733 Phil. 183

FIRST DIVISION

[G.R. No. 188190, April 21, 2014]

BARKO INTERNATIONAL, INC./CAPT. TEODORO B. QUIJANO AND/OR FUYO KAIUN CO. LTD., PETITIONERS, VS. EBERLY S. ALCAYNO, RESPONDENT.

R E S O L U T I O N

REYES, J.:

This is a petition for review on *certiorari*[1] under Rule 45 of the Rules of Court which seeks to reverse and set aside the Decision[2] dated December 5, 2008 and the Resolution[3] dated June 3, 2009 of the Court of Appeals (CA) in CA-G.R. SP. No. 102402 denying the motion for reconsideration thereof. The assailed CA decision reversed the Resolution[4] dated November 29, 2007 of the National Labor Relations Commission (NLRC) and reinstated the Decision[5] dated April 10, 2007 of the Labor Arbiter (LA) upholding the award of permanent and total disability benefits in favor of Eberly S. Alcayno (respondent).

Facts of the Case

On November 18, 2005, the respondent was employed by Fuyo Kaiun Co. Ltd. through its local manning agent, Barko International, Inc. (petitioners), as Able-bodied Seaman. The employment contract[6] provided for a contract period of nine months with a basic monthly salary of US$539.00, a fixed overtime pay in the amount of US$401.00 plus vacation leave with pay. His prime duty, among others, was to paint and chip rust on deck or superstructure of ship and to give directions to the crew engaged in cleaning wheelhouse and quarterdeck[7] on board the vessel, M/V Cape Iris.

Having passed the required Pre-Employment Medical Examination (PEME) and found fit for sea service,[8] the respondent boarded the ocean vessel M/V Cape Iris on December 1, 2005.

After one month on board the vessel, the respondent complained of stiff neck, and his right jaw started to swell. His physical condition worsened despite medications given him on board until he signed off on February 2, 2006 at the port of the Suez Canal, Egypt where he was examined by a certain Dr. Michael H. Mohsen (Dr. Mohsen) of the Dr. Nazmy Hospital. Dr. Mohsen's diagnosis stated that the respondent had a "*firm mass in the left side of neck with severe diffuse infection and pus collection in the neck, gangrene and necrosis in skin and tissues of neck, Uncontrolled D.M., Toxaemia and this condition may be due to chronic disease or malignancy.*"[9] The Medical Report[10]

issued by the Dr. Nazmy Hospital recommended hospital confinement. It further reads, as follows:

> Patient name: Alcayno Eberly
> Age: 49 y[r]s.
> Date: 2 / 2 / 2006.
>
> We received Patient at 5:00 pm.
>
> **Presenting with** :-
>
> 1. Severe diffuse infection in the neck with discharge of pus.
> 2. Uncontrolled D.M.
> 3. Fever and toxaemia due to severe infection.
>
> **Patient needs** stay in hospital about 5 days or more to do:
>
> 1. Control D.M with insulin.
> 2. Drainage and cleaning to severe infection of neck under general anaesthesia then change dressing 2 times per day till control of infection and improving toxaemia and fever.
> 3. Giving parental massive antibiotics.
> 4. Follow up of blood sugar.[11]

On February 8, 2006, the respondent was repatriated to the Philippines.

Upon arrival in Manila, the respondent was examined by Dr. Nicomedes G. Cruz (Dr. Cruz), a company-designated physician. The diagnosis[12] indicated: Uncontrolled *diabetes mellitus* and *tuberculous adenitis*. The respondent was placed under a six-month anti-tuberculosis treatment.

As early as June 23, 2006, the respondent consulted a private physician, Dr. Regina Pascua Barba, who also medically assessed him to be suffering from cervical tuberculosis adenitis as similarly assessed by the company-designated physician. She recommended continuous treatment and medication for the respondent until January 2007.[13]

On July 6, 2006, the respondent filed a complaint for disability benefits, reimbursement of medical expenses, payment of the unexpired portion of his contract, moral and exemplary damages and attorney's fees against the petitioners. To support his claim, he alleged that his illness was contracted while he was on board M/V Cape Iris; that he was repatriated for medical reasons and was treated for more than 120 days; and, that he suffered a permanent total disability with Grade 1 impediment. Thus, he should be compensated by the petitioners.

The petitioners denied the claim and averred that a company-designated physician, in fact, issued a handwritten medical evaluation on August 17, 2006 finding his condition well-controlled, asymptomatic, and stable and therefore, physically fit to resume work anytime.[14] On August 22, 2006, Dr. Cruz declared the respondent fit to work on even date after completion of the anti-Koch's medication for six months.[15] Such fact was not disputed; hence, there is no disability to speak of.

