



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No.

153/2021

In the matter between:

JOEL MHANJELWA SHONGWE

Applicant

And

THE COMMISSIONER OF LABOUR

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

ESWATINI POST AND TELECOMMUNICATIONS

CORPORATION

3rd Respondent

Neutral Citation : Joel Mhanjelwa Shongwe vs The Commissioner of Labour, The Attorney General and Eswatini Post and Telecommunications Corporation (153/2021) [2021] SZIC 91 (30 November, 2021)

CORAM : **X. HLATSHWAYO-MABUZA AJ**
(Sitting with Mr. D.P.M Mmango and Mr. A.S. Ntiwane)
Nominated Members of the Court)

DATE HEARD : 23rd November 2021

DATE DELIVERED

: 30th November 2021

Summary : **Workmen's Compensation Act 1983**- non-compliance with the stipulated rates during assessment of loss percentage
Section 32 Medical Board has final decision- Prescription of claim.

Held : Lack of jurisdiction point of law upheld- Concession referred back for reassessment to Labour Commissioner

RULING

1. The Applicant approached this court for relief as follows;
 - "1. Directing that the awards of 10% disablement for Applicant's ankle joint and 0% disablement for the cervical vertebrae made by the 1st Respondent be hereby set aside because they are in violation of the provisions of the **Workmen's Compensation Act No. 7 of 1983** as amended
 2. Directing the 1st Respondent to refer the Applicant's claims for Workmen's Compensation to the Medical Doctors to redo the assessment in compliance with the second schedule of the **Workmen's Compensation Act No.7 of 1983** as amended
 3. Granting further and/or alternative relief
 4. Directing the Respondents to pay costs of this application in the event they oppose it unsuccessful(sic)"
2. The 1st and 2nd Respondents opposed the application and filed points *in limine* which were argued and are the subject of this ruling.
3. Respondent first raised, from the bar, a point of law of non-joinder of the Medical Board whereas the cause for complaint is its assessment of the injuries. Counsel submitted that the Medical Board was a creature of statute,

having been established by **Section 32 of the Workmen's Compensation Act** ("WCA"). He argued that the Medical Board is independent of the 1st Respondent and has its own chairperson and members.

4. The Applicant refuted the assertion that the Medical Board was an independent body and argued that it took its instructions from the 1st Respondent, or attends to matters which have been referred to it by the 1st Respondent, and finally that the Medical Board's decisions are communicated by the 1st Respondent. Further argument was that, it was the 1st Respondent's responsibility to ensure that the decisions/ conclusions of the Medical Board are in compliance with the **Workmen's Compensation Act**, as the latter is the custodian of the **Workmen's Compensation Act**.

5. This court finds that the prayers sought do affect the Medical Board and it ought to have been cited as a party with substantial interest. In as much as it has no legal persona, only the Attorney General as legal representative of all government departments was cited. The latter's participation herein does not address the shortcoming resulting from the non-joinder. It would not be just to dismiss the application on that point, however ordinarily the matter would be removed from the court's roll for the necessary joinder of the Medical Board as it is a breach of procedure and impropriety which does not go to the root of the matter. That course is, however affected by the point *in limine* relating to jurisdiction.

6. The Respondents further raised the issue of the jurisdiction of the court to hear the matter, that is, a complaint against the assessment or decision of the Medical Board in light of the provisions of **Section 32 of the**

Workmen's Compensation Act which provides that:-

"(2) The Board shall give a decision in writing to the Labour Commissioner on any matter or dispute referred to the Board by him and that decision shall be final and binding on the Labour Commissioner and on the parties concerned. "

7. The Applicant argued that the court has jurisdiction to hear the matter and by virtue of **Section 20(1)** which provides that;-

Jurisdiction of Court and right of appeal.

20. (1) *Save as is provided in this Act, the Court shall, upon or in connection with any question to be investigated or determined under the Act, have all the powers and jurisdiction exercisable by the Court under the **Industrial Relations Act, 1980**, and a decision of the Court shall be appealable to the extent provided under that Act.*

as read with **Section 8(1) of the Industrial Relations Act 2000** as amended which provides as follows;-

Jurisdiction.

