



Osiri v Onda Mechanical EA Limited & 2 others (Employment and Labour Relations Appeal E184, E188, E164 & E178 of 2022 & E066 & E070 of 2020 & E160, E162 & E135 of 2021 (Consolidated)) [2023] KEELRC 3120 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3120 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

**EMPLOYMENT AND LABOUR RELATIONS APPEAL E184, E188, E164 & E178 OF 2022
& E066 & E070 OF 2020 & E160, E162 & E135 OF 2021 (CONSOLIDATED)**

NJ ABUODHA, J

NOVEMBER 24, 2023

BETWEEN

GEOFREY NYAKERIGA OSIRI APPELLANT

AND

ONDA MECHANICAL EA LIMITED 1ST RESPONDENT

FIRST ASSURANCE COMPANY LIMITED 2ND RESPONDENT

**DIRECTOR OCCUPATIONAL SAFETY AND HEALTH SERVICES 3RD
RESPONDENT**

(Being appeals from the decision of the Director of Occupational Safety & Health Services delivered on the 22nd day of April, 2021 in claim reference No. WIBA/NBI/144/2021 at Nairobi)

JUDGMENT

1. Through the Memorandum of Appeal filed on 7th February, 2023 the Appellant appeals against the decision of the Director of Occupational Safety & Health Services delivered on the 22nd day of April, 2021 in claim reference No. WIBA/NBI/144/2021 on grounds inter alia:
 - a. The 1st and 2nd Respondent failed to serve the Appellant with an objection 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. Therefore, rendering any resulting decision unsupported by law and facts.
 - b. The Director of Occupational Safety and Health Services erred in law and in fact by failing to give the Appellant a fair hearing thus condemning him unheard.



- c. The Director of Occupational Safety and Health Services erred in law and in fact in failing to give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and failed to send a copy of the statement to the Appellant.
 - d. The Director of Occupational Safety and Health Services erred in law when he proceeded to revise an assessed compensation without a written substantive objection placed before him.
 - e. The Director of Occupational Safety and Health Services completely disregarded the medical report by the Appellant's primary treating doctor by Dr. Sang Edward dated 09.02.2021 which assessed the Appellant's permanent incapacity at 15%.
 - f. The Director of Occupational Safety and Health Services erred in law by failing to inform the Appellant that he could raise an objection to the decision to revise his compensation.
 - g. The Director of Occupational Safety and Health Services ignored the fact that the Appellant was temporarily disabled due to the serious injuries he suffered at work and awarded him zero compensation.
 - h. The decision is manifestly unreasonable and misguided.
 - i. In all instances, the decision and orders of the Director of Occupational Safety and Health Services are unsupportable by law and facts.
2. The appellant therefore sought from the Court orders that:
- i. This Appeal be allowed with costs.
 - ii. The objection by the Respondents and the decision of the Director of Occupational Safety and Health Services dated 21st April 2021 be produced before this court.
 - iii. The decision of the Director of Occupational Safety and Health Services dated 21st April 2021 be set aside in its entirety.
 - iv. The Court grants such other Orders as it may deem necessary.
 - v. That costs be in the cause.
3. The Appellant in its submissions dated 24th July, 2023 submitted among others that it was not disputed that the claimant was an employee of the 1st respondent and that he got injured in the course of his employment. The notice to Director, Occupational Safety and Health (DOSH) of the accident was made by the 1st respondent and an assessment done on 3rd November, 2020. This according to Counsel conclusively determined the issue.
4. According to Counsel, section 52 of the *Occupational Safety and Health Act* (OSHA) required the director to give a response to any objection within 14 days after varying or upholding the impugned decision. The response must set out the reason for the decision and must be served on all persons affected by the decision. According to Counsel, as at the time of writing the submissions the appellant had not been served with the director's written decision setting out the reason for the revision of the of the appellant's percentage of permanent disability from the initial 15% to 0% despite the fact that he stood affected by the said decision. Further, the appellant was not served with the respondent's objection instigating the revision process.
5. Further, on 28th September, 2022 the Court ruled in favour of the appellant and ordered that DOSH produces a copy of the objection lodged by the 1st and 2nd respondent within 30 days from the date of the ruling. According to Counsel, 30 days have elapsed and it was clear that the 1st and 2nd respondent



did not object the assessment pursuant to section 51 of the WIBA since they have failed to produce the said copy as ordered by the Court. Counsel therefore submitted that the process was outside the statute and taken to the disadvantage of the appellant. The process was therefore according to counsel illegal.

6. It would appear from the record that the respondents did not file any submissions in respect of the appeal.

Determination

7. Section 51 of the WIBA provides that:

“... 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.

Section 53 further provides that:

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.
8. From the foregoing, it is therefore clear from the above provisions that an objection to the decision of the director must be lodged within 60 days of his decision and that once such objection is lodged, the Director is required to give his decision within 14 days of receiving the same. In this particular case the Director made an assessment on 9th February, 2020 placing the appellant at 15% permanent disability and awarding him Kshs. 1,122,000/-. This assessment was in line with the recommendation Dr. Sang of PCEA Kikuyu Hospital. The Court did not see any objection to this assessment by any of the respondents as required by section 51 of WIBA. However there was on record two medical reports one by Dr. Khamala on behalf of the 2nd Respondent and another by Dr. Kowino and Kimani which placed the claimant’s permanent incapacity at 15%. The Court is therefore in wonder over what informed the second and third medical opinion over the appellant. It is curious that even after the Court ordered that the appellant be furnished with the respondent’s objection and the decision of the director, this was not complied with. One can therefore only presume that no such objection was filed and that the Director never made any decision revising his previous assessment made on 9th February, 2020.
9. The significant revision of the assessment was a matter that significantly affected the appellant hence the procedure prescribed by law ought have been adhered to. As observed above, there was no evidence that this was done. As a result the appellant was condemned unheard contrary to the rules of natural justice.
10. In conclusion the Court finds and holds that the revision of the director’s assessment dated 9th February, 2020 without any formal objection by the respondent as required by WIBA was unlawful and is hereby set aside. Further, the appellant is entitled to be paid the assessment as done by the Director on 9th February, 2020. The Appellant shall further have the costs of the Appeal
11. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023

DELIVERED VIRTUALLY THIS 24TH DAY OF NOVEMBER, 2023

ABUODHA NELSON JORUM



JUDGE

