



**Momanyi v Pressmaster Africa Ltd (Appeal E091 of 2021)
[2022] KEELRC 13423 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13423 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E091 OF 2021
MA ONYANGO, J
DECEMBER 2, 2022**

BETWEEN

DENNIS OGENGA MOMANYI APPELLANT

AND

PRESSMASTER AFRICA LTD RESPONDENT

JUDGMENT

1. This is an appeal by the Appellant lodged pursuant to the provisions of section 52(2) of the [Work Injury Benefits Act](#) (WIBA). Through the appeal, the Appellant has challenged part of the award made by the Director of Occupational Safety and Health Services (hereafter called the Director) dated July 8, 2021.
2. The appeal is opposed by the respondent. In addition to the several other objections to the Appeal, the respondent asserts that the Director has not issued a response to the appellant's objection in terms of section 52 of the WIBA. Consequently, the appeal has been filed prematurely.

Facts of the Dispute

3. The appellant, an employee of the respondent suffered injury whilst at work. As required under the WIBA, the respondent lodged a report of the injury with the Director. Following this report, the Director made an initial assessment of compensation for the appellant which was capped at Ksh 69,188. This assessment was done around December 6, 2019.
4. Dissatisfied with the assessment, the appellant lodged an objection with the Director on May 27, 2021. It would appear that in reaction to this objection, the Director made a reassessment of the award to the appellant to Ksh 424,079.92. This was done on July 7, 2021. Still unhappy with some aspects of the new assessment, the appellant has now lodged this appeal.



5. The gist of the appeal is that the Director erred by failing to award the Appellant Ksh 150,000 to cover future medical expenses. It is the appellant's case that it was wrong for the Director to subsume future medical expenses in the compensation granted to cover permanent incapacity. According to the Appellant, awards for temporary disablement and permanent incapacity under sections 28 and 30 of the WIBA are distinct from reimbursement for reasonable medical expenses under section 47 of the Act.
6. Proceeding on the above premise, the Appellant asks the court to order the Respondent to pay him an additional sum of Ksh. 150,000/ to cover medical costs for the prospective surgery to remove the implant in the Appellant's arm. In support of his claim, the Appellant relies on a medical report by Dr. Cyprianus Okoth dated 23rd March 2021.
7. The Respondent has objected to the appeal. It is the Respondent's position that this matter was settled when the Director first awarded the Appellant Ksh. 69,188/. According to the Respondent, it was not notified of the objection by the Appellant against the award of Ksh. 69,188/. Neither was it involved in processing the alleged reassessment of the amount to Ksh. 424,079.92. As such, the new assessment should be nullified.
8. The Respondent has also challenged the competence of the appeal. According to the Respondent, if it is true that the Appellant lodged an objection to the Director's award in terms of section 51 of the WIBA, the Director has yet to furnish the parties with his response to the alleged objection to entitle either of them to move the court on appeal.

Evaluation of the Grounds of Appeal

9. Once a party to the process under section 51 of the WIBA objects to the Director's finding, the Director is required to deliver his response within fourteen days of receipt of the objection. Section 52(1) of the Act provides as follows in relation to this requirement:-

“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.”
10. The provision permits the Director to vary or uphold his decision in the response that he issues to the parties. In addition, the Director must provide reasons for his decision.
11. The objection to the Director's award in the cause before me was received on 27th May 2021. On 7th July 2021, the Director wrote to the Respondent by way of Dosh form 4 revising the initial award from Ksh. 69,188/ to Ksh. 424,079.92. The form is headed “Revised ML/Dosh/Wiba/Form 4.”
12. This revision of award form in reaction to the objection filed by the Appellant satisfies the requirement of section 52(1) of WIBA obligating the Director to respond to the objection to his award in writing. It is apparent that the Director did not issue this revised award within 14 days as required under the law. However, this failure does not, in my view, invalidate the revision.
13. The Director addressed Dosh form 4 to the Respondent. At the same time, the Appellant wrote to the Respondent on 6th August 2021 forwarding a copy of the revised award. The letter is stamped by the Respondent on the same date signifying that it had been received.
14. The totality of the foregoing demonstrates that the Director received and reacted to the objection lodged by the Appellant. It is also apparent that both the Appellant and the Respondent received the



