

TRANSCRIPT
FROM
The Danish Eastern High Court's records

D E C I S I O N

Delivered on 4 November 2014 by the Eastern High Court's 23th department.
(The High Court judges Tine Vuust, Gunst Andersen and Malou Kragh Halling (appointed ad interim)).

23th department no. B-193-14:

The Danish Metalworkers' Union as agent for
Edwin De Guzman Waje
(Attorney Asger Tue Pedersen)

v

The Danish Appeals Board

(the Legal Adviser to the Danish Government of attorney Benedicte Galbo)

This case, commenced on 25 November 2013 before the City Court of Copenhagen, has on 16 January 2014 by order been sent for trial in the Eastern High Court pursuant to the Danish Administration of Justice Act, section 226, subsection 1. The case concerns the stipulation of the loss of ability to work for a Philippine sailor, who was injured while working on a Danish vessel.

The plaintiff, the Danish Metalworkers' Union as agent for Edwin De Guzman Waje contends that the defendant, The Danish Appeals Board, be ordered to recognise that

Edwin de Guzman Waje's loss of ability to work as a consequence of the industrial injury on 19 September 2010 to be 85%, alternatively less than 85%, but at least 40%.

The Danish Appeals Board contends acquittal primarily, remitted in the alternative.

Statement of claim

Edwin de Guzman Waje, being a Philippino citizen and a resident of the Philippines, was injured in an industrial accident on 19 September 2010 while carrying out his job as bosun (boatswain) for the Danish shipping company Torm A/S.

On 29 August 2011 the Danish National Board of Industrial Injuries recognised the accident as a work-related injury covered by the Workers' Compensation Act and fixed the degree of impairment to be 12%, which the Danish Appeals Board raised to 15% by ruling on 2 December 2011.

On 27 January 2012 the National Board of Industrial Injuries made a ruling on Edwin De Guzman Waje's loss of ability to work. Among other things it is stated that:

“Rulings and decisions

Your loss of ability to work is 70 percent.

...

We have determined your annual earnings to be 97,000 Danish kroner.

...

Representations of the case

You have stated that you have not worked since your industrial injury on 19 September 2010.

You have stated that you will start up a business, as you do not expect to be able to use your hand working as a boatswain.

...

Reason

We have assessed that you have a loss of ability to work of 70 percent.

In our assessment we have taken into account that you have a relatively specific, but high need to spare your hand, in relation to work that puts stress on your hand.

We have also taken into account in our assessment that you, as a consequence of this, will not be able to return to your work as a boatswain.

In comparison with Phillipine standards, you receive a relatively high annual salary and with your need for light duties you will not be able to obtain a comparable salary in another job, which takes into consideration your reduced ability to work. We have also taken into account in our assessment that in relation to the labour market you are of an age which means that you will be able to achieve labour market attachmen,

however, you will not in our estimate be able to reach similar earnings.

Therefore, we have assessed that you have a loss of ability to work of 70 percent....”

The decision was made in accordance with the National Board of Industrial Injuries' guidelines on compensation for loss of ability to work of 1 November 2010, whereof it is evident among other things:

”15.2. Non-resident sailors on a Danish vessel

15.2.1. In short about issues, background (sailors)

Non-resident sailors on a Danish vessel, for instance a vessel registered in the Danish International Ship Register (DIS) are, as a rule, covered by Danish industrial injury insurance.

The injured person can be a Philippine employee, who have never been a resident of Denmark. The only affiliation with Denmark is working on the Danish vessel. This can cause some special challenges when calculating the non-resident sailor's loss of ability to work.

In 2010 there were about 4,000 non-resident sailors in the DIS Register, divided into about 20 different nationalities. Of the 4,000 sailors about half were EU citizens.

The seafarer is subject to Danish law and Danish authorities and must live up to Danish health and education requirements for signing on. They are also covered by the Danish Work Environment Act.

However, collective agreements may not be entered into by Danish professional organisations on salary and working conditions. Sometimes there is agreement between the non-resident and Danish sailors' employment conditions. In accordance with the collective agreement between the Danish Shipowners' Association and for example 3F (United Federation of Danish Workers) sailors will be equal, if they work on the same vessel in the same position.

