present, the prognosis is good and recuperation will take 4-6 months from date of operation.[13]

Munar continued his physiotherapy sessions at Lorma Medical Center at Carlatan, San Fernando City, La Union.[14]

On February 27, 2007, Munar was physically examined by Dr. Lim and Dr. Periquet. The following observations were noted in the medical report Dr. Chua issued:

> Patient was re-evaluated by Dr. Tiong Sam Lim with finding of right lower extremities has improved but there is still pain on straight leg raise of left

and weak extensor hallis longes.

He was also evaluated by Dr. Antonio Periquet with following finding

1. there is a decrease in pain
2. tenderness – lumbar paravertebral
3. weakness left lower extremity
4. decrease in sensation from T 10 down
5. SLR – 30^{o} left; full – right
6. decrease ankle jerk left
7. pain on all trunk motion[15]

On April 11 and 12, 2007, Munar was once again examined by Dr. Periquet and Dr. Lim, respectively. On May 3, 2007, Dr. Chua issued a medical report[16] where he enumerated the findings of Dr. Periquet and Dr. Lim and rated Munar's impediment as Grade 8.

> The above patient [was] re-evaluated by Dr. Antonio Periquet on April 11, 2007 with report of pain level is 5/10
>
> - SLR-45^{o} bilateral, weakness left foot muscle, decrease sensation below mid-thigh
> - Tenderness-lumbo sacral process and left lumbar area
> - Pain on side bending and forward flexion
>
> He is advised to continue physiotherapy.
>
> He was also seen by Dr. Tiong Sam Lim on April 12, 2007 and advised to continue physiotherapy and recommended disability assessment.
>
> After thorough evaluation, the report of Dr. Antonio Periquet; Dr. Tiong Sam Lim and Dr. Edward Lingayo, patient will take a long time to fully recovered.
>
> Therefore, he may [be] given disability.
>
> Based on Amended POEA Contract Section 32-CHEST-TRUNK- SPINE # 5-disability grade 8.[17]

Meantime, on April 17, 2007, Munar filed a complaint for total and permanent disability benefits. His complaint was docketed as NLRC-NCR Case No. OFW-07-04-00970-00 and raffled to Labor Arbiter Veneranda Guerrero (LA Guerrero). Munar claimed that the mere fact that his medical condition, which incapacitated him to engage in any gainful employment, persisted for more than 120 days automatically entitles him to total and permanent disability benefits.

During the mandatory mediation and conciliation conferences, petitioners invoked Dr.

Chua's assessment per his medical report dated May 3, 2007 and offered to pay Munar the benefit corresponding to Grade 8 disabilities or $16,795.00. Munar rejected petitioners' offer and maintained that his disability should be rated as Grade 1. Munar relied on the following assessment made by Dr. Edward L. Chiu (Dr. Chiu), an orthopedic surgeon at Lorma Medical Center, in a medical certificate[18] the latter issued on May 21, 2007:

> At present, he could tolerate walking for short distances due to his low back pain. There is weakness of his left foot.
>
> Due to his back injury and pain, he could not go back to work. He could not tolerate stren[u]ous physical activities[.][19]

In a Decision[20] dated May 30, 2008, LA Guerrero awarded Munar with total and permanent disability benefits in the amount of US$60,000.00 and attorney's fees equivalent to ten percent (10%) of the former. As between the assessment of Dr. Chua and that of Dr. Chiu, LA Guerrero gave more weight to the latter:

> Assessing the parties' respective averments and documents adduced in support thereof, this Office finds that the complainant is entitled to the maximum compensation benefit as provided under the POEA Standard Employment Contract in the amount of US$60,000.00.
>
> The medical certificate issued by Dr. Edward L. Chiu dated May 21, 2007 categorically states that complainant cannot go back to work due to his back injury and that he cannot tolerate strenuous physical activities. Given the nature of his shipboard employment, it is logical to conclude that the complainant cannot resume shipboard employment. This conclusion is borne out by the respondents' own medical certificate showing that after the complainant underwent surgery in December, 2006 he was expected to recuperate for a period of 4-6 months, and on May 3, 2007 the respondents' designated physician determined that the complainant "will take a long time to fully recovered (sic)". And, while he was assessed with Impediment Grade 8, the assessment is not accompanied by any justification, other than the vague qualification on the length of time of recovery.
>
> Evidently, such ambiguous assessment, vis-à-vis that made by the complainant's independent physician who had taken over the complainant's therapy, cannot be a basis for the grant of the assessed disability grading. The determination of the company designated physician cannot prevail over the specific assessment made by the independent physician.
>
> Verily the illness sustained by the complainant has rendered him unfit to continue his employment as seafarer. Accordingly, he is entitled to the maximum compensation benefit of US$60,000.00.