Decision of the LA

In a Decision[16] dated April 10, 2007, the LA granted the claim of the respondent. The LA explained that the disease suffered by the respondent was contracted during the term of his employment on board M/V Cape Iris; that he was declared fit to work even if it was indicated in his PEME that the respondent had "pulmonary fibrosis right lower lung with calcified benign nodules" and was thus able to board the vessel; that the *tuberculous adenitis* and *diabetes mellitus* of the respondent was assessed by a company- designated physician to be present upon the former's repatriation.

According to the LA, the respondent's illness is a permanent total disability as it prevented him from earning a living for more than 120 days (February 2, 2006 to August 22, 2006). An award of the disability compensation is intended to help the employee in making ends meet during the time when he is unable to work.[17] As provided for in the Schedule of Disability Allowances of the Standard Employment Contract of the Philippine Overseas Employment Agency,[18] the respondent is entitled to disability benefits of Grade 1 or the amount of US$50,000.00 x 120% or US$60,000.00. He was also awarded medical expenses of P2,766.50, as supported by receipts.[19] In addition, he was entitled to receive ten percent (10%) of the total award as attorney's fees. His claim for moral and exemplary damages was, however, denied for lack of basis. The *fallo* of the LA decision reads:

> WHEREFORE, premises considered, judgment is hereby rendered ordering [petitioners] BARKO INTERNATIONAL, INC. and FUYO KAI[U]N CO. LTD. jointly and severally to pay [respondent] the amount of [US$]60,000.00 or its peso equivalent representing permanent and total disability.
>
> Medical expenses in the amount of P2,766.00 is likewise awarded.
>
> Likewise, [petitioners] are jointly and severally liable to pay [respondent] attorney's fees equivalent to ten (10%) percent of the amount due him.
>
> All other claims are DISMISSED for lack of basis.
>
> SO ORDERED.[20]

Decision of the NLRC

In a Resolution[21] dated November 29, 2007, the NLRC reversed the decision of the LA as it found no factual and legal basis to support the respondent's allegation that the *tuberculous adenitis* and *diabetes mellitus* were contracted while on board the vessel in order for it to be considered as compensable; that *tuberculous adenitis* and *diabetes mellitus* "takes quite a number of years to develop and cannot just be acquired in so short a time as the tour of duty of the [respondent], which started on December 1, 2005 up to February 2, 2006 only[; n]or has there been evidence presented that the working conditions on board the vessel contributed to or exacerbated the physical condition of the [respondent]."[22] The NLRC further criticized the failure of the respondent to seek the opinion of another doctor to contest the medical findings of the company-designated physician. Thus, it puts to question how the LA arrived at the conclusion that the petitioners failed to substantiate their averments. Lastly, the NLRC stressed that what matter more is the schedule of disability rather than the number of days the seafarer is unable to perform his customary work.[23] Hence, the NLRC ordered the dismissal of the complaint for lack of merit.

Decision of the CA

Undaunted, the respondent sought relief to the CA *via* petition for *certiorari.*

The CA granted the petition and reversed the resolution of the NLRC. According to the CA, it is the incapacity of a seafarer to work resulting in the impairment of his earning capacity which is compensated and not the injury or illness itself. The CA further stated that when a seafarer is medically repatriated and assessed as incapable to regularly perform his duties for a period beyond 120 days, he shall be deemed to have suffered from a permanent disability which entitles him to a corresponding compensation.[24]

With this, the CA also emphasized that where the claimant's ailment occurred during and in the course of employment, the same is presumed as the cause of the ailment.[25] Sadly, the petitioners failed to refute the same. It is not required that the employment was the sole factor for the development of the ailment as it is enough that the said employment contributed to it "*even in a small measure.*"[26] Considering further that the respondent's prime duties included the cleaning and maintenance of the deck or superstructure of the ship, which constantly exposed him to different types of hazardous chemicals like paints, thinners and other forms of agents and harmful substances, the same may have invariably contributed to the aggravation of his illness. Hence, the CA found the LA decision to be more in accord with law and jurisprudence in granting the permanent total disability benefits, as prayed for by the respondent.