15.2.2. The Assessment (sailors)

The background for the assessment in these cases is the same as in all other cases:

The frame of reference is the salary the injured person would have earned had the injury not occurred, compared with the potential earnings following the injury.

A non-resident sailor cannot choose to move to Denmark following the injury. This is a person, who has never resided or worked in Denmark and whose sole connection to Denmark is that the vessel is registered in Denmark. The injured person has no social right in Denmark and has never been at the disposal of the Danish labour market. (Therefore, PA 2-03 does not apply in these cases.)

In these cases the salary reduction assessment must be made on the basis of potential salary in the native country with the injury compared with the potential salary as a sailor without the injury. This can give rise to - due to low salary and price levels in the native country - injured persons being awarded a relatively higher compensation than if the injured took up residence in Denmark. Meanwhile, the

compensation must cover the injured person's actual loss, pursuant to the Danish Industrial Injuries Act. The sailor has a significant higher salary compared with others with similar jobs in the native country, and had he not suffered the injury he would have had the opportunity to maintain the high income. Therefore, the loss in these cases will often be great compared with the possibility of income in the native country.

The assessment of the future loss of ability to work will normally be subject to great insecurity in these cases. The injured person may be young and, despite the injury, have great potential in obtaining additional skills and training. It may be taken into account, in the assessment, that the compensation will give the injured person an economic latitude, which may also be used for learning new skills. The loss of ability to work cannot alone be based on a salary reduction assessment; a wider assessment must be made, where the considerations mentioned above are included into other assessment criteria (see chapter 2.2 on assessment criteria).

...”

The National Board of Industrial Injuries' decision was appealed and sent to the Appeals Board, which on 24 July 2013 made a decision, after which Edwin De Guzman Waje's loss of ability to work was reduced to 35%, and his annual salary was increased to 115,000 Danish kroner. The reason for this was as follows:

“Reason for the decision on loss of ability to work

We have assessed that your approximate loss of ability to work is 35 percent as a consequence of the industrial injury.

We have taken into account that you have been awarded 15 percent permanent injury for a right sided hand injury with pains, affected grip and swelling including muscular dystrophy, altered sense of touch and reduced movement in second and fifth finger.

At the time of the injury you worked as boatswain (bosun) on a Danish registered vessel, and had an annual salary of more than 100,000 Danish kroner. You now live in your native country, the Philippines, where you are at the disposal of the labour market.

We have taken into account that the industrial injury has resulted in the need for lighter duties in connection with work straining your hand. Thus, the injury prevents you from continuing in your current line of work as boatswain (bosun) and similar work on a vessel.

It follows from our test case 77-13 that the loss of ability to work for non-residents, who are working in Denmark for a period, and after the industrial injury move back to their native country must be assessed based on the conditions in the country where they have taken up residence. Thus, it is not a matter of making a comparison between what the injured person could have earned in Denmark without the injury and what the injured person will be able to earn in the native country, since this will mostly be an expression of the difference in the general salary level. In such situations the decreased earning ability is therefore based on an estimate.

You are at the disposal of the labour market in your native country, however in need of lighter duties when it comes to harder unskilled work with a lot of lifting. As a consequence of your injuries it is our assessment, that you will be able to take on lighter unskilled work, such as working in a shop. In view of the character and extent

of your industrial injury your ability to work is thus reduced by an estimation of about 1/3.

...

Notes to the complaint

With reference to your payslips your trade union has stated that the calculated annual salary of 97,000 Danish kroner is too low. It is also stated that as a consequence of your injury you will no longer be able to work at sea. When compared with the Philippine minimum salary equal to an income of about 13,600 Danish kroner your loss of ability to work is therefore 85 percent.

The insurance provider has by email of 29 February 2012 stated that they do not agree with the trade union's view.

Your trade union has by letter of 24 April 2013 further referred to excerpts from

the National Board of Industrial Injuries' guide on compensation for ability to work, chapter 15.2 on non-residential sailors on Danish vessels. It appears from the chapter, that the reduced salary shall be based on the potential salary in the native country taking the injury into account, compared with the potential salary as a sailor without the injury.