It is well-settled that:

> "disability should not be understood more on its medical significance but on the loss of earning capacity. Permanent total disability means disablement of an employee to earn wages in the same kind of work, or 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 attainment could do. It does not mean absolute helplessness. In disability compensation, We likewise held, 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[.]" (Philippine Transmarine, Inc., vs. NLRC 353 SCRA 47[)][21]

On appeal by petitioners, the National Labor Relations Commission (NLRC) affirmed LA Guerrero's Decision dated May 30, 2008. In a Decision[22] dated June 30, 2009, the NLRC ruled that Dr. Chiu's categorical and definite assessment should prevail over that of Dr. Chua, which failed to approximate the period needed by Munar to fully recover and lacked clear basis.

> Given the report of the company-designated physician who is unsure how much time complainant needs in order to fully recover, and the report of complainant's physician who is certain in his own findings that complainant cannot go back to work given his present condition, this Commission has no other obvious choice than to place its confidence and accordingly uphold the findings of complainant's physician.[23]

The NLRC denied petitioners' motion for reconsideration in a Resolution[24] dated August 28, 2009.

Petitioners filed a petition for *certiorari*[25] with the CA, alleging that the NLRC acted with grave abuse of discretion in characterizing Munar's disability as total and permanent. The NLRC should have upheld Dr. Chua's findings over those of Dr. Chiu whose knowledge of Munar's case is questionable. Apart from the fact that it is Dr. Chua, being the company designated physician, who is tasked under the Philippine Overseas Employment Administration-Standard Employment Contract (POEA-SEC) to determine the nature and degree of a seafarer's disability or his fitness to perform sea duties, the reliability of his assessment springs from his undisputed familiarity with Munar's medical condition. As one of Munar's attending physicians from the time he was repatriated, Dr. Chua is in a position to give a more accurate appraisal of Munar's disability. Moreover, Dr. Chua's assessment is based on the findings of Dr. Lim and Dr. Periquet who are both specialists in the treatment and management of spine injuries. Furthermore, under the POEA-SEC, herniated disc is not one of the disabilities that are classified as Grade 1. Munar's herniated or slipped disc only resulted to partial loss of motion of his lower extremities, which is classified as Grade 8 impediment under

Section 32 of the POEA-SEC. Petitioners claim that for a spine injury to be considered as Grade 1 disability, it should have brought forth incontinence or rendered walking impossible even with the aid of crutches.

By way of the assailed decision, the CA found no grave abuse of discretion on the part of the NLRC and ruled that Munar's continued inability to perform his usual sea duties, which is attributable to his medical condition that is work-related, despite surgery and seven (7) months of physical therapy, conclusively indicate that he is totally and permanently disabled. The CA noted that while the company-designated doctors did not categorically state that Munar is unfit for sea duties, this is easily inferable from their statement that he continues to experience pain, weakness and tenderness and would take a long time to recover.

> In the case at bar, despite his having undergone surgeries, treatment and physical therapy of more than seven months from the injury, Munar is still found by all physicians involved to continue to suffer from weakness, tenderness and pain that prevent him from doing strenuous activities. In fact, Kestrel's own designated physicians have stated this in their last report and found that Munar was entitled to disability benefits as he "(would) take a long time to fully recover." Though they did not state it, it is clear from these findings that Munar is still unable to return to his customary work as a seafarer in an ocean-going vessel, due to the strenuous nature of the work demanded by it. No profit-motivated ship owner will employ Munar because of his condition. Munar's private physician's statement of this fact in his own report merely confirms what is already obvious. Should he even try, Munar is certain to get disqualified as seafarer since such an employment will require him to undergo rigorous physical examinations which he is sure to fail because of the sorry state of his physical health.
>
> Thus, it is not even necessary to address Kestrel et al.'s arguments as to the persuasive or binding nature of the findings of the company- designated physicians since, as earlier stated, they have been ruled to be not binding nor conclusive on the courts. In fact, the findings of Kestrel's company-designated doctors themselves do not categorically state that Munar is fit to return to work; on the contrary, they state that Munar still suffers from weakness, tenderness and pain and is ent[it]led to disability benefits. Thus, the only issue left for resolution is the amount of disability payments due to Munar.[26] (Citations omitted)

Nonetheless, while the CA agreed with the NLRC that Munar's spine injury is a Grade 1 disability, it deemed proper to reduce the amount of attorney's fees to two percent (2%) of his disability benefits.

