



Mativo v Director of Occupational Safety and Health Services & another (Civil Appeal E063 of 2022) [2023] KEELRC 1062 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1062 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E063 OF 2022**

L NDOLO, J

MAY 4, 2023

BETWEEN

FELIX NYAMAI MATIVO APPELLANT

AND

DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH SERVICES 1ST RESPONDENT

EMPIRE GLASS INDUSTRIES LIMITED 2ND RESPONDENT

(Appeal from the decision of the Director of Occupational Safety and Health Services dated 11th May 2022)

JUDGMENT

1. This appeal arises from the decision of the Director of Occupational Safety and Health dated May 11, 2022, overruling the Appellant's objection dated April 21, 2022 and upholding an earlier decision dated March 3, 2022 which reduced the Appellant's permanent incapacity from 15% to 3%.
2. In his Memorandum of Appeal dated May 31, 2022, the Appellant raises the following grounds of appeal:
 - a. That the 1st Respondent erred in law and in fact in changing the Appellant's award on permanent incapacity from 15% to 3%;
 - b. That the 1st Respondent erred in law and in fact in disregarding the medical report by Dr S Awinga dated November 18, 2021, which had assessed the Appellant's permanent incapacity at 15%;
 - c. That the 1st Respondent misdirected himself by relying on the opinion contained in the Work Injury Medical Evaluation report dated March 3, 2022, which opinion unjustifiably



disregarded the Appellant's disclosed complaints and limitations in movement and work arising out of the subject accident;

- d. That without any reasonable justification, the 1st Respondent awarded a permanent incapacity of 3% which was too low compared to the medical report of Dr S Awinga dated November 18, 2021.
3. The 2nd Respondent filed a replying affidavit sworn by its Director, Kamal Asodia on August 3, 2022.
4. Asodia concedes that the Appellant was involved in an industrial accident on February 21, 2018, in which he sustained injuries, while working within the 2nd Respondent's premises.
5. He depones that the 2nd Respondent filed ML/DOSH/WIBA Form 1 on May 18, 2018 and on November 18, 2021, a doctor assessed the Appellant's permanent incapacity at 15%.
6. Based on the Appellant's medical report dated November 18, 2021, the 1st Respondent assessed damages payable to the Appellant at Kshs 316,206.92.
7. The Appellant was subsequently subjected to a second medical examination whose report reduced the Appellant's permanent incapacity to 3%.
8. Another report dated February 1, 2022, by the 2nd Respondent's doctor indicated that the Appellant did not suffer any permanent incapacity.
9. By a ruling delivered on May 11, 2022, the 1st Respondent dismissed the Appellant's objection and upheld the decision dated March 3, 2022, on the ground that the Appellant had not adduced any further supporting medical documents.
10. I understand the substance of this appeal to be the 1st Respondent's decision to vary his earlier award in favour of the Appellant based on 15% permanent incapacity to a lower award based on 3% permanent incapacity.
11. The Appellant submits that because there was no objection by the 2nd Respondent to the award based on 15% permanent incapacity, there was no basis for the 1st Respondent to revise the award based on 3% permanent incapacity.
12. Part VIII of the *Work Injury Benefits Act* provides for Appeals. Section 51 whose marginal note reads: 'Objections and appeals against decisions of the Director provides as follows:
 51.
 - (1) Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director against such decision.
 - (2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.
13. Section 52 provides for the Director's reply in the following terms:
 52.
 - (1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his



decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.

14. In this appeal, there is nothing on record to show any objection by the 2nd Respondent to the award made by the 1st Respondent in the Appellant's favour, on the basis of 15% permanent incapacity.
15. I must therefore agree with the Appellant that there was no basis for the 1st Respondent to order a second medical examination on the Appellant. I hasten to add that there was also no basis for the second award based on the reduced permanent incapacity of 3%.
16. I need at this point to state that in assessing awards under the *Work Injury Benefits Act*, the Director of Occupational Safety and Health Services performs a statutory duty and his decisions must be based on the law. He is not at liberty to change his mind just because assessing doctors return conflicting reports.
17. Finally, this appeal succeeds and is allowed with the consequence that the award by the 1st Respondent based on 3% permanent incapacity is set aside and replaced with the earlier award based on 15% permanent incapacity.
18. The 2nd Respondent will meet the costs of the appeal.

DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF MAY 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Malonza for the Appellant

Mr. Ogara for the 2nd Respondent

No appearance for the 1st Respondent