We provide that the National Board of Industrial Injuries' guide is not binding for us, and that we are making a specific assessment of each individual case. We refer to our practice in test case 77-13 on the assessment of the loss of ability to work in these special situations, where sailors following an industrial injury take up residence in the native country.

We further refer to the above reason for our decision.

..."

Test case 77-13 referred to by the Danish Appeals Board in its decision, is published in *Retsinformation*, the joint publication of Danish law and legal documents, including the Danish Law Gazette, with the following summary:

“Non-residents, working in Denmark for a period, who move back to their native country following an industrial injury must have their loss of ability to work assessed based on the conditions in the country where they have taken up residence. Thus the loss of ability to work does not make up the difference between what the injured person would have been able to earn in Denmark without the industrial injury and what the injured person will be able to earn in the native country with the industrial injury. This comparison would mostly be an expression of the difference in the overall salary level in Denmark and the country in question, not an expression of the reduced ability to earn money from working. Therefore, the loss of ability to work must be determined based on an estimate, in such situations.

In the specific case, a Phillipine woman, working on a Danish registered vessel, got an injury to her knee, preventing her from taking similar work on a vessel. The woman later took up residence in her native country, the Phillipines.”

The parties have before the High Court agreed that Edwin De Guzman Waje’s annual salary prior to the industrial injury can be determined to be 115,000 Danish kroner, and the annual salary following the injury is estimated at 15,000 Danish kroner.

The parties have further agreed that the industrial injury will prevent Edwin De Guzman Waje from continuing working in his former profession as a boatswain, including other work on a vessel.

Statements

Statements have been made by Edwin De Guzman Waje and Ole Strandberg.

Edwin De Guzman Waje has, among other things, stated that he finished his bachelor's degree in science in marine transportation in 1983 at the Phillipine Marine Institute, equal to a university. Until 1989 he worked as a security guard in the Phillipines, as it was difficult to find work as a sailor. In 1989 he was employed by Tormi Shipping, a shipping agent, to work in the international merchant navy, including on board Norwegian and Danish vessels.

He was employed in the Danish shipping company Torm A/S in 2003, where he worked until the industrial injury took place in 2010. The salary was the same as with other shipping companies. It is customary, as a sailor, to be employed on 6 month contracts, which will however always be renewed, if the shipping company is satisfied with ones work. Holidays are held for about 3 months after expiry of a contract term. During holidays he stayed with family in the Philippines. He is now working in his spouse's shop.

Ole Strandberg has, among other things, stated, that he is Union Officer in CO-SEA, where he has been employed since 1997 and has managed non-resident sailors' interests against Danish authorities since 2005. CO-SEA are cooperating with international shipping organisations, especially the Phillipine, as the majority of the non-resident sailors at Danish vessels are Filipino. Sailors from the Philippines are very popular, as they work hard and do not drink alcohol. The two large Danish shipping organisations enter into specific Danish collective agreements with the Philippine employee organisations. The collective agreements are very similar across the world, as it is attempted to maintain roughly the same salary level. However, Danish sailors receive a significantly higher salary in accordance with the Danish collective agreements. A Danish boatswain will thus receive a monthly salary of about 20,000 Danish kroner after tax.

Argument

The Danish Metalworkers' Union as agent for Edwin De Guzman Waje claims, among other things, that the appeals board's decision is not in compliance with the Workers' Compensation Act, section 17, after which the loss of ability to work must compensate the

permanent loss of income that Edwin De Guzman Waje has suffered as a consequence of the recognised industrial accident.

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It is a matter of an economic standard based on a comparison of the earning capacity before and after the industrial injury. It is not possible to take into account a hypothetical chance of finding work anywhere else than in the Philippines subject to the Workers' Compensation Act.

The Danish Appeals Board's decision is based on the basic premise that Edwin De Guzman Waje must, himself, carry the risk of the overall salary level when employed in the Philippines, which is not supported in the text of section 17, subsection 2, or the regulation's legislative material.

Based on a comparison of Edwin De Guzman Waje's annual salary of 115,000 Danish Kroner prior to the industrial accident, and his subsequent annual earning capacity of 15,000 Danish kroner in the Philippines, his loss of ability to work must therefore be fixed at 85%, alternatively a lower percentage rate, but higher than was fixed by the Appeals Board.