> We find, however, that the grant by public respondent of 10% of $60,000 as attorney's fees is exorbitant and without any stated basis, since it was not proven that Kestrel[,] et al. acted in gross and evident bad faith in denying

> Munar's claim of Impediment Grade 1 compensation. The records bear that Kestrel in fact offered to pay Impediment Grade 8 compensation, or $16,795.00, to Munar in good faith, which the latter refused. But since the instant case is an action for recovery of compensation by a laborer, attorney's fees are still due based on Article 2208(8) of the Civil Code, albeit on a reduced amount of two percent (2%) of the main award, which We deem to be the reasonable fee under the circumstances.[27]

In a Resolution[28] dated September 6, 2011, the CA denied petitioners' motion for reconsideration.

Issue

There is no dispute that Munar's spine injury is work-related and that he is entitled to disability benefits. The bone of contention is how to classify such injury in order to determine the amount of benefits due to him. There is a conflict between the disability ratings made by the company-designated physician and Munar's doctor-of-choice and petitioners claim that holding the latter's determination to be more credible is contrary to the provisions of the POEA-SEC and prevailing jurisprudence. Absent any substantial challenge to the competence and skill of the company-designated doctors, there is no reason why their assessment should not be given due credence.

Petitioners insist on the correctness of the grade assigned by their doctors on Munar's disability. According to petitioners, Munar's herniated disc is not a Grade 1 impediment as it did not disable him from walking or rendered him incontinent. Munar suffers from "moderate rigidity or two thirds (2/3) loss of motion or lifting power of the trunk" and under Section 32 of the POEA-SEC, this is a Grade 8 and not a Grade 1 impediment.

Munar cannot claim, petitioners further posit, that he is totally and permanently disabled and claim the benefits corresponding to Grade 1 disabilities simply because he has not yet fully recovered after the lapse of 120 days from the time he signed-off from M/V Southern Unity. The nature of disability and the benefits attached thereto are determined by the manner they are graded or classified under the POEA and not by the number of days that a seafarer is under treatment. If a seafarer has an injury or medical condition that is not considered a Grade 1 impediment under the POEA- SEC, then he cannot claim that he is totally or permanently disabled. To allow the contrary would render naught the schedule of disabilities under the POEA-SEC.

Our Ruling

This Court resolves to DENY the petition.

Indeed, under Section 32[29] of the POEA-SEC, only those injuries or disabilities that are classified as Grade 1 may be considered as total and permanent. However, if those injuries or disabilities with a disability grading from 2 to 14, hence, partial and permanent, would incapacitate a seafarer from performing his usual sea duties for a period of more than 120 or 240 days, depending on the need for further medical

treatment, then he is, under legal contemplation, totally and permanently disabled. In other words, an impediment should be characterized as partial and permanent not only under the Schedule of Disabilities found in Section 32 of the POEA-SEC but should be so under the relevant provisions of the Labor Code and the Amended Rules on Employee Compensation (AREC) implementing Title II, Book IV of the Labor Code. That while the seafarer is partially injured or disabled, he is not precluded from earning doing the same work he had before his injury or disability or that he is accustomed or trained to do. Otherwise, if his illness or injury prevents him from engaging in gainful employment for more than 120 or 240 days, as the case may be, he shall be deemed totally and permanently disabled.

Moreover, the company-designated physician is expected to arrive at a definite assessment of the seafarer's fitness to work or permanent disability within the period of 120 or 240 days. That should he fail to do so and the seafarer's medical condition remains unresolved, the seafarer shall be deemed totally and permanently disabled.