The petitioners filed a motion for reconsideration.[27] Citing the case of *Vergara v. Hammonia Maritime Services, Inc., et al.,*[28] the petitioners contended that the inability to work for a period of 120 days to a maximum of 240 days is only a temporary total disability which becomes "permanent" only (a) when so declared by the company physician within the periods he is allowed to do so, or (b) upon expiration of the 240-day period without a declaration of either the fitness to work or existence of "permanent" total disability. Here, the respondent was declared "fit to work" by the

company-designated physician, Dr. Cruz on August 22, 2006, well within the 240-day period from the date of the respondent's repatriation on February 8, 2006. Therefore, the respondent is not entitled to disability benefits.[29]

The petitioners, moreover, pointed out that in case of conflict between the company-designated doctor and a claimant's private doctor, a third opinion should be obtained. Otherwise, the assessment of the company designated doctor is binding.[30]

In the Resolution[31] dated June 3, 2009, the CA denied the motion for reconsideration of the petitioners. According to the CA, the NLRC resolution was issued on November 29, 2007 while the *Vergara* ruling was rendered on October 6, 2008. Thus, following the prospective application of the rules, the case of *Vergara* cannot be applied in the instant case. Instead, the prevailing jurisprudence on the matter is *Crystal Shipping, Inc. v. Natividad*[32] considering that the claim of the respondent was filed on July 6, 2006 prior to *Vergara*. In Crystal Shipping, a medically repatriated seafarer's continuous inability to work beyond 120 days from his sign-off from the vessel is construed as a permanent disability, *without any qualification*.[33] Thus, the respondent is entitled to permanent disability benefits.

Unable to agree, the petitioners filed the instant petition raising the following:

A. THE COURT OF APPEALS SERIOUSLY ERRED IN RULING THAT RESPONDENT IS ENTITLED TO TOTAL AND PERMANENT DISABILITY BENEFITS JUST BECAUSE HIS INJURY RENDERED HIM INCAPABLE OF PERFORMING HIS WORK FOR MORE THAN 120 DAYS.

B. THE COURT OF APPEALS GRIEVOUSLY ERRED WHEN IT ORDERED THE PAYMENT OF ATTORNEY'S FEES TO THE RESPONDENT.[34]

The Court's Ruling

The petition is devoid of merit.

The Court finds no cogent reason to deviate from the factual findings of the LA, as affirmed by the CA.

Settled is the rule that the burden of proof rests upon the party who asserts the affirmative of an issue. In labor cases, the quantum of proof necessary is substantial evidence, or such amount of relevant evidence which a reasonable mind might accept as adequate to justify a conclusion. In disability claims, as in the case at bar, the employee bears the onus to prove by substantial evidence his own positive assertions.[35]

In the instant case, the respondent went through the PEME. While there was a notation of "pulmonary fibrosis right lower lung with calcified benign nodules cleared by the pulmonary specialist"[36] in said report, he was declared fit for sea duties. The

respondent was able to board the vessel on December 1, 2005. On February 8, 2006, he was repatriated to Manila on medical grounds. He was diagnosed to be suffering mainly from *tuberculous adenitis* and was treated thereof. The respondent asserted that he contracted the illness while on board the vessel. Notwithstanding the medical treatment he underwent, he was unable to go back to his sea duties for a period of more than one hundred twenty (120) days.

The Court finds merit in the respondent's contention regarding the suspicious gesture of the petitioners in having a medical certification declaring him as "fit to work" despite apparent clear knowledge that he has been subjected to a long period of medical treatment. Both the company-designated physician and the respondent's private physician had similar findings that the respondent is suffering from *tuberculous adenitis* which is occupational in character and compensable under the attendant circumstances. The CA's disquisition on the matter reads:

> Under Section 32-A (18) of the POEA Memorandum Circular No. 09, Series of 2000, "Pulmonary Tuberculosis" shall be considered as an occupational disease in "any occupation involving constant exposure to harmful substances in the working environment in the form of gases, fumes, vapors and dust." It is well to point out that *among* [respondent's] daily tasks as an able bodied seaman were to paint and chip rust on deck or superstructure of ship and to give directions to crew engaged in cleaning wheelhouse and quarterdeck, which constantly exposed him to different types of hazardous chemicals, such as paints, thinners, and other forms of cleaning agents and harmful substances, that may have invariably contributed to the aggravation of his illness.[37] (Citations omitted)

Indeed, the fact that a certification declaring the respondent as fit to work contrary to a prior finding of tuberculosis can be considered as a ploy to circumvent the law intended to defeat the respondent's right to be compensated for a disability which the law considers as permanent and total.