In relation to the Appeals Board's claim in the alternative, it is alleged that sufficient information exists in the case to assess what income Edwin De Guzman Waje will be able to earn from ordinary unskilled work in the Philippines. Therefore, there are no grounds for sending the case to be reopened and considered again by the Appeals Board.

The Appeals Board has in their claim of acquittal stated that there are no grounds for setting aside the Appeals Board's decision. When a non-resident who worked for a Danish employer, prior to the injury, under the same conditions as Danes, take up residence in the native country after the industrial injury, the percentage of the loss of ability to work must be fixed based on an estimate of all of the existing information, including information on the industrial injury's health consequences, and that the injured person is residing abroad. Determining the loss of ability to work based on a mathematical calculation of the ratio between earnings on a Danish-registered vessel and earnings in the native country will

indicate the difference in the overall salary level between Denmark and the native country of the person in question, and not for the actual loss of ability to work. The mathematical model of calculation does in this specific case lead to an unfair result. Fixing the loss of ability to work on an estimate is supported by the Workers' Compensation Act, section 24,

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subsection 2, on estimating the fixing of annual salary when particular conditions for earnings or employment apply. Therefore, the Appeals Board's decision is in complete agreement with the Workers' Compensation Act.

In support of the claim of remission the Danish Appeals Board submits, that if the High Court finds ground for overriding the Appeals Board's decision, the case should be sent to be tried again in the Appeals Board to fix the percentage of the loss of ability to work in accordance with such guidelines as are evident from the reasons of the High Court's decision.

The High Court's reason and result

Under the Workers' Compensation Act, section 17, subsection 1, also applying to persons working on a Danish vessel. cf. section 2, subsection 4, an injured person has the right to compensation for loss of ability to work, if the industrial injury has decreased the person in question's ability to earn a living from work.

Subject to section 17, subsection 2, when assessing the loss of ability to work, the injured person's chance to make an income by such work, that within reason can be demanded of the person in question considering his or her abilities, education, age, chances of updating skills and retraining.

It is evident from the legislative material that compensation for loss of ability to work should compensate for the impairment caused by the injury earning capacity or ability to work, of which a correct assessment of damages implies an "...assessment of the injured person's ability to work, if the injury had not happened, compared with an assessment of his ability to work considering the injury", cf. Chapter II, 3rd sentence in report no. 792 of 5 March 1974 on industrial injury insurance.

Thus under section 17 the loss of ability to work must be fixed based on an individual assessment of the injury's financial consequence in each case. Neither in the wording of the provision of the Danish Workers' Compensation Act, section 24, subsection 2, equal to the rule in the Liabilities for Damages Act, section 7, subsection 2, nor the practice related to this provision, is there authority to reducing the percentage of the loss of ability to work

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based on an estimate based solely on the difference in the overall salary level for employees on a Danish vessel and people employed in the Philippines.

Edwin De Guzman Waje is a Philippine citizen, and has always resided in the Philippines.

Based on this the plaintiff's primary claim is allowed and Edwin De Guzman Waje's loss of ability to work is thus fixed at 85%.

The Appeals Board must pay legal costs for the High Court to the Danish Metalworkers' Union as agent for Edwin De Guzman Waje amounting to a total of 42,000 Danish kroner. The amount includes 2,000 Danish kroner for court fees, 40,000 Danish kroner for expenses for legal assistance. On fixing the amount covering expenses for legal assistance the value of the matter as well as the significance of the case has been considered.

I T I S H E L D T H A T :

The Danish Appeals Board is ordered to recognise that Edwin De Guzman Waje's loss of ability to work under the Workers' Compensation Act, as a consequence of the industrial injury on 19 September 2010 is 85%.

Within 14 days from making this decision the Appeals Board must pay legal expenses for the High Court in the amount of 42,000 Danish kroner to the Danish metalworkers' Union as agent for Edwin De Guzman Waje.

The legal expenses yield interest subject to the Danish late Payment of commercial Debts Act, section 8 a.

(Signature)

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**This is certified to be a true copy. The Danish Eastern
High Court, on**