It is settled that the provisions of the Labor Code and AREC on disabilities are applicable to the case of seafarers such that the POEA-SEC is not the sole issuance that governs their rights in the event of work-related death, injury or illness. As ruled in *Remigio v. NLRC*:[30]

> *Second*. Is the Labor Code's concept of permanent total disability applicable to the case at bar? Petitioner claims to have suffered from permanent total disability as defined under Article 192(c)(1) of the Labor Code, *viz*:
>
> > Art. 192 (c). The following disabilities shall be deemed total and permanent:
> >
> > (1) Temporary total disability lasting continuously for more than one hundred twenty days, except as otherwise provided in the Rules; x x x
>
> Petitioner likewise cites *Vicente v. ECC* and *Abaya, Jr. v. ECC*, both of which were decided applying the Labor Code provisions on disability benefits. Private respondents, on the other hand, contend that petitioner erred in applying the definition of "permanent total disability" under the Labor Code and cases decided under the ECC as the instant case involves a contractual claim under the 1996 POEA SEC.
>
> Again, we rule for petitioner.
>
> The standard employment contract for seafarers was formulated by the POEA pursuant to its mandate under E.O. No. 247 to "secure the best terms and conditions of employment of Filipino contract workers and ensure compliance therewith" and to "promote and protect the well-being of Filipino workers overseas." Section 29 of the 1996 POEA SEC itself provides that

> "[a]ll rights and obligations of the parties to [the] Contract, including the annexes thereof, shall be governed by the laws of the Republic of the Philippines, international conventions, treaties and covenants where the Philippines is a signatory." Even without this provision, a contract of labor is so impressed with public interest that the New Civil Code expressly subjects it to "the special laws on labor unions, collective bargaining, strikes and lockouts, closed shop, wages, working conditions, hours of labor and similar subjects."
>
> Thus, the Court has applied the Labor Code concept of permanent total disability to the case of seafarers. In *Philippine Transmarine Carriers v. NLRC,* seaman Carlos Nietes was found to be suffering from congestive heart failure and cardiomyopathy and was declared as unfit to work by the company-accredited physician. The Court affirmed the award of disability benefits to the seaman, citing *ECC v. Sanico, GSIS v. CA*, and *Bejerano v. ECC* that "disability should not be understood more on its medical significance but on the loss of earning capacity. Permanent total disability means disablement of an employee to earn wages in the same kind of work, or 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 attainment could do. It does not mean absolute helplessness." It likewise cited *Bejerano v. ECC*, that in a 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.[31]
> (Citations omitted)

In *Vergara v. Hammonia Maritime Services, Inc*.,[32] this Court read the POEA-SEC in harmony with the Labor Code and the AREC in interpreting in holding that: (a) the 120 days provided under Section 20-B(3) of the POEA-SEC is the period given to the employer to determine fitness to work and when the seafarer is deemed to be in a state of total and temporary disability; (b) the 120 days of total and temporary disability may be extended up to a maximum of 240 days should the seafarer require further medical treatment; and (c) a total and temporary disability becomes permanent when so declared by the company-designated physician within 120 or 240 days, as the case may be, or upon the expiration of the said periods without a declaration of either fitness to work or permanent disability and the seafarer is still unable to resume his regular seafaring duties. Quoted below are the relevant portions of this Court's Decision dated October 6, 2008:

> In real terms, this means that the shipowner?an employer operating outside Philippine jurisdiction?does not subject itself to Philippine laws, except to the extent that it concedes the coverage and application of these laws under the POEA Standard Employment Contract. On the matter of disability, the employer is not subject to Philippine jurisdiction in terms of being compelled to contribute to the State Insurance Fund that, under the Labor Code, Philippine employers are obliged to support. (This Fund, administered by the Employees' Compensation Commission, is the source of work-related

compensation payments for work-related deaths, injuries, and illnesses.) Instead, the POEA Standard Employment Contract provides its own system of disability compensation that approximates (and even exceeds) the benefits provided under Philippine law. The standard terms agreed upon, as above pointed out, are intended to be read and understood in accordance with Philippine laws, particularly, Articles 191 to 193 of the Labor Code and the applicable implementing rules and regulations in case of any dispute, claim or grievance.

In this respect and in the context of the present case, Article 192(c)(1) of the Labor Code provides that:

x x x x

The rule referred to – Rule X, Section 2 of the Rules and Regulations implementing Book IV of the Labor Code – states:

x x x x

These provisions are to be read hand in hand with the POEA Standard Employment Contract whose Section 20 (3) states:

x x x x

As these provisions operate, the seafarer, upon sign-off from his vessel, must report to the company-designated physician within three (3) days from arrival for diagnosis and treatment. For the duration of the treatment but in no case to exceed 120 days, the seaman is on *temporary total disability* as he is totally unable to work. He receives his basic wage during this period until he is declared fit to work or his temporary disability is acknowledged by the company to be permanent, either partially or totally, as his condition is defined under the POEA Standard Employment Contract and by applicable Philippine laws. If the 120 days initial period is exceeded and no such declaration is made because the seafarer requires further medical attention, then the temporary total disability period may be extended up to a maximum of 240 days, subject to the right of the employer to declare within this period that a permanent partial or total disability already exists. The seaman may of course also be declared fit to work at any time such declaration is justified by his medical condition.