Permanent total disability means "disablement of an employee to earn wages in the same kind of work or work of a similar nature that he was trained for or accustomed to perform, or any kind of work which a person of his mentality and attainment can do."[38] And, as aptly observed by the LA and affirmed by the CA:

> While [the respondent] may have pulmonary fibrosis [right] lower lung with calcified benign as per PEME, it must be noted that he was declared fit for work x x x. Hence, he was able to board the vessel.
>
> The sickness that complainant now seeks for disability benefit is tuberculosis adenitis and diabetes mellitus.
>
> > 'Tuberculosis is a contagious infection caused by the airborne bacterium Mycobacterium tuberculosis. It is usually transmitted

> by inhaling air contaminated by the bacterium. Active tuberculosis usually begins in the lungs (pulmonary tuberculosis). Tuberculosis that affects other part of the body (extrapulmonary tuberculosis) usually comes from pulmonary tuberculosis that has spread through the blood. Tuberculosis adenitis is a form of tuberculosis which affects the lymp[h] nodes. The diagnosed illness Tuberculosis Adenitis is considered as work-related under Section 32-A, No. 18 of the Amended POEA Contract.'
>
> This was found in the June 15, 2006 findings of Dr. Nicomedes Cruz, the company[-]designated physician.
>
> Clearly, the sickness is work[-]related and regarded as an occupational disease. Thus, the same is compensable.[39]

Again, **what is important is that he was unable to perform his customary work for more than 120 days which constitutes permanent total disability, and not the actual injury itself.** Undoubtedly, the illness of the respondent which incapacitated him to work more than 120 days after repatriation is considered as work-related which entitles him to disability benefits.

This Court, moreover, agrees with the CA regarding the applicability of the doctrine in the case of *Crystal Shipping* that a seafarer's continuous inability to work due to a work-related illness for a period of more than 120 days need not be qualified by a declaration of fitness to work by a company-designated physician for it to be considered as a permanent total disability which is compensable. It would, thus, be illogical to apply the ruling laid down in *Vergara* which was promulgated on October 6, 2008, or more than two years from the time the complaint was filed. The observance of the principle of prospectivity dictates that *Vergara* should not operate to strip the respondent of his cause of action for total and permanent disability that accrued since the time of his inability to perform his customary work.[40]

All told, the Court finds no reversible error with the decision of the CA, finding the respondent to be entitled to disability benefits. The Court further notes the death of the respondent on October 11, 2008 which was belatedly made known to his counsel.[41]

WHEREFORE, the petition is **DENIED**. the Decision dated December 5, 2008 and the Resolution dated June 3, 2009 of the Court of Appeals in CA-G.R. SP. No. 102402 are **AFFIRMED**.

SO ORDERED.

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

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[1] *Rollo,* pp. 9-25.

[2] Penned by Associate Justice Estela M. Perlas-Bernabe (now a member of this Court), with Associate Justices Vicente S.E. Veloso and Myrna Dimaranan-Vidal, concurring; id. at 29-35.

[3] Id. at 37-38.

[4] Id. at 200-204.

[5] Issued by Labor Arbiter Marita V. Padolina; id. at 135-143.

[6] Id. at 54.

[7] Id. at 34.

[8] Id. at 55.

[9] Id. at 87.

[10] Id. at 86.

[11] Id.

[12] Id. at 57.

[13] Id. at 276-277.

[14] Id. at 92.

[15] Id. at 60.

[16] Id. at 135-143.

[17] Id. at 142.

[18] Id. at 82-84.

[19] Id. at 103-105.

[20] Id. at 142-143.

[21] Id. at 200-204.

[22] Id. at 203.

[23] Id.

[24] Gist of Section 20-B(3) and (6) of the POEA Memorandum Circular No. 09, Series of 2000 re: compensation and benefits for illness and injury.

[25] Rollo, p. 33.

[26] Id. at 34.

[27] Id. at 252-260.

[28] 588 Phil. 895 (2008).

[29] *Rollo,* p. 256.

[30] Id. at 252.

[31] Id. at 37-38.

[32] 510 Phil. 332 (2005).

[33] *Rollo*, p. 38.

[34] Id. at 15.

[35] *Camilo A. Esguerra v. United Philippines Lines, Inc., Belships Management (Singapore) Pte Ltd., and/or Fernando T. Lising,* G.R. No. 199932, July 3, 2013.

[36] *Rollo*, p. 55.

[37] Id. at 34.

[38] *Seagull Maritime Corp. v. Dee,* 548 Phil. 660, 671 (2007).

[39] *Rollo,* pp. 140-141. See also CA Decision dated December 5, 2008, *rollo*, p. 33.

[40] *Kestrel Shipping, Co., Inc. v. Munar*, G.R. No. 198501, January 30, 2013, 689 SCRA 795, 817-818.

[41] *Rollo,* p. 296.