- Director's response to the objection. Therefore, the assertion by the Respondent that the Director has not issued his response to the objection to enable the filing of the current appeal is without basis.
15. I have considered the ground of appeal by the Appellant as alluded to in the preceding sections of this decision. The Appellant contends that the award of future medical expenses ought to be made under section 47 of WIBA. That it was wrong for the Director to suggest that this award was covered by the award for permanent incapacity under section 30 of the Act.
 16. Section 30 of the WIBA entitles the Director to make an award for permanent incapacity which is to be computed based on the affected employee's monthly earnings up to a maximum of ninety six (96) months. However, this sum is not fixed but subject to the minimum and maximum possible award fixed by the Minister in charge in consultation with the National Labour Board.
 17. Where such minimum and maximum has been fixed in the manner aforesaid, it is supposed to be incorporated in the 3rd Schedule to the Act. A look at the 3rd Schedule to the Act discloses that the Minister has only set a bracket for awards relating to dependants of a workman.
 18. On the other hand, the degree of permanent incapacity of an employee is to be determined by reference to the 1st Schedule to the Act. However, where the degree of permanent incapacity suffered by an employee cannot be ascertained by reference to the 1st Schedule to the Act, the employee will be compensated based on a percentage of permanent incapacity approved by a medical doctor so long as the assessment does not lead to a result that goes contrary to the guidelines in the 1st Schedule. Section 30(4) of the Act also gives the Director the power to make such higher percentage as he shall deem equitable to cover injury that has unusual consequences for the employee.
 19. I have looked at the 1st and 3rd Schedules to the Act. The 1st Schedule does not determine the degree of incapacity for the injury sustained by the Appellant. And the 2nd Schedule does not provide for the minimum or maximum award that the Director should make in favour of the Appellant except for the ceiling under section 30(1) of the Act relating to the Appellant's monthly income for ninety six (96) months.
 20. The Record of Appeal shows that in the face of the foregoing, the Director set up a work injury evaluation clinic on 17th June 2021 at which two doctors assessed the Appellant's incapacity as a result of the work injury he had sustained. The two doctors gave their opinion in the following terms:-

“He is awarded twenty five (25%) percent permanent incapacity which will also cover the cost of removal of the internal fixators. He should be refunded all the cost of treatment he has incurred under section 47 of WIBA.”
 21. The Director, relying on this medical opinion and in view of the guidelines provided under section 30(3) & (4) of WIBA, awarded the Appellant permanent incapacity of 25% yielding a sum of Ksh. 424,079.92 to cover both the award for permanent incapacity and the cost of the anticipated medical operation to remove the implant in the Appellant's arm.
 22. The Appellant now asks that the court orders that the Respondent pays him Ksh. 150,000/ in addition to the Director's award to cover the cost of the anticipated medical operation. His argument is that this amount is awardable under section 47 of the Act as part of the medical expenses incurred by an injured employee which the employer must reimburse. I do not agree with this argument. In my view, section 47 of the Act contemplates reimbursement of medical expenses that have already been incurred: not anticipated.



23. But even if I were wrong in my interpretation of the section, it is clear to me that at the time of making his award, the Director took into consideration the aspect of the future cost for removal of the implant in the Appellant's arm. And in doing this, the Director was guided by the expert opinion of two medical doctors who assessed the Appellant and reached the conclusion that the degree of 25% incapacity awarded to him would adequately cover compensation both for the physical injury and the cost of future treatment.
24. In my view, the Director rightly invoked his discretion under section 30(4) of the Act to make the award in the manner that he did. Consequently, I decline to vary the decision on account of the reasons advanced by the Appellant.

Determination

25. The appeal is dismissed.

26. I will make no order as to costs.

DATED AND SIGNED ON THE 30TH DAY OF NOVEMBER, 2022.

MAUREEN ONYANGO

JUDGE

DELIVERED ON THE 2ND DAY OF DECEMBER, 2022.

B O M MANANI

JUDGE