x x x x

As we outlined above, a temporary total disability only becomes permanent when so declared by the company physician within the periods he is allowed to do so, or upon the expiration of the maximum 240-day medical treatment period without a declaration of either fitness to work or the existence of a permanent disability. In the present case, while the initial 120-day treatment or temporary total disability period was exceeded, the company-designated doctor duly made a declaration well within the extended 240-day

> period that the petitioner was fit to work. Viewed from this perspective, both the NLRC and CA were legally correct when they refused to recognize any disability because the petitioner had already been declared fit to resume his duties. In the absence of any disability after his temporary total disability was addressed, any further discussion of permanent partial and total disability, their existence, distinctions and consequences, becomes a surplusage that serves no useful purpose.[33] (Citations omitted)

Consequently, if after the lapse of the stated periods, the seafarer is still incapacitated to perform his usual sea duties and the company- designated physician had not yet declared him fit to work or permanently disabled, whether total or permanent, the conclusive presumption that the latter is totally and permanently disabled arises. On the other hand, if the company-designated physician declares the seaman fit to work within the said periods, such declaration should be respected unless the physician chosen by the seaman and the doctor selected by both the seaman and his employer declare otherwise. As provided under Section 20-B(3) of the POEA-SEC, a seafarer may consult another doctor and in case the latter's findings differ from those of the company-designated physician, the opinion of a third doctor chosen by both parties may be secured and such shall be final and binding. The same procedure should be observed in case a seafarer, believing that he is totally and permanently disabled, disagrees with the declaration of the company-designated physician that he is partially and permanently disabled.

In *Vergara*, as between the determinations made by the company- designated physician and the doctor appointed by the seaman, the former should prevail absent any indication that the above procedure was complied with:

> The POEA Standard Employment Contract and the CBA clearly provide that when a seafarer sustains a work-related illness or injury while on board the vessel, his fitness or unfitness for work shall be determined by the company-designated physician. If the physician appointed by the seafarer disagrees with the company-designated physician's assessment, the opinion of a third doctor may be agreed jointly between the employer and the seafarer to be the decision final and binding on them.
>
> Thus, while petitioner had the right to seek a second and even a third opinion, the final determination of whose decision must prevail must be done in accordance with an agreed procedure. Unfortunately, the petitioner did not avail of this procedure; hence, we have no option but to declare that the company-designated doctor's certification is the final determination that must prevail. x x x.[34] (Citation omitted)

In this case, the following are undisputed: (a) when Munar filed a complaint for total and permanent disability benefits on April 17, 2007, 181 days had lapsed from the time he signed-off from M/V Southern Unity on October 18, 2006; (b) Dr. Chua issued a disability grading on May 3, 2007 or after the lapse of 197 days; and (c) Munar secured

the opinion of Dr. Chiu on May 21, 2007; (d) no third doctor was consulted by the parties; and (e) Munar did not question the competence and skill of the company-designated physicians and their familiarity with his medical condition.

It may be argued that these provide sufficient grounds for the dismissal of Munar's complaint. Considering that the 240-day period had not yet lapsed when the NLRC was asked to intervene, Munar's complaint is premature and no cause of action for total and permanent disability benefits had set in. While beyond the 120-day period, Dr. Chua's medical report dated May 3, 2007 was issued within the 240-day period. Moreover, Munar did not contest Dr. Chua's findings using the procedure outlined under Section 20-B(3) of the POEA-SEC. For being Munar's attending physicians from the time he was repatriated and given their specialization in spine injuries, the findings of Dr. Periquet and Dr. Lim constitute sufficient bases for Dr. Chua's disability grading. As Munar did not allege, much less, prove the contrary, there exists no reason why Dr. Chiu's assessment should be preferred over that of Dr. Chua.

