Insurance & Personal Injury

Employees’ Compensation – the Application of Hong Kong Paper Mills Formula

Introduction

If an employee sustains personal injuries by accident arising out of and in the course of his employment, the employer shall be liable to pay compensation under the Employees’ Compensation Ordinance, Cap.282 (“ECO”) even if the employee might have committed acts of faults or negligence when the accident occurred. The injured employee is entitled to claim compensation for permanent partial incapacity resulting from the work accident for the loss of earning capacity under section 9 of ECO.

In this article, we will briefly discuss the criteria on the application of the Hong Kong Paper Mills Formula propounded in *Hong Kong Paper Mills Ltd. v Chan Hin Wu* as modified by *Lui Kwong Yan v Shui Hing Decoration Works & Another*, and the assessment of the percentage of the loss of earning capacity.

The Criteria

The criteria are:-

1. The employee has suffered from permanent partial incapacity, that is, the percentage of loss of earning capacity is not 100%.

2. The injury is not one of the scheduled injuries stipulated in the First Schedule of the ECO. There are 48 types of injuries and their corresponding percentage of incapacity set out in the First Schedule of ECO. In the event that an employee suffers from one of those scheduled injuries resulting in permanent partial incapacity, the compensation under s. 9 is calculated by reference to the percentage prescribed in the First Schedule.

3. The employee is unable to return to his pre-accident job as a result of the residual disabilities of the injury and is only able to undertake a job that pays less than the pre-accident job. To succeed, medical expert evidence must be produced in support of his incapability so as to persuade the Court to adopt the Hong Kong Paper Mills Formula.

4. The presence of “special circumstances of the employee” under section 9(1A) of ECO. Such special circumstances in general include (i) the nature of the injury in relation to
the nature of the employee’s pre-accident job; and (ii) his quantification, previous training and experience.

**The Equation and the s.9(1)(b) Provisos**

The equation of the Hong Kong Paper Mills Formula is \[ (b - a) / b \times c. \]

“a” denotes the monthly earnings of an alternative job that the employee is now capable of undertaking after the accident but assessed at the date of the accident. For example, if the employee is now only able to work as building attendant and the monthly wage of building attendant was HK$7,500 at the time of accident, then “a” is HK$7,500.

“b” denotes the employee’s pre-accident monthly earnings. The pre-accident monthly earnings is either the earnings for the month immediately preceding the date of accident, or the average of monthly earnings for the previous 12 months (or any lesser period if the employee has not been so long employed), whichever calculation is more favorable to the employee. “Earnings” include cash wages, the value of any privilege or benefit which can be estimated in cash (e.g. food), overtime payments, bonus, allowance (not travelling allowance) if it is of a constant nature, and customary tips. At present, the monthly earnings for calculation of the s.9 compensation is subject to a maximum of HK$26,070 per month and a minimum of HK$3,690 per month.

“c” denotes the compensation payable upon permanent total incapacity.

Assuming that “b” is HK$25,000, based on the above equation, the loss of earning capacity is 70% \[(25,000 - 7,500) / 25,000 \times 100\].

However, the 70% figure is subject to limitation under s. 9(1)(b) provisos which stipulates that in the case of injury to any part of the body specified in the First Schedule of ECO not amounting to the loss of that part, the percentage of loss of earning capacity permanently caused by that injury shall not exceed the appropriate percentage specified in the First Schedule of ECO in respect of the loss of such part. Such percentage shall be assessed having regard so far as possible to the scale of percentages specified in that Schedule.

For example, according to the First Schedule of ECO, the percentage of loss of earning capacity for loss of thumb of the preferred hand is 32%. An employee, who suffered from fracture of thumb of his preferred hand and was left with residual pain and weakness in his preferred hand, cannot claim to have suffered from more than 32% loss of earning capacity relying on the Hong Kong Paper Mills Formula.
The Case Law

In the case Yu Wing Sun v Ho Wai Leung T/A Hip Wo Engineering Co. and another DCEC 1242 of 2005, the Applicant was an ironworker at the time of accident. He sustained fractured left heel bone from a fall while he was working. The fractured heel bone is not a scheduled injury. The Medical Assessment Board of the Labour Department assessed the loss of earning capacity permanently caused to the Applicant is 5%. The medical expert’s assessment is 8%. According to the expert, the Applicant would not be able to resume full duties of his pre-accident job as efficiently as before. He could either resume his pre-accident job with reduced efficiency such as working slower and taking more frequent rest in-between the job or change his job to more sedentary type such as security guard and cleaner.

In the trial, the Court found that the Applicant was required to do a lot of walking, standing and climbing up and down in his pre-accident job. It is not realistic that there will be employers willing to employ the Applicant to accommodate his need to work slower and to take frequent rests. The Applicant would have to seek alternative employment recommended by the expert. The Court considered the Applicant’s rather limited formal education is a special circumstance and adopted the Hong Kong Paper Mills Formula.

The Court also found that the Applicant’s pre-accident monthly earning was HK$17,400. According to the Quarterly Report of Wage and Payroll Statistics issued by the Census and Statistics Department of Hong Kong Government, the average monthly wage for a male security guard and a cleaner was HK$7,245 and HK$5,193 respectively at the time of accident. The Court adopted the higher sum of HK$7,245. On application of the Hong Kong Paper Mills Formula, the percentage of loss of earning capacity is 58% \(\left\{\frac{17,400 - 7,245}{17,400}\right\} \times 100\}.\) However, under the First Schedule, the percentage of loss of earning capacity for loss of a foot is 55% and the percentage for loss of all toes of one foot is 20%. In view of the s. 9(1)(b) provisos, the 58% figure cannot stand and the Court held that the appropriate percentage of loss of earning capacity is 30%.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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