824 Phil. 552

SECOND DIVISION

[G.R. No. 226103, January 24, 2018]

GENERATO M. HERNANDEZ, PETITIONER, VS. MAGSAYSAY MARITIME CORPORATION, SAFFRON MARITIME LIMITED AND/OR MARLON R. ROÑO, RESPONDENTS.

D E C I S I O N

PERALTA, J.:

This petition for review on *certiorari* under Rule 45 of the Rules of Court *(Rules)* seeks to reverse the April 6, 2016 Decision[1] and August 1, 2016 Resolution[2] of the Court of Appeals *(CA)* in CA-G.R. SP No. 140581, which set aside the February 4, 2015 Decision[3] and March 3, 2015 Resolution[4] of the National Labor Relations Commission *(NLRC),* affirming with modification the November 18, 2014 Decision[5] of the Labor Arbiter *(LA).*

The facts[6] appear as follows:

> [Petitioner] alleges: that he has been under the employ of respondent agency since 1991 and was rehired consistently by the said agency (Annex "D"); that on February 28, 2012, he was hired by respondent agency to work on board "MV Saga Sapphire" as Head Wine Waiter for a period of six (6) months with a basic monthly salary of US$623.00 (Annex "B"); that he underwent a thorough pre-employment medical examination by the company[-]designated doctors and was declared "fit for sea duty" (Annex "B"); that he departed on March 3, 2012, to join his assigned vessel and everything went well without any trouble until on November 16, 2012 when he had an accident; that he was then lifting a box of wine when the vessel suddenly rolled causing him to lose his balance; that he fell on the floor with his back hitting the steel pavement; that he felt a sharp snap on his lower back accompanied by extreme pain radiating down to his lower extremities; that the ship doctor gave him a pain reliever and recommended his medical repatriation with a view to physiotherapy; that he was repatriated on December 22, 2012 and upon arrival he reported to respondents' office for post employment medical examination; that he was referred to the company-designated physicians at the Manila Doctors Hospital where he underwent MRI; that the results of the MRI revealed Lumbar Spondylosis, Disc Protrusion, and Disc Bulges; that he underwent extensive physical therapy from January 8, 2013 until his latest medical evaluation on March 11, 2013 and considered [petitioner] for disability assessment of slight rigidity or one[-]third loss of lifting power (Annex "F-3"); that [petitioner] sought consult (sic) from Dr. Rogelio P. Catapang, Jr., Orthopaedic

Surgeon and Traumatology expert and in his medical report, he stated:

> *"xxx He has tenderness over the spinal process and para spinal muscle; he has difficulty going up and down the stairs. Straight leg[-]raising noted at the right; no atrophy of the leg muscles. Deep tendon reflexes are normoactive and noted with difficulty of carrying and bending. Patient was advised to continue physiotherapy and to modify activities of daily living, avoid lifting heavy objects and high impact exercises.*
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> *xxx*
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> *Mr. Hernandez continues to complain and suffer low back pain. Diagnosis: the pain is made worse by prolonged standing and bending. He has difficulty in climbing up and down the stairs. He has lost his pre-injury capacity and is UNFIT to work back at his previous occupation.* "

[Petitioner] further avers that despite the conclusive findings of physical disabilities, his plea for assistance from the respondents was denied alleging that they have no liability whatsoever. His request for sickness allowance was likewise denied. Hence, this present complaint.

Respondents, on the other hand, admitted the fact of [petitioner's] employment on board the vessel "MV Saga Sapphire" as Head Wine Waiter and alleges the following: that the contract was for a term of six (6) months; that [petitioner] joined the vessel on March 2, 2012 and disembarked from the vessel on December 18, 2013 (Annex "2"); that [petitioner] complained of lumbar back pain and was given ibuprofen gel and paracetamol for relief; that the x-ray on his pelvis or lumbar spine showed no abnormality; that he was later on disembarked for medical treatment (Annex "3"); that after his repatriation, [petitioner] was referred to the company physician[,]Dr. Benigno A. Agbayani[,] of the Manila Doctors Hospital who recommended MRI (Annex "4"); that the MRI results showed [petitioner] was suffering Mild Disc Herniation; that on March 8, 2013, [petitioner] was assessed a partial permanent disability grade 11 – slight rigidity or one[-]third loss of lifting power (Annex "6")[.][7]