8. (1) *The Court shall, subject to **sections 17 and 65**, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this, the **Employment Act**, the **Workmen's Compensation Act**, or any other legislation which extends jurisdiction to the Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an employer or employers' association and a trade union, or staff association or between*

*an employees' association, a trade union, a staff association,
a federation and a member thereof*

8. The Applicant's submission is that the assessment of the Medical Board with regards to the provisions of **Section 14(4) and Section 32** are misconstrued. These sections do not oust the jurisdiction of this court. The assertion is that the Medical Board performs injury assessment and produces a final assessment and disablement percentage as a medical doctor in cases where the medical doctor makes a finding that there is no disablement and a dispute arises because the worker feels that there is disablement. The submission is that, the meaning of the finality of the Medical Board's decision is similar to that of the loss percentage as may be contained in the medical doctor's final award.

9. This court however is bound by the numerous consistent decisions holding that **Section 32** gives the Medical Board a final decision in matters referred to it. This court, in the case of **Moses Msibi v Robert's Construction and the Medical Board IC88/88** decided that:-

"Having perused these sections I am of the view that the decision made by the Medical Board is final and that this Court has no jurisdiction to hear and determine this matter. "

See also **Coshiwe Ndzimandze v Workers Compensation Medical Board IC3/1989**.

10. In an extra-ordinary case of **Elijah Dlamini v Royal Swaziland Sugar Company Limited IC 88/09** this court entertained an injury dispute even though it was after the decision of the Medical Board because the parties had unwittingly reopened the matter at the Labour Commissioner's stage

but the court was not revisiting the assessment of the Medical Board even then.

11. *In casu*, there is no background allegation of mischief, unlawfulness or other cause which may persuade this court to entertain the matter outside of **Section 32**. The Applicant argued that the assessed disablement of 8% is such circumstance, as it diverts from the set percentage of 25-100%. This court however is not persuaded especially because the statute made provision in the Second Schedule "*the assessment of disfigurement shall be made by the Workmen's Compensation Medical Board. If the assessment is less than 10% the disfigurement shall be deemed to be not conspicuous and no compensation shall be payable for the condition*" which means that there are instances wherein the assessment may be less than 10% and the Medical Board, as the professional medical practitioners, exercising their expertise as such, did not categorize and assess the cervical vertebrae as falling with the category of ankylosis i.e. being a disablement to be assessed between 25-100%.

12. The point raised about this court's jurisdiction, in relation to the cervical vertebrae injury which was assessed by the Medical Board, is therefore upheld and this court need not go further with the matter except to refer the matter back to the Respondent to rectify the assessment of the injury on the ankle per the concession by Counsel. The ankle issue was conceded to have been erroneously dealt with by the 1st Respondent (not the Medical Board) who calculated the award at 10% loss whilst the **Workmen's Compensation Act** stipulates calculations to be between 25-100%.

13. For completeness, the court heard a point of law relating to prescription/ acquiescence/ peremption, to which the Respondent submitted that the claim has already been paid three years ago, i.e. in October 2017 after an agreement was reached by the employer and worker. As much as the Respondent protested against being the one dragged to court with orders sought against it, despite the fact that it was an agreement made with the 3rd Respondent which resulted in the non-compliance with the WCA, it submitted that it had no problem revisiting the calculations relating to the ankle injury. The Respondent conceded that the shortfall of 1.5%, being the difference between the 10% awarded and the statutory limit of 25% has to be corrected. The court however pointed out that it was the responsibility of the 1st Respondent to ensure that the agreement entered into by the parties was compliant with **Section 13(2)(b) of the Workmen's Compensation Act**, especially because of its role as custodian of the Act. The Respondent argued about the fact that the Applicant approaches the court after three (3) years of the agreement and payment yet that was supposed to be done within three (3) months of the agreement to enable the correction of the agreement.
14. The parties made submissions regarding the entitlement to costs. The Applicant introduced evidence from the bar of being a retiree who has been put out of pocket by 1st Respondent's failure to properly apply the law, and the Respondent begged out of being mulcted with cost and asked the court to consider that it had made concessions favourable to Applicant despite Applicant's obvious non-compliance with the time limits provided for in the law too. It is obvious that each party has been non-compliant with the WCA at one point or other and the concession is commendable, hence it is only fair that each party bears its own costs.

15. This court makes an order as follows:-

- (i) Upholds the preliminary point of lack of jurisdiction in relation to the issue of the case dealt with by the Medical Board
- (ii) Refers the issue of the assessment of the ankle injury back to the P' Respondent for re-assessment as conceded
- (iii) Each party to bear own

costs The members agree

**X. HLATSHWAYO-MABUZA
ACTING JUDGE OF THE INDUSTRIAL COURT**

Delivered in open court on 30th November, 2021

FOR APPLICANT

: L Nkambule

(Dlamini Nkambule Attorneys)

*FOR
RESPONDENT*

: N Dlamini

(Attorney General's Chambers)