It must be noted, however, that when Munar filed his complaint, Dr. Chua had not yet determined the nature and extent of Munar's disability. Also, Munar was still undergoing physical therapy and his spine injury had yet been fully addressed. Furthermore, when Munar filed a claim for total and permanent disability benefits, more than 120 days had gone by and the prevailing rule then was that enunciated by this Court in *Crystal Shipping, Inc. v. Natividad*[35] that total and permanent disability refers to the seafarer's incapacity to perform his customary sea duties for more than 120 days. Particularly:

> **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.** As gleaned from the records, respondent was unable to work from August 18, 1998 to February 22, 1999, at the least, or more than 120 days, due to his medical treatment. This clearly shows that his disability was permanent.
>
> 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.
>
> x x x x
>
> Petitioners tried to contest the above findings by showing that respondent was able to work again as a chief mate in March 2001. Nonetheless, this information does not alter the fact that as a result of his illness, respondent was unable to work as a chief mate for almost three years. **It is of no consequence that respondent was cured after a couple of years. The law does not require that the illness should be incurable. What is**

> **important is that he was unable to perform his customary work for more than 120 days which constitutes permanent total disability.** An award of a total and permanent disability benefit would be germane to the purpose of the benefit, which is to help the employee in making ends meet at the time when he is unable to work.[36] (Citations omitted and emphasis supplied)

Consequently, that after the expiration of the 120-day period, Dr. Chua had not yet made any declaration as to Munar's fitness to work and Munar had not yet fully recovered and was still incapacitated to work sufficed to entitle the latter to total and permanent disability benefits.

In addition, that it was by operation of law that brought forth the conclusive presumption that Munar is totally and permanently disabled, there is no legal compulsion for him to observe the procedure prescribed under Section 20-B(3) of the POEA-SEC. A seafarer's compliance with such procedure presupposes that the company-designated physician came up with an assessment as to his fitness or unfitness to work before the expiration of the 120-day or 240-day periods. Alternatively put, absent a certification from the company-designated physician, the seafarer had nothing to contest and the law steps in to conclusively characterize his disability as total and permanent.

This Court's pronouncements in *Vergara* presented a restraint against the indiscriminate reliance on *Crystal Shipping* such that a seafarer is immediately catapulted into filing a complaint for total and permanent disability benefits after the expiration of 120 days from the time he signed- off from the vessel to which he was assigned. Particularly, a seafarer's inability to work and the failure of the company-designated physician to determine fitness or unfitness to work despite the lapse of 120 days will not automatically bring about a shift in the seafarer's state from total and temporary to total and permanent, considering that the condition of total and temporary disability may be extended up to a maximum of 240 days.

Nonetheless, *Vergara* was promulgated on October 6, 2008, or more than two (2) years from the time Munar filed his complaint and observance of the principle of prospectivity dictates that *Vergara* should not operate to strip Munar of his cause of action for total and pennanent disability that had already accrued as a result of his continued inability to perform his customary work and the failure of the company-designated physician to issue a final assessment.

WHEREFORE, premises considered, the petition is **DENIED**. The Decision dated January 28, 2011 and Resolution dated September 6, 2011 of the Court of Appeals in CA-G.R. SP No. 110878 are **AFFIRMED.**

SO ORDERED.

Sereno, C.J, (Chairperson), Leonardo-De Castro, Bersamin, and *Villarama, Jr., JJ.,* concur.

[1] Penned by Associate Justice Rebecca De Quia-Salvador. with Associate Justices Sesinando E. Villon and Amy C. Lazaro-Javier, concurring; *rollo*, pp. 13-24.

[2] Id. at 26-27.

[3] CA *rollo*, p. 96.

[4] Id. 101-102.

[5] Id. at 102.

[6] Id. at 103-104.

[7] Id.

[8] Id. at 104.

[9] Id. at 142.

[10] Id. at 144.

[11] Id.

[12] Id. at 145.

[13] Id.

[14] Id. at 113.

[15] Id. at 146.

[16] Id. at 147.

[17] Id.

[18] Id. at 114.

[19] Id.

[20] Id. at 201-207.

[21] Id. at 204-206.

[22] Id. at 63-70.

[23] Id. at 68.

[24] Id. at 80-81.

[25] Id. at 3-61.

[26] *Rollo*, pp. 20-21.

[27] Id. at 22-23.

[28] Id. at 26-27.

[29] NOTE: Any item in the schedule classified under Grade 1 shall be considered or shall constitute total and permanent disability.

[30] 521 Phil. 330 (2006).

[31] Id. at 345-347.

[32] G.R. No. 172933, October 6, 2008, 567 SCRA 610.

[33] Id. at 626-629.

[34] Id. at 629-630.

[35] 510 Phil. 332 (2005).

[36] Id. at 340-341.