The LA ruled that petitioner is entitled to permanent total disability benefits because the very nature of the grading of the company-designated physician is a minimum grading based on a purely medical schedule that does not consider the loss of earning capacity. It was noted that even the company-designated doctor had not issued any declaration that petitioner is already "fit to work;" thus, the prognosis of the petitioner's own physician does not contradict the findings of the company-designated doctor, but merely connects it to the question of earning capacity and the loss of profession. For the LA, the fact that petitioner can no longer be employed as a seaman is essentially a total and permanent disability since the principle is that

disability is measured by the loss of earning capacity and not on its medical significance. In addition to the payment of permanent total disability benefits in the amount of US$60,000.00, respondents were ordered to pay sickness allowance of US$2,492.00 and ten percent (10%) of the total monetary award as attorney's fees.

On appeal, the NLRC deleted the award of sickness allowance. In sustaining petitioner's entitlement to permanent total disability benefits, the NLRC agreed that disability should be interpreted more in relation to the loss of earning capacity. In this case, the certification of petitioner's physician appears to reflect his actual physical condition *vis-a-vis* his work as a seafarer. Since the time he was medically repatriated, he was not able to and could not land a gainful occupation in a job that he was trained or accustomed to do. His true condition is that he has not completely and fully healed. It was noted that medical reports issued by the company-designated doctor do not necessarily bind the NLRC. Even so, respondents' physician refrained from issuing a fit-to-work certification.

For the NLRC, the case of *Splash Philippines, Inc., et al. v. Ruizo,*[8] cited by respondents, finds no application on the following grounds: (1) petitioner was medically repatriated for a work-related illness; (2) a disability grading was issued not by petitioner's own doctor but by the company-designated physician; and (3) petitioner is not guilty of willful refusal to undergo treatment in order to claim disability benefits; hence, there is no need to refer to a third doctor for final assessment. In any case, the NLRC opined that Section 20 (B) (3) of the Philippine Overseas Employment Administration – Standard Employment Contract (POEA-SEC), on the appointment of a third physician, is merely a directory provision.

With regard to respondents' claim that petitioner is guilty of concealment or misrepresentation of a pre-existing illness, the NLRC ruled that there is no evidence presented of a pre-existing medical condition in 2003 even if petitioner recalled that he suffered a particular pain in the lumbar area that year. More importantly, there is no evidence that he knew of any back problem in 2003 or even at the time his pre-employment medical examination *(PEME)* was conducted on January 27, 2012. It was noted that not every pain suffered is synonymous to illness or medical condition and that not every pain suffered is required to be disclosed by the seafarer. Lastly, the claim of concealment of a pre-existing illness is futile, since the medical condition suffered by petitioner is established to be caused by his work and not merely aggravated by it.

When the case was elevated to the CA, the appellate court agreed that petitioner is not guilty of fraudulent misrepresentation, considering that lumbar or lower back pain is not one of the pre-existing illness or condition that he was required to disclose. Nonetheless, the CA held that the referral to a third doctor is mandatory in case of conflicting findings between the company-designated physician and the seafarer's chosen doctor. Citing *Phil. Hammonia Ship Agency, Inc., et al. v. Dumadag,*[9] it concluded that while a seafarer has 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. In light of the contrasting diagnoses in this case, petitioner prematurely filed his complaint without regard to the conflict-resolution procedure under the POEA-SEC. The CA, likewise, noted that unlike petitioner's physician who apparently examined him only once, the company-designated doctor examined and treated him for several months, enabling him to

acquire familiarity and detailed knowledge of petitioner's medical condition to arrive at a more accurate appraisal of his condition. Finally, according to the appellate court, there is no permanent total disability to speak of because petitioner disembarked from the vessel on December 18, 2012, while the company-designated doctor arrived at an assessment that his disability rating was Grade 11 on March 8, 2013, which is evidently prior to the expiration of the 120-day or 240-day treatment period. The CA disposed:

> **WHEREFORE,** premises considered, the assailed Decision and Resolution of the NLRC are hereby **SET ASIDE,** and in lieu thereof, a new one is rendered ordering petitioners to jointly and severally pay private respondent Seven Thousand Four Hundred Sixty[-]Five US Dollars (US$7,465.00) in its equivalent in Philippine Peso at the prevailing rate of exchange at the time of actual payment.
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> **SO ORDERED.**[10]

Now before Us, petitioner argues that, in a Rule 65 petition, the CA erred when it proceeded to evaluate the conflicting assessments of the company-designated physician and the seafarer's preferred doctor because it cannot be said that the NLRC committed grave abuse of discretion when its decision was based on substantial evidence that consisted of the medical reports of both physicians showing that he is permanently and totally unfit for further sea duty. It is contended that the third-doctor-referral rule should not be applied in this case since the company-designated physician's reports are biased and doubtful. In issuing a Disability Grade 11, there is failure to explain if petitioner can still resume his previous functions as a seafarer given the fact that he was continuously suffering from persistent low back pain. Further, petitioner asserts that the determination of disability benefits of seamen should be based not only on the disability grading issued by the company-designated doctor or the schedule under Section 32 of the POEA-SEC but also on the provisions of the Labor Code and the Amended Rules on Employees' Compensation. It is emphasized that disability should be viewed on the seafarer's loss of earning capacity and that what is being compensated is not the illness or injury but the incapacity to work.

The petition is denied.

The rulings of the labor authorities are seriously flawed because they were rendered in total disregard of the POEA-SEC provision, which are deemed written in the contract of employment, on the prescribed procedure in the resolution of conflicting disability assessments of the company-designated physician and the seafarer's doctor. There is grave abuse of discretion, considering that, as labor dispute adjudicators, the LA and the NLRC are expected to uphold the law between the parties.[11]

It bears to stress that there is no issue as to the compensability of petitioner's health condition since the parties do not dispute that it is work-related. What remains to be resolved is whether he is entitled to the payment of permanent total disability benefits or to that which corresponds to Disability Grade 11 of the POEA-

SEC.

Under Section 20(A)(3) of the 2010 POEA-SEC, *"[if] a doctor appointed by the seafarer disagrees with the assessment, a third doctor may be agreed jointly between the Employer and the seafarer. The third doctors decision shall be final and binding on both parties."* The provision refers to the declaration of fitness to work or the degree of disability.[12] It presupposes that the company-designated physician came up with a valid, final and definite assessment as to the seafarer's fitness or unfitness to work before the expiration of the 120-day or 240-day period.[13] The company can insist on its disability rating even against a contrary opinion by another doctor, unless the seafarer signifies his intent to submit the disputed assessment to a third physician.[14] The duty to secure the opinion of a third doctor belongs to the employee asking for disability benefits.[15] He must actively or expressly request for it.[16] In *INC Navigation Co. Philippines, Inc., et al. v. Rosales,* [17] We opined:

> By so acting, Rosales proceeded in a manner contrary to the terms of his contract with INC in challenging the company doctor's assessment; he failed to signify his intent to submit the disputed assessment to a third doctor and to wait for arrangements for the referral of the conflicting assessments of his disability to a third doctor.
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> Significantly, no explanation or reason was ever given for the omission to comply with this mandatory requirement; no indication whatsoever is on record that an earnest effort to secure compliance with the law was made; Rosales immediately filed his complaint with the LA. As we recently ruled in *Bahia Shipping Services, Inc., et al. v. Crisante C. Constantino,* when the seafarer challenges the company doctor's assessment through the assessment made by his own doctor, the seafarer shall so signify and the company thereafter carries the burden of activating the third doctor provision.
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> **To definitively clarify how a conflict situation should be handled,** upon notification that the seafarer disagrees with the company doctor's assessment based on the duly and fully disclosed contrary assessment from the seafarer's own doctor, the seafarer shall then signify his intention to resolve the conflict by the referral of the conflicting assessments to a third doctor whose ruling, under the POEA-SEC, shall be final and binding on the parties. Upon notification, the company carries the burden of initiating the process for the referral to a third doctor commonly agreed between the parties. In *Bahia,* we said:
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> > In the absence of any request from him (as shown by the records of the case), the employer-company cannot be expected to respond. As the party seeking to impugn the certification that the law itself recognizes as prevailing, Constantino bears the burden of positive action to prove that his doctor's findings are correct, as well as the burden to notify the company that a contrary finding had been made by his own physician. Upon such notification